

# **The right to legal assistance in criminal proceedings: the European Court's approach and practical challenges**

## **Abstract**

The right to fair trial is one of the most litigated human rights enshrined in the European Convention. The right to legal assistance is an important element of the fair trial. It is recognized, that when it comes to criminal proceedings, the support of a qualified lawyer is imperative to ensure the fairness of the trial and the effective enjoyment of procedural rights by a person suspected or accused of committing a crime. The European Court repeatedly pointed out that without any real access to legal counsel suspects and accused are extremely susceptible to being coerced into giving confessions and into waiving their rights without understanding the consequences. The article focused on the relevant European Court's case law and highlighted practical challenges associated with the implementation of this right in criminal proceeding, in particularly the issue of the effectiveness of legal assistance. It has always been the position of the Court that the state is not accountable for the actions of an officially appointed lawyer. In Court's opinion, the conduct of the defense is essentially a matter between the defendant and his counsel. Active state intervention is seen rather as an exception tolerated only in special circumstances. Nevertheless, without diminishing the importance of the independence of lawyers, it should not be seen as more valuable than providing qualified and practical legal assistance to a person suspected or accused of a crime. The effective legal assistance in the pre-trial stage, especially in the critical ones, should be considered as an integral part of the fair trial. When assessing whether adequate legal assistance was provided in specific case, the formal approach is inadmissible. The effectiveness of legal assistance should not be presume by the mere fact, that a person suspected or accused was "equipped" with a counsel whether retained or appointed. The question of the quality of legal assistance should not be seen predominantly as an internal matter of the lawyer's professional association. There should be independent supervision specific to redress ineffective assistance by the counsel.

**Keywords:** European Court of Human Rights, fair trial, criminal proceedings, defense counsel, right to legal assistance, effectiveness.

## 1. Introduction

Among the rights provided by the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950<sup>1</sup>, the right to a fair trial occupies a special place. It is recognized, that the violation of the right to a fair trial may result in a breach of other rights guaranteed by the Convention and its Protocols. “The idea of a fair trial is central to human rights doctrine, not only as a right in itself, but because without this one right, all others are at risk; if the state is unfairly advantaged in the trial process, it cannot be prevented in the courts from abusing all other rights” (Robertson, 2004, p. 80). This is one of the main reasons, why the European Court’s case law concerning art. 6 of the Convention is so extensive. It is regrettable that the right to legal assistance in criminal proceedings, while being an essential part of the right to fair trial, relatively rare becomes the subject of Court’s review. The reason may perhaps be found in the opinion expressed by the Court, that the state generally can’t be accountable for the actions of a lawyer and the conduct of the defense is essentially a matter between the defendant and his counsel. That fact is even more regrettable since the Convention doesn’t specify the requirements that legal assistance is expected to meet. The question, whether the right to legal assistance is a formal or a substantive one became a subject of the continuous scientific discussion.

The article adopt a twofold approach to the research topic. First, the initial exploration as to the European Court’s case law on the right to legal assistance. This analysis will emphasize the essence of the right to legal assistance, its role and purpose and also shows permissible restrictions. Second, it has to be proven, why effective legal assistance during pre-trial criminal proceedings must be considered an essential part of fair trial. This author addresses the issue using the case example.

## 2. The right to a fair trial

Since it was established in 1959 the Court decided on the examination of around 798,600 applications and has delivered more than 20,600 judgments. Around 40% of those judgements concerned three member States of the Council of Europe: Turkey (3,386), Italy (2,382) and the Russian Federation (2,253). Nearly 40% of the violations found by the Court have concerned art. 6 of the Convention, whether on account of the fairness (17.21 %) or the length (20.70 %) of the proceedings. In 2017 28,05 % of all violations found by the Court were

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<sup>1</sup> Hereinafter referred to as the Convention.

related to the provisions of art.6 of the Convention. Even those European countries, which has a relatively good reputation when it comes to the sphere of human rights, have “a number of judgments” on their account stating infringements of art. 6 of the Convention. For example, in the case of Denmark, which undoubtedly stands out among Western European countries, if we take into consideration the level of human rights protection (Christoffersen and others, 2014, p. 139-164, 313-319), the Court found 15 violations, nine of which were violations of art. 6 of the Convention. In eight cases, the dispute concerned the length of the proceedings, and in one case related to violation of the right to a fair trial. Against Italy, where the Convention was in force since 1955, a total of 2135 complaints were filed in 1959-2016. The European Court issued 1791 judgments in which it stated at least one violation of the rights guaranteed by the Convention. In 1480 cases, the Court found violations concerned art. 6 of the Convention, among others the violation of the rules of conduct within a reasonable time and principles of enforceability of judgments.

