Workshop 29 August 2005 - 10th IAP Conference in Copenhagen

Human rights Issues

Speaker: Jesper Hjortenberg, Assistant Deputy Director of Public Prosecutions, Denmark

I am very pleased to be able to address you on the issue of human rights protection in the context of witness and victims protection. When I say witness protection during the next 10 minutes that will generally include protection of victims as well.

I will try to guide you through some of the main issues that arise when you hold witness protection up against the rights of the defendant. How do we strike a reasonable balance between those sometimes conflicting rights?

My approach will be a Danish one, but also a European one. Our national approach is of course intended to be in conformity with the European Convention on Human Rigthts and the case-law from The European Court of Human Rights.

First point:

Focus is very often on the rights of the defendant. That must of course be so. The traditional approach in a human rights framework has been to take care of the conflict between the states – represented by the courts, the police and prosecution service - and the individual charged with a criminal offence.

The rights of witnesses and victims are normally and primarily violated not by the state but by fellow citizens – the criminals. The states role will therefore be of a different nature in relation to victims and witnesses. It would probably be better to say that the state has some positive obligations to protect witnesses and victims against criminals in general and to protect their rights during the investigation and trial phases of a criminal case.

Second point:

One must never forget that witnesses and victims also have basic human rights that must be protected.

The European Court of Human Rights is of course aware of this fact.

In the case Doorson v/ Netherlands (54/1994/501/583) the court acknowledges that article 6 in itself 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 according to the court the life, liberty or security of a person might be at stake as may interests coming generally within the ambit of article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other substantive provisions of the European Convention, which imply that contracting states should organize their criminal proceedings in such a way that those interests are not unjustifiably imperilled.

Coming to the conclusive part of its reasoning the court found that against this background the principles of the fair trial also require that, in appropriate cases, the interests of the defense should be balanced against those of witnesses or victims called upon to testify.

This view on the need for a balance between the rights of the defense and the rights of witnesses and victims was also the starting point for the Council of Europe Committee of Experts on Intimidation of Witnesses and the Rights of the Defense (PC-WI). The name of the committee reveals in itself one of the basic issues that the committee dealt with drafting recommendation (97) 13 on Intimidation of witnesses and the rights of the defense. The recommendation was adopted on 10. September 1997 by the Committee of Ministers.

Furthermore and along the same line of thinking the Committee of Ministers of the Council of Europe adopted on the 20 April 2005 a Recommendation Rec. (2005) 9 on the Protection of Witnesses and Collaborators of Justice. As well as the case law from the European Court of Human Rights the texts from the Council of Europe can be found through the website www.coe.int.

Turning to the substance one first important observation can be made:

The majority of witness protection measures can be carried out without even having to consider if the rights of the defense are respected.

States can for example criminalize acts of intimidation, train police officers and others to cope with situations were intimidation occurs and set up witness protection programmes, which deal with the situation of the witness – being collaborators of justice or not – before and after they have testified in court.

As long as the measures does not affect the criminal process in itself there are no problems with regard to the rights of the defense and to my knowledge some countries actually prefer to put the main emphasis on such non-procedural measures. But of course one approach does not exclude the other.

One question to be asked is therefore, to what extent the state needs measures related to criminal procedure and to what extent non-procedural measures could prove to be sufficient?

The answer to that question will firstly depend on the legal nature of the national system.

The choice of measures will furthermore depend on an assessment of the crime situation in the country in question and of the level of actual experienced intimidation.

Leaving the non-procedural measures aside in my opinion the next question to be asked could be the following:

How far shall we go along a line that imposes serious limitations on the rights of the defense? Proportionality must be considered from a general point of view when drafting general provisions and when applying those provisions in specific cases.

Anonymity of a witness is for example an exceptional measure according to recommendation (97) 13 and to recommendation (2005) 9 and should only be granted when the life or freedom of the person involved is seriously threatened - or in the case of an undercover agent his/her potential to work in the future is seriously

threatened - and the evidence appears to be significant and the person appears to be credible.

So when considering the general provisions that should allow a substantial protection of witnesses the measures that really do impose serious difficulties for the defense should only be applied where the cases involve serious or organized crime and where the need to ensure the protection of witnesses and others is evident.

