The Right to Legal Assistance in Criminal Proceedings

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The development of individual rights protection in European Criminal Law including the accession to the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR) has significantly extended the content and scope of rights of the defendant. On 22 May 2012, Directive 2012/13/EU[2] on the right to information in criminal proceedings was adopted. Article 3(1) (a) explicitly clarifies that the Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively – the right of access to a lawyer. As noted in recital 19 of Directive 2012/13, the right to be informed of one's rights aims to safeguard the fairness of criminal proceedings and to guarantee the effectiveness of the rights of the defence from the first stages of those proceedings.

On 8 June 2011, the EU Commission presented a proposal for a directive on access to lawyer. On 22 October 2013, Directive 2013/48/EU[3] was adopted. This

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2 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. OJ L 142, p. 1–10.

3 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. OJ L 294, p. 1–12.

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Directive serves to harmonise the defence rights in a European single area of Freedom, Security and Justice. It also adequately guarantees the rights of the defendants in transnational criminal proceedings. The Directive can be considered as a legal instrument which represents a significant step forward in the protection of fundamental rights in criminal proceedings.[4] Recitals 12, 21 and 51 of Directive 2013/48 highlight the aim to lay down minimum rules concerning the right of access to a lawyer in criminal proceedings and promote the application of the Charter, in particular Articles 4, 6, 7, 47 and 48. By building upon Articles 3, 5, 6 and 8 of the ECHR, as interpreted by the ECtHR, which in its case-law reiterates that the Directive sets standards on the right of access to a lawyer. The Directive also emphasises the situation regarding police questioning in which a person other than a suspect or accused person becomes a suspect or accused person, questioning should be suspended immediately.

The European Court of Justice (ECJ) has recognised that the purpose of both Directive 2012/13 and Directive 2013/48 is to establish minimum rules on certain rights of suspects and accused persons in criminal proceedings. Directive 2012/13 concerns more specifically the right to information about rights and Directive 2013/48 relates to the right to have access to a lawyer Furthermore, it is clear from the recitals of those Directives that they are based to that end on the rights set out in, *inter alia*, in Articles 6, 47 and 48 of the Charter and seek to promote those rights with regard to suspects or accused persons in criminal proceedings.[5]

In accordance with Article 2(1) and (3) of the Directive 2013/48 the personal scope of the application are suspects or accused persons in criminal proceedings. The Directive also clarifies that it shall also apply to persons other than suspects or accused persons who, while questioning by the police or by another law enforcement authority, become suspects or accused persons. Article 3 of the Directive anticipates that suspects and accused persons have the right of access to a lawyer in such time and in such a manner to allow the persons concerned to exercise their rights of defence practically and effectively. The access to a lawyer must be without undue delay. For example, before they

4 Bachmaier Winter, L. (2015). The EU Directive on the Right to Access to a Lawyer: A Critical Assessment. Article in: Human Rights in European Criminal Law. Springer Heidelberg, 113.

5 *Rayonna prokuratura Lom* [CJEU], No. C-467/18, [19.09.2019]. ECLI:EU:C:2019:765.

are questioned by the police or by another law enforcement or judicial authority or upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act.

The ECJ has acknowledged that Article 3(1) of the Directive 2013/48 requires the Member States to ensure that suspects and accused persons have that right in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.[6] Although Article 3(1) lays down the fundamental principle that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow them to exercise their rights of defence practically and effectively, that principle is fleshed out in paragraph 2 of that article with respect to the moment from which the right must be granted.[7] The lawyer must be present and participate effectively when questioned. Since the authorities carry out any investigative act against a certain person, it might be unclear when the person should be considered a suspect and not a witness anymore. In such circumstances to provide that the access to a lawyer is granted without undue delay, the nature of the investigated offence and the case materials must be assessed.

Article 12(1) of the Directive clarifies that the Member States shall ensure that suspects or accused persons in criminal proceedings have an effective remedy under national law in the event of a breach of the rights under this Directive. The recital 10 of Directive 2016/1919[8] repeats the considerations that were mentioned in Directive 2013/48. It emphasises that where a person who was initially not a suspect or an accused person, such as a witness, becomes a suspect or an accused person, that person should have the right not to incriminate himself or herself and the right to remain silent in accordance with Union law and ECHR, as interpreted by the Court of Justice of the European Union and by the European Court of Human Rights. The presumption of innocence is strengthened in Directive 2016/343[9].

6 *Kolev and Others* [CJEU], No. C-612/15, [5.06.2018]. ECLI:EU:C:2018:392.

7 *VW* [CJEU], No. C-659/18, [12.03.2020]. ECLI:EU:C:2020:201.

8 Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings. OJ L 297, p. 1–8.

9 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. OJ L 65, p. 1–11.

