

# THEMIS competition Grand Final

## Written Report

### Team Romania 1

#### **I. The issues under the umbrella of article 6 of the European Convention of Human Rights**

The issues raised in this case fall within the scope of article 6, as follows:

It concerns a criminal charge, which is an autonomous notion, as described by the Convention: 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.”<sup>1</sup>

The starting-point for the assessment of the applicability of the criminal aspect of Article 6 of the Convention is based on the following criteria: (1) classification in domestic law; (2) nature of the offence; (3) severity of the penalty that the person concerned risks incurring.<sup>2</sup>

Having that the applicant was accused of rape, it is obvious that this crime comes within the scope of article 6 of the Convention in what regards criminal matters, being a criminal offence.

From our point of view, article 6 was violated and we have identified the following issues:

Firstly, the right to a fair trial implies that everyone charged with a criminal offence must be effectively defended by a lawyer.<sup>3</sup> As a rule the suspect should be granted access to legal assistance from the moment he is taken into police custody.<sup>4</sup> The applicant was arrested on the same evening Edith was allegedly raped and was immediately identified as her rapist. This is the moment from which all the guarantees of article 6 became applicable and the direct of access to a lawyer should have been granted.

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<sup>1</sup> Deweer v. Belgium, §42, §46, as seen on the hudoc.echr.coe.int

<sup>2</sup> Engel and Others v. the Netherlands, §§ 82-83.

<sup>3</sup> Salduz v. Turkey, §51.

<sup>4</sup> Dayanan v. Turkey, §31.

Moreover, the applicant was questioned by an investigating judge in the absence of a defence lawyer.

Secondly, the requirement of reasonable time requested by article 6§1 was not observed by the national authorities in the case of the applicant. The period to be taken into consideration begins the day on which a person is charged and ends with the judgement determining the charge.<sup>5</sup>

When determining whether the duration of criminal proceedings has been respected we have into consideration the following criteria: the complexity and nature of the case – the stake for the applicant, the applicant`s conduct – if he has intentionally delayed the proceedings and the national authorities` conduct – if there are long periods of inactivity imputable to the states.<sup>6</sup> The proceedings began in 2003 when the crime was committed and the applicant was arrested. It was only in 2005 when the Public Prosecutor`s Office indicted the applicant on charges of rape, although he had been heard before by an investigating judge. After several poor attempts of the judicial authorities to summon Edith to trial, on 17 August 2009 a hearing was held at which the applicant pleaded not guilty. Later, the applicant was found guilty on the charges of rape and was sentenced to two and a half years imprisonment, his appeal being rejected by the courts.

The next issue concerns the guarantee of contradictoriness provided in article 6. The Deputy Public Prosecutor asked the trial court to admit in evidence the written record of Edith`s oral statement given to the investigating judge. An important aspect of fair criminal proceedings is the ability for the accused to be confronted with the witnesses in the presence of the judge who ultimately decides the case. The principle of immediacy, alongside with the guarantee of contradictoriness are important guarantees in criminal proceedings in which the observations made by the court about the demeanor and credibility of a witness may have important consequences for the accused.<sup>7</sup> Therefore, this piece of evidence should have been discussed before the court and should have been brought to the knowledge of all parties.

Moreover, having the fact that the national court based its judgement on Edith`s statement given before the investigating judge, it raises a problem concerning the equality of arms and adversarial proceedings. The victim, who was an essential witness, should have been heard in court and the applicant should have had the opportunity to cross-examine Edith`s statement since it was the sole and decisive evidence of the case.

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<sup>5</sup> Neumeister v. Austria, §18, 19.

<sup>6</sup> Didu v. Romania, §27.

<sup>7</sup> Cutean v. Romania, §60.

