CROSS JUSTICE
Knowledge, Advisory and Capacity Building Information tool
for Criminal Procedural Rights in Judicial Cooperation

DT 5.1

User Manual

Grant Agreement nº:	<847346>
Project Acronym:	CROSS-JUSTICE
Project Title:	Knowledge, Advisory and Capacity Building. Information tool for Criminal Procedural Rights in Judicial Cooperation
Website:	https://site.unibo.it/cross-justice/en
Contractual delivery date:	M 27
Contributing WP	WP 5
Dissemination level:	Public
Deliverable leader:	EUI
Contributors:	EUI, UNIWROCLAW, UNILEIDEN, UNIBO

This project is funded by the European Union's Justice Programme (2014-2020)

1 Document History

Version	Date	Author	Partner	Description
1.0	November 2020	M. Catanzariti, M. Gigli	EUI	First draft
2.0	December 2020	K. Kremens	UNI WROCLAW	Contribution with case scenarios
3.0	December 2020	J. W. Ouwerkerk	UNI LEIDEN	Contribution with case scenarios
4.0	January 2021	G. Lasagni, Alessandra Santangelo	UNIBO	Comments
5.0	February 2021	M. Catanzariti, M. Gigli	EUI	Final draft

Disclaimer: On behalf of the EUI, the present deliverable has been drafted by M. Catanzariti, and M. Gigli of the European University Institute.

CrossJustice – Knowledge, Advisory and Capacity Building Information Tool for Criminal Procedural Rights in Judicial Cooperation

USER MANUAL

FUNDED BY THE EUROPEAN JUSTICE PROGRAMME 2014-2020.
GRANT AGREEMENT N. 844376

CROSS JUSTICE
Knowledge, Advisory and Capacity Building Information tool
for Criminal Procedural Rights in Judicial Cooperation

Contents

Short Abstract of the Project

The protection of fundamental rights for persons accused or suspected of a crime is one of the main aims of the EU policy in the area of justice. However, the effective protection of such rights throughout the EU is heavily affected by the highly varying legal frameworks which characterize Member States regulation on procedural rights in criminal proceedings. In this context, legal actors often struggle to identify which legislation and therefore which procedural rights are applicable to persons accused or suspected of a crime in specific cases, both due to linguistic barriers and the peculiarities of different national legal systems.

This situation persists also after the introduction of the EU Directives derived from the Stockholm Programme, that aim at creating a certain level of harmonized rules on the matter. Firstly, such directives often provide only a very minimal level of protection, and tackle only specific phases of the criminal proceeding. Secondly, the application of such directives at the national level is often further reducing the impact of the EU acquis due to incorrect or incomplete implementation or to the persistence of different interpretations given to criminal procedural rights by national courts.

The Project aims to tackle the issues described above identifying critical gaps and solutions in a comparative perspective, in order to improve the efficiency of judicial systems and their cooperation, thanks to information and communication technology. We thus propose to develop CrossJustice, an online platform for advice and support on the effectiveness of procedural rights providing a free service, mainly directed to legal professionals, but accessible to law students, NGOs and all EU citizens.

The CrossJustice platform will provide a unique contribution to address information needs pertaining to procedural rights, by delivering A) a free of charge and updated information and advisory service directed to legal professionals (lawyers, magistrates, and public servants), but also accessible to law students and citizens, and B) capacity building for legal professionals and law students.

The CrossJustice platform features an innovative architecture with the aim of providing support with regard to:

1. the compliance of national instruments implementing EU directives with the EU acquis.
2. the compatibility between national frameworks as resulting from the implementation of EU directives.

Thanks to this set of resources and functionalities, the CrossJustice platform will contribute to meet all needs indicated above in the domain of criminal procedure rights. In particular, it will contribute to:

- Provide an ICT-supported analysis and assessment over the compliance of national legislation with the EU acquis on the matter
- Support capacity building of legal professionals, by enabling lawyers and students to complement their knowledge of the national implementation of the EU acquis on procedural rights

More generally, the CrossJustice project will contribute to the following:

- Strengthen the cooperation and exchange of information between competent judicial and law enforcement authorities on the rights of persons suspected or accused of crime;
- Increase the awareness of relevant policy makers on substantial differences in the rights of persons suspected or accused of crimes across different national systems to facilitate the harmonisation of practices concerning procedural rights.

A) Training Methodology

This **User Manual** has been developed in the framework of CrossJustice Project, running from September 2019 to February 2022, by the team of the Centre for Judicial Cooperation of the European University Institute (EUI). The User Manual aims to propose a **common methodology of legal training** to better improve and implement the procedural rights enshrined in the EU Directives and to increase the awareness of legal professionals about the importance of judicial dialogue. It includes 12 Hypotheticals on several aspect regarding procedural rights as well as useful materials (legislation, case law, reports' excerpts) for the resolution of the cases.

Training methodology entails sharing of perceptions of challenges related to failures of protection. It then propose the means for tackling them via relevant exchanges of existing best practices, existing training materials and repositories of documents and standards on procedural rights protection across Europe, thereby identifying gaps in terms of training (including national case law).

The underlying philosophy of the Centre for Judicial Cooperation of the EUI, as a partner institution of CrossJustice, is to support judges and legal professionals, and to foster cooperation on the ongoing challenges undergone by the due process of law across Europe, by promoting the awareness on the

substantive and procedural tools offered by CFR and ECtHR-based standards and encouraging legal professionals in becoming familiar with judicial interaction techniques. National courts, prosecutors, arbitrators and lawyers including solicitors must be equipped with a set of legal notions and criteria aimed at assessing the effective degree of procedural rights' protection in each domestic judicial system concerned (either their own system or that of another Member State).

More precisely, this training targets **three major needs** for legal trainees. In particular, the needs assessment regards two aspects: the lack of knowledge of practical issues and the risk of weak application of the procedural rights standards. CrossJustice Transnational Training will support trainees in the identification of the scope of the EU Directives which remains challenging for national courts and lawyers and in learning by exchange with peers.

To better identify the training needs, the Training Methodology will ensure that in each training event that will follow during the project,

a) the target groups (judges, lawyers, prosecutors, arbitrators, policy makers, public officials, representatives of ministries, legal scholars and early academics) are widely representative from the point of view of the age/gender/nationality/cultural and legal background of the participants;
b) the specific topics addressed in the training are helpful for the daily activity of participants.

The future strategy for judicial training put in place by the EC has three main key-points:

- a new European judicial training strategy for 2021-2024,
- the 9th annual report 2020 on European Judicial training of Directorate-General Justice and Consumers,
- and the launch of the European Training Platform (ETP) on the European e-Justice Portal.

Among the most ambitious training goals and new priorities, such a strategy points out that[1]:

- Judicial training should even more promote the common rule of law culture, uphold fundamental rights, upscale the digitalization of justice, go beyond legal education and support the development of professional skills, while ensuring that new training offers are quickly made available in response to new training needs.
- The priority is training of judges and prosecutors but all justice professionals are concerned: court staff, lawyers, notaries, bailiffs, mediators, legal interpreters and translators, court

[1] https://e-justice.europa.eu/content_the_european_judicial_training_policy-121--maximize-en.do.

experts, and in certain situations prison staff and probation officers. In particular, court staff and lawyers' training is lagging behind and should be addressed. Prison staff and probation officers are a new target audience that was not covered by the previous strategy.

Along with the new Strategy, the Commission has launched the European Training Platform (ETP). The ETP is a search tool that enables justice professionals to find training courses on EU law organised in the EU and training material to train themselves. Justice professionals will be able to search there for training courses on EU law and keep up to date on the training activities held in different languages. The ETP is launched as a 1st test phase in 2021 with the participation of the four recognised EU-level judicial training providers: the European Judicial Training Network (EJTN), the Academy of European Law (ERA), the European Institute of Public Administration (EIPA) and the European University Institute (EUI). The Commission contributes to the platform with up-to-date and ready-to-use training materials or handbooks produced notably thanks to EU financial support.

B) Brief glossary of judicial interaction techniques

Most of the following judicial interaction techniques have been described in the context of the ACTIONES Project (Active Charter Training through Interaction of National Experiences), an EU-funded project coordinated by the EUI Centre for Judicial Cooperation, which ended on 31 October 2017[2].

Hereinafter an overview of the most common judicial interaction techniques is provided, which will be useful for the analysis of the case sheets dealing with data protection.

As we can see, the commonly used technique is that of consistent interpretation, which enhances the judicial dialogue between national courts and EU courts in a constructive way in the light of the protection of fundamental rights.

However, we also encountered cases in which dissenting opinion and vertical interaction (this latter at national level only) have been used.

[2] See the database available at http://judcoop.eui.eu/data/?p=data.

INTERPRETATIVE TECHNIQUES

Consistent interpretation

Typically, national judges must interpret national law in compliance with their constitution. Furthermore, they are obliged to interpret domestic laws in such a manner so as not to infringe upon EU and ECHR law. This duty is the result of the principle of the primacy of EU law over national law, and of the obligation of the High Contracting Parties to ensure that the ECHR is implemented within the domestic legal order. According to the doctrine of consistent interpretation, a national judge must choose among different possible interpretations of a domestic provision that which does not lead to a conflict with EU law or the ECHR. In particular, as far as EU law is concerned, consistent interpretation is a technique through which national judges can sometimes overcome the lack of implementation of EU legislation through the domestic legislator's activism, eventually limiting the implications of the lack of horizontal effect of EU secondary law (notably, directives). In order to provide an interpretation in compliance with EU law, national judges must use the instruments allowed by national law in order to achieve the purpose of an EU act.

Comparative reasoning

It can be useful to look at the approach endorsed by legislators in other States or by foreign courts in similar legal cases. By this technique, judge is offered a solution adopted by another national judge when confronted with the application of the same EU or ECHR legal provision, or when the State acts within the margin of appreciation. The national judge who wishes to engage in comparative reasoning should: 1) choose a foreign decision that may concern similar facts; and 2) adapt the solution chosen in another legal context to his or her own legal order.

INTERACTION BETWEEN LEGAL PROVISIONS

Disapplication

This technique is probably the one that implies the highest degree of interference of supranational/international law in the domestic legal orders of the Member States, as it requires national judges to set aside domestic law that conflicts with EU law, the ECHR or international law. Thus, it presupposes an assessment of incompatibility between national provisions and the relevant supranational/international law. Such incompatibility of national law with EU-level law that could

lead to disapplication of national law does not render the latter void – it merely precludes its application in that specific case.

INTERACTION BETWEEN RIGHTS (NATIONAL/EU)

Proportionality test

This technique requires national judges to appreciate whether (i) the domestic measure interfering with supranational/international law pursues a legitimate aim, (ii) it actually contributes to that aim and (iii) it is the least restrictive measure that can achieve it. This technique is feasible only in relation to fundamental rights which can be balanced with other fundamental rights, and for the purpose of balancing fundamental rights guarantees against national public policies or among different fundamental rights guarantees.

INTERACTION BETWEEN COURTS

Preliminary ruling

Article 267 TFEU provides a mechanism of direct cooperation between national judges and the CJEU. It allows any national court to refer questions directly to the CJEU on the interpretation or validity of EU law. In principle, courts whose decisions cannot be further appealed are under an obligation to refer a preliminary question whenever they have doubt on the interpretation or the validity of EU provisions, whereas other courts are under an obligation to refer only if they consider that the provision of EU law applicable to their case is not valid.

DEFERENTIAL APPROACH

Margin of appreciation

In order to preserve Member States' regulatory autonomy and constitutional identity, the ECtHR is keen to afford them some margin of discretion when implementing Convention obligations. This is particularly true with respect to fundamental rights in two hypotheses. First, when there is no European consensus as to the interpretation and application of a certain right. Second, when rights must be balanced with one another, in which case the choice of the correct balance is entrusted to the State. The doctrine of margin of appreciation implies that the application of the ECHR is not necessarily uniform across all Member States, whereas, at least in principle, the application of the EU

Charter of Fundamental Rights is less concerned with local peculiarities and advocates an unconditional compliance with the uniform standards of protection set therein (the CJEU in *Melloni* expressly states that 'the primacy, unity and effectiveness of EU law' should not be compromised by the adoption of domestic standards').

Judicial self-restraint

This is a procedural or substantive approach to the exercise of judicial review. As a procedural doctrine, the principle of restraint urges judges to refrain from ruling on specific legal issues, and especially on constitutional ones, unless the decision is necessary for the resolution of a concrete controversy. As a substantive one, it compels judges to consider constitutional questions to grant substantial deference to the views of the governed branches and invalidate their actions only when constitutional limits have clearly been violated[3].

Equivalent protection

This doctrine has been developed for ruling on the relationships between the CJEU and the ECtHR. It is a horizontal interaction technique, which aims to ensure that the protection of fundamental rights by the EU law can be considered equivalent to that of the Convention system, the only exception being that this doctrine can be rebutted if the protection under the Convention is manifestly deficient (*Bosphorus* case).

Specifically, Art. 52 (3) of the EU Charter of Fundamental Rights is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR. These arrangements are thus made applicable to the rights covered by the Charter, without adversely affecting the autonomy of Union law and that of the CJEU[4].

[3] *See* https://www.britannica.com/topic/judicial-restraint.
[4] See Explanations relating to the Charter of Fundamental Rights, Art. 52-Scope and interpretation, Official Journal of the European Union C 303/17 - 14.12.2007, available at https://fra.europa.eu/en/charterpedia/article/52-scope-and-interpretation-rights-and-principles.

Dissenting Opinion

The progressive integration of the domestic judicial authorities within the multi-level European systems calls upon national judges to acquire the capability to manage the logic inherent to judge-made law systems, such as the EU and ECHR systems are. Civil law legal systems, particularly those most inspired by the French model[5], are traditionally grounded on the cornerstone of the primacy of statutory law, according to which the *ratio legis* is the direct and binding reference of the judicial interpretation and application of the law. The *ratio legis* is by its nature logically and chronologically placed *before* the case to adjudicate. The *ratio legis* is the reason for the norm, enshrined in the formal structure of the legal provision, and as such it reflects its general and abstract nature. The thinking of the continental judge is influenced by the logical structure of the normative system he or she is called upon to interpret and apply. Consequently, the judicial reasoning traditionally presents a deductive syllogistic structure.

In contrast, the ECHR legal order is grounded on the cornerstone of the European Convention of Human Rights (along with its Protocols), which is a very short charter, and above all on the ECtHR case law. The compelling force stemming from the ECHR legal system is rooted in the logic of the *ratio decidendi*, that is to say the concrete reason which the assessment performed by the Court is grounded on. The *ratio decidendi* logically and chronologically comes *after* the case to adjudicate, so that its material characteristics have a decisive weight on the reasoning of the judicial assessment. Therefore the national judge, where called upon to decide cases falling within the scope of the ECHR, must face the need to change the usual structure of his or her reasoning: from the abstract, deductive, syllogistic approach assumed by the logic of the primacy of the statutory law, to the inductive and concrete logic of the *ratio decidendi*-oriented system. This syllogistic reasoning gives way to the distinguishing technique, which relates to two entities, both concrete: the case pending before the domestic jurisdiction and the *ratio decidendi* of a relevant precedent of the ECtHR. The *ratio decidendi* is to be searched by the interpreter not only in the reasoning of the judgment, which is the privileged structure expressing the logic of the decision, but also in the concurring and dissenting opinions, which are inasmuch able to shed light on the logical thread followed by the majority.

[5] H. de Charles Montesquieu, *L'Esprit des Lois* (1748); English trans., The Spirit of Laws (translated by T. Nugent) (Nourse & Vaillant, 1752).

Hypotheticals – Procedural rights in practice

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

- **Art. 47 (Right to an Effective Remedy):**
- Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
- Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
- Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.
- **Art. 48 (Presumption of Innocence and Right of defence)**
- 1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
- 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

EUROPEAN CONVENTION ON HUMAN RIGHTS

- **Art. 6 (Right to a Fair Trial):**
- 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 3. Everyone charged with a criminal offence has the following minimum rights:
- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (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;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Hypothetical N° 1 - Timeframe for essential documents' translation

Level 1

Mr Jo, a Belgian citizen, is suspected of having committed a criminal offence in Germany. Investigations started but nobody realized that Mr Jo cannot understand anything in German. Mr Jo's lawyer realized that there was not any list of interpreters that he could consult for guaranteeing his client's rights. The investigations were oral and resulted in a charge for Mr Jo.

Should you be a legal consultant, which steps would you suggest Mr Jo to protect his rights?

- Complain to a higher authority
- Record the basis for the objection
- When no effective mechanisms for complaints exists, use arguments at a later stage and recall relevant CJEU and ECtHR case

Level 2

Furthermore, declarations were recorded but information was not communicated correctly, because the recording had missing parts. How is it possible to use means of evidence if they consist of oral declarations that are not integral?

VARIABLE to Level 2

The executing authority was convinced that a European arrest warrant had been issued and that only the translation was lacking. The translation of the European arrest warrant had to be received within the "general rules" applicable to detention (3 months). At the end of that period it did not arrive. What can the executing authority do?

Level 3

The lawyer wondered whether minutes were somehow contestable and under which grounds. After some time, he tried to translate them to his client as it was the only way to work the issue out without causing delay. Nonetheless, he failed in translating because he misunderstood his client's declarations and suggested a wrong legal strategy on the basis of the wrong translations. Which kind of legal remedies may be used in case of lawyer's responsibility for wrong translation of essential documents? Are there any best practices in the field at your national level?

DIRECTIVE (EU) 2010/64 ON THE RIGHT TO INTERPRETATION AND TRANSLATION IN CRIMINAL PROCEEDINGS

Art. 2 (Right to Interpretation):

- 1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.
- 2. Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.
- 3. The right to interpretation under paragraphs 1 and 2 includes appropriate assistance for persons with hearing or speech impediments.
- 4. Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.
- 5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.
- 6. Where appropriate, communication technology such as videoconferencing, telephone or the Internet may be used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings.
- 7. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide persons subject to such proceedings who do not speak or understand the language of the proceedings with interpretation in accordance with this Article.
- 8. Interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

Art. 3 (Right to translation of essential documents):

- 1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.
- 2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.
- 3. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.
- 4. There shall be no requirement to translate passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them.
- 5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents

or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings.

- 6. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the European arrest warrant is drawn up, or into which it has been translated by the issuing Member State, with a written translation of that document. EN 26.10.2010 Official Journal of the European Union L 280/5
- 7. As an exception to the general rules established in paragraphs 1, 2, 3 and 6, an oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings.
- 8. Any waiver of the right to translation of documents referred to in this Article shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily.
- 9. Translation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

ECHR

Art. 5 § 2 (Right to Liberty and Security):

- Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

Art. 6 § 3 (Right to a Fair Trial):

- Everyone charged with a criminal offence has the following minimum rights:
- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (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;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Useful materials for the resolution of the case

CJEU case law

***Covaci*, C-216/14, 15 October 2015**

Articles 1(2) and 2(1) and (8) of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings are to be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which provides for the use of a certain language as the language of the proceedings before the courts of that State. However, those same provisions are to be interpreted as permitting an individual against whom a judgment has been delivered in criminal proceedings and who does not have a command of the language of the proceedings to bring an appeal in his own language against such a judgment, and it is the responsibility of the competent court, pursuant to the right to interpretation enjoyed by the accused person under Article 2 of that directive, to provide appropriate resources for the translation of the appeal into the language of the proceedings.

***Balogh*, C-25/15, 9 June 2016**

Article 1(1) of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings must be interpreted as meaning that that directive is not applicable to a national special procedure for the recognition by the court of a Member State of a final judicial decision handed down by a court of another Member State convicting a person for the commission of an offence.

Concerning the interpretation of Directive 2010/64, it is necessary, in the first place, to note that, in accordance with Article 1(1) thereof, that directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European arrest warrant. It is apparent from the wording of Article 1(2) of that directive that that right is to apply to the person concerned from the time that he is made aware by the competent authorities of a Member State that he is suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether that person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.

In the second place, it should be noted that, as, inter alia, recitals 14, 17 and 22 of Directive 2010/64 state, that directive seeks to ensure, for suspected or accused persons who do not speak or understand the language of the proceedings, the right to interpretation and translation by facilitating the application of that right with a view to ensuring that those persons have a fair trial. Therefore, Article 3(1) and (2) of that directive provide that Member States are to ensure that those persons are, within a reasonable period of time, provided with a written translation of all documents, including the judgment handed down in their regard, which are essential for the purpose of ensuring that they are able to exercise their rights of defence and safeguarding the fairness of the proceedings.

***Sleutjes*, C278/16, 12 October 2017**

Article 3 of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings must be interpreted as meaning that a measure, such as an order provided for in national law for imposing sanctions in relation to minor offences and delivered by a judge following a simplified unilateral procedure, constitutes a 'document which is essential', within the meaning of Article 3(1) of that directive, of which a written translation must, in accordance with the formal requirements laid down in that provision, be provided to suspected or accused persons who do not understand the language of the proceedings in question, for the purposes of enabling them to exercise their rights of defence and thus of safeguarding the fairness of the proceedings.

On 12 October 2017, the Court of Justice interpreted the concept of "essential document" in Article 3 of Directive 2010/64, pursuant to which Member States are required to ensure that suspects or accused persons who do not understand the language of the criminal proceedings are, within a reasonable period of time, provided with a written translation of all the documents which are essential to ensure the exercise of their rights of defence and to safeguard the fairness of the proceedings. By way of background, a penalty order was issued against Mr Sleutjes, a Dutch citizen who did not understand German, imposing a fine for failure to stop at the scene of an accident. The penalty order, which was in German, included only a partial Dutch translation on legal remedies, and specified that the order would become legally binding and enforceable unless Mr Sleutjes lodged an objection, in German, within two weeks of notification. Mr Sleutjes proceeded to lodge an objection, but it was dismissed on the grounds that it was not filed in time. The referring court asked the Court whether a penalty order, which was issued by a judge following a simplified unilateral procedure, constitutes an "essential document" which must be translated for suspects or accused persons who do not understand the language of the proceedings in question. The Court confirmed that the penalty order constituted a "document which is essential", within the meaning of Article 3(1) of Directive 2010/64, and therefore a written translation has to be provided to suspects or accused persons who do not understand the language of the proceedings, in order to enable that person effectively to exercise his rights of defence.

ECHR case law (mostly ante 2010)

Please see a list of the most relevant selected parts of the CJEU case law concerning the appellant's hearing or questioning: https://eulita.eu/case law/

Case law of the European Court of Human Rights on language assistance in criminal proceedings[6]

***Akbingöl v. Germany* (decision), 2004, no. 74235/01**

[6] Courtesy of James Brannan, Translator, European Court of Human Rights; originally drafted for TRAFUT presentation. Any emphasis made or opinions expressed in these summaries are those of the author; for full texts of judgments and decisions (in French and/or English), see http://www.echr.coe.int/echr/en/hudoc; the few decisions of the pre-1999 European Commission on Human Rights listed herein are of interest but do not necessarily reflect the Court's current case law.

After conviction the applicant was made to pay for the cost of translating his telephone conversations recorded during the investigation (for the prosecutor).

Court: The translation did not concern a matter for which the free assistance of an interpreter was required under Article 6 § 3 (e).

Complaint inadmissible

Amer v. Turkey*, 2009, *no. 25720/02

The applicant, an Arabic speaker, had no interpreter in police custody.

Court: Even though the applicant understood the foreign language (Turkish) to some extent – enough to be able to express himself – he was not capable of reading texts. So he should have had an interpreter at least to retranslate his statements back to him. The authorities did not make sure that he understood the written statements.

***Violation** of Article 6 § 1 in conjunction with Article 6§ 3 (e)*

***Baka v. Romania*, 2009, no. 30400/02**

Hungarian national complained that interpreting in one court hearing was done by a court clerk, and that not everything said by the participants had been translated – the Government said that the applicant had waived his right to a sworn interpreter. No written translation of judgment.

Court: No unfairness in proceedings; applicant had not requested translation of judgment, which could in any event have been explained orally by lawyer.

No violation of Article 6 §3(a) or (e)

***Baytar v. Turkey*, 2014, no. 45440/04**

A Kurdish speaker was not assisted by an interpreter when questioned in police custody and argued that the statement taken from her constituted illegally obtained evidence which should therefore have been excluded by the trial court.

Court: An interpreter was particularly important at that stage in the proceedings where any statements made without such assistance were subsequently used in evidence at trial and as the suspect's waiver of other rights could thus be called into question. The fact that an interpreter was present when she was brought before a judge could not cure the defect in the proceedings, especially as the interpreter in question was unqualified.

***Violation** of Article 6 § 3 (e) together with 6 § 1*

***Berisha & Haljiti v. "the former Yugoslav Republic of Macedonia"* (decision), 2007, no. 18670/03**

In a court hearing the second applicant, mother-tongue Albanian, did not have an interpreter but relied on the first applicant's language assistance, as she spoke neither Macedonian nor Serbian. The Government accepted that the second applicant had not known the language of the court, but claimed that it had been her decision not to have the assistance of an interpreter.

