

Case C-634/22

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:

10 October 2022

Referring court:

Sofiyski gradski sad (Bulgaria)

Date of the decision to refer:

28 September 2022

Public Prosecutor's Office:

Sofiyska gradska prokuratura

Defendants in the criminal proceedings:

OT

PG

CR

VT

MD

Subject matter of the main proceedings

The request for a preliminary ruling is made by a panel ('the referring panel') which began to hear a criminal case as part of the Spetsializiran nakazatelen sad (Specialised Criminal Court, 'SNS') and, following the abolition of that court, has continued to deal with that criminal case, since 28 July 2022, as part of the Sofiyski gradski sad (Sofia City Court).

The criminal proceedings were brought in 2018 against five individuals who are charged with participating in a criminal organisation for the purpose of committing secondary crimes under Article 213a of the Nakazatelen kodeks

(Criminal Code, Bulgaria) (extortion) and some of whom are accused of specific acts of extortion from injured parties.

While the proceedings were pending, public debate commenced on the draft version of the *Zakon za izmenenie i dopalnenie na Zakona za sadebnata vlast* (Law amending and supplementing the Law on the judiciary), which provides for the abolition of the SNS ('the draft law').

In the course of that public debate, a meeting of the *Grazhdanski savet kam Visshia sadeben savet* (Civil Council to the Supreme Judicial Council) was convened on 25 February 2022, the participants at which included the Chair of the referring panel (as the President of the SNS) and the lawyer representing the defendant OT (as a representative of a non-governmental organisation).

In that meeting, the lawyer for OT supported the abolition of the SNS and stated that he agreed with the explanatory memorandum for the draft law. One of the arguments given in the explanatory memorandum for the abolition of the SNS is that it would guarantee the constitutional principle of the independence of the judiciary and the protection of the constitutional rights of citizens.

During the criminal proceedings, the lawyer for OT has not challenged the referring panel. Furthermore, the referring panel cannot determine any subjective grounds for disqualification. Given that grounds for disqualification must be assessed on the basis of an objective approach, however, the referring panel points out that the abovementioned statement by the lawyer for OT raises legitimate doubts whether there are, objectively, sufficient guarantees of the independence and impartiality of the SNS.

Subject matter of the request

The referring panel is seeking to ascertain whether the procedure and the grounds for the adoption of the Law abolishing the SNS are compatible with EU law, whether they impair the independence of the judges at the SNS and, if so, whether those judges should continue to administer justice.

The referring panel considers the request for a preliminary ruling to be admissible because a case is pending before it and it is required to decide those proceedings by means of a judicial act. It is necessary for the Court of Justice to answer the questions referred so that the referring panel is able, both in the present criminal proceedings and in the other cases which it is required by that law to complete, to undertake the mandatory examination of whether to rule on the merits, adopt a procedural act or disqualify itself.

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, 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, with effect from 27 July 2022), but the judges are to continue up to and after that date to deal with those cases before that court in which preliminary hearings have been held, 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 are thereby safeguarded, and the facts leading to the conclusion that those principles have been infringed are not duly set out[?]
2. Must the abovementioned provisions of EU law be interpreted as precluding national provisions such as those of the Law amending and supplementing the Law on the judiciary (DV No 32/26 April 2022), which result in the complete abolition of an autonomous judicial body in Bulgaria (the Specialised Criminal Court) on the ground referred to above and in the transfer of judges (including the judge of the panel hearing the criminal case at hand) from that court to various other courts, but which require those judges to continue to deal with those cases which are pending before the abolished court and which they have already commenced?
3. If so, what procedural acts should be undertaken – also in the light of the primacy of EU law – by the members of the national legal service attached to the recently abolished courts in the cases of the abolished court (which, by law, they must complete), having regard also to their obligation to examine closely whether they must recuse themselves from those cases? What consequences would that have for the procedural decisions of the recently abolished court in the cases which must be completed and for the legal acts 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, 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, Articles 6 and 13

Judgment of the ECtHR of 1 December 2020 in *Ástráðsson v. Iceland* CE:ECHR:2020:1201JUD002637418;

Judgment of the ECtHR of 9 March 2021 in *Bilgen v. Turkey* CE:ECHR:2021:0309JUD000157107.

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), (3), (4), (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

Nakazatelen kodeks (Criminal Code), Article 213a

Nakazatelno-protsesualen kodeks (Code of Criminal Procedure), Articles 29, 31, 485 and 486.

