



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

8 December 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 their trial – Second paragraph of Article 47 and Article 48(2) of the Charter of Fundamental Rights of the European Union – Right to a fair trial and rights of the defence – Examination of prosecution witnesses in the absence of the accused person and their lawyer during the pre-trial stage of criminal proceedings – Impossibility to examine prosecution witnesses during the pre-trial stage of criminal proceedings – National legislation allowing a criminal court to base its decision on the previous testimony of said witnesses)

In Case C-348/21,

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

HYA,

IP,

DD,

ZI,

SS,

in the presence of:

Spetsializirana prokuratura,

THE COURT (Third Chamber),

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

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

* Language of the case: Bulgarian.

having regard to the written procedure,

after considering the observations submitted on behalf of:

- IP, by H. Georgiev, Advokat,
- DD, by V. Vasilev, Advokat,
- the European Commission, by M. Wasmeier and I. Zaloguin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2022,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 6(1) and 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 the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been submitted within the context of criminal proceedings brought against HYA, IP, DD, ZI and SS (together, 'the accused persons') for offences committed in relation to illegal immigration.

Legal context

International law

- 3 Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), which is entitled 'Right to a fair trial', provides:

'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. ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

...'

European Union law

4 Recitals 22, 33, 34, 36, 41 and 47 of Directive 2016/343 read as follows:

‘(22) The burden of proof for establishing the guilt of suspects and accused persons is on the prosecution, and any doubt should benefit the suspect or accused person. The presumption of innocence would be infringed if the burden of proof were shifted from the prosecution to the defence, without prejudice to any *ex officio* fact-finding powers of the court, to the independence of the judiciary when assessing the guilt of the suspect or accused person, and to the use of presumptions of fact or law concerning the criminal liability of a suspect or accused person. ...

...

(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.

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

...

(36) Under certain circumstances it should be possible for a decision on the guilt or innocence of a suspect or accused person to be handed down even if the person concerned is not present at the trial. ...

...

(41) The right to be present at the trial can be exercised only if one or more hearings are held. This means that the right to be present at the trial cannot apply if the relevant national rules of procedure do not provide for a hearing. ...

...

(47) This Directive upholds the fundamental rights and principles recognised by the Charter and by the ECHR, including the prohibition of torture and inhuman or degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, the integration of persons with disabilities, the right to an effective remedy and the right to a fair trial, the presumption of innocence and the rights of the defence. Regard should be had, in particular, to Article 6 of the Treaty on European Union (TEU), according to which the Union recognises the rights, freedoms and principles set out in the Charter, and according to which fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are to constitute general principles of Union law.’

5 Article 2 of that directive, entitled ‘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.’

6 Article 6(1) of the said directive, entitled ‘Burden of proof’, provides:

‘Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons 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.’

7 Article 8 of the same directive, under the heading ‘Right to be present at the trial’ provides in paragraphs 1 and 2:

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

2. Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that:

(a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or

(b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.’

Bulgarian law

Law on the Ministry of the Interior

8 The combined provisions of Article 72(1) and the Article 73 of the zakon za Ministerstvoto na vatreshnite raboti (Law on the Ministry of the Interior), of 28 May 2014 (DV No 53, of 27 June 2014, p. 2), in the version applicable to dispute in the main proceedings, provide that a person suspected of having committed an offence may be held under arrest for a period of 24 hours before charges are brought against them.

NPK

9 Under Article 12 of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure, ‘the NPK’), judicial proceedings are *inter partes* and the defence has the same rights as the prosecution.

10 In accordance with Article 46(2)(1) and Article 52 of the NPK, the pre-trial stage of the proceedings is to be conducted by the investigative authorities, under the supervision of the prosecutor.

11 As is apparent from the order for reference, pursuant to Article 107(1) and Articles 139 and 224 of the NPK, a witness who is examined at the pre-trial stage of criminal proceedings, with a view to gathering evidence, is usually examined without the accused person or their lawyer being present.

Further to Article 280(2) of the NPK, read in conjunction with Article 253 thereof, the witness is subsequently examined again at the judicial stage of the proceedings, at the hearing, in the presence of the accused person and their lawyer, who may then put their own questions to the witness.

- 12 Article 223 of the NPK, entitled ‘Witness examination before a judge’, provides in paragraphs 1 and 2 thereof:

‘(1) Where there is a risk that the witness will be unable to appear before the court on account of a serious illness, a prolonged period of absence from the country or other reasons that make his or her appearance at trial impossible, and also where it is necessary to perpetuate witness testimony that is of particular importance for the establishment of the objective truth, the examination shall be carried out before a judge of the relevant court of first instance or of the court of first instance in whose district the activity takes place. In those circumstances, the file is not submitted to the judge.

