ROMANIA 2

Written Paper

The case is related to a problem of investigation and trial of a case of a sexual nature. In these kind of cases, along with the application of the general framework related to the application of Article 6 of the Convention, there are some specificities related mainly to the obligation imposed to the State to thoroughly prosecute sex crimes.

I. What issues are raised in this scenario under the umbrella of Article 6 of the Convention?

In the present case there are some issues under article 6 of the Convention. For reasons related to the length of the document and to the need to address the questions asked, we will address only in very limited situations aspects related to the applicability of other rights under the Convention.

In order to assess whether Article 6 is applicable in a specific case, we need to base our reasoning on the criteria outlined in Engel and Others v. the Netherlands: classification in domestic law, nature of the offence, severity of the penalty that the person concerned risks incurring. *In our case, it is clear that according to the national law rape is considered a criminal offence, therefore Article 6 is applicable to proceedings described therein.*

1. Right to defend oneself or through legal assistance. Article 6 par. 3 (c)

In our case, the applicant admitted before the investigating judge that he had sexual intercourse with the alleged victim, but he said that the act was consensual. This partial recognition of the facts was done in the absence of his lawyer and was later taken into account in the Court's decision of conviction. This situation poses a problem of self-incrimination when the applicant admitted having consensual sex with Edith, the victim, at the very early stage of the proceedings.

As the European Court decided in Salduz case, "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 (see, *mutatis mutandis, Jalloh*, cited above, par. 101). (…) Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies." (Salduz v. Turkey, par. 54).

In our case, the applicant was charged with a very serious crime, rape, and the legal consequences he faced were very serious. The mere fact that he answered the questions asked by the investigating judge does not mean that he waived his right to be assisted by a lawyer. (Pishchalnikov v. Russia, par. 78).

Similar to Salduz case, in the present situation these statements were used by national court in proceedings against the applicant. As the European Court stated: "The rights of the defense will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

2. Right to have the case settled within a reasonable time. Article 6 par. 1

Another issue raised in this scenario concerning the Article 6 of the Convention regards the length of the proceedings.

The course of the proceedings can be described as it follows: the acts that the applicant has been convicted for happened in 2003; the Public Prosecutor's Office indicted the applicant in 2005; the first hearing of the applicant during the trial was held in 2008; the second hearing of the applicant was held in 17 August 2009; the applicant was sentenced to two and a half year's imprisonment and lodged several appeals and, finally, the applicant's appeals were rejected.

It doesn't resort from the indications of the case the exact duration of the proceedings, but we can suppose it was at least of 6 years, starting with the moment of the official notification of the criminal charge.

Regarding the length of the proceedings, in criminal matters, the aim of Article 6 par. 1, by which everyone has the right to a hearing within a reasonable time, is to ensure that accused

persons do not have to lie under a charge for too long and that the charge is determined (Wemhoff v Germany, par. 18; Kart v. Turkey, par. 68).

Also, the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what is at stake for the applicant in the litigation. Regarding the last aspect, a serious criminal conviction and a sentence of imprisonment, is not in doubt. (Mellors v. United Kingdom, par. 28-29). *In our case, the main criteria for assessing the reasonableness of the length of proceedings consists of the conduct of the authorities. The failure of the authorities to act in a reasonable time is particularly serious in view of the fact that the case concerns rape charges*. (see Sidjimov v. Bulgaria, par. 35).

The authorities should have acted more expeditiously having in regard the seriousness of the accusations, in this case, charges of rape, because the result of the proceedings is very important for the victim, who can be seen as a vulnerable person.

On the other hand, we can see that the trial court had never fined the victim for failure to comply with the court summons, nor had it ever attempted to reach the victim by telephone although it had had her number, a conduct which extended the proceedings.

All these aspects could represent a violation of Article 6 par. 1 of the Convention, on the aspect of the reasonableness of the length of proceedings.

3. Right to examine witnesses. Article 6 par. 3 (d)

The term “witness” has an autonomous meaning in the Convention system, regardless of classifications under national law (Damir Sibgatullin v. Russia, par. 45; S.N. v. Sweden, par. 45). The evidence against the applicant have not been produced in a public hearing, with a view to adversarial and contradictorial argument. This right is enshrined in Article 6 par. 3 (d), in conjunction with Article 6 par. 1. The term includes also the victim of a crime.

Related to the right to contradictorial proceedings, the European Court of Human Rights has held that, 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 par. 1 and 3(d) of the Convention apply (Kaste and Mathisen v. Norway, par. 53). *In our case, the written record of the victim’s oral statement given to the investigating judge serves as the basis for the*

applicant's conviction, being a decisive piece of evidence in regard to the charges of rape. Therefore, all the guarantees provided by by Article 6 par. 1 and 3(d) of the Convention are applicable.

