

Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

15 September 2022 (\*)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive (EU) 2016/343 – Strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings – Article 8(1) – Right of an accused person to be present at the trial – Examination of an incriminating witness in the absence of the accused person – Possibility of remedying the infringement of a right at a later stage in the proceedings – Additional examination of the same witness – Directive 2013/48/EU – Right of access to a lawyer in criminal proceedings – Article 3(1) – Examination of an incriminating witness in the absence of the lawyer of the accused person)

In Case C-347/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), made by decision of 3 June 2021, received at the Court on 4 June 2021, in the criminal proceedings against

**DD,**

intervening party:

**Spetsializirana prokuratura,**

THE COURT (Eighth Chamber),

composed of N. Jääskinen, President of the Chamber, M. Safjan (Rapporteur) and M. Gavalec, Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- DD, by V. Vasilev, advokat,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the European Commission, by M. Wasmeier and I. Zaloguin, 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) 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), and of Article 3(1) of 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 (OJ 2013 L 294, p. 1).

2 The request has been made in criminal proceedings brought against DD for offences relating to illegal immigration.

### **Legal context**

#### ***European Union law***

##### *Directive 2013/48*

3 Recital 54 of Directive 2013/48 is worded as follows:

‘This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection. ...’

4 Article 1 of that directive, entitled ‘Subject matter’, provides:

‘This Directive lays down minimum rules concerning the rights of suspects and accused persons in criminal proceedings ... to have access to a lawyer, to have a third party informed of the deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.’

5 Article 3 of that directive, entitled ‘The right of access to a lawyer in criminal proceedings’, provides:

‘1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.

...

3. The right of access to a lawyer shall entail the following:

...

(c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:

- (i) identity parades;
- (ii) confrontations;
- (iii) reconstructions of the scene of a crime.

...'

*Directive 2016/343*

6 Recitals 33 and 47 of Directive 2016/343 state:

'(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 Union.

...

(47) This Directive upholds the fundamental rights and principles recognised by the [Charter of Fundamental Rights of the European Union] and by the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950], including ... the right to an effective remedy and the right to a fair trial, the presumption of innocence and the rights of the defence. ...'

7 Article 8 of that directive, entitled 'Right to be present at the trial', provides, in paragraph 1 thereof:

'Member States shall ensure that suspects and accused persons have the right to be present at their trial.'

***Bulgarian law***

8 Article 55 of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; 'the NPK') provides:

'The accused person shall have the following rights:

...

to participate in criminal proceedings

...

to have a lawyer.'

9 Under Article 94(1)(8) of the NPK, where a case is tried in the absence of the accused person, it is mandatory for that person to be defended by a defence counsel.

10 Article 99 of the NPK provides:

‘A defence counsel shall enjoy the following rights:

...

to participate in criminal proceedings. ...’

11 According to Article 269(3) of the NPK, a case may be tried in the absence of the accused person only if that person cannot be found or if he or she has been informed of the fact that the proceedings could be conducted in his or her absence.

12 Article 271(2) of the NPK provides:

‘The hearing shall be adjourned if the following persons do not appear:

...

2. the accused person ...

3. the defence counsel ...’

13 Under Article 348(3) of the NPK:

‘The infringement of the rules of procedure shall be substantial:

1. if it has led to a limitation of the procedural rights of the parties and it has not been remedied;

...’

### **The main proceedings and the questions referred**

14 DD, a border police officer at Sofia Airport (Bulgaria), is being prosecuted, together with other persons, for offences relating to illegal immigration before the referring court, the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria).

15 At an initial hearing, which took place before the referring court on 15 October 2020, DD appeared accompanied by his lawyer, VV. At that hearing, the anonymous witness No 263, among others, was examined, and an opportunity was given to VV to put questions to that witness. The continuation of that examination was fixed for 30 November 2020.

16 On 27 November 2020, VV requested that the hearing scheduled be postponed and that the proceedings be adjourned on the ground that he had not yet recovered after contracting the [novel] coronavirus.

17 At the hearing on 30 November 2020, DD requested that the proceedings be adjourned due to the absence of his lawyer, VV. The referring court nevertheless proceeded with the examination of the anonymous witness No 263, while acknowledging that doing so constituted an infringement of DD’s right to be represented by a lawyer and of VV’s right to be present at and participate in the proceedings. However, referring to the judgment of 13 February 2020, *Spetsializirana prokuratura (Hearing in the absence of the accused*

*person*) (C-688/18, EU:C:2020:94), that court held that that infringement could be remedied by re-examining the anonymous witness No 263 at the following hearing, scheduled for 18 December 2020, so that VV could put questions to him. The parties present at the hearing on 30 November 2020 put their questions to that witness. Subsequently, a copy of the minutes of that examination was sent to VV.

