Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

19 September 2018 *

(Reference for a preliminary ruling — Urgent preliminary ruling procedure — Judicial cooperation in criminal matters — Directive (EU) 2016/343 — Presumption of innocence — Public references to guilt — Remedies — Procedure for reviewing the lawfulness of pre-trial detention)

In Case C-310/18 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), made by decision of 11 May 2018, received at the Court on the same date, in the criminal proceedings against

Emil Milev,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.-C. Bonichot, A. Arabadjiev, S. Rodin (Rapporteur) and E. Regan, Judges,

Advocate General: M. Wathelet,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 11 July 2018,

considering the observations submitted on behalf of:

– Mr Milev, representing himself,

– the Netherlands Government, by M.K. Bulterman, acting as Agent,

– the European Commission, by R. Troosters and Y. Marinova, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 August 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3, Article 4(1) and Article 10 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

* Language of the case: Bulgarian.

present at the trial in criminal proceedings (OJ 2016 L 65, p. 1), read in the light of recitals 16 and 48 thereof, as well as Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in criminal proceedings against Mr Emil Milev concerning the continuation of his pre-trial detention.

Legal context

EU law

3 Recital 10 of Directive 2016/343 states:

'By establishing common minimum rules on the protection of procedural rights of suspects and accused persons, this Directive aims to strengthen the trust of Member States in each other's criminal justice systems and thus to facilitate mutual recognition of decisions in criminal matters. Such common minimum rules may also remove obstacles to the free movement of citizens throughout the territory of the Member States.'

4 Recital 16 of that directive is worded as follows:

'The presumption of innocence would be violated if public statements made by public authorities, or judicial decisions other than those on guilt, referred to a suspect or an accused person as being guilty, for as long as that person has not been proved guilty according to law. Such statements and judicial decisions should not reflect an opinion that that person is guilty. This should be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, such as the indictment, and without prejudice to judicial decisions as a result of which a suspended sentence takes effect, provided that the rights of the defence are respected. This should also be without prejudice to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and are based on suspicion or on elements of incriminating evidence, such as decisions on pre-trial detention, provided that such decisions do not refer to the suspect or accused person as being guilty. Before taking a preliminary decision of a procedural nature the competent authority might first have to verify that there are sufficient elements of incriminating evidence against the suspect or accused person to justify the decision concerned, and the decision could contain reference to those elements.'

5 Under recital 48 of that directive:

'As this Directive establishes minimum rules, Member States should be able to extend the rights laid down in this Directive in order to provide a higher level of protection. The level of protection provided for by Member States should never fall below the standards provided for by the Charter or by the [Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950], as interpreted by the Court of Justice and by the European Court of Human Rights.'

6 Article 1 of that directive, headed '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.'

7 Article 2 of Directive 2016/343, headed ‘Scope’, provides:

‘This Directive applies to natural persons who are suspects or accused persons in criminal proceedings. It applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive.’

8 Article 3 of that directive, headed ‘Presumption of innocence’, provides:

‘Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law.’

9 Article 4(1) of the same directive, that article being headed ‘Public references to guilt’, states:

‘Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. This shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence.’

10 Article 10 of Directive 2016/343, headed ‘Remedies’, provides:

‘1. Member States shall ensure that suspects and accused persons have an effective remedy if their rights under this Directive are breached.

2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected.’

Bulgarian law

11 Under the heading ‘Pre-trial detention’, Article 63(1) of the Nakazatelno protsesualen kodeks (Criminal Procedure Code; ‘the NPK’) provides:

‘A measure for “pre-trial detention” is to be applied where there are reasonable grounds to suspect that the accused person has committed a criminal offence ...’

12 Article 64(4) of the NPK, concerning the adoption of the coercive measure of ‘pre-trial detention’ during the pre-trial phase, provides:

‘The court shall adopt the coercive measure of “pre-trial detention” where the conditions set out in Article 63(1) are satisfied ...’

13 Article 65(1) and (4) of the NPK provides, that, at any time during the pre-trial procedure, the accused person on whom a coercive measure of ‘pre-trial detention’ has been imposed may request re-examination of that measure. The court is then to review whether all the grounds which justified the adoption of that measure — including the reasonable grounds to suspect that the accused committed the offence at issue — continue to exist.

