



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

27 October 2016*

(Reference for a preliminary ruling — Urgent preliminary ruling procedure — Judicial cooperation in criminal matters — Directive 2016/343/EU — Articles 3 and 6 — Temporal application — Review by the courts of the remand in custody pending trial of an accused — National legislation prohibiting, during the trial stage of the proceedings, inquiry into whether there are reasonable grounds to suspect that the accused has committed an offence — Incompatibility with Article 5(1)(c) and (4) of the European Convention on Human Rights — Discretion left by the national case-law to the national courts to decide whether or not to apply that convention)

In Case C-439/16 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU, from the Spetsializiran nakazatelen sad (Special court for criminal cases, Bulgaria), made by decision of 28 July 2016, received at the Court on 5 August 2016, in the criminal proceedings against

Emil Milev,

THE COURT (Fourth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, E. Juhász, C. Vajda, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Bobek,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 22 September 2016,

after considering the observations submitted on behalf of:

- Mr Milev, in person and by S. Barborski and B. Mutafchiev, advokati,
- the European Commission, by V. Soloveytkhik, R. Troosters and V. Bozhilova, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 October 2016,

gives the following

* Language of the case: Bulgarian.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 3 and 6 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 (OJ 2016 L 65, p. 1).
- 2 The request has been made in criminal proceedings against Mr Emil Milev concerning the continuation of his detention in custody pending trial.

Legal context

The ECHR

- 3 Under the heading ‘Right to respect for private and family life’, Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, (‘the ECHR’) provides:

‘1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

...’

- 4 Article 6 of the ECHR, entitled ‘Right to a fair trial’, states in paragraph 1:

‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...’

Directive 2016/343

- 5 Under Article 3 of Directive 2016/343, entitled ‘Presumption of innocence’:

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

6 Article 6 of that directive, entitled ‘Burden of proof’, provides:

‘1. Member States shall ensure that the burden of proof for establishing the guilt of suspects and accuseds is on the prosecution. This shall be without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law.

2. Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused, including where the court assesses whether the person concerned should be acquitted.’

7 In accordance with Article 14(1) of that directive, the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 1 April 2018 at the latest and to inform the European Commission thereof forthwith.

8 By virtue of Article 15 thereof, Directive 2016/343 entered into force on 31 March 2016, namely the 20th day following that of its publication in the *Official Journal of the European Union*.

Bulgarian law

9 The Nakazatelno protsesualen kodeks (Code of Criminal Procedure; ‘the NPK’) provides, in Article 63, entitled ‘Remand in custody pending trial’:

‘(1) The measure of ‘remand in custody pending trial’ shall be adopted when there are reasonable grounds to suspect that the accused has committed an offence punishable by a ‘custodial penalty’ or by another, more severe penalty and that it is apparent from the evidence that there is a real danger that the accused will abscond or commit an offence.

...’

10 Article 64 of the NPK, concerning the adoption of the coercive measure of ‘remand in custody pending trial’ during the pre-trial stage, provides:

‘(1) During the pre-trial stage, the coercive measure of ‘remand in custody pending trial’ shall be adopted by the competent court of first instance at the request of the prosecutor.

...

(4) The court shall adopt the coercive measure of ‘remand in custody pending trial’ when the conditions referred to in Article 63(1) are met and, if that is not the case, the court may decide not to adopt the coercive measure or to adopt a less stringent measure.

...’

11 Under Article 65 of the NPK, entitled ‘Court review of remand in custody pending trial during the pre-trial stage’:

‘(1) At any time during the pre-trial stage, the accused or his defence lawyer may request to have the adopted coercive measure of ‘remand in custody pending trial’ commuted.

...

(4) The court shall assess all the facts concerning the lawfulness of the custody and shall rule by order notified to the parties at the hearing.

...'

12 Article 256 of the NPK, entitled 'Preparation for the hearing', reads as follows:

'(1) For the purposes of preparation for the hearing, the Judge Rapporteur shall give his view on:

...

2. The coercive measure, without assessing whether there are reasonable grounds to suspect that an offence has been committed;

...

(3) In the event of an application concerning the coercive measure of 'remand in custody pending trial', the Judge Rapporteur shall present a report on the case in open court, in the presence of the prosecutor, the accused and his defence lawyer. When the order is adopted, the court shall consider whether the conditions for the coercive measure to be commuted or annulled are met, without assessing whether there are reasonable grounds to suspect that an offence has been committed.

...'

13 Under Article 270 of the NPK, entitled 'Decisions on the coercive measure and the other measures of pre-trial judicial supervision during the trial stage':

'(1) The question of the commutation of the coercive measure may be raised at any point in the trial procedure. In the event of a change of circumstances, a new application concerning the coercive measure may be made before the court having jurisdiction.

(2) The court shall rule by way of order in open court, without assessing whether there are reasonable grounds to suspect that the accused has committed an offence.

...

