

Case C-420/20**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

9 September 2020

Referring court:

Sofiyski rayonen sad (Bulgaria)

Date of the decision to refer:

7 August 2020

Defendant in criminal proceedings:

HN

Subject matter of the main proceedings

Criminal proceedings against a third-country national who, however, is unable to be present in person at the trial concerning him because the Bulgarian authorities have returned him to his country of origin and imposed on him a ‘ban on entering and residing in the Republic of Bulgaria’.

Subject matter and legal basis of the reference for a preliminary ruling

Interpretation of EU law, second paragraph of Article 267 TFEU

Questions referred

1. Is it permissible for the right of the accused person to be present in person at the trial concerning him, as provided for in Article 8(1) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, pp 1–11), 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 (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, pp 1–11), 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, as provided for in Article 8(1) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, pp 1–11), 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, as provided for in Article 8(1) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, pp 1–11), which was clearly expressed during the pre-trial investigation, permissible, provided that the accused person was informed of the consequences of non-appearance?

EU legislation and case-law relied on

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, pp 1–11): recitals 35 and 48, Article 8(1) and (2)

National legislation relied on

Nakazatelen kodeks (Criminal Code, Bulgaria, ‘the NK’)

Article 93, point 7:

‘A “serious crime” is any crime punishable under law by a term of imprisonment of more than five years, life imprisonment or life imprisonment without the possibility of conversion [into imprisonment subject to a limited tariff]’.

Article 308(1) and (2):

‘(1) A person who draws up a false official document or alters the content of an official document for the purposes of using it, shall be liable to punishment for forgery of a document in the form of a term of imprisonment of up to three years.

(2) Where the object of the act under paragraph 1 are [...] Bulgarian or foreign identity papers [...], the punishment shall take the form of a term of imprisonment up to eight years’.

Article 316:

‘The punishment provided for in the preceding articles of this Chapter shall also be imposed on a person who consciously makes use of a false or forged document, [...], where that person cannot be held criminally responsible for the actual drawing up of that document’.

Nakazatelno-protsesualen kodeks (Code of Criminal Procedure, Bulgaria, ‘the NPK’)

Article 247b(1):

‘By order of the judge rapporteur, a copy of the indictment shall be served on the defendant. Upon service of the indictment, the defendant shall be informed of the date of the pre-trial hearing and of the questions referred to in Article 248(1), of his right to appear with his defence counsel and of the option available to him of having a defence counsel appointed in the cases provided for in Article 94(1), and of the fact that the case may be tried and adjudicated upon in his absence, provided that the conditions laid down in Article 269 are fulfilled’.

Article 248(1):

‘The pre-trial hearing shall consider the following questions:

1. whether the case falls within the jurisdiction of the court;
2. whether there are grounds for discontinuing or suspending the criminal proceedings;
3. whether it is necessary to remedy any material breach of the rules of procedure committed during the pre-trial investigation which has led to a restriction of the procedural rights of the defendant, the injured party or his heirs;

[...]’.

Article 269(1) and (3):

‘(1) In cases in which the defendant is accused of a serious offence, his presence at the trial shall be mandatory.

[...]

(3) Where this does not preclude the determination of the objective truth, the case can be tried in the absence of the defendant, where:

[...]

4. he is located outside the Republic of Bulgaria and:

- a) his place of residence is unknown;
- b) he cannot be summoned for other reasons;
- c) he has been duly summoned and there is no good reason for his non-appearance’.

Zakon za chuzhdentsite v Republika Bulgaria (Law on Foreign Nationals in the Republic of Bulgaria, ‘the ZChRB’)

Article 10:

‘(1) A foreign national shall be refused a visa or leave to enter the country where:

[...]

7. he has attempted to enter or transit the country using false or forged documents or a false or forged visa or residence permit;

[...]

22. there is information to the effect that the purpose of his entry is to use the country as a country of transit with a view to migration to a third State.

[...]

(2) In the cases referred to in paragraph 1, a visa may be issued or leave to enter the territory of the Republic of Bulgaria may be granted where there are humanitarian grounds for doing so or where it is necessary to do so in the interests of the State or in order to comply with international obligations’.

Article 41:

‘Removal shall be ordered where:

[...]

5. it is established that the foreign national entered the country lawfully across the border but is attempting to leave it at a crossing point not authorised for that purpose or using a false or forged passport or passport replacement’.

Article 42h:

‘(1) A ban on entering and residing in the territory of the Member States of the European Union shall be imposed if:

1. the conditions laid down in Article 10(1) are met;

[...]

(4) The ban on entry may be imposed in parallel with the coercive measure provided for in Article 40(1), point 2, or Article 41 if the conditions laid down in Article 10(1) are met’.

