THE EDITH CASE

Themis Final

Written report

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THEMIS FINAL: WRITTEN REPORT

Summary of the facts:

In 2003, an Austrian citizen was arrested in Dublin on the allegation of rape. In 2005, he was indicted by the Prosecutor's office. Nevertheless, in 2008, the victim failed to appear while the applicant pleaded non guilty. The victim failed to appear on several more occasions until 2005 when a hearing was held and the applicant convicted and sentenced to 2 years imprisonment and expulsion from Ireland. Later on, his transfer to Austria was decided.

I- Issues raised under the umbrella of art. 6 ECHR

Several problematic aspects of our case's proceedings regarding the right to a fair trial – and its interpretation by the Court – might possibly be raised by the respondent's lawyer. We have listed seven of them, but do not panic, some might not get very far.

In limine litis. On the basis of article 6§3 a) and e), any person convicted has the **right to be assisted by an interpreter**, if he neither understands nor speaks the language employed during the proceedings. In this particular case, the respondent is Austrian; the felony occurred in Dublin, Ireland, and therefore, the whole procedure was based on Irish criminal law in the English language. Thus, one should have made sure that the accused party was able to understand the charges against him. And if not, it should have been checked that he had the opportunity to ask for and be provided with an Austrian interpreter.

During the pre-trial phase. Several requirements of article 6 overlap with each other. At the core of the general right to a fair trial (art. 6§1) lies the right to prepare one's defence (art. 6§3 b)), which is correlated by the **right to have legal assistance** (art. 6§3c)), specifically in criminal matters. While article 6§3 b) regards the preparation of the trial, article 6§3 c) gives the accused a more general right to legal assistance. These rights apply at every stage of the proceedings (Imbrioscia v. Switzerland).
In concreto, an investigating judge was referred to for the investigation into Edith's rape. He questioned the respondent on his version of the facts without the presence of a lawyer. Yet, it remains to be clarified whether the respondent was effectively informed of his right to get legal assistance, whether he exercised it throughout the whole proceedings, and then whether

he consciously and knowingly decided not to exercise this right during the hearing before the investigating judge. If not, the issue of his right to have legal assistance under article 6 of the ECHR should be raised.

Furthermore, article 6§1 also tackles the **right to remain silent and not to incriminate oneself**, as part of the equality of arms. This right starts to apply as soon as the suspect is questioned by the police (John Murray v. the UK). In order to examine whether a procedure has violated the substance of this right, Strasbourg judges look closely at the following elements: the nature and degree of coercion, the existing of procedural safeguards, and the use of the piece of evidence obtained (Jalloh v/ Germany, 11 july 2006). As a consequence, the ECHR actively takes into account the early access to a lawyer as part of the procedural safeguards required when an accused gives a statement that might be used against him (Funke v. France).
In our case, the applicant admitted having consensual sexual intercourse during which he got injured on his right arm and leg, in the absence of any lawyer. Not knowing whether this element had decisive weight in the final verdict, it can be presented as a violation of the right not to contribute to incriminating oneself.

During the trial. Before someone is convicted, **all evidence must be produced in his presence, which means during a public hearing, and in an adversarial way** (art. 6§1). Furthermore, in criminal proceedings, **the right to examine or have examined witnesses** is fundamental and must be given to the defence (art. 6§3 d), Hummer v. Germany, Luca v. Italy). We will study later on whether or not in our case this right was violated (cf. part III)
Besides, article 6§2 of the ECHR ensures that **"everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."** This cardinal principle of criminal law is infringed where the burden of the proof is reversed from the prosecution to the defence. In its case law on sexual offences, the ECHR requires that conviction should not rest only on a single piece of evidence, and looks for "impressive and unambiguous body of evidence in support of the applicant's version of events " (Maslova and Nalbandov v. Russia, 24 January 2008).
In our particular case, the respondent pleaded non guilty; the forensic report was not a decisive piece of evidence, and we do not have further elements on other pieces of evidence used for the verdict. Indeed, the forensic report did not notice any physical injury on the victim, and therefore did not corroborate her version of the facts. Yet, the doctor did notice

abrasions on the accused, whose origin remains undetermined with the elements at hand. Therefore, it remains to be clarified if there has not been a reversal of the burden of the proof, insofar as there were few pieces of evidence in favour of the respondent's guilt, and given Edith's failure to reiterate her accusal before a judge.

