Case C-644/23 [Stangalov] [i]

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

26 October 2023

Referring court:

Sofiyski gradski sad (Bulgaria)

Date of the decision to refer:

26 October 2023

Defendant:

IR

Subject matter of the main proceedings

Provision of information to a defendant who has absconded that he is going to be tried, in order for that defendant to be entitled to a new trial held in his presence.

Subject matter and legal basis of the request

The reference for a preliminary ruling is made in accordance with point (b) of the first paragraph of Article 267 TFEU.

Questions referred for a preliminary ruling

Is Article 9 of Directive 2016/343, read in conjunction with Article 8(4) and (2) thereof, compatible with a provision of national law – the first alternative in the second sentence of Article 423(1) of the NPK – under which a defendant who has been convicted in absentia has no right to a new trial in his or her presence if he or she absconded after having been informed of the accusation in the most general terms during the pre-trial stage and it was that very absconding which prevented that defendant from being informed of the full charges, the trial initiated pursuant

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

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to those charges or the consequences of non-appearance at that trial – and that defendant also has no right to a new trial in his or her presence if he or she is defended by a lawyer appointed of the court's own motion, regardless of the fact that the defendant has no contact with that lawyer?

If the first question is answered in the negative, do Article 8 of Directive 2016/343 and Article 47 of the Charter oblige or allow the referring court to refuse to examine the merits of the charges brought against such a defendant and refuse to deliver a judgment in absentia against him or her if that court is convinced, on the basis of reliable information, that the supreme national judicial authority, which has exclusive jurisdiction to decide on an application made by a defendant convicted in absentia for a new trial in his or her presence will not grant such an application in the main proceedings and will not reopen the proceedings, in so far as it will not apply the rule set out in Article 9 of the directive, read in conjunction with Article 8(4) and (2) thereof, but will instead apply the national law and thereby deprive the defendant convicted in absentia of the right, guaranteed by EU law, to be present in the criminal proceedings?

Provisions of European Union law and the 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, p. 1), in particular recitals 36 to 39 and Articles 8 to 10

Charter of Fundamental Rights of the European Union, Article 47

Judgment of 19 May 2022, C-569/20, ECLI:EU:C:2022:401 ('judgment in Case C-569/20')

Judgment of 17 December 2020, C-416/20 PPU, ECLI:EU:C:2020:1042 ('judgment in Case C-416/20')

Judgment of 15 September 2022, C-420/20, ECLI:EU:C:2022:679 ('judgment in Case C-420/20')

Provisions of national law relied on

Konstitutsia na Republika Bulgaria (Constitution of the Republic of Bulgaria)

Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; 'the NPK')

During the investigations in the pre-trial stage, the suspect is formally accused; that is done by means of a separate legal act ('the decision governed by Article 219 of the NPK'), which sets out the essential factual and legal elements of the accusation. That legal act informs the suspect that he or she is officially

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accused of a certain offence, and gives that person the opportunity to provide explanations in respect of the accusation and make requests.

The second part of the pre-trial procedure comprises the actions of the public prosecutor following the conclusion of investigations. The public prosecutor may decide to bring charges by means of a bill of indictment which he or she files with the court.

In practice, the content of the decision governed by Article 219 of the NPK is incorporated into the concluding part of the bill of indictment governed by Article 246 of the NPK. The factual part of the bill of indictment contains detailed information on the offence committed by the accused person, the time of the offence, the place and manner in which the offence was committed, the injured party and the amount of the damage sustained.

The trial stage is initiated by the filing of the bill of indictment with the court. The court undertakes certain steps to inform the defendant, sending that defendant a copy of the bill of indictment and officially informing him or her of certain circumstances, including the fact that a trial will be held on that bill of indictment and that there is a possibility, in certain circumstances, of trying and deciding the criminal case in absentia ('the procedure governed by Article 247c of the NPK'). After receiving the bill of indictment governed by Article 246 of the NPK and the information accompanying it, the accused person (now called the defendant) becomes aware for the first time that a trial will be held in the context of which it will be considered whether the charges are proved and whether he or she will be found guilty and have a certain penalty imposed. At that stage, that person is also informed of the possibility that the case can be decided despite his or her absence.

