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

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Restrictions on access to a lawyer in the initial stages of criminal proceedings in breach of the applicant's right to a fair trial

In today's **Chamber** judgment[1] in the case of Tonkov v. Belgium (application no. 41115/14) the European Court of Human Rights held, unanimously, that there had been:

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

In this case, Mr Tonkov complained that he had been deprived of his right of access to a lawyer in the initial stages of the judicial investigation against him, and in particular during his police custody and during the hearings, interviews and other investigative measures. He was sentenced to life imprisonment in the criminal proceedings.

Emphasising the strictness of the scrutiny which it had to conduct in the absence of overriding reasons to justify restricting the right of access to a lawyer in criminal cases, and in line with the Grand Chamber judgment in *Beuze v. Belgium*[2], the Court held that the criminal proceedings in the case had been unfair as a whole. It had regard to the fact that the Assize Court had failed to consider Mr Tonkov's submissions concerning the impact of the absence of a lawyer on the quality of the evidence submitted by the co-accused, on which the applicant's conviction had been based to a decisive degree.

The Court also considered that the finding of a violation was sufficient just satisfaction for the non-pecuniary damage sustained by Mr Tonkov.

Principal facts

The applicant, Mr Tonislav Tonkov, is a Bulgarian national who was born in 1983. He is currently detained in Hasselt Prison (Belgium), where he is serving a life prison sentence.

Mr Tonkov was interviewed twice in 2009 by the Belgian police as a "source" in the framework of an investigation into the murder of a certain B.V. during the evening of 14 September 2009. He was once again heard on 20 January 2010 as a "suspect". He returned to Bulgaria in the meantime, where he was arrested and extradited to Belgium.

On his arrival in Belgium on 18 August 2010, Mr Tonkov was questioned by the police as a suspect in the murder of B.V., and then heard by the investigating judge. The arrest warrant was served on him after that examination. The reports drawn up the same day specify that Mr Tonkov voiced a wish to be assisted by a lawyer to help him understand Belgian law and recount his version of events. On that occasion, it transpired that Mr Tonkov knew N.I., who had also been arrested and questioned and whom the investigators presented as being under suspicion of having carried out the murder.

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.

2 *Beuze v. Belgium [GC]*, no. 71409/10, 9 November 2018.

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In September and October 2010 Mr Tonkov was once again examined on several occasions. Furthermore, a polygraph test was carried out on him on 25 November 2010, followed on 8 December 2010 by a police hearing, which comprised telephone contact between the investigators and Mr Tonkov's lawyer, who requested that his client be informed of his right to remain silent. Mr Tonkov then refused to answer any of the questions asked by the investigators. A further hearing was held on 21 December 2010, the report on which stated that Mr Tonkov had had advance consultations with his lawyer. Several examinations were carried out in 2011, followed by a recapitulatory examination. In accordance with domestic law in force at the time, Mr Tonkov was assisted by a lawyer neither during the examinations and questioning, apart from the recapitulatory examination, nor during the polygraph test.

Subsequently, Mr Tonkov was committed to stand trial before the Eastern Flanders Assize Court, together with one co-accused. On 21 May 2013, at the opening of the trial, Mr Tonkov argued, amongst other things, that there had been an irremediable infringement of the rights of the defence and the right to a fair trial within the meaning of Article 6 of the Convention, on the grounds that he had not been assisted by a lawyer in the examinations and questioning conducted during the judicial investigation, and that incriminating statements had been obtained from the co-accused and various witnesses, who had also not been given access to legal assistance. The Assize Court dismissed that objection.

Finally, on 30 May 2013, the jury found Mr Tonkov and the co-accused guilty of intentional premeditated murder. As regards Mr Tonkov, the jury's arguments were based, amongst other things, on the co-accused's detailed and consistent statements to the effect that he had stabbed B.V. to death on the express instructions of Mr Tonkov.

On 26 November 2013 the Court of Cassation dismissed Mr Tonkov's appeal on points of law.

Complaints, procedure and composition of the Court

Relying on Article 6 §§ 1 and 3 (c) of the Convention (right to a fair trial / right to legal assistance), the applicant complained that he had been deprived of his right of access to a lawyer during his police custody, without adequate information on his right to remain silent and not to incriminate himself, as well as the absence of any lawyer during the hearings, interviews and other investigative measures. He also complained that his conviction was partly based on statements made by a co-accused without the assistance of a lawyer.

The application was lodged with the European Court of Human Rights on 26 May 2014.

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

Georges **Ravarani** (Luxembourg), *President*,
María **Elósegui** (Spain),
Darian **Pavli** (Albania),
Peeter **Roosma** (Estonia),
Andreas **Zünd** (Switzerland),
Frédéric **Krenc** (Belgium),
Mikhail **Lobov** (Russia),

and also Milan **Blaško**, *Section Registrar.*

Decision of the Court

Article 6 §§ 1 and 3 (c) of the Convention (right to a fair trial / right to legal assistance)

The Court noted that during the first two examinations the applicant had been heard as a "source", having been formally questioned as a "suspect" only in the framework of the third examination. The applicant had not had the benefit of legal assistance at any of the three examinations, even though his statements had proved decisive for the ongoing investigation. In fact, in the Court's view, the applicant had acquired, right from the beginning of the investigation, the status of an accused person, thus attracting the guarantees of Article 6 of the Convention. In all, between his surrender to the Belgian authorities and the committal order issued by the Indictments Division of Ghent Court of Appeal on 26 April 2012, the applicant had been heard on about ten occasions by the police and the investigating judge concerning the offences of which he had been convicted, without any help from his lawyer. Nor had the latter been present during the polygraph testing.

