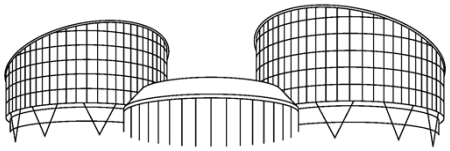

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF DOYLE v. IRELAND

(Application no. 51979/17)

JUDGMENT

STRASBOURG

23 May 2019

FINAL

23/08/2019

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Doyle v. Ireland,

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

Angelika Nußberger, *President,*
Ganna Yudkivska,
André Potocki,
Síofra O'Leary,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lado Chanturia, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 2 April 2019,

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

PROCEDURE

1. The case originated in an application (no. 51979/17) against Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish national, Mr Barry Doyle ("the applicant"), on 12 July 2017.

2. The applicant was represented by Fahy Bambury, a firm of solicitors based in Dublin. The Irish Government ("the Government") were represented by their Agent, Mr Peter White, of the Department of Foreign Affairs.

3. The applicant complained that, following his arrest, he was not entitled to have a solicitor present during his police interrogation, representing a failure by the respondent State to vindicate his right to a fair trial as provided in Article 6 § 3 (c) of the Convention.

4. On 18 January 2018 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1985 and is currently serving a life sentence for murder in Mountjoy Prison, Dublin.

6. In the early hours of 9 November 2008, the applicant killed a man in Limerick. It was a case of mistaken identity. The applicant had set out to kill another man at the behest of a well-known criminal figure in the city in the context of a feud between criminal gangs. The applicant mistook the victim, S.G., who had no connection whatsoever to the criminal milieu, for the intended target. S.G., who was 28 years old, was walking home when the applicant shot and wounded him on the street. He then pursued his victim

into the back garden of a nearby house where he shot him several times, inflicting five wounds in all, including a fatal head wound.

7. On 24 February 2009 investigating police carried out a search of the applicant's residence. They arrested him there at 7.15 a.m. He was brought to a police station shortly before 8.00 a.m. There he was informed of his rights, including a right of access to a solicitor. He requested legal advice from a particular solicitor, whom the police duly notified. At 9.55 a.m. the solicitor telephoned the police station and spoke to the applicant. This first consultation lasted two minutes.

8. The first police interview commenced at 10.12 a.m. and lasted fifty minutes. All of the interviews were video recorded, and were conducted without the applicant's solicitor being physically present in the interview room. At no stage did the applicant or his solicitor request the presence of the latter during questioning. It was confirmed during the subsequent proceedings that, in view of police practice at that time, such a request would have been denied.

9. Another solicitor, Mr O'D., who was acting on behalf of the first solicitor, arrived at the police station at 11.00 a.m. and represented the applicant from that point onwards. The police concluded the first interview at 11.03 a.m. The applicant then had a consultation with the solicitor lasting nine minutes. The second interview commenced at 11.19 a.m. and lasted twenty-three minutes. The third interview started at 12.07 p.m. and lasted one hour and fifty-four minutes. The fourth interview began at 3.00 p.m. and had a duration of one hour and thirty-nine minutes. The fifth interview, beginning at 5.59 p.m., lasted for two hours and seven minutes. The final interview of the day took place between 10 p.m. and 11.42 p.m., a duration of one hour and forty-two minutes. The applicant, who did not request or have any further contact with his solicitor that day, did not make any admissions to police.

10. The following day, 25 February 2009, the police continued to question the applicant. Three interviews took place in the morning and afternoon, lasting almost five hours in total. The applicant was brought before the District Court, which extended his detention for a further 72 hours. His solicitor was present at the court hearing. The applicant was brought back to the police station where another interview, the tenth, took place between 10.38 p.m. and 11.25 p.m. During this interview, the police informed him that his former girlfriend, G, who was also the mother of his young daughter, had been arrested in Dublin early the previous morning on suspicion of withholding information. She was being held in detention and interviewed by police about her knowledge of the killing. He was given certain details about her replies to police questions. Once again, the applicant did not request further consultations with his solicitor and did not make any admissions.

11. The interviewing of the applicant continued on 26 February 2009. The eleventh interview began at 9.03 a.m. and lasted seventy-two minutes. Questioning recommenced at 12.22 p.m. for one hour and twenty-one minutes. The police impressed on him that G was enduring the hardship of detention as well as separation from her young daughter on account of the applicant's refusal to admit to the crime. They also underlined the fact that the victim had been an entirely innocent man. The thirteenth interview took place between 3.02 p.m. and 4.15 p.m. During it, the applicant asked to consult his solicitor. Questioning stopped while the police made contact with the solicitor. The consultation between the applicant and his solicitor was again by telephone. It lasted approximately two minutes.

12. The next interview, the fourteenth, commenced at 5.32 p.m. In the first minutes, the police asked the applicant about text messages sent to Ms G. around the time of the murder. At some point the applicant asked to speak to his solicitor again. The interviewers replied that he had just spoken to the solicitor, to which the applicant said that he had not been able to speak to him properly. It is not clear from the documents in the case-file when this occurred. The interview continued. At around 6.15 p.m. the applicant again asked to speak with the solicitor, saying that he would answer questions afterwards. A moment later the interview was briefly suspended while one of the officers left the room to fetch a glass of water. He returned at 6.20 p.m. and for the remaining 15 minutes the officers questioned him about his background and his sporting interests. Before ending, they informed him that Ms G was alright. The interview concluded at 6.35 p.m.

13. As requested by the applicant, the solicitor arrived at the police station at 6.52 p.m. He and the applicant spoke for about ten minutes. According to a memo written by a police officer some hours afterwards, the solicitor then approached the officers conducting the interviews and told them, on an off-the-record basis, that the applicant was prepared to admit to the murder provided that Ms G. was released. The police replied that they wanted the applicant to tell the truth about the killing. The solicitor conferred again with the applicant for ten minutes and then informed the police that there would be no admissions before Ms G.'s release. The police replied that a confession taken in such circumstances would not be accepted in court, as it would be regarded as inducement. The solicitor then consulted with the applicant for a further 10 minutes, after which he indicated to the police that the applicant would not admit to anything prior to Ms G. being released and then left the police station.

14. The fifteenth interview commenced at 7.42 p.m. The applicant refused to answer the first two questions posed to him, but then stated that he had been present at the scene around the time of the murder. At that moment another police officer entered the interview room and stated that the applicant's solicitor had telephoned the station and wished to speak to

him. The interview was immediately suspended to allow the applicant confer with his solicitor. This consultation took about four minutes. When the interview resumed at 7.51 p.m., the applicant admitted to shooting the victim. As the interview continued, he provided a number of other details about the crime: how he had been driven to the scene in a particular car; the clothes he had been wearing and which he had burned later; how many shots he had fired, and where; the fact that he had used his right hand to shoot; the fact that the gun had jammed and that he had cleared it by ejecting bullets. He also sketched a map of the crime scene to indicate where each event had taken place. Beyond this, he refused to answer the questions put to him. The interview ended at 9.05 p.m. At the conclusion of the interview, the applicant made a particular gesture. He removed a set of rosary beads that he wore around his neck as a memento of his dead brother, and asked the police give them to the victim's family.

15. The sixteenth interview took place between 10.09 p.m. and 11.29 p.m., a duration of 90 minutes. The police repeatedly asked him to explain why he had killed an innocent man, but the applicant refused to answer.

16. By that time, Ms G. was no longer in custody, having been released at 9 p.m. that same day.

17. There were five further interviews the next day, 27 February 2009, with a combined duration of seven hours and twenty-seven minutes. The applicant continued to refuse to answer the questions put to him about the identity of the intended victim, about his own association with a well-known criminal figure in the city, and about calls and messages to and from his mobile phone around the date of the murder. In the twentieth interview, held that evening, he indicated on a map how the crime had unfolded, and stated that when he caught up with him in the back garden, the victim had said "please stop" just before the fatal shots were fired.

18. Two further interviews were held on 28 February, lasting two hours and three minutes in all. The police showed the applicant various items of evidence retrieved from the scene of the crime, including unfired bullets, bullet casings, bullets removed from the victim's body, and items of the victim's clothing. He made no comment on this or any other question put to him. At 3.15 p.m. police charged the applicant with murder and brought him before the District court.

19. The applicant pleaded not guilty. He was tried in the Central Criminal Court.

A. The first and second criminal trials

20. The first trial, in 2011, was inconclusive, the jury failing to reach a verdict.

21. The second trial commenced on 16 January 2012 and lasted 22 days. At the outset, the applicant sought to exclude the admissions he had made to the police. In accordance with domestic law, his challenge was considered by the trial judge in the absence of the jury. This process, a *voir dire* (a trial within a trial to determine the admissibility of evidence) took ten days. The trial judge viewed more than twenty hours of the video records of the interviews. During that process, the recording of the interview was played on screen and then the interviewing officers gave evidence concerning the videos and were cross-examined by the legal representatives for the prosecution and defence. At the end, counsel for both sides made submissions to the judge in regard to the questions of inducement of threat, oppression and fairness.

