



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF HASÁLIKOVÁ v. SLOVAKIA

(Application no. 39654/15)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 • Fair trial of applicant, with slight intellectual disability, resulting in conviction for murder and prison sentence
• Lack of sufficient indications requiring authorities to consider applicant a particularly vulnerable person and make appropriate adjustments • Applicant's defence rights not irretrievably prejudiced or right to a fair trial not adversely affected • Authorities took all necessary steps

STRASBOURG

24 June 2021

FINAL

22/11/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Hasáliková v. Slovakia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Ksenija Turković, *President*,

Alena Poláčková,

Péter Paczolay,

Gilberto Felici,

Erik Wennerström,

Raffaele Sabato,

Lorraine Schembri Orland, *judges*,

and Renata Degener, *Section Registrar*,

Having regard to:

the application (no. 39654/15) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Slovak national, Ms Jana Hasáliková (“the applicant”), on 3 August 2015;

the decision to give notice to the Slovak Government (“the Government”) of the complaints under Articles 5 § 2 and 6 §§ 1 and 3 of the Convention;

the parties’ observations;

Having deliberated in private on 18 May 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicant complained that the criminal proceedings, in which she had been convicted of murder and sentenced to a fifteen-year prison term, had been unfair. She alleged that no reasonable steps or adjustments had been made with regard to her intellectual disability and that, consequently, her rights had not been duly and effectively protected. She further complained that she had not had enough time to choose a lawyer and that her confession made before the police had served as the basis for her conviction even though she had later retracted it.

THE FACTS

2. The applicant was born in 1972. She is currently serving a sentence in Levoča Prison. She was represented before the Court by Mr M. Cibul’a, a lawyer practising in Liptovský Mikuláš.

3. The Slovak Government (“the Government”) were represented by their Co-Agent, Ms M. Bálintová, from the Ministry of Justice.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. On 24 October 2009 a criminal prosecution was opened against an unknown perpetrator by the Žilina police following a murder committed the day before. The crime was classified as “particularly serious” (*obzvlášť závažný zločin*).

6. On the basis of a statement by P.O., who was heard as a witness, the police suspected his brother, J.O., who was arrested on 24 October 2009 and taken to the police station at 8.18 p.m.

7. On the evening of 24 October 2009 and the following day J.O. and his mother gave the police some items stolen from the victim’s flat. At 4.50 a.m. on 25 October 2009 the applicant’s sister gave the police clothes worn by the applicant the day before. The applicant insisted on the fact that no traces of the victim’s blood had later been found on the clothes.

8. On 25 October 2009, J.O. and the applicant were charged with “particularly serious” murder. The decision stated that, because of the likely sentence, they had to be legally represented from the pre-trial stage of the proceedings (see paragraph 40 below) and that if they (or others authorised to do so on their behalf) did not choose their defence counsel within thirty minutes of being notified of the charges, a lawyer would be appointed for them by the court.

9. On the same day, according to the Government, after finding out that J.O. lacked the financial means to find a lawyer, the investigator asked the Žilina District Court to appoint defence counsels for both J.O. and the applicant as they had not chosen a lawyer within the relevant time-limit. According to the applicant, the investigator made that request without knowing her position. The court granted the investigator’s request.

10. From 10.20 a.m. to 2.15 p.m. on 25 October 2009 J.O. was interviewed by the investigator and stated, in presence of the two court-appointed counsels, that both he and the applicant had stabbed the victim.

11. On 25 October 2009, at around 3 p.m. according to the Government, the applicant arrived at the Žilina police station. According to the relevant record, she voluntarily responded to a summons to appear. She was notified of the charges and, from 3.20 to 5.25 p.m., was interviewed by the investigator in presence of the lawyers appointed for her and J.O. The first two pages of the record contained pre-printed information stating that the applicant had the right to choose a lawyer, that she had not done so and asked to be appointed one by the court, and that she had the right to remain silent and could not be forced into confession. The applicant specifically signed a statement saying that the information had been adequately explained to her and that she understood it. She further confirmed that she fully understood the charges and did not require any further explanation. All the pages of the interview record were signed by the applicant, and the last page was signed by both court-appointed lawyers.

12. During the interview the applicant indicated that she was seeing a psychiatrist once a year, that she was in receipt of an invalidity pension on account of a spinal disorder, that she fully understood the charges against her and waived her right to challenge them, and that she had not chosen a lawyer due to her financial situation and consented to be defended by the court-appointed lawyer. A note was made that the applicant had been given sufficient time to consult with her counsel prior to the interview. She then stated that she regretted what had happened, that she had been at the scene when J.O. had killed the victim, but that she had not participated in the killing. She later changed her description of the events and explained that J.O. had stabbed the victim first and then passed her the knife, and that the victim had died after she had stabbed her. At the end the applicant responded to the questions asked by her counsel and that of J.O.

13. It appears from the police record that the applicant was arrested at 5.30 p.m. on 25 October 2009 as she was considered a flight risk.

14. Several witnesses were also interviewed that day. The applicant pointed to the fact that two witnesses had stated that she had been with them in a pub at the time of the events.

15. At 12.12 p.m. on 26 October 2009 the investigator received an authority form confirming that a lawyer appointed by the applicant's sister was representing the applicant in the criminal proceedings. The lawyer was given the opportunity to consult the case file; he then authorised another lawyer to be his substitute in communication with the applicant.

16. At 3.03 p.m. the same day the Žilina regional prosecutor ("the prosecutor") filed a request to place J.O. and the applicant in detention.

17. On 27 October 2009 the court ordered an examination of the mental state of the two accused.

18. At 9 a.m. on 28 October 2009 the pre-trial judge interviewed J.O., who confirmed his confession made to the investigator and described the applicant's involvement in the murder. The applicant's substitute counsel was present.

Following the interview, the court granted the prosecutor's request to place J.O. in detention. No complaint was filed against that decision.

19. From 9.50 to 10.40 a.m. on 28 October 2009 the pre-trial judge interviewed the applicant, in presence of the substitute counsel. According to the official record, the applicant was again informed of her procedural rights. She then stated that she had been arrested at 5.30 p.m. on 25 October 2009 after voluntarily arriving at the police station, that she did not object to the police's conduct and that no violence had been used against her. She then disputed her confession, asserting that her statement to the investigator was untrue and had only been made out of fear. When replying to the prosecutor's questions, she admitted that she had stabbed the victim with J.O.'s knife under threat but declared that the victim had died only after J.O. had cut her throat.

At the end, even though the applicant's lawyer disagreed with the prosecutor's request to place the applicant in detention, referring to the fact that the latter had voluntarily given herself up to the police, the court decided to order the applicant's detention with effect from 5.30 p.m. on 25 October 2009. A complaint by her against this decision was dismissed by the Žilina Regional Court on 5 November 2009.

20. During the pre-trial stage of the proceedings the authorities secured further witness statements, several expert opinions, including those concerning the mental state of the accused, and recordings of telephone conversations.

