ONLY FAIR? THE RIGHT TO A FAIR TRIAL CHALLENGED IN CASE C-420/20 *HN (PROCÈS D'UN ACCUSÉ ÉLOIGNÉ DU TERRITOIRE)*

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The right to a fair trial forms an integral part of the rule of law in the EU and is enshrined in Article 47 of the EU Charter of Fundamental Rights. It provides that

> *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*

Further details, particularly on the right to be present as an essential element of the right to a fair trial, can be found in EU secondary legislation, such as Directive 2016/343.[1] *This came under scrutiny in the course of the criminal proceedings against HN.*[2]

1. IN A NUTSHELL – THE FACTS OF THE CASE

On 11 March 2020, HN, an Albanian citizen, was detained by the Bulgarian security control at Sofia airport for having presented forged documents of a falsified Greek identity in an attempt to board a plane to Bristol, the UK. While the criminal investigation procedure was initiated following his arrest, an administrative return decision was issued on 12 March 2020 together with an entry ban of five years. The latter was enforced on 16 June with the actual removal of HN from Bulgarian territory, however without prior communication to the criminal prosecutor.

The pre-trial hearing for HN's criminal case was determined only after his removal took place, scheduled for 23 July 2020. The prosecuting court learned of HN's deportation on 16 July 2020 – an entire month after HN was forced to leave the country. As his whereabouts were unknown, it was not possible to properly inform HN of the scheduling of his proceedings before the court. While HN was informed about the opening of such proceedings and the possibility of a trial *in absentia* before his departure, the exact details thereof were specified only afterwards.

In the absence of being properly informed of the concrete details of and his options in the trial, while at the same time being unable to attend the trial regardless, the legality of

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[1] 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 [2016] OJ L 65/1 (Directive 2016/343).

[2] Case C-420/20 *HN (Procès d'un accusé éloigné du territoire)* EU:C:2022:679. See also my Op-Ed on EU Law Live on this Judgment, Annegret Engel, 'The Court of Justice Strengthens the Rule of Law in Criminal Proceedings against *HN (Procès d'un accusé éloigné du territoire)*' (*EU Law Live*, 6 October 2022), <https://eulawlive.com/op-ed-the-court-of-justice-strengthens-the-rule-of-law-in-criminal-proceedings-against-hn-proces-dun-accuse-eloigne-du-territoire-by-annegret-engel/> accessed 27 January 2023.

HN's waiver of his rights was questioned. In addition, the entry ban was *per se* inhibiting a suspect's obligation to be present at the trial, as prescribed under Bulgarian law. The District Court in Sofia decided to stay the criminal proceedings against HN and make a preliminary reference to the European Court of Justice. The relevant issues shall be considered in the order presented in the court's judgment.

1.1. THE SCOPE OF THE RIGHT TO BE PRESENT AT THE TRIAL

In its judgment, the Court first considered the scope of the right to be present at the trial under EU law. According to Article 8(1) of Directive 2016/343, 'Member States *shall* ensure that suspects and accused persons have the right to be present at the trial.'[3] Further, subsection 2 of that provision 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'[4] under certain circumstances.

Ad verbum, the Court interpreted these provisions narrowly, finding that Member States are under an obligation to ensure the accused is able to exercise their right to be present, while exceptions to that right remain an option for Member States to allow for, if they wish. Consequently, Member States were under no requirement to provide for the possibility of a trial *in absentia*, the Court held.[5] In the absence of a Member State thus granting such exceptions to the right to be present at the trial, does this automatically turn the right into an obligation?

The court found no explicit answer in Article 8, which is silent as to whether an obligation to be present at the trial is to be allowed or rather prohibited. However, with regards to the overall purpose of the directive to lay down 'common minimum rules', as provided in Article 1, the Court noted that this rules out exhaustive harmonisation. As a result, the Court held that

> 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.[6]

In other words, Member States have discretion in legislating beyond the minimum standards prescribed in the Directive, in this case imposing an obligation on the accused to be present at the trial. EU law effectively does not preclude such intergovernmental flexibility here.

1.2. THE CONDITIONS FOR A TRIAL IN ABSENTIA

In the second part of its judgment, the Court continued with the analysis of Articles 8(1) and (2) of Directive 2016/343, however with regards to the exceptions provided under the right to be present at the trial, ie the conditions for a trial *in absentia*. According to Article 8(2), one of the following conditions must be fulfilled:

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[3] Emphasis added.
[4] Emphasis added.
[5] *HN* (n 2), para 37.
[6] ibid para 42.

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.

The Court interpreted these conditions narrowly in its judgment. In particular, and with regards to the information requirement, the person concerned must have been given a genuine opportunity to attend their trial and to have 'voluntarily and unequivocally' waived that right.[7] It follows that a mere informing of the person concerned who is otherwise prohibited from exercising their right to be present due to an entry ban imposed on them would not qualify as fulfilment of this condition. The Court found that this would otherwise 'deprive the conditions laid down in that provision of any practical effect'.[8]

It is clear from recitals 9 and 10 that the overall purpose of the Directive is to strengthen the right to a fair trial in criminal proceedings and, thus, build trust between Member States in each other's criminal justice systems with the aim to facilitate mutual recognition of decisions in criminal matters. Along this line, the Court recalled Articles 47 and 48 of the EU Charter of Fundamental Rights, which established the right to be present as an essential element of the right to a fair trial. It was therefore necessary for the Court to also consider the necessity of the entry ban imposed on the individual and the possibility for Member States to withdraw or suspend any such decision under EU law for the purpose of ensuring the right to a fair trial.

