

Case C-118/22

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:

17 February 2022

Referring court:

Varhoven administrativen sad (Bulgaria)

Date of the decision to refer:

10 January 2022

Appellant on a point of law:

NG

Respondent in the appeal on a point of law:

Direktor na Glavna direktsia ‘Natsionalna politsia’ pri MVR – Sofia

Subject matter of the main proceedings

Appeal in on a point of law brought by NG against the judgment of the Administrative Sad Sofa-grad (Administrative Court, Sofia City) dismissing his action against the order of the Direktor na Glavna direktsia ‘Natsionalna politsia’ pri Ministerstvo na vatreshnite raboti (MVR) (Director of the ‘National Police’ Directorate-General at the Bulgarian Ministry of the Interior [MVR]) of 2 September 2020 refusing the erasure of police record No 16903 of 2 June 2015 created in respect of NG by the Rayonno upravlenie Kazanlak pri Oblastna direktsia na MVR – Stara Zagora (Kazanlak District Police Office at the Regional Directorate of the MVR – Stara Zagora).

Processing of personal data by the competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. Requirements for the erasure of a police record.

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

Does the interpretation of Article 5 in conjunction with Article 13(2)(b) and (3) of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, permit national legislative measures which lead to a virtually unrestricted right of competent authorities to process personal data for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and/or to the elimination of the data subject's right to have the processing of his or her data restricted or to have them erased or destroyed?

Provisions of European Union law and case-law relied on

Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p. 89), Articles 5, 13 and 14

Provisions of national law relied on

Nakazatelen kodeks (Criminal Code, Bulgaria; 'the NK'), Articles 82, 85 and 88a

Zakon za Ministerstvo na vatreshnite raboti (Law on the Ministry of the Interior, Bulgaria; 'the ZMVR'), Articles 25 to 27 and Article 68

Naredba za reda za izvarshvane i snemane na politseyska registratsia (Bulgarian Regulation on the creation and erasure of police records), Articles 18 to 22

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 15 July 2020, NG from Sofia applied to the Rayonno upravlenie na MVR, grad Kazanlak (District Police Office of the MVR in Kazanlak) for the erasure of a police record that had been created in connection with a preliminary investigation filed in the register of that police office. He enclosed a copy of a

certificate of good behaviour, by which he proved that he had no previous convictions.

- 2 On 29 July 2020, the head of the Kazanlak District Police Office notified the deputy director of the Oblastna direktsia na MVR – Stara Zagora (Regional Directorate of the MVR – Stara Zagora) that criminal record No 16903 had been created in respect of NG on 2 June 2015 in the course of a preliminary investigation filed in the register of that police office, as he had failed to tell the truth as a witness, which constitutes a criminal offence under Article 290(1) of the NK.
- 3 On 13 August 2020, the Rayonen prokuror (District Public Prosecutor) of Kazanlak notified the Regional Directorate MVR – Stara Zagora that NG had been accused of an offence under Article 290(1) of the NK. On 2 July 2015, charges were brought against NG before the Rayonen sad Kazanlak (District Court, Kazanlak) and he was given a suspended sentence of one year by judgment of 28 June 2016. That judgement was confirmed by the Okrazhen sad Stara Zagora (Regional Court, Stara Zagora) on 2 December 2016. On 14 March 2018, the sentence had been served.
- 4 The administrative authority requested certified copies of the judgments. The results of the investigation were set out in a report of 19 August 2020, which recommended that a reasoned proposal be submitted to the 'National Police' Directorate-General – Sofia for refusal of the erasure of police record No 16903 of 2 June 2015, which was created in respect of NG by the Kazanlak District Police Office in the course of a preliminary investigation into an offence under Article 290(1) of the NK, for which NG was given a suspended sentence by judgment of the District Court, Kazanlak of 28 June 2016, confirmed by judgment of the Regional Court, Stara Zagora of 2 December 2016.
- 5 On 19 August 2020, a proposal was made to the Director of the 'National Police' Directorate-General at the MVR for the issuance of an order refusing the erasure of the police record relating to the person NG from Sofia, due to lack of a legal basis under Article 68(6) of the ZMVR.
- 6 On 2 September 2020, the Director of the 'National Police' Directorate-General at the MVR issued the contested order refusing the erasure of police record No 16903 of 2 June 2015 created by the Kazanlak District Police Office at the Regional Directorate of the MVR – Stara Zagora. The reason given for the refusal was that, even in the case where rehabilitation has taken place, a final conviction is not one of the grounds for erasure of a police record that are exhaustively listed under Article 68(6) of the ZMVR.
- 7 On 8 October 2020, NG brought an action before the Administrative Court, Sofia City against the order of the Director of the 'National Police' Directorate-General at the MVR of 2 September 2020.