21. An expert psychiatric and psychological opinion drawn up in January 2010, using a wide range of tests, concluded that the applicant had a slight intellectual disability (with an IQ of between 64 according to the Raven test and 69 according to the verbal part of the WAIS-R test), with infantile features and simplistic thinking. According to the experts, she was also very naïve, emotionally immature and easily influenced. At the time of the events she had been able to identify that her actions were dangerous to society and to foresee their consequences, but had been limited in her ability to control herself due to emotional distress, a lower mental capacity and alcohol. The experts stated that during her examination the applicant had first denied the events but later confessed to them, had been insincere, had kept changing her statements and had naively feigned memory disorders.

22. On 28 May 2010 the applicant had a pre-trial confrontation with J.O., in presence of both defence counsels, during which she maintained that she had not been at the scene. When asked by the investigator why she had previously confessed to the murder and had been able to describe it in detail, the applicant responded that she had confessed out of fear and reproduced the events as described in the charges. J.O., on the other hand, first asserted that the applicant had been present and involved in the murder, then stated that she had not been at the scene and that he had committed the murder and felt guilty.

23. On 4 June 2010 the applicant and her counsel had the opportunity to consult the entire case file and familiarise themselves with the results of the investigation. They did not formulate any objections or propose any evidence; the applicant's counsel expressly stated that he was not asking for the activities carried out before he had taken over the applicant's representation to be repeated, but for the prosecutor to discontinue the prosecution because the evidence available did not, in his view, prove her guilt.

24. On 17 June 2010 the applicant was formally indicted for a "particularly serious" murder committed together with J.O.

25. It is mentioned in the above indictment that, on the same day, J.O. and the prosecutor concluded a plea bargain in which J.O. pleaded guilty of

the murder committed together with the applicant in exchange for a prison sentence of twenty-two and a half years.

26. After the prosecutor asked the court to approve the above plea bargain, the applicant's counsel complained to the court that he had not been informed beforehand of the plea-bargain negotiations despite the applicant and J.O. being tried jointly. The court did not accept his argument that such conduct had breached the applicant's defence rights and on 2 July 2010 approved the agreement.

27. At another hearing held later that day the court proceeded to a preliminary examination of the applicant's indictment. The applicant refused to enter into a plea bargain and her counsel unsuccessfully proposed to the court that the prosecution be discontinued on the grounds that the crime had not been committed by the applicant.

28. Public hearings were then held on 27 September 2010, 2 November 2010, 7, 27 and 28 December 2010, 7 and 11 January 2011. Numerous witnesses and experts were heard, and several expert opinions and other pieces of written evidence were produced.

29. At the hearing on 27 September 2010 the applicant denied her guilt, claiming that she had only confessed to the murder in the pre-trial stage of the proceedings out of fear. According to the record of the hearing, the expert in psychology present intervened in the applicant's examination in order to rephrase a question asked by the prosecutor; on one other occasion the applicant declared that she did not understand the prosecutor's question and it was then rephrased.

30. On 8 October 2010 the court granted a request by the applicant for release from pre-trial detention, stating that the existence of a reasonable suspicion against her was weakened by the evidence produced to date and the fact that the decisive direct evidence, that is to say J.O.'s statement, had been lost due to the latter's death. That decision was later quashed by the appellate court.

31. At the hearing of 27 December 2010 the court took note of J.O.'s death and granted a proposal by the prosecutor to read out J.O.'s statements made on 25 and 28 October 2009 as well as the record of the pre-trial confrontation between him and the applicant. The latter did not make any comments or propose new evidence.

32. In his closing arguments made on 7 January 2011, the applicant's counsel pointed to the fact that both J.O. and the applicant had submitted numerous versions of events and that the evidence available, including several witness statements, demonstrated that the applicant had not been at the scene. He also insisted on the fact that she had been apprehended by the police in Liptovský Mikuláš on 24 October 2009, that is to say one day before her first interview, since she would have been unable to travel on her own to the police station in Žilina; that also explained why her clothes had been handed over at 4.50 a.m. on 25 October 2009 by her sister. According

to her counsel, during those twenty-four hours the applicant had been described the events and told what to say; due to her intellectual disability, she had complied. Moreover, her subsequent interview had been unlawful because of the misleading nature of the questions asked by the investigator.

33. By a judgment of 11 January 2011 the applicant was convicted of “particularly serious” murder committed jointly with J.O. and sentenced to fifteen years’ imprisonment. The court noted that since both accused had repeatedly changed their version of events throughout the proceedings, their statements had been rigorously analysed and linked to the circumstantial evidence, without any reason being found for J.O. to have falsely implicated the applicant. In the court’s view, the applicant’s guilt had been proven mainly by J.O.’s testimony but also by her repeated confessions made to the investigator, the pre-trial judge and the expert, which provided a very detailed description of the events (that she would have been unable to repeat had she not been at the scene) and which were for the most part consistent with J.O.’s statements; given that the applicant had been unable to explain the subsequent changes in her testimony, but for the argument of fear, the court would not use her later statements. Other pieces of evidence, notably recordings of telephone conversations and some witness statements, also pointed to her guilt, and the expert opinions could not exclude the possibility that the victim had been stabbed by two people. Relying on the expert psychiatric opinion, which had not found any mental illness, the court considered that the applicant’s slight intellectual disability could not, as such, lead to a conclusion of diminished responsibility.

34. In an appeal filed on 28 January 2011 the applicant challenged the guilty verdict, arguing that it had been clearly proven that she could not have been at the scene. She further complained that the court had refused to hear a witness for the defence and that her defence rights had been breached on account of the fact that her counsel had been unable to participate in the plea-bargain negotiations with J.O.

35. On 3 May 2011, following a hearing, the Žilina Regional Court dismissed the applicant’s appeal as unfounded on the grounds that she had only presented her own assessment of the evidence; the judgment was changed solely as regards the type of the prison in which she was to serve her sentence. The appellate court considered that the first-instance court had gathered the necessary evidence, drawn correct findings of fact and responded to all objections raised by the defence, and that its conclusions were neither unfounded nor arbitrary. The guilty verdict was based on sufficient and convincing evidence, including J.O.’s pre-trial statements made in compliance with the adversarial principle, the applicant’s testimonies collected in a lawful manner and her full and free confession; in this connection, the appellate court observed that the applicant had in no way explained her pretended fear or alleged any violence or threat of violence and that all her interviews had taken place in her counsel’s

presence. The court further pointed out that the applicant's assessment of the forensic evidence was subjective and isolated from other evidence, including her own statements; that no evidence put her guilt in doubt, since the timeline of events as established and the physical distance between the relevant places did not rule out the possibility that she had been at the scene at the time of the murder; that the absence of her fingerprints and DNA at the scene did not prove that she could not have been there; and that the applicant's sister's statement was not credible and did not, in any event, exclude the applicant's presence at the scene at the time of the murder.

As to the first-instance court's refusal to hear a witness for the defence, the appellate court admitted that no reasons had been given in the judgment but considered that it was clear from the case file that the witness concerned had only been expected to confirm another witness statement found to be unreliable. It also admitted that the applicant's counsel should have been summoned to the plea-bargain negotiations with J.O. since an accomplice's statement of guilt necessarily affected the other accomplices. However, given the form and content of the plea-bargain negotiations, the absence of the applicant's counsel did not amount to a substantial breach of the applicant's defence and adversarial rights and did not render the agreement unlawful; in any event, the applicant and her counsel had been able to take note of the agreement and corresponding judgment concerning J.O., which were part of the case file.

