

Case C-544/23**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:**

28 August 2023

Referring court:

Najvyšší Správny súd Slovenskej republiky (Slovakia)

Date of the decision to refer:

16 August 2023

Appellants in cassation:

T.T.

BAJI Trans, s.r. o.

Respondent in cassation:

Národný inšpektorát práce

Subject matter of the main proceedings

Request for a preliminary ruling made in the context of a dispute concerning the review of the lawfulness of a decision [regarding an appeal] in cassation. The present request arises from the referring court's doubts as to whether EU law applies in the event of the imposition of an administrative penalty for failure to fulfil an obligation under EU law and in the event that the Member States are required to penalise that failure, as in the case of Article 19(1) of Regulation No 3821/85 and Article 41(1) of Regulation No 165/2014.

Subject matter and legal basis of the request

Interpretation of Article 49 and Article 51(1) of the Charter of Fundamental Rights of the European Union, as well as Article 19(1) of Regulation No 3821/85 and Article 41(1) of Regulation No 165/2014.

Questions referred for a preliminary ruling

1. Is Article 51(1) of the Charter of Fundamental Rights of the European Union to be interpreted as meaning that a Member State is implementing Union law when it imposes, under national law, an administrative penalty for failure to fulfil an obligation where that obligation arises from EU law and the Member States are required to penalise failure to fulfil it, as in the case of Article 19(1) of Regulation No 3821/85 and Article 41(1) of Regulation No 165/2014?
2. If the answer to the first question is in the affirmative, are Article 49(1) of the Charter of Fundamental Rights of the European Union and the principle of *lex posterior mitius* laid down therein to be interpreted as also applying to the imposition of penalties for administrative offences in cases where the guilt and the penalty are first decided not by a judicial body but by an administrative body, and does this principle then also apply to the review of the decisions of that administrative body by an administrative court?
3. If the answer to the second question is in the affirmative, are Article 49(1) of the Charter of Fundamental Rights of the European Union and the principle of *lex posterior mitius* laid down therein to be interpreted as applying to national administrative or judicial proceedings, regardless of the current stage of those proceedings?
4. If the answer to the third question is in the negative, by what criteria should that stage be determined? More specifically, are Article 49 of the Charter of Fundamental Rights of the European Union and the principle of *lex posterior mitius* laid down therein to be interpreted as applying in the context of contentious administrative proceedings concerning an appeal in cassation, and must the Supreme Administrative Court before which that appeal in cassation has been brought at second and final instance therefore take into account a legislative amendment in favour of the perpetrator of the administrative offence which was the subject of the proceedings before the administrative body, rather than the court which was affected by the amendment only after the decision of the lower administrative court that is subject to review became final?

Provisions of European Union law relied on

Charter of Fundamental Rights of the European Union, Article 41 and Article 51(1).

Council Regulation (EEC) No 3821/85 [of 20 December 1985] on recording equipment in road transport, Article 3(1) and (2), as well as Article 19(1).

Regulation (EU) No 165/2014 of the European Parliament and of the Council [of 4 February 2014] on tachographs in road transport, repealing Council Regulation

(EEC) No 3821/85 on recording equipment in road transport and amending Regulation (EC) No 561/2006 of the European Parliament and of the Council on the harmonisation of certain social legislation relating to road transport, Article 3(1) and (2), Article 41, and Article 47.

Regulation (EC) No 561/2006 of the European Parliament and of the Council [of 15 March 2006] on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85, Article 3 and Article 13(1).

Provisions of national law relied on

Ústava Slovenskej republiky č. 460/1992 Zb. (Constitution of the Slovak Republic No. 460/1992) of 1 September 1992:

Article 50(6)

‘The criminal nature of any act shall be determined and the penalty for that act shall be imposed under the law effective at the time of the commission of the act. A later law shall apply if it is more beneficial to the perpetrator.’

