

Case Study: Case C-348/21 – HYA and Others

Right to be present at trial and right to fair trial

Facts

This Bulgarian criminal proceeding related to irregular entry; some of the accused persons are agents of the Bulgarian border police, while some of the witnesses are irregular migrants.

Pre-trial stage

At the investigative stage, the prosecutor examined several persons, whose illegal entry into Bulgarian territory was allegedly facilitated by the suspects. **As a precaution, some of the witnesses were also heard before a judge.**

Prosecution brought an action before the competent court for the criminal conviction of suspects.

Trial stage

At the judicial stage of the proceedings, the court **failed to summon the witnesses** as the latter either because it was not possible to determine their place of residence or because they had been removed from Bulgaria or had voluntarily left.

The prosecution **requested that the witnesses' statement recorded at the pre-trial stage be included at the judicial stage**, as the statements of the witnesses are crucial to the assessment of the guilt of the accused persons and that its judgment will depend, to a very large extent, on whether and, if so, to what extent, it can rely on the information contained in those statements.

Facts

Trial stage

At the judicial stage of the proceedings, the court **failed to summon the witnesses** as the latter either because it was not possible to determine their place of residence or because they had been removed from Bulgaria or had voluntarily left.

The prosecution **requested that the witnesses' statement recorded at the pre-trial stage be included at the judicial stage**, as the statements of the witnesses are crucial to the assessment of the guilt of the accused persons and that its judgment will depend, to a very large extent, on whether and, if so, to what extent, it can rely on the information contained in those statements.

Problem...

This practice would allow a national court to base its decision on the guilt or innocence of the person prosecuted on evidence obtained during a hearing **held during the pre-trial phase** of those proceedings, but **without the participation of the person prosecuted or his lawyer**.

Question



Is the application of national legislation which allows a national court, where it is not possible to examine a prosecution witness during the judicial stage of criminal proceedings, to base its decision on the guilt or innocence of the accused person on the testimony of that witness obtained during a hearing before a judge during the pre-trial stage of those proceedings, but without the participation of the accused person or their lawyer, compatible with Article 6(1) and Article 8(1) of Directive 2016/343, read in conjunction with the second paragraph of Article 47 and Article 48(2) of the Charter?

Burden of proof on the prosecution

Right of the accused person to be present at trial

Effective judicial remedy and fair trial

Presumption of innocence

Findings of the Court can be summarised in three points

- I. the irrelevance of art. 6(1) Directive 2016/343;
- II. the inclusion of the right to examine or have witnesses examined under art. 8 of the same Directive;
- III. the subjection of any limitation to such right to the conditions laid down in art. 52(1) of the Charter

Findings:

I. the irrelevance of art. 6(1) Directive 2016/343



this provision places the burden of proof on the prosecution, but *"does not prescribe the manner in which the prosecution must establish the guilt of an accused person or the manner in which that person must [...] be able to challenge the evidence adduced by the prosecution"*

Findings

II. the inclusion of the right to examine or have witnesses examined under art. 8 of the same Directive



In addition to the right to appear in person at hearings held in the context of the trial, does the right for the accused persons to be present, enshrined in art. 8(1), also includes a more active role, and in particular *"the right to examine or have examined witnesses"*?

- the Court decided to interpret the right to be present at trial with the level of protection of the the right to a fair trial rights guaranteed by art. 6 ECHR: it comes to the conclusion that the right to be present at trial is not limited to ensuring the mere presence of the accused person; the latter should *"be able to participate effectively in that trial and to exercise, to that end, the rights of the defence, which include the right to examine or have examined prosecution witnesses at that judicial stage"*.

Findings

III. the subjection of any limitation to such right to the conditions laid down in art. 52(1) of the Charter

Is the domestic provision in line with this interpretation?

"death, health grounds, a fear of giving evidence or the impossibility of that witness being located".



- the Court established that the statements of an absent witness may be admitted only if such a possibility is *"provided for by the relevant national legal framework"*; those statements *"can be taken into account only in limited circumstances, for legitimate reasons and with due regard for the fairness of the criminal proceedings as a whole"*.
- The statement of an absent witness must be considered decisive if they are *"of such significance that it is likely to be determinative of the outcome of the case"*.
- Based on ECtHR case *Schatschaschwili*, the Court rules that it is for the referring judge to evaluate *"whether there is a good reason warranting the non-appearance of the witness and whether, in so far as the testimony of the witness could constitute the sole or decisive basis for a possible conviction of the accused person, there are counterbalancing factors, including strong procedural safeguards, sufficient to compensate for the handicaps faced by that accused person and their lawyer"*.

Conclusion

- The Court concluded that:

art. 8(1) Directive 2016/343 must be interpreted as precluding the application of national legislation which allows the admissibility as evidence of prosecution witness statements gathered before the trial, without the defence being present, *"unless there is a good reason warranting the non-appearance of the witness at the judicial stage of the criminal proceedings, the testimony given by that witness does not constitute the sole or decisive basis for the conviction of the accused person, and there are sufficient counterbalancing factors to compensate for the handicaps faced by the accused person and their lawyer"*.

Lessons learned



- ❑ This judgement fills the lacuna in Directive 2016/343 on the right to cross-examine witnesses
- ❑ The Court of relies on the level of protection provided by the European Court of Human Rights and methodology on absent witnesses, while at the same time squeezing it into its own methodology based on Article 52(1) of the EU-Charter.
- ❑ This judgement provides clarity on the 'the meaning and scope' of some rights of the Charter (Article 52(3))



EIPA

European
Institute of
Public
Administration

