Case C-653/19 PPU

Request for a preliminary ruling

Date lodged:

4 September 2019

Referring court:

Spetsializiran nakazatelen sad (Bulgaria)

Date of the decision to refer:

4 September 2019

Criminal proceedings against:

DK

ORDER

Date: 4 September 2019 City: Sofia
Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) […]

[…]

having examined criminal case of a general nature No 3298/2017, has found the following:

1 In the present case, there have been numerous court decisions on the lawfulness of Mr DK's detention in custody which led to the dismissal of his application for release on the ground of absence of new circumstances, in accordance with the second sentence of Article 270(1) of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; 'the NPK').

2 It is necessary to take into account the recent judgment of the European Court of Human Rights (ECtHR) in the case *Magnitskiy and others v. Russia* (judgment of 27 August 2019, 32631/09, 53799/12), § 222 of which states that the presumption in favour of release is inverted if, according to the national law, detention is to continue in the absence of new circumstances, and that that shifts the burden of proof to the defence.

3 The national legal framework is very similar to that of Russia in the abovementioned case and that same § 222 refers to a Bulgarian case as an example of criticised national practice in that regard; even though that [Bulgarian] case concerns legislation that has now been repealed, the Bulgarian national case-law has remained the same.

4 It is therefore likely that the national law is contrary not only to Article 5(3) of the ECHR, but also to Article 6 and recital 22 of Directive 2016/343, in so far as that law shifts the burden of proving the unlawfulness of the detention to the defence and thus gives rise to a presumption of lawfulness of the continuation of the detention, with the rebuttal of that presumption falling to the defence.

5 In the main proceedings, the continuation of the detention of the accused person for over three years is precisely due to the failure on the part of the defence to convince the court that it is not necessary **[Or.2]** to continue the detention. That is to say, the detention has continued because the defence has not proven that there are grounds for release, and not because the prosecution has been able to prove that detention is the only preventive measure possible.

6 There is no doubt that release is more likely if the court adopts the opposite approach, that is to say, if it imposes as the sole condition for the detention's continuation that the prosecution is able to prove, in a convincing manner, that the material and procedural conditions for detention continue to exist and that no other, less severe, measure is appropriate.

7 In order to adopt such an approach, the court must disapply the second sentence of Article 270(1) of the NPK, which means that it needs to be certain that that provision is contrary to EU law; only the Court of Justice of the European Union can make such a finding in a binding manner.

8 On those grounds, a request for a preliminary ruling must be made.

In view of the foregoing, this court

ORDERS:

The following request for a preliminary ruling is MADE to the Court of Justice of the European Union:

Facts of the case

9 Mr DK was charged with belonging to an organised criminal group and with murder — offences under Articles 321 and 116 of the Nakazatelen kodeks (Criminal Code; 'the NK'), respectively. For each of those charges, the punishment provided is a 'custodial sentence', of varying duration, including 'life imprisonment' for murder and attempted murder. Charges were brought against another nine persons; those charges are outside the scope of the present request for a preliminary ruling.

10 The criminal proceedings were initiated following a shooting at a restaurant, which resulted in the death of one person and a serious injury to another. The Public Prosecutor's Office asserts that Mr DK is responsible for that person's death. The defence maintains that **[Or.3]** the acts were committed in self-defence made necessary by the attack on the victims and third parties. It was established that Mr DK remained at the scene of the accident and turned himself in to the police.

11 Mr DK was remanded in custody on 11 June 2016. In accordance with the national law, no time limit was set for his detention.

12 The case was brought before the court on 9 November 2017. In accordance with the national law, the Court did not examine the evidence and merits of the charge.

13 During the trial stage, the first application for release was made on 5 February 2018; that application was unsuccessful. Thus, the detention acquired a stable character. In accordance with the national law, that detention's duration was not set in advance and no periodic review of the court's own motion is prescribed. The detention measure continues to apply until it is lifted upon an application made by the defence.