22. On the eleventh day of the trial the judge ruled as follows:

> "The defence object to the prosecution proposal to call evidence of various admissions made by Barry Doyle in the course of interviews that took place while he was in custody .... The defence contend that these admissions are inadmissible and rely on three grounds.
>
> 1) That the admissions were made involuntarily as a result of a combination of threats, inducements and oppression.
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> 2) That the admissions were made as a result of breaches of the accused's constitutional right of access to legal advice.
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> 3) The admissions were made as a result of breaches of the requirement of fundamental fairness.
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> ...
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> The onus of proof in respect of admissibility is on the prosecution and if confessions are to be admitted in evidence the Court must be satisfied beyond a reasonable doubt that it is proper to do so.
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> ...
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> With regard to the question of legal access Barry Doyle had two consultations with his solicitor while he was in [the police station] prior to making admissions and he was also represented by that solicitor in court when an application was made to extend his detention. The Court does not consider the length of time that either consultation lasted to be relevant in the context of this case. The Court also holds that the [police] were entitled to continue interviewing Barry Doyle in interview 14 when he had complained that a short telephone conversation with his solicitor was not a proper consultation and when his solicitor's arrival at the [police] station was expected within an hour. The Court is satisfied that there was no breach of Barry Doyle's constitutional right to legal advice.
>
> In considering the question of oppression the Court observed Barry Doyle in video recordings over a period of in excess of 20 hours and holds that he appeared to be physically and mentally strong throughout. He engaged with the [police] when he chose to do so and refused to answer questions when he did not wish to do so. ...
>
> With regard to the questioning by [the police officers], the Court finds that the interviews were conducted in a careful, patient and structured way in which some of the results of the [police] investigation were gradually revealed to Barry Doyle. The

Court also holds that Barry Doyle first began to engage with [the police] in a limited way, essentially as a result of [their] appeal to Barry Doyle's humanity. This engagement was built on ... and ultimately the accused told the [police] about his involvement in the death of [S.G.].

The Court holds that the interviews conducted by [police] were at all times professional and courteous and involved no oppression. The Court also holds that Barry Doyle was in full control of himself throughout the interviews and holds that he made the admissions that he did because he chose to do so.

With regard to the question as to whether some of the promptings by the [police] to Barry Doyle to the effect that he should tell the truth and not keep [G] away any longer from their child, the question arises as to whether this, or any other related promptings made prior to interview 15 and relating to the release of [G], could amount to an inducement. The first thing to be said is that these remarks must be viewed in the overall context of all that had taken place, which included the various responses of Barry Doyle regarding the death of his brother, the responses regarding his own family, his children by a previous relationship to his relationship with [G], as well as read or taken in the context of the limited answers he had given about living in Limerick and the fact that he had conceded ... that being in custody on suspicion of the murder of [S.G.] was the lowest point in his life. The context also includes the gradual unfolding of the evidence in the case to him and the context further includes numerous appeals to him to tell the truth.

Notwithstanding the context in which they occurred, ... even if these promptings could possibly amount to an inducement when objectively viewed they were not immediately acted on and their effect, whatever it may have been, was dissipated by the consultation Barry Doyle had with his solicitor and his solicitor's interaction with [the police]. This broke any possible causative link and it is highly relevant that the solicitor told the detectives that Barry Doyle would not admit to the offence and that they would have a bit more work to do.

The Court holds that when Barry Doyle came to make his admissions in interview 15 he made them voluntarily. Accordingly, the Court holds that the admissions were made not as a result of oppression and were not made as a result of any threat or inducement.

Finally, the Court has considered the objection made by the defence that the admissions were made as a result of a breach of fundamental fairness. The Court has considered all the objections in the round and bears in mind [the relevant Supreme Court case-law].

The Court holds that there is no breach of the requirements of fundamental fairness and accordingly holds that the confessions made by Barry Doyle are admissible in evidence."

23. Following the conclusion of the *voir dire* proceedings, the trial resumed. The jury was shown excerpts from the video recordings and received transcripts of the interviews. There was other evidence before the court. This included ballistic evidence, evidence about the car the applicant had travelled in, and evidence given by G. There was evidence from another witness, C, who said she had been present when the killing had been ordered, and, the day after the murder, had heard the applicant confirm that he had carried it out.

24. Following the final submissions of the prosecution and defence, the judge summarised the case and gave instructions to the jury in the Judge's Charge. He instructed the jury to be careful when considering the evidence and underlined their obligation to examine neutrally the question of whether the applicant had been induced to confess to the crime, with a detailed explanation of what that meant in the circumstances. The judge also warned the jury that it may be dangerous to convict a person on confession evidence alone without corroboration. The judge went on to explain in detail why that was the case, and what corroboration evidence meant in the circumstances.

25. On 15 February 2012 the applicant was unanimously convicted by a jury of the murder of S.G. He received the mandatory sentence of life imprisonment.

B. The Court of Appeal

26. The applicant appealed against his conviction, raising 27 grounds. The Court of Appeal dismissed the appeal on 8 June 2015. Insofar as relevant, the Court of Appeal decided as follows.

27. It first dealt with the submission that the police had resorted to inducement or threat to elicit his confession to the murder. It agreed with the position taken by the trial judge that the fact that the applicant had consulted with his lawyer immediately before admitting the crime in the fifteenth interview represented a significant interruption in the process of police questioning. Of even greater significance was the fact that the police rejected the proposal of the applicant to confess in return for the release of G, which the solicitor conveyed to the applicant. With no room for ambiguity or misunderstanding in this respect, the response of the police was sufficient to refute the argument about inducement or threat. Nor did the Court of Appeal accept that, during the course of the interviews, the police resorted to implied inducement or threat. It considered that, as found by the trial judge, the transcripts showed the police trying to appeal to his better nature and to his essential humanity. This interpretation of the evidence was borne out by the applicant's gesture of remorse following the fifteenth interview (see paragraph 14 above). It was also supported by the fact that the applicant had retained a degree of precision and control over the admissions he was prepared to make. He provided certain precise details to the police about his own actions but gave nothing away about the other persons implicated in the murder. The fact that he did not ask about G's release after admitting the murder further suggested that there was no element of inducement. It concluded on this point:

> "48. The Court holds that the learned trial judge was entitled to find on the evidence that the prosecution had established that the admissions made by the appellant were not brought about by any inducement or threat. The Court is also satisfied that the judge's interpretation of the interviews was correct. It concludes that the proposal by the appellant's solicitor not only dissipated any possible belief in an offer by the

> [police] but also constituted an approach that actually negated belief in an inducement ..."

28. The Court of Appeal then considered the argument that the applicant had not been granted sufficient access to legal advice and, as a result, had been subjected to oppression during questioning. The applicant further complained of irretrievable prejudice caused by the continuation of the fourteenth interview despite his request to consult his solicitor, which was not cured but actually compounded by the subsequent consultation. The judgment states:

> "69. The appellant had access to his solicitor for as much time and on as many occasions as he or his lawyer requested, in which circumstances it is hard to see how he can say that there was oppression because of the inadequate legal advice availability. The solicitor ... did not ask to be present for the interviewing by the [police]. No doubt, had he asked for that facility, it would have been refused but that simply did not happen and it was not the understanding at the time that a lawyer was entitled to be present. That, however, does not make the detention of the appellant retrospectively unconstitutional on the basis of a hypothetical refusal of a request that was not made.
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> ...
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> 72. It was submitted by the appellant that if a solicitor had been present throughout the interviewing of Barry Doyle, the interviews would have proceeded differently. But it is by no means clear that that would have been of any great assistance to him; the questions would still have been asked and he could well have been in the same situation of deciding that he was going to confess to the extent, limited in degree as it was, that he actually did in interview 15 and followed up in later interviews."

29. The Court of Appeal again referred to the fact that all interviews had been recorded, so that the trial judge was able to see precisely what had happened during them. The police had respected the custody regulations, and while they had repeatedly questioned him they had permitted him breaks and access to a solicitor. There was no sign of oppression or unfairness.

30. The Court of Appeal also reviewed in detail the content of the Judge's Charge to the jury, following a challenge that it had been inadequate and incorrect, and it rejected that complaint. It considered that most of the challenges to the judge's charge concerning the applicant's admissions amounted to a complaint that the judge's charge had not adopted the applicant's arguments. The Court of Appeal rejected this recalling that "118. It would not have been correct for the judge to tell the jury what the appellant wanted him to say" and "121 ... it is not the function of the trial judge to make another speech either for defence or prosecution ...". The Court of Appeal also noted that the applicant criticised the Judge's Charge on the question of the dissipation of inducement or threat, and recalled that the judge had consulted with the lawyers of both parties in advance on the presentation of that issue and both had indicated their agreement. Overall, the Court of Appeal concluded:

"159. The appellant's advisors legitimately advanced every ground of objection in defending their client. All of their extensive submissions were fully ventilated and carefully considered by the trial judge. The many issues were re-visited in a hearing in this Court that occupied two full days of oral argument and which were also explored in comprehensive submissions that were of great assistance to the Court.

160. The Court is satisfied that none of the grounds of appeal can succeed. The trial was satisfactory and the conviction of Mr Doyle was safe."

C. The Supreme Court

31. On 8 June 2015 the Supreme Court granted leave to appeal, identifying three issues for examination, one of which is of central relevance to the present application:

"Whether or not the appellant was, in the circumstances of this case, entitled to consult with a solicitor, and have a solicitor present, prior to and during the 15th interview with the [police], during which admissions were alleged to have been made. This raises the question of whether the right to have a solicitor present during questioning is a matter of right of the detained person, or a matter of concession by the [police].

