

## Reasons withheld and insufficient reasoning as due process violations: two cases before the ECHR

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### Introduction

In civil disputes and criminal cases alike, the right to a fair process undoubtedly includes the right to be heard in court. This right may then extend backwards to include a right of access to court, as well as forwards, to include the courts' duty to provide reasons for their decisions. While obvious denials of fair process may manifest themselves by an impediment arising during the court proceedings themselves prior to the pronouncement of the sentence, justice can go wrong in that respect already some time before the court phase<sup>2</sup>. Or at the forward end of proceedings, court decisions rendered might be fair decisions, but deficiencies in the court's reasoning justifying the decision could still result in the process not being recognized as fair and reasonable. Deficiency of the reasoning can deprive a procedure of the quality of fairness regardless of the existence or non-existence of unexplained good reasons. This is illustrated by the ECHR's *Letellier v France* case, which we shall present in the sequel.<sup>3</sup> Related to the phase of a civil dispute preceding the court phase, interestingly the right of access to court may also be violated on account of reasons not being given, the non-availability of justification for some act that could otherwise be subjected to review in court, as illustrated by the more recent case of *KMC v Hungary* decided in Strasbourg.<sup>4</sup>

Fair trial or due process are broad notions appearing in several constitutional documents<sup>5</sup> and international conventions. Both the European Convention of Human Rights of 1950 (Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6) and the Pact of San José of 1969 (American Convention of Human Rights, Article 8) are more specific: their respective articles relating to the fair trial requirement speak about "hearing" by a tribunal, both in civil and criminal cases, as does the Universal Declaration of Human Rights of 1948 (Article 10), the International Covenant on Civil and Political Rights of 1966 (Article 14) and the Charter

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<sup>1</sup> Deposited to Archive of European Integration, February 2016. The views expressed in this paper are those of the author only and do not purport to represent the views of any institution that the author is affiliated with.

<sup>2</sup> As the outlaw-turned-sheriff tells his former accomplice in the 1961 movie *One-Eyed Jacks*, "*You'll get a fair trial, and then I'm gonna hang you*". Behind the movie makers' expression of cynicism towards a flexible legal concept there may have been a real social need of the times for more precision in the content of a fundamental right.

<sup>3</sup> *Letellier v France* (1991) A207 App no 12369/86

<sup>4</sup> *KMC v Hungary* (2012) App no 19554/11

<sup>5</sup> Constitution of the United States, Fifth Amendment; Grundgesetz der Bundesrepublik Deutschland, Artikel 103; Constitution fédérale de la Confédération Suisse, Art. 29, 29a, 30; Costituzione della Repubblica Italiana, Art. 111; Basic Law of Hungary, Article XXVIII.

of Fundamental Rights of the European Union (Article 47). The right to be heard is also specifically guaranteed by the Basic Law of Germany and by the Federal Constitution of the Swiss Confederation, referring to this right in the same terms as “*Anspruch auf rechtliches Gehör*”<sup>6</sup>, and – less explicitly – by the Basic Law of Hungary<sup>7</sup>. The notion that fair process would have to include not only the right to be heard, but also the right to know the reasons of a decision, may be implicit in international human rights instruments and several constitutional texts, but it does appear explicitly in the Constitution of Belgium<sup>8</sup> as well as in the Constitution of the Italian Republic<sup>9</sup>.

Due process and reasonableness requirements are not limited to the trial phase proper of legal proceedings. In particular, decisions about pre-trial detention must respect certain norms of reasonableness or justification, which appear separately in several constitutions and international conventions. Requirements of reasonableness or justification regarding pre-trial detention are spelt out more or less explicitly in the Constitution of the United States (Fourth Amendment), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 5), the Pact of San José (American Convention of Human Rights, Article 7), the Basic Law of Germany (Article 104), and the Basic Law of Hungary (Article IV).