The procedural rules for Member States to return illegally residing third-country nationals are regulated in Directive 2008/115/EC.[9] Article 11 of that Directive, which lays down the conditions for an entry ban, provides in subsection 3 that Member States shall consider withdrawing or suspending such an entry ban under certain circumstances. The Court found that this option must be interpreted widely in order to allow the proper attainment of other rights. As a result, the Court held 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.[10]

The Court thus found the relevant criminal procedural laws to prevail over the administrative aspects of migration law in this case in order to guarantee a fair trial.

2. ANALYSIS – THE JUDGMENT IN CONTEXT

Varying standards of fundamental rights protection in criminal proceedings between Member States have caused numerous legal challenges in the past. As a result, harmonising

[7] *HN* (n 2), para 58.
[8] ibid para 59.
[9] 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 [2008] OJ L348/98.
[10] *HN* (n 2), para 66.

those standards across the national legal systems by raising them to a minimum level of protection has often been the chosen method of the EU legislator. Once harmonising legislation is in place, Member States can deviate from the prescribed standard only to the extent that they are left with a regulatory margin and – in case of minimum harmonisation – and only if they provide for higher standards of protection.[11]

2.1. HIGHER OR LOWER – WHICH STANDARD OF FUNDAMENTAL RIGHTS PROTECTION IN CRIMINAL PROCEEDINGS?

Indeed, in the *criminal proceedings against HN*, the Court ruled that minimum harmonisation was at stake.[12] While the relevant EU legislation sets the minimum standard of a right to be present at the trial, Bulgarian national laws impose an obligation on the accused to be present at their trial. The court found that such an obligation was neither required nor prohibited under EU law and consequently fell within the margin of appreciation of the national legislator. But does an obligation indeed constitute a higher standard of protection than a mere right to be present? Would such an obligation perhaps pose an unreasonable burden on the accused if there is no possibility for a waiver?

The Advocate General (AG) de la Tour argued in his opinion that such an obligation imposed on the accused does not constitute a higher level of protection, but, to the contrary, would be rather restrictive by depriving the accused of the possibility to waive their right to be present at the trial. Thus, the AG claimed, such an obligation would conversely lower the standard of protection provided for in the Directive.[13] De la Tour compared this with the right not to give testimony before a court under certain circumstances, in particular concerning cases in which suspects would incriminate themselves.[14] This reasoning is however flawed, as presence in a trial would not automatically lead to self-incrimination and therefore does not necessitate the existence of a waiver as an essential guarantor of fundamental rights protection in the same way as is the case with testimonies.

In addition, this argumentation could be misused by Member States as a loophole to avoid compliance with their own obligations imposed on them by EU law, especially if the requirements for a trial *in absentia* can be watered down by lowering the threshold for a possible waiver of rights to merely informing the accused. Indeed, maintaining a high threshold for the exceptions to apply might be costly and time consuming and it might place an additional administrative burden on the Member State to ensure that any suspect would have a genuine possibility to attend their trial. De la Tour's reasoning would have thus sent the wrong message to Member States, effectively lowering the standards for a fair trial and incentivising trials *in absentia*.

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[11] Article 53 of the EU Charter of Fundamental Rights provides that 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized […] by Union law and international law […] and by the Member States' constitutions'.

[12] See also point 48 of the preamble of Directive (EU) 2016/343 (n 1) which provides that 'Member States should be able to extend the rights laid down in this Directive in order to provide a higher level of protection'.

[13] Opinion of the Advocate General Jean Richard de la Tour in Case C-420/20 *HN (Procès d'un accusé éloigné du territoire)* EU:C:2022:157, para 116.

[14] Interestingly, while the AG seemed apprehensive about the compliance with the minimum requirements of an accused person's rights on this issue, he was rather unconcerned about the waiver of rights after merely informing the accused on the second issue.

It is therefore unsurprising that the Court did not follow the AG's opinion, but instead found that a Member State's obligation imposed on the accused to be present at their trial would in fact constitute a higher standard of protection and a strengthening of the rule of law and effectiveness of a fair trial, which therefore could not be invalidated. A higher standard of fundamental rights protection at national level would only be problematic if a conflict occurred with some equally important EU principle or legal norm. The *Melloni* case[15] serves as perfect illustration of this – a similar legal setting, yet with some key differences – to be distinguished from the case at hand.

2.2. COMPARING APPLES AND ORANGES – HN DISTINGUISHED FROM THE MELLONI-SAGA

Looking at the facts of both cases and the issues under scrutiny therein, most legal experts in the field would point out the undeniable resemblance of *HN* and *Melloni* . Both concern the right to a fair trial, and, particularly, the conditions for a trial *in absentia* under EU law. However, it seems they have received different appraisals concerning the protection of fundamental rights standards in criminal proceedings at their respective national level. Can this be merited based on differences in the facts? Or has the Court changed its approach over the course of time?

