THE DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN CASES AGAINST CROATIA REGARDING THE RIGHT OF ACCESS TO A LAWYER IN CRIMINAL PROCEEDINGS

Lovorka Kušan [*]

INTRODUCTION

By 27 November 2016 Croatia is required to align its legislation with Directive 2013/48/EC on the right to access to a lawyer in criminal proceedings, and in proceedings under the European arrest warrant, and on the right to notification of a third party in the event of detention, and the right to communicate with third parties and consular authorities.

The shortcomings of Croatian legislation and practice in this regard are highlighted by the decisions of the European Court of Human Rights (hereinafter: the Court) in cases against Croatia.

1. HANŽEVAČKI V CROATIA, APPLICATION NO. 17182/01, JUDGMENT OF 16.4.2009[1]

In this case, the Court held that there had been a violation of the right of the defense to have the assistance of a lawyer of their own choice, because the local court had rejected the appeal of a defense lawyer to postpone a hearing, because of his sudden illness, at which the parties were to give concluding statements, the court believing that the presence of a defense lawyer at the hearing was not necessary.

Contrary to domestic courts, the Court said that one of the most important aspects of a hearing of concluding statements in the main trial in criminal proceedings is to give an opportunity to the defense, as well as the prosecution, to present their final words, and that this is the only chance for both parties to present their views orally, in relation to the whole case and all evidence adduced therein, as well as to provide their assessment of the results of the criminal

---

[*] Lovorka Kušan, Attorney at law, Zagreb.

[1] This case is also significant due to the inability of the applicant to reopen proceedings after the verdict of the Court, in other words, domestic courts considered that, according to the law (at that time) on criminal procedure, a finding by the European Court of Human Rights of a violation of the right to a fair trial does not constitute sufficient grounds for reopening proceedings. This defect was rectified in later amendments to the law on criminal procedure, as well as in decisions of the Constitutional Court (i.e. U-III-3780/2011).

proceedings. In the opinion of the Court, the absence of the applicant's defense lawyer was a valid reason for postponing the hearing of concluding statements of the main trial, having regard to its significance in criminal proceedings.

2. ZLATKO PREŽEC V CROATIA, REQUEST NO. 48185/01, JUDGMENT OF 15.10.2009

In this case, the Court held there to be a violation of the right to a fair trial because of a violation of the right to a free lawyer.

During the criminal proceedings the applicant was in jail serving an earlier sentence. During the proceedings he filed a written request to the court to appoint a defense lawyer at public expense, but this request was placed on file only after the conclusion of the main hearing. The applicant alleged at the hearing that he did not understand the charges or the notifications of the judge, and to the notification that he had the right to a lawyer, he responded that he would 'plead my own case even though it is considered a violation of my constitutional rights'. The case concerned a person who had previously been treated for several years for mental health problems, and in the criminal proceedings in question, a course of compulsory psychiatric treatment was imposed in addition to the penalty. Following an appeal by the applicant, the court of appeal returned the case to the court of first-instance for failing to decide whether a defense lawyer for the applicant should have been appointed at his request. The court of first-instance therefore appointed a defense lawyer for the applicant 'at public expense', whereby in the pronouncement of the decision a lawyer T.S. was appointed, and in the explanation of the decision a lawyer T.B., without any information about the address and the phone number of either lawyer, and neither lawyer contacted the applicant. As the defense lawyer, lawyer T.S. filed an appeal against the judgment.

Unlike domestic courts which have held that an applicant relinquishes the right to a defense lawyer by stating that he will defend himself, the Court ruled that, with regard to the mental health condition of the applicant and his explicit request during the trial that a defense lawyer be appointed at public expense, it could not accept that the applicant waived his right to legal representation during the trial. In other words, the Court considered, although neither the text nor the meaning of Article 6 of the European Convention on Human Rights prevent a person from willingly waiving the right to a lawyer, that such a waiver should not conflict with a matter of public interest, and should be followed with the minimum guarantee proportional to its importance.

In relation to the right to a defense lawyer at public expense, the Court said that Article 6, paragraph 3(c) of the Convention binds this right with two conditions: the lack of funds to meet the costs of the defense, and the interests of justice. The first requirement in this case was not contested, because even the

domestic court accepted it when they assigned the applicant with a defense lawyer at public expense in the appeal. In terms of the interests of justice, the Court ruled that, in this particular case, the mental health condition of the applicant and the fact that he was a convicted prisoner charged with an offence against a prison employee, determined that he required legal representation. In other words, the Court early on clearly expressed the principle that, in cases of detention, the interests of justice generally require that the defense have legal representation. Appointing a defense lawyer at public expense only on appeal did not rectify this violation in light of the importance of criminal proceedings before a trial court, where usually all the evidence is heard, and where the defendant has what is usually his only chance to be heard in person by the court.