## **II. The issues related to the nature of the crime and the Strasbourg Court's approach**

Having regard to the sexual nature of the crime, the Court states that domestic proceedings need to be examined primarily under both articles 3 and 8 of the Convention.<sup>8</sup>

The obligation under article 1 of the Convention requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals. The Court emphasizes that the States have positive obligations to ensure the effective protection of the right to respect for private life under Article 8. These obligations may include the adoption of measures even in the sphere of the relations between individuals.

The positive obligations of the States under article 3 require incriminating acts which bring damage to the values centered upon an individual's sexual life. At the same time, they include creating the mechanisms to help conduct an effective investigation. In case the states fail to comply with the above mentioned obligations, the Convention provides that they ensure effective remedies under Article 13.

Furthermore, in cases of sexual offences the Court pays special attention to the victims, taking into account their vulnerability and the fact that in the majority of the cases they are unwillingly confronted with the defendant. Therefore, the relevance of the fact that the crime was of sexual nature lies in counterbalancing the interest of the defence and the protection of the right for private life and personal integrity of the victim.<sup>9</sup>

When dealing with these particular crimes, the Strasbourg Court agrees with using special protection measures for the victim on condition that such measures could be reconciled with an adequate and effective use of defence rights.<sup>10</sup> However, the Court requires to recognize the humiliation and degradation experienced by the victims of such an ordeal, aspect which should be translated into special measures of protection of the victim. Cross-examination should not be used as a means of intimidating or humiliating the victim. Limiting what the defendant can ask, the national court should mitigate the distressing nature of the experience for the victim without curtailing the defendant's right to defence. In securing the rights of the defence, the judicial

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<sup>8</sup> M.C. v. Bulgaria, §148.

<sup>9</sup> Y. v. Slovenia, §101.

<sup>10</sup> Şandru v. Romania, §61.

authorities may be required to take measures which counterbalance the handicaps under which the defence labours.<sup>11</sup>

In conclusion, the sexual nature of the crime indicates special procedural steps when investigating such crimes, as well as protection measures due to the major psychological impact for the victims. In addition to that, sexual offences tend to produce a repulsive echo in the society and need to be repressed with firmity. Therefore, the national judicial authorities have the difficult task to conciliate all these conflicting interests.

### **III. Violations of article 6 § 1 and § 3(d) of the Convention**

Preliminary, the term “witness” has an autonomous meaning in the Convention system, regardless of classifications under national law. Where a deposition may serve to a material degree as the basis for a conviction, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 § 1 and § 3(d) of the Convention apply. The term also includes victims.<sup>12</sup>

We strongly believe that in this particular case there has been a violation of 6§3 (d) in conjunction with article 6§1, for the following reasons:

The guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision, which must be taken into account in any assessment of the fairness of proceedings. For this reason, it is appropriate to examine the complaint under the two provisions taken together.<sup>13</sup>

The Court established in its case-law that the primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings. In making this assessment the Court will look at the proceedings as a 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<sup>14</sup> and, where necessary, to the rights of witnesses. It is also recalled in this context that the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court’s only concern is to examine whether the proceedings have been conducted fairly.

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<sup>11</sup> D. v. Finland, §43.

<sup>12</sup> Vladimir Romanov v. Russia, § 97

<sup>13</sup> Colac v. Romania, §39, Al-Khawaja and Tahery v. UK §118, Aigner v. Austria, §33.

<sup>14</sup> Gäfgen v. Germany [GC], no. 22978/05, § 175, ECHR 2010

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. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but 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 the proceedings.<sup>15</sup>

As the Court stated in the case of *Al-Khawaja and Tahery*, the first aspect which must be examined is the question of whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance. Typical reasons for non-attendance are the death of the witness or the fear of retaliation. There are, however, other legitimate reasons why a witness may not attend trial. When a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort.

Edith, the victim of the rape, was initially questioned by the investigating judge, but later she failed to appear in front of the court who sentenced the applicant to two and a half years of imprisonment. That was her sole statement in front of the judicial authorities. Even though the defense opposed the request of the Public Prosecutor to admit in evidence the written report of Edith's oral statement, the court based its judgement on this statement.