Succinct presentation of the facts and procedure

- 1 The criminal proceedings were brought by an indictment filed at the SNS against five individuals by which they are charged with participating in a criminal organisation for the purpose of committing secondary crimes under Article 213a of the Nakazatelen kodeks (Criminal Code, Bulgaria) (extortion).
- 2 OT is one of the defendants. He is accused of participating in the criminal organisation in Bulgaria from an unknown date in early December 2016 to 14 November 2018. That crime is punishable by a term of imprisonment of in excess of three years.
- 3 In the course of the investigation, on 16 November 2018 an order was made that OT be remanded in custody pending trial. By order of the Apelativen spetsializiran sad (Specialised Criminal Court of Appeal) of 2 April 2019, the coercive measure of remand in custody pending trial was commuted to house arrest.
- 4 By order of the Apelativen spetsializiran sad of 5 August 2019, the coercive measure of house arrest in OT's case was commuted to bail of 20 000 leva [BGN].
- 5 By order of the referring panel of 28 January 2020, the coercive measure of 20 000 leva was reduced to 10 000 leva and, by order of 28 June 2021, to 2 000 leva.
- 6 The criminal proceedings were brought before the SNS on 12 July 2019 and assigned to a rapporteur. On 26 November 2019, they were transferred to a different rapporteur because the rapporteur initially appointed had been seconded to another court.
- 7 On 28 November 2019, the second rapporteur recused himself because of relations with one of the parties to the proceedings. On the same date, the proceedings were transferred to the rapporteur who is also the Chair of the referring panel.
- 8 On 28 January 2020, the referring panel held a preliminary hearing in open court.
- 9 At the public hearing on 11 March 2020, the trial was not opened due to the absence of the civil plaintiff for important (health-related) reasons.
- 10 The next public hearing, which was scheduled for 7 May 2020, was adjourned until 2 June 2020 due to a suspension of public hearings in Bulgarian courts in accordance with recommendations made by the Vissh sadeben savet (Supreme Judicial Council) in the light of the epidemic situation and the Covid-19 infection rate.

- 11 At the public hearing on 2 June 2020, the trial was opened and the taking of evidence was commenced.
- 12 Thus far, 12 public hearings have been held; witnesses were examined in six of these, while in the other six the proceedings did not progress because procedural requirements were not met.
- 13 The hearing scheduled for 26 October 2020 was adjourned due to the absence of OT for important (health-related) reasons.
- 14 The hearing scheduled for 21 April 2021 was adjourned because the parties had not given consent for the witnesses summoned to give evidence to be examined online by videoconference.
- 15 The hearing scheduled for 15 October 2021 was adjourned due to the absence of OT for important (health-related) reasons.
- 16 The hearing scheduled for 3 November 2021 was adjourned due to the absence of the defence counsel of another defendant.
- 17 The hearing scheduled for 18 March 2022 was adjourned due to the absence of another defendant on grounds of illness.
- 18 The hearing scheduled for 27 May 2022 was adjourned due to the absence of the defence counsel of one of the defendants.
- 19 In the course of the entire court proceedings, none of the parties has challenged the referring panel, its Chair or the lay judges.

The essential arguments of the parties in the main proceedings

- 20 During the discussions on the draft law at the meeting of the Civil Council to the Supreme Judicial Council on 25 February 2022, the lawyer for OT publicly stated that the abolition of the SNS was ‘a first step for citizens, members of the national legal service and defence counsel towards a fair and expeditious procedure’. On the basis of this statement made by the lawyer for OT, the referring panel expected a reasoned request for disqualification to be submitted following the adoption of the draft law; however, this did not materialise.
- 21 In support of this statement, the lawyer for OT relied on personal experience of criminal cases in which he had represented defendants before the SNS, and raised a number of complaints, in particular: automatic association of individuals for the purposes of investigations against them by the SNS; imposition of lighter penalties for crimes incurring severe penalties; lengthy periods of remand in custody pending trial; use of lengthy periods of remand in custody pending trial as a means of exerting pressure to enter into an agreement [with the Public Prosecutor’s Office]; a large number of authorisations for the use of special

investigative techniques, going beyond the public interest; inadequate measures to protect witnesses; conduct of hearings for crimes incurring severe penalties even though defendants or their representatives are objectively prevented from attending.

