

THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS IMPACT ON THE DEFINITION OF THE LANGUAGE ASSISTANCE AS A FUNDAMENTAL RIGHT OF THE THIRD-COUNTRY NATIONALS¹

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Abstract: The paper focuses on the specific aspects of the provision of the language assistance to the third-country nationals arriving into the territory of the European Union. Being defined as one of the fundamental human rights, particularly within the criminal proceedings, the language mediation is provided across the EU Member States in various ways. Different approaches are presented from the perspective of the European Court of Human Rights Judgments related to the violation of Article 5§2 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Based on the European Court of Human Rights Case-Law, the author presents possible solutions to the remaining challenges faced by the EU Member States when providing the language assistance to third-country nationals arriving into the territory of the EU.

Keywords: fundamental human rights, third-country nationals, language assistance, procedural safeguards, detention, intercultural communication.

INTRODUCTION

Even though the COVID-19 pandemics reduced the numbers of people migrating across the European Union (EU) borders, migration remains one of the most topical issues at the European level even in 2021. “The COVID-19 pandemic has affected migration and human mobility in the European re-

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gion as countries have restricted international, transborder and internal movements to minimize the spread and impact of the pandemic. As of mid-June 2020, 6 per cent of airports, 25 per cent of land border crossing points and 9 per cent of “blue border” (sea, river or lake) crossing points were closed for their entry and exits in the European Economic Area (EEA)” (IOM, 2020). However, illegal migration of third-country nationals arriving into the territory of the EU Member States remains an issue that still needs to be addressed as, according to the International Organization for Migration (IOM), the total number of illegal migrants and asylum seekers who arrived in Europe in 2020 was 128,536, respectively. With such number of foreigners, the national governments of the individual Member States face the challenges in terms of providing funding to address migration and tackle the need to provide adequate housing, health care, education, legal aid, and also *language assistance*³ to the arriving migrants, even they are entering the territory of the EU illegally and consequently are detained in the detention facilities. *“The provision of the language assistance along with the cultural mediation for the third-country nationals detained in detention facilities is an area that has received increasing attention in recent years, as it is an issue that directly reflects the level of respect for fundamental human rights in the individual EU Member States towards the third-country nationals”* (Nikolajová Kupferschmidtová, 2020).

The main aim of the present contribution is to present the legal framework and current situation regarding the provision of language assistance to the third-country nationals detained in detention facilities within the individual Member States and point out at the European Court of Human Rights Case-Law related to the violation of the right to communicate in the language a detainee understands which is at the same time procedural safeguard guaranteed by the respective authorities at the national, European and international level.

PROVISION OF LANGUAGE ASSISTANCE AS A PROCEDURAL SAFEGUARD

The EU efforts to establish a unified approach in the field of immigration and asylum resulted in adoption of Directive 2008/115/EC on an effective removal and repatriation policy based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity. Consequently, Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) and Regulation (EU) No 439/2010 establishing a European Asylum Support Office were adopted as the core documents in the field of migration. The above-mentioned documents set the common framework that was transposed into the national legislation of the Member States with the protection of the human rights in mind.

However, even the Member States are prohibited from detaining an asylum seeker for the sole reason that he/she has applied for asylum and detention can be ordered only if necessary and on the basis of an individual assessment of each case, detention remains one of the key tools in the response to migration and asylum flows in most of the countries. The grounds for detention are explicitly defined in Article 8(3) of the recast Reception Conditions Directive and in compliance with the Body of Principles for the Protection of All Persons (adopted by the United Nations General Assembly in 1988) and it is explicitly stated (Principle 11) that a person shall not be kept in

3 For the purposes of this study, the term *language assistance* means an interpretation service which must be provided by the Member State not only for basic communication in official communication with the competent authorities, but also for daily communication between members of the Police Force and foreigners placed in detention facilities across the Member States.



detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by a counsel as prescribed by law and shall also receive prompt and full communication of any order of detention, together with the reasons therefor (UN Body of Principles for the Protection of All Persons, 1988). Thus, the right to communicate is set as one of the fundamental human rights. Further, the right to communicate in a language a person detained can understand is set also in Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights (ECHR)) as stated in Article 5 § 2 of the ECHR: “*Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him*” (ECHR, 1950). The need to provide the language assistance to a person who does not understand the information also forms an integral part of Principle 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the assistance of an interpreter is supposed to be provided promptly **in a language which a person understands the information (...)** and the language assistance is provided **free of charge**, if related to the **legal proceedings subsequent to person’s arrest** (UN Body of Principles for the Protection of All Persons, 1988). Further, a detained person is entitled to have the assistance of a legal counsel, to be informed of that right and to be provided with facilities for exercising it (UN Body of Principles for the Protection of All Persons, 1988). All of the cited principles were successfully transposed into the secondary legislation of the EU in the form of above-mentioned Directives and these principles also form an integral part of the European Convention on Human Rights. Thus, as part of the secondary legislation and the European Convention on Human Rights, the principles are legally binding for all EU Member States. In addition, the legal basis for the language assistance for the third-country nationals is also set within the Return Directive, in particular Article 13(3) and (4); Articles 20 and 21 of recast Asylum Procedures Directive 2013/32/EU (replacing Article 15(3) to (6) of Asylum Procedures Directive 2005/85/EC). In accordance with the listed documents the third-country national⁴ concerned shall have the possibility to obtain not only legal advice and representation but also the language assistance.⁵