Whether the matters set out in the applicant's application, under the heading 'relevant facts considered not to be in dispute', or any of them, constituted threats or inducements to the applicant, and calculated to extract a confession from him. This is a matter not decided by the court of trial, or the Court of Appeal. Secondly, if they do constitute such threats or inducements, whether their effect had 'dissipated', or 'worn off', by the time of the admissions relied on by the State, as held by the trial judge, and whether or not there was any evidence on which it could have been determined that the effect of these threats, or inducements, (if any), had 'dissipated', or 'worn off', by the time of the alleged admissions."

32. On 18 January 2017 the Supreme Court dismissed the appeal, by a majority of six to one. Six members of the court gave judgment.

33. In the first judgment, the Chief Justice limited her remarks to the first issue above. She recalled that reasonable access to a solicitor was a constitutional right for persons in detention. As a matter of constitutional law, the concept of basic fairness of process applied from the time of arrest, as the Supreme Court had recently affirmed in a judgment that took into account the relevant Convention jurisprudence – *DPP v. Gormley and DPP v. White*, [2014] IESC 17 ("Gormley"). Since the question of the presence of a solicitor during questioning did not arise on the facts in Gormley, any statements in the judgment on this matter were obiter. She continued:

"15. ... [I]t is clear that the appellant requested access to a solicitor and obtained access to a solicitor. He had access to legal advice. He had access to the solicitor before the important Interview 15, and he had access, at the solicitor's request, during that interview, when the solicitor phoned in and sought to speak to the appellant as Interview 15 was underway. The interview was interrupted to enable the appellant to speak to his solicitor. There was no request to have the legal adviser present during the interview.

16. I am satisfied that the constitutional right of access to legal advice was met by the attendance of the appellant with his solicitor prior to Interview 15, and indeed by the telephone call from his solicitor which interrupted Interview 15.

17. The constitutional right is a right of access to a lawyer. The right is one of access to a lawyer, not of the presence of a lawyer during an interview." [emphasis in the original]

34. She considered that the requirements of the Convention had also been met. Regarding the second issue in the appeal she concurred with Charleton J (see below).

35. The second judgment was given by O'Donnell J, who also confined his analysis to the first issue. He too regarded statements in *Gormley* about a more general right to the presence of a solicitor during detention as obiter. Referring to relevant Convention case-law he observed:

"8. Given the fact that the jurisprudence of the ECtHR has to date largely been developed in the context of civil law systems with early supervision of investigation by a magistrate, it cannot be said that it has been definitively determined that the Convention requires a bright-line rule that in a common law system, an accused person must have not just access to, but the assurance of the presence of, a lawyer during any detention. This is particularly so because, until now, the Convention jurisprudence has not adopted any absolute rule that evidence obtained in breach of a Convention right must be inadmissible, but rather has applied a test of considering the overall fairness of the proceedings."

36. In his view, the legal argument for adopting an absolute rule of presence of a lawyer as a matter of constitutional principle therefore rested almost entirely on the reasoning of the Miranda decision of the US Supreme Court. However, that authority had not been followed in Irish jurisprudence in the fifty years since it was decided. In the present case, the voluntary nature of the confession was not in doubt, and the admission of the applicant's statement had not been held to be unfair. Were a bright-line rule to be adopted, it would have the potential to exclude key evidence in the shape of statements given voluntarily without the benefit of legal advice in circumstances otherwise beyond criticism. He stated:

"14 ... I would for my part stop short at this point of finding that in addition to the videotaping of interviews, the access to and advice from a lawyer (provided if necessary by the State), and the requirement that only statements found to be voluntary beyond reasonable doubt be admitted in evidence, the Constitution nevertheless requires and perhaps has always required, the presence of a lawyer at all times during questioning, as a condition of admissibility of any evidence obtained."

37. He concluded:

"84. The appellant's conviction was based upon a confession of his guilt, supported by significant independent evidence. This included a description by the appellant of what happened at the scene of the crime examination of matters unknown to the garda, and ballistic evidence. The conviction was supported by independent testimony from Ms. [G.], to whom he (the appellant) made inculpatory remarks outside the confines of a garda station. It was corroborated by evidence from Ms [A.], who was present both when the order was given to the appellant to commit the murder, and the

following day when the appellant was challenged as to whether or not he had shot the right man, and when he asserted, incorrectly, that he had. The voluntary nature of the confession was proved to the satisfaction of the trial judge based upon a detailed review of all the evidence, including 20 hours of interview process. There is no basis, under the law, upon which it can be contended that the evidence was inadmissible, or that the trial herein was an unfair one. ..."

38. MacMenamin J gave the third judgment. He recalled that at the time of the applicant's arrest and trial, the relevant precedent of the Supreme Court, *Lavery v. Member in Charge Carrickmacross Garda Station* [1999] 2 IR 390, did not accept that a suspect was generally entitled to the presence of a solicitor during police questioning.

39. He rejected the argument that the applicant's will had been sapped, notably during the fourteenth interview. While the police had continued to question him even after he had requested another consultation with his solicitor, nothing had been elicited in that interview that had carried through to the next interview. There was no basis to consider that the applicant's position, at that point in time or subsequently, had been irretrievably prejudiced.

40. As to the argument that, in light of the Supreme Court's decision in Gormley and also Convention and US case-law, there was now a right to have a solicitor present during police questioning, MacMenamin J held that it could not succeed in the instant case. He stated:

"46. ... [W]hat I think is imperative to bear in mind, is that *here* (subject to the point made regarding the immaterial Interview 14), the appellant was granted access to a solicitor at the outset of his custody, during his custody, prior to the relevant interview, and even during that interview. His limited confession was that he accepted that he had killed [S.G.]. Unavoidably, the appellant must face the fact that the logic of what is sought to be applied here is a *retrospective* recognition and application of a then unrecognised constitutional right to have a lawyer present throughout interviews." [emphasis in the original]

41. The judge continued that he would be prepared, in light of recent developments in law and procedures, to recognise in future cases a right under the Constitution to have a solicitor present during police questioning. He then referred to a number of relevant ECtHR judgments, in particular the case of *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008. He considered that the facts of the present case were very different, and that the two must be distinguished. He added that, for the purposes of Article 6 of the Convention, the relevant issue was always whether criminal proceedings as a whole had been fair.

42. Charleton J, with whom Laffoy J concurred, dealt first with the inducement issue. He reviewed in detail the applicant's evidence and the circumstances in which it was taken by police. He considered that in the thirteenth interview the references to G's situation constituted a clear inducement to confess. However, the fact that he was granted access to independent legal advice from his chosen solicitor was important. He then

referred to several factors – including the evidence of remorse, the fact that the applicant limited his admissions to his own role, the fact that he did not retract his statement, and the gesture involving the beads – which constituted material on which the decision of the trial judge could reasonably be made. The decision could not be disturbed.

43. On the issue of access to a solicitor, Charleton J noted that the Court of Appeal had followed the existing Supreme Court case-law to the effect that there was no constitutional right to have a solicitor present during questioning. The Gormley case had not established such a right, since this point had not arisen on the facts of that case. While the fundamental requirement of basic fairness applied from the time of arrest, it did not necessarily follow that all of the safeguards of a fair trial, especially legal representation, must also be applied in full from the outset.

44. O'Malley J agreed that the appeal should be dismissed. However, she took a different approach to MacMenamin and Charleton JJ in relation to the implications of the right of access to legal advice. She agreed with the conclusion of MacMenamin J that there was no causative link between the applicant's admissions and the absence of the solicitor during questioning, and that this was sufficient to dispose of the issue in the present case. However, she considered that the issue might properly arise for consideration in another case. She saw some strength in the argument that this should now be regarded as a right flowing from the constitutional right to a fair trial. The State had in effect anticipated this by modifying police practice in this respect. She noted that the issue might arise in the context of statutory provisions that permit the drawing of inferences from a failure to answer questions. As this was not an appropriate case to reach a definitive view, she reserved her position on the question. She stated:

> "71 ... I consider that the question of the existence of such a right does not truly arise on the admittedly unusual facts of this case.
>
> 72. Largely, this is because of the unusually central role, discussed above, taken by [the solicitor] in the events immediately preceding the admissions. Prior to that, it is true that the appellant did not see his solicitor for any great length of time. However, it is also clear that he was aware of his right to see him; that he saw him when he wanted to, for as long as he wanted; and that he was under no pressure to relinquish or curtail his right of access. It is also clear that while he answered some questions in some interviews he did not incriminate himself prior to Interview No.15.
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> 73. I do not accept the contention that the statement by the appellant (in Interview No. 14) that he would answer questions when he saw his solicitor demonstrates that he was 'irretrievably prejudiced' by the [police] decision to continue asking questions despite the request for the solicitor. I cannot see that it should be interpreted as a decision to incriminate himself - he committed himself to nothing, and certainly not to admitting guilt. There is no evidence that his will was overborne to any extent, still less to the extent that a consultation could not assist him.
>
> 74. The actual admissions came about in the circumstances discussed above. The role of the solicitor was, in fact, far more central than would be envisaged where a

> lawyer is present in the interview room - the [police] and the appellant were actually communicating through him, rather than directly with each other. He had complete privacy to advise his client while carrying on the discussion with the [police] and also a greater degree of control than would be normal over what was said on behalf of the client and how it was presented. For the reasons already discussed, therefore I consider that not only was the trial judge entitled to conclude that the admissions were the result of a fully voluntary decision by the appellant, but that there is nothing to indicate that the exercise of the right now contended for would have altered the situation in any material respect."

