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I – Issues raised in this scenario under the umbrella of Article 6 of the Convention

The Article 6 of the European Convention on Human Rights and Fundamental Freedoms (“The Convention” or ECHR) is at the heart of several procedural rights that put together are the framework of the right to a fair trial. In the present case several issues arise when put under the strict scrutiny of the Article 6 of the Convention.

The main issues are the ones the applicant has raised himself in front of the European Court of Human Rights (“The Court” or ECtHR). He argues that he wasn’t able to cross-examine the main witness on which testimony the decision relied decisively to convict him. In his opinion, it constitutes a violation of Article 6 § 3 (d) of the Convention, which states that “Everyone charged with a criminal offence has the following minimum rights: [...] to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

He also puts forth that his right to have a fair trial was violated in that his transfer to another country had a *de facto* consequence of lengthening his sentence without him being able to bring this question to the attention of a tribunal, which would have deprived him of his right to access a tribunal.

However, some questions can be asked concerning issues that were not raised by the applicant. For instance, in the criminal proceedings that led to his conviction, he was questioned by an investigative judge in absence of a defence lawyer. Despite, the fact that in *Salduz v. Turkey*, no. 36391/02, 27 November 2008, §55, and in the subsequent cases, the Court has stated that:

*“The Court finds that in order for the right to a fair trial to remain sufficiently “practical and effective” [...], Article 6 § 1 requires that, as a rule, **access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.**”*

Accordingly, the issue of the violation of Article 6 § 1 could have been raised, since no compelling reason to restrict this right was discussed. Yet, it was during this part of the questioning that he admitted to having sexual intercourse with the victim.

Furthermore, it could also be argued that the right to be judged in a reasonable time, which also arise from Article 6 § 1 was violated. Indeed, this reasonableness must be assessed in the light of the criteria established by the Court’s case-law: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (*Comingersoll S.A. v. Portugal*, *Frydlender v. France*, § 43; *Surmeli v. Germany*, § 128).

In the present case, there is a case to be made that none of the criteria was fulfilled. The case was not complex, it wasn't the applicant's conduct that delayed it, and the stakes for the applicant were high since he was under the risk of severe prison sentences.

Those two points won't be discussed further in the present paper, in which we will mainly focus on the two questions that were directly raised by the applicant in front of the Strasbourg's Court. However, before discussing the heart of the subject, it appears necessary to approach the specifics of the Court in matters of sexual offences. Indeed the Court has a particular consideration for victims of sexual abuse which plays an important role in the balance between the rights of the parties at the trial.

II – Concerning the relevance of the fact that the crime was of a sexual nature and the Strasbourg Court's approach to sexual crimes

A/ The European Court of Human Rights' approach to sexual crimes on matters of victims and testimony

Traditionally in courts of law, there is a balance to be found between the interest of the defendant to be presumed innocent, to have his right to privacy protected and to be preserved from degrading treatment, and the public interest in the conviction and punishment of criminals.

However, in recent decades, a new interest has emerged in cases before the ECtHR: the interest of victims and witnesses to be protected against cruel and inhuman treatment and from unwarranted and unnecessary intrusions into their private lives.

In the decision *M.C. v. Bulgaria*, no. 39272/98, 4 December 2003, in which the Court marks the emergence of a definition of rape, and sexual crimes in general, the Court focused on a lack of consent as the central defining element, but also finally recognized that sexual abuse was both a violation of personal integrity and, at the same time, the right to a respect for private life.

Accordingly, the Court has been reinforcing its protection of the rights of victims to be protected not only by criminal proceedings, but also from the possibly traumatic impact of the criminal proceedings themselves, from hearings, testimonies, cross-examination and other procedural tools that put a heavy burden on them.

The Court's particular interest in those rights starts with *Doorson v. The Netherlands*, no 20524/92, 26 March 1996, §70, in which it states that:

“Contracting States should organise their criminal proceedings in such a way that those

interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.”

Furthermore, the case-law of the Strasbourg Court in this matter reveals that the protection of victims and witnesses from degrading treatment and intrusion into their private lives is particularly important in cases involving sexual violence.

As so, in *S.N. v. Sweden*, no. 34209/96, 2 July 2002, § 47, and in several subsequent decisions, the Court states that:

“The Court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.”

Also, the particular importance of the sexual nature of the offence in the issue of the balance to be achieved between the right of the defendant to a fair trial, and the right of the victim to be protected in the sense of articles 3 and 8 of the Convention, has been made clear in *Aigner v. Austria*, no 28328/03, 10 May 2012, § 39:

“Given the Court’s particular regard to the special features of criminal proceedings concerning sexual offences, and the need to take specific measures for the purpose of protecting the victim, the Court is satisfied that good reasons for the non-attendance of Mrs K. of the trial against the applicant existed.”