The language assistance covers not only a translation of a decision (this is already covered by Article 12(2)), but also an obligation to make available assistance by interpreters in order to allow the third-country national to exercise the procedural safeguards afforded to him/her under Article 13 (Return Handbook, 2017). However, for the purposes of the European Court of Human Rights Judgments and the purposes of the present contribution, the distinction between translation and interpretation should be noted. When the reference to ‘interpretation’ is made, it is understood as an oral interpretation of oral communication. When the reference to ‘translation’ is made, it is understood as a written translation of written documents. The distinction between translating and interpreting forms also part of Directive 2010/64/EU on the Right to Interpretation and Translation in Criminal Proceedings which was transposed into the national legislations of the EU Member States and governs the detainee’s right to interpretation in police interviews, hearings and in meetings with detainee’s lawyer and the right to translation of essential documents. The question of language of the detainee is

4 For the purposes of the present contribution, a third-country national is any person who is not a citizen of the European Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the right of free movement under European Union law, as defined in Article 2(5) of the Schengen Borders Code.

5 For the purposes of the present contribution, expression *language assistance* will be used and it is understood as covering both translation, as well as interpreting services provided to someone who does not speak or understand the language of the country he/she is detained in. The distinction between interpretation and translation is not insignificant given that, in the case-law of the European Court on Human Rights the two are largely conflated as Article 6(3) (e) of the ECHR refers only to ‘interpretation’.



explained in para 22 of the Directive 2010/64/EU as follows: *“Interpretation and translation under this Directive should be provided in the native language of the suspected or accused persons or in any other language that they speak or understand in order to allow them fully to exercise their right of defence, and in order to safeguard the fairness of the proceedings”*.

Therefore, the EU Member States are required to provide an interpreter in order to ensure a standard procedure, i.e. the third-country national can understand and communicate in the interpreted language in all procedural proceedings with the competent authorities. The legal regulation concerning standards and procedures in the field of communication in the framework of official contact with third-country nationals in all EU member states, including Slovakia, is similar, as they are governed by the following common European legislation:

- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection;
- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals;
- 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;
- Regulation (EU) No 182/2011 of the European Parliament and of the Council 439/2010 of 19 May 2010 establishing a European Asylum Support Office;
- Regulation (EU) No 182/2011 of the European Parliament and of the Council Regulation (EC) No 640/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person;
- Commission Recommendation (EU) 2017/432 of 7 March 2017 on ensuring more effective returns in the implementation of Directive 2008/115/EC;
- Commission Recommendation of 1 October 2015 establishing a common “Handbook on Return” to be used by the competent authorities of the Member States in carrying out return tasks (C (2015) 6250 final).

In practice, however, the legislation in question is implemented with regard to specific conditions in individual countries.

EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS SHAPING THE LANGUAGE PROVISION TO THIRD-COUNTRY NATIONALS

The protection of the fundamental human rights guaranteed under the ECHR in relation to the language assistance is in practice interpreted on the basis of Member States needs and possibilities. The language-related provisions are drafted in a broader sense, thus giving the way to broader interpretation, e. g. *being ‘promptly’ informed* can cover the time period from 10 minutes to 24 hours, also the very use of an interpreter is also a subject to different approaches as it is not clear if the interpreter should assist the authorities from the moment of arrest or through the next stages of detention (Nikolajová Kupferschmidtová, 2020). And even the common framework of the language assistance is



grounded in the ECHR and the EU Directives, the European Court of Human Rights (EctHR) may help to narrow down various interpretations from the Member States and adopt more unified way through the language provision as the EctHR judgments function as a reference to the future court decision-making also at the national level of the respective Member States.

Challenges related to the language issues have been raised in a number of cases – till the beginning of the year 2021 there were 189 apparent violation of Article 5 §2. However, there were only 45 cases marked as the key cases. For the purposes of the present contribution, the violations of Article 5 §2 related particularly to the following issues were analyzed:

- a) information in language understood (30);⁶
- b) information on charge (13);
- c) information on reasons for arrest (106);
- d) prompt information (86).

As the number of the judgments was significant, the further selection was performed not only on the basis of violation of Article 5 §2 criterion but further the current Member States of the EU being the parties involved in the cases criterion was also implemented. Furthermore, only the judgments that appear to be crucial in shaping the provision of language assistance were taken into account based on the thorough analysis of all 189 cases. The selected judgments also reappear in the Court's Assessment section in the latter judgments as the respective judgments of key cases were cited as Principles laid down in the Court's case-law. The following cases/judgments⁷ were considered as the core ones having impact on the language provision in terms of fundamental rights and freedoms entitled to third-country nationals arriving into the territory of the EU. The following key cases are given along with the reasons of their importance being underlined and subsequently commented on:

- **the case of Čonka v. Belgium, Judgment of 5 February 2002, No. 51564/99**, the Grand Chamber ruled as follows: *"Given that the applicants were not given information on available remedies in their language, there was only one interpreter available for many people and no form of legal assistance at the detention centre, there was no realistic possibility of accessing a remedy"*. The Court confirmed that one interpreter being available for many people is not sufficient. The case also stipulates that a group of people cannot be taken into account as an entity, therefore, the individual approach is obligatory not only for the purposes of legal assistance, but consequently even in regard to language assistance. Thus, granting the language assistance equal status as legal assistance.