Overall. The ECHR ensures the **right to be judged in a reasonable time frame** (art. 6§1). The aim of this procedural requirement of the right to a fair trial is to ensure "that accused persons do not have to remain under a charge for too long". The "reasonable time" may begin to run from the time of the arrest (Wemhoff v/ Germany); it undoubtedly covers the whole of the proceedings at hand (König V/ Germany), and includes appeal proceedings (Delcourt v/ Belgium). As for the elements that the ECHR takes into account in order to determine whether the length of proceedings was reasonable are: the circumstances and complexity of the case (Boddaert v/ Belgium), what is at stake for the applicant, his own conduct, and the conduct of the relevant administrative and judicial authorities (König v/ Germany). An overview of the ECHR case law on this matter reveals that it tends to consider that a case is complex when there is a high number of charges decided by Prosecution, when many people are involved as witnesses, defendants, or victims, and when the case has an international dimension (Neumeister v/ Austria). For instance, a seven years and four months time was not considered as excessive in the Neumeister case insofar as it concerned complicated and international transactions in various countries, it required the involvement of Interpol, the implementation of treaties on mutual legal assistance, and twenty two individuals were concerned.

In our particular case, the accused was arrested in 2003, and definitely tried in 2009, which means a length of six years. Following the ECHR's case law, the circumstances do not appear as complex, or requiring time-consuming investigations. Indeed, the prosecution only involved one victim (hopefully), and the facts occurred in a unique time frame. The accused did not show any intention to delay the proceedings. However, the two versions of Edith and the respondent opposed each other and international investigations must have been led, insofar as the victim was living in Belgium, the author was Austrian, and the rape occurred in Dublin. Yet, from the elements we have, nothing was done by the authorities between 2005 and 2008, which means that the respondent remained under a charge for three more years after the intervention of the investigating judge. If the authorities were diligent to summon Edith to the public hearings, they did not do everything a fair minded observer would have

expected them to do (see above). Therefore, the right to be judged in a reasonable time frame might have been violated.

II- Sexual crime

The sexual nature of the crime. Sexual crimes are a delicate question that every national law has to deal with. Indeed, the boundary between **the intimate life**, preserved by the right to privacy, guaranteed by article 8 of the ECHR, and public order which requires to give a penal response to any breach to physical or psychological integrity. Therefore, law must regulate sexual offenses and in this way, enter in the private sphere.

The biggest issue regarding sexual crimes is the question of will and evidence. Indeed, to be qualified as an offense, the sexual act must have occurred without **the consent** of the victim. Most of the time, it is kind of a "he said, she said" debate, with the accused claiming that the victim had given consent while the victim says that the accused acted with violence, constraint, threat or surprise. And this is precisely the case between Edith and her alleged rapist where there are no other witnesses of the facts. Even if some biological removals can be done on the victim and the alleged offender, those scientific proofs are often not sufficient and represent nothing compared to the perpetrator's confession. As we can see in our case, the forensic report did not prove any physical injury, though a sexual intercourse, whether consented or not, has undoubtedly occurred. This is why the statements of the parties are crucial in sexual offenses and must be renewed at every steps of the trial, especially during the oral hearings.

Besides, special attention is paid to **preserve the interests and the fragility of the victim** of sexual abuses before the accused. For instance, in some States, like in the United Kingdom or in France, where the acts were committed in our case, rape victims can, upon request, testify via visio-conference or with the assistance of an intermediary if they feel difficulties to express themselves before Court.

