

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

FIFTH SECTION

CASE OF BOGDAN v. UKRAINE

(Application no. 3016/16)

JUDGMENT

This version was rectified on 16 May 2024
under Rule 81 of the Rules of Court.

Art 6 § 1 (criminal) and Art 6 § 3 (c) • Fair hearing • Validity of waiver of right to legal assistance signed by applicant while in unrecorded detention and suffering from drug withdrawal symptoms • In such circumstances, voluntary nature of waiver open to doubt • Domestic courts' failure to adequately scrutinise waiver's validity and applicant's mental state during on-site reconstruction of crime • Applicant vulnerable on account of his state of health • Statements made in absence of lawyer directly incriminating and forming very significant part of case against applicant • Initial procedural defects of investigation not remedied by criminal proceedings • Government's failure to demonstrate, in circumstances of case, why overall fairness of trial was not irretrievably prejudiced by restriction of applicant's access to legal advice

Prepared by the Registry. Does not bind the Court.

STRASBOURG

8 February 2024

FINAL

08/05/2024



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

In the case of Bogdan v. Ukraine,

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

Georges Ravarani, *President*,
Lado Chanturia,
Carlo Ranzoni,
Stéphanie Mourou-Vikström,
María Elósegui,
Kateřina Šimáčková,
Mykola Gnatovskyy, *judges*,
and Victor Soloveytchik, *Section Registrar*,

Having regard to:

the application (no. 3016/16) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Valeriy Pavlovych Bogdan ("the applicant"), on 31 December 2015;

the decision to give notice to the Ukrainian Government ("the Government") of the complaint under Article 6 §§ 1 and 3 (c) of the Convention;

the parties' observations;

Having deliberated in private on 16 January 2024,

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

INTRODUCTION

1. The case concerns the applicant's complaint under Article 6 of the Convention that his right to legal assistance had been breached, notably because the waiver of his right to a lawyer had not been valid as he had been suffering from the effects of drug addiction and withdrawal symptoms when he signed it.

THE FACTS

2. The applicant was born in 1988 and is currently imprisoned in Vinnytsya. He was represented by Mr A. Kadochnikov, a lawyer practising in Vinnytsya.

3. The Government were represented by their Agent, Ms M. Sokorenko.

4. The facts of the case may be summarised as follows.

I. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

5. In the early hours of 14 April 2014 Mr P.'s garage was burgled and some of his possessions (bicycles, an inflatable boat, fishing equipment and

sundry other items) were stolen. On the same day a criminal investigation was opened in that connection.

6. The applicant's first interaction with the police in connection with the theft occurred late at night on 14 April 2014. The nature of those interactions was later described by the police, whose statements are summarised in paragraph 24 below.

7. On 16 April 2014 a police investigator drew up a report, stating that between 4.35 p.m. and 4.40 p.m. on the same date the applicant had been informed that he was suspected of aggravated theft and that, in that connection, he was entitled to the assistance of a lawyer, whom he could choose himself or who could be appointed for him at the State's expense. The applicant added a handwritten note to this printed report, stating that "at the current time I am refusing the services of a lawyer; this is not related to my financial situation" ("*на даний час від послуг захисника відмовляюсь, що не пов'язано з моїм матеріальним становищем*"). The applicant and the police investigator both signed the report.

8. On 16 April 2014, from 6.55 p.m. to 7.35 p.m., the investigator conducted an on-site reconstruction of the event, in which the applicant participated. The reconstruction was observed by Mr and Ms S., witnesses. The applicant demonstrated how he had committed the theft. His statements were included in the police report and photographs were taken.

9. On 17 April 2014 an arrest report was drawn up. It noted that the applicant was arrested at 1.35 p.m. on the premises of the Vinnytsya city police station.

10. On 13 May 2014 a local addiction-treatment centre informed the investigating authority that, as of 18 April 2014, the applicant had been registered with it as an outpatient, with a diagnosis of "psychological and behavioural disorders caused by opioid and amphetamine use".

11. When the case came to trial, the applicant requested a legal aid lawyer and on 4 July 2014 a lawyer was assigned to his case.

12. During the trial the applicant pleaded not guilty. He stated that he had purchased the goods in question (which turned out to be the victim's stolen possessions) from an unknown individual and had then resold them to another stranger. The police had arrested him on 14 April 2014 and had subjected him to "psychological and physical pressure", resulting in a false confession. An ambulance had had to be repeatedly called for him at the detention centre.

13. On 16 September 2014 the Vinnytsya City Court (the trial court) instructed the prosecutor's office to investigate the applicant's complaint of ill-treatment by the police (see paragraphs 22 to 24 below for the results of that investigation).

