

JUDGMENT OF THE COURT (Sixth Chamber)

13 February 2020 (*)

(Reference for a preliminary ruling — Judicial cooperation in criminal matters — Directive (EU) 2016/343 — Presumption of innocence and right to be present at the trial in criminal proceedings — Article 8(1) and (2) — Conditions laid down by national law in order to hold a trial in absentia — Non-appearance of accused persons at certain hearings for reasons either within or beyond their control — Right to fair legal process)

In Case C-688/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Spetsializiran nakazatelen sad (Special Court for Criminal Cases, Bulgaria), made by decision of 22 October 2018, received at the Court on 6 November 2018, in the criminal proceedings against

**TX,
UW,**

THE COURT (Sixth Chamber),

composed of M. Safjan (Rapporteur), President of the Chamber, L. Bay Larsen and C. Toader, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Portuguese Government, by L. Inez Fernandes, P. Barros da Costa, L. Medeiros and D. Pires, acting as Agents,
- the European Commission, by R. Troosters and Y. Marinova, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 8(1) and (2) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1).
- 2 The request has been made in criminal proceedings brought against TX and UW for their participation in a criminal organisation.

Legal context
European Union law

3 Recitals 9, 33 to 37, 44 and 47 of Directive 2016/343 state:

(9) The purpose of this Directive is to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial.

...

(33) The right to a fair trial is one of the basic principles in a democratic society. The right of suspects and accused persons to be present at the trial is based on that right and should be ensured throughout the [European] Union.

(34) If, for reasons beyond their control, suspects or accused persons are unable to be present at the trial, they should have the possibility to request a new date for the trial within the time frame provided for in national law.

(35) The right of suspects and accused persons to be present at the trial is not absolute. Under certain conditions, suspects and accused persons should be able, expressly or tacitly, but unequivocally, to waive that right.

(36) Under certain circumstances it should be possible for a decision on the guilt or innocence of a suspect or accused person to be handed down even if the person concerned is not present at the trial. This might be the case where the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance and does not, nevertheless, appear. Informing a suspect or accused person of the trial should be understood to mean summoning him or her in person or, by other means, providing that person with official information about the date and place of the trial in a manner that enables him or her to become aware of the trial. Informing the suspect or accused person of the consequences of non-appearance should, in particular, be understood to mean informing that person that a decision might be handed down if he or she does not appear at the trial.

(37) It should also be possible to hold a trial which may result in a decision on guilt or innocence in the absence of a suspect or accused person where that person has been informed of the trial and has given a mandate to a lawyer who was appointed by that person or by the State to represent him or her at the trial and who represented the suspect or accused person.

...

(44) The principle of effectiveness of Union law requires that Member States put in place adequate and effective remedies in the event of a breach of a right conferred upon individuals by Union law. An effective remedy, which is available in the event of a breach of any of the rights laid down in this Directive, should, as far as possible, have the effect of placing the suspects or accused persons in the same position in which they would have found themselves had the breach not occurred, with a view to protecting the right to a fair trial and the rights of the defence.

...

(47) This Directive upholds the fundamental rights and principles recognised by the Charter [of Fundamental Rights of the European Union, the “Charter”] and by the

[European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, the “ECHR”], including the prohibition of torture and inhuman or degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, the integration of persons with disabilities, the right to an effective remedy and the right to a fair trial, the presumption of innocence and the rights of the defence. Regard should be had, in particular, to Article 6 of the Treaty on European Union (TEU), according to which the Union recognises the rights, freedoms and principles set out in the Charter, and according to which fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are to constitute general principles of Union law.’

- 4 Article 1 of that directive, entitled ‘Subject matter’, provides:
‘This Directive lays down common minimum rules concerning:
- (a) certain aspects of the presumption of innocence in criminal proceedings;
 - (b) the right to be present at the trial in criminal proceedings.’
- 5 Article 8 of that directive, entitled ‘Right to be present at the trial’, provides, in paragraphs 1 and 2 thereof:
- ‘1. Member States shall ensure that suspects and accused persons have the right to be present at their trial.
2. Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that:
- (a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or
 - (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.’

