Case C-797/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

15 December 2021

Referring court:

Sofiyski rayonen sad (Bulgaria)

Date of the decision to refer:

15 December 2021

Applicant:

Y. YA.

Defendant:

K. P.

Subject matter of the main proceedings

The proceedings were instituted on the application of Y. YA. seeking an order for protection from violence. At present, only the dispute as to costs is still pending in the case, in connection with which the request for a preliminary ruling is also made.

Subject matter and legal basis of the request

On the basis of Article 267 TFEU, the referring court refers two groups of questions of interpretation to the Court of Justice of the European Union. The first group concerns the independence of judicial authorities and, in particular, the compatibility of the rules on the long-term secondment of judges under Bulgarian law with the requirement under the second subparagraph of Article 19(1) TEU to guarantee the independence of the courts of the Member States of the European Union. The second group of questions concerns the effects of legal acts issued by an adjudicating panel that may not meet the standards for an independent court or

tribunal in the case where those acts contain directions given to a lower national court.

Questions referred for a preliminary ruling

1. Must the second subparagraph of Article 19(1) TEU be interpreted as meaning that, due to the fact that the independence of the courts has been undermined, citizens are not guaranteed the legal remedies necessary for effective judicial protection where, in a Member State of the European Union, it is permissible for judges to be seconded to a higher court for an indefinite period, with their consent, by decision of a governing body of the judiciary which is independent of the other public authorities, if conditions are laid down for a decision to terminate the secondment and provision is made for a legal remedy against that decision, but that remedy does not have suspensive effect while the proceedings are pending, and on the basis of what criteria should it be specifically assessed whether secondment for an indefinite period is permissible?

2. Would the answer to the first question be different if the objective conditions for the decision to order the termination of a secondment are laid down by law and are subject to judicial review, but no such conditions subject to judicial review are laid down in respect of the selection of judges to be seconded?

3. If the answer to the first question is that the secondment of judges is permissible under such conditions if objective rules are complied with, must account be taken, when assessing the extent to which the national provisions run counter to the requirement to provide sufficient remedies under the second subparagraph of Article 19(1) TEU, of not only the criteria laid down by law but also the manner in which they are applied by the competent administrative and judicial authorities?

4. Must Commission Decision 2006/929/EC be interpreted as meaning that the answers to the previous three questions would be different if a national practice of secondment which is based on rules similar to those currently in force has been established, and this has given rise to objections under the mechanism for cooperation and verification established by that decision?

5. If it has been established that the national provisions on the secondment of judges may run counter to the obligation to provide remedies that are necessary to guarantee effective judicial protection under the second subparagraph of Article 19(1) TEU, must that article be interpreted as precluding a higher court, the adjudicating panel of which was also composed of a seconded judge, from giving binding directions to a national court, and under what conditions is that the case? In particular, are directions which do not concern the merits of the dispute but prescribe that certain procedural acts are to be performed vitiated by a procedural defect?

Provisions of European Union law and case-law relied on

Second subparagraph of Article 19(1) TEU

Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16 (EU:C:2018:117, paragraphs 32 to 37)

Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, [Joined Cases] C-558/18 and C-563/18 (EU:C:2020:234, paragraphs 34, 35 and 46 to 48)

Judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19 (EU:C:2021:798, paragraph 94)

Judgment of 23 November 2017, *CHEZ Elektro Bulgaria and FrontEx International*, [Joined Cases] C-427/16 and C-428/16 (EU:C:2017:890)

Judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, [Joined Cases] C-748/19 to C-754/19 (EU:C:2021:931, paragraphs 78 to 86)

Judgment of 18 May 2021, *Asociaţia "Forumul Judecătorilor din România"*, [Joined Cases] C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (EU:C:2021:393)

Judgment of 5 October 2010, *Elchinov*, C-173/09 (EU:C:2010:581)

Provisions of national law relied on

Konstitutsia na Republika Balgaria (Constitution of the Republic of Bulgaria) – preamble, Articles 8, 117, 129, 130, 130a, 133

Zakon za sadebnata vlast (Law on the judiciary; 'the ZSV') – Articles 2, 5, 16, 30, 36, 87, 107, 160, 165, 176, 178, 188, 189, 191a, 192 and 193, Article 227(1) and (2)

Zakon za zashtita ot domashnoto nasilie (Law on protection against domestic violence)

Grazhdanski protsesualen kodeks (Code of Civil Procedure; 'the GPK') – Articles 20, 21, 22, 78, 81, 248, 252, 258, 274, 278

Pravilnik za administratsiata v sadilishtata (Regulations on the administration of the courts) – Article 80

Succinct presentation of the facts and procedure in the main proceedings

Facts

1 The proceedings were instituted on 28 February 2020, on the application of Y. YA. seeking an order for protection from violence, in which he claims that he and his minor daughter had been victims of violence at the hands of the defendant, K. P. The hearing in the proceedings was scheduled for 3 July 2020.