18 On 4, 10 and 15 December 2020, VV submitted documents attesting to his health problems and to the fact that DD was suffering from the [novel] coronavirus and twice requested that the proceedings be adjourned.

19 At the following hearing, which nevertheless took place on 18 December 2020, in the absence of DD and VV, the referring court examined the witness YAR, whose statement was relevant for the purposes of the prosecution of DD, again observing that DD and VV would be given the opportunity to put questions to that witness at the following hearing. A copy of the minutes of that examination was sent to DD and VV.

20 A hearing was held on 11 January 2021, at which DD and VV were present. At that hearing, VV challenged the referring court's decision to maintain the hearings of 30 November 2020 and 18 December 2020, arguing that there had been an infringement of the rights of the defence. In that regard, the referring court considered, *inter alia*, that although the holding of those hearings had led to an infringement of the right of DD and VV to be present in person, that infringement could be remedied by a re-examination of the witnesses concerned.

21 At a hearing which took place on 22 February 2021, DD and VV had the opportunity to put questions to the anonymous witness No 263 and the witness YAR. At that time, DD did not ask any questions, while VV put questions only to the witness YAR, stating that he did not have any questions for the anonymous witness No 263.

22 The referring court observes that, under national law, there is an infringement of the right of the accused person to be present at his or her trial and to have access to a lawyer where evidence is obtained, in particular by examining witnesses, while the accused person and his or her lawyer are absent. It is clear that that procedural defect can be remedied only if those witnesses are called again and the accused person and his or her lawyer are given the opportunity to put questions to them.

23 However, national law does not contain any express provision on the nature of that re-examination of the witnesses. That re-examination is either of an additional nature, in which case the statements made during a previous examination, in the absence of the accused person and his or her lawyer, by the witnesses to the questions put by the other parties remain valid, or the new examination replaces the previous examination, which should be regarded as void and as having no legal force. In such a case, the parties who were present at the previous examination would be required to re-ask the questions which they had put on that occasion. In that regard, the referring court states that there are indications that an additional examination would be sufficient to remedy the breach of the procedural rules at issue in the main proceedings.

24 According to the referring court, it is apparent from the judgment of 13 February 2020, *Spetsializirana prokuratura (Hearing in the absence of the accused person)* (C-688/18, EU:C:2020:94), that, where the accused person has been absent from a hearing, his or her

right to be present in person at his or her trial, enshrined in Article 8(1) of Directive 2016/343, is not infringed if the steps taken when he or she was absent are repeated subsequently in his or her presence. That court considers, however, that the scope of that requirement is not clear. Specifically, it asks whether it is necessary to repeat the examination of a witness in its entirety, so that, first, parties who were present previously and who had already put their questions to the witness must again ask the same questions and, secondly, the accused person who was previously absent then raises his or her questions, or whether it is sufficient that the additional examination merely offers the accused person and his or her counsel the opportunity to put their questions to the witness.

25 In addition, the referring court asks whether, since, in the present case, the hearings of 30 November 2020 and 18 December 2020 took place in the absence of VV, DD's right to be defended by a lawyer, enshrined in Article 3(1) of Directive 2013/48, has been infringed.

26 In those circumstances, the Spetsializiran nakazatelen sad (Specialised Criminal Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the right of the accused person to be present in person under Article 8(1) of Directive 2016/343, read in conjunction with Article 10(1) and recital 44 thereof, safeguarded where a witness has been examined in the absence of the accused person at a separate hearing but the accused person had the opportunity to put questions to that witness at the subsequent hearing but stated that he or she had no questions, or is it necessary, in order to safeguard the right to be present in person, for that examination to be repeated in its entirety, including the questions put by the other parties who were present at the first examination?

(2) Is the right to be defended by a lawyer under Article 3(1) of Directive 2013/48, read in conjunction with Article 12(1) thereof, safeguarded where two witnesses have been examined in the absence of the lawyer [of the accused person] at two separate hearings but the lawyer was given the opportunity to put questions to the two witnesses at the subsequent hearing, or is it necessary, in order to safeguard the right of defence by a lawyer, for those two examinations to be repeated in their entirety, including the questions of the other parties from the first [examinations], and, in addition, for the lawyer who was absent from the two previous hearings to be given the opportunity to ask his or her questions?'

