

Case C-373/22**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:**

9 June 2022

Referring court:

Spetsializiran nakazatelen sad (Bulgaria)

Date of the decision to refer:

9 June 2022

Public Prosecutor's Office:

Spetsializirana prokuratura

Defendant in the criminal proceedings:

NE

Subject matter of the main proceedings

Charges were brought against NE in proceedings before the Spetsializiran nakazatelen sad (Specialised Criminal Court; 'the referring court'). At the preliminary hearing in this case, NE sought the disqualification of the court, since he questions the impartiality of both the judge to whom the case has been assigned and all the judges of the referring court.

To that end, NE relies on the following:

- the referring court is the defendant in civil proceedings before the Sofiyski gradski sad (Sofia City Court) concerning an action by which he seeks compensation based on tortious liability for the measure of remand in custody pending trial imposed on him by the referring court; and
- the adoption of the Zakon za izmenenie i dopalnenie na Zakona za sadebnata vlast (Law amending and supplementing the Law on the judiciary (DV No 32 of 26 April 2022; 'the ZIDZSV'), by which the referring court is to be abolished with effect from 27 July 2022.

The judge to whom the case is assigned states that there is no legal basis for disqualification and denies any bias with regard to either the case or NE.

However, in accordance with the judgment of the European Court of Human Rights in *Boyan Gospodinov v. Bulgaria* of 5 April 2018 ('the judgment of the ECtHR in *Boyan Gospodinov v. Bulgaria*'), on which NE relies, the impartiality of the court must be assessed not only on the basis of a subjective approach (seeking to determine the personal conviction of a judge or his or her interest in the outcome of the given case), but also on the basis of an objective approach, ascertaining whether sufficient guarantees are offered to exclude any legitimate doubt in that respect.

The referring court is uncertain whether reasonable doubt as to its impartiality can be excluded in the present case, since, first, it is a defendant in civil proceedings in which NE seeks compensation and, second, the legislature has adopted a law abolishing the court, justifying it on the ground of 'safeguarding the constitutional principle of the independence of the judiciary and the protection of the constitutional rights of citizens'.

More generally, the question arises as to whether the adoption of the ZIDZSV on such a ground impairs not only the independence of the referring court, but also that of the *Apelativen spetsializiran nakazatalen sad* (Specialised Criminal Court of Appeal), the *Spetsializirana prokuratura* (Specialised Public Prosecutor's Office) and the *Apelativna spetsializirana prokuratura* (Specialised Appellate Public Prosecutor's Office), which are also being abolished, with effect from 27 July 2022, and must continue to carry out their functions until that date.

The referring court has concerns as to the compatibility of the procedure for the adoption of the ZIDZSV and the provisions of that law with the principles of the rule of law, the separation of powers and the independence of the judiciary and, in particular, seeks to ascertain whether EU law permits a regime governing the reappointment of members of the national legal service (judges, public prosecutors and investigators) such as that provided for in the ZIDZSV.

Subject matter and legal basis of the request

In order to be able to determine whether it must disqualify itself from the case pending before it, the referring court requests a preliminary ruling from the Court of Justice of the European Union ('the Court') under Article 267 TFEU.

It seeks to ascertain, first, whether Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a court which is called on to rule on a criminal case and is at the same time a defendant in civil proceedings concerning an action brought by the defendant in that criminal case on the basis of infringements committed by that court or its successor in law in the handling of that or another criminal case, or which would

be liable to pay compensation if the action were upheld, is not an independent and impartial tribunal within the meaning of EU law. Should the Court find that those provisions must be interpreted in that manner, the referring court seeks to ascertain whether and how the case must proceed.

Second, the referring court seeks to ascertain whether the abovementioned provisions of EU law must be interpreted as meaning that a law which abolishes a court with effect from a certain date, while the judges of that court continue to hear both the cases assigned to them up to that date and the cases in which they have held a preliminary hearing, and which justifies the abolition of the court on the ground of safeguarding the constitutional principle of the independence of the judiciary and the protection of the constitutional rights of citizens, without, however, citing any evidence that the court has committed any infringements in that regard, impairs the independence of that court.