2 On 15 May 2020, the applicant applied to the court of second instance (Sofiyski gradski sad, Sofia City Court) and requested that it expedite the proceedings by setting a time limit for the referring court to perform procedural acts (referred to as an 'application to have a time limit set in the event of delay'). That application was refused by order of the Sofia City Court ('the SGS') of 2 July 2020.

3 By application of the same date, lodged not with the SGS, where the case file was located at that time, but with the Sofiyski rayonen sad (District Court, Sofia; 'the SRS'), a court of first instance, the applicant withdrew his application for protection, stating that his fundamental rights had been violated.

4 The following day (3 July 2020), the case file was still not physically in the building of the SRS, as a result of which the scheduled hearing was not held. On the same day, the defendant lodged an application with the court, by which, in addition to numerous objections to the applicant's conduct, she also requested that she be reimbursed the costs.

5 By decision of the SRS of 14 July 2020, the proceedings were discontinued (due to the withdrawal of the application for protection on 2 July 2020). The referring court proceeded on the assumption that no costs were to be reimbursed, as it had no information concerning any action taken by the defendant. The failure to take the defendant's application of 3 July 2020 into account was attributable to an omission on the part of either the judge or the court administration.

6 On 7 August 2020, the defendant lodged an appeal by which she requested that she be reimbursed the costs following the discontinuation of the proceedings. The decision to discontinue the proceedings was not challenged and became final on 7 August 2020.

7 The defendant's appeal was forwarded to the appellate court (the SGS). The adjudicating panel seised of that appeal was composed of two judges appointed to the SGS and one judge who had been seconded from the SRS to the SGS on 6 February 2017 (by order of the President of the Apelativen sad Sofia, [Court of Appeal, Sofia]; 'the SAS') for a period of 12 months (but whose secondment had not yet been terminated), whereby the reason cited for the secondment was 'the existence of vacant judge positions, the secondment of judges from the SGS to the SAS and the Varhoven kasatsionen sad, [Supreme Court of Cassation] – "the VKS" – and the extended parental leave of judges'. By order of the SGS of

28 January 2021, the proceedings relating to the defendant's appeal of 7 August 2020 were discontinued, whereby the SGS found that the referring court had jurisdiction and directed it to rule itself on the question of costs in accordance with Article 248 of the GPK.

8 The applicant brought an appeal against the order of 28 January 2021, which was dismissed by the SAS (via the adjudicating panel composed of the three judges who had already ruled in the proceedings, one of whom had been seconded). The directions of the SGS instructing the referring court to rule on the defendant's claim for costs also became final with that dismissal.

9 It should be noted that there is no evidence in the proceedings showing that the judges included in the adjudicating panels with powers of review were compromised by a conflict of interest, and no concerns have been raised in that regard. The only cause for concern is the objective existence of rules of the secondment system that are liable to give rise to doubts as to the impartiality of a seconded judge.

Facts about the secondment system in Bulgaria

10 Bulgarian law has always allowed a judge appointed to a particular judicial authority to be seconded, during his or her judicial service, to another court of the same or a higher judicial level under certain conditions. For years, that power was regarded as being extraordinary in nature and was subject to certain conditions. Over time, and due to the inability (and perhaps unwillingness) of the judiciary's body responsible for the organisation of personnel (Vissh sadeben savet, Supreme Judicial Council; 'the VSS') to organise regular competitions for the promotion of judges, there has been an ever increasing number of vacant posts for judges in the higher courts. The workload of those courts is increasing and this has brought about a need to seek alternative career paths.

11 One such alternative path is the secondment of judges, which has become a widespread practice, as it is carried out not according to a centralised competition procedure, but only by decision of the presidents of the courts, which is not subject to consultation with other judicial authorities. For example, the secondment of a judge from the SRS to the SGS is ordered solely by the President of the SAS (Article 87 of the ZSV), while the secondment of a judge from the SGS to the SAS is likewise ordered by decision of the President of the SAS (Article 107 of the ZSV).