- 8 The court of first instance found that the contested order of the Director of the ‘National Police’ Directorate-General at the MVR is correct and lawful, and dismissed NG’s action.
- 9 The court held that police records are, by nature, a type of processing of personal data that is carried out without the consent of the data subjects under the ZMVR. According to the court, the grounds for erasure of a police record are exhaustively listed in Article 68(6) of the ZMVR, and no evidence proving the existence of any of the listed grounds for erasure of the police record has been submitted in the proceedings. The court further held that it is common ground between the parties that NG had been convicted of an offence under Article 290(1) of the NK by final judgment and that the sentence imposed has been served and rehabilitation has taken place. It stated that rehabilitation is not among the grounds for erasure of a police record which are expressly listed in the law and that the grounds cannot be interpreted broadly, since police records serves a different purpose (that is to say, according to Article 27 of the ZMVR, guaranteeing national security, combating crime and maintaining public order) from that of rehabilitation, which serves to expunge the conviction and eliminate the associated consequences for the future. With regard to the application of Articles 13 and 14 of the directive, the court of first instance held that those provisions have not been infringed as there is no evidence that NG had been denied the information requested and that, in principle, EU law does not preclude the processing of personal data for the purpose of protecting national security, combating crime and maintaining public order.
- 10 For the reasons set out above, the court concluded that Article 68(6) of the ZMVR is a special provision in relation to the general provisions in the field of personal data protection, with the result that it takes precedence and the erasure of a police record is not possible on grounds other than those set out in the special provision. It dismissed NG’s action.
- 11 The judgment at first instance was challenged before the referring panel of the Varhoven administrativen sad (Supreme Administrative Court) of the Republic of Bulgaria, which considers that an interpretation of EU law is necessary to enable it to resolve the dispute correctly.

The essential arguments of the parties in the main proceedings

- 12 The main argument of the appellant on a point of law is that the court of first instance erred in finding that the contested order refusing the erasure of the police record was lawful, because it failed to take into account that the general meaning of Articles 5, 13 and 14 of the directive is that there cannot be an indefinite (unlimited) period for the processing of personal data by way of storage. He further argues that, in the absence of a legal ground for the erasure of a police record after rehabilitation has taken place, a convicted person will, in effect, never be able to request the erasure of his or her personal data collected by the competent authorities in connection with the offence which he or she committed

and in respect of which he or she has served the sentence and has been rehabilitated, with the result that the storage is for an unlimited period.

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

- 13 The panel seised of the present case finds that NG is a natural person who has been finally convicted of an offence that is the subject of prosecution by the public prosecutor, has served the sentence for that offence and has been rehabilitated in accordance with Article 88a(1) of the NK, in conjunction with Article 82(1)(5) thereof. Rehabilitation was completed on 14 March 2020.
- 14 The national law contains a system of legal provisions governing the creation of police records concerning persons accused of committing an intentional offence that is the subject of prosecution by the public prosecutor.
- 15 By their nature, police records constitute processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, and such records fall within the scope of Directive (EU) 2016/680.
- 16 The national system of legal provisions allows a police record to be erased (removed, destroyed) under certain conditions. The grounds for erasure are listed exhaustively in Article 68(6) of the ZMVR and do not include rehabilitation. Therefore, in such a case, the record cannot be erased and none of the other grounds can be applied.
- 17 EU law, and in particular Directive (EU) 2016/680, recital 26, which concerns the lawful, fair and transparent processing of personal data, requires guarantees that the personal data collected are not excessive and not kept longer than is necessary for the purpose for which they are processed. It also provides that time limits should be established by the controller for erasure or for a periodic review. Recital 34 expressly states that the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, should cover operations for the restriction of processing of data and for the erasure or destruction of data.
- 18 Those principles are reflected in specific provisions such as Article 5 of the directive, which obliges Member States to provide for appropriate time limits to be established for the erasure of personal data or for a periodic review of the need for the storage of personal data, including procedural measures to ensure that those time limits are observed; Article 13(2) obliges Member States to ensure, by way of legislative measures, the exercise of the data subject's rights by informing him or her of the period for which the personal data will be stored, or, where that is not possible, the criteria used to determine that period; Article 13(3) empowers

Member States to adopt legislative measures delaying, restricting or even omitting the provision of the information to the data subject pursuant to [Article 13(2)], but only in so far as due regard is had to the fundamental rights and legitimate interests of the person concerned.

- 19 The referring court takes the view that it is not clear whether the objectives pursued by the directive permit legislative measures by Member States which lead to a virtually unrestricted right of competent authorities to process personal data for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and to the elimination of the data subject's right to have the processing of his or her data restricted or to have them erased or destroyed.
- 20 In considering the need to make a request for a preliminary ruling, the referring court took into account that, according to recital 7 of the directive, 'Ensuring a consistent and high level of protection of the personal data of natural persons and facilitating the exchange of personal data between competent authorities of Members States is crucial in order to ensure effective judicial cooperation in criminal matters and police cooperation. To that end, the level of protection of the rights and freedoms of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, should be equivalent in all Member States'.
- 21 The referring court is aware that two cases are pending before the Court of Justice of the European Union: Case C-180/21, referred by the Administrativen sad Blagoevgrad (Administrative Court, Blagoevgrad, Bulgaria) on 23 March 2021, and Case C-205/21, referred by the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) on 31 March 2021. However, they concern other provisions of Directive 2016/680 and have no bearing on the question to be ruled on in the present case. A review of the case-law of the Court of Justice of the European Union handed down under preliminary ruling procedures did not reveal any judgments providing an answer to the main question in the present case, with the result that a reference for a preliminary ruling would ensure a uniform interpretation of the relevant provisions of Directive 2016/680.