

**Case C-269/22**

**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:**

21 April 2022

**Referring court:**

Spetsializiran nakazatelen sad (Bulgaria)

**Date of the decision to refer:**

21 April 2022

**Accused persons:**

IP

DD

ZI

SS

HYa

**Other party to the proceedings:**

Spetsializirana prokuratura

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**Subject matter of the main proceedings**

Criminal proceedings – Right to a fair trial and presumption of innocence – Request for a preliminary ruling

**Subject matter and legal basis of the request**

The request is made in accordance with point (b) of the first paragraph of Article 267 TFEU.

### **Question referred for a preliminary ruling**

Do the second paragraph of Article 47 of the Charter, which establishes the requirement of a fair trial, and Article 48(1) of the Charter, which establishes the presumption of innocence, preclude a request for a preliminary ruling under Article 267 TFEU in which certain acts of the accused persons are presumed to be established, where, before submitting the request for a preliminary ruling, the referring court respected all the procedural safeguards required for a decision on the merits?

### **Provisions of EU law and case-law**

Treaty on the Functioning of the European Union ('TFEU')

Charter of Fundamental Rights of the European Union ('the Charter')

Judgment of 5 July 2016, C-614/14, EU:C:2016:514

Order of 25 March 2022, C-609/21, EU:C:2022:232

### **Provisions of national law**

Nakazatelno-protsesualen kodeks (Code of Criminal Procedure, Bulgaria; 'the NPK')

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 By order of 25 March 2022 (EU:C:2022:232), the Court of Justice of the European Union ('the Court') answered the question referred for a preliminary ruling in Case C-609/21, which concerned the precise manner in which requests for a preliminary ruling are to be formulated. It is stated in that order that EU law precludes national rules under which the referring court is required to decline jurisdiction where, in the context of preliminary ruling proceedings, it has made findings on particular facts which it established on the basis of the evidence taken; according to the order, such a rule must be disregarded (paragraphs 30 to 34). In paragraph 30, the Court states that the referring court took Article 267 TFEU and Article 94 of the Rules of Procedure into account in setting out the facts and legal assessment of the main proceedings, for which reason the right to a fair trial under the second paragraph of Article 47 of the Charter is not infringed. Nevertheless, that answer still leaves room for doubt. That doubt is based on the case-law of the European Court of Human Rights (ECtHR) concerning the impartiality of a court which, in a decision relevant to the proceedings (usually one relating to the reasonable suspicion that the act was committed), has taken a position on the facts and legal assessment. In accordance with Article 52(3) of the Charter, that case-law must be taken into account in determining the precise meaning of the right to a fair trial.

- 2 The lingering doubts are also based on the assumption that it is possible to infringe the presumption of innocence enshrined in Article 48(1) of the Charter when making a request for a preliminary ruling. In fact, the question as to the court's impartiality arises precisely in the context of factual findings which are made by the court in its request for a preliminary ruling and which may infringe the presumption of innocence. For those reasons, it is necessary to make a new request, in which the focus is to be placed on the second paragraph of Article 47 and Article 48(1) of the Charter.
- 3 On 19 June 2020, the Spetsializirana prokuratura (Specialist Public Prosecutor's Office, Bulgaria) brought charges against five persons for participation in a criminal organisation, the purpose of which was to enrich itself through the unlawful smuggling of nationals of third countries (Bangladesh and Iraq) into Bulgaria, the unlawful facilitation of entry into the territory, and the acceptance and payment of bribes in connection therewith, whereby public officials participated in that organisation, since the first three accused persons were officers of the 'Granichna politsia' (border police) at Sofia Airport – an offence punishable under point 2 of Article 321(3) of the Nakazatelen kodeks (Criminal Code, Bulgaria; 'the NK'), read in conjunction with Article 321(2) thereof. Furthermore, the Public Prosecutor's Office charged some of the accused persons with having facilitated the unlawful entry of the persons MM, RB, HN and AH into the territory, an offence punishable under point 2 of Article 281(2) of the NK, in conjunction with Article 281(1) thereof, in conjunction with Article 20(2) thereof.
- 4 The Specialist Public Prosecutor's Office submits that those third-country nationals were in Cyprus on student visas and travelled from Cyprus to Bulgaria by plane. It states that the first three accused persons carried out border controls on those third-country nationals upon their arrival at Sofia Airport, and allowed them to enter into the country in breach of their official duties. More specifically, the Specialist Public Prosecutor's Office submits that those accused persons conducted a purely formal check on the Bangladeshi nationals without subjecting them to the mandatory second line of control and without requiring certain documents. It alleged that they thereby infringed national law, namely point 22 of Article 10(1) and point 5 of Article 19 of the Zakon za chuzhdentsite (Law on foreign nationals, Bulgaria). That law regulates a matter that comes within the scope of Regulation 2016/399.
- 5 The referring court has not yet determined whether that submission is supported by the evidence in the main proceedings. As regards the possibility of using certain evidence, requests for a preliminary ruling were made in Cases C-348/21 and C-349/21. Nevertheless, there is a certain likelihood that those allegations, including those relating to the precise manner in which the accused persons IP, DD and ZI carried out the border control, will prove to be well founded. Therefore, the referring court finds that it appears possible that Article 67(2) TFEU, in conjunction with Article 77(2)(e) thereof, in conjunction with Article 22 of Regulation 2016/399, in conjunction with Article 2(1)(b) thereof, in conjunction with Article 2(3) thereof, may have to be interpreted with a view to

