Is there a right to written translation?

James Brannan[1], EULITA conference (panel discussion), 16/03/23

Over the past few decades the Strasbourg Court (European Court of Human Rights) has considered that Article 6 § 3 (e)[2] of the European Convention on Human Rights (ECHR) includes the right to have a written translation of parts of the file in criminal proceedings but not the whole file[3] (already suggesting that some documents are more "essential" than others, in particular the "indictment"); in addition, the Court allows, as a substitute for a written translation, the oral or sight translation of a document in court by an interpreter[4]. Thus there is certainly a right to written translation under the ECHR and a number of other instruments, but it is not always effective in practice.

In one of the few Strasbourg cases on the specific subject of written translation, *H.K. v Belgium*[5], the Court decided that the applicant was not entitled to a translation of the whole file (400,000 pages) and that even though the translation (into Armenian) was clearly of poor quality, the applicant had been able to understand the "gist" ("*le sens général*"). I note incidentally that this resembles what the judge said in the *Iuventa* case recently, that the defendant had understood the "main content" (of the interpreting in that case). This raises all sorts of alarm bells with translators (how can the judge be the judge of a translation, how can the defendant know if anything vital is missing and so on?).

We were all very hopeful that Directive 2010/64 (covering criminal proceedings, not asylum or administrative proceedings, for example) would bring about an increase in the volume – and quality – of written translation, which was identified as a separate right (Article 3 of the Directive). I wrote a few articles on this subject at the time[6]. It provided for some quality assurance, the possibility of complaining about a translation, etc. However, there were already some compromises in the text – notably the "essential documents" limitation[7] and the possibility of sight translation by an interpreter. The Directive also allows for the translation of extracts and summaries (but who decides on this?). Commentators at the time – and even at least one MEP in the European Parliament debate – rightly

[1] Any opinions are personal.
[2] "Everyone charged with a criminal offence has the following minimum rights: to have the free assistance of an interpreter if he cannot understand or speak the language used in court".
[3] Case-law going back to the *Luedicke, Belkacem and Koç* judgment of 1978 (principle that documents are covered by Article 6) and *Kamasinski v Austria* (1989) "A defendant not conversant with the court's language may in fact be put at a disadvantage if he is not also provided with a written translation of the indictment in a language he understands" (even though no violation was found under that head).
[4] *Hermi v. Italy* (2006).
[5] *H.K. v. Belgium*, inadmissibility decision of 2010 (French only) https://hudoc.echr.coe.int/eng?i=001-97018
[6] See for example my Qualetra paper and article "Identifying written translation in criminal proceedings as a separate right: scope and supervision under European law", https://jostrans.org/issue27/art_brannan.php.
[7] The directive identifies 3 types of essential document: detention order, charge or indictment, judgment (see the various language versions to see how these terms have been translated); but the list is not exhaustive.

feared that these possibilities would be used to cut corners. Domestic implementation in some countries seems to have confirmed those fears.

In France there has been little change as regards the volume of written translation. A Court of Cassation judgment of 27 July 2022[8] indeed confirms that a sight translation is an adequate substitute. In that case a defendant had complained that certain documents such as the prosecutors' submissions had not been translated prior to a hearing to decide on his pre-trial detention – the court of appeal had found that they were not "essential documents" as per the domestic text (incorporating the directive). The Court of Cassation found that the documents in question had been translated orally by an interpreter when the defendant had had a meeting with his lawyer just a few minutes before the hearing[9] – and that was considered sufficient!

However, there were two more positive judgments in the same month last year. On 9 March 2022 the Court of Cassation upheld an appeal partly based on a failure to translate a notice seeking a defendant's agreement to a hearing by videolink – even though it was not specifically in the list of essential documents it was found to be essential in the circumstances (and the possibility for the lawyer to make observations on the matter was no substitute)[10]. Then a judgment of 23 March 2022 quashed a decision rejecting an appeal, because the time-limit should have run from the notification of the translation of a judgment (mention was made again of what constitutes an essential document)[11].

