

Anonymised version

Translation

C-312/24 – 1

Case C-312/24 [Darashev]ⁱ

Request for a preliminary ruling

Date lodged:

29 April 2024

Referring court:

Sofiyski rayonen sad (Bulgaria)

Date of the decision to refer:

30 January 2024

Applicant:

CL

Defendant:

Prokuratura na Republika Bulgaria

ORDER

[...]

SOFIYSKI RAYONEN SAD, GRAZHDANSKO OTDELENIE (Sofia District Court, Civil Division), [...] in open court on 30 January 2024 [...],

[...]

Civil case No **20211110120709**, [...]

took the following matters into consideration in reaching its decision:

ⁱ The name of this case is fictitious and not the real name of any of the parties to the proceedings.

These are proceedings under Article 276(1) TFEU and Chapter 55 of the Grazhdanski protsesualen kodeks (GPK – Code of Civil Procedure) (requests for a preliminary ruling)

The proceedings were instituted following an action brought by CL, [...], Kazichene village, [...] **against** the PROKURATURA NA REPUBLIKA BALGARIA (PRB – Public Prosecutor’s Office of the Republic of Bulgaria) seeking an order requiring the defendant, on the basis of Article 2(1), points 2 and 3, of the **Zakon za otgovornostta na darzhavata i obshtinite za vredi (Law on the liability of the State and municipalities for damage, short form Law on State liability, or ZODOV)** to pay a sum of BGN 6 000.00 as compensation for non-material damage resulting from actions undertaken against the applicant in the preliminary investigative proceedings [...] and their aftermath.

In the application it is asserted that the applicant had the status of a suspect but had not been formally charged (in the original: ne e bil privlechen kato obvinyaem). According to the application, he was informed that he was ‘a person with an unexplained role’. He claims that he was detained for a period of 24 hours. At a later date, he states, the investigative proceedings were stayed, as the offender had not been identified (Article 244(1)(2) of the Nakazatelen protsesualen kodeks (NPK – Code of Criminal Procedure)). In the period following the final abandonment of the investigative proceedings, he asserts, he was unable to advance in the official hierarchy at the Ministerstvo na vnatreshnite raboti (MVR – Ministry of the Interior) because he had been a suspect. He claims to have suffered non-material damage as a result of the following actions: **(1)** he had been detained for 24 hours; **(2)** his arrest had taken place in front of all his colleagues and staff in his place of work; **(3)** he had not been informed as to why investigative proceedings had been initiated or been told that he could meet a lawyer or contact his family, and his telephone had been seized; **(4)** investigative measures had been taken against him, comprising a body search (in the original: obisk), a house search (in the original: pretarsvane) and an identification procedure, although his status had not been that of a person charged with an offence and he had had no previous convictions; **(5)** as an employee of the Ministry of the Interior (MVR), he had been denied appointment to any more senior post in the period from 2016 to 2022 because he had had the status of a suspect in the aforementioned investigative proceedings. As regards the actions depicted in points 1 to 4, he maintains that the damage occurred during the seven-month period following the investigative measures taken against him in the criminal proceedings referred to above. In particular, he seeks his removal from the database in which he appears as a suspect.

The defendant, the PUBLIC PROSECUTOR’S OFFICE OF THE REPUBLIC OF BULGARIA, contests the application in its entirety, both in principle and relation to the amount.

The request for a preliminary ruling concerns the way in which information on persons having the status of suspects in criminal proceedings should be processed

(collected, stored and erased) where the investigating authorities are part of the organisational structure of the body for which the suspect works. The request concerns the information that the employer may collect, store or erase when other of its organisational entities conduct investigative measures against its employee. By requesting a preliminary ruling, the referring court seeks to clarify the interpretation of the ‘right to be forgotten’ in cases where the information gathered is in the personal file of an employee working in an organisational entity of an employer, that precise information having been gathered in the context of criminal proceedings conducted by another organisational entity of the employer, where that other entity is the investigating authority in the criminal proceedings. May an employer with organisational entities which undertake investigative actions deny promotion to an employee on the sole ground that he is a suspect in pending criminal proceedings, the investigative actions for which are undertaken by an entity of the employer other than that in which the employee works? May an employer with a dedicated directorate conducting investigative measures in criminal proceedings deny promotion to an employee working in another directorate on the ground that the employee is a suspect or has the status of an accused or defendant in criminal proceedings conducted by another organisational entity of the employer?

THE PARTIES TO THE DISPUTE

Applicant: CL, [...], Kazichene village, [...]

