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THE PROTECTION OF MINOR WITNESSES VERSUS THE RIGHT OF ACCUSED TO EXAMINE THE WITNESS*

Introduction

In application practice, the question of the extent to which it is necessary to ensure respect for the adversarial principle in the case of questioning witnesses in criminal proceedings resonates in these days more and more frequently. In this context, we encounter the requirement that the questioning of witnesses in criminal proceedings have a so-called adversarial character. The term adversarial interrogation can be defined through the decision of the Constitutional Court of the Slovak Republic no. I. ÚS 140/04, according to which the adversarial interrogation of a witness is such an interrogation, which took place at a public main hearing with the presence of the defendant, who had the opportunity to assess the credibility of the witness on the basis of direct observation of the witness's report and reactions. Such an interrogation is also an interrogation conducted during the preparatory proceedings, if the defendant had the right to express his opinions about this witness, to deny the testimony of witness and ask him a questions. Such a requirement concerning the nature of the examination of a witness also follows directly from Art. 6, para. 3, letter d of the European Convention on Human Rights,¹ according to which everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. In other words, the immanent attribute of a fair trial is the preservation of the right to an adversarial procedure, that is to say, the

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¹ Henceforth cited as: ECHR.

preservation of the right to make the critical examination of the proof by the accused person. According to the cited provision of the ECHR, if we deprive the accused of the opportunity to conduct a contradictory examination of a witness, it is not possible to speak about a fair trial.

At first sight, this is a requirement that sounds relatively rational and unambiguous. However, ensuring adversariality in the context of witness interrogations is not always an easily feasible task – this is very often jointed with the need for subsequent assessment of the admissibility of the evidence in the form of testimony of witness who was interrogated contrary to the adversarial requirement. In this context, it should be noted that the decision making of courts regarding the resolving this issue has not got completely uniform character. Given that the issue in question is quite extensive, the article will look at this issue primarily from a point of view that is fundamentally sensitive, namely from the point of view of the questioning of witnesses who are minors in cases of sexual abuse offenses.

1. The requirement of a contradictory of witness interrogation in the case law of Supreme Court of Slovak Republic

When we talk about a minor witness and the requirement of his adversarial interrogation, it is first necessary to point out the opinion of the Supreme Court of the Slovak Republic² from 2009,³ in which exceptions to the adversarial principle were formulated. One of the three conceived exceptions is the examination of a witness under the age of 18. In this context, however, it should be added that the precondition for the application of the exception is the fact that the witness will be a person under the age of 18 even at court proceedings. This requirement was explicitly conceived in the subsequent decisions of lower courts.⁴ Based on the findings of individual courts of the Slovak Republic, it can be concluded that despite the fact that the examination of a minor witness was carried out in a non-adversarial manner, such an examination will be admissible evidence in court proceedings.

² Henceforth cited as: SC SR.

³ The unifying opinion of SC SR, file ref. no. Tpj 63/2009.

⁴ The resolution of SC SR, file ref. no. 2 Tdo 56/2012.

2. The requirement of contradictory of witness interrogation in the case law of ECtHR

The opinion of the Supreme Court of Slovak Republic as well as the opinions of lower courts regarding the issue of adversariality of testimonies of minor witnesses is clear. However we should highlight that the Slovak Republic is a contracting state of the ECHR and according to the Art. 7, para. 5 of the Constitution of the Slovak Republic the ECHR is an international treaty, which takes precedence over Slovak law. In this context it should be also noted that it is important to look not only at the wording of the article of the Convention, which has the most fundamental meaning in this respect, namely at the Art. 6, para. 3, letter d, but also at interpretation of article in question created by ECtHR. In this context, it is appropriate to state that the ECtHR, in resolving the question whether the absence of a witness in court proceedings leads to a violation of the mentioned article of the Convention, applies the so-called a three-step test developed in the case of *Al-Khawaja and Tahery v. Great Britain* in 2011.⁵ According to this test, the following questions have to be assessed: 1) Was there a legitimate reason for the absence of the witness at the trial and for the subsequent acceptance of his statement as admissible evidence by the court?; 2) Is the evidence in the form of such a statement to be considered as the sole or decisive evidence for the conviction of the accused?; 3) Have sufficient balancing measures been taken to compensate for the disadvantage of the defense caused by the acceptance of “unverified” evidence?

In connection with the three-step test in question, it is necessary to point out in the first place the relatively new decision, which fundamentally disrupted and changed the manner of application of the test, as well as the way of interpreting its individual questions. This revolution in the application of the test was caused by the decision in the case *Schatschaschwili v. Germany*.⁶ In the present decision, the ECtHR pointed out that in each considered case it is necessary to examine all three questions defined above and to apply the

⁵ Case of *Al-Khawaja and Tahery v. The United Kingdom*, Applications no. 26766/05 and 22228/06, Strasbourg, 15 December 2011.