It appears that when citizens are involved in disputes to be settled by public authority, in a process that can legitimately result in the determination of rights or obligations, in civil or criminal matters, then one of the first specific rights of each subject is the right to be heard, extending to all parties in the dispute (*audiatur et altera pars*). This is an informational right, a right of communication, and when such communication is subject to legal norms, the question of legal norms relative to communication in the opposite direction also arises. In another area of fundamental rights, the freedom to impart information and opinions, the recognition of this opposite direction of the right to communicate resulted – historically rather late – in the right of access to information being acknowledged as a component of freedom of expression. If access to information is part and parcel of the right to speak freely, then the right to be heard may also be expected to include a right to know.

### **Reasons to justify pre-trial detention: *Letellier v. France***

Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) allows for pre-trial detention on reasonable suspicion of having committed an offence if detention is needed to ensure that the suspect will be tried in court<sup>10</sup>. Thus reasonable suspicion is not enough, detention must be a means to ensure that the suspect will be available

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<sup>6</sup> Basic Law of Germany Article 103 paragraph (1), Constitution of the Swiss Confederation Art. 29

<sup>7</sup> “Hearing”, in the sense of the party to a judicial proceeding being heard by the tribunal, is implicit in the formulation of the fair trial provision of Art. XXVIII. of the Basic Law of Hungary, even though the Hungarian term “*tárgyalás*” emphasizes more the two-sided, adversarial aspect of court proceedings.

<sup>8</sup> Constitution Belge, Art. 149 *Tout jugement est motivé. Il est prononcé en audience publique.*

<sup>9</sup> Costituzione della Repubblica Italiana, Art. 111 *Tutti i provvedimenti giurisdizionali devono essere motivati.*

<sup>10</sup> “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so” [Article 5, 1 (c)].

for trial. However, at the relevant time Article 144 of the French *Code of Criminal Procedure* (CCP) also used to allow pre-trial detention in a number of other circumstances, in particular, when it is “necessary to preserve public order from the disturbance caused by the offence”<sup>11</sup>. It seems that a public order clause so broadly formulated, when used alone to justify detention, would not prevent the detention from predictably constituting a violation of Article 5. In the Letellier case the public order clause was used in conjunction with the need to ensure presence at trial. In our opinion, as far as application of the Convention is concerned, use of the public order clause by a national court to justify pre-trial detention tends to weaken the court’s reasoning rather than reinforcing it, raising a suspicion of intent to punish before judgment.

The background facts of the Letellier case are as follows. In 1985 Mrs Monique Letellier, a mother of eight children and operator of a bar-restaurant in La Varenne St-Hilaire in France, was living separately from her second husband, when he was murdered by Gérard Moysan on 6 July 1985. Mrs Letellier, living at that time with another man, was taken into custody on suspicion of having incited to the murder of her separated husband.

The investigating judge charged Mrs Letellier with being accessory to murder, then on 24 December 1985 ordered her release pending trial, subject to court supervision. On appeal by the prosecutor the release order was set aside on 22 January 1986, and from that time on she remained in pre-trial detention until May 1988. She was thus in pre-trial detention altogether for almost three years, before in May 1988 she was tried, convicted and sentenced to three years of imprisonment. At that point she was free to go.

After her release in December 1985 was set aside in January 1986, Mrs Letellier’s repeated requests for release were the subject of judicial examinations seven times, at various dates before her trial in May 1988.

All the seven judicial reviews resulted in her detention being continued. The reasons named in those judicial decisions were few, they were explicit but completely general, and did not go into the details of her case at all. They were also consistent over time, indeed they were expressed in almost identical wording. In all the seven judicial reviews, the measure of court supervision - that was in place when she was on release between December 1985 and January 1986 - was simply called “inadequate” or “not effective” - “to ensure that she will appear for trial” or to counter the danger that “she may seek to evade”. In all the 7 judicial reviews, a single, very clear reason was given why “she may seek to evade”: it was, without any further explanation clearly and solely, nothing else but the expected severity of her sentence.

Public disturbance caused by the offence, which French criminal procedure allowed and still allows as a reason for pre-trial detention, was mentioned in five out of the seven decisions refusing her release pending trial, with no details given ever as to how the disturbance might manifest itself. Finally, an unspecified risk of interference with witnesses, and the indication that there would be strong evidence against her, were mentioned in half of those judicial decisions, given as reasons to keep the person charged in custody.