Court: The fact that one of the applicants served as interpreter for the other did not invalidate proceedings, about which they had not complained at the time.

Complaint inadmissible

***Brozicek v. Italy*, 1989, no. 10964/84**

A Czech man living in Germany was prosecuted in Italy and received the judicial notification of proceedings only in Italian – he requested a translation into his mother tongue or a UN language, but this was refused.

Court: Where translation is requested, the burden of proof is on the (judicial) authorities to prove that the defendant sufficiently understands the language of the court and not for the defendant to prove he does not.

Violation of Article 6 § 3 (a)

***Coban v. Spain* (decisions), 2003 and 2006, no. 17060/02**

Turkish national had been convicted in Spain for drug trafficking and complained, among other things, about the choice of interpreter/translator. He also stated that the prosecution had relied on intercept evidence which had been translated from Turkish in summary form by an "unregistered" translator (part of an Article 8 complaint).

Court: Even a non-official translator is adequate if he has a "sufficient degree of reliability as to knowledge of the language interpreted"; the Spanish Code of Criminal Procedure did not require an official qualification for that task and a summary translation was acceptable. In fact only the conversations in Spanish had been relied on by the court, not the translated evidence.

Application inadmissible

Čonka v. Belgium, 2002, no. 51564/99

Group of Roma from Slovakia arrested pending deportation.

Court: A variety of factors contributed to a violation of the right to liberty, including the fact that only one interpreter was available to assist the large number of Roma families in the police station and he did not stay with them at the closed centre; however the level of information was sufficient for the purposes of 5 § 2.

No violation of 5 § 2 but of 5 § 1

***Cuscani v. the United Kingdom*, 2002, no. 32771/96**

Italian national convicted of fraud. Judge had instructed that an interpreter be found for the sentencing hearing but none was present. Instead of adjourning the hearing the judge was prepared to rely on the applicant's brother to interpret if need be.

Court: Although aware of the applicant's difficulty in following the proceedings, the judge was persuaded by the barrister, without consulting the applicant, that it would be possible to make do with the "untested language skills" of the applicant's brother in a hearing that led to a four-year prison sentence and a 10-year disqualification as company director; no award of just satisfaction, however, as Court could not speculate as to what the sentence would have been if an interpreter had been present.

Violation of Article 6 § 1 in conjunction with 6 § 3 (e)

***D. v. Belgium* (Commission decision), 1988, no. 12831/87**

French national received summons in Dutch with no translation.

Commission: Convention does not guarantee translation of all documents in a case. He could have obtained a translation by other means.

Inadmissible

***Diallo v. Sweden* (decision), 2010, no. 13205/07**

French national sentenced to ten years' imprisonment for drugs offence without having had the assistance of an authorised interpreter during her initial questioning by a customs officer, who subsequently gave evidence against her; and that evidence allegedly led to increase in prison sentence. Under Swedish law no registered interpreter was necessary if the officer could speak the foreign language.

Court: No evidence of shortcomings in the language assistance provided; and "the Appeal Court did exercise a sufficient degree of control of the adequacy of the interpretation [*sic*]". However, the Court confirmed here the right to an interpreter at the earliest investigative stage of the proceedings, drawing a parallel with the right to a lawyer in police interviews, as established in *Salduz v Turkey*.

Inadmissible

***Erdem v Germany* (decision), 1999, no. 38321/97**

Applicant complained about the refusal by the courts to order the translation into Turkish of the investigation files and a 900-page judgment which, according to him, was "the accusation against him"in the framework of the appeal proceedings.

Court: No general right of the accused to have the court files translated, since Article 6 § 3 protects rights of the defence in general and not those of the accused considered separately. "It therefore suffices that the files are in a language that the accused or his lawyer understands".

Complaint inadmissible

***Fedele v. Germany* (Commission decision), 1987, no. 11311/84**

Applicant made to pay for interpreting costs after he failed to appear for trial.

Court: Only a person who attends the trial – and who, being present, "cannot understand or speak the language used in court" – can be "assisted" by an interpreter, so Article 6 § 3 (e) was not applicable.

Inadmissible

***Galliani v. Romania*, 2008, no. 69273/01**

Applicant was arrested with a view to deportation and had no interpreter to explain reasons for arrest.

Court: The applicant could engage in dialogue with police officers and had no difficulty in understanding what was said to her and expected from her.

No violation of Article 5 § 2

***H.K. v. Belgium* (decision), 2010, no. 22738/08**

Applicant (Lebanese national, defendant in proceedings conducted in Dutch) complained about the poor quality of an Armenian translation of the public prosecutor's submissions against him; failure to translate police investigation files.

Court: Article 6 § 3 (e) did not require translation of all documents. According to an expert's report, the applicant had understood the "gist" of the submissions, even though the translation was somewhat

inaccurate. Overall, he had sufficient information in a language he understood in order to conduct his defence. Related Article 14 (discrimination) complaint not sufficiently substantiated. Article 13 complaint about lack of effective remedy also rejected.

Inadmissible

***Husain v. Italy* (decision), 2005, no. 18913/03**

The applicant, an Arabic speaker, was tried *in absentia*as one of the organisers of the terrorist attack in 1985 on the Italian cruise liner *Achille Lauro*. A few years later he was arrested and extradited to Italy where a committal warrant was read to him with an interpreter at a police station. He complained under Article 6 § 3 (a) and (e) that there had been no written translation of that warrant; and that there had been no control over the quality of the interpretation.

Court: The interpreter had been able to translate the document orally (and applicant was assisted by counsel). The Court stated for the first time: "it should be noted that the text of the relevant provisions refers to an 'interpreter', not a 'translator'. This suggests that oral linguistic assistance may satisfy the requirements of the Convention". As regards quality, the fact that he had not complained at the time "may have led the authorities to believe that he had understood the content of the document concerned".

Inadmissible

***Kajolli v Italy* (decision), 2008, no. 17494/07**

Albanian defendant complained that court documents had not been translated into his language; and no interpreter had been provided.

Court: He had been entitled to translation of documents, there being no evidence that he spoke Italian and such translation having been requested by lawyer, but in the particular circumstances of the case there was no issue because he had absconded and notices could not be served on him personally, only on his lawyer (thus distinguishing the case from *Brozicek*). Applicant had not taken part in proceedings, so had not needed an interpreter.

Inadmissible

***Kamasinski v. Austria*, 1989, no. 9783/82**

Applicant was a US citizen arrested on suspicion of fraud in 1980, ultimately convicted; did not speak German. Complaints: system of court-certified interpreters did not provide effective assistance; no written translation of indictment or pre-trial witness statements; the interpretation during the trial was insufficient, and in particular neither the written depositions nor certain oral testimony nor the questions put to witnesses were interpreted into English; save for its operative part the judgment was neither interpreted on the spot nor translated thereafter. Some of the interpreting had been done by a prison officer, and even a prisoner had interpreted for a police interview in the absence of a sworn translator.

Court: As regards choice of interpreter, it was "not called upon to adjudicate on the Austrian system of registered interpreters as such, but solely on the issue whether the interpretation assistance … satisfied the requirements of Article 6". As regards quality, it was not substantiated on the evidence taken as a whole that applicant was unable because of deficient interpretation either to understand the evidence being given against him or to have witnesses examined on his behalf.

The Court established the principle that Article 6 covered written material, not just oral statements, but set limitations: it does not require translation of all documents, only those necessary for the defendant to have knowledge of the case and defend himself (in particular the indictment). A written translation of the indictment is unnecessary if sufficient oral information as to its content is given to the accused (at admissibility stage, some dissenting members of Commission had disagreed with this). Translation of the judgment itself: not necessary and oral explanations, with assistance of a lawyer, sufficient for an appeal. Principle that authorities' obligation may also extend to a degree of subsequent control over the adequacy of the interpretation provided, but requirement satisfied in present case.

No violation in respect of Article 6 complaints concerning language assistance

***Katritsch v. France*, 2010, no. 22575/08**

Russian national convicted in France of theft, illegal immigration and forgery. He had an interpreter in police custody, before the investigating judge, and at an initial hearing; but at a subsequent Court of Appeal hearing confirming his conviction, some years later, no interpreter was present.

Court: There was no evidence he had requested an interpreter and as his last request went back 5 years, during which time he had lived and worked in France, it was not certain that he still needed one. The charges were not particularly complex such as to require more in-depth knowledge of French.

No violation of Article 6 § 3(e)

***Kuvikas v. Lithuania*, 2006, no. 21837/02**

Lithuanian applicant (a border guard) complained that his conviction was based on written complaints by foreigners that had not been translated into national language.

Court: There was no evidence that the applicant's conviction was based on any document in a foreign language which had not been translated into Lithuanian.

Complaint inadmissible, violation of Article 6 § 1 (length of proceedings)

***Ladent v. Poland*, 2008, no. 11036/03**

French national, upon his arrest was informed about the reasons for it and the charges against him in Polish; he was released after 10 days in custody.

Court: He was not informed promptly and in a language which he understood of the reasons for his arrest and the charges against him until his release.

***Violation** of Article 5 § 2*

***Özkan v. Turkey* (decision), 2006, no. 12822/02**

Kurdish applicant complained that he had no interpreter during some court hearings and the interpreter provided in others lacked impartiality as he was a police officer.

Court: The applicant had apparently waived his right to a new interpreter when asked; he could have been expected to request a change of interpreter if he had really doubted his impartiality, as his lawyer had claimed. In one hearing he decided to submit his arguments without an interpreter and the judge verified that the applicant had sufficient language skills to participate effectively in the criminal proceedings.

Complaint under Article 6 § 3 (e) inadmissible

***Panasenko v. Portugal*, 2008, 10418/03**

The applicant, a Ukrainian national (on trial for murder of a taxi driver), complained that his interpreter worked into Russian, not Ukrainian, and that he was incompetent. During the trial he tried to express his complaints through the interpreter, but the presiding judge told them both not to engage in a discussion.

Court: It found from a recording supplied by the applicant that the interpreting was not perfect but he had "failed to indicate how the interpreting problems had affected the fairness of the proceedings as a whole. The material in the case file showed that he was able to understand the oral proceedings in essence and present his version of the facts". There had been a violation, however, because of a lack of legal assistance on appeal to Supreme Court: he had missed the deadline partly because the time-limit ran from service of the judgment in Portuguese, not that of the translation.

No violation of Article 6 § 3 (e) but of Article 6 §§ 1 and 3 (c)

***Petuhovs v. Germany* (decision), 2010, no. 60705/08**

Complaint about failure to provide translation of indictment (6 § 3 (a)).

Court: With oral translation of arrest warrant and meetings with counsel together with an interpreter, a written translation of the indictment was unnecessary. Applicant had not explained how his defence rights had been affected by the lack of a translation.

Inadmissible

***Protopapa v. Turkey*, 2009, no. 16084/90(and *Strati v. Turkey*)**

Cypriot national tried for participation in anti-Turkish demonstration. Complained of poor translation of proceedings.

Court: Although the Court had "no information on which to assess the quality of the interpretation provided", it was apparent from the applicant's own version of the events that she understood the charges against her and the statements made by the witnesses; it did not appear that she challenged the quality of the interpretation before the trial judge, requested the replacement of the interpreter or asked for clarification concerning the nature and cause of the accusation. She did not request a translation of written documents and there was nothing to suggest that such a request would have been rejected.

No violation of Article 6

***Şaman v. Turkey*, 2011, no. 35292/05**

The applicant (a Kurdish speaker) complained that she could not understand Turkish well enough and that her defence rights had been violated during her police custody as she was deprived of the assistance of an interpreter (and of a lawyer).

Court: Taking into account the importance of the investigation stage, it was not established that the applicant had a sufficient understanding of the questions she was being asked or that she was able to express herself adequately in Turkish, and certainly not to a level which would justify reliance on her statements as evidence against her. The accusations were sufficiently complex as to require a detailed knowledge of the language: she was charged with "particularly grave criminal offences". The absence of an interpreter during her police custody irretrievably affected her defence rights. She could not have validly waived the right to legal assistance without an interpreter being present.

Violation of Article 6 § 3 (e) (and of 6 § 3 (c))

***Sandel v. "the former Yugoslav Republic of Macedonia"*, 2010, no. 21790/03**

Complaint about failure to provide Hebrew interpreter after a certain point in proceedings. The case appeared to have been delayed mainly because there were no suitably authorised interpreters and it was prohibited to recruit a court interpreter from a foreign country.

Court: The authorities had wasted time (two and a half years) trying to find a Hebrew interpreter, when an interpreter in another language would have been sufficient at that stage of the proceedings. Written translation of indictment not necessary.

No violation of Article 6 § 3 (e) but of 6 § 1 (length of proceedings)

***Vizgirda v. Slovenia*, 2018, no. 59868/08**

The applicant complained that he was not promptly informed, in a language he could understand, of the accusation against him, and that interpretation and translation into Russian, instead of Lithuanian, prevented him from participating effectively in the criminal proceedings. He claimed that he was only able to communicate orally in basic Russian and that he was not informed of his right under domestic law to use his mother tongue.

Court: The domestic authorities had never verified that the applicant's Russian was good enough to conduct his defence effectively in that language. They could not assume such knowledge merely on the ground that Russian was widely spoken in Lithuania. The applicant had not complained at the time because he had never been informed of his right and he had been vulnerable as a foreigner facing criminal proceedings; his lawyer's failure to raise the issue did not relieve the court of its responsibility. Overall, the language assistance had not allowed him to actively participate in his trial, which had therefore been unfair.

Violation of Article 6 § 1 with § 3 (a) and (e)

***Bideault v. France* (Commission decision), 1986, no. 11261/84**

Court of Appeal had refused to hear witnesses who wished to speak in Breton, without checking first whether they could speak French.

Commission: Article 6 § 3 (d) does not guarantee the right of witnesses to speak in a language of their choosing.

No violation of Article 6 § 3 (d) in conjunction with 14

***Kamasinsky v. Austria*, Application no. 9783/82, § 74**

«In view of the need for the right guaranteed by paragraph 3 (e) (art. 6-3-e) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided»

Supporting Documents

FRA OPINION 3

To safeguard the effectiveness of the right to a fair trial in line with the overall aim of Directive 2010/64/EU, EU Member States should consider ensuring that suspected and accused persons receive, at the very beginning of proceedings, explicit information about the availability of

interpretation for communicating with their legal counsel. These should be outlined in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.

FRA OPINION 5

When establishing a register of legal interpreters and translators in line with Article 5 (2) of Directive 2010/64/EU, EU Member States should consider introducing relevant safeguards to maximise the quality of translation and interpretation services ensured through such a register. For instance, they should consider defining clear admission criteria, and providing for regular registration renewals, mandatory professional development for legal interpreters and translators, and special training for legal interpreters and translators who work with vulnerable groups. At the same time, EU Member States should consider making it mandatory for criminal justice authorities to use such registers when they need interpretation and translation services in the context of criminal proceedings.

Not all EU Member States have established registers of independent interpreters and translators, instead using alternative means to secure suitable legal interpreters or translators. In fact, given that interpreters and translators have to be secured for a number of languages, and often in unplanned, urgent circumstances, nearly all EU Member States have alternative means of securing interpretation and translation services – even in countries with official registers. These often take the form of, for example, alternative lists of interpreters and translators with more flexible minimum registration requirements than those applicable to official registers. These requirements are not always clearly set out or harmonised across the country, and are often very lenient. Codes of conduct or ethic codes developed by national associations of legal interpreters and translators are an example of a promising practice that helps protect the quality of interpretation and translation services.

FRA OPINION 6

To ensure that the interpretation and translation provided meets the quality required under Directive 2010/64/EU, Member States could consider developing clear and binding rules on the conditions for using alternative ways of securing legal interpreters or translators. Such rules should include specific quality safeguards, such as a minimum level of education or years of experience to be included on alternative lists. Member States should also consider supporting other measures that help safeguard the quality of interpretation and translation services, such as codes of conduct and ethic codes specifying professional quality standards. National associations of legal interpreters and translators often voluntarily develop such codes. Using information and communication technology (ICT)-solutions or engaging in cross-border cooperation with other EU Member States could help ensure the quality of services even when appropriately qualified translators or interpreters are not available in a given country. In a cross-border context, criminal justice authorities could share resources, such as legal interpreters and translators available in their national registers.

****

- Study done by the European Union Agency for Fundamental Rights (FRA), Rights of suspected and accused persons across the EU: translation, interpretation and information, November 2016. Available at http://fra.europa.eu/en/publication/2016/rights-suspected-and-accused-persons-across-eu-translation-interpretation-and

- Study done by Council of Bars and Law Societies of Europe (ECCB), TRAINAC — Assessment, good practices and recommendations on the right to interpretation and translation, the right to information and the right of access to a lawyer in criminal proceedings, published in 2016. Available at http://europeanlawyersfoundation.eu/wp-content/uploads/2015/04/TRAINAC-study.pdf . See also "Inside Police Custody" and "Inside Police Custody 2", carried out by the Irish Council for Civil Liberties in 2014 and 2018. Available at: https://intersentia.be/nl/pdf/viewer/download/id/9781780681863_0/ .

Hypothetical N° 2 - The quality of the right to information about procedural rights

Level 1

Mrs. Belen was accused of having committed a serious crime, presumably the murder of his husband, and has received a notice stating that she is only suspect. She never received any Letter of Rights. Before judicial authorities, Mrs. Belen was stuck by a psychological panic attack and started lying without any particular consideration, without knowing that one of her rights is to remain silent. In the notice she received it was only mentioned the type of crime of which she was suspect without any motivation. After the police questioning, she was arrested. The written detention order and the accompanying declaration signed by the detained person served the function of a letter of rights.

Level 2

Should she be arrested for the purpose of the execution of a European Arrest Warrant, would the available protection change? Is the duty to inform suspects of their rights on the issuing state or the executing state?

48 hours, the maximum period of normal police detention, has elapsed after the arrest. However, the executing authority was not convinced that a European arrest warrant (irrespective of the language) had been issued. In this circumstance, is the executing state obliged to do something?

Level 3

However, Mrs. Belen wanted to challenge this decision and asked to have access to the materials of the case, but her request was denied without any motivation.
Is there any legal remedy available against the access denial to case's materials?

DIRECTIVE 2012/13/EU ON THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS

Art. 3 (Right to Information About Rights):

- 1. 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:
  (a) the right of access to a lawyer;
  (b) any entitlement to free legal advice and the conditions for obtaining such advice;
  (c) the right to be informed of the accusation, in accordance with Article 6;
  (d) the right to interpretation and translation;
  (e) the right to remain silent.
- 2. Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.

Art. 4 (Letter of Rights on Arrest):

- 1. Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights. They shall be given an opportunity to read the Letter of Rights and shall be allowed to keep it in their possession throughout the time that they are deprived of liberty.
- 2. In addition to the information set out in Article 3, the Letter of Rights referred to in paragraph 1 of this Article shall contain information about the following rights as they apply under national law:
  (a) the right of access to the materials of the case;
  (b) the right to have consular authorities and one person informed;
  (c) the right of access to urgent medical assistance; and
  (d) the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.
- 3. The Letter of Rights shall also contain basic information about any possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release.
- 4. The Letter of Rights shall be drafted in simple and accessible language. An indicative model Letter of Rights is set out in Annex I.
- 5. Member States shall ensure that suspects or accused persons receive the Letter of Rights written in a language that they understand. Where a Letter of Rights is not available in the appropriate language, suspects or accused persons shall be informed of their rights orally in a language that they understand. A Letter of Rights in a language that they understand shall then be given to them without undue delay.

Art. 5 (Letter of Rights in European Arrest Warrant proceedings):

- Member States shall ensure that persons who are arrested for the purpose of the execution of a European Arrest Warrant are provided promptly with an appropriate Letter of Rights containing information on their rights according to the law implementing Framework Decision 2002/584/JHA in the executing Member State.
- The Letter of Rights shall be drafted in simple and accessible language. An indicative model Letter of Rights is set out in Annex II.

Art. 6 (Right to Information About the Accusation):

- 1. Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.
- 2. Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.
- 3. Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.
- 4. Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings.

Art. 7 (Right of Access to the Materials of the Case):

- 1. Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.
- 2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.
- 3. Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.
- 4. By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.
- 5. Access, as referred to in this Article, shall be provided free of charge.

Useful materials for the resolution of the case

CJEU case law

1. **Right of information about the accusation**

***PPU – UY*, Case C-615/18**: Article 6 must be interpreted as: - not precluding national legislation according to which the period of two weeks to form opposition against an order having condemned a person to a driving 10 prohibition begins to run from its service to the representative of this person, provided that, as soon as said person becomes aware of it, he/she actually has a period of two weeks to appeal against this order, if necessary following or within the framework of proceedings foreclosure statement, without having to demonstrate that he/she has taken the necessary steps to seek information as soon as possible by his/her representative of the existence of the said order, and that the effects of the latter are suspended during this time limit; - precluding national legislation according to which a person residing in another Member State incurs a penal sanction if he/she does not respect, from the date when it acquired the authority of res judicata, an order having condemned him/she to a driving ban, even though this person was unaware of the existence of such an order on the date when he/she disregarded the driving ban which ensued.

***Covaci*, Case C-216/14**: Under Articles 6(1) and 6(3) the service of a penalty order issued by a court under a simplified unilateral procedure is a form of communication of the "accusation". National law can require that the accused appoint an agent to receive service but must still ensure that the accused still has benefit of the full appeals period upon become aware of the order.

***Kolev and others*, Case C-612/15**: The latest point at which the defence should be provided with detailed information on the accusation ("at the latest on submission of the merits of the accusation to a court") may be after the initiation of trial but must be:

1. Before the hearing of argument on the merits commences in front of the court

2. Subsequent amendments may be provided after the hearing of argument commences, but must be provided:

    a. Before the deliberation stage commences, and

    b. Only if "all necessary measures are taken by the court in order to ensure respect for the rights of the defence".

Notwithstanding the requirements above, in accordance with the principle of equality of arms, the information must be provided at a time which allows the defence "sufficient time to become acquainted with that information", and puts the defence in a position to prepare the defence effectively. This provision may require that the case be stayed and postponed accordingly to allow the defence time.

***Ianos Tranca*, Case C-124/16**: Article 6(1) and (3), and Covaci, does not preclude the clock for an appeals period starting to run upon delivery to a mandatory service agent, or the expiry of the period. However, as soon as the accused becomes aware of the order, he should be placed in status quo ante and be allowed the full appeals period. In effect, no practical finalisation of an order upon change from Covaci: national court must still allow the accused the full appeals period.

***Nikolay Kolev and Others*, Case 704/18**: the Bulgarian court considered that national procedural rules prevented the implementation of the earlier Kolev ruling in relation to Article 6(3) because the trial phase of the criminal proceedings was already terminated. The referring court considered that it is necessary to interpret its national law so that that procedural impediment does not hinder the application of EU law. It asked the CJEU whether Article 267 TFEU (on the preliminary reference procedure) could be interpreted as authorising a national court not to apply a preliminary ruling in the main proceedings, with regard to which that ruling was issued, in reliance on the factual circumstances taken into account by the Court when it gave the preliminary ruling? The CJEU considered that Article 267 TFEU must be interpreted as not precluding a provision of national procedural law which obliges the referring court in the case giving rise to the earlier Kolev ruling to comply with an injunction, imposed on it by a higher court, to refer the case back to the prosecutor, after the termination of the trial phase of the criminal proceedings, for procedural irregularities committed during the pre-trial phase of those proceedings to be remedied, to the extent that those provisions of EU law, as interpreted by the Court in the earlier Kolev judgment, are respected in the context of the pre-trial phase of the criminal proceedings or in that of the subsequent trial phase thereof.

2. Right of access to the materials of the case

***Kolev and others*, Case C-612/15**: The national court must be satisfied that the defence has been granted a "genuine opportunity to have access to the case materials". Access may be provided after the initiation of trial but must be at least: 1. Before the hearing of argument on the merits commences in front of the court 2. Access to new evidence placed in the file during proceedings may be provided after the hearing of argument commences but: a. Must be provided before deliberation commences; and b. Only if "all necessary measures are taken by the court in order to ensure respect for the rights of the defence" a. Notwithstanding the requirements above, in accordance with the principle of equality of arms, access must be provided at a time which allows the defence "sufficient time to become acquainted with that information", and puts the defence "in a position to prepare the defence effectively". This provision may require that the case be stayed and postponed accordingly to allow the defence time. Also, where a suspect for legitimate reasons has not been able to attend access to file on the day summoned, Article 7(2) and 7(3) requires the court or prosecutor to allow the suspect a further opportunity to become acquainted with the case file.

ECHR case law[7]

1. Information on the nature and cause of the accusation (Article 6 § 3 (a))

377. The scope of Article 6 § 3 (a) must be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (*Pélissier and Sassi v. France* [GC], § 52; *Sejdovic v. Italy* [GC], § 90; *Varela Geis v. Spain*, § 42).

