Fair Trials

A.T. v Luxembourg: European Court of Human Rights follows EU law on access to lawyer

On 9 April 2015, the European Court of Human Rights ('ECtHR') gave judgment in *A.T. v Luxembourg*, a case taken by Mr Roby Schons, Advisory Board member for Luxembourg of the Legal Experts Advisory Panel (LEAP), in which Fair Trials intervened.

The judgment, which will become final unless referred to the Grand Chamber, in finding a violation of Article 6 of the European Convention on Human Rights (ECHR), develops the principles established in the *Salduz v Turkey*. At Fair Trials' invitation, it also takes into account, for the first time, Directive 2013/48/EU on access to a lawyer in criminal proceedings (the Access to a Lawyer Directive).

Background

A.T. was questioned by police following surrender under a European Arrest Warrant (EAW) (as to the cross-border aspect of the case, see the post-script). On arrival, he demanded a lawyer, following which information was given to him which caused him to accept to be questioned without one; he denied the offences. He was then questioned again before the investigating judge, with a lawyer present but (a) without having had the chance to talk with that lawyer beforehand and (b) without the lawyer having had sight of the case file prior to that questioning; again, he denied the offences.

At trial, A.T. argued that his defence rights had been breached, as he had been denied access to a lawyer. The appeal court, and after that the Court of Cassation, rejected this, finding that he had 'waived' his right to a lawyer and that it therefore had no obligation to remedy any prejudice caused. This being the last instance, A.T. applied to the ECtHR arguing a violation of Article 6 ECHR.

The legal territory: the *Salduz* principle

The case was decided by reference to the ECtHR's 2008 judgment in *Salduz v Turkey*, which established that a person charged with a criminal offence has a right of access to a lawyer 'as from the first interrogation by police', and that the rights of the defence are irretrievably prejudiced if incriminating statements made in the absence of a lawyer are used for a conviction.

There are, however, some unanswered questions about this principle. No case had yet raised the question whether the principle applied where a person denied the offences when questioned in the absence of a lawyer. Nor had it been clarified whether the presence of a lawyer satisfied the principle if that lawyer had not had an opportunity to discuss the case with the client first, as the case may be on the basis of a prior examination of the case file.

Fair Trials' intervention

Fair Trials has, in the last 18 months, begun to intervene in cases before the ECtHR in certain case to inform it of the developments within the EU regarding defence rights in criminal proceedings. The *Salduz v Turkey* judgment – which led to waves of reform, including within older Member States e.g. in France and Scotland – highlighted the absence of common definitions of defence rights in the EU.

Experts confirm that there are serious problems in practice arising from the lack of respect for international standards. This is the ECtHR's summary of Fair Trials' view on this in *A.T. v Luxembourg*,

based on consultations with lawyers in 25 Member States in 2012-13: 'many suspects encounter serious difficulties in the exercise of this right, in particular due to legal or practical restrictions on the right of access to a lawyer, a prevalence of supposed 'waivers' of the right whose reliability is questionable, and ineffective remedial action by the courts to repair violations' (at 59).

With Member States required to cooperate on the basis of mutual trust, such concerns are problematic (more on this in the postscript). So, in 2009, the EU adopted a 'Roadmap' setting out a step-by step plan to adopt measures on key defence rights under the new legal basis of Article 82(2)(b) of the Treaty on the Functioning of the EU ('TFEU'), in order to strengthen mutual trust.

After Directive 2010/64/EU on the right to interpretation & translation and Directive 2012/13/EU on the right to information, came the Access to a Lawyer Directive (together, the Roadmap Directives). As we explained in our intervention, the Directive sets minimum standards regarding access to a lawyer, the waiver of the right to a lawyer and remedies when that right is infringed.

Fair Trials argued that the ECtHR was entitled to take account of the Access to a Lawyer Directive as an indicator of consensus within the EU (over half the Council of Europe) as to the requirements of a fair trial as protected by the ECHR. We are, essentially, hoping that EU law may lead the ECtHR to interpret the ECHR progressively so as to match the EU law standard, possibly triggering an upward spiral between the two systems.

The decision

1. *You cannot waive a right that you do not have*

The decision found a violation of the right to a lawyer. The judgment clarifies that when there is no legal right to a lawyer – as was the case at the time in Luxembourg for the narrow category of persons questioned following surrender under a European Arrest Warrant (EAW) – there is no question of that right being 'waived': you cannot waive something to which you have no right.