(4) The order referred to in paragraphs 2 and 3 may be appealed, on the conditions laid down in Chapter 22.'

The main proceedings and the question referred for a preliminary ruling

14 In criminal proceedings brought in 2013, Mr Milev has been charged with a number of offences, including leading an organised armed criminal group, kidnapping, armed robberies and attempted murder, which carry sentences of between three years' imprisonment and life imprisonment without possibility of commutation. He has been remanded in custody since 24 November 2013.

15 That procedure entered its trial stage on 8 June 2015. Since that date, the Spetsializiran nakazatelen sad (Special court for criminal matters, Bulgaria) has given 15 rulings on the applications made by Mr Milev for release from custody.

16 In accordance with Article 270(2) of the NPK, that court ruled on those applications without examining whether there were reasonable grounds for suspecting that the accused had committed an offence.

- 17 The Spetsializiran nakazatelen sad (Special court for criminal matters, Bulgaria) considers that the national law governing criminal procedure runs counter to the requirements flowing from the ECHR. While that national law prohibits the court, during the trial stage of the case, to rule, in the court's review of a remand in custody pending trial, on whether there are reasonable grounds to suspect that the accused has committed the offences of which he is accused, Article 5(1)(c) and 4 of the ECHR allows an accused to be kept in custody only where there is 'reasonable suspicion of [his] having committed an offence'.
- 18 In those circumstances, the Spetsializiran nakazatelen sad (Special court for criminal matters) requested an opinion from the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria). In an opinion delivered on 7 April 2016 by the full court, the criminal chamber of that court confirmed that there is a conflict between the national criminal procedural law and the ECHR which has given rise to a number of judgments against the Republic of Bulgaria by the European Court of Human Rights, the first of those judgments being in 1999 (see ECtHR, 25 March 1999, *Nikolova v. Bulgaria* [GC], CE:ECHR:1999:0325JUD003119596).
- 19 The Varhoven kasatsionen sad (Supreme Court of Cassation) also stated in that opinion, firstly, that the solution of conferring the power to rule on the reasons for the continuation of the custody on a formation of the court of first instance different from that which decided on the remand in custody or on a different court would meet obstacles both legal and practical. Secondly, it considered that having the court hearing the case at the trial stage also rule on the existence of reasonable grounds to suspect that the accused has committed the offence with which he has been charged could run counter to the requirement of impartiality of the court enshrined in Article 6(1) of the ECHR.
- 20 In those circumstances, the Varhoven kasatsionen sad (Supreme Court of Cassation), taking the view that the national criminal procedural provisions risk, in all cases, contravening those of the ECHR and pointing out the need for a legislative intervention to put an end to the abovementioned conflict, stated in the opinion of 7 April 2016, that 'it is clear that we are not in a position to propose any solution to the problem. We are clearly of the view that each court must examine whether it should give priority to the ECHR or to national law and whether it is in a position to rule in that context'. That court also stated in that opinion that it had been decided to communicate it to the Minister for Justice in order to set in motion the amendment of the legislative provisions at issue.
- 21 According to the Spetsializiran nakazatelen sad (Special court for criminal matters), the authority of the opinion of 7 April 2016 must be analogous to that of an interpretative decision and the grounds which it contains are, accordingly, binding on all national courts. Nonetheless, the referring court entertains doubts as to the conformity of those grounds with Articles 3 and 6 of Directive 2016/343. While aware of the fact that the time limit for transposition of that directive has not yet expired, it recalls, however, that, by virtue of the case-law of the Court, the competent national bodies, including the courts, should refrain from adopting measures likely seriously to compromise the attainment of the result prescribed in that directive.
- 22 In those circumstances, the Spetsializiran nakazatelen sad (Special court for criminal matters) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is a domestic precedent — in particular a binding opinion of the Varhoven [kasatsionen] sad [(Supreme Court of Cassation)] (delivered after the adoption of Directive 2016/343 of 9 March 2016 but before the time limit for its transposition has passed), pursuant to which the Varhoven [kasatsionen] sad [(Supreme Court of Cassation)], after having established that there is a conflict between Article 5(4) of the ECHR, read in conjunction with Article 5(1)(c) thereof, and national legislation (Article 270(2) of the NPK) relating to the issue of whether to take into consideration the reasonable grounds for assuming that an offence was committed (within the context of a procedure for reviewing the extension of a coercive measure of 'remand in custody' during the trial stage of

criminal proceedings), grants to the courts dealing with the substance of the case the power to decide whether to comply with the ECHR — consistent with Articles 3 and 6 of Directive 2016/343 (relating to the presumption of innocence and the burden of proof within the context of criminal proceedings)?'

