Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 19 November 2019 [1]

Case C-653/19 PPU

Criminal proceedings against
DK
Interested party:
Spetsializirana prokuratura

(Request for a preliminary ruling from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria))

(Reference for a preliminary ruling — Judicial cooperation in criminal matters — Directive (EU) 2016/343 — Presumption of innocence — Burden of proof — Decision on guilt — Judicial review of continued pre-trial detention)

1. The Member States' criminal justice systems are marked, to a very large extent, by a contradiction that is difficult to resolve. At the same time as they enshrine the principle of the presumption of innocence, the very foundation of the identity of European criminal justice, they make widespread use of pre-trial detention. [2] The question to be answered by the Court in this reference for a preliminary ruling is whether and to what extent 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 [3] has succeeded, as regards the legal system of pre-trial detention, in making the EU area of criminal justice less incomplete and unbalanced. [4]

I. Legal framework

A. Directive 2016/343

2. According to recital 16 of Directive 2016/343, '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. … This should 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

1 Original language: French.

2 See, for a comparative study, A.M. van Kalmthout, M.M. Knapen and C. Morgenstern (eds.), *Pre-trial Detention in the European Union*, Wolf Legal Publishers 2009, p. 994.

3 OJ 2016 L 65, p. 1.

4 To borrow the expression used by the European Parliament in paragraph 5 of its resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (P7_TA(2014)0174).

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.'

3. Recital 22 of Directive 2016/343 states that '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. Such presumptions should be confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence, and the means employed should be reasonably proportionate to the legitimate aim pursued. Such presumptions should be rebuttable and in any event, should be used only where the rights of the defence are respected.'

4. Article 1 of the directive reads as follows:

'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.'

5. 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.'

6. Article 6 of Directive 2016/343, entitled 'Burden of proof', provides:

'1. 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.

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

B. Bulgarian law

7. Article 270 of the Nakazatelen protsesualen kodeks (Code of Criminal Procedure) reads as follows:

'(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 in 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.'

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

8. DK was at the scene of a shooting which resulted in the death of one person and serious injury to another. Following the shooting, DK remained at the scene and turned himself in to the police. For this conduct, he was charged with belonging to an organised criminal group and with murder and was remanded in custody on 11 June 2016. The Public Prosecutor's Office asserts that DK is responsible for the death of the victim. DK maintains that he acted in self-defence.

9. The criminal proceedings against DK entered the trial stage on 9 November 2017. On 5 February 2018, DK made a first application for release, which was refused. At least six other similar applications were made by DK. All were refused, either at first instance or at second instance. All these applications were examined in the light of the legal requirement of new circumstances that call into question the lawfulness of the detention.

10. The referring court observes that the Public Prosecutor's Office did not make any application for the continuation of the detention. The detention continues as long as the defence is unable to show evidence of a change in circumstances within the meaning of Article 270 of the Bulgarian Code of Criminal Procedure. The referring court may order release only if the defence is able to prove in a convincing manner that there has been a change in circumstances. According to the referring court, Article 270 of that Code shifts the burden of proof from the prosecution to the defence and gives rise to a presumption of lawfulness of the continuation of the detention which must be rebutted by the defence. It doubts that such an approach is consistent with recital 22 and Article 6 of Directive 2016/343. The referring court also mentions the judgment of the European Court of Human Rights (ECtHR) of 27 August 2019, Magnitskiy and Others v. Russia,[5] in which the ECtHR ruled that the presumption in favour of release is inverted if national law permits detention to continue in the absence of new circumstances and that that shifts the burden of proof to the defence. National law could therefore also be contrary to Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (ECHR).

11. The referring court also notes that national law does not set a maximum duration for continued pre-trial detention or prescribe a periodic review of the court's own motion.

12. In these circumstances, the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) decided to stay the proceedings and, by decision received at the Court Registry on 4 September 2019 and confirmed on 27 September 2019, to refer the following question to the Court for a preliminary ruling:

'Is a national law that, during the trial stage of criminal proceedings, requires a change in circumstances as a condition for granting the defence's application for the release of the accused person from detention, consistent with Article 6 and recital 22 of Directive 2016/343 and with Articles 6 and 47 of the Charter of Fundamental Rights of the European Union ['the Charter']?'