14 Subsequently, the defence made another six applications for release. All were unsuccessful; some were upheld at first instance but the decision in favour of the defence was set aside at second instance. The court (first and second instance) examined the application for release in the light of the requirement provided for in the national law of new circumstances that call in question the lawfulness of the detention. The defence's application for the replacement of the detention [with another measure] was dismissed on the ground that the arguments put forward in support of the release were not considered sufficiently convincing.

15 The public prosecutor did not make any application for the detention's continuation, in so far as according to the national law, remand in custody is not limited by a term and the public prosecutor is not under an obligation to apply for its continuation. Where an accused person is remanded in custody, the detention continues as long as the defence is unable to show evidence of a 'change in circumstances' which renders the detention's continuation unlawful. In the main proceedings, the public prosecutor successfully objected to the defence's arguments that there had been a 'change of circumstances'.

[Or.4]

16 The referring court was seised of a further application for release made by Mr DK. Once again, the public prosecutor's arguments consist solely in the claim that there are no new circumstances.

The referring court notes that if it rules in line with the manner prescribed by the national law, it may order release only if the defence is able to prove, in a convincing manner, that there has been 'a change in circumstances'. At the same

time, the referring court doubts that such an approach is consistent with Article 6 and recital 22 of Directive 2016/343, in so far as that approach establishes a presumption of lawfulness of the detention, with the burden of rebuttal falling on the defence.

17 To date, Mr DK continues to be remanded in custody.

18 EU law

Article 6 and recital 22 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).

Articles 6 and 47 of the Charter of Fundamental Rights of the European Union (OJ 2016 C 202, 7 June 2016, p. 389-405; 'the Charter').

19 Council of Europe law

Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the ECtHR: *Magnitskiy and others v. Russia* (Nos 32631/09 and 53799/12) — §§ 212 to 223; *Pastukhov and Yelagin v. Russia* (No 55299/07) — §§ 38 to 51; *Ilijkov v. Bulgaria* (No 33977/96), §§ 76 to 87; *Rokhlina v. Russia* (No 54071/00), §§ 63 to 70; *Zherebin v. Russia* (No 51445/09), §§ 56 to 63; *Buzadji v. Republic of Moldova* (No 23755/07), § 59, §§ 84 to 102.

Rules 3, 8(2), 11, 23 and 24 of Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it is applied and the provision of safeguard against abuse.

[Or.5]

Paragraph 12.1 and 12.3 of Resolution 2077 (2015) of 1 October 2015, adopted by the Parliamentary Assembly of the Council of Europe, entitled 'Abuse of pretrial detention in States Parties to the European Convention on Human Rights'.

National law — Nakazatelno-protsesualen kodeks (Code of Criminal Procedure, 'the NPK')

20 [Translator's note: there is no paragraph 20 in the original]

21 As regards the duration of the coercive measure of 'remand in custody'

When the court decides that the accused person is to be remanded in custody, that decision does not provide a specific time limit for that detention. That detention measure continues to apply until it is lifted, which is done upon an application by the defence. An obligation on the court's part to review of its own motion the

remand in custody only arises once the final judgment on the substance is given (Article 309 of the NPK).

22 As regards the coercive measure of 'remand in custody' during the pre-trial stage [1]

Once the court decides to permanently remand in custody the accused person, that detention may continue for a fixed maximum term, the length of which depends on the severity of the offence with which he has been charged (Article 63(4) of the NPK). Until the expiry of that term, the defence may apply for the detention measure to be lifted (Article 65 of the NPK). The court is required to reconsider all the circumstances relating to the lawfulness of the detention (Article 65(4) of the NPK), without being bound by the previous ruling on that matter (paragraph 4 of interpretative judgment No 1/02). In particular, there is no presumption of lawfulness of the detention, whereby the detention is the result of a final judgment and based on which the review consists of examining whether new circumstances have arisen. On the contrary, the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria) expressly interprets the law (in paragraph 4 of interpretative judgment No 1/02) as meaning that it is for the court to establish the existence of circumstances on the basis of which detention may be continued.

Where there is suspicion that the defence is abusing the right to seek review of the detention, the court may impose a ban on such an application for a period of up to two months; that ban does not apply where the health of the accused person deteriorates (Article 65(6) of the NPK).