378. Sub-paragraphs (a) and (b) of Article 6 § 3 are connected in that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence (*Pélissier and Sassi v. France* [GC], § 54; *Dallos v. Hungary*, § 47).

379. Article 6 § 3 (a) points to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him (*Pélissier and Sassi v. France* [GC], § 51; *Kamasinski v. Austria*, § 79).

380. Article 6 § 3 (a) affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say, the acts he is alleged to have committed and on which the accusation is based, but also of the "nature" of the accusation, that is, the legal characterisation given to those acts (*Mattoccia v. Italy*, § 59; *Penev v. Bulgaria*, §§ 33 and 42).

381. The information need not necessarily mention the evidence on which the charge is based (*X. v. Belgium*, Commission decision; *Collozza and Rubinat v. Italy*, Commission report).

382. Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him (*Pélissier and Sassi v. France* [GC], § 53; *Drassich v. Italy*, § 34; *Giosakis v. Greece (no. 3)*, § 29). In this connection, an indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him or her (*Kamasinski v. Austria*, § 79).

383. The duty to inform the accused rests entirely on the prosecution and cannot be complied with passively by making information available without bringing it to the attention of the defence (*Mattoccia v. Italy*, § 65; *Chichlian and Ekindjian v. France*, Commission report, § 71).

384. Information must actually be received by the accused; a legal presumption of receipt is not sufficient (*C. v. Italy*, Commission decision).

385. If the situation complained of is attributable to the accused's own conduct, the latter is not in a position to allege a violation of the rights of the defence (*Erdogan v. Turkey*, Commission decision; *Campbell and Fell v. the United Kingdom*, § 96).

[7] Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb), at https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf.

386. In the case of a person with mental difficulties, the authorities are required to take additional steps to enable the person to be informed in detail of the nature and cause of the accusation against him (*Vaudelle v. France*, § 65).

[…]

392. The adequacy of the information must be assessed in relation to Article 6 § 3 (b), which confers on everyone the right to have adequate time and facilities for the preparation of their defence, and in the light of the more general right to a fair hearing enshrined in Article 6 § 1 (*Mattoccia v. Italy*, § 60; *Bäckström and Andersson v. Sweden* (dec.)).

393. While the extent of the "detailed" information varies depending on the particular circumstances of each case, the accused must at least be provided with sufficient information to understand fully the extent of the charges against him, in order to prepare an adequate defence (*Mattoccia v. Italy*, § 60). For instance, detailed information will exist when the offences of which the defendant is accused are sufficiently listed; the place and the date of the offence is stated; there is a reference to the relevant Articles of the Criminal Code, and the name of the victim is mentioned (*Brozicek v. Italy*, § 42).

394. Some specific details of the offence may be ascertainable not only from the indictment but also from other documents prepared by the prosecution in the case and from other file materials (*Previti v. Italy* (dec.), § 208). Moreover, factual details of the offence may be clarified and specified during the proceedings (*Sampech v. Italy* (dec.), § 110; *Pereira Cruz and Others v. Portugal*, § 198).

395. The information must be submitted to the accused in good time for the preparation of his defence, which is the principal underlying purpose of Article 6 § 3 (a) (*C. v. Italy*, Commission decision, where the notification of charges to the applicant four months before his trial was deemed acceptable; see, by contrast, *Borisova v. Bulgaria*, §§ 43-45, where the applicant had only a couple of hours to prepare her defence without a lawyer).

396. In examining compliance with Article 6 § 3 (a), the Court has regard to the autonomous meaning of the words "charged" and "criminal charge", which must be interpreted with reference to the objective rather than the formal situation (*Padin Gestoso v. Spain* (dec.); *Casse v. Luxembourg*, § 71).

[…]

2. Preparation of the defence (Article 6 § 3 (b))

402. The "rights of defence", of which Article 6 § 3 (b) gives a non-exhaustive list, have been instituted above all to establish equality, as far as possible, between the prosecution and the defence. The facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence (*Mayzit v. Russia*, § 79).

403. Article 6 § 3 (b) of the Convention concerns two elements of a proper defence, namely the question of facilities and that of time. This provision implies that the substantive defence activity on the accused's behalf may comprise everything which is "necessary" to prepare the trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings (*Can v. Austria*, Commission report, § 53; *Gregačević v. Croatia*, § 51).

404. The issue of adequacy of the time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case (*Iglin v. Ukraine*, § 65; *Galstyan v. Armenia*, § 84).

405. When assessing whether the accused had adequate time for the preparation of his defence, particular regard has to be had to the nature of the proceedings, as well as the complexity of the case and the stage of the proceedings (*Gregačević v. Croatia*, § 51).

406. Article 6 § 3 (b) protects the accused against a hasty trial (*Kröcher and Möller v. Switzerland*, Commission decision; *Bonzi v. Switzerland*, Commission decision; *Borisova v. Bulgaria*, § 40; *Malofeyeva v. Russia*, § 115; *Gafgaz Mammadov v. Azerbaijan*, § 76-82). Although it is important to conduct proceedings at a good speed, this should not be done at the expense of the procedural rights of one of the parties (*OAO Neftyanaya Kompaniya Yukos v. Russia*, § 540).

407. In determining whether Article 6 § 3 (b) has been complied with, account must be taken also of the usual workload of legal counsel; however, it is not unreasonable to require a defence lawyer to arrange for at least some shift in the emphasis of his work if this is necessary in view of the special urgency of a particular case (*Mattick v. Germany* (dec.)). In this context, in a case in which the applicant and his defence counsel had had five days to study a six-volume case file of about 1,500 pages, the Court did not consider that the time allocated to the defence to study the case file was enough to protect the essence of the right guaranteed by Article 6 §§ 1 and 3 (b). The Court took into account the fact that in the appeal the applicant had analysed the case material in detail, that he had been represented before the appeal court by two lawyers, who confirmed that they had had enough time to study the file, and that the applicant had not been limited in the number and duration of his meetings with the lawyers (*Lambin v. Russia*, §§ 43-48).

408. Article 6 § 3 (b) of the Convention does not require the preparation of a trial lasting over a certain period of time to be completed before the first hearing. The course of trials cannot be fully charted in advance and may reveal elements which had not hitherto come to light and require further preparation by the parties (*Mattick v. Germany* (dec.)).

409. An issue with regard to the requirement of "adequate time" under Article 6 § 3 (b) may arise with regard to the limited time for the inspection of a file (*Huseyn and Others v. Azerbaijan*, § 174-178; *Iglin v. Ukraine*, §§ 70-73), or a short period between the notification of charges and the holding of the hearing (*Vyerentsov v. Ukraine*, §§ 75-77). Furthermore, the defence must be given additional time after certain occurrences in the proceedings in order to adjust its position, prepare a request, lodge an appeal, etc. (*Miminoshvili v. Russia*, § 141). Such "occurrences" may include changes in the indictment (*Pélissier and Sassi v. France* [GC], § 62), introduction of new evidence by the prosecution (*G.B. v. France*, §§ 60-62), or a sudden and drastic change in the opinion of an expert during the trial (*ibid.*, §§ 69-70).

410. An accused is expected to seek an adjournment or postponement of a hearing if there is a perceived problem with the time allowed (*Campbell and Fell v. the United Kingdom*, § 98; *Bäckström and Andersson v. Sweden* (dec.); *Craxi v. Italy (no. 1)*, § 72), save in exceptional circumstances (*Goddi v. Italy*, § 31) or where there is no basis for such a right in domestic law and practice (*Galstyan v. Armenia*, § 85).

411. In certain circumstances a court may be required to adjourn a hearing of its own motion in order to give the defence sufficient time (*Sadak and Others v. Turkey (no. 1)*, § 57; *Sakhnovskiy v. Russia* [GC], §§ 103 and 106).

412. In order for the accused to exercise effectively the right of appeal available to him, the national courts must indicate with sufficient clarity the grounds on which they based their decision (*Hadjianastassiou v. Greece*, § 33). When a fully reasoned judgment is not available before the expiry

of the time-limit for lodging an appeal, the accused must be given sufficient information in order to be able to make an informed appeal (*Zoon v. the Netherlands*, §§ 40-50; *Baucher v. France*, §§ 46-51).

413. States must ensure that everyone charged with a criminal offence has the benefit of the safeguards of Article 6 § 3. Putting the onus on convicted appellants to find out when an allotted period of time starts to run or expires is not compatible with the "diligence" which the Contracting States must exercise to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (*Vacher v. France*, § 28).

414. The "facilities" which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings (*Huseyn and Others v. Azerbaijan*, § 175; *OAO Neftyanaya Kompaniya Yukos v. Russia*, § 538).

415. The States' duty under Article 6 § 3 (b) to ensure the accused's right to mount a defence in criminal proceedings includes an obligation to organise the proceedings in such a way as not to prejudice the accused's power to concentrate and apply mental dexterity in defending his position. Where the defendants are detained, the conditions of their detention, transport, catering and other similar arrangements are relevant factors to consider in this respect (*Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia*, § 252).

416. In particular, where a person is detained pending trial, the notion of "facilities" may include such conditions of detention that permit the person to read and write with a reasonable degree of concentration (*Mayzit v. Russia*, § 81; *Moiseyev v. Russia*, § 221). It is crucial that both the accused and his defence counsel should be able to participate in the proceedings and make submissions without suffering from excessive tiredness (*Barberà, Messegué and Jabardo v. Spain*, § 70; *Makhfi v. France*, § 40; *Fakailo (Safoka) and Others v. France*, § 50). Thus, in *Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia*, §§ 253-254, the Court found that the cumulative effect of exhaustion caused by lengthy prison transfers – in poor conditions and with less than eight hours of rest, repeated for four days a week over a period of more than four months – seriously undermined the applicant's ability to follow the proceedings, make submissions, take notes and instruct his lawyers. In these circumsatnces, and given that insufficient consideration had been given to the applicant's requests for a hearing schedule that might have been less intensive, the Court considered that he had not been afforded adequate facilities for the preparation of his defence, which had undermined the requirements of a fair trial and equality of arms, contrary to the requirements of Article 6 §§ 1 and 3 (b) of the Convention.

417. The facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence (*Padin Gestoso v. Spain* (dec.); *Mayzit v. Russia*, § 79).

418. Article 6 § 3 (b) guarantees also bear relevance for an accused's access to the file and the disclosure of evidence, and in this context they overlap with the principles of the equality of arms and adversarial trial under Article 6 § 1 (*Rowe and Davis v. the United Kingdom* [GC], § 59; *Leas v. Estonia*, § 76).13 An accused does not have to be given direct access to the case file, it being sufficient for him to be informed of the material in the file by his representatives (*Kremzow v. Austria*, § 52). However, an accused's limited access to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions (*Öcalan v. Turkey* [GC], § 140).

419. When an accused has been allowed to conduct his own defence, denying him access to the case file amounts to an infringement of the rights of the defence (*Foucher v. France*, §§ 33-36).

420. In order to facilitate the conduct of the defence, the accused must not be hindered in obtaining copies of relevant documents from the case file and compiling and using any notes taken (*Rasmussen v. Poland*, §§ 48-49; *Moiseyev v. Russia*, §§ 213-218; *Matyjek v. Poland*, § 59; *Seleznev v. Russia*, §§ 64-69).

421. "Facilities" provided to an accused include consultation with his lawyer (*Campbell and Fell v. the United Kingdom*, § 99; *Goddi v. Italy*, § 31). The opportunity for an accused to confer with his defence counsel is fundamental to the preparation of his defence (*Bonzi v. Switzerland*, Commission decision; *Can v. Austria*, Commission report, § 52). Thus, an issue under Article 6 § 3 (b) arises if the placement of an accused in a glass cabin during the hearing prevents his or her effective consultation with a lawyer (*Yaroslav Belousov v. Russia*, §§ 148-153).

422. Article 6 § 3 (b) overlaps with a right to legal assistance in Article 6 § 3 (c) of the Convention (*Lanz v. Austria*, §§ 50-53; *Öcalan v. Turkey* [GC], § 148; *Trepashkin v. Russia (no. 2),* §§ 159-168).

Supporting documents

FRA OPINION 8

Article 7 of Directive 2012/13/EU provides the right to access materials of the case, but recognises that this right is not absolute and has to be weighed against other interests that require protection. In their efforts to safeguard the fairness of the proceedings in line with this provision, EU Member States should consider introducing practical arrangements to facilitate access to case materials – for example, by requiring criminal justice authorities to proactively share such materials with defendants or their lawyers in the course of proceedings. Rules that unnecessarily hamper the effectiveness of the right of access should be avoided, such as rules limiting where persons or their lawyers can consult information, what type of information they can consult, or for how long.

EU Member States should also consider exploring the possibility of allowing individuals or their lawyers to obtain copies with the use of digital technology, including mobile devices, to avoid or minimise any indirect costs of accessing case materials.

FOCUS

There are no specific remedies in the Directive as well as in national legislation for challenging statements made without the lawyer being present, but some remedies are enshrined in the MS practice. Different legal avenues referred by professionals from the Member States are listed below[8].

a) filing a complaint against the police officer (Denmark);
b) inadmissibility complaint (Austria and Bulgaria);
c) application because of violation of the rights of the defendant (Austria and the Netherlands);
d) complaining in the main proceedings (Austria);

[8] European Union Agency for Fundamental Rights (FRA). *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*. Luxembourg, 2019.

e) request for annulment (France and Greece);
f) appeal complaint (Poland);
g) claiming that testimony was given under duress or threat (Bulgaria);
h) claiming there was a procedural violation (Bulgaria);
i) motion to the supervising prosecutor (Bulgaria).

Hypothetical N° 3 – The right to information for third country nationals in administrative detention proceedings

Level 1

A migrant boat in failure coming from Greece is rescued by the Italian Guardia Costiera off the coast of Puglia in August 2020. Migrants aboard are disembarked and driven to the Taranto hotspot. Some of them show symptoms of cough and high fever. There, they are informed by the authorities that they will be health screened, pre-identified by means of digital fingerprinting and mugshooted. They also have a right to claim for asylum and access voluntary return programmes.

Hassan, an afghan citizen, states not to want to be lifted fingerprints and tries to quit the hotspot. Following his refusal, he is immediately brought in front of law enforcement authorities and forcibly fingerprinted. Because of the flight risk, he is subsequently driven to the CPR (detention and repatriation centre for migrants) in Brindisi, where he asks to apply for international protection. While remaining in state of detention, Hassan is provided with an Italian-written form through which he could present his request. With the help of an agent roughly translating the questions in English, he manages to fill out the form. His claim is processed under accelerated procedure.

What procedural rights is Hassan entitled to? Should you be the EASO Member of the Examining Committee, which procedural points could you raise?

Level 2

Shortly after, Hassan develops fever and sore throat. He demands for health screening insofar as he had not accessed hotspot procedures after disembarkation. He is thus placed in confinement in the isolation section of the CPR, where an official tells him that he has a right to be screened for health.

After 4 days remaining in the isolation section without further notification, Hassan files an objection to the Protection Authority for the Rights of Detainees and Restricted Persons, the complaints body as for the living conditions within the centres: he claims that he was told to have a right of access to health screening but he is not in a position to exercise it.

You play the role of the Appeal Authority. How would you answer the claim?

DIRECTIVE 2012/13/EU ON THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS

Art. 3 (Right to information about rights):

- 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:
  (a) the right of access to a lawyer;
  (b) any entitlement to free legal advice and the conditions for obtaining such advice;
  (c) the right to be informed of the accusation, in accordance with Article 6;
  (d) the right to interpretation and translation;
  (e) the right to remain silent.
- 2. Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.

ECHR

Art. 5 (Right to liberty and security):

- 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
- a) the lawful detention of a person after conviction by a competent court;
- b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
- 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
- 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

DIRECTIVE 2008/115/EC ON COMMON STANDARDS AND PROCEDURES IN MEMBER STATES FOR RETURNING ILLEGALLY STAYING THIRD-COUNTRY NATIONALS

Art. 16 (Conditions of detention):

- 1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.
- 2. Third-country nationals in detention shall be allowed — on request — to establish in due time contact with legal representatives, family members and competent consular authorities.
- 3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.
- 4. Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.
- 5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4.

DIRECTIVE 2013/32/EU ON COMMON PROCEDURES FOR GRANTING AND WITHDRAWING INTERNATIONAL PROTECTION

Art. 8 (Information and counselling in detention facilities and at border crossing points):

- 1. Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so. In those detention facilities and crossing points, Member States shall make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure.
- 2. Member States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders. Member States may provide for rules covering the presence of such organisations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible.

Art. 29 (The role of UNHCR):

- 1. Member States shall allow UNHCR:
  (a) to have access to applicants, including those in detention, at the border and in the transit zones;
  (b) to have access to information on individual applications for international protection, on the course of the procedure and on the decisions taken, provided that the applicant agrees thereto;

(c) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure.

- 2. Paragraph 1 shall also apply to an organisation which is working in the territory of the Member State concerned on behalf of UNHCR pursuant to an agreement with that Member State.

Useful materials for the resolution of the case

ECHR case law[9]

Confinement in transit zones and reception centres

16. In determining the distinction between a restriction on liberty of movement and deprivation of liberty in the context of confinement of foreigners in transit zones and reception centres for the identification and registration of migrants, the factors taken into consideration by the Court may be summarised as follows: i) the applicants' individual situation and their choices; ii) the applicable legal regime of the respective country and its purpose; iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events; and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants (*Z.A. and Others v. Russia* [GC], § 138; *Ilias and Ahmed v. Hungary* [GC], §§ 217-218). The Court has distinguished the lengthy confinement in airport transit zones, where it found Article 5 of the Convention to apply (see *Z.A. and Others v. Russia* [GC]), from the applicants´ stay in a land border transit zone where they awaited the outcome of their asylum claims (*Ilias and Ahmed v. Hungary* [GC], where the Court found Article 5 not to apply). In *J.R. and Others v. Greece*, the applicants, Afghan nationals, arrived on the island of Chios and were arrested and placed in the Vial "hotspot" facility (a migrant reception, identification and registration centre). After one month, that facility became semi-open and the applicants were allowed out during the day. The Court considered that the applicants had been deprived of their liberty within the meaning of Article 5 during the first month of their stay in the facility, but that they were subjected only to a restriction of movement, rather than a deprivation of liberty, once the facility had become semi-open.

Immigration detention under Article 5 § 1(f)

1. General principles

17. Article 5 § 1(f) of the Convention allows States to control the liberty of aliens in an immigration context in two different situations: the first limb of that provision permits the detention of an asylum-seeker or other immigrant prior to the State's grant of authorisation to enter (for the second limb, see paragraphs 54-56 below). The question as to when the first limb of Article 5 § 1(f) ceases to apply, because the individual has been granted formal authorisation to enter or stay, is largely dependent on national law (*Suso Musa v. Malta*, § 97; see also *O.M. v. Hungary*, where the detention of the asylum-

[9] Guide on the case law of the European Convention on Human Rights: Immigration, at https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf.

seeking applicant was consequently examined under Article 5 § 1(b), since domestic law created a more favourable position than required by the Convention, with the result that the Court did not consider it necessary to address the lawfulness of the detention under Article 5 § 1(f); and *Muhammad Saqawat v. Belgium*, §§ 47 and 49, as to the impact of EU law on domestic law). Such detention must be compatible with the overall purpose and requirements of Article 5, notably its lawfulness, including the obligation to conform to the substantive and procedural rules of national law. However compliance with domestic law is not sufficient, since a deprivation of liberty may be lawful in terms of domestic law but still be arbitrary (*Saadi v. the United Kingdom* [GC], § 67). In the case of massive arrivals of asylum-seekers at State borders, subject to the prohibition of arbitrariness, the lawfulness requirement of Article 5 may be considered generally satisfied by a domestic legal regime that provides, for example, for no more than the name of the authority competent to order deprivation of liberty in a transit zone, the form of the order, its possible grounds and limits, the maximum duration of the confinement and, as required by Article 5 § 4, the applicable avenue of judicial appeal (*Z.A. and Others v. Russia* [GC], § 162). The requirement of lawfulness was an issue, for example, where the detention was based on an administrative circular (*Amuur v. France*), where the legal basis was not accessible to the public (*Nolan and K. v. Russia, and Khlaifia and Others v. Italy* [GC]: readmission agreement) or where no maximum period of detention was laid down in legislation (*Mathloom v. Greece*). In *Nabil and Others v. Hungary*, the domestic courts had not duly assessed whether the conditions set out in domestic law for the prolongation of the detention - falling under the second limb of Article 5 § 1(f) - were met.

18. In respect of adults with no particular vulnerabilities, detention under Article 5 § 1(f) is not required to be reasonably necessary. However, it must not be arbitrary. “Freedom from arbitrariness” in the context of the first limb of Article 5 § 1(f) means that such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued (*Saadi v. the United Kingdom* [GC], § 74). If the place and conditions of detention are not appropriate, this may also breach Article 3 of the Convention (see, for example, *M.S.S. v. Belgium and Greece* [GC], §§ 205-234; *S.Z. v. Greece*, and *HA.A. v. Greece*).

18. In respect of adults with no particular vulnerabilities, detention under Article 5 § 1(f) is not required to be reasonably necessary. However, it must not be arbitrary. “Freedom from arbitrariness” in the context of the first limb of Article 5 § 1(f) means that such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued (*Saadi v. the United Kingdom* [GC], § 74). If the place and conditions of detention are not appropriate, this may also breach Article 3 of the Convention (see, for example, *M.S.S. v. Belgium and Greece* [GC], §§ 205-234; *S.Z. v. Greece*, and *HA.A. v. Greece*).

2. Procedural safeguards

20. Under Article 5 § 2, any person who has been arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his deprivation of liberty, so as to be able to apply to a court to challenge its lawfulness in accordance with Article 5 § 4 (*Khlaifia and Others v. Italy* [GC], § 115). Whilst this information must be conveyed "promptly", it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (*ibid.*; see *Čonka v. Belgium*; *Saadi v. the United Kingdom* [GC]; *Nowak v. Ukraine*; *Dbouba v. Turkey*).

21. Article 5 § 4 entitles a detained person to bring proceedings for review by a court of the procedural and substantive conditions which are essential for the "lawfulness", in the sense of Article 5 § 1, of his or her deprivation of liberty (*Khlaifia and Others v. Italy* [GC], § 131; see, in particular, *A.M. v. France*, §§ 40-41, concerning the required scope of judicial review under Article 5 § 1(f)). Proceedings to challenge the lawfulness under Article 5 § 1(f) of administrative detention pending deportations do not need to have a suspensive effect on the implementation of the deportation order (*ibid.*, § 38). Where deportation is expedited in a manner preventing the detained person or his lawyer from bringing proceedings under Article 5 § 4, that provision is breached (*Čonka v. Belgium*). In cases where detainees had not been informed of the reasons for their deprivation of liberty, their right to appeal against their detention was deprived of all effective substance (*Khlaifia and Others v. Italy* [GC], § 132). The same holds true if the detained person is informed about the available remedies in a language he does not understand and is unable, in practice, to contact a lawyer (*Rahimi v. Greece*, § 120). The proceedings under Article 5 § 4 must be adversarial and ensure equality of arms between the parties (see *A. and Others v. the United Kingdom* [GC], §§ 203 et seq.; and *Al Husin v. Bosnia and Herzegovina (no. 2)* in respect of national security cases). It breaches Article 5 § 4 if the detainee is unable to obtain a substantive judicial decision on the lawfulness of the detention order, and hence his release from detention, because the appeal is deemed to have become "without object" as a new detention order has been issued in the meantime (*Muhammad Saqawat v. Belgium*), or if there is no judicial remedy available to challenge the lawfulness of the detention, even if it is brief (*Moustahi v. France*).

22. Article 5 § 4 also secures to persons arrested or detained the right to have the lawfulness of their detention decided "speedily" by a court and to have their release ordered if the detention is not lawful (*Khlaifia and Others v. Italy* [GC], § 131; in relation to case law on the "speediness" requirement in respect of detention under Article 5 § 1(f), albeit with a view to the second limb of the provision, see also *Khudyakova v. Russia*, §§ 92-100; *Abdulkhakov v. Russia*, § 214; *M.M. v. Bulgaria*). Where the national authorities decide in exceptional circumstances to detain a child and his or her parents in the context of immigration controls, the lawfulness of such detention should be examined by the national courts with particular expedition and diligence at all levels (*G.B. and Others v. Turkey*, §§ 167 and 186). Where an automatic review is not conducted in compliance with the time-limits provided for by domestic law, but nonetheless speedily from an objective point of view, there is no breach of Article 5 § 4 (*Aboya Boa Jean v. Malta*).