ECHR's approach to sexual crimes. In a view to respect for the private life of the plaintiff, the Court accepts that particular measures can be taken in order to protect her interests, on the sole condition that the defence could effectively exercise its rights (e.g. D. v. Finland). The directive of 25th of October of 2012 of the European Parliament and the Council (2012/29/EU) establishes minimum standards on the rights, support and protection of victims

of crime, replacing the Council Framework Decision 2001/220/JHA. For instance, this Community act provides that interviews of victims should be carried out in premises designed or adapted, by or through professionals trained and as far as possible, by the same persons. In particular, interviews of sexual violence should be conducted by a person of the same sex as the victim, upon request of the victim. It also recommends reducing as far as possible the number of interviews of victims. Measures can also be taken in order to avoid visual contact between victims and offenders including during the giving of evidence.

Thus, the ECHR concludes to the non-violation of article 6§3 d) even though the minor victim could not be cross-examined by the defence lawyers during the trial and appeal proceedings. In the S.N. versus Sweden case law of 2nd of October of 2002, the Court explained that "*Having regard to the special features of criminal proceedings concerning sexual facts, this provision cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel, through cross-examination or by other means."* At the same time, the Court decided that a simple video recording a witness's testimony was not sufficient regarding to the protection of the rights of the defence in the decision D. v. Finland, of 6th of November of 2009. Besides, the Court decided that the accused must be able to challenge the credibility and statements as well as observe the behaviour of the witnesses under questioning (Bocos-Cuesta v.the Netherlands)
These different case laws teach us that the ECHR adopts a case-to-case analysis, given the delicate aspect of the question (see above) and the weight of subjective testimonies and statements.
In our case, several elements make one think that the victim had practical issue impeding her to come more than personal and psychological ones, even though we cannot infer from the simple information given. Therefore, the proportionality principle must be used to strike a balance between Edith's interests, and the alleged sexual offender's right to a fair trial. This leads us to focus on his special right to examine and have examined witnesses.

III- Right to examine and have examined witnesses, art. 6§3 d) with art. 6§1

Principles. In a criminal trial, article 6§1 usually overlaps with the defence rights under article 6§3, which states the right for the accused to examine or have witnesses examined. In its decision Al-Khawaja and Tahery v. the United Kingdom, the ECHR presented the two

necessary conditions in the application of the above mentioned general principles. On the one hand, the absence of a witness at trial must be motivated by a legitimate reason. On the other hand, when a testimony is considered essential for the accusation and in the mean time has not been debated previously, the defence should have the opportunity to have it examine on trial.

Indeed, the defence should have the opportunity to challenge and question a witness testifying against him. When the evidence of the witness is decisive, it is strongly advised that his testimony should be debated at the public hearing and corroborated by other pieces of evidence (Asch v. Austria, 26 April 1991). Yet, the ECHR has decided that there is no automatic violation of article 6§3 when a person who did testify in the pre-trial phase refused to give evidence in court (S.N. v. Sweden, 2 July 2002). In that case, which was a sexual offence, the testimony of the victim was shown on video and audiotape, and the defence knew the identity of the witness. Besides, to ensure the right to examine witnesses, the authorities must make a reasonable effort to secure the witness's presence at the trial (Karpento v. Russia, and Bonev v. Bulgaria). These efforts consist in a best-efforts obligations. It means that if diligences have been made and the government was diligent in trying to reach out for the missing witness, but in vain, it is not necessary to discontinue the prosecution. Besides, there can be exceptions, such as when the victim is facing too strong an ordeal and cannot withstand examination, which happens frequently in sexual offences cases. Last but not least, in ECHR decisions, victims can be considered as witnesses (Vladimir Romanov v. Russia).

Application to the facts. In our case, Edith's testimony was indeed decisive, and was never debated at any public hearing, due to her repeated absence. The elements that we possess while we study the case do not allow us to say that she was not responsible for her repeated failures to attend the adjourned public hearings. Indeed, she once asked herself for an adjournment. Distance was the motive she invoked to justify failure. She did not sustain that she was facing too strong an ordeal. Therefore, the Irish government must have demonstrated enough efforts to secure Edith's presence at the trial.

