ECBA
EUROPEAN CRIMINAL BAR ASSOCIATION
An association of European defence lawyers

Newsletter

Issue 17 *April 2009*

In this issue….

Editorial

Dear colleagues,

Our association is growing, not only but particularly in terms of our membership and the fact that we are henceforth representing defence lawyers from over 30 Council of Europe States including 25 EU Member States. The huge idea of building a real network of defence lawyers throughout Europe has become reality, not yet perfect but functioning in the practise of cross border cases. And we are very optimistic that we will improve this network concerning quantity and quality. For defence practitioners this network – available on our website - is one of the most important benefits. The network enables practitioners and EU citizens to contact a defence lawyer should a legal problem arise in a particular jurisdiction. As the use of European instruments such as the European Arrest Warrant and the proposed European Evidence Warrant increase, so will the requirement for specialist defence lawyers to represent individuals in cross-border cases. Apart from the network benefit, individual members have the opportunity to become involved in ECBA working groups on topical EU initiatives and to meet and talk with practitioners throughout Europe. Current projects include money laundering and the role of the legal professional in Europe, anti-trust, probation issues, letters of rights, pre-trial defence rights and legal aid. As you already know we are the European platform for defence lawyers to debate and highlight short-comings in either European or domestic legislation, compared to best practice and universal fundamental rights standards.

Our recent engagement is to establish a collective (or organisational) membership in the ECBA. We want to achieve the involvement of all important national defence associations or organisations in the ECBA and our vision is to affect the foundation of national defence associations in all European countries which would be the perfect basis for strengthening the defence lawyer's position all over Europe. The ECBA collective membership is open to all national organisations who represent those eligible for (individual) membership and whose objects are consistent with those of the ECBA. Collective members are entitled to nominate a delegate as their member to act on their behalf. We are nevertheless convinced that

individual membership does in any case have an added value.
Dear colleagues, please use your personal involvement with the ECBA and any personal connections you may have with any European Defence Lawyer to increase the (individual and collective) membership of the Association. The stronger we are, the stronger we are able to fight for the objectives of the ECBA, which are to fight for the rights of all citizens in the Council of Europe States. We bear that responsibility!

Madrid Spring Conference: April 24 and 25, 2009

We are pleased to announce that the ECBA Spring Conference will be held in Madrid, the capital and largest city of Spain. While Madrid is a major financial centre, provided with modern infrastructures, it has preserved the look and feel of many of its streets and historic neighbourhoods, and it represents an extraordinary centre of art and culture, due especially to its renowned art museums (including the Prado Museum, the Museo Nacional Centro de Arte Reina Sofía and the Thyssen-Bornemisza Museum, located in the elegant setting of Villahermosa Palace).

The Conference will focus on the use and abuse of universal jurisdiction and the European Arrest Warrant in European criminal justice. In particular, the first session on the morning of April 25, will deal with the role of universal jurisdiction in modern times: a subject which, in recent years, has generated a lot of controversy in Europe and around the world, and which has seen Spain at the vanguard in a specific application of this concept. At this session, chaired by Mr. Marc Henzelin, member of the Advisory Board of the ECBA, the Spanish magistrate Mr. José Ricardo de Prada, who has significant experience at the International Criminal Court for the former Yugoslavia, and currently at the Spanish Audiencia Nacional, will address us.

Later in the morning, the subject of transnational crime within the EU will be analysed from the angle of the recent Czech proposal for a Framework Decision on "conflicts of jurisdiction", aimed at avoiding multiple prosecutions of the same case in Member States. In a session chaired by the Chair of the ECBA Prof. Holger Matt, an official representative of the Czech Republic will discuss the pros and cons of the proposal together with the ECBA Vice-Chair Mr. Roberto Pisano.

At the end of the morning, a specific session, chaired by the Treasurer of the ECBA, Mr. Kevin Roberts, will be dedicated to the increasingly relevant subject of E-Justice, and we will be addressed by the European Project coordinator of PenalNet and a Spanish representative of the CCBE.

The afternoon will begin with a short update on the main ECBA projects (Legal Aid, Probation, Money Laundering, Justice Forum and Supervision Orders), followed by a session chaired by the Vice-Chair of the ECBA, Mr. Roberto Pisano, dedicated to a comparative view on pre-trial detention in Europe, with particular emphasis on the European Arrest Warrant. In this respect, a Portuguese Public Prosecutor and defence lawyers from Greece, Norway and Spain will discuss the

relevant topic, prior to leaving the floor open to animated discussion among colleagues of the various jurisdictions.