45. McKechnie J dissented. On the issue of the presence of the solicitor during questioning, he first rejected the applicant's argument that the amount of contact he had had with his solicitor during the period of detention did not amount to reasonable access. The real question at issue was if, where reasonable access to legal advice has been afforded, a solicitor's attendance at the interview process was as of right or by concession. He referred to the recent change of police practice in this respect and observed:

> "136. [A]lthough this newly-established practice is not definitive in the legal analysis of whether such a right exists, nonetheless the shifts which I have described, being both potent and influential, are significant and should not be underestimated. Reality, as it now stands, must be faced up to."

46. Turning to Convention case-law, he analysed the *Salduz* judgment and considered that it did not directly support the applicant's argument. He considered, however, that this Court's interpretation of Article 6 had evolved since then, citing the following cases: *Dayanan v. Turkey*, no. 7377/03, 13 October 2009; *Navone and Others v. Monaco*, nos. 62880/11 and 2 others, 24 October 2013; *A.T. v. Luxembourg*, no. 30460/13, 9 April 2015; *Simons v. Belgium* (dec.), no. 71407/10, 28 August 2012; and *Brusco v. France*, no. 1466/07, 14 October 2010. In drawing out the main points of this case-law he stated:

> "150. ... [I]t seems clear that the judgments have made express reference to a suspect's right to have a lawyer present during the interview process. Thus on one reading it could be said that this right has already been clearly established. However, I am not aware of any decision reflecting the particular facts of Mr. Doyle's situation ... in which the Court has definitively declared the existence of such right."

47. He next referred to 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 (OJ 2013 L 294, p. 1–12). Under the Directive, the right of suspects or accused persons for their lawyer to be present and to participate effectively in during questioning is provided for. Although the Directive did not apply to Ireland, it "illuminate[d] the directional focus" of other EU Member States, and "offer[ed] further evidence of a prevailing

trend amongst fellow members of the Union". Moreover, the Directive had been referred to by in *A.T. v. Luxembourg* (cited above). In addition, he took note of the position of the Committee for the Prevention of Torture, which considered that the right of access to a lawyer should include the right to legal assistance during questioning (CPT/Inf (2011) 28, at § 24). He then summarised the position in the different jurisdictions of the United Kingdom, noting that in each of them provision was made for solicitors to be present during questioning. In view of all of this material, he saw a "significant shift in the acknowledgment of this right across other diverse legal regimes":

> "167. ... I believe that on balance the existing case law of the ECtHR is already to the effect that the Convention does in fact require the presence of a lawyer during questioning. The judgments [referred to above] and many others, all make express reference to the existence of such a right in clear-cut and deliberate terms. To the reservation that this position has not been definitively spelled out, I believe that if the settled and current trend of dealing with the availability of legal protection should continue, then it is more likely than not that the outcome of any case where the precise point was directly in issue would support the conclusion which I have arrived at. Of course this anticipation may be wrong, but, even if so, the existing state of jurisprudence is of such force in this regard that such of itself is highly influential in calling for such a right. ..."

48. He then set out a series of considerations in support of according constitutional status to the right to the presence of a solicitor during questioning: the substantial length of detention permitted by law, allowing for multiple interviews throughout the day over a number of days; the daunting and frightening effect that detention may have on many people; even where the accused is a hardened criminal, the importance of preserving their rights too; the increasing complexity of the criminal law; the limits of judicial control, which prohibits rather than prevents abuse. He did not consider that existing safeguards were sufficient to overcome the inequality in the interview room. While the recording of interviews permitted judicial scrutiny of the actions of the police, he was

> "not convinced that this ex post facto supervision is an adequate surrogate for the presence of a solicitor at the interview itself."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Ireland (Bunreacht na hÉireann)

49. Article 38.1 of the Constitution enshrines the principle of fairness in the criminal process: "No person shall be tried on any criminal charge save in due course of law".

B. Case-law

50. The right of access to a solicitor, when requested by or on behalf of a person in detention, was recognised as being a constitutional right by Finlay C.J. in *The People (DPP) v. Healy* [1990] 2 I.R. 73, where he stated:

> "The undoubted right of reasonable access to a solicitor enjoyed by a person who is in detention must be interpreted as being directed towards the vital function of ensuring that such person is aware of his rights and has the independent advice which would be appropriate in order to permit him to reach a truly free decision as to his attitude to interrogation or to the making of any statement, be it exculpatory or inculpatory. The availability of advice from a lawyer must, in my view, be seen as a contribution, at least, towards some measure of equality in the position of the detained person and his interrogators. Viewed in that light, I am driven to the conclusion that such an important and fundamental standard of fairness in the administration of justice as the right of access to a lawyer must be deemed to be constitutional in it origin, and to classify it as merely legal would be to undermine its importance and the completeness of the protection of it which the courts are obliged to give."

51. In the case *The People (DPP) v Pringle* (1981) 2 Frewen 57, it was held by O'Higgins CJ that, in the absence of an express guarantee against self‑incrimination in the Irish Constitution, it was not possible to infer a right to have a solicitor present during questioning.

52. In the case *Lavery v. Member in Charge*, *Carrickmacross Garda Station* (cited above, see paragraph 38), O'Flaherty J affirmed that position:

> "Counsel for the State submitted to the High Court Judge that in effect what [the solicitor] was seeking was that the [police] should give him regular updates and running accounts of the progress of their investigations and that this was going too far. I agree. The solicitor is not entitled to be present at the interviews. Neither was it open to the applicant, or his solicitor, to prescribe the manner by which the interviews might be conducted, or where."

53. The core issue in *DPP v. Gormley* and *DPP v. White* (cited above, see paragraph 33) which was repeatedly referred to by the Supreme Court in the present case was, according to Clarke J:

> "8.1. ... whether the entitlement to a trial in due course of law, guaranteed by Article 38(1) of [the Irish Constitution], encompasses an entitlement to have access to legal advice prior to the conduct of any interrogation of a suspect arrested .... If that proposition is accepted at the level of general principle then many more questions of detail would, of course, arise. *Questions such as ... the extent to which a lawyer is entitled to be present during the questioning* as well as being entitled to advise the suspect prior to questioning... . *By no means do all of those issues arise on the facts of these cases.*" [Emphasis added]

54. On the main question raised in the Gormley case Clarke J stated:

> "8.7. The first issue which perhaps arises is as to whether it is appropriate to regard any part of the investigative stage of a criminal process as forming part of a 'trial in due course of law'. It is clear that the ECtHR takes such a view. It must, of course, be recalled that, in many civil law countries, there are formal parts of the investigative process which are judicial or involve prosecutors who have a quasi-judicial status.

The line between investigation and trial is not necessarily the same in each jurisdiction. Furthermore, it is important to emphasise a potential distinction between a formal investigation directly involving an arrested suspect and what might be termed a pure investigative stage where the police or other relevant prosecuting authorities are simply gathering evidence.

8.8. I am persuaded that the point at which the coercive power of the State, in the form of an arrest, is exercised against a suspect represents an important juncture in any potential criminal process. Thereafter the suspect is no longer someone who is simply being investigated by the gathering of whatever evidence might be available. Thereafter the suspect has been deprived of his or her liberty and, in many cases, can be subjected to mandatory questioning for various periods and, indeed, in certain circumstances, may be exposed to a requirement, under penal sanction, to provide forensic samples. It seems to me that once the power of the State has been exercised against a suspect in that way, it is proper to regard the process thereafter as being intimately connected with a potential criminal trial rather than being one at a pure investigative stage. It seems to me to follow that the requirement that persons only be tried in due course of law, therefore, requires that the basic fairness of process identified as an essential ingredient of that concept by this Court in State (Healy) v. Donoghue applies from the time of arrest of a suspect. The precise consequences of such a requirement do, of course, require careful and detailed analysis. It does not, necessarily, follow that all of the rights which someone may have at trial (in the sense of the conduct of a full hearing of the criminal charge before a judge with or without a jury) apply at each stage of the process leading up to such a trial. However, it seems to me that the fundamental requirement of basic fairness does apply from the time of arrest such that any breach of that requirement can lead to an absence of a trial in due course of law. In that regard it seems to me that the Irish position is the same as that acknowledged by the ECtHR and by the Supreme Court of the United States."

55. Later in his judgment he observed:

"9.10 ... [T]he question as to whether a suspect is entitled to have a lawyer present during questioning does not arise on the facts of this case for the questioning in respect of which complaint is made occurred before the relevant lawyer even arrived. However, it does need to be noted that the jurisprudence of both the ECtHR and the United States Supreme Court clearly recognises that the entitlements of a suspect extend to having the relevant lawyer present."

56. In a concurring judgment, Hardiman J stated:

"For many years now judicial and legal authorities have pointed to the likelihood that our system's option for the very widespread questioning of suspects who are held in custody for that purpose, was very likely to attract a right on the part of such suspects, not merely to be advised by lawyers before interrogation, but to have lawyers present at the interrogation, and enabled to intervene where appropriate. This has now come to pass in countries with similar judicial systems... and also under the European Convention on Human Rights ('ECHR')...

It is notable, however, that Mr. Gormley has not asserted that right to its full extent but has asserted only a right to have a lawyer to advise him, in custody, before the questioning starts. Manifestly, however, it will not be long before some person or other asserts a right to legal advice in custody on a broader basis. I say this in explicit terms in order that this may be considered by those whose duty it is to take account of potential developments."