⁶ Case of *Schatschaschwili v. Germany*, Application no. 9154/10, Strasbourg, 15 December 2015.

test in its entirety, with particular emphasis on assessing the number and adequacy of balancing measures. This also applies if the previous question was answered in the negative manner. In other words, the so-called the three-step test must be applied in full way in each case. Based on this statement of the ECtHR, it is possible to state a new violation of Art. 6, para. 3, letter e of ECHR also in the case when the testimony of witness has not got character of sole or decisive evidence. According to the this new approach, the decisive criterion for the ECtHR is the extent to which the acceptance of evidence in the form of a witness statement arising from a non-adversarial hearing has disadvantaged the defence.⁷ This change in the application of the three-step test is of particular importance due to the fact that the need to respect contradictory principle had been required only in cases where testimony has a character of single or key evidence. In other words, if the court found a negative answer to the question contained in the test in the second place, it did not consider the question regarding the adoption of counterbalancing measures and automatically assessed the conduct of the national authorities as compliant with Art. 6, para. 3, letter e of ECHR. The new view of the ECtHR on the assessment of the adversarial nature of the examination of witnesses may thus fundamentally undermine the current practice of national courts in the field of resolving the raised issue.

When we want to talk about the application of the test regarding the assessment of the testimony of minor witnesses, it can be pointed out the ECtHR's approach to assessing of this kind of interrogations. Indeed, the ECtHR often points out in its decisions that criminal proceedings for sexual abuse offenses involving a child are undoubtedly a highly traumatic experience for victims and therefore the need to take measures to protect the victim, such as the absence of a child witness in court proceedings, should be respected.⁸ At the same time, however, ECtHR adds that these measures are not automatically applicable to every criminal proceeding involving, in particular, sexual abuse offenses.⁹ In other words, even though we are talking about criminal proceedings for the crime of sexual abuse, in which a person under the age of eighteen acts as a witness, such criminal proceedings must be evaluated by carry-

⁷ Case of Schatschaschwili v. Nemecko, para. 116.

⁸ Case of Bocos-Cuesta v. Netherland, Application no. 54789/00, 10 November 2005, para. 69.

⁹ Case of Lučić v. Croatia, Application no. 5699/11, 24 February 2014, para. 75.

ing out the three-step test mentioned above with the aim to answer the question about the fairness of the trial. Based on the analysis of selected decisions of the ECtHR, it is possible to create a model of criminal proceedings leaden for the crime of sexual abuse that will have a character of fair proceedings, despite the absence of an adversarial, contradictory element within interrogation of a child victim. In order to create this model, the particular examples of answers to individual questions in the three-step test, will be formulated.

3. The three-step test and the suitable answers to it's questions

As regards the first question of the Al-Khawaja test, namely the question of legitimate grounds justifying the absence of a minor witness in court proceedings, it can be stated that the fact justifying the absence of witness is the fact that the examination of a witness in court proceedings will be a traumatic experience for the victim. In this context, however, the ECtHR emphasizes that the finding of imminent trauma made by law enforcement authorities cannot be understood as sufficient. The conclusion that there is a threat must be substantiated by specific evidence in the form of an expert opinion. Examples of the decisions of ECtHR where this conclusion was made are *Rosin v. Estonia*¹⁰ and *Bocos – Cuesta v. Netherland*.¹¹

Regarding the second question of the test, the question about decisive character of evidence, it should be noted that within the case-law of ECtHR this kind of an evidence is understood as a testimony that may have a decisive or significant role in the process of finding the defendant guilty. In regards to the defining of this term the ECtHR had taken many different decisions¹² [Šamko 2013].

In relation to the issue in question it should be stated at first place that the ECtHR has, for the last few decennia, formulated general principles and tests designed to guarantee minimum rights to the defense without unduly prejudicing the interests of justice. One such test that is related to our question is the so-called “Sole and Decisive Rule” [Kwik 2015, 1]. The history of this

¹⁰ Case of *Rosin v. Estonia*, Application no. 26540/08, 19 December 2013, para. 59.

¹¹ Case of *Bocos-Cuesta v. Netherland*, para. 72.

