THE RIGHT TO FREE INTERPRETATION UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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The Council of Europe Colloquy held in Madeira in 1983 on Human Rights of Aliens in Europe brought to the fore various problems, some of them far from small, facing aliens and especially migrant workers in Europe. The present paper seeks to focus on one particular area where the European Convention on Human Rights has afforded them effective protection. This concerns the right to free interpretation in criminal proceedings when the person charged is not, or not sufficiently, conversant with the language used in court.

Article 6 paragraph 3(e) of the Convention provides that everyone charged with a criminal offence has the right "to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Obviously, this right is not confined exclusively to aliens since there may be aliens who are sufficiently conversant with the language of the proceedings, and on the other hand, even a national forming part of a linguistic minority may conceivably find himself in need of protection in this regard, though in view of the modern principle of compulsory education, it is not easy to envisage a member of a linguistic minority within a member State not being sufficiently conversant with the national language.

Of course, in principle, a member of a linguistic minority within a State may not complain that he is not entitled to use his own language before courts in which the language used is that of the majority, the national language. But the determining factor remains always whether the person concerned can understand or speak the language used in court. Thus, as was held by the European Commission on Human Rights, a Turkish national who persisted in using in the proceedings his native Kurdish language could claim no protection, since it was not a case of a person who could not understand or speak the language used in court,

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but of a person who simply insisted on conducting his defence in a different language.[1]

The right protected by Article 6 paragraph 3(e) will be examined under the following heads:

1. Nature and scope of the right;
2. Quality and extent of the interpretation;
3. Interpretation costs.

1. Nature and scope of the right

This right forms part of a cluster of "minimum" rights secured to anyone charged with a criminal offence (Article 6 paragraph 3). These rights are specific aspects of the general right to a fair trial set forth in paragraph 1 of the same Article and must also be interpreted in the light of that general notion. Indeed, the importance of the right to a fair trail in a democratic society subscribing to the rule of law needs no stressing. It is also the right which is more commonly invoked before both the European Commission and the European Court of Human Rights and which has therefore given rise to a particularly abundant and interesting jurisprudence. On the particular aspect of it presently under consideration, however, the existing jurisprudence, though certainly not lacking in interest, is not so abundant, obviously because the incidence of cases concerning the subject of interpretation is not as high as that of cases concerning, for instance, that other aspect of the same general right which is an independent and impartial tribunal.

The protection afforded by Article 6 paragraph 3(e) does not extend to any person involved in court litigation, but applies only to a person "charged with a criminal offence." On the other hand, it is not confined to oral statements made at the trial hearing, but applies also to documentary material in the proceedings, the understanding of which is necessary to secure for the person charged a fair trial. Nor is it confined to the trial proper, but applies also to pre-trial proceedings, where interpreters' assistance is also necessary to provide the person charged with an opportunity to prepare his defence and ensure that the trial will be fair.[2]

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[1] D. 18954/91, 21st October 1993, DR 75, 192.

[2] *Luedicke, Belkacem and Koc*, judgment of the 28th November 1978, Series A, no. 29, p. 20, para. 48; *Kamasinski*, judgment of the 19th December 1989, Series A, no. 168, p. 35, para. 74.

It has been held, however, by the European Commission on Human Rights in the case of an Italian citizen extradited from France to Austria, who could not speak German, that this provision (see the words "language used in court") "cannot be given such a wide interpretation as to cover the relations between the accused and his counsel. [It] in fact only applies to the relations between the accused and the judge."[3] In this case the applicant complained that he had not been given the free assistance of an interpreter for contacts with his defence counsel (*not* a free legal aid one) who did not speak his language. It is submitted, however, that the position would be different, under other aspects of the notion of a fair trial, had the counsel been a free legal aid one.

Whether an accused person can understand or speak the language used in court or not is of course a question of fact to be decided in each particular case. The question has come up before the Commission on more than one occasion. The accused person's inability to understand or speak the language, as a condition for the free assistance of an interpreter, need not be absolute. It is enough if his knowledge or comprehension of the language is sufficiently limited to prevent him from adequately following the proceedings and having a fair trial.[4]

In the first case on this particular provision to come up before the European Court of Human Rights, *Luedicke, Belkacem and Koc*, the scope of this provision was defined as follows: "Construed in the context of the right to a fair trial guaranteed by Article 6, paragraph 3(e) signifies that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial."[5] This case is particularly important, as we shall see, for the construction of the word "free" qualifying the words "assistance of an interpreter" in the text of this provision.

