Op-Ed

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“The Recent Luxembourg Case-Law on Procedural Rights in Criminal Proceedings: Towards Greater Convergence with Strasbourg?”

Johan Callewaert

The recent months have seen an increased number of rulings by the Court of Justice of the European Union (‘the Court of Justice’) applying some of the directives on procedural rights in criminal proceedings. As one will recall, these directives were gradually adopted, on the basis of Article 82(2) TFEU, pursuant to the 2009 ‘Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings’. Their main purpose is to facilitate mutual recognition of judicial decisions between the EU Member States. The topics covered by the directives already adopted in this context include the right to interpretation and translation (Directive 2010/64/EU), the right to information (Directive 2012/13/EU), the right of access to a lawyer (Directive 2013/48/EU) and the right to be present at the trial, as well as the presumption of innocence (Directive 2016/343/EU).

From the very beginning, these directives represented a challenge. It is indeed a delicate endeavour to try and codify a subject matter as vast as procedural fundamental rights, given that these rights are primarily the result of a dynamic case-law generated notably by the European Court of Human Rights (‘ECtHR’”) on the basis of Article 6 of the European Convention on Human Rights (‘the Convention’) which protects the right to a fair trial. The European lawmaker had to avoid two different pitfalls here: being too specific and freezing the case-law or being too general and leaving lacunae in the regulation. It is therefore quite interesting to see how the Court of Justice goes about interpreting these directives.

In any event, the recent Luxembourg jurisprudence on these matters seems to rather reinforce its convergence with the Strasbourg case-law, which is good news for domestic judges. Three different aspects are worth mentioning in this connection. They concern the lacunae in the said directives, the increased reference to the Convention as a benchmark and the use of the test of the proceedings as a whole, respectively.

The lacunae in the directives on procedural rights in criminal proceedings

With the increasing number of cases concerning these directives and the rising number of different procedural situations involved, their limits and notably their lacunae become ever more visible. As had been anticipated already at the time, it is extremely difficult to codify the huge amount of case-law to which the right to a fair trial has already given rise. Only recently did the Court of Justice have to deal with the absence of any provisions in Directive 2016/343 concerning such important issues as the waiver of the right to be present at the trial and the right to cross-examine witnesses. On both issues, which arose in *Spetsializirana prokuratura* (C-569/20) and *HYA and Others* (C-348/21) respectively, the Court of Justice filled the lacunae by taking on board the relevant Strasbourg case-law.

Drawing on that case-law in such situations obviously makes sense, if only because any interpretation of these directives by the Court of Justice, as applied by the domestic courts of the Member States, at the end of the day can be tested against the Convention in the context of an application to the ECtHR. Regrettably, however, drawing on the Convention case-law with a directive as a starting point is not without sometimes generating a more complex legal reasoning, as illustrated in *HYA and Others*. In this case, lengthy developments were needed before the Court of Justice could state what under the Convention is obvious, i.e. that a right for an accused to just attend their trial without at the same time being allowed to cross-examine the witnesses for the prosecution would strip the right to a fair trial of one of its essential components.

The Convention as benchmark

A second observation to be made in this context is about the fact that the directives on procedural rights are becoming an area where the Court of Justice, perhaps more than anywhere else in its case-law, seems to show an increased awareness of the benchmark function of the Convention in Union law. This awareness frequently takes the form of statements such as the one according to which 'the Court must … ensure that its interpretation of the second and third paragraph of Article 47 and of Article 48 of the Charter of Fundamental Rights ensures a level of protection which does not disregard that guaranteed by Article 6 ECHR, as interpreted by the European Court of Human Rights'[1]. More often than not, the reminder of this principle is followed by an indication of the Strasbourg case-law relied on by the Court of Justice, which is very helpful for understanding the ongoing and evolving interplay between EU law and the Convention.

The Convention indeed has a double function under Union law: it is at the same time toolbox and benchmark. It is a toolbox when it is relied on to fill gaps in Union law, as was done in respect of the lacunae of the directives described above, or when it is to determine 'the meaning and scope' of some rights of the EU-Charter (Article 52(3) of the Charter). But it is also a benchmark, if only because domestic courts must apply Union law in conformity with the Convention and this conformity can be checked by the ECtHR (see, among many others, *Bivolaru and Moldovan v. France*). While the Court of Justice under Article 267 TFEU authoritatively interprets EU law, the ECtHR tests its application against the human rights laid down in the Convention.