Thus the applicant, who had been eligible for Article 6 protection right from the initial stages of the investigation, had not had access to a lawyer even when he had become an "accused person", and the right to such access had subsequently been restricted throughout the pre-trial stage.

In that connection the Court observed that the restrictions in question had not been based on compelling reasons. It reiterated that it accordingly had to carefully consider whether the criminal proceedings against the applicant, taken as a whole, had made good the omissions at the preliminary stage. It noted the following aspects.

As regards the legal framework governing the pre-trial proceedings, the Court pointed out that since Belgian law as applied at the time had been incompatible with the requirements of Article 6 § 3 of the Convention[3], the overall fairness of proceedings could not have been guaranteed solely by legal provisions laying down a number of abstract safeguards. Furthermore, the application of those provisions would have had to have a compensatory effect rendering the whole of the proceedings fair. The Court noted in that regard that freedom to communicate with counsel outside of examinations and questioning had been insufficient to remedy the deficiencies in the initial stages of the investigation. It noted that the Government argued that the applicant had been able to avail himself of other guarantees; however, while such guarantees had allowed him occasionally, at the investigation stage, to be assisted by his lawyer, the Court held that this had not had an adequate compensatory effect. Consequently, the implementation of other guarantees – which the applicant had enjoyed under the legal provisions applicable at the time – had been insufficient to ensure the fairness of the proceedings.

As regards the nature of the evidence presented by the applicant in the absence of counsel, the Court noted that while the statements made by the applicant during the examinations and interviews without legal assistance had not, strictly speaking, comprised any admission of guilt, the statements had been detailed, and had decisively influenced the further conduct of proceedings. Moreover, even though the law in force at the time had required the applicant to consent to the polygraph testing, he had given replies which had been deemed mendacious and had been held in evidence against him.

When the investigation had been closed and the applicant committed for trial before the Assize Court, the Indictments Division of the Brussels Court of Appeal had not considered, possibly of its own motion, the procedural irregularities in issue in the case. Consequently, all the reports containing the impugned statements made by the applicant without assistance by a lawyer had remained in the case file.

[3] *Beuze v. Belgium [GC]*, no. 71409/10, 9 November 2018.

Subsequently, the applicant having submitted a request to the Assize Court for the removal of the reports of the examinations and interviews conducted without legal assistance and for the proceedings in question to be declared inadmissible, the Assize Court rejected that request and admitted all the reports, considering that the applicant would still have a fair trial by jury.

The Assize Court focused on the facts that the interviews and examinations had been neither coercive nor oppressive and that the applicant had made no self-incriminating statements. However, the Assize Court's affirmation that the applicant had not incriminated himself was contradicted by the bill of indictment, which showed that the statements made by the applicant right from the initial stages of the investigation and the results of the polygraph test had provided the investigators with a framework for the prosecution. Therefore, the Belgian courts had not adequately analysed the impact of the absence of a lawyer on the admissibility of the evidence given by the applicant.

As regards the admissibility of the evidence given by the co-accused in the absence of a lawyer, the Court noted that the applicant had not merely complained that the statements incriminating him had been made by the co-accused in the absence of a lawyer and without prior consultation. He specifically criticised the conditions under which the hearings of the co-accused had been conducted, submitting that the reliability of the statements made in evidence against him might have been compromised by the fact that the co-accused had possibly yielded to pressure exerted by the investigators, thinking that it might be in his interests to testify against the applicant as he did. In its interlocutory judgment, however, the Assize Court had not examined the applicant's arguments concerning the impact of the absence of a lawyer on the quality of the evidence given by the co-accused, even though the applicant's conviction was based decisively on that evidence. The Court pointed out that it was for the domestic courts to ensure that that evidence had not originated in the exertion of pressure or in acts contrary to Article 3 of the Convention. The Court noted in that connection that subsequently to the present case, the Court of Cassation had considered that an accused could rely on ignorance of the right to legal assistance in connection with incriminating statements made by a co-accused, where the reliability of those statements had been undermined and using them would violate the accused's defence rights, inasmuch as such statements had been obtained by means of pressure, coercion or torture.

As regards the use of evidence given by the applicant in the absence of a lawyer, the Court observed first of all that while the bill of indictment, which had been read out at the beginning of the trial before the Assize Court, had been based on several factors, including witness statements, the investigators' findings and recordings of telephone calls, it had also drawn on statements made by the applicant in the absence of a lawyer.

It further noted that in declaring the applicant guilty of murder as having masterminded it, the jury had referred to factors which could only have been gleaned from comparison of all the statements gathered from the applicant, the co-accused and the persons heard as "witnesses". Although those statements from the co-accused incriminating the applicant had been decisive in forming the verdict, the Court considered that that did not suffice to obscure the fact that the statements made by the applicant himself without legal assistance had been a major influence on the jury' decision.

In conclusion, emphasising the strictness of the scrutiny which it had to conduct in the absence of overriding reasons to justify restricting the right of access to a lawyer in criminal cases, and in line with the Grand Chamber judgment in *Beuze v. Belgium*[4], the Court, having regard to the combination of the various aforementioned factors, held that the criminal proceedings against the applicant had been unfair as a whole. There had therefore been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

[4] *Beuze v. Belgium [GC]*, no. 71409/10, 9 November 2018.

Just satisfaction (Article 41)

The Court held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by Mr Tonkov. It further held that Belgium should pay him 2,400 euros (EUR) in respect of costs and expenses.

The judgment is available only in French.

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