14. On 26 December 2014 the trial court convicted the applicant of theft aggravated by burglary and sentenced him to six years' imprisonment. It relied on the following evidence.

(i) Testimony given by Mr K., who stated that on the day of the theft he had bought two bicycles, a boat and fishing equipment from the applicant.

(ii) The reconstruction report (see paragraph 8 above) indicating that the applicant had freely demonstrated, without any pressure and in the presence of two attesting witnesses, how he had committed the theft.

(iii) Testimony given by Mr P. (the victim), his wife Ms P. and Ms S., an attesting witness, to the effect that they had observed the reconstruction of the event during which the applicant had willingly demonstrated, without any pressure, how he had committed the theft in the victim's garage.

(iv) Police and technical expert reports, showing that the garage had been burgled.

15. The trial court found that the applicant's allegations that he had confessed under duress were unsubstantiated and had been invalidated by the decision of 16 October 2014 to discontinue the related criminal investigation against the police officers (see paragraph 22 below). As to the right to a lawyer, it held that the applicant had waived that right and the law did not require the mandatory participation of a lawyer.

16. The applicant appealed against that judgment. He contested the assessment of the evidence by the trial court and, in particular, the results of the reconstruction. He pointed out that no video-recording had been made during the reconstruction and that the photographs taken during it were of such low quality that it was impossible to identify what the applicant had been pointing at. He added that only one of the attesting witnesses had been questioned in court. This had made it impossible to ascertain with certainty whether the police had told the applicant before the reconstruction what he was to say and what he should point at. Moreover, the trial court had failed to take into account the fact that during the reconstruction the applicant had been suffering from withdrawal symptoms, which was proven by the discontinuance decision cited by the trial court. The fact that the applicant was suffering from a mental disorder due to opioid and amphetamine abuse should also have been taken into consideration. For those reasons, and in view of the absence of a lawyer, the evidence was questionable. The applicant concluded that, when fearing the police and suffering from withdrawal symptoms, he had falsely incriminated himself.

17. On 5 March 2015 the Vinnytsya Regional Court of Appeal upheld the applicant's conviction. It considered that there was sufficient proof of his guilt. It held that the reconstruction had been conducted lawfully and the trial court had correctly found it sufficient to examine only one of the attesting witnesses. The applicant had himself waived his right to a lawyer. The Court of Appeal also referred to the discontinuance of criminal proceedings against the police officers on 16 October 2014 (see paragraph 22 below).

18. The applicant's lawyer lodged a cassation appeal, using the same arguments as before the Regional Court of Appeal. He added that the applicant had *de facto* been arrested on 14 April 2014. When he signed the

waiver he had already been in unrecorded detention without his rights having been explained to him, in breach of Article 5 of the Convention.

In any event, there had been a legal requirement to appoint a lawyer to represent the applicant after the investigating authority received, on 18 April 2014, an official certificate stating that he was suffering from a mental disorder caused by drug abuse (see paragraph 27 below). However, the trial and appellate courts had not properly assessed those circumstances. Accordingly, all the material gathered from the applicant during the investigation activities was questionable and could not be relied upon. That argument was further supported by the fact that the applicant had been suffering from withdrawal symptoms of such severity that an ambulance had to be repeatedly called; subjecting him to investigative activities at that time had thus amounted to ill-treatment. The use of such evidence was contrary to the Code of Criminal Procedure and the Convention.

19. On 1 October 2015 the Higher Specialised Civil and Criminal Court upheld the conviction. Concerning in particular the right to a lawyer, it stated that, when the applicant was arrested, the investigating authority had not known that he was suffering from a mental disorder caused by drug use. The investigating authority had only learned of the applicant's addiction-related psychological and behavioural disorders on 13 May 2014, when the centre provided it with the relevant certificate (see paragraph 10 above). No investigation activities had been conducted after that date. Accordingly, there had been no grounds under domestic law (see paragraph 27 below) for the mandatory participation of a lawyer. The case-file material showed that the applicant's right to a lawyer had been explained to him and that he had personally written in the relevant record that he was waiving his right to a lawyer for reasons unrelated to his financial situation.

II. PROCEEDINGS FOR EXTRAORDINARY REVIEW BEFORE THE SUPREME COURT

20. The Deputy Prosecutor General and the applicant's lawyer petitioned the Supreme Court of Ukraine for an extraordinary review of the Higher Court's decision in the applicant's case. They alleged that its decision entailed a divergence from the Supreme Court's case-law concerning the possibility, under domestic law (see paragraph 28 below), for a criminal defendant to waive his right to a lawyer validly in the absence of a lawyer. They believed that in other decisions the Higher Court had correctly assessed that no waiver was possible in the absence of a lawyer and urged the Supreme Court to quash the Higher Court's decision in the applicant's case, owing to the violation of his right to a lawyer. The applicant's lawyer also reiterated, in substance, the arguments raised in the applicant's initial appeals.

