Personal Identification Attempt in the Decisions of the European Court of Human Rights

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Abstract

The study shows the most representative cases in the European Court of Human Rights in the field of identity parade/line-up section. Its aim is to examine how we can prevent false personal identification in criminal cases which can lead the worst outcome: justizmord (miscarriage of justice). The reader can understand how the mistakes of identity parade (line-up, recognition) method is a main factor and it can have not wished outcome.

Lastly the writer suggests the modification of some legal rules ("de lege ferenda") for the lawmakers and a few preventive methods, tactics for the law enforcers (police service men, custom examiners, detectives), and criminalists as well.

Keywords: *identity parade, line-up, false identification, miscarriage of justice, justizmord*

I. The European Court and the European Convention on Human Rights

In the course of our research we have examined the rulings of the European Court of Human Rights (later referred to as ECtHR) in order to answer the following questions:

a) does the ECtHR pay attention to the recognitions at all („presentation for identification", eyewitness identification procedure", „identification parade", „line-up")?
b) does the recognition proceeding affect any of the fundamental human rights?
c) if it does, has did a violation ever occured?
d) which are the most common reasons of violation?
e) have there been any Hungarian recognition anomalies in front of the court?
f) what sort of conclusions and edifications can be taken in the domestic regulations and practices?

As a starting point we establish that on the 5th of November in 1992 Hungary has ratified, then declared one of the most important documents of the European Community – the Convention to Protect Human Rights and Fundamental Freedoms – phrased on the 7th of April in 1993 in the XXXI Act of 1993. This convention originally took effect on September 3rd in 1953 (later referred to as Convention).

In case of the grievance of the Convention – among others the failure of detection – anyone can appeal to the European Court of Human Rights in Strasbourg with a complaint. Today the Convention has a great number of ancillary protocols.

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We have reviewed the content and the cases of the ECtHR and we think that our topic is relates to the prohibition of torture fixed in Article 3 and to the right to a fair trial, which can be found in Article 6. (The first point of Article 6 makes a keystone of the document, which is authoritative for all kinds of proceedings, while points 2 and 3 contain elements of criminal procedure.) Here we quote both Articles as part of the preface of our study:

Article 3 - Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 6 – Right to a fair trial:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

II. The decisions of the European Court of Human Rights on (personal) identification

The ECtHR– for most members of the Council of Europe own direct effect –is the highest level interpretation forum of the Convention; its decisions usually lead to changes in law and in customary practice. Accordingly, its decisions on detection can be prevailing – according to our view-point – and also for our domestic law and for its application. For this reason the the chronological review of the jurisdictional decisions of the aspects of the past decades can be useful in answering the original questions, in observing the Hungarian regulations in force and in creating the „de lege ferenda" suggestions.

The first one to be noted is the *Perry vs. United Kingdom case* in 2003, in which the applicant was suspected with robbery series and denied takeing part in the personal recognition process. This is why a high ranked police officer gave permission to take records of him secretly. It happened in the way of calling the applicant in again to the recognition process to the institution of the authority which he denied again to take

part in. However, while he was waiting in the common area, a crystal-clear recording was taken of him. Later they generated the videotape along with the records of 11 volunteers. Afterwards they showed these records to the witnesses, from whom 2 identified the applicant as the perpetrator of the robberies.

On the trial of the applicant the judge disapproved of the application to exclude the video evidence although he admitted that the police had not used properly the Code of Procedure. The applicant was convicted and the appeal was rejected.

According to the ECtHR the regular usage of the security cameras on the public streets or even in shopping malls or in police stations where they serve a rightful and predictable purposes do not raise any problems in connection with human rights. In this case the police positioned the cameras in the way to make clear records of the applicant and they made a montage of these records to show them to the witnesses for the purpose of identification. The video was also shown on the public trial. Irrespectively of the fact that the applicant was or was not aware of the camera, there were not any signs which referred to the identification purposes of the records. This act of the police overran the regular and predictable usage of the security cameras that is why the permanent recording and the montage made by them for further usage could be considered as collecting and processing the personal data of the applicant, which meant breach of the fundamental rights.

Furthermore, the records were not voluntarily gained nor in conditions where the use of the records could have been predicted for identification purposes. Accordingly, the police interfered into the right to respect privacy and with this they violated Article 8 of the Convention.

As we mentioned the Article 8 is the third important Article and we quote it here from the Convention:

> *„Right to respect for private and family life. 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".*

The *Zashevi vs. Bulgaria case* started on the application of two Bulgarian citizens' application, Genka Ivanova Zasheva and Metodi Dimitrov Zashev, who presented the application on the 26th of April in 2005. The applicants stated that the authorities failed to perform the efficient investigation in connection with the death of their son and they did not even get an efficient remedy.

