



Funded by the European Union

Strategic Litigation for Rights in Europe: Building Knowledge, Skills and Connections for Legal Practitioners to Use the EU Charter of Fundamental Rights (STARLIGHT)

LEGAL CLINIC ARGUMENTS

CRIMINAL JUSTICE

Angelo Stirone, Ionuț Chisăr, Kamila Marciniak, Tünde Komoróczy, Nora Varga



Imprint

Hertie School Executive Education in
collaboration with the Hungarian
Helsinki Committee

Text

Angelo Stirone
Ionuț Chisăr
Kamila Marciniak
Tünde Komoróczy
Nora Varga

Mentor

András Kádár
Laure Baudrihayé

Edited by

Kersty McCourt

Publisher

2024 STARLIGHT

The STARLIGHT programme is funded by The Citizens, Equality, Rights and Value programme (CERV) of the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the EU CERV-Programme. Neither the European Union nor the granting authority can be held responsible for them.



Funded by the European Union

The Legal Clinics are a core part of the STARLIGHT programme, where all participants worked in groups to develop legal arguments on a real or potential case. Groups were mentored by their course leads and one case per thematic stream selected for publication.¹

LEGAL ARGUMENTS

CASE – NATURE OF THE PROBLEM

The case involves four activists volunteering for a Polish NGO which provides basic necessities to refugees in the forest having crossed the Polish-Belarusian border. Ms. O, a Slovak national, and activists X, Y and Z, Polish nationals – were stopped by police officers when returning by car after a humanitarian intervention. The police officers, when stopping the activists, pointed guns at them and shouted that this was how the human trafficking ends. The activists were obliged to remain first in their car and later in the police car and told not to communicate with each other.²

One of the police officers took a mobile phone that was in the activists' car, requested one of the activists to unlock it – without providing information on the right to refuse to do so – and checked the content of the applications, i.e. looked at a map application which showed the way to the activists' house. The officer asked whether that was the place where they kept the refugees and later referred to the place as a 'smuggling base'.

The police officers, together with additional reinforcements, immediately conducted a search of the activists' house, without obtaining a warrant, after making one of the activists to open the house. During the house search the activists were made to stay in separate rooms. The police officer, when asked by activist X whether the activists were under arrest, denied it, but did not allow them to exit the designated rooms.

All activists were questioned simultaneously during the house search, in the house, as witnesses:

- a. activist X was allowed to call a lawyer only after his repeated requests; the police officer decided not to wait for the lawyer to arrive, despite the information that he would appear in approx. 90 minutes, and activist X was questioned without a lawyer present;
- b. Ms. O was questioned without a lawyer present; the police officers decided that Ms. O's Polish was good enough to question her in that language; however, in the report it was indicated that an interpreter was present – the 'interpreter' was one of the officers who did not know Slovak;
- c. activists Y and Z were questioned with their lawyer present; however, they were allowed to talk to their lawyer before their interrogation only in the presence of a police officer.

The lawyer's request to obtain access to the case files was denied by the prosecutor as the activists were told they were merely witnesses in the case.

¹ The final legal arguments have been lightly edited but are the work of the group. Experimental legal arguments were encouraged. Readers are encouraged to draw inspiration from the work but should note that there may be some legal inaccuracies.

² This case is largely based on the actual case but with some facts altered for the purpose of the legal clinic exercise.

The interlocutory appeals against the deprivation of liberty (demanding that the grounds, legality and propriety of the deprivation of liberty be examined) and against the search of the house were filed and the proceedings (conducted by a relevant court) are ongoing.

LEGAL ANALYSIS

1. Introduction

The activists' rights of defence were violated during the criminal proceedings conducted by the Polish authorities. Several EU laws and provisions of the Charter of Fundamental Rights were infringed.

The EU Law analysis starts from the premise that the activists were *de facto* suspects. Even though the criminal investigation bodies suspected that Ms. O and the other activists were involved in an alleged criminal activity, and even though they treated them as suspects, the authorities deprived the activists of their procedural rights.

It is reasonable to assume that the activists were *de facto suspects* and not witnesses, since:

- a. they were stopped by the police officers for several hours and were not allowed to freely move;
- b. during the police intervention, the police officers claimed that the activists were involved in human trafficking;
- c. the severity of coercive measures suggested that the police officers treated the activists as dangerous criminals.

Therefore, the activists should have been made aware, by the competent Member State authorities, that they were suspected of having committed a criminal offence. The activists were, therefore, accused persons within the meaning of the EU Law, meaning that the Polish legal provisions and practice fall within the scope of EU law in the following areas:

- a. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty,
- b. Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings,
- c. Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings,
- d. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

2. EU Law arguments

- i) Potential violation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty

According to the Directive, Member States shall ensure that suspects or accused persons have the right to have their lawyer present and participate effectively in the interrogation (Article 3, Section 1); such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned (Article 3 section 3 b). Moreover, Member States are obliged to ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police (Article 3 section 3 a), and to respect the confidentiality of communication between suspects or accused persons and their lawyer (Article 4). Member States should also facilitate the obtaining of a lawyer by suspects or accused persons and make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right (Article 3 section 4).