Defendant: PUBLIC PROSECUTOR’S OFFICE OF THE REPUBLIC OF BULGARIA (PRB), City of Sofia [...]

FACTS OF THE CASE

It is common ground between the parties that, on 1 March 2016, investigative proceedings were initiated [...] into a crime that had been committed, namely robbery in complicity with other persons, an offence defined in Article 198(1) of the Nakazatelen kodeks (NK – Bulgarian Criminal Code), read in conjunction with Article 20(2) and with Article 20(1) thereof. The investigative proceedings were conducted against an unknown offender. It is common ground between the parties that, in the period from 2012 to 2023, the applicant held various posts as a police officer within the Ministry of the Interior (MVR) in two directorates, namely the Directorate General for the Security Police and the Directorate General for the National Police.

On 17 May 2016, a general meeting was held of all the police officers who were present at the time in the unit where the applicant works. The head of department, a representative of the Internal Security Directorate of the MVR, a public prosecutor from the Sofiyska gradska prokuratura (SGP – Public Prosecutor’s Office of the City of Sofia) and an investigator reportedly appeared at that general meeting. It is established that, at that meeting, the applicant was publicly arrested

in front of everyone and was required to surrender his service badge, his weapon and his service identity card.

It is common ground that the applicant was arrested on 17 May 2016 and detained for a period of 24 hours. A warrant was issued by the Internal Security Directorate of the MVR for his arrest. The arrest warrant was issued on the basis of Article 72(1)(1) of the Zakon za ministerstvoto na vatreshnite raboti (ZMVR – Law on the Ministry of the Interior), which is headed ‘Person about whom there is information that he has committed an offence’. The arrest warrant indicated that the person was to be arrested because, on 1 March 2016, he had, by complicity, removed movable items belonging to another person with intent to appropriate those items forcibly, which constituted a criminal offence within the meaning of Article 198(1) of the NK, read in conjunction with Article 20(2) and with Article 20(1) thereof.

There is no doubt that the applicant was released after those 24 hours. It is common ground that the applicant was not formally charged. He was not indicted. The applicant was searched in the course of investigative actions in the context of a search and seizure operation. The home where the applicant lived was searched. The applicant took part in an identification procedure, in which the victims did not identify him as an offender. As a suspect, the applicant was fingerprinted. It was established that no traces of him were to be found on the victims’ items. It is common ground that the search and seizure operation was carried out with the prior authorisation of a court. The parties agree that the investigative proceedings were stayed because the offender could not be identified.

In the proceedings, it was noted that the applicant resumed his official duties within the MVR system. The applicant took part in selection procedures for promotion to other posts in other units, divisions and directorates within the MVR system. The main reason why he was not appointed to another post is that he had been arrested as a suspect in the abovementioned investigative proceedings. It is recorded in the applicant’s personal file and in the MVR archives that the applicant was arrested and that investigative measures (body search, house search, seizure and identification procedure) were taken against him as a suspect. The reason why the applicant was not promoted or transferred to other posts was his connection as a suspect with the criminal offence referred to in Article 198(1) NK, that is to say robbery, in the abovementioned investigative proceedings.

He claims that he suffered non-material damage as a result of having been arrested in front of his colleagues, consisting in the humiliation, for a long-serving employee of the MVR, of being arrested for an offence which there was no proof of his having committed. In his view, he suffered damage because no information about his arrest was communicated to him – no lawyer, no telephone conversation with his family and no reason given for his arrest. That arrest, in his view, constituted an obstacle to his career advancement and professional development. He asserts that his employer, which made the arrest, keeps a database on those investigative proceedings and refuses to remove or erase it. In any case, the

applicant states, he was referred to by name as a suspect during the investigative proceedings, which barred him from any further promotion.

**CASE-LAW OF THE VARHOVEN KASATSIONEN SAD NA
REPUBLIKA BALGARIA (VKS – SUPREME COURT OF CASSATION
OF THE REPUBLIC OF BULGARIA)**

According to the case-law of the VKS, a person who has been linked with a criminal offence but not formally charged is entitled to compensation if the criminal proceedings are abandoned. The compensation is payable in accordance with the ZODOV. The person may also claim damages for the period prior to being named as a suspect if, at the time when criminal proceedings were initiated against an unknown offender, he or she was the only person who could have committed the offence. The defendant in these proceedings is the Public Prosecutor's Office, as they are investigative proceedings.