27 By letter of 5 August 2022, the Sofiyski gradski sad (Sofia City Court, Bulgaria) informed the Court of Justice that, following a legislative amendment which entered into force on 27 July 2022, the Spetsializiran nakazatelen sad (Specialised Criminal Court) had been dissolved and certain criminal cases which had been brought before that court, including the case in the main proceedings, had been transferred, as from that date, to the Sofiyski gradski sad (Sofia City Court).

### **Consideration of the questions referred**

28 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 8(1) of Directive 2016/343 and Article 3(1) of Directive 2013/48 must be interpreted as meaning that where, in order to ensure that the right of the accused person to be present at his or her trial and his or her right of access to a lawyer are safeguarded, the national court carries out an additional examination of an incriminating witness since, for reasons beyond their control, the accused person and his or her lawyer could

not be present at the previous examination of that witness, it is sufficient that the accused person and his or her lawyer be able freely to question that witness, or whether that additional examination must consist of repeating in its entirety the previous examination of that witness; an action which would have the effect of invalidating the procedural steps taken during that previous examination.

29 In the first place, it must be recalled that Article 8(1) of Directive 2016/343 provides that Member States are to ensure that suspects and accused persons have the right to be present at their trial.

30 According to recital 47 of that directive, that directive upholds the fundamental rights and principles recognised by the Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), including the right to a fair trial, the presumption of innocence and the rights of the defence.

31 As is apparent from recital 33 of that directive, the right of suspects or of accused persons to be present at the trial is based on the right to a fair trial, enshrined in Article 6 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 of the Charter of Fundamental Rights, as well as Article 48 thereof. The Court must, accordingly, ensure that its interpretation of the latter provisions ensures a level of protection which does not disregard that guaranteed by Article 6 ECHR, as interpreted by the European Court of Human Rights (see, to that effect, judgment of 29 July 2019, *Gambino and Hyka*, C-38/18, EU:C:2019:628, paragraph 39 and the case-law cited).

32 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 ECHR. That principle is of particular importance in the criminal context, where the procedure must, in general, provide at first instance for a tribunal which fully meets the requirements of Article 6 ECHR, before which the individual has an entitlement to have his or her case 'heard', with the opportunity, inter alia, to give evidence in his or her own defence, to hear the evidence against him or her and to examine and cross-examine the witnesses (see, to that effect, ECtHR, 23 November 2006, *Jussila v. Finland*, CE:ECHR:2006:1123JUD007305301, § 40, and ECtHR, 4 March 2008, *Hüseyn Turan v. Turkey*, CE:ECHR:2008:0304JUD001152902, § 31).

33 It is also apparent from the case-law of that court that the Contracting States enjoy a wide discretion in the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6 ECHR as regards the right of the accused to take part in the hearing, and the procedural means offered by domestic law and practice must be shown to be effective where that person has neither waived the right to appear and defend him or herself nor sought to escape trial (see, to that effect, ECtHR, 1 March 2006, *Sejdovic v. Italy*, CE:ECHR:2006:0301JUD005658100, § 83).

34 As regards, more specifically, the right to obtain the attendance and the examination of witnesses, provided for in Article 6(3)(d) ECHR, the European Court of Human Rights has held that that provision enshrines the principle that, before an accused person can be convicted, all evidence against him or her must normally be produced in his or her presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question an

incriminating witness, either when that witness makes his or her statement or at a later stage of proceedings (see, to that effect, ECtHR, 15 December 2011, *Al-Khawadja and Tahery v. the United Kingdom*, CE:ECHR:2011:1215JUD002676605, § 118, and ECtHR, 23 March 2016, *Blokhin v. Russia*, CE:ECHR:2016:0323JUD004715206, § 200).

35 In the light of that case-law, it must be held that, although the examination of an incriminating witness at a hearing held in the absence of the accused person for reasons beyond his or her control constitutes an infringement of that person's right to be present at his or her trial, enshrined in Article 8(1) of Directive 2016/343, that provision does not preclude that infringement from being remedied at a later stage in the same proceedings. Thus, the Court has held that a person who has had repeated, in his or her presence, the steps taken during hearings at which he or she was unable to appear cannot be regarded as having been absent from his or her trial (judgment of 13 February 2020, *Spetsializirana prokuratura (Hearing in the absence of the accused person)*, C-688/18, EU:C:2020:94, paragraph 48).

36 In order to ensure observance of the right to a fair trial and the rights of the defence, the examination of the incriminating witness must, however, be repeated in such a way as to give the accused person an adequate opportunity to challenge the incriminating testimony and to question the author thereof.