Bulgarian law

- 6 Article 55(1) of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure, the ‘NPK’) states:
‘The accused person shall have the following rights:
- ...
- to participate in criminal proceedings ...’
- 7 Article 94(1) of the NPK provides:
‘The participation of a defence counsel in criminal proceedings is mandatory if:
- ...
8. the case is tried in the absence of the accused person;
- ...’
- 8 Article 247b(1) of the NPK provides:

'At the request of the Judge-Rapporteur, a copy of the indictment shall be served on the accused person. Through service of the indictment, the accused person shall be informed of the preliminary hearing and of the matters referred to in Article 248(1), of his right to appear in court with a defence counsel and of the possibility of appointing a defence counsel in the cases provided for in Article 94(1), and of the fact that the case may be tried and decided in his absence, provided that the conditions laid down in Article 269 are fulfilled.'

9 Article 269 of the NPK is worded as follows:

'(1) In cases where the accused person has been indicted for a serious criminal offence, his presence at the hearing shall be mandatory.

(2) The court may also order that the accused person appear in court where his presence is not required when such appearance is necessary in order to establish the truth from an objective point of view.

(3) Provided that this does not hinder the establishment of the truth from an objective point of view, the case may be tried in the absence of the accused person, if:

...

3. he has been duly summoned to appear in court, has failed to provide valid reasons for not appearing and the procedure laid down in Article 247b(1) has been complied with;

...'

10 Article 423 of the NPK provides:

'(1) Within 6 months of becoming aware of a final judgment in criminal proceedings or of the receipt of such decisions by the Republic of Bulgaria from another country, the person convicted in absentia may request the reopening of the criminal case, relying on the fact that he was not present during the criminal proceedings. The request shall be granted, except, first, in the event that the convicted person has absconded after notification of the charges in the preliminary procedure, with the result that the procedure under Article 247b(1) cannot be carried out or, secondly, after that procedure was carried out, the convicted person failed to appear at the hearing for no valid reason.

(2) The request shall not suspend enforcement of the conviction, unless the court decides otherwise.

(3) The procedure for reopening the criminal case shall be terminated if the person convicted in absentia fails to appear at the hearing without a valid reason.

...'

The dispute in the main proceedings and the question referred for a preliminary ruling

11 The Spetsializirana prokuratura (Specialist Public Prosecutor's Office, Bulgaria) brought criminal proceedings against 13 individuals accused of being leaders and/or members of a criminal organisation, the purpose of which was to commit murder, robbery and theft, and of committing other offences as part of that criminal organisation. Two of the accused persons are TX and UW, who are charged with participating in that criminal organisation, a criminal offence punishable by a term of imprisonment of 3 to 10 years.

- 12 TX and UW were informed of the conditions under which their trial could take place in their absence, in particular should they fail to enter an appearance without a valid reason, and of the fact that, in such a case, the final decision on the substance of the case would be binding on them and could not be challenged on the ground that they had not personally participated in the trial.
- 13 Seven hearings were initially held in the trial of TX and UW before the Spetsializiran nakazatelen sad (Special Court for Criminal Cases, Bulgaria). The case was adjourned at each of these hearings. No measures of inquiry were adopted and no evidence was taken by the referring court on the ground that some of the accused persons were absent due to illness on the date of those hearings. That court checked whether the reason for those absences was genuine, but, in spite of its many doubts, was unable to call into question the claim that the absence of those accused persons was justified.
- 14 By decisions of 19 and 26 April 2017, the referring court ruled on whether it was possible, in the main proceedings, to hold a hearing in the absence of those accused persons.
- 15 In that regard, first, the referring court found that the presence of those accused persons was not necessary ‘for the purpose of establishing the truth from an objective point of view’, within the meaning of national law, as regards the offences of which they were accused.
- 16 Secondly, as regards the holding of the trial in the main proceedings in the absence of one of the accused persons, the referring court established, on the basis of national law, the following rules:
 - the lawyer representing the person concerned must be present and must actually defend that person;
 - a copy of the transcript of the hearing must be sent to the person concerned so as to enable that person to be aware of the measures of inquiry adopted and evidence taken in his absence;
 - the person concerned must be given the opportunity to state whether he would like that evidence to be taken again in his presence;
 - if the person concerned did not enter an appearance for a reason beyond his control, he has the right to have the steps taken thus far repeated in his presence;
 - if the person concerned did not enter an appearance for a reason within his control, he has the right to have the steps taken thus far repeated, at his request, where his personal participation in the specific act of taking evidence is required to safeguard his interests.
- 17 Some of the accused persons did not appear during the 12 hearings held subsequent to the decisions of 19 and 26 April 2017, for various reasons.
- 18 Thus, TX did not appear at the hearing held on 16 May 2018 for a reason that was beyond his control, namely because he was ill. UW, for his part, did not wish to appear at that hearing. Both were defended by the lawyers mandated by them. TX and UW were sent copies of the transcript of that hearing so that they would be aware of the evidence taken in their absence.

