Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

5 September 2019*

(Reference for a preliminary ruling — Judicial cooperation in criminal matters — Directive (EU) 2016/343 — Article 4(1) — Presumption of innocence — Public references to guilt — Agreement concluded between the prosecutor and the perpetrator of an offence — National case-law providing for the identification of accused persons who have not concluded such an agreement — Charter of Fundamental Rights — Article 48)

In Case C-377/18,

REQUEST for a preliminary ruling under Article 267 TFEU, from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), made by decision of 31 May 2018, received at the Court on 8 June 2018, in the criminal proceedings against

AH,

PB,

CX,

KM,

PH,

intervener:

MH,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, T. von Danwitz and C. Vajda (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 13 March 2019,

after considering the observations submitted on behalf of:

– the German Government, initially by T. Henze, E. Lankenau and M. Hellmann, acting as Agents, and subsequently by E. Lankenau and M. Hellmann, acting as Agents,

* Language of the case: Bulgarian.

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Faraci, avvocato dello Stato,

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

after hearing the Opinion of the Advocate General at the sitting on 13 June 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the first sentence of 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 (OJ 2016 L 65, p. 1), read in conjunction with the first sentence of recital 16, and recital 17 of that directive.

2 The request has been made in criminal proceedings brought against AH, PB, CX, KM and PH concerning their alleged membership of a criminal organisation.

Legal context

European Union law

The Charter

3 Article 48 of the Charter of Fundamental Rights of the European Union ('the Charter'), entitled 'Presumption of innocence and right of defence', provides:

'1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.'

4 The Explanations relating to the Charter (OJ 2007 C 303, p. 17) specify that the second paragraph of Article 48 of the Charter corresponds to Article 6(2) and (3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

5 Article 52(3) of the Charter, that article being headed 'Scope and interpretation of rights and principles', provides:

'In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

Directive 2016/343

6 Under recitals 1, 4, 5, 9, 10, 16 and 48 in the preamble to Directive 2016/343:

‘(1) The presumption of innocence and the right to a fair trial are enshrined in Articles 47 and 48 of the [Charter], Article 6 of the [ECHR], Article 14 of the International Covenant on Civil and Political Rights (the ICCPR) and Article 11 of the Universal Declaration of Human Rights.

…

(4) The implementation of the [principle of mutual recognition of judgments and other judicial decisions] presupposes that Member States trust in each other’s criminal justice systems. The extent of the principle of mutual recognition is dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspects and accused persons and common minimum standards necessary to facilitate the application of that principle.

(5) Although the Member States are party to the ECHR and to the ICCPR, experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

…

(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.

(10) 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.

…

(16) 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.

…

(48) 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 ECHR, as interpreted by the Court of Justice and by the European Court of Human Rights.'

7 Article 1 of Directive 2016/343, entitled 'Subject matter', states:

'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.'

8 Article 2 of that directive, entitled 'Scope', provides as follows:

'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.'

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 14 of the directive, entitled 'Transposition', provides, in paragraph 1:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 April 2018. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference at the time of their official publication. Member States shall determine how such reference is to be made.'

Bulgarian law

11 Under Article 381 of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure, the 'NPK'), any accused person admitting his guilt has the opportunity, once the investigation is complete, to conclude an agreement with the prosecutor through his lawyer.

12 Article 381(5) of the NPK provides:

'The agreement must be made in writing and include an acknowledgement with regard to the following questions:

1. was an act committed, was it committed by the accused person, is it attributable to him, does the act constitute a criminal offence, and the legal classification of that act?

…’

13 Article 381(7) of the NPK provides:

‘Where the proceedings concern several persons …, the agreement may be entered into by some of those persons …’

14 Article 382(5) of the NPK states:

‘The court may propose amendments to the agreement, which shall be examined along with the prosecutor and the lawyers for the accused persons. The accused person shall be heard last.’

15 Under the terms of Article 382(7) of the NPK, the court approves the agreement if it is not contrary to law and morality.

16 Article 383(1) of the NPK provides that the agreement produces the effects of a judgment having the force of *res judicata*.

17 Under Articles 12 to 14 of the Zakon za grazhdanskata registratsia (Law on civil status), the designation of Bulgarian nationals is made using three factors, namely a first name, a patronymic and a surname. They also have a national identity number, laid down by Article 11(1) of the Law on civil status, by way of an administrative identifier allowing the person at issue to be clearly determined.