¹² See for example judgments in the cases: *Unterpertinger v. Austria*, *Kostovski v. Netherland*, *Windisch v. Austria*.

rule is surprisingly vague, despite its prominence in legal discussion. The very first seeds of this rule were planted in *Unterpertinger v. Austria*, where the Court mentioned that the conviction was based “mainly” on two read testimonies, an unobtrusive mention about decisive testimony also surfaced in *Kostovski v. Netherland*, with little consequence. It was not until *Doorson v. Netherland* that the Court explicitly mentioned the sole and decisive nature of evidence as an autonomous factor in determining whether the Convention was violated [ibid., 2; Svák and Balog 2017, 255].

Regarding this test the most important milestone was above mentioned judgment in the case *Al-Khawaja v. the United Kingdom*. *Al-Khawaja* was the first real case where the Court had to apply the rule, based on fifteen years of non-existent “settled case-law.” In this decision ECtHR stated that “sole” has only one meaningful sense (“only”) and that decisive should be interpreted narrowly, i.e., determinative of the outcome [Kwik 2015, 3-4].

In more precise words, the term “decisive” should be understood narrowly: it should not mean merely “capable of making a difference” but instead “likely to be determinative or conclusive.”¹³ This concept means more than “probative.” It further means more than that, without the evidence, the chances of a conviction would recede and the chances of an acquittal advance. The word “decisive” should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence – the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive¹⁴ [Paruch 2018, 108-62].

However, on the base of three step test, it should be concluded that ECtHR supposed that the sole and decisive nature of evidence merely raises the defense’s handicap, which can still be counterbalanced with sufficient safeguards [Kwik 2015, 7]. In this context ECtHR had stated that a conviction based solely or decisively on the testimony of witness would not automatically result in a breach of Art. 6 ECHR. Where hearsay evidence was sole

¹³ Judgment of ECtHR in the Case of *Al-Khawaja v. the United Kingdom*, para. 116.

¹⁴ Ibid., para. 131.

or decisive, the question was whether there were adequate counterbalancing factors in place, including strong procedural safeguards, to compensate for the difficulties caused to the defense.

With regard to the question of particular form of balancing measures, several examples of means of this character can again be drawn from the case law of the ECtHR. In that regard, however, it is necessary, in the first place, to clarify the fact, set out above, concerning the fundamental importance which measures of that nature enjoy. The ECtHR has repeatedly emphasized in its decision-making activity that the right of an accused person to an adversarial hearing cannot be perceived so strictly that public authorities are in any case obliged to ensure the cross-examination of a minor witness in court or a confrontation between the accused person and the minor witness. The right arising from Art. 6, para. 3, letter e of the ECHR can also be fulfilled by implementation of balancing measures which compensate for the disadvantage of the defense caused by the absence of a witness at the trial.

An example of a measure through which it is possible to compensate for an absent confrontation between a witness and an accused person is to ensure that questions are asked in other way than by direct questioning, for example through an investigator or psychologist who formulates it in a way that does not harm the minor witness.¹⁵ However, the measure in question must be accompanied by a video recording of the interrogation in order to ensure that the accused person and also the court will have the same possibility to observe the reactions of witness during responding to the questions and also to assess his credibility. An alternative to recording the interrogation is to take it in a double-glazed room, which also provides both protection for the witness against secondary victimization and the possibility of observing his reactions on the part of the accused.¹⁶ In this context, however, it is necessary to emphasize that the only sole video recording of the interrogation or the only sole realization of the interrogation in the double-glass hearing room cannot be considered, according to the ECtHR, as a measure of a sufficient nature.

¹⁵ Case of *Rosin v. Estonia*, para. 62.

¹⁶ Case of *Accardi and Others v. Italy*, Application no. 30598/02, 20 January 2005.

On the one hand, the ECtHR emphasizes the possibility of directly observing the witness's reactions, which will not be heard in court proceedings, ideally through a video recording of a minor's interrogation during the preparatory proceedings, which will ensure that his credibility can be assessed, but on the other hand it highlights that the video recording alone is not sufficient to secure the accused's right to a defense in situation when testimony of such witness is the proof with the value of decisive evidence. In other words, in the case of a key witness, it is necessary to ensure, in addition to the video recording, for the accused person the possibility of asking questions in the indirect ways indicated above.¹⁷

In that context, it is a *de facto* development of the finding made by the ECtHR in the case of the *Schatschaschwili v. Germany* concerning the examination of the requirement for balancing measures. The ECtHR noted that the existence of counterbalancing measures was not in itself sufficient to establish a finding about the compliance with Art. 6, para. 3, letter e ECHR. An important factor in this context is their nature and scope, which depends on the importance of the evidence – absent witness statement. In other words, the more important that evidence, the more weight the counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair¹⁸ [Mrčela 2017, 23].