The applicants are parents of Ivaylo Zashev, who was killed in the house of his aunt in Stavertsi village, Pleven region in February, 1997. The crime happened as follows: around midnight the victim and his sibling Valeri Zashev woke up and saw three men standing in the room wearing masks and gloves. The attackers commanded the siblings to give them the money they had. This time T. L., the aunt of the children stepped in. The attackers became startled and the man with the gun shot twice. One of the bullets hit the boy, Ivaylo Zashew, who thereupon died minutes later. The detectives interrogated madam T. L. and many other witnesses. Including V. K., who worked as the driver of the local businessman, P. T. He became a suspect on the 8th of February and was kept in custody for a few days. During this time he was interrogated multiple times. He confessed

that P. T. had ordered him to go to Stavertsi's with I. K. and two other persons. When the three men had got out of the car they took up masks and gloves. While V. K. was waiting for them, he heard two shots. After this V. K. returned to the house of P. T., who told him to forget the events of the night.

On the 15th of February, 1997 P. T., I. K. and V. P. were arrested and on the next day P. T. was set free and later the detective performed a presentation for recognition where V. K. identified I. K. and V. P. In March 1997 someone called G. G. was also arrested with the suspicion of taking part in the robbery.

V. K. was interrogated again in June, 1997. He withdrew his previous statements and said that he was forced by the police to supply false evidence. During an interrogation in August a person, who was taken into custody and stayed in the same cell as G. G., stated that this person asked him to kill V. K.

In November the detective interrogated V. K. again, who changed his statement again. He confirmed his statements taken in February to be true and withdrew his statement he had made in June. He said he had been under pressure by P. T., who had kidnapped and restrained him and this is why he had lied.

During the organised presentation for recognition in the December of 1997 V. K. did not recognize G. G., then stated that the police treated him badly and he was under pressure for identifying a person who had been defined earlier.

The court of justice did not find the presentation for recognition with the participation of V. K. trustworthy. It was against the procedural rules that they never asked him about the perpetrators' differentials from which they would identify them before the recognition procedure and in the line there were not any individuals who looked like him. Moreover, V. K. got an order about who he should identify by which physical characteristics. The prosecutor's office did not present any other evidence for setting up the connection between the suspects and the crime. In the lack of evidence an acquittal was born.

According to the ECtHR the detectives made the first mistake when they had not collected enough information before the recognition process from which they could have decided that in this instance a special recognition process should have been conducted with a one-way mirror, in favour of the safety and influence immunity of the eyewitness. In the next place the action itself was performed in an irregular way[1]. After all these they affected the efficiency and decency of the investigation with not providing efficient protection for the key eyewitness, who probably withdrew his criminative statements because of the intimidations given to him[2]. Regarding to these, ECtHR reached the conclusion that the investigation in connection with the death of Ivaylo Zashev violated the 2nd Article of the Convention and Bulgaria was condemned.

If it arisen, we quote the 2nd Article of the Convention:"*Right to life"*

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

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[1] B. W. Behrman, S. L. Davey, *Eyewitness identification in actual criminal cases: an archival analysis*, Law and Human Behavior, 2001/2, pp. 475-491.

[2] P.M. Wall, *Eye-Witness Identification in Criminal Cases*, Springfield, Illinois, USA, Charles C. Thomas Publisher, 1965.

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

The *K.Ö. vs Turkey case* was started by a Turkish citizen February 23rd in 2001. According to the main case the daughter of the applicant joined an illegal organization. What the applicant said is that since that the police had descended on her in her house, harassed and threatened her multiple times. The applicant states that in the evening on the 19th of November in 1999 three men identified themselves as police officers stuffed her mouth, beat her, threatened her and the officers also committed sexual assaults against her. Furthermore, the applicant stated that the officers overran her house again on the 28th of November. They told her that they were going to kill her and her children if she would hand in a formal complaint in connection with the previous incident. One of them was holding a gun to her head and took her money.

In the December of 1999 the applicant filed a report in which she asked for taking three police officers in civilian clothes in front of the court. She described the events of the two days which had been committed by the same three police officers according to her statement. She also noted that the officer who had held a gun to her head was tall and thin and thin haired. On the 27th of December she made a statement again with the interpretation of her son and stated that two police officers went to her house around 6 pm and told her that they knew that she had handed in a complaint. She had never seen them before. They went into her house and tore up her medical reports, broke the pictures of her daughter and ruined her green card. After these they beaten and threatened her.