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<sup>11</sup> Presently the public order clause of Art. 144 of the CPP only allows pre-trial detention when it is necessary (“*constitue l’unique moyen*”) to end an exceptional and persistent disturbance of public order caused by the offence itself, by the circumstances of its commission, or by the importance of the harm that resulted from the offence.

How did the ECHR assess the sufficiency of these reasons? If we look at the judgment of the Strasbourg court in the Letellier case, it becomes clear that the ECHR was concerned mainly not with the question of whether reasons to keep the accused in detention existed, but with the question of whether such reasons were explicitly given as part of the pre-trial judicial decisions in France, whether the judiciary satisfied their obligation to provide sufficient reasoning to justify the pre-trial detention. The assessment of the ECHR was that the reasoning of the French judiciary was insufficient, and this in itself resulted in unjustified restriction of liberty in violation of Article 5 of the Convention.

The following appear then to be the lessons from the Letellier case. First of all, the existence of evidence against an accused person, while necessary to keep the accused in custody, is not in itself a sufficient reason to do so. Second, in a judicial review, stereotyped repetition of the reasons provided by a previous review is not considered sufficient, when the conditions – *such as the motivation to abscond, or the possibility to affect evidence already gathered* – are evolving with time. Third, in deliberations affecting the liberty of an individual, her personal circumstances must be addressed. Fourth, measures less restrictive of liberty, such as court supervision, should not be discarded without assessing the success of their previous application. Finally the ECHR was also critical of the vagueness of the French judiciary in referring to disturbance of public order, ignoring that the victim's family never requested Mrs Letellier's pre-trial detention - even when they requested the pre-trial detention of Mr Moysan, whom Mrs Letellier was accused of inciting to murder.

Article 5 of the Convention certainly does not allow for pre-trial detentions based on reasons unconnected either to preventing a criminal act, or to the prevention of escaping justice after its commission. Of the seven possible justifications for pre-trial detention that Article 144 of the French CCP presently allows,<sup>12</sup> the first five are clearly related to ensuring that the case will be tried in court<sup>13</sup>, the sixth refers to crime prevention<sup>14</sup> – and these are then compatible with the provisions of Article 5 of the Convention. The seventh possible justification of pre-trial detention in the CCP seems on the other hand to provide an entirely different rationale for limiting the liberty of the suspect, one that is independent of the need to ensure that the case be tried.<sup>15</sup> It is indeed a survival in a milder form of the old public order clause already called upon in the reasoning of the French judiciary in refusing pre-trial release in the Letellier case, a reasoning that the ECHR found insufficient.

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<sup>12</sup> Code de procédure pénale, Version consolidée au 25 janvier 2016

<sup>13</sup> "Conserver les preuves et ou les indices...", "Empêcher une pression sur les témoins ou les victimes...", "Empêcher une concertation frauduleuse...", "Protéger la personne mise en examen", "Garantir le maintien de la personne mise en examen à la disposition de la justice".

<sup>14</sup> "Mettre fin à l'infraction ou prévenir son renouvellement."

<sup>15</sup> "Mettre fin au trouble exceptionnel et persistant à l'ordre public provoqué par la gravité de l'infraction, les circonstances de sa commission ou l'importance du préjudice qu'elle a causé. Ce trouble ne peut résulter du seul retentissement médiatique de l'affaire."

## **The right to know the reasons: *K.M.C. v. Hungary***

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to be heard in court. The Convention binds the states that signed it, court systems hearing legal disputes have to be maintained by these states, and the courts have to hear and adjudicate also those disputes that arise between a state and its own officials.