Succinct presentation of the facts and procedure in the main proceedings

1 The facts of the main proceedings are those already described in the request for a preliminary ruling in Case C-569/20. The referring court wishes to rectify a factual error on its part and clarify that IR in fact received in person the accusation during the pre-trial procedure (the decision governed by Article 219 of the NPK) but not the charges on the basis of which the trial stage was initiated (the bill of indictment governed by Article 246 of the NPK), namely the charges which were filed with the court.

2 IR was charged with two criminal offences: participating in a criminal organisation with the objective of committing tax offences and aiding and abetting a specific tax offence.

3 In the pre-trial stage of the proceedings, the decision governed by Article 219 of the NPK was drawn up in respect of IR on 18 April 2016 and served on him the next day; he engaged a lawyer mandated by him. IR preferred not to provide explanations and merely stated that he was abroad; he also provided a new address where he could be located.

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4 Following the conclusion of the investigations, on 9 December 2016 the public prosecutor drafted a bill of indictment governed by Article 246 of the NPK. He then referred the case to the court, thereby initiating the trial stage in the main proceedings.

5 Between 2016 and the present, the referring court has made several attempts to summon IR to trial, but he could not be located, including at the address which he had indicated himself. The mandated lawyer resigned from the defence because he had no contact with IR. Subsequently, three defence lawyers were appointed by the court one after the other who had no contact with IR or his relatives. In principle, it is unclear whether IR knows that a bill of indictment has been drawn up, that the charges are being examined by a court (that is to say, that a trial is being held against him) and that the court has appointed defence counsel for him of its own motion.

6 According to the latest available information regarding IR, he has been finally convicted in three other sets of criminal proceedings and is being sought for the purpose of enforcing the sentences imposed on him; he is also being sought in the case in the main proceedings. However, he cannot be found.

Succinct presentation of the reasoning in the request for a preliminary ruling

Grounds for the first question

7 Having discussed the reasoning in the Court's judgment in Case C-569/20, the referring court considers that IR's legal situation is in fact covered by Article 8(4) of Directive 2016/343, with the result that he would have the right to a new trial.

8 That is so in so far as IR absconded after the decision governed by Article 219 of the NPK was served on him – a decision which, under national law, does not contain the necessary information that a trial would be held in the future. In fact, that information is only provided when the bill of indictment governed by Article 246 of the NPK is served and the procedure laid down in Article 247c of the NPK is implemented.

9 Consequently, IR was not in fact informed of the trial, although the provision of that information is a basic prerequisite for applying Article 8(2) of Directive 2016/343.

10 In particular, he was not informed:

– of the bill of indictment governed by Article 246 of the NPK, meaning of the nature of the accusation levelled against him so that he would be able to exercise his rights of defence (Article 6(3) of Directive 2012/13), including to assess whether or not to appear in person,

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– nor of the circumstance that a trial will be held in the first place, including the date and place of that trial (judgment in Case C-569/20, paragraphs 41 and 42),

– nor of the consequences of his non-appearance (paragraph 40),

– nor was he represented by a lawyer he trusted (paragraph 56).

11 Although his absconding is the sole reason for the impossibility of informing him, that absconding does not, under Article 9, the first sentence of Article 8(4) and the first sentence of recital 39 of Directive 2016/343, and in accordance with paragraphs 46 and 47 of the judgment in Case C-569/20, have the effect of precluding the right to a new trial.

12 In particular, absence (including absconding) qualified by the conditions set out in Article 8(2) of Directive, as described in paragraph 48 of the judgment in Case C-569/20, namely absence where the accused person is 'aware that he or she is going to be brought to trial' and has 'received sufficient information to know that he or she was going to be brought to trial' (second sentence of paragraph 59 and operative part), has not occurred.

13 The situation expressly described by the Court in paragraphs 57 and 58 of the judgment in Case C-569/20 – namely proper service of the bill of indictment governed by Article 246 of the NPK, turning out to be vitiated by procedural errors, and subsequent impossibility, caused by IR's absconding, of serving him with a new, corrected bill of indictment governed by Article 246 – which the Court dealt with only on account of the referring court's error, also did not occur. In fact, as a result of his absconding, IR was not served with any bill of indictment governed by Article 246 of the NPK.