[Or.6]

23 As regards the coercive measure of 'remand in custody' during the trial stage

It is only by its initial decision that the court carries out a complete and independent review of the lawfulness of the detention. Subsequently, before the court having jurisdiction, that detention acquires a stable character. In particular, the measure is lifted only in the event of 'a change in circumstances' (second sentence of Article 270(1) of the NPK). That means that new facts which render the continued detention unlawful must be established.

Article 270(1) and (2) provides:

'**Article 270** (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.'

[1] The main proceedings are at the trial stage; the pre-trial stage is referred to here in order to allow for a more comprehensive overview of the national law.

Detention during the trial stage is not subject to any time limit and continues until the measure is lifted. The application for the lifting of the measure is made by the defence and it is for the defence to prove a change in circumstances; such change requires that the detention measure be lifted and a less stringent preventive measure taken.

That results in a shift in the focus of the court's examination, more specifically on whether the change in circumstances is sufficiently convincing; if that is not the case, the detention's continuation is ordered.

24 Question referred

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?

25 Admissibility of the question referred

Article 6 and recital 22 of Directive 2016/343 concern the establishment of guilt of the accused person; that is to say, they lay down specific requirements only regarding the evidentiary rules for the judgment on the substance, with which it is decided whether the accused person is innocent or guilty. In the present case, the national law (second sentence of Article 270(1) of the NPK) relates to **[Or.7]** a procedural matter — whether the detention must continue. For that reason, it is unclear whether those provisions of Directive 2016/343 are applicable here.

Clarifications relating to the question

26 The national law which provides for the stability of the decision ordering detention is consistent with the principle of legal certainty. Once the matter of the accused person's detention has been ruled on at first instance and then at second instance by a final decision, the rule is that that final decision can only be reviewed in the event that new circumstances arise. That ensures simplicity, clarity and efficiency. It avoids having to reiterate the same grounds to confirm the detention measure and prevents any risk of conflict between the judicial instances in the event of a first instance court ordering release on the basis of grounds already rejected by a second instance court in a previous decision.

27 However, the principle of legal certainty is inherent in judgments on the substance. Its application to a procedural act such as remand in custody amounts to establishing a presumption of lawfulness of the detention and consequently means that the burden of proof as regards the circumstances in favour of lifting the detention measure lies with the defence. That is in direct contradiction with the ECtHR's interpretation of Article 5(3) of the ECHR; according to that interpretation, when assessing the lawfulness of the detention, the presumption

must always be in favour of release of the accused person and detention must be an exception, provided for in strictly defined cases (*Magnitskiy*, § 214 and *Buzadji*, § 89). The ECtHR has also held that a national framework that does not permit the lifting of a detention measure unless there are new circumstances consequently affirms the reverse presumption, namely that detention must be continued until grounds for release are established (*Magnitskiy*, § 222, *Pastukhov and Yelagin*, § 49, *Ilijkov*, §§ 85 and 87, *Rokhlina*, § 67, *Zherebin*, § 60)[2].

28 That risk of reversal of the presumption in favour of release and the establishment of a presumption of lawfulness of the detention is particularly acute in the light of the national law's characteristics, according to which detention is not subject to a time limit and there is no obligation for a periodic review of the court's own motion. That gives rise to a certain stability of the detention. Consequently, any application for **[Or.8]** release on the part of the defence is treated as a challenge to detention that has been held lawful and as an application for the establishment of its unlawfulness.

29 Thus, it appears that when the defence applies for the detention measure to be lifted, the court has to assess whether there is convincing evidence in favour of the release of the accused person and not whether there is convincing evidence in favour of the continuation of the detention.

30 It follows that the court, when examining an application by the defence for the detention measure to be lifted, takes a specific approach; in particular, it examines whether there have been any new circumstances since the last decision on that same issue, which, in themselves, would lead to the conclusion that the detention has now become unlawful.

31 The review of the lawfulness does not concern the question whether all the conditions for detention continue to be met but whether they have been successfully challenged. In practice, that gives rise to the view that it is for the defence to show convincing evidence of the need to lift the detention measure.

