[Translation – Extracts]

...

THE FACTS

1. The applicant, Ms Carine Simons, is a Belgian national who was born in 1967 and lives in Ougree. She was represented before the Court by Mr M. Neve, Mrs S. Berbuto and Mrs E. Berthe, lawyers practising in Liège. The Belgian Government ("the Government") were represented by their Agent, Mr Marc Tysebaert, General Counsel, Federal Public Department of Justice.

A. The circumstances of the case

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

3. On 13 March 2010 the Liège police were informed that a man had been stabbed with a knife. At the scene, the applicant told the police officers that the victim was her partner and that she herself had inflicted the wounds. The officers found a trail of blood leading to her home, where they discovered other traces of blood and a blood-stained kitchen knife.

4. The applicant was arrested that same day at 4 p.m. She was interviewed by investigators between 11.59 p.m. and 2.32 a.m. as a "suspect". She was not assisted by a lawyer and – she alleged – was not informed beforehand of her right to remain silent, but her rights as provided in the "Franchimont Act" of 12 March 1998 were read to her prior to the interview. She was thus informed that her statements could be used in evidence, that she was entitled to ask for a verbatim record to be made of any questions put to her, together with her answers, and to request any supplementary investigative act or interview, that she could use any documents in her possession, provided the questioning was not delayed, and that, during or after her interview, she could have documents included in the case file or deposited in the registry. The applicant confessed to being the perpetrator of the stabbing and, in response to the investigators' questions, gave a detailed account of the incident, explaining in particular that it had followed an argument, of which she described the context and circumstances.

5. The next day, from 11.08 a.m. to 11.34 a.m., the applicant was questioned by an investigating judge. She was not assisted by a lawyer and – she alleged – was not informed of her right to remain silent. She confirmed the statements she had made to the police. The investigating judge then informed her that she was being charged with attempted murder,

with intent, and that she had the "right to choose a lawyer". He issued a detention order with the following reasoning:

> "... the offence is punishable by a one-year prison sentence, in respect of a lesser indictable offence, or by an even harsher sentence; ... the maximum duration of the sentence exceeding a 15-year term of imprisonment; ... the documentary evidence in the file, the findings of the reporting officers, the witness statements, and the statement and confessions of the person charged, constitute serious indications of guilt; ... the extreme seriousness of the facts, representing a danger for public safety and entailing bodily harm, requires that a detention order be issued against the person charged; ..."

6. The applicant appeared, assisted by her lawyer, on 18 March 2010, before the Committals Division (*chambre du conseil*) of the Liège Court of First Instance, which found the detention order to be lawful and properly served, and remanded her in custody for one month.

On 14 April 2010, after a further appearance by the applicant, the Committals Division ordered the extension of that measure. It did so once again on 12 May 2010.

7. The applicant appealed to the Indictments Division of the Liège Court of Appeal against the order of 12 May 2010. Referring to the *Salduz v. Turkey* judgment ([GC] (no. 36391/02, ECHR 2008), the *Dayanan v. Turkey* judgment (no. 7377/03, ECHR 2009) and the *Bouglame v. Belgium* decision (no. 16147/08, 2 March 2010), her counsel argued that the fact that the applicant had not been assisted by a lawyer during her police interview or her examination by a judge constituted a breach of the right to a fair trial as enshrined in Article 6 §§ 1 and 3 (c) of the Convention, and also of Article 5 § 1 of the Convention, under which any deprivation of liberty had to be "in accordance with a procedure prescribed by law". Counsel thus submitted that the records of the interview and examination should be removed from the case-file and that the applicant should be released.

8. In his submissions of 3 June 2010, the Principal Public Prosecutor at the Liège Court of Appeal called on the Indictments Division to dismiss those arguments. He observed, in particular, as follows:

> "... in a judgment of 5 May 2010 (P.10.0257.F/1) ..., the Court of Cassation noted that, having regard to all the statutory safeguards generally afforded to the person charged so as to ensure respect for the defence rights, from the time of the decision to prosecute, it could not be concluded automatically that it was definitely impossible for a person to have a fair trial when the assistance of a lawyer was lacking during the first twenty-four hours of deprivation of liberty.
>
> ... on a number of occasions the Court of Cassation has observed that neither Article 5 § 1 nor Article 6 §§ 1 and 3 of the Convention ..., as interpreted by the Court ..., obliges investigating divisions to discharge a detention order with immediate effect on that ground alone (Cass. 29 December 2009, P.09.1826.F/1, Cass. 13 January 2010, P.09.1908.F/1 and Cass. 12 May 2010, P.10.0772.F/1).