- 19 TX and UW appeared at the next hearing, which took place on 30 May 2018. After consulting with their lawyers, they stated that they were aware of the transcript of the hearing of 16 May 2018 and the evidence taken in their absence and did not wish for that evidence to be taken again with their participation. The steps taken in their absence were not repeated.
- 20 TX once again did not appear at the hearing that took place on 1 October 2018 because of illness. He was represented at that hearing by a lawyer. In TX's absence, the referring court proceeded with the taking of evidence and, inter alia, examined the main witness for the prosecution, who was called by the Public Prosecutor's Office. TX was sent a copy of the transcript of that hearing so that he would be aware of the evidence taken in his absence.
- 21 TX appeared in the next hearing, which was held on 17 October 2018. After consulting with his lawyer, he stated that he was aware of the transcript of the hearing of 1 October 2018 and the evidence taken in his absence, and that he wished to participate personally in the examination of the main prosecution witness. The referring court granted that request and conducted a further examination of that witness. TX was given the opportunity to participate fully in that examination and to ask all the questions he wished to ask.
- 22 As regards UW, the referring court notes that, in order to conduct in absentia proceedings after the accused person has given his fully informed consent, national law provides that that person is to be informed of the trial and the consequences of non-appearance and that he must be represented by a lawyer, guarantees which are referred to in Article 8(2)(a) and (b) of Directive 2016/343.
- 23 That court states that it has doubts as to the compatibility with EU law of the national legislation at issue in the main proceedings, in particular in the light of recital 35 of Directive 2016/343, and that those doubts relate to the conditions under which the right to be present at the trial may be validly waived.
- 24 With regard to TX, who did not appear at some hearings for reasons beyond his control, namely because of illness, the referring court considers that, in the light of recital 34 of Directive 2016/343, TX's right to be present at the trial could have been infringed, in so far as his absence was justified. It raises the question whether there actually was such infringement, having regard to the steps that were undertaken following those hearings at TX's request.
- 25 In that regard, concerning the hearing held on 16 May 2018, the referring court asks whether TX's statement that he did not wish the steps previously taken to be repeated constitutes a valid waiver of the right to be present at his trial and whether the possibility of waiving his right to be present at the trial, referred to in recital 35 of Directive 2016/343, also applies in respect of procedural steps that have already been taken. As regards the hearing that took place on 1 October 2018, the referring court seeks to ascertain whether the further examination, in TX's presence, of the prosecution witness called by the Public Prosecutor's Office constitutes a sufficient measure, in the light of recital 44 of Directive 2016/343.
- 26 The referring court states that the lawyers representing TX and UW participated in all the hearings held in the main proceedings.
- 27 In those circumstances, the Spetsializiran nakazatelen sad (Special Court for Criminal Cases) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the right of the accused person to be present at the trial pursuant to Article 8(1) and (2) and recitals 35 and 44 of Directive 2016/343 infringed if one of the hearings in criminal proceedings took place in the absence of the accused person, who was duly summoned, informed of the consequences of his non-appearance and defended by a lawyer chosen by him, where:

- (a) he did not appear for a reason within his control (namely where he decided not to participate in that specific hearing);
- (b) he did not appear for a reason beyond his control (namely because of illness), if he was subsequently informed of the steps taken in his absence and, with full knowledge of the situation, decided and stated that:
 - he did not call the lawfulness of those steps into question in reliance on his non-appearance and did not wish for them to be repeated in his presence;
 - he wished to participate in those steps, whereupon the court conducted a further examination of the person specified by the person accused and gave the person accused the opportunity to participate in it fully?