37 To that end, it is sufficient to carry out an additional examination during which the accused person has the opportunity freely to question the witness, without it being necessary to repeat, in its entirety, the examination which has taken place in his or her absence, since the invalidation of procedural steps taken during that examination does not appear to be necessary in the light of the requirements set out in the preceding paragraph.

38 It is important, nevertheless, that before the additional examination, the accused person should be sent a copy of the minutes of the examination of the incriminating witness that was carried out in his or her absence. It is only on condition that he or she is aware of the content and progress of the questioning of the witness during that previous examination that the accused person is fully in a position to question that witness, if necessary, based on the statements made during that examination.

39 In the present case, it is apparent from the request for a preliminary ruling that, for health reasons, DD was unable to attend the hearing held on 18 December 2020 at which the witness YAR was questioned. DD was, however, provided with a copy of the minutes of that examination and subsequently had an opportunity freely to question that witness at a subsequent hearing held on 22 February 2021. Consequently, subject to the checks to be carried out by the referring court, it must be held that the infringement of DD's right to be present at his trial, enshrined in Article 8(1) of Directive 2016/343, has thus been remedied.

40 In the second place, it should be recalled that Article 3(1) of Directive 2013/48 lays down the fundamental principle that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow them to exercise their rights of defence practically and effectively (see, to that effect, judgment of 12 March 2020, *VW (Right of access to a lawyer in the event of non-appearance)*, C-659/18, EU:C:2020:201, paragraph 31).

41 As regards the investigative or evidence-gathering acts to which that right applies, Article 3(3)(c) of Directive 2013/48 provides that Member States are to ensure that suspects



or accused persons have, as a minimum, the right for their lawyer to attend identity parades, confrontations and reconstructions of the scene of a crime.

42 In addition, it must be borne in mind that, under Article 1 of Directive 2013/48, that directive lays down minimum rules concerning, inter alia, the right of suspects and accused persons to have access to a lawyer in criminal proceedings.

43 Recital 54 of that directive states that, since the directive sets only minimum rules, Member States may extend the rights set out therein in order to provide a higher level of protection.

44 Under the actual wording of Article 3(3)(c) of Directive 2013/48, Member States may thus extend the right of suspects or accused persons to the presence of their lawyer during the investigative or evidence-gathering acts listed in that provision to other acts, such as the examination of an incriminating witness before a criminal court.

45 However, in such circumstances, it must be held that, in the light of the fundamental principles of a fair trial which follow from paragraphs 35 to 38 above, an accused person may be regarded as able to exercise his or her rights of defence practically and effectively where, although the examination of an incriminating witness before a criminal court took place without the presence of that person's lawyer for reasons beyond his or her control, that lawyer had the opportunity freely to question that witness, on the basis of the minutes of the examination which was carried out in his or her absence, during an additional examination. It is not therefore necessary to repeat, in its entirety, the examination which took place in the lawyer's absence.

46 Having regard to the foregoing, the answer to the questions referred is that Article 8(1) of Directive 2016/343 and Article 3(1) of Directive 2013/48 must be interpreted as meaning that, where, in order to ensure that the right of the accused person to be present at his or her trial and his or her right of access to a lawyer are safeguarded, the national court carries out an additional examination of an incriminating witness since, for reasons beyond their control, the accused person and his or her lawyer could not be present at the previous examination of that witness, it is sufficient that the accused person and his or her lawyer be able freely to question that witness, providing, prior to that additional examination, the accused person and his or her lawyer were sent a copy of the minutes of the previous examination of that witness. In those circumstances, it is not necessary to repeat in its entirety, thereby invalidating the procedural steps taken during that examination, the examination which took place in the absence of the accused person and his or her lawyer.

### **Costs**

47 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 (Eighth Chamber) hereby rules:

**Article 8(1) 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 and Article 3(1) of 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,**

**must be interpreted as meaning that:**

**where, in order to ensure that the right of the accused person to be present at his or her trial and his or her right of access to a lawyer are safeguarded, the national court carries out an additional examination of an incriminating witness since, for reasons beyond their control, the accused person and his or her lawyer could not be present at the previous examination of that witness, it is sufficient that the accused person and his or her lawyer be able freely to question that witness, providing, prior to that additional examination, the accused person and his or her lawyer were sent a copy of the minutes of the previous examination of that witness. In those circumstances, it is not necessary to repeat in its entirety, thereby invalidating the procedural steps taken during that examination, the examination which took place in the absence of the accused person and his or her lawyer.**

[Signatures]

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\* Language of the case: Bulgarian.