She pointed that the perpetrator was not on the photos which were shown to her in the police station. She also made a description about the two persons and added they had a beard. According to her the officer who was strangling her with a cord had black hair and he was tall and thin and a white man.

On the 31st of March, 2000 the applicant was called for a presentation for identification in the police station. 108 police officers (from the anti-terrorism section) stepped in to the identifying room in 10 persons-groups.

Under the recognition protocol the applicant and her son identified R.G. as one of the men who had stepped inside their house. The prosecutor of this time decided o ask the son to leave the identifying room because he showed excited behaviour.

After her son was taken out of the room the applicant stated the R.G. was one of the men who had been in her house in 1999, November 28th. She stated also that R.G. and the two other officers had said they had been journalists and that was why she had opened the door to them. She could see R.G. but she could not see the other two men's faces. When she was asked why contradictions appeared in her testimonies the applicant stated that she was confused. She repeated that R.G. had taken her money on the 28th of November 1999 but he had not hurt her. In 2000, 7th April the prosecutor interrogated R.G. – the identified person – who denied the commitment of the crime. He stated that he was not familiar with the applicant or with her house. He said that he spoke a bit of Kurdish and he had heard when the son of the applicant had said to his mother that she should identify him. According to him the son of the claimant applicant tried to take revenge with this act because a half year ago he had arrested the son of the applicant. Furthermore, he added that he had been working in the area in the last 3 and a half years and not everybody sympathized with him. Lastly, he suggested the

applicant's statements taken during the identifying procedure were contradictionary with her previous statements.

On the 17th of April, 2000 the director of the Psychiatry Department, S.Y. communicated that the applicant was taken under examination on the 26th of February and on the 24th of March. She was diagnosed with post-traumatic stress syndrome and she was under treatment by that time already.

On the 23rd of May the prosecutor handed in the decision in which he did not file an indictment against R.G. The applicant found fault with the mentioned prosecutor's decision but the Jury rejected her objection. The applicant stated that the police had molested her in her house repeatedly and she had been beaten and threatened by them in the May of 2000 and in April and June of 2001.

On the 3rd of January in 2005 the applicant was arrested. On an undefined date one of the Turkish courts sentenced the applicant because of the aiding for an illegal weapon organism, they imposed 3 years and 9 months of imprisonment upon her.

The ECtHR found in its decision made in 2007, December 11 the violation of the 3rd Article of the Convention because of the lack of an effective investigation into the applicant's allegations because of ill-treatment.

In the investigation of the homicidal *Popov vs. Russia case* the applicant took part in a presentation for identification where two schoolboys out of four identified him. However, these two boys were not eyewitnesses of the murder he was suspected with in May 2000. when the applicant was kept in the SIZO 77/1 prison in Moscow. In June 2002 his lawyer handed in a complaint to the prosecutor because of the conduct of the investigation. Among other things he stated that the presentation for identification violated the requirements of the proceeding and that there were no steps taken for the proving of the applicant's alibi[3].

The prosecutor permitted the implementation of the proposal, to interrogate R., the applicant's neighbour and K.H., the carpenter working in the house. Their testimony was never recorded by the investigation authorities. In 2003 the applicant was sentenced for 10 years to high-security prison. Besides the conflicting reports of the schoolboys the court leant on other evidence for example to the necropsy of the victim, on the crime scene and on other diverse reports without explaining how these items proved the guiltiness of the applicant.

According to the ECtHR by neglecting the interrogation of two witnesses of the protection the national court did not scale that their statements could have been important in case of the investigation of this case. The previous motions of the protection, to examine them were permitted even in the preliminary examination and in the judicial proceeding. Consequently, the domestic authorities thought that their statements could be relevant. Considering the following:

a) the sentencing of the applicant was based on conflicting evidence;
b) the domestic authorities neglected the interrogation of the witnesses;
c) the relevancy of their statements was ignored;
d) by this they denied the right to have protection with an irreconcilable way of the fair guarantees.

Hence, as a final conclusion. the ECtHR offered as one voice the violation of point d) in the (3) Paragraph of Article 6 in connection with the (1) Paragraph of Article 6.

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[3] G.L.Wells, R. Lindsay, *Improving Eyewitness identifications from lineups: Simultaneous versus sequential lineup presentation,* Journal of Applied Pshychology, vol. 70/1985, no. 3, pp. 556-563.; G.L. Wells, E. A. Olson, *Eyewitness testimony*, The Annual Review of Psychology, no. 54/2003, pp. 277-295.