21. On 21 April 2016 the Supreme Court of Ukraine found that the decisions cited by the petitioners did indeed indicate a disagreement in the

case-law as to whether the presence of a lawyer was needed for a waiver to be valid, and declared the petitions admissible on that basis. However, it rejected the applicant's petition, finding that the criterion in the domestic law that a valid waiver of the right to a lawyer required the presence of a lawyer applied only to situations where a lawyer had already been appointed by a defendant or on his or her behalf. That had not been the situation in the applicant's case.

The applicant's right to a lawyer had been duly explained to him and he had waived it. At the time, there had been no indication that there were grounds to require the mandatory participation of a defence lawyer.

III. CRIMINAL INVESTIGATION INTO THE APPLICANT'S ALLEGATIONS

22. On 16 October 2014 and 30 June 2016 the prosecutor's office, in nearly identical decisions, discontinued the investigation into the applicant's complaint of ill-treatment by the police, finding that the constituent elements of an offence had not been made out in the police officers' actions.

In summarising the evidence gathered during the investigation, the prosecutor stated that the applicant had asserted that he had been pressured psychologically and struck on the head and body by the police officers to force him to confess, while the officers denied that there had been any ill-treatment. The applicant had been held in a police temporary detention centre from 17 to 25 April 2014, when he was transferred to a pre-trial detention facility. No injuries or complaints were recorded on his arrival at either facility. The police detention centre reported that an ambulance had been called for the applicant eleven times and that the diagnosis had been "drug withdrawal syndrome". The pre-trial detention facility stated that the applicant had been examined by medical staff on arrival and, because he had been diagnosed with opioid addiction, it had been decided not to accept him in the facility and to transfer him to a medical facility instead.

23. The decisions to discontinue the investigations were overruled as premature. In quashing the decision of 30 June 2016, the Vinnytsya City Court stated that the prosecutor's office had not conducted all possible steps to clarify the circumstances surrounding the allegations. In particular, it had failed to investigate the circumstances under which an ambulance had been repeatedly called for the applicant and to question the medical staff of the pre-trial detention facility.

24. On 13 May 2017 the criminal proceedings were again discontinued, essentially for the same reasons. In his decision, the prosecutor summarised the statements by the pre-trial detention facility's medical staff and the records confirming their previous statements.

The prosecutor also summarised the police officers' statements concerning their interactions with the applicant on 14 April 2014. At around 6 p.m. on

that day, two police officers had received information about the possible sale of the items stolen from Mr P. Arriving at the scene of the possible sale, they had noticed individuals loading some items into a car; the individuals appeared to behave nervously after noticing the police. The police had followed one of the pair (the applicant) and stopped him at around midnight. In conversation he had admitted to having committed a number of thefts, including the one at Mr P.'s garage. They had accordingly invited him to the police station and he had agreed to accompany them. On arrival at the police station at 1 a.m. on 15 April 2014, the applicant had been interviewed about his alleged offences, including thefts. The applicant had remained at the station by choice; he had not been under arrest and no arrest report had been drawn up.

In the early morning the officers told him to leave, having obtained his telephone number and an undertaking that he would appear when summoned. However, the applicant had refused to leave, explaining that he had nowhere to stay. He had been allowed to remain at the station and the police had given him money for food and also for painkillers, as he had explained that he had tuberculosis and was suffering from oedema and lesions on his legs caused by drug use. The applicant had eventually left the station on 15 April 2014.

At around midday on 15 April 2014, the officers, based on information provided by the applicant, went to another city to search for Mr P.'s stolen property, which they found.

25. The decision of 13 May 2017 to discontinue proceedings was overruled by the Vinnytsya City Court on 27 November 2017. The proceedings were again discontinued, for lack of the constituent elements of an offence, on 28 September 2018.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CODE OF CRIMINAL PROCEDURE 2012

26. Article 49 of the Code of Criminal Procedure requires the relevant authority in charge of the case (investigator, prosecutor or the court) to ensure that a legal aid lawyer is appointed if: (i) the defendant fails to appoint a lawyer even though the participation of a defence lawyer is mandatory (Article 52 of the Code – see paragraph 27 below); or (ii) the defendant asks for a defence lawyer but lacks the necessary funds or for other objective reasons cannot hire a lawyer him- or herself; or (iii) the relevant authority considers that the circumstances of the criminal investigation require the participation of a defence lawyer but the defendant fails to appoint one; or (iv) other situations envisaged by the Legal Aid Act (2011) arise.