Zákon č. 462/2007 Z. z. o organizácii pracovného času v doprave a o zmene a doplnení zákona č. 125/2006 Z. z. o inšpekcii práce a o zmene a doplnení zákona č. 82/2005 Z. z. o nelegálnej práci a nelegálnom zamestnávaní a o zmene a doplnení niektorých zákonov v znení zákona č. 309/2007 Z. z. (Law No 462/2007 on the organisation of working time in transport and amending and supplementing Law No 125/2006 on labour inspection and amending and supplementing Law No 82/2005 on illegal work and illegal employment and amending and supplementing certain laws, as amended by Law No 309/2007):

Paragraph 38(1)(a), point 1

‘A driver who drives a vehicle without recording equipment or with recording equipment which does not carry a valid test certificate or who makes improper use of the recording equipment commits an offence.’

Zákon č. 461/2007 Z. z. o používaní záznamového zariadenia v cestnej doprave (Law No 461/2007 on the use of recording equipment in road transport):

Paragraph 1(a)

‘This Law regulates legal relations not covered by special regulations concerning:

a) the scope of the obligation to install and use recording equipment in motor vehicles.’

Paragraph 2(1) and (2)

(1) A transport undertaking which engages in bus or road freight transport shall install recording equipment on any vehicle used for the carriage of passengers or the carriage of goods and, unless otherwise specified below, shall use record sheets and cards during such carriage.

(2) The transport undertaking's obligation under subparagraph 1 above shall not apply to vehicles used for transport operations defined under special regulations'.

Zákon č. 162/2015 Správny súdny poriadok (Law No 162/2015 establishing the Code of Administrative Procedure):

Paragraph 11(h)

'The Najvyšší Správny súd (Supreme Administrative Court) shall rule on appeals in cassation.'

Paragraph 135(1)

'In examining a case, the administrative court shall base its decision on the situation prevailing at the time the decision of the public administrative body was announced or issued, or at the time the measure was applied by the public administrative body.'

Paragraph 195(d)

'When imposing administrative penalties, the administrative court is not bound by the scope and grounds of the complaint, as far as compliance with the rules on the imposition of penalties laid down by the *Trestný zákon* (Criminal Code) is concerned, which shall also be applied to the imposition of penalties in administrative proceedings.'

Paragraph 438(1) and (2):

'(1) An appeal in cassation may be lodged against a final decision of the administrative court

(2) The appeal in cassation shall be ruled on by a chamber of the Supreme Administrative Court and, in the cases referred to in Paragraph 22(1), the Grand Chamber of the Supreme Administrative Court (the 'Court of Cassation').

Paragraph 440(1)

'An appeal in cassation may be based only on the fact that, in the course of the proceedings or through the decision, the administrative court infringed the law in that:

a) the administrative court had no jurisdiction to hear the case,

- b) a person who appeared as a party to the proceedings did not have legal standing,
- c) a party to the proceedings did not have full capacity to act before an administrative court and there was no legal representative or procedural guardian acting on his or her behalf,
- d) in the same case, a final decision had already been issued or proceedings had already been initiated,
- e) the case was heard by a judge without the competence to make a ruling or an administrative court whose composition did not have competence,
- f) procedural irregularities prevented a party to the proceedings from exercising his or her procedural rights to such an extent that the right to a fair trial was infringed,
- g) the decision was issued on the basis of an incorrect assessment of the legal situation,
- h) there was a departure from the established case-law of the Court of Cassation,
- i) the binding legal opinion expressed in the decision dismissing the appeal in cassation was not taken into account, or
- j) the action was unlawfully dismissed.’

Paragraph 453(1) and (2):

‘(1) The Court of Cassation shall be bound by the scope of the appeal in cassation; this does not apply in cases where the ruling on the contested point of the operative part of the decision depends on a point of the operative part that was not contested by the appeal in cassation.

(2) The Court of Cassation is bound by the grounds of appeal; this does not apply in cases where the contested decision was issued in proceedings in which the administrative court was not bound by the grounds of appeal. The Court of Cassation shall not consider pleas which the party to the proceedings did not raise until after the time limit for bringing the appeal in cassation had expired.’

Paragraph 454

‘When examining a case, the Court of Cassation shall base its decision on the situation prevailing at the time when the administrative court announced or issued the contested decision.’

Relevant national case-law and case-law of the Court of Justice and of the European Court of Human Rights (ECtHR)

a.

