

Question 18

Chapter XIV

SPECIAL TREATMENT IN THE CRIMINAL PROCEEDING

Provision and the general rules of special treatment

Section 81

(1) Where the aggrieved party or the witness is a natural person, he shall be considered a person requiring special treatment, provided that, considering his personal characteristics or the nature and circumstances of the criminal offence serving as the basis for the proceeding, he is restricted in his ability

- a) to understand others or have himself understood by others,
- b) to exercise his rights or perform his obligations specified in this Act, or
- c) to participate in the criminal proceeding efficiently.

(2) In particular, the following factors shall serve as grounds for providing special treatment:

- a) age of the person concerned,
- b) mental, physical, medical condition of the person concerned,
- c) the extremely violent nature of the act serving as the basis for the proceeding, and
- d) the relationship between the person concerned and another person participating in the criminal proceeding.

(3) The court, the prosecution service, and the investigating authority

- a) shall examine, ex officio after getting into contact with, or upon a motion by, the person concerned if he qualifies as a person requiring special treatment,
- b) shall decide on providing special treatment based on individual assessment as determined by law,
- c) may apply measures to treat carefully and protect the person concerned, as well as to facilitate the exercise of his rights and the performance of his obligations; the decision on applying such measures shall be taken upon a motion by the person concerned or ex officio,
- d) may order case documents relating to initiating and examining the provision of special treatment to be handled confidentially.

(4) The measure applied by the court, the prosecution service, and the investigating authority to treat carefully and protect a person requiring special treatment, as well as to facilitate the exercise and performance of his rights and obligations, shall be appropriate and proportionate to the circumstances serving as the basis for special treatment. Unless otherwise provided in this Act, applying a measure qualifying as special treatment may not violate the procedural rights of any other person participating in the criminal proceeding.

(5) The court, the prosecution service and the investigating authority shall decide on

- a) providing special treatment,
- b) applying a measure qualifying as special treatment, unless otherwise provided in this Act, and
- c) dismissing a motion submitted by the witness for special treatment without adopting a decision.

(6) In a situation described in paragraph (5) c), the investigating authority shall notify, without delay, the prosecution service about dismissing the motion.

(7) The court, the prosecution service, and the investigating authority shall decide on dismissing a motion for special treatment, which was submitted by the aggrieved party, by adopting a decision.

Section 82

The following persons shall qualify as persons requiring special treatment even without a specific decision:

- a) persons who have not attained the age of eighteen years,
- b) disabled persons as defined by the Act on the rights of and ensuring equal opportunities for disabled persons, as well as persons who might qualify as such persons,
- c) aggrieved parties of criminal offences against the freedom of sexual life and sexual morality.

Refusing special treatment

Section 83

(1) A person requiring special treatment may, after being informed appropriately, refuse being provided special treatment or any individual measure qualifying as special treatment.

(2) A person requiring special treatment may not refuse a mandatory provision concerning the performance of individual procedural acts or the application of measures qualifying as special treatment.

Review of special treatment

Section 84

(1) The court, the prosecution service and the investigating authority may terminate any special treatment if the conditions for providing special treatment are not met any longer due to changes in the circumstances serving as grounds for such special treatment.

(2) The court, the prosecution service and the investigating authority shall decide on the termination of special treatment

- a) by adopting a decision concerning the aggrieved party,

b) without adopting a decision concerning the witness.

(3) In a situation described in paragraph (2) b), the investigating authority shall notify the prosecution service without delay.