27. Article 52 of the Code provides that the designation and participation of a defence lawyer in the proceedings is mandatory in a number of specifically enumerated categories of cases. This concerns, in particular,

defendants with psychological or physical disabilities (*вади*) such as deafness, blindness and other conditions which prevent them from fully exercising their rights. In such cases the participation of a defence lawyer is mandatory from the moment that the existence of such a disability is established.

28. Article 54 § 2 of the Code provides that a waiver of the right to a defence lawyer or replacement of a defence lawyer can be effected only in the presence of a defence lawyer and after an opportunity has been provided for confidential consultation with him or her. The waiver is to be recorded in a report. Article 54 § 3 provides that a waiver of the right to a defence lawyer cannot be accepted if the participation of a lawyer in the proceedings is mandatory.

29. Article 87 declares inadmissible any evidence obtained as a result of a "serious violation" of human rights and freedoms guaranteed by the Constitution, laws or international treaties. It goes on to provide examples of actions that constitute "serious violations", including the gathering of evidence as a result of ill-treatment and breaches of the right of defence.

II. REVIEW OF THE DOMESTIC CASE-LAW PUBLISHED BY THE PLENARY FORMATION OF THE HIGHER SPECIALISED CIVIL AND CRIMINAL COURT

30. On 25 September 2015 the plenary formation of the Higher Specialised Civil and Criminal Court published and gave notice to the regional courts of appeal a review it had undertaken of the lower courts' case-law concerning the right to defence in criminal proceedings. Section 2.3 of the report focused on defendants suffering from psychological or physical disabilities which prevented them from fully exercising their rights (see paragraph 27 above).

The plenary formation stated that the question whether a person was suffering from such psychological disabilities had to be examined on a case-by-case basis and explained that such circumstances could be established through documents showing that a person had been recognised as disabled because of mental illness, or that he or she was registered as a patient at a mental health facility, or that a medical institution certified the person as suffering from chronic alcoholism or drug addiction resulting in psychological and behavioural disorders.

The plenary formation cited with approval a ruling by a district court in April 2013 directing that a legal aid lawyer be appointed for a defendant because she was registered as an outpatient with a diagnosis of "psychological and behavioural disorders caused by opioid use".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

31. The applicant, relying on Article 6 of the Convention, complained that his right of access to a lawyer had been breached.

32. The Court notes that the requirements of Article 6 § 3 constitute specific aspects of the right to a fair trial guaranteed under Article 6 § 1. The Court, accordingly, will examine the applicant's complaints under those provisions taken together (see, for example, *Gäfgen v. Germany* [GC], no. 22978/05, § 169, ECHR 2010). The relevant provisions read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (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;
>
> ..."

A. Admissibility

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

B. Merits

1. The parties' submissions

(a) The applicant

34. The applicant submitted that, when he signed the waiver on 16 April 2014 and until he was officially arrested on 17 April 2014, he had actually been present in the police station, and thus unofficially detained. The applicant considered that the Government had not refuted the allegation that he had been suffering from withdrawal symptoms which had affected his understanding when his defence rights were explained to him. He submitted that police pressure had also been a factor.

35. The applicant further argued that the Government's objection that the authorities had only become aware of his addiction on 13 May 2014 did not stand up to scrutiny, since he had been officially arrested on 17 April 2014 and on the very next day (18 April), while he was under the authorities' control, medical records were created for him at the addiction treatment

centre. Even after the authorities received that information, they had not appointed a lawyer for him until the court hearing.

36. According to the decisions discontinuing proceedings against the police officers, while the applicant was held in the temporary detention centre in the municipal police station an ambulance was called for him eleven times because of his complaints about withdrawal symptoms. The applicant referred to the review published by the plenary formation of the Higher Specialised Civil and Criminal Court, stating that documented drug addiction could affect the exercise of a person's right to defence and require the mandatory appointment of a defence lawyer (see paragraph 30 above).

37. He further alleged that there was no independent evidence establishing his involvement in the offence or even his presence at the crime scene. His conviction had been based on the statements he had made during the reconstruction, which had been conducted without the assistance of a lawyer.

38. As a result of the combined circumstances of the applicant's detention, the failure to provide him with a lawyer and the withdrawal syndrome (a disorder established by the medical certificate), he had been unable to defend himself properly. No examination of his mental state had been conducted at the relevant time.

(b) The Government

39. The Government submitted that the authorities had only become aware that the applicant was registered as suffering from an addiction-related illness on 13 May 2013 (see paragraph 19 above). The domestic courts at three levels of jurisdiction had examined and rejected the applicant's complaint concerning the absence of a lawyer at the reconstruction. The applicant's right to a lawyer had been duly explained to him and he had confirmed this by signing the relevant report. He had knowingly participated in the reconstruction in the absence of defence counsel. As in *Trymbach v. Ukraine* (no. 44385/02, § 64, 12 January 2012), there had been no violation of the applicant's rights. The applicant's complaint was of a "fourth instance" nature because it merely contested the domestic courts' assessment of the evidence. The reasoning of the domestic courts had not been arbitrary or manifestly unreasonable, especially given that they had based the conviction on a range of evidence other than the applicant's confession.