Brief presentation of the facts and the procedure

- 1 HN is an Albanian citizen. As he does not speak Bulgarian, communication with him takes place in Albanian through an interpreter engaged by the judicial authorities.
- 2 On 11 March 2020, HN was arrested, by order of the police authorities, for a period of up to 24 hours on the basis of findings concerning a forgery committed on the same day, that is to say an attempt to leave Bulgarian territory at the border crossing point of Sofia airport using false official foreign identity documents.
- 3 On the very same day, 11 March 2020, a pre-trial investigation into the criminal offence found to have been committed was opened.
- 4 On 12 March 2020, the Head of the Granichno politseysko upravlenie Sofia ärz (Sofia Border Police Authority, ‘the GPU Sofia’), by order made under Article 41, point 5, and Article 44(1) of the ZChRB, adopted as against HN the coercive measure entitled ‘removal to the country of origin, to the country of transit or to a third State’. Also on 12 March 2020, the Head of the GPU Sofia, by a further order made under Article 42h(3) and (4) in conjunction with Article 10(1), point 7 and point 22, and Article 44(1) of the ZChRB, also adopted as against HN a coercive measure imposing on him a ‘ban on entering and residing in the Republic of Bulgaria’ for a period of five years from 12 March 2020 to 11 March 2025. In the main proceedings, there is nothing to indicate that those orders were challenged in administrative or judicial proceedings.
- 5 On 23 April 2020, HN, by order of the pre-trial investigation authority made in the course of the pre-trial investigation opened against him, was formally charged with an offence under Article 316 in conjunction with Article 308(1) and (2) of the NK. In particular, he was charged with having, on 11 March 2020, deliberately

used false official foreign identity documents, namely a false Greek passport and a false Greek identity card, there having been no grounds for holding him criminally responsible for the actual production of those documents.

- 6 On 27 April 2020, HN and his State-appointed defence counsel were notified of the order formally preferring the charge against him, HN having been informed, in the presence of his interpreter, of his rights under the NPK, including the provision in Article 269 of the NPK concerning the holding of a trial *in absentia* and the consequences thereof. During the examination that took place on the same day, HN stated that he understood the rights explained to him, that he did not wish to appear at the trial because this ‘would impose unnecessary costs’ on him, and that he had full confidence in the ability of his State-appointed defence counsel to represent him ‘at a trial *in absentia*’.
- 7 Following the receipt of the indictment charging HN with having committed an offence under Article 316 in conjunction with Article 308(1) and (2) of the NK at the Sofiyski rayonen sad (District Court, Sofia), the referring court, on 27 May 2020, the criminal proceedings in the course of which the request for a preliminary ruling has been made were commenced.
- 8 By order of 24 June 2020, the Sofiyski rayonen sad (District Court, Sofia) set the date for the pre-trial hearing in the case at issue at 23 July 2020. The judge rapporteur, in the light of the requirements laid down in Article 247b(3) of the NPK, ordered that copies of the order [preferring the charge] and the indictment, each translated into Albanian, be served on HN via the Direktsia Migratsia (‘Migration’ Directorate) at the Ministerstvo na vateshnite raboti (Ministry of the Interior, ‘the MVR’). These also pointed out that the defendant’s presence at the trial was mandatory, in accordance with Article 269(1) of the NPK, and that the trial could be held in his absence only under the conditions set out in Article 269(3) of the NPK.
- 9 On 16 July 2020, a letter from staff at the ‘Migration’ Directorate of the MVR informed the court that, on 16 June 2020, HN had been removed from the temporary accommodation facility for foreign nationals and taken to the State border of the Republic of Bulgaria for the purposes of enforcing the coercive measure imposed on him under the headings of ‘removal to the country of origin, country of transit or a third State’ and a five-year ‘ban on entering and residing in the Republic of Bulgaria’. This fact had prevented the defendant from being duly informed of the judicial proceedings instituted against him.

Essential arguments of the parties to the main proceedings

- 10 The defendant, HN, has not submitted any observations, as he was forcibly removed from [Bulgaria] and his whereabouts are currently unknown to the judicial authorities.

- 11 The defendant's State-appointed defence counsel has not submitted any observations in this regard and did not take advantage of the time allowed for her to raise any additional questions that might fall to be included in the request for a preliminary ruling.
- 12 At the hearing on 23 July 2020, she stated that HN had not been informed of the judicial proceedings instituted [against him] and that, in accordance with the general rules, those proceedings must therefore be conducted in his absence.
- 13 The Public Prosecutor has not submitted any express observations in this regard and did not take advantage of the time allowed for him to raise any additional questions that might fall to be included in the request for a preliminary ruling.
- 14 At the hearing on 23 July 2020, the Public Prosecutor stated that the conditions for conducting a trial *in absentia* were met in this case, as the defendant was not in the country and his place of residence was unknown.