Measures qualifying as special treatment

Section 85

(1) The court, the prosecution service, and the investigating authority shall contribute to facilitating the exercise of rights and the performance of obligations of, and to treating carefully, a person requiring special treatment, having regard to the interests of the proceeding, preferably by the following measures:

- a) ensuring that the person concerned may exercise his rights and perform his obligations specified in this Act despite all obstacles that may arise from the circumstances serving as grounds for his special treatment,
- b) proceeding with special care during communication,
- c) proceeding with special care to protect the privacy of the person concerned in the course of conducting the criminal proceeding,
- d) providing enhanced protection for personal data of the person concerned that serve as grounds for his special treatment, in particular data concerning his health,
- e) facilitating the use of an aide by the person concerned,
- f) taking into account the personal needs of the person concerned in the course of planning and performing procedural acts, and carrying out without delay the particular procedural acts that require the presence of the person concerned,
- g) preparing each procedural act requiring the presence of the person concerned in a manner that allows for it to be carried out without any repetition,
- h) ensuring that the person concerned does not meet unnecessarily any other person participating in the criminal proceeding in the course or at the location of a procedural act, especially if the ground for special treatment is his relationship to that person,
- i) carrying out the procedural act in a room used or made suitable for such acts provided that no other means or measures would ensure that the exercise of the rights and the performance of the obligations of the person concerned are facilitated, and the person concerned is treated carefully,
- j) making audio-visual recordings at procedural acts requiring the participation of the person concerned,
- k) securing the attendance of the person concerned at a procedural act by using a telecommunication device.

(2) To facilitate the exercise of the rights and the performance of the obligations of the person requiring special treatment, as well as to treat him carefully, the court may exclude the public from the trial or a specific part of the trial.

(3) The court, the prosecution service, and the investigating authority may also apply other measures specified in this Act to treat carefully the person requiring special treatment and to facilitate the exercise of his rights and the performance of his obligations.

Section 86

(1) The court, the prosecution service and the investigating authority shall protect a person requiring special treatment

a) if his life, physical integrity, or personal freedom is in jeopardy due to his participation in the criminal proceeding, or

b) to ensure that he can exercise his rights and perform his obligations under this Act without intimidation or influence.

(2) To protect a person requiring special treatment, the court, the prosecution service and the investigating authority may, in addition to the measures specified in section 85,

a) order to distort all identifying personal features of the person concerned by technical means when using a telecommunication device,

b) order the production of a copy of a sound recording or an audio-visual recording of a procedural act where all identifying personal features of the person concerned are distorted by technical means,

c) restrict, under this Act, the right of a defendant or a defence counsel to attend a procedural act,

d) restrict the right to ask questions of a person, who attends a procedural act involving the person concerned, by permitting that motions for questions be submitted,

e) refrain from confrontation involving a witness requiring special treatment,

f) order, ex officio, to process the personal data of the person concerned confidentially,

g) initiate ordering personal protection for the person concerned,

h) declare the person concerned to be a specially protected witness, or initiate such a declaration,

i) initiate the conclusion of an agreement for including the person concerned in a Protection Programme.

(3) If a measure protecting the person requiring special treatment is applied, all case document relating to the initiation and examination of providing special treatment shall be handled confidentially.

Special rules of measures qualifying as special treatment

Section 87

(1) If a procedural act requires the participation of a person who has not attained the age of eighteen years, the court, the prosecution service and the investigating authority

a) shall prepare an audio-visual recording as possible,

b) may order

ba) the procedural act to be attended also by a judicial psychologist expert,

bb) the procedural act to be carried out with assistance from a consultant performing a service specified in section 61 (2) of Act XXXI of 1997 on the protection of children and guardianship administration or another consultant specified by law. The consultant shall carry out its activities under the guidance of the person in charge of the procedural act; in doing so, he shall convey the questions put to the person who has not attained the age of eighteen years and any other communications by the authority,

c) shall ensure that the rights of children, enshrined in the Fundamental Law, the convention on the rights of the child promulgated by Act LXIV of 1991, the Act on the protection of children and guardianship administration, and other Acts, are enforced effectively concerning the criminal proceeding.

(2) A witness testimony made by a person who has not attained the age of eighteen years may not be subject to instrumental credibility examination.

(3) The confrontation of a witness who has not attained the age of eighteen years may not be ordered without his consent.