(2) The authority responsible for the pre-trial proceedings shall ensure the attendance of the witness and the possibility for the accused person and his or her defence counsel, if any, to take part in the conduct of the examination.’

- 13 Article 281 of the NPK, entitled ‘Reading of witness testimony’, states, in paragraph 1(4) and paragraph 3 thereof:

‘(1) Witness testimony given in the same case before a judge in the pre-trial proceedings or before a different composition of the court shall be read, where:

...

4. the witness cannot be found in order to be summoned, or has passed away;

...

(3) Under the conditions set out in Article 281(1)(1) to (6), witness testimony given before an authority responsible for the pre-trial proceedings shall be read where the accused person and his or her defence counsel, if such counsel was authorised or appointed, took part in the examination. If there are several defendants, the reading of the witness testimonies which shall relate to the charges brought against them shall require the consent of those defendants who were not summoned for the examination or who provided duly justified reasons for their failure to appear.’

The main proceedings and the question referred for a preliminary ruling

- 14 The accused persons, including agents of the Sofia (Bulgaria) airport border police, are the subject of criminal proceedings for offences relating to illegal immigration.

- 15 IP, DD, SS and HYA were arrested on the evening of 25 May 2017 and charged the next day. ZI was arrested on 31 May 2017 and charged the same day. Subsequently, the accused persons were placed in pre-trial detention and were afforded the assistance of a lawyer.

- 16 During the pre-trial stage of the criminal proceedings, several third-country nationals, namely MM, RB, KH, HN and PR (together, ‘the witnesses’), whose illegal entry into Bulgarian territory was allegedly facilitated by the accused persons, were examined by the prosecution’s investigating authorities.
- 17 Some of the witness examination took place before a judge. MM and RB were heard by a judge, on 30 March 2017 and 12 April 2017, respectively. KH was heard by a judge on 26 May 2017, HN on 30 March 2017, and PR on both 30 March 2017 and 12 April 2017.
- 18 Due to their illegal presence in Bulgaria, the witnesses became the subject of administrative proceedings for the purposes of their removal.
- 19 During the pre-trial stage of the criminal proceedings, SS and DD expressly requested to be allowed to examine MM. The Public Prosecutor’s Office did not respond to those requests.
- 20 On 19 June 2020, the Spetsializirana prokuratura (Specialised Public Prosecutor’s Office, Bulgaria), taking the view that the charges against the accused persons were well founded, brought an action before the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) for their criminal conviction.
- 21 As is apparent from the order for reference, that court’s attempts to summon the witnesses in order to examine them in the presence of the accused persons and their defence proved unsuccessful, either because it was not possible to determine their place of residence or because they had been removed from Bulgaria or had voluntarily left. According to that court, there was no possibility that the witnesses could be examined in person during the judicial stage of the proceedings.
- 22 At the hearing before the referring court on 9 April 2021, the Public Prosecutor’s Office requested that the statements made by the witnesses during the pre-trial stage of the criminal proceedings be read out, in accordance with Article 281(1) of the NPK, so that those statements could thus form part of the evidence on the basis of which that court would rule on the merits.
- 23 The referring court has doubts as to the compatibility with EU law of the application of that provision of national law in the circumstances of the present case and asks whether it is required to set it aside in the case in the main proceedings.
- 24 In that regard, the referring court explains that the statements of the witnesses are crucial to the assessment of the guilt of the accused persons and that its judgment will depend, to a very large extent, on whether and, if so, to what extent, it can rely on the information contained in those statements.
- 25 The referring court states that the said provision of national law aims to counter the risk that it might not be possible to examine a witness during the judicial stage of criminal proceedings by providing that he or she may be examined during the pre-trial stage of those proceedings, before a judge. The role of the judge, who does not have access to the file, consists, chiefly, of ensuring the formal legality of the examination. In that case, once a suspect has already been charged, he or she must be informed of the witness examination and offered the opportunity to participate in it.

