THEMIS COMPETITION

TEAM POLAND 2:

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I. The issues to which Article 6 of the Convention is applicable

1) Fairness of proceedings – adversarial process and equity of arms (Article 6 § 1) and the right to examine or have examined witnesses against the defendant (Article 6 § 3(d))

The right to a fair hearing is a fundamental element of Article 6 of the Convention. This right involves the adversarial character of proceedings, which means that in criminal trials both prosecution and defence must be given the chance to have knowledge of and comment on the evidence submitted by the other party (Brandstetter v Austria). The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but to verify whether the proceedings as a whole, including the way in which evidence was taken, were fair in the light of Article 6 §§ 1 and 3 (d). That means *inter alia* that the defendant should be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage. It may also prove acceptable or even necessary to refer to statements made during the investigative stage. Similarly, the defendant must be offered an opportunity to challenge them when they are made or later (Van Mechelen and Others v. the Netherlands, Doorson v. the Netherlands, Lüdi v. Switzerland).

The victim in the present case was only heard as a witness during the preliminary proceedings as she failed to appear before the national court. There is no indication that the applicant or his counsel took part in the questioning or at least were given such an opportunity. It has thus to be examined whether the applicant's right to a fair trial has not been violated in this manner.

2) Trial within a reasonable time (Article 6 § 1)

The right to a trial within a reasonable time applies to both civil and criminal cases The purpose of this provision is to protect civil litigants and criminal defendants against excessive delays in legal proceedings, and to underline the importance of "rendering justice without delays which might jeopardise its effectiveness and credibility (H. v France). The question of what period of time is "reasonable" is judged in each case according to its particular circumstances. In making the assessment of reasonableness, the Court has regard to three issues, namely the complexity of the case, the conduct of the applicant, and the conduct of the state authorities (Pélissier and Sassi v. France). The Court examines the three issues separately, and then considers whether at certain stages, or overall, there have been excessive delays.

The preliminary proceedings in present case lasted 2 years and the criminal proceedings as a whole – 6 years. It should be considered whether applicant's right to fair trail within reasonable time was not infringed since the case was not complex, there was not many evidence to take, only one charge to be examined (contrary to Vaivada v. Lithuania) against one defendant (contrary to Meilus v. Lithuania). There was no defendant's contribution to this delay. Furthermore, the act of indictment was lodged with the court in 2005 but the first hearing date was not set until 2008. For three years there was not any court's activity in a given case. It seems that also such failing to act at all constitute excessive procedural delays.

3) The right to defend oneself and to legal representation (Article 6 § 3(c))

If we assume that the applicant was not charged with the crime while questioned by the investigating judge for the first time, the presence of a lawyer was not necessarily required, even if later he became a suspect (Aleksandr Zaichenko v. Russia). In the given case the applicant may have lacked legal assistance after the charges were presented to him. His rights would be probably infringed under Article 6(3)(c) if he was denied it without a good reason. A person charged with a criminal offence has a right of access to a lawyer as from the first interrogation 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 (Salduz v. Turkey). The Court reiterates that although not absolute, this right is one of the fundamental features of a fair trial (see Poitrimol v. France, Demebukov v. Bulgaria). It may be subject to restrictions only for good cause. The question in whether in a given case the restriction was justified and, if so, whether, in the light of the entirety of the proceedings, it has not deprived the accused of a fair hearing, for even a justified restriction is capable of doing so in certain circumstances (see John Murray v. UK, Brennan and Magee v. the UK). In this respect, the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (see Can v. Austria). At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when

examining whether a procedure has extinguished the very essence of the privilege against self-incrimination (Jalloh v. Germany).

No information was provided about the reasons of the restriction put on the applicant's right to legal representation, so it cannot be evaluated whether it was justified. But it is possible to refer to its impact on the future proceedings. The Court underlines that the violation of article 6 § 3 (c) occurs if the restricted access to a lawyer affects the position of the accused in further trial (Carkci v. Turkey, Panovits v. Cyprus, Pakshayev v. Russia). The applicant firstly questioned did not confess to committing a crime, presenting a reasonable line of his defence. It is to be observed that the absence of his lawyer did not harm his procedural situation. Actually, he was released after the first interrogation.