14 Nevertheless, the Court states, in the third sentence of paragraph 58 of the judgment in Case C-569/20, that, if 'the content of the new indictment corresponds to the initial indictment', it can be found that the situation is one of absconding as described in paragraph 48. Under national law, the content of the decision governed by Article 219 of the NPK differs substantially from that of the bill of indictment governed by Article 246 of the NPK, in so far as the two documents serve different procedural objectives.

15 The referring court therefore considers that IR's legal situation does not come within the scope of Article 8(2) of Directive 2016/343, in so far as none of the three conditions set out in that provision is met. Consequently, in the event that he was tried, found guilty and sentenced in absentia to a particular penalty, he would have the right under Article 9 of Directive 2016/343 to a new trial in his presence.

16 The referring court states that, under national law, IR's legal situation comes within the scope of the first alternative in the second sentence of Article 423(1) of the NPK, under which, in the event that he was tried, found guilty and sentenced in absentia to a particular penalty, he would have no right to a new trial in his presence.

WORKING DOCUMENT

17 That is the case because IR absconded after being served with the decision governed by Article 219 of the NPK and it is because of that very absconding that the procedure governed by Article 247c of the NPK cannot be conducted, that is to say, he cannot be informed of the bill of indictment governed by Article 246 of the NPK, of the trial and of the consequences of non-appearance at that trial.

18 Under the first alternative in the second sentence of Article 423(1) of the NPK, IR has no right to a new trial in his presence.

19 Moreover, for the conduct of the trial in IR's absence to be lawful, it suffices that he be represented by a lawyer, without it being necessary for that lawyer to have his trust. It is not in fact required that the absent defendant have any contact at all with his lawyer.

20 Therefore, representation by a lawyer appointed by the court of its own motion, whom he does not know and whom he has not entrusted with his defence fully satisfies the requirement laid down in Article 94(1)(8) of the NPK and does not constitute grounds for granting him a new trial in his presence and with the participation of a lawyer of his choosing.

21 That is why the referring court considers IR's legal situation to be covered under national law by the first alternative in the second sentence of Article 423(1) of the NPK. In the event that he was tried, found guilty and sentenced in absentia to a particular penalty, he would, under that provision, have no right to a new trial in his presence.

22 In the referring court's view, there is therefore a clear contradiction between, on the one hand, Article 9 of Directive 2016/343, read in conjunction with Article 8(4) and (2) thereof and, on the other, the first alternative in the second sentence of Article 423(1) of the NPK. The former provision grants IR the right to a new trial, while the latter deprives him of that right.

23 It is in that context that the first question is referred for a preliminary ruling, seeking to ascertain whether there is in fact a contradiction between the two provisions.

Grounds for the second question

24 The second question is asked only in case the Court considers that the first alternative in the second sentence of Article 423(1) of the NPK is not consistent with EU law. This in turn would mean that such an interpretation means that the provision must be disapplied. The legal procedure for the reopening of criminal proceedings conducted in the defendant's absence is then to be governed by Article 9 of Directive 2016/343, read in conjunction with Article 8(4) and (2) thereof; the same applies in respect of the main proceedings – in particular, in respect of IR.

WORKING DOCUMENT

25 More specifically, IR, in his capacity as defendant in a Member State, has the right to a new trial in the event that he is convicted in absentia: that right flows directly from Article 9 of Directive 2016/343, read in conjunction with Article 8(4) and (2) thereof, which must be regarded as having direct effect (judgment in Case C-569/20, paragraph 28 and operative part; judgment in Case C-416/20, second sentence of paragraph 55).

26 The necessity of the second question follows from the certainty of the referring court that IR would in reality be unable to exercise that right. That certainty arises in turn from a consideration of the case-law of the Varhoven [kasatsionen] sad (Supreme Court [of Cassation], Bulgaria) on the reopening of criminal cases tried in the absence of the defendants. That case-law takes into account only national law (Article 423 of the NPK) and disregards EU law, including Articles 8 and 9 of Directive 2016/343.

