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"The right to a fair trial"

1. Issues raised under the umbrella of Article 6 of the Convention.

The present case concerns the possible violation of art. 6 §§ 1 and 3 (d) of the Convention of Human Rights and Fundamental Freedoms (hereinafter: ECHR), which, in so far as relevant, reads as follows:

"1. *In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...*

... 3. Everyone charged with a criminal offence has the following minimum rights: ...

(d) 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 ..."

The applicant complains that he had not had an opportunity to examine the person who accused him and that his conviction had been based to a decisive extent on her evidence.

The analysis on the merits of the case must be preceded by an evaluation of the **applicability of Article 6** ECHR in the present case. As expressly stated in the terms of the Article 6 itself, it applies where a person is "*charged with a criminal offence*". The Court of Human Rights (hereinafter: ECtHR) repeatedly emphasised that "**criminal charge**" is an autonomous concept and must be interpreted according to the three criteria set out in its case-law, namely the classification of the proceedings in domestic law, their essential nature, and the degree of severity of the potential penalty[1].

To evaluate any complaint under Article 6 arising in the context of judicial proceedings, it is therefore first of all necessary to ascertain whether the impugned proceedings involved the determination of a criminal charge, within the meaning of the Court's case-law.

In the present case, the conclusion is that all three criteria have been satisfied.

Before entering into the merits of the case, two general principles, stemming from the case-law of the ECtHR, should be highlighted.

First of all, according to the so called "**fourth instance doctrine**", the Court has no jurisdiction under Article 6 to reopen national legal proceedings or to substitute his own findings of facts or his own assessment of evidence.

Secondly, the Court's primary concern under Article 6 § 1 is to evaluate the **overall fairness of the criminal proceedings[2].** In making this assessment the Court will look at the proceedings as a

[1] ECtHR, *Engel and Others v. the Netherlands*, 8 June 1976, § 82, and *Phillips v. the United Kingdom*, 5 July 2001, § 31.

[2] ECtHR *Taxquet v. Belgium,* 16 November 2010 § 84.

whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted[3] and, where necessary, to the rights of witnesses[4].

Now, let us consider the established case-law of ECtHR about "**the right to examine or to have examined witnesses**". Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings[5].

In implementing this principle in the present case, two further requirements should be considered. First, for the admissibility of the evidence, there must be *a good reason for the non-attendance of a witness.* It is for the court to decide whether there has been a **good reason for the witness not to attend the trial**.
The requirement that there should be a good reason for admitting the evidence of an absent witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. When witnesses do not attend to give live evidence, there is a duty to enquire whether their absence is justified[6].
There are a number of reasons why a witness may not attend trial. Typical reasons for non-attendance are considered for example, the death of the witness or the fear of retaliation[7], but there might be, however, other legitimate reasons why a witness may not attend trial.

Second, it must be decided whether the untested evidence could be considered **decisive**.
Decisive (or *déterminante*) in this context means more than "probative". It further means more than that, without the evidence, the chances of a conviction would recede and the chances of an acquittal advance. The word "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case.
When the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence: the

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[3] ECtHR, *Gäfgen v. Germany*, 1 June 2010 § 175.
[4] ECtHR, *Doorson* v. the Netherlands , 26 March 1996§ 70.
[5] ECtHR, *Lucà vs Italy*, 27 February 2001 and *Solakov v."the former Yugoslav Republic of Macedonia*" 31 January 2011, § 57.
[6] ECtHR, *Al-Khawaja and Tahery v. the United Kingdom* [GC] 15 December 2011, § 120; *Gabrielyan v. Armenia*, 10 April 2012, §§ 78, 81-84.
[7] ECtHR, *Al-Khawaja and Tahery v. the United Kingdom*, cited above.

stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive.

Finally, the last issue raised in the prospected scenario is whether under Article 6 § 3 of the Convention, if interpreted in the context of an overall examination of the fairness of the proceedings, the sole or decisive rule should or should not be applied in an inflexible manner. In particular, the Court is called to decide what kind of **scrutiny** it should perform in the context of proceedings where a conviction is based solely or decisively on the evidence of absent witnesses, because of the dangers of the admission of such evidence.
What is at stake in such situations is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance to the case.