The main proceedings and the questions referred for a preliminary ruling

14 In the course of an investigation of a robbery with violence, committed in 2008, of a shop in Sofia (Bulgaria), Mr Milev was suspected of being one of the perpetrators. He was not, however, charged.

15 On 31 July 2009 that investigation was suspended, since no suspects had been identified.

16 The referring court states that two other criminal cases are pending against Mr Milev.

17 The referring court states that, in the first of those cases, which concerns a bank robbery with violence, a Bulgarian court refused to place Mr Milev in pre-trial detention (remand him in custody), on the ground that the statements of the main prosecution witness, Mr BP, were not credible. A judicial decision as to the substance of that case has yet to be made.

18 In the second case, which concerns the control of a criminal organisation set up to commit robberies with violence, in the context of which Mr BP is again the main prosecution witness, the referring court states that Mr Milev was detained from 24 November 2013 to 9 January 2018, when he was acquitted of all charges against him on the ground that the statements of Mr BP were not deemed credible by the Bulgarian court. Mr Milev was not, however, released.

19 On 11 January 2018 the case concerning the robbery with violence committed in 2008 was reopened. Mr BP was again heard as a witness.

20 On the same date, Mr Milev was arrested with a view to being brought before the court responsible for deciding whether to remand him in custody pending trial.

21 At first instance, the prosecution's application that Mr Milev should be remanded in custody was upheld on the ground that, 'prima facie', the statements made by the witness, Mr BP, were credible. At second instance, the decision to remand him in custody was confirmed on the basis of the detailed statements made by Mr BP and on the ground that the witness could be held criminally liable for perjury. According to the referring court, the two judicial bodies seised examined Mr BP's statements separately, and did not compare them to other evidence that exculpated Mr Milev. Moreover, it is stated that the courts concerned failed to rule on the arguments made in that connection by Mr Milev's lawyer.

22 The referring court points out that, when reviewing whether pre-trial detention should continue, the court of first instance, holding that a detailed analysis of the evidence was not required, examined only the statements given by Mr BP. That court also held that the pre-trial detention of Mr Milev could continue on the basis of incriminating evidence that possessed less value. The court of second instance upheld that assessment, having examined, very generally, the witness statements, and found that the evidence, 'albeit summary, … [supported] the argument that [the accused] should be charged … and that it [was] not refuted by other evidence'.

23 During the second review of the pre-trial detention, the court of second instance held that, pursuant to the NPK as amended, the statements and evidence in the case file ought to be subject to a very general, rather than in-depth, examination, in the context of which it was sufficient to find that there was a general likelihood and a suspicion that Mr Milev had been involved in the commission of the criminal offence in question.

24 The referring court notes that the arguments made by the accused's lawyer concerning the bias and lack of credibility of Mr BP's statements were not examined by the court of second instance in adversarial proceedings and that court, furthermore, did not rule on those arguments.

25 The referring court states that Mr Milev brought an action before it seeking the re-examination of the lawfulness of his pre-trial detention.

26 The referring court states that Mr Milev takes the view that the criterion, provided for in national law, of 'reasonable grounds' to suspect that an accused has committed a criminal offence as a precondition for the imposition and continuation of pre-trial detention must be interpreted as defined in the judgment of the European Court of Human Rights of 30 August 1990, *Fox, Campbell and Hartley v. the United Kingdom* (CE:ECHR:1990:0830JUD001224486). He therefore argues that that criterion requires the existence of objective information which would satisfy an objective observer that the person concerned probably committed the offence in question. Mr Milev also put forward specific arguments concerning Mr BP's lack of credibility as a witness, and his lawyer has submitted a number of requests that evidence be gathered for the purposes of determining the credibility of Mr BP's witness statements.

27 The referring court notes that national law and case-law have evolved in this area.

28 As a consequence, new national case-law concerning the examination of 'reasonable grounds' has been developed, according to which the court hearing the case, at both the pre-trial and trial stages, must rule after having 'prima facie', rather than detailed, knowledge of the evidence.

29 The referring court is of the opinion that decisions as to whether pre-trial detention should continue constitute 'preliminary decisions of a procedural nature', within the meaning of the second sentence of Article 4(1) of Directive 2016/343, but that they also display certain characteristics of decisions 'on guilt', referred to in the first sentence of that provision.