Section 88

(1) If a procedural act requires the participation of a person who has not attained the age of fourteen years,

a) the procedural act may not be carried out, unless there is no alternative to the expected evidence,

b) the procedural act shall be carried out in a room used or made suitable for such acts, provided that no other means or measures would ensure that the exercise of the rights and the performance of the obligations of the person concerned are facilitated, and the person concerned is treated carefully,

c) the investigating authority shall ensure that the procedural act is carried out by the same person each time during the investigation unless doing so would jeopardise the success of the procedural act,

d) the court, the prosecution service and the investigating authority shall prepare an audiovisual recording of the procedural act.

(2) The confrontation of a witness who has not attained the age of fourteen years may not be ordered.

(3) If the procedural act requires the participation of a person who has not attained the age of fourteen years, the defendant and the defence counsel shall not be allowed to be present at the location of the procedural act in person.

(4) If the interrogation of a witness who has not attained the age of fourteen years was motioned by a defendant or a defence counsel, the court, the prosecution service and the investigating authority may

ensure that the defendant, who filed the motion, and his defence counsel are present in person at the procedural act requiring the participation of the witness.

Section 89

- (1) If the aggrieved party requires special treatment under section 82 c) during the investigation,
 - a) he may be interrogated only by a person of the same sex, and a person, who is of the same sex as the aggrieved party, shall also be present from the proceeding investigating authority at all other procedural acts attended by the aggrieved party, and
 - b) the investigating authority shall ensure that all procedural acts requiring the presence of the aggrieved party are carried out by the same person each time.
- (2) The investigating authority may deviate from the provisions laid down in paragraph (1)
 - a) upon a motion by or with the consent of the aggrieved party,
 - b) if doing so is indispensable to ensure the success of the proceeding.
- (3) The confrontation of an aggrieved party requiring special treatment under section 82 c) may not be ordered without the consent of the aggrieved party.
- (4) If the aggrieved party requiring special treatment under section 82 c) has not attained the age of eighteen years,
 - a) the procedural act shall be carried out in a room used or made suitable for such acts, unless the procedural act cannot be carried out in that room or other means or measures are available to ensure that the exercise of the rights and the performance of the obligations of the person concerned are facilitated, and the person concerned is treated carefully,
 - b) an audio-visual recording of the procedural act shall be prepared by the court, the prosecution service, and the investigating authority,
 - c) the defendant and the defence counsel may not be present in person at the location of the procedural act requiring the participation of the aggrieved party,
 - d) unless otherwise provided by law, it shall be ensured that the aggrieved party can see only the proceeding judge, prosecutor, or member of the investigating authority when using a telecommunication device,
 - e) after the indictment, a procedural act requiring the participation of the aggrieved party shall be carried out by the court through a delegate judge or a requested court,
 - f) the right to ask questions of persons who attend the procedural act requiring the participation of the aggrieved party shall be restricted, and such persons may only move for asking questions,
 - g) the public shall be excluded from parts of the trial where participation for the aggrieved party at the procedural act is mandatory.
- (5) If the aggrieved party requiring special treatment under section 82 c) has not attained the age of eighteen years, the court, to protect the aggrieved party, may refrain from, ex officio or upon a motion, interrogating the aggrieved party as a witness, provided that the aggrieved party was interrogated

during the investigation under paragraph (4) b). In this event, the witness testimony made by the aggrieved party during the investigation may be used as a means of evidence.

Specially protected witness

Section 90

(1) A witness requiring special treatment may be declared a specially protected witness by the court, upon a motion by the prosecution service, if

- a) his testimony is related to the substantial circumstances of a case of considerable gravity,
- b) there is no alternative to the evidence expected from his testimony, and
- c) the life, physical integrity, or personal freedom of the witness or his relatives would be exposed to grave threats if his identity or the fact that he was interrogated as a witness would be revealed.

(2) No appeal shall lie against the court decision declaring a person to be a specially protected witness; the prosecution service and the witness may submit an appeal against the court decision dismissing a motion for declaring a person to be a specially protected witness.