Brief presentation of the grounds for the reference

- 15 The matter under examination in the present proceedings is HN's alleged involvement in the offence for which he is to be held criminally responsible, it being for the court hearing and determining the substance of the matter to decide conclusively on his guilt or innocence.
- 16 First of all, however, it is necessary to answer the question of principle as to whether it is permissible to restrict the defendant's participation in person in the trial concerning him by means of a coercive measure adopted by the executive authorities and imposing on him a long-term ban on entering or residing in the territory of the Republic of Bulgaria.
- 17 In the light of all of the foregoing, it falls to the Court of Justice of the European Union to decide whether it is permissible for the right of the accused person to be present at the trial concerning him, as provided for in Article 8(1) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, pp 1–11), 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.
- 18 The defendant's forcible removal from the country and the entry and residence ban imposed on him stand in the way of his participation in person in the proceedings [concerning him], in particular the pre-trial hearing, following the conclusion of which any breaches of his rights of defence committed in the course of the pre-trial investigation can no longer be invoked. In the main proceedings, the court conducted the pre-trial hearing notwithstanding the defendant's absence in order to take the case forward to the judicial examination stage, since it is not

until the judicial examination stage that Bulgarian law allows for the possibility of making a reference to the Court of Justice of the European Union. There is, however, no procedural obstacle preventing the pre-trial hearing from being re-held should the defendant present himself in person.

- 19 In accordance with Article 10(1), point 7, of the ZChRB, a foreign national is to be refused entry if he has attempted to enter or transit through [Bulgarian territory] using false or forged documents. Article 10(2) of the ZChRB provides for an exception applicable on humanitarian grounds or where this is necessary in the interests of the State or in order to fulfil international obligations.
- 20 An examination of the provisions cited shows that, once a foreign accused person has attempted to enter or transit through [Bulgarian territory] using false or forged documents, his participation in person in the trial concerning him is dependent on the express prior leave to enter that country that is issued by the executive authorities and is not subject to judicial review, a process effectively involving the imposition of a series of obstacles that impact on the right to a fair trial.
- 21 In the event that the answer to the first question is answered in the affirmative, it falls to the Court of Justice of the European Union to clarify whether the conditions laid down in Article 8(2)(a) and/or (b) 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, pp 1–11) with respect to the holding of a trial in the absence of a foreign accused person are fulfilled in the case where that person was duly informed of the trial 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 his appearance in person is precluded by a ban on entering and residing in the country in which the criminal proceedings are being conducted.
- 22 The answer to the second question is relevant to the further conduct of the proceedings by the [national] court, inasmuch as this will determine whether that court should take measures to ascertain the defendant's place of residence abroad in accordance with the applicable international procedures, inform the defendant of the proceedings [brought against him] and conclude those proceedings in his absence but in the presence of his State-appointed lawyer, or [whether it should] suspend the criminal proceedings for the duration of the ban imposed in the administrative proceedings in order to guarantee his right to participate in the trial in person.
- 23 In accordance with the provision contained in Article 269(1) of the NPK, the defendant's presence at trial in criminal proceedings for serious offences is mandatory, conduct of the trial *in absentia* being permissible, in accordance with paragraph 3 thereof, only in the case where this does not operate as a bar to the determination of the objective truth. That rule makes it necessary for the Court of Justice of the European Union to give a ruling on the further question as to

whether it is permissible for the right of the accused person to be present at the trial concerning him, as provided for in Article 8(1) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, pp 1–11), to be converted into an obligation under procedural law, and, in particular, whether the Member States thereby ensure a higher level of protection within the meaning of recital 48 [of the Directive] or whether such a course of action is incompatible with recital 35 of the Directive, which states that the aforementioned right of the accused person is not absolute and can be waived.

- 24 The answer to the third question is a condition of the lawful conduct of a trial in the absence of the defendant, provided that this does not operate as a bar to the determination of the objective truth, in the case where the defendant was duly informed of the proceedings [against him] and, without regard to the ban on entering and residing in the Republic of Bulgaria imposed in the administrative proceedings, nonetheless unequivocally waives his right to be present at the trial concerning him.
- 25 If the Court of Justice of the European Union answers the third question to the effect that it is not permissible to convert the right enjoyed by the accused person under Article 8(1) of Directive 2016/343 into an obligation under procedural law, it must clarify whether an advance waiver of that right which was clearly expressed in the pre-trial investigation is possible provided that the accused person was informed of the consequences of non-appearance.
- 26 It is apparent from the record of the examination of HN in the course of the pre-trial investigation that he was informed of his rights under the NPK, including the provision of Article 269 of the NPK on the conduct of the trial *in absentia* and of the consequences thereof, in the presence of an interpreter and his State-appointed defence counsel. HN expressly stated that he understood the rights explained to him, that he did not wish to be present at the trial because this ‘would impose unnecessary costs’ on him, and that he had full confidence in the ability of his State-appointed defence counsel to represent him ‘at a trial *in absentia*’. That waiver, however, was expressed before the court received the indictment and, therefore, before the point at which the right to be present at the trial came into being, which raises legitimate doubts as to whether the legal consequences intended by that waiver were brought to bear.