In the *Bocos-Cuesta vs. Netherlands case* the applicant complained that after a presentation for identification the court – falsely – sent the case back to the detective authorities for the victims to choose their abuser by identification with photograps. The applicant wrote in the application that it was unnecessary to take identification with his photograph because the recognizers had already identified him on the personal presentation for identification (however, not regularly).

In the same case it appeared that the persons acting in the proceeding organised a presentation for identification with the help of a one-way mirror where no one was presented except the suspect on the presentations for identification. Furthermore, it was not allowed for the applicant to ask questions from the underage victims, who were the recognizers.

The applicant also found it offensive that the proceeding causelessly took an illogically long time. The ECtHR stated that the investigation took almost two years and during this time significant delays occurred. The applicant handed in a complaint to the prosecutor's office in the August of 2006, however, he was only interrogated in the January of 2007 and the substantive official investigations were also started only in this month. The recognition process was held on the 28th of February in 2008. Nothing explained the implementations after one and a half years of the handling in of the complaint.

The ECtHR considered that the investigation was not objective and comprehensive, in view of these it stated the violation of Paragraphs (1) and (3) of Article 6.

In the *Laska and Lika vs. Albania case* on the 21st of March, 2001 a person wearing a blue, two wearing white face covering masks (baklava) robbed the passengers of the minibus travelling between Kukes and Tirana, armed with knives and AK-47s. They had taken the money of the victims, their jewellery and after that they left without causing personal injury.

A few hours later the police practiced house searching in the houses located near the scene, including Lica's house (the second applicant), where he was staying with his father, his brother (B.L.) and his friend – Laska (the first applicant).According to the police's report the police found two white and a blue T-shirts in the pocket of the first applicant and the baklavas were considered to be made of these clothes. (The stolen items and the weapons were not found, only a couple of grenades near the house.)

The applicants and B.L. – the brother of Lika – and his father were taken to the police station for interrogation. B.L. asked for the presence of a lawyer but they the denied the request, even though he was underage. Lika denied the possession of any kind of masks or baklava and charged the police with the manipulation of the evidence.

On the same day the presentation for identification was held according to Articles 171-175 of the Albanian criminal procedure law with the participation of the victims. Five persons were queued up for the identification. The two applicants and B.L. were wearing homemade white and blue baklavas and the two other presented persons were wearing black ones. Even though the police had changed the positions of the persons standing in the line and the victims identified again the ones wearing white and blue baklavas.

The recognition of the persons was followed by recognition of items. In this procedure the victims were asked to choose from among two black, two white and one blue baklava. They chose the white and the blue masks as the baklavas of the perpetrators.

With all these evidences the applicants and B.L. were arrested because of the suspicion of armed robbery. The first applicant accepted that he possessed a white T-shirt which was converted into a baklava by F.N. – the officer responsible for the investigation. The second applicant stated that the other white T-shirt which was found by the first applicant was not his.

On 2nd of April, 2001 the prosecutor's office brought an accusation against the applicants and B.L. At the trial they asked for the ignorance of the results of the presentation for identification in knowledge of the fact that they were held in violation of the domestic law and considering that suspicion was casted on the police in connection with faking the evidence. Also because of this they asked the officers to summon to the court who labelled the textiles to be baklavas, because they thought that they were only T-shirts and asked to present them in front of the court. The court refused to allow both of these applications without specifying a reason and building to the results of the presentation for identification and it sentenced the applicants for 13 years imprisonment and B.L. to five years imprisonment. (Beyond that they were found guilty with illegal possession of weapons even though the weapons used by them during the crime were not found by the police.)

On the 29th of May 2002 the defendants held in an appeal to the Shkodrai Appellate Court with the reason that the general court's sentence was created in an unfair proceeding. They stated that the presentation for identification was implemented with harsh violation of the Albanian criminal procedure because they were wearing the same ski masks at the processes. The court in first instance rejected the application of their attorney in connection with the nullity of the identifying act. They also found it offensive that despite of their request the pieces of evidence – the masks – were not shown at the trial. They argued with the fact that the authorities could not find the money and the weapons used for the robbery.

In front of the ECtHR the applicants pleaded that the presentation for identification was unfair. They stated furthermore that the domestic courts never fulfilled their applications which asked to examine the pieces of evidence (ski masks) at the public trials.

The ECtHR felt that the guiltiness of the perpetrators was set by the statements of the eyewitnesses who had taken part at the presentation for identification. That is why it examined the rules of the identification process and the implementation method specially. According to the sentence Paragraphs 171-175 the Albanian criminal procedure rules the organisation of the presentation for identification obviously. The corporation examined that in case of the applicants the presentation for identification was or was not in correspondence with the requirements of decency due to Article 6.