According to national case-law, the principle of *lex posterior mitius* also applies to the imposition of administrative penalties, if this is more favourable to the perpetrator of an administrative offence; this also applies when the change in the legal regulation occurred after the administrative decision in question became final.

judgment of the Najvyšší Správny súd Slovenskej republiky (Supreme Administrative Court of the Slovak Republic) of 21 February 2018, ECLI:SK:NSSR:2018:8016200465.1, paragraph 79

judgments of the Supreme Administrative Court of the Slovak Republic of 25 November 2010, No 5Sž/18/2010, p. 19, and of 4 May 2021, ECLI:SK:NSSR:2021:1017200783.1, paragraphs 85 and 88

judgment of the Supreme Administrative Court of the Slovak Republic of 5 November 2019, ECLI:SK:NSSR:2019:1015201090.1, paragraphs 72, 73, 76 and 78

b.

According to the Supreme Administrative Court, the case-law of the Court of Justice of the European Union does not provide a satisfactory answer to the question of the scope of the obligation to apply the principle of *lex posterior mitius* at various stages of the proceedings. The Supreme Administrative Court notes that, according to the case-law of the Court of Justice, that obligation applies to proceedings until a final decision has been issued, but there is no guidance as to what type of national decisions should be regarded as final.

As regards the application of Article 49(1) of the Charter of Fundamental Rights of the European Union to the various stages of national proceedings, depending on the period during which the change of law in favour of the perpetrator of the administrative offence occurred, this has not yet been resolved in the case-law of the Court of Justice of the European Union.

Judgment of the Court of Justice of 6 October 2015, *Delvigne*, C-650/13, EU:C:2015:648, paragraph 56, and order of 16 June 2021, *Crédit agricole v ECB*, C-456/20 P to C-458/20 P, EU:C:2021:502, paragraphs 27 and 65

judgment of the ECtHR of 17 September 2009, *Scoppola v. Italy*, CE:ECHR:2009:0917JUD001024903, §§ 108 and 109

judgment of the ECtHR of 12 January 2016, *Gouarré Patte v. Andorra*, CE:ECHR:2016:0112JUD003342710, §§ 28 and 32 to 35

judgment of the ECtHR of 27 September 2011, *A. Menarini Diagnostics S.R.L. v. Italy*, CE:ECHR:2011:0927JUD004350908, §§ 64 to 66

judgment of the ECtHR of 21 February 1984, *Öztiirk v. Germany*, CE:ECHR:1984:0221JUD000854479, § 56

judgment of the ECtHR of 2 September 1998, *Lauko v. Slovakia*, CE:ECHR:1998:0902JUD002613895, §§ 63 and 64

Succinct presentation of the facts and procedure in the main proceedings

- 1 By decision of the administrative body of first instance of 8 December 2016, the first of the appellants in cassation, T.T., was found guilty of the commission of an offence under point 1 of Paragraph 38(1)(a) of Law No 462/2007,¹ which he allegedly committed by, on 4 November 2015, driving a vehicle belonging to the other appellant in cassation, BAJI Trans s. r. o., which was for the carriage of concrete and was fitted with recording equipment which had not passed a technical check since 25 June 2015, for which a penalty of EUR 200 was imposed.
- 2 By decision of 3 April 2017, the respondent in cassation, the Národný inšpektorát práce (National Labour Inspectorate, Slovak Republic), rejected T.T.'s complaint and upheld the decision of the body of first instance.
- 3 The appellants in cassation brought actions against those administrative decisions before the Krajský súd v Bratislave (Regional Court, Bratislava, Slovak Republic) [(‘the Regional Court’)].
- 4 By judgment of 27 March 2019, [the Regional Court], acting in its capacity as an administrative court, dismissed T.T.'s action and also dismissed BAJI Trans s.r.o.'s action on grounds of a lack of legal standing.
- 5 Addressing the merits of T.T.'s action, [the Regional Court] stated that the obligation to use tachographs in all road transport vehicles had been introduced by Article 3 of Regulation No 3821/85, and then also by Paragraph 2(1) of Law No 461/2007, subject to the exceptions listed in Article 3 of Regulation No 561/2006. However, vehicles for the carriage of concrete were not listed among those exceptions. Article 13(1) of Regulation No 561/2006 provides that a Member State may grant exceptions from Articles 5 to 9 thereof subject to certain conditions.² [The Regional Court] pointed out that those exceptions can apply only to vehicles used for transport which have been expressly listed in Article 13(1) [of that regulation]. Law No 461/2007, which was adopted to implement Regulation No 3821/85, did not provide for any exception concerning the installation and use of tachographs in vehicles intended for the carriage of

¹ In the version in force since 8 December 2016.