2. *If access to a lawyer is denied, a remedy may be needed even in absence of a confession*

That being established, the ECtHR found that the courts had infringed Article 6 ECHR by not making taking any remedial action to repair the restriction on A.T.'s right to a lawyer. This might have included, for instance, excluding his statements, ensuring any conviction was not contaminated by evidence obtained in breach of the right to a lawyer as required by the *Salduz* doctrine.

It is worth noting, in that regard, that Luxembourg had argued that no violation of Article 6 arose because A.T. had denied the offences. In this logic, *Salduz* only prevents 'incriminating statements' from being used for a conviction, so if a person makes no confession, no prejudice is caused to the overall fairness of proceedings and there is no need for courts to take remedial action.

Fair Trials had argued for a more protective line. Relying on the broader language of Article 12 of the Access to a Lawyer Directive, which refers to 'statements', not simply confessions, we noted that a person might compromise themselves in other ways, e.g. saying too much or too little, speaking confusedly under pressure, damaging their credibility vis-à-vis other witnesses etc.

The ECtHR followed this line, pointing out that A.T. had 'changed his story' during the proceedings and that the statements made in absence of a lawyer, though denials of the allegations, were held

against him in that way. This is a useful addition to a line of cases which had so far only dealt with total silence, clear confessions and consistent denials. It means courts need to evaluate carefully what happened in the early stages and take remedial action.

It is worth noting, on this point, that there appeared to be some divergence in the case-law: one case, *Dvorski v. Croatia*, suggested convictions would be Article 6-compliant even if a confession was factored in somewhere, provided it was not the 'sole or decisive basis' of that confession. Another, *Martin v. Estonia*, pointed to a much more rigid approach, requiring any prejudice caused by the early defence rights breach to be 'completely undone'. The former case has now been referred to the Grand Chamber and it is to be hoped that the latter will be adopted as the correct approach.

3. Access to a lawyer includes a right to prior consultation before questioning

The judgment is, perhaps, most notable for its extension of the Article 6(3)(c) ECHR case-law by stating confirming that access to a lawyer includes a right to consult with that lawyer privately before any questioning takes place. The legal assistance provided to A.T. during the questioning, without such a prior opportunity, was not 'effective' and so did not meet the requirements of the ECHR.

Enthusiasts of the Roadmap will be delighted to note that in so finding, the ECtHR took account of Article 3(3)(a) of the Access to a Lawyer Directive which articulates this requirement in black and white. This is the first time one of the Roadmap Directives has been relied upon in the interpretation of the ECHR, an interesting example of convergence in the complex and evolving relationship between the ECHR and EU law.

Postscript: the questions with mutual trust

The facts of the case note that A.T. was tried in Luxembourg following surrender under an EAW from the UK. Search in the English databases, and you will find that when resisting surrender to Luxembourg, one A.T. – it is clearly the same one – resisted surrender to Luxembourg arguing that the conviction against him infringed the Article 6 ECHR: he had been questioned without a lawyer and convicted on the basis of his statements made at that time, and surrendering him to Luxembourg would therefore infringe his fundamental rights.

The approach to such a case in the surrendering state is a live issue. The Court of Justice of the EU (CJEU), in its recent Opinion 2/13 on the EU's accession to the ECHR, informed the community that in the EU justice and home affairs area, Member States were required by EU law to presume each other's compliance with fundamental rights and should not, save in exceptional circumstances, be required by the European Convention on Human Rights (ECHR) to check whether they have done so. This led Prof. Steve Peers to identify a 'moral duty to reject the EU's accession to the ECHR'.

Behind the CJEU's posture, though, the real position may be less worrying. As Judge Lars Bay Larsen, the Danish member of the CJEU, recently pointed out to the LEAP Annual Conference in February, recital 19 of Directive 2014/41/EU on the European Investigation Order (EIO) – the newest mutual recognition instrument, adopted in light of lessons earned in the asylum and extradition contexts – states clearly that in such a system, there is a presumption of compliance, but that the latter is rebuttable; thus, where there 'substantial grounds for believing that [the execution of the EIO] would result in a breach of a fundamental right', this should be refused.

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