- 22 The lawyer for OT concluded that the SNS, as an autonomous judicial body, was not a guarantor of a fair trial and that there was no need to bundle together certain proceedings in a specialised court, as the judges at the regional courts and the Sofiyski gradski sad (Sofia City Court) were sufficiently well prepared to handle those proceedings also.
- 23 In the view of the referring panel, the abolition of the SNS, in the manner in which it was conducted and on the grounds mentioned, is contrary to the principle of the rule of law, infringes the independence of that judicial body and the separation of powers and constitutes a means of exerting pressure by the legislative and executive authorities.
- 24 The referring panel takes the view that the allegations against the SNS, to the effect that its existence and functioning infringe the principles of the independence of the judiciary and the protection of the rights of citizens, are not substantiated by any concrete facts. Various arguments in connection with the actual activity and the results of the SNS were ignored and all demands for an expert report to be presented to the public for discussion were rejected. The legislative process was conducted in extraordinary haste, with shortened periods for public discussion and just a partial, provisional assessment of its effectiveness. In the view of the referring panel, this raises doubts as to whether the abolition of the SNS was the result of criticism of its judicial activity, with considerable pressure being thereby exerted on the independence of the SNS through apparently legitimate measures.
- 25 In the discussion of the draft law, specifically during the sitting of the Narodno Sabranie (National Assembly) on 14 April 2022, a number of groundless, offensive assessments were expressed, which, in the view of the referring panel, harm the reputation of the SNS as a judicial body and that of its judges. According to the case-law of the ECtHR, continued confidence of individuals in the courts forms the basis for meeting the requirements for the independence and impartiality of the judiciary.
- 26 Since the discussion of the draft law was public, parties and witnesses in proceedings before the SNS know the reasons for its abolition and the assessments of its work. As a result, they might conclude that all proceedings concluded at the SNS and pending before it are heard by a judicial body whose status as an independent court and guarantor of the rights of citizens is officially denied by the legislature through the explanatory memorandum and the assessment of effectiveness in the draft law. In the view of the referring panel, this leads to legal uncertainty, places the judges at the SNS in a position where their independence and impartiality are called into question at every point until the proceedings are

finally concluded and may constitute a ground for the resumption of the concluded proceedings.

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

- 27 Under the Constitution of the Republic of Bulgaria, justice is administered by the Varhoven kasatsionen sad (Supreme Court of Cassation), the Varhoven administrativen sad (Supreme Administrative Court), courts of appeal, regional courts, courts-martial and district courts. In addition, specialised courts may be established by law, while extraordinary courts are not permitted.
- 28 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 brought against certain groups of persons – high-ranking public office holders – concerning corruption offences.
- 29 The manner in which judges are appointed to specialised courts is the same as that in which judges are appointed to other courts. They are all appointed following application 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 the judges in the specialised courts are the same as those for other members of the national legal service.
- 30 The Konstitutsionen sad (Constitutional Court) has ruled on the compatibility of the specialised courts with the Bulgarian Constitution on two occasions (by judgment No 10 of 15 November 2011 and by judgment No 6 of 27 March 2018). In those judgments the claim that the specialised criminal courts are extraordinary courts was rejected. It was stated that they dispense justice in accordance with the general rules and that judges 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.
- 31 On 26 April 2022, the Zakon za izmenenie i dopalnenie na zakona za sadebnata vlast (Law amending and supplementing the Law on the judiciary) was adopted. Under that Law, the specialised criminal courts (at first instance and at the appellate stage) and the associated Public Prosecutor's Offices are abolished on 28 July 2022. Jurisdiction to hear the cases pending before them at the time was changed such that the Sofiyski gradski sad (Sofia City Court) is the successor in law to the Spetsializiran nakazatelen sad (Specialised Criminal Court) and the Sofiyski apelativen sad (Court of Appeal, Sofia) is the successor in law to the Apelativen spetsializiran nakazatelen sad (Specialised Criminal Court of Appeal).
- 32 The Law [amending and supplementing the Law on the judiciary] provides that [in the period] from its promulgation to the abovementioned date of abolition of the specialised criminal courts, those courts must open new cases and deal with

pending cases. Cases in which a preliminary hearing has been held are to be concluded by the relevant panel before which they are pending and may not start anew. To that end, the Law provides for the registration of cases with the Sofiyski gradski sad (Sofia City Court) or with the Sofiyski apelativen sad (Court of Appeal, Sofia), amendment of the terms of office of the participating judges, who are then considered to be lay judges at the Sofiyski gradski sad, and the secondment of judges who have not been reappointed to the Sofiyski gradski sad or the Sofiyski Apelativen sad in order to conclude those [cases].

- 33 The Law requires the Supreme Judicial Council to reappoint the members of the national legal service without an application procedure, while certain restrictions (a quota) apply to the number of judges concerned who can be appointed to the same court. These rules enter into force upon the promulgation of the Law and deviate from the general regime governing the reappointment of judges where a court is abolished or reduced in size. The Law requires the Supreme Judicial Council to reappoint the members of the national legal service by 10 June 2022 with provisional effect (an appeal against that decision does not have suspensive effect).
- 34 The Prosecutor-General challenged the abovementioned provisions before the Konstitutsionen sad (Constitutional Court), whereupon the Supreme Judicial Council suspended the procedure for the reappointment of the judges of the specialised criminal courts. By judgment No 7 of 14 July 2022, the Konstitutsionen sad (Constitutional Court) ruled that those provisions were unconstitutional because they infringed the principle of separation of powers and impaired the independence of the judiciary. After that judgment, the procedure for the reappointment of the judges of the specialised criminal courts was resumed on the basis of the general regime.