Third, the referring court seeks to ascertain whether the abovementioned provisions of EU law must be interpreted as precluding national provisions which, on the grounds referred to above, abolish an autonomous judicial body in Bulgaria and transfer its judges to other courts, some of which are located in very remote parts of the country, without the judges having been specifically informed of that beforehand and without their consent having been obtained, whereby a maximum number of appointments to a judicial body is provided for by law in respect of those judges alone. Should the Court take the view that the abovementioned provisions must be interpreted in that manner, the referring court seeks to ascertain how the judges of the abolished courts must proceed in the cases pending before them.

Questions referred for a preliminary ruling

1. Must Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that a court before which a criminal case has been brought and which is at the same time a defendant in proceedings concerning an action for compensation brought by a defendant in that criminal case and based on an alleged infringement in the activity of that court or of a court whose successor in law it is, in the same or a different criminal case, or which would be liable to pay compensation if the action were upheld, is not an independent and impartial tribunal within the meaning of EU law?

2. If so, must the abovementioned provisions of EU law be interpreted as meaning that such a court may not continue the criminal proceedings, including ruling on the merits of the case, and what would be the consequences for the procedural and substantive acts of that court were it not to disqualify itself?

3. Must Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that, in the case where a

court has been abolished by the adopted amendment to the *Zakon za sadebnata vlast* (Law on the Judiciary) (DV No 32/26 April 2022, the implementation of which has been postponed until 27 July 2022) but the judges must continue to hear the cases assigned to them up to that date and must also continue, after that date, to hear cases of that institution in which they have held preliminary hearings, the independence of that court is impaired, given that the abolition of the court is justified on the ground that the constitutional principle of the independence of the judiciary and the protection of the constitutional rights of citizens is thereby safeguarded and the facts leading to the conclusion that those principles have been infringed are not duly set out?

4. Must the abovementioned provisions of EU law be interpreted as precluding national provisions such as those of the Law on the Judiciary (DV No 32/26 April 2022, the implementation of which has been postponed until [27] July 2022), which lead to the complete abolition of (the Specialised Criminal Court as) an autonomous body of the judiciary in Bulgaria on the ground referred to above and to the transfer of judges (including the judge of the panel who is hearing the criminal case at hand) from that court to various courts throughout the country, including courts situated far from the place where they currently perform their duties, without the place in question having been specified in advance, without the consent of the judges, and in the presence of restrictions which are laid down by law in respect of those members of the national legal service alone as to the maximum number which can be reappointed to a judicial body?

5. If so, and in the light of the primacy of EU law, what procedural acts should be undertaken by the members of the national legal service attached to the courts to be abolished? What consequences would that have for the procedural decisions of the court to be abolished in the cases which must be taken to their conclusion and for the decisions terminating the proceedings in those cases?

Provisions of European Union law and case-law relied on

Treaty on European Union, Article 2, Article 6(1) and (3), second subparagraph of Article 19(1)

Charter of Fundamental Rights of the European Union, second paragraph of Article 47

Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, recitals 9 and 10, Article 2

Judgment of 19 September 2006, *Wilson* (C-506/04, EU:C:2006:587)

Judgment of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39)

Judgment of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088)

Judgment of 9 October 2014, *TDC* (C-222/13, EU:C:2014:2265)

Judgment of 6 October 2015, *Consorti Sanitari del Maresme* (C-203/14, EU:C:2015:664)

Judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311)

Judgment of 18 May 2021, *Asociația “Forumul Judecătorilor din România” and Others* (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 6 October 2021, *W.Ž. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19 (EU:C:2021:798)

Provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and case-law of the European Court of Human Rights relied on

European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6(1)