determining whether an internal border is involved in the present case; furthermore, Article 6(1) and (3) of Regulation 2016/399, in conjunction with Annex I thereto and Article 8(3) to (5) and Article 14(2) thereof, would also have to be interpreted in the light of the national law – the Law on foreign nationals of the Republic of Bulgaria – which may regulate the matter differently.

- 6 The referring court points out that, in view of the nature of a request for a preliminary ruling, it would be required specifically to describe, in such a request, how the accused persons carried out controls on the third-country nationals at the border. It would also be required to state whether that course of action constitutes a breach of their official duties under national law. This is objectively necessary. Without sufficiently clear findings on the facts in the main proceedings, a request for a preliminary ruling intended to lead to a useful answer would not be possible. More specifically, in order to refer a question on Article 6 (or Article 8) and Article 14 of Regulation 2016/399, it would be necessary to state precisely how the accused persons carried out controls on the third-country nationals.
- 7 The referring court intends to submit the request for a preliminary ruling under procedural conditions which fully comply with the safeguards required by national law for a decision on the merits by which the court convicts or acquits the accused persons. This means first concluding the taking of evidence and then hearing the parties in relation to the facts of the case and the legislation applied, hearing the last words of the accused persons and retiring for deliberation in chambers. However, before formulating the request for a preliminary ruling in that manner, the referring court needs to be certain that it is not thereby infringing the law. [That would be the case] if, in particular, the request for a preliminary ruling is deemed to constitute an infringement of the law because it infringes the presumption of innocence. That would also be the case if the future decision on the merits which the referring court will issue after receiving a reply from the Court and in which it takes into account the interpretation of Regulation 2016/399 given by the Court is deemed to constitute an infringement of the law because it was issued by a court that has already taken a position on the subject matter of the main proceedings (on the facts relating to the act committed by the accused persons) in advance in its request for a preliminary ruling.
- 8 In the order of 25 March 2022, C-609/21 (EU:C:2022:232), the Court states that Article 267 TFEU and the second paragraph of Article 47 of the Charter preclude national case-law which requires courts hearing criminal cases to decline jurisdiction where they lose the status of ‘impartial tribunal’ in the context of a request for a preliminary ruling (operative part 1). However, that outcome is reached only by taking the national law and the relevant case-law into account. The Court has not ruled on that question in the light of Article 6(1) and (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the ECtHR.
- 9 The second paragraph of Article 47 of the Charter provides that everyone is entitled to a hearing by an impartial tribunal, and the presumption of innocence is

enshrined in Article 48(1). It follows from Article 52(3) of the Charter that the requirement of an impartial tribunal corresponds to the identical requirement under Article 6(1) of the Convention, and that the presumption of innocence corresponds to the identical requirement under Article 6(2) of the Convention. This means that the case-law of the ECtHR must be applied *mutatis mutandis*.