The relevance of EU law

32 Article 6(1) of the directive obliges Member States to organise their penal system in such a manner that the burden of proof is on the prosecution; under Article 6(2), any doubt is to benefit the defence. Recital 22 prohibits shifting the burden of proof, subject to the use of presumptions of fact or law; however, those should be rebuttable, confined 'within reasonable limits', take into account the 'importance of what is at stake', the 'rights of the defence' and whether those presumptions are 'reasonably proportionate to the legitimate aim pursued'.

33 The national law, by the second sentence of Article 270(1) of the NPK, establishes a presumption in favour of the prosecution and to the detriment of the defence —

[2] The application numbers of the ECtHR's judgments are provided in paragraph 19.

that is to say, detention is considered lawful at the present time, since, at a point in the past, its lawfulness was already established in a definitive manner. Thus, that detention acquires a stable character and it is for the defence to challenge its lawfulness by putting forward convincing arguments in that respect.

34 Therefore, that national law falls within the scope of application of Article 6 and recital 22 of Directive 2016/343, in so far as that law provides for a legal presumption which, **[Or.9]** in principle, is accepted if it meets certain requirements. There is no doubt that that presumption satisfies the requirement of being rebuttable. It must be determined whether it is confined 'within reasonable limits', takes into account 'the importance of what is at stake', respects the 'rights of the defence' and is 'reasonably proportionate to the legitimate aim pursued'. That assessment falls within the exclusive jurisdiction of the Court.

35 Article 6 of the Charter guarantees the right to liberty and security. The very nature of the measure of detention entails a deprivation of liberty. For that reason, the conditions under which the detention measure may be lifted must be consistent with the accepted limitations of the scope of Article 6 of the Charter; those limitations must meet the requirements of Article 52(1) of the Charter. It must be noted that Article 6 of the Charter corresponds to Article 5 of the ECHR (Article 6 TEU and Article 52(3) of the Charter) and that the interpretation of the ECtHR is directly applicable; the interpretation of the Charter must not lead to a reduction in the level of protection guaranteed by the ECtHR (Article 53 of the Charter).

36 Article 47 of the Charter provides for effective remedies before a tribunal. The national law in the second sentence of Article 270(1) of the NPK by its nature limits the rights to a defence, in so far as the accused person is faced with the presumption of the lawfulness of his detention. Instead of the prosecution having to prove the grounds for detention, it is the defence that is obliged to show evidence of the grounds for the lifting of the detention measure. For that reason, the issue in the present case is whether the reduction in the level of protection renders the remedy provided under national law ineffective.

View of the referring court

37 Until 2000, the national law provided for mandatory detention in custody for certain offences, the exceptions to that detention being interpreted strictly; it was for the accused to prove that those exceptions were applicable and he was released only if he could successfully rebut the presumption in favour of detention. Thus, a national legal regime was established, under which, once an accused person is detained, his detention is lawful and that person must challenge that lawfulness in a convincing manner, being able to argue only a change in circumstances.

[Or.10]

38 Following numerous judgments of the ECtHR (*Ilijkov*, No 33977/96, *Nikolova*, No 31195/96, *Assenov and others*, No 24760/94, *Nankov*, No 28882/95 and

others), a reform was adopted, which abolished mandatory detention and established a procedure to challenge the detention before the courts. The reform was aimed primarily at the pre-trial stage, where the ECtHR had found the most violations of the accused person's rights of defence. Thus, a higher standard of protection of the accused person was provided for when reviewing the lawfulness of detention; the court seised of that application carried out a new and complete assessment, of its own motion, without taking into consideration the decision that ordered the detention.

39 That reform did not make as much progress at the trial stage of the proceedings, where a lower standard of protection applied; once the accused person was already in detention, his release was made dependent on new circumstances which had not been taken into account up to that point and which had to be proven by the defence.

40 That is the explanation for the wording of the second sentence of Article 270(1) of the NPK and the manner in which that provision is applied by the national court, including in the main proceedings.

41 Directive 2016/343 gives rise to new challenges for the development of national criminal procedural law and it will depend on the Court's ruling whether those challenges will lead to a change in the national law and national legal thinking.

[…] [procedural formalities; signatures]