C. Practice

57. Following the Gormley case, and acting on the advice of the Director of Public Prosecutions, the Irish police force changed its practice so as to permit a solicitor to be present during the questioning of a suspect. In April 2015 it published a code of practice on the subject, setting out in detail the manner in which police officers should give effect to a suspect's entitlement to the presence of a solicitor.

58. In December 2015, the Law Society of Ireland published a document entitled "Guidance for Solicitors Providing Legal Services in Garda Stations". The document sets out advice for solicitors, in light of the relevant law and the police code of practice.

III. EUROPEAN UNION MATERIAL

A. The right of access to a lawyer

59. Article 3(1) – (3) of Directive 2013/48, entitled "The right of access to a lawyer in criminal proceedings" reads as follows:

> "1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.
>
> 2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:

(a) before they are questioned by the police or by another law enforcement or judicial authority;

(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;

(c) without undue delay after deprivation of liberty;

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

> 3. The right of access to a lawyer shall entail the following:

(a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;

(b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective

exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;

(c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence‑gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:

(i) identity parades;

(ii) confrontations;

(iii) reconstructions of the scene of a crime."

60. For a detailed summary of the recitals and other relevant provisions of the directive see *Beuze v. Belgium* [GC], no. 71409/10, §§ 82-85, 9 November 2018).

61. Directive 2013/48, which had to be transposed by 12 November 2016, applies to all EU Member States except for Denmark, Ireland and the United Kingdom.

THE LAW

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

62. The applicant complained that, following his arrest, he was not entitled to have a solicitor present during his police interrogation, representing a failure by the respondent State to vindicate his right to a fair trial. The Court will examine this complaint pursuant to Article 6 §§ 1 and 3 c) of the Convention. Those provisions read as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (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;
>
> ..."

63. The Government contested that argument.

A. Admissibility

64. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

65. The applicant argued that at the time of the facts, police practice was not to admit solicitors to attend with an accused person during police interviews. To vindicate his Constitutional right to a trial in due process of law and his right to a fair trial under Article 6 of the Convention, the State ought to have ensured that he was entitled to have a solicitor present during his interrogation. The applicant submitted that he was vulnerable as he was inexperienced in the interrogation process. The absence of his solicitor from the interrogations meant that the police were able to pressure him to give his confession which was ultimately relied upon at trial. The applicant recognised that he had been cautioned and advised of his right to remain silent at the beginning of each interview. He argued, however, that the interviewers sought to undermine his caution in a manner calculated to instil fear and anxiety and erode his will not to self-incriminate. In view of the above, he was deprived of a fair trial.

66. The Government submitted that the applicant's rights under Article 6 § 3 (c) of the Convention had not been affected by the fact his lawyer was not present as he was provided with access to a lawyer from his first interrogation by police, as set out in *Salduz v. Turkey* ([GC], no. 36391/02, § 55, ECHR 2008). Concerning inducement, they emphasised that under Irish law, a strict exclusionary rule applies to any statement made involuntarily by an accused (see *the People (DPP) v. McCann*, [1998] 4 IR 397). As regards the protection against self-incrimination, the Government contested the applicant's version of events. Pointing to the finding of the trial court, which had viewed the video recordings of the interviews, it emphasised that the latter had found that the applicant was in full control of himself throughout the interviews and that he had made the admissions he did because he chose to do so. That was, furthermore, the position articulated by the applicant in his 20th interview. The Government concluded that even assuming that the applicant's right of access to a lawyer had been restricted, with reference to the factors set out in *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, § 574, 13 September 2016) the overall fairness of his trial was not irretrievably prejudiced.

2. The Court's assessment

(a) General principles

67. The right of everyone "charged with a criminal offence" to be effectively defended by a lawyer, guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial (see *Salduz* cited above, § 51).

68. Since its judgment in *Salduz*, the Grand Chamber has, on a number of occasions, confirmed, clarified and consolidated what that right entails (see *Beuze*, cited above, §§ 119-150; *Simeonovi v. Bulgaria* [GC], no. 21980/04, §§ 110-120, 12 May 2017 and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, §§ 249-274, 13 September 2016).

69. In its recent judgment in *Beuze*, the Grand Chamber underlined that since *Salduz*, cited above, its case-law concerning the rights guaranteed under Article 6 § 3 had evolved gradually and that the case of *Beuze*, cited above, afforded it an opportunity to restate the reasons why this right constitutes one of the fundamental aspects of the right to a fair trial, to provide explanations as to the type of legal assistance required before the first police interview or the first examination by a judge, and to clarify whether the lawyer's physical presence is required in the course of any questioning or other investigative acts carried out during the period of police custody and that of the pre-trial investigation (as conducted, in that case, by an investigating judge) (see *Beuze*, cited above, § 117).

70. It also reiterated that what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case. The Court's primary concern, in examining a complaint under Article 6 § 1, is to evaluate the overall fairness of the criminal proceedings (see *Beuze*, cited above, § 120 with further references).

71. Compliance with the requirements of a fair trial must thus 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, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1 (see *Beuze*, cited above, § 121, with further references).

72. According to the Court, those minimum rights guaranteed by Article 6 § 3 are, nevertheless, not ends in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a

whole (see *Beuze*, cited above, § 122, and *Ibrahim and Others*, cited above, §§ 251 and 262 with further references).

73. Concerning the content of the right of access to a lawyer, Article 6 § 3 (c) does not specify the manner of exercising the right of access to a lawyer or its content. While it leaves to the States the choice of the means of ensuring that it is secured in their judicial systems, the scope and content of that right should be determined in line with the aim of the Convention, namely to guarantee rights that are practical and effective (see *Beuze*, cited above, § 131).

74. First, suspects must be able to enter into contact with a lawyer from the time when they are taken into custody. It must therefore be possible for a suspect to consult with his or her lawyer prior to an interview, or even where there is no interview (see *Beuze*, cited above, §§ 124 and 133 and *Simeonovi*, cited above, §§ 111, 114 and 121). The lawyer must be able to confer with his or her client in private and receive confidential instructions. Second, suspects have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings. Such physical presence must enable the lawyer to provide assistance that is effective and practical rather than merely abstract, and in particular to ensure that the defence rights of the interviewed suspect are not prejudiced (see *Beuze*, cited above, §§ 132-134 and *Soytemiz v. Turkey*, no. 57837/09, §§ 43-46, 27 November 2018). Third, one of the lawyer's main tasks at the police custody and investigation stages is to ensure respect for the right of an accused not to incriminate himself and for his right to remain silent (see *Salduz*, cited above, § 54, *Beuze*, cited above, § 128, with further references, and *Soytemiz v. Turkey*, no. 57837/09, §§ 43-46, 27 November 2018).

75. The applicable test under Article 6 §§ 1 and 3 c) of the Convention consists of two stages – first looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer and then examining the overall fairness of proceedings (*Beuze*, cited above, §§ 138 and 141 and *Ibrahim and Others*, cited above, §§ 257 and 258-62)

76. In *Beuze*, the Court confirmed that the finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. It also held that, whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole, the Court having already rejected the argument of applicants according to which it had laid down an absolute rule in *Salduz* to the effect that the statutory and systematic origin of a restriction on the right of access to a lawyer sufficed, in the absence of compelling reasons, for the requirements of Article 6 to have been breached (*Beuze*, cited above, §§ 142 and 144; *Ibrahim and Others*, cited above, §§ 258 and 262).

77. However, as the Court indicated, where there are no compelling reasons justifying such a restriction, it will apply very strict scrutiny to its fairness assessment (*Beuze*, cited above, § 145).

78. A non-exhaustive list of factors, drawn from the case-law, has been developed which the Court will take into account, where appropriate, when examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of criminal proceedings (see, for further details, *Beuze*, cited above, § 150; *Simeonovi*, cited above, § 120, and *Ibrahim and Others*, cited above, § 274).

(b) Application of the general principles to the present case

79. By way of introduction, the Court notes that the police interviews in the present case took place just after the delivery of the Court's judgment in *Salduz*, cited above, but before those cases in which the question of the physical presence of lawyers at police interviews was directly addressed (see the case law referred to in *Beuze,* cited above, § 134). The Court has indicated that it is aware of the difficulties that the passage of time and the development of its case-law may entail for national courts. However, as regards Article 6 §§ 1 and 3 (c), it has pointed out that the development has been linear since the *Salduz* judgment (ibid. § 152).

80. This latter point was highlighted by the dissenting member of the Supreme Court in his analysis of the right of access to a lawyer (see paragraph 46 above) and indeed to an extent by other members of the Supreme Court who regarded a requirement of physical presence as being part of the possible or probable direction of travel in the case-law (see paragraphs 41 above). As the Court confirmed in *Beuze*, that requirement clearly flows from Article 6 §§ 1 and 3 c) of the Convention.

(i) Existence and extent of the restrictions

81. In the present case it is important to stress that the applicant had, pursuant to domestic law and practice at the time, the right to consult a solicitor following his arrest and the right to consult with his solicitor, at his request, or that of the solicitor, throughout the pre-trial stage. He was entitled to and was granted access to a lawyer after his arrest and prior to being interviewed by the police on 24 February 2009 (see paragraph 8 above). After that first interview he was able to request access to his lawyer at any time, meet with his solicitor in person and continue to consult him by telephone if the solicitor was not or could not be in attendance at the police station. He met with his solicitor again in person when he was brought before the District Court to have his detention extended, and then had a longer consultation with him in person the next day (see paragraphs 9, 10 and 13 above). He also consulted with his lawyer by telephone on the third and fourth days he was interviewed (see paragraphs 11-17 above).