Supporting Documents

Recommendations of the Parliamentary Assembly of the Council of Europe on *Detention of asylum seekers and irregular migrants in Europe*[10]:

- 9.2.2. detainees shall be accommodated in centres specifically designed for the purpose of immigration detention and not in prisons;
- 9.2.3. all detainees must be informed promptly, in simple, non-technical language that they can understand, of the essential legal and factual grounds for detention, their rights and the rules and complaints procedure in detention; during detention, detainees must be provided with the opportunity to make a claim for asylum or complementary/subsidiary protection, and effective access to a fair and satisfactory asylum process with full procedural safeguards;
- 9.2.4. legal and factual admission criteria shall be complied with, including carrying out appropriate screening and medical checks to identify special needs. Proper records concerning admissions, stay and departure of detainees must be kept;
- 9.2.5. the material conditions for detention shall be appropriate to the individual's legal and factual situation;
- 9.2.6. the detention regime must be appropriate to the individual's legal and factual situation;
- 9.2.7. the detention authorities shall safeguard the health and well-being of all detainees in their care;
- 9.2.9. detainees shall be guaranteed effective access to legal advice, assistance and representation of a sufficient quality, and legal aid shall be provided free of charge;
- 9.2.10. detainees must be able periodically to effectively challenge their detention before a court and decisions regarding detention should be reviewed automatically at regular intervals;
- 9.2.12. detention centre staff and immigration officers shall not use force against detainees except in cases of self-defence or in cases of attempted escape or active physical resistance to a lawful order, and always as a last resort and in a manner proportionate to the situation;
- 9.2.13. detention centre management and staff shall be carefully recruited, provided with appropriate training and operate to the highest professional, ethical and personal standards;
- 9.2.14. detainees shall have ample opportunity to make requests or complaints to any competent authority and be guaranteed confidentiality when doing so;

Resolution of the Parliamentary Assembly of the Council of Europe on *Administrative detention*[11]:

The Council of Europe's Committee of Ministers has affirmed the fundamental rights of all persons deprived of their liberty several times and has developed a number of general rules in this field, including the legality principle, the prohibition of arbitrariness, the right to habeas corpus, the proportionality requirement, the right of access to a lawyer and authorisation of contact with the

[10] Assembly debate on 28 January 2010 (7th Sitting) (see Doc. 12105, report of the Committee on Migration, Refugees and Population, rapporteur: Mrs Mendonça). Pp. 2-3.
[11] Doc. 14079. Report of the Committee on Legal Affairs and Human Rights, rapporteur: Lord Balfe Richard. 06 June 2016.

outside. In view of the general nature of these principles, they also apply in the area of administrative detention.

Council of Europe's Guidelines on Forced Return[12]:

- **Guideline 6.2**: The person detained shall be informed promptly, in a language which he/she understands, of the legal and factual reasons for his/her detention, and the possible remedies; he/she should be given the immediate possibility of contacting a lawyer, a doctor, and a person of his/her own choice to inform that person about his/her situation.
- **Guideline 10.3:** Staff in such facilities should be carefully selected and receive appropriate training. Member states are encouraged to provide the staff concerned, as far as possible, with training that would not only equip them with interpersonal communication skills but also familiarise them with the different cultures of the detainees. Preferably, some of the staff should have relevant language skills and should be able to recognise possible symptoms of stress reactions displayed by detained persons and take appropriate action. When necessary, staff should also be able to draw on outside support, in particular medical and social support.
- **Guideline 10.5:** National authorities should ensure that the persons detained in these facilities have access to lawyers, doctors, non-governmental organisations, members of their families, and the UNHCR, and that they are able to communicate with the outside world, in accordance with the relevant national regulations. […]
- **Guideline 10.6:** Detainees shall have the right to file complaints for alleged instances of ill-treatment or for failure to protect them from violence by other detainees. Complainants and witnesses shall be protected against any ill-treatment or intimidation arising as a result of their complaint or of the evidence given to support it.
- **Guideline 10.7**: Detainees should be systematically provided with information which explains the rules applied in the facility and the procedure applicable to them and sets out their rights and obligations. This information should be available in the languages most commonly used by those concerned and, if necessary, recourse should be made to the services of an interpreter. Detainees should be informed of their entitlement to contact a lawyer of their choice, the competent diplomatic representation of their country, international organisations such as the UNHCR and the International Organization for Migration (IOM), and non-governmental organisations. Assistance should be provided in this regard.

[12] Council of Europe. *Twenty Guidelines Of The Committee Of Ministers Of Europe On Forced Return*. September 2005.

Hypothetical N° 4 - The right to communicate, while deprived of liberty, with third persons

Level 1

Ahmet is an Algerian citizen domiciled in France. In February 2019 he moved in Turin, Italy, where he lives as undocumented resident in the apartment of his cousin Bashir. Ahmet does not speak Italian and sometimes he helps Bashir working in a factory. On 9th March 2019, while Bashir is at work, Ahmet is seized from the apartment by law enforcement authorities and driven to the police station, where an officer asks him whether he can understand Italian.

A few hours later, the state's attorney joins them at the station, together with a French interpreter. The attorney informs Ahmet that France issued a European arrest warrant against him, as he is being investigated for terrorist offences, and that he will be interviewed by a judge the following day. Ahmet is informed that he has a right to be assisted by a lawyer and to contact him or her free of charge. He is thus provided with the contact list of available lawyers in the district.

Ahmet tells he wants to contact his fiduciary lawyer living in France and he would like to call Bashir to be given the lawyer's telephone number, as his phone had been taken by the police. Nevertheless, their house has to be searched as there is a suspicion that some explosive devices are hidden there, and Bashir shouldn't be warned beforehand. Ahmet tells Bashir's number is the only one he can remember, and he does not know anyone else in Italy.

What should the public attorney do at this stage?

Level 2

Ahmet is prevented from calling his cousin and is granted legal assistance by a public defender. They met the next morning, a few minutes before the court hearing. With the assistance of an interpreter, the defender asks Ahmet to roughly explain the circumstances of the arrest.

What could the defender suggest to Ahmet?

DIRECTIVE 2013/48/EU ON THE RIGHT OF ACCESS TO A LAWYER IN CRIMINAL PROCEEDINGS AND IN EUROPEAN ARREST WARRANT PROCEEDINGS

Recital 35

- Suspects or accused persons who are deprived of liberty should have the right to have at least one person, such as a relative or an employer, nominated by them, informed of their deprivation of liberty without undue delay, provided that this does not prejudice the due course of the criminal proceedings against the person concerned or any other criminal proceedings. Member States may make practical arrangements in relation to the application of that right. Such practical arrangements should not prejudice the effective exercise and essence of the right. In limited, exceptional circumstances, however, it should be possible to derogate temporarily from that right when this is justified, in the light of the particular circumstances of the case, by a compelling reason as specified in this Directive. When the competent authorities envisage making such a temporary derogation in respect of a specific third person, they should firstly consider whether another third person, nominated by the suspect or accused person, could be informed of the deprivation of liberty.

Art. 3 (The right of access to a lawyer in criminal proceedings):

- 1. Member States shall ensure 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 the persons concerned to exercise their rights of defence practically and effectively.
- 2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:
  (a) before they are questioned by the police or by another law enforcement or judicial authority;
  (b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;
  (c) without undue delay after deprivation of liberty;
  (d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.
- 3. The right of access to a lawyer shall entail the following:
- (a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;
- (b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;
- (c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:
  (i) identity parades;
  (ii) confrontations;

(iii) reconstructions of the scene of a crime.

- 4. Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons.
- Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right in accordance with Article 9.
- 5. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of point (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.
- 6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:

(a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;

(b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

Art. 5 (The right to have a third person informed of the deprivation of liberty):

- 1. Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to have at least one person, such as a relative or an employer, nominated by them, informed of their deprivation of liberty without undue delay if they so wish.
- 2. If the suspect or accused person is a child, Member States shall ensure that the holder of parental responsibility of the child is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed. For the purposes of this paragraph, a person below the age of 18 years shall be considered to be a child.
- 3. Member States may temporarily derogate from the application of the rights set out in paragraphs 1 and 2 where justified in the light of the particular circumstances of the case on the basis of one of the following compelling reasons:
- (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
- (b) where there is an urgent need to prevent a situation where criminal proceedings could be substantially jeopardised.
- 4. Where Member States temporarily derogate from the application of the right set out in paragraph 2, they shall ensure that an authority responsible for the protection or welfare of children is informed without undue delay of the deprivation of liberty of the child.

- **Art. 6 (The right to communicate, while deprived of liberty, with third persons):**
- 1. Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to communicate without undue delay with at least one third person, such as a relative, nominated by them.
- 2. Member States may limit or defer the exercise of the right referred to in paragraph 1 in view of imperative requirements or proportionate operational requirements.

Art. 8 (General conditions for applying temporary derogations):

- 1. Any temporary derogation under Article 3(5) or (6) or under Article 5(3) shall
  (a) be proportionate and not go beyond what is necessary;
  (b) be strictly limited in time;
  (c) not be based exclusively on the type or the seriousness of the alleged offence; and
  (d) not prejudice the overall fairness of the proceedings.
- 2. Temporary derogations under Article 3(5) or (6) may be authorised only by a duly reasoned decision taken on a case-by- case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review. The duly reasoned decision shall be recorded using the recording procedure in accordance with the law of the Member State concerned.
- 3. Temporary derogations under Article 5(3) may be authorised only on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review.

EUCFR

Art. 47.2 (Right to an effective remedy and to a fair trial):

- Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

ECHR

Art. 6 § 3 (Right to a Fair Trial):

- 3. Everyone charged with a criminal offence has the following minimum rights:
- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (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;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Useful materials for the resolution of the case

CJEU case law

***Kolev and others*, Case C-612/15**: CJEU considered that Article 3(1), and the Directive generally, should be read in conjunction with Article 47, and 48(2) of the Charter, and also in light of Article 6(3) ECHR. Citing Croissant v Germany, ECtHR and Lagerblom v Sweden, ECtHR, CJEU found that while it should be possible to use one's lawyer of choice, that right is not absolute. A lawyer must have no conflict of interest if "the effectiveness of the rights of the defence is to be protected". Accordingly, where a lawyer is representing co-defendants with conflicting interests, the court can dismiss the conflicted lawyer and allow the selection of new lawyers for each party, or appoint new lawyers itself.

***VW*, Case C-659/18**: Article 3(1) requires the Member States to ensure 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.

Suspects and accused persons must have access to a lawyer without undue delay and, in any event, from whichever of the four specific points in time listed in (a) to (d) of that provision is the earliest. Article 3(2) provides that suspects or accused persons are to have access to a lawyer inter alia 'before they are questioned by the police or by another law enforcement or judicial authority', in accordance with Article 3(2)(a) and 'where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court', in accordance with Article 3(2)(d).

The temporary derogations from the right of access to a lawyer which Member States may provide for are set out exhaustively in Article 3(5) and (6) and must be interpreted strictly. Furthermore, Article 8 of that directive, entitled 'General conditions for applying temporary derogations', refers only, as regards the right of access to a lawyer, to the derogations provided for in Article 3(5) or (6) thereof. Recitals 30 to 32 of Directive 2013/48 also refer to those derogations only. To interpret Article 3 of Directive 2013/48 as allowing Member States to provide for derogations from the right of access to a lawyer other than those which are exhaustively set out in that article would run counter to those objectives and the scheme of that directive and to the very wording of that provision and would render that right redundant. The exercise by a suspect or accused person of the right of access to a lawyer laid down by Directive 2013/48, arising, in any event, from whichever of the four points in time referred to in Article 3(2)(a) to (d) of that directive is the earliest, does not depend on the person concerned appearing. Moreover, the fact that a suspect or accused person has failed to appear is not one of the reasons for derogating from the right of access to a lawyer set out 18 exhaustively in that directive, so that the fact that a suspect has failed to appear, despite summonses having been issued to appear before an investigating judge, cannot justify that person being deprived of the exercise of that right.

ECHR case law[13]

1. Telephone conversations

520. Article 8 of the Convention does not confer on prisoners the right to make telephone calls, in particular where the facilities for communication by letter are available and adequate (*A.B. v. the Netherlands*, § 92; *Ciszewski v. Poland* (dec.)). However, where domestic law allows prisoners to speak by telephone, for example to their relatives, under the supervision of the prison authorities, a restriction imposed on their telephone communications may amount to "interference" with the exercise of their right to respect for their correspondence within the meaning of Article 8 § 1 of the Convention (*Lebois v. Bulgaria*, §§ 61 and 64; *Nusret Kaya and Others v. Turkey*, § 36). In practice, consideration should be given to the fact that prisoners have to share a limited number of tele-phones and that the authorities have to prevent disorder and crime (*Daniliuc v. Romania* (dec.); see also *Davison v. the United Kingdom* (dec.), as regards the charges for telephone calls made from prison).

521. Prohibiting a prisoner from using the prison telephone booth for a certain period to call his partner of four years, with whom he had a child, on the grounds that they were not married was found to breach Articles 8 and 14 taken together (*Petrov v. Bulgaria*, § 54).

522. In a high security prison, the storage of the numbers that a prisoner wished to call – a measure of which he had been notified – was considered necessary for security reasons and to avoid the commission of further offences (the prisoner had other ways of remaining in contact with his relatives, such as letters and visits) (*Coşcodar v. Romania* (dec.), § 30 – see also in an ordinary prison, *Ciupercescu v. Romania (no. 3)*, §§ 114-117).

2. Correspondence between prisoners and their lawyer

523. Article 8 applies indiscriminately to correspondence with a lawyer who has already been instructed by a client and a potential lawyer (*Schönenberger and Durmaz v. Switzerland*, § 29).

524. Correspondence between prisoners and their lawyer is "privileged" under Article 8 of the Convention" (*Campbell v. the United Kingdom*, § 48; *Piechowicz v. Poland*, § 239). It may constitute a preliminary step to the exercise of the right of appeal, for example in respect of treatment during detention (*Ekinci and Akalın v. Turkey*, § 47), and may have a bearing on the preparation of a defence, in other words the exercise of another Convention right set forth in Article 6 (*Golder v. the United Kingdom*, § 45 in fine; *S. v. Switzerland*, § 48; *Beuze v. Belgium* [GC], § 193).

525. The Court considers observance of the principle of lawyer-client confidentiality to be fundamental (*Helander v. Finland* (dec.), § 53). See also the *Recommendation of the Committee of Ministers to Membet States of the Council of Europe on the European Prison Rules Rec(2006)*. Systematic monitoring of such correspondence sits ill with this principle (*Petrov v. Bulgaria*, § 43).

[13] Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence, at https://www.echr.coe.int/documents/guide_art_8_eng.pdf.

526. The Court accepts, however, that the prison authorities may open a letter from a lawyer to a prisoner when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose. The letter should, however, only be opened and should not be read (*Campbell v. the United Kingdom*, § 48; *Erdem v. Germany*, § 61). The protection of the prisoner's correspondence with the lawyer requires the Member States to provide suitable guarantees preventing the reading of the letter such as opening the letter in the presence of the prisoner (*Campbell v. the United Kingdom*, § 48).

527. The reading of a prisoner's mail to and from a lawyer should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the "privilege is being abused" in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as "reasonable cause" will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication is being abused (*Campbell v. the United Kingdom*, § 48; *Petrov v. Bulgaria*, § 43; *Boris Popov v. Russia*, § 111). Any exceptions to this privilege must be accompanied by adequate and sufficient safeguards against abuse (*Erdem v. Germany*, § 65).

528. The prevention of terrorism is an exceptional context and involves pursuing the legitimate aims of protecting "national security" and preventing "disorder or crime" (*Erdem v. Germany*, §§ 60 and 66-69). In the case cited, the context of the ongoing trial, the terrorist threat, security require-ments, the procedural safeguards in place and the existence of another channel of communication between the accused and his lawyer led the Court to find no violation of Article 8.

529. The interception of letters complaining of prison conditions and certain actions by the prison authorities was found not to comply with Article 8 § 2 (*Ekinci and Akalın v. Turkey*, § 47).

530. The withholding by the public prosecutor of a letter from a lawyer informing an arrested person of his rights was held to breach Article 8 § 2 (*Schönenberger and Durmaz v. Switzerland*, §§ 28-29).

531. Article 34 of the Convention (see below Correspondence with the Court) may also be applicable in the case of a restriction of correspondence between a prisoner and a lawyer concerning an application to the Court and participation in proceedings before it (*Shtukaturov v. Russia*, § 140, concerning in particular a ban on telephone calls and correspondence51). For instance, the Court examined a case under Article 34 which dealt with the interception of letters sent to prisoners by their lawyers concerning applications before the Court (*Mehmet Ali Ayhan and Others v. Turkey*, §§ 39-45).

532. The Court has nevertheless specified that the State retains a certain margin of appreciation in determining the means of correspondence to which prisoners must have access. Thus, the refusal by the prison authorities to forward to a prisoner an email sent by his lawyer to the prison email ad-dress is justified where other effective and sufficient means of transmitting correspondence exist (*Helander v. Finland* (dec.), § 54, where domestic law provided that contact between prisoners and their lawyers had to take place by post, telephone or visits). The Court has also accepted that com-pliance by a representative with certain formal requirements might be necessary before obtaining access to a

detainee, for instance for security reasons or in order to prevent collusion or perversion of the course of the investigation or justice (*Melnikov v. Russia*, § 96).

533. There is no reason to distinguish between the different categories of correspondence with lawyers. Whatever their purpose, they concerned matters of a private and confidential character. In the case of *Altay v. Turkey (no. 2)*, the Court ruled for the first time that, in principle, oral, face-to-face communication with a lawyer in the context of legal assistance falls within the scope of "private life" (§ 49 and § 51).

> **ECtHR,** *Ibrahim and Others v. The United Kingdom* (case summary), § 193-195
>
> The Court reiterated that it had always recognised that the right to legal advice could be subject to restrictions for good cause. In the Grand Chamber judgment Salduz v. Turkey the Court had referred to the possibility of restricting access to a lawyer for "compelling reasons". However, even where a restriction on access to legal advice was justified for compelling reasons, it might nonetheless be necessary, in the interests of fairness, to exclude from any subsequent criminal proceedings any statement made during a police interview in the absence of a lawyer. The question, at this stage of the Court's assessment, was whether the admission of a statement made without access to legal assistance caused undue prejudice to the applicant in the criminal proceedings, taking into account the fairness of the proceedings as a whole.

Supporting Documents

Council of Europe: Committee for the Prevention of Torture[14]

«The CPT fully recognises that it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer who can be trusted not to jeopardise the legitimate interests of the investigation should be organised. It is perfectly feasible to make satisfactory arrangements in advance for this type of situation, in consultation with the local Bar Association or Law Society»

[14] *The CPT standards*, 8 March 2011, CPT/Inf/E (2002) 1 - Rev. 2010. Available at https://www.refworld.org/docid/4d7882092.html.

Hypothetical N° 5 – Right to be present at trial in the context of EAW

Level 1

November 2020. Mr Plumber is driving his car with headlights off at 8 pm in the Brenner Pass, Italy, close to the Austrian border, and has an accident with a transport truck travelling in the opposite direction, towards Austria. The trucker steps off the truck in a state of shock to check the conditions of Mr. Plumber. Thinking he had killed Mr. Plumber, the trucker continues his road in order to leave the murder site and deliver the goods in time. A few hours later, Mr. Plumber is rescued by another driver and taken to the closest hospital, where over the following days he refers everything that's happened. The prosecutor in Bozen opens a hit-and-run report against unidentified persons.

The law enforcement authorities manage to track down the plate number of the truck thanks to security cameras installed in a gas station close to the accident site and contact the delivery agency headquartered in Salzburg, Austria, which leased the truck. They find that the truck was being driven by Mr. Ivan, a Croatian citizen who does no longer work for the same agency and is unreachable at his place of residence. Italy issues a European arrest warrant against Mr. Ivan and an alert in the Schengen Information System. What the alert shall consist of in this case?

Level 2

Following investigations, the Austrian police finds Mr. Ivan in a small village in the north of the country and arrests him. Pending the transferring procedure to Italy, Mr. Ivan is placed in pre-trial custody and provided with a lawyer. What rights is Mr. Ivan entitled to at this stage?

Level 3

The Italian judicial authority is informed of the arrest of Mr. Ivan, so the prosecutor office notifies the defendant that an indictment had been unsealed and the preliminary hearing will be held in three days time. Mr. Ivan's lawyer requests the judge a new date for the hearing in order to allow his client to be present. The judge replies in writing that no hearings of the defendant will be held as the authorities made all reasonable effort to reach him in time and the time-limit for requesting a hearing had expired. Who is responsible of the delay?

DIRECTIVE (EU) 2016/343 ON THE PRESUMPTION OF INNOCENCE AND THE RIGHT TO BE PRESENT AT TRIAL IN CRIMINAL PROCEEDINGS

Recital 36

- Under certain circumstances it should be possible for a decision on the guilt or innocence of a suspect or accused person to be handed down even if the person concerned is not present at the trial. This might be the case where the suspect or accused person has been informed, in due time, of the trial and of the consequences of non- appearance and does not, nevertheless, appear. Informing a suspect or accused person of the trial should be understood to mean summoning him or her in person or, by other means, providing that person with official information about the date and place of the trial in a manner that enables him or her to become aware of the trial. Informing the suspect or accused person of the consequences of non-appearance should, in particular, be understood to mean informing that person that a decision might be handed down if he or she does not appear at the trial.

Art. 8 (Right to be present at Trial):

- 1.Member States shall ensure that suspects and accused persons have the right to be present at their trial.
- 2.Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that: (a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non- appearance; or (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.
- 3.A decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned.
- 4.Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9.
- 5.This Article shall be without prejudice to national rules that provide that the judge or the competent court can exclude a suspect or accused person temporarily from the trial where necessary in the interests of securing the proper conduct of the criminal proceedings, provided that the rights of the defence are complied with.
- 6.This Article shall be without prejudice to national rules that provide for proceedings or certain stages thereof to be conducted in writing, provided that this complies with the right to a fair trial.

EUCFR

Art. 48 (Presumption of Innocence and Right of Defence):

- Everyone who has been charged shall be presumed innocent until proved guilty according to law.
- 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Useful materials for the resolution of the case

CJEU case law

***Stefano Melloni v. Ministerio Fiscal*, Case C-399/11. § 49**: «although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute […]. The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so».

***Dworzecki*, Case C-108/16. § 33**: «Article 4a(1)(a)(i) of Council Framework Decision 2002/584/EC (…) must be interpreted as meaning that a summons […] which was not served directly on the person concerned but was handed over, at the latter's address, to an adult belonging to that household who undertook to pass it on to him, when it cannot be ascertained from the European arrest warrant whether and, if so, when that adult actually passed that summons on to the person concerned, does not in itself satisfy the conditions set out in that provision.»

***PPU Tupikas*, Case C-270/17 § 100**: «Where the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, at least one of which has been handed down in absentia, the concept of 'trial resulting in the decision', within the meaning of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case. An appeal proceeding, such as that at issue in the main proceedings, in principle falls within that concept. It is nonetheless up to the referring court to satisfy itself that it has the characteristics set out above».

***PPU Zdziaszek*, Case C-271/17 (summary)**: In this case the CJEU provided clarification on the provisions of Article 4a(1) of the EAW FD regarding when executing authorities may refuse to execute an EAW to serve a custodial sentence where the defendant was not present at the trial. The CJEU held that the provisions of Article 4a(1) apply not only to the main trial proceeding itself, but as to all subsequent proceedings, such as those that ultimately lead to the a different sentence than that imposed at the end of the main trial. Thus, the executing state may refuse to execute an EAW if the defendant was not present during one of these subsequent proceedings and the EAW request form does not indicate whether appropriate steps had been taken to properly serve or inform the defendant

of the hearing (as defined in Article 4a(1) subparagraphs (a)-(d)).” The case concerns a request for a preliminary ruling from the Amsterdam District Court over the execution of an EAW issued by Poland against Mr Sławomir Andrzej Zdziaszek for the execution in Poland of a custodial sentence. The EAW indicated that Mr Zdziaszek did not appear in person in the course of the proceedings leading to the judicial decision which definitively fixed the sentence to be served. Instead he had a counsel appointed ex officio to defend him during the trial in Poland.

***PPU Samet Ardic,* Case C-571/17 § 93**: «Where a party has appeared in person in criminal proceedings that result in a judicial decision which definitively finds him guilty of an offence and, as a consequence, imposes a custodial sentence the execution of which is subsequently suspended in part, subject to certain conditions, the concept of ‘trial resulting in the decision’, as referred to in Article 4a(1) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as not including subsequent proceedings in which that suspension is revoked on grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed».

***TX UV*, Case C-688/18:** «Article 8(1) and (2) of 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 must be interpreted as not precluding national legislation which provides, in a situation where the accused person has been informed, in due time, of his trial and of the consequences of not appearing at that trial, and where that person was represented by a mandated lawyer appointed by him, that his right to be present at his trial is not infringed where:

– he decided unequivocally not to appear at one of the hearings held in connection with his trial; or
– he did not appear at one of those hearings for a reason beyond his control if, following that hearing, he was informed of the steps taken in his absence and, with full knowledge of the situation, decided and stated either that he would not call the lawfulness of those steps into question in reliance on his non-appearance, or that he wished to participate in those steps, leading the national court hearing the case to repeat those steps, in particular by conducting a further examination of a witness, in which the accused person was given the opportunity to participate fully».

