

Witness protection in european and slovenian law

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The regulation of witness protection is very complex. It is regulated in Slovenian law, law of European Union and law of the Council of Europe. All legislations are connected and influenced by each other. Slovenia is a member of both, The Council of Europe and European Union (EU), and is consequently obliged to adapt our legislation to acts of EU and Council of Europe and the European Court for Human Rights (ECHR) case law. It is important to stress out that acts, adopted by EU, refer to European Convention on Human Rights¹ and even to ECHR case law.

Secondly, two types of witnesses are protected in every law. First there are the victims of the crime. They are protected in order to prevent secondary victimisation. On the other hand there are witnesses, who are protected due to their precious knowledge about crime and may enable successful prosecution of the defendant, but are under a threat of vengeance from the defendant. This article is orientated to the last type of witnesses.

In this article I put my emphasis on the law of EU. Since the European Court of Justice (ECJ) has already given one preliminary ruling on witness protection, I also present the court's decision. In Slovenian legislation, which has been gravely influenced by numerous acts from European Union and also legislation from European countries, I make a quick overview on basic acts on witness protection and present two judgements of the Slovenian Constitutional Court.

1. The law of European Union. *The Treaty on European Union from Maastricht² established the three pillar constitution of EU, the third pillar being the cooperation in the field of justice and home affairs. The Amsterdam Treaty³ preserved the three pillar constitution, but changed its content. The third pillar now contains only police and judicial cooperation in criminal matters. The European area of freedom, security and justice should be established eventually through police and judicial cooperation and harmonisation of legislation. This is also the legal basis for enactment of numerous (legal) acts on witness protection. Witness protection has been introduced into European law as a tool to an efficient fight against international organised crime and lately also against terrorism. Almost every witness protection act in EU legislation refers to European area of freedom, security and justice or efficient fight against crime. Witnesses are guaranteed protection in exchange to testifying against alleged suspects in order to secure his conviction.*

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¹ Rome, 4.11. 1950.

² OJ 191, 29.11. 1992.

³ The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Union and related acts, Official Journal C 340, 10.11 1997.

*The presidential conclusions of European Council in Tampere*⁴ stipulates that minimum standards should be drawn up for the protection of victims of crimes⁵ and according to *Treaty establishing a Constitution for Europe*⁶ the European Council has a jurisdiction to adopt European laws or framework laws, which would among other things, establish minimum rules concerning the rights of individuals in criminal proceedings and the rights of victims of crime.⁷ Such rules should take into account the differences between the legal traditions and legal systems of member states.

As said before, there are numerous acts, which include regulation of witness protection. On one hand, many action plans and recommendations on how to efficiently fight international organised crime and terrorism recommend member states to reconsider the possibility of granting protection to individuals in exchange to their cooperation in criminal procedure.⁸ On the other hand EU has adopted acts, which specifically regulate witness protection, such as *Resolution of the Council of 23 November 1995 on the protection of witnesses in the fight against international organized crime*,⁹ which refers to fight against international crime. The act defines witness as “any person, whatever his legal status, who possesses intelligence or information regarded by the competent authority as being material to criminal proceedings and liable to endanger that person if divulged.”¹⁰ As the effective protection of witnesses reduces the defendant’s ability to defend himself, the regulation of witness protection should comply with the European Convention on human rights (ECHR). Member states should guarantee proper protection of witnesses before, during and after the trials, where competent state authorities deem this necessary. The witnesses should be protected against all forms of direct or indirect threat, pressure or intimidation. To avoid indirect pressure, the protection should be extended also to parents, children and other close relatives of witnesses if necessary.

The deciding authority should be able to decide that the address and identifying particulars of the witness should be known only to this authority. The change of identity is available, but only if the threat is extremely serious. The

⁴ 15th and 16th October 1999.

⁵ In particular crime victims' access to justice and on their right to compensation for damages, including legal costs.

⁶ The Treaty hasn't been enacted yet. It still remains opened, whether it will ever be. It is nevertheless very interesting, because it deeply infringes the sovereignty of the member states, especially because the criminal law is considered the last defender of the state sovereignty. http://europa.eu/constitution/index_en.htm (06.03.2007).

⁷ Art. 270/II.

⁸ For example: Action programme on the prevention and fight against organised crime; The prevention and control of organised crime: a European Union strategy for the beginning of the new millennium; The Declaration on combating terrorism; Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice; EU/IOM project »Establishment of the network of and joint training for operational law enforcement officers, NGOs and IOs in fighting human trafficking into the EU member states from EU accession countries and countries bordering the EU after enlargement«.

⁹ OJ C 327, 7.12. 1995.