In accordance with Article 4(1) of Directive 2016/1919, the Member States shall ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require.

The ECtHR has clarified that the protections afforded by Article 6(3) and (3) (c), which lie at the heart of the present case, apply to a person subject to a "criminal charge", within the autonomous ECHR meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him or her.[10] The ECtHR held that a person arrested on suspicion of having committed a criminal offence,[11] in such cases the status of a person is of formal importance if the facts available to the investigative authorities confirm the reasonable suspicion,[12] a suspect questioned about his or her involvement in acts constituting a criminal offence,[13] a person who has been questioned in respect of his or her suspected involvement in an offence,[14] irrespective of the fact that he or she was formally treated as a witness[15] as well as a person who has been formally charged with a criminal offence under procedure set out in domestic law[16] can all be regarded as being "charged with a criminal offence" and claim the protection of Article 6 of the ECHR. It is the actual occurrence

10 *Beuze v. Belgium* [ECHR], No. 71409, [9.11.2018]. ECLI:CE:ECHR:2018:1109JUD007140910.

11 *Heaney and McGuinness v. Ireland* [ECHR], No. 34720/97, [21.12.2000]. ECLI:CE:ECHR:2000:1221JUD003472097.

12 *Brusco v France* [ECHR], No. 1466/07, [14.10.2010]. ECLI:CE:ECHR:2010:1014JUD000146607.

13 Aleksandr Zaichenko v. Russia [ECHR], No. 39660/02, [18.02.2010]. ECLI:CE:ECHR:2010:0218JUD003966002.

14 *Stirmanov v. Russia* [ECHR], No. 31816/08, [29.01.2019]. ECLI:CE:ECHR:2019:0129JUD003181608.

15 *Kaleja v. Latvia* [ECHR], No. 22059/08, [5.11.2017]. ECLI:CE:ECHR:2017:1005JUD002205908.

16 *Pelissier and Sassi v. France* [ECHR], No. 25444/94, [25.03.1999]. ECLI:CE:ECHR:1999:0325JUD002544494.

of the first of the aforementioned events, regardless of their chronological order, which triggers the application of Article 6 in its criminal aspect.[17]

The ECHR is intended to guarantee rights that are practical and effective and not theoretical and illusory. In order to ensure that the protections afforded by the right to a lawyer and the right to silence and privilege against self-incrimination are practical and effective, it is crucial that suspects be aware of them. This is implicit from the ECtHR application of the "knowing and intelligent waiver" standard to any purported waiver of the right to counsel. Immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights. However, where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his or her right to a lawyer and his or her right to silence and privilege against self-incrimination takes on a particular importance.[18] The presence and knowledge of a defence counsel as a qualified professional lawyer preventively ensures that procedural measures in which a suspect or an accused is involved are performed in accordance with the law, including the basic principles of criminal proceedings.

The ECtHR reiterates that the right to be assisted by a lawyer applies throughout and until the end of the questioning by the police, including when the statements taken are read out and the suspect is asked to confirm and sign them, as the assistance of a lawyer is equally important at this point of the interview. The lawyer's presence and active assistance during questioning by the police is an important procedural safeguard aimed at, among other things, preventing the collection of evidence through methods of coercion or oppression in defiance of the will of the suspect and protecting the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police.[19] Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, the effect of which is

17 *Simeonovi v. Bulgaria* [ECHR], No. 21980/04, [12.05.2017]. ECLI:CE:ECHR:2017:0512JUD002198004.

18 *Ibrahim and Others v. the United Kingdom* [ECHR], Nos. 50541/08, 50571/08, 50573/08 and 40351/09, [13.09.2016]. ECLI:CE:ECHR:2016:0913JUD005054108.

19 *Harun Gurbuz v. Turkey* [ECHR], No. 68556/10, [30.07.2019]. ECLI:CE:ECHR:2019:0730JUD006855610.

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.[20]

Neither the latter? nor the spirit of Article 6 of the ECHR prevents a person from waiving of his or her own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. That also applies to the right to legal assistance. However, if it is to be effective for ECHR purposes, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance. The waiver needs not be explicit, but it must be voluntary and must constitute a knowing and intelligent relinquishment of a right. Moreover, the waiver must not run counter to any important public interest. An accused's lawyer may serve an important role as the "watchdog of procedural regularity". It also is well-established in ECtHR case-law that any conversation between a detained criminal suspect and the police must be treated as formal contact and cannot be characterised as informal questioning or interview.[21]

The ECtHR has examined whether the overall fairness of the criminal proceedings against the applicant was prejudiced by the absence of a valid waiver of legal assistance when the applicant gave statements to the police and the subsequent admission by the trial court of those statements to secure his/her conviction. There were no compelling reasons to restrict the applicant's right of access to a lawyer when he was giving statements to the police. The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice. The quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. Indeed, where the reliability of evidence is in dispute the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance. It was in the first place the trial court's duty to establish in

20 *Ayetullah AY v. Turkey* [ECHR], Nos. 29084/07 and 1191/08, [27.10.2020]. ECLI:CE:ECHR:2020:1027JUD002908407.