2. Quality and extent of the interpretation

The question of the adequacy of the interpretation came up before the European Court of Human Rights in a case against Austria, *Kamasinski*.[6]

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[3] D. 6185/73, 29th May 1975, DR 2, 68 (70).

[4] See, inter alia, D. 8124/77, 7th December 1978 (unpublished).

[5] Page 20, para. 48.

[6] Judgment of the 19th December 1989, Series A, no. 168.

The applicant, a United States citizen who underwent trial in Austria on charges of aggravated fraud and misappropriation, did not understand German, but was assisted by interpreters. He complained in the first place that the Austrian law providing for court-registered interpreters (the Court Experts and Interpreters Act, 1975, which, *inter alia*, required "special knowledge") was excessively vague and did not prescribe a reasonable standard of proficiency ensuring the effective assistance of an interpreter. The Court premised in this connection that 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 provided in this case satisfied the requirement of Article 6.

On this issue, the applicant alleged inadequate interpretation of oral statements and complained of the lack of written translation of official documents at the different stages of the procedure. After quoting the general principle set out in the *Luedicke, Belkacem and Koc* judgment, already referred to, the Court went on to state as follows: "However, paragraph 3(e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. The interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events."[7]

Applying by analogy a principle affirmed by it in the *Artico* case[8] with regard to Article 6 paragraph 3(c), the Court also said: "In view of the need for the right guaranteed by paragraph 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 one notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided."[9] The principle had already been accepted also in the Commission's report.

It will be noted that the Court took a global approach based on a cumulative assessment of the various factors involved. For instance, with regard to the fact that questions put to the witnesses (as distinct from the answers) were not interpreted at the trial hearing, the Court remarked that this in itself did not suffice to establish a violation of paragraphs

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[7] Ibid., page 35, para. 74.

[8] Judgment of the 13th May 1980, Series A, no. 37, pp. 16 and 18, paras 33 and 36.

[9] Page 35, para. 74.

3(d) or 3(e) of Article 6, but was one factor along with others to be considered. In the end it did not find it substantiated on the evidence, taken as a whole, that the applicant was unable, because of deficient interpretation, either to understand the evidence produced against him or to have witnesses examined or cross-examined on his behalf.[10]

3. Interpretation costs

The question of the true meaning of the word "free" qualifying the words "assistance of an interpreter" in the provision under examination came up before the European Court of Human Rights for the first time in the case, already referred to, of *Luedicke, Belkacem and Koc*. The case originated in three separate applications brought against the Federal Republic of Germany by a United Kingdom citizen, an Algerian and a Turk who had been criminally charged before different German courts. Under German law they were duly provided with the assistance of an interpreter, but after being convicted and sentenced, they were ordered to pay interpreters' fees as part of the costs of the proceedings. The essential question involved was in fact whether paragraph 3(e) requires definitive relief from liability to pay interpreters' costs or merely provisional relief, i.e. until final conviction. In other words, does freedom from liability to pay interpretation costs depend on the outcome of the criminal prosecution or is it a once for all dispensation?

The Court, agreeing with the Commission's conclusion, found in the first place that the words "free" / "gratuitement" in this provision have in themselves an ordinary meaning that is clear and determinate. Moreover, that ordinary meaning is not contradicted by the context of the sub-paragraph and is in fact confirmed by the object and purpose of Article 6. Sub-paragraph (e) of Article 6.3, the Court said, entails for anyone who cannot speak or understand the language used in court the right to receive the free assistance of an interpreter without subsequently having the relative costs claimed back from him.[11] After the judgment, the Federal Republic of Germany, the State concerned, amended its legislation to bring it into line with it.

The same question then came up again before the European Court of Human Rights in *Ozturk*, but with a new and interesting twist. The offence

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[10] Page 38, para. 83.