² These articles concern crews, driving time, breaks and rest periods.

concrete, and therefore the obligation to use such recording equipment applies in full also to vehicles intended for the carriage of concrete.

- 6 The appellants in cassation lodged an appeal in cassation against that judgment before the Supreme Administrative Court on 15 July 2019. In the course of the proceedings relating to the appeal in cassation, the appellants in cassation lodged, on 24 August 2020, a pleading in which they stated that their legal position had changed in the light of Regulation 2020/1054.³
- 7 On 1 August 2021, the Supreme Administrative Court commenced its activities and initiated proceedings in all cases in which proceedings had been conducted up to 31 July 2021 by the správne kolégium (administrative college) of the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic). The case was then assigned to the Fifth Three-Member Chamber of the Supreme Administrative Court, which concluded that the conditions for referring the case to the Grand Chamber of the Supreme Administrative Court were satisfied, as it wished to depart from the opinion of the First Three-Member Chamber of that court. While the First Three-Member Chamber of the Supreme Administrative Court wishes to answer in the affirmative the question of whether the Supreme Administrative Court must also apply later legal provisions if these are more favourable to the perpetrator of an administrative offence, including where those provisions were amended after the announcement or issuing of a decision by a lower administrative court, the Fifth Three-Member Chamber of the Supreme Administrative Court is of the view that, given the nature of the appeal in cassation and the principle according to which the decision of the lower administrative court which has already acquired the force of *res judicata* is reviewed, the answer to that question must be in the negative.
- 8 The case is currently before the Grand Chamber of the Supreme Administrative Court, which is tasked with adopting an interpretation of the relevant legal provisions (scope of the principle of *lex posterior mitius*), which will then be binding on all three-member chambers of the Supreme Administrative Court.

The essential arguments of the parties in the main proceedings

- 9 In the present case, the appellants in cassation did not raise any pleas before [the Regional Court] relating to the factual grounds on the basis of which T.T. had been found guilty of the commission of an offence, but challenged the finding of guilt of commission of an offence and the imposition of a penalty on the ground that no offence had been committed, because the vehicle for the carriage of

³ Regulation (EU) 2020/1054 of the European Parliament and of the Council of 15 July 2020 amending Regulation (EC) No 561/2006 as regards minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods and Regulation (EU) No 165/2014 as regards positioning by means of tachographs, which amends, inter alia, Article 13(1) by supplementing it with points (q) and (r).

concrete at issue had to be excluded from the list of vehicles required to use recording equipment (tachographs).

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

I.

- 10 The Supreme Administrative Court is ruling on a case, based on an administrative appeal and a subsequent appeal in cassation, in which it is reviewing the decision of the respondent in cassation in which it upheld a decision which found the appellant in cassation T.T. guilty of the commission of an offence under national law and as a result of which a fine of EUR 200 was imposed. T.T. argued that during the deliberations on the appeal in cassation, the national laws were changed, as a result of which the action he had performed had ceased to be against the law and that that action should therefore be subject to national law pursuant to Article 50(6) of the Constitution [of the Slovak Republic].
- 11 As regards the first question referred for a preliminary ruling, the Supreme Administrative Court notes that the same principle follows from Article 49(1) of [the Charter of Fundamental Rights of the European Union ('the Charter')]. In the present case, it is the scope of that principle which is at issue, that is, its applicability at the various stages of the administrative and judicial proceedings at national level.
- 12 In accordance with Article 267(1)(a) TFEU, the Court of Justice has jurisdiction to give preliminary rulings on questions concerning the interpretation of the Treaties. Since, in accordance with Article 6(1) TEU, the Charter has the same legal force as the Treaties, the Court of Justice therefore also has jurisdiction to interpret the Charter itself. It follows that the Court of Justice has jurisdiction to interpret Article 51(1) of the Charter, which is necessary for assessing when Member States are implementing Union law and thus when the provisions of the Charter are applicable to them. The interpretation of the provision relied upon is decisive in the present case in the context of Article 49(1) of the Charter, as that provision may be applied by the Supreme Administrative Court only if the proceedings pending before it are considered as concerning a situation in which a Member State is implementing Union law.
- 13 In the present case, the national laws were adopted in order to transpose the regulations⁴ concerned, along with both the obligations established by those regulations and the penalties resulting from a failure to fulfil them. According to the Supreme Administrative Court, the administrative body acting as the respondent in cassation was implementing Union law within the meaning of Article 51(1) of the Charter when deciding on the guilt and penalty for the offence. However, the Supreme Administrative Court believes that the Court of