The closing session, chaired by the Vice-Chair of the ECBA, Ms. Louise Hodges, will be dedicated to the "Recent developments and proposed reforms affecting the legal profession in the European Union", and it will provide as usual a useful update on key developments in criminal law and procedure in the various jurisdictions.

Madrid is a really stimulating city, so we hope that as many members as possible will take the opportunity to be with us, as well as to participating in what we hope will be a practical and topical conference. We look forward to seeing you there!

Conference details are available on the website and we invite you all to register for the event: click here for the registration form.

Experts' Meeting on Procedural Safeguards in the EU

The European Commission convened an experts meeting on procedural rights in criminal proceedings in Brussels on 26 and 27 March 2009. Members will be familiar with this proposal which had been through protracted negotiations since the issue of the green paper on procedural safeguards in 2003 which resulted in stalemate. The Commission have resurrected this proposal and the experts meeting was the first step in putting this topic firmly back on the EU agenda. Copies of relevant documents including the agenda and reports are available on the ECBA website. Click here to go the web page.

The meeting opened with presentations on research and studies currently being conducted including an update on Taru Spronken's excellent study on "Procedural Rights in the European Union" which was published in 2006, a presentation of a study funded under the Criminal Justice Programme, entitled "Effective criminal defence rights in Europe" as well as two ECBA sponsored projects on "Letter of Rights" and "Pre-trial access to defence rights" which are also funded under the Criminal Justice Programme.

The key topics in the meeting were: 1) is there a need for EU action in this area? 2) Mutual recognition and mutual trust 3) Cross border versus domestic proceedings. The meeting also heard from a representative from the Swedish Ministry of Justice setting out the Swedish plans in this area during their presidency which starts in July 2009. Procedural safeguards are a priority under the Swedish presidency and their approach is to propose a 'road map' for procedural safeguards to be agreed on a step-by-step (or safeguard-by-safeguard) basis. It is intended that the roadmap will set out an ambitious programme with the first proposal from the European Commission to deal with translation and interpretation. This has been identified as perhaps the least controversial procedural safeguard in a multi-lingual EU. Details of the roadmap and the first step proposal will be presented at the outset of the Swedish presidency. In addition they announced a conference in Stockholm on 22 / 23 July 2009

ECBA
EUROPEAN CRIMINAL BAR ASSOCIATION
An association of European defence lawyers

Newsletter

Issue 17 *April 2009*

entitled "Justice in the EU – from the citizens' perspective" which will review citizens' access to the civil justice and their rights in criminal proceedings.

Representatives from the Ministries of Justice gave their preliminary response to the Swedish proposal and the European Commission's plans to resurrect procedural safeguards as a priority area. In general the Member States adopted the positions they held during the close of the last negotiations, however there were indications from some Member States who had previously expressed opposition and reservations to a EU wide proposal on procedural safeguards that they were open to engage positively in the debate and that the Swedish proposal was very welcome. However, it is clear that for any proposal to succeed there are some familiar obstacles to overcome, in particular arguments questioning the legal competence of the EU to legislate in this area, differences of opinion about whether such proposals should be confined to cross-border cases only or whether they should have universal application and whether there was "added value" to the procedural safeguards already enshrined in European Convention on Human Rights.

There were several useful papers presented at the meeting dealing with some of these objections, including a collaborative paper produced by Justice, Open Society - Justice Forum and Amnesty International dealing with legal competence.

The ECBA Autumn Conference will concentrate on the Swedish 'road map' and the European Commission's first step (or steps) in this process and we hope that a draft programme will be available either at the Madrid conference or shortly after. This is obviously a key proposal for criminal defence practitioners and we urge you to re-engage in the debate. We are particularly interested in speaking to criminal defence practitioners from the jurisdictions who have previously objected to the procedural safeguards proposal so that we can develop a concerted campaign in those Member States to influence the domestic and European politicians. Those dissenting Member States were (and are): Ireland, United Kingdom, Malta, Cyprus, Czech Republic, and Slovakia.

Anyone who would like to assist in this project or would like any further information should contact **secretariat@ecba.org.**

ECBA success in European Commission Study on Legal Aid

Work will start in Brussels on the 23rd April 2009 on a new Study on the provision of legal aid in cross-border cases. The ECBA has for a long time campaigned for a wider investigation across Europe of the way legal aid is granted to defence lawyers in criminal cases, but this Project is a good start. At the ECBA Conference in Bratislava last Autumn we published a "Code" which summarised the EU case-law on the entitlement to legal aid under Article 6, and we have lobbied hard the Commission and other EU bodies to show support for work on legal aid.