(3) All case documents relating to a motion for declaring a person to be a specially protected witness shall be handled confidentially among the case documents of the proceeding until the motion is adjudicated. If the court declares a person to be a specially protected witness, all case documents concerning the motion for declaring that person to be a specially protected witness, procedural acts carried out with the participation of the witness concerned before he was declared a specially protected witness, and procedural acts carried out with the participation of the specially protected witness shall be handled confidentially among the case documents of the proceeding, unless otherwise provided in this Chapter.

Section 91

(1) The court shall cancel the status of a specially protected witness

- a) upon a motion by the specially protected witnesses,
- b) ex officio or upon a motion by the prosecution service if the conditions of declaring a person a specially protected witness are not met, or
- c) ex officio or upon a motion by the defendant, the defence counsel, or the prosecution service if a specially protected witness engages in any behaviour that is clearly incompatible with his status as a specially protected witness.

(2) No appeal shall lie against the dismissal of the motion or the adoption of a decision cancelling the status of a specially protected witness under paragraph (1) a).

(3) At the time of cancelling the specially protected witness status of a person, the court shall also cancel the confidential handling of case documents pertaining to the granting of the specially protected witness status.

Section 92

(1) Only the following persons may attend the procedural act requiring the participation of the specially protected witness before the indictment:

- a) prosecutors and members of the investigating authority,
- b) keepers of minutes and, if justified, experts and consultants,
- c) aides to the specially protected witness, and
- d) other persons inevitably affected by the procedural act.

(2) After the indictment, the court shall carry out procedural acts requiring the participation of the specially protected witness primarily through a requested court or a delegate judge; the defendant and the defence counsel may not attend such acts.

(3) The court may allow the specially protected witness to attend a procedural act by using a telecommunication device, provided that doing so does not pose any risk of revealing the identity of the witness. In this event, the court shall order the individual identifying characteristics of the witness to be distorted by technical means; the right to ask questions of the persons present shall also be limited to moving for asking questions.

(4) In the course of carrying out a procedural act requiring the participation of a specially protected witness, it shall be ensured that the specially protected witness cannot be identified.

(5) In the course of interrogating the specially protected witness, the credibility of the witness, the reliability of his knowledge, and all circumstances possibly affecting the trustworthiness of his testimony shall be examined and verified. All information obtained this way shall be recorded in the minutes of the interrogation.

(6) If the attendance of a specially protected witness is ensured by using a telecommunication device under paragraph (3), the witness may refuse to testify regarding any data based on which conclusion can be drawn regarding his identity, home address, contact address, or actual place of residence.

(7) A procedural act requiring the participation of the specially protected witness shall be recorded in a written minutes, which shall be handled confidentially. An extract of these minutes shall be produced.

(8) The extract of the minutes may only contain the name of the members of the court, the prosecution service, and the investigating authority, who attend the procedural act, as well as the fact that the witness was granted the status of a specially protected witness, and the description of the procedural act. If the court ensures the attendance of a specially protected witness by using a telecommunication device under paragraph (3), the extract of the minutes may only contain the name of the members of the authority specified in section 123 (1) c) or d), from among the persons present at the separate location, as well as the fact that the witness was granted the status of a specially protected witness, and the description of the procedural act.

(9) The proceeding judge, prosecutor, or member of the investigating authority shall ensure that no conclusion can be drawn from the performance of the procedural act or the extract of minutes of the procedural act regarding the identity, home address, contact address, or actual place of residence of the specially protected witness.

Section 93

If the prosecution service intends to use as means of evidence a testimony given by or the results of a procedural act carried out with the participation of a specially protected witness, the court shall advise the defendant and his defence counsel that

- a) they may file motions for cancelling the status of the specially protected witness under section 91 (1) c) only,
- b) they may file motions for asking questions from the specially protected witness, but a question may not be aimed at discovering the identity or actual place of residence of the specially protected witness.