Ms K.M.C. was a Hungarian civil servant whose employment at an environmental directorate was terminated in 2010. At that time, Section 8(1) of Act no. LVIII of 2010 on the Legal Status of Government Officials – no longer on the books - allowed for dismissals without having to provide the reasons. A civil servant dismissed could always file a lawsuit, but was a “meaningful action” conceivable in the absence of “any known position of the respondent employer”? The answer given by the European Court of Human Rights (*ECHR*) in its judgment of 10 July 2012 was negative. Also in Hungary, Constitutional Court decision no. 8/2011. (II.18.) AB annulled Section 8(1) of Act no. LVIII of 2010. The Constitutional Court relied partly on *ECHR* case law, and the *ECHR* also cited the Constitutional Court’s decision, as well as the EU Charter and the European Social Charter. Judge Paulo Pinto de Albuquerque of the *ECHR*, elaborating on the judgment in his concurring opinion and also referring to international labor law (ILO), summed up the violation of Article 6 of the Convention as a breach of Ms K.M.C.’s “rights to know the reasons for her dismissal and to have her dismissal fully assessed by an independent body”.

The key dates are as follows. Section 8(1) of Act. no. LVIII of 2010 allowing dismissal of civil servants without providing reasons was in force from 6 July 2010. Ms K.M.C. was dismissed from government service on 27 September 2010. The time limit for challenging this decision in a Hungarian court expired on 26 October 2010. On 18 February 2011 the Constitutional Court annulled Section 8(1) of Act. no. LVIII of 2010. Ms K.M.C. applied to the *ECHR* in Strasbourg on 22 March 2011, claiming violation of the fair trial provisions of Article 6 of the Convention because “her dismissal could not be *effectively* challenged in court for want of reasons given by the employer” (emphasis added by me). The case was communicated to the Hungarian Government on 12 September 2011. In a judgment of 10 July 2012, Article 6 § 1 was unanimously held by the *ECHR* to have been violated, and the judgment became final on 19 November 2012 (*Case of K.M.C. v. Hungary, Second Section*).

The absence of reasons given in the applicant’s dismissal from government service, allowed by law, had a double effect in the dispute before the *ECHR*.

Firstly, it resulted in the respondent Government’s inability to argue successfully for the non-admissibility of the case at the *ECHR*. Article 35 § 1 of the Convention only allows the *ECHR* to deal with a case after the exhaustion of domestic remedies by the applicant. The Government argued that domestic remedies were not exhausted, as the applicant did not take legal action before a Hungarian court. In the Government’s view, access to a court was not prevented by the employer *not having to give reasons* for the dismissal. The *ECHR* saw it otherwise, considering the possible action in a Hungarian court ineffective and therefore not required in order to satisfy the domestic remedy criterion of Article 35 § 1, because the dismissal’s “reasons were entirely unknown” to the applicant, and thus the domestic court action “could only have been a formal motion” (§ 28 of the *ECHR* judgment).

Secondly, the absence of reasons given in the dismissal led directly to a determination of the violation of the fair trial requirement of Article 6 § 1. The ECHR, citing its previous case law, recalled that the Convention is designed to “guarantee not rights that are theoretical or illusory but rights that are practical and effective”. Further, according to the ECHR a “meaningful action” in court was “inconceivable” because “the employer was under no obligation to give any reasons”, and this amounted to “depriving the impugned right of action of all substance” (§§ 33-34 of the judgment). The ECHR thus recognized a substantive right to know the reasons of decisions that are subject to be challenged in court.

What was really damaging to the respondent Government’s position in the case is not merely the fact that an organ of the state failed to give reasons when terminating the employment of a civil servant, it was rather the authorization given by a law to withhold the reasons. From the logic of the ECHR’s decision on admissibility in the *K.M.C.* case it appears that the non-provision of reasons in a decision by an employer or by anyone else can be viewed as an obstacle to judicial review, rendering judicial remedies ineffective, and rendering the exhaustion of such remedies unnecessary before an application can be filed with the ECHR. From the logic of the decision on the merits of the case, it appears on the other hand that national legislation allowing the withholding of reasons in decisions affecting civil rights or obligations may amount to a state’s failure to ensure access to fair trial, and may thus lead - upon individual application - to the finding of a violation of Article 6 § 1 of the Convention.