> ... in a judgment of 31 March 2010, confirming its case-law ... the Court of Cassation further indicated that Articles 28 *quinquies* and 57, paragraph 1, of the Code of Criminal Procedure, concerning the secrecy of the preliminary and judicial investigations, precluded the presence of a lawyer at that stage (P.10.0501.F/1).
>
> ... at no stage of the proceedings did the defendant ask to be assisted by a lawyer ...
>
> ... furthermore, the decision [*Bouglame v. Belgium*] ... sums up the lessons of the *Salduz* judgment but finds that the application is inadmissible, as the proceedings have to be considered as a whole ...".

9. In a judgment of 3 June 2010 the Indictments Division agreed with the Principal Public Prosecutor on that point, finding that "[his] submissions ... fully address[ed] the arguments for the defence as to the absence of a lawyer during the defendant's questioning". It nevertheless ordered the applicant's release on the ground that public safety no longer required that she be detained.

10. According to the information provided by the parties, the judicial investigation is still pending and the case is not yet ready for trial.

B. Relevant domestic law

11. In the above-cited *Bouglame* case, where the applicant had complained of being prevented from having contact with his lawyer before his examination by the investigating judge, the Court found that the refusal to allow contact had been "explained by the applicable law as it [stood], namely section 16(2) of the Law of 20 July 1990 [on pre-trial detention], which [did] not provide for assistance by counsel during questioning by the investigating judge or prior thereto".

12. Sections 16 and 20 of the Law of 20 July 1990 on pre-trial detention read as follows:

Article 16

> "§ 1. In cases of absolute necessity for public safety alone, and if the act is punishable by a one-year prison sentence, in respect of a lesser indictable offence, or by an even harsher sentence, the investigating judge may make a detention order ...
>
> § 2. Unless the person charged is a fugitive or is evading arrest, the investigating judge shall, before making a detention order, question the person [on the acts constituting the charges and potentially justifying a detention order] and hear his or her observations. Failure to question the person charged shall entail his or her release.
>
> The investigating judge shall also inform the person charged of the possibility of an order being made for his or her detention and shall hear his or her observations on that matter. Failure to satisfy these conditions shall entail the person's release. ..."

Article 20

> "§ 1. Immediately after the first examination, the person charged may communicate freely with counsel. ...".

13. The Court of Cassation has, on a number of occasions, been called upon to examine – both in disputes concerning pre-trial detention and in appeals on points of law against appellate judgments on the merits – legal argument alleging a violation of Article 6 §§ 1 or 3 (c) of the Convention on the ground that the suspect had not received assistance from a lawyer during his or her police custody or while being questioned by the police or investigating judge.

For a long time that court took the view that, although Belgian law did not provide for the presence of a lawyer to assist a suspect when he or she was deprived of liberty, this did not automatically entail a violation of the right to a fair trial. In the court's opinion, the restriction had to be assessed in the light of all the statutory safeguards generally afforded to the accused so as to ensure respect for his or her defence rights from the time of the decision to prosecute: formalities for the suspect's examination under Article 47 *bis* of the Code of Criminal Procedure; the brevity of the statutory police custody period (24 hours); the immediate remittance to the person charged, when served with a detention order, of all the documents referred to in sections 16(7) and 18(2) of the Law of 20 July 1990; the right of the person charged to communicate immediately with counsel in accordance with section 20(1) and (5) of that law; access to the case file prior to his or her appearance before the investigating judge, as provided for by section 21(3) of that law; the presence of counsel for the charged person during the recapitulation interview provided for in section 22(3) of that law; and the rights granted, in particular, by Articles 61 *ter*, 61 *quater*, 61 *quinquies*, 136 and 235 *bis* of the Code of Criminal Procedure. The court found that this series of safeguards prevented the absence of counsel during the first twenty-four hours of deprivation of liberty from irretrievably compromising the fair handling of the case (see, for example, the judgments of 5 May and 22 June 2010, P.10.0257.F/1 and P.10.0872.N/1).