12 The provisions on the secondment of judges have been amended several times in the last six years. In response to the objections raised by the European Commission under the mechanism for cooperation and verification established by its Decision 2006/929, an attempt was made in 2016 to limit that practice by amending the ZSV so as to set a maximum period of secondment of one year and to prohibit repeated secondments to the same judicial authority (see Article 227(1) of the ZSV). However, that amendment has to a certain extent been rendered

meaningless by the creation of a new Article 227(2) of the ZSV (in force since 14 November 2017), which allows a judge to be seconded with his or her consent, without a time limit, where the authority to which he or she has been seconded has a vacant post for a judge. Thus, in practice, the decision on secondment, which is valid for an indefinite period, is taken solely by the presidents of the courts, who authorise such secondment, provided that the seconded judge gives his or her consent. Experience shows that the duration of secondments reaches nine years in some cases.

13 Moreover, by order of 14 August 2020 in Administrative Case No 2374/2020, the Varhoven administrativen sad (Supreme Administrative Court; 'the VAS') refused to refer to the Court of Justice of the European Union the question as to whether the secondment of judges solely by decision of presidents of courts constitutes a breach of the guarantee of judicial independence.

14 Until 2018, the termination of secondments took place solely by decision of the president of a court who had authorised the secondment. An amendment made to Article 30(5) of the ZSV that same year created a new point 18, which empowered the Sadiyska kolegia na VSS (Judicial College of the VSS) to terminate the secondment of a judge where there are 'breaches of the procedure provided for in this Law or where the work of the judicial authority from which the judge was seconded has brought about staffing needs'.

15 The law does not define what 'staffing needs' means. However, point 18 of Article 30(5) of the ZSV has been interpreted by the VAS. In judgment No 8223 of 25 June 2020 in Administrative Case No 13214/2018, it held that, when assessing 'staffing needs', only the workload of the court from which the judge was seconded is to be taken into account, whereby that court must have experienced a change in the number of cases received. Furthermore, the VAS held that a termination of secondment does not require, as a mandatory condition, that the seconded judge be heard before the Judicial College of the VSS, since the termination of the secondment is requested by the president of the court from which the judge had been seconded.

16 In relation to the practice of the Judicial College of the VSS in the exercise of the powers to terminate secondment, the referring court examined, in detail, the minutes of the hearing of the Judicial College of the VSS held on 23 June 2020, which show that, in a particular case, the usual procedure for appointing certain judges was changed in order to terminate the secondment of another judge. The referring court takes the view that the contradictory reasoning set out in the minutes raises concerns that the judiciary's body responsible for the organisation of personnel does not take its decisions in a transparent manner and, in that respect, is guided by motives to satisfy certain judges at the expense of others. In support of that conclusion, the referring court also points to the judgment of the European Court of Human Rights of 19 October 2021 in *Miroslava Todorova* v *Bulgaria*, from which the reluctance of the Judicial College of the VSS to state

reasons for the unequal treatment of persons is apparent (albeit in relation to different issues).

17 In summary, with regard to the situation of a seconded judge under the Bulgarian law currently in force, it can be said that, in the general case of secondment under Article 227(1) of the ZSV, the change of job is a one-off event and for a maximum period of one year. The period is quite short and the judge is aware that he or she will return to his or her former post, with the result that the secondment appears to be in accordance with the conditions established in the case-law of the Court (see paragraph 31 below).

18 The situation is different in the case of secondment under the provision of Article 227(2) of the ZSV, which was introduced in 2017. In accordance with that provision, secondment for an indefinite period of time is conditional only on the existence of a vacant post in the court to which the judge is seconded (after all, such a judge agrees to be seconded for an indefinite period of time). Those secondments often last several years, even up to 10 years in some cases. During that time, the judge develops social and domestic ties with his or her new place of work and changes his or her functions according to his or her new duties. Despite that change, there is no guarantee that the secondment cannot be terminated at any time, including by the president of the court who authorised it. The decision on such termination is subject to judicial review, but is enforced while the court proceedings are pending, and the judge must await the outcome of the proceedings in the post and with the authority from which he or she was seconded (see Article 36 of the ZSV). This makes the judge's work dependent on the decisions of the Judicial College of the VSS and the president of the court who seconded him or her, and this could constitute a reason for exerting pressure in the case of specific decisions. Thus, the referring court takes the view that the secondment system can be used to exert pressure on certain judges, thereby giving rise to the possibility of arbitrariness *within* the judiciary.

