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NOTE

from : General Secretariat
to : Delegations

Subject : Draft Resolution of the Council on a roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings

Proposal for a Resolution of the Council and of the Governments of the Member States meeting within the Council fostering the implementation by Member States of the right to interpretation and to translation in criminal proceedings

- Observations by the Council of Europe Secretariat

Delegations will find attached observations by the Council of Europe Secretariat on the draft "roadmap" and on the draft Resolution accompanying the draft Framework Decision on interpretation and translation in criminal proceedings.

Strasbourg, 4 September 2009

Observations by the Council of Europe Secretariat on a Draft Resolution of the Council on a roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings and on a Draft Resolution of the Council and of the Governments of the Member States meeting within the Council fostering the implementation by Member States of the right to interpretation and to translation in criminal proceedings

Introduction

On 16 July 2009, the Swedish EU presidency requested comments from the Council of Europe Secretariat on a Draft Resolution of the Council on a roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings (Council document 11987/09 DROIPEN 62), and on a Draft Resolution of the Council and of the Governments of the Member States meeting within the Council fostering the implementation by Member States of the right to interpretation and to translation in criminal proceedings (Council document 12116/09 DROIPEN 66).

The Council of Europe Secretariat notes with great appreciation the constructive approach taken by the Swedish Presidency in involving the Council of Europe from an early stage in the elaboration of new instruments concerning procedural rights in criminal proceedings. It also notes with satisfaction that earlier comments and exchanges, both formal and informal, have been carefully considered in the process of elaboration and revision of the various documents in preparation.

The Council of Europe Secretariat reaffirms its support for the establishment of common minimum standards in procedural rights at the EU level and for the step-by-step approach proposed by the Swedish Presidency, provided that overall coherence of the various measures is ensured, as a meaningful contribution towards mutual trust in the member states' criminal justice systems. At the same time, it wishes to reiterate the need to ensure that new EU legal instruments fully comply with the provisions of the European Convention on Human Rights and facilitate the application of the standards set therein, as interpreted in the case-law of the European Court of Human Rights.

These comments have been prepared in cooperation with the Registry of the European Court of Human Rights.

A. Draft Resolution of the Council on a roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings

The draft resolution is based, to a large extent, on a draft roadmap which had been submitted to the Council of Europe by the Swedish Presidency in June 2009, and on which the Council of Europe Secretariat had formulated a number of comments. We refer therefore to the comments submitted on that occasion, welcoming the fact that many of these comments have been taken into account in the elaboration of this new draft. We appreciate, in particular, the reference to the need to ensure that any new legislative acts in this field should be "Strasbourg-proof". In this respect, we would reiterate the proposal to establish a compendium of ECHR standards related to all measures foreseen in the roadmap.

In addition, the Council of Europe Secretariat would recommend that full consistency is sought in the use of terms and definitions throughout the different documents in preparation in order to avoid possible doubts as to the scope of application of different instruments and provisions. We note, for instance, that while the draft Framework Decision uses in article 1, paragraph 2 the term "suspect", giving to it a broad sense, the Title of one of the draft resolutions and various paragraphs of both texts use the expression "suspected and accused in criminal proceedings", including when referring to the rights to interpretation and translation. Is there any special reason for these variations in terminology?

In line with the comments made with respect to the Stockholm Programme, the Council of Europe considers that the consolidation and the possible enhancement at the EU level – through the adoption new EU instruments – of the standards of the ECHR and its protocols, as interpreted by the European Court of Human Rights, would contribute to the further development of a common European legal area, in which co-operation with the relevant Council of Europe bodies and mechanisms could play an important role. We would therefore suggest that a reference be made in the draft Resolution on co-operation with the Council of Europe in the context of the measures to be adopted under the Roadmap.

Regarding Measure B of the Annex (Information on Rights and Information about the Charges), the sentence “it being understood that this should not prejudice the due course of the criminal proceedings” may give way to an excessively broad interpretation of the admissible exceptions to the right of access to the file. The case-law of the European Court of Human Rights has admitted the possibility of limitations of this right for particular reasons of confidentiality or secrecy of some documents (e.g. for ensuring the confidentiality of the investigation, or for national security considerations), or to the access to the file by the accused if his/her lawyer has already been granted such access. Nevertheless, limitations should never cause undue difficulties to the accused and his/her lawyer in the preparation of the defence, and should not infringe the principle of equality of arms, whereby each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent (see for instance *Kamasinski v. Austria*, *Faucher v. France*, *Ocalan v. Turkey*, but also *A. and others v. United Kingdom and Mooren v. Germany*, where the issue of access to the file is raised under article 5, paragraph 4 of the ECHR). Insofar as the wording “The right to information should also include access to the file for the individual concerned” seems sufficiently general for the purpose of the description of Measure B and does not prejudice the precise definition of this right and of the possible limitations thereto during the future drafting of Measure B, it is suggested to delete the sentence “it being understood that this should not prejudice the due course of the criminal proceedings”. If a reference, already in the Roadmap, to the possibility of limitations is deemed important, we would suggest a more general phrase, such as “it being understood that certain limitations to this right may be legitimate”.