[11] Page 19, para. 46.

involved was not an "ordinary" criminal offence, but a "regulatory" one. Again, the State concerned was the Federal Republic of Germany, and it was represented on behalf of the government that paragraph 3(e) was not applicable in the circumstances since the applicant was not "charged with a criminal offence." Under the German Regulatory Offences Act of 1968/1975, which decriminalised petty offences, notably traffic offences, the misconduct committed by the applicant was not treated as a criminal offence (*Straftat*), but as a "regulatory offence" (*Ordnungswidrigkeit*), which was distinguishable not only by reason of the procedure laid down for its prosecution and punishment, but also by reason of its juridical characteristics and consequences.

In the first place the Court said: "By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual ... as well as the needs of the proper administration of justice .... The Convention is not opposed to the moves towards 'decriminalisation' which are taking place - in extremely varied form in the member States of the Council of Europe .... Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as 'regulatory' instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention."[12]

Now already in 1976 in the *Engel* case the Court had considered as criminal offences for the purposes of Article 6 certain offences for which some Dutch conscript servicemen had been subjected to sanctions, but which were classified by domestic law as disciplinary offences. In fact the paragraph just quoted from *Ozturk* practically reproduces another in *Engel*.[13]

Reaffirming the "autonomy" of the notion of "criminal" for the purposes of Article 6 and applying the criteria developed in the *Engel* judgment (briefly, the qualification given under domestic law, the very nature of the offence and the degree of severity of the penalty that the person concerned risks incurring), here too the Court, like the Commission, identified in effect a criminal offence for the purposes of Article 6. The consequence was that paragraph 3(e) applied, and as the domestic court

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[12] Page 18, para. 32.

[13] Engel and Others, judgment of the 8th June 1976, Series A, no. 22, page 33, para. 80. See also pages 34 - 35, paras 81 - 82.

had made the applicant bear the costs incurred in connection with the services of an interpreter at the hearing, a violation of this provision was in fact found. Initially the Federal Republic of Germany took the view that the *Ozturk* judgment "had not modified domestic law,"[14] but eventually amended the relevant legislation to bring it into line with this judgment as well.

In the matter of interpretation costs, the fact that any such costs, which a person charged has been ordered by the court to pay, are covered by his insurance does not alter the essential principle, saving of course any repercussions on the application of Article 50 (just satisfaction). Thus in the *Ozturk (Article 50)* judgment, since the interpreter's fees had in fact been borne by the applicant's insurance company, the Court held that there was therefore no prejudice capable of being the subject of a claim for restitution.[15]

Is an intimation by the domestic authorities that the applicant would eventually have to pay interpreters' fees sufficient to bring about a violation of this provision? Reverting in this connection to *Kamasinski*, the applicant in that case objected that for several months he had been led by the Austrian authorities to believe that he would have to pay interpretation charges in the event of his being convicted (even though eventually he was not made to pay them), and in his submission this very fact was in violation of paragraph 3(e). The Court does not seem to have in principle ruled out the possibility that, in appropriate cases, the matter may come within the purview of this provision. It observed that, whilst the attitude of the accused towards the appointment of an interpreter might "in some borderline cases" be influenced by the fear of financial consequences,[16] the temporary concern occasioned in this particular case to the applicant because of the initial error of the Austrian authorities was not such as to have had any repercussions on the exercise of his right to a fair trial as safeguarded by Article 6.[17]

Although this paper has concentrated on paragraph 3(e) of Article 6, it is important to keep in mind the special relationship of this provision with others in the Convention. This particular provision seeks to prevent any inequality between an accused person who is not conversant with the language used in court and one who is. Hence, it is to be regarded as a special rule in relation to the general rule contained in Article 6

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[14] Comm. D. 11394/85, 5th March 1986, DR 46, 214.

[15] Judgment of the 23rd October 1984, Series A no. 85, para. 8.

[16] See the abovementioned Luedicke, Belkacem and Koc judgment, page 18, para. 42.

[17] Page 39, para. 86.

paragraph 1 and Article 14 taken together.[18] In particular, paragraph 3(e) is to be read in the context of the whole Article 6, which guarantees the all-important general right to a fair trial and reflects the fundamental principle of the rule of law.[19]

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[18] Luedicke, Belkacem and Koc, supra, para. 53.

[19] Sunday Times, judgment of the 26th April 1979, Series A no. 30, page 34, para. 55.