- **the case of Rusu v. Austria, Judgment of 2 October 2008, No. 34082/02** as the Court reiterated that paragraph 2 of Article 5 contains the elementary safeguard that: *"(...) by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. Whilst this information must be conveyed 'promptly' (in French: 'dans le plus court délai'), it need not be related in its entirety by the arresting officer at the very moment of the arrest"*. As mentioned in connection with the time framework for the provision of information and consequently also for the language assistance required in this matter, it is obvious that the obligation to provide information 'promptly' is understood as being provided as soon as possible and additionally by the arresting officer. This judgment, however, does not take into account the language competence of the arresting officer.

⁶ The numbers in the brackets indicate the number of the judgments of the EctHR directly related to the violation of the Article 5 §2.

⁷ The judgments are publicly available through the website of the ECtHR and are part of Case-law section.



- **the case of Husain v. Italy, Judgment of 24 February 2005, No. 18913/03** the Court notes that the right to the free assistance of an interpreter signifies that an accused has the right to “(...) *the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him that it is necessary for him to understand in order to have the benefit of a fair trial* (...)” However, paragraph 3 (e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. In that connection, it should be noted that the text of the relevant provisions refers to an “interpreter”, not a “translator”. This suggests that oral linguistic assistance may satisfy the requirements of the Convention.

- **the case of Diallo v. Sweden, Judgment of 5 January 2010, No. 13205/07** - in the third section of the ECtHR judgment, the right to language assistance is built on the level of legal aid and must therefore be granted at the investigation stage, i.e. immediately upon arrest at the police station.

- **the case of Vizgirda v. Slovenia, Judgment of 28 August 2018, No. 59868/08** – the Court denied the claim of the applicant that he was not provided with the language assistance in his mother tongue as the proceedings were held in Russian language of which the applicant has a good spoken command even he was not able to write in Russian. The person’s own language would in principle be his or her mother tongue but, if the person had a command of another language, the use of the latter could suffice for oral communication in the proceedings. Thus, the right to language assistance does not solely imply that the language assistance has to be provided in the mother tongue of the third-country national.

The rights concerned are obviously intended to represent minimum standards. The language-related assistance is in practice a subject of interpretation from the perspective of the individual countries. Through the case-law of the ECtHR it is shown how the provisions on language assistance can be developed to some extent. Frequently, the language issues are raised together with complaints under Article 5 and 6 and occasionally in conjunction with Article 14 (prohibition of discrimination). Even though the Court has rarely found a violation solely on account of language issues, the above-mentioned cases have given it the opportunity to lay down the basic principles in passages that represent a consolidation of the applicable case-law (Brannan, 2010).

CONCLUSION

Since the language assistance provided to third-country nationals arriving into the territory of the EU Member States is firmly grounded not only within the secondary legislation of the EU (within respective Directives), but also forms an integral part of the European Convention on Human Rights, it is legally binding for all Member States, even though it is defined in the listed legislation too broadly and as such gives rise to various interpretations within the national legislations of the EU Member States. To prevent further disparities and discrepancies between the EU Member States implementations of the right to language assistance, the presented European Court of Human Rights case-law can help to clarify provisions regarding the language provision in more detail. As providing the information promptly, accurately and in the language a detained third-country national understands is a procedural safeguard guaranteed not only at the national level of the individual EU Member States and the European level, but also forms an integral part of the international law.

The given case-law can shed more light on the language issues related to the assistance of interpreter/translator, time span reflecting the requirement of providing information promptly, helps to understand the status of the language assistance in the processes related to the asylum procedure (fortu-



nately it is equally important as the legal assistance provided to detained third-country nationals), and also points out at the possible solutions available for the EU Member States that are struggling with the number of interpreters, especially in relation to less-spread or minority languages, and the EctHR case-law allows them to provide the language assistance not solely in the mother tongue of the detained third-country national, but also in the language a detainee understands which may also be one of the widely-spread language as English, Russian, German, etc.

To sum up, the language assistance is listed as one of the procedural safeguards firmly rooted not only in the European Convention on Human Rights as the crucial document, but also within the respective Directives at the European level that are legally binding for all EU Member States. Thus, it is of high importance to unify the way the language assistance is provided to arriving third-country nationals as the unification would help to prevent the exploitation of such right from the third-country perspective and would allow the competent authorities at the national levels to rely on one interpretation and therefore, contribute to more effective tackling of at least one of the burdens related to the migration.

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