Judgment of the ECtHR of 5 April 2018 in *Boyan Gospodinov v. Bulgaria*

Judgment of the ECtHR of 1 December 2020 in *Ástráðsson v. Iceland*

Judgment of the ECtHR of 9 March 2021 in *Bilgen v. Turkey*

Provisions of national law relied on

Constitution of the Republic of Bulgaria, Article 119, Article 129(1) and (3), Article 130a

Zakon za sadebnata vlast (Law on the Judiciary), Article 30(1), (2)(8) and (20), Article 30(3) and (4), Article 30(5)(1), (4), (5), (6), (7), (12) and (13), Article 161(1) and (2), Article 165(1), (2) and (3), Article 194

Zakon za izmenenie i dopalnenie na Zakona za sadebnata vlast (Law amending and supplementing the Law on the judiciary, DV No 32 of 26 April 2022, in force from 27 July 2022), Paragraphs 44, 49, 50, 51, 52, 53, 59 and 67 of the Transitional and final provisions

Nakazatelno-protsesualen kodeks (Code of Criminal Procedure), Articles 29 and 31, Article 35(3), (4) and (5), and Articles 258, 411a, 485 and 486

Nakazatelen kodeks (Criminal Code), Article 108(2) and Article 325(1) and (2)

Grazhdanski protsesualen kodeks (Code of Civil Procedure), Article 519(2)

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 29 May 2018, NE set fire to the flag of the Republic of Bulgaria in front of the Sofia Court House in Sofia city centre and desecrated it by way of offensive acts, recording a video of himself. He published that video recording on the internet on 2 June 2018 in Stara Zagora.
- 2 By judgment of 27 September 2018, NE was found guilty of desecrating the flag of the Republic of Bulgaria in the course of a continuing criminal offence and of committing indecent acts grossly disturbing public order and expressing manifest contempt for society.
- 3 For the two offences, NE was sentenced to a total of two years' imprisonment under initial general rules on serving sentences. The period during which he had been remanded in custody pending trial (from 4 June 2018) was deducted from his sentence.
- 4 On 15 January 2019, the Specialised Criminal Court of Appeal set aside the judgment against NE and referred the case back to a different panel of the referring court for reconsideration as from the stage of the preliminary hearing. The ground for the setting aside was a material procedural irregularity: the case should have been assigned to a single judge, but had been assigned to a judge and a jury.
- 5 By decision of 14 March 2019, in a private criminal case before the Specialised Criminal Court of Appeal, the remand in custody pending trial imposed on NE was changed to the least severe coercive measure – 'signature'.
- 6 On 18 July 2019, the referring court found NE guilty on both charges and sentenced him to a total term of imprisonment of one year and 10 months. The sentence was suspended subject to a four-year probation period. The period during which he had been remanded in custody pending trial, from 4 June 2018 to 14 March 2019, was deducted from his sentence.
- 7 In December 2019, NE brought a civil action before the Sofia City Court against the referring court, the Specialised Criminal Court of Appeal and the Public Prosecutor's Office of the Republic of Bulgaria, seeking compensation based on tortious liability in the amount of 500 000 leva (BGN). He submitted that the referring court had erred in imposing remand in custody pending trial on him for the period from 4 June 2018 to 14 March 2019.
- 8 By judgment of 6 April 2020, the Specialised Criminal Court of Appeal varied the judgment of 18 July 2019 in the part concerning NE's conviction for the acts committed in Stara Zagora on 2 June 2018 and upheld the judgment in all other respects.