The essential arguments of the parties in the main proceedings

19 The applicant submits that he is not required to reimburse costs to the defendant, as he had cause to institute the proceedings, but opted not to pursue them only because the courts had infringed his procedural rights. According to the applicant, the defendant is entitled to hire expensive lawyers, but such costs should not be borne by the applicant. In addition, the applicant has submitted, before the courts at the various instances, that his right to a fair trial has been infringed and that the SRS's view that there is no basis for reimbursing the defendant's costs should not be reviewed.

20 The defendant contends that she filed an application for reimbursement of costs within the prescribed time limit and seeks reimbursement of the lawyers' fees that she has paid (in the amount of 425 leva [BGN]).

Succinct presentation of the reasoning in the request for a preliminary ruling

Subject matter of the dispute and link between that subject matter and EU law

21 As stated above, only the dispute as to costs is still pending in the proceedings at the time of the reference for a preliminary ruling.

22 First, the referring court points out that, due to the doubts expressed by the applicant as to the possibility that he is a victim of biased judges, failure to respond to that objection could constitute an infringement of Article 6 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, and such an infringement may also have financial consequences for the State. The referring court takes the view that this requires exhaustion of all permissible remedies, including those under EU law, to remove any doubt as to the impartiality of the judges who heard the case.

23 Furthermore, with a view to establishing the link between the subject matter of the dispute and EU law, the referring court interprets the case-law of the Court of Justice on the second subparagraph of Article 19(1) TEU as follows:

24 According to the Court of Justice, any court or tribunal that might potentially apply EU law may defend its independence against external factors that may impair its independence, even if the subject matter of the main proceedings does not fall directly within an area of competence of the European Union (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 32 to 37). In other words, the very provision of the second subparagraph of Article 19(1) TEU makes the independence of any national court or tribunal entrusted in the abstract with the task of adjudicating on cases in which it is possible to make a request for a preliminary ruling on the substance under Article 267 TFEU a matter of EU law and not merely of national constitutional law (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, Joined Cases C-558/18 and C-563/18, EU:C:2020:234, paragraphs 34 and 35).

25 It is self-evident that national courts or tribunals cannot make requests for preliminary rulings in order to defend their independence where they consider only in the abstract that it might be compromised, but, rather, they can make such requests only where there is a factual circumstance which places the adjudicating court or tribunal in a situation in which its independence would be called into question (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, Joined Cases C-558/18 and C-563/18, EU:C:2020:234, paragraphs 46 to 48).

26 In the present case, the higher courts gave directions to the referring court, in accordance with Article 278(3) of the GPK, instructing it to rule on the question of costs in proceedings that had been discontinued. Even though those proceedings have been discontinued and the order concerning that question has become final, one of the parties claims that it is aggrieved by the fact that the

independence of the national court which refused to order it to pay costs is undermined. The applicant in the proceedings submits that the referring court has already ruled on the claim against him and found that it was unfounded, thereby bringing an end to the dispute.

27 At the same time, the question of costs was challenged by the defendant in the proceedings before two ordinary courts of the Bulgarian legal system, [the adjudicating panels of which] were also composed of seconded judges. Those courts held that the proceedings concerning costs had not yet been concluded, as a result of which they referred the case back to the referring court, and their view that the proceedings were still pending is binding on that court. This is a matter of national procedural law, but it relates to judicial independence and the possibility to give directions to a national judge, with the result that there is a case concerning the application of the second subparagraph of Article 19(1) TEU (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 94).

28 In the light of the foregoing, it is necessary to assess to what extent the referring court is to be regarded as being bound by the directions of the higher courts (as provided for in national law, namely in Article 278(3) of the GPK) in the case where the adjudicating panels were composed of seconded judges. This is a question concerning the independence of the court (on which the further progression of the present proceedings directly depends) and, consequently, there is reason to take the view that the second subparagraph of Article 19(1) TEU applies.

29 Lastly, for the sake of completeness, the referring court states that, in examining the question of the amount of the claim for costs, it will also have to assess – in the light of the applicant's view that the defendant had used expensive legal services – whether and to what extent the defendant's claim should be granted in terms of amount. In that regard, it is recognised in national law that the Vissh advokatski savet (Supreme Council of the Legal Profession) has set a mandatory tariff, on which the Court of Justice has ruled (judgment of 23 November 2017, *CHEZ Elektro Bulgaria and FrontEx International*, [Joined Cases] C-427/16 and C-428/16, EU:C:2017:890).