2. The Court's assessment

(a) General principles

40. The right of everyone "charged with a criminal offence" to be defended effectively by a lawyer, as guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial (see *Salduz v. Turkey* [GC], no. 36391/02, § 51, ECHR 2008; *Ibrahim and Others v. the United Kingdom*

[GC], nos. 50541/08 and 3 others, § 255, 13 September 2016; and *Beuze v. Belgium* [GC], no. 71409/10, § 123, 9 November 2018).

41. The Court reiterates that access to a lawyer during the investigation phase may be temporarily restricted where there are "compelling reasons" for doing so. However, restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. Where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention. In such circumstances, there is a pressing duty on the authorities to protect the rights of potential or actual victims under Articles 2 and 3 and Article 5 § 1 of the Convention in particular. When assessing whether compelling reasons have been demonstrated, it is important to ascertain whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying them (see *Ibrahim and Others*, cited above, §§ 258-59, and *Simeonovi v. Bulgaria* [GC], no. 21980/04, §§ 116-17, 12 May 2017).

42. According to the Court's case-law, the absence of "compelling reasons" for restricting access to a lawyer does not lead in itself to a finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention. In the absence of "compelling reasons", the Court must apply a very strict scrutiny to its fairness assessment. The Government's failure to point to any compelling reasons weighs heavily in the balance when assessing the overall fairness of the trial and may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (c). The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice. Where, on the contrary, compelling reasons for restricting access to a lawyer have been established, a holistic assessment of the entirety of the proceedings must be conducted to determine whether they were "fair" for the purposes of Article 6 § 1 (see *Ibrahim and Others*, §§ 262-65, and *Simeonovi*, § 118, both cited above).

43. The Court further emphasises that where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against self-incrimination or the right to remain silent, it will be even more difficult for the Government to show that the proceedings as a whole were fair (see *Beuze*, cited above, § 146). Indeed, it is inherent in the privilege against self-incrimination, the right to remain silent and the right to legal assistance that a person "charged with a criminal offence" for the purposes of Article 6 has the right to be notified of these

rights. Consequently, Article 6 § 3 (c) of the Convention must be interpreted as also safeguarding the right of persons charged with an offence to be informed immediately of their right to legal assistance, irrespective of their age or specific situation and regardless of whether they are represented by an officially assigned lawyer or a lawyer of their own choosing. Moreover, respect for that right may well influence the validity of any waiver of the right to legal assistance (see *Ibrahim and Others*, §§ 272-73, and *Simeonovi*, § 119, both cited above).

44. Since the fairness of criminal proceedings is assessed in each case with regard to the conduct of the proceedings as a whole, the Court has set out a non-exhaustive list to be taken into account, where appropriate, in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings. Those factors are as follows (see the above-cited cases of *Ibrahim and Others*, § 274; *Simeonovi*, § 120; and *Beuze*, § 150):

(a) whether the applicant was particularly vulnerable, for example by reason of his or her age or mental capacity;

(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

(e) where evidence was obtained unlawfully, the nature of the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

(f) in the case of a statement, the nature of that statement and whether it was promptly retracted or modified;

(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;

(h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;

(i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and

(j) other relevant procedural safeguards afforded by domestic law and practice.

45. The Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his or her own free will,

either expressly or tacitly, the entitlement to the guarantees of a fair trial. The right to legal assistance is no exception (see, among other authorities, *Dvorski v. Croatia* [GC], no. 25703/11, §§ 100 and 101, ECHR 2015, and *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 90, 2 November 2010). However, if it is to be effective for Convention purposes, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. Such a waiver need not be explicit, but it must be voluntary and constitute a knowing and intelligent relinquishment of a right (see *Pishchalnikov v. Russia*, no. 7025/04, § 77, 24 September 2009, and *Simeonovi*, cited above, § 115). Before an accused can be said to have implicitly, through his or her conduct, waived an important right under Article 6, it must be shown that he or she could reasonably have foreseen what the consequences of such conduct would be (see *Pishchalnikov*, cited above, § 77 *in fine*). Moreover, the waiver must not run counter to any important public interest (see *Håkansson and Sturesson v. Sweden*, 21 February 1990, § 66, Series A no. 171-A; *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-II; and *Simeonovi*, cited above, § 115).

