



## Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

15 September 2022\*

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Charter of Fundamental Rights of the European Union – Articles 47 and 48 – European Convention for the Protection of Human Rights and Fundamental Freedoms – Article 6 – 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 – Right to be present at the trial – Return decision accompanied by an entry ban of five years – Conditions for holding a trial in the absence of the person concerned – Obligation to be present at the trial provided for under national law)

In Case C-420/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sofiyski Rayonen sad (District Court, Sofia, Bulgaria), made by decision of 7 August 2020, received at the Court on 9 September 2020, in the criminal proceedings against

**HN,**

intervening parties:

**Sofiyska rayonna prokuratura,**

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, L. Bay Larsen (Rapporteur), Vice-President of the Court, I. Ziemele, P.G. Xuereb and A. Kumin, Judges,

Advocate General: J. Richard de la Tour,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 8 December 2021,

after considering the observations submitted on behalf of:

- HN, by N. Nikolova, advokat,
- the German Government, by F. Halabi, M. Hellmann, R. Kanitz and J. Möller, acting as Agents,

\* Language of the case: Bulgarian.

- the Hungarian Government, by M.Z. Fehér and R. Kissné Berta, acting as Agents,
  - the Netherlands Government, by M.K. Bulterman and H.S. Gijzen, acting as Agents,
  - the European Commission, by M. Wasmeier and I. Zaloguin, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 3 March 2022,  
gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 8 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).
- 2 The request has been made in criminal proceedings brought against HN, who is being prosecuted for use of forged documents.

### **Legal context**

#### *European Union law*

##### *Directive 2008/115/EC*

- 3 Article 1 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98) provides:  
  
‘This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of [EU] law as well as international law, including refugee protection and human rights obligations.’
- 4 Article 11(1) and (3) of that directive provides:  
  
‘1. Return decisions shall be accompanied by an entry ban:  
  
(a) if no period for voluntary departure has been granted, or  
  
(b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

...

3. Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.

...

Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.

Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.'

*Directive 2016/343*

5 Recitals 9, 10, 35, 36 and 48 of Directive 2016/343 are worded as follows:

'(9) The purpose of this Directive is to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial.

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

...

(35) The right of suspects and accused persons to be present at the trial is not absolute. Under certain conditions, suspects and accused persons should be able, expressly or tacitly, but unequivocally, to waive that right.

(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. This might be the case where the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance and does not, nevertheless, appear. Informing a suspect or accused person of the trial should be understood to mean summoning him or her in person or, by other means, providing that person with official information about the date and place of the trial in a manner that enables him or her to become aware of the trial. Informing the suspect or accused person of the consequences of non-appearance should, in particular, be understood to mean informing that person that a decision might be handed down if he or she does not appear at the trial.

...

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

6 Article 1 of that directive states:

‘This Directive lays down common minimum rules concerning:

- (a) certain aspects of the presumption of innocence in criminal proceedings;
- (b) the right to be present at the trial in criminal proceedings.’

7 Article 8(1) to (4) of that directive is worded as follows:

‘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.

3. A decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned.

4. Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9.’

***Bulgarian law***

8 Article 93 of the Nakazatelen kodeks (Criminal Code), in the version applicable to the facts in the main proceedings ('the NK'), is worded as follows:

'The terms and expressions below are used in this Code as follows:

...

(7) "serious criminal offence" means an offence punishable by a custodial sentence of more than five years, life imprisonment or life imprisonment without the possibility of commutation.

...'

9 Under Article 308 of the NK:

'1. Anyone who draws up a forged official document or falsifies the content of an official document for use shall be liable to a maximum of three years' imprisonment for forgery of documents.

2. Where the act referred to in paragraph 1 concerns ... Bulgarian or foreign identity documents ..., the custodial sentence shall be for a maximum of eight years.'

10 Article 316 of the NK provides:

'The penalty provided for in the preceding articles of this Chapter shall also be imposed on any person who knowingly uses a forged or falsified document, an incorrect document or a document as referred to in the preceding article, where that person cannot be held responsible for creating it him or herself.'

11 Article 269 of the Nakazatelen protsesualen kodeks (Code of Criminal Procedure), in the version applicable to the facts in the main proceedings ('the NPK'), is worded as follows:

'1. In cases where the accused person has been indicted for a serious criminal offence, his or her presence at the hearing shall be mandatory.