However, in a judgment of 15 December 2010 (P.10.0744.F/1), the Court of Cassation quashed, for a violation of Article 6 of the Convention, a trial court decision that relied on self-incriminating statements given to the police during police custody without any possibility of assistance by a lawyer. It found, in particular, as follows:

> "... The right to a fair trial, as enshrined in Article 6 § 1 of the Convention ..., implies that the person arrested or held at the disposal of the courts should have the effective assistance of a lawyer during the police interview which takes place within twenty-four hours after he or she is taken into custody, unless it is shown, in the light of the particular circumstances of the case, that there are compelling reasons to restrict such right.

In so far as it allows such access to a lawyer only after the first examination by the investigating judge, section 20, first paragraph, of the Law of 20 July 1990 on pre-trial detention must be regarded as incompatible with Article 6 of the Convention.

The fairness of a criminal trial should be assessed in the light of the proceedings as a whole, ascertaining whether the defence rights have been upheld, examining whether the person charged has had the possibility of challenging the authenticity of the evidence and of opposing its use, verifying whether the circumstances in which evidence for the prosecution has been obtained cast doubt on its credibility or accuracy, and assessing the influence of any unlawfully obtained evidence on the outcome of the criminal proceedings. ..."

14. The Court of Cassation has further found that Articles 5 § 1, 6 § 1 and 5 § 3 (c) of the Convention do not oblige investigating divisions to discharge a detention order with immediate effect on the sole ground that prior to his or her examination by the investigating judge the person charged had been interviewed by the police and had given a confession to them without being allowed access to counsel from the very first questioning (see, for example, the judgments of 29 December 2009, 13 January 2010 and 23 June 2010, P.09.1826.F/1, P.09.1908.F/1 and P.10.1009.F/1).

15. The relevant domestic law was changed by the Law of 13 August 2011 amending the Code of Criminal Procedure and the Law of 20 July 1990 on pre-trial detention, in order to grant rights, including the right to consult and be assisted by a lawyer, to any person who is questioned or deprived of liberty.

Section 2 of that law provides that before the first interview of a person concerning offences with which he or she might be charged, the person has "the right ... to a confidential consultation with a lawyer of his or her choosing or a lawyer appointed to assist him or her, provided that the potential charges concern an offence that could justify a detention order, with the exception of the offences referred to in section 138, 6º, 6º *bis* and 6º *ter*".

Section 4 adds a section 2 *bis* to the Law of 20 July 1990 on pre-trial detention, reading as follows:

"§ 1. Anyone who is deprived of liberty pursuant to sections 1 or 2 hereof, or in accordance with a warrant under section 3, shall be entitled, from that time onwards and prior to the first subsequent interview by the police or, failing that, by the Crown Prosecutor or investigating judge, to have a confidential consultation with a lawyer of his choosing. If he has not chosen a lawyer or if that lawyer is unavailable, contact shall be made with the duty service organised by the Bar Council of French-speaking and German-speaking Lawyers, and the Flemish Bar Council or, failing that, by the chairman of the Bar or his representative. ...

§ 2. The person concerned shall be entitled to receive assistance from a lawyer during the interviews that take place within the time-limit provided for in the preliminary section and sections 1º, 2, 12 or 15 *bis*. ..."

COMPLAINTS

16. The applicant complained under Article 5 § 1 ... of the Convention ... that on account of the inadequacy of Belgian law, she had not been assisted by a lawyer during her police custody or in her interview by the police, or her first examination by the investigating judge, and had not been notified of her right to remain silent.

THE LAW

17. The applicant complained that on account of the inadequacy of Belgian law, she had not been assisted by a lawyer during her police custody or in her interview by the police, or her first examination by the investigating judge, and had not been notified of her right to remain silent. She alleged that this constituted a violation of Article 5 § 1 ...of the Convention ..., which reads:

Article 5 § 1

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ..."

...