III. Procedure before the Court

13. The present request for a preliminary ruling was made on 4 September 2019. On account of its doubts as to the state of the proceedings before the referring court, the Court sent the referring court a request for information, to which that court responded on 13 September 2019. On 25 September 2019, the referring court informed the Court that the decision to release DK had been annulled by the

5 ECLI:CE:ECHR:2019:0827JUD003263109.

court at second instance. On 27 September 2019, the referring court held an extraordinary hearing in the course of which DK made a new application for release. In these circumstances, by decision of 1 October 2019, the Court decided to deal with the reference for a preliminary ruling under the urgent procedure in accordance with Article 107(1) of the Rules of Procedure.

14. Written observations were submitted by DK and the European Commission. Only the Commission presented oral argument at the hearing held before the Court on 7 November 2019.

IV. Analysis

A. Preliminary remarks

15. The referring court asks the Court, in essence, whether a national criminal law, under which a decision on pre-trial detention may be lifted in the trial stage of criminal proceedings only if there are 'new circumstances', is compatible with Article 6 of Directive 2016/343 and, if appropriate, with the Charter. The reading of the question referred for a preliminary ruling should, however, be supplemented by the other grounds of the order for reference, from which it becomes a little clearer that the question is being asked in connection with the burden of proof. In other words, is a law that requires the accused person to prove the existence of new circumstances if he wishes to be released from pre-trial detention compatible with Article 6 of Directive 2016/343?

16. The simplicity of the question referred to the Court does not reflect the fundamental issues which it raises for the European area of criminal justice.

17. The question arises in a particular context. The referring court describes in quite concerning terms the state of the national law applicable to pre-trial detention. In particular, pre-trial detention is not subject to any time limit once criminal proceedings have entered the trial stage. Article 270 of the Bulgarian Code of Criminal Procedure does provide that the accused person may apply for release from pre-trial detention *at any time*, but it would seem that it is very difficult in practice to obtain actual release or commutation of the coercive measure.[6]

18. I cannot therefore refrain from expressing my concerns regarding this situation. These concerns are twofold: first, on a *micro* level, in relation to the personal situation of DK and, second, on a *macro* level, in relation to what this case says about the reality of the European area of criminal justice.

19. First, DK is an accused person. An accused person cannot yet be considered as guilty and is even potentially innocent. Can we feel entirely comfortable with the idea that there is no time limit on his detention? Is it not a misnomer to continue to speak of pre-trial detention? Thus, whilst it is certainly not for me to revisit the Member States' choice to opt for systems in which there is widespread use of pre-trial detention,[7] it seems that any analysis of the matter must bear in mind that in criminal cases those who are waiting to find out their fate, generally in somewhat squalid conditions, are potentially *not* guilty.

6 Nonetheless, as the Commission pointed out at the hearing, the wording of Article 270 of the Bulgarian Code of Criminal Procedure in itself does not define the respective roles of the defence and the prosecution, the required standard of proof or the circumstances which can be considered 'new' within the meaning of that provision, which, in my view, could give the national courts a margin of discretion when they are required to apply that provision, unless this is precluded by other items of national law that were not presented to the Court.

7 Particularly as I readily acknowledge that this choice is naturally also dictated by considerations relating to the protection of public security and safety.

20. Second, my concerns are justified by the almost non-existent state of European harmonisation in this area, as I will undertake to show below. This case compels us to acknowledge the limits of EU law. On such a fundamental question as the length of pre-trial detention and the conditions in which a decision on pre-trial detention may be challenged before a court, it can be nothing but disappointing to note that EU law is not very effective. Not everything can be excused on the ground that the European Union lacks the competence to act in this area.

21. Of course, in criminal matters, something which is not guaranteed by the European Union may be guaranteed by the ECtHR. This case could therefore be seen as an opportunity for the Court to perform its role as a 'pointsman of competences'.[8] It is obvious that a matter which is not governed by EU law does not necessarily lie outside the law itself. I will return to this later, but the ECtHR has developed important principles to frame the discretion enjoyed by the States Parties to the ECHR with regard to decisions on pre-trial detention. But how much longer should DK remain in pre-trial detention before obtaining a ruling from the Strasbourg Court? Can he do this alone, as his representatives, perhaps for financial reasons, did not take part in the hearing before this Court?

22. Going beyond the question of relationships between systems, the EU legislature must urgently address the question of harmonisation, however minimal, of pre-trial detention as it is ultimately the European area of criminal justice that is under threat. There can be judicial cooperation in criminal matters only if mutual trust between Member States is strengthened and that trust cannot be soundly established if such contrasting standards are applied by Member States, especially in respect of pre-trial detention, which, I repeat, constitutes an exception, which must remain as limited as possible, to the keystone of our legal civilisation that is the right to liberty.