2. The court may order that the accused person also appear in cases in which his or her presence is not compulsory where this is necessary to ascertain the objective truth.

3. Provided that this does not prevent the truth from being ascertained objectively, the case may be tried in the absence of the accused person, if:

(1) he or she is not to be found at the address indicated by that person, or he or she has changed address without notifying the competent authority;

(2) his or her place of residence in Bulgaria is not known and has not been identified following an extensive search;

(3) having been duly summoned, he or she has not given valid reasons for not appearing, and the procedure laid down in Article 247b(1) has been complied with;

- (4) the accused person is outside the territory of the Republic of Bulgaria and:  
(a) his or her place of residence is unknown;  
(b) he or she cannot be summoned to appear for other reasons;  
(c) he or she was duly summoned and gave no valid reasons for not appearing.’
- 12 Article 10(1) of the *Zakon za chuzhdentsite v Republika Bulgaria* (Law on foreign nationals in the Republic of Bulgaria) (DV No 153 of 23 December 1998), in the version applicable to the facts in the main proceedings, states:
- ‘A visa or entry into the country shall be refused to a foreign national if:
- ...
- (7) he or she attempted to enter the territory or transit through it using documents, a visa or a residence permit which have been forged or falsified;
- ...’
- 13 Article 41 of that law provides:
- ‘A [foreign national] shall be returned where:
- ...
- (5) it is established that the foreign national has crossed the border of the country in accordance with legal rules, but that he or she attempted to leave the country by going through places not provided for that purpose or with a forged or falsified passport or travel document in lieu of a passport.’
- 14 Article 42h(1) of that law is worded as follows:
- ‘A ban on entry into and residence within the territory of the Member States of the European Union shall be imposed where:
1. the conditions laid down in Article 10(1) are fulfilled;
- ...’

### **The main proceedings and the questions referred for a preliminary ruling**

- 15 HN, an Albanian national, is suspected of having presented, on 11 March 2020, a forged passport and a forged identity card having the appearance of documents issued by the competent Greek authorities at the border control post at Sofia Airport (Bulgaria) in order to take a flight to Bristol (United Kingdom).
- 16 After being arrested on the same day by the police, an investigation procedure was initiated at the *Sofiyska rayonna prokuratura* (Sofia District Public Prosecutor’s Office, Bulgaria) for use of forged documents.

- 17 The next day, the director of the Granichno politseysko upravlenie – Sofia (Sofia Border Police Authority, Bulgaria) issued a return decision against HN accompanied by an entry ban of five years, starting on 12 March 2020 and ending on 11 March 2025.
- 18 On 23 April 2020, HN was examined for use of forged documents by decision of the investigating authority. That decision was submitted to HN and his lawyer on 27 April 2020. On that occasion, HN was informed of his rights, in particular those under Article 269 of the NPK relating to the conduct of proceedings in absentia and of the consequences of such proceedings.
- 19 At the hearing which took place on the same day, HN stated that he understood the rights which had been explained to him, that he did not wish to appear in the proceedings on the ground that such an appearance would cause him to incur disproportionate expense and that he trusted his lawyer entirely to represent him in proceedings in absentia.
- 20 On 27 May 2020, the indictment issued against HN for the criminal offence provided for in Article 316 of the NK, read in conjunction with Article 308 of the NK, was submitted for examination to the referring court, the Sofiyski Rayonen sad (District Court, Sofia, Bulgaria).
- 21 By order of 24 June 2020, that court set the date for the preliminary public hearing as 23 July 2020, and the judge-rapporteur directed that a translation in the Albanian language of that order and of the indictment be delivered to HN through the Bulgarian Ministry of Internal Affairs. That order also stated that the presence at the hearing of the accused person was mandatory, in accordance with Article 269(1) of the NPK, and that the proceedings could be conducted in absentia only if the conditions laid down in paragraph 3 of that article were complied with.
- 22 On 16 July 2020, that court was informed by the Ministry of Internal Affairs that HN had been deported to the Bulgarian border on 16 June 2020, pursuant to the return decision made against him by the border police authority, which therefore prevented HN from being duly informed of the judicial proceedings brought against him.
- 23 In those circumstances, the Sofiyski Rayonen sad (District Court, Sofia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
  - ‘(1) Is it permissible for the right of the accused person to be present in person at the trial concerning him [or her], as provided for in Article 8(1) of [Directive 2016/343] to be restricted by national legislation under which a ban under administrative law on entering and residing in the country in which the criminal proceedings are being conducted may be imposed on foreign nationals who have been formally charged?
  - (2) If the first question were to be answered in the affirmative, would the conditions laid down in Article 8(2)(a) and/or (b) of [Directive 2016/343], with respect to the holding of a trial in the absence of a foreign accused person, be fulfilled in the case where the foreign national was duly informed of the criminal case and of the consequences of non-appearance and is represented by a mandated lawyer appointed either by the accused person or by the State, but the appearance in person of the accused person is precluded by a ban, adopted in the administrative proceedings, on entering and residing in the country in which the criminal proceedings are being conducted?