ECHR case law[15]

The right to an oral hearing and presence at the hearing

1. Right to an oral hearing

[15] Council od Europe, *Guide on Art. 6 ECHR. Right to a fair trial (criminal limb)*, at https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf.

266. The entitlement to a "public hearing" in Article 6 § 1 necessarily implies a right to an "oral hearing" (*Döry v. Sweden, §* 37).

267. The obligation to hold a hearing is, however, not absolute in all cases falling under the criminal head of Article 6. In light of the broadening notion of a "criminal charge" to cases not belonging to the traditional categories of criminal law (such as administrative penalties, customs law and tax surcharges), there are "criminal charges" of differing weights. While the requirements of a fair hearing are the strictest concerning the hard core of criminal law, the criminal-head guarantees of Article 6 do not necessarily apply with their full stringency to other categories of cases falling under that head yet not carrying any significant degree of stigma (*Jussila v. Finland* [GC], §§ 41-43).

268. Nevertheless, refusing to hold an oral hearing may be justified only in exceptional cases (*Grande Stevens and Others v. Italy*, §§ 121-122). The character of the circumstances which may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be dealt with by the competent court – in particular, whether these raise any question of fact or law which could not be adequately resolved on the basis of the case file. An oral hearing may not be required where there are no issues of credibility or contested facts which necessitate an oral presentation of evidence or cross-examination of witnesses, and where the accused was given an adequate opportunity to put forward his case in writing and to challenge the evidence against him. In this connection, it is legitimate for the national authorities to have regard to the demands of efficiency and economy (*Jussila v. Finland* [GC], §§ 41-43 and 47-48, concerning tax-surcharge proceedings; *Suhadolc v. Slovenia* (dec.), concerning a summary procedure for road traffic offences; *Sancaklı v. Turkey*, § 45, concerning an administrative fine on a hotel owner for using the premises for prostitution). However, in cases where the impugned offence has been observed by a public officer, an oral hearing may be essential for the protection of the accused person's interests in that it can put the credibility of the officers' findings to the test (*Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia*, § 54).

269. Moreover, in some instances, even where the subject matter of the case concerns an issue of a technical nature, which could normally be decided without an oral hearing, the circumstances of the case may warrant, as a matter of fair trial, the holding of an oral hearing (*Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey*, § 37).

2. Presence at the trial

270. The principle of an oral and public hearing is particularly important in the criminal context, where a person charged with a criminal offence must generally be able to attend a hearing at first instance (*Jussila v. Finland* [GC], § 40; *Tierce and Others v. San Marino*, § 94; *Igor Pascari v. the Republic of Moldova*, § 27, concerning the applicant's exclusion from the proceedings in which his guilt for a road traffic accident had been determined).

271. Without being present, it is difficult to see how that person could exercise the specific rights set out in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6, namely the right to "defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court". The duty to guarantee the right of a criminal defendant to be present in the courtroom ranks therefore as one of the essential requirements of Article 6 (*Hermi v. Italy* [GC], §§ 58-59; *Sejdovic v. Italy* [GC], §§ 81 and 84; *Arps v. Croatia*, § 28).

272. Moreover, the right to be present at the hearing allows the accused to verify the accuracy of his or her defence and to compare it with the statements of victims and witnesses (*Medenica v. Switzerland*, § 54). Domestic courts must exercise due diligence in securing the presence of the accused by properly summoning him or her (*Colozza v. Italy*, § 32; *M.T.B. v. Turkey*, §§ 49-53) and they must take measures to discourage his unjustified absence from the hearing (*Medenica v. Switzerland*, § 54).

273. While Article 6 § 1 cannot be construed as conferring on an applicant the right to obtain a specific form of service of court documents such as by registered post, in the interests of the administration of justice, the applicant should be notified of a court hearing in such a way as to not only have knowledge of the date, time and place of the hearing, but also to have enough time to prepare his or her case and to attend the court hearing (*Vyacheslav Korchagin v. Russia*, § 65).

274. A hearing may be held in the accused's absence, if he or she has waived the right to be present at the hearing. Such a waiver may be explicit or implied thorough one's conduct, such as when he or she seeks to evade the trial (*Lena Atanasova v. Bulgaria*, § 52; see, for instance, *Chong Coronado v. Andorra*, §§ 42-45). However, any waiver of guarantees under Article 6 must satisfy the test of a "knowing and intelligent" waiver as established in the Court's case law (*Sejdovic v. Italy* [GC], §§ 86- 87).

275. Relatedly, the Court has held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from one's status as a "fugitive", which was founded on a presumption with an insufficient factual basis, that the defendant had waived the right to appear at trial and defend oneself. Moreover, a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure. At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control (*ibid.*, § 87).

276. The Court has also held that the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution, or miscarriage of justice (*Colozza v. Italy*, § 29). Thus, holding a hearing in an accused's absence is not in itself contrary to Article 6. However, when domestic law permits a trial to be held notwithstanding the absence of a person "charged with a criminal offence" who is in the applicant's position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge (*Sanader v. Croatia*, §§ 77-78)

277. Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless occurs where a person convicted *in absentia* is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself or that he intended to escape trial (*Sejdovic v. Italy* [GC], § 82). This is because the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during original proceedings or at a retrial – ranks as one of the essential requirements of Article 6 (*Stoichkov v. Bulgaria*, § 56).

278. In *Sanader v. Croatia* (§§ 87-88) the Court held that the requirement that an individual tried *in absentia*, who had not had knowledge of his prosecution and of the charges against him or sought to evade trial or unequivocally waived his right to appear in court, had to appear before the domestic authorities and provide an address of residence during the criminal proceedings in order to be able to request a retrial, was disproportionate. This was particularly so because once the defendant is under the jurisdiction of the domestic authorities, he would be deprived of liberty on the basis of the conviction *in absentia*. In this regard, the Court stressed that there can be no question of an accused being obliged to surrender to custody in order to secure the right to be retried in conditions that comply with Article 6 of the Convention. It explained, however, that this did not call into question whether, in the fresh proceedings, the applicant's presence at the trial would have to be secured by ordering his detention on remand or by the application of other measures envisaged under the relevant domestic law. Such measures, if applicable, would need to have a different legal basis – that of a reasonable suspicion of the applicant having committed the crime at issue and the existence of "relevant and sufficient reasons" for his detention (see, by contrast, *Chong Coronado v. Andorra*, §§ 38-40, where the detention was not mandatory in the context of a retrial).

279. Lastly, an issue with regard to the requirement of presence at the hearing arises when an accused is prevented from taking part in his trial on the grounds of his improper behaviour (*Idalov v. Russia* [GC], § 175; *Marguš v. Croatia* [GC], § 90; *Ananyev v. Russia*, § 43).

280. In this context, the Court has held that it is essential for the proper administration of justice that dignity, order and decorum be observed in the courtroom as the hallmarks of judicial proceedings. The flagrant disregard by a defendant of elementary standards of proper conduct neither can, nor should, be tolerated. However, when an applicant's behaviour might be of such a nature as to justify his removal and the continuation of his trial in his absence, it is incumbent on the presiding judge to establish that the applicant could have reasonably foreseen what the consequences of his ongoing conduct would be prior to the decision to order his removal from the courtroom (*Idalov v. Russia* [GC], §§ 176-177). Moreover, the relevant consideration is whether the applicant's lawyer was able to exercise the rights of the defence in the applicant's absence (*Marguš v. Croatia* [GC], § 90) and whether the matter was addressed and if appropriate remedied in the appeal proceedings (*Idalov v. Russia* [GC], § 179).

c. Presence at the appeal hearing

281. The principle that hearings should be held in public entails the right of the accused to give evidence in person to an appellate court. From that perspective, the principle of publicity pursues the aim of guaranteeing the accused's defence rights (*Tierce and Others v. San Marino*, § 95). Thus, when an accused provides justification for his or her absence from an appeal hearing, the domestic courts must examine that justification and provide sufficient reasons for their decision (*Henri Rivière and Others v. France*, § 33).

282. However, the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for a trial hearing. The manner in which Article 6 is applied to proceedings before courts of appeal depends on the special features of the proceedings involved, and account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (*Hermi v. Italy* [GC], § 60).

283. Leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, despite the fact that the appellant is not given the opportunity to be heard in person by the appeal or cassation court, provided that a public hearing is held at first instance (*Monnell and Morris v. the United Kingdom*, § 58, as regards the issue of leave to appeal; *Sutter v. Switzerland*, § 30, as regards the court of cassation).

284. Even where the court of appeal has jurisdiction to review the case both as to the facts and as to the law, Article 6 does not always require a right to a public hearing, still less a right to appear in person (*Fejde v. Sweden*, § 31). In order to decide this question, regard must be had to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it (*Seliwiak v. Poland*, § 54; *Sibgatullin v. Russia*, § 36).

285. However, where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (*Dondarini v. San Marino*, § 27; *Popovici v. Moldova*, § 68; *Lacadena Calero v. Spain*, § 38). This is particularly so where the appellate court is called upon to examine whether the applicant's sentence should be increased (*Zahirović v. Croatia*, § 57; *Hokkeling v. the Netherlands*, § 58).

286. As a rule, when an appellate court overturns an acquittal at first instance, it must take positive measures to secure the possibility for the accused to be heard (*Botten v. Norway*, § 53; *Dănilă v. Romania*, § 41; *Gómez Olmeda v. Spain*, § 32). In the alternative, the appeal court must limit itself to quashing the lower court's acquittal and referring the case back for a retrial (*Júlíus Þór Sigurþórsson v. Iceland*, § 38). In this connection, a closely related issue to the presence of an accused at the trial arises also with respect to the necessity of a further examination of evidence relied upon for the applicant's conviction (*Ibid.*, §42; by contrast, *Marilena-Carmen Popa v. Romania*, §§ 45-47, and *Zirnīte v. Latvia*, § 54, where the reversal of the applicant's acquittal was not based on a reassessment of the credibility of witness evidence). This may concern, where relevant, the necessity to question witnesses (*Dan v. the Republic of Moldova (No. 2)*).

287. However, an accused may waive his right to participate or be heard in the appeal proceedings, either expressly or by his conduct (*Kashlev v. Estonia*, §§ 45-46; *Hernández Royo v. Spain*, § 39; *Bivolaru v. Romania (no. 2)*, §§ 138-146). In each case it is important to establish whether the relevant court did all what could reasonably be expected of it to secure the applicant's participation in the proceedings. Questioning via video-link could be a measure ensuring effective participation in the proceedings (*Ibid.*, §§ 138-139, 144-145).

288. The Court's case law on this matter seems to draw a distinction between two situations: on the one hand, where an appeal court, which reversed an acquittal without itself hearing the oral evidence on which the acquittal was based, not only had jurisdiction to examine points of fact and law but actually proceeded to a fresh evaluation of the facts; and, on the other hand, situations in which the appeal court only disagreed with the lower court on the interpretation of the law and/or its application to the established facts, even if it also had jurisdiction in respect of the facts. For example, in the case of *Igual Coll v. Spain*, § 36, the Court considered that the appeal court had not simply given a different legal interpretation or made another application of the law to facts already established at first instance,

but had carried out a fresh evaluation of facts beyond purely legal considerations (see also *Spînu v. Romania*, §§ 55-59; *Andreescu v. Romania*, §§ 65-70; *Almenara Alvarez v. Spain*). Similarly, in *Marcos Barrios v. Spain,* §§ 40-41), the Court held that the appeal court had expressed itself on a question of fact, namely the credibility of a witness, thus modifying the facts established at first instance and taking a fresh position on facts which were decisive for the determination of the applicant's guilt (see also *García Hernández v. Spain*, §§ 33-34).

289. By contrast, in *Bazo González v. Spain*, the Court found that there had not been a violation of Article 6 § 1 on the ground that the aspects which the appeal court had been called on to analyse in order to convict the applicant had had a predominantly legal character, and its judgment had expressly stated that it was not for it to carry out a fresh evaluation of the evidence; rather, it had only adopted a legal interpretation different to that of the lower court (see also *Lamatic v. Romania*).

290. However, as explained by the Court in *Suuripää v. Finland*, § 44), it should be taken into account that the facts and the legal interpretation can be intertwined to an extent that it is difficult to separate the two from each other.

Supporting Materials

The concept of "a trial in absentia resulting in a decision" within the EAW framework, http://www.ejtn.eu/PageFiles/17290/WR%20TH-2018-01%20PL.pdf.

Hypothetical N° 6 Rights of respondents

Level 1

In Florence, Italy, a place of business run by Mr. Mario has been reported to the public authority as possibly exercising illegal sale of firearms and explosive devices. A legal case being opened for illegal arms trafficking, some of the regular customers of Mr. Mario are heard by the prosecuting authorities as witnesses. One of them, Mr. Paolo, reveals he bought from Mr. Mario some explosive materials he uses for massive fishing and he stores them in the cellar of his house. Police officers carry on questioning him about time and modalities of purchase of the said material.

At the end of the interrogation, they make Mr. Paolo aware that, due to his statement, he self-incriminated himself, and he is now suspected of illegal possession of weapons. Therefore he has to remain in custody at the police station until his statements will be verified.

What can Mr. Paolo object?

Level 2

Following his declarations, Mr. Paolo is put in pre-trial custody. While in custody, Mr. Paolo is informed by an agent he had previously been suspected of assisting Mr. Mario in his illegal trafficking. Thus, he had been charged with a criminal offence before the hearing. The real reason why he was questioned by the police was to ascertain the trustworthiness of his released declarations.

Which could be Mr. Paolo's claim?

DIRECTIVE (EU) 2016/343 ON THE PRESUMPTION OF INNOCENCE AND THE RIGHT TO BE PRESENT AT TRIAL IN CRIMINAL PROCEEDINGS

Art. 7 (Right to remain silent and not to incriminate oneself):

- 1. Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed.
- 2. Member States shall ensure that suspects and accused persons have the right not to incriminate themselves.
- 3. The exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons.
- 4. Member States may allow their judicial authorities to take into account, when sentencing, cooperative behaviour of suspects and accused persons.
- 5. The exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned.
- 6. This Article shall not preclude Member States from deciding that, with regard to minor offences, the conduct of the proceedings, or certain stages thereof, may take place in writing or without questioning of the suspect or accused person by the competent authorities in relation to the offence concerned, provided that this complies with the right to a fair trial.

EUCFR

Art. 48 (Presumption of innocence and right of defence):

- 1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
- 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Useful materials for the resolution of the case

CJEU case law (on administrative proceedings)

***D.B. v. CONSOB*, Case 489/19 § 59:** «Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, must be interpreted as allowing Member States not to penalise natural persons who, in an investigation carried out in respect of them by the competent authority under that directive or that regulation, refuse to provide that authority with answers that are capable of establishing their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability».

***Orkem v Commission*, Case 374/87, § 35:** «The Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove».

ECHR case law

Right to remain silent and not to incriminate oneself[16]

a. Affirmation and sphere of application

193. Anyone accused of a criminal offence has the right to remain silent and not to contribute to incriminating himself (*O'Halloran and Francis v. the United Kingdom* [GC], § 45; *Funke v. France*, § 44). Although not specifically mentioned in Article 6, the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6 (*John Murray v. the United Kingdom* [GC], § 45; *Bykov v. Russia* [GC], § 92).

194. The right not to incriminate oneself applies to criminal proceedings in respect of all types of criminal offences, from the most simple to the most complex (*Saunders v. the United Kingdom* [GC] § 74).

195. The right to remain silent applies from the point at which the suspect is questioned by the police (*John Murray v. the United Kingdom* [GC], § 45). In particular, a person "charged with a criminal offence" for the purposes of Article 6 has the right to be notified of his or her privilege against self-incrimination (*Ibrahim and Others v. the United Kingdom* [GC], § 272).

b. Scope

196. The right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case against the accused without recourse to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (*Saunders v. the United Kingdom* [GC], § 68; *Bykov v. Russia* [GC], § 92).

197. The privilege against self-incrimination does not protect against the making of an incriminating statement *per se* but against the obtaining of evidence by coercion or oppression. It is the existence of compulsion that gives rise to concerns as to whether the privilege against self-incrimination has been respected. For this reason, the Court must first consider the nature and degree of compulsion used to obtain the evidence (*Ibrahim and Others v. the United Kingdom* [GC], § 267).

[16] Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb), at https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf.

198. Through its case law, the Court has identified at least three kinds of situations which give rise to concerns as to improper compulsion in breach of Article 6. The first is where a suspect is obliged to testify under threat of sanctions and either testifies as a result (*Saunders v. the United Kingdom* [GC], *Brusco v. France*) or is sanctioned for refusing to testify (*Heaney and McGuinness v. Ireland*; *Weh v. Austria*). The second is where physical or psychological pressure, often in the form of treatment which breaches Article 3 of the Convention, is applied to obtain real evidence or statements (*Jalloh v. Germany* [GC]; *Gäfgen v. Germany* [GC]). The third is where the authorities use subterfuge to elicit information that they were unable to obtain during questioning (*Allan v. the United Kingdom*; contrast with *Bykov v. Russia* [GC], §§ 101-102).

199. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, may be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial, or to otherwise undermine his credibility. The privilege against self-incrimination cannot therefore reasonably be confined to statements which are directly incriminating (*Ibrahim and Others v. the United Kingdom* [GC], § 268).

200. However, the privilege against self-incrimination does not extend to the use in criminal proceedings of material which may be obtained from the accused through recourse to compulsory powers but which has an existence independent of the will of the suspect, such as documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing (*Saunders v. the United Kingdom* [GC], § 69; *O'Halloran and Francis v. the United Kingdom* [GC], § 47). Moreover, the Court held that confronting the accused in criminal proceedings with their statements made during asylum proceedings could not be considered as the use of statements extracted under compulsion in breach of Article 6 § 1 (*H. and J. v. the Netherlands* (dec.)).

201. 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. In order for the right to a fair trial under Article 6 § 1 to remain sufficiently "practical and effective", access to a lawyer should, as a rule, be provided from the first time a suspect is questioned 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* [GC], §§ 54-55; *Ibrahim and Others v. the United Kingdom* [GC], § 256).

202. Persons in police custody enjoy both the right not to incriminate themselves and to remain silent and the right to be assisted by a lawyer whenever they are questioned; that is to say, when there is a "criminal charge" against them (*Ibrahim and Others v. the United Kingdom* [GC], § 272). These rights are quite distinct: a waiver of one of them does not entail a waiver of the other. Nevertheless, these rights are complementary, since persons in police custody must *a fortiori* be granted the assistance of a lawyer when they have not previously been informed by the authorities of their right to remain silent (*Brusco v. France*, § 54; *Navone and Others v. Monaco*, § 74). The importance of informing a suspect of the right to remain silent is such that, even where a person willingly agrees to give statements to the police after being informed that his words may be used in evidence against him, this cannot be regarded as a fully informed choice if he has not been expressly notified of his right to remain silent and if his decision has been taken without the assistance of counsel (*ibid.*; *Stojkovic v. France and Belgium*, § 54).

203. The right to remain silent and the privilege against self-incrimination serve in principle to protect the freedom of a suspect to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which the suspect has elected to remain silent during questioning and the authorities use subterfuge to elicit confessions or other statements of an incriminatory nature from the suspect which they were unable to obtain during such questioning (in this particular case, a confession made to a police informer sharing the applicant's cell), and where the confessions or statements thereby obtained are adduced in evidence at trial (*Allan v. the United Kingdom*, § 50).

204. Conversely, in the case of *Bykov v. Russia* [GC] (§§ 102-103), the applicant had not been placed under any pressure or duress and was not in detention but was free to see a police informer and talk to him, or to refuse to do so. Furthermore, at the trial the recording of the conversation had not been treated as a plain confession capable of lying at the core of a finding of guilt; it had played a limited role in a complex body of evidence assessed by the court.

c. A relative right

205. The right to remain silent is not absolute (*John Murray v. the United Kingdom* [GC], § 47; *Ibrahim and Others v. the United Kingdom* [GC], § 269).

206. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will have regard, in particular, to the following elements:

- the nature and degree of compulsion;
- the existence of any relevant safeguards in the procedure;
- the use to which any material so obtained is put (*Jalloh v. Germany* [GC], § 101; *O'Halloran and Francis v. the United Kingdom* [GC], § 55; *Bykov v. Russia* [GC], § 104; *Ibrahim and Others v. the United Kingdom* [GC], § 269).

207. On the one hand, a conviction must not be solely or mainly based on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the right to remain silent cannot prevent the accused's silence – in situations which clearly call for an explanation from him – from being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. It cannot therefore be said that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications (*John Murray v. the United Kingdom* [GC], § 47).

208. Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the weight attached to such inferences by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation (*ibid.*, § 47). In practice, adequate safeguards must be in place to ensure that any adverse inferences do not go beyond what is permitted under Article 6. In jury trials, the trial judge's direction to the jury on adverse inferences is of particular relevance to this matter (*O'Donnell v. the United Kingdom*, § 51).

209. Furthermore, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and weighed against the individual's interest in having the evidence against him gathered lawfully. However, public-interest concerns

cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination (*Jalloh v. Germany* [GC], § 97). The public interest cannot be relied on to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings (*Heaney and McGuinness v. Ireland*, § 57).

ECtHR, *Brusco v. France*, App. No. 1466/07

«the argument that [the applicant] had merely been a witness – which was why he had been asked to take an oath – was purely formalistic and therefore unconvincing. In actual fact, when [the applicant] had been made to swear an oath, "criminal charges" had been brought against him and he should therefore have had the right to remain silent and not to incriminate himself.»

Getting inspired by national experience

BGH, Beschluss vom 17. Juli 2019 – 5 StR 195/19: The FCL stated, that the use of the statement as evidence would be legally unobjectionable, if the police officer had not questioned him specifically, but had only passively received a spontaneous statement, even if the interrogators had failed to inform the accused of his rights as a suspect in the course of the interrogation.

Hypothetical N° 7 - Declarations released in presence of a public defender and right to legal aid

Level 1

Mrs. Doughtfire is French, committed a robbery in a bank in Paris and was arrested in Germany. She was deprived of liberty and immediately was granted the right to legal aid there since the executing Member State has requested her. However legal aid was not necessary in her case as she was a very wealthy person. However, the lawyer in the executing Member State could not fulfil his tasks as regards the execution of a European arrest warrant effectively and efficiently without the assistance of a lawyer in the issuing Member State. Therefore, France required to apply either a means test or a merits test to determine whether legal aid was to be granted. After this, Mrs. Doughtfire was denied legal aid before she was surrendered to the State seeking her, and she wanted to appoint again another lawyer as the former failed to lodge adequate complaints in order to protect her rights.
On which grounds can Mrs. Doughtfire base her claim?

Level 2

She did not speak to a lawyer at all before the police questioning. Well before talking to her lawyer, the police put pressure on her to sign papers in German which she did not understand. And when she saw the lawyer, it was useless since she did not speak German and no interpreter was there. She only managed to speak lonely with the lawyer in Germany a few minutes before the videoconference with the judge. That did not serve much purpose as he just explained the procedure through an interpreter and that he would apply for bail. Mrs. Doughtfire was completely lost in the procedure even after these explanations.

Level 3

The German Level was exhausted and applied to be assisted and represented by the French colleague representing the defendant. He also required in the issuing state to transfer proceedings taken in the executing state.
Which are the steps to be taken?

DIRECTIVE (EU) 2016/1919 ON LEGAL AID FOR SUSPECTS AND ACCUSED PERSONS IN CRIMINAL PROCEEDINGS AND FOR REQUESTED PERSONS IN EUROPEAN ARREST WARRANT PROCEEDINGS

Recital 21:

- Requested persons should have the right to legal aid in the executing Member State. In addition, requested persons who are the subject of European arrest warrant proceedings for the purpose of conducting a criminal prosecution and who exercise their right to appoint a lawyer in the issuing Member State in accordance with Directive 2013/48/EU should have the right to legal aid in that Member State for the purpose of such proceedings in the executing Member State, in so far as legal aid is necessary to ensure effective access to justice, as laid down in Article 47 of the Charter. This would be the case where the lawyer in the executing Member State cannot fulfil his or her tasks as regards the execution of a European arrest warrant effectively and efficiently without the assistance of a lawyer in the issuing Member State. Any decision regarding the granting of legal aid in the issuing Member State should be taken by an authority that is competent for taking such decisions in that Member State, on the basis of criteria that are established by that Member State when implementing this Directive.

