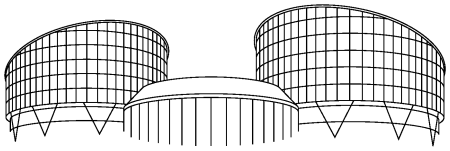

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF BEUZE v. BELGIUM

(Application no. 71409/10)

JUDGMENT

STRASBOURG

9 November 2018

This judgment is final but it may be subject to editorial revision.

In the case of Beuze v. Belgium,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President*,
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Ganna Yudkivska,
Helena Jäderblom,
Robert Spano,
Nebojša Vučinić,
Paul Lemmens,
Krzysztof Wojtyczek,
Valeriu Griţco,
Ksenija Turković,
Egidijus Kūris,
Síofra O'Leary,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Lətif Hüseynov,
Jovan Ilievski, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 15 December 2017 and on 27 June 2018,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 71409/10) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Belgian national, Mr Philippe Beuze ("the applicant"), on 25 November 2010.

2. The applicant, who had been granted legal aid, was represented by Ms D. Paci, a lawyer practising in Brussels. The Belgian Government ("the Government") were represented by their Agent, Ms I. Niedlispacher, of the Federal Justice Department.

3. Relying on Article 6 §§ 1 and 3 (c) of the Convention, the applicant alleged, first, that he had been deprived of his right of access to a lawyer while in police custody, without being given sufficient information about his right to remain silent and his right not to be compelled to incriminate himself, and secondly, that he had not been assisted by a lawyer during the

subsequent police interviews, examinations by an investigating judge and other investigative acts in the course of the judicial investigation.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 25 August 2014 a Chamber of that Section gave notice of the above-mentioned complaints to the Government. The remainder of the application was declared inadmissible pursuant to Rule 54 § 3. On 13 June 2017 the Chamber, composed of the following judges: Işıl Karakaş, Nebojša Vučinić, Paul Lemmens, Valeriu Griţco, Jon Fridrik Kjølbro, Stéphanie Mourou-Vikström and Georges Ravarani, Judges, and also of Hasan Bakırcı, Deputy Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

6. The applicant and the Government each filed further written observations on the merits of the case. The parties replied at the hearing to each other's observations (Rule 44 § 5). In addition, third-party comments were received from Fair Trials International, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 20 December 2017.

There appeared before the Court:

(a) *for the Government*
Ms I. Niedlispacher, *Agent*;

(b) *for the applicant*
Ms D. Paci, *Counsel*.

The Court heard addresses by Ms Paci and Ms Niedlispacher and their replies to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1974. He is currently serving a life sentence in Marche-en-Famenne prison (Belgium).

A. The applicant's arrest in France

9. The applicant was arrested on 17 December 2007 by the French gendarmerie in a village situated in the French *département* of Nord and taken into police custody under a European arrest warrant issued against him on 14 November 2007 by an investigating judge of the Charleroi (Belgium) Court of First Instance, on the basis of a request of 6 November 2007 from the Crown Prosecutor attached to that court.

10. The warrant stated that the applicant was wanted for the premeditated murder of his former girlfriend, M.B., committed on 5 November 2007. The warrant stated that a witness who was a neighbour of M.B. had formally identified the applicant. It also referred to a risk of reoffending in view of his history of violence.

11. The interview record drawn up by the French gendarmes at the time of the applicant's arrest on 17 December 2007 indicated that he had waived his right under Article 63-4 of the French Code of Criminal Procedure to consult with a lawyer of his choosing or, failing that, officially assigned counsel.

12. In a judgment of 21 December 2007, the Investigation Division of the Court of Appeal of Douai (France), after acknowledging that the applicant had not renounced his entitlement to the rule of speciality[1], ordered his surrender to the Belgian judicial authorities for the execution of the above-mentioned arrest warrant. The applicant was assisted before the Investigation Division by a lawyer, Ms A., of the Douai Bar.

B. Surrender to Belgian authorities and pre-trial investigation stage

13. Having been surrendered to the Belgian authorities at 10.40 a.m. on 31 December 2007, the applicant was interviewed by the criminal investigation police from 11.50 a.m. to 3.55 p.m.