ECBA
EUROPEAN CRIMINAL BAR ASSOCIATION
An association of European defence lawyers

Newsletter

Issue 17 *April 2009*

Now the Commission has awarded a contract to the ECBA, working jointly with the CCBE, to set up a Steering Committee to plan the project. Work will begin straight away, and will be concluded in nine months. Chairman Holger Matt and Advisory Board Member Jonathan Mitchell will represent the ECBA on the Steering Committee.

The main task for the ECBA and the CCBE will be to analyse whether it would be possible to set up a scheme in order to assist defence lawyers working on cross-border cases to cooperate better, and to facilitate the exchange of information in cases involving mutual recognition instruments, or the use of the 2000 Mutual Legal Assistance Convention in particular.

Members of the ECBA and the CCBE have for a long time argued that the system of mutual recognition imposes many problems for criminal defence practitioners. The ECBA and the CCBE agree with the conclusions reached by Gisele Vernimmen that "the mutual recognition instruments have neglected the rights of the defence" in her analysis of the future of mutual recognition in criminal matters in the European Union.

The ECBA and the CCBE will identify the practical problems that defence practitioners experience with regard to cross-border cases, and will seek to find solutions to those problems.

Justice Forum
Meeting on E-Justice

In May 2008 the European Commission announced the e-Justice initiative. Louise Hodges of the ECBA outlined the EC's proposals at the ECBA conference in Bratislava in October. The e-Justice action plan was issued in November 2008. On the 5th March 2009 a meeting was held of stakeholders in the e-Justice project. Kevin Roberts attended on behalf of the ECBA and he will present a full report at the conference in Madrid.

The meeting began with an introduction to the new General Justice Issues and e-Justice Team, which had been formed on 1 October 2008 in DG Justice Freedom and Security to deal with the e-Justice initiative. It is headed by Jacek Garstka and is one of the smallest in the directorate. The unit asked throughout the meeting for help from stakeholders in preparing for the e-Justice initiative. The European Commission announced that the new e-Justice portal will be launched on 14 December 2009, but will need to be ready two months before that for testing. It will be available in 23 languages. The contract for the portal's construction had been signed the week before, on 25 February, and the nominated consultants – Unisys, with whom the CCBE have already had a meeting – were present among the participants at the Forum.

Presentations by the representatives of the institutions highlighted the following themes: the importance of a one-stop shop; respect for multilingualism; and emphasis on linking of existing schemes rather than the creation of ambitious new databases or systems. All were in favour of quick wins, and mentioned the linking of criminal databases and greater use of video-conferencing as examples of items which could be achieved quickly.

In the round-table which followed, the CC, the European Criminal Bar Association (ECBA), Fair Trials International, Justice and MEDEL, all raised the issues of what mechanism would be established for the discussion of the human rights aspects of some of the innovations. For instance, the linking of criminal databases (who would have access to the database? for what purposes would the information be able to be used? what if there was a mistake in it?) and the use of video-conferencing (in criminal cases, the judge might not be able to examine the nuances of the defendant's appearance and responses through a video-link). Diana Wallis MEP (ALDE-UK), in reply, said that she agreed with the concerns, and that there should be research of all the experience available, for instance from the US.

The following points were also made:

- There is no plan to link databases of bad debtors (European Commission);
- Court interpreters need harmonisation of accreditation and mutual recognition of qualifications – at present, anyone can sign up to a court in some countries (FIT);
- Video-conferencing should be optional and not obligatory, databases should be protected, standardisation of justice needs to be avoided, there must be a compilation of citizens' rights (MEDEL).

The afternoon session began with a presentation by the UK Ministry of Justice on their 'Small claims mediation' scheme, which won the 2008 Crystal Scales of Justice prize.

There followed a round-table discussion on stakeholders' requests for individual functionalities of the e-Justice Portal.