Art. 2 (Scope)

- 1.This Directive applies to suspects and accused persons in criminal proceedings who have a right of access to a lawyer pursuant to Directive 2013/48/EU and who are:
- (a) deprived of liberty;
- (b) required to be assisted by a lawyer in accordance with Union or national law; or
- (c) required or permitted to attend an investigative or evidence-gathering act, including as a
- minimum the following:
- (i) identity parades;
- (ii) confrontations;
- (iii) reconstructions of the scene of a crime.
- 2.This Directive also applies, upon arrest in the executing Member State, to requested persons who have a right of access to a lawyer pursuant to Directive 2013/48/EU.
- 3.This Directive also applies, under the same conditions as provided for in paragraph 1, to persons who were not initially suspects or accused persons but become suspects or accused persons in the course of questioning by the police or by another law enforcement authority.
- 4.Without prejudice to the right to a fair trial, in respect of minor offences:
- (a) where the law of a Member State provides for the imposition of a sanction by an authority other
- than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be
- appealed or referred to such a court; or
- (b) where deprivation of liberty cannot be imposed as a sanction;
- this Directive applies only to the proceedings before a court having jurisdiction in criminal matters.
- In any event, this Directive applies when a decision on detention is taken, and during detention, at any stage of the proceedings until the conclusion of the proceedings.

Art. 4 (Legal Aid in Criminal Proceedings):

- 1. 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.
- 2. Member States may apply a means test, a merits test, or both to determine whether legal aid is to be granted in accordance with paragraph 1.
- 3. Where a Member State applies a means test, it shall take into account all relevant and objective factors, such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that Member State, in order to determine whether, in accordance with the applicable criteria in that Member State, a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer.
- 4. Where a Member State applies a merits test, it shall take into account the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake, in order to determine whether the interests of justice require legal aid to be granted. In any event, the merits test shall be deemed to have been met in the following situations:
- (a) where a suspect or an accused person is brought before a competent court or judge in order to
- decide on detention at any stage of the proceedings within the scope of this Directive; and
- (b) during detention.
- 5. Member States shall ensure that legal aid is granted without undue delay, and at the latest before questioning by the police, by another law enforcement authority or by a judicial authority, or before the investigative or evidence- gathering acts referred to in point (c) of Article 2(1) are carried out.
- 6. Legal aid shall be granted only for the purposes of the criminal proceedings in which the person concerned is suspected or accused of having committed a criminal offence.

Art. 5 (Legal Aid in European Arrest Warrant Proceedings):

- 1. The executing Member State shall ensure that requested persons have a right to legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or until the decision not to surrender them becomes final.
- 2. The issuing Member State shall ensure that requested persons who are the subject of European arrest warrant proceedings for the purpose of conducting a criminal prosecution and who exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State in accordance with Article 10(4) and (5) of Directive 2013/48/EU have the right to legal aid in the issuing Member State for the purpose of such proceedings in the executing Member State, in so far as legal aid is necessary to ensure effective access to justice.
- 3. The right to legal aid referred to in paragraphs 1 and 2 may be subject to a means test in accordance with Article 4(3), which shall apply mutatis mutandis.

Art. 7 (Quality of Legal Aid Service and Training):

- 1. Member States shall take necessary measures, including with regard to funding, to ensure that:
- (a) there is an effective legal aid system that is of an adequate quality; and
- (b) legal aid services are of a quality adequate to safeguard the fairness of the proceedings, with

- due respect for the independence of the legal profession.
- 2. Member States shall ensure that adequate training is provided to staff involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings.
- 3. With due respect for the independence of the legal profession and for the role of those responsible for the training of lawyers, Member States shall take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services.
- 4. Member States shall take the necessary measures to ensure that suspects, accused persons and requested persons have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify.

CFREU

Art. 47 § 3 (Right to an effective remedy and to a fair trial):

- Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Useful materials for the resolution of the case

CJEU case law

***Deb Deutsche Energiehandels*, Case C-279/09, ruling**:

The principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer.

In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.

In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the relevant law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.

With regard more specifically to legal persons, the national court may take ac- count of their situation. The court may therefore take into consideration, inter alia, the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.

ECHR case law

Legal aid[17]

- **Granting of legal aid (in non-criminal proceedings, applicable?)**

131. Article 6 § 1 does not imply that the State must provide free legal aid for every dispute relating to a "civil right" (*Airey v. Ireland*, § 26). There is a clear distinction between Article 6 § 3 (c) – which guarantees the right to free legal aid in criminal proceedings subject to certain conditions – and Article 6 § 1, which makes no reference to legal aid (*Essaadi v. France*, § 30).

132. However, the Convention is intended to safeguard rights which are practical and effective, in particular the right of access to a court. Hence, Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court (*Airey v. Ireland*, § 26).

133. The question whether or not Article 6 requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case (*ibid.*; *Steel and Morris v. the United Kingdom*, § 61; *McVicar v. the United Kingdom*, § 48). What has to be ascertained is whether, in the light of all the circumstances, the lack of legal aid would deprive the applicant of a fair hearing (*ibid.*, § 51).

134. The question whether Article 6 implies a requirement to provide legal aid will depend, among other factors, on:

- the importance of what is at stake for the applicant (*Steel and Morris v. the United Kingdom*, § 61; *P., C. and S. v. the United Kingdom*, § 100);
- the complexity of the relevant law or procedure (*Airey v. Ireland*, § 24);
- the applicant's capacity to represent him or herself effectively (*McVicar v. the United Kingdom*, §§ 48-62; *Steel and Morris v. the United Kingdom*, § 61);
- the existence of a statutory requirement to have legal representation (*Airey v. Ireland*, § 26; *Gnahoré v. France*, § 41 *in fine*).

135. However, the right in question is not absolute and it may therefore be permissible to impose conditions on the grant of legal aid based in particular on the following considerations, in addition to those cited in the preceding paragraph:

  - the financial situation of the litigant (*Steel and Morris v. the United Kingdom*, § 62);
  - his or her prospects of success in the proceedings (*ibid*).

[17] Guide on Art. 6 ECHR (civil limb), at https://www.echr.coe.int/documents/guide_art_6_eng.pdf.

Hence, a legal aid system may exist which selects the cases which qualify for it. However, the system established by the legislature must offer individuals substantial guarantees to protect them from arbitrariness (*Gnahoré v. France*, § 41; *Essaadi v. France*, § 36; *Del Sol v. France*, § 26; *Bakan v. Turkey*, §§ 75-76 with a reference to the judgment in *Aerts v. Belgium* concerning an impairment of the very essence of the right to a court). It is therefore important to have due regard to the quality of a legal aid scheme within a State (*Essaadi v. France*, § 35) and to verify whether the method chosen by the authorities is compatible with the Convention (*Santambrogio v. Italy*, § 52; *Bakan v. Turkey*, §§ 74-78; *Pedro Ramos v. Switzerland*, §§ 41-45).

136. It is essential for the court to give reasons for refusing legal aid and to handle requests for legal aid with diligence (*Tabor v. Poland*, §§ 45-46; *Saoud v. France*, §§ 133-36).

137. Furthermore, the refusal of legal aid to foreign legal persons is not contrary to Article 6 (*Granos Organicos Nacionales S.A. v. Germany*, §§ 48-53).

- **Effectiveness of the legal aid granted**

138. The State is not accountable for the actions of an officially appointed lawyer. It follows from the independence of the legal profession from the State (*Staroszczyk v. Poland*, § 133), that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel is appointed under a legal aid scheme or is privately financed. The conduct of the defence as such cannot, other than in special circumstances, incur the State's liability under the Convention (*Tuziński v. Poland* (dec.)).

139. However, assigning a lawyer to represent a party does not initselfguarantee effective assistance (*Siałkowska v. Poland*, §§ 110 and 116). The lawyer appointed for legal aid purposes may be prevented for a protracted period from acting or may shirk his duties. If they are notified of the situation, the competent national authorities must replace him; should they fail to do so, the litigant would be deprived of effective assistance in practice despite the provision of free legal aid (*Bertuzzi v. France*, § 30).

140. It is above all the responsibility of the State to ensure the requisite balance between the effective enjoyment of access to justice on the one hand and the independence of the legal profession on the other. The Court has clearly stressed that any refusal by a legal aid lawyer to act must meet certain quality requirements. Those requirements will not be met where the shortcomings in the legal aid system deprive individuals of the "practical and effective" access to a court to which they are entitled (*Staroszczyk v. Poland*, § 135; *Siałkowska v. Poland*, § 114 - violation).

FOCUS

Benefits of Dual-Representation for an individual subject to an EAW[18]

- *The lawyer in the issuing state might be able to provide information about the prosecution's case that is of relevance to the EAW proceedings;*
- *The lawyer in the issuing state might be able to provide information about the criminal justice system and the laws of the issuing state that helps the requested person to challenge his/her*

[18] https://www.fairtrials.org/unit-4-–-dual-representation-eaw-cases.

surrender. This could, for example, include information about prison conditions that forms the basis of Article 3 ECHR based challenges, and advice on local legal provisions that affects the requested person's right to a fair trial under Article 6 ECHR;

- *On certain occasions, lawyers in the issuing state have also been able advocate for the withdrawal of the EAW, and/or by facilitating alternatives to the EAW, such as voluntary transfer;*
- *The lawyer in the issuing state might be able to advise on the likely impact of the requested person's EAW proceedings on his/her criminal proceedings. It may, for example, be worth seeking advice on whether or not the requested person's decision to resist surrender will have any impact on his/her final sentence, and about how it might affect decisions relating to pre-trial detention; and*
- *Given that EAWs can be very difficult to resist, it could be beneficial for the individual subject to an EAW to be given access to legal representation in the issuing state as soon as possible, in order to give the lawyer as much time to prepare his/her substantive case. Depending on the jurisdiction, early access to legal representation could also enable the requested person to make the most of any plea-bargaining mechanisms or other alternative legal procedures, which might help him/her secure the best possible outcome in his case.*

National Experience

Gorczowska v District Court in Torun Poland [2012] EWHC 378 (summary)
A person is arrested under an EAW issued by Poland in relation to breaching a suspended sentence imposed for minor drugs offences some years earlier. She has established a stable family life in the UK and is the sole-carer for her young son. The British courts have no grounds on which to refuse her surrender to serve a sentence in Poland and her appeal against the EAW fails. However, when she obtains assistance from a Polish lawyer it becomes apparent that the Polish authorities are willing to remove the warrant on condition that she pays a fine. Had she had the right to a lawyer in the issuing state as soon as she was arrested the proceedings would have been resolved more quickly, saving resources and the stress of extradition proceedings.

Supporting documents

Handbook on European Law relating to access to justice,
https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf.

Hypothetical N° 8 - Modalities of Individual Assessment

Level 1

Two 14 years old children were questioned by police several times with regard to a case of sexual harassment on web. Their lawyer was not present during each investigative or evidence-gathering act. They were not initially suspected or accused persons but become suspects or accused persons in the course of questioning by the police or by another law enforcement authority. Records of questioning were disseminated to newspapers. However, they were not provided with any information to be assisted by a lawyer and to have right to data protection nor made aware that they are suspects or accused persons.

Do children have a special right to privacy that may exceed the right of freedom of expression? Is there any difference according on whether they are accused or suspected?

Level 2

Police used an automated decision-making mechanism to provide individual assessment of the two children without taking into account the child's personality and maturity, the child's economic, social and family background, and any specific vulnerabilities that the child may have.

Is there any possibility to challenge an individual assessment taken on the basis of automated decision making, even before a final decision is taken?

Level 3

A decision of deprivation of liberty was finally provided. However, the length of deprivation of liberty was not reduced to the shortest appropriate period of time. Neither the age nor the individual situation of the child were taken into account. Is the individual assessment to be relied on the single phase of the proceeding or shall it take into account the proceeding as a whole?

Level 4

Holders of parental responsibility were present to the proceedings involving children but children were not asked of being granted this opportunity. Is this allowed in case children disagree with their presence?

DIRECTIVE (EU) 2016/800 ON PROCEDURAL SAFEGUARDS FOR CHILDREN WHO ARE SUSPECTS OR ACCUSED PERSONS IN CRIMINAL PROCEEDINGS

Art. 2 (Scope):

- 1.This Directive applies to children who are suspects or accused persons in criminal proceedings. It applies until the final determination of the question whether the suspect or accused person has committed a criminal offence, including, where applicable, sentencing and the resolution of any appeal.
- 2. This Directive applies to children who are requested persons from the time of their arrest in the executing Member State, in accordance with Article 17.
- 3. With the exception of Article 5, point (b) of Article 8(3), and Article 15, insofar as those provisions refer to a holder of parental responsibility, this Directive, or certain provisions thereof, applies to persons as referred to in paragraphs 1 and 2 of this Article, where such persons were children when they became subject to the proceedings but have subsequently reached the age of 18, and the application of this Directive, or certain provisions thereof, is appropriate in the light of all the circumstances of the case, including the maturity and vulnerability of the person concerned. Member States may decide not to apply this Directive when the person concerned has reached the age of 21.
- 4. This Directive applies to children who were not initially suspects or accused persons but become suspects or accused persons in the course of questioning by the police or by another law enforcement authority.
- 5.This Directive does not affect national rules determining the age of criminal responsibility.
- 6.Without prejudice to the right to a fair trial, in respect of minor offences:
- (a) where the law of a Member State provides for the imposition of a sanction by an authority other
- than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be
- appealed or referred to such a court; or
- (b) where deprivation of liberty cannot be imposed as a sanction,
- this Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters.
- In any event, this Directive shall fully apply where the child is deprived of liberty, irrespective of the stage of the criminal proceedings.

Art. 4 (Right to Information):

- 1.Member States shall ensure that when children are made aware that they are suspects or accused persons in criminal proceedings, they are informed promptly about their rights in accordance with Directive 2012/13/EU and about general aspects of the conduct of the proceedings.
- Member States shall also ensure that children are informed about the rights set out in this Directive. That information shall be provided as follows:
- (a) promptly when children are made aware that they are suspects or accused persons, in respect
- of:
- (i) the right to have the holder of parental responsibility informed, as provided for in Article 5;
- (ii) the right to be assisted by a lawyer, as provided for in Article 6;
- (iii) the right to protection of privacy, as provided for in Article 14;
- (iv) the right to be accompanied by the holder of parental responsibility during stages of the

- proceedings other than court hearings, as provided for in Article 15(4);
- (v) the right to legal aid, as provided for in Article 18;
- (b) at the earliest appropriate stage in the proceedings, in respect of:
- (i) the right to an individual assessment, as provided for in Article 7;
- (ii) the right to a medical examination, including the right to medical assistance, as provided for
- in Article 8;
- (iii) the right to limitation of deprivation of liberty and to the use of alternative measures,
- including the right to periodic review of detention, as provided for in Articles 10 and 11;
- (iv) the right to be accompanied by the holder of parental responsibility during court hearings,
- as provided for in Article 15(1);
- (v) the right to appear in person at trial, as provided for in Article 16;
- (vi) the right to effective remedies, as provided for in Article 19;
- (c) upon deprivation of liberty in respect of the right to specific treatment during deprivation of
- liberty, as provided for in Article 12.
- 2.Member States shall ensure that the information referred to in paragraph 1 is given in writing, orally, or both, in simple and accessible language, and that the information given is noted, using the recording procedure in accordance with national law.
- 3.Where children are provided with a Letter of Rights pursuant to Directive 2012/13/EU, Member States shall ensure that such a Letter includes a reference to their rights under this Directive.

Art. 5 (Right of the child to have the holder of parental responsibility informed):

- 1. Member States shall ensure that the holder of parental responsibility is provided, as soon as possible, with the information that the child has a right to receive in accordance with Article 4.
- 2. The information referred to in paragraph 1 shall be provided to another appropriate adult who is nominated by the child and accepted as such by the competent authority where providing that information to the holder of parental responsibility:
- (a) would be contrary to the child's best interests;
- (b) is not possible because, after reasonable efforts have been made, no holder of parental
- responsibility can be reached or his or her identity is unknown;
- (c) could, on the basis of objective and factual circumstances, substantially jeopardise the criminal
- proceedings.
- Where the child has not nominated another appropriate adult, or where the adult that has been nominated by the child is not acceptable to the competent authority, the competent authority shall, taking into account the child's best interests, designate, and provide the information to, another person. That person may also be the representative of an authority or of another institution responsible for the protection or welfare of children.
- 3.Where the circumstances which led to the application of point (a), (b) or (c) of paragraph 2 cease to exist, any information that the child receives in accordance with Article 4, and which remains relevant in the course of the proceedings, shall be provided to the holder of parental responsibility.

Art. 7 (Right to an Individual Assessment):

- 1. Member States shall ensure that the specific needs of children concerning protection, education, training and social integration are taken into account.
- 2. For that purpose children who are suspects or accused persons in criminal proceedings shall be individually assessed. The individual assessment shall, in particular, take into account the child's personality and maturity, the child's economic, social and family background, and any specific vulnerabilities that the child may have.
- 3. The extent and detail of the individual assessment may vary depending on the circumstances of the case, the measures that can be taken if the child is found guilty of the alleged criminal offence, and whether the child has, in the recent past, been the subject of an individual assessment.
- 4. The individual assessment shall serve to establish and to note, in accordance with the recording procedure in the Member State concerned, such information about the individual characteristics and circumstances of the child as might be of use to the competent authorities when:
- (a) determining whether any specific measure to the benefit of the child is to be taken;
- (b) assessing the appropriateness and effectiveness of any precautionary measures in respect of the
- child;
- (c) taking any decision or course of action in the criminal proceedings, including when sentencing.
- 5. The individual assessment shall be carried out at the earliest appropriate stage of the proceedings and, subject to paragraph 6, before indictment.
- 6. In the absence of an individual assessment, an indictment may nevertheless be presented provided that this is in the child's best interests and that the individual assessment is in any event available at the beginning of the trial hearings before a court.
- 7. Individual assessments shall be carried out with the close involvement of the child. They shall be carried out by qualified personnel, following, as far as possible, a multidisciplinary approach and involving, where appropriate, the holder of parental responsibility, or another appropriate adult as referred to in Articles 5 and 15, and/or a specialised professional.
- 8. If the elements that form the basis of the individual assessment change significantly, Member States shall ensure that the individual assessment is updated throughout the criminal proceedings.
- 9. Member States may derogate from the obligation to carry out an individual assessment where such a derogation is warranted in the circumstances of the case, provided that it is compatible with the child's best interests.

Art. 14 (Right to protection of privacy):

- 1. Member States shall ensure that the privacy of children during criminal proceedings is protected.
- 2. To that end, Member States shall either provide that court hearings involving children are usually held in the absence of the public, or allow courts or judges to decide to hold such hearings in the absence of the public.
- 3. Member States shall take appropriate measures to ensure that the records referred to in Article 9 are not publicly disseminated.
- 4. Member States shall, while respecting freedom of expression and information, and freedom and pluralism of the media, encourage the media to take self-regulatory measures in order to achieve the objectives set out in this Article.

Art. 15 (Right of the child to be accompanied by the holder of parental responsibility during the proceedings):

- 1. Member States shall ensure that children have the right to be accompanied by the holder of parental responsibility during court hearings in which they are involved.
- 2. A child shall have the right to be accompanied by another appropriate adult who is nominated by the child and accepted as such by the competent authority where the presence of the holder of parental responsibility accompanying the child during court hearings:
- (a) would be contrary to the child's best interests;
- (b) is not possible because, after reasonable efforts have been made, no holder of parental
- responsibility can be reached or his or her identity is unknown; or
- (c) would, on the basis of objective and factual circumstances, substantially jeopardise the criminal
- proceedings.
- Where the child has not nominated another appropriate adult, or where the adult that has been nominated by the child is not acceptable to the competent authority, the competent authority shall, taking into account the child's best interests, designate another person to accompany the child. That person may also be the representative of an authority or of another institution responsible for the protection or welfare of children.
- 3. Where the circumstances which led to an application of point (a), (b) or (c) of paragraph 2 cease to exist, the child shall have the right to be accompanied by the holder of parental responsibility during any remaining court hearings.
- 4. In addition to the right provided for under paragraph 1, Member States shall ensure that children have the right to be accompanied by the holder of parental responsibility, or by another appropriate adult as referred to in paragraph 2, during stages of the proceedings other than court hearings at which the child is present where the competent authority considers that:
- (a) it is in the child's best interests to be accompanied by that person; and
- (b) the presence of that person will not prejudice the criminal proceedings.

EUROPEAN CONVENTION ON THE EXERCISE OF CHILDREN RIGHTS

Art. 12 (Right to an effective remedy and to a fair trial):

- 1 Parties shall encourage, through bodies which perform, inter alia, the functions set out in paragraph 2, the promotion and the exercise of children's rights.
- 2 The functions are as follows:
- a) to make proposals to strengthen the law relating to the exercise of children's rights;
- b) to give opinions concerning draft legislation relating to the exercise of children's rights;
- c) to provide general information concerning the exercise of children's rights to the media, the
- public and persons and bodies dealing with questions relating to children;
- d) to seek the views of children and provide them with relevant information.

DIRECTIVE (EU) 2016/680 ON DATA PROTECTION

Art. 11 (Automated Individual Decision-making)

- 1. Member States shall provide for a decision based solely on automated processing, including profiling, which produces an adverse legal effect concerning the data subject or significantly affects him or her, to be prohibited unless authorised by Union or Member State law to which the controller is subject and which provides appropriate safeguards for the rights and freedoms of the data subject, at least the right to obtain human intervention on the part of the controller.
- 2. Decisions referred to in paragraph 1 of this Article shall not be based on special categories of personal data referred to in Article 10, unless suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place.
- 3. Profiling that results in discrimination against natural persons on the basis of special categories of personal data referred to in Article 10 shall be prohibited, in accordance with Union law.

Useful materials for the resolution of the case

CJEU case law

***Zubair Haqbin*, Case C-233/18, ruling**

«Article 20(4) and (5) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, read in the light of Article 1 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a Member State cannot, among the sanctions that may be imposed on an applicant for serious breaches of the rules of the accommodation centres as well as seriously violent behaviour, provide for a sanction consisting in the withdrawal, even temporary, of material reception conditions, within the meaning of Article 2(f) and (g) of the directive, relating to housing, food or clothing, in so far as it would have the effect of depriving the applicant of the possibility of meeting his or her most basic needs. The imposition of other sanctions under Article 20(4) of the directive must, under all circumstances, comply with the conditions laid down in Article 20(5) thereof, including those concerning the principle of proportionality and respect for human dignity. In the case of an unaccompanied minor, those sanctions must, in the light, inter alia, of Article 24 of the Charter of Fundamental Rights, be determined by taking particular account of the best interests of the child».

***Dawid Piotrowski*, Case C-367/16**

§ 51: «That being said, it should be noted, first, that, as an exception to the general rule that a European arrest warrant must be executed, the ground for mandatory non-execution provided for in Article 3(3)

of Framework Decision 2002/584 cannot be interpreted as enabling the executing judicial authority to refuse to give effect to such a warrant on the basis of an analysis for which no express provision is made in that article or in any other rule of that framework decision, such as the rule which calls for a determination of whether the additional conditions relating to an assessment based on the circumstances of the individual, to which the prosecution and conviction of a minor are specifically subject under the law of the executing Member State, are met in the present case».

§ 52: « Second, such a determination may cover matters which are, as in the main proceedings, subjective, such as the individual characteristics of the minor concerned and of his family and associates, and his level of maturity, or objective, such as reoffending or whether youth protection measures have previously been adopted, which would in fact amount to a substantive re-examination of the analysis previously conducted in connection with the judicial decision adopted in the issuing Member State, which forms the basis of the European arrest warrant. As the Advocate General observed in point 56 of his Opinion, such a re-examination would infringe and render ineffective the principle of mutual recognition, which implies that there is mutual trust as to the fact that each Member State accepts the application of the criminal law in force in the other Member States, even though the implementation of its own national law might produce a different outcome, and does not therefore allow the executing judicial authority to substitute its own assessment of the criminal responsibility of the minor who is the subject of a European arrest warrant for that previously carried out in the issuing Member State in connection with the judicial decision on which the warrant is based.

§ 64: «Article 3(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, is to be interpreted as meaning that the judicial authority of the executing Member State must refuse to surrender only those minors who are the subject of a European arrest warrant and who, under the law of the executing Member State, have not yet reached the age at which they are regarded as criminally responsible for the acts on which the warrant issued against them is based.
Article 3(3) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, is to be interpreted as meaning that, in order to decide whether a minor who is the subject of a European arrest warrant is to be surrendered, the judicial authority of the executing Member State must simply verify whether the person concerned has reached the minimum age required to be regarded as criminally responsible in the executing Member State for the acts on which such a warrant is based, without having to consider any additional conditions, relating to an assessment based on the circumstances of the individual, to which the prosecution and conviction of a minor for such acts are specifically subject under the law of that Member State».

ECHR case law

***ET. v UK*, Application No. 24724/94 § 133**

The Commission recalls that the Court in the Hussain case (Eur. Court HR, op. cit., p. 269, paras. 52-54) found that an indeterminate term of detention for a convicted young person could only be justified by considerations based on the need to protect the public. These considerations had to take into account any developments in the young offender as he or she grows older. Since therefore new issues of lawfulness, relevant to dangerousness to society, might arise in the course of detention, the Court

held that such a young person is entitled under Article 5 para. 4 to take proceedings to have these issues decided by a court at reasonable intervals.