Personal protection

Section 94

(1) The proceeding court, prosecution office, and investigating authority may initiate, ex officio or upon a motion from the person requiring special treatment, that the person requiring special treatment, or another person with regard to the person requiring special treatment, be granted personal protection as defined by law.

(2) The court, the prosecution service, or the investigating authority shall decide on the initiative within eight days following receipt of the motion. No legal remedy shall lie against initiating personal protection. The person who submitted the motion may seek legal remedy if the motion is dismissed.

(3) Case documents relating to personal protection shall be handled confidentially, except for the corresponding motion, any decision dismissing the motion, and any decision on ordering or terminating personal protection.

Participating in the Protection Programme

Section 95

(1) The proceeding court, the prosecution office and, in agreement with the prosecution service, the investigating authority, may initiate ex officio, with the consent of the person requiring special treatment, or upon a motion from the person requiring special treatment, the conclusion of an agreement on participating in the Protection Programme defined by law.

(2) The court, the prosecution service, or the investigating authority shall decide on the initiative within three days following receipt of the motion. No legal remedy shall lie against the decision.

(3) The criminal procedural rights and obligations of a person participating in the Protection Programme shall not be affected by the fact that he is participating in the Protection

Programme. If a person participates in the Protection Programme, the provisions of this Act shall apply subject to the following derogations:

- a) all case documents relating to his participation in the Protection Programme shall be handled confidentially,

- b) the person participating in the Protection Programme shall be summoned or notified through the organ protecting him, and case documents to be served on such a person may only be served through the organ protecting him,
- c) the person participating in the Protection Programme shall disclose his original natural identification data in the criminal proceeding and provide the address of the organ protecting him in place of disclosing his home address, contact address, or actual place of residence,
- d) all personal data of the person participating in the Protection Programme shall be processed confidentially,
- e) the confidentially processed personal data of the person participating in the Protection Programme may only be accessed by, or any case document containing such data may only be inspected by, and information regarding such data or documents may only be provided to, persons approved by the organ providing protection,
- f) costs incurring in relation to the appearance and participation of the person participating in the Protection Programme shall not be considered criminal costs,
- g) a person protecting the person participating in the Protection Programme may attend any procedural act attended by the protected person,
- h) the person participating in the Protection Programme may refuse to testify concerning any data based on which conclusion can be drawn regarding his new identity, new home address, contact address, or actual place of residence.

Other persons affected by individual measures

Section 96

(1) To facilitate the exercise of the rights and the performance of the obligations of the defendant, the court, the prosecution service, or the investigating authority may apply a measure specified in section 85 (1) if

- a) the defendant has not attained the age of eighteen years,
- b) the defendant is or may qualify as a disabled person as defined by the Act on the rights of and ensuring equal opportunities for disabled persons, or
- c) it is justified in light of the relationship between the defendant and another person participating in the criminal proceeding.

(2) To facilitate the exercise of the rights and the performance of the obligations of the defendant who has not attained the age of eighteen years, the court, the prosecution service, or the investigating authority shall apply section 87 (1) and (2) accordingly.

(3) To facilitate the exercise of the rights and the performance of the obligations of the defendant who has not attained the age of fourteen years, the court, the prosecution service, and the investigating authority

- a) shall apply the provisions laid down in section 88 (1) d),
- b) may not order any confrontation involving the defendant without his consent.

(4) If the conditions of providing personal protection are met regarding

a) an aide to an aggrieved party or a witness,

b) a defendant, a defence counsel, an expert, a consultant, a party with a pecuniary interest, or an aide to such a person, or another person with regard to any of the persons listed above, the provisions laid down in section 94 shall apply accordingly.

(5) If the conditions of participating in the Protection Programme are met concerning the defendant, the provisions laid down in section 95 shall apply accordingly.

(6) In a situation described in paragraphs (4) or (5), the court, the prosecution service, or the investigating authority may apply the measures specified in section 85.