¹⁰ Resolution, art. 1.

adversary principle as interpreted in the case law of the ECHR¹¹ should be still respected, even though the witness gives evidence in a place other than that in which the person being prosecuted is situated, through the use, if necessary, of audiovisual methods. Special regulation is needed, if audiovisual methods are used between two or more member states. It should be considered, whether the hearing may be conducted under legal and practical conditions of the requesting state. Member states should also mitigate judicial assistance in the field of witness protection.

Another important act is *Council Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organized crime*.¹² It refers to “greater and more efficient cooperation in the EU context in combating international organised crime” and emphasises, that “knowledge of criminal organizations may be significantly improved and their activities more effectively curbed by using the statements made to the competent authorities by members of such organizations who agree to cooperate with the judicial process and that consequently individuals should be encouraged to cooperate with the judicial process.”¹³ According to this the member states should adopt appropriate measures to encourage individuals who participate or have participated in an association of criminals or other criminal organization of any kind, or in organized crime offences, to cooperate with the judicial process. The document is very important because it defines cooperation with the judicial process as supplying information useful to the competent authorities for investigative and evidential purposes¹⁴ and providing practical, concrete help to competent authorities which may contribute to depriving criminal organizations of illicit resources or of the proceeds of crime.

Member states should assess the possibility of granting benefits to individuals, who break away from a criminal organization and do their best to prevent the criminal activity being carried further, or provide specific help to the police or judicial authorities to collect evidence which proves decisive in reconstructing the facts and identifying the perpetrators of the crimes or leading to

¹¹ The ECHR formed its case law on anonymous witness in the spectre of the right to test witness evidence. The Court acknowledged some exceptions to this right, also in the case of intimidated witness or undercover agents. According to Trechsel the Court “proceeds in three steps. First it examines whether the reason invoked as an exception actually existed, and whether it had been subject to serious examination by the national authorities. Second, it asks whether the restrictions on the defence rights were kept to a very minimum, and whether they were strictly necessary in order to satisfy the legitimate aim of protection. Finally, there is an examination of whether the rights of the defence were adequately compensated for the shortcomings.” Trechsel, *HUMAN RIGHTS IN CRIMINAL PROCEEDINGS* (2006), p. 313.

The basic cases are *Doorson v. Netherlands*, *Kostovski v. Netherlands and Van Mechelen and others v. Netherlands*.

¹² OJ C 10, 11.1. 1997. <http://legislationline.org/legislation.php?tid=155&lid=5691&less=false> (02.03.2007).

¹³ Introductory articles to the resolution.

¹⁴ Information on the composition, structure or activities of criminal organizations, links, including international links, with other criminal groups and offences which these organizations or groups have committed or might commit.

their arrest. The benefits should be granted according to the basic principles of national law.¹⁵ The resolution puts emphasis on judicial assistance between member states, as do all other EU acts.

Among other documents I should name *Convention on mutual assistance in criminal matters between member states of the European Union*.¹⁶ Articles 10 and 11 regulate hearing of witness by videoconference or telephone conference, when a person is in one member state and has to be questioned as a witness by judicial authorities of another member state. If it is not desirable or possible for the person to appear in person, one can testify by videoconference, if that isn't contrary to basic legal principles of the requested member state. The request for hearing by videoconference should contain also the reason for not attending in person. Judicial authority of the requested member state should be present during the hearing, to be responsible for ensuring both the identification of the person to be heard and respect for the fundamental principles of the law of the requested member state. Where it is necessary, states should form an agreement to adopt measures for witness protection.

Slovenian Witness Protection Act is based on *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings*¹⁷. The reason for special victim protection is the prevention of secondary victimization. That is why member states should adopt measures to help victims before, during and after the criminal procedure. The basic article for victim and witness protection (as long as these categories do not coincide) is article 8. It guarantees the right to protection: "each member state should ensure a suitable level of protection for victims and their families or persons in similar position, if competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy."¹⁸ Each state should also prevent contact between victims and offenders within court and adopt appropriate measures to protect the privacy and photographic image of victims, their families or persons in a similar position. These measures should not interfere with the victim's right to information. Particularly the most vulnerable victims are entitled to protection against effects of giving evidence in open court. They should be entitled to testify in a manner that will protect them, but be still compatible to the basic principles, including the adversary principle.¹⁹

¹⁵ Criminal Code in its 42nd regulates the possibility of sentencing the defendant to the punishment under the legislation limit or to the milder type of sentence, if he cooperates with the judicial process. Art. 42 of Criminal Code of Slovenia, RS, 95/2004.

¹⁶[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=42000A0712\(01\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=42000A0712(01)&model=guichett) (02.03.2007).

¹⁷ OJ L 82, 22.3. 2001.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001F0220:SL:NOT> (02.03.2007).