Further points made during the afternoon round-table were:

- there needs to be more work done on automatic translation of texts (various speakers);
- more information on the laws in the Member States needs to be translated, but great care must be taken with the translation of legal concepts from different legal systems which must be carefully explained, and the information needs to be kept constantly updated (various speakers);
- please identify the gaps on the European Judicial Network's website, particularly its information on laws in the Member States, since the Commission does not want to re-invent the wheel, and would rather perfect the EJN website than create its own new database (European Commission);
- all justice information needs to be found in one place (various speakers);
- the e-Justice initiative will not work without the minimum procedural safeguards for defendants, and there are also many concerns about the linking of criminal databases and video-conferencing (ECBA);
- do not forget administrative law (Association of the Councils of State and Supreme Administrative Jurisdictions of the EU);
- what about an on-line possibility for users to comment on the competence of

interpreters and lawyers? (Fair Trials International);
- the portal will be too large, and so there should be separate pages for citizens, legal professionals, courts etc (Council of Europe).
- the functionality for citizens should be a single access point for finding a lawyer in Europe.
- the functionality for lawyers would be the use of the portal for e-identity management, to enable lawyers to undertake cross-order transactions with registries (insolvency, company, land etc) in other Member States.

The European Commission noted, among other things, that various speakers had asked for the human rights aspects of e-Justice to be considered, and promised that they would be vigilant about this.

Future meetings of the Justice Forum will consider: access to cross-border justice and legal aid; minimum procedural rights; evidence in criminal justice, and another meeting on e-Justice in mid-May. The annual meeting of the Forum will consider its operation so far.

Report on Experts Meeting on Pre-Trial Detention

On 9 February 2009, Dr Holger Matt (Chair of the ECBA) and Louise Hodges (Vice-Chair of the ECBA) were invited to attend an experts' meeting on pre-trial detention procedures hosted by the European Commission. In preparation for the meeting, the delegates were provided with an empirical study on pre-trial detention throughout the European Union produced by Tilburg University. A copy of the report and other documents relevant to the meeting are available on the ECBA website: click here to go the web page. In particular, we are grateful to the members who spent time to provide us with comments and observations about pre-trial detention in their various jurisdictions. This gave us a valuable insight to the issues that impact on defendants and defence practitioners throughout Europe.

Key points and themes from the Tilburg University report were:

- Nearly a quarter of the prison population in the EU in 2006 were in pre-trial custody (139,883 out of 607,725). There was considerable variation between countries, with the Czech Republic at around 12% and Italy at around 57%.

- In 17 out of the 27 EU Member States, the trend for pre-trial detention prison population is upwards while in ten countries it is downwards.

- There is prison overcrowding in 15 Member States.

- The deduction of pre-trial custody in any final sentence was erratically observed and used in the various Member States

- There was little evidence that pre-trial detention is really seen as a last resort

- There was little evidence that introducing alternatives has resulted in a reduction in pre-trial detention

- Courts have little time and information to consider alternatives as they are overloaded

- There are big differences in the age of criminal responsebility between MS (from seven to 18 years old for example) and there is little information available on numbers of juveniles in pre-trial detention (and it is not known how many in non-prison institutions).

- Conditions for juveniles are often worse than adults in many countries

In relation to the question whether this is an area where the EU should intervene, several of the Ministries of Justice (MOJs) did not see this as an area where the EU should intervene or, in any event, that this should not be a priority. Many stated that more pressing and important at this stage is **minimum standards of procedural safeguards**. We will monitor with interest the support these Ministries give to the new European Commission initiative on procedural safeguards in criminal proceedings throughout the EU, which is due to be a priority during the Swedish Presidency.

Dr Holger Matt (European Criminal Bar Association) commented that the study demonstrated there is a need for work at an EU level in this area. The assistance of a lawyer early in the process can reduce the time an individual spends in pre-trial detention. There could be added value at the EU level if there were binding standards relating to pre-trial detention, such as: minimum standards and procedural safeguards; the right to representation by a lawyer to protect against legal infringements; the right to appeal to a judge; alternatives to pre-trial detention available on an EU-wide basis (for example a supervision order); and legal aid available during pre-trial detention.

At the end of the meeting, the Commission confirmed it would explore these issues further via a Green Paper later this year. The Commission sees it as part of the procedural rights package. It is hoped that this topic will be discussed during the Swedish presidency of the EU.

Framework Decision on Probation

On 27 November 2008 the Council of the European Union adopted with regard to the initiative of the Federal Republic of Germany and the French Republic the Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions. This framework decision stipulates that by the 6 december 2011 all EU Member States will have to implement regulations governing the recognition and supervision of suspended sentences, conditional sentences and alternative sanctions

delivered by a court in another Member State.

This framework decision is – according to its introduction – considered to be another step towards the development of an „European area of freedom, security and justice". Since the concept of probation is a major aspect of sentencing in all European criminal jurisdictions it follows that there should be a framework for the mutual recognition of all implications that go along with the suspension of a judgement. However from the critical view of a defence counsel the framework decision has fundamental shortcomings.