2. STRASBOURG COURT'S APPROACH TO SEXUAL CRIMES. RELEVANT PROFILES.

For the peculiar nature of sexual crimes t**he victim's witness is often the only or, anyway, the main, evidence** to prove someone's responsibility for the crime.
However criminal proceedings concerning sexual offences are often perceived as an "ordeal" by the victim, in particular when the latter is unwillingly confronted with the defendant or with his lawyer. These features are even more prominent in cases involving a minor victim of a sexual crime: everybody will agree that it can be a great trauma for a child victim of sexual abuse to be cross examined or questioned in a court.
So, in assessing the respect of fair trial in such proceedings, the right to **respect for the private life** of the alleged victim must be also taken into account.

Therefore, 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 the adequate and effective exercise of the rights of the defence. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps of

the defence itself in proportion with the protection of the alleged victim's private life, fear and modesty[8].

In particular, having regard to the special features of criminal proceedings concerning sexual offences, according to ECtHR case law, art. 6.3(d) 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[9].

In *Accardi Vs Italy*[10], the ECHR further emphasised that art. 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court: it is normally for the national courts to decide whether it is necessary or advisable to call a witness[11]. In a case like the present, to secure the rights of the defence, the judicial authorities may be required to take measures, such us preventing the defence from cross examining the victim, to avoid a further trauma to the victim; however there must be a relevant reason adduced for applying such measures by domestic judges who must implement "counterbalance measures" to assure the right of the defence[12].

As regards the possibility of excusing a witness from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable[13].

As regards the **possibility of excusing a witness from testifying on grounds of the impossibility of locating the witness herself/himself**, under certain conditions, the ECtHR justifies the admission of the witness statement as evidence, although the defence had no opportunity to cross examine or question him or her. However, the domestic authorities must take positive steps to enable the accused to examine or have examined witnesses against him or at least to take any effort to allow the questioning of the "disappeared" witness[14]; which means that they should actively search for the witnesses or try an international rogatory procedure[15].

The *fair trial* principle is therefore respected if the domestic authorities did everything which is reasonable to secure the presence of the witness (several summoning, rogatories, adjournments of

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[8] ECtHR, *Aigner v. Austria*, 10 May 2012, § 37; *D. v. Finland*, 7 July 2009 § 43; *Accardi and Others v. Italy,* 20 January 2005, *Vronchenko v. Estonia*, 18 July 2013 § 56.

[9] ECtHR, *S.N. v. Sweden*, 2 July 2002, § 52; *W.S. v. Poland*, 19 June 2007 § 55.

[10] ECtHR, *Accardi Vs Italy,* cited above.

[11] ECtHR, *Bricmont v. Belgium*, 7 July 1989, § 89.

[12] ECtHR, *P.S. v. Germany*, 20 December 2001 § 28.

[13] ECtHR, *Al-Khawaja and Tahery,* mentioned above § 125

[14] ECtHR *, Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 78.

[15] ECtHR, *Rachdad v. France*, 13 November 2003 § 24 and *Tseber Vs. Chzech Republic*, 22 November 2012, § 48, see also Italian Court of Cassation 27918/11, "*De Francesco*" case, which states the same principle.

trial to allow the presence of the witness, also by the mean of international legal assistance instruments).

At the end it is for the Strasbourg Court to establish whether the absence of the witness is imputable to the domestic authorities or not.

In brief, there can be an attenuation of the right of defence stated in art. 6.3 lett. D[16] in sexual crimes proceedings, but this attenuation cannot touch the core of the right. So practically, in order to respect the ECHR, **the State must take all possible positive action to assure the cross examination of the victim as a witness**; only if this is not possible (due to fear or impossibility to locate the victim/witness herself) there the admission of previous statements as evidence can be considered as a last resort measure. Nonetheless, as said above, further corroborating evidence is necessary to establish someone's guilty of such a crime.

3. Possible violation of art. 6.3 (d) in conjunction with art. 6.1 in the present case.

In order to reply to the question, it must be stressed that, according to the case law of the ECtHR, mentioned above:

- where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6.1;
- at the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny.