Crucially, the applicant consulted with his solicitor in person between the fourteenth and fifteenth interviews and the latter was interrupted, following a call from his solicitor, for further consultation. Overall, he received 42 minutes of legal advice both by telephone and in person, having been interviewed for approximately 31 hours.

82. However, the fact that the applicant's lawyer could not be present during his police interviews amounted to a restriction of his right of access to his lawyer. His solicitor was not permitted in the police interview as a result of the relevant police practice applied at the time.

83. There is no doubt that the applicant was subject to police interviews, over a period of days, for a considerable number of hours. However, the clear restriction of his right of access to a lawyer due to the absence of the physical presence of the solicitor during the police interviews must be placed in context when assessing the extent of the restriction. Unlike the applicant in *Beuze*, cited above, he had access to his solicitor before the crucial first police interview; he could request and was granted access to his lawyer at any time thereafter, bar a delay following the request during the 14th interview; all the interviews were video recorded, recordings which were later examined by the trial judge; his consultations preceded the interviews and even took place during them, particularly during the crucial 15th interview. A detailed register of police interviews and legal consultations was maintained. In conclusion, although there is no doubt that the applicant's right was restricted, the extent of that restriction was relative.

(ii) Whether there were compelling reasons

84. The Court considers that as the restriction on his right under Article 6 § 3 (a) resulted from police practice at the time, there was no individual assessment of the applicant's circumstances. The restriction was of a general nature. In the circumstances, there is nothing to suggest that the restriction was justified by compelling reasons, within the meaning of the Court's case-law (see *Ibrahim and Others*, cited above, § 258).

(iii) The fairness of the proceedings as a whole

(α) Whether the applicant was vulnerable

85. The applicant has argued that he was vulnerable as he was unaccustomed to police interviews (see paragraph 65 above). The Court accepts that a police interview is inevitably a stressful event from a suspect's perspective. However, the applicant was an adult and a native English speaker (see *a contrario Knox v. Italy*, no. 76577/13, § 160, 24 January 2019 (not yet final)). The interviews conducted whilst he was in police custody were not unusual and, while conducted over several days, they were not excessively long. The applicant was permitted extensive breaks from police questioning with, as indicated previously, access to his

lawyer by phone or, at times, in person, when requested. The trial judge also examined this question and found that the applicant was physically and mentally strong throughout the interviews. He chose when and when not to engage with the police. In these circumstances, the Court considers that the applicant was not particularly vulnerable.

(β) The circumstances in which the evidence was obtained

86. There is no suggestion that the applicant had been subject to ill-treatment by the police during the interview process. The applicant argued that the police had exerted pressure on him by threatening him or inducing him to confess (see paragraph 65 above). In particular, he submitted that the fact that the police informed him about the detention of his partner Ms G., and his subsequent concern for their daughter whom he believed to be in need of medical treatment and without her parents, amounted to psychological intimidation and a threat or inducement on him to admit to the crime with which he was charged.

87. This element was considered extensively by all three judicial instances in accordance with the strict scrutiny required under domestic law. None of them found that the police had resorted to inducement or threat as a matter of domestic law (see paragraphs 22, 27, and 36-39 above). The Court cannot question the assessment of the domestic authorities unless there is clear evidence of arbitrariness, which there is not in the instant case (see *Naït-Liman v. Switzerland* [GC], no. 51357/07, § 116, 15 March 2018 and *Zubac v. Croatia* [GC], no. 40160/12, § 79, 5 April 2018). On the contrary, the domestic courts examined very carefully the question of whether there had been threat or inducement, the trial judge reviewed the video recordings of the relevant interviews in their entirety and all three instances gave extensive reasons for their conclusions.

88. Insofar as the question whether there had been a threat or inducement is relevant to the Court's overall assessment of fairness, it finds convincing the reasoning of the trial judge that even if the actions of the police could have been considered a threat or inducement, they did not have any link with the applicant's admission because of the passage of time and the fact that the applicant had an opportunity to consult with his solicitor both in person and by telephone immediately prior to making the admission (see paragraphs 14, 15 and 22 above).

(χ) The legal framework governing pre-trial proceedings and the admissibility of evidence at trial, and whether the applicant was able to challenge the evidence and oppose its use

89. The applicant was able to and did challenge the use of the statements he made during some of the police interviews on the basis that it had been obtained in breach of what he argued was his Constitutional and Conventional right to have a legal representative present during questioning.

The trial court held a ten day *voir dire* procedure, or trial within a trial, where it reviewed the video recordings of the police interviews and heard from the police officers concerned, who were cross questioned by counsel for the defence and prosecution, in order to establish whether the evidence from the applicant's police interviews was admissible (see paragraph 21 above). At the end of those proceedings the trial judge gave a lengthy, reasoned decision as to why he had decided to admit the evidence (see paragraph 22 above). As such, the trial judge conducted a precise examination of the circumstances in which the applicant had been questioned by – and had given statements to – the police (see *Ibrahim and Others*, cited above, §§ 69-84 and 282, and contrast *Beuze,* cited above, § 174).

90. Moreover, the applicant had the opportunity to argue again before the Court of Appeal and the Supreme Court that the evidence should not have been admitted. Both courts considered the matter at great length and in detail, paying attention to the case-law of this Court.

91. All three courts found that in light of the manner in which the evidence had been obtained and the fact that the applicant had had contact with his solicitor by telephone and in person during the interview process, admitting the evidence was not problematic. In doing so, they applied a domestic legal framework which allowed the applicant to challenge the admissibility of the evidence and to oppose its use, in light of the Convention case-law, at every stage of the proceedings.

(δ) The nature of the statements and the prosecution's case

92. The admissions made by the applicant during the fifteenth police interview were incriminating, as they amounted to an admission that he had committed the crime. Those admissions and certain details provided by the applicant therefore formed a central part of the evidence against him. Given that very strict scrutiny is called for where there are no compelling reasons to justify the restriction of an accused's right of access to a lawyer, the Court finds that significant weight must be attached to the above factors in its assessment of the overall fairness of the proceedings.

93. However, two crucial points are of relevance in that assessment. Firstly, the evidence against the applicant was not restricted to the details of the crime he provided or to his admissions. At trial, that evidence formed part of a substantial prosecution case against the applicant, including ballistic evidence, evidence about the car the applicant had travelled in on the night of the murder, the evidence which had been provided by Ms. G. to whom the applicant had made inculpatory remarks prior to his arrest and further evidence by a witness, C., to the effect that she had been present when the killing had been ordered and who, the day after the murder, had heard the applicant confirm that he had carried it out (see paragraph 23 above). The Supreme Court's examination of this aspect of the applicant's

trial was also very thorough and by a majority of six to one it concluded that the applicant's conviction was based on a voluntary confession of his guilt, supported by significant independent evidence (see, for example, paragraph 38 above). Secondly, it cannot be said that the applicant's statements were made without him having had access to legal assistance. As indicated previously, he consulted with his lawyer prior to his police interviews and during the days when he was being interviewed. After the fourteenth interview he consulted with his lawyer in person and during the fifteenth interview, just before making his first admission, questioning was interrupted in order to facilitate further consultation. Thus, while one aspect of his right had undoubtedly been restricted, he had been provided with legal assistance from the outset.

(ε) The use of evidence and, in a case where guilt is assessed by lay jurors, the content of any jury directions or guidance

94. The applicant was convicted by a lay jury at trial. Videos of the applicant's police interviews were shown to the jury as evidence but only after the question of their admissibility had been determined by the trial judge after the ten day *voir dire* proceedings (see paragraph 23 above). The nature of the *voir dire* proceedings and the judge's conclusion on those proceedings was also brought to the attention of the jury. As such, the jury was informed about the contested status of the interviews, and the judge's reasons as to why those interviews could be admitted as evidence.

95. At the end of the trial the judge summed up the proceedings for the jury in the Judge's Charge (see paragraph 24 above). Having decided that the evidence of the police interviews could be admitted following the *voir dire* proceedings he did not address the question of its admissibility separately during the Judge's Charge. The directions of the trial judge were of particular importance given that their purpose was to enable the jurors to assess the consequences, for the overall fairness of the trial, of any procedural defects that may have arisen at the investigation stage. The trial judge instructed the jury to be careful when considering the evidence and underlined their obligation to examine neutrally the question of whether the applicant had been induced to confess to the crime, with a detailed explanation of what that meant in the circumstances. The judge also warned the jury that it may be dangerous to convict a person on confession evidence alone without corroboration. The judge went on to explain in detail why that was the case, and what corroboration evidence meant in the circumstances. The applicant also had an opportunity to challenge the content of the Judge's Charge before the Court of Appeal which that court rejected (see paragraph 30 above).

(ϕ) Weight of the public interest

96. The Court finds that sound public-interest considerations justified prosecuting the applicant, who was charged with murder. Furthermore, it is not disputed that the criminal trial in the present case followed the killing of an innocent victim as a result of mistaken identity following the ordering of the killing of another man in the context of a feud between criminal gangs which required appropriate measures to be taken (see *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 53, ECHR 2008); violence by and between criminal gangs is a problem in the respondent state which the Court has previously noted (see *Campion v. Ireland* (dec.), no. 29276/17, 10 October 2017).

