

**\*393 Rubach**

(C-344/08)

European Court of Justice (Second Chamber)

16 July 2009

**[2010] Env. L.R. 23**

C.W.A. Timmermans , President of the Chamber , J.C. Bonichot , K. Schiemann , J. Makarczyk and  
C. Toader ( Rapporteur ) JJ. ; M. Poiares Maduro A.G. :

July 16, 2009

Admissibility; Criminal evidence; EU law; Prosecutions; Protected species

H1 *Nature conservation—EC law—international trade in endangered species—criminal prosecutions—establishment of source of specimens—art.8(5) of CITES Regulation 338/97—evidence admissible in prosecutions—burden of proof in prosecutions—presumption of innocence*

H2 The defendant in domestic proceedings (R) acquired a species of spider protected under Annex B to the CITES Regulation (338/97) , and began to breed them in captivity, auctioning them on the internet. Article 8 of the Regulation provided:

“1. The purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain and sale, keeping for sale, offering for sale or transporting for sale of specimens of the species listed in Annex A shall be prohibited.

...

5. The prohibitions referred to in paragraph 1 shall also apply to specimens of the species listed in Annex B except where it can be proved to the satisfaction of the competent authority of the Member State concerned that such specimens were acquired and, if they originated outside the Community, were introduced into it, in accordance with the legislation in force for the conservation of wild fauna and flora.

...”

H3 R was prosecuted for infringement of the Polish legislation on nature protection. In domestic appeal proceedings the Regional Court found that the accused could only avoid criminal liability if he were in a position to establish the source of the animals, either by producing a certificate of registration relating to the animals sold, as required under art.64(1) of the national law on nature protection, or by supplying evidence which would make it possible to retrace the source of those animals and to identify with certainty the person or persons to whom they belonged or who had bred them. A reference was made to the ECJ asking: **\*394**

“[H]ow, under [ Article 8(5) of Regulation No 338/97 ] and in the light of the presumption of innocence, may a keeper of animals listed in Annex B [to that regulation] (which are

not amphibians, reptiles, birds or mammals) prove satisfactorily that his specimens were acquired ... in accordance with the legislation in force with regard to wild fauna and flora ...?"

#### H4 Held:

H5 (1) The reference asked two questions: first, what evidence was admissible, in the light of art.8(5) , in relevant criminal proceedings; and, secondly, what was a fair apportionment of the burden of proof with regard to establishing whether those specimens were acquired lawfully.

H6 (2) The Regulation did not contain a general prohibition on importing, and trading in, species other than those referred to in Annex A . The commercial use of specimens of the species listed in Annex B was authorised where the conditions laid down in art.8(5) were complied with. The Regulation did not specify what evidence had to be used in order to establish that specimens of Annex B species had been acquired lawfully, in accordance with art.8(5) , in particular where those specimens had been born in captivity within the Community. The task of determining what evidence may establish that those conditions had been met was thus left to the competent authorities of the Member States. That evidence included the licences or certificates provided for in the Regulation or any other appropriate document which may be deemed useful by the competent national authorities.

H7 (3) The presumption of innocence was one of the fundamental rights which were protected in the Community legal order. It was intended to ensure that no-one was declared guilty, or treated as being guilty, of an offence before his guilt had been established by a court of law. Putting in place the system of protection introduced for specimens of species listed in Annexes A and B did not affect the general obligation on the prosecution to prove, in criminal proceedings, that the accused used specimens of Annex B species for commercial purposes. The accused had the right to defend himself by demonstrating, in accordance with art.8(5) that those specimens came into his possession lawfully, under the conditions laid down in that provision, and to use for that purpose any type of evidence admissible under the relevant procedural law. Consequently, art.8(5) had to be interpreted as meaning that any type of evidence accepted under the procedural law of the Member State concerned in similar proceedings was in principle admissible for the purpose of establishing whether specimens had been lawfully acquired.