30 Accordingly, the referring court is also uncertain as to the scope of its review of the principal incriminating evidence and the extent to which it must give a clear and specific reply to the arguments put forward by the accused, in the light of aspects of the rights of the defence referred to in Article 10 of Directive 2016/343 and Article 47(1) of the Charter. Last, it seeks to ascertain whether the fact that recital 16 of that directive states that a preliminary decision of a procedural nature 'could contain reference' to incriminating evidence means that that evidence may be the subject of adversarial argument before the court or that the latter may only mention that evidence.

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

'(1) Is national case-law according to which the continuation of a coercive measure of "pre-trial detention" (four months after the accused's arrest) is subject to the existence of "reasonable grounds", understood as a mere "prima facie" finding that the accused may have committed the criminal offence in question, compatible with Article 3, the second sentence of Article 4(1), Article 10, the fourth and fifth sentences of recital 16 and recital 48 of Directive 2016/343 and with Articles 47 and 48 of the Charter?

Or, if it is not, is national case-law according to which the term "reasonable grounds" means a strong likelihood that the accused committed the criminal offence in question compatible with the abovementioned provisions?

(2) Is national case-law according to which the court determining an application to vary a coercive measure of "pre-trial detention" that has already been adopted is required to state the reasons for its decision without comparing the incriminating and exculpatory evidence, even if the accused's lawyer has submitted arguments to that effect — the only reason for that restriction being that the judge must preserve his impartiality in case that case should be assigned to him for the

purposes of the substantive examination —, compatible with the second sentence of Article 4(1), Article 10, the fourth and fifth sentences of recital 16 and recital 48 of Directive 2016/343 and with Article 47 of the Charter?

Or, if it is not, is national case-law according to which the court is to carry out a more detailed and specific examination of the evidence and to give a clear answer to the arguments put forward by the accused's lawyer, even if it thus takes the risk that it will be unable to examine the case or deliver a final decision on guilt if the case is assigned to it for the purposes of the substantive examination, — which implies that another judge will examine the substance of the case — compatible with the abovementioned provisions?'

The urgent preliminary ruling procedure

32 The referring court has requested that the present reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court.

33 In support of its request, the referring court relies on the fact that Mr Milev is currently remanded in custody and that, on the basis of the Court's reply, it will rule on the lawfulness of extending that detention.

34 In that connection, it should be observed, in the first place, that the present reference for a preliminary ruling concerns the interpretation of Directive 2016/343, which comes under Title V of Part Three of the FEU Treaty on the area of freedom, security and justice. It may therefore be dealt with under the urgent preliminary ruling procedure.

35 In the second place, as regards the criterion relating to urgency, it is necessary, according to the case-law of the Court, to take into consideration the fact that the person involved in the main proceedings is currently deprived of his liberty and that the question as to whether he may continue to be held in custody depends on the outcome of the dispute in the main proceedings (judgment of 28 July 2016, *JZ*, C-294/16 PPU, EU:C:2016:610, paragraph 29 and the case-law cited).

36 In the present case, it is apparent from the information supplied by the referring court and recalled in paragraphs 19 to 25 of the present judgment that Mr Milev is currently deprived of his liberty and that the question as to whether he may continue to be held in custody depends on the decision of the Court, in so far as the answer by the Court to the questions referred might result in his immediate release (see, to that effect, judgment of 22 December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraph 59).

37 In those circumstances, on 5 June 2018 the First Chamber of the Court, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided to grant the referring court's request that the present reference be dealt with under the urgent preliminary ruling procedure.

Consideration of the questions referred

38 By its questions, which it is appropriate to examine together, the referring court is asking, in essence, whether Article 3, Article 4(1) and Article 10 of Directive 2016/343, read in the light of recitals 16 and 48 of that directive together with Articles 47 and 48 of the Charter, must be interpreted as meaning that, where a national court determines whether there are 'reasonable grounds', for the purposes of national legislation, for believing that a person has committed a criminal offence, which is a prerequisite of the continued pre-trial detention of that person, that court may confine itself to finding that, prima facie, that person may have committed that offence, or rather that that court

should examine whether it is highly probable that that person committed that offence. The referring court is also uncertain whether those provisions must be interpreted as meaning that a national court ruling on an application to modify a pre-trial detention measure may state reasons for its decision without comparing the incriminating and exculpatory evidence, or rather that that court should undertake a more detailed examination of that evidence and furnish a clear response to the arguments submitted by the person detained.