Firstly, the applicants and B.L. had to stand in the line wearing white and blue ski masks, similar to the ones worn by the perpetrators. The other two people in the line wore black ski masks unlike the white and blue masks which were suspected for the commitment of the crime worn by the applicants and B.L. The changing of the positions of persons taking part in the setup did not result indifferent results because they had to wear the same coloured ski masks (white and blue). The ECtHR stated that the presentation for identification was equivalent with a direct call for the witnesses to point out the applicants and B.L. as the perpetrators of the crime.

The Court of the Human Rights also noticed that the presentation for identification was held without the presence of the attorneys of the applicants. From the documents of the case it did not emerge if the applicants renounced from their free will – decidedly or implicitly - from the entitlement for defence during the presentation for identification. The ECtHR noted in connection with this, that even though the regional court admitted that during the examination period infringements occurred, when sentencing the the applicants, it relied on the positive identification of them which was set by the eyewitnesses on the recognition process. However, nor the defence offered later by the attorney, nor the contradictory natured proceedings following the previous ones could repair the errors having occurred during the criminal investigation.

There was no independent supervisory proceeding about the unfair proceeding or about the protestation about the flagrant irregularities. The Strasbourg-panel stated that the obvious ignorance of right to have defence in this period had influenced irreversibly prejudicial the posterior justice of criminal jurisdiction.

Lastly, the judges noted that there was no explanation for rejecting the application of the accused about showing the used ski masks on the presentation for identification in front of the court. Although it is true that the right to release the relevant evidence is not absolute, the court has to examine the decision-making proceeding in favour of granting the proceeding to fit to the conflicting proceeding to the equality of the weapons and to the integrated requirements.

The ECtHR judged that the in the cases of the applicant the equity would have demanded that they should have been able to argue beside the fact that the ski masks worn during the identifying process, which were the main evidence of the charge, were entirely different from the ones worn by the robbers. At the trial they did not get the opportunity to repair the irregularities having occurred during the presentation for identification. In connection with these the Albanian government did not refer to explanations of public utility in holding back these kinds of evidence and from the domestic procedure did not show any reason for this either.

Facing the findings above the ECtHR came to the conclusion with its decision made on the 20th of April 2010 that the mentioned proceeding did not fit the requirements of a bona-fide proceeding. Accordingly, it announced the violation of point (1) of Article 6.

In *Velev vs. Bulgaria case* the applicant handed in a complaint in connection with the failed efficient investigation. In the general case on March 21st in 2005 the applicant and another person, E.Y. were apprehended by the police with the suspicion of robbery. A year later the applicant handed in an accusation that said the police officers had beaten him to make him admit the commitment of the crime during the 3-day long custody. He stated that he did not know the names of the officers but he would be able to identify them.

The applicant was interrogated several times between January and March in 2007. On one of these occasions he described the officers abusing him and the ones who were eyewitnesses of the abuse. One of the officers was about 160 cm tall and black haired and the other officer who abused him on 21st March 2005 was about 25-30 years old, 175-180 cm tall and had short black hair and a beard with a distinctive shape.

On 19th February 2008 the applicant took part in the identifying process with photographs. With more photos different people were shown to him and the applicant identified two of them as the ones who beat him on 21st of March but could not identify the officer who beat him on 22nd March. Later the applicant was confronted with S.S. and D.D. but he stated that he was not familiar with them. It appeared to him that they were not the officers identified by him on the presentation for identification made with the photographs.

On 11th March 2008 the prosecutor finished the criminal procedure. One of the reasons for this was that the applicant confessed that he had seen the assumed perpetrators after the incident, which influenced the results of the identification process with the photographs according to the prosecutor's opinion.

The ECtHR found that there was a violation of Article 3 of the Convention by reason of the authorities' failure to investigate the applicant's ill-treatment effectively.

In the main *Beuze vs. Belgium case* on 17th December, 2007 the French gendarmerie arrested Philippe Beuze, a Belgian citizen and after that took him in custody in virtue of a warrant of arrest and on 31st December handed him to the Belgian authorities. He

had murdered his ex-girlfriend, M.B. with malice aforethought. The warrant of arrest contained that Beuze was identified officially by the neighbour of the victim. The warrant also contained the danger of recidivism on the grounds of the violent past of the perpetrator. From the records of the French gendarmerie it turns out that the suspect had renounced from the defendant choosing and from the appointed public defender also due to Paragraph (4) of Article the 63 of the French criminal procedure.