There were no compelling reasons as those mentioned in the Court's case law to admit the evidence of an absent witness. In fact, Edith was properly summoned several times to appear in court, but she failed to appear as she was living abroad. However, the judicial authorities did not undertake sufficient measures to ensure the presence of the witness, even though they knew where she was living and had the appropriate means of constraining her to appear before the court deriving from the international legal provisions.<sup>16</sup>

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<sup>15</sup>*Gabrielyan v. Armenia*, no. 8088/05, § 76, 10 April 2012

<sup>16</sup> The European Convention on Mutual Assistance in Criminal Matters, Strasbourg 20.04.1959. Ireland did not ratify the 2000 Convention on Judicial Assistance in Criminal Matters between the Member States of the European Union yet.

However, we consider that the national authorities didn't exhaust all the resources to find Edith and bring her before the court, considering the crucial importance of her attendance at the trial. They could have applied a fine or reached her by telephone, which was the easiest way to contact her. Finally, if these attempts would have failed, the court could have issued a peremptory writ against her at any moment. Although they resorted to some procedural measures such as summoning Edith by means of international legal assistance in criminal matters through the authorities in Belgium, seeing that they were ineffective,

The Court requires that the domestic authorities do everything which is reasonable to secure the presence of the witness and establish whether the absence of the witness is imputable to the domestic authorities.<sup>17</sup>

In lack of any evidence to justify her absence the national authorities have failed to fulfill their obligations and so did Edith.

Living abroad is not a legitimate reason for a witness not to attend trial and for the judicial authorities to admit her previous written statement. Moreover, Edith never informed the domestic courts that she was somehow frightened or that she was unwilling to testify for any other reasons.

In its constant case law, the Court recognizes the special features of criminal proceedings concerning sexual offences and it accepts that in such cases certain measures may be taken for the purpose of protecting the victim, as they must be reconciled with an adequate and effective exercise of the rights of the defense.<sup>18</sup> As to the fact that the national court did not consider mandatory the presence of Edith at the trial, grounding its judgement on the written record of her oral statement given to the investigating judge, we consider that this action has no justification. The court should have considered all the available alternatives such as witness anonymity or if other special measures were inappropriate or impracticable.<sup>19</sup>

Consequently, there was no legitimate reason for the Court to admit in evidence the written statement of Edith instead of hearing her in person at the trial.

The admission as evidence of Edith's statement resulted in potential disadvantage for the defendant, who could not observe the demeanor of the witness under questioning and to challenge

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<sup>17</sup> Tseber v. the Czech Republic, §47.

<sup>18</sup> Zdravko Petrov v. Bulgaria, no. 20024/04, §35.

<sup>19</sup> Al-Khawaja and Tahery v. UK, §125, Lucic v. Croatia, §75.

her statement and credibility<sup>20</sup>. The applicant should have had an effective opportunity to challenge the evidence against him.

According to the former ECtHR case-law<sup>21</sup> regarding “sole or decisive rule”, if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defense rights are unduly restricted and the right to a fair trial under article 6§ 3(d) is violated.

In its recent case-law though, the Court developed a new view regarding this problem, ascertaining that when a hearsay statement represents the sole or decisive evidence against the defendant its admission as an evidence does not automatically involve the infringement of article 6. In the same time, when a conviction is based exclusively or determinately on statements of absent witnesses, the Court must subject the proceedings to the most searching scrutiny.<sup>22</sup>

Because of inherent risks that admission of such evidence implies, there must be sufficient counterbalancing measures, including firm procedural guarantees. The question which is raised in each of the cases is whether there are sufficient counterbalancing elements, including measures which give the possibility of a correct and equitable evaluation of the reliability of that particular piece of evidence.