B/ Relevance of these considerations in a cross-examination or testimony

The main element of this “particular regard to the special features of criminal proceedings concerning sexual offences” is considered in the case of the cross-examination of witnesses or victims. For it is in these situations that the “*intimate nature of the subject matter*” is at the greatest risk of “*adversely [affecting] the [victim]’s personal integrity*”, requiring from the authorities

conducting the criminal proceedings (and specifically the presiding judge) “*a correspondingly sensitive approach*”¹.

Accordingly, the Court takes this question to a very practical level, considering whether or not a testimony or cross examination was absolutely necessary to establish the guilt of a defendant in a trial. In particular, the Court protects the rights of the defendant to cross-examine when the accusation relies mostly on the testimony of a witness or victim, with few other elements² (see Question III below).

However, even in such cases, the Strasbourg Court analyzes whether there were any practical or technical means to permit a cross-examination that would protect the rights of both the defendant and the victim or witness. Seeking for instance whether the defendant’s counsel was present during the interview, or if he was able to follow it with the help of technical devices in an adjacent room³.

Consequently, it appears that the Court considers that criminal proceedings in matters of sexual crimes must try to best protect the right to private life and personal integrity of the victim or witness, in particular during their testimonies or cross-examination, but that this protection should not hamper the defendant’s right to have a fair trial, above all in situations where the testimony or cross examination is of utmost importance for the defense.

The sexual aspect of this procedure forces us to take the necessary protection of the alleged victim into account to assert if there has been a violation of the equality of arms and of the adversarial principle in this case. The fact that Edith could not testify - despite the efforts of the authorities to bring her to a trial, and despite her incapacity to justify her refusal to appear in court - cannot be, in itself, sufficient to establish a violation of article 6§3 d) and therefore of the article 6§1.

III. Concerning a possible violation of article 6§3 (d) in conjunction with article 6§1

A/ General principles

The ECtHR has repeatedly held that the admissibility of evidence is a matter for regulation by national law and the national courts. However the way in which the evidence is treated in civil or criminal proceedings may have an impact on whether or not a trial was fair, according to article 6 of the ECHR (*Gäfgen v. Germany*, 22978/05, § 162).

¹ *Y. v. Slovenia* no. 41107/10, 28 May 2015, §114.

² In particular see: *Zdravko Petrov v. Bulgaria* no. 20024/04, 23 June 2011, §34:

³ *S. N. v. Sweeden*, quoted above.

Article 6§1 guarantees the right to a fair hearing, which incorporates the principle of equality of arms and the right to adversarial proceedings. In particular, the ECtHR stated that the right to a fair hearing implies the opportunity for all the parties to a criminal or civil trial to have knowledge of and to comment on all evidence adduced or observations filed during proceedings (*Ruiz-Mateos v. Spain*, 23 June 1993, § 63).

Article 6§3 (d) affirms the right, for everyone charged with a criminal offense, “*to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him*”. It provides that the accused has the right to call and examine any witness whose testimony he considers relevant to his case and the right to be able to examine any witness who is called or any testimony which is used by the prosecutor (*Lucà v. Italy*, no. 33354/96, § 39; *Solakov v. “the former Yugoslav Republic of Macedonia”*, no. 47023/99, § 57). The ECtHR stated that Article 6§3 (d) has thus to be considered as a specific aspect of the right to a fair hearing set forth in Article 6§1.

The ECtHR underlined that its primary concern under Article 6§1 is to “*evaluate the overall fairness of the criminal proceedings*” (*Taxquet v. Belgium*, 926/05, 16 November 2010, § 84). In making this assessment, the Court emphasizes that the rights of the defense must be balanced with the interests of the public and the victims that the crime is properly prosecuted as well as the rights of witnesses (*Gäfgen v. Germany*, mentioned above, § 175; *Doorson v. the Netherlands*, mentioned above § 70, *Al-Khawaja and Tahery v. the UK*, 26766/05 and 22228/06, 15 December 2011, § 18).

In particular, exceptions to Article 6§3 (d) are possible as long as they do not infringe upon the rights of the defense so much as to deprive the accused of an adequate and proper opportunity to challenge the evidence produced against him. The ECtHR drew two requirements from this general principle.