27 In the first place, the referring court states that the wording of Article 8(2)(a) and (b) of that directive is sufficiently precise and unconditional, whatever doubts may exist, that is to say, the person convicted in absentia must have been informed of the 'trial' if he or she is to be refused a new trial. In so far as it is obvious that the information imparted in the decision governed by Article 219 of the NPK is qualitatively different from the information about the trial, there is no doubt that the national rules differ substantially from EU law. Nevertheless, the Supreme Court [of Cassation] continues to apply national law even after the deadline for transposition of the directive (1 April 2018), without considering it necessary to address that contradiction in any of its decisions or to submit a request for a preliminary ruling.

28 In the second place, the referring court states that any doubts concerning the incompatibility of national and EU law, should any such doubt even seem possible, are to be ruled out upon closer consideration of the case-law of the Court. The judgment in Case C-569/20 is of particular importance; in its operative part, the Court clearly concludes that the person convicted in absentia has no right to a new trial in his or her presence only if he or she 'received sufficient information to know that he or she was going to be brought to trial' and subsequently absconded. It is without doubt that under national law the information imparted in the decision governed by Article 219 of the NPK is qualitatively different from the information about the trial. In fact, the decision to draw up a bill of indictment governed by Article 246 of the NPK is the first step in opening the trial, and that decision is taken long after the accused person has been informed by means of the decision governed by Article 219 of the NPK.

29 Despite the judgment of the Court in Case C-569/20, the case-law of the Supreme Court [of Cassation] has remained unchanged. The Supreme Court [of Cassation] does not apply EU law directly, does not discuss whether there is a contradiction between EU law and national law and has not submitted a request for a preliminary ruling on the matter. Instead, it continues to apply national law and, in

WORKING DOCUMENT

particular, continues to refuse to reopen cases decided in absentia on the basis of the first alternative in the second sentence of Article 423(1) of the NPK.

30 It can be assumed with full certainty that IR will also receive such a refusal if he is found guilty and sentenced in absentia and subsequently makes an application asserting his right to a new trial in his presence.

31 Concerning the certainty that IR's right to be present in person will be infringed:

32 That certainty is based on the criteria established by the Court of Justice of the European Union in other, similar cases. However, they concern the reciprocal relationships between different national judicial systems and not the reciprocal relationships between the courts of one national judicial system.

33 The Court of Justice of the European Union has previously stated that a two-step examination must be undertaken if, in proceedings to execute a European arrest warrant (EAW), there is a risk of breach of the fundamental right to a fair trial (judgments of 31 January 2023, C-158/21, ECLI:EU:C:2023:57, paragraphs 97, 98 and 102; of 17 December 2020, C-354/20 and C-412/20, ECLI:EU:C:2020:1033, paragraph 51; of 22 February 2022, C-562/21 and C-563/21, ECLI:EU:C:2022:100, paragraph 66).

34 In the first place, it must be examined whether there is objective, reliable, specific and properly updated material indicating that there is a real risk of infringement of the right to a fair trial on account of systemic or generalised deficiencies (specifically, in the case in the main proceedings, infringement of the right to be present in person at the trial in criminal matters) relating to the way in which the justice system operates. In that case, an overall assessment of the way in which the justice system operates is to be undertaken (judgments in Case C-158/21, paragraphs 102 and 103; in Case C-354/20, paragraph 54; and in Joined Cases C-562/21 and C-563/21, paragraphs 67 and 77).

35 In the case in the main proceedings, the first step of the examination results in an affirmative answer. Material of that nature exists in the form of the express and clear wording of the law (first alternative in the second sentence of Article 423(1) of the NPK). Under that provision, all defendants who have absconded after service of the decision governed by Article 219 of the NPK, as a matter of principle and without exception, are deprived of the right to a new trial in their presence. It is not necessary that they be informed about the trial and the consequences of non-appearance. Nor is it necessary for the lawyers representing them to have their trust.

36 In the second place, it must be examined to what extent those deficiencies specifically and directly affect IR's legal situation, in respect of his personal situation, the nature of the offence and other circumstances, while the risk of infringement of the right to a fair trial must be 'manifest' (judgments in Case C-158/21, paragraphs 106 and 107; in Case C-354/20, paragraph 55; and in Joined Cases C-562/21 and C-563/21, paragraph 82).