#### H8 Cases referred to:

Hauptzollamt Neubrandenburg v Leszek Labis (Met-Trans) (C-310/98 and C-406/98) [2000] E.C.R. I-1797

[\*Huls AG v Commission of the European Communities \(C-199/92 P\) \[1999\] E.C.R. I-4287; \[1999\] 5 C.M.L.R. 1016\*](#)

[\*Montecatini SpA v Commission of the European Communities \(C-235/92 P\) \[1999\] E.C.R. I-4539; \[2001\] 4 C.M.L.R. 18\*](#)

[\*Nationale Raad van Dierenkwekers en Liefhebbers VZW v Belgium \(C-219/07\) \[2008\] E.C.R. I-4475; \[2009\] Env. L.R. D2\*](#)

[\*Tridon \(C-510/99\) \[2001\] E.C.R. I-7777\*](#)

YB v Turkey (48173/99 and 48319/99) October 28, 2004

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## **H9 Legislation referred to:**

EU Treaty arts 6 and 234 now TFEU arts 6 and 267

European Convention on Human Rights 1950 art.6(2)

Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973

Regulation 3626/82 (international trade in endangered species) [1982] OJ L384/1

Single European Act 1986

CITES Regulation 338/97 [1997] OJ L61/1 arts 1 , 8 and 16 and Annexes A and B

## **H10 Representation**

M. Dowgielewicz , acting as agent, appeared on behalf of Poland.

N. Díaz Abad , acting as agent, appeared on behalf of Spain.

M. Konstantinidis and M. Owsiany-Hornung , acting as agents, appeared on behalf of the Commission.

## **JUDGMENT**

1 The reference for a preliminary ruling concerns the interpretation of art.8(5) of Regulation 338/97 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L61/1.

2 This reference has been made in the course of criminal proceedings brought against Mr Rubach for infringements of the Polish legislation on nature protection.

## **Legal context**

### *The Convention on International Trade in Endangered Species of Wild Fauna and Flora*

3 The Convention on International Trade in Endangered Species of Wild Fauna and Flora , signed in Washington on March 3, 1973 ( United Nations Treaty Series , vol.993, No.I-14537) (CITES) seeks to ensure that international trade in species listed in its appendices, and in parts and derivatives thereof, does not damage the conservation of biodiversity and is based on a sustainable use of wild species.

### *Community law*

5 Article 8 of Regulation 338/97 provides:

#### *"5 Provisions relating to the control of commercial activities*

1. The purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain and sale, keeping for sale, offering for sale or transporting for sale of specimens of the species listed in Annex A shall be prohibited.

...

5. The prohibitions referred to in paragraph 1 shall also apply to specimens of the species listed in Annex B except where it can be proved to the satisfaction of the competent authority of the Member State concerned that such specimens were acquired and, if they \*396 originated outside the Community, were introduced into it, in accordance with the legislation in force for the conservation of wild fauna and flora."

6 Article 16 of that regulation provides:

#### *"6 Sanctions*

1. Member States shall take appropriate measures to ensure the imposition of sanctions for at least the following infringements of this Regulation:

(a) introduction into, or export or re-export from, the Community of specimens without the appropriate permit or certificate or with a false, falsified or invalid permit or certificate or one altered without authorisation by the issuing authority;

(b) failure to comply with the stipulations specified on a permit or certificate issued in accordance with this Regulation;

...

(j) purchase, offer to purchase, acquisition for commercial purposes, use for

commercial gain, display to the public for commercial purposes, sale, keeping for sale, offering for sale or transporting for sale of specimens in contravention of Article 8;

...

2. The measures referred to in paragraph 1 shall be appropriate to the nature and gravity of the infringement and shall include provisions relating to the seizure and, where appropriate, confiscation of specimens.

...

4. Where a live specimen of a species listed in Annex B or C arrives at a point of introduction into the Community without the appropriate valid permit or certificate, the specimen must be seized and may be confiscated or, if the consignee refuses to acknowledge the specimen, the competent authorities of the Member State responsible for the point of introduction may, if appropriate, refuse to accept the shipment and require the carrier to return the specimen to its place of departure."

7 Annex B to Regulation 338/97 lists, within the class *Arachnida*, order *Araneae*, spiders of the genus *Brachypelma*.

#### *National law*

8 The national provisions applying in the case in the main proceedings are contained mainly in the Law of April 16, 2004 on nature protection ( Official Journal of Laws , No.92, item 880) (the Law on nature protection), which reproduces the provisions of CITES and of the relevant Community legislation.

