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

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Lack of access to a lawyer of the applicant's own choosing and inability to consult legal-aid lawyer during questioning by the police while in incommunicado detention

In today's **Chamber** judgment[1] in the case of Atristain Gorosabel v. Spain (application no. 15508/15) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 §§ 1 and (right to a fair trial) and 3 (c) (right to legal assistance of own choosing) of the European Convention on Human Rights.

The case concerned the applicant's pre-trial detention incommunicado, and the fact that he was questioned by the police without a lawyer present, making self-incriminating statements. Those statements had formed part of the reasons for his conviction for terrorism offences.

The Court found in particular that preventing the applicant from having access to counsel without giving individualised reasons had undermined the fairness of the subsequent criminal proceedings in so far as the applicant's incriminating initial statement was admitted in evidence. The absence of remedial measures during the trial had irretrievably prejudiced his defence rights.

Principal facts

The applicant, Javier Atristain Gorosabel, is a Spanish national who was born in 1970. He is currently serving a 17-year prison sentence for membership of a terrorist group and possession of explosives.

Mr Atristain Gorosabel was arrested under a European arrest warrant in France and extradited to Spain in 2010 on suspicion of offences related to the terrorist group ETA. He denied membership of that organisation. Later that year the trial was discontinued.

A second investigation was also taking place, specifically focused on the ETA cell of which Mr Atristain Gorosabel was alleged to be part. On 29 September 2010 his detention incommunicado was ordered by the *Audiencia Nacional*, to protect the integrity of the investigation. He was assigned a legal-aid lawyer, but he could not talk to him and was not allowed to meet with any legal counsel. In the light of evidence seized during a search of his home, including explosives and information on computer disks, the detention was extended. He was interviewed by the police, stating that he had "cooperated" with ETA in such areas as attempted kidnapping, providing information on police officers and so forth.

Mr Atristain Gorosabel later made a statement in which he revealed where a cache of firearms, bullets, various USB keys containing several training handbooks on terrorism, and some fake licence plates could be found in his residence. The police found that material.

During his detention Mr Atristain Gorosabel was examined daily by a doctor. There appeared to have been no ill-treatment, although he did claim to the doctor that the police had threatened to arrest his girlfriend.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

On 4 October 2010 he was brought before the investigating judge. His detention incommunicado was lifted. On 16 April 2013 he was convicted of being a member of a terrorist group and of possession of explosives and sentenced by the *Audiencia Nacional*. The court referred to various pieces of material and witness evidence, including that allegedly hidden by him in his residence, and his own self-incriminating statements. The court stated that no ill-treatment had taken place and that he had given his statements freely.

That judgment, and the finding of no ill-treatment, was upheld by the Supreme Court. An *amparo* appeal by Mr Atristain Gorosabel was declared inadmissible in 2014.

Complaints, procedure and composition of the Court

Relying on Article 6 §§ 1 (right to a fair trial) and 3 (c) (right to legal assistance of own choosing) of the Convention, the applicant complained that while being held in detention incommunicado he had been denied access to a lawyer of his own choosing during police questioning.

The application was lodged with the European Court of Human Rights on 24 March 2015.

Judgment was given by a Chamber of seven judges, composed as follows:

Georges **Ravarani** (Luxembourg), *President*,
Georgios A. **Serghides** (Cyprus),
Dmitry **Dedov** (Russia),
María **Elósegui** (Spain),
Anja **Seibert-Fohr** (Germany),
Andreas **Zünd** (Switzerland),
Frédéric **Krenc** (Belgium),

and also Olga **Chernishova**, *Deputy Section Registrar.*

Decision of the Court

The Court reiterated that Article 6 applies not only to the trial before a court, but also to pre-trial proceedings. A “criminal charge” existed from official notification by the authorities of an allegation that a criminal offence had been committed by the individual, or from the point at which the situation of the individual had been substantially affected by actions taken by the authorities. In general, access to a lawyer should be provided as soon as there is such “a criminal charge”. It reiterated that detention incommunicado should only be ordered by an investigating judge in exceptional circumstances and only for purposes provided by law.

Although not decisive, the Court did find that there had been no individual assessment and justification by the authorities of the need to restrict the applicant’s access to a lawyer of his own choosing, and even to counsel at all at some point. The detention incommunicado order had been in accordance with the relevant law, but had been of too general a nature.

The Court observed that the statements made by the applicant at the police station formed a significant basis for the applicant’s conviction, and that the domestic court did not address the complaints that the legal-aid lawyer had not been able to contact the applicant at this time. In terms of the overall fairness of the proceedings, preventing the applicant’s legal-aid lawyer from having access to him at the relevant time and from being assisted by a lawyer of his own choosing without giving individualised reasons had undermined the fairness of the subsequent criminal proceedings in so far as the applicant’s incriminating initial statement was admitted in evidence. The absence of remedial measures during the trial had irretrievably prejudiced his defence rights.

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

The Court lastly noted that the Code of Criminal Procedure had been amended by Organic Law 13/2015 of 5 October 2015 and currently provided an individual assessment of the particular circumstances of individuals held incommunicado. That amendment had not however been applicable at the time in question.

Just satisfaction (Article 41)

The Court held that Spain was to pay the applicant 12,000 euros (EUR) in respect of non-pecuniary damage and EUR 8,000 in respect of costs and expenses.

The judgment is available only in English.

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