



Child-Friendly Justice in Europe - Participation and Restorative Justice: Online event – 12 May 2020

Statement by Mr Linos-Alexandre SICILIANOS, President of the European Court of Human Rights

Children in the case-law of the European Court of Human Rights

As President of the European Court of Human Rights, I was honoured to have been asked to participate in the Roundtable on child-friendly justice which was to be co-organized under the auspices of the Georgian presidency of the Committee of Ministers of the Council of Europe. Unfortunately, due to the COVID-19 sanitary crisis, this event which should have taken place on 23 March 2020, was cancelled. While I regret the fact that I have not been able to participate in person, nor to hear the interventions of fellow participants, I greatly appreciate the initiative of creating a special resources' page on the website of the Children's Rights Division of the Council of Europe, where all contributions will be grouped together.

Even though the European Convention on Human Rights ("the Convention") contains only a few explicit references to children, the Court has developed a large body of case-law concerning the rights of the child, with the concept of the "best interest of the child" at its core. Bearing in mind that children are holders of rights, rather than simply objects of protection, the Court has treated them as beneficiaries of all of the rights guaranteed by the Convention, as well as subjects of special regulation given their specific characteristics. In so doing the Court has examined the rights of the child in a variety of circumstances.

For this short piece I will look at three lines of the Court's case-law. Firstly, how juvenile defendants are treated in criminal trials; secondly, how child victims are treated as witnesses, particularly in sexual offences cases; and thirdly, how the Strasbourg Court approaches the question of child representation at the European level.

I. Treatment of Juvenile Defendants in Criminal Trials

Firstly, concerning juvenile defendants in criminal proceedings, the Court has elaborated under Article 6 specific requirements for ensuring children's effective participation. Concrete examples of this include ensuring the child's presence during hearings, the holding of hearings in private, limiting publicity, ensuring that the child understands what is at stake and that the proceedings are not unduly formal¹.

The Court has held that the criminal proceedings must be so organised as to respect the principle of the best interests of the child. It is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings².

The authorities must take steps to reduce, as far as possible, the child's feelings of intimidation and inhibition and ensure that he has a broad understanding of the nature of the investigation, of what is at stake for him, including the significance of any penalty which may be imposed as well as of his rights of defence and, in particular, of his right to remain silent.³ This means that he or she may need the assistance of an interpreter, lawyer, social worker or friend to understand the general thrust of what is said by the arresting officer and during any questioning by the police.

In the case of *Panovits v. Cyprus (2008)*⁴ the applicant was a 17 year old who was charged with murder and robbery. He was brought to the police station, accompanied by his father. He was then arrested and taken alone into a separate room for questioning. Several minutes later, his father was told that his son had confessed to the crime. The Court found that, in view of his age, he could not have been considered to be aware of his right to legal representation before making any incriminating statements.

II. Treatment of Child Victims as Witnesses

Children can participate in criminal proceedings in other ways, not only as defendants. They may be victims or witnesses. This brings me to the second point I wish to cover. There have been a number of cases concerning sexual offences in which children are called upon to testify against the alleged perpetrator.⁵ This can be a traumatic experience leading to repeat victimisation.

Criminal proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. There is a positive obligation on the State under Articles 3 and 8 of the Convention to protect the rights of victims in criminal proceedings. Among the criteria for such protection the Court has singled

¹ *T. v. the United Kingdom* [GC], no. 24724/94, 16 December 1999

² see *Adamkiewicz v. Poland*, no. 54729/00, § 70, 2 March 2010; *Panovits v. Cyprus*, no. 4268/04, § 67, 11 December 2008; *V. v. the United Kingdom* [GC], no. 24888/94, § 86, ECHR 1999-IX; and *T. v. the United Kingdom* [GC], no. 24724/94, § 84, 16 December 1999

³ see *Martin v. Estonia*, no. 35985/09, § 92, 30 May 2013.

⁴ *Panovits v. Cyprus*, no. 4268/04, 11 December 2008

⁵ By way of examples, see *S.N. v. Sweden*, no. 34209/96, ECHR 2002-V, *Bocos-Cuesta v. the Netherlands*, no. 54789/00, 10 November 2005, *Kovač v. Croatia*, no. 503/05, 12 July 2007, *Vronchenko v. Estonia*, no. 59632/09, 18 July 2013 and *Rosin v. Estonia*, no. 26540/08, 19 December 2013.

out the duty to protect victims from intimidation and repeat victimisation and to keep medical examinations to a minimum.⁶ These features are even more prominent in cases involving a minor.