Although No. 8 of the introduction of the framework decision states that the aim of mutual recognition and supervision of suspended sentences is "to enhance the prospects of the sentenced person's being re-integrated into society" one may well ask whether this goal, given that it really may have been intended, can be achieved by the framework decision's regulations or whether its only purpose will be the facilitation of the supervision of the sentenced person? Unfortunately the answer will not be in favor of the individual and his rights.

To begin with it remains yet unclear how the framework decision should enhance the prospects of reintegration into society. Given that anyone who receives a suspended sentence in a foreign country is usually free to return to his homecountry any assistance in his reintegration is obsolete. That is unless the courts would base their judgement on the fact that the accused is a European citizen and would therefore – because of the mere existence of this framework decision – suspend their sentences with a higher likelihood. This unfortunately is an assumption that cannot completely be dismissed.

Secondly the framework decision has the connotation that the current system of probation in the EU is flawed. So far no empirical data exists that would support this connotation. Yet it has to be asserted that the sanctioning of violations of obligations that were imposed with the sentence does not depend on the sentenced persons whereabouts. Thus only the supervision of probation instructions could be improved by the new framework decision. This however neither alludes to the sentenced persons prospects of reintegration nor the protection of the victim.

Apart from these general considerations the framework decision is insufficient in two major legal respects.

First of all the framework decision does not include any provisions governing the possibility of legal action against any measurements taken under its regulations. It is hardly believable that no one falling under the framework decision will have a reason to fight its consequences. That seems the more unlikely since Art. 9 of the framework decision allows the executing state to adapt probation measures and alternative sanctions. Art.9(3), in particular, which prohibits the adopted probation measure from being more severe or longer than the originally imposed measure, is liable to lead to a significant number of disputable cases.

ECBA
EUROPEAN CRIMINAL BAR ASSOCIATION
An association of European defence lawyers

Newsletter

Issue 17 *April 2009*

Secondly the framework decision does not provide for the partaking of the sentenced person in any of its main areas. Thus the refusal to grant the sentenced person his right to be heard, for example in the process of the adaption of probation measurements according to Art. 9, can only be considered a highly problematic infringement of the concerned individual's basic rights.

If the national legislations will not recognize these two important aspects and provide solutions on their own level it remains highly questionable if the implementation of this framework decision will be considered constitutional once it is challenged within the Member States.

Other aspects that seem problematic on a minor level are the abandonment of the verification of double criminality in Art. 10 and the transferral of competence to non-judicial authorities in Art. 3 (2).

While the general idea to provide a common basis for questions that arise with suspended sentences within the EU is to be generally welcomed, it quickly becomes quite clear that the major aim of this framework decision is not focussed on the sentenced persons reintegration but on the extension of supervision and control. This is mainly manifested in the poor makeup of the framework provisions where the sentenced person hardly ever is considered to be more than a problem that institutions have to deal with.

From a defence counsel's point of view the new framework decision may therefore well be considered as at least imperfect if not futile – whether it may also be considered as relatively harmless remains to be seen.

Salduz and Panovits and the requirements of article 6 ECHR

A) Introduction

In two recent cases, the ECHR has rendered land mark decisions with respect to article 6, more specifically in the light of a fair trial, the right of the suspect to have access to a lawyer and the assistance of a lawyer already at the initial stages of police interrogation. We will now give a brief overview of the rulings in the cases of Salduz v. Turkey and Panovits v. Cyprus.

B) ECHR, Case of Salduz v. Turkey, 27 November 2008, Application no. 36391/02

I. Facts

Salduz is a Turkish national and was at the time of his arrest 17 years old. Salduz was arrested by police officers from the anti-terrorism branch of the Izmir Security Directorate on suspicion of having participated in an illegal demonstration in support of the imprisoned leader of the PKK. Salduz was also accused of hanging an illegal placard.

The day after his arrest the police took a statement from Salduz in which he confessed his guilt. The following day Salduz was brought before the public prosecutor and then the investigating judge. Salduz denied before both officials the content of his police statement, claiming that his confession had been extracted from him under duress. He also claimed that he had been beaten and insulted while in police

custody. He stated that on the day of the demonstration he visited a friend living in that neighbourhood.
After the investigating judge remanded Salduz in custody he was allowed access to his lawyer.