4) Free assistance of an interpreter (Article 6 § 3(e))

The applicant was an Austrian citizen being tried in Ireland. It is to be ascertain whether he used English enough to take part in the proceedings, in which he was involved. If he could not understand or speak the language of the court, he was entitled to the free assistance of an interpreter by virtue of article 6 § 3(e) of the Convention. This right is certainly overlapped with rights to adversarial proceedings and the equality of arms. Supposing that the accused was acquainted in an adequate degree with the language of the court, he did not enjoy the right to the assistance of an interpreter to enable him to conduct his defence in another language. However, the burden is on the authorities to prove that the accused has sufficient knowledge of the language used in the proceedings (Brozicek v. Italy). The level of understanding or speaking ability at which the right to free assistance arises must be a question of fact and degree. Nonetheless, in general the accused must be in a position where, either through his own abilities or through the assistance of an interpreter, he can understand and participate in the proceedings to a degree that ensures that he receives a fair trial Cuscani v. UK).

II. Sexual nature of the crime

The sexual nature of the crime may be relevant for the assessment of the present case. The Strasbourg jurisprudence takes into account the special features of criminal proceedings concerning rape and other sexual offences. Such proceedings are often perceived by the victim as an ordeal, particularly when they involve being confronted again with the defendant. It is not uncommon for such victims to seek ways to avoid such distressing confrontations by refusing to give oral evidence in court. It becomes even more difficult for the national authorities to secure the attendance of such victims before a trial court when the victims'

whereabouts are unknown (Scheper v. the Netherlands). We may assume that in the present case, after the first adjournment, the national court was no longer able to establish the victim's actual address. Judgments in cases Demski v. Poland, Chudy-Sternik v. Poland and Gani v. Spain demonstrate that the Strasburg jurisprudence evolves towards a greater protection of victims of sexual crimes. Such cases involve balancing the needs of the defence against those of witnesses or victims called upon to testify. The need of protection against re-victimization might even require that the defendant should be banned from questioning the victim during the hearing.

It is worth noting that the above trend is reflected by the Council of Europe's Convention on preventing and combating violence against women and domestic violence (see e.g. Article 56) and EU Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (see Article 19).

The above considerations shall be referred to the present case in Section III of the paper.

III. Violation of article 6 § 3 (d) and Article 6 § 1

As a general rule, conviction should not be based solely or to a decisive extent on a testimony which the defence was unable to question (A.L. v. Finland). Consequently witnesses should give evidence during the trial and all reasonable efforts should be made to secure their attendance.

It is important to note, however, that the Court allows certain exceptions to this rule. Nevertheless, the statements of an absent witness may only be admitted if the national court has made all the reasonable efforts to have such a witness examined. Even where the evidence of an absent witness has not been sole or decisive, the Court has still found a violation of Article 6 §§ 1 and 3 (d) when no good reason has been shown for the failure to have the witness examined (Lüdi v. Switzerland). Such a violation is all the more plausible if the statement in question is the only evidence for the prosecution.

When assessing whether there was a violation of Article 6 §§ 1 and 3 (d) in the present case, one must bear in mind that the testimony of the victim whom the applicant was not able to question was the decisive if not the sole piece of evidence for the prosecution. The medical examination of the victim produced no results and the frictions on the defendant's body could as well occur during a consensual albeit fierce sexual intercourse (to which he admitted).

In this respect, the present case is rather similar to that of Demski v. Poland than to Chudy-Sternik v. Poland, where the conviction was based not only on the statements of the

victim but also on other evidence. In consequence the national court should have taken any measures available to have the witness examined.

As we have already mentioned, in cases concerning sexual crimes a "good reason" for not examining a witness before the court is the avoidance of re-victimization (Scheper v. the Netherlands). This measure is justified if the appearance of the victim before the court is not recommended because of its possible negative impact on her mental state (Gani v. Spain).

However, such a situation did not occur in the present case. There is no data indicating that the victim sought ways to avoid a confrontation with the defendant or that recalling the incident would cause her an unbearable distress. Had the domestic court's efforts to summon the witness to the proceedings proved successful and had she demonstrated that her participation would have had an adverse effect on her mental state, the applicant's complaint would have been put in a different perspective.

Therefore it is necessary to assess whether the Irish court has taken all the possible steps to secure the victims' presence during the trial.

Edith was summoned properly for the first hearing, yet failed to appear. She demanded an adjournment, claiming that she moved abroad. It results from the factual description of the case that she did not provide the court with her new actual address, as it was forced to order the Police to search for her whereabouts, which proved unsuccessful. This must have also been the reason behind the failure to summon her by using the means of international legal assistance. In such a situation it was also impossible to have the victim questioned by a court in her state of residence. The fine would also prove ineffective. Moreover, the witness' phone number is often not recorded in the case file and the phone conversation in not deemed to be a proper way of summoning to a hearing in legal systems of many states (especially when the witness manifestly ignores the summon).