However, the Court must perform a balancing exercise as the adult defendant also has the right to a fair trial under Article 6. According to Article 6 § 3 (d), all evidence against an accused must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe upon his defence rights, which, as a rule, require that he should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.⁷

I would like to give one recent example here of the tension between the defence rights of the accused on the one hand and the rights of the alleged child victim on the other. In the case of *Vronchenko v. Estonia* (2015)⁸ the applicant was charged with the sexual abuse of his nine-year old stepdaughter. He was convicted on the basis of a video-recorded interview which had been conducted during the pre-trial proceedings. He alleged that he had not been given an opportunity to have questions put to her. In assessing whether the defendant had had a fair trial at the domestic level, the Court (by a majority) accepted that while it had been in the best interests of the child not to call her as a witness in the trial itself, there had been no counterbalancing measures which had permitted a fair and proper assessment of the reliability of her evidence. This could have been done, for example, by putting additional questions to her through his lawyer. I know this case well as I was one of the two Judges who dissented. In my joint dissenting opinion with Judge Lazarova Trajkovska I underlined the relevant provisions of the International and European instruments on the protection of child victims during criminal proceedings. On the facts of the case, we came to the view that the domestic authorities had taken the necessary counter-balancing measures so that the defendant's defence rights were safeguarded: the defendant had been given the opportunity to question and cross-examine all witnesses and experts and to call his own witness. This case shows that the task facing domestic courts and prosecuting authorities, when balancing the rights of the child victim against the defence rights of the accused in criminal proceedings, is not always an easy one.

III. Child representation before the ECtHR

My third point concerns the question of child representation before the Strasbourg Court itself. In the recent case of *A and B v. Croatia* (2019)⁹, the first applicant complained on behalf of her daughter, the second applicant, who was born in 2009, that the domestic authorities had failed to provide a proper response to the allegations that the girl's father had sexually abused her and that they had had no effective remedy for that issue. Under the child's complaints under Articles 3 and 8 of the Convention, a majority of Judges found no violation of her procedural rights as the domestic authorities were found to have done everything that could have reasonably been expected of them to protect her rights and to act in her best interests.

⁶ *Y. v. Slovenia*, no. 41107/10, § 104, ECHR 2015 (extracts)

⁷ *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011

⁸ Cited above.

⁹ *A and B v. Croatia*, no. 7144/15, 20 June 2019

I also dissented in this case together with Judges Turković and Pejchal. We considered that the authorities had not carried out an effective investigation nor had they afforded sufficient protection to her rights as a victim. We found a number of failures on the part of the authorities: no special legal representation and/or guardian; examples of secondary victimisation through repeated interviewing; no access to psychological or other support and lack of coordination and collaboration by the different actors involved.

However, for the purposes of this short paper, I would like to look at another issue which was raised in this case, that of the separate representation of the child before the European Court of Human Rights. This case is of interest because for the first time, the Court asked a local Bar Association to appoint a lawyer to make submissions on behalf of the child at the European level.

As Judge Wojtyczek noted in his concurring opinion, ordinarily minors are represented by their parents before domestic and international authorities. However, where there is a conflict between the parents there is a risk that the child may become instrumentalised and the child's best interests may become hard to identify.

In my joint dissenting opinion with Judges Turković and Pejchal, we agreed with the Croatian government that the Strasbourg Court should in time establish in its Rules of Court more detailed criteria and a procedure for the appointment of special representatives for children. In so doing, the Court should avoid situation in which the same authority implicated in the proceedings might be called upon to appoint a special guardian for the child. The Court should take into consideration that the interests of the Government and child do not necessarily coincide; just as the interests of a parent and the child do not necessarily coincide. Judges Koskelo, Eicke and Ilievski in their concurring opinion raised the wider question of identifying or establishing domestic mechanisms for the appointment of a legal guardian/separate representation for a child in proceedings before the Court.

The Rules Committee of the Strasbourg Court is currently working on establishing specific rules in relation to family break-up cases and they should be elaborated shortly. This will bring more clarity to these difficult situations.

Concluding Remarks

By way of conclusion, I would underline that the three situations I have focused on in this short paper show that many differing interests are at stake in proceedings, be they criminal or civil, where children are involved. The domestic authorities may sometimes have difficulties in balancing the competing interests at play. However, the best interest of the child should be at the centre of their decision-making, as should the international law standards in respect of children's rights.¹⁰

¹⁰ As set out extensively in *A and B. v Croatia*, §§ 77- 83.