Mr Melloni, an Italian citizen was residing in Spain when a European Arrest Warrant was issued by the competent Italian authorities for his involvement in bankruptcy fraud. While his surrender was authorised by the Spanish authorities, Mr Melloni escaped during his release on bail; his trial in Italy was subsequently held *in absentia*. When finally being arrested again years thereafter, Mr Melloni contended the execution of his surrender based on the fact that under Italian procedural law a judgment *in absentia* cannot be appealed against; such a right to appeal was however protected under Spanish constitutional law.[16]

Thus, the higher standard of fundamental rights protection under Spanish law in *Melloni* had to be balanced against the lower level of protection under Italian procedural law, the latter of which nevertheless complied with the minimum standards required at EU level. Unlike the circumstances at stake in *HN*, the higher standards under Spanish law cannot be viewed in isolation as they impact on another Member State and on the proper function of intergovernmental cooperation in criminal matters. While Spain would certainly have discretion to impose higher standards of fundamental rights protection with regards to its own affairs[17] – just as in *HN* – the same cannot be expected from other Member States.

In addition, this feeds into the principle of primacy of EU law. Insisting on a higher standard of fundamental rights protection across Member States in *Melloni* would have also impeded the effectiveness and proper functioning of the European Arrest Warrant according

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[15] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107. See eg case discussion by Vanessa Franssen, 'Melloni as a Wake-up Call – Setting Limits to Higher National Standards of Fundamental Rights' Protection' (*European Law Blog*, 10 March 2014) <https://europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/> accessed 27 January 2023.

[16] Article 24(2) of the Spanish Constitution.

[17] cf Case C-617/10 *Åkerberg Fransson* EU:C:2013:105. See also discussion in Laurens Ankersmit 'Casting the net of fundamental rights protection: C-617/10 Åkerberg Fransson' (European Law Blog, 26 February 2013) <https://europeanlawblog.eu/2013/02/26/casting-the-net-of-fundamental-rights-protection-c-61710-akerberg-fransson/> accessed 27 January 2023.

to Framework Decision 2002/584/JHA.[18] For this to work, Member States cannot oblige each other to comply with the highest standards of protection, which would defeat the whole purpose of the European Arrest Warrant as a mechanism of mutual trust and recognition of the different national judiciaries.[19] Such mutual trust is based on the minimum requirements set at EU level, and therefore, Member States have to accept a potentially lower standard of protection in such intergovernmental cooperation.

Hence, the court's decision in *Melloni* has to be distinguished from the criminal proceedings against *HN*. While the former concerned a triangle situation in which the Spanish laws had to be evaluated, the latter merely affected the direct relationship between a national legal setting vis-à-vis EU norms. It is thus unsurprising that the higher level of protection was ruled down in *Melloni*, whereas it was upheld in *HN*. Crucially, a different result in *HN* would have required Member States to lower their fundamental rights standards in criminal proceedings without any direct conflict with other national or European legislation. Perhaps this would have led to another *Solange* moment in EU litigation,[20] with the effect of Member States refusing to apply EU legal standards as long as they provide for a lower level of protection, with the inevitable constitutional battle between national and European courts.[21]

3. CONCLUDING REMARKS

In conclusion, the *HN* judgment strengthens the rule of law and the right to be present as an essential element of a fair trial. An obligation to be present in criminal proceedings constitutes a higher standard of fundamental rights protection, which is within the discretion of the national legislator, where EU law provides for minimum harmonisation only. A Member State can go beyond the required minimum standards if no other conflict occurs, with EU legislation otherwise taking precedence. In addition, a trial *in absentia* has to meet certain minimum thresholds in order to avoid misuse at national level and circumvention through non-essential administrative provisions, such as migration law, as was the case here.

The judgment also provides guidance for subsequent cases already pending before the European courts. For example, in the criminal proceedings against *VB*,[22] the Bulgarian criminal court requested another preliminary ruling in relation to Directive 2016/343 and certain aspects of the right to appeal against a trial *in absentia*. As such, *HN* might well have laid the foundations and provided a direction for a series of judgments to come in this area.

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[18] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24.

[19] See also Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 (TEU), art 4(2). A discussion on these issues can be found in Costanza di Francesco Maesa, 'Effectiveness and Primacy of EU Law v. Higher National Protection of Fundamental Rights and National Identity' (2018) 1 The European Criminal Law Associations' Forum.

[20] Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)* EU:C:1970:114.

[21] The German Federal Constitutional Court, with reference to the *Åkerberg Fransson* judgment (n 17), already raised concerns of *ultra vires* action on the part of the European courts, 1 BvR 1215/07, para 91.

[22] Case C-468/22 *VB*, pending.

While it is too early to call it a landmark judgment, *HN*'s significance for the strengthening of the rule of law in criminal proceedings and the conditions for a fair trial in the EU are already undeniable.

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