9 Article 61(1) of the Law on nature protection provides:

"1. The transportation across the State border of plants and animals of species subject to restrictions under the provisions of European Union law, and also recognisable parts and derivatives thereof, shall require authorisation by the minister competent for environmental matters, subject to paragraph 2." **\*397**

10 Article 64 of the Law provides:

"1. The keeper of animals referred to in Article 61(1) which are classified as amphibians, reptiles, birds or mammals, and the breeder thereof, shall be required to

register them in writing.

2. The registration requirement referred to in paragraph 1 shall not concern:

(1) zoological gardens;

(2) persons engaged in commercial activities involving trade in animals referred to in Article 61(1);

(3) temporary detention of animals for the purpose of treatment and rehabilitation.

3. The register referred to in paragraph 1 shall be maintained by the Starosta (District Officer) competent for the place at which the animals are being held or bred.

...

5. The requirement to register or deregister arises from the date of purchase or sale, importation into the country or exportation from the country, acquisition of the animal, or the loss or death thereof. An application for registration or deregistration must be filed with the competent Starosta within 14 days of the date on which that requirement arises.

...

8. The Starosta shall confirm entry in the register by issuing a certificate.

9. Persons referred to in paragraph 2(2) shall be required to possess and hand over, with the animal sold, the original or a copy of the document referred to in paragraph 4(11). The person selling the animal shall provide that copy with a consecutive number, a date of issue, the stamp and signature of the seller, information on the number of animals in respect of which it has been issued and, where the copied document concerns more than one species, information also on the species to which they belong.

...”

11 Article 128 of the Law on nature protection provides:

“Any person who:

...

(2) infringes the provisions of EU law concerning the protection of species of wild animals and plants through the regulation of trade therein by:

...

(d) offering for sale or purchase, purchasing or acquiring, using or displaying publicly for commercial purposes, selling, holding or transporting for the purpose of sale, specimens of specific species of plants or animals,

...

shall be liable to punishment by a term of imprisonment of between three months and five years.” \*398

### The dispute in the main proceedings and the question referred

12 It is apparent from the order for reference that Mr Rubach acquired at terrarium fairs exotic spiders of the genus *Brachypelma Albopilosum* , a protected specimen belonging to an animal species listed in Annex B to Regulation 338/97 , and that he began breeding those arachnids in captivity and auctioning them on the internet between February and October 2006.

13 On the basis of those facts, criminal charges were brought against Mr Rubach in respect of 46 infringements of art.128(2)(d) of the Law on nature protection.

14 By judgment of October 26, 2007, the *S#d Rejonowy w Ko#cianie* (District Court, Ko#cian) acquitted the accused of all the charges brought against him, ruling that his action did not constitute the prohibited act attributed to him in the indictment.

15 On April 2, 2008, in an appeal brought by the *Prokurator Rejonowy w Ko#cianie* (District Prosecutor in Ko#cian), the *S#d Okr#gowy w Poznaniu* (Regional Court, Poznan) overturned that judgment in its entirety and referred it back for reconsideration.

16 In reconsidering the case, the *S#d Rejonowy w Ko#cianie* held that the appeal court's interpretation of national law, which was binding on the court reconsidering the case, meant that the accused could avoid criminal liability only if he were in a position to establish the source of the animals, either by producing a certificate of registration, as required under art.64(1) of the Law on nature protection, relating to the animals sold or by supplying evidence which would make it possible to retrace the source of those animals and to identify with certainty the person or persons to whom they belonged or who had bred them.

17 Concerning the first issue, the *S#d Rejonowy w Ko#cianie* questioned the *Starostwo Powiatowe w Ko#cianie* (Ko#cian District Office). The position of that authority shows that the accused was unable to register the specimens at issue because, as arachnids, they were not subject to registration. That fact was also confirmed by the Polish Government in its written

observations.

18 However, according to the *Sąd Rejonowy w Końcu*, if the accused were under an obligation to present a document which national law does not require him to obtain, even though he is not required to have particular knowledge of the origin of the animals concerned, he could not avoid criminal liability.