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

(i) Preliminary remarks concerning the applicant's situation at the early stage of the investigation

46. The Court notes at the outset that the applicant alleged throughout the proceedings that he had been arrested on 14 April 2014 and had been held in unrecorded detention until 17 April 2014[1], at which point he was officially arrested (see paragraphs 12 and 18 above). The Court considers that the police officers' statements which emerged after the completion of the criminal proceedings against the applicant (see paragraph 24 above) lend credence to that account.

47. While the police officers stated that the applicant had left the police station on 15 April 2014 and had been rearrested the next day, none of those events was documented at the time thus casting doubt on the completeness of the police officers' explanations. In contrast, the applicant's account that he was held in unrecorded detention from 14 April to 17 April[2] (when he was officially arrested) remained unchanged throughout the proceedings and is coherent and credible in the circumstances of the case.

48. The Court, therefore, finds strong indications that the applicant was *de facto* arrested on 14 April and deprived of his liberty until 17 April 2014[3], at which point he was officially arrested.

[1] Rectified on 16 May 2024: the text was "16 April 2014".
[2] Rectified on 16 May 2024: the text was "16 April".
[3] Rectified on 16 May 2024: the text was "16 April 2014".

49. From the moment of his arrest, the domestic authorities had plausible reasons for suspecting that the applicant had been involved in the theft and he was therefore to be considered a "suspect" within the autonomous meaning of the Convention, requiring the application of the Article 6 safeguards, notably the right of access to legal assistance (see *Simeonovi*, cited above, and *Truten v. Ukraine*, no. 18041/08, § 66, 23 June 2016). That right also applied to the reconstruction (see *Türk v. Turkey*, no. 22744/07, § 47, 5 September 2017).

50. The police officers stated that the applicant had been questioned at the police station and that the use of the information obtained in those informal interviews had allowed the police to recover the stolen goods (see paragraph 24 above).

51. All these events occurred before the applicant was informed, the following day, of his right to legal assistance (see paragraph 6 above).

52. In this context the Court reiterates its established case-law to the effect that any conversation between a detained criminal suspect and the police must be treated as formal contact and cannot be characterised as an informal interview or questioning (see *Ayetullah Ay v. Turkey*, nos. 29084/07 and 1191/08, § 137, 27 October 2020, with further references).

53. After signing the waiver, the applicant also made incriminating statements in the course of the reconstruction of the events (compare *Türk*, cited above, § 47).

(ii) Validity of the waiver

54. The applicant alleged before the domestic courts that he had been ill-treated, which would cast doubt on the validity of the waiver and admissibility of any confession in doubt (see *Turbylev v. Russia*, no. 4722/09, § 96, 6 October 2015). Those allegations have not been supported by evidence, but that circumstance in itself is not sufficient to conclude that the waiver was valid (see *Bozkaya v. Turkey*, no. 46661/09, § 45, 5 September 2017, and *Akdağ v. Turkey*, no. 75460/10, § 55, 17 September 2019).

55. The applicant challenged the validity of the waiver at the domestic level on two other grounds: firstly, on the ground that no lawyer had been present when the waiver had been signed; and secondly, because he had been suffering from the mental and physical effects of drug addiction and withdrawal syndrome when he signed the waiver.

56. The absence of a lawyer when the waiver was signed does not of itself render the waiver invalid for the purposes of Article 6 of the Convention (see *Fariz Ahmadov v. Azerbaijan*, no. 40321/07, §§ 50-55, 14 January 2021). The Court also observes that the Supreme Court interpreted the relevant provisions of the domestic law to mean that the presence of a lawyer was not required for a valid waiver where no lawyer had yet been appointed for the defendant (see paragraph 21 above).

57. As to the applicant's drug addiction, he was suffering from it at the time of his *de facto* arrest on 14 April 2014 (see paragraph 24 above). The applicant signed the waiver of his right to a lawyer two days later, on 16 April 2014.

58. Since there is no indication that the applicant had access to drugs or substitution therapy while he was under the control of the police, his allegation that he was already suffering from withdrawal symptoms at the time that he signed the waiver may be considered credible.

59. The Court has already held that confession statements made while in unrecorded detention, combined with evidence of unexplained injuries, may create an appearance that such statements were not voluntary (see, for example, *Belousov v. Ukraine*, no. 4494/07, § 63, 7 November 2013, and *Zyakun v. Ukraine*, no. 34006/06, 25 February 2016).

60. While in the present case there is no evidence of injuries and the applicant's allegations of physical ill-treatment lack substantiation, somewhat similar considerations nevertheless apply in that the circumstances of the applicant's unrecorded detention, combined with credible allegations that he was suffering from withdrawal symptoms at the time he waived his right to a lawyer, render the voluntary nature of the waiver open to doubt.