This scrutiny, in the present case, should be conducted pursuant to the following three tests:

a) whether it was necessary to admit the witness statements of Edith (the victim of the rape);
b) whether her untested evidence was the sole or decisive basis for applicant's conviction;
c) thirdly, whether there were sufficient counterbalancing factors including strong procedural safeguards to ensure that the trial, judged as a whole, was fair within the meaning of Article 6.1 and 6.3 lett. d.

Considering the present case, the "test" can be answered as follows.

a) It is not in dispute that Edith absence, despite searches, made it necessary to admit her witness statement if her evidence was to be considered. The domestic authorities took

[16] *Everyone charged with a criminal offence has the following minimum rights: D) 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.*

reasonable efforts to summon the victim of the rape (Edith) but she always failed to appear in front of the Court, stating that she was living abroad and asked for an adjournment. After the adjournment she failed again to appear in front of the Court with the only justification that she was living abroad. On several occasions the authorities ordered the police to search for Edith's whereabouts and to establish her exact address and attempted to summon her at the addresses abroad by using the means of international legal assistance. It is true that the domestic courts never fined Edith for not appearing at the trial, nor did they contact her by telephone, although they had been provided with her telephone number; but actually there is no evidence that any of these measures would have been effective in practice.

b) The judge who admitted Edith's statement was the best placed to evaluate its significance. It should be concluded that Edith's statement was decisive for the final decision of conviction.
c) The admission of the statement in evidence cannot be considered as conclusive as to the unfairness of the trial, but as a very important factor to be placed in the balance alongside with the procedural safeguards other counterbalancing factors present in the case. The interests of justice were obviously in favour of admitting in evidence the statement of Edith, which was recorded by the police in proper form, but without the defendant attorney presence. However the reliability of the evidence was not supported by further facts. In particular, there are no other valuable witnesses and the medical evidence is not decisive. The medical report shows that the applicant (the person convicted for Edith's rape) had abrasions on his right upper arm, elbow and his right knee. These injuries could, but not necessarily had to, match Edith's version of events. On the opposite side, no injuries were found on Edith's body or genitals.

In conclusion, regarding the justification given for not appearing at trial, even if it is a case of sexual offence, we may consider that the domestic authorities took reasonable measures to secure her presence, without succeeding.

On the other side, since Edith's witness statements are the only available evidence of the applicant's responsibility, her testimony at Court would have been necessary to ensure the right of the defence to question the evidence against him. In fact, the decisive nature of that statement, in the absence of any strong and clear corroborative evidence, meant that domestic courts were unable to conduct a proper and fair scrutiny of the reliability of Edith's statement.

In view of the fairness of the proceedings as a whole, we must conclude that there were not sufficient counterbalancing factors to compensate the serious limitations of the defence rights which resulted from the admission of Edith's statement as evidence at trial.

Therefore, there has been a violation of art. 6.1 and 6.3, lett. d, of the E.C.H.R..

4. APPLICABILITY OF ART. 6 § 1 IN EXECUTION PROCEEDINGS

The last issue that arises in the present case concerns *the* **execution of the applicant's conviction**.

In the present case, the applicant, while serving his two and a half year's imprisonment sentence in Ireland, was transferred to Austria in order to serve the remainder of his sentence there. This transfer gave rise to a *de facto* ten-month increase in the term of imprisonment that he would have suffered if the remainder of the sentence would have been executed in Ireland and not in Austria. The applicant's transfer to Austria was possible on account of the fact that his criminal conviction contained an order for his expulsion from Ireland, such an order being a precondition for a transfer under the Additional Protocol to the 1983 Convention on the Transfer of Sentenced Persons (hereafter "the Transfer Convention").

The question is whether these circumstances raise an issue under Article 6 of the Convention and, in particular, under § 1.

Firstly, it has to be determined **whether Article 6 § 1 is applicable to proceedings concerning the execution of sentences** and, secondly, if a transfer proceedings share this nature (of execution of sentences)**.**

As already noted above, the concept of a "criminal charge", contained article 6 of ECHR, bears an "autonomous" meaning, independent of the categorisations employed by the national legal systems of the member States. The concept of "charge" has to be understood within the meaning of the Convention. It may thus be defined as "*the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence*", a definition that also corresponds to the test whether "*the situation of the [suspect] has been substantially affected*"[17].