19 In those circumstances, the *Sąd Rejonowy w Końcu* decided to stay the proceedings and to refer the following question to the court for a preliminary ruling:

“[H]ow, under [ Article 8(5) of Regulation No 338/97 ] and in the light of the presumption of innocence, may a keeper of animals listed in Annex B [to that regulation] (which are not amphibians, reptiles, birds or mammals) prove satisfactorily that his specimens were acquired ... in accordance with the legislation in force with regard to wild fauna and flora ...?”

## The question referred for a preliminary ruling

### *Observations submitted to the court*

20 The Polish Government proposes that the answer to be given to the referring court should be that art.8(5) of Regulation 338/97, which makes exercise of commercial activities for the purposes of art.8(1) of that regulation conditional upon proof that the specimens of the species listed in Annex B to that regulation **\*399** were acquired lawfully, refers to the rules of evidence that apply before the competent national authority. If it is a criminal court, the evidence of that fact must be adduced in accordance with the rules of criminal procedure, which require the genuineness of the facts to be established by every possible type of proof and the accused to have the benefit of any residual doubt.

21 The Spanish Government suggests that the court's answer to the question should be that it is necessary to require proof of the legality of the source of all specimens listed in Annex B, leaving it to the authorities of the Member States which have competence under CITES to assess the evidence that will, in any event, ensure that the lawful source of the specimens in question may be traced.

22 According to the Commission of the European Communities, the answer to be given to the referring court is that during criminal proceedings brought in order to penalise a possible infringement of the provisions of art.8(5) of Regulation 338/97, in view of the absence of Community provisions governing such criminal proceedings, the national court should, as a general rule, apply national law, interpreting it in accordance with Community law and ensuring the full effectiveness of Community law. In regard to apportionment of the burden of proof, the Commission considers, taking into account the fact that the prohibition on the use of specimens of species listed in Annex B to Regulation 338/97 for commercial purposes applies as a general rule, that it is for the prosecuting authority, in criminal proceedings, to establish that Mr Rubach used specimens of protected species for commercial purposes. However, it is Mr Rubach who should prove that those specimens came into his possession lawfully, which would enable him to avoid criminal liability.

### *Answer of the court*

23 As is apparent from all of the material connected with the reference for a preliminary ruling, the referring court seeks in essence to ascertain, first, what evidence is admissible, in the light of art.8(5) of Regulation 338/97, in criminal proceedings concerning activities relating to specimens of animal species such as those referred to in the case in the main proceedings, which are listed in Annex B to that regulation, and, secondly, what is a fair apportionment of the burden of proof with regard to establishing whether those specimens were acquired lawfully.

24 The purpose of the arrangements introduced in order to protect specimens of species listed in Annexes A and B to that regulation is to ensure the fullest possible protection for species of wild fauna and flora through controls on trade in such species, in compliance with the objectives,

principles and provisions of CITES .

25 It is common ground that Regulation 338/97 does not contain a general prohibition on importing, and trading in, species other than those which are referred to in Annex A thereto ( [\*Nationale Raad van Dierenkwekers en Liefhebbers VZW v Belgium \(C-219/07\) \[2008\] E.C.R. I-4475\*](#) at [18]).

26 As the court has held, the commercial use of specimens of the species listed in Annex B to Regulation 338/97 is authorised where the conditions laid down in art.8(5) of that regulation are complied with ( [\*Criminal Proceedings against Tridon \(C-510/99\) \[2001\] E.C.R. I-7777\*](#) at [44]). Indeed, the prohibition on trade contained in art.8 of that regulation does not apply where the competent authority of the Member State concerned has proof that those specimens were acquired and, if they \*400 originated outside the Community, were introduced into it in accordance with the legislation in force for the conservation of wild fauna and flora.

27 In the light of those provisions, it must therefore be concluded that Regulation 338/97 does not specify what evidence must be used in order to establish that specimens of species listed in Annex B to that regulation have been acquired lawfully, in accordance with the conditions laid down in art.8(5) of that regulation, in particular where those specimens have been born in captivity within the Community. The task of determining what evidence may establish that those conditions have been met is thus left to the competent authorities of the Member States. That evidence includes the licences or certificates provided for in Regulation 338/97 or any other appropriate document which may be deemed useful by the competent national authorities.