Other procedural measures to be considered are the following:

- excluding the media and/or the public from all or part of the trial.

This could be a useful measure in a number of cases and is a measure that is allowed by The European Convention on Human Rights article 6. The measure should of course be reasonably used and based on a careful assessment in the specific case. The measure does not give rise to serious problems concerning the rights of the defense if used in a cautious way.

- use of pre-trial examination and the exclusion of the defendant from court.

In relation to the right to examine or have examined witnesses, the European Court's constant rule is that all the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that the statement of a witness must always be made in court and in public if it is to be admitted as evidence; in particular, this may prove impossible in certain cases. The use in this way of statements obtained at the pre-trial stage is not in itself inconsistent with the rights of the defense. As a rule those rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making a statement or at a later stage in the proceedings. (Asch case, judgment of 26 April 1991, series A, No. 203). Similarly, under certain circumstances the exclusion of the accused from the court can be justified, provided his or her lawyer is present.

Thus the exclusion of the accused from the court room under a Danish provision and while the witness was testifying was held to

be justified in a case from the European case-law where the accused had threatened a witness (X v/ Denmark, application No. 8395/78). The identity of the witness was also concealed from the accused in the later case, although available to his lawyer, subject to an obligation of confidentiality.

The European Court has not categorically rejected the use as evidence at the trial of statements previously made by witnesses to the police or judicial authorities (Unterpertinger case, judgment of 27 November 1986, Series A, No. 110, and Kostovski case, judgment of 20 November 1989, Series A, No. 166). Statements made outside the public court hearing may be used as evidence, provided that compensatory measures are available for the defense ensuring, particularly, the opportunity to challenge, at some stage, the creditability and reliability of the witness and his or her evidence.

Even if a witness has to testify again later on at the trial it is normally helpful to the witness that he or she is generally no longer an object of intimidation because of the earlier statement. What is said is said in the pre-trial phase and can be taken into consideration by the court when giving judgment. Pre-trial statements is thus in the general interest of justice and a help to future witnesses and victims because the measure generally helps bringing criminals to justice.

I can add that according to Danish law it is, as you have already heard, possible to exclude the defendant from the courtroom while a witness is testifying, but the defense lawyer will in such a case still be present and be able to ask questions. This is in my view a good way to avoid face-to-face confrontation between witness and accused in serious crime cases and is mainly used where the witness is the victim of that crime. It is at the same time a measure that still ensures that the defendant is having a fair trial.

Another measure to be considered could be restrictions on the details given to the defendant and the defense counsel about witnesses and victims:

- revealing at the latest possible stage of the proceedings the identity of the witness and/or releasing only selected details.

To start with I would introduce a word of caution. It must be avoided to reveal the details so late that it would interfere with the possibility to prepare the defense adequately. Anyhow the defense does not necessarily have to know every detail about the life and whereabouts of a witness or a victim – where he or she lives or his or her profession to take an example. The witness could for example just be an innocent bystander to a crime.

One must also be ready to consider the possibilities in special cases to use video links and to disguise the witness if necessary. This should generally not be considered to be contrary to the principle of fair trial.

This brings me on to **the difficult issue of anonymity.**

Anonymity is accepted only in limited situations by the Strasbourg court. Anonymity is allowed in Denmark, but again only in very limited situations and it is a measure not very often used.

My advice would therefore be to consider the use of anonymity carefully. There are many other means of protection and it is clear from the Strasbourg case law that a testimony from an anonymous source must not be the sole evidence or the decisive basis for conviction.

One last remark that might be helpful in this context and in the combat against organized crime:

Anonymous informants are as they have always been quite useful and their use according to the European Court of Human Rights not contrary to article 6, at least when they are not used as witnesses during trial. There may be many informants and witnesses who are not really needed during trial. If so it should be considered not to use them as witnesses and thus not exposing them to the defendant and the public.

So I will conclude by saying that we must try to find the right balance between the rights of witnesses and victims and those of the defense and last but not least do not forget the practical aspects: Will a certain measure really be of practical use. If not alternatives should be considered.