Therefore, there is a potential breach of Directive 2013/48/EU as follows:

- a. the activists were denied access to a lawyer in the meaning of the Directive;
- b. the questioning of activist X and Ms. O was conducted without their lawyer. This was in a clear violation of Article 3 section 3b. No exception specified in Article 3 section 5 and 6 occurred, as the lawyer indicated that he would arrive in 90 minutes (the geographical remoteness did not make it impossible to secure the suspect's rights), especially that the activists did not need to be questioned urgently and no immediate action had to be taken;
- c. the fact that activists Y and Z were not allowed to talk with their lawyer privately, without the presence of the police officer, violated Article 3 section 3a, and Article 4.

- ii) Potential violation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings

Directive 2010/64/EU requires that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before i.a. investigative authorities, including during police questioning (Article 2 section 1). According to the Directive, Member States are obliged to ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter (Article 2 section 4). Moreover, the quality of the interpretation must be sufficient to safeguard the fairness of the proceedings (Article 2 section 8) and Member States must take concrete measures to ensure the fairness of the proceedings (Article 5 section 1). In particular, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain about the quality of the interpretation (Article 2 section 5).

Ms. O was deprived of her right to translation and interpretation:

- a) Ms. O's knowledge of the Polish language to the extent of enabling her to take part in the interrogation was determined arbitrarily by the police officers, which violated Article 2 Section 4 of the Directive;
- b) indication in the protocol that the interpretation was provided by a police officer who, did not speak Slovak, breaches the requirements of Article 2 section 8 concerning the adequate quality of the interpretation, and also of Article 5 section 1.

iii) [Potential violation of Directive \(EU\) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings](#)

Directive (EU) 2016/343 provides for minimum rules concerning certain aspects of the presumption of innocence in criminal proceedings.

Member States are obliged to ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed (Article 7 section 1) and that suspects and accused persons have the right not to incriminate themselves (Article 7 section 2). The activist's rights to remain silent were violated, as despite being *de facto* suspects they were questioned as witnesses. They were questioned without the guarantees of a suspect and with the obligations that fall on a witness according to the Polish Code of Criminal Procedure.

According to the Polish law, a suspect may, without giving reasons, refuse to answer certain questions or refuse to give explanations (Article 175 § 1 CCP in connection with Article 71 § 3 CCP). However, a witness may only refuse to answer a question, if the answer might incriminate himself or his next of kin for an offence or a fiscal offence (Article 183 § 1 CCP). The practice of application of Article 183 § 1 CCP suggests that especially witnesses who act without a lawyer, are often refused to effectively invoke this right. Moreover, witnesses are obliged to testify the truth, under the penalty of incarceration from 6 months to 8 years.

Therefore, the activists were not able to refuse to give explanations, which was contrary to their right to remain silent. As a consequence, they were obliged to tell the truth under the criminal penalty which might have led to their self-incrimination.

Moreover, the activists' right not to incriminate themselves was violated as the police officers made one of the activists unlock their mobile phone. Later on, the information on the phone was used to locate the activists' house in which a search was subsequently carried out.

Pursuant to Recitals (27) the right to remain silent and the right not to incriminate oneself imply that competent authorities should not compel suspects or accused persons to provide information if those persons do not wish to do so. To determine whether the right to remain silent or the right not to incriminate oneself has been violated, the interpretation by the European Court of Human Rights of the right to a fair trial under the ECHR should be taken into account.

According to the ECHR, these immunities provide the accused with protection against improper compulsion by the authorities, thus contributing to avoiding miscarriages of justice and to securing the aims of Article 6 (John Murray v. the United Kingdom [GC], 1996, § 45; Bykov v. Russia [GC], 2009, § 92). Through its case-law, the ECHR has identified at least three kinds of situations which give rise to concerns as to improper compulsion in breach of Article 6. One of them is where physical or psychological pressure, often in the form of mistreatment which breaches Article 3 of the Convention and is applied to obtain evidence or statements (Jalloh v. Germany [GC], 2006; Gäfgen v. Germany [GC], 2010).

Since the police pointed guns and shouted at the activists when stopping them, the activists were put under psychological pressure to surrender and provide the police with whatever was demanded from them. They were not given the possibility to decide based on free will, neither were they provided with safeguards (e.g. early access to a lawyer), nor were they informed about the right to refuse to provide access details to the mobile phone. Without the active coerced participation of the activist, the police officers would not have obtained the information about the location of the house. As an extensive search was carried out in the house, in which items necessary to provide humanitarian assistance were stored, it may be assumed that the items secured may constitute a basis for future actions by the police.

iv) Potential violation of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

Directive 2012/13/EU on the right to information in criminal proceedings lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them.