36. On 2 May 2014 the applicant lodged an appeal on points of law, challenging shortcomings in the establishment of the facts as well as procedural errors and a breach of the principles of the presumption of innocence and *in dubio pro reo*. She argued that J.O.'s statements were inconsistent and that the reliability of her confession should have been assessed in the light of her intellectual disability, the signs of which were clearly visible. In her view, the experts should have also examined her ability to understand the meaning of the criminal proceedings and testify about the events, and should have assisted her in her pre-trial interviews. The applicant further complained of a violation of her right to defence in the pre-trial stage of the proceedings, claiming that she had been arrested and interviewed one day earlier than that recorded by the police.

37. On 12 August 2014 the Supreme Court dismissed the applicant's appeal on points of law, holding, *inter alia*, that it was not called on to examine whether there was an extreme discrepancy between the evidence and the facts established by the lower courts. It further observed that the appeal on points of law could only be considered admissible if it had been proven that the applicant had been arrested on 24 October 2009 and that the authorities' conduct had had a negative impact on her later statements, which was not the case here.

38. The applicant filed a constitutional complaint in which she complained mainly of violations of her right to a fair trial guaranteed by

Article 6 §§ 1 and 3 (c) and of the principle of the presumption of innocence. She argued that the facts of the case and her participation in the murder had not been established beyond reasonable doubt and that all the evidence in her favour, including the expert opinions, had been ignored. The applicant further claimed that her pre-trial confession should not have been accepted as credible since it had not been supported by other reliable pieces of evidence and had been tainted by her intellectual disability, as well as the fact that her statements had been collected in the absence of an expert, in breach of her defence rights. Lastly, the applicant insisted on the fact that she had been arrested on 24 October 2009 and asserted that the Supreme Court's failure to duly examine this complaint amounted to a denial of justice and to a violation of her right to an effective remedy.

39. On 4 February 2015 the Constitutional Court dismissed the complaint as manifestly ill-founded, finding that the applicant was only challenging the outcome of the case and that the courts' decisions were based on comprehensive and convincing arguments and displayed no signs of arbitrariness. It stressed that while the applicant had confessed repeatedly during the pre-trial stage of the proceedings, the guilty verdict had not only been based on that confession since she had also been incriminated by the repeated statements of her co-accused; the courts' explanation as to why they had not believed the witnesses in the applicant's favour could be accepted. Moreover, the applicant's defence counsel, who had attended at all her pre-trial interviews, had never requested the assistance of an expert on account of her mental state.

RELEVANT LEGAL FRAMEWORK

CODE OF CRIMINAL PROCEDURE (LAW NO. 301/2005 COLL.), AS IN FORCE AT THE RELEVANT TIME

40. Article 37 § 1 (c) provided that the legal assistance of counsel was mandatory from the pre-trial stage of the proceedings if the person concerned had been charged with a "particularly serious" criminal offence.

41. Article 232 § 2 provided that the prosecutor was to summon to attend the plea-bargain hearing the accused and victim who filed a claim for damages in a due and timely manner; the public prosecutor was to inform the defence counsel of the accused of the time and place of the hearing.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

42. Relying on Article 6 §§ 1 and 3 (a), (b) and (c) and on Article 17 of the Convention, the applicant complained that the criminal proceedings against her had been unfair and had not been adapted to take into account her mental state. She alleged, in particular, that she had been unable to fully understand the charges and accompanying instruction about her procedural rights, and that she had not had enough time to choose a lawyer and prepare her defence. No reasonable steps had been taken to address her mental health until the court hearing of 27 September 2010; that is to say, she had been deprived of adequate legal aid and any psychological assistance during the pre-trial activities carried out by the police on 24 and 25 October 2009. Moreover, her confession made on that occasion had been used as evidence against her even though she had later retracted it and there had been numerous items of evidence in her favour.

43. The Court considers that the complaints fall to be examined under Article 6 §§ 1 and 3 of the Convention, which read as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing .. by [a] ... tribunal ...

...

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;

...”

A. Admissibility

44. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

(a) The applicant

45. The applicant stated that the authorities should have considered her a vulnerable person requiring special treatment and assistance since they had known from the very beginning that she had attended a special school, was in receipt of a disability pension and was seeing a psychiatrist; moreover, her physical defect was clearly visible and her intellectual disability was clearly evident from any conversations with her.

46. The applicant argued that she had not had the opportunity to choose a lawyer before her first interview, given that one had been appointed for her by the court on 25 October 2009 at the request of the investigator, who could not yet have been aware of her position and before she had been notified of the charges and information about her procedural rights (see paragraphs 9 and 11 above). This was also proven by the fact that the court-appointed lawyer had participated in J.O.'s interview (see paragraph 10 above) which, according to the record, had taken place long before she had arrived at the police station. The applicant also complained that, once at the police station, there had been a lot of procedural steps for her to undergo and information to understand, which she had been incapable of doing since she had lacked adequate time and the assistance of a professional or family member. Her statements made in such a traumatising situation could not thus be considered reliable, particularly since she had been made to plead guilty and the investigator had asked her misleading and inadmissible questions. It should have been obvious to the investigator that she had been unable to understand and participate in the proceedings or make any informed choices, so her mental state should have been examined prior to her first interview. Furthermore, her subsequent statements had been confusing, divergent and inconsistent with the other evidence, namely witness statements confirming that she had been with them at the time of the events and the outcome of the expert examination finding no traces of blood on her clothes or any of her DNA at the scene. Given her mental state, any of her allegations and, *nota bene*, confessions should not have been accepted without due verification. However, the authorities had not taken any reasonable steps until 27 September 2010, when she had been interviewed in the presence of a psychologist.

47. The applicant further asserted that the first interview of her co-accused J.O. had taken place before she had been aware of the charges, before she had been able to choose her counsel and before she had been advised of her right to be present. She also pointed to the fact that at the end of their pre-trial confrontation J.O. had stated that she had not been at the scene (see paragraph 22 above). Moreover, since neither she nor her counsel

had been informed of the plea-bargain negotiations with J.O., they had been unable to participate and cross-examine him even though he had practically convicted her on this occasion. This deficiency could not be rectified later because J.O. had committed suicide, and the appellate court had also failed to draw conclusions therefrom.

48. According to the applicant, her defence and fair-trial rights guaranteed by Article 6 §§ 1 and 3 of the Convention had been violated both by the court-appointed lawyer and the conduct of the authorities, and the adversarial principle had not been observed.

(b) The Government

49. The Government stressed, firstly, that the applicant had neither been deprived of her legal capacity nor was she of limited legal capacity, that she had completed her secondary education and that she did not suffer from any visible defect preventing her from hearing, expressing herself or perceiving reality (contrast *Z.H. v. Hungary*, no. 28973/11, 8 November 2012). Her mental state had been subject to an expert examination, which had concluded that she had a slight intellectual disability, was emotionally immature, very naïve and sensitive to external influences, but that she was not suffering from any mental disorder or illness. In the experts' view, the applicant's intellectual disability did not make her incapable of foreseeing the possible consequences of her actions or of recognising their dangerousness, even though her ability to control her behaviour at the relevant time had been significantly reduced (see paragraph 21 above).