The case-law of the CJEU has also been rather disappointing on this front. The first judgment relating to Directive 2010/64 found that there was no right for a defendant in criminal proceedings to have a document (an appeal) translated into the language of the court[12] unless that document was considered "essential" at the authorities' discretion. National law could require a written appeal to be drafted in the national language, even if the appellant did not speak it. This rather restrictive approach is the

[8] Cour de cassation, criminelle, Chambre criminelle, 27 juillet 2022, 22-83.386.

[9] "…il résulte du procès-verbal de débat contradictoire qu'avant celui-ci la personne mise en examen a pu s'entretenir avec son avocat, en présence de l'interprète, qui lui a traduit oralement l'ordonnance de soit-communiqué de la procédure au procureur de la République, les réquisitions de celui-ci et l'ordonnance de saisine du juge des libertés et de la détention."

[10] Cour de cassation, criminelle, Chambre criminelle, 9 mars 2022, 21-82.580.

[11] Cour de cassation, criminelle, Chambre criminelle, 23 mars 2022, 21-83.064.

[12] *Covaci*: "[The Directive] does not permit the individual against whom a penalty order has been made to lodge an objection in writing against that order in a language other than that of the proceedings, even though that individual does not have a command of the language of the proceedings, provided that the competent authorities do not consider, in accordance with Article 3(3) of that directive, that, in the light of the proceedings concerned and the circumstances of the case, such an objection constitutes an essential document".

result of a lacuna in Article 3 of the Directive (right to translation of essential documents), which does not provide for written translation into the language of the proceedings[13].

Since that first judgment there have been a few others (more positive) about what constitutes an essential document. In *Sleutjes* the CJEU decided that an order imposing a sanction for a minor offence was an essential document[14]. More recently in *T.L.* (2022, reference from a Portuguese court) the importance of translating an essential document was again emphasised – a translation has to be provided for the purposes of an appeal and the time-limit for appeal starts to run only once that translation has been provided[15]. This judgment provided another interpretation of what "essential documents" should include – in this case it was a decision revoking a suspension of sentence (the same as in the 23/3/22 judgment of the Court of Cassation). Likewise, the essential document issue arose in *D.P.* (2021)[16] and in *Balogh* (2016) on the translation of a judgment.

So I would describe the right to written translation as one that is often overlooked, both by the courts and by defence lawyers themselves. Perhaps awareness is gradually being raised in the legal community. It is possible that in some EU States, depending on national implementation, the Directive has had a greater impact on this front, and more preliminary references can be expected.

Relevant CJEU case-law:

Covaci C-216/14 (2015) [Germany]

Balogh C-25/15 (2016) [Hungary]

Sleutjes C-278/16 (2017) [Germany]

D.P. C-338/20 (2021) [Poland]

T.L. C-242/22 PPU (2022) [Portugal]

[13] NB nor does the Directive cover translation for the prosecuting authorities such as telephone transcripts.

[14] *Sleutjes*: "... a measure, such as an order provided for in national law for imposing sanctions in relation to minor offences …, constitutes a 'document which is essential', within the meaning of Article 3(1) of that directive, of which a written translation must … be provided to suspected or accused persons who do not understand the language of the proceedings in question, for the purposes of enabling them to exercise their rights of defence and thus of safeguarding the fairness of the proceedings."

[15] *T.L.*: "[The Directive precludes] national legislation under which the infringement of the rights ... must be invoked by the beneficiary of those rights within a prescribed period ... where that period begins to run before the person concerned has been informed, in a language which he or she speaks or understands, first, of the existence and scope of his or her right to interpretation and translation and, secondly, of the existence and content of the essential document in question and the effects thereof".

[16] *D.P.*: concerning a financial penalty for a road traffic offence, requiring a translation "of the elements of the decision which are essential in order to enable him or her to understand the charge against him or her and fully to exercise his or her rights of the defence" [not directly linked to Directive 2010/64].