**REASONS WHY THE COURT CONSIDERS THAT THE REQUEST FOR
A PRELIMINARY RULING IS RELEVANT TO THE CORRECT
OUTCOME OF THE CASE**

The legal concept of a suspect in criminal proceedings does not feature in the Bulgarian Code of Criminal Procedure (NPK). Pursuant to the judgment in Case **C-209/22**, the suspect enjoys rights under *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*, subject to the proviso that such access to a lawyer is only necessary if the person concerned is able to exercise his or her rights of defence practically and effectively.

The applicant in the present proceedings had the full status of a suspect during the aforementioned investigative proceedings, which is common ground between the parties. Following the measures of inquiry, however, he was not formally charged, and the criminal proceedings against him have been stayed since 2016, as the offender has not been identified.

The applicant claims that he is entitled to compensation for his arrest and detention if he was suspected of involvement in a criminal offence but such involvement was not proved. He is claiming damages for the following reasons: 1. his arrest took place in front of his colleagues at his place of work; 2. his status as a suspect has been an obstacle to his career advancement in the organisational system of the MVR; 3. he was denied access to information during his arrest and detention – a conversation with his family and with his lawyer to find out why he had been arrested.

The MVR is a single administrative structure which is responsible for the maintenance of public order. It is composed of several directorates, the

Directorate-General for the National Police and the Directorate-General for the Security Police being responsible for measures to protect public order.

At the same time, employees of the MVR may also be named as suspects, charged with offences and prosecuted. Investigations concerning MVR employees are conducted by the Internal Security Directorate, irrespective of the offence. The Internal Security Directorate undertakes actions for the investigation of offences where there is information indicating that they were committed by employees of the MVR. An investigating police officer from the Internal Security Directorate may open investigative proceedings against an employee of another directorate of the MVR. The staff of the Internal Security Directorate carry out investigative measures – searches, seizure, examination of witnesses, formal charging, disclosure of investigation records, etc.

As a single administrative authority, the MVR is the employer of all staff working for that ministry. Each directorate holds information on its employees and stores it in their personal file. When an employee takes part in selection procedures for promotions and transfers, his personal file is requested, and information is sought on the manner in which the employee has performed his duties, on whether he has ever been suspected of, charged with or put on trial for a criminal offence and on whether he has ever contravened staff regulations or committed a breach of public order.

The Internal Security Directorate, on the other hand, is an organisational entity of the MVR which undertakes actions for the investigation of offences which are believed to have been committed by employees of the MVR. Information obtained during the investigations is also recorded in the personal file. An internal review is conducted, the result of which is also placed on the personal file.

In this context, a problem arises with regard to the processing, storage and use of information obtained by an MVR directorate acting as the investigating authority in the context of criminal proceedings and made available to another MVR directorate in which the suspect, accused or defendant is employed. It is not clear to the court whether a directorate of the MVR acting as the investigating authority may insert, *proprio motu*, information which it has obtained into the personal file of an employee performing the duties of a police officer in another directorate of the MVR. How is that information stored and for how long, and can it constitute an obstacle to promotion of the employee? Problems relating to the processing and storage of investigation data collected by the MVR are addressed in Cases **C-205/21 and C-118/22**.

In the present case, the MVR acted not only as the employer, through the directorates in which the applicant performed his duties, but also as the investigating authority through the Internal Security Directorate, which conducted investigations into offences committed by MVR employees.

Is it proportionate for the MVR, in its capacity as an employer, to use and rely on information about an employee which it has received from another division or directorate of the MVR which was performing the duties of an investigating authority? Is the objective of detection and prevention of criminal offences by an organisational entity of the MVR compatible with the option for the employer to deny an employee promotion on the sole ground that the employee was suspected of having committed a criminal offence, the prosecution of the case having been stayed because the identity of the offender had not been established?

It should be noted that it is not clear to the court whether the GDPR is applicable in cases such as the present one, in which some of the directorates within the same organisational structure perform the function of an employer and another performs the functions of an investigating authority in criminal proceedings.

Article 4(1) of the GDPR defines what personal data means. In the proceedings, it is common ground that the MVR, as the employer, stores information indicating that the applicant was suspected and was arrested during the investigative proceedings relating to the offence of robbery in complicity. The question arises whether that storage and addition to the suspect's personal file constitutes data processing within the meaning of Article 4(2) of the GDPR or whether the personal file is a filing system within the meaning of Article 4(6). Another question facing the referring court is whether the storage of data such as that at issue in the present case falls within the scope of Article 9(2)(b) of the GDPR.