50. In the Government's view, the applicant had thus neither been vulnerable to the point of requiring particular adjustments, nor had the experts arrived at the conclusion that she would not understand the proceedings. They also noted that at no point had the applicant or her lawyer stated that she would have difficulties expressing herself or that there would be circumstances making her increasingly vulnerable. When, on one occasion, the expert had alerted the court to the fact that the applicant might not have understood a question, the prosecutor had rephrased it (see paragraph 29 above). That demonstrated, in the Government's view, that the authorities had been ready to accommodate any difficulties the applicant might have.

51. The Government argued that there was therefore no reason to assume that the applicant had not understood the charges against her on 25 October 2009, particularly since she had been immediately appointed a defence lawyer, whom she had had time to consult before her first interview. By signing the record of that interview the applicant had confirmed, in her counsel's presence, that she fully understood what she had been charged with, that she did not need any further explanation, that she had been informed of her procedural rights and that she consented to be defended by the court-appointed lawyer (see paragraphs 11 and 12 above).

The next day she had been represented by a lawyer chosen by her sister, who had actively participated in all the interviews of her and her co-accused and witness examinations, having had the opportunity to consult the investigation file, suggest further evidence and raise any objections concerning the applicant's rights. Her counsel had also been present at the court hearings, where he had been given the possibility to ask the applicant and witnesses questions.

52. It could therefore be said that the applicant had never been examined in the absence of a lawyer or without prior consultation with him. However, in her two pre-trial statements made on 25 and 28 October 2009 (see paragraphs 12 and 19 above), she had confessed and described the circumstances of the murder, including her stabbing the victim. The Government observed that, in any event, those statements had not amounted to decisive evidence against the applicant. Indeed, she had also confessed to the murder during her expert examination (see paragraph 21 above), providing details consistent with the repeated incriminating statements of her co-accused and which could have been known only by someone at the scene.

53. The Government further stated that the only reason the applicant's co-accused J.O. had been absent from the trial had been the fact that he had died; his statement from the pre-trial stage of the proceedings had therefore been read out. Nevertheless, the applicant's counsel had been present at J.O.'s pre-trial interviews (see paragraphs 10 and 18 above) when he had asked him questions, and a pre-trial confrontation had also taken place on 28 May 2010 in the presence of the applicant's and J.O.'s counsels (see paragraph 22 above). The Government were therefore convinced that the applicant had been given sufficient opportunity throughout the criminal proceedings to contest J.O.'s statements.

54. Lastly, the Government noted that the applicant mainly challenged the domestic courts' assessment of the evidence and guilty verdict, which was contrary to the Court's subsidiary role. In their view, all the evidence against the applicant had been lawful and taken in an adversarial manner, and her defence and fair-trial rights had been observed.

2. *The Court's assessment*

(a) **Relevant general principles**

55. As the Court has explained on numerous occasions, its primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings. It is not its role to determine, as a matter of principle, whether particular types of evidence, including evidence obtained unlawfully in terms of domestic law, may be admissible (see, *inter alia*, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 250, 13 September 2016, with further references). In making this assessment, the

Court will look at the proceedings as a whole, having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011).

56. The right of everyone charged with a criminal offence to be effectively defended by a lawyer, as guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial. The national authorities must have regard to the defendant's wishes as to his or her choice of legal representation, but may override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (see *Dvorski v. Croatia* [GC], no. 25703/11, §§ 79 and 81, with further references, ECHR 2015). Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and the ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused (see *Ibrahim and Others*, cited above, § 255, and *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 112, 12 May 2017). One of the lawyer's main tasks during the police custody and at the investigation stage is to ensure respect for the right of an accused not to incriminate himself and for his right to remain silent (see *Beuze v. Belgium* [GC], no. 71409/10, § 128, 9 November 2018).

57. In order to ensure that the protections afforded by the right to a lawyer and the right to silence and privilege against self-incrimination are practical and effective, it is crucial that suspects be aware of them. The Court has therefore considered that it is inherent in the privilege against self-incrimination, the right to remain silent and the right to legal assistance that a person "charged with a criminal offence", within the meaning of Article 6, should have the right to be informed of these rights. Consequently, Article 6 § 3 (c) of the Convention must be interpreted as safeguarding the right of persons charged with an offence to be informed immediately of the content of the right to legal assistance, irrespective of their age or specific situation and regardless of whether they are represented by an officially assigned lawyer or a lawyer of their own choosing (see *Beuze*, § 129, and *Simeonovi*, § 119, both cited above).

58. The Court has also held that the privilege against self-incrimination does not protect against the making of an incriminating statement *per se* but against the obtaining of evidence by coercion or oppression. It is the existence of compulsion that gives rise to concerns as to whether the privilege against self-incrimination has been respected (see *Ibrahim and Others*, cited above, § 267).

59. The Court further reiterates the general principles to be applied in cases where a prosecution witness did not attend the trial but statements previously made by him or her were admitted as evidence (see *Al-Khawaja*

and *Tahery*, cited above, §§ 119-47, and *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 110-31, ECHR 2015). The application of those principles involves, generally speaking, answering three questions: (i) whether there was a good reason for the non-attendance of the witness and for the admission of the absent witness's statement as evidence (see *Schatschaschwili*, cited above, §§ 119-25); (ii) whether the evidence of the absent witness was the sole or decisive basis for the conviction or whether it carried significant weight (*ibid.*, §§ 116, 119 and 126-47); and (iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps faced by the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair (*ibid.*, § 147). In the latter context, the Court has held that the ability to confront a witness for the prosecution who is absent from the trial at the investigation stage is an important procedural safeguard which can compensate for the handicaps faced by the defence on account of absence of such a witness from the trial (see *Chmura v. Poland*, no. 18475/05, §§ 56 and 57, 3 April 2012; *Gani v. Spain*, no. 61800/08, §§ 48-50, 19 February 2013; and *Schatschaschwili*, cited above, § 130).

60. Lastly, the Court notes that the rights guaranteed by Article 6 § 3 are not ends in themselves: their intrinsic aim is always to contribute to ensuring the overall fairness of the criminal proceedings. Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident (see *Beuze*, cited above, §§ 121-22).

(b) Application of those principles to the present case

61. Firstly, the Court notes that in the present case the applicant was prosecuted for a “particularly serious” murder which, under domestic law, required mandatory legal assistance. According to the official record submitted to the Court, she was first questioned by the investigator on 25 October 2009, approximately twenty minutes after arriving at the police station and after being notified of the charges (see paragraph 11 above). It is not disputed that the applicant was assisted by a lawyer from that first questioning by the police. However, given her assertions that she was not given the opportunity to hire a lawyer of her own choosing since the authorities had secured her a court-appointed lawyer without even knowing her position (see paragraph 9 above), the question arises whether or not her freedom to be assisted by a lawyer of her choosing as such was respected (see *Dvorski*, cited above, §§ 103 et seq.).

62. Admittedly, it appears from the case file that the investigator's request to have defence counsels appointed for both J.O. and the applicant was formulated before the applicant had been notified of the charges and information about her procedural rights and was based on J.O.'s statement

that he lacked the financial means to choose a lawyer (see paragraph 9 above). The court then gave as a reason for appointing a lawyer for the applicant the fact that she had not chosen one of her own. The court-appointed lawyer was then present to assist the applicant from her very first contact with the police since he had participated in the questioning of J.O., which had taken place some time before (see paragraph 10 above).