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

18 It follows from the order for reference that AH, PB, CX, KM, PH and MH are being prosecuted for their alleged membership, from the month of November 2014 to the month of November 2015, of an organised criminal group operating in Sofia (Bulgaria). The purpose of that group was to profit from making false official documents or by falsifying the content of those documents, namely identity documents and driving licenses. The indictment maintains that those six persons were working together in an organised criminal group and divided up tasks between themselves with the aim of achieving a common criminal objective.

19 Only one of these people, namely MH, expressed a wish to enter into an agreement with the prosecutor, in which he admitted his guilt in exchange for a reduced sentence.

20 According to the information in the order for reference, the other five accused persons (‘the five accused persons’) gave their ‘procedural consent’ to the conclusion, by MH and the prosecutor, of such an agreement, while specifically indicating that that did not mean that they were guilty and that they did not waive their right to plead not guilty.

21 It follows from the description of the facts in the agreement between the prosecutor and MH that the latter was part of an organised criminal group with the five accused persons. All the accused persons are identified in the same way, that is, by their first name, patronymic, surname and national identity number. The only difference in the way in which those persons are identified is that MH, is, furthermore, also identified by his date and place of birth, address, nationality, ethnicity, family circumstances and criminal record.

22 In accordance with the rules of national procedure, that agreement has been submitted for approval to the referring court, which is empowered to make changes to it.

23 In that regard, the referring court wonders whether it is compatible with Article 4(1) of Directive 2016/343 that, in the text of the agreement at issue in the main proceedings, the five accused persons who have not entered into that agreement and for whom the case continues under the ordinary criminal procedure, be clearly and expressly identified as members of the organised criminal group at issue and be identified by their first name, patronymic, surname and national identity number.

24 On the one hand, according to settled national case-law, the text of the agreement must correspond fully to the text of the indictment, in which all the accused persons are identified as joint perpetrators of the criminal offence. In addition, the reference to the joint perpetrators could be essential for the purposes of ensuring whether the constituent elements of the criminal act concerned are present, in so far as, in accordance with Bulgarian law, in order to constitute an organised criminal group, at least three persons must be involved.

25 On the other hand, the referring court notes that Article 4(1) of Directive 2016/343 prohibits a court from presenting an accused person as being guilty in a decision other than that ruling on guilt. It questions whether it is necessary to consider that the five accused persons, against whom the case continues in accordance with ordinary criminal procedure, are referred to as being guilty, to the extent that, in the official court decision, they are identified as joint perpetrators of the criminal offence at issue, with their first name, patronymic, their surname and their national identity number.

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

‘Is national case-law which requires that, in the text of an agreement (entered into in the context of criminal proceedings), not only the accused person who has admitted that he is guilty of a criminal offence and has entered into that agreement, but also other accused persons, the joint perpetrators of the offence, who have not entered into that agreement, who have not admitted that they are guilty and against whom the case continues in accordance with ordinary criminal procedure, but who have agreed to the first accused person entering into that agreement, be identified as perpetrators of the criminal offence in question, compatible with the first sentence of Article 4(1) of Directive 2016/343, read in conjunction with the first sentence of recital 16 and with recital 17, of that directive?’

27 By decision of 22 June 2018, the President of the Court of Justice gave the case priority over others, pursuant to Article 53(3) of the Rules of Procedure of the Court of Justice.

Consideration of the question referred

28 At the outset, although the request for a preliminary ruling specifies that the five accused persons gave their ‘procedural consent’ to the conclusion, by MH and the prosecutor, of an agreement implying the recognition of his guilt in exchange for a reduction in sentencing, it should be noted that the Court is not questioned on the possible compliance with EU law of national legislation which would, where appropriate, make judicial approval of such an agreement subject to the consent of those persons.

29 By its question, the referring court asks, in essence, whether Article 4(1) of Directive 2016/343 should be interpreted as meaning that it precludes an agreement, in which the accused person admits his guilt in exchange for a reduced sentence, which must be approved by a national court, that expressly mentions as joint perpetrators of the criminal offence at issue not only that person, but also the other accused persons, who did not admit their guilt and are prosecuted in the context of separate criminal proceedings.

Applicability of Directive 2016/343

30 As a preliminary point, it should be examined whether Directive 2016/343 is applicable in circumstances such as those at issue in the main proceedings.