The urgent procedure

- 23 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.
- 24 In support of that request, the referring court states that Mr Milev has been in custody since 24 November 2013. It further considers that, in the event of a negative answer to the question referred, if the national court asked to rule on Mr Milev's continued detention were to find that there were no reasonable grounds to suspect that he has committed the offences of which he is accused, he would have to be freed immediately.
- 25 In that regard, 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 TFEU on the area of freedom, security and justice. It may therefore be dealt with under the urgent preliminary ruling procedure.
- 26 In the second place, as regards the test for 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 26 July 2016, *JZ*, C-294/16 PPU, EU:C:2016:610, paragraph 29 and the case-law cited). In the present case, it is apparent from the information provided by the referring court and referred to in paragraph 17 to 20 of this judgment that Mr Milev is in custody and that the outcome of the main proceedings could lead the referring court to decide to end that custody (see, to that effect, judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 24).
- 27 In those circumstances, on 17 August 2016, the Fourth Chamber of the Court of Justice, acting on a proposal from the Judge- Rapporteur and after hearing the Advocate General, decided to accede to the referring court's request that the present reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure.

The question referred for a preliminary ruling

- 28 By its question, the referring court asks, in essence, whether Articles 3 and 6 of Directive 2016/343 must be interpreted as precluding the opinion delivered on 7 April 2016 by the Varhoven kasatsionen sad (Supreme Court of Cassation) at the beginning of the transposition period of that directive conferring on the national courts having jurisdiction to hear an action brought against a custody decision the ability to decide whether, during the trial phase of the criminal proceedings, the continued custody of an accused must be subject to a review by the court of whether there are reasonable grounds to suspect that he committed the offence with which he is charged.
- 29 It must be noted, first of all, that, in accordance with Article 15 thereof, Directive 2016/343 entered into force on 31 March 2016 and that, in accordance with Article 14(1) thereof, the period prescribed for transposition of that directive expires on 1 April 2018.

- 30 Since that period is intended in particular to give the Member States the time necessary to adopt the transposing measures, those States cannot be reproached for not having yet adopted measures implementing it in national law (see judgments of 18 December 1998, *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628, paragraph 43, and of 15 October 2009, *Hochtief and Linde-Kca-Dresden*, C-138/08, EU:C:2009:627, paragraph 25).
- 31 The fact remains that the Member States must refrain, during the period prescribed for transposition of a directive, from taking any measures liable seriously to compromise the result prescribed by that directive (see judgments of 18 December 1997, *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628, paragraph 45, and of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 32). In this connection it is immaterial whether or not such provisions of domestic law, adopted after the directive entered into force, are concerned with the transposition of the directive (see judgment of 4 July 2006, *Adeneler and Others*, C-212/04 EU:C:2006:443, paragraph 121).
- 32 It follows therefrom that, from the date upon which a directive has entered into force, the authorities and courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive (see, to that effect, judgment of 4 July 2006, *Adeneler and Others*, C-212/04 EU:C:2006:443, paragraphs 122 and 123).
- 33 The referring court is doubtful as to whether the opinion delivered by the Varhoven kasatsionen sad (Supreme Court of Cassation) on 7 April 2016 could constitute a measure of interpretation of national law likely seriously to compromise attainment of the objective pursued by Directive 2016/343.
- 34 In that regard, it is appropriate to note, as is apparent from the actual terms of that opinion, that it does not require the national court hearing actions against the continuation of custody to adopt, during the trial stage of the criminal proceedings, a particular decision. On the contrary, it is clear from the order for reference that that opinion leaves those courts free to apply the provisions of the ECHR, as interpreted by the European Court of Human Rights, or those of the national criminal procedural law.
- 35 It follows that the opinion of the Varhoven kasatsionen sad (Supreme Court of Cassation) of 7 April 2016 is not likely seriously to compromise, after the expiry of the period prescribed for transposition of Directive 2016/343, the attainment of the objectives prescribed by that directive.
- 36 Having regard to the foregoing considerations, the answer to the question referred for a preliminary ruling is that the opinion delivered on 7 April 2016 by the Varhoven kasatsionen sad (Supreme Court of Cassation) at the beginning of the transposition period of Directive 2016/343, which confers on the national courts having jurisdiction to hear an action brought against a custody decision the ability to decide whether, during the trial stage of the criminal proceedings, the continued custody of an accused must be subject to a review by the court of whether, in addition, there are reasonable grounds to suspect that he committed the offence with which he is charged is not likely seriously to compromise, after the expiry of the period prescribed for transposition of the directive, the attainment of the objectives prescribed by that directive.

Costs

- 37 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 (Fourth Chamber) hereby rules:

The opinion delivered on 7 April 2016 by the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria) at the beginning of the transposition period 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, which confers on the national courts having jurisdiction to hear an action brought against a custody decision the ability to decide whether, during the trial stage of the criminal proceedings, the continued custody of an accused must be subject to a review by the court of whether, in addition, there are reasonable grounds to suspect that he committed the offence with which he is charged is not likely seriously to compromise, after the expiry of the period prescribed for transposition of the directive, the attainment of the objectives prescribed by that directive.

[Signatures]