61. In such circumstances, it was in the first place for the domestic courts to establish in a convincing manner whether or not the waiver of legal assistance had been voluntary and valid, in spite of those problems (see *Ogorodnik v. Ukraine*, no. 29644/10, § 108, 5 February 2015, and *Türk*, cited above, § 53).

62. The courts did not dispute that the applicant's diagnosis of addiction-related psychological and behavioural disorders could in principle be a barrier to a valid waiver of his right to a lawyer under domestic law (see paragraphs 19 and 27 above). The domestic case-law explicitly recognised the applicant's diagnosis as potentially bringing him into the category of individuals who could not, by law, validly waive that right, on account of his mental disorder (see paragraphs 10 and 30 above).

63. However, they found that the authorities had only become aware of the applicant's addiction in May 2014, after all the investigation activities with his participation had been completed. In making that assessment, the courts did not comment on the information (contained in the discontinuance decision on which the courts themselves relied – see paragraphs 15, 17 and 22 above) to the effect that, starting no later than 17 April 2014 – that is, the day after the applicant had signed the waiver and had confessed – ambulances were repeatedly called to the detention centre in connection with his withdrawal symptoms. Nor did the courts explain how the applicant could have been registered, without the authorities' knowledge, with the addiction treatment centre on 18 April 2014, that is, while he was being held in detention (see paragraph 10 above).

64. The flawed nature of the domestic courts' assessment was confirmed when it came to light that the police had known about the applicant's addiction from the very outset of the investigation, in the period from 14 to 16 April 2014 when, according to strong indications in the police officers' own statements, as noted in paragraphs 24, 46 and 47 above, the applicant was already under their control. The fact that this information had only come to light after the completion of the criminal proceedings against the applicant is attributable to the authorities and to the delay caused by the repeated adoption of premature discontinuance decisions (see paragraphs 23 to 25 above).

65. Thus, although the domestic law in principle established a safeguard for such situations, it proved ineffective on account of the police officers' conduct. This can be compared to the practice under the 1960 Code of Criminal Procedure – identified by the Court as problematic in judgments such as *Balitskiy v. Ukraine* (no. 12793/03, §§ 50-54, 3 November 2011, with further references) – of initially classifying an offence as a less serious one which did not require mandatory legal representation and, in this way, effectively denying the defendants appropriate legal assistance.

66. In *Balitskiy* the defendant, after signing a waiver, was questioned about a murder without a lawyer being present. The charges were subsequently upgraded to murder for profit, an offence punishable by life imprisonment in respect of which any waiver of the right to a lawyer was excluded by domestic law. That was despite the fact that the police had indications from the outset that the crime had been motivated by profit. The Court found that this was an example of a practice, identified in previous cases, of erroneously classifying the offence with the ulterior purpose of effectively denying legal assistance to defendants (ibid., §§ 40 and 52).

67. Likewise, in the applicant's case, domestic case-law excluded acceptance of waivers from patients with the very diagnosis that the applicant himself was later found to have. However, the police had already known that the applicant was suffering from drug addiction from 14 April 2014, when he was, according to strong indications in the police officers' own statements, under their control. This may have indicated that the applicant had an illness which led, under domestic case-law, to the impossibility of accepting his waiver. The police, nevertheless, withheld that information from the relevant authorities.

68. It is also relevant that, before signing the waiver of his right to a lawyer, the applicant was not informed of his right to remain silent. While that right and the right to legal assistance are distinct and a waiver of one does not entail a waiver of the other, the rights are nevertheless complementary, since persons in police custody must *a fortiori* be granted the assistance of a lawyer when they have not previously been informed of their right to remain silent (see *Navone and Others v. Monaco*, nos. 62880/11 and 2 others, § 74, 24 October 2013). Therefore, while the applicant did not raise a separate

complaint in respect of his right to remain silent, the absence of notification of that right is a relevant factor which further undermines the validity of his waiver of the right to legal assistance.

69. In sum, the applicant signed the waiver when, according to the indications in the police officers' statements, he was in unrecorded detention and when, according to his credible account, he was suffering from drug withdrawal symptoms. This made the voluntary nature of the waiver signed by the applicant open to doubt. In particular, in such circumstances it was for the domestic courts to scrutinise the validity of the waiver, which they failed to do adequately.

70. Taking into account all these elements, the Court considers that the Government have failed to demonstrate that the applicant validly waived his right to a lawyer (compare *Akdağ*, cited above, § 61, and *Lalik v. Poland*, no. 47834/19, § 62, 11 May 2023).

(iii) Whether compelling reasons existed for restricting access to a lawyer

71. Given that there was no effective waiver of the right to a lawyer, the question arises whether the absence of a lawyer was justified by a compelling reason. The Court perceives no such reason. Accordingly, the Court must apply very strict scrutiny in assessing whether the absence of a lawyer undermined the fairness of the proceedings, with the burden being on the Government to demonstrate convincingly that this was not the case (see *Beuze*, cited above, § 145).