23. Nevertheless, whatever my concerns and regrets over the current state of EU law, I can only find, following a rigorous analysis of the law, that Directive 2016/343 does not provide a solution to the situation of DK.

B. The question referred for a preliminary ruling

24. Does Article 6 of Directive 2016/343 require Member States to provide that the burden of proof is on the prosecution when the defence applies for release from pre-trial detention if this continues after criminal proceedings have entered the trial stage? In order to answer this question, I will begin by demonstrating that Directive 2016/343 does not lay down any rules on the conditions in which a decision on continued pre-trial detention may be challenged. This interim conclusion will then be tested against the Court's case-law on Directive 2016/343 and decisions on pre-trial detention. Lastly, I will conclude the analysis by setting out the requirements laid down by the ECtHR.

1. Literal, schematic, historical and teleological interpretation of Directive 2016/343

25. I must note, at the outset, that the link between the situation at issue in the main proceedings and Article 6 of Directive 2016/343 is not obvious.

26. Directive 2016/343 provides that it applies to 'natural persons who are suspects or accused persons in criminal proceedings'.[9] It is common ground that DK falls within the scope *ratione personae* of Directive 2016/343.

8 If I may borrow this from Georges Vedel.

9 Article 2 of Directive 2016/343.

27. Furthermore, the directive applies 'at all stages of the criminal proceedings', that is to say, from the moment when a person is suspected or accused of having committed a criminal offence until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive.[10] The period during which the accused person is placed in pre-trial detention is fully part of those proceedings with the result that, in principle, the situation in the main proceedings falls within the scope of Directive 2016/343.[11] It is nonetheless clear that not every article of that directive necessarily applies at all stages of the criminal proceedings.[12]

28. Could Article 6 of Directive 2016/343 nevertheless govern the burden of proof in proceedings to challenge continued pre-trial detention? I am not convinced.

29. It should be noted in this regard that this article is included in a larger chapter devoted to the presumption of innocence. Thus, Directive 2016/343 requires Member States to ensure that suspects and accused persons are presumed innocent until proved guilty according to law.[13] In particular, when a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities and judicial decisions must not refer to that person as being guilty.[14] This is, however, '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*'.[15] As regards the manner in which the presumption of innocence must be maintained by public statements and preliminary decisions of a procedural nature, some useful light can be shed on Article 4 of Directive 2016/343 by reading recital 16 thereof, according to which an indictment cannot be criticised for referring to the person concerned as being potentially guilty. Respect for the presumption of innocence also appears to be 'without prejudice to preliminary decisions of a procedural nature … 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'.[16] If, therefore, reference is made here to decisions on pre-trial detention, it is solely in connection with statements made by public and judicial authorities, which are thus prohibited by the directive from referring to the suspect or accused person as being guilty.

30. As for the burden of proof strictly speaking, Article 6(1) of Directive 2016/343 — to which the question referred specifically relates — requires Member States to ensure that the burden of proof *for establishing the guilt* of suspects and accused persons is on the prosecution. This is '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'.[17] Doubt is to benefit the suspect or accused person, 'including where the court assesses whether the person concerned should be acquitted'.[18] Recital 22 of Directive 2016/343 is intended to clarify the intention of the legislature. According to that recital, it is a question of the burden of proof for establishing the *guilt* of suspects and accused persons and that burden must be on the prosecution. The EU legislature seems to have accepted the possibility of using presumptions of fact or law concerning the criminal liability of a suspect or accused person, without them infringing the principle

10 See Article 2 of Directive 2016/343.

11 See, by analogy, judgment of 19 September 2018, *Milev* (C-310/18 PPU, EU:C:2018:732, paragraph 40).

12 See, for example, Articles 8 and 9 of Directive 2016/343, which establish, respectively, the right to be present at the trial and the right to a new trial.

13 See Article 3 of Directive 2016/343.

14 See Article 4(1) of Directive 2016/343.

15 Article 4(1) of Directive 2016/343. Emphasis added.

16 Recital 16 of Directive 2016/343. Emphasis added.

17 Article 6(1) of Directive 2016/343.

18 Article 6(2) of Directive 2016/343.

of the presumption of innocence, provided they are 'confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence, and the means employed should be reasonably proportionate to the legitimate aim pursued. Such presumptions should be rebuttable and in any event, should be used only where the rights of the defence are respected'. [19]

31. Accordingly, although Article 4 of Directive 2016/343 refers explicitly to preliminary decisions of a procedural nature, such as decisions on pre-trial detention, [20] it must be stated that Article 6 of the directive does not contain any such reference. The same is true of recital 22 of the directive. I think that this can be explained by the fact that the EU legislature is here addressing a different stage of the criminal proceedings, the establishment of guilt. [21] The sole objective of Article 4 of Directive 2016/343, with regard to decisions on pre-trial detention, is to ensure that such decisions do not refer to accused persons as being guilty. Because the decision on pre-trial detention is not a decision on the guilt of those persons, as is expressly prescribed by the directive, [22] such a decision does not, in my view, fall within the scope of Article 6 of Directive 2016/343.