¹⁸ Art. 8

¹⁹ The framework decision ensures also other rights of crime victims: respect and recognition; right to receive information; communication safeguard; specific assistance to the victim; reimbursement of expenses incurred as a result of their legitimate participation in criminal proceedings; right to compensation in the course of criminal proceedings; penal mediation in the course of criminal proceedings.

2. The case law of European Court of Justice. The ECJ delivered the judgement in the case *C-105/03, Maria Pupino* in June 2005.²⁰ The ECJ gave preliminary ruling on the interpretation of certain articles of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (more precisely: articles 2, 3 and 8). The Italian court asks whether, on a proper interpretation of Articles 2, 3 and 8/IV of the framework decision, a national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements ensuring them an appropriate level of protection, outside the public trial and before it is held.²¹

In Italy the Public Prosecutor's Office asked the judge in charge of preliminary enquiries "to take the testimony of eight children, witnesses and victims of the offences, by the special procedure for taking evidence early, on the ground that such evidence could not be deferred until the trial on account of the witnesses' extreme youth, inevitable alterations in their psychological state, and a possible process of repression."²²

The referring court states that "under the national provisions the application of the Public Prosecutor's Office would have to be dismissed. Those provisions do not provide for the use of the Special Inquiry procedure, or for the use of special arrangements for gathering evidence, where the facts are such as those alleged against the defendant, even if there is no reason to preclude those provisions also covering cases other than those referred to in which the victim is a minor. A number of offences excluded from the scope of Italian criminal code might well prove more serious for the victim than those referred to in that provision. That, in the view of the national court, is the case here, where, according to the Public Prosecutor's Office, the defendant maltreated several children aged less than five years, causing them psychological trauma."²³

The framework decision does not define the concept of a victim's vulnerability. However, "it cannot be denied that where, as in this case, young children claim to have been maltreated, and maltreated, moreover, by a teacher, those children are suitable for such classification having regard in particular to their age and to the nature and consequences of the offences of which they consider themselves to have been victims, with a view to benefiting from the specific

²⁰<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&alljur=alljur&juredj=juredj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=allldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=allldocnorec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=CPJP&mots=witness+protection&resmax=100&Submit=Submit> (02.03.2007).

²¹ Pt. 50.

²² Pt. 16.

²³ Pt. 17.

protection required by the provisions of the framework decision referred to above.”²⁴

Consequently the ECJ gives a ruling, that “articles 2, 3 and 8/IV of the framework decision must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place.

The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the framework decision.”²⁵

3. The regulation of witness protection in slovenian law. In Slovenian law, the precise and ample regulation of witness protection is rather new. *Criminal procedure act* had some general provisions on witness protection even before amendment. Witness was protected when giving testimony in investigation and on trial. With an act amending criminal procedure act (2004) the circle of endangered persons, entitled to witness protection, broadened. It also regulated more precisely the procedure of deciding, whether the person is entitled to witness protection in the phase of judicial investigation and trial. Another act amending criminal procedure act was adopted in 2005. It, again, slightly changed the range of persons, who are entitled to witness protection.

Then in 2005 *Witness protection act* was adopted. It regulates conditions and procedures for witness protection and for protection of other person, who are endangered due to their cooperation in criminal procedure.²⁶ In this aspect, Slovenian act is broader than Framework decision on standing of victims in criminal procedure, which regulates only witness protection, when Slovenian act protects also others.²⁷ Special department of the Slovenian Police has been established: Department for witness protection. It executes the witness protection in practice. The decision to include a person in witness protection programme or to terminate it is made by the Commission for witness protection on the proposal of a supreme state prosecutor. The Commission has four members: a supreme judge, a supreme state prosecutor, a representative of Ministry of Interior and Ministry of Justice. The act precisely defines measures for witness protection, including psychological, social and legal assistance, which is emphasised in the framework. The Department for witness protection should cooperate with non-governmental organisations.

²⁴ Pt. 53.

²⁵ Pt. 62.

²⁶ According to introductory articles of the framework decision, the witness should be assisted not only in criminal procedure, but also before and after criminal procedure.

²⁷ Art. 4 Witness protection act: ”The Act is also used for suspects and accused persons, whose punishment can be mitigated and who are endangered because they prevented crime or revealed information, relevant for investigation and prosecution of the committed acts. The act is used also for persons who are endangered because of their relation to suspects and accused persons.”

This act regulates also all the legal and technical questions concerning witness protection programme. This act ensures stronger protection than Criminal procedure act, which guarantees protection only in investigation and on trial, in judicial phase. It was adopted according to European framework decision but it also considers experiences from other states.