- 26 However, as it happened in the present case, that provision of national law is circumvented in practice. Indeed, it is sufficient, at the pre-trial stage of criminal proceedings, for the witness examination to be conducted before a judge within the 24-hour period between the suspect's arrest and the formal bringing of charges, for the suspect, in so far as he or she has not yet been formally charged, and the suspect's lawyer not to have the right to participate.
- 27 In those circumstances, the Spetsializiran nakazatelen sad (Specialised Criminal Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:
- 'Is a national law which provides that the right of an accused person to be present in proceedings is safeguarded and the public prosecutor's office properly discharges its obligation to prove the guilt of the accused person compatible with Article 8(1) and Article 6(1) of Directive 2016/343, read in conjunction with recitals 33 and 34 thereof and the second paragraph of Article 47 of the Charter, if the testimony given at the pre-trial stage of the proceedings by witnesses who cannot be examined for objective reasons is introduced at the trial stage of the criminal proceedings, whereby those witnesses were examined solely by the prosecution and without the participation of the defence, but before a judge, and the prosecution could have provided the defence with the opportunity to participate in that examination at the pre-trial stage, but did not do so?'
- 28 By letter of 5 August 2022, the Sofiyski gradski sad (Sofia City Court, Bulgaria) informed the Court that, following a legislative amendment which entered into force on 27 July 2022, the Spetsializiran nakazatelen sad (Specialised Criminal Court) had been dissolved and that, from that date, certain criminal cases brought before that court, including the case in the main proceedings, had been transferred to the Sofiyski gradski sad (Sofia City Court).

The question referred for a preliminary ruling

- 29 As a preliminary point, it must be borne in mind that, in accordance with Article 52(3) of the Charter, in so far as the Charter contains rights that correspond to those guaranteed by the ECHR, and their meaning and scope are the same as those laid down by that convention. As is apparent from the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), Article 48(2) of the Charter, according to which respect for the rights of the defence is guaranteed for all accused persons, corresponds to Article 6(3) ECHR. The question referred for a preliminary ruling must therefore also be examined in the light of Article 48(2) of the Charter.
- 30 In those circumstances, it must be understood that, by its question, the referring court asks, in essence, whether Article 6(1) and Article 8(1) of Directive 2016/343, read in conjunction with the second paragraph of Article 47 and Article 48(2) of the Charter, must be interpreted as precluding the application of national legislation which allows a national court, where it is not possible to examine a prosecution witness during the judicial stage of criminal proceedings, to base its decision on the guilt or innocence of the accused person on the testimony of that witness obtained during a hearing before a judge during the pre-trial stage of those proceedings, but without the participation of the accused person or their lawyer.
- 31 First, Article 6(1) of Directive 2016/343 provides that Member States are to ensure that the prosecution bears the burden of proof of establishing the guilt of suspects and accused persons.

- 32 It is true that Article 6(1) of Directive 2016/343, which governs the allocation of the burden of such proof (see, to that effect, the judgment of 28 November 2019, *Spetsializirana prokuratura*, C-653/19 PPU, EU:C:2019:1024, paragraph 31), precludes, as is apparent from recital 22 of that directive, that burden from being transferred from the prosecution to the defence. However, as the Advocate General observed at point 61 of his Opinion, Article 6(1) does not prescribe the manner in which the prosecution must establish the guilt of an accused person or the manner in which that person must, in the exercise of his or her rights of defence, be able to challenge the evidence adduced by the prosecution at the judicial stage of criminal proceedings.
- 33 In view of the above, it must be held that Article 6(1) of Directive 2016/343 does not apply to national legislation such as that at issue in the main proceedings.
- 34 Secondly, Article 8(1) of Directive 2016/343 provides that Member States must ensure that suspects and accused persons have the right to be present at their trial.
- 35 In that regard, it must be recalled on the one hand, that, pursuant to Article 2 of Directive 2016/343, that directive applies to natural persons who are suspects or accused persons in criminal proceedings. It covers all stages of criminal proceedings, from the moment a person is suspected of having committed a criminal offence or an alleged criminal offence, or is charged as having done so, until the final decision on whether that person has committed the criminal offence concerned has become final.
- 36 On the other hand, it follows from Article 8(2) of Directive 2016/343, read in the light of recitals 36 and 41 thereof, that, by virtue of their right to be present at their trial, an accused person must be able to appear in person at the hearings held in the context of the trial to which they are subject.
- 37 As the Advocate General observed, in essence, in point 38 of his Opinion, the referring court is uncertain as to the scope and content of an accused person's right to be present at their trial at the judicial stage of the criminal proceedings. It is admittedly true that the taking into account, for the purposes of the decision on the guilt or innocence of an accused person, of the statement of a prosecution witness examined in the absence of that person and his or her lawyer at the pre-trial stage of the criminal proceedings, without the latter having the opportunity to examine or have examined that witness during the judicial stage of those proceedings, does not deprive the accused person of the opportunity to appear in person at hearings in the context of the trial to which he or she is subject. However, in such a case, the accused person's role is limited to passively attending the reading of the content of the statements made by that witness as recorded in the minutes of a hearing in which he or she was unable to participate during the pre-trial stage of the criminal proceedings.
- 38 In view of the above, it is necessary, in the first place, to determine whether, in addition to the right to appear in person at hearings held in the context of the trial of an accused person, the right for an accused person to be present at his or her trial, enshrined in Article 8(1) of Directive 2016/343, also confers on that person the right to examine or have examined witnesses against them during the judicial stage of criminal proceedings.
- 39 In that regard, it should be recalled that, according to recital 47 of Directive 2016/343, that directive observes the fundamental rights and principles recognised by the Charter and the ECHR, including the right to a fair trial, the presumption of innocence and the rights of the defence.