### 3. The right to legal assistance

The right to legal assistance is considered as an important guarantee of the right to a fair trial (art. 6 of the Convention) and the prohibition of torture (art. 3 of the Convention), although it was never regarded as the fundamental characteristic of the fair trial. The right to legal assistance is not even directly named in the Convention. The very term appears in official factsheets and in comments. In accordance with art. 6 § 3 (c) of the Convention, everyone charged with a criminal offence has “the right 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”. So formally the Convention recognizes the right of an accused to defend himself or in other words the accused's right to be present at the trial so that he can participate in the criminal proceedings instituted against him. The right of the accused to participate in the criminal trial also includes the right to receive legal assistance and to follow the proceedings effectively (Schabas, 2015, p. 310; Cassim, 2005, p. 285).

The Convention itself provides very little information on the practical aspects of fair trial and the right to legal assistance in particular. The Member States have been permitted a wide discretion concerning the formalities of trial procedure, “provided the trials themselves are deemed to fulfil Convention requirements” (Greer, 2006, p. 251). The Court's extensive case law concerning art. 6 of the Convention makes up

for the absence of specific legal provisions. Over the last decades the European Court addressed a range of important questions related to the right to legal assistance more often in connection with free legal aids: when the obligation to provide legal assistance arose, whether the state authorities can restrict the right of a person suspected or accused of a crime to legal counsel and for how long the deprivation of professional legal help can last. The Court has been addressing these issues in its judgements in *Salduz v. Turkey* from 2008, *Ibrahim and others v. United Kingdom* from 2016, *Simeonov v. Bulgaria* from 2017. On 20 December 2017, the Grand Chamber has heard the case of *Beuze v. Belgium*, which probably will have wide-ranging effects on the right to early access to a lawyer in criminal cases across Europe.

It should be emphasized that although an accused is entitled to be defended by counsel, the Court has not viewed this as absolute, but rather subject to limitations. In *Salduz* case the European Court concluded that the fairness of the applicant's trial had not been prejudiced by his lack of legal assistance during his police custody. The Court held, that access to a lawyer had to be provided from the first police interview of a suspect, unless it could be demonstrated that in the particular circumstances there were compelling reasons to restrict that right. Even where such compelling reasons did exist, the restriction should not unduly prejudice the rights of the defense, which would be the case where incriminating statements made during a police interview without access to a lawyer were used as a basis for a conviction. The *Salduz's* case has given impetus to the process of transformation of the right to legal assistance in criminal proceedings. Prior to the judgment in *Salduz's* case, many national legal systems in Europe did not provide for the possibility of a suspect being assisted by a lawyer in police interrogation. On 22 October 2013 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings was adopted. The Directive provides access to a counsel from the beginning of police questioning, allows adequate and confidential meetings with the defense counsel for the suspect to effectively exercise his procedural rights, allows the defense counsel to play an active role ("to participate effectively") during preliminary interrogation. In accordance with the Directive 2013/48/EU the right to legal counsel can be derogated in exceptional circumstances, if there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person or immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings (Bachmaier Winter, 2015, p. 122). In *Ibrahim and others v. United Kingdom* the applicants claimed, that they had been interviewed by

the police (in connection with terrorist attack under the Terrorism Act 2000) without access to a lawyer and that the evidence obtained from those interviews was used at their respective trials. The Court has allowed derogations from certain rights under the Convention in the context of questioning and holding individuals suspected of terrorist activities. The Court found that there had been compelling reasons to delay the applicants' access to legal advice in light of the exceptionally serious and imminent threat to public safety. The Simeonov's case concerned the absence of legal assistance for the first three days of the pretrial detention. The Court held, that the fairness of the criminal proceedings taken as a whole had not been irretrievably infringed by the absence of a lawyer and that the absence of a lawyer during the police custody in this particular case had in no way infringed applicant's privilege against self-incrimination. The case of *Beuze v. Belgium*, in turn, concerns the scope of the right of access to a lawyer during the preliminary stages of criminal proceedings. The applicant, Philippe Beuze, sentenced to life imprisonment for intentional homicide, complained that the Belgian legislation did not provide for assistance by a lawyer at the initial stage of proceedings and that, in consequence, he did not receive the assistance of a lawyer during preliminary stage of criminal procedure against him. The Court (the Grand Chamber) will decide, whether individuals can be convicted if were unlawfully denied early access to a lawyer in criminal proceedings.