- 9 That judgment of the Specialised Criminal Court of Appeal was set aside by the Varhoven kasatsionen sad (Supreme Court of Cassation) by judgment of 3 November 2020 on the grounds of material procedural irregularities which led to a restriction of the accused person's rights of defence. According to the Supreme Court of Cassation, it is not possible to establish on the basis of the forensic psychiatry expert report drawn up in relation to NE whether he was capable of understanding the meaning and nature of the offence, of controlling his actions and of participating in the criminal proceedings, that is to say, whether he was responsible for his actions.
- 10 The case was referred back to the referring court, which requested the Supreme Court of Cassation to specify the stage at which it should start to re-consider the case. After receiving a response, it scheduled the preliminary hearing in the case.
- 11 At that hearing, which took place on 31 March 2021, NE sought the recusal of the judge. NE submitted that he had brought civil proceedings against the referring court, with the result that the judge of that court hearing the criminal case is not impartial. The judge refused the request for recusal, That judge denied any knowledge of the action, which, moreover, had to be brought against the State, as well as any interest in the outcome of the case.
- 12 By order issued at that preliminary hearing, the case was referred back to the Public Prosecutor's Office owing to material procedural infringements of NE's rights. The referring court stated that the guidance of the Supreme Court of Cassation concerned also the admissibility of the charge brought against NE at the pre-trial stage, as criminal proceedings may not be brought against a person who does not understand the meaning and nature of the offence and cannot control his or her actions.
- 13 After the case was referred back to the Public Prosecutor's Office, a new expert report confirming that NE was responsible for his actions within the meaning of the law was issued, and the case was again submitted to the referring court.
- 14 On 26 April 2022, the Law amending and supplementing the Law on the judiciary was published in the State Gazette. That law abolishes the referring court, the Specialised Public Prosecutor's Office, the Specialised Criminal Court of Appeal and the Specialised Appellate Public Prosecutor's Office with effect from 27 July 2022.
- 15 On 27 April 2022, at the preliminary hearing before the referring court, NE again sought the recusal of the judge, citing both the civil action brought against the referring court and the impending abolition of that court.

The essential arguments of the parties in the main proceedings

- 16 NE submits that the judge of the referring court who is hearing his case is not impartial. NE advances two arguments in that regard.

- 17 First, he refers to the judgment of the ECtHR in *Boyan Gospodinov v. Bulgaria*. He asserts that it follows from that judgment that the question as to the impartiality of the court arises with regard to not only the subjective impartiality but also the objective impartiality of criminal judges. Even if there were no reason to doubt the personal impartiality of the criminal judges, their professional membership in one of the defendants in civil proceedings being conducted in parallel to the criminal proceedings could give rise to legitimate doubts as to their objective impartiality. Moreover, the rules that, in the event of the civil action being upheld, the compensation must be paid from the budget of the body in which the infringement was committed could influence the decision of the criminal judges to a certain extent.
- 18 In the present case, the referring court is a defendant in civil proceedings which were brought against it by NE and are running in parallel to these criminal proceedings. Moreover, in the event of NE's civil action being upheld and compensation being awarded to him, the compensation would have to be paid from the budget of the referring court.
- 19 In that connection, the referring court states that the outcome of the civil proceedings depends to an even greater extent on the outcome of the criminal proceedings, since compensation is sought for unlawful detention in these criminal proceedings. Both the merits of the claim and the amount of compensation, if any, depend on the outcome of the criminal proceedings.
- 20 Under the ZIDZSV, the Sofia City Court is the successor in law to the assets, liabilities, rights and obligations of the referring court. That means that, after 27 July 2022, the criminal proceedings against NE will come within the jurisdiction of the Sofia City Court, that is to say, the court before which NE brought his civil action. In the event that the judge of the referring court holds the preliminary hearing in the criminal proceedings by that date, that judge must be assigned to the Sofia City Court and must take the proceedings to their conclusion in that court. If, on the other hand, the judge does not hold the preliminary hearing by that time, the criminal proceedings could be conducted either by that judge (if reassigned as a judge of the Sofia City Court) or by another judge of the Sofia City Court. Moreover, as the successor in law to the referring court, the Sofia City Court would have to be a defendant in the civil proceedings pending before it concerning NE's claim for compensation.
- 21 In the light of those circumstances and the case-law of the ECtHR cited above, the referring court states that there is legal uncertainty as to whether the request for disqualification should be granted and what the consequences of not granting it would be for the procedural and substantive acts taken.
- 22 Second, NE refers to the impending abolition of the referring court.
- 23 In that regard, the referring court states that, in a regular procedure for the abolition of a court, it should not be possible, in cases before the court to be