Salduz was sentenced to four years and six months imprisonment, which was reduced to two and a half years as Salduz had been a minor at the time of the offence. The State Security Court based its decision on the applicant´s statements to the police, statements from co-defendants, an expert report comparing Salduz handwriting to that on the banner/placard and the police report which concluded that Salduz had been among the demonstrators.

Salduz alleged that his defence rights had been violated as he had been denied access to a lawyer during his police custody, referring to Article 6(3) (c) of the Convention.

II. § 55

As a main rule access to a lawyer should be provided from the first interrogation of a suspect by the police. Only under exceptional circumstances access to a lawyer may be denied. In principle the rights of the defence will be irretrievably prejudiced when incriminating statements without access to a lawyer are used for a conviction.

"Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently "practical and effective" […] Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect 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. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 […]. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

Note: paragraph 55 is placed under the heading ´General principles applicable in this case`. The considerations the Court therefore makes under these paragraphs are therefore not linked to the facts of this specific case (*see* Taru Spronken, *Ja, de zon komt op voor de raadsman bij het politieverhoor!*, Nederlands Juristenblad, 16-01-2009, Afl. 2)

III. § 51- 54

Although not absolute an accused has the right to be effectively defended by a lawyer free of charge.

§ 51:
"The Court further reiterates that although not absolute, the right everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial […]. Nevertheless, Article 6§3 (c) does not specify the manner of exercising this right. It thus leaves the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court´s task being only to ascertain whether

the method they have chosen is consistent with the requirements of a fair trial. In this respect, it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused".

§ 52:
"National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation."

§53:
"These principles, outlined in paragraph 52 above, are also in line with the generally recognised international human rights standards […] which are at the core of the concept of a fair trial and whose rationale relates in particular to the protection of the accused against abusive coercion on the part of the authorities. They also contribute to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused.

§54
The vulnerable position of the accused can *"only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused".*

C) ECHR, Case of Panovits v. Cyprus, 11 december 2008 (Application no. 4268/04)

I. Facts

Panovits is a Cypriot national who was at the time of his arrest just 17 years old. In the context of a police investigation Panovits was invited with his father to visit the police office. The Police Director informed Panovits and his father that Panovits was suspected of committing the crime of murder, that there was evidence involving Panovits and that an arrest warrant had been issued against him. Panovits stated that he was innocent.

Subsequently another police officer entered the room and informed Panovits that he was under the arrest of murder.The police officer then told Panovits to follow him into a different office. According to the police he was cautioned several times. The arresting officer stated that Panovits was interrupted and his attention was drawn to the law. During the questioning Panovits confessed his guilt.

His father was not present during the interrogations. The Police Director advised the father to seek the advice of a lawyer. The father remained at the police office, afraid that the

police would use violence against his son.

Panovits was sentenced for man-slaughter and robbery. During the trial Panovits maintained that his confession to the police had not been voluntary but the product of deception, psychological pressure, promises, threats and other tactics aimed at creating fear. He also argued that at the time he had made his statement to the police he had been drunk and, therefore, he had not been in the position to remember accurately the facts described in that statement. Furthermore he argued that he did not have legal advice immediately after his arrest and before being questioned and induced to sign a written statement.

The Assize Court found that Panovits´ confession had been voluntary and that he had not been subjected to any undue or improper pressure by the police to secure it. The court dismissed Panovits´s allegation that he was drunk and therfore suffered loss of memory. According to the national courts Panovits never asked for legal advice, neither was it refused.

Panovits complained at the ECHR that he had not been informed of his right to consult a lawyer prior to being questioned and submitting his statement and that he had not been provided with an adequate opportunity to find a lawyer at that stage. He further complained that he had not been adequately warned of his right to remain silent and that he had not received a fair trial by the national courts given its acceptance of his confession. The ECHR declared the above-mentioned complaints admissible.

II. § 66

"As regards the applicant´s complaints which concern the lack of legal consultation at the pre-trial stage of the proceedings, the Court observes that the concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation. The lack of legal assistance during (underscore TvdL, CvB) an applicant´s interrogation would constitute a restriction of his defence rights in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings."

In other words, a suspect already has the right to legal assistance at the initial stages of police interrogation. Restrictions are only allowed when there are compelling reasons that do not prejudice the overall fairness of the proceedings.

From the last sentence quoted it can be derived that a suspect has the right of legal assistance during the interrogation. It undoubtedly means that an accused may seek legal assistance/advice while being interrogated, but it is ambiguous whether the lawyer should be permitted to be physically present during the interrogation.
Furthermore it is not clear whether an accused must have the possibility of being assisted by a lawyer only while being questioned or already at the very beginning of police custody or pre-trial detention.