Consideration of the question referred

- 28 By its question, the referring court asks, in essence, whether Article 8(1) and (2) of Directive 2016/343 must be interpreted as precluding national legislation which provides, in a situation where the accused person has been informed, in due time, of his trial and of the consequences of not appearing at that trial, and where that person was represented by a mandated lawyer appointed by him, that his right to be present at his trial is not infringed where:
- he decided unequivocally not to appear at one of the hearings held in connection with his trial; or
 - he did not appear at one of those hearings for a reason beyond his control if, following that hearing, he was informed of the steps taken in his absence and, with full knowledge of the situation, decided and stated either that he would not call the lawfulness of those steps into question in reliance on his non-appearance, or that he wished to participate in those steps, leading the national court hearing the case to repeat those steps, in particular by conducting a further examination of a witness, in which the accused person was given the opportunity to participate fully.
- 29 As a preliminary point, it should be noted that the purpose of Directive 2016/343 is, as is clear from Article 1 and recital 9 thereof, to lay down common minimum rules applicable to criminal proceedings concerning certain aspects of the presumption of innocence and the right to be present at the trial (judgments of 19 September 2018, *Milev*, C-310/18 PPU, EU:C:2018:732, paragraph 45, and of 5 September 2019, *AH and Others (Presumption of innocence)*, C-377/18, EU:C:2019:670, paragraph 38).
- 30 It must also be recalled that that directive cannot be interpreted, in the light of the minimal degree of harmonisation it seeks to attain, as being a complete and exhaustive instrument (see, to that effect, order of 12 February 2019, *RH*, C-8/19 PPU, EU:C:2019:110, paragraph 59 and the case-law cited).

- 31 In that regard, Article 8(1) of that directive provides that Member States are to ensure that suspects and accused persons have the right to be present at their trial.
- 32 Recital 35 of that directive states that the right of suspects and accused persons to be present at the trial is not absolute and that, under certain conditions, suspects and accused person should be able, expressly or tacitly, but unequivocally, to waive that right.
- 33 Accordingly, under Article 8(2) of Directive 2016/343, Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that, in accordance with point (a) of that provision, the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance or that, in accordance with point (b) of that provision, the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.
- 34 Furthermore, recital 47 of Directive 2016/343 states that the directive upholds the fundamental rights and principles recognised by the Charter and by the ECHR, including the right to a fair trial, the presumption of innocence and the rights of the defence.
- 35 As is apparent from recital 33 of that directive, the right of suspects and accused persons to be present at the trial is based on the right to a fair trial, enshrined in Article 6 of the ECHR, which corresponds, as stated in the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p.17), to the second and third paragraphs of Article 47, and Article 48 of the Charter.
- 36 In that regard, it is clear from the case-law of the European Court of Human Rights that a public hearing constitutes a fundamental principle enshrined in Article 6 of the ECHR. That principle is particularly important in criminal cases, where, generally, there must be at first instance a court which fully meets the requirements of Article 6 of the ECHR, and where an individual is entitled to have his case 'heard', with the opportunity, inter alia, to give evidence in his defence, hear the evidence against him, and examine and cross-examine witnesses (ECtHR, 23 November 2006, *Jussila v. Finland*, CE:ECHR:2006:1123JUD007305301, § 40, and ECtHR, 4 March 2008, *Hüseyin Turan v. Turkey*, CE:ECHR:2008:0304JUD001152902, § 31).
- 37 According to that case-law, neither the letter nor the spirit of Article 6 of the ECHR prevents a person from waiving of his own free will, either expressly or tacitly, entitlement to the guarantees associated with a fair trial. However, a waiver of the right to take part in the hearing must be established unequivocally and be attended by minimum safeguards commensurate with its seriousness. Furthermore, it must not run counter to any important public interest (ECtHR, 1 March 2006, *Sejdovic v. Italy*, CE:ECHR:2006:0301JUD005658100, § 86, and ECtHR, 13 March 2018, *Vilches Coronado and Others v. Spain*, CE:ECHR:2018:0313JUD005551714, § 36).
- 38 In the case in the main proceedings, criminal proceedings were brought against several persons for leading and/or participating in a criminal organisation. At the initial stage of their trial, the accused persons were informed, on the basis of national law, of the conditions in which the trial, should they fail to appear without a valid reason, could take place notwithstanding their absence. In addition, the lawyers representing the accused persons participated in all the hearings held in connection with their trial.