***Panovits v. Cyprus*, Application no. 4268/04 § 73 - 75.**

The Court finds that the lack of provision of sufficient information on the applicant's right to consult a lawyer before his questioning by the police, especially given the fact that he was a minor at the time and not assisted by his guardian during the questioning, constituted a breach of the applicant's defence rights. The Court moreover finds that neither the applicant nor his father acting on behalf of the applicant had waived the applicant's right to receive legal representation prior to his interrogation in an explicit and unequivocal manner.

Concerning the applicant's complaint as to his right to remain silent, the Court notes that the Government maintained that the applicant had been cautioned in accordance with domestic law both at the time of his arrest and before his written statement had been taken. The applicant did not dispute this. The Court notes that in accordance with domestic law the applicant was told that he was not obliged to say anything unless he wished to do so and that what he said could be put into writing and given in evidence in subsequent proceedings (see paragraph 44 above). The Court finds, given the circumstances of the present case, in which the applicant had been underage and was taken for questioning without his legal guardian and without being informed of his right to seek and obtain legal representation before he was questioned, that it was unlikely that a mere caution in the words provided for in the domestic law would be enough to enable him to sufficiently comprehend the nature of his rights.

Lastly, the Court considers that although the applicant had the benefit of adversarial proceedings in which he was represented by the lawyer of his choice, the nature of the detriment he suffered because of the breach of due process at the pre-trial stage of the proceedings was not remedied by the subsequent proceedings, in which his confession was treated as voluntary and was therefore held to be admissible as evidence.

***Adamkiewiczy v. Poland*, Application n. 54729/00**

The Court reiterated the rule that where the case concerned a minor, the courts were required to act in accordance with the principle that the best interests of the child should be protected, having regard to his or her age, level of maturity and intellectual and emotional capacities, and taking steps to promote the child's ability to participate in the proceedings.

The applicant had not been informed by his lawyer of his right to remain silent until six weeks after the proceedings had begun and he had been placed in a children's home, after several unsuccessful attempts by his lawyer to meet him. The authorities had therefore obtained his incriminating admissions before he had even been informed of that right. Given his age, it could not be asserted that Mr Adamkiewicz knew of his right to seek legal representation and of the consequences of his failure to do so, whereas it was crucial for him, isolated in a children's home as he had been during the decisive period of the investigation, to have broad access to a lawyer from the very beginning of the proceedings. The Court therefore held that the considerable restrictions on the applicant's defence rights had amounted to a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1.

Supporting Documents

Council of Europe's Guidelines on Child-Friendly Justice[19]

- **Information and Advise**

1. From their first involvement with the justice system or other competent authorities (such as the police, immigration, educational, social or health care services) and throughout that process, children and their parents should be promptly and adequately informed of, *inter alia*:

a) their rights, in particular the specific rights children have with regard to judicial or non-judicial proceedings in which they are or might be involved, and the instruments available to remedy possible violations of their rights including the opportunity to have recourse to either a judicial or non-judicial proceeding or other interventions. This may include information on the likely duration of proceedings, possible access to appeals and independent complaints mechanisms;
b) the system and procedures involved, taking into consideration the particular place the child will have and the role he or she may play in it and the different procedural steps;
c) the existing support mechanisms for the child when participating in the judicial or non-judicial procedures;
d) the appropriateness and possible consequences of given in-court or out-of-court proceedings;
e) where applicable, the charges or the follow-up given to their complaint;
f) the time and place of court proceedings and other relevant events, such as hearings, if the child is personally affected;
g) the general progress and outcome of the proceedings or intervention;
h) the availability of protective measures;
i) the existing mechanisms for review of decisions affecting the child;
j) the existing opportunities to obtain reparation from the offender or from the state through the justice process, through alternative civil proceedings or through other processes;
k) the availability of the services (health, psychological, social, interpretation and translation, and other) or organisations which can provide support and the means of accessing such services along with emergency financial support, where applicable;
l) any special arrangements available in order to protect as far as possible their best interests if they are resident in another state.

2. The information and advice should be provided to children in a manner adapted to their age and maturity, in a language which they can understand and which is gender and culture sensitive.

3. As a rule, both the child and parents or legal representatives should directly receive the information. Provision of the information to the parents should not be an alternative to communicating the information to the child.

4. Child-friendly materials containing relevant legal information should be made available and widely distributed, and special information services for children such as specialised websites and helplines established.

[19] Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, adopted on 17 November 2010. At https://rm.coe.int/16804b2cf3.

5. Information on any charges against the child must be given promptly and directly after the charges are brought. This information should be given to both the child and the parents in such a way that they understand the exact charge and the possible consequences.

- **Protection of Family Life**

6. The privacy and personal data of children who are or have been involved in judicial or non-judicial proceedings and other interventions should be protected in accordance with national law. This generally implies that no information or personal data may be made available or published, particularly in the media, which could reveal or indirectly enable the disclosure of the child's identity, including images, detailed descriptions of the child or the child's family, names or addresses, audio and video records, etc.

7. Member states should prevent violations of the privacy rights as mentioned under guideline 6 above by the media through legislative measures or monitoring self-regulation by the media.

8. Member states should stipulate limited access to all records or documents containing personal and sensitive data of children, in particular in proceedings involving them. If the transfer of personal and sensitive data is necessary, while taking into account the best interests of the child, member states should regulate this transfer in line with relevant data protection legislation.

9. Whenever children are being heard or giving evidence in judicial or non-judicial proceedings or other interventions, where appropriate, this should preferably take place in camera. As a rule, only those directly involved should be present, provided that they do not obstruct children in giving evidence.

10. Professionals working with and for children should abide by the strict rules of confidentiality, except where there is a risk of harm to the child.

- **Training of professionals**

14. All professionals working with and for children should receive necessary interdisciplinary training on the rights and needs of children of different age groups, and on proceedings that are adapted to them.

15. Professionals having direct contact with children should also be trained in communicating with them at all ages and stages of development, and with children in situations of particular vulnerability.

- **Multidisciplinary approach**

16. With full respect of the child's right to private and family life, close co-operation between different professionals should be encouraged in order to obtain a comprehensive understanding of the child, and an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation.

17. A common assessment framework should be established for professionals working with or for children (such as lawyers, psychologists, physicians, police, immigration officials, social workers and

mediators) in proceedings or interventions that involve or affect children to provide any necessary support to those taking decisions, enabling them to best serve children's interests in a given case.

18. While implementing a multidisciplinary approach, professional rules on confidentiality should be respected.

- **Children and the police**

27. Police should respect the personal rights and dignity of all children and have regard to their vulnerability, that is, take account of their age and maturity and any special needs of those who may be under a physical or mental disability or have communication difficulties.

28. Whenever a child is apprehended by the police, the child should be informed in a manner and in language that is appropriate to his or her age and level of understanding of the reason for which he or she has been taken into custody. Children should be provided with access to a lawyer and be given the opportunity to contact their parents or a person whom they trust.

29. Save in exceptional circumstances, the parent(s) should be informed of the child's presence in the police station, given details of the reason why the child has been taken into custody and be asked to come to the station.

30. A child who has been taken into custody should not be questioned in respect of criminal behaviour, or asked to make or sign a statement concerning such involvement, except in the presence of a lawyer or one of the child's parents or, if no parent is available, another person whom the child trusts. The parent or this person may be excluded if suspected of involvement in the criminal behaviour or if engaging in conduct which amounts to an obstruction of justice.

31. Police should ensure that, as far as possible, no child in their custody is detained together with adults.

32. Authorities should ensure that children in police custody are kept in conditions that are safe and appropriate to their needs.

33. In member states where this falls under their mandate, prosecutors should ensure that child-friendly approaches are used throughout the investigation process.

- **Legal Counsel and Representation**

37. Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.

38. Children should have access to free legal aid, under the same or more lenient conditions as adults.

39. Lawyers representing children should be trained in and knowledgeable on children's rights and related issues, receive ongoing and indepth training and be capable of communicating with children at their level of understanding.

40. Children should be considered as fully fledged clients with their own rights and lawyers representing children should bring forward the opinion of the child.

41. Lawyers should provide the child with all necessary information and explanations concerning the possible consequences of the child's views and/or opinions.

42. In cases where there are conflicting interests between parents and children, the competent authority should appoint either a guardian ad litem or another independent representative to represent the views and interests of the child.

43. Adequate representation and the right to be represented independently from the parents should be guaranteed, especially in proceedings where the parents, members of the family or caregivers are the alleged offenders.

- **Organisation of the proceedings, child-friendly environment and child-friendly language**

54. In all proceedings, children should be treated with respect for their age, their special needs, their maturity and level of understanding, and bearing in mind any communication difficulties they may have. Cases involving children should be dealt with in non-intimidating and child-sensitive settings.

55. Before proceedings begin, children should be familiarised with the layout of the court or other facilities and the roles and identities of the officials involved.

56. Language appropriate to children's age and level of understanding should be used.

57. When children are heard or interviewed in judicial and non-judicial proceedings and during other interventions, judges and other professionals should interact with them with respect and sensitivity.

58. Children should be allowed to be accompanied by their parents or, where appropriate, an adult of their choice, unless a reasoned decision has been made to the contrary in respect of that person.

59. Interview methods, such as video or audio-recording or pre-trial hearings in camera, should be used and considered as admissible evidence.

60. Children should be protected, as far as possible, against images or information that could be harmful to their welfare. In deciding on disclosure of possibly harmful images or information to the child, the judge should seek advice from other professionals, such as psychologists and social workers.

61. Court sessions involving children should be adapted to the child's pace and attention span: regular breaks should be planned and hearings should not last too long. To facilitate the participation of children to their full cognitive capacity and to support their emotional stability, disruption and distractions during court sessions should be kept to a minimum.

62. As far as appropriate and possible, interviewing and waiting rooms should be arranged for children in a child-friendly environment.

63. As far as possible, specialist courts (or court chambers), procedures and institutions should be established for children in conflict with the law. This could include the establishment of specialised units within the police, the judiciary, the court system and the prosecutor's office.

Hypothetical N° 9 – Applicability of procedural rights to house detention

Level 1

Maryam is a Nigerian woman, arrived in Italy in 2018, where she applied for international protection. Before leaving the native country, Maryam got into debt with Mme Diop to face travel expenses, and since then she has been forced into prostitution for repayment of her debt. Mme Diop run the prostitution business remotely: she gives instructions to Maryam by phone and makes her send the money to a postal address in Naples.

Pending the evaluation process of her claim, the prosecuting authority opens a sex-trafficking report against Mme Diop on the ground of Maryam's statements. Since Mme Diop is not reachable at the aforementioned address in Naples and her residence is unknown, the other women living there are interviewed as witnesses and they give evidence that Mme Diop lives in a small town in Germany. A European Arrest Warrant is thus issued against her by the preliminary investigation Judge.

The German law enforcement authorities reach Mme Diop at her place of residence and place her under house arrest to avoid flight risk. Mme Diop is informed on the offence she is charged with as well as on the possibility to contact a lawyer. After talking with his lawyer, she files a request to the German Prosecuting Authority to be given access to the documents of her case in order to be able to effectively exercise her right of defence. The authority denies her request by stating that, as the defendant does not find herself in state of detention, the right of access to the material of the case does not apply.

Which law is applicable?

Level 2

After being made aware of the prison sentence she risks in Italy, Mme Diop refuses to surrender. She claims the conditions of detention in Italy are dire for women, especially for those convicted for serious sexual crimes.

What should the German judicial authorities do to take a decision on the surrender?

DIRECTIVE 2012/13/EU ON THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS

Art. 7 (Right of access to the material of the case):

- 1. Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.
- 2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.
- 3. Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.
- 4. By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.
- 5. Access, as referred to in this Article, shall be provided free of charge.

CFEU

Art. 42 (Right of access to documents):

- Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

REGULATION (UE) 2018/1861 ON THE SCHENGEN INFORMATION SYSTEM (SIS) IN THE FIELD OF POLICE COOPERATION AND JUDICIAL COOPERATION IN CRIMINAL MATERS

- **Art. 2 (Subject Matter):**
- 1. This Regulation establishes the conditions and procedures for the entry and processing of alerts in SIS on persons and objects and for the exchange of supplementary information and additional data for the purpose of police and judicial cooperation in criminal matters.
- 2. This Regulation also lays down provisions on the technical architecture of SIS, on the responsibilities of the Member States and of the European Union Agency for the Operational Management of Large-Scale

IT Systems in the Area of Freedom, Security and Justice (eu-LISA), on data processing, on the rights of the persons concerned and on liability.

Useful materials for the resolution of the case

CJEU case law

***Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, 5 April 2016, § 88**

«where the judicial authority of the executing Member State is in possession of information showing there to be a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, in the light of the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter, that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual concerned by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment»

***Krzystof Marek Poltorak*, Case C-452/16, 10 November 2016, § 26-27**

«The principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law […] The principle of mutual recognition, which is the 'cornerstone' of judicial cooperation, means that, pursuant to Article 1(2) of the Framework Decision, Member States are in principle obliged to give effect to a European arrest warrant. The executing judicial authority may refuse to execute such a warrant only in the cases, exhaustively listed, of obligatory non-execution, laid down in Article 3 of the Framework Decision, or of optional non-execution, laid down in Articles 4 and 4a of the Framework Decision.»

***Tadas Tupikas*, Case C-270/17, 10 August 2017, § 50**

«Article 1(2) of the Framework Decision lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that Framework Decision. Except in exceptional circumstances, the executing judicial authorities may therefore refuse to execute such a warrant only in the exhaustively listed cases of non-execution provided for by Framework Decision 2002/584 and the execution of the European Arrest Warrant may be made subject only to one of the conditions listed exhaustively therein. Accordingly, while the execution of the European arrest warrant constitutes the rule, the refusal to execute is intended to be an exception which must be interpreted strictly».

***LM*, Case C-216/18, 25 July 2018, § 71-71-73**

«It is for the European Council to determine a breach in the issuing Member State of the principles set out in Article 2 TEU, including the principle of the rule of law, with a view to application of the

European arrest warrant mechanism being suspended in respect of that Member State. Therefore, it is only if the European Council were to adopt a decision determining[…] that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend Framework Decision 2002/584 in respect of that Member State that the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected. Accordingly, as long as such a decision has not been adopted by the European Council, the executing judicial authority may refrain, on the basis of Article 1(3) of Framework Decision 2002/584, to give effect to a European arrest warrant issued by a Member State which is the subject of a reasoned proposal as referred to in Article 7(1) TEU only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, that there are substantial grounds for believing that the person in respect of whom that European arrest warrant has been issued will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial.»

***Dumitru-Tudor Dorobantu*, Case C-128/18, 15 October 2019, §55**

«in order to ensure observance of Article 4 of the Charter in the particular circumstances of a person who is the subject of a European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is then bound to determine, specifically and precisely, whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4 of the Charter, because of the conditions for his detention envisaged in the issuing Member State».

***L&P*, Joined Cases C-354/20 PPU and C-412/20 PPU, 17 December 2020, § 69**

«where the executing judicial authority, which is called upon to decide whether a person in respect of whom a European arrest warrant has been issued is to be surrendered, has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the Member State that issues that arrest warrant which existed at the time of issue of that warrant or which arose after that issue, that authority cannot deny the status of 'issuing judicial authority' to the court which issued that arrest warrant and cannot presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the Charter, without carrying out a specific and precise verification which takes account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued».

ECHR case law

Equality of arms and adversarial proceedings[20]

151. Equality of arms is an inherent feature of a fair trial. It requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent (*Öcalan v. Turkey* [GC], § 140; *Foucher v. France*, § 34; *Bulut v. Austria*; *Faig Mammadov v. Azerbaijan*, § 19). Equality of arms requires that a fair balance be struck between the parties, and applies to criminal and civil cases.

152. The right to an adversarial hearing means in principle the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (*Brandstetter v. Austria*, § 67). The right to an adversarial trial is closely related to equality of arms and indeed in some cases the Court finds a violation of Article 6 § 1 looking at the two concepts together.

153. There has been a considerable evolution in the Court's case law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice (*Borgers v. Belgium*, § 24).

154. In criminal cases Article 6 § 1 overlaps with the specific guarantees of Article 6 § 3, although it is not confined to the minimum rights set out therein. Indeed, the guarantees contained in Article 6 § 3 are constituent elements, amongst others, of the concept of a fair trial set forth in Article 6 § 1 (*Ibrahim and Others v. the United Kingdom* [GC], § 251). The Court has dealt with the issues of equality of arms and adversarial trial in a variety of situations, very often overlapping with the defence rights under Article 6 § 3 of the Convention.

a. Equality of arms

155. A restriction on the rights of the defence was found in *Borgers v. Belgium*, where the applicant was prevented from replying to submissions made by the *avocat général* before the Court of Cassation and had not been given a copy of the submissions beforehand. The inequality was exacerbated by the *avocat général*'s participation, in an advisory capacity, in the court's deliberations. Similar circumstances have led to the finding of a violation of Article 6 § 1 concerning the failure to communicate the higher prosecutor's observations on appeal to the defence (*Zahirović v. Croatia*, §§ 44-50).

156. The Court has found a violation of Article 6 § 1 combined with Article 6 § 3 in criminal proceedings where a defence lawyer was made to wait for fifteen hours before finally being given a chance to plead his case in the early hours of the morning (*Makhfi v. France*). Equally, the Court found a violation of the principle of equality of arms in connection with a Supreme Court ruling in a criminal case. The applicant, who had been convicted on appeal and had requested to be present, had been excluded from a preliminary hearing held in camera (*Zhuk v. Ukraine*, § 35). The same is true for instances in which an applicant is not allowed to be present at a hearing before the appeal court

[20] Guide on Art. 6 ECHR (criminal limb), at https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf.

while the representative of the prosecution is present (*Eftimov v. the former Yugoslav Republic of Macedonia*, § 41).

157. In contrast, a complaint concerning equality of arms was declared inadmissible as being manifestly ill-founded where the applicant complained that the prosecutor had stood on a raised platform in relation to the parties. The accused had not been placed at a disadvantage regarding the defence of his interests (*Diriöz v. Turkey*, § 25).

158. The failure to lay down rules of criminal procedure in legislation may breach equality of arms, since their purpose is to protect the defendant against any abuse of authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules (*Coëme and Others v. Belgium*, § 102).

159. Witnesses for the prosecution and the defence must be treated equally; however, whether a violation is found depends on whether the witness in fact enjoyed a privileged role (*Bonisch v. Austria*, § 32; conversely, see *Brandstetter v. Austria*, § 45). In *Thiam v. France*, §§ 63-68, the Court did not consider that the participation of the President of the Republic as a victim and civil party in the proceedings disturbed the principle of equality of arms although he could not be questioned as a witness in the proceedings due to a constitutional prohibition. The Court stressed that such a constitutional prohibition did not in itself contravene Article 6. It also noted, in particular, that in convicting the applicant, the national courts had not referred to any evidence against him adduced by the civil party that required them to test its credibility and reliability by hearing the President. The Court also noted that the nature of the case, the evidence available and the non-conflicting versions of the applicant and the civil party did not in any event require that the latter party be questioned. In addition, the Court had regard to the fact there was no indication in the case file that the President's involvement had encouraged the public prosecutor's office to act in a way that would have unduly influenced the criminal court or prevented the applicant from bringing an effective defence.

160. Refusal to hear any witnesses or examine evidence for the defence but examining the witnesses and evidence for the prosecution may raise an issue from the perspective of equality of arms (*Borisova v. Bulgaria*, §§ 47-48; *Topić v. Croatia*, § 48). The same is true if the trial court refuses to call defence witnesses to clarify an uncertain situation which constituted the basis of charges (*Kasparov and Others v. Russia*, §§ 64-65). Thus, in all such instances, in determining whether the proceedings were fair, the Court may need to apply the relevant test set out in the *Murtazaliyeva* case, which aims to determine (1) whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation; (2) whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial; and (3) whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings (*Abdullayev v. Azerbaijan*, §§ 59-60).

161. The principle of equality of arms is also relevant in the matters related to the appointment of experts in the proceedings (*Khodorkovskiy and Lebedev v. Russia (no.2)*, § 499). The mere fact that the experts in question are employed by one of the parties does not suffice to render the proceedings unfair. The Court has explained that although this fact may give rise to apprehension as to the neutrality of the experts, such apprehension, while having a certain importance, is not decisive. What is decisive, however, is the position occupied by the experts throughout the proceedings, the manner in which they performed their functions and the way the judges assessed the expert opinion. In

ascertaining the experts' procedural position and their role in the proceedings, the Court takes into account the fact that the opinion given by any court-appointed expert is likely to carry significant weight in the court's assessment of the issues within that expert's competence (*Shulepova v. Russia*, § 62; *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, § 94).

162. The Court has found that if a bill of indictment is based on the report of an expert who was appointed in the preliminary investigations by the public prosecutor, the appointment of the same person as expert by the trial court entails the risk of a breach of the principle of equality of arms, which however can be counterbalanced by specific procedural safeguards (*J.M. and Others v. Austria*, § 121).

163. In this regard, the requirement of a fair trial does not impose on a trial court an obligation to order an expert opinion or any other investigative measure merely because a party has requested it. Where the defence insists on the court hearing a witness or taking other evidence (such as an expert report, for instance), it is for the domestic courts to decide whether it is necessary or advisable to accept that evidence for examination at the trial. The domestic court is free, subject to compliance with the terms of the Convention, to refuse to call witnesses proposed by the defence (*Huseyn and Others v. Azerbaijan*, § 196; *Khodorkovskiy and Lebedev v. Russia*, §§ 718 and 721; *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, § 95).

164. Similarly, under Article 6 it is normally not the Court's role to determine whether a particular expert report available to the domestic judge was reliable or not. The domestic judge normally has wide discretion in choosing amongst conflicting expert opinions and picking one which he or she deems consistent and credible. However, the rules on admissibility of evidence must not deprive the defence of the opportunity to challenge the findings of an expert effectively, in particular by introducing or obtaining alternative opinions and reports. In certain circumstances, the refusal to allow an alternative expert examination of material evidence may be regarded as a breach of Article 6 § 1 (*Stoimenov v. the former Yugoslav Republic of Macedonia*, § 38; *Matytsina v. Russia*, § 169) as it may be hard to challenge a report by an expert without the assistance of another expert in the relevant field (*Khodorkovskiy and Lebedev v. Russia*, § 187).

165. Equality of arms may also be breached when the accused has limited access to his case file or other documents on public-interest grounds (*Matyjek v. Poland*, § 65; *Moiseyev v. Russia*, § 217).

166. The Court has found that unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial. The failure to afford such access has weighed in favour of finding that the principle of equality of arms had been breached (*Beraru v.Romania*, §70). In this context, importance is attached to appearances as well as to the increased sensitivi ty to the fair administration of justice. Respect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence from being made available to the accused before the trial and the accused from being given an opportunity to comment on it through his lawyer in oral submissions (*Öcalan v. Turkey* [GC], § 140). In some instances, however, an accused may be expected to give specific reasons for his request to access a particular document in the file (*Matanović v. Croatia*, § 177).

167. Non-disclosure of evidence to the defence may breach equality of arms as well as the right to an adversarial hearing (*Kuopila v. Finland*, § 38, where the defence was not given an opportunity to comment on a supplementary police report).

Hypothetical N° 10 - Consequences of SIS alert on procedural rights

1 Level

After a jewelry store has been robbed in Rome, a robbery report is opened against unknown persons. The main suspect is Mr. Clerk, a Belarusian citizen with a criminal record who is domiciled in Rome and who had threatened the store owner a few days before. The state's attorney wants to get Mr. Clerk for questioning, but he is not reachable by the police at his place of residence. Therefore, the judge releases an ordinance of pre-trial custody against him and issues a European arrest warrant, as well as an alert in the Schengen Information System (SIS).

Which procedural rights are granted at this stage?

Layer 2

Similar episodes of robbery take place in Rome thereafter which are linked to local criminal organisations. After other people being interviewed, the judge releases an order suspending the previous ordinance, due to the easing of evidence against Mr. Clerk which constituted the basis for the pre-trial measure. The European arrest warrant was thus withdrawn, and the Italian law enforcement authorities notify the competent division of Interpol about the need to call off the search.

Meanwhile, Mr. Clerk is stopped at the border crossing point between Switzerland and Italy and is held at the frontier office as the alert registered in the SIS at his name has not been deleted. The Ministry of Justice is immediately informed of the arrest. Mr. Clerk is allowed to contact his lawyer, who arrived on the spot the next morning. The lawyer asks to talk to the public prosecutor and requests for the suspect to be released by arguing that failure to delete the SIS alert is in violation of the presumption of innocence guaranteed by the EU Law.

What shall the public prosecutor answer?