III. § 67

"It means that he or she, if necessary with the assistance of, for

example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said by the arresting officer and during his questioning by the police".

Again this phrase accentuates that a suspect has the right of legal assistance during the interrogation.

IV. Letter Professor Taru Spronken to registrar

Taru Spronken wrote a letter to the registrar asking how paragraph 66 should be interpreted. The registrar answered:
"As indicated by the use of conditional tense in the sentence you referred to, lack of legal assistance during questioning of a suspect would be an unjustified restriction of his defence rights unless there are compelling reasons for such restriction that, in any event, must not prejudice the overall fairness of the proceedings. Lastly, it is noted that paragraph 66 of the judgment in Panovits v. Cyprus should be read in line with paragraph 55 of the judgment in Salduz v. Turkey [GC], no. 36391/02, 27 November 2008`.

V. Concurring opinions

That an accused has the right to legal assistance during interrogations can also be derived from the concurring opinions of judges Bratza, Zagrebelsky, Casadevall and Türmen. Additionally these concurring opinions seem to stress that an accused must have the possibility of being assisted by a lawyer at the very beginning of police custody or pre-trial detention.
Zagrebelsky wrote, backed up by Casadevall and Türmen "a few words to explain the meaning of the Court´s reasoning, as I understand it:
[…] The generally recognised international standards, which the Court accepts and which form the framework for its case-law, provide: ´An untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representation … and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him and to receive, confidential instructions…`
It is therefore at the very beginning of police custody or pre-trial detention that a person accused of an offence must have the possibility of being assisted by a lawyer, and not only while being questioned.
The importance of interrogations in the context of criminal procedure is obvious, so that, as the judgment makes clear, the impossibility of being assisted by a lawyer while being questioned amounts, subject to exceptions, to a serious failing with regard to the requirements of a fair trial."

Bratza agrees to the foregoing and mentions:
"Article 6 requires that, as a rule, access to a lawyer should be provided ´as from the first interrogation of a suspect by the police`. This principle is consistent with the Court´s earlier case-law and is clearly sufficient to enable the Court to reach a finding of a violation of Article 6 on the facts of the present case. However, I share the doubts of Judge Zagrebelsky as to whether in appearing to hold that the right of access to a lawyer only arises at the moment of first interrogation, the statement of principle goes far enough. Like Judge

ECBA
EUROPEAN CRIMINAL BAR ASSOCIATION
An association of European defence lawyers

Newsletter

Issue 17 *April 2009*

Zagrebelsky, I consider that the Court should have used the opportunity to state in clear terms that the fairness of criminal proceedings under Article 6 requires that, as a rule, a suspect should be granted access to legal advice from the moment he is taken into police custody or pre-trial detention. It would be regrettable if the impression were to be left by the judgment that no issue could arise under Article 6 as long as a suspect was given access to a lawyer at the point when his interrogation began or that Article 6 was engaged only where the denial of access affected the fairness of the interrogation of the suspect. The denial of access to a lawyer from the outset of the detention of a suspect which, in a particular case, results in prejudice to the rights of the defence may violate Article 6 of the Convention whether or not such prejudice stems from the interrogation of the suspect".

VI. § 68-73

An (minor) accused doesn't have to ask for legal assistance. If such a request by an accused is missing, it cannot be presumed that he waives his right to consult a lawyer.

§ 68:
"The Court reiterates that a waiver of a right guaranteed by the Convention – in so far as it is permissible – must not run counter to any important public interest, must be established in an unequivocal manner and must not be attended by minimum safeguards commensurate to the waiver´s importance. […] Moreover, before an accused can be said to have impliedly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be […] The Court considers that given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of an important right under Article 6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his right of defence and can appreciate, as far as possible, the consequences of his conduct" *(underscore TvdL/CvB)*.

§ 70:
" […] without informing him of his right to consult a lawyer before proceeding to make any statement. […] The applicant himself was not advised that he could see a lawyer before saying anything to the police and before he had his written statement".

§ 71:
"In view of the above the Court considers that it was unlikely, given the applicant´s age, that he was aware that he was entitled to legal representation before making any statement tot the police".

§72:
"The Court takes note of the Government's argument that the authorities had remained willing at all times to allow the applicant to be assisted by a lawyer if he so requested. It observes that the obstacles to the effective exercise of the rights of the defence could have been overcome if the domestic authorities, being conscious of the

difficulties for the applicant, had actively ensured that he understood that he could request the assignment of a lawyer free of charge if necessary. […] The passive approach adopted by the authorities in the present circumstances was clearly not sufficient to fulfil their positive obligation to furnish the applicant with the necessary information enabling him to access legal representation"
(Underscore TvdL/CvB).