The EU lawmaker drew the right conclusion from this by stating in the Explanations to Article 52(3) of the EU-Charter that 'In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.' In simple terms, the toolbox function is about the *substance* of fundamental rights and helps ensure *substantive harmony* between the Convention and Union law, whereas the benchmark function is about the respective *levels of protection* between the two and their *compatibility*.

That being so, and while welcoming the increased reliance by the Court of Justice on the benchmark function of the Convention as a contribution to the coherence of European fundamental rights, one may nonetheless wonder why that reliance is not more frequent in other areas of the Luxembourg case-law. After all, Article 52(3) of the EU-Charter covers all Charter provisions borrowed from the Convention, not only Articles 47 and 48. It is certainly not intended to be used 'à la carte'. Extending to other areas of Union law the reference to the Convention as benchmark would help national judges perform their difficult task of applying Union law in compliance with the Convention, as they could rely on EU law being in line with the Convention minimum standards, which can in any event be raised. It would protect them to the same extent against complaints being raised in Strasbourg.

The test of the proceedings as a whole

Finally, one should also note something new in the Luxembourg case-law on procedural rights, which is the use made of the test of the proceedings as a whole. This notion is the standard test in the Strasbourg case-law on the right to a fair trial. It was explained by the ECtHR in the following way: 'Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident … [The] minimum rights guaranteed by Article 6 § 3 are … not ends in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole' (*Beuze v. Belgium*, §§ 121-2).

The directives on procedural rights are silent about this test. They leave open the question how shortcomings in ensuring the enjoyment of these rights are to be handled at domestic level under Union law: should any such shortcoming automatically vitiate proceedings and trigger a right for them to be reopened? Or should its impact on the proceedings as a whole be evaluated before deciding on its consequences, as the ECtHR does? Obviously, the first alternative represents a higher protection standard for the accused. Yet the Court of Justice does not seem to go for it, even though higher EU standards are allowed both under the Convention and EU law.

Until recently, the Court of Justice had not taken a stance on this important issue. That has now changed with *HYA and Others* (C-348/21) where the Court of Justice applied the Strasbourg wholistic test, while trying to combine it with its own methodology based on Article 52(1) of the EU-Charter. The issue at the heart of the case was about whether there was a right for the accused not only to attend their trial, but also to cross-examine witnesses at the trial. After answering

these questions in the affirmative, the Court of Justice turned to the issue whether the accused could be convicted on the basis of witness statements which had been made during the investigation of the criminal case, in the absence of the accused and their lawyer.

Here, the Court of Justice was confronted with divergent methodologies in assessing the lawfulness of limitations: whereas Article 52(1) of the EU-Charter requires the application of three different criteria – the existence of a legal basis, the preservation of the essential content of the right at stake and the proportionality of the limitations to it –, the Strasbourg approach is based on an assessment of the proceedings as a whole, which looks at the global impact of any limitations or procedural flaws in light of possible counter-balancing factors (see, among several others, *Ibrahim and Others v. United Kingdom* and *Beuze v. Belgium*).

Interestingly, in *HYA and Others* the Court of Justice opted for copying almost verbatim the Strasbourg methodology on absent witnesses, as it was laid down in *Al-Khawaja and Tahery v. United Kingdom* and *Schatschaschwili v. Germany*, while at the same time squeezing it into its own methodology based on Article 52(1) of the EU-Charter. It is indeed under the second criterion laid down by Article 52(1), the essential content of the right, that the domestic courts are instructed by the Court of Justice to apply the full Strasbourg test.

Overall, by taking on board the entire Strasbourg test, this ruling fortunately ensures jurisprudential harmony with the ECtHR. That said, the combination of two partly different methodologies generates an increased level of complexity now facing domestic judges. It will also be interesting to see whether the Court of Justice will apply the wholistic test in the context of the other directives on procedural rights, given that the ECtHR itself applies it to virtually all aspects of the right to a fair trial. This issue will arise in future cases before the Court of Justice as a matter of coherence.

Concluding remark

Despite some inevitable complexities, the Luxembourg case-law on procedural rights in criminal proceedings seems to be developing into an area of greater convergence with the Strasbourg case-law, thereby facilitating the job of domestic courts. An example for other, less convergent areas?

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[1] See among others IS, C-564/19, para 101; HN, C-420/20, para 55; DD, C-347/21, § 31; similarly: TL, C-242/22 PPU, para 40; Orde van Vlaamse Balies and Others, C-694/20, para 26.

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