abolished which relate to that procedure, to justify disqualification on the grounds of the abolition. However, according to the referring court, in the present case, a procedure has been conducted seeking to discredit the members of the national legal service attached to the courts to be abolished and which affects their independence. Since the legislature adopted the law on the abolition of the referring court on the ground that it ‘guarantees the constitutional principle of the independence of the judiciary and the protection of the constitutional rights of citizens’, the referring court has doubts as to whether it is perceived in society as an impartial and independent tribunal and whether it can continue to hear the case or must disqualify itself.

- 24 The referring court takes the view that the manner in which the procedure for the adoption of the law on the abolition of specialised courts was conducted, the explanatory memorandum to the draft law and the rules on the reappointment of members of the national legal service infringe the principles of the rule of law and the separation of powers, impair the independence of the judges of the bodies to be abolished and give rise to suspicions of deliberate retribution in respect of their activities.

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

- 25 In order to be able to rule on NE’s request for disqualification and to assess how to rule on the case before it, the referring court must establish whether certain objective facts cast doubt on its impartiality.
- 26 On the one hand, in the judgment of the ECtHR in *Boyan Gospodinov v. Bulgaria*, cited by NE, the view is taken that, in view of the objective approach to determining the impartiality of a court, reasonable doubts arise where a defendant in a criminal case is also a claimant in civil proceedings concerning an action against the court before which the criminal case is pending and where any compensation awarded in the civil proceedings would be paid from the budget of that court.
- 27 On the other hand, if the view that judges of a court must always recuse themselves if the court in which they sit is the defendant in such civil proceedings were to be followed, a party could choose a court or panel, and that would constitute an abuse of law. That question is relevant to the decision on the grounds for the recusal of the panel of judges and concerns both the decision on the specific request made and the stability of the final decision that will be given in the criminal case.
- 28 With regard to the second argument of NE’s request for disqualification, the referring court is uncertain whether – since its capacity as guarantor of the independence of the judiciary and the protection of the constitutional rights of citizens has been called into question in the grounds for the adoption of the law abolishing it – it can continue to hear the criminal proceedings and what the consequences of not disqualifying itself would be for the acts taken in this case.

The answer to that question is relevant to both the present case and the other cases that the specialised courts will be required to hear pending their impending abolition.

- 29 The referring court has doubts as to whether EU law permits the abolition of judicial institutions on the ground that they constitute an obstacle to the ‘safeguarding of the constitutional principle of the independence of the judiciary and the protection of the constitutional rights of citizens’, given that those institutions apply the same procedural and substantive rules as the other courts and public prosecutor’s offices in the country.
- 30 The specialised courts in Bulgaria were created in 2011. They were initially entrusted with cases concerning crimes committed by organised criminal groups. In 2015, their jurisdiction was extended to cases concerning offences against the Republic and, in 2017, to cases concerning corruption offences brought against certain groups of persons – high-ranking public office holders.
- 31 The manner in which members of the national legal service are appointed to specialised courts is the same as that in which such members are appointed to other courts. They are all appointed following competitive procedures and selection procedures identical to those for other members of the national legal service in the country, and they have the same status. The guarantees of the independence of members of the national legal service in the specialised courts are the same as those for other such members.
- 32 The Konstitutsionen sad (Constitutional Court) has ruled on the compatibility of those courts with the Bulgarian Constitution on two occasions. In those judgments, the claim that the specialised criminal courts are extraordinary in nature was rejected. It was stated that those courts dispense justice in accordance with the general rules and that members of the national legal service attached to those courts are appointed, transferred, promoted and dismissed in accordance with the same rules as those applicable in the other courts. The proposition that the court is extraordinary on account of its specialisation by subject and object was also rejected. On the contrary, it was stated that, until the creation of those bodies, such jurisdiction was vested in the Sofia City Court and was never called into question in theory or practice.
- 33 Therefore, the referring court submits that the allegations that the existence and functioning of the specialised courts infringe the principles of the independence of the judiciary and the protection of the constitutional rights of citizens are unfounded. In the procedure for the adoption of the ZIDZSV, those allegations were not substantiated by any concrete facts or reliable data, which is contrary to the principles of transparency and accountability in the legislative process. The abolition of a court on the basis of such allegations leads to an unjustified undermining of the reputation of a judicial body and the members of the national legal service working in it.