We therefore consider that it was not for the national authorities to make inquiries to establish the whereabouts of a person residing on the territory of a foreign state. Since their efforts were to no avail, the national court was not in a position to serve a summons on Elizabeth abroad or to request that she be heard as a witness by the authorities of a foreign state.

We therefore conclude that in these circumstances, even though the applicant's conviction was to a decisive extent based on the depositions of a witness whom he had had no opportunity to examine, his rights of defence under Article 6 had not been violated, as the national court had taken all the necessary steps to have the witness appear at the hearing.

It is also important to remember that the victim's testimony from the preliminary proceedings should normally be disclosed before the court, thus giving the defendant a chance of commenting upon it.

IV. Execution of prison sentence

It has to be noted, first of all, that the legal basis for the applicant's transfer to Austria in order to serve the remainder of the sentence is laid down in the Convention on the Transfer of Sentenced Persons of 21 March 1983 (European Treaty Series, No. 112; hereinafter as the Transfer Convention), and its Additional Protocol of 18 December 1997 (ETS No. 167). The Convention entered into force in Austria on 1 January 1987 and in Ireland – on 1 November 1995. The entry into force of the Protocol took place on 1 April 2001 in case of Austria and on 1 April 2007 in case of Ireland.

According to the Article 7 of Protocol its provisions shall be applicable to the enforcement of sentences imposed either before or after its entry into force, which means that both acts are apply to the present case, regardless of the date of the sentence or of the perpetration of the crime in question.

As it follows from the Article 2 § 2 of the Transfer Convention a person sentenced in the territory of a Party (i.e. Ireland) may be transferred to the territory of another Party (i.e. Austria), in accordance with the provisions of this Convention, in order to serve the sentence imposed on him. To that end, he may express his interest to the sentencing State or to the administering State in being transferred under this Convention.

Article 3 § 1 of the Transfer Convention sets forward the conditions for such transfer, which include the consent of the sentenced. However, Article 3 § 1 of the Protocol provides that upon being requested by the sentencing State (Ireland), the administering State (Austria) may (…) agree to the transfer of a sentenced person without the consent of that person, where the sentence passed on the latter (…) includes an expulsion or deportation order or any other measure as the result of which that person will no longer be allowed to remain in the territory of the sentencing State once he or she is released from prison.

The above provision certainly applies to the present the case, as the conviction contained the order for the applicant's expulsion from the territory of Ireland. Thus his consent (which, as we may deduce from the description of the case, was not given) was not necessary for the transfer.

Articles 10-11 of the Transfer Convention provide for the conversion of sentences by the Administering State in certain situations. Pursuant to the Article 11 § 1(a) the

Administering State shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State.

The transfer procedure may, in certain circumstances, result in a prolonged *de facto* deprivation of liberty of the sentenced.

The Court has examined whether the problem of longer *de facto* imprisonment of the persons transferred based on the Transfer Convention should be considered under the Article 6 of the Convention. A comprehensive analysis of this issue is to be found in the Szabó v. Sweden case (no. 28578/03).

The Court noted in the first place that Article 6 § 1 does not apply to proceedings concerning expulsion or extradition, as decisions regarding the entry, stay and deportation of aliens do not concern the determination of civil rights or obligations or of a criminal charge, within the meaning of that Article – a conclusion it has also reached in judgments Maaouia v. France (no. 39652/98, §§ 33-41) or Sardinas Albo v. Italy (no. 56271/00).

Moreover, under the Court's case-law, proceedings concerning the execution of a sentence are not covered by Article 6 § 1 of the Convention (see also Aydin v. Turkey, no. 41954/98). Such proceedings do not aim at determining one's civil rights or obligations or any criminal charges.

The transfer procedure provided for in the Transfer Convention certainly falls under the category of execution proceedings. The additional period of *de facto* imprisonment resulting from the applicant's transfer is not a consequence of any new determination of his civil rights and obligations or of any criminal charge against him (see especially Article 11 § 1(a) of the Transfer Convention). Nor has a "new" or additional penalty been imposed on him in the transfer proceedings.

The Court has further observed that the Convention does not confer the right to serve a prison sentence in accordance with a particular regime. 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.

Also, the said Transfer Convention or its Additional Protocol do not stipulate that proceedings relating to a transfer should meet the requirements of Article 6 of the Convention.

Bearing the above considerations in mind, it has to be concluded that Article 6 § 1 is not applicable to the transfer decisions such as in the present case.

However, the question of de facto imprisonment resulting from the transfer should certainly be analysed under the Article 5 § 1(a) of the Convention. Its violation may occur in the case of a flagrantly longer *de facto* term of imprisonment in the administering State.