32. This interpretation does not seem to be called into question by the wording of paragraph 2 of Article 6 of Directive 2016/343, under which any doubt is to benefit the accused person. As pre-trial detention is determined before a decision on guilt — that is to say at a time in the criminal proceedings when no conviction as to guilt can be established and thus necessarily subject to doubt — if Article 6(2) of Directive 2016/343 were considered also to apply to decisions on pre-trial detention, the assumptions underlying pre-trial detention would melt away, as was rightly noted by the Commission. [23]

33. A narrow interpretation of Article 6 of Directive 2016/343 to the effect that it does not regulate the apportionment of the burden of proof for the adoption of decisions on pre-trial detention seems to be further corroborated by a historical analysis of the directive. Paragraph 16 of the Explanatory Memorandum of the Proposal for a directive of the European Parliament and of the Conseil on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [24] states that, according to the Commission, pre-trial detention was the subject of separate EU initiatives 'and [was] therefore not addressed in this Directive'. The still limited

19 Recital 22 of Directive 2016/343. The very articulated wording of this recital contrasts with the more concise formulation of Article 6 of Directive 2016/343, which makes no mention of the presumptions envisaged in the preamble.

20 As is shown by recital 16 of Directive 2016/343.

21 The wording of recitals 36 and 37 seems to confirm that, in the mind of the legislature, 'a decision on the guilt or innocence of a suspect or accused person' is in principle delivered at the end of the trial.

22 The scope of Article 4 of Directive 2016/343 thus clearly differs from the scope of Article 6 of the directive. Article 4 of Directive 2016/343 applies to public statements made by public authorities and judicial decisions, other than those on guilt but including preliminary decisions of a procedural nature, such as decisions on pre-trial detention. By contrast, Article 6 of the directive is applicable, in my view, only to substantive decisions on guilt. For a further illustration of this distinction, see judgment of 5 September 2019, *AH and Others* (Presumption of innocence) (C-377/18, EU:C:2019:670, paragraphs 34 and 35).

23 It would then be mainly cases of flagrante delicto or irrefutable confessions, if such confessions exist. The ECHR makes the mere existence of 'reasonable suspicion of having committed an offence' — and not certainties — one of the conditions for the application of the exception to the right to liberty and security; see Article 5(1)(c) of the ECHR.

24 COM(2013) 821 final.

scope of these separate legislative initiatives [25] cannot justify an interpretation of Directive 2016/343 going beyond that permitted by it. I also note in this regard that the European Parliament's proposal to include an explicit reference to pre-trial detention only in the wording of Article 4 was not adopted. [26]

34. As I observed above, the objective of Directive 2016/343 is to strengthen *certain* aspects of the presumption of innocence in order to enhance the Member States' trust in each other's criminal justice systems and mutual recognition of judgments and other judicial decisions. [27] Nevertheless, Directive 2016/343 established *minimum* rules, in accordance with its legal basis, [28] relating only to *certain* aspects of the presumption of innocence in criminal proceedings. [29]

35. The Court's case-law has thus far placed particular emphasis on this minimum harmonisation in order to limit the scope of Directive 2016/343 in respect of national systems of pre-trial detention.

2. Directive 2016/343 and decisions on pre-trial detention in the Court's case-law

36. In its first *Milev* judgment, [30] the Court was asked to rule on the compatibility with Articles 3 and 6 of Directive 2016/343 of an opinion delivered by the Bulgarian supreme court which conferred 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 had to be subject to a review by the court of whether, in addition, there were reasonable grounds to suspect that he had committed the offence with which he was charged. As the question was asked at a time when Directive 2016/343 had entered into force but the period prescribed for its transposition had not yet expired, the Court simply set out the obligations to which Member States were subject during that specific period [31] before finding that, because the opinion in question left the courts concerned free to apply the provisions of the ECHR as interpreted by the ECtHR or national criminal procedural law, that opinion was not likely seriously to compromise, after the expiry of the period prescribed for transposition, the attainment of the objectives of Directive 2016/343. In that case, the Court's response therefore focused on the question concerning the obligation not to compromise seriously the result prescribed by Directive 2016/343 during the period for transposition of the directive, and the underlying but distinct [32] question of the compatibility with Directive 2016/343 of the opinion of the Supreme Court and, more broadly, of the Bulgarian legislation, was not examined.