21 *Goran Kovacevic v. Croatia* [ECHR], No. 34804/14, [12.04.2018]. ECLI:CE:ECHR:2018:0412JUD003480414.

a convincing manner whether the applicant's confessions and waivers of legal assistance had been voluntary.[22]

Since the lawyer's presence and active assistance during questioning by the police is an important procedural safeguard, the effective exercise of this right should be provided. Therefore, in situations where the suspect or accused person in a certain stage of pre-trial investigation exercises the right to legal assistance, it should be guaranteed, or his/her waiver of rights must be voluntary, knowing and intelligent, for example, in the presence of defence counsel. Otherwise, the freedom of a suspect or an accused person to exercise the rights of defence and the fairness of criminal proceedings might be breached.

In certain situations, the police or other investigative authorities persuade suspects or accused persons to waive the right to defence counsel in his or her absence, thus causing a risk that the guarantees arising from the presumption of innocence might be limited. If the testimony acquired in police interrogation is the result of invalid waiver of the right of legal assistance, it should render the evidence inadmissible. In such circumstances the prosecutor supervising an investigation at an early stage should prevent the injustice caused by the restriction of legal assistance. Thus, to secure the interests of investigation and appropriate conviction of the perpetrators, the prosecutor supervising an investigation should ensure that evidence is gathered according to procedural law. Failure to prevent the shortcomings might be the cause for domestic court to declare obtained evidence inadmissible.

Bibliography

Legal normative acts

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. OJ L 142, p. 1–10.

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon

22 *Rusen Bayar v. Turkey* [ECHR], No. 25253/08, [19.02.2019]. ECLI:CE:ECHR:2019:0219 JUD002525308.

deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. OJ L 294, p. 1–12.
Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings. OJ L 297, p. 1–8.
Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. OJ L 65, p. 1–11.

Case law

Pelissier and Sassi v. France [ECHR], No. 25444/94, [25.03.1999]. ECLI:CE:ECHR:1999:0325JUD002544494.
Heaney and McGuinness v. Ireland [ECHR], No. 34720/97, [21.12.2000]. ECLI:CE:ECHR:2000:1221JUD003472097.
Aleksandr Zaichenko v. Russia [ECHR], No. 39660/02, [18.02.2010]. ECLI:CE:ECHR:2010:0218JUD003966002.
Brusco v France [ECHR], No. 1466/07, [14.10.2010]. ECLI:CE:ECHR:2010:1014JUD000146607.
Ibrahim and Others v. the United Kingdom [ECHR], Nos. 50541/08, 50571/08, 50573/08 and 40351/09, [13.09.2016]. ECLI:CE:ECHR:2016:0913JUD005054108.
Simeonovi v. Bulgaria [ECHR], No. 21980/04, [12.05.2017]. ECLI:CE:ECHR:2017:0512JUD002198004.
Kaleja v. Latvia [ECHR], No. 22059/08, [5.11.2017]. ECLI:CE:ECHR:2017:1005JUD002205908.
Goran Kovacevic v. Croatia [ECHR], No. 34804/14, [12.04.2018]. ECLI:CE:ECHR:2018:0412JUD003480414.
Beuze v. Belgium [ECHR], No. 71409, [9.11.2018]. ECLI:CE:ECHR:2018:1109JUD007140910.
Stirmanov v. Russia [ECHR], No. 31816/08, [29.01.2019]. ECLI:CE:ECHR:2019:0129JUD003181608.
Rusen Bayar v. Turkey [ECHR], No. 25253/08, [19.02.2019]. ECLI:CE:ECHR:2019:0219JUD002525308.
Harun Gurbuz v. Turkey [ECHR], No. 68556/10, [30.07.2019]. ECLI:CE:ECHR:2019:0730JUD006855610.
Ayetullah AY v. Turkey [ECHR], Nos. 29084/07 and 1191/08, [27.10.2020]. ECLI:CE:ECHR:2020:1027JUD002908407.
Kolev and Others [CJEU], No. C-612/15, [5.06.2018]. ECLI:EU:C:2018:392.
Rayonna prokuratura Lom [CJEU], No. C-467/18, [19.09.2019]. ECLI:EU:C:2019:765

Special literature

Bachmaier Winter, L. (2015) The EU Directive on the Right to Access to a Lawyer: A Critical Assessment. Article in: Human Rights in European Criminal Law. Springer Heidelberg, 113.

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