What we know for sure is that she was regularly summoned according to Irish criminal procedure standards; the police was asked to search for her whereabouts and address, legal international means were even used. Yet, neither was she fined for her non-attendance, nor was she reached by the telephone. These elements are basic researches and legal requirements

that should have been completed, notwithstanding the other diligences accomplished. Moreover, it has to be verified if the possibility to show the video or audiotape of her statement and her identification of the accused during the pre-trial phase was considered. If not, the respondent can legitimately oppose that his right to challenge Edith's decisive testimony was violated.

IV- The execution of the applicant's prison sentence and article 6§1

Facts. The applicant was convicted and sentenced to two years imprisonment, yet he was transfered to his birthplace country to execute his condemnation according to the Strasbourg Convention on the Transfer of Sentenced persons of 1983. The accused alleged the fact that the transferment would mean added time to his imprisonment, due to the fact that the probatory systems are not the same in both countries and that his release would be achieved later in Austria.

Issue. Then, the issue debated here is to examine whether or not the execution of a criminal sentence might come within the scope of article 6§1: « in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing » i.e. to determine how extensive the conception of criminal procedure by the ECHR is.

Opposite case laws. There seems to be a debate in ECHR case law regarding what is to considered as the execution of a sentence, and as to whether or not it falls within the scope of article 6§1. Indeed, opposing case law might be found.

On the one hand, in Assandize v Geogia 8 April 2004 the Court decided that execution of a judgment given by any Court must be regarded as integral part of the trial for the purposes of article 6. Otherwise the guarantees afforded by article 6 would be illusory. The application of this jurisprudence to our case would lead us to assume that article 6 applies to the circumstances of the execution of the applicant's prison sentence. The right to a fair trial should be respected and the accused could contest its transfer to Austria under the requirements of article 6. Article 6§1 would apply to the whole criminal procedure and also to the execution of the sentence. Otherwise an uncertainty in the definitiveness of judicial decisions could arise.

On the other hand, the Strasbourg Court has determined that article 6§1 applies to the whole criminal procedure from the moment when « the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence » (Deweer v Belgium) to the effective pronunciation of the decision, might it be a release or a conviction (König v. Germany). Following this second case law, the proceedings concerning the execution of sentences, taking part after the definitive decision, should logically be excluded from the scope of the application of article 6§1.

Another case law was issued on the specific problem of transferment (Szabo v/ Sweden case). The Court declared Szabo's complaint was not admissible and decided to adjourn the examination of whether the applicant's de facto longer period of imprisonment was a violation of article 6 ECHR. In this case, Strasbourg judges followed the position they adopted in Deweer v/ Belgium, and considered that transfer proceedings would not fall within the scope of the ECHR.

As for the reasons, the transfer proceeding, as defined by the Strasbourg Convention of 1983 (article 1), is part of the post judicial decision phase insofar as it includes any «sentences i.e punishment or measure involving deprivation of liberty ordered by a court for a limited or unlimited period of time on account of a criminal offence ». Its aim is that foreigners who are deprived of their liberty because they committed a criminal offence should be given the opportunity to serve their sentences within their own society.

Since the Szabo case, part of the doctrine assumes that the ECHR looks at the existence of a casual connection between the sentence and the effective punishment served in order to determine whether the transfer procedure of a prisoner falls within the scope of article 6§1[1].

If we apply this reasoning to our case, there is a strong casual link between the sentence pronounced in Ireland which encompassed both an imprisonment sentence and the expulsion from Ireland and the sentence that would be served in Austria. Thus, the decision of the Irish authorities to transfer the applicant to Austria was legitimately founded. It can be seen as a direct consequence of the expulsion ordered by the Irish Court which would have applied just after the end of the sentence, had the respondent not been transferred to Austria.

Therefore article 6§1 should not apply in that particular case.

[1] Release from Prison: European Policy and Practice, Nicola Padfield,Dirk Van Zyl Smit,Frieder Dünkel

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