#### **4. The effectiveness of legal assistance in the European Court's case law**

Although access to a lawyer at the earlier stages of criminal proceedings and the question of whether accused can be deprived of this right are vital issues an equally important element of the right to legal assistance is a matter of its effectiveness. W. A. Schabas noted, that art. 6 § 3 (c) speaks of "assistance", not of "nomination" or "appointment". Its an "important distinction because mere nomination or appointment does not ensure effective assistance" (Schabas, 2015, p. 311). Nevertheless, the term "effective" on its own is something intuitively understandable, but in criminal procedure could be easily misunderstood or interpreted differently depending on the assessment criteria. For the first time the Court discussed the problem of the effectiveness of legal assistance and the corresponding obligations of the Member States in *Artico v. Italy* of 1980. The Court held, that the Convention is intended to guarantee not rights that are

theoretical or illusory, but rights that are practical and effective, that the interests of justice sometimes require the provision of effective assistance. In *Poitrimol v. France*, the Court interpreted the word “assistance” pointed out, that “although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial”. In *Ananyev v. Russian* the Court noted, that “the procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial”. According to J. E. B. Coster van Voorhout, the “effectiveness” of the defense can be measured in terms of its contribution to an error-free process or accurate outcome (Coster van Voorhout, 2016, p. 55). In the context of evaluating legal assistance services, effectiveness also refers to a causal link between an activity and an outcome (Digiusto, 2012, p. 1). The main and obvious purpose of the criminal justice is to deliver justice for all, by convicting and punishing the guilty, while protecting the innocent. However, an accused and other persons participated in criminal proceedings can suffer from ungrounded restriction of their rights and freedoms. In such a situation it would be at least inhumane and in contradiction with the principle of a fair trial to wait for the final judicial decision. So the legal assistance in criminal proceedings in the pre-trial stages can be described as an effective, if a defense counsel managed to protect a defendant from unlawful and ungrounded accusations, and from the unlawful and ungrounded restriction of his rights and freedoms.

At the end of 2013 a new Guide on Article 6 concerning criminal matters was published. The Court noted, that art. 6 § 3 (c) enshrines the right to “practical and effective” legal assistance (para. 295). In 2018 a Guide on Article 6 of 2013 concerning civil matters was updated. In both documents the Court indicated that the State is not accountable for the actions of an officially appointed lawyer. It follows from the independence of the legal profession from the State, that the conduct of the defense is essentially a matter between the defendant and his counsel, whether counsel is appointed under a legal aid scheme or is privately financed. The conduct of the defense as such cannot incur the State’s liability under the Convention. However, the Court in accordance with its case law concluded that assigning a lawyer does not in itself guarantee effective assistance. “The lawyer appointed for legal aid purposes may be prevented from acting or may shirk his duties. If they are notified of the situation, the competent national authorities must replace him; should they fail to do so, the litigant would be deprived of effective assistance. It is above all the responsibility of

the State to ensure the requisite balance between the effective enjoyment of access to justice on the one hand and the independence of the legal profession on the other” (para. 297 and para. 107, respectively). Such an approach, however, could have a mixed impact on the access to effective criminal legal services. The independence of lawyers should not be seen as more valuable than providing qualified legal assistance to a person suspected or accused. Professional independence of a lawyer is not only just a privilege, but also its a duty as it serves as a guarantee of due process. The view, that the independence of the lawyer's professional organizations would be endangered when the state would become responsible for shortcomings of the lawyer, leads to the unnecessary polarization of the two interests (the responsibility of the state for fair trial and independent advocacy) against each other. The profession of a lawyer is a public one, the state determines its conditions and scope, and therefore is directly responsible for the quality of legal assistance particularly in criminal cases, there are the consequences of ineffective actions or mistakes of a lawyer can be grave.

## 5. The importance of effective legal assistance at the initial stage of the criminal procedure

Being deprived of legal assistance either formally, or factually (in such a case, there would be ineffective legal assistance) a person suspected or accused of a crime, in most cases, cannot defend himself especially, if we take in to account the conditions under which initial police interrogations take place (Ericsson, Baranek, 1982, p. 50-51). The importance of effective and practical legal assistance can be showed by the following example.