63. The Court further notes that according to the official record, the applicant was, on her arrival at the police station, notified of the charges, including information about legal assistance being mandatory in her case and about her right to choose a lawyer within thirty minutes of being notified of the charges (see paragraph 8 above). Neither the applicant nor the lawyer appointed for her by the court raised, at that particular time or later, any objection as to the applicant's freedom to choose her own lawyer or as to the time allowed for preparation of the defence. On the contrary, by signing, in the presence of the court-appointed lawyer, her official statement made on 25 October 2009, the applicant confirmed that she had been informed of her right to choose a lawyer and given time to consult counsel prior to the police questioning (see paragraph 11 above). Moreover, the applicant indicated during her interview that she had not chosen a lawyer due to her financial situation and that she consented to be defended by the court-appointed lawyer (see paragraph 12 above). In this connection, the Court takes particular account of the fact that both the applicant and the lawyer signed the relevant record.

64. The Court also observes that, as soon as the authorities were informed the next day that the applicant's sister had hired another lawyer to represent the applicant, that lawyer was given the possibility to consult the case file (see paragraph 15 above) and participate in all the activities that followed in person or through his substitute. Later, the applicant's counsel expressly stated that he was not asking for the activities carried out before he had taken over the applicant's representation to be repeated (see paragraph 23 above).

65. In view of the above considerations, the Court cannot give weight to the applicant's allegation that she was limited in her right to choose a lawyer.

66. Secondly, the applicant maintained that the authorities should have considered her a vulnerable person requiring special treatment, namely the assistance of a professional or family member in order to help her understand the charges and meaningfully participate in the proceedings. Without any adjustments addressing her mental state, her statements and, *nota bene*, confessions made in such a traumatising situation for her should not have been relied on, particularly since they had been inconsistent with the other evidence.

67. The Court observes in this context that, when assessing the impact of procedural failings at the pre-trial stage on the overall fairness of the

criminal proceedings, it has to examine, among other things, whether the applicant was particularly vulnerable, for example, by reason of age or mental capacity (see *Ibrahim and Others*, cited above, § 274).

68. The Court has already accepted that a police interview is inevitably a stressful event from a suspect's perspective (see *Doyle v. Ireland*, no. 51979/17, § 85, 23 May 2019). This must have been all the more true in the present case, where the applicant had a slight intellectual disability, as shown by the expert examination carried out in January 2010 (see paragraph 21 above). The Court notes, however, that the experts concluded that while the applicant had a lower mental capacity which, together with emotional distress and the effects of alcohol, limited her ability to control her behaviour at the time of the events, she was not suffering from any mental illness or disorder and had been able to recognise the dangerousness of her actions and foresee their consequences. Furthermore, the Court has to take account of the fact that she was an adult and literate and had been assisted by a lawyer from her very first questioning, during which she confirmed that she fully understood the charges and did not require any further explanation (see paragraphs 11 and 12 above). Apart from the court hearing of 27 September 2010, where steps were taken enabling her to understand the questions asked (see paragraph 29 above), the applicant did not point to any indication in the records of her interviews and examinations that she had had difficulty understanding or expressing herself (see *Beuze*, cited above, § 168). Nor did the court having interviewed the applicant during the investigation notice anything particular (see paragraph 19 above). Had the applicant considered herself unprepared for the interviews or in need of any further explanation or assistance, it was incumbent on her and her lawyer to bring such concerns to the attention of the authorities (see also paragraph 39 above). However, it was only in her appeal on points of law that the applicant claimed that the experts should also have examined her ability to understand the meaning of the criminal proceedings and testify about the events, and should have assisted her in her pre-trial interviews (see paragraph 35 above).

69. In these circumstances, the Court does not consider that there were sufficient indications requiring the authorities to consider the applicant a particularly vulnerable person and make appropriate adjustments (compare *O'Donnell v. the United Kingdom*, no. 16667/10, 7 April 2015, where the judge refused to absolve the applicant, with an IQ of 62, of giving evidence because of his mental condition and directed the jury to draw adverse inferences from the applicant's decision not to testify).

70. It follows from the above considerations that the Court has *a priori* no reason to blame the authorities for admitting the applicant's pre-trial statements as admissible evidence. It reiterates in this context that the applicant was informed of her rights to remain silent and not to be forced into confession (see paragraph 11 above), and that she was assisted by a

lawyer from her first questioning by the police. Although the applicant repeatedly asserted to the domestic authorities that her pre-trial confessions were not true and had been made out of fear (see paragraphs 19, 22 and 29), and even claimed to have been somehow coerced into making self-incriminating statements (see paragraph 32 above), the Court observes that the case file does not suggest any element of coercion used against the applicant. Nor is there any specific indication that she would have been threatened by any sanctions if she refused to answer any questions. On that point, the appellate court noted that she had not in any way explained her pretended fear nor alleged any violence or threat of violence and that all her interviews had taken place in her counsel's presence (see paragraph 35 above), and the Supreme Court considered her allegations of coercion unsubstantiated (see paragraph 37 above).

71. In the Court's view, nothing in the present case therefore calls into question the reliability of the applicant's first statement given to the police on 25 October 2009, particularly since neither during her later interview by the pre-trial judge (see paragraph 19 above), in the presence of a lawyer of her choosing, nor during her examination by the experts (see paragraph 21 above) did she consistently deny her guilt. On the contrary, on all those occasions, she eventually confessed to the crime.

72. The Court is therefore convinced that there were no defects in the pre-trial stage of the proceedings and that the applicant's statements were obtained lawfully, following the application of the legislative framework in place, and after the applicant had received information about her procedural rights as well as legal advice. There was thus no reason for the courts to exclude her pre-trial statements from the evidence and not use them against her at the trial. Furthermore, the ruling that those statements were admissible did not prevent the applicant from challenging them before the courts, which she did by retracting them. With the assistance of her counsel, the applicant was indeed able to take the stand and, again, raise objections as to the circumstances of her questioning, call witnesses and make any submissions that she deemed useful for her defence. However, the court explained that it would not use the applicant's later statements on the grounds that she had been unable to adequately explain the changes in her testimony (see paragraph 33 above).

73. Lastly, the Court notes that the applicant had every opportunity at the trial to comment on the evidence available and examine witnesses, except for the key witness and accomplice J.O., who did not testify in court because he had died. The court therefore used J.O.'s pre-trial statements, made in compliance with the adversarial principle, and the record from the pre-trial confrontation between him and the applicant, which were read out, without the defence making any comments or proposing evidence (see paragraph 31 above).

74. In that connection, the Court reiterates the principle, established in its case-law, that the ability to confront a witness for the prosecution at the investigation stage is an important procedural safeguard which can compensate for the handicaps faced by the defence on account of absence of such a witness from the trial (see the case-law cited in paragraph 59 above).