39 As a preliminary point, it should be noted that Article 2 of Directive 2016/343 provides that the directive applies to natural persons who are suspects or accused persons in criminal proceedings. It applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive.

40 Since the referring court must rule on the lawfulness of the continuation of the pre-trial detention ordered in criminal proceedings against Mr Milev, on the basis that there are reasonable grounds for believing that he has committed a criminal offence, it must be held that Directive 2016/343 applies to Mr Milev and to those national proceedings.

41 However, since it is not apparent from the order for reference that the case in the main proceedings concerns the existence of an effective remedy as provided for in Article 10(1) of Directive 2016/343, or any of the matters governed by Article 10(2) of that directive, that article is not relevant to the answer sought from the Court in the present case.

42 As regards the other provisions of Directive 2016/343 mentioned by the referring court, it should be noted that Article 3 of that directive provides that the Member States are to ensure that suspects and accused persons are presumed innocent until proved guilty according to law.

43 In that connection, Article 4(1) of that directive provides that the Member States are to take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, judicial decisions in particular, other than those on guilt, do not refer to that person as being guilty, without prejudice to preliminary decisions of a procedural nature which are taken by judicial authorities and which are based on suspicion or on incriminating evidence.

44 That provision must be read in the light of recital 16 of Directive 2016/343, whereby observance of the presumption of innocence should be without prejudice to decisions on pre-trial detention, provided that such decisions do not refer to the suspect or accused person as being guilty. According to the same recital, before taking a preliminary decision of a procedural nature, the judicial authorities might first have to verify that there is sufficient incriminating evidence against the suspect or accused person to justify the decision concerned, and the decision could contain reference to that evidence.

45 Moreover, 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 concerning certain aspects of the presumption of innocence and the right to be present at the trial.

46 Furthermore, Directive 2016/343 confines itself, in accordance with recital 10 thereof, to establishing common minimum rules on the protection of procedural rights of suspects and accused persons, in order to strengthen the trust of Member States in each other's criminal justice systems and thus to facilitate mutual recognition of decisions in criminal matters.

47 Accordingly, in the light of the minimal degree of harmonisation pursued therein, Directive 2016/343 cannot be interpreted as being a complete and exhaustive instrument intended to lay down all the conditions for the adoption of decisions on pre-trial detention.

48 It follows from the foregoing that, in the context of criminal proceedings, Directive 2016/343 and, in particular, Article 3 and Article 4(1) thereof, do not preclude the adoption of preliminary decisions of a procedural nature, such as a decision taken by a judicial authority that pre-trial detention should continue, which are based on suspicion or on incriminating evidence, provided that such decisions do not refer to the person in custody as being guilty. Moreover, in so far as, by its questions, the referring court seeks to ascertain the circumstances in which a decision on pre-trial detention may be adopted, and has doubts, in particular, as to the degree of certainty which it must have concerning the perpetrator of the offence, the rules governing examination of various forms of evidence, and the extent of the statement of reasons that it is required to provide in response to arguments made before it, such questions are not governed by that directive but rather fall solely within the remit of national law.

49 Accordingly, the answer to the questions referred for a preliminary ruling must be that Article 3 and Article 4(1) of Directive 2016/343 must be interpreted as not precluding the adoption of preliminary decisions of a procedural nature, such as a decision taken by a judicial authority that pre-trial detention should continue, which are based on suspicion or on incriminating evidence, provided that such decisions do not refer to the person in custody as being guilty. However, that directive does not govern the circumstances in which decisions on pre-trial detention may be adopted.

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 (First Chamber) hereby rules:

Article 3 and Article 4(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 must be interpreted as not precluding the adoption of preliminary decisions of a procedural nature, such as a decision taken by a judicial authority that pre-trial detention should continue, which are based on suspicion or on incriminating evidence, provided that such decisions do not refer to the person in custody as being guilty. However, that directive does not govern the circumstances in which decisions on pre-trial detention may be adopted.

[Signatures]