4. The case of Rosin v. Estonia

On the basis of the conclusions formulated above, it is possible to draft an ideal form of criminal proceedings, in which, despite the absence of a witness – a minor in a trial proceedings, the compliance of the procedure of national authorities with Art. 6, para. 3, letter e of ECHR will be concluded. In this context we are talking about the model of criminal proceedings, in which both the existence of imminent trauma for a minor will be confirmed by an expert opinion and the existence of a balancing measures in the form of indirect questioning while video recording the interrogation. However, in connection with this outline of the ideal model of criminal proceedings characterized by the absence of a witness at the court hearing, it is necessary to point

¹⁷ Case of *Rosin v. Estonia*, para. 62.

¹⁸ Case of *Schatschaschwili v. Germany*, para. 118.

to a case that was dealt with by the ECtHR in 2015. This is the case of *Rosin v. Estonia*, in which the ECtHR has formulated a *de facto* negative condition, the fulfillment of which is necessary in order to assess criminal proceedings as fair proceedings. The condition in question is that the competent authorities conducting the examination of the minor within the preparatory proceedings were not aware of his non-repetition in the next part of the criminal proceedings. In other words, the ECtHR pointed out that in the case of criminal proceedings in which the competent authorities have knowledge that the witness will not be questioned repeatedly at the next stage of the criminal proceedings, the existence of a legitimate reason or the existence of the above-mentioned counterbalancing measures is sufficient for conclusion about the compliance with the Art. 6, para. 3, letter d of ECHR. In that regard, the ECtHR stated that, where law enforcement authorities have indications of a nature in question during the preparatory proceedings, they are required to ensure the right for cross-examination arising from Art. 6, para. 3, letter e of ECHR, already during the first interrogation of a minor witness. The ECtHR emphasized in particular that, in such a situation, it was not possible to remedy the error of the acting authority at later stages of the criminal proceedings.¹⁹ In other words, the ECtHR directly ruled out the possibility of applying a balancing measure in the form of putting the questions to the witness in writing form during the trial, as was the case in *Scholer v. Germany*.

However, the significance of the described case does not end with this statement. Another important fact, which must be pointed out equally fundamentally, is the time at which the examination of a minor witness took place. The interrogation in question was carried out at the time of the preparatory proceedings, but before the specific person was charged with the criminal offence. In this context, we can talk about confirming the current trend in the decision-making activities of the ECtHR – to provide suspects with the same range of rights as the person accused in criminal proceedings. According to that decision, the right to examine witness belongs not only to the accused person but also to the suspect.

¹⁹ Case of *Rosin v. Estonia*, para. 59.

Conclusion

On the base of abovementioned facts it should be concluded that the requirement of the respecting the right of accused to examine the witness has still more and more decisive character within the assessing of the fairness of criminal proceedings. The interpretation of this right given by ECtHR has the graduating character in that sense that ECtHR is still more and more strict while assessing the compatibility of acting of states authorities with the Art. 6, para. 3, letter d of ECHR. In the case of *Rosin v. Estonia* the ECtHR created the conclusion that nor the commission of a sexual offense against a child is a sufficient justification of a violation of Art. 6, para. 3, letter d of ECHR. At the base of these facts we can conclude that it will be interesting to observe another steps that will be taken by ECtHR in this field in the future.

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The Protection of Minor Witnesses Versus the Right of Accused to Examine the Witness

Summary

The contribution deals with the issue that is more and more resonant in the field of interrogation of witness in criminal proceedings not only at the level of legal theory but also at the level of application practice – it is the question of the need to respect the principle of contradictory within the realization of the abovementioned procedural act. In this context we are confronted with the requirement that the testimony of witnesses in criminal proceedings should have the so-called contradictory character which arises directly from Article 6 section 3 letter d of ECHR.

Key words: contradictory principle, interrogation of witness, minor witness

Ochrona świadków nieletnich a prawo oskarżonego do przesłuchania świadka

Streszczenie

Artykuł dotyczy coraz bardziej istotnej kwestii w zakresie przesłuchania świadka w postępowaniu karnym nie tylko na płaszczyźnie teorii prawa, ale także jego aplikacji w praktyce – jest to zagadnienie odnoszące się do konieczności przestrzegania zasady kontrydiktoryjności w wykonaniu powyższej czynności procesowej. W związku z tym mamy do czynienia z wymogiem, aby zeznania świadków w postępowaniu karnym miały tzw. charakter kontrydiktoryjny, co wynika bezpośrednio z art. 6 ust. 3 lit. d EKPC.

Słowa kluczowe: zasada kontrydiktoryjności, przesłuchanie świadka, świadek nieletni

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