Firstly, there must be a good reason for the non-attendance of any witness. Secondly, when a conviction is based “*solely or to a decisive degree*” on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, there must be sufficient “*counterbalancing factors (...) that permit a fair and proper assessment of the reliability of that evidence to take place*” (the so-called “sole or decisive rule”; *Al-Khawaja and Tahery v. the UK*, quoted above, § 119). This means that specific measures were put in place, during investigations or during the trial, to make sure that the testimony against the accused is sufficiently reliable, even if he was not able to question the witness himself.

B. Application of these principles to the present case

1. First requirement: a reason for the absence of the witness

Concerning the first requirement, we need to examine whether or not there was a good reason for Edith, the witness, not to attend the trial.

1.1. the rights of the witness

Although she was properly summoned by the prosecution, Edith failed to appear at the first hearing. Edith stated that she was living abroad and an adjournment of the trial was pronounced. Edith then failed a second time to attend the hearing. No explanations were given by the witness as to the reasons why she would not attend the trial. The authorities tried to summon her again, but failed to establish her address. They turned in vain to international legal assistance. One year after the first hearing, and after several adjournments, the trial was held in her absence.

In this case, Edith never asked for any specific measures to be taken in order to protect her rights as a victim. While the ECtHR recognizes that criminal proceedings concerning sexual offences can be reorganised in order to limit their impact on the victims (see question 2 above), such measures, particularly the non-attendance of a witness to give evidence at the trial, are not automatically applicable to all criminal proceedings concerning sexual offences. Therefore there must be relevant reasons adduced by the domestic authorities for applying such measures (*P.S. v. Germany*, no. 33900/96, § 28, 20 December 2001, *Lučić v. Croatia*, 5699/11, § 75, 27 February 2014). In particular, as regards the possibility of excusing a witness from testifying on grounds of fear, all available alternatives, such as witness anonymity and other special measures, must be considered first (*Al-Khawaja and Tahery*, cited above, § 125).

Edith never informed the court that she was frightened of the applicant or that she was unwilling to testify for some other reason. As a consequence, the rights of the victim cannot be considered as a good reason in this case to justify the fact that she did not attend the trial.

1. 2. the impossibility to secure the witness' presence at the court

Article 6§3 (d) implies that domestic authorities have to take positive action so as to enable the accused to examine or have examined witnesses against him (*Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 78). In particular that they should actively search for the witnesses, when they cannot be found (*Rachdad v. France*, no. 71846/01, § 24, 13 November 2003).

In the present case, it cannot be argued that the absence of the witness during the trial is imputable to the Irish authorities. Indeed, the authorities have made all possible efforts to reach Edith and thus secure her attendance at the trial. The prosecution properly summoned Edith a first time, and then

called for international legal assistance. In a similar case, the ECtHR stated that the fact that the courts never fined Edith for not appearing at the hearings and that they never tried to contact her by phone was not relevant, as there is no evidence that these measures would actually have been effective in practice (*Lučić v. Croatia*, quoted above, § 79, *Fafrowicz v. Poland*, 43609/07, 17 April 2012).

As a conclusion, it can be considered that there has been a valid reason for the Irish courts to pursue with the trial even in the absence of the witness.

2. Second requirement: the presence of counterbalancing factors

Concerning the second requirement, we need to assess whether there had been sufficient *counterbalancing factors* during the proceedings to guarantee the rights of the defence even in the absence of the witness.

The first question we need to answer is whether or not the defendant's conviction was based solely or to a decisive degree on the depositions made by the victim.

In our case, Edith, the victim, was the only witness called by the prosecution. The defendant admitted to having had sexual intercourse with Edith, but he argued that it had been consensual. His declarations were moreover obtained in the absence of a defence lawyer. Finally, the prosecution produced medical evidence describing abrasions on the defendant's right upper arm and elbow and his right knee. No injuries were found on the body or genitals of Edith.

In this context, the accusation rests almost solely on the declarations of Edith. Without her testimony, there would have been no case for the prosecution to go trial.

Accordingly, it is necessary to examine whether there were adequate counterbalancing factors and safeguards in place during the proceedings and trial to ensure that the disadvantage caused to the defendant by admitting the written record of the witness's oral statement did not restrict his defence rights to an extent incompatible with the requirements of Article 6§3 (d) of the Convention.

Such counterbalancing factors include notably, but not solely, the possibility to cross-examine the witness at the investigation stage (*Gani v. Spain*, 61800/08, 19 February 2013, § 46).

In our case, Edith was not cross-examined by the defendant or his counsel, even though she did appear before the investigating judge.