(γ) Whether other procedural safeguards were afforded by domestic law and practice

97. It is not disputed that the applicant was notified of his rights on his arrest and that he was provided with immediate access to his lawyer who was able to provide further information about his procedural rights, including his to remain silent and the privilege against self-incrimination.

98. While the applicant's solicitor was not physically present during the interviews it is clear that he could and did interrupt them to further consult with his client. As indicated by one of the Supreme Court judges, his role was, in fact, central in that the police and the applicant were actually communicating through him, rather than directly with each other.

99. A key additional safeguard highlighted by the Court of Appeal and the Supreme Court was the fact that all the applicant's police interviews were recorded on video and those videos were available to the judges at all three levels of jurisdiction and the jury at trial. The Court considers that this was indeed an important safeguard as it doubtless acted to maintain pressure on the police to act in conformity with the law. It also enabled the domestic courts to make well informed decisions when considering whether it was possible to admit the evidence obtained in police interview. Finally, the fact of video-recording the interviews was a step towards prevention of coercion and ill-treatment by the police, which is one reason for the presence of a lawyer during police interviews (see *Beuze*, cited above, § 126).

(η) Conclusion as to the overall fairness of the proceedings

100. In conclusion, the Court recalls that its role is not to adjudicate in the abstract or to harmonise the various legal systems, but to establish safeguards to ensure that the proceedings followed in each case comply with the requirements of a fair trial, having regard to the specific circumstances of each accused (see *Beuze*, cited above, § 148.).

101. In the present case it is important to stress that while a majority of the Supreme Court, which engaged extensively with the Court's case-law on

Article 6, was correct in concluding that where there have been procedural defects at pre-trial stage, the primary concern of the domestic courts at trial stage and on appeal must be the overall fairness of the criminal proceedings, it failed to recognize that the right of an accused to have access to a lawyer extended to having that lawyer physically present during police interviews.

102. The Court finds that, in the circumstances of the present case, notwithstanding the very strict scrutiny that must be applied where, as here, there are no compelling reasons to justify a restriction of the accused's right of access to a lawyer, when considered as a whole the overall fairness of the trial was not irretrievably prejudiced.

103. The foregoing considerations are sufficient to enable the Court to conclude that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

Done in English, and notified in writing on 23 May 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Angelika Nußberger
Registrar	President

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

A.N.
C.W.

DISSENTING OPINION OF JUDGE YUDKIVSKA

A. Introduction

The Police Station Chief in Jaroslav Hašek's "*The Good Soldier Švejk*"[1] was known "for acting with great tact and cleverly at the same time. He never swore at the detainees or arrestees, but would subject them to such a cross-examination that even an innocent would confess". "Criminology always depends on smarts and kindness" he would tell his subordinates, "to be screaming at somebody, that won't get you anywhere. You have to approach delinquents and suspects gently, but at the same time see to it that they *drown in an avalanche of questions*".

Of course, such tactics could hardly be successful in the presence of a lawyer, but who cared about procedural rights in those times?!

Some one hundred years later, however, a similar ignorance not only occurred in one of the most respectable of democracies, but was also endorsed by its judiciary and, most strikingly, subsequently by this Court. For the reasons explained below, I respectfully dissent from my esteemed colleagues who found no violation of the right to a fair trial in the present case.

In the instant case the applicant, who was accused of a serious crime, was detained and interviewed on 23 occasions for approximately 31 hours in total. The applicant's lawyer was not present during any of these interviews, which formed the gist of his complaint to this Court.

Over fifty years ago, in the landmark case of *Miranda v. Arizona*[2] (which, as recognised by the Supreme Court, was not followed in Irish jurisprudence – see paragraph 36), the US Supreme Court brilliantly summarised the *ratio* behind having a lawyer present during interrogations: "If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial".

More recently, the Special Rapporteur on the Independence of Judges and Lawyers acknowledged that "it is desirable to have the presence of an attorney during police interrogations as an important safeguard to protect the rights of the accused. The absence of legal counsel gives rise to the potential for abuse"[3]. Such a contention is shared by the CPT, which states

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[1] Jaroslav Hašek, *The Fateful Adventures of the Good Soldier Švejk*, Book Two (AuthorHouse, 2009).

[2] *Miranda v Arizona* 384 US 436 (1966).

that "[a]ccess to a lawyer for persons in police custody should include the right to contact and to be visited by the lawyer (in both cases under conditions guaranteeing the confidentiality of their discussions) as well as, in principle, the right for the person concerned to have the lawyer present during interrogation"[1].

Interrogation, "for people who are honest and skilful, is a means of uncovering what would have been otherwise unavailable to court... but on the other hand,... being used by dishonest and incompetent people, it can become an art by which one can force a person to renounce everything he knows and call himself not by his name"[2]. The position is thus obvious - who else, if not lawyers, can ensure the appropriateness of tactics and methods employed during police interrogations?

As argued below, in the present case the applicant was forced to confess by the use of methods incompatible with the democratic legal order and by the employment of techniques that grossly violate the principles of fair criminal process. Such methods and techniques could normally be prevented by the presence of a lawyer during police interviews.

B. *Beuze's* unfortunate legacy

As recognised in the judgment, the inability of the applicant's solicitor to be present during his police interrogations stemmed from the police practice prevailing at the time of the applicant's arrest, which was subsequently changed, in 2015.

Together with my learned colleagues Judges Vučinić, Turković and Hüseynov in the concurring opinion to the recent Grand Chamber precedent, *Beuze v. Belgium* ([GC], no. 71409/10, 9 November 2018), I have already expressed a deep regret that the Court has made a dramatic U-turn from one of its most progressive judgments (*Salduz v. Turkey* ([GC], no. 36391/02, 27 November 2008), with its unequivocal prohibition of any blanket restriction on defence rights) based upon a misguided interpretation of its own jurisprudence (see, among other authorities, *Dayanan v. Turkey*, no. 7377/30, 13 October 2009*; Boz v Turkey*, no. 2039/04, 9 September 2010*; Yesilkaya*, no. 59780/00, 8 December 2009*; Stojkovic v. France and Belgium*, no. 25303/08, 27 October 2011; and *Navone and Others v. Monaco*, nos. 62880/11 and 2 others, 24 October 2013).

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[3] UN Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers regarding the Mission of the Special Rapporteur to the United Kingdom* E/CN.4/1998/39/Add.4 (1998), paragraph 47.

[1] European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment, *Detention by Law Enforcement Officials: Extract from the 2nd General Report* [CPT/Inf(92) 31 (2002), paragraph 38.

[2] Sergeitch P, *Art Speech at the Court*, M Gosyurizdat (1960) 372 pages, page 151.

The present case involves similar factual circumstances to *Salduz*, in which the applicant's restricted access to a lawyer arose from a systemic, mandatory and general restriction of suspects' access to a lawyer in the respondent State's national law. Such a restriction was determined to have irreparably prejudiced the proceedings and thereby constituted a violation of Article 6 §§ 1 and 3 (c) of the Convention. *Salduz* thus seemingly advanced a test whereby if an applicant's access to a lawyer has been restricted and there is an absence of compelling reasons to justify that restriction, the proceedings will be irreparably prejudiced and therefore there will be a finding of a violation of Article 6. Accordingly, in accordance with (what I consider to be the "correct" interpretation of) *Salduz,* the Court ought to have determined that, due to the absence of any compelling reasons to justify the applicant's restricted access to a lawyer (paragraph 84), there has been a violation of Article 6 §§ 1 and 3 (c) in this case.

Had the present case been examined prior to *Beuze*, it would have been fairly straightforward since, as also recognised by the Supreme Court dissenting Judge McKechnie (paragraphs 45-48), the *Salduz* jurisprudence on the right to have access to a lawyer (including to have a lawyer present during interrogations), with its clear prohibition of blanket restrictions, was followed in subsequent cases and is supported by a number of international instruments and case-law (see for example, *CPT/Inf (92)3-part1*[1]; *[CPT/Inf (2011) 28]*; *CPT/Inf(2011)28-part1*[2]; *E/CN.4/1998/39/Add.4*[3]; and *Miranda v Arizona*, 384 US 436 (1966)).

C. Overall fairness in the present case

1. The applicant's severely restricted communication with his solicitor

Although the above interpretation of *Salduz* would result in a more fair and just conclusion in the present case – namely an automatic finding of a violation due to the absence of compelling reasons to justify the restrictions on the applicant's right of access to a lawyer – being bound by judicial discipline I cannot ignore the fact that the *Beuze* judgment, however much I may regret it, is the Court's most recent valid jurisprudence to be followed.

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[1] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Detention by Law Enforcement Officials: Extract from the 2nd General Report,* [CPT/Inf (92)3-part1] (2007), paragraph 38.

[2] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Access to a lawyer as a means of preventing ill-treatment: Extract from the 21st General Report,* [CPT/Inf (2011) 28] (2011), paragraph 24.

[3] United Nations Economic and Social Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers regarding the Mission of the Special Rapporteur to the United Kingdom of Great Britain and Northern Ireland, E*/CN.4/1998/39/Add.4 (1998), paragraph 47.

The *Beuze* case introduced a two-step test, in accordance with which the Court ought first of all to consider whether there are compelling reasons that justify restricting an applicant's access to a lawyer. In the absence of such compelling reasons, the Court will merely apply a "strict scrutiny" to the second stage of the test (*Beuze*, paragraph 145), which requires an assessment of the overall fairness of the proceedings. In accordance with *Beuze*, regardless of the reasons (or lack thereof) for restricting an applicant's access to a lawyer, the Court will thus always conduct an assessment of the overall fairness of the proceedings in question in order to determine whether there has been a violation of Article 6.