Sergey, a 30-year-old software engineer of one of the leading Russian computer companies, created an account in a popular social network. For that purpose he used a SIM card registered to another person, which he'd bought off the Internet. On his profile Sergey introduced himself as a 16-year-old, who is looking for a girl “to spend time together”. One day, 13-year-old Kate wrote back to Sergey. As it turned out later, on her profile she gave her real name, surname and age. Sergey and Kate for a whole month talked with each other through the online platform. They talk mostly about love and sex. Sergey assured the girl, that regardless to his age, he had considerable experience in this area. He wrote, that he already had several sexual partners and knew well, what a girl in the age of Kate needs. One day Katherine proposed Sergey a meeting in the real

world. Sergey cautiously warned her that he had a little more years than he gave in his profile. Kate replied that such a difference between them in age did not bother her, and even assured Sergey that she was attracted to older men. During the first date, Sergey and Kate walked around the city for a long time, sit at the cafe, on the second they agreed to go to cinema. When planning a third date, Kate proposed to meet near her home. When they met (on this occasion they for the first time contacted each other via SMS, and Sergey used his authentic phone number), as always, they talked mostly about love. Kate stated that she wanted her first man to be like him. But after that she confessed, that she had already had sexual contacts with several partners, but only in anal and oral forms. She even gave him names of other men. At one point, she said her parents had left, so the flat was vacant, and she asked if Sergey would like to go there. They entered the house, took the elevator to the fourth floor, where the parent's apartment was located. The girl opened the door and then invited Sergey inside. Sergey took off his jacket and hung it in the wardrobe. At this point, Kate said that two days ago she had had the first natural sexual contact with another man. Sergey reacted quite relentlessly to this message saying that in that case he no longer wanted to see her, and then began to put on his jacket. Then Kate came to him from the back and began kissing while touching the pants under his waist. They had penetrative sex in natural and anal forms. Sergey ejaculated into his hand. Then he went to the bathroom, washed and wiped his hands. He did not talk to Kate, dressed and left the apartment. The next day, he wrote to Kate online, asking how she felt. Kate replied that she did not want to talk to him anymore. After a month, police officers knocked at the door of Sergey's apartment. He was unofficially deprived of liberty and waited for the initial interrogation for at least 7 hours. After 6 hours, police officer draw up official arrest report, after that the investigator officially interrogated Sergey as a suspect. Before the interrogation, the lawyer from the local bar was appointed by the investigator as defender. However, in the protocol of interrogation there was no single question asked by the lawyer, and Sergey later admitted that he did not talk to him. He did not get any legal assistance, but he was told that admitting guilt in his situation, it will be the best possible solution for him. Sergey gave the investigator the data necessary to log on to his false account. After a two-and-half hour interrogation, the investigator asked the district court to apply a preventive measure in the form of temporary detention. After hearing the parties, the court allowed the investigator's request. During the

court session, Sergey allegedly confirmed the circumstances of the crime he was suspected of, although it was not possible to deduce from the content of the court documentation, what statements the suspect really made. Sergey was placed in the detention center. After a few days, he was charged with raping and performing sexual activities to the under-aged victim. Immediately after presenting the charges, Sergey was questioned in accordance with the legal requirements. The counsel advised Sergey to stick to the previously adopted "defense line". Kate in turn testified that Sergey raped her covering her face with a pillow, that by accident her brother found out about what's happened to her. Her mom persuaded her to inform police about rape. The details of the entire incident in her testimony generally coincided with those Sergey later described in his confession. One month later the investigator received the opinion of an expert in gynecology, which showed that Kate was a virgin, and on her body and inside it there were no evidence of her involvement in any sexual activities either in natural or anal form. At the same time, expert in urology found Sergey incapable to have normal sexual intercourse due to chronic illness.

The sequence and the way events were described by the suspect in his confession were kept deliberately. The author was the second defense counsel in that case. The content of Sergey's confession, as well as the facts that preceded the first interrogation have called into question the defendant's honesty. The results of the gynecological and urological examinations didn't come et. But in Sergei's confession, there were no details that would clearly indicate that he actually raped the victim. Moreover, in his confession there were no details indicating with no doubts that he ever had sexual contact with the victim. From the time the crime reportedly was committed to the moment the police officers arrested Sergey, one month passed. The chances that the investigators somehow will find objective evidence of the crime, as well as of Sergei's guilt, were small. In such circumstances, every criminal lawyer should advise client to remain silent. There of cause might be an exception, when for example a defendant, despite everything, continues to insist on his guiltiness, the task of the counsel in a such situation is to ask questions about the details of the crime committed that can be objectively verified, to require that a medical examination of the defendant be conducted, and video registration of both interrogation and medical examination will be provided by the investigator. The first defender for unclear reasons refused to follow those recommendations. Moreover, he aggravated the situation of the defendant by advised him to accept the model of the events proposed by the

investigator. The author wrote the complaint against the first defend attorney and send it as the law required to the local bar association. The answer never came. At first the investigator ignored the demand to exclude the confession statement from evidence on the basis of the failure to provide legal assistance to the detainee and the possibility of coercive primary questioning. The situation changed, then the results of gynecological and urological examinations had come. Nevertheless, Sergey had spent more, then a year in strict isolation in the detention center before his case finely was referred for trial. He began to suffer medical problems, became depressed, lost his job and his fiancé left him after all.