- 34 In particular, the referring court seeks to ascertain whether the provisions of the ZIDZSV governing the reappointment of members of the national legal service attached to the institutions to be abolished are compatible with EU law. Formally, that law provides for the reappointment of members of the national legal service without a competitive procedure, but it in fact introduces deviations from the general regime. Such deviations consist in the limitation of reappointments to a single court to no more than one quarter of the judges of the abolished Specialised Criminal Court and no more than one third of the judges of the abolished Specialised Criminal Court of Appeal, as well as the provisional implementation of the decisions of the Vish sadeben savet (Supreme Judicial Council) concerning reappointment (appeals against those decisions do not have suspensive effect).
- 35 The referring court states that those provisions are discriminatory as they provide for a different procedure for reappointment. The merely hypothetical possibility of difficulties in the reappointment of members of the national legal service cannot form the basis for the introduction of extraordinary rules. Moreover, the provisions themselves are contradictory – on the one hand, it is provided that the workload of the court concerned is to be taken into account in the reappointment of members of the national legal service, while, on the other hand, a restriction is placed on reappointment beyond the prescribed quota, even though there may be a need for a greater number of members of the national legal service in the body concerned. By introducing the quota system described above, the legislature restricts the powers of the Supreme Judicial Council, which are enshrined in the Constitution, to reappoint members of the national legal service and to assess and create the necessary posts in each court and public prosecutor’s office.
- 36 The referring court submits that the provisions of the ZIDZSV governing the reappointment of members of the national legal service attached to the institutions to be abolished are unclear and open to different interpretations. It is not clear how the legislature obliges those members to take up their duties if, on the basis of the applicable quotas, they are reappointed to a court for which they have not given their consent, how they can appeal against such reappointment, and whether that regime does not exert a form of coercion on members of the national legal service, forcing them either to accept what is imposed on them or to leave the judiciary.
- 37 In that connection, the referring court refers to the judgment of the ECtHR of 9 March 2021 in *Bilgen v. Turkey*. That judgment confirms the right of members of the national legal service to protection against arbitrary transfer and the importance of the possibility of judicial review of decisions affecting their career and status, and more specifically, decisions concerning their non-consensual transfer (and, by analogy, non-consensual dismissals, reappointments or secondments), in order to ensure that their autonomy is not jeopardised by undue external influences.
- 38 The referring court requests that the request for a preliminary ruling be dealt with under an expedited procedure, for the following reasons:

- The questions referred are of national interest, since the answers to them may have an impact on the legal certainty of all acts undertaken before and after the entry into force of the ZIDZSV;
- There are currently 23 judges sitting in the referring court who have until 27 July 2022 to rule on the cases assigned to them, after which they will be appointed to other courts in unknown (as yet unspecified) judicial districts;
- The referring court performs extremely important judicial functions in the Bulgarian judicial system, since, until 27 July 2022, it is the only court which exercises jurisdiction at first instance over cases involving organised criminal groups and authorises the use and continuing use of special investigative methods for offences related to the activities of organised criminal groups, offences which come within the jurisdiction of the European Public Prosecutor’s Office;
- An answer to the questions referred for a preliminary ruling as soon as possible is necessary in order to dispel any existing doubts as to whether the legislative procedure followed impairs the independence of judges of the specialised courts. That issue is important because the judges must rule – including on the merits – on the cases assigned to them. If they were to continue to hear those cases in the absence of clarity, that would jeopardise the stability of the decisions to be taken by them.