As such, having agreed with the majority that there were indeed no compelling reasons to justify the restrictions imposed upon the applicant's defence rights (paragraph 84), I will present an assessment of the overall fairness of the proceedings in the present case (considering some key elements only) which dramatically differs from that of the majority.

During the first five days of the applicant's detention (24-28 February 2009) 23 police interviews took place which lasted for 31 hours in total. During this time, the applicant's total time communicating with his solicitor amounted to 42 minutes (paragraph 81). The most primitive calculation thus suggests that for every hour of police interview the applicant had on average 1 minute and 21 seconds of communication with his solicitor; therefore, for every hour of "*drowning in an avalanche of questions*", as Hašek elegantly put it, the applicant only received 1 minute 21 seconds of legal "advice". Can we accept that this allowed for a meaningful exchange of information? That this allowed for the consideration of different defence strategies? Can we allege that a thorough discussion of the applicant's previous interview and preparation for the subsequent one took place each time? It is noteworthy that even during the applicant's crucial 15th interview, prior to making his confession, his communication with his solicitor lasted for only 4 minutes. In such circumstances, could the applicant's solicitor have explained in detail all of the consequences of his confession or have carefully discussed all the options open to the applicant?

All these questions may appear rhetorical, but the domestic court simply did not "consider the length of time that either consultation lasted to be relevant in the context of this case" (paragraph 22). Unfortunately, the majority did not give due consideration to this either. My colleagues also agreed with their national counterparts that the lawyer's role in this case "was, in fact, central in that the police and the applicant were actually communicating through him" (paragraph 98). Given the above proportion of applicant/lawyer vs. applicant/police communication, however, such a conclusion goes beyond my comprehension.

Over a hundred years ago, the outstanding author of "*The Moral Principles in the Criminal Process*"[1], Anatoly Koni, noted that "a close tie of trust and sincerity is established between a defence attorney and the one who turns to him in anxiety and grief because of forbidding prosecution, in the hope of help...."

As the Court has recognised on a number of occasions (e.g. *Pishchalnikov v. Russia*, no. 7025/04, 24 September 2009, paragraph 78), the right of access to a lawyer protects against a number of potential abuses such as to reduce the likelihood of violations of Article 6. In *A.T. v. Luxembourg* (no. 30460/13, 9 April 2015, paragraph 64) the Court has summarised what a lawyer does during the initial stages of proceedings:

discusses the case;
organises the defence;
collects evidence favourable to the accused;
prepares the accused for questioning;
supports the accused in distress;
checks the conditions of detention;
helps to ensure respect for the right of the accused not to incriminate himself.

In this case, only 42 minutes were devoted to offering this range of services. In *Dvorski v. Croatia* ([GC], no. 25703/11, 20 October 2015) the Court recalled that "in order to exercise his right of defence, the accused should normally be allowed to have the *effective* benefit of the assistance of a lawyer from the initial stages of the proceedings" (see *Dvorski v. Croatia,* cited above, paragraph 77). In the present case, not only was it impossible to establish any "close tie of trust and sincerity"[2], and not only was any required effectiveness obviously missing, but in principle the circumstances constituted a complete mockery of legal assistance. Whilst it is not at all my task to assess the solicitor's professional conduct in this case, consideration of the restriction of the applicant's defence rights is undoubtedly relevant to an assessment of the overall fairness of proceedings. Unfortunately, however, any judicial scrutiny of the applicant's solicitor's performance is lacking in the present case.

Moreover, before his first interview, which we see as the most crucial moment for the whole defence (as also confirmed by *Salduz*, cited above), the applicant was given an opportunity to talk to his lawyer for a mere 2 (!) minutes (paragraph 7). What can be said in this time aside from general politenesses? What kind of strategic choice can be pronounced, let alone any full and informed discussion of the same? In these circumstances, the majority's finding that the applicant "had access to his solicitor before the

[1] Koni A.F., *Nravstvennye nachala v ugolovnom protsesse*, M.:Izdatelstvo Yurayt 2016.
[2] Ibid..

crucial first police interview" (paragraph 83) is, in my view, egregiously mistaken.

Furthermore, although according to the documents in the case file the applicant was advised of his right to remain silent at the beginning of each interview, the police officers sought to undermine this caution with remarks such as "no comment looks like a guilty man" or "[n]o comment was not consistent with innocence" (interview records submitted by the applicant). Needless to say, the applicant's lawyer's presence during his interviews could have been an obstacle to such a "technique", and in such circumstances, due to his restricted access to legal advice, the applicant may have considered that confessing was his only option (see *Pishchalnikov v. Russia*, cited above, paragraph 80).

2. The coercion of the applicant

What is even more shocking, however, is that the applicant's confession occurred after clear intimidation by the police officers, wherein they arrested an obviously innocent person – "Ms G.", the applicant's ex-girlfriend and the mother of his little daughter – in order to blackmail him with the fate of his child who would be separated from her mother pending such time as the applicant confessed. If such conduct does not qualify as police pressure, I wonder how else it could be described.

The psychological impact of these threats was assessed by the domestic courts in quite a creative way, as apparently threatening the applicant with the sufferings of his under-age daughter in being separated from her mother was by no means intimidation, but rather merely constituted an "appeal to his better nature and to his essential humanity" (see paragraph 28). Stalin's General Prosecutor, Andrey Vyshinsky, applauds from his tomb – he could never have dreamt of a more beautiful formula for the same ugly technique that was so widespread during the Great Purge, of which he was the key legal architect. However incomparable these situations are, it is regrettable that rather than strongly condemning the means employed in the present case, judges have tried to find a sound justification for these means, seemingly forgetting the consequences which endorsing such an approach – with the ends justifying the means – can have in extreme situations.

I find it particularly unfortunate that the majority, stating that "the Court cannot question the assessment of the domestic authorities unless there is clear evidence of arbitrariness, which there is not in the instant case" (paragraph 87), might also be understood as implicitly endorsing this reasoning.

I recall that in the case of *Nechiporuk and Yonkalo v. Ukraine* (no. 42310/04, 21 April 2011, paragraph 156), threats of ill-treatment towards the applicant's pregnant wife in order to force him to confess were considered to have considerably exacerbated the applicant's mental

suffering, thereby constituting one of the relevant factors for reaching the conclusion that the applicant had been subjected to torture.

Despite this, in the present case the Court has determined that the circumstances in which the applicant's confession was obtained do not display any indications of unfairness (paragraphs 86-88).

Assessing the extent of the restriction on the applicant's right of access to a lawyer, the majority also argues that the applicant "could request and was granted access to his lawyer at any time thereafter, bar a delay following the request during the 14th interview; all the interviews were video recorded, recordings which were later examined by the trial judge; his consultations preceded the interviews and even took place during them, particularly during the crucial 15th interview" (paragraph 84). The length (4 minutes) and the effectiveness of the consultation during the "crucial 15th interview" have already been discussed above. With respect to the applicant's 14th interview, it is notable that the applicant's right to interrupt the interviews in order to consult with his solicitor was in fact *twice* refused during the same (paragraph 12).

Whilst the majority heavily stresses that the video recordings of the applicant's interviews and their accessibility to judges and the jury are a key safeguard (paragraph 99), it follows from paragraph 23 that the jury was in fact only shown *excerpts* of those video recordings; thus, it remains unclear whether the jury had in fact observed the footage of the crucial moments of the applicant's intimidation.

D. Conclusion

As is evident from the above discussion, the overall fairness of the proceedings in the present case was irreparably compromised. This is due to the absence of the applicant's lawyer during his police interviews, the lack of sufficient advice provided during the short telephone conversations/meetings which the applicant had with his lawyer (particularly given that the applicant's solicitor was unaware of what was occurring during the police interviews, having not been present and having not been provided with details of the same nor any disclosure from the police officers - see *A.T. v. Luxembourg*, cited above, paragraph 64, and *Huseyn and Others v. Azerbaijan*, nos. 35485/05 and 3 others, 26 July 2011, paragraph 180), and, primarily, due to the fact that the applicant's confession, which formed the crucial basis of his conviction, was obtained following clear pressure and intimidation by police officers in the absence of his lawyer.

In those circumstances, I strongly believe that, even applying the "*Beuze* test" instead of the "*Salduz* test" and assessing the overall fairness of the proceedings against the applicant, the Court ought to have found a violation of Article 6 §§ 1 and 3 (c) of the Convention.

* * *

"...(T)he inquisitor asked him toughly and inescapably:

"Will you admit everything?"

Švejk gazed intently with his good blue eyes at the merciless man and said softly:

"If you wish, Sir, for me to confess, then I'll confess. That can't be too unfavourable for me. I'll do whatever you say. So, if you say: "Švejk, don't admit anything!" I'll deny everything until my body is torn to pieces".

The stern gentleman wrote something in a document.

He handed Švejk a pen, and challenged him to sign.

Švejk signed the document.

It was a denunciation by Bretschneider, with this addendum:

All of the above shown accusations against me are based on truth. Josef Švejk"[1]

[1] Jaroslav Hašek, *The Fateful Adventures of the Good Soldier Švejk*, Book One (AuthorHouse, 1997).