The court is well aware that officers who maintain public order (persons working in the MVR) should satisfy more stringent moral and ethical criteria than other categories of workers or employees. These persons must not do anything which might result in their being convicted, put on trial, charged or suspected, because that would defeat the purpose of their professional activity, namely to maintain order in the State and to avert, detect and prevent criminal offences and infringements of the law. They are, however, to be presumed innocent until proved guilty. The court wonders whether the employer can deny an employee promotion on the sole ground that he has been suspected of, charged with or put on trial for a criminal offence in view of the more stringent ethical criteria which that category of employees must satisfy. Can an employer invoke the fact that its employee has been suspected of, charged with or put on trial for a criminal offence to put an end to his career advancement after the criminal proceedings against him have been stayed? It is not clear whether the collection and processing in an employee's personal file of data connected with his status as a suspect, accused or defendant are manifestly proportionate to the standards expected of that category of employees. This is because only a final conviction constitutes a ground for termination of the employment and service relationship with the employee.

At the same time, recitals 65 and 66 and Article 17 of the GDPR have introduced the principle of the right to be forgotten. For that reason, it is unclear whether the principle of the right to be forgotten set out in Article 17(1)(a) of the GDPR must

be interpreted as meaning that erasure from an employee's personal file is required for any data which have been collected by another organisational entity of the employer performing the functions of an investigating authority and which relate to the employee having been suspected of, charged with or put on trial for a criminal offence.

It is not clear to the court whether unlawful processing within the meaning of Article 17(1)(d) of the GDPR is to be understood as covering the processing and storage of data by an organisational entity of the employer on account of suspicion that its employee has committed a criminal offence in cases where that information was obtained, collected and stored by another organisational entity of the employer in its capacity as a prosecuting authority.

In accordance with recital 19 and Article 2(2)(d) of the GDPR, the processing and storage of personal data in criminal proceedings are regulated in *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 prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data and repealing Council Framework Decision 2008/977/JHA, read in conjunction with Article 52 of the Charter of Fundamental Rights of the European Union.*

The dispute in the main proceedings concerns information stored by the employer in the employee's file and obtained from another directorate of the employer which, in relation to police officers (persons working in the organisational structure of the MVR), was acting as an investigating authority in the context of criminal proceedings. In the court's view, data obtained in the context of criminal investigations against an employee fall simultaneously within the scope of the GDPR, Directive 2016/680 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Article 10 of Directive 2016/680 introduces special categories of personal data. For the referring court, the question arises whether the storage of data in the personal file of MVR employees in the context of criminal proceedings brought against them is proportionate, given the more stringent moral criteria required for the practice of their profession. Can the employer use data obtained in the context of investigations *proprio motu* if one of its other organisational entities undertakes investigative actions? The question arises whether 'personal data' and 'processing' within the meaning of Directive 2016/680 must be interpreted as including the activities at issue in the present case. The question for the court is whether Article 9(1) of Directive 2016/680 must be interpreted as allowing an employer to collect and store information relating to an employee in a directorate who has been suspected of, charged with or tried for a criminal offence if the employer has collected that information through another of its directorates which is an investigating authority.

The applicant applied to take part in selection procedures for promotion and transfer and was ranked in the first places. Because of his status as a suspect, however, he was not appointed to the police posts for which he attained the highest ranking. In that context, the court asks whether the storage of data by one and the same organisational structure (such as the MVR, in which some of the directorates have the function of an employer and a dedicated directorate has the function of an investigating authority) constitutes **a form of discrimination** within the meaning of Article 1 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation in cases where the information concerns an employee's status in criminal proceedings and is collected by a directorate in the same organisational structure which has the role of an investigating authority. Does equal treatment therefore also encompass prohibition of the storage of data relating to an employee who has been a suspect but against whom the criminal proceedings have been abandoned?

In the light of the foregoing considerations, Article 631(1) of the GPK, read in conjunction with the first paragraph of Article 267 TFEU, requires a stay of proceedings until the Court of Justice of the European Union has ruled on the questions of interpretation set out in the operative part of the order.