28 In that regard, it should be noted that, given that there is no legislation at Community level governing the concept of proof, any type of evidence admissible under the procedural law of the Member States in similar proceedings is in principle admissible. Consequently, in a situation such as that at issue in the main proceedings, it is for the national authorities to determine, according to the principles of their national law on evidence, whether, in the specific case before them, and in the light of all the circumstances, it has been proved that the conditions laid down in art.8(5) of Regulation 338/97 have been met (see, to that effect, *Hauptzollamt Neubrandenburg v Leszek Labis (C-310/98 & C-406/98) [2000] E.C.R. I-1797* at [29] and [30]).

29 The answer that should be given to the referring court should therefore be, in respect of this first aspect, that Regulation 338/97 does not limit the evidence that may be used in order to establish that specimens of species listed in Annex B to that regulation have been acquired lawfully and that any type of evidence which is accepted under the procedural law of the Member State concerned in similar proceedings is in principle admissible in order to establish whether those specimens were lawfully acquired.

30 Concerning, secondly, the apportionment of the burden of proof with regard to determining whether specimens of species listed in Annex B to Regulation 338/97 have been acquired lawfully, in the light of the principle of the presumption of innocence, it should be noted that the presumption of innocence resulting in particular from art.6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms , signed in Rome on November 4, 1950, is one of the fundamental rights which, according to the court's settled case law, reaffirmed in the preamble to the Single European Act and in art.6(2) of the EU Treaty [now art.6(2) of the TFEU, are protected in the Community legal order (see, inter alia, [\*Hüls AG v Commission of the European Communities \(C-199/92 P\) \[1999\] E.C.R. I-4287; \[1999\] 5 C.M.L.R. 1016\*](#) at [149], and [\*Montecatini SpA v Commission of the European Communities \(C-235/92 P\) \[1999\] E.C.R. I-4539; \[2001\] 4 C.M.L.R. 18\*](#) at [175]).

31 The presumption of innocence is intended to ensure that no-one is declared guilty, or treated as being guilty, of an offence before his guilt has been established by a court of law (see [43] of the judgment of the European Court of Human Rights of October 28, 2004 in *YB v Turkey* (48173/99 and 48319/99) .

32 It should be pointed out that putting in place the system of protection introduced for specimens of species listed in Annexes A and B to Regulation 338/97 does not affect the general obligation on the prosecution to prove, in criminal proceedings, \*401 that the accused used for commercial purposes specimens of species listed in Annex B to Regulation 338/97 , protected by the relevant legislation.

33 The accused has, in any event, the right to defend himself in an action seeking to establish his

criminal liability, by demonstrating, in accordance with art.8(5) of Regulation 338/97, that those specimens came into his possession lawfully, under the conditions laid down in that provision, and to use for that purpose any type of evidence admissible under the relevant procedural law.

34 Consequently, the answer to the question referred is that art.8(5) of Regulation 338/97 must be interpreted as meaning that, in the context of criminal proceedings brought against a person accused of having infringed that provision, any type of evidence accepted under the procedural law of the Member State concerned in similar proceedings is in principle admissible for the purpose of establishing whether specimens of animal species listed in Annex B to that regulation were lawfully acquired. In the light also of the principle of the presumption of innocence, such a person may adduce any such evidence to prove that those specimens came lawfully into his possession in accordance with the conditions laid down in that provision.

## Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

## Order

### Order

On those grounds, the Court (Second Chamber) HEREBY RULES:

Article 8(5) of Regulation 338/97 on the protection of species of wild fauna and flora by regulating trade therein must be interpreted as meaning that, in the context of criminal proceedings brought against a person accused of having infringed that provision, any type of evidence accepted under the procedural law of the Member State concerned in similar proceedings is in principle admissible for the purpose of establishing whether specimens of animal species listed in Annex B to that regulation were lawfully acquired. In the light also of the principle of the presumption of innocence, such a person may adduce any such evidence to prove that those specimens came lawfully into his possession in accordance with the conditions laid down in that provision. **\*402**