Moreover, the European Court has outlined 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 (Hümmer v. Germany, par. 38; Lucà v. Italy, par. 39). *Returning to our case, we observe that the victim was questioned by the investigating judge at an early stage of the proceedings. Later, after the applicant was indicted on charges of rape, although the victim was properly summoned and the court tried on several occasions to reach her by means of international legal assistance, she didn't appear in court. Even though the victim's statement was not produced again before the court, offering the applicant the opportunity to address questions and respond to the accusations, the court used this evidence given before the investigating judge.*

Article 6 par. 3 (d) obliges the State to make a reasonable effort in securing attendance of a witness. In the event that the impossibility of examining the witnesses or having them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence (Karpenko v. Russia, par. 62). The Court will only check if the authorities can be accused of a lack of diligence in their efforts to afford the defendant an opportunity to examine the witnesses in question, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution (Gossa v. Poland, par. 55; Haas v. Germany (dec.)). *In our case, authorities made only limited efforts in locating and ensuring the presence of the victim in proceedings before the court.*

II. What is the relevance of the fact that the crime was of a sexual nature and what is the Strasbourg Court's approach to sexual crimes?

1. In our case, the fact that the crime was of a sexual nature is relevant for the following reasons.

First of all, there are certain requirements inherent in the State's positive obligations under Article 3 to effectively investigate and punish all forms of rape and sexual abuse (I.G. v. Moldova, Application no. 53519/07, Judgement 2012, par. 45).

Proceedings regarding crimes of sexual nature are of a sensitive matter because of the meaning and the implications this type of crime have for the victim. This requires speedy proceedings in order to not do more harm to the victim in addition to what she went through during the crime itself. In our case, the authorities haven't succeed to investigate the accusations brought against the applicant in a reasonable time.

Second of all, having regard to the special features of criminal proceedings concerning sexual offences, Article 6 par. 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 (S.N. v. Sweden, par. 52; W.S. v. Poland, par. 55).

But we have to keep in mind that the version of the story as told by the victim is very important for determining the merits of the case, because the assessment of whether a sexual act represents a criminal offence depends on the existence or not of the victim's consent. So, authorities must make efforts in order to hear the victim and offer the accused the opportunity to challenge the information provided by the victim.

2. When it comes to the Strasbourg Court's approach to sexual crimes, there are several aspects which deserve to be mentioned, both for the victim and to the accused person.

2.1. As to the rights of the victim

On one hand, criminal proceedings concerning sexual offences 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,

the right to respect for the private life of the alleged victim must be 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 (Aigner v. Austria, par. 37; S.N. v. Sweden, par. 47).

In these cases, any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim. (M.C. v. Bulgaria, par. 166).

2.2. As to the accused person

The accused must be able to observe the demeanour of the witnesses under questioning and to challenge their statements and credibility (Bocos-Cuesta v. the Netherlands, par. 71; P.S. v. Germany, par. 26; Accardi and Others v. Italy (dec.); S.N. v. Sweden, par. 52).

In the case where there is an evidence which cannot be reproduced before the court, because of the victim’s fear, the accused must be provided with an adequate opportunity to exercise his defence rights within the meaning of Article 6 of the Convention, and the Court will examine whether there were sufficient procedural safeguards and other factors capable of counterbalancing the fact that the accused could not adduce other evidence in his defence (Lucic v. Croatia, par. 81).

III. Do you think the Court would find a violation or no violation of Article 6 par. 3 (d) in conjunction with Article 6 par. 1?

In our case, the applicant claimed he had not an adequate and effective opportunity to question and challenge the statement of the victim in an adversarial proceedings before the court. Moreover, his conviction was based to a decisive degree on this deposition.

In this respect, the European Court of Human Rights analysed the rights of the defendant in situations in which a very important evidence gathered during the investigation stage could not be reproduced before the court, in the Grand Chamber Judgement *Al-Khawaja and Tahery* (2011). Later on, in an affair very similar to the present one, the Court reiterated these principles and applied them to a rape case (*Lucic v. Croatia*, 2014). The Court summarized these principles as follows (see *Štefančič v. Slovenia*, 2012):

(i) the Court should first examine the preliminary 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. *In our case, it is important to assess whether or not the absence of the victim in the proceedings before the court was based on solid reasons and if the court has made reasonable efforts in order to assure the witness' attendance at the trial. Related to the first criteria, we observe that Edith motivated her absence at the hearing in 2008 on living abroad. There is no other clue permitting us to consider that the victim was frightened by the applicant or that she was unwilling to testify for some other reason. The national court did not make use of the exception to the principle of immediacy in sex crimes and persisted on summoning the victim.*

Regarding to the court's diligence to secure Edith's presence at the trial, it is important to outline that she was legally summoned for the hearing in 2008, but she was not present and she asked for an adjournment. In spite of this, she didn't appear in court later in the proceedings, even though she was summoned at her addresses by means of international legal assistance. Therefore, we can conclude that the authorities took limited steps in order to secure the presence of the victim before Court. In addition, the authorities did not attempt to reach the victim by telephone. Nor did they make efficient use of the international legal assistance in criminal matters through the authorities in Belgium. Even though, the Convention on mutual assistance in criminal matters of the European Union (2000) was not applicable for Ireland because it hasn't been ratified yet (https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_RatificationsByCou.aspx), Ireland could have made use of the European Convention on mutual assistance in criminal matters of the Council of Europe (1959).