⁴ Regulation No 3821/85 and subsequent Regulation No 165/2014.

Justice needs to explicitly confirm that the case falls within the scope of EU law and that it concerns the implementation of that law within the meaning of Article 51(1) of the Charter. If this is not the case, the referring court wishes to know the reasons for the differing interpretation.

2.

- 14 With regard to the second question referred for a preliminary ruling, the Supreme Administrative Court refers to the case-law of the ECtHR according to which any case of criminal prosecution should be examined in accordance with Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'). However, the referring court additionally points out that it is acceptable to assume that another body may rule on such prosecution, provided, however, that the decision of that other body is subject to review by a court which meets the requirements of Article 6 of the Convention and has full cognisance of the case, including the ability to assess the proportionality of the penalty imposed.
- 15 The Supreme Administrative Court assumes that, in order to comply with the requirements of Article 6(1) of the Convention in the context of the determination by administrative bodies of guilt and penalties for administrative offences, those bodies, given that their adjudication in this regard is exceptional, are required to apply the principle of *lex posterior mitius*.
- 16 The Supreme Administrative Court therefore considers it necessary to obtain express confirmation from the Court of Justice that, in accordance with Article 49(1) of the Charter, the principle of *lex posterior mitius* should also apply to administrative bodies and is therefore also applicable in the context of the judicial review of administrative proceedings.

3.

- 17 By its third and fourth questions, which have been referred subject to an affirmative answer to the two previous questions, the Supreme Administrative Court is asking the Court of Justice for guidance as to whether it must take account of *lex mitius* (law more favourable to the perpetrator) which has been enacted after the decision of a lower administrative court has been announced and is final. The referring court emphasises that this issue is also disputed between the various chambers of the Supreme Administrative Court, which is why the case was referred to the Grand Chamber of that court.
- 18 The referring court therefore needs to determine whether the principle of *lex posterior mitius* is limited by the stage of the proceedings or whether the court seised is required to apply it at any stage of the proceedings. At the same time, the [referring] court draws attention to the fact that, in the case of *lex mitius* (law more favourable to the perpetrator) which has been enacted only after the decision of the lower administrative court has become final, the appellant in cassation could

not raise in the pleading containing his application (appeal in cassation), a plea of *lex posterior mitius* on factual grounds, as it could lead to a situation where the *lex mitius* (law more favourable to the perpetrator) is adopted after the expiry of the time limit for bringing an appeal in cassation, and the expiry of that time limit makes it impossible to submit new pleas in cassation. It should be added that an appeal in cassation is an extraordinary remedy, because it is directed against a final decision of a lower administrative court.

- 19 According to the Supreme Administrative Court, Article 49(1) of the Charter is, however, liable to render the abovementioned national rules of procedure inapplicable and it has therefore decided to refer the questions at issue to the Court of Justice for a preliminary ruling. The [referring] court considers that the interpretation of Article 49(1) of the Charter is open to dispute and may be the subject of debate, adding that the issue has not yet been interpreted by the Court of Justice.
- 20 The Supreme Administrative Court is therefore uncertain whether, under Article 49(1) of the Charter, the principle of *lex posterior mitius* may be applied in all ongoing administrative or judicial proceedings or whether, on the contrary, that principle should be considered only at certain stages and, further, is uncertain as to the criteria by which such a stage should be defined. Specifically, the Supreme Administrative Court would like to determine to what extent Article 49(1) of the Charter requires that the principle of *lex posterior mitius* should also be applied in the context of proceedings relating to an appeal in cassation.