According to the Court's case law legal assistance should be provided rather in critical stages of the criminal proceedings, such as custodial police interrogations or other police evidence gathering acts, pretrial detention hearings, court trial, appeal and appeal in cassation. The term "critical" in Court's opinion refers to the situations, where crucial evidence of guilt could be "produced" (for example during initial police questioning, then a confession may have been obtained from a suspect) or where such assistance ensured other, related defense rights and fair trial guarantees. Given that each state sets its own rules concerning the role of a particular stage or procedure, the importance of specific proceedings should be assessed case by case. Getting back to our example, it should be noted, that in Russian criminal procedure the investigation phase is not just a subordinate part of the criminal proceedings. In practice the most important evidence for the prosecution are "produced" during this phase. According to art. 276 of the Russian Code of Criminal Procedure of 2001, the announcement of the defendant's testimony, which he has given in the course of the preliminary inquisition, as well as the reproduction of the materials of the photography, of the audio and/or the video recording and of the cinema shooting of his testimony, may be performed at the party's petition. So there are no restrictions on the announcement of the defendant's testimony including his or her confession during the trial. The confession is also popular way of avoiding a full criminal trial under the provisions of chapter 40 of Russian Code of Criminal Procedure. The example clearly shows that the adequate legal assistance in the pre-trial stages is one of the crucial fair trial safeguards. The lack of imperative objective supervision specific to redress ineffective assistance by counsel in a situation where means of the internal controls within bar association did not work leads to the fact that the right to legal assistance becomes formal (Coster van Voorhout, 2016, p. 272-273). In a situation like this, a person suspected or accused of a crime bears the consequences of inadequate

legal assistance, which in obvious way does not correspond to the meaning of the Court's concept of a fair trial (Flynn and others, 2016, p. 229). Nevertheless, the prospect of applying to the European Court in connection with the inadequacy of legal assistance in the pre-trial stages, then when the defendant was formally granted a defense counsel, is not completely clear.

## 6. Conclusions

The international community, international human rights organizations focus on issues related to the effectiveness of free legal assistance or free legal aids systems in criminal proceedings. In this case, it should be recognized that the responsibility for the quality of the assistance provided by the legal aids system rests more with the state. However, one can't help, but admit that in the framework of this one-sided approach, the interests of the remaining part of the persons suspected or accused (with privately financed counsels) remain in certain degree less protected. The Global Study on Legal Aid conducted by the United Nations Development Programme and the United Nations Office on Drugs and Crime in 2014-2015 showed, that there is no difference in the performance and quality of services provided by legal aid lawyers, when compared with private lawyers receiving pay from private clients. The same found, that over a third of responding Member States have adopted specific quality and performance standards on legal aid, but close to half (46%) of experts called attention to the fact that there is no formal mechanism in place in their country to assess whether a legal aid provider is adequately qualified or prepared. Altogether, it can be assumed that cases where the effectiveness of legal assistance raises justified doubts are much more common than this could be judged from a relatively limited practice of the European Court. It can be assumed also that such violations can be systematic and at the same time remain unnoticed if the existing legal mechanisms do not ensure their timely detection. Based on the above, the main conclusions are as follows:

- 1) a fair trial in criminal proceedings is impossible without effective legal assistance especially in the pre-trial stage;
- 2) the independence of lawyers should not be seen as more valuable than providing qualified legal assistance to a suspected or accused;
- 3) when assessing whether an adequate legal assistance was provided, the formalism is inadmissible; it cannot be assumed that a person "equipped" with the legal counsel had actually received adequate legal help;

- 4) effective legal assistance should be provided in every critical stage of criminal procedure; the term “critical” in the case of preliminary investigation should be understood to refer to the situation, then crucial evidence of guilt could be “produced”, for example during initial police questioning, then a confession may have been obtained from a suspect;  
the question of the quality of legal assistance rendered by a lawyer in specific
- 5) criminal case should not be resolved solely within the lawyer’s professional association; there should be objective supervision, for example judicial, specific to redress ineffective assistance by the counsel;
- 6) if the violations of the right to legal assistance in its material interpretation are systematic, it is the duty of the European Court to oblige the state to take adequate measures to resolve such situation by the appropriate modification of national law and (or) by the improvement of the mechanisms of its application.

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