Both Articles 3 and 6 of the Directive 2012/13/EU state that the accused persons must be informed about the accusation and about their rights *promptly*. This means that as soon as the authorities had suspicions that the activists might have been involved in the criminal activity, they should have officially informed the activists about the accusation. Choosing to postpone the moment of informing the suspects about their rights does not entitle the criminal investigation bodies to treat the '*de facto*' suspects as witnesses. Therefore, in this case the Polish authorities failed to perform their obligations according to Art. 2,3 and 6 of the Directive and inform the suspects of their rights.

The violation is even more stringent since the prosecution used the witness statements as evidence against the activists (e.g. based on the statements, the prosecution received access to the phone and the location of the house).

Moreover, the Directive 2012/13/EU states that *where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers* (Article 7 Section 1).

The lawyer's request to obtain access to the case files was denied by the prosecutor on the basis that the activists were only witnesses in the case. However, the activists were accused persons within the meaning of the EU Law, which means that failing to give the activists access to the documents of the case file constitutes a violation of Article 7 Section 1.

3. EU Charter of Fundamental Rights (CFR)

According to art. 51 paragraph 1 CFR, Member States are bound by the Charter when implementing Union Law. In the analysed case, the actions of the Polish authorities fell into the scope of EU law – i.e. the directives indicated above. Therefore, the Polish authorities were also obliged to apply the Charter – *respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.*

In this case, there has been a violation of Articles 47 and 48 of the Charter. The violations of the directive rights that concern the fair trial guarantees and right to defence constitute at the same time violations of Articles 47 and 48 of the Charter.

Article 47: Right to an effective remedy and to a fair trial. Article 47 paragraph 2 of the Charter was infringed because the activists were not given access to a lawyer in due time and because, even after a lawyer arrived, no guarantees of confidentiality for the attorney-client discussions were provided, which means that the activists did not have a real possibility of being advised by a lawyer.

Article 48: Presumption of innocence and right of defense. Article 48 of the Charter was violated because the activists' defense rights were not properly guaranteed. Article 48 is phrased in the way similar to Article 6(2) and (3) of the ECHR. In accordance with Article 52(3), this right has the same meaning and scope as the right guaranteed by the ECHR. Also, the CJEU stated in case C564/19 (paragraph 101) that *"the Court must, accordingly, ensure that its interpretation of Article 48 of the Charter ensures a level of protection which does not disregard that guaranteed by Article 6 ECHR, as interpreted by the European Court of Human Rights (see, to that effect, judgment of 29 July 2019, Gambino and Hyka, C38/18, EU:C:2019:628, paragraph 39 and the case-law cited."* Therefore, this right applies not only to those who were formally presented charges, but also to *de facto* suspects.

The activists' right to be presumed innocent and their defence rights were violated, as has been in detail substantiated above. They were treated as criminals, with verbal violence by police officers, deprived of liberty and denied an effective realisation of their right to a lawyer – all of that despite the fact that they were volunteers, acting to provide humanitarian assistance.

CONCLUSION AND RECOMMENDATIONS

Due to the reasons explained above, several provisions of the EU secondary legislation (the outlined directives) and the Charter were violated.

We recommend taking the following steps in the national proceedings and before the CJEU.

It is possible to argue in the national judicial proceedings regarding the recognition of the interlocutory appeals against the deprivation of liberty and against the search that the Court should directly apply the relevant parts of the Directives.³ The application of EU standards should lead to finding that the deprivation of liberty and the search was groundless, unlawful and improper. Moreover, although the Polish law does not provide rules allowing to exclude the evidence, it could be argued that in order to provide an effective remedy against the violations the Court should oblige the enforcement authorities to exclude any evidence obtained as a result of a search, as well as testimonies of the activists given as witnesses.

Based on our above assessment we recommend asking the court to request a preliminary ruling by the CJEU on the following questions:

- *Whether Article 7 paragraph 2 and Article 10 paragraph 2 of Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings must be interpreted as excluding the possibility of obliging a person to provide a PIN or a security code for their mobile phone or for other personal electronic device;*
- *If the answer to the first question is positive, whether Article 10 of the aforementioned Directive requires domestic bodies (a prosecutor and/or a court of law) to exclude the evidence obtained as a result of providing a PIN or a security code for the mobile phone or for other personal electronic device by the suspect obliged to do that by the law enforcement authorities.*

³ For the purpose of the legal clinic exercise it wasn't possible to fully assess whether Poland has adequately transposed all of the Directives – the above is on the basis that EU law should have been applied / Polish law should have been interpreted in the light of EU law.