Accordingly, the defendant was given an opportunity to confront the victim at no stage of the proceedings. In the absence of any other corroborative evidence in the case, the testimony of Edith cannot be considered as reliable enough to justify a conviction.

Therefore, we conclude that there has been a violation of Article 6§1 and 6§3 (d) of the ECHR.

IV- Concerning the applicability of article 6§1 to the circumstances of the execution of the applicant's prison sentence

The Convention for the Transfer of Sentenced Persons, signed in Strasbourg on 21st March 1983 and entered into force on 1st July 1985 regulates the possibility of transferring a foreigner convicted of a criminal offence to serve his sentence in his state of origin for rehabilitation and humanitarian purposes.

Both the sentencing State and the administering State (from which the person comes) must agree, as must the sentenced person himself. A custodial sentence cannot be converted into a fine and any period of detention already served by the sentenced person must be taken into account. Moreover, the transfer *“shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State may provide for the offence or offences committed⁴.”*

In this case, the applicant complains that his serving his sentence in Austria would result in a de facto ten month increase of his penalty, most probably because of the different rules governing conditional release in the two countries.

Such a case has already been judged by the Strasbourg Court. In *Szabo v. Sweden* (28578/03, 27 June 2006), a Hungarian national convicted in Sweden was sent back to Hungary to serve his prison sentence. He complained that the conditions of his detention and the rules applicable to the possibility of his benefitting from early release on parole had been changed and made his sentence considerably harsher, without his being able to defend himself before a court. The ECtHR, however, ruled that article 6§1 was not applicable to that case because:

“the Convention does not confer the right to such release or the right to serve a prison sentence in accordance with a particular regime. Nor does it require that parole decisions be taken by a court. Furthermore, questions of conditional release relate to the manner of implementation of a prison sentence. This conclusion is supported by several provisions of the Transfer Convention and its Additional Protocol, which indicate that a transfer is seen as a measure of enforcement of a sentence. Under the Court's case-law, proceedings concerning the execution of a sentence are not covered

⁴Article 11, 1) d) of the Convention for the Transfer of Sentenced Persons.

by Article 6§1 of the Convention.”

And because “... the additional period of imprisonment resulting from the applicant’s transfer is not a consequence of his having received a penalty in fresh criminal or disciplinary proceedings”

And “Lastly, the Court notes that neither the Transfer Convention nor its Additional Protocol stipulates that proceedings relating to a transfer should meet the requirements of Article 6 of the Convention.

But in the *Buijen v. Germany* case (27804/05, 1 April 2010), a Dutch national confessed to having committed an offence in Germany after the prosecutor told him he could be transferred to serve his time in the Netherlands, where the conditions for early release are more lenient. After being sentenced, he was not given the possibility of being transferred and had to carry out his sentence in Germany. The court decided that article 6 §1 was applicable in that case because “42... *the transfer proceedings have to be regarded as an integral part of the criminal proceedings in so far as they directly relate to the assurance which was given by the Public Prosecutor during the criminal proceedings*”. The Court furthermore stated that article 6§1 had been breached because the applicant had been given no possibility to have his transfer request examined by a court, therefore the essence of his right to access a court had been overlooked.

The confrontation of these two decisions raises an important issue. If it is clear that article 6§1 could not be considered as applicable here in the sense of *Enea v. Italy* (74912/01, 17 September 2009) in which the Court stated that decisions concerning the conditions of detention must respect the prescriptions of article 6§1 when they concern “civil rights and obligations”, one fails to see how a decision that prolongs a criminal penalty could escape the scope of the criminal trial and not be subjected to the prescriptions of article 6§1. Clearly in our case, a de facto ten-month increase in the duration of the prison term cannot be analyzed as a breach of a “civil right or obligation” but must be seen as a criminal sentence. Of course it does not rely on new facts or a new conviction but clearly concerns the duration of a penalty which is a coercive element, linked to the core of criminal procedure. In its decision “*Engel and Others v. Netherlands*” (5370/72, 8 June 1976) the Court decided that the criminal nature of a procedure could be established despite the fact that Member States did not consider it as such. Not granting the right to access a court to discuss the prolonging of a sentence is tantamount to making the rights protected by article 6§1 theoretical and illusory.

In our opinion, given the present state of case law on the subject, it is doubtful that the Court would acknowledge the existence of a violation of article 6§1 but, if we take into account the discrepancy created by the Buijen decision, it would seem more logical to consider that a transfer that ends up

in the prolonging of a prison sentence without a proper court decision violates the practical and effective exercise of the rights guaranteed by article 6§1 reaffirmed by the “Golder v. United Kingdom” case.