75. It is noteworthy in this context that the applicant's counsel was present, and given the opportunity to ask questions, at both of J.O.'s interviews during the pre-trial stage (see paragraphs 10 and 18 above) and that the applicant was confronted with the latter (see paragraph 22 above). In that sense, there was a sufficient counterbalancing factor, the fact that the applicant had had an opportunity to confront J.O. at the investigation stage and that the courts appear to have assessed the reliability of his statements in a careful manner (see paragraphs 33 and 35 above), to compensate for the handicap for the defence created as a result of J.O.'s absence from the applicant's trial and the lack of a practical opportunity for the applicant to cross-examine him on that occasion (see *Schatschaschwili*, cited above, §§ 162-63).

76. It is true, however, that, in accordance with Article 232 § 2 of the CCP (see paragraph 41 above) the applicant's counsel was not informed of the prosecutor's plea-bargain negotiations with J.O. and could not participate in them (see paragraph 26 above). As admitted by the appellate court (see paragraph 35 above), the terms of the plea bargain concluded by J.O. were undoubtedly relevant to the applicant's own case. The Court does not however lose sight of the fact that the statements made by J.O. on that occasion corresponded to his pre-trial statements given in the presence of the applicant or her counsel and that both had an opportunity to take knowledge of the plea-bargain agreement during the applicant's trial before the court of first instance and take a stand on it. It therefore does not appear that the applicant's rights under the Convention were not respected by the fact that J.O.'s statements were admitted as evidence.

77. Having examined the parties' submissions in the light of the principles cited above, the Court considers that it has not been shown that the applicant's defence rights were irretrievably prejudiced or that her right to a fair trial was adversely affected. In its view, the national judicial authorities took all the necessary steps to ensure that the applicant was adequately defended and that the criminal proceedings in her case were in compliance with the requirements set forth in Article 6 §§ 1 and 3 of the Convention.

78. In sum, there has been no violation of Article 6 §§ 1 and 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION

79. The applicant further complained that the procedure followed by the authorities on her arrest had fallen short of the requirements of the Convention.

80. This complaint was communicated to the Government under Article 5 § 2 of the Convention, which reads as follows:

“...

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

...”

81. The Government argued that no argument related to the circumstances of the applicant's arrest had been raised before the domestic courts and that her allegations were not supported by any evidence.

82. The applicant maintained that, as stated by her counsel in his closing statements (see paragraph 29 above), she had actually been arrested one day earlier than recorded, that is to say on 24 October 2009, and left in the hands of the police without any assistance, which had tainted her understanding of the charges and her interview of 25 October 2009. She denied going to the police station voluntarily, stating that due to her mental state she would not even have been able to travel alone to Žilina, 90 km from her hometown, and that it was very unlikely that the police would expect a person suspected of murder to come to the station on her own. She also claimed that she had not been informed of the reasons for her arrest.

83. The Court is of the view that the applicant clearly did not raise this complaint before the competent authorities at the relevant time, apart from some above-mentioned assertions made to the courts which were however aimed mainly at challenging the admissibility of her pre-trial statement of 25 October 2009. Nor did she at any point rely on Article 5 § 2 of the Convention or its constitutional equivalent. In such circumstances, the Court cannot but refer to the finding of the Supreme Court that it had not been proven that the applicant had been arrested on 24 October 2009 (see paragraph 37 above). It also reiterates in this connection that it did not find any element of coercion or threat in the present case (see paragraph 70 above).

84. It follows that the remainder of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaints under Article 6 §§ 1 and 3 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds*, by five votes to two, that there has been no violation of Article 6 §§ 1 and 3 of the Convention.

Done in English, and notified in writing on 24 June 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Ksenija Turković
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinion is annexed to this judgment:

joint dissenting opinion of Judges Turković and Schembri Orland.

K.T.U
R.D.

JOINT DISSENTING OPINION OF JUDGES TURKOVIĆ AND SCHEMBRI ORLAND

1. We regret that we cannot share the majority’s opinion in the present case that there has been no violation of Article 6 §§ 1 and 3 of the Convention for the following reasons.

A. Whether the applicant was a particularly vulnerable person due to her intellectual disability

2. An expert psychiatric and psychological opinion, drawn up in January 2010, using a wide range of tests, concluded that the applicant had a slight (a more appropriate translation would be “mild”, see paragraph 8 below) intellectual disability (with an IQ of between 64 according to the Raven test and 69 according to the verbal part of the WAIS-R test¹), with infantile features and simplistic thinking. According to the experts, she was also very naïve, emotionally immature and easily influenced. As a result, they concluded that at the time of the event her ability to control her behaviour was limited (see paragraph 21 of the judgment).

3. The majority acknowledged that when assessing the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings the Court’s case law required consideration of whether the applicant was particularly vulnerable, including by reason of mental capacity (see paragraph 67 of the judgment). Thus it is essential that the degree of vulnerability of a person suspected or accused in criminal proceedings, based on his or her mental capacity, is promptly identified and adequately addressed, preferably before the first interview by the police or by an investigating judge². In line with this, the competent domestic authorities must be able to ask an independent expert to examine the degree of vulnerability of the suspect, his or her needs and the appropriateness of any measures taken or envisaged against the vulnerable person³.

4. In the present case the domestic authorities ordered an examination of the mental state of the applicant two days after her arrest and first interview by the police (see paragraph 17 of the judgment). The next day, the applicant was interviewed by the investigating judge. The expert report was produced three months later, in January 2010. In the light of the above recommendations this could not be considered sufficiently prompt for a timely identification of her possible special needs and of the appropriateness of any special measures ensuring her procedural rights.

¹ Such an IQ is approximately equivalent to the mental age of a nine to ten-year-old child.

² See EU Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013/C 378/02) (hereinafter “Recommendation of 27 November 2013”), preamble, point 6.

³ Ibid.

5. Furthermore, although the expert report identified the applicant as a person with an extremely low IQ (see paragraph 2 above) the authorities never required an assessment of the degree of her vulnerability or any special needs she might have in the criminal proceedings. Nothing in the legal framework provided to the Court by the Government and the applicant (see paragraphs 40-41 of the judgment) indicates that the domestic authorities were required to undertake such an assessment. Indeed, the expert reports do not address the applicant's fitness to be interviewed, her capacity to stand trial, any special needs she might have, or the appropriateness of any measures due to her intellectual disability. The thrust of the expert report sought merely to establish whether the applicant could distinguish right from wrong, and thus be held responsible for the crime she had allegedly committed, which is a separate and distinct investigation from that of determining fitness for the interview and capacity to stand trial.

6. The majority failed to recognise that at the domestic level, although the applicant was identified as a person with an extremely low IQ, and thus as a person with intellectual disability, no further assessment of her capabilities to understand, adequately follow and participate in the criminal proceedings against her had been undertaken. Consequently, she was not provided with any procedural guarantees that would counterbalance her disability.

7. Instead of problematising these shortcomings, the majority opted not to treat the applicant as a particularly vulnerable person (see paragraph 69 of the judgment), relying on the fact that her disability was categorised as slight/mild, that she was not suffering from any mental illness or disorder, that she had been able to recognise the dangerousness of her actions and foresee their consequences and that she was an adult and literate (see paragraph 68 of the judgment). The majority came to this conclusion even though at domestic level experts never opined on the applicant's ability to function within the criminal proceedings.