The suspect was interrogated by the Belgian police and by a verifier judge without the presence of a defendant. The dealing Belgian court rejected the application of the suspect, which he asked them to exclude the evidence which was included without a defendant in front of the police and the verifier judge. After the trial the jury sentenced him to life-long imprisonment because of murder with alike aforethought. His appeal was rejected by the Supreme Court because in the verifier period before the trial the lack of defence was not considered as a bruising fact of his right to have a fair procedure.

The ECtHR stated that the accused was handed over to the Belgian police on 31st December, 2007 at 10:40 am but till 17:42 pm – until the meeting with the verifier judge - he was not able to discuss anything with his defendant when the verifier judge asked for the appointance of an attorney. After this he was able to make discussions with his defendant but he was interrogated or other investigation acts were taken without the presence of the defendant 10 times (including the presentation for identification). The defendant did not take part in the reconstruction of the location on 6th July, 2008. It otherwise did not win statement that neither the French, nor the Belgian authorities made pressure on the suspect.

Besides the Treaty the 2013/48/EU guideline of the European Parliament and Council disposes about the right to have the help of an attorney during the criminal procedure in connection with the warrant of arrest and about the right to notify some of the third parties at the time of the imprisonment and about the right to communicate with the third parties and the consular authorities during the imprisonment.

The sentence of the ECtHR stated the violation of Article 6 because the lack of the presence of a defendant in some of the investigation events for example during the presentation for identification, which can disparage the fair trials.

In the main *Mindadze and Nemsitsveridze vs. Georgia case*, David Mindadze (later referred to as first applicant) and Valerian Nemsitsveridze (later referred to as second applicant) turned to the ECtHR in the May of 2005. They stated that:

a) the first applicant was abused by the police while the arrest;
b) the conditions and the period of the arrest were deficient and illicit in the case of both of the applicants;
c) some of the seizure orders did not include adequate decrees;
d) with both applicants the criminal procedure was basically unfair.

According to the story in January 2004, the criminal procedure was started against unknown persons, who attacked K.G. with weapons, a representative of the Georgian parliament; they attempted homicide. In February 2004 the victim was interrogated by a detective first. According to his description a sketch was made of the perpetrator, but the representative said that he did not know who the attacker was and did not know if he was able to identify him.

On 13th May, 2004 the first applicant was captured on the street because of the suspicion for attempting homicide. According to the police the first applicant confessed that he had made an agreement with the second applicant, who offered ten thousand USD to murder the representative.

On the same day the first applicant had taken part at a presentation for identification with three other persons. After some hesitation the member of parliament identified the applicant as his attacker.

After the presentation for identification the member of parliament asked for a private conversation with the first applicant, which was allowed. No one was present at this conversation and later that day the second applicant was also arrested with the suspicion of the attempt of homicide.

In the May of 2004 the first applicant was confronted with the second applicant. On this he confessed duly to his previous confession, he accused the second applicant.

Subsequently, the wife of the first applicant complained that she had seen signs of massive abuse on his husband and that is why they had entrusted an own attorney.

After the first applicant had handed in a complaint to the detective authorities referring to his confession, which he had made under torture on 13th May, he had been beaten and shocked by electricity. His proclamations made at that time were not true due to this reason. He asked for repeated interrogation. He cleaved to the fact that the criminal procedure conducted in connection with his abuse would be of capital importance with the survey of the validity of the criminal procedure conducted against him and the second applicant.

The second applicant also confessed himself to be innocent. His attorney asked for the pronouncement of the records ineligible because it was worsened by malpractice. In connection with this he highlighted that the victim had said: he was not able to identify his attacker, the sketch which was made from his description was not similar to the first applicant. Later he stated that he was able to identify him and he had done it building upon the ”general look” of the applicant. On top of that the first applicant was lined up with three other persons in front of the victim and those persons looked entirely different from him. His application was rejected by the Georgian authorities because of groundlessness.

One of the men who had taken part in the presentation for identification where the first applicant was identified told the court that the police had contacted him on the street randomly to take part in the process. He stated that all of the participants of the identification process were shaved except the first applicant. One of another obvious discriminative parameter was that from among the men in the line only the first applicant was bald. The applicant looked weary and a deep bruise was to be seen around one of his eyes. A significant difference was to be discovered between the appearance of the applicant and that of the other three men.

The other participant of the presentation for identification – who was also called in from the street – told the same characteristics about the applicant including the bruise as well. He added that only the first applicant did not wear a belt and shoelaces. When the victim identified him as the man who shot at him the applicant shouted that it was not him.

Even so the national court stated that the charge of attempting homicide was in the case of both applicants and by direct evidence which did not have essential anomalies. For example the proclamations taken from him due to the private conversation with the parliament representative and the proclamations of the first applicant. Both applicants handed in an appeal, which was rejected by the court and the first applicant was sentenced for 21 years of imprisonment and the second applicant for 16 years of imprisonment.