As regards the autonomous notion of "criminal", this is based on the three well-known criteria reminded above of (1) classification in domestic law; (2) nature of the offence; (3) severity of the penalty that the person concerned risks incurring[18].

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[17] ECtHR, *Deweer v. Belgium*, 27 february 1980 §§ 42 and 46, and *Eckle v. Germany*, 21 June 1983 § 73.

[18] ECtHR, *Engel and Others v. the Netherlands,* 23 November 1976 §§ 82-83.

Moreover, according to the Court's case-law, **Article 6 § 1 is applicable throughout the entirety of proceedings for the determination of any "criminal charge",** including for example, appeal proceedings; the sentencing process (for instance, confiscation proceedings enabling the national courts to assess the amount at which a confiscation order should be set[19]); the proceedings resulting in the demolition of a house built without planning permission, as the demolition could be considered a "penalty"[20]. However, it is not applicable to proceedings for bringing an initial sentence into conformity with the more favourable provisions of a national new Criminal Code[21].

Regarding **execution of sentences proceedings** – such as proceedings for the application of an amnesty, parole proceedings, and exequatur proceedings relating to the enforcement of a forfeiture order made by a foreign court[22] - **they do not fall within the ambit of the criminal head of Article 6.** The exclusion seems to be founded on the basis that in all these cases there is no determination of any "criminal charge" which, on the contrary, has already been ascertained.

Thus, according to the Court's case-law, proceedings concerning the execution of a sentence are not covered by Article 6 § 1 of the Convention[23].

In applying the above principles to the present case, it should to be noted that there is no doubt that **the question of transfer clearly relates to the manner of implementation of a prison sentence**. This conclusion is also 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. Therefore the transfer proceedings do not have to meet the requirements of Article 6 of the Convention.

It has also to be underlined that neither the Transfer Convention nor its Additional Protocol stipulates that proceedings relating to a transfer should comply with Article 6 of the Convention. Thus, for example, Article 9 of the Transfer Convention provides that the administering State may decide on the enforcement of the sentence in accordance with its own laws through either a judicial or an administrative procedure. Furthermore, the Explanatory Report to the Additional Protocol states that persons may be expelled only where the conditions laid down in Article 1 of Protocol No. 7 to the Convention are met. In contrast, it does not refer to Article 6 of the Convention.

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[19] ECtHR, in *Phillips v. the United Kingdom*, 5 July 2011 § 39).
[20] ECtHR, *Hamer v. Belgium*, 27 November 2007, § 60.
[21] ECtHR , *Nurmagomedov v. Russia*, 7 June 2007 § 50.
[22] ECtHR, *Saccoccia v. Austria*, 18 December 2008.
[23] ECtHR *Aydin v. Turkey*, 14 September 2000, *Szabó v. Sweden,* 27 June 2006.

After all, the Convention does not confer the right to serve a prison sentence in accordance with a particular regime.

Lastly, it has to be observed that, only if the additional period of imprisonment had been a consequence of having received a penalty in a new criminal or disciplinary proceedings due, for example, to an offence against prison discipline[24], this could have led to a violation of Article 6 on account of the nature of the charges and the nature and severity of the penalties[25]; even if proceedings concerning the prison system do not in principle fall within the ambit of the criminal head of Article 6[26].

It follows all the reported reasons that the transfer issue is incompatible *ratione materiae* with the provisions of the Convention, in particular with Article 6 § 1, within the meaning of Article 35 § 3.

In conclusion a hypothetical application lodged with the ECHR **may be considered inadmissible** in accordance with Article 35 § 4[27].

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[24] ECtHR, *Ezeh and Connors v. the United Kingdom*, 9 October 2003.

[25] For example, a prisoner's placement in a high- supervision unit does not concern a criminal charge; access to a court to challenge such a measure and the restrictions liable to accompany it should be examined under the civil head of Article 6 § 1 (*Enea v. Italy* [GC], 17 September 2009, § 98).

[26] ECtHR, *Boulois v. Luxembourg* [GC], 3 april 2012 § 85

[27] See *Ernő Szabó v. Sweden,* 27 June 2006.