(ii) 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. *This condition is not applicable in our case, because the victim was heard by the investigating judge.*

(iii) the admission as evidence of statements of absent witnesses results in a potential disadvantage for the defendant, who, in principle, in a criminal trial should have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the truthfulness and reliability of the evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings. *In the present case, the victim was heard only by the investigating judge, but the applicant wasn't offered the opportunity to challenge the victim's allegations. Moreover, taking into consideration that the victim was absent in court, there was no chance for this violation to be remedied at this later stage of the proceedings. The applicant's right of defense was restricted to such an extent that its substance was affected.*

(iv) according to the "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 defence rights are unduly restricted. *The applicant's conviction was based primarily on the statement of the victim, given in front of the investigating judge and on the injuries found on the applicant's body. Taking into account that no violence marks were found on the victim's body, a hearing before the court would have been of utmost importance. This would have helped the court assessing Edith's credibility and analyze if the facts reported by her were true.*

The situation in our case is different from the one in case Scheper (no. 39209/02), where the Court has found that the conviction was based on multiple means of evidence, not just the victim's statement, in our case Edith's hearing in the early stages of the proceedings was decisive. In this context, the word "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative for the outcome of the case, as the Court stated in the judgement Al-Khawaja and Tahery.

(v) however, as Article 6 par. 3 should be interpreted in the context of an overall examination of the fairness of the proceedings, the sole or decisive rule should not be applied in an inflexible manner.

This condition is not applicable in our case, because there are not enough information regarding the general fairness of the proceedings.

(vi) in particular, 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 par. 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. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case 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.

In our case, the applicant was not provided with an adequate opportunity to exercise his defence rights, in respect of the aspects revealed by the victim in her statement. In spite of this, the national court was not able to offer sufficient factors capable of counterbalancing the fact that the applicant couldn't address questions to the victim before the court.

To sum up, in Lucic case cited above, the Court noted that the domestic courts, in their assessment of evidence, should have given the necessary weight to the fact that victim's statement was admitted into evidence without hearing her directly and should have approached such evidence with a particular caution. Also, the domestic court admitted other evidence which were not conclusive (other witnesses who testified only on the victim's perception of the facts, medical examination of the perpetrator's injuries which could, but not necessarily had to, match the victim's version of events). Therefore, in Lucic case, the Court considered that *"*the decisive nature of that evidence, in the absence of any strong and clear corroborative evidence in the case, meant the domestic courts were unable to conduct a fair and proper assessment of the reliability of J.N.'s evidence without her questioning at the trial."

Along with this conclusion, in our opinion, in the present case, the Court, in view of the fairness of the proceedings as a whole, would find a violation of Article 6 par. 3 (d) in conjuction with Article 6 par. 1 of the Convention, taking into account that there were not sufficient counterbalancing factors to compensate for the difficulties to the defence which resulted from the admission of Edith's statement.

IV. As to the circumstances of the execution of the applicant's prison sentence, is Article 6 par. 1 applicable?

Under the Court's case-law, proceedings concerning the execution of a sentence are not covered by Article 6 par. 1 of the Convention (see, *among other authorities, Aydin v. Turkey* (dec.)). The Court stated with several occasions that transfer proceedings under the Convention on the Transfer of Sentenced Persons do not fall within the ambit of the criminal head of Article 6 (*Csoszánski v. Sweden* (dec.); *Szabo v. Sweden* (dec.) and *Veermae v. Finland* (dec.)).

There is one exception found by the Court in the particular situation from Buijen v. Germany, in which the European Court considered that "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." (Buijen v. Germany, par. 42). *However, in our case, there is no indication of any assurances given by the public prosecution before or during the criminal proceedings, such as a Transfer Convention, that would influence the course of the trial and the fixing of the sentence.*

However, under Article 5 of the Convention, in the case of Szabó v. Sweden (dec.), the Court decided that, if a transferred person from one state (Sweden) to another (Hungary) was likely to serve additional period of detention in the state of destination, this was not contrary to Article 5, taking into account that the addition corresponds to only 20% of the time served. This additional term stemmed from differences in legislation regarding parole terms. *In our case, we could expect to have a discussion before the European Court, due to the fact that the additional time corresponds to a percentage of 33% of the total punishment (10 months compared to 30 months sentence – 2 years and a half).*

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