25 Thus, to my knowledge, no specific action was taken in response to the Green Paper of 14 June 2011 'Strengthening mutual trust in the European judicial area — A Green Paper on the application of EU criminal justice legislation in the field of detention' (COM(2011) 327 final). The Commission also referred, in paragraph 16 of the Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (COM(2013) 821 final), to Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ 2009 L 294, p. 20). The objective of that framework decision is, as its title suggests, to promote the mutual recognition of alternatives to provisional detention. It does not therefore seek to regulate provisional detention itself. In addition, it recognises that the right to the use, in the course of criminal proceedings, of a non-custodial measure as an alternative to custody 'is a matter governed by the law and procedures of the Member State where the criminal proceedings are taking place' (Article 2(2) of Framework Decision 2009/829).

26 See Amendment 41 of the Report on the proposal for a directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (doc. A8-0133/2015).

27 See recitals 2 and 4 of Directive 2016/343.

28 Namely Article 82 TFEU, the second paragraph of which provides for the adoption of minimum rules where this is necessary 'to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension'. Those minimum rules must, moreover, take into account the differences between the legal traditions and systems of the Member States and are without prejudice to the possibility of maintaining or introducing a higher level of protection.

29 See recitals 4 and 9 and Article 1 of Directive 2016/343.

30 Judgment of 27 October 2016 (C-439/16 PPU, EU:C:2016:818).

31 See paragraphs 29 to 32 of the judgment of 27 October 2016, *Milev* (C-439/16 PPU, EU:C:2016:818).

32 In the words used in point 35 of the Opinion of Advocate General Bobek in *Milev* (C-439/16 PPU, EU:C:2016:760).

37. In its second *Milev* judgment,[33] the Court was asked to determine whether Articles 3, 4 and 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, had to 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 also asked the Court to clarify whether the provisions of EU law relied on permitted a national court ruling on an application to modify a pre-trial detention measure to 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.[34]

38. After recalling the wording of Articles 2, 3, 4 and 10 of Directive 2016/343, the Court stated that the purpose of the directive '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'.[35] The objective of those minimum rules is 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.[36] On account of this particularly minimal degree highlighted in the judgment, the Court held that 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'.[37] The Court then ruled that Articles 3 and 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'.[38] Furthermore, the Court held that, 'in so far as … 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*'.[39] Putting it even more clearly, Directive 2016/343 'does not govern the circumstances in which decisions on pre-trial detention may be adopted'.[40]

39. Even more recently, the Court made an order pursuant to Article 99 of the Rules of Procedure.[41] In essence, the Court was asked whether Article 4 of Directive 2016/343, read together with recital 16 of that directive, had to be interpreted as meaning that the conditions relating to the presumption of innocence require that, where the court examines the existence of reasonable grounds for believing that the accused person has committed the offence alleged, in order to adjudicate on the legality of a pre-trial detention decision, that court must weigh the elements of inculpatory and exculpatory evidence presented to it and it must give grounds for its decision, not only indicating the evidence relied on, but also ruling on the objections of the defence counsel of the person concerned.[42] After noting that the case seemed to fall 'within the wider context [[43]] of the notion of "reasonable