WORKING DOCUMENT

37 In the case in the main proceedings, the second step of the examination arrives at an affirmative answer. The express and clear wording of the law (first alternative in the second sentence of Article 423(1) of the NPK) is applied by the Supreme Court [of Cassation] in accordance with its literal meaning, without any derogation. There is therefore long-standing, clear and consistent case-law of the Supreme Court [of Cassation] refusing persons convicted in absentia a new trial held in their presence if they absconded after service of the decision governed by Article 219 of the NPK and were for that reason not informed about the trial at which they were convicted in absentia. Consequently, no circumstances relating to IR's personal situation, the nature of the offence or other circumstances can lead to that legislation and that case-law not being applied in respect of him.

38 On the contrary, in so far as the present case concerns two serious crimes, deliberate absconding over many years and three other final convictions in absentia (in respect of which IR may also request a new trial in his presence), there is full certainty that the Supreme Court [of Cassation] will refuse to grant IR's request for a new trial in his presence, where that request is made after a possible conviction in absentia in the main proceedings.

39 That full certainty satisfies the criterion of 'a real risk of breach of [the …] right to a fair trial' in paragraphs 61 and 66 of the judgment in Case C-354/20 and paragraphs 82 and 84 of the judgment in Case C-562/21 and that of 'substantial grounds' for considering that risk to exist in paragraphs 88, 89 and 101 of the judgment in Case C-562/21.

40 That full certainty is further borne out by the fact that even after 19 May 2022, when the Court's judgment in Case C-569/20 was delivered, the case-law of the Supreme Court [of Cassation] has remained unchanged. In particular, the Supreme Court [of Cassation] has not discussed Articles 8 and 9 of Directive 2016/343 and the case-law of the Court relating to those provisions and has not considered it necessary to make a request for a preliminary ruling in view of the manifest contradiction between them and the first alternative in the second sentence of Article 423(1) of the NPK.

41 Consequently, the referring court states that IR will not be able to exercise his right to a new trial, which is conferred on him by EU law.

42 In fact, Bulgarian law provides for no legal remedies in respect of possible deficiencies in the judicial activity of the Supreme Court [of Cassation] where proceedings decided in absentia are reopened under Article 423 of the NPK, in so far as the Supreme Court [of Cassation] is the only instance which rules on that issue (contrasting view: judgments in Case C-158/21, paragraph 112 and in Case C-562/21, paragraphs 91 and 92).

43 Concerning the communication between the referring court and the Varhoven sad:

44 In its case-law, the Court of Justice of the European Union has developed a legal remedy to prevent infringements of rights guaranteed by EU law, that is to say,

WORKING DOCUMENT

that the executing State can require certain guarantees from the issuing State (judgment of 5 April 2016 in Joined Cases C-404/15 and C-695/15, concerning the conditions of detention in a prison, paragraph 103).

45 However, that case-law does not apply in the case in the main proceedings, since the nature of the reciprocal relationships between the judicial authorities in the Bulgarian legal system does not allow the referring court to require the Supreme Court [of Cassation] to guarantee that it will comply with EU law in its judicial activity.

46 Moreover, under national law, the referring court does not, in principle, have jurisdiction to examine whether IR has a right to have proceedings reopened. It is questionable whether it has that jurisdiction under Article 8 of Directive 2016/343, in so far as the Court has previously held that EU law does not require a national court hearing a case in the absence of the defendant, in circumstances where that person has a recognised right to a new trial, to define that right in its judicial decision (judgment of 8 June 2023, C-430/22, ECLI:EU:C:2023:458, operative part).

47 Under national law, that jurisdiction is the sole preserve of the Supreme Court [of Cassation], which will determine the facts of the case and apply the law as it sees fit on that basis only after IR, having been convicted in absentia, requests a new trial.

48 Therefore, the legal conclusions of the referring court, including those contained in the present request for a preliminary ruling, have no legal significance for the Supreme Court [of Cassation].