Finally, concerning Measure D, the redrafting proposed, which shifts the focus of the right to communication from the individual concerned to the information itself, seems compatible with the standards of the Convention and of the CPT. It could however be suggested to use a more general wording instead of “relatives and employer”, such as “a third party of his/her choice”¹, and to refer to the communication with the Consular authorities as an opportunity to be offered to the person concerned. It may also be appropriate to specify that information should be provided without delay. In the light of these suggestions, Measure D could read as follows:

“When a person has been deprived of his/her liberty, a third party of his/her choice is to be informed without delay of the deprivation of liberty. The person should also be given the opportunity to contact, where appropriate, his/her consular authorities.”

The title of the measure could be also redrafted accordingly into “Communication with third parties”.

B. Draft Resolution of the Council and of the Governments of the Member States meeting within the Council fostering the implementation by Member States of the right to interpretation and to translation in criminal proceedings

The Council of Europe welcomes the initiative of complementing the draft Framework Decision with a Resolution providing guidance on concrete measures to foster the implementation of this right.

As a general comment, it appears that the draft Resolution is focused almost exclusively on the proficiency of the translators and interpreters. It would seem that there are, in addition, other practical modalities to make effective the right of suspect persons to interpretation and translation in criminal proceedings which could usefully be taken up in the Resolution.

¹ See “The CPT Standards - ‘substantive’ sections of the CPT’s General Reports”, paragraph 36.

With respect to training (paragraphs 6 and 7), for instance, the Council of Europe Secretariat considers that training of judges, court officials, lawyers and police officers would be equally important in order to provide them with the necessary and adequate skills to recognise the circumstances in which interpretation and translation are necessary in order to ensure the respect of the rights of the suspects. This principle is mentioned in Article 5, paragraph 2 of the draft framework decision; it would merit being reflected also in the Resolution on practical measures.

Similar considerations could also apply with respect to other provisions which state a principle but provide little or no specific guidance or practical measures (e.g. paragraph 8 on persons with hearing or speech impediments, where the only measure proposed is specific training for interpreters, or paragraph 19 on the needs of minors and persons with disabilities).

As far as the engagement of accredited/certified interpreters and translators is concerned, the difference in the qualifications required, which would be higher in the case of official languages of the European Union, may have a potentially discriminatory effect with respect to the suspects. Although the Convention does not prescribe accreditation for interpreters and translators, Article 6 requires – as already indicated above – that the quality of interpretation and translation be adequate in order to ensure that the accused is able to understand his/her case (documents, proceedings etc.) without undue difficulties and that the principle of equality of arms is not infringed. However, and although paragraph 16 contains a number of guarantees which would be required also for interpretations and translations in cases involving a language which is not an official language of the EU, the current draft makes a rather pronounced distinction between the two situations, while not giving any reason to justify a possible difference in treatment of suspects according to the language they speak. In this respect, it should be recalled that Article 14 ECHR (prohibition of discrimination) applies not only when discriminatory measures *violate* other rights of the Convention; it is sufficient, for the applicability of Article 14, that the differential treatment concerns a matter which *falls within the ambit* of another ECHR right (in the present case, Article 6).

We would therefore suggest that the provisions of paragraphs 15 and 16 be reformulated so as to create a general rule, whereby Member states should ensure that interpretations and translations are carried out only by accredited/certified interpreters and translators. An exception could then be added for cases in which it is not reasonably possible to use an accredited/certified interpreter or translator, provided that particular attention is paid to the quality of the interpretation or translation.

With respect to the possibility of making use of remote devices for interpretation and translation, the Council of Europe Secretariat considers that while such a provision would give rise to no particular difficulties concerning translation (although the concept of remote devices applied to translation seems somewhat difficult to understand, apart from the aspect related to the transmission of the translation), in the case of interpretation the use of this solution should be restricted to very exceptional cases. In the absence of specific Court case-law, the test to apply to remote interpretation would be, as usual, that the suspect is able to have full knowledge of the case, and that the interpretation provided does not compromise the entitlement to a fair trial. This being said, these conditions seem certainly more difficult to fulfil if the interpreter and the suspect are not physically in the same room, as a suspect may often need to discuss bilaterally with and to ask for specific clarification to the interpreter, circumstances that that it may be difficult to reproduce using remote interpretation. If these devices may be useful in exceptional circumstances, the use of the expression “in situations where it is appropriate” seems to open the way to a large use of remote interpretation, including in situations where compliance with Article 6 ECHR could be questioned. It is therefore suggested to redraft paragraph 17 stressing the exceptionality of the circumstances justifying the use of remote interpretation, and adding a reference to the particular need, in these cases, for high quality videoconference facilities.

Finally, it can be observed that Paragraph 23(a) seems to extend the scope of application of the draft resolution, at least as far as data collection is concerned, not only to suspects (in accordance with the meaning given to this expression in the draft Framework Decision), but to all persons questioned in respect of a criminal offence.