- 40 As is apparent from recital 33 of that directive, the right of suspects or of accused persons to be present at their 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, to the second and third paragraphs of Article 47 of the Charter 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 (judgment of 15 September 2022, *DD (Reiteration of the hearing of a witness)*, C-347/21, EU:C:2022:692, paragraph 31 and the case-law cited).
- 41 In that regard, it is clear from the case-law of the European Court of Human Rights that the appearance of an accused person is of capital importance in the interests of a fair criminal trial, and the duty to guarantee that person the right to be present in the courtroom being, in that regard, one of the essential requirements of Article 6 ECHR (see, to that effect, ECtHR, 18 October 2006, *Hermi v. Italy*, CE:ECHR:2006:1018JUD001811402, § 58).
- 42 More specifically, the European Court of Human Rights has held that, in view of the rights of the defence being guaranteed, inter alia, by Article 6(3)(d) ECHR, the right of the accused person to take part in the hearing implies the right of that person to participate effectively in their trial (see, to that effect, ECtHR, 5 October 2006, *Marcello Viola v. Italy*, CE:ECHR:2006:1005JUD004510604, §§ 52 and 53, and ECtHR, 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom*, CE:ECHR:2011:1215JUD002676605, § 142), the right of such a person to examine or have examined prosecution witnesses, referred to in that provision, constituting a specific aspect of the right to a fair trial guaranteed by Article 6(1) ECHR (see, to that effect, ECtHR, 19 February 2013, *Gani v. Spain*, CE:ECHR:2013:0219JUD006180008, § 36).
- 43 Furthermore, the Court noted that the ability for an accused person to be confronted with the witnesses in the presence of the judge who ultimately hands down the decision on the guilt or innocence of that person, is one of the important aspects of fair criminal proceedings, as the assessment of the trustworthiness of a witness is a complex task, which, usually, cannot be achieved by a mere reading of the content of the witness's statements, as recorded in the minutes of the hearings (see, to that effect, judgment of 29 July 2019, *Gambino and Hyka*, C-38/18, EU:C:2019:628, paragraphs 42 and 43).
- 44 It follows from the foregoing considerations that the right for an accused person to be present at their trial, enshrined in Article 8(1) of Directive 2016/343, must be guaranteed in such a way that it can be exercised, at the judicial stage of criminal proceedings, in a manner which complies with the requirements of a fair trial. Thus, that right is not limited to ensuring the mere presence of the accused person at the hearings held in the context of the trial to which he or she is subject, but requires that the accused person be able to participate effectively in that trial and to exercise, to that end, the rights of the defence, which include the right to examine or have examined prosecution witnesses at that judicial stage.
- 45 As the Advocate General noted, in essence, at point 43 of his Opinion, a more restrictive interpretation of Article 8(1) of Directive 2016/343 to the effect that the right of an accused person to be present at their trial is limited to ensuring that the accused person is able to attend in person the hearings held in the context of the trial to which he or she is subject, would have the consequence of depriving the fundamental right to a fair trial of its essential content.