On those grounds, the COURT

MAKES THE FOLLOWING ORDER:

The following questions are **REFERRED** to the Court of Justice of the European Union for a preliminary ruling **under Article 267 TFEU and Article 629 of the GPK**:

Is **Article 2(1) of the GDPR** to be interpreted as meaning that data processing includes activities within one and the same organisational structure, in which some of its directorates perform the duties of an employer while one other directorate has the function of an investigating authority in criminal proceedings against employees of the other directorates? **If the answer is in the affirmative:**

1. Is the expression **'processing of personal data'** in Article 4(2) of the GDPR to be interpreted as covering an activity in the context of which information concerning a particular employee which has been obtained by the employer, in its capacity as the investigating authority, through one of its directorates is added to that employee's personal file?
2. Is the expression **'filing system'** in Article 4(6) of the GDPR to be interpreted as covering the personal file of an employee or worker working in a directorate of the employer where the information has been collected by another directorate of the employer which has the status of an investigating authority?

3. Is **Article 9(2)(b) of the GDPR** to be interpreted as meaning that an organisational entity of an employer may gather and store data indicating that a particular employee was suspected of, charged with or put on trial for a criminal offence in criminal proceedings if that information was collected by another organisational entity of the employer which has the status of an investigating authority?

4. Is the **‘right to be forgotten’** within the meaning of Article 17(1)(a) of the GDPR to be interpreted as meaning that an employer is required to erase from the personal file of the employee any data which it has collected and stored through another of its directorates, which has the status of a public authority for the purposes of investigating its employees, and which indicate that the employee:
 - 4.1. is suspected of, charged with or on trial for a criminal offence in pending criminal proceedings, or
 - 4.2. was suspected of, charged with or put on trial for a criminal offence for which criminal proceedings were stayed or abandoned?

5. Must personal data **‘unlawfully processed’** within the meaning of Article 17(1)(d) of the GDPR be interpreted as including data which the employer has received, collected and stored through another of its organisational entities which performs investigative functions in criminal proceedings against employees of other organisational entities of the employer, where those data are recorded in the personal file and relate to the fact that the employee has been suspected of, charged with or on trial for a criminal offence, that is to say:
 - 5.1. is suspected of, charged with or on trial for a criminal offence in pending criminal proceedings, or
 - 5.2. was suspected of, charged with or on trial for a criminal offence for which criminal proceedings were stayed or abandoned?

6. Are **‘personal data’** within the meaning of Article 3(1) 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 prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data and repealing Council Framework Decision 2008/977/JHA, read in conjunction with Article 52 of the Charter of Fundamental Rights of the European Union*, to be interpreted as meaning data which have been obtained, collected and stored by the employer through one of its organisational entities which performs the functions of an investigating authority in criminal proceedings against an employee serving in another organisational entity of the employer?

7. Is **'processing'** within the meaning of Article 3(2) 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 prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data and repealing Council Framework Decision 2008/977/JHA, read in conjunction with Article 52 of the Charter of Fundamental Rights of the European Union*, to be interpreted as meaning that it encompasses an activity consisting in the employer storing in the employee's personal file data which the employer has obtained, collected and stored through one of its organisational entities which performs the duties of an investigating authority in criminal proceedings against any of the employer's employees serving in another of its organisational entities?
8. Is **Article 9(1)** 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 prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data and repealing Council Framework Decision 2008/977/JHA, read in conjunction with Article 52 of the Charter of Fundamental Rights of the European Union*, to be interpreted as meaning that it permits the employer to collect and store information on an employee who is suspected of, charged with or on trial for a criminal offence in cases where the employer collected that information through another of its organisational entities which has the status of an investigating authority in criminal proceedings against that employee?
9. Is **Article 16(2)** 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 prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data and repealing Council Framework Decision 2008/977/JHA, read in conjunction with Article 52 of the Charter of Fundamental Rights of the European Union*, to be interpreted as meaning that the employer must erase from the employee's personal file any data which the employer has collected and stored through another of its organisational entities which has the status of an investigating authority in criminal proceedings against that employee and which relate to the fact that the employee:
- 9.1. is suspected of, charged with or on trial for a criminal offence in pending criminal proceedings, or

- 9.2. was suspected of, charged with or put on trial for a criminal offence for which criminal proceedings were stayed or abandoned?
10. Is **Article 1** of *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* to be interpreted as not permitting an employer, one of whose organisational entities undertakes investigative actions against an employee of another organisational entity, to deny an employee promotion on the sole ground that he:
- 10.1. is suspected of, charged with or on trial for a criminal offence in pending criminal proceedings, or
- 10.2. was suspected of, charged with or put on trial for a criminal offence for which criminal proceedings were stayed or abandoned?

The proceedings **ARE STAYED** [...]

[...]

WORKING DOCUMENT