33 Judgment of 19 September 2018 (C-310/18 PPU, EU:C:2018:732).

34 See judgment of 19 September 2018, *Milev* (C-310/18 PPU, EU:C:2018:732, paragraph 38).

35 Judgment of 19 September 2018, *Milev* (C-310/18 PPU, EU:C:2018:732, paragraph 45).

36 Judgment of 19 September 2018, *Milev* (C-310/18 PPU, EU:C:2018:732, paragraph 46).

37 Judgment of 19 September 2018, *Milev* (C-310/18 PPU, EU:C:2018:732, paragraph 47).

38 Judgment of 19 September 2018, *Milev* (C-310/18 PPU, EU:C:2018:732, paragraph 49).

39 Judgment of 19 September 2018, *Milev* (C-310/18 PPU, EU:C:2018:732, paragraph 48). Emphasis added.

40 Judgment of 19 September 2018, *Milev* (C-310/18 PPU, EU:C:2018:732, paragraph 49).

41 Order of 12 February 2019, *RH* (C-8/19 PPU, EU:C:2019:110).

42 Order of 12 February 2019, *RH* (C-8/19 PPU, EU:C:2019:110, paragraph 49).

43 Compared with the judgment of 19 September 2018, *Milev* (C-310/18 PPU, EU:C:2018:732).

suspicion", within the meaning of Article 5(1)(c) of the [ECHR]',[44] and focusing on the wording of the provisions of the directive which could be useful in settling the reference for a preliminary ruling, the Court sought to reinforce its point by also referring to Article 6 of the directive, concluding that 'if, as a result of an examination of the elements of incriminating and exculpatory evidence, a national court reaches the conclusion that there are reasonable grounds for suspecting that a person has committed the acts of which he is accused and takes a preliminary decision to that effect, those actions do not amount to presenting the suspect or accused person as being guilty of those charges, within the meaning of Article 4 of Directive 2016/343'.[45] At the same time, the Court recalled the Milev precedent on the minimal degree of harmonisation pursued by Directive 2016/343, which could not 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, whether as regards the rules governing examination of various forms of evidence or the extent of the statement of reasons for such a decision'.[46] The Court then held that 'Articles 4 *and 6* of Directive 2016/343 … *do not preclude*, where the competent court examines the reasonable grounds for believing that the suspect or the accused person has committed the offence with which he is charged, in order to give a ruling on the legality of a pre-trial detention decision, that court from comparing the elements of incriminating and exculpatory evidence presented to it and giving reasons for its decision, not only stating the evidence relied on, but also ruling on the objections of the defence counsel of the person concerned, provided that that decision does not present the person detained as being guilty'.[47] The statement that Article 6 of Directive 2016/343 'does not preclude' can be understood to mean, in accordance with the Court's previous case-law, that it simply does not apply.[48] Only then does the operative part of the order make sense.[49]

3. Decisions on pre-trial detention in the case-law of the ECtHR

40. Directive 2016/343 puts into effect the presumption of innocence and the right to a fair trial enshrined in Articles 47 and 48 of the Charter, to which it explicitly refers.[50] The presumption of innocence is intended to ensure that no-one is declared guilty, or treated as being guilty, of an offence before his guilt has been established by a court of law.[51] Furthermore, Directive 2016/343 contains a non-regression clause under which 'nothing in [the directive] shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR … or the law of any Member State which provides a higher level of protection'.[52]

41. Articles 47 and 48 of the Charter enshrine, respectively, the right to an effective remedy and the right to a fair trial and, as I have just stated, the presumption of innocence and the right of defence. It is clear in particular from the Explanation on Article 48 that that provision is the same as Article 6(2) and (3) of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope as the right guaranteed by the ECHR.

44 Order of 12 February 2019, *RH* (C-8/19 PPU, EU:C:2019:110, paragraph 52).

45 Order of 12 February 2019, *RH* (C-8/19 PPU, EU:C:2019:110, paragraph 57).

46 Order of 12 February 2019, *RH* (C-8/19 PPU, EU:C:2019:110, paragraph 59).

47 Order of 12 February 2019, *RH* (C-8/19 PPU, EU:C:2019:110, paragraph 60). Emphasis added.

48 The fact that the Court made that order pursuant to Article 99 of its Rules of Procedure and referred to its judgment in *Milev* (19 September 2018 (C-310/18 PPU, EU:C:2018:732)), which raised a similar issue, in the text of the order supports this interpretation.

49 It may seem strange, on the face of it, to supplement the interpretation given of Article 4 of Directive 2016/343 — which relates only to judicial decisions other than those on guilt — with a reference to Article 6 of that directive, which covers decisions establishing the guilt of suspects and accused persons.

50 See recital 1 of Directive 2016/343.

51 See judgment of 16 July 2009, *Rubach* (C-344/08, EU:C:2009:482, paragraph 31 and the case-law cited).

52 Article 13 of Directive 2016/343.

42. The case-law of the ECtHR mentioned by the referring court did not rule on the compatibility of the situation that was at issue with Article 6 of the ECHR but with Article 5(3) of the ECHR.[53]

43. In its judgment in Magnitskiy and Others v. Russia,[54] the ECtHR recalled the now established principles which it had previously outlined in assessing whether continued pre-trial detention was consistent with the ECHR.