Consequently also *Act on execution of penal sanctions*²⁸ needed to be amended in 2006. The legislator adopted measures for appropriate protection of prisoners, who are protected according to witness protection programme.

I think I should also stress two decisions, made by the Constitutional Court of the Republic of Slovenia.²⁹ The facts of the cases are almost similar. The criminal act in question was illegal production and trafficking of drugs, in which Slovenian police often uses undercover police co-workers. In these two criminal procedures the defence requested undercover police co-workers to be questioned, but the court denied the request. Instead the court questioned police coordinators, who had supervised the police activity and only read the report, made by undercover police co-workers. This report was also an exhibit in the procedure.

In case Up-754/04 the Court decided, that the mere fact, that the court denied the request to question directly the undercover police co-worker, who had written the incriminating report about the defendant, doesn't automatically mean that the defendant's right to test witness evidence has been infringed. The ECHR and the Slovenian Constitutional Court have developed test; the right has been infringed when the conviction is based solely or decisively on the evidence in question. This is the case also when the court has judged other evidences in a way, whether they collaborate the witness's statements or not.³⁰

In both cases the Court judged, that it is not defendant's duty to justify, what would be content of the undercover police co-worker testimony and in which way his testimony will influence the verdict. Defence has the duty of justification only when the witness's testimony should accomplish defendant's acquittal. When the court uses aggravating testimony as evidence, it should enable defence to test the evidence according to ECHR case law. And as defendant hasn't had the possibility to question undercover police co-workers, his right to test witness evidence has been infringed.³¹

Court decided to annul both the previous trials and ordered a new trial, in which the defendant's right to test witness evidence should be enabled. It is interesting that the Court points out to witness protection legislation according to Criminal procedure act. The appeal to The Constitutional Court had been filed before the act was amended and the witness protection was improved. However, in the new procedure, new, improved legislation should be used. In disputed criminal procedures courts didn't even think of the possibility to use measures to protect the witness and at the same time question them. They simply refused to question the

²⁸ 110/2006.

²⁹ Up-518/03, Ur. l. RS, 11/2006 and Up-754/04, Ur. l. RS, 101/2006.

³⁰ Up-754/04, pt. 12.

³¹ Up-518/03, pt. 16 and Up-754/04, pt. 18.

witnesses (in one case court primarily even asked the Ministry of the Interior to disclose the witness's identity so the court could summon them for questioning, but the Ministry declined and consequently the court gave in and declined the defendant's request³²).

4. The conclusion. In witness protection regulation there are two human rights that need to be respected. First is the reason, why the witness is protected: to protect witness's life, health and personal safety. The ECHR concurred to this in case *Doorson v. Netherlands*³³ where it stated that "article 6³⁴ does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of article 8³⁵ of the convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the convention, which imply that contracting states should organize their criminal proceedings in such a way that those interests are not unjustly imperilled."³⁶ Others and especially the European acts emphasize the efficiency of the criminal procedure and efficient fight against organized crime and terrorism. "The efficiency of the fights against crime is substantially infringed by the fact that witnesses are afraid to testify or to tell the truth."³⁷

However, there is the opposite aspect of this matter: the right of the defendant to defend himself (article 29 of the Slovenian Constitution) and the right to test witness evidence (article 6 of the European convention on human rights). All documents acknowledge these aspects. They need to be in balance, but I think that different institutions put emphasis on different aspects.

As EU tends towards efficient fight against terrorism and organized crime, Slovenian Constitutional Court and ECHR acknowledge legitimate interest of the state and witness to witness protection, but they also stress out that the protection needs to be counterbalanced by defendant's rights. EU mentions European convention on human rights and the case law of ECHR, but it should be noticed that EU got the jurisdiction for criminal matters primarily for the purpose of effective fight against international organized crime and crime against financial interests of the EU. And that all criminal questions are regulated in the purpose of

³² Up-518/03, pt. 12.

³³ 54/1994/501/583.

³⁴ Of the European convention on human rights: »Everyone charged with a criminal offence has the following minimum rights: ... (d) 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.«

³⁵ »Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.«

³⁶ *Doorson v. Netherlands*, pt. 70

³⁷ Horvat, ZAKON O KAZENSKEM POSTOPKU S KOMENTARJEM (2004), p. 554.

creating European space of liberty, justice and security. There is also no valid and binding convention on rights in EU, all members of EU are also the contracting parties of European convention on human rights, but the EU itself isn't. Consequently no ECHR's decision is binding for EU as a legal person and there is also no other authority that would counterbalance European efficient measures by defendant's rights, by annulling the act, if necessary. But that is the main problem of all European acts, not just the one on witness protection. There is no authority in EU or elsewhere that would have the same role for European acts as the ECHR has for acts adopted by contracting parties in the Council of Europe.

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