The ECtHR founded the violation of Point 1 and 3 of Articles 3, 5 and Point 1 of Article 6.

III. Short Answers for the Previously Asked Questions

a) The ECtHR is familiar with and deals with the identification processes. Most commonly referred to as „identity parade"
b) It is obvious that it can violate the requirement of fair proceeding (Article 6) if the identification which makes the base of the impeachment is implemented wrongly (influentially or forcefully). The humiliating and illicit management (torture) can also occur and it comes up against Article 3, the prohibition of torture. The wrong result of the identification can come off as the result of the wrong identity parade and also the violation of Article 5, "right to liberty and security". And the violation of Article 8 is also unexcluded if the mode enters into the right to keep the private and family life decent[4].
c) In some states the violation of the forensic and criminal procedural requirements can occur. The cases described above show that among the national authorities, technical deficiencies can show up. Not correct, not fair, not lawful implementation formulas[5].
d) Within the most common violation reasons the followings can be seen: the (potential) accused is not shown with persons with similar look, authorities make influence (in harsh cases coercion), conduction without the presence of a defendant, insecure choices are protocolled as secure choices.
e) Concrete Hungarian application cannot be found in connection with identification proceeding.

IV. Conclusions and Suggestions

Our conclusions drawn from the decisions of the ECtHR and our (general) suggestions for the Hungarian legislation and law enforcement are sketchily presented as the following. (We answer our previous 6th question with this line.)

We start immediately with our criticism of the appellation. According to our perception the appellation „presentation for identification" in the Hungarian criminal procedure urges the recognizer who usually wants to fit to the authorities' expectations and who is most commonly the insulted witness of the crime to choose from the presented people (objects, sounds, photos, videos etc.). To choose someone either way, to recognize someone for sure.

The forced compliance can come with the incorrect outcome that the recognizer chooses even though he or she is not sure about it or just feels a bit of similarity or simply makes an inference due to the outlook that he/she only guesses to see the real perpetrator. This flaw of the recognizer can lead to *justizmord* because the choice cannot be denied theoretically or practically if the chosen person does not have a substantive alibi[6]. This is why it would be more legitimate to speak about „experiment for identification" – modelled on the evidentiary experiment – that is to say the attempt of

[4] Department of Justice Technical Working Group for Eyewitness Evidence 1999: https://www.ncjrs.gov/txtfiles1/nij/178240.txt Chapter V, par. 4 (accessed on 22.02.2023).

[5] M.J. Saks, J. J. Koehler, *The Coming Paradigm Shift in Forensic Identification*, Science, 2005, no. 309.

[6] C.R. Huff, A. Rattner, E. Sagarin, *Convicted but Innocent. Wrongful Conviction and Public Policy*, Sage Publications, Thousand Oaks, 1966; A. Badó, J. Bóka, *Ártatlanul halálra ítéltek [Innocently death penalty]* Budapest, Nyitott könyv, 2003; http://www.innocenceproject.org (accessed on 25.02.2023).

identification not presentation. This is why we feature this expression in the title of our study[7].

Our following thought is part of our criticism on legislation. Even though we read the most detailed law regulation about the identification in the history of criminal procedural law the criminal proceeding does not say that the identification should be carried out preferably between the circumstances of the original perception.

A) We also suggest it as a „*de lege ferenda*" proposal that it would be practical to fix in the law framing that the person who performs the identification process should call the recognizer (and should inform the recognizer about the following):

a) it is not certain that the perpetrator is among the people to be recognized;[8]
b) it is not obligatory for him/her to choose (to make a choice anyway);
c) the investigation continues if he/she does not choose anybody;
d) he/she will not get any feedback about the „right" answer, if he/she had chosen at all;
e) in case of the identification of objects, photos the mentioned warnings in points a-d) should be applicable just as the fact that as time passes by the perpetrator's outlook (hair colour, hair length, hair shape, facial hair, skin) can change and may look different on photos.

B) We raise a suggestion for the applicators of the law which can prevent influence and this method can be carried out also in practice. Doing it, instead of the detectives familiar with the case other executors, so-called „blind" ones who have not dealt with the case so far are precluded. Here we speak about the law enforcement employees (police, customs investigator, prosecution) who are not familiar with the person of the (potential) suspect, namely they do not know even in their subconscious who the target is. The line-up itself is set up by the criminalist who is familiar with the case and the suspect. Their task stops here for a while, they step out from the process. The employee who is unhinged from the influence of the case and this employee communicates this fact to the recognizer too. Therefore, he only practices the identification process and he does not know the case or the participants. He conducts the identification experiment organised and fixed - reservedly, distantly, uninfluenced because he does not know whom he should focus on - duly to the tactical-technical dedications. After that he hands the protocol containing the „results" to the original detectives. Because he does not have data about the history of the case it is not difficult for him not to give feedback, reinforcement nor extenuation nor in words or with movements and metacommunication. And he cannot do this after the identification process as the detectives dealing with the case also cannot do it[9].