8. None of the reasons provided by the majority are convincing and some are indeed irrelevant. The fact that her disability was categorised as slight/mild does not mean that she was not particularly vulnerable. According to the American Psychiatric Association's *Diagnostic and Statistical Manual on Mental Disorders* (5th ed. 2013) intellectual disability is categorised into four levels of severity: mild, moderate, severe, and profound. The majority of people with intellectual disabilities (about 85%) fall within the category of "mild". Individuals with mild intellectual disabilities tend to fall in the IQ range of anywhere from 50 to 70. While individuals with mild intellectual disabilities may be able to work in jobs that do not emphasise conceptual skills, they generally require support in conducting complex daily living tasks and making decisions regarding health or law (ibid.) Indeed, the applicant attended a special school and she is in receipt of a disability pension. She claimed that her physical defect was

clearly visible and that her intellectual disability was clearly evident from any conversation with her (see paragraph 35 of the judgment). The experts described her as a person with infantile features and simplistic thinking, very naïve, emotionally immature and easily influenced (see paragraph 2 above).

9. The fact that she was not suffering from any mental illness or disorder should be irrelevant for assessing the consequences of her intellectual disability⁴. Though many individuals suffer from both conditions, these conditions are separate. In the criminal justice context, they may pose different challenges. The Court has already acknowledged intellectual disability itself as a ground for particular vulnerability (see *A.-M.V. v. Finland*, no. 53251, § 73, 23 March 2017).

10. While a person with intellectual disability might understand his or her actions resulting in murder and foresee the consequences thereof (and thus his or her state of mind may satisfy the mental element of the offence), it might be far more difficult for him or her to navigate through intricate rules of criminal procedure which “tend to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence” (see *Salduz v. Turkey*, no. 36391/02, §54, 27 November 2008). Persons with intellectual disabilities may struggle to understand the full implications of various procedures and processes involving arrest and detention; of the exercise of their rights and entitlements; the significance of what they are told, of the questions they are asked or of their replies; or may be prone to become confused and unclear about their position; may struggle to communicate effectively; and may be suggestible or compliant⁵. Thus the criteria that are used to establish capacity for criminal responsibility are not the same as the criteria that should be used to establish eligibility for additional procedural protection for persons with intellectual disabilities. In short, the fact that the applicant was capable of understanding her alleged actions and of foreseeing the consequences thereof does not necessarily mean that she was capable of functioning adequately in criminal proceedings.

11. As the majority themselves acknowledged (see paragraph 67 of the judgment), in *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, § 273, 13 September 2016) and *Beuze v. Belgium* ([GC], no. 71409/10, § 150, 9 November 2018) it was further

⁴ Intellectual disability is often confused with mental illness, but an intellectual disability is not an illness. Whereas people with mental illness often suffer temporary, cyclical or episodic disturbances in their thought process and emotions, individuals with intellectual disabilities have limited abilities to learn and socialise with others.

⁵ These are, for example, some of the criteria listed in Home Office, Code C, Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (TSO, London 2018), para. 1.13(d) for recognising as vulnerable adults with mental illness or intellectual disability.

clarified that a person involved in criminal proceedings may be particularly vulnerable not only by reason of his or her age, but by reason of his or her mental capacity as well. Thus adult suspects or defendants with intellectual disabilities may fall within the category of particularly vulnerable persons and the fact that the applicant in the present case was not a minor is irrelevant to her eligibility for additional procedural protections due to her intellectual disability (see, *a contrario*, paragraph 68 of the judgment).

12. The expert report in the present case was not intended, and did not address, how the applicant's intellectual disability could have affected her ability to fully comprehend the implications of the questions asked, whether her replies would represent a rational and accurate explanation of her involvement in the commission of the offence, or whether she could understand the evidence and adequately instruct a lawyer and communicate with the court. Indeed, according to the record of the hearing held on 27 September 2010, at which the expert in psychology was present to give his oral testimony, he intervened in the applicant's examination in order to rephrase a question asked by the prosecutor because in his view the question could not be understood by the applicant (see paragraph 29 of the judgment). However, the applicant was never afforded a pre-trial hearing to determine the degree of her vulnerability due to intellectual disability. Domestic judges never determined the applicant's eligibility for additional procedural protection although it was established that she was a person with significant sub-average intellectual functioning (IQ below 70) accompanied with limitations in adaptive functioning. Thus, the majority did not have the proper premises on which to base their conclusions in relation to her vulnerability.

13. In our view the Court should presume particular vulnerability of a person with intellectual disability as long as the domestic authorities have not proven otherwise.

B. Risk of wrongful conviction of persons with intellectual disabilities

14. Research confirms that persons with intellectual disabilities are at a higher risk of wrongful conviction because they are less able to enlist legal the assistance and support of others, to give meaningful assistance to their counsel and are typically poor witnesses, risking false confessions; and their demeanour may create an unwarranted impression of lack of remorse for their crimes. They are vulnerable to exploitation by co-defendants. They are especially likely to fall into the category of defendants who had some factual involvement in the crime(s) of which they were convicted, but were guilty of only some of those crimes, or of a less aggravated crime⁶.

⁶ Blume, John H., Sheri, Lynn and Millor, Susan E., *Convicting Lennie: Mental Retardation, Wrongful Convictions, and the Right to a Fair Trial*, pp. 947-58 (2012), Cornell Law Faculty Publications, Paper 603.

15. For all these reasons both the Council of Europe and the EU have paid special attention to suspects with mental issues. Accordingly a Green Paper⁷ proposed, among eight groups of potentially vulnerable suspects and defendants, persons suffering from a mental or emotional handicap, in the broadest sense, while the Resolution on a Roadmap for Strengthening Procedural rights of suspected or accused persons in criminal proceedings⁸ specifically dedicated measure E to suspected or accused persons who could not understand or follow the content or the meaning of the proceedings including because of a mental condition⁹. The Directive on the right of access to a lawyer emphasises that member States should ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in the application of the Directive¹⁰. The Recommendation of 27 November 2013¹¹ specifically elaborates upon the procedural rights of vulnerable persons in criminal proceedings.

16. The judgment does not refer to any of these documents and it disregards their recommendations as well as the research done in this area.

C. Additional protection for defendants with intellectual disabilities

17. Persons with intellectual disabilities must, when eligible, be provided with additional procedural protections such as: counsel (appropriate adult) or advocate with training in intellectual disabilities, videotaping of their interviews to allow the judge to better determine the credibility and voluntariness of confessions made by suspects with intellectual disabilities, precluding convictions in the absence of corroboration, placing limits on plea bargaining. The procedural rights granted to vulnerable persons should apply from the time they are suspected of having committed an offence and should be respected throughout the criminal proceedings taking into account the nature and degree of their vulnerability¹².

⁷ Green Paper from the Commission on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM (2004) 328 final, 28 April 2004.

⁸ OJ 2009, C 295/1.

⁹ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (Annex, Measure E).

¹⁰ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, see Article 13.

¹¹ Recommendation cited above.

¹² See, *supra* note 2, Articles 2-17.

18. The appellate court confirmed the judgment, making reference to the “applicant’s testimonies collected in a lawful manner and her full and free confession ... and that all her interviews had taken place in her counsel’s presence”. As demonstrated below, in doing so the appellate court completely disregarded the above listed safeguards.