- 46 In that context, it is necessary, in the second place, to determine whether Article 8(1) of Directive 2016/343, read in conjunction with the second paragraph of Article 47 and Article 48(2) of the Charter, precludes a criminal judge from applying national legislation under which, where it is impossible for a witness, for objective reasons, to be present at the judicial stage of the criminal proceedings, that judge may read out statements made by that witness before a judge during the pre-trial stage of the proceedings, in order to rule on the guilt or innocence of the accused person, including where the accused person was not charged at the time that the hearing of that witness took place and neither the accused person nor their lawyer was able to participate.
- 47 The application of such national legislation could infringe the right of an accused person to be present at their trial, as defined in paragraph 44 of the present judgment.
- 48 It is thus for the referring court to assess, in accordance with the guidance provided by the Court, whether the application of the national legislation at issue in the main proceedings is compatible with those provisions of EU law.
- 49 It should be borne in mind that Article 267 TFEU empowers the Court not to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions. According to settled case-law, the Court may, however, in the framework of the judicial cooperation established by that article and on the basis of the case file, provide the national court with guidance on the interpretation of EU law which may be useful to it in assessing the effects of a particular provision of EU law (judgment of 2 March 2021, *A. B. and Others (Appointment of judges to the Supreme Court – Action)*, C-824/18, EU:C:2021:153, paragraph 96 and the case-law cited).
- 50 In that regard, it should be recalled that, in accordance with Article 52(1) of the Charter, limitations may be imposed on the exercise of the rights enshrined in the Charter, provided that those limitations are provided for by law, that they respect the essence of those rights and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.
- 51 First, as regards the requirement that any limitation on the exercise of fundamental rights must be provided for by law, that requirement implies that the possibility of taking into account statements by absent witnesses must be provided for by the relevant national legal framework. Subject to the assessments of the referring court in that regard, that appears to be the case in the dispute in the main proceedings.
- 52 Secondly, with regards to respect for the essence of the fundamental rights of the accused person, that essential content should be respected in so far as statements by absent witnesses can be taken into account only in limited circumstances, for legitimate reasons and with due regard for the fairness of the criminal proceedings as a whole.
- 53 In that regard, it is important to state that such an assessment complies with the relevant case-law of the European Court of Human Rights, which shows that the use as evidence of witness testimony obtained during the pre-trial stage of criminal proceedings is not, in itself, inconsistent with Article 6(1), and (3)(d) ECHR, subject to the respect for the rights of the defence, which require, as a general rule, that the accused person be given an adequate and proper opportunity

to challenge the evidence against them and to question the witness giving that evidence, either at the time of their testimony or at a later stage. (see, to that effect, ECtHR, 15 December 2015, *Schatschaschwili v. Germany*, CE:ECHR:2015:1215JUD000915410, § 105 and the case-law cited).

- 54 Thirdly, as regards observance of the principle of proportionality, that principle requires that any limitations which may, in particular, be imposed by acts of EU law on rights and freedoms enshrined in the Charter do not exceed the limits of what is appropriate and necessary in order to meet the legitimate aims pursued or the need to protect the rights and freedoms of others, it being understood that, where there is a choice between several appropriate measures, recourse must be had to the least onerous measure (see, to that effect, judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraph 41 and the case-law cited)).
- 55 In order to verify compliance with that principle, it is for the referring court to determine whether there is a good reason warranting the non-appearance of the witness and whether, in so far as the testimony of the witness could constitute the sole or decisive basis for a possible conviction of the accused person, there are counterbalancing factors, including strong procedural safeguards, sufficient to compensate for the handicaps faced by that accused person and their lawyer as a result of that testimony being taken into account and to ensure the fairness of the trial as a whole (see, to that effect, ECtHR, 15 December 2011, *Al-Khawaja and Tahery v. the United Kingdom*, CE:ECHR:2011:1215JUD002676605, § 152; ECtHR, 15 December 2015, *Schatschaschwili v. Germany*, CE:ECHR:2015:1215JUD000915410, § 107; and ECtHR, 7 June 2018, *Dimitrov and Momin v. Bulgaria*, CE:ECHR:2018:0607JUD003513208, § 52).
- 56 In that regard, it is, first of all, for the referring court to ascertain whether the absence of a prosecution witness during the judicial stage of the criminal proceedings is justified by a good reason, such as death, health grounds, a fear of giving evidence or the impossibility of that witness being located, that court being required, in the case of the last supposition, to make every effort that can reasonably be expected of it to ensure the attendance of that witness (see, to that effect, ECtHR, 15 December 2015, *Schatschaschwili v. Germany*, CE:ECHR:2015:1215JUD000915410, §§ 119 to 121 and the case-law cited).
- 57 Next, it should be considered that the testimony of a witness who is absent at the judicial stage of criminal proceedings, when admitted as evidence at that stage, but obtained prior to it, would constitute the sole basis for the conviction of the accused person if that testimonial evidence were the only evidence against them. That basis should be regarded as decisive in the event that the said testimonial evidence is of such significance that it is likely to be determinative of the outcome of the case, it being understood that, if the testimony of the absent witness is capable of being corroborated by other evidence, the assessment of the decisive nature of that testimony depends on the probative value of that other evidence: the stronger it is, the less likely the testimony of the absent witness is to be regarded as decisive (see, to that effect, ECtHR, 15 December 2015, *Schatschaschwili v. Germany*, CE:ECHR:2015:1215JUD000915410, § 123 and the case-law cited).
- 58 Finally, with regards to the existence of counterbalancing factors, such factors must enable a correct and fair assessment of the reliability of untested evidence and concerns, more particularly, the way in which the trial court assesses the untested evidence of the absent witness, the production of corroborating evidence at the judicial stage of the criminal proceedings and its probative value, and the procedural measures taken to compensate for the fact that the witness could not be directly cross-examined during the judicial stage of the criminal proceedings (see, to