From the foregoing quotations can be concluded that at least for a minor accused authorities actively have to ensure that he or she is aware of his right of defence and can appreciate, as far as possible, the consequences of his conduct.
Moreover, it seems from § 72 that legal aid should be government supported if necessary.

According to article 6(1) jo. (3)(c) ECHR an (minor) accused doesn't only have a right to consult a lawyer when he asks for one. The authorities have the duty to inform an (minor) accused that he can request the assignement of lawyer and seek advice free of charge if necessary.

Conclusion

- *Access to a lawyer should be provided from the first interrogation of a suspect by the police;*
- *In principle the rights of the defence will be irretrievably prejudiced when incriminating statements without access to a lawyer are used for a conviction;*
- *Only under exceptional circumstances access to a lawyer may be denied;*
- *An accused must be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation.*
- *From the concurring opinons in the Panovits case it seems that the Court meant that an accused must have the possibility of being assisted by a lawyer at the very beginning of police custody or pre-trial detention;*
- *Authorities have to take all reasonable steps to ensure that an (minor) accused is fully aware of his right of defence (Active approach instead of passive approach);*
- *Although not absolute an accused has the right to be effectively defended by a lawyer free of charge.*

Still ambiguous is whether authorities have to take an active approach to make sure that an accused is fully aware of his right of defence when the accused is an adult. In addition to that, it is still unclear whether "access to a lawyer" means that a lawyer should be permitted to be physically present when an accused is interrogated.

The Dutch Supreme Court is expected to rule on these matters shortly. Dutch judges had "close reading" sessions of the above-mentioned decisions. The Department of Justice has sent a letter to prosecutors explaining how they should react when a suspect or his lawyer would indeed ask for the lawyer to be present during interrogation. In a recent decision the Superior Court of Den Bosch

*(*LJN: BH5081, Gerechtshof Arnhem, 21.001413-08) *ruled that the initial statement by the suspect in that case should be excluded from evidence, since it could not be established that the suspect had had access to his lawyer prior to the interrogation.*

Please send recent case law from your countries to:
cees.vanbavel@cms-dsb.com
We will then report during the Spring Conference in Madrid

Young Defenders Training Programme

For those who might be interested we would like to inform you that in June 2009 Fair Trials International (FTI) will host a networking and training event for young lawyers across Europe (up to 10 years post-qualification) on the fields of human rights law, criminal law and advocacy.
Deadline for applications is 17:00 GMT on 10 April 2009.
More information available on www.fairtrials.net

Key Dates

ECBA Executive Committee and Advisory Board Meeting
Madrid 24th April 2009

ECBA Autumn Conference Stockholm
September/October 2009

Your views....

Do you have any questions, remarks or information relating to this news-letter? Please e-mail them to: **secretariat@ecba.org**

ECBA
EUROPEAN CRIMINAL BAR ASSOCIATION
An association of European defence lawyers

Newsletter

Issue 17 *April 2009*

Contacts

Executive Committee

Chairman
Prof Dr Holger Matt, Germany
h.matt@ecba.org

Vice Chairman
Louise Hodges, England and Wales
l.hodges@ecba.org

Vice Chairman
Roberto Pisano, Italy
robertopisano@pisanolaw.com

Treasurer
Kevin Roberts, England and Wales
KRoberts@mofo.com

Secretary
Roland Kier, Austria
kier@anwaltsbuero.at

Advisory Board

Vincent Asselineau, France
vasselineau@farthouat.com

Vânia Costa Ramos, Portugal
vcr@advogados.in

Scott Crosby, Belgium
Scott.Crosby@chaps-law.eu

Peter Engels, Belgium
p.engels@elegis.be

Matus Gemes, Slovakia
matusgemes@stonline.sk

Robin Grey QC, England and Wales
robin.grey@holliswhiteman.co.uk

Marc Henzelin, Switzerland
mhenzelin@lalive.ch

Jonathan Stuart Mitchell MA, England and Wales
j.mitchell@ecba.org

Jaanus Tehver, Estonia
jaanus@tehver.ee

Cees van Bavel, The Netherlands
cees.vanbavel@cms-dsb.com

Secretariat

Marie-Anne Sarlet
secretariat@ecba.org