31 In the first place, it is common ground that this directive is applicable *ratione temporis*. In that regard, it is sufficient to note that the agreement at issue in the main proceedings has not yet been approved by the referring court and that any approval by that court will therefore necessarily take place after the deadline for the transposition of Directive 2016/343, namely 1 April 2018.

32 In the second place, Directive 2016/343 is also applicable *ratione personae*. According to Article 2 thereof, that 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.

33 It is clear from the order for reference that the five accused persons in the case in the main proceedings are prosecuted in the context of criminal proceedings and that a final decision to determine whether they are guilty of the criminal offence concerned has not yet been adopted.

34 In the third place, that directive is applicable *ratione materiae* to the extent that the agreement at issue in the main proceedings comes within the category of 'judicial decisions, other than those on guilt' covered by Article 4(1) of Directive 2016/343. On the one hand, such an agreement, which is concluded between the prosecutor and the accused person, constitutes, following the approval by a judge, a judicial decision, as noted by the Advocate General in points 37 to 42 of his Opinion.

35 On the other hand, the agreement in question in the main proceedings does not rule on the guilt of the five accused persons. In that regard, it should be noted that the mere fact that that agreement rules on MH's guilt is not such as to exclude the categorisation of a decision 'other than those on guilt' having regard to the five accused persons. As the referring court has noted, the same agreement may constitute a decision on the substance for the person who concludes it and who may therefore be presented as being guilty, but not for the other accused persons who have not entered into an agreement. To interpret Article 4(1) of Directive 2016/343 in a different way would mean that the five accused persons would no longer benefit from the guarantees laid down by that provision. Such an interpretation would be contrary to the purpose of the directive, such as follows from recital 9 thereto, namely to enhance the right to a fair trial in criminal proceedings.

The obligation referred to in the first sentence of Article 4(1) of Directive 2016/343

36 Under the first sentence of Article 4(1) of Directive 2016/343, Member States are to take the necessary measures to ensure that, inter alia, for as long as a suspect or an accused person has not been proved guilty according to law, judicial decisions, other than those on guilt, do not refer to that person as being guilty.

37 It follows from recital 16 to Directive 2016/343 that that provision seeks to guarantee that the presumption of innocence is observed. Therefore, such judicial decisions should not, according to that recital, reflect the opinion that that person is guilty.

38 In that context, it should be stated 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 (judgment of 19 September 2018, *Milev*, C-310/18 PPU, EU:C:2018:732, paragraph 45).

39 That directive accordingly seeks to strengthen the confidence of Member States in the criminal justice system of other Member States, as is evident from recitals 4, 5, and 10 to that directive.

40 Although Article 4(1) of Directive 2016/343 gives Member States discretion in adopting the necessary measures for the purposes of that provision, the fact remains, as is evident from recital 48 to that directive, that the level of protection offered by Member States should never be below the standards set out in the Charter and the ECHR, including those relating to the presumption of innocence.

41 In that regard, it should be noted that the presumption of innocence is enshrined in Article 48 of the Charter, which corresponds to Article 6(2) and (3) of the ECHR, as is apparent from the explanations to the Charter. It follows, in accordance with Article 52(3) of the Charter, that it is necessary to take account of Article 6(2) and (3) of the ECHR for the purposes of interpreting Article 48 of the Charter, as a minimum threshold of protection (see, by analogy, as regards Article 17 of the Charter, judgment of 21 May 2019, *Commission* v *Hungary (Rights of usufruct over agricultural land)*, C-235/17, EU:C:2019:432, paragraph 72 and the case-law cited).

42 In the absence of specific guidance in Directive 2016/343 and in the case-law concerning Article 48 of the Charter as to how to determine whether a person is presented as being guilty in a judicial decision, it is appropriate to draw on the case-law of the European Court of Human Rights concerning Article 6(2) of the ECHR, for the purposes of interpreting Article 4(1) of Directive 2016/343.

43 In that regard, the European Court of Human Rights has held that the principle of the presumption of innocence will be infringed if a judicial decision or a statement by a public official concerning a person charged with a criminal offence contains a clear declaration, in the absence of a final conviction that the person concerned has committed the crime in question. In that context, that court underlined the importance of the choice of words by the judicial authorities and of the particular circumstances in which they were made and of the nature and context of the proceedings at issue (see, to that effect, ECtHR, 27 February 2014, *Karaman v. Germany*, CE:ECHR:20140227JUD001710310, § 63).