- 39 The question referred for a preliminary ruling concerns, first, the situation in which an accused person deliberately waives his right to appear at one of the hearings held in connection with his trial.
- 40 In the light of the very wording of Article 8(2) of Directive 2016/343, it must be noted that, in a case such as that in the main proceedings, both the conditions laid down in point (a) of that provision and those referred to in point (b) were complied with.
- 41 Furthermore, it is apparent from the order for reference that UW's waiver of his right to take part in the hearing was attended by minimum safeguards commensurate with its seriousness and that that waiver does not run counter to any important public interest.
- 42 In those circumstances, it must be held that Article 8(2) of Directive 2016/343 does not preclude national legislation which provides that the right of an accused person to be present at his trial is not infringed where that person has decided, unequivocally, not to appear at one of the hearings held in connection with his trial, provided that he has been informed that that hearing will be held and has been represented, at that hearing, by a mandated lawyer.
- 43 The referring court's question concerns, in the second place, the situation in which the accused person was unable to appear at hearings held in connection with his trial for a reason beyond his control, namely because of illness.
- 44 According to recital 34 of Directive 2016/343, if, for reasons beyond their control, suspects or accused persons are unable to be present at the trial, they should have the possibility to request a new date for the trial within the time frame provided for in national law.
- 45 The referring court asks the Court, first, about the situation in which the accused person, who was unable, for a reason beyond his control, to appear at a hearing held in connection with his trial and who was informed of steps taken in his absence during that hearing, stated that he would not call the lawfulness of the steps taken into question in reliance on that absence and that he did not want them to be repeated in his presence.
- 46 In that context, it is important to note that such a position may be regarded as constituting an unequivocal waiver of the right to be present at the hearing concerned.
- 47 Secondly, the referring court refers to the situation in which the accused person stated that he wished to have the steps taken when he was absent repeated in his presence, which led to the conducting of a further examination of a witness, in which the accused person was given the opportunity to participate fully.
- 48 In that regard, a person who has had repeated in his presence the steps taken during hearings at which he was unable to appear, cannot be regarded as having been absent from his trial.
- 49 In the light of the foregoing considerations, the answer to the question referred is that Article 8(1) and (2) of Directive 2016/343 must be interpreted as not precluding national legislation which provides, in a situation where the accused person has been informed, in due time, of his trial and of the consequences of not appearing at that trial, and where that person was represented by a mandated lawyer appointed by him, that his right to be present at his trial is not infringed where:

- he decided unequivocally not to appear at one of the hearings held in connection with his trial; or
- he did not appear at one of those hearings for a reason beyond his control if, following that hearing, he was informed of the steps taken in his absence and, with full knowledge of the situation, decided and stated either that he would not call the lawfulness of those steps into question in reliance on his non-appearance, or that he wished to participate in those steps, leading the national court hearing the case to repeat those steps, in particular by conducting a further examination of a witness, in which the accused person was given the opportunity to participate fully.

Costs

- 50 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.

On those grounds, the Court (Sixth Chamber) hereby rules:

Article 8(1) and (2) of Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings must be interpreted as not precluding national legislation which provides, in a situation where the accused person has been informed, in due time, of his trial and of the consequences of not appearing at that trial, and where that person was represented by a mandated lawyer appointed by him, that his right to be present at his trial is not infringed where:

- **he decided unequivocally not to appear at one of the hearings held in connection with his trial; or**
- **he did not appear at one of those hearings for a reason beyond his control if, following that hearing, he was informed of the steps taken in his absence and, with full knowledge of the situation, decided and stated either that he would not call the lawfulness of those steps into question in reliance on his non-appearance, or that he wished to participate in those steps, leading the national court hearing the case to repeat those steps, in particular by conducting a further examination of a witness, in which the accused person was given the opportunity to participate fully.**

[Signatures]