(iv) Overall fairness of the proceedings

72. The Court will now examine, in the light of the factors set out in *Ibrahim and Others* (cited above, § 274) and *Beuze* (cited above, § 150), whether the restriction of access to legal assistance affected the overall fairness of the criminal proceedings.

73. Turning to those criteria, the Court will first list those factors which tend to argue in favour of considering the proceedings fair: (i) the evidence was assessed by professional judges; (ii) there is no indication that any domestic provisions were breached in the collection of the relevant evidence; (iii) there were no factors that would cast doubt on the reliability or accuracy of the applicant's statements; and (iv) there was considerable public interest in the prosecution of the offence imputed to the applicant.

74. However, other factors tend to militate in favour of a finding that the fairness of the proceedings was irretrievably prejudiced.

75. The applicant was to a certain extent vulnerable on account of the state of his health (compare, in respect of alcoholics, *Płonka v. Poland*, no. 20310/02, § 38, 31 March 2009, and *Lalik*, cited above, § 67; in respect of drug addicts in the context of matters related to the care of children, *Y.I. v. Russia*, no. 68868/14, § 87, 25 February 2020, and *V.Y.R. and A.V.R.*

v. Bulgaria, no. 48321/20, § 91, 13 December 2022; in respect of mentally ill detainees, *Rooman v. Belgium* [GC], no. 18052/11, § 145, 31 January 2019; and contrast, for example, *Hasáliková v. Slovakia*, no. 39654/15, §§ 66-78, 24 June 2021).

76. The statements at issue were directly incriminating. Having been made at the beginning of the investigation, they framed the way the authorities approached the investigation and therefore formed a very significant part of the case against the applicant.

77. While the statements made by the applicant on 15 April 2014 before being informed of his right to legal assistance were never introduced into evidence as such, they allowed the authorities to obtain further evidence against him by locating and recovering the stolen goods. Having made those statements, the applicant might have found it prejudicial to change them after he was informed of the right to legal assistance and when the reconstruction was conducted (compare *Sitnevskiy and Chaykovskiy v. Ukraine*, nos. 48016/06 and 7817/07, § 83, 10 November 2016).

78. The statements subsequently made by the applicant in the course of the reconstruction had a central role in the proceedings. No other evidence directly showed that he had committed the offence of theft aggravated by burglary.

79. Almost all of the other evidence against the applicant was derived from statements he had made in the course of the reconstruction: the evidence of most of the witnesses consisted in simply confirming that he had indeed confessed. The only exception was the evidence of Mr K., the person who had purchased the stolen goods from the applicant. However, the material in the case file indicates that the police were able to implicate the applicant through statements he had given before the right to a lawyer had been explained to him (see paragraph 24 above). It is not the Court's task in the present case to decide whether using evidence obtained owing to those statements was in breach of the requirements of Article 6 of the Convention. The relevant point in the present analysis is nevertheless that the failure of the domestic courts to question the validity of the waiver made by the applicant had very serious consequences for the overall fairness of the trial.

80. Although, as noted above, the applicant did have an opportunity to challenge the authenticity of the evidence and oppose its use, the domestic courts' assessment of the issue of his mental state during the reconstruction was superficial. The domestic courts did not sufficiently address the applicant's complaints concerning the breach of his right to a lawyer. While an exclusionary rule existed in domestic law (see paragraph 29 above), it was not applied.

81. For this reason, after applying strict scrutiny, the Court is not convinced that the criminal proceedings, when considered as a whole, remedied the procedural defects which had occurred in the first few days of the investigation. It concludes that the Government have failed to

demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on the applicant's access to legal advice (compare *Beuze*, cited above, § 193).

82. There has accordingly been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

84. The applicant claimed 25,000 euros (EUR) in respect of non-pecuniary damage and EUR 4,200 in respect of costs and expenses, the latter to be transferred directly to his representative's bank account.

85. The Government contested that claim.

86. The Court, making its assessment on an equitable basis, awards the applicant EUR 3,600 in respect of non-pecuniary damage.

87. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. A representative's fees are actually incurred if the applicant has paid them or is liable to pay them (see *Luedicke, Belkacem and Koç v. Germany* (Article 50), 10 March 1980, § 15, Series A no. 36, and *Airey v. Ireland* (Article 50), 6 February 1981, § 13, Series A no. 41). In the present case, the applicant did not provide any contract with his representative or other evidence that he had paid or was under an obligation to pay the fees charged by his representative. Accordingly, the Court makes no award under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention;

3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with

Article 44 § 2 of the Convention, EUR 3,600 (three thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 February 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Georges Ravarani President