C) Before the conduction it is expedient to give the description made by the witness or by the victim about the (potential) suspect to the legal representative (defendant, defence counsel) of the suspect. Hereby, the defendant has the opportunity to observe the flagrantly differently, the suggestive setting and complain if needed[10].

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[7] Cs. Fenyvesi, *Felismerési kísérlet a bűnügyekben [Identification Attempt in Criminal Cases],* Ludovika EgyetemiKiadó, Budapest, 2023.

[8] Benefits of Best Practice Recommendations (Canada), https://www.justice.gc.ca/fra/pr-rp/jp-cj/rc-ccr/pej-pmj/p5.html (accessed on 10.02.2021).

[9] A. Levi, *Some Facts Lawyers Need to Know about the Police Lineup*, Criminal Law Quaterly, 2002, no. 46, pp. 76-180.

[10] D.B. Wright, A.T. McDaid, *Comparing system and estimator variables using data from real lineups*, Applied Cognitive Psychology, 1996/10, pp. 75-84.

D) It is an important and to be controlled criteria that among the people in the line there must not stand an acquaintance of the recognizer (most commonly the victim)[11].

E) The leader of the identification process should aim not to communicate much during the process. The instructions should be short, clear and punctual.

F) It could have tactical importance to refer punctually and to fix it correctly how the recognizer witness impresses that from the people in the line in whom he/she recognizes the one who is in connection with the crime. Does he/she point at the perpetrator? Does he/she it out loud, decidedly, surely, repeatedly or inversely insecurely, indefinitely?

G) In connection with the previous point we emphasize our reasoning that no presented similarity, match can be accepted. The active subject either recognizes the person (object, sound) or not. In between, percented comparing is not to be accepted; in this case we cannot speak about identification.

H) For the collation of the bustling witness who wants to fit to the expectations of the authorities the so-called „empty" formation is needed. In the case if the (potential) suspect is not set into the line only the ones who are indifferent and above the/any suspicion.

I) In connection with the witnesses we offer to summon the active subject to appointments separately so they cannot talk about the previous events, people, description or in front of the building or inside while waiting. Everything has to be done to prevent them from communicating with each other before or during the identification. (They should not send messages and photos to eachother and they should not create Facebook, WhatsApp groups).

J) During the identification carried out with photos several photos should be shown to the recognizer and the same should be done during the preliminary investigation and the collection of data.

K) More (different) photos about the same person cannot be shown.

L) The sizes of the photos about different people should be the same and they should carry same parameters. All of them should be shown to the recognizer for the same amount of time.

M) Especially when the process is made by functional personalities (e.g. running, talking, sound) it is practical to use more modern technical gadgets (e.g. video, digital camera, electronic recorder). No kinds of recording cut should be made in the parade.

N) By identifying a corpse it must be fixed if the active subject did not recognize the body or face but the clothes or jewellery. In this case we cannot speak surely about recognizing a (dead) person.

O) It should be considered that in the trial period is it necessary to repeat the question to the recognizer if he/she recognizes the person who he/she had already seen and picked out. We think that the „reproduction of the reproduction" does not have proving power.

P) It is not only a reason for the security of the victim that the passive subjects (the ones to be recognized) cannot see the active subject – the recognizer – but also a reason for the criminal tactics.

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[11] P. Hack, *Az igazságszolgáltatás kudarcai [Failure of Criminal Justice],* in Cs. Fenyvesi, (Ed.), *A Magyar Büntetőjogi Társaság Jubileumi Tanulmánykötete*, Budapest-Debrecen-Pécs, MBT, 2011.

V. Constitutional closing thought

Like all people who seek for the rule of law, security, qualitative criminal investigation, lasting and capable legal norms and like all the researchers busy with legal theory we also hope that our suggestion of improvement published in our scientific study have substantive influence and effect on the legislation and on the application of law. If not even in the following months but during the years we hope that we can earn that one of the milestone acts of the criminal proceeding – the identification experiment – can appear worthy to its contentious form even in law and even in implementation and it will not give evidence to false decision of the court and to *justizmord*[12] which ought to be prevented by everyone.

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