Regarding the quality of a defense lawyer at public expense, the Court reiterated its earlier opinion that the state cannot be held responsible for any deficiency in a defense lawyer appointed at public expense or selected by the defendant. Following the principle of the independence of the legal profession from the state, the behaviour of a defense lawyer is primarily a matter between the defendant and his lawyer, regardless of whether such a lawyer is funded by free legal aid, or with private funds. Local authorities are required under Article 6, paragraph 3(c) to intervene only in the event of the evident failure, by the defense lawyer appointed at public expense, to provide effective legal representation, or where some other material circumstance is brought to their attention. The fact that, in the decision of the local court appointing the defense lawyer at public expense, there were listed two different lawyers, one in the pronouncement of the decision, and the other in the explanatory statement, and that the applicant could not get in touch with them because he did not have either the phone numbers or addresses of the two lawyers, and that neither of the listed lawyers visited the applicant in prison or made contact with him in any other way, were also significant factors in the Court's decision. The Court stressed that the purpose of the Convention was to 'guarantee practical and effective, and not theoretical or imaginary, rights' and that the appointment of a lawyer by itself does not ensure the effectiveness of the legal assistance that he should provide for the defendant, and the fact that lawyer T.S. filed an appeal in the name of the applicant could not rectify these violations, since he could only have had a rudimentary understanding of the case of the applicant because, during the trial, the applicant had defended by silence.

3. DOLENEC V CROATIA, REQUEST NO. 25282/01, JUDGMENT OF 26.11.2009

In this case the court found there to be a violation of the right to a fair trial because the defendant did not have access to the file and therefore to the evidence used in the criminal proceedings, and this decision was also determined by the fact that the defendant did not have a defense lawyer in the main hearing, and it was uncertain whether he had effectively waived his right to a defense lawyer. During the first part of the criminal proceedings, the applicant was being held in prison, and had been assigned a defense lawyer at public expense. On 30 March 2005 he was released, and at the same time his defense lawyer was withdrawn because the conditions for mandatory legal representation of an applicant in criminal proceedings ceased to exist. A hearing was scheduled for the next day, 1 March 2005, and at that hearing the applicant had no defense lawyer. In that hearing the proceedings were concluded, and the defendant was convicted. It was not completely clear whether the applicant had waived his right to a lawyer at that hearing. The trial record stated that he did, however the applicant did not sign the record, and the very next day filed a complaint for violation of the right to a defense lawyer. Therefore the court did not attribute 'decisive importance to the note in the record whereby the applicant gave up his right to legal representation and decided to defend by silence'. In addition to this, the applicant had on several occasions unsuccessfully sought from the court permission to look at the file.

The Court found that a violation of the right to a defense lawyer had taken place because it was in the specific 'criminal proceedings in their entirety, and considering all the circumstances', where the decisive circumstances were the lack of access to the file, and the fact that the applicant had no defense lawyer at the main trial, because the former defense lawyer at public expense had been withdrawn the day earlier when the defendant had been released.

4. MAĐER V CROATIA, REQUEST NO. 56185/07, JUDGMENT OF 21.6.2011

This case concerned a complaint that the defendant had not been given appropriate time and materials for the preparation of the defense, that the police questioned him without the presence of a defense lawyer, and that the services of the defense lawyer, appointed at public expense, did not meet the requirements for a fair trial.

At 06.00 hours on 1 June 2004 the applicant was brought to the police station. The first meeting with the defense lawyer P.B. did not occur until 4 June 2004 at 00.25 hours. Except for the short time during polygraph testing, there are no records as to the whereabouts of the defendant in the meantime. According to the official record, the lawyer P.B. was called by the police, the

questioning began 25 minutes after midnight on 4 June 2004, and ended at 02.30 hours the same day, and was conducted in the presence of the lawyer. During that questioning the applicant admitted to having committed a murder.

During the investigation the applicant hired a defense lawyer of his own choice, and until then had defended by silence. He complained that his confession was made under pressure from the police, that he was not aware of what he was signing, and that he didn't call the lawyer P.B., and that the same had not been present during questioning.