44 That court recognised that in complex criminal proceedings involving several persons who cannot be tried together, references by the national court to the participation of third persons, who may later be tried separately, may be indispensable for the assessment of the guilt of those who are on trial. It stated, however, that if facts related to the involvement of third parties have to be introduced, the relevant court should avoid giving more information than necessary for the assessment of the legal responsibility of those persons who are accused in the trial before it. In addition, that court stated that the reasoning of judicial decisions must be worded in such a way as avoid a potential pre-judgment about the guilt of the third parties concerned, capable of jeopardising the fair examination of the charges brought against them in the separate proceedings (see, to that effect, ECtHR, 27 February 2014, *Karaman v. Germany*, CE:ECHR:20140227JUD001710310, §§ 64 and 65; see, also, ECtHR, 23 February 2016, *Navalnyy and Ofitrov v. Russia*, CE:ECHR:2016:0223JUD004663213, § 99).

45 Having regard to that case-law, and as the Advocate General pointed out, in essence, in point 91 of his Opinion, Article 4(1) of Directive 2016/343 should be interpreted as meaning that it does not preclude that an agreement, such as that at issue in the main proceedings, which must be approved by a national court, refers to the participation of the accused persons, other than the person who entered into that agreement and thus recognised his guilt, but who will be tried separately and identifies them on condition, first, that that reference is necessary for the categorisation of the legal liability of the person who entered into the agreement and, second, that the same agreement clearly indicates that those other persons are being prosecuted in the context of separate criminal proceedings and that their guilt has not been legally established.

46 In that regard, in order to review compliance with the presumption of innocence, it is necessary to always analyse a judicial decision and its reasoning as a whole and in light of the particular circumstances in which it has been adopted. As the Commission noted at the hearing, any explicit reference, in certain parts of a judicial decision, to the absence of guilt of the joint perpetrators would be devoid of sense if other parts of that decision were likely to be understood as a premature expression of their guilt.

47 In the present case, the referring court notes that, as required by national law, to form an organised criminal group, the participation of at least three persons is required. It therefore appears to be apparent from the order for reference, subject to determination by the referring court, that the reference in the agreement at issue in the main proceedings to the five accused persons as joint perpetrators of the criminal offence was necessary in order to establish MH's guilt by way of his participation in an organised criminal group.

48 However, it appears that the agreement at issue in the main proceedings, as submitted to the referring court for approval, does not make it clear that the five accused persons are accused separately and that their guilt has not been legally established, which is for the referring court to determine. In the absence of such clarification, that agreement is likely to present those persons as being guilty, whereas their guilt has not yet been legally established, contrary to Article 4(1) of Directive 2016/343.

49 It is apparent from the order for reference that the referring court has the possibility, under national law, in the context of the approval procedure, to amend the terms of that agreement. In those circumstances, Article 4(1) of that directive requires that the agreement at issue in the main proceedings be approved, if necessary, only after an amendment to it clearly indicates that the five accused persons are being prosecuted in the context of separate criminal proceedings and that their guilt has not been legally established.

50 In those circumstances, the answer to the question referred is that Article 4(1) of Directive 2016/343 must be interpreted as meaning that it does not preclude that an agreement in which the accused person recognises his guilt in exchange for a reduction in sentencing, which must be approved by a national court, expressly mentions as joint perpetrators of the criminal offence in question not only that person, but also other accused persons, who have not recognised their guilt and are being prosecuted in separate criminal proceedings, on the condition that, first, that reference is necessary for the categorisation of the legal liability of the person who entered into the agreement and, second, that that same agreement makes it clear that those other persons are being prosecuted in separate criminal proceedings and that their guilt has not been legally established.

Costs

51 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 (Second Chamber) hereby rules:

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 meaning that it does not preclude that an agreement in which the accused person recognises his guilt in exchange for a reduction in sentencing, which must be approved by a national court, expressly mentions as joint perpetrators of the criminal offence in question not only that person but also other accused persons, who have not recognised their guilt and are being prosecuted in separate criminal proceedings, on the condition that that reference is necessary for the categorisation of

the legal liability of the person who entered into the agreement and, second, that that same agreement makes it clear that those other persons are being prosecuted in separate criminal proceedings and that their guilt has not been legally established.

[Signatures]