44. While Article 5(1)(c) of the ECHR sets out the grounds on which pre-trial detention may be permissible in the first place, paragraph 3 of that article lays down 'certain procedural guarantees, including the rule that detention pending trial must not exceed a reasonable time, thus regulating its length'.[55] The persistence of a reasonable suspicion is a condition *sine qua non* for the validity of the continued detention[56] but, after a 'certain lapse of time', it no longer suffices. The ECtHR must then establish, first, whether other grounds cited by the judicial authorities continue to justify the deprivation of liberty and, second, where such grounds were relevant and sufficient, whether the national authorities displayed special diligence in the conduct of the proceedings.[57] Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities.[58] When deciding whether a person should be released or detained, the authorities are obliged to consider alternative means of ensuring his or her appearance.[59] The ECtHR has ruled that such justification exists in the case of danger of absconding, risk of pressure being brought to bear on witnesses, evidence being tampered with, collusion, reoffending and causing public disorder or where there is a need to protect the detainee.[60] It has also ruled that 'the presumption is always in favour of release … Until conviction, he or she must be presumed innocent, and the purpose of [Article 5(3) of the ECHR] is essentially to require his or her provisional release once his or her continuing detention ceases to be reasonable. … Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features. Continued detention can be justified in a given case only if there are actual indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty'.[61] To this end, the judicial authorities 'must, with respect for the principle of the presumption of innocence, examine all the facts militating for or against the existence of the above-mentioned requirement of public interest or justifying a departure from the rule in Article 5 [of the ECHR] … It is essentially on the basis of the reasons given in these decisions and of the well-documented facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of [Article 5(3) of the ECHR]'.[62]

53 Under which 'everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial'. Article 5 of the ECHR corresponds to Article 6 of the Charter (see the Explanation on Article 6 of the Charter. For an appraisal by the Court of matters relating to pre-trial detention from the perspective of Article 6 of the Charter, see judgment of 16 July 2015, *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraph 54 et seq.)).

54 ECtHR, 27 August 2019 (ECLI:CE:ECHR:2019:0827JUD003263109).

55 ECtHR, 5 July 2016, Buzadji v. Republic of Moldova (ECLI:CE:ECHR:2016:0705JUD002375507, § 86). However, the ECtHR has not set a fixed maximum duration for pre-trial detention; see the report drafted by Pedro Agramunt for the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe entitled 'Abuse of pretrial detention in States Parties to the [ECHR]' (doc. 13863 of 7 September 2015, paragraph 22). See also ECtHR, 3 October 2006, McKay v. The United Kingdom (ECLI:CE:ECHR:2006:1003JUD000054303, § 45), in which the ECtHR justifies the absence of a fixed time frame for the maximum period of pre-trial detention by the importance ascribed, in its review, to the special features in each case.

56 See, inter alia, ECtHR, 17 March 2016, Rasul Jafarov v. Azerbaijan (ECLI:CE:ECHR:2016:0317JUD006998114, § 119 and the case-law cited).

57 See ECtHR, 5 July 2016, Buzadji v. Republic of Moldova (ECLI:CE:ECHR:2016:0705JUD002375507, § 87).

58 See ECtHR, 5 July 2016, Buzadji v. Republic of Moldova (ECLI:CE:ECHR:2016:0705JUD002375507, § 87).

59 See ECtHR, 5 July 2016, Buzadji v. Republic of Moldova (ECLI:CE:ECHR:2016:0705JUD002375507, § 87).

60 See ECtHR, 5 July 2016, Buzadji v. Republic of Moldova (ECLI:CE:ECHR:2016:0705JUD002375507, § 88).

61 ECtHR, 5 July 2016, Buzadji v. Republic of Moldova (ECLI:CE:ECHR:2016:0705JUD002375507, § 89 and 90).

62 ECtHR, 5 July 2016, Buzadji v. Republic of Moldova (ECLI:CE:ECHR:2016:0705JUD002375507, § 91).

45. In the judgment in Magnitskiy and Others v. Russia,[63] the ECtHR also attributed particular weight to the fact that the domestic authorities had inverted the presumption in favour of release in stating that in the absence of new circumstances pre-trial detention should remain unchanged. It noted that Article 5 of the ECHR establishes the exceptional nature of departures from the right to liberty, which are only permissible in exhaustively enumerated and strictly defined cases.[64] It nonetheless follows from the case-law of the ECtHR that shifting the burden of proof from the prosecution to the defence gives grounds for criticism on the part of the defence, but does not constitute an autonomous, sufficient and automatic ground to find a violation of Article 5(3) of the ECHR, as such a violation is always established on the basis of a specific assessment of all the circumstances of each case.[65]