During the proceedings the lawyer P.B. testified, who among other things stated that he 'put himself at the disposition of public authorities to be called upon when he was needed for the purpose of questioning suspects', and that he came after midnight, that the applicant had signed the authorization and that the employees of the police had said to him that the defendant had been questioned and that he had admitted to an indictable offence. He also said that he had seen a hand-written log in which the defendant's statement had been recorded, and that this record had been dictated to the clerk in front of him. This had been the complete statement of the defendant and in his presence the defendant had not stated anything. He had not received a copy of the 'machine-typed record of the defendant's questioning because that was not the practice'. Despite the fact that the defendant was questioned in front of the police before his arrival, he had not made any formal comments about the said questioning. Upon arrival at the police station he had not talked privately with the defendant 'because there was no need to because we all talked together, therefore in the presence of the police employees'. As to the circumstances of the critical event he had not asked questions of the defendant 'because he had been told that the indictable offence had been admitted'. He had not advised the defendant about his right not to present the defense in person or his right not to reply to certain questions, 'because it was too late since he had already been questioned'.

In the trial court's decision, the court had ordered that the record of the police interrogation of the applicant be struck from the case file because the police questioned the applicant without the presence of a defense lawyer, but that decision was overruled by the Supreme Court. The trial court had, relying mainly on the admission given to the police, found the applicant guilty of murder and sentenced him to 28 years in prison.

The Supreme Court, considering a violation of the right to a lawyer, found that there had been no violation of the right of the accused to a defense lawyer, because such a violation (a violation of Art 367, para 3 of the Criminal Code) only applies during the main hearing, and also during preparations therefor, but not to actions made prior to criminal proceedings, and moreover the court found that the right to a defense lawyer had not been violated because everything had been carried out in accordance with Art

177, para 5 of the Criminal Code, and that the court cannot interfere with the question of a defense lawyer's professional conscience and matters relating to legal professional ethics.

Contrary to this decision, the Court, based on earlier established principles (Salduz), concluded that Article 6 did apply even before court proceedings, including to the actions of the police and investigating authorities; that just naming the defense lawyer to the defendant could not ensure by itself the provision of effective legal assistance to the defendant; moreover, it stressed the importance of early access to a lawyer, and that any exception to the application of the right to a defense lawyer should be clearly prescribed and its application time limited; and the Court found there to be a violation of the right to a fair trial.

In this particular case, the interrogation of the applicant was conducted without basic procedural guarantees. Neither the subsequently provided assistance of a lawyer, nor the adversarial nature of the proceedings that followed, could rectify the violations that had occurred while the applicant was held in police custody.

5. DVORSKI V CROATIA, REQUEST NO. 25703/11

This case raises interesting questions about the right to a defense lawyer of one's own choice. The case is before the Grand Chamber of the European Court of Human Rights after the applicant submitted a request following the judgement of the Court that there had not been a violation (with 5 judges for and 2 judges against).

After being arrested on suspicion of having commited the crimes of murder and armed robery, the applicant had chosen the lawyer M.R. from a list that he had been given in the police station, which lawyer was present during the interrogation. At the same time, his parents hired the lawyer G.M. who also came to the police station, but was denied contact with the accused, who had not been notified of G.M.'s presence.

During the discussion before the Grand Chamber, the judges were interested in the following questions relating to the choice of a defense lawyer (and which, in fact, very clearly highlight the problems in practice): the nature and the content of the lawyers list which was given to the applicant in the police station (during the proceedings the Government did not deliver that list to the Court, but another list, stating that it contained the same data, but next to the lawyer M.R. it was noted that he did not work anymore); does someone pay such a lawyer, and if so who? (in this particular case the applicant did not pay anything to M.R., which would be expected if this was the defense lawyer of his own choice); whether in this particular case the issue was about having a defense lawyer of one's own choice or one which was gu-

aranteed because the interests of justice so required; the lawyer M.R. is the former chief of the Rijeka police, whether that in anyway affected the case and whether the applicant knew that; whether, by signing the authorization to use M.R., the applicant had effectively waived the right to be represented by G.M.; would the applicant have signed the authorization to use M.R. if he had known that his parents had hired G.M?; and whether an interrogation can be carried out during the night in the light of contradictory national legislation.

6. CONCLUSION

The presented cases show several weaknesses in domestic law. Some of them, particularly those concerning the right to a defense lawyer at the first questioning of the defendant, have been addressed in the new law on criminal procedure. However, there may still be some problems in practice regarding the application of the right to choose a defense lawyer when a person is detained; making contact with an officially appointed lawyer; the interpretation of the conditions for granting a defense lawyer at public expense 'when it is in the interests of justice'; and regarding the nature of the official duties and obligations of state authorities to intervene in the case of an evident lack of quality of such a defense lawyer.