

Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings

4 April 2014

Introduction

The CCBE has examined the Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings. The CCBE has the following comments to make:

CCBE comments on the Explanatory Memorandum

6. It is essential that the vulnerability of a person suspected or accused in criminal proceedings is promptly identified and recognised. For that purpose an initial assessment should be carried out by police officers, law enforcement or judicial authorities. The competent authority should also be able to ask for an independent expert to examine the degree of vulnerability, the needs of the vulnerable person and the appropriateness of any measures taken or envisaged against the vulnerable person.

This process has to be recorded in writing so that there is a note of relevant questions being asked and, where appropriate, follow up questions arising from the answers. Only if there is a paper trail to evidence whether this exercise was conducted will it be taken seriously.

7. Suspects or accused persons or their lawyers should have the right to challenge, in accordance with national law, the assessment of the potential vulnerability in criminal proceedings, in particular if this would significantly impede or restrict the exercise of their fundamental rights. That right does not entail the obligation for Member States to provide for a specific appeal procedure, a separate mechanism, or a complaint procedure in which such failure or refusal may be challenged.

There has to be effective judicial review available on an urgent basis where a vulnerable person is being detained and potentially questioned even with the safeguard of the presence of a lawyer and audio/visual recording.

This is all the more important given that the measure has not sought to define what a vulnerable person is. This will be an issue in a great number of cases. While the proposal envisages cases where there are already in place court appointed guardians as legal representatives, or persons who are acknowledged to be an "*appropriate adult*".

There will be a great many cases where vulnerability has been hitherto undetected, or is temporal in nature such as in relation to addiction, recent trauma or distress etc.

The facility has to be in place for the argument in relation to vulnerability to be canvassed effectively and adjudicated upon quickly.

17. *"In order to ensure that professionals in contact with vulnerable persons are aware of the specific needs of these persons, they should receive adequate training"*.

We welcome this as even very experienced lawyers feel under prepared in dealing with vulnerable persons and it should be a fundamental part of training that they are better equipped to do so (having regard to national training systems). It is reasonable that the cost of this training be borne by the Member States.

Comments on the Recommendations

1, 2 and 3.

We welcome the fact that vulnerable persons are to be given strengthened procedural rights. However, that does not take away from the difficulty that the persons are not easily identified.

Article 4 addresses the identification of vulnerable persons. It envisages that competent authorities may have recourse to a medical examination by an independent expert. It is silent however on how that expert is to be sourced and agreed.

7. Member States should foresee a presumption of vulnerability in particular for persons with serious psychological, intellectual, physical or sensory impairments or mental illness or cognitive disorders, hindering them to understand and effectively participate in the proceedings.

We welcome that there is at least a presumption and some indicative criteria. However, that is of little use if there is not a method of adjudication. Otherwise, there is a risk that there will simply be a stand off between defence lawyers and police forces.

10. We welcome the fact that the legal representative (being a court appointed amicus) or an appropriate adult can be present at the police station and during court hearings.

11. *"If a vulnerable person is unable to understand and follow the proceedings, the right to access to a lawyer in accordance with Directive 2013/48/EU should not be waived"*

We welcome the strong expression of principle but doubt its practical effect if there is no method of establishing independently by way of Judicial Review that a person is vulnerable.

It follows that other identified rights including the right to medical assistance, recording of questioning, deprivation of liberty and privacy rights are all welcome, but will only have a concrete benefit if there is a way of establishing clearly who is vulnerable.