46. The assertion relating to matters of evidence in the case-law of the ECtHR is much more precise where a situation is assessed in the light of Article 6(2) of the ECHR,[66] the ECtHR having ruled that in criminal cases the whole matter of the taking and presentation of evidence must be looked at in the light of that provision.[67]

47. In contrast, it is clear from the case-law of the ECtHR relating to Article 5(3) of the ECHR that the ECtHR will examine, beyond the *a priori* definition of the burden of proof in relation to proceedings to challenge decisions on pre-trial detention, whether all the arguments for and against the existence of a public interest which could justify a departure from the rule established in Article 5 of the ECHR — namely liberty — have been assessed by the authority responsible for reviewing such decisions, such an assessment being reflected in the decision of that authority.[68] Nor has the ECtHR ruled out recourse to a presumption as to satisfaction of the legal conditions for continued pre-trial detention, provided, however, that the existence of the concrete facts outweighing the rule laid down in Article 5 of the ECHR are convincingly demonstrated by the authorities in order to constitute sufficient grounds to justify the continued deprivation of liberty.[69]

4. Summary

48. It therefore follows from the foregoing that Directive 2016/343 was not intended to put into effect the right to liberty, as enshrined in Article 6 of the Charter and Article 5 of the ECHR, but only to harmonise *certain* aspects of the presumption of innocence.[70] Article 6 of Directive 2016/343 thus concerns the burden of proof for establishing the guilt of the accused person. Since the determination of the burden of proof for challenging a decision on continued pre-trial detention is a distinct question, it is not governed by Article 6 of Directive 2016/343.

63 ECtHR, 27 August 2019 (ECLI:CE:ECHR:2019:0827JUD003263109).

64 ECtHR, 27 August 2019, Magnitskiy and Others v. Russia (ECLI:CE:ECHR:2019:0827JUD003263109, § 222).

65 See, inter alia, ECtHR, 24 March 2016, Zherebin v. Russia (ECLI:CE:ECHR:2016:0324JUD005144509, § 51, 60 and 62).

66 The ECtHR thus did not compromise when it stated that 'the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence' (ECtHR, 31 March 2009, Natunen v. Finland, (ECLI:CE:ECHR:2009:0331JUD002102204, § 53)), which moves away from the idea that such a shift does not in itself give rise to an infringement of Article 5(3) of the ECHR.

67 See ECtHR, 6 December 1988, Barberà, Messegué and Jabardo v. Spain (ECLI:CE:ECHR:1988:1206JUD001059083, § 76).

68 See ECtHR, 26 July 2001, Ilijkov v. Bulgaria (ECLI:CE:ECHR:2001:0726JUD003397796 § 86 and 87), and of 19 March 2014, Pastukhov and Yelagin v. Russia (ECLI:CE:ECHR:2013:1219JUD005529907, § 40). In its judgment of 10 March 2009, Bykov v. Russia (ECLI:CE:ECHR:2009:0310JUD000437802, § 64 and 65), after recalling its basic position regarding the reversal of the burden of proof in establishing the condition for release, the ECtHR found a violation of Article 5(3) of the ECHR on the ground that 10 applications for release had been refused for a single suspect and each of the 10 refusal decisions had not gone any further than listing the legal grounds for continued detention, omitting to substantiate them with relevant and sufficient reasons and failing to reflect the developing situation (see § 64 and 65 of that judgment).

69 See, for a presumption considered to be compatible with Article 5(3) of the ECHR, ECtHR, 24 August 1998, Contrada v. Italy (ECLI:CE:ECHR:1998:0824JUD002714395, § 58); see, in the opposite case, ECtHR, 26 July 2001, Ilijkov v. Bulgaria (ECLI:CE:ECHR:2001:0726JUD003397796 § 84 et seq.). In the latter judgment, the ECtHR stresses the deficiency of the grounds of the decision (see, in particular, § 86 of the judgment).

70 The executive summary of the impact assessment stresses that the overall objective of the directive is to ensure the right to a fair trial and that there is no such fair trial where the presumption of innocence is not respected (see paragraph 1 of the executive summary of the impact assessment accompanying the document 'Proposal for measures on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings', doc. SWD(2013) 479 final of 27 November 2013). The question of the right to liberty therefore seems to fall outside the scope of Directive 2016/343.

V. Conclusion

49. On the basis of all the above considerations, I propose that the Court answer the question referred for a preliminary ruling by the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) as follows:

Article 6 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 does not govern the burden of proof in relation to decisions on continued pre-trial detention.