that effect, ECtHR, 15 December 2015, *Schatschaschwili v. Germany*, CE:ECHR:2015:1215JUD000915410, §§ 125 to 131 and the case-law cited, and ECtHR, 7 June 2018, *Dimitrov and Momin v. Bulgaria*, CE:ECHR:2018:0607JUD003513208, § 53). As regards the latter aspect, the ability to examine a witness at the pre-trial stage of proceedings may constitute a procedural safeguard that is capable of compensating for the handicaps faced by the defence on account of the absence of the witness during the judicial stage of those criminal proceedings (see, to that effect, ECtHR, 10 February 2022, *Al Alo v. Slovakia*, CE:ECHR:2022:0210JUD003208419, § 56 and the case-law cited).

- 59 In the present case, it should be recalled, first, that the impossibility of locating a witness with a view to them being called during the judicial stage of criminal proceedings constitutes, in principle, a good reason, within the meaning of the case-law referred to in paragraph 56 of the present judgment, in particular where that witness no longer resides in the territory of the Member State concerned and attempts to locate him or her, notably through Interpol, have remained unsuccessful.
- 60 Secondly, it is for the referring court to ascertain whether, if the accused persons were convicted, its decision could be based solely or decisively, within the meaning of the case-law referred to in paragraph 57 of the present judgment, on the testimony given by the witnesses during the pre-trial stage of the criminal proceedings.
- 61 Thirdly, it is for the referring court to determine whether, in the present case, there are sufficient counterbalancing factors to compensate for the handicaps faced by the accused persons and their defence as a result of the possible taking into account, as evidence, of the testimony given by the witnesses during the pre-trial stage of the criminal proceedings, within the meaning of the case-law referred to in paragraph 58 of the present judgment, in particular the possibility for the accused persons and their defence to examine the witnesses during the pre-trial stage of the criminal proceedings and the existence of a remedy against a possible refusal decision.
- 62 In the light of all of the foregoing, the answer to the question referred is that Article 8(1) of Directive 2016/343, read in conjunction with the second paragraph of Article 47 and Article 48(2) of the Charter, must be interpreted as precluding the application of national legislation which allows a national court, where it is not possible to examine a prosecution witness during the judicial stage of criminal proceedings, to base its decision on the guilt or innocence of the accused person on the witness testimony obtained during a hearing before a judge during the pre-trial stage of those proceedings, but without the participation of the accused person or their lawyer, unless there is a good reason warranting the non-appearance of the witness at the judicial stage of the criminal proceedings, the testimony given by that witness does not constitute the sole or decisive basis for the conviction of the accused person, and there are sufficient counterbalancing factors to compensate for the handicaps faced by the accused person and their lawyer as a result of the taking into account of that testimony.

Costs

- 63 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. The costs incurred in submitting observations to the Court, other than those of those parties, shall not be reimbursed.

On those grounds, the Court (Third 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, read in conjunction with the second paragraph of Article 47 and Article 48(2) of the Charter of Fundamental Rights of the European Union,

must be interpreted as precluding the application of national legislation which allows a national court, where it is not possible to examine a prosecution witness during the judicial stage of criminal proceedings, to base its decision on the guilt or innocence of the accused person on the witness testimony obtained during a hearing before a judge during the pre-trial stage of those proceedings, but without the participation of the accused person or their lawyer, unless there is a good reason warranting the non-appearance of the witness at the judicial stage of the criminal proceedings, the testimony given by that witness does not constitute the sole or decisive basis for the conviction of the accused person, and there are sufficient counterbalancing factors to compensate for the handicaps faced by the accused person and their lawyer as a result of the taking into account of that testimony.

[Signatures]