49 Concerning the scope of the question:

50 The referring court states that the question referred for a preliminary ruling does not concern the conformity with EU law of the case-law of the Supreme Court [of Cassation] on the reopening of proceedings decided in a defendant's absence. That case-law is mentioned only as an objective fact which the referring court must take into account when reaching its decision whether to hear and rule on the charges brought against IR or to refuse to do so.

51 What the question referred for a preliminary ruling concerns is the conformity with EU law of the future decision which the referring court will take as to whether or not to conduct the criminal proceedings against IR in his absence.

52 Since the referring court is itself currently examining the charges brought against IR, the obligation to conduct the criminal proceedings in such a way as to uphold his right to take part in person falls on that court directly. More specifically, it is subject to 'the absolute obligation […] to comply, within its legal system, with all provisions of EU law, including Directive 2016/343' (judgment in Case C-416/20, paragraph 55).

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53 In particular, compliance with Article 9 of the directive means that a defendant's right to be present in the proceedings must be guaranteed, even if a judicial decision in absentia has been delivered, except under the conditions for specific absence set out in Article 8(2) of the directive. That guarantee consists of the certainty that he or she will be granted a new trial, to be held in his or her presence, simply by submitting a request.

54 In the absence of that guarantee, the question arises whether the referring court must refuse to conduct the criminal proceedings and to decide on the merits of the case brought against IR.

55 Concerning the refusal to conduct criminal proceedings:

56 It is specifically in that context that the second question is referred for a preliminary ruling. It concerns the possibility and nature of a potential refusal on the part of the referring court to conduct the criminal proceedings against IR.

57 In the first place, it should be stated that the charges brought against IR concern participation in a criminal organisation with the objective of committing tax offences and aiding and abetting a specific tax offence. Those are two areas governed by EU law, which requires, in particular, that those criminal acts be punishable (Article 3 of Council Framework Decision 2008/841 of 24 October 2008 on the fight against organised crime, OJ L 300 of 11 November 2008, p. 42, and Article 7 of Directive 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198 of 28 July 2017, p. 29).

58 Therefore, the referring court's refusal to conduct the criminal proceedings against IR would be manifestly contrary to those legislative acts.

59 In the second place, it should be stated that that refusal could be justified only if the criminal proceedings would otherwise be conducted under conditions which would prevent a fair trial. More specifically, when Article 3 of Framework Decision 2008/841 and Article 7 of Directive 2017/1371 require that the criminal acts in question be punishable, they presuppose that penalties will be imposed in accordance with the procedures provided for by EU law and with respect for the fundamental rights of the persons concerned, so that a fair hearing (second paragraph of Article 47 of the Charter) is guaranteed and the right of defence and the defendant's right to be present in criminal proceedings are respected, those being rights expressly recognised by EU law in respect of which, in the event of infringement, sufficiently effective remedies must be available (first paragraph of Article 47 of the Charter).

60 Therefore, the referring court asks whether the certainty that IR's right to be present at the trial will not be respected, in so far as any request on his part for a new trial in his presence will be refused by the Supreme Court [of Cassation], can, as a consequence, lead to the referring court refusing to conduct the criminal proceedings against him and potentially reach a decision convicting him.

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61 There can be two aspects to that refusal.

62 One is whether the referring court must necessarily refrain from conducting the criminal proceedings in so far as the guarantee of a fair trial, reflected in IR's right to take part in the trial (which, in the event of a conviction in absentia, is specifically guaranteed by his right to a new trial, enshrined in Article 9 of the directive) outweighs the need for the offences he may have committed to be punishable (judgment of 17 January 2019, C-310/16, ECLI:EU:C:2019:30, paragraphs 33 and 34). Moreover, the Court has previously ruled that Article 8 of Directive 2016/343 does not require Member States to hold trials in absentia but merely allows them to do so, subject to certain conditions (judgment in Case C-420/20, paragraph 37).

63 The other is whether the referring court, on the contrary, has the option of assessing whether to conduct the criminal proceedings despite the certainty that IR's right to take part will be infringed, by assessing whether the need to prevent impunity outweighs his right to take part in person. If that is so, what are the criteria to be used for that assessment?

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