- 10 There have been a number of decisions in which the ECtHR was required to assess whether an ‘impartial tribunal’ rules on the merits of a case where that tribunal had previously ruled on a particular procedural issue, in respect of which it had taken a position on the merits of the case (on the commission of the offence and its nature in law). In each case, the ECtHR ruled that such a decision leads to an infringement of the requirement of impartiality, on account of which the subsequent decision infringes Article 6(1) of the Convention (*Chesne v. France*, *Dāvidsons and Savins v. Latvia*, *Mironenko and Martenko v. Ukraine*, *Ionuț-Laurențiu Tudor v. Romania*, *Gomez de Liano Y Botella v. Spain*, *Perote Pellon v. Spain*, *Hauschildt v. Denmark*, *Ekeberg and Others v. Norway*, *Cardona Serrat v. Spain*, *Nestak v. Slovakia*, *Castillo Algar v. Spain*, *Matijašević v. Serbia*, *Cabezas Rector v. Spain*, *Dragojević v. Croatia*, *Hernandez Cairos v. Spain*, *Kiratli v. Turkey*, *Nortier v. Netherlands*).
- 11 In none of the cases did the ECtHR take a position on the issue of expressing a preliminary view, including in relation to the guilt of the accused person, in a request for a preliminary ruling. If the national court makes a request for a preliminary ruling in which it assumes that, on the basis of the facts, the accused person had committed the act, and it makes that assumption at the very beginning of the proceedings, before having taken all the evidence and heard the parties in relation to the legal significance of that evidence, it seems obvious that the ECtHR would reach a conclusion in line with its existing case-law. However, if the national court makes that request for a preliminary ruling after having complied with all the safeguards required for a decision on the merits – taking all the evidence, hearing the parties, hearing the last word, formal deliberation in chambers – such an inference is not possible.
- 12 The referring court cannot make a request for a preliminary ruling to the ECtHR, as that possibility does not exist. However, it can refer the request to the Court of Justice of the European Union, taking into account the fact that the requirements of impartiality and the presumption of innocence under the second paragraph of Article 47 and Article 48 of the Charter have the same importance as those under Article 6(1) and (2) of the Convention, respectively. For that reason, the Court’s interpretation is also sufficiently useful.

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

- 13 With regard to the application of the second paragraph of Article 47 of the Charter: the question arises as to whether a national court that makes a request for a preliminary ruling in which it takes a sufficiently clear position on the subject

matter of the proceedings (considers that certain facts relating to the act of the accused persons are established) expresses a preliminary view, from which it might be inferred that that court is not impartial. That question arises in the case where the request for a preliminary ruling is made in compliance with all the procedural safeguards that apply to a decision on the merits.

- 14 With regard to Article 48(1) of the Charter: the question arises as to whether a national court infringes the presumption of innocence where it makes a request for a preliminary ruling in which it considers that certain facts alleged by the public prosecutor's office are established (the facts relating to the act of the accused persons). That question arises in the case where the request for a preliminary ruling is made in compliance with all the procedural safeguards that apply to the decision on the merits.
- 15 Article 48(1) of the Charter provides that everyone who has been charged must be presumed innocent until proved guilty according to law. Is there a 'presumption of guilt' where the national court establishes only certain elements necessary for a finding of guilt but ultimately does not reach that finding of guilt? Indeed, it is the difficulties in reaching that finding that give rise to the need for the request for a preliminary ruling.
- 16 In the present case, this means, in concrete terms, that the referring court will establish a specific act or omission on the part of the accused persons in the course of the border controls that they carried out at Sofia Airport, during which they allowed third-country nationals to enter the country. However, that is by no means tantamount to a finding of guilt. Only the Court's answer regarding the applicability of Regulation 2016/399 would be necessary to reach a – possible – finding of guilt.

Usefulness of the answer to be given by the Court of Justice

- 17 By virtue of that answer, the referring court would be certain that it would be lawful to make a request for a preliminary ruling in which it took a position on the established facts relating to the act of the accused persons. Moreover, the future decision on the merits would not be annulled on the ground of lack of an impartial tribunal – an annulment that would render both the main proceedings and the Court's answer otiose.
- 18 The future decision on the merits would not have to be annulled merely because the Court has held that the national law providing for the annulment must be disregarded – order of 25 March 2022 (EU:C:2022:232). The reason why it would not have to be annulled is because it would be objectively lawful, since the requirements of an impartial tribunal and the presumption of innocence would have been met when it was taken.

Personal view of the referring court

- 19 Like any procedural act of a court, a request for a preliminary ruling may be unlawful. It is conceivable for a request for a preliminary ruling to be made in circumstances which indicate that the judge has formed a premature, groundless and therefore unlawful opinion on the facts of the case, including the guilt of the accused person.
- 20 It cannot be accepted that such a procedural breach cannot be identified and corrected by the national courts, whether by the court that made the request for a preliminary ruling (by disqualifying itself) or by the higher courts (which set aside the conviction on the sole ground of lack of an impartial tribunal), and that the sole reason for that impossibility to identify and correct the procedural breach is that it was committed by making a request for a preliminary ruling. EU law, in particular Articles 47 and 48 of the Charter, aims to safeguard the rights of the accused person, not to infringe them. A request for a preliminary ruling should not lead to immunity of the procedural breach, that is to say, the impossibility to identify and correct it.

#### Additional observations

- 21 The referring court proposes a certain standard for making a request for a preliminary ruling, namely that, if it contains certain elements of the decision on the merits, it should be made under the same conditions as the decision on the merits. If the Court of Justice of the European Union decides that other conditions must be complied with, statements in that regard would be sufficiently useful.