20. ... the Government submitted that the application was manifestly ill-founded. They observed that the detention imposed on the applicant corresponded to the situation referred to in Article 5 § 1 (c) and argued that there was nothing to suggest that it was not compliant with "a procedure prescribed by law", within the meaning of that provision. On that last point they indicated that, as the domestic authorities had found, the applicant had been held in custody in compliance with the rules on pre-trial detention, which were "clear and foreseeable in their effects", such that the principle of legal certainty was preserved. They added that the applicant had enjoyed "procedural and substantive safeguards" throughout her detention, which had protected her against any risk of arbitrary deprivation of liberty: from the time of her interview by the police, on 13 March 2010, she had been notified, in accordance with Article 47 *bis* of the Code of Criminal Procedure, of the fact that her statements could be used in evidence, that she

was entitled to ask for a verbatim record to be made of any questions put to her, together with her answers, and to request any supplementary investigative act or interview, that she could use documents in her possession and could have documents included in the case file or deposited in the registry. She had received a copy of her statement to the police. She had been examined, from 14 March 2010, by an independent and impartial investigating judge, who had informed her of her rights, and in particular her right to "choose a lawyer" for the remainder of the proceedings. She had then, on 18 March, 14 April and 12 May, assisted by her lawyer, appeared before the Committals Division of the Liège Court of First Instance, for a decision on whether her detention should be extended, and she had had the right to appeal against such decision. The Government further argued that the applicant had not claimed to have been subjected to pressure during the first phase of her detention with the aim of eliciting a confession, that she herself had spontaneously acknowledged the facts prior to her initial interview, that she had not requested the assistance of a lawyer at that time or when first examined by the investigating judge, and that she had not withdrawn her confession.

21. ...

On the merits, the applicant observed that it was apparent from the Court's case-law that the words "in accordance with a procedure prescribed by law", within the meaning of Article 5 § 1 of the Convention, referred back to domestic law and required it to be in conformity with the Convention, including the general principles expressed or implied therein. In the applicant's submission, that included the case-law principles concerning the right to a fair trial, including the principle stemming from the judgments in *Salduz* (cited above), *Dayanan* (cited above) and *Brusco v. France* (no. 7466/07, 14 October 2010) and from the *Bouglame* decision (cited above) to the effect that a person "charged with a criminal offence" should be allowed to benefit from the assistance of a lawyer from the beginning of his or her deprivation of liberty. She particularly drew attention in this connection to the Court's finding in the *Bouglame* decision (cited above) that the fact that, as in Belgium, the denial of access to a lawyer in that context stemmed from the systematic application of statutory provisions sufficed for a breach of the requirements of Article 6 to be found. The applicant thus requested the Court to find a violation of Article 5 § 1.

...

25. That being said, the Court finds that the applicant did not have the possibility of being assisted by a lawyer, neither during her police custody or in the interview, nor during her first examination by the investigating judge. As the Court found in the *Bouglame* decision, cited above, this was the result of "the applicable law as it [stood], namely section 16(2) of the Law of 20 July 1990 [on pre-trial detention], which [did] not provide for

assistance by counsel during questioning by the investigating judge [following police custody] or prior thereto".

26. The Court further observes that under Article 5 § 1, no one can be deprived of liberty save in the cases enumerated therein and "in accordance with a procedure prescribed by law".

27. On the first point, the Court notes that the deprivation of liberty at issue in the present case undoubtedly falls within Article 5 § 1 (c) of the Convention, which covers in particular the detention of a person for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence. This was not in dispute between the parties.

28. As to the words "in accordance with a procedure prescribed by law", the Court observes that they essentially refer back to domestic law: they state the need for compliance with the relevant procedure under that law (see *Winterwerp v. the Netherlands*, 24 October 1979, § 45, Series A no. 33) and an obligation to conform to the substantive rules thereof (see *Erkalo v. the Netherlands*, 2 September 1998, § 52, *Reports of Judgments and Decisions* 1998-VI). In addition the domestic law must itself be in conformity with the Convention, including the "general principles expressed or implied therein" (see *Winterwerp*, cited above, same references).

The applicant's argument thus consists in saying that, in so far as it does not allow persons deprived of liberty to benefit from the assistance of a lawyer during their police custody and their subsequent examination by the investigating judge, Belgian law disregards one of those principles, such that the condition of compliance with "a procedure prescribed by law" under Article 5 § 1 is not fulfilled.