The question referred for a preliminary ruling

30 The Court of Justice recently had occasion to rule on the question as to whether the possibility to second judges, as provided for in a national legal system, is incompatible with the standards for guaranteeing the independence of the judiciary (see judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, [Joined Cases] C-748/19 to C-754/19, EU:C:2021:931). The case concerned a Polish law under which a body of the executive (the Minister of Justice), who also performs the functions of the Public Prosecutor General, may second appointed judges from one court to another.

31 In accordance with paragraphs 78 to 86 of the judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim* (C-748/19 to C-754/19, EU:C:2021:931), in assessing the permissibility of the secondment of judges with a view to guaranteeing the independence of the judiciary, the national court must proceed on the basis of whether the secondment is carried out by a public authority without exercising any influence on the judicial proceedings, whether it is carried out with or without the consent of the judge, whether the selection of the seconded judges and the termination of the secondment are carried out on the basis of criteria known in advance and whether they are accompanied by a statement of reasons, and whether the decisions seconding a judge and terminating that secondment may be challenged before an independent and impartial court or tribunal.

32 At this point, it is necessary to address some differences between the situation in Bulgaria and the secondment of judges in Poland by the Minister of Justice. First, secondment in Bulgaria takes place by decision of the judicial authorities. Second, a secondment for a period of more than three months can take place only with the consent of the judge. Third, although there are no criteria for the start of the secondment, there are criteria for the termination of secondments by the Judicial College of the VSS and they appear to be objective (see paragraph 14 above).

33 Therefore, in the first place, it is necessary to answer the question as to whether the criteria set out in the judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim* (Joined Cases C-748/19 to C-754/19, EU:C:2021:931) apply not only where the secondment is ordered by a body of the executive, but also where it is carried out by a governing body of the judiciary which enjoys a status of independence from the legislature and the government (first question referred).

34 Second, it must be clarified whether the absence of judicially reviewable requirements for the selection of judges at the beginning of a secondment is sufficient to impair judicial independence, in breach of the second subparagraph of Article 19(1) TEU. It must be taken into account that Article 227(7) of the ZSV provides for abstract conditions for selection for a secondment, but they are not subject to judicial review (second question referred).

35 Third, it is necessary to answer the question as to whether the establishment of statutory conditions for the termination of the secondment, which appear to be objective (see paragraph 32 above), is not rendered meaningless by the manner in which the VSS applies the law, which, even in the view taken by some of its members, is not consistent (see paragraph 16 above). More generally, the question arises as to whether, despite the existence of objective conditions for secondment that are laid down by law, the arbitrary application of the law by the competent national administrative and judicial authorities can lead to a breach of the standard of independence under the second subparagraph of Article 19(1) TEU (third question referred).

36 Fourth, it must be noted that the reports under the mechanism for cooperation and verification identified a systemic problem with the control of the secondment of judges, whereby the report of 13 November 2018 (COM(2018) 850 final) expressed concerns that secondment not subject to scrutiny could become an alternative career path not provided for by law, leading to 'risks to independence' (see, regarding the binding nature of the decision establishing the mechanism for cooperation and verification, operative part 2 of the judgment of 18 May 2021, *Asociaţia "Forumul Judecătorilor din România"*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393). It is therefore necessary to take into account the specific context of Bulgaria and Romania as countries to which the mechanism for cooperation and verification applies and to answer the question as to whether, where weaknesses in the secondment system have been identified under the mechanism for cooperation and verification but have not been remedied (or have been remedied but subsequently reintroduced by law), the removal of the guarantees relating to secondment can be regarded as a breach of the requirement of independence under the second subparagraph of Article 19(1) TEU (fourth question referred).

37 If the above questions are answered to the effect that there has been a breach of the requirement of independence of seconded judges, the fifth question that must be answered is what the consequences of the established lack of independence are (fifth question referred).

38 It must also be taken into account that, in accordance with the judgment of 5 October 2010, *Elchinov*, (C-173/09, EU:C:2010:581), directions from a higher court which are binding under national law lose their binding force if they do not comply with EU law. In the present case, guidance is sought as to [the circumstances in which] that binding force would cease to exist in the case where the directions, although not directly contrary to EU law, were given by an authority which might not meet the standards of that law. It should also be borne in mind in the present case that the directions [of the higher national court] do not concern a decision on the substance of the dispute but are procedural in nature (see paragraph 27 above).