The applicant was not even given half an hour, as prescribed by law, a period which itself is excessively short, to find a lawyer of her own choosing (see paragraph 11 of the judgment). She was hardly given any time to consult with the legal aid lawyer prior to her first interview with the police, which is contrary to the principles reaffirmed in *Dvorski v. Croatia* ([GC], no. 25703/11, § 106, ECHR 2015) where the Court emphasised that in this context regard should also be had to the requirement in Article 6 § 3 (b) that an accused should be afforded adequate time and facilities for the preparation of his or her defence.

19. Moreover, it appears that none of applicant’s lawyers had training and experience in intellectual disabilities, and that she was not assigned an appropriately trained adult that could help her to interact with the authorities and exercise her rights effectively. In this case, once the authorities had failed to react appropriately to her obvious intellectual difficulties, the legal aid advocate did not see fit to raise what would have been a legitimate query concerning her intellectual impairment and the evidential value of her statement. Not only that, but her subsequent lawyer did not even consider it necessary to question the preceding events and request reopening¹³; or request a separate psychiatric/psychological assessment into her fitness for questioning and/or her capacity to stand trial, once the authorities themselves had failed to do so. In such circumstances, the capabilities of the defendant to ascertain and understand his/her position comes into play. It is true that the role of the defence lawyer should be to secure the guarantees against self-incrimination and of a fair trial. However, in this case, the vulnerability of the accused was not counter-balanced by appropriate action on the part of her advocate. Rather, it was exacerbated by his inaction. This only serves to confirm the importance of providing a suspect with intellectual disability with appropriate assistance and support from the very beginning of criminal proceedings, which includes court-appointed counsel or other professionals (legal guardian, psychologist, social worker or educational professional) who have training and experience working with a wide spectrum of individuals with intellectual disabilities. In this context we recall that the Court has, on numerous occasions, underlined the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained at this stage determines the framework in which the

¹³ “.....the applicant’s counsel expressly stated that he was not asking for the activities carried out before he had taken over the applicant’s representation to be repeated, but for the prosecutor to discontinue the prosecution because the evidence available did not, in his view, prove her guilt” (paragraph 23 of the judgment).

offence charged will be considered at the trial (see *Salduz*, cited above, § 54).

The applicant signed a statement saying that the pre-printed information as to her rights had been explained to her and that she had understood it. She also confirmed that she understood the charges but waived her right to challenge them. Of particular significance is the fact that the applicant waived her right to remain silent. Yet we have no evidence that she was capable of understanding the concept of the right to silence, or the privilege against self-incrimination or any other rights explained to her. These were not the object of the expert assessment, which, in any case, did not pre-date the first interview where she signed the waiver. In addition, as already mentioned, there is no indication that the police conducting the interview were specialised in dealing with persons who lacked adequate intellectual capacity or had received specific training to interact with them, to recognise special problems they might encounter and to assess the level of their understanding¹⁴.

20. Furthermore, whilst admitting that she was present during the killing, the applicant stated she had not participated in it. She changed her version during the interview and also in later proceedings, claiming that she was forced to participate under duress. She went on to give conflicting statements which proved to be self-incriminating. The experts stated that during her examination the applicant had first denied the events but later confessed to them, had been insincere, had kept changing her statements and had naïvely feigned memory disorders (paragraph 21 of the judgment). The majority failed to properly address her changing testimony, presuming that this showed she was lying. The applicant's mental impairment and its impact on the probatory force of her confessions were not duly considered by the domestic courts, nor by the Chamber. It must be said that the high risk of false confessions is supported by a variety of empirical evidence. Persons with intellectual disability cannot remember facts as well as persons without such disability. They have a strong desire to please figures of authority and are easily tricked by questions. Indeed, it is recalled that the experts established that the applicant was a person with infantile features and simplistic thinking, being naïve, emotionally immature and easily influenced.

21. In addition, the authorities failed to inform the applicant about the plea-bargaining procedure and thus the applicant's lawyer failed to participate in it. As a result, the authorities failed to protect the applicant from possible exploitation by her co-defendant, who during the plea bargaining proceedings put the main blame on the applicant. He subsequently committed suicide. The authorities and the majority disregarded the contention that the prevention of a miscarriage of justice,

¹⁴ See, *supra* note 2, point 17 and Article 17.

brought about by the exploitation of the weaknesses of one co-defendant, necessitates that limits should be placed on the plea-bargaining process in the shadow of intellectual disability. In our view, in such circumstances, entering into plea bargaining should be pre-approved by the judge and the presence of a lawyer of the co-defendant with intellectual disability should be mandatory.

22. Finally, according to the trial court, the applicant's guilt had been proven mainly by the co-defendant's testimony and her repeated confessions without any regard being given to the absence of corroboration. An examination of the remaining evidence shows that it was circumstantial at best. Also, as regards the reliability of her confessions, given her intellectual disability, it is arguable that the threshold of determining the concept of voluntariness of the confession is lowered to a considerable degree. To be complete, an act of volition must not only be free from coercion but must also be performed with a sufficient degree of understanding.

D. Conclusion

23. It is our opinion that, in circumstances where the domestic authorities have established that the applicant is a person with intellectual disabilities, the failure to assess the applicant's vulnerability at both the pre-trial and trial stage, for the purposes of her fitness and capacity to be interviewed and stand trial, should have been given weighty consideration by the Court and should have led the Court, when the domestic authorities had not demonstrated otherwise, to assume that she was particularly vulnerable for the purposes of a fair trial assessment.

24. In such circumstances, in our view, there was a breach of Article 6 because there were no adequate procedural safeguards in place to counterbalance the applicant's lack of adequate intellectual capacity, nor was the absence of such safeguards given due consideration by the domestic courts in determining the admissibility of the statements made by the applicant, or at the very least, their evidential value, and in reaching their finding of guilt. All these deficiencies are particularly important in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies (see *Salduz*, cited above, § 54).

25. In the light of the foregoing, we cannot concur with the conclusion of the Court, in paragraph 69 of the judgment, to the effect that:

“[i]n these circumstances, the Court does not consider that there were sufficient indications requiring the authorities to consider the applicant a particularly vulnerable person and make appropriate adjustments (compare *O'Donnell v. the United Kingdom*, no. 16667/10, 7 April 2015, where the judge refused to absolve the applicant, with an IQ of 62, of giving evidence because of his mental condition and

directed the jury to draw adverse inferences from the applicant's decision not to testify)."

26. The comparison with *O'Donnell v. the United Kingdom* (no. 16667/10, 7 April 2015) is not opportune. In that case there were not one, but two assessments on the capacity of the defendant to give evidence subject to certain safeguards. Furthermore, the trial judge allowed the presentation of evidence to the jury as to the applicant's intellectual capacity and the effects that this might have on his ability to give evidence on his own behalf. These considerations were also reflected in the judge's instructions to the jury. This was not the case in the current matter at hand. On the contrary, in the present case the applicant, a person with established intellectual disability, was neither examined as to her eligibility for additional protection, nor afforded any additional protection due to her disability.

27. From all of the above it follows that the Court's case-law on the participation of a suspect or defendant with intellectual disability in criminal proceedings is underdeveloped. The Chamber's reliance on *O'Donnell* should have led to a different outcome, as argued above. Regrettably this case represents a missed opportunity to properly identify the procedural safeguards required in these circumstances and to set proper standards to ensure procedural fairness for such suspects or accused persons.