- (3) Is it permissible for the right of the accused person to be present at the trial concerning him [or her], as provided for in Article 8(1) of [Directive 2016/343], to be converted by national legislation into an obligation incumbent on that person under procedural law? In particular, do the Member States thereby ensure a higher level of protection within the meaning of recital 48 [of the Directive] or is such a course of action, on the contrary, incompatible with recital 35 of the Directive, which states that the aforementioned right of the accused person is not absolute and can be waived?
- (4) Is an advance waiver by the accused person of the right to be present in person at the trial concerning him [or her], as provided for in Article 8(1) of [Directive 2016/343], which was clearly expressed during the pre-trial investigation, permissible, provided that the accused person was informed of the consequences of non-appearance?’

## Consideration of the questions referred

### *The third question*

- 24 By its third question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 8(1) of Directive 2016/343 must be interpreted as precluding national legislation which imposes an obligation on suspects and accused persons in criminal proceedings to be present at their trial.

### *Admissibility*

- 25 The European Commission questions the admissibility of the third question, which is of somewhat theoretical interest in the present case, given that it is impossible for the accused person to go to the Member State in which his trial is to take place.
- 26 In that regard, it should be noted that, according to settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling (judgment of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraph 54 and the case-law cited).
- 27 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation or assessment of the validity of an EU rule which is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 28 April 2022, *Caruter*, C-642/20, EU:C:2022:308, paragraph 29 and the case-law cited).



- 28 It is apparent from the order for reference that Bulgarian law lays down an obligation for persons accused of a serious criminal offence, such as that alleged against HN in the present case, to be present at the trial and that therefore, under Bulgarian law, HN is subject to that obligation.
- 29 In that context, the fact that HN is outside Bulgarian territory and is prohibited from entering it is not sufficient to establish that the third question, which relates to the compatibility of such an obligation with EU law, bears no relation to the actual facts of the main action or its purpose and, therefore, to rebut the presumption of relevance enjoyed by that question.
- 30 It follows that the third question is admissible.

### *Substance*

- 31 Article 8(1) of Directive 2016/343 provides that Member States are to ensure that suspects and accused persons have the right to be present at their trial.
- 32 It is clear from the wording of that provision that the Member States must allow suspects and accused persons to be present at their trial.
- 33 On the other hand, that provision does not say anything about the possibility for Member States to make such presence compulsory.
- 34 In addition, other provisions of that directive state that the Member States have the option to hold a trial in the absence of the person concerned.
- 35 Thus, Article 8(2) of that directive states that 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 certain conditions are fulfilled.
- 36 The context of those conditions is set out in recital 35 of Directive 2016/343, which makes it possible to cite the rationale used in Article 8(2) of that directive, according to which certain types of unambiguous conduct, reflecting the intention of the suspect or accused person to waive his or her right to be present at the trial, must make it possible to hold a trial in his or her absence (see, to that effect, judgment of 19 May 2022, *Spetsializirana prokuratura (Trial of an absconded accused person)*, C-569/20, EU:C:2022:401, paragraph 35).
- 37 Although that provision thus allows the Member States, under certain conditions, to provide that a criminal trial may be held in the absence of the suspect or accused person, it does not in any way require the Member States to provide for such a possibility in their national law.
- 38 Similarly, Article 8(4) of that directive provides that, where Member States provide for the possibility of holding trials in the absence of suspects or accused persons, but it is not possible to comply with the conditions laid down in paragraph 2 of that article, because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced.
- 39 It is thus apparent from the wording of Article 8(4) of that directive, in particular the use of the word ‘where’, that the EU legislature only intended to give Member States the option of providing for the conduct of a trial in the absence of the person concerned.