29. The question to be addressed by the Court in the present case is therefore whether the Convention implies a "general principle" whereby any person deprived of liberty must have the possibility of being assisted by a lawyer from the beginning of his or her detention.

30. The Court observes in this connection that in the above-cited *Salduz* judgment it found that, in order for the right to a fair trial to remain sufficiently "practical and effective", Article 6 § 1 required that, "as a rule", access to a lawyer should be provided "as from the first interrogation of a suspect" by the police, "unless it [was] demonstrated in the light of the particular circumstances of each case that there [were] compelling reasons to restrict this right". Even where this is the case, it added, denial of access to a lawyer must not unduly prejudice the rights of the accused under Article 6 and "[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction" (see *Salduz*, cited above, § 55). The Court found that there had been a violation of Article 6 §§ 1 and 3 (c) notwithstanding the fact that the applicant had subsequently been assisted by a lawyer and that the ensuing proceedings

had been adversarial in nature, after noting, in particular, that the impugned restriction on the right of access to a lawyer was provided for on a systematic basis by the relevant legal provisions (see *Salduz*, cited above, §§ 56 and 61).

In the *Dayanan* judgment (cited above, §§ 31-33), the Court confirmed that "the fairness of criminal proceedings under Article 6 of the Convention require[d] that, as a rule, a suspect should be granted access to legal assistance from the moment he [was] taken into police custody or pre-trial detention", and not only while being questioned. It thus observed that "the fairness of proceedings require[d] that an accused be able to obtain the whole range of services specifically associated with legal assistance", indicating that "discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention" were fundamental aspects of a defence that counsel should be able freely to provide. The Court further found that the fact that the applicant had not received legal assistance while in police custody because of a systematic restriction under domestic law was sufficient in itself for a violation of Article 6 to be found, notwithstanding the fact that the applicant had remained silent when questioned during that time (see also the *Bouglame* decision, cited above, and the judgments in *Boz v. Turkey*, no. 2039/04, § 35, 9 February 2010, and *Fidancı v. Turkey*, no. 17730/07, §§ 37-38, 17 January 2012). In the *Brusco* judgment (cited above, §§ 45 and 54), the Court added that the right of a person in police custody to be assisted by a lawyer from the beginning of that measure, and during the interview itself, is all the more important where he or she has not been notified by the authorities of the right to remain silent.

31. This case-law clearly expresses the following principle: first, a person "charged with a criminal offence", within the meaning of Article 6 of the Convention, is entitled to receive legal assistance from the time he or she is taken into police custody or otherwise remanded in custody and, as the case may be, during questioning by police or by an investigating judge; secondly, whilst a restriction of this right may in certain circumstances be justified and be compatible with the requirements of that Article (see, by way of example, *Hovanesian v. Bulgaria*, no. 31814/03, 21 December 2010), any such restriction that is imposed by a systemic rule of domestic law is inconsistent with the right to a fair trial.

32. The Court would observe, however, that this is one of the principles of the right to a fair trial, specifically deriving from Article 6, paragraph 3, of the Convention, which secures among other things the right for a person "charged with a criminal offence" to have legal assistance of his own choosing. It is not one of the "general principles" implied by the Convention, which are, by definition, transversal in nature.

The Court further points out that the general principles implied by the Convention to which the Article 5 § 1 case-law refers are the principle of the rule of law (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 461, ECHR 2004-VII) and, connected to the latter, that of legal certainty (see, among other authorities, *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000 III), the principle of proportionality (see, for example, *Enhorn v. Sweden*, no. 56529/00, § 36, ECHR 2005-I) and the principle of protection against arbitrariness (which is, moreover, the very aim of Article 5 – see, *inter alia*, *Erkalo*, cited above, § 52).

33. Thus, whilst the statutory inability for a person "charged with a criminal offence", who is deprived of his liberty, to receive legal assistance from the beginning of his detention affects the fairness of the criminal proceedings against him, it cannot be inferred from that sole fact that his detention breaches Article 5 § 1 of the Convention for failure to satisfy the requirement of lawfulness inherent in that provision.

34. In the light of the foregoing, having examined the application under Article 5 § 1 of the Convention, the Court finds that it is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Françoise Elens-Passos
Deputy Registrar

Danutė Jočienė
President