In the case of the applicant the Court grounded its judgement on the written statement of Edith since it was if not the solely, then at least the decisive evidence in the case. Other evidences such as the physical examination of the victim's body did not result in any injuries on her body or genitals, while on the applicant's right upper arm and elbow and his right knee were found abrasions. These scientific evidence could not have spread the doubt if the crime was committed as the applicant justified those injuries due to frictions during intercourse. Also, having the fact that the applicant did not deny the sexual activity with Edith, he strongly affirms that it was a consensual one. Moreover, no other witness were identified or heard by the Court, aspects which makes us conclude that the sentence of the applicant was based solely or decisively on Edith's deposition.

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<sup>20</sup> P.S. v. Germany, §26.

<sup>21</sup> Unterpertinger v. Austria §33

<sup>22</sup> Al-Khawaja and Tahery v. UK

All these elements do not automatically lead to the conclusion that article 6 was violated. We still have to analyze whether the national authorities have provided sufficient counterbalancing factors to permit a fair and proper assessment of the reliability of that evidence.<sup>23</sup>

The national authorities have failed to provide any procedural safeguards in order to account for relying only on Edith`s written statement.

The only counterbalancing measure that could have been used, taking into account the specific circumstances of this case would have been the opportunity of the defendant to question Edith, as the court stated that the written record of an oral statement cannot be regarded alone as sufficiently safeguarding the right of the defense, where no opportunity to put questions to a person has been afforded by the authorities.<sup>24</sup>

However, even if the Court could accept that the statements of the missing witnesses may not have been the sole or decisive evidence on which the applicant`s conviction was based, it appears from the grounds provided by the domestic courts that their testimonies carried considerable weight in the establishment of the circumstances of the case and of the applicant`s guilt.<sup>25</sup>

Even though the mere fact that the court based their sentence on the written report of the victim`s oral statement does not alter the fairness the trial by itself, but making an in-depth analysis of the counterbalancing measures that could have been offered to the defendant which the authorities failed to provide, we must infer that the overall fairness of the trial was violated.

#### **IV. Applicability of article 6 § 1 of the Convention concerning the execution of the prison sentence**

Article 6 § 1 is applicable throughout the entirety of proceedings for the determination of any “criminal charge”, including the sentencing process.

Regarding the execution of the applicant`s prison sentence, it derives from the ECtHR case law that it does not come within the scope of article 6 of the Convention. Proceedings concerning the execution of sentences – such as proceedings for the application of an amnesty, parole proceedings, transfer proceedings under the Convention on the Transfer of Sentenced Persons –in view of the particular circumstances of the case – and exequatur proceedings relating to the

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<sup>23</sup> Colac v. Romania, §43.

<sup>24</sup> A.L. v. Finland, §41.

<sup>25</sup> Idem, §54.



enforcement of a forfeiture order made by a foreign court do not fall within the ambit of the criminal head of Article 6.

The only situation that could have fallen under the protection of article 6 would have been the execution of a judgment containing an acquittal decision that would have remained inoperative to the detriment of the person acquitted. Criminal proceedings form an entity and the protection afforded by Article 6 does not cease with the decision to acquit.<sup>26</sup> If the State administrative authorities could refuse or fail to comply with a judgment acquitting a defendant, or even delay in doing so, the Article 6 guarantees previously enjoyed by the defendant during the judicial phase of the proceedings would become partly illusory.

The applicant is serving a two and a half year`s prison sentence applied by the Regional court, therefore it concerns the lawful detention of a person after conviction by a competent court, thus concerning the applicability of article 5 § 1 a) of the Convention.

Moreover, according to the European legislation, before taking the expulsion decision on grounds of public policy or public security Ireland should have taken into account considerations such as how long the defendant has resided on its territory, his age, state of health, family and economic situation, social and cultural integration and the extent of its links with the country of origin – Austria. The personal conduct of the defendant must represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society.<sup>27</sup>

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<sup>26</sup> Assanidze v. Georgia, §182.

<sup>27</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territories of the Member States, art. 27, 28.