- 40 It follows from the foregoing considerations that Article 8 of Directive 2016/343 merely makes provision and establishes a framework for the right of suspects and accused persons to be present at their trial, together with the exceptions to that right, without, however, requiring Member States to impose an obligation for any suspect or accused person to be present at his or her trial, or prohibiting them from imposing such an obligation.
- 41 In that context, it is important to recall that it follows from Article 1 of that directive that its purpose is to lay down common minimum rules concerning certain aspects of the presumption of innocence in criminal proceedings and the right to be present at the trial in those proceedings, and not to carry out exhaustive harmonisation of criminal procedure (see, to that effect, judgment of 19 May 2022, *Spetsializirana prokuratura (Trial of an absconded accused person)*, C-569/20, EU:C:2022:401, paragraph 43 and the case-law cited).
- 42 Therefore, in the light of the limited scope of the harmonisation carried out by that directive and the fact that it does not govern the question whether the Member States may require the suspect or accused person to be present at the trial, such a question is a matter for national law alone.
- 43 In the light of all the foregoing considerations, the answer to the third question is that Article 8(1) of Directive 2016/343 must be interpreted as not precluding national legislation which imposes an obligation on suspects and accused persons in criminal proceedings to be present at their trial.

#### ***The fourth question***

- 44 It is apparent from the order for reference that the fourth question is asked in the event that the third question is answered to the effect that Article 8(1) of Directive 2016/343 does indeed preclude national legislation which imposes an obligation to be present at the criminal trial.
- 45 Therefore, in view of the answer given to the third question, there is no need to examine the fourth question.

#### ***The first and second questions***

- 46 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 8(1) and (2) of Directive 2016/343 must be interpreted as precluding legislation of a Member State which permits a trial to be held in the absence of the suspect or accused person, where that person is outside that Member State and is unable to enter its territory because of an entry ban imposed on him or her by the competent authorities of that Member State.
- 47 As has been pointed out in paragraphs 32 and 40 above, Article 8 of Directive 2016/343 makes provision and establishes a framework for the obligations incumbent on the Member States with a view to permitting suspects and accused persons to be present at their trial.
- 48 Under Article 8(2) of that directive, Member States may provide that a trial which can result in a decision on the guilt or innocence of the suspect or accused person can be held in his or her absence, provided that that person has been informed, in due time, of the trial and of the consequences of non-appearance at the trial or that, having been informed of the trial, that person is represented by a mandated lawyer, who was appointed either by that person or by the State.

- 49 It is true that none of the conditions referred to in that provision expressly concerns the right of that person to travel physically to the territory of the Member State in which the criminal trial is taking place in order to be present there.
- 50 That said, as has been noted in paragraphs 35 and 36 above, the conditions set out in that provision are intended to limit the exercise of such an option granted to the Member States to situations in which the person concerned must be deemed to have voluntarily and unequivocally waived his or her right to be present at the trial.
- 51 In that context, it should be noted that Article 8(2) of Directive 2016/343 attaches particular importance to keeping the person concerned informed, in that it expressly makes any possibility of holding a trial in absentia subject to the condition that that person has been informed of the trial.
- 52 Thus, recital 36 of Directive 2016/343 states that informing a suspect or accused person of the trial should be understood to mean summoning him or her in person or, by other means, providing that person with official information about the date and place of the trial in a manner that enables him or her to become aware of the trial.
- 53 It should also be noted that the purpose of that directive, as stated in recitals 9 and 10 thereof, is to strengthen the right to a fair trial in criminal proceedings, in such a way as 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 (judgment of 19 May 2022, *Spetsializirana prokuratura (Trial of an absconded accused person)*, C-569/20, EU:C:2022:401, paragraph 36).
- 54 In that regard, it should be recalled that the right to be present at the trial in criminal proceedings is an essential element of the right to a fair trial laid down in the second and third paragraphs of Article 47 and in Article 48 of the Charter of Fundamental Rights, which, as stated in the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), correspond to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') (see, to that effect, judgments of 24 May 2016, *Dworzecki*, C-108/16 PPU, EU:C:2016:346, paragraph 42, and of 19 May 2022, *Spetsializirana prokuratura (Trial of an absconded accused person)*, C-569/20, EU:C:2022:401, paragraph 51).
- 55 The Court must, accordingly, ensure that its interpretation of the second and third paragraphs of Article 47 and of Article 48 of the Charter of Fundamental Rights ensures a level of protection which does not disregard that guaranteed by Article 6 ECHR, as interpreted by the European Court of Human Rights (see, to that effect, judgment of 23 November 2021, *IS (Illegality of the order for reference)*, C-564/19, EU:C:2021:949, paragraph 101).
- 56 It is apparent from the case-law of the European Court of Human Rights that the presence of an accused person is of crucial importance in the interests of a fair and just criminal trial and that the duty to guarantee the right of the accused person to be present in the courtroom ranks as one of the essential requirements of Article 6 ECHR. (ECtHR, 18 October 2006, *Hermi v. Italy*, CE:ECHR:2006:1018JUD001811402, § 58).
- 57 According to that case-law, neither the letter nor the spirit of Article 6 ECHR prevents a person from waiving of his or her own free will, either expressly or tacitly, entitlement to the guarantees associated with a fair trial. However, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate

with its importance (ECtHR, 1 March 2006, *Sejdovic v. Italy*, CE:ECHR:2006:0301JUD005658100, § 86, and ECtHR, 13 March 2018, *Vilches Coronado and Others v. Spain*, CE:ECHR:2018:0313JUD005551714, § 36).

- 58 It follows from those considerations that the conditions to which Article 8(2) of Directive 2016/343 subjects the exercise of the option granted to the Member States by that provision of providing for the holding of a trial in the absence of the person concerned, in particular the requirement to inform that person, are intended to limit the exercise of that option to situations in which that person has had a genuine opportunity to attend, and voluntarily and unequivocally waived that option.
- 59 A Member State which merely informs the person concerned, who is prohibited from entering its territory, of the holding of his or her trial, without providing, in such circumstances, for measures enabling that person to be authorised to enter that territory despite that prohibition, would deprive that person of any real possibility of actually exercising his or her right to be present at the trial and would thus deprive the conditions laid down in that provision of any practical effect.
- 60 Such a situation differs from one in which the person concerned voluntarily and unequivocally waives his or her right to be present at the trial.
- 61 In the light of all those factors, it must be held that Article 8(2) of Directive 2016/343 implicitly precludes a Member State from holding a trial in the absence of the person concerned who is prohibited from entering its territory, without providing for measures allowing him or her to be authorised to enter that territory despite that prohibition.
- 62 In so far as it is apparent from the order for reference that, in the present case, the person concerned is prevented from entering the territory of the Member State in which his trial is taking place because of an entry ban imposed on him by the competent authorities of that Member State, it remains to be determined whether Directive 2008/115, in such a situation, precludes the Member State concerned from withdrawing or suspending the entry ban imposed on that person.
- 63 In that regard, it should be recalled that that directive, which lays down common standards and procedures to be applied in the Member States for returning illegally staying third-country nationals, permits Member States, as provided for in Article 11(3), where a return decision is accompanied by an entry ban, to withdraw or suspend such a ban.
- 64 Thus, the fourth subparagraph of that paragraph states that, in specific cases or certain categories of cases, for other reasons, Member States are to have such an option.
- 65 As the Advocate General observed in point 87 of his Opinion, the fourth subparagraph of Article 11(3) of Directive 2008/115 confers on the Member States a wide discretion in defining the cases in which they consider that an entry ban accompanied by a return decision should be suspended or lifted and therefore allows them to withdraw or suspend such an entry ban in order to enable a suspect or accused person to travel to their territory in order to be present at his or her trial.

- 66 In the light of all the foregoing considerations, the answer to the first and second questions is that Article 8(2) of Directive 2016/343 must be interpreted as precluding legislation of a Member State which permits a trial to be held in the absence of the suspect or accused person, where that person is outside that Member State and is unable to enter its territory because of an entry ban imposed on him or her by the competent authorities of that Member State.

### **Costs**

- 67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

- 1. 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**

**must be interpreted as:**

**not precluding national legislation which imposes an obligation on suspects and accused persons in criminal proceedings to be present at their trial.**

- 2. Article 8(2) of Directive 2016/343**

**must be interpreted as:**

**precluding legislation of a Member State which permits a trial to be held in the absence of the suspect or accused person, where that person is outside that Member State and is unable to enter its territory because of an entry ban imposed on him or her by the competent authorities of that Member State.**

[Signatures]