DIRECTIVE (EU) 2016/343 ON THE PRESUMPTION OF INNOCENCE AND OF THE RIGHT TO BE PRESENT AT THE TRIAL IN CRIMINAL PROCEEDINGS

Art. 6 (Burden of Proof):

- 1.Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. This shall be without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law. 2.Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.

EUCFR

Art. 48 (Presumption of innocence and right of defence):

- Everyone is presumed innocent until proven guilty according to law, and a person charged with a crime is entitled to a defence.

ECHR

Art. 6.2 (Right to a Fair Trial):

- Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

REGULATION (UE) 2018/1861 ON THE SCHENGEN INFORMATION SYSTEM (SIS) IN THE FIELD OF POLICE COOPERATION AND JUDICIAL COOPERATION IN CRIMINAL MATERS

Art. 40 (Deletion of Alerts):

- 1. Alerts for refusal of entry and stay pursuant to Article 24 shall be deleted:
- (a) when the decision on the basis of which the alert was entered has been withdrawn or annulled by the competent authority; or
- (b) where applicable, following the consultation procedure referred to in Article 27 and Article 29.
- 2. Alerts on third-country nationals who are the subject of a restrictive measure intended to prevent entry into or transit through the territory of Member States shall be deleted when the restrictive measure has been terminated, suspended or annulled.
- 3. Alerts on a person who has acquired citizenship of a Member State or of any State whose nationals are beneficiaries of the right of free movement under Union law shall be deleted as soon as the issuing Member State becomes aware, or is so informed pursuant to Article 44 that the person in question has acquired such citizenship.

- 4. Alerts shall be deleted upon expiry of the alert in accordance with Article 39.

COUNCIL FRAMEWORK DECISION ON THE EAW 2002/584/JHA

Art. 3 (Grounds for mandatory non-execution of the European arrest warrant):

- The judicial authority of the Member State of execution (hereinafter 'executing judicial authority) shall refuse to execute the European arrest warrant in the following cases:
- 1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;
- 2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;
- 3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

Art. 9 (Transmission of a European Arrest Warrant)

- 1. When the location of the requested person is known, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority.
- 2. The issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System (SIS).
- 3. Such an alert shall be effected in accordance with the provisions of Article 95 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of controls at common borders. An alert in the Schengen Information System shall be equivalent to a European arrest warrant accompanied by the information set out in Article 8(1).
- For a transitional period, until the SIS is capable of transmitting all the information described in Article 8, the alert shall be equivalent to a European arrest warrant pending the receipt of the original in due and proper form by the executing judicial authority.

COUNCIL DECISION ON THE SIS II 2007/533/JHA

Art. 26 (Objectives and conditions for issuing alerts):

- 1. Data on persons wanted for arrest for surrender purposes on the basis of a European Arrest Warrant or wanted for arrest for extradition purposes shall be entered at the request of the judicial authority of the issuing Member State.
- 2. Data on persons wanted for arrest for surrender purposes shall also be entered on the basis of arrest warrants issued in accordance with Agreements concluded between the European Union and third countries on the basis of Articles 24 and 38 of the EU Treaty for the purpose of surrender of persons on the basis of an arrest warrant, which provide for the transmission of such an arrest warrant via the Schengen Information System.

Art. 37 (Execution of the action based on an alert):

- 1. For the purposes of discreet checks or specific checks, all or some of the following information shall be collected and communicated to the authority issuing the alert when border control or other police and customs checks are carried out within a Member State:
- (a) the fact that the person for whom, or the vehicle, boat, aircraft or container, for which an alert has
- been issued, has been located;
- (b) the place, time or reason for the check;
- (c) the route and destination of the journey;
- (d) the persons accompanying the persons concerned or the occupants of the vehicle, boat or aircraft
- who can reasonably be expected to be associated to the persons concerned;
- (e) the vehicle, boat, aircraft or container used;
- (f) objects carried;
- (g) the circumstances under which the person or the vehicle, boat, aircraft or container was located.
- 2. The information referred to in paragraph 1 shall be communicated through the exchange of supplementary information.
- 3. For the collection of the information referred to in paragraph 1, Member States shall take the necessary steps not to jeopardise the discreet nature of the check.
- 4. During specific checks, persons, vehicles, boats, aircraft, containers and objects carried, may be searched in accordance with national law for the purposes referred to in Article 36. If specific checks are not authorised under the law of a Member State, they shall automatically be replaced, in that Member State, by discreet checks.

Art. 44 (Retention period of alerts on persons).

- 1. Alerts on persons entered in SIS II pursuant to this Decision shall be kept only for the time required to achieve the purposes for which they were entered.
- 2. A Member State issuing an alert shall, within three years of its entry into SIS II, review the need to keep it. The period shall be one year in the case of alerts on persons pursuant to Article 36.
- 3. Each Member State shall, where appropriate, set shorter review periods in accordance with its national law.
- 4. Within the review period, the Member State issuing the alert may, following a comprehensive individual assessment, which shall be recorded, decide to keep the alert longer, should this prove necessary for the purposes for which the alert was issued. In such a case paragraph 2 shall apply also to the extension. Any extension of an alert shall be communicated to CS-SIS.
- 5. Alerts shall automatically be erased after the review period referred to in paragraph 2 except where the Member State issuing the alert has communicated the extension of the alert to CS-SIS pursuant to paragraph 4. CS-SIS shall automatically inform the Member States of the scheduled deletion of data from the system four months in advance.
- 6. Member States shall keep statistics about the number of alerts the retention period of which has been extended in accordance with paragraph 4.

Art. 58 (Right of access, correction of inaccurate data and deletion of unlawfully stored data):

- 1. The right of persons to have access to data relating to them entered in SIS II in accordance with this Decision shall be exercised in accordance with the law of the Member State before which they invoke that right.
- 2. If national law so provides, the national supervisory authority shall decide whether information is to be communicated and by what procedures.

- 3. A Member State other than that which has issued an alert may communicate information concerning such data only if it first gives the Member State issuing the alert an opportunity to state its position. This shall be done through the exchange of supplementary information.
- 4. Information shall not be communicated to the data subject if this is indispensable for the performance of a lawful task in connection with an alert or for the protection of the rights and freedoms of third parties.
- 5. Any person has the right to have factually inaccurate data relating to him corrected or unlawfully stored data relating to him deleted.
- 6. The individual concerned shall be informed as soon as possible and in any event not later than 60 days from the date on which he applies for access or sooner if national law so provides.
- 7. The individual shall be informed about the follow-up given to the exercise of his rights of correction and deletion as soon as possible and in any event not later than three months from the date on which he applies for correction or deletion or sooner if national law so provides.

Useful materials for the resolution of the case

Handbook on how to issue and execute a European arrest warrant

The following measures might be considered at the pre-trial stage of criminal proceedings:[21]

(a) issuing a European Investigation Order (EIO) for a suspect to be heard via a video link in another Member State;

(b) issuing a European Investigation Order (EIO) for suspect to be heard in another Member State by the competent authorities of that Member State;

(c) issuing a European Supervision Order (ESO) for a non-custodial supervision measure concerning the suspect to be executed by the Member State of residence of the suspect in the pre-trial stage;

(d) issuing an alert in SIS for the purpose of establishing the place of residence or domicile of a suspect (Article 34 of the SIS II Decision)[22]. Such alerts differ from the alerts for arrest that are described under Section 3.3.1 of this Handbook. As soon as the place of residence or domicile has been provided to the issuing judicial authority, that authority needs to take the necessary follow-up measures (such as requiring the suspect to appear before a relevant authority responsible for criminal proceedings) and delete the alert from SIS in accordance with point 6.5 of the SIRENE Manual;

[21] Commission Notice — Handbook on how to issue and execute a European arrest warrant. OJ C 335, 6.10.2017. pp. 15-16.

[22] When the location of the requested person is unknown the EAW should be transmitted to all Member States. To that end, an alert for arrest or surrender should be created in the SIS in accordance with Article 26 of SIS II Decision. It is important to emphasise that the issuing judicial authority must issue the EAW before the alert can be entered into the SIS.

(e) requiring a suspect located in the executing Member State to appear before a relevant authority responsible for criminal proceedings in the issuing Member State; (f) inviting a person to attend the criminal procedure voluntarily.

According to the SIS II Decision, alerts on persons entered in SIS may be kept only for the time required to achieve the purposes for which they were entered (Article 44(1) of SIS II Decision). As soon as there are no longer grounds for an EAW, the competent authority of the issuing Member State must delete it from SIS[23].

European Criminal Bar Association (ECBA), *Handbook EAW*, online.

If you are asked to represent someone who is aware of an EAW pending against them, and therefore that a SIS II alert is in place, it is possible for a flag to be added at the behest of a competent judicial authority where it is obvious that the EAW will have to be refused (Article 25 SIS II Decision). So, for instance, if you can demonstrate that one of the mandatory refusal grounds under Article 3 EAW Framework Decision applies, or that a fundamental right is at risk you could seek an order from a national court or authority (whichever is competent for these purposes in your Member State) ordering the SIS II / SIRENE Bureau[24] to require that a flag be added to the alert by the Issuing State.

If the EAW has been resisted by persuading the Issuing State to withdraw the underlying arrest warrant and EAW, the ISL should ensure that the issuing judicial authority also orders the withdrawal of the SIS II alert when it revokes the EAW. You should remind them to do this, since issuing authorities do not always do it automatically.

Supporting documents

- ECBA (2017). *How to defend a European Arrest Warrant Case: ECBA Handbook on the EAW for Defence Lawyers.* At http://www.ecba-eaw.org/extdocserv/ECBA-Handbook-on-the-EAW-Palma-Edition-2017-v1-6.pdf
- Eucrim (2019). New Legal Framework for Schengen Information System. At https://eucrim.eu/news/new-legal-framework-schengen-information-system/

[23] OJ C 335, 6.10.2017, cit. P. 42.
[24] A list of SIS II Offices and national SIRENE Bureaux can be found in the OJ C 278, 22.8.2014, p. 145–152.

Hypothetical N° 11 - Procedural rights of vulnerable persons subject to EAW

Level 1

Mrs. Row is a requested person who as such shall have the right of access to a lawyer in the executing Member State. She has been arrested pursuant to the European arrest warrant on the basis of a pre-trial custody decree and she has menthal deaseases. Because of her vulnerable status, the competent authority informed her that she had the right to appoint a lawyer in the issuing Member State. However, such a motivation has been given orally but there was not any prompt identification of vulnerability grounds. Mental and physical conditions or disabilities as well as cognitive disorders hindered such a person to understand and effectively participate in the proceedings, so that she understood that she had to appoint a lawyer in the executing state. However, her vulnerable status was not double-checked by anyone else other than the competent authority. Moreover, Mrs. Row is a person with speech and hearing disabilities who communicated in sign language, therefore she was to be treated as a person who does not speak or understand the language of the criminal proceedings and therefore was provided with interpretation of a specific letter of rights adapted to her.
Is such a letter discriminatory in fact or does it provide some help to Mrs. Row? Shall the competent authority have some discretion in treating cases regarding vulnerable persons?

Level 2

The only person who knew about the vulnerable condition of Mrs. Row is her lawyer in the executing Member State, who informed the competent authority of this. Does the duty of confidentiality prevent the lawyer from communicating with competent authorities about the vulnerable character of the defendant?

DIRECTIVE 2013/48/EU ON THE RIGHT OF ACCESS TO A LAWYER IN CRIMINAL PROCEEDINGS AND IN EUROPEAN ARREST WARRANT PROCEEDINGS

Art. 4 (Confidentiality):

- Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.

Art. 10 (The right of access to a lawyer in European Arrest Warrant proceedings):

- 1. Member States shall ensure that a requested person has the right of access to a lawyer in the executing Member State upon arrest pursuant to the European arrest warrant.
- 2. With regard to the content of the right of access to a lawyer in the executing Member State, requested persons shall have the following rights in that Member State:
- a) the right of access to a lawyer in such time and in such a manner as to allow the requested
- persons to exercise their rights effectively and in any event without undue delay from deprivation
- of liberty;
- (b) the right to meet and communicate with the lawyer representing them;
- (c) the right for their lawyer to be present and, in accordance with procedures in national law,
- participate during a hearing of a requested person by the executing judicial authority. Where a
- lawyer participates during the hearing this shall be noted using the recording procedure in
- accordance with the law of the Member State concerned.
- 3. The rights provided for in Articles 4, 5, 6, 7, 9, and, where a temporary derogation under Article 5(3) is applied, in Article 8, shall apply, *mutatis mutandis*, to European arrest warrant proceedings in the executing Member State.
- 4. The competent authority in the executing Member State shall, without undue delay after deprivation of liberty, inform requested persons that they have the right to appoint a lawyer in the issuing Member State. The role of that lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA.
- 5. Where requested persons wish to exercise the right to appoint a lawyer in the issuing Member State and do not already have such a lawyer, the competent authority in the executing Member State shall promptly inform the competent authority in the issuing Member State. The competent authority of that Member State shall, without undue delay, provide the requested persons with information to facilitate them in appointing a lawyer there.
- 6. The right of a requested person to appoint a lawyer in the issuing Member State is without prejudice to the time-limits set out in Framework Decision 2002/584/JHA or the obligation on the executing judicial authority to decide, within those time- limits and the conditions defined under that Framework Decision, whether the person is to be surrendered.

Art. 13 (Vulnerable persons):

- Member States shall ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in the application of this Directive.

FRAMEWORK DECISION ON THE EUROPEAN ARREST WARRANT AND THE SURRENDER PROCEDURES BETWEEN MEMBER STATES - 2002/584/JHA

Art. 11 (Rights of a requested person):

- 1. When a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the European arrest warrant and of its content, and also of the possibility of consenting to surrender to the issuing judicial authority.
- 2. A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.

Useful materials for the resolution of the case

CJEU case law

Zubair Haqbin, Case C-233/18, ruling

«Article 20(4) and (5) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, read in the light of Article 1 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a Member State cannot, among the sanctions that may be imposed on an applicant for serious breaches of the rules of the accommodation centres as well as seriously violent behaviour, provide for a sanction consisting in the withdrawal, even temporary, of material reception conditions, within the meaning of Article 2(f) and (g) of the directive, relating to housing, food or clothing, in so far as it would have the effect of depriving the applicant of the possibility of meeting his or her most basic needs. The imposition of other sanctions under Article 20(4) of the directive must, under all circumstances, comply with the conditions laid down in Article 20(5) thereof, including those concerning the principle of proportionality and respect for human dignity. In the case of an unaccompanied minor, those sanctions must, in the light, inter alia, of Article 24 of the Charter of Fundamental Rights, be determined by taking particular account of the best interests of the child».

ECHR case law

1. Applicants in poor mental health

68. The case of *Tehrani and Others v. Turkey* concerned, *inter alia*, the removal of the applicants, Iranian nationals and ex-members of the PMOI recognised as refugees by UNHCR. After one of the applicants had written to the Court that he wished to withdraw his application, his representative informed the Court that he wished to pursue the application and that the applicant was in poor mental health and needed treatment. The Government stated that the applicant did not suffer from a psychotic illness but that further diagnosis could not be carried out due to his lack of co-operation. The Court noted that one of the applicant's allegations concerned the possible risk of death or ill- treatment and considered that striking the case out of its list would lift the protection afforded by the Court on a

subject as important as the right to life and physical well-being of an individual, that there were doubts about the applicant's mental state and discrepancies of the medical reports, and concluded that respect for human rights as defined in the Convention and the Protocols thereto required the examination of the application to continue (§§ 56-57).

2. Vulnerable individuals

19. Additional safeguards against arbitrary detention apply to children and other individuals with specific vulnerabilities, who, to be able to benefit from such protection, should have access to an assessment of their vulnerability and be informed about respective procedures (see *Thimothawes v.Belgium*, and *Abdi Mahamud v.Malta*). Lack of active steps and delays in conducting the vulnerability assessment may be a factor in raising serious doubts as to the authorities' good faith (*Abdullahi Elmi and Aweys Abubakar v. Malta*; *Abdi Mahamud v. Malta*). The detention of vulnerable individuals will not be in conformity with Article 5 § 1(f) if the aim pursued by detention can be achieved by other less coercive measures, requiring the domestic authorities to consider alternatives to detention in the light of the specific circumstances of the individual case (*Rahimi v. Greece*; *Yoh-Ekale Mwanje v. Belgium*, concerning the second limb of the provision). In addition to Article 5 § 1(f), immigration detention of children and other vulnerable individuals can raise issues under Article 3 of the Convention, with particular attention being paid to the conditions of detention, its duration, the person's particular vulnerabilities and the impact of the detention on him or her (in respect of the detention of accompanied children see *Popov v. France* concerning the second limb and the overview of the Court's case law in *S.F. and Others v. Bulgaria*; in respect of unaccompanied children see *Abdullahi Elmi and Aweys Abubakar v. Malta*; *Rahimi v. Greece*; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, where the Court found a violation of Article 3 in respect of both the detained child and the child's mother who was in another country, and *Moustahi v. France* concerning the detention of unaccompanied minors by arbitrary association with an unrelated adult; in respect of adults with specific health needs see *Aden Ahmad v. Malta*, and *Yoh-Ekale Mwanje v. Belgium*, and a heavily pregnant woman *Mahmundi and Others v. Greece*; see also *O.M. v. Hungary*, § 53, with a view to the assessment of the vulnerability of the applicant, an LGBTI asylum-seeker, under Article 5 § 1(b)). The detention of accompanied children may also raise issues under Article 8 of the Convention in respect of both children and adults (see overview of the Court's case law in *Bistieva and Others v. Poland*), as may the refusal to allow the reunion of a parent with his children, who were placed *de facto* in administrative detention by arbitrary association with an unrelated adult (*Moustahi v. France*).

Supporting Documents

FRA's findings show that using the same state-appointed interpreters to interpret both during police interrogations and communications between a defendant and their lawyer may present a conflict of interest. It may conflict with the principle of confidentiality of client-counsel communications. While relying on interpreters, who the police or other criminal justice authorities regularly use, can be beneficial in terms of availability, speed, and knowledge of the procedures, they can be unsuitable for interpretation in a client-counsel relationship, unless strict quality safeguards are put in place.

FRA OPINION 4

EU Member States should consider introducing specific safeguards to ensure that the confidentiality of communication between suspected or accused persons and their legal counsel is strictly respected and not jeopardised by the use of state-appointed interpreters.

FRA OPINION 9

While Directives 2010/64/EU and 2012/13/EU do not provide specific guidance on how to ensure that the needs of vulnerable suspects and accused persons are taken into account, EU Member States taking steps to ensure the protection of the rights of suspects or accused persons whose vulnerability affects their ability to follow proceedings and make themselves understood should ensure compliance with their international human rights law obligations. In particular, Member States should adhere to the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Rights of the Child (CRC) – and the interpretative elaborations made by the expert bodies monitoring these conventions. EU Member States are also encouraged to follow guidelines developed by the Council of Europe in this field, particularly its Guidelines on child-friendly justice. In this context, the effective implementation of the new Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings will be essential. EU Member States are also encouraged to follow the guidance set out in the European Commission Recommendation on the procedural safeguards for vulnerable suspected and accused persons in criminal proceedings who are not able to understand and to effectively participate in such proceedings due to age, their mental or physical condition or disabilities.

****

Commission Recommendation 27 November 2013[25]

1. Identification of vulnerable persons

Vulnerable persons should be promptly identified and recognised as such. Member States should ensure that all competent authorities may have recourse to a medical examination by an independent expert to identify vulnerable persons, and to determine the degree of their vulnerability and their specific needs. This expert may give a reasoned opinion on the appropriateness of the measures taken or envisaged against the vulnerable person.

2. Rights of vulnerable persons

Non-discrimination

Vulnerable persons should not be subject to any discrimi nation under national law in the exercise of the procedural rights referred to in this Recommendation.

The procedural rights granted to vulnerable persons should be respected throughout the criminal proceedings taking into account the nature and degree of their vulnerability.

[25] Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013/C 378/02), 27 November 2013. At https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H1224(02)&from=EN.

Presumption of vulnerability

Member States should foresee a presumption of vulner ability in particular for persons with serious psychological, intellectual, physical or sensory impairments, or mental illness or cognitive disorders, hindering them to understand and effectively participate in the proceedings.

Right to information

Persons with disabilities should receive upon request information concerning their procedural rights in a format accessible to them.

Vulnerable persons and, if necessary, their legal represen tative or an appropriate adult should be informed of the specific procedural rights referred to in this Recommen dation, in particular those relating to the right to information, the right to medical assistance, the right to a lawyer, the respect of privacy and, where appropriate, the rights related to pre-trial detention.

The legal representative or an appropriate adult who is nominated by the vulnerable person or by the competent authorities to assist that person should be present at the police station and during court hearings.

Right of access to a lawyer

If a vulnerable person is unable to understand and follow the proceedings, the right to access to a lawyer in accordance with Directive 2013/48/EU should not be waived.

Right to medical assistance

Vulnerable persons should have access to systematic and regular medical assistance throughout criminal proceedings if they are deprived of liberty.

Recording of questioning

Any questioning of vulnerable persons during the pre-trial investigation phase should be audio-visually recorded.

Deprivation of liberty

Member States should take all steps to ensure that depri vation of liberty of vulnerable persons before their conviction is a measure of last resort, proportionate and taking place under conditions suited to the needs of the vulnerable person. Appropriate measures should be taken to ensure that vulnerable persons have access to reasonable accommodations taking into account their particular needs when they are deprived of liberty.

Privacy

Competent authorities should take appropriate measures to protect the privacy, personal integrity and personal data of vulnerable persons, including medical data, throughout the criminal proceedings.

European arrest warrant proceedings

The executing Member State should ensure that a vulnerable person who is subject to European arrest warrant proceedings has the specific procedural rights referred to in this Recommendation upon arrest.

Training

Police officers, law enforcement and judicial authorities competent in criminal proceedings conducted against vulnerable persons should receive specific training.

Hypothetical N° 12 - Impact of trainings on procedural rights

Level 1

There was a case in which judicial staff in Poland defended an applicant who complained of not having been granted sufficient legal remedies to safeguard his procedural rights such as information rights. Judicial staff claimed they were not provided with training opportunities for handling cases involving procedural rights of children. They argued they were not properly trained with regard to children's rights, appropriate questioning techniques, child psychology and communication in a language suitable for the child. The applicant wanted to make the right to training enforceable. Training would entail: providing data and guidance to practitioners and family members to better support people considered suspected or accused; providing an easy-to-read version of the letter of rights.

Therefore, the applicant applies to the Judicial Administration of Poland claiming that it was complaint with the duty of permanent education of judicial staff and legal practitioners.

What kind of remedies could be feasible to compensate rights not adequately protected because of the lack of judicial staff's expertise and education?

Level 2

Judicial Administration resisted in trial pointing out that there is no specific obligation to set up judicial trainings and monitor the outcomes of these trainings.

The applicant agrees with his lawyer to change defense strategy.

Should you be the lawyer, which steps would you suggest in order to assert the lack of training as a possible cause of lack of procedural rights' protection?

DIRECTIVE (EU) 2016/800 ON PROCEDURAL SAFEGUARDS FOR CHILDREN WHO ARE SUSPECTS OR ACCUSED PERSONS IN CRIMINAL PROCEEDINGS

Art. 20 (Training):

- 1. Member States shall ensure that staff of law enforcement authorities and of detention facilities who handle cases involving children, receive specific training to a level appropriate to their contact with children with regard to children's rights, appropriate questioning techniques, child psychology, and communication in a language adapted to the child.
- 2. Without prejudice to judicial independence and differences in the organisation of the judiciary across the Member States, and with due respect for the role of those responsible for the training of judges and prosecutors, Member States shall take appropriate measures to ensure that judges and prosecutors who deal with criminal proceedings involving children have specific competence in that field, effective access to specific training, or both.
- 3. With due respect for the independence of the legal profession and for the role of those responsible for the training of lawyers, Member States shall take appropriate measures to promote the provision of specific training as referred to in paragraph 2 to lawyers who deal with criminal proceedings involving children.
- 4. Through their public services or by funding child support organizations, Member States shall encourage initiatives enabling those providing children with support and restorative justice services to receive adequate training to a level appropriate to their contact with children and observe professional standards to ensure such services are provided in an impartial, respectful and professional manner.

DIRECTIVE 2012/13/EU ON THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS

Art. 9 (Training):

- Without prejudice to judicial independence and differences in the organization of the judiciary across the Union, Member States shall request those responsible for the training of judges, prosecutors, police and judicial staff involved in criminal proceedings to provide appropriate training with respect to the objectives of this Directive.

EUCFR

Art. 14 (Right to education):

- 1. Everyone has the right to education and to have access to vocational and continuing training.
- 2. This right includes the possibility to receive free compulsory education.
- 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Useful materials for the resolution of the case

- Annual report on the training of justice professionals https://ec.europa.eu/info/sites/info/files/judicial-training-2020-web.pdf
- EVALUATION of the 2011-2020 European judicial training strategy https://ec.europa.eu/info/sites/info/files/5_en_document_travail_service_part1_v2.pdf