14. As shown by the police interview record, in accordance with Article 47*bis* of the Code of Criminal Procedure (*code d'instruction criminelle*) (see paragraphs 62-65 below), the applicant was notified that he was entitled to request the verbatim transcription of all the questions put to him and his answers, to request any investigative act or the conducting of any interview, and that his statements could be used in evidence.

15. During that first interview, the applicant explained that he had met M.B. in early 2007 through C.L., his then girlfriend. He admitted that he had been present on 5 November 2007 at the scene of the crime but denied having committed the murder. He claimed that the victim, M.B., had been

1. The speciality rule entails that a person whose extradition or surrender is requested may only be prosecuted, tried and detained in respect of the offence for which he or she is extradited or surrendered or for acts committed thereafter.

struck with a hammer by her thirteen-year-old son. He explained that he had intervened and grabbed the hammer from the child, but the latter had continued to hit his mother. The applicant stated that he had left with an axe – which the police had later found near the scene – because he was afraid of being accused on account of his criminal record. He explained that he had fled the scene and had been hiding in his car when the emergency services arrived. He stated that he was unaware that the victim was dead.

16. During the interview the applicant was also questioned about a statement made to the police by M.B. on 25 October 2007 according to which the applicant had tried to kill her by running her over. The applicant explained that he had accidentally skidded while driving his car and had probably hit M.B., but denied that his intention had been to kill her as she had alleged.

17. The investigators informed the applicant that they had intercepted a number of text messages that had been sent to relatives of M.B., following her death, from a mobile phone belonging to him. Those messages included one offering condolences for the death of M.B. The applicant denied having sent them himself.

18. The applicant's detailed statements were taken down by the police in an eight-page record. The record indicated at the very end that following the interview the applicant had read over his statements and had not wished to correct them or add to them.

19. All subsequent records of his statements contained the same indications and were signed by the applicant. Except for the first police interview record, of which a copy was given to him after his examination by the investigating judge later that day, the applicant received his copies immediately after being questioned.

20. Following his interview by the criminal investigation police, the applicant was examined by the investigating judge at the Charleroi Court of First Instance at 4.45 p.m. that day. He confirmed his statements to the investigating judge.

21. On being asked by the investigating judge at the beginning of the examination whether he had chosen a lawyer, the applicant answered in the negative. At the end of the interview record it was stated:

> "I (the investigating judge) have notified him that I have informed the deputy to the Chair of the Bar Council, given that, at the current stage of the proceedings, he has not appointed counsel."

22. Following the investigating judge's examination, which finished at 5.42 p.m., the judge observed that a psychiatrist needed to be called immediately. He formally charged the applicant with the premeditated murder of M.B. An arrest warrant was issued to the applicant on the same day and he was remanded in custody.

23. It is not in dispute that the applicant was not allowed to communicate with a lawyer between the time of his surrender to the Belgian

authorities and the end of his period in police custody on 31 December 2007. He was only allowed to consult with a lawyer, in accordance with the applicable law, once the decision had been taken by the investigating judge to remand him in custody (see paragraphs 21 above and 55-56 below). Moreover, even though he was subsequently assisted by a lawyer during the judicial pre-trial investigation, that lawyer did not attend the police interviews, examinations by the investigating judge or other investigative acts which took place throughout that phase of the proceedings (see paragraph 59 below).

24. On 11 January 2008 the applicant was again interviewed by the criminal investigation police. He confirmed his previous statements about M.B.'s death and provided further particulars about what had happened. The applicant stated that he had indeed seen a person passing by in the street who had witnessed the blows inflicted by the victim's son, and that this witness had been accompanied by a woman, and he admitted to having threatened the witness with a fake gun that had subsequently been found in his car after his arrest. When the officers pointed out the inconsistencies in his account, the applicant acknowledged that he had been carrying a real gun at the time but continued to deny that he was the murderer.

25. There is no indication in the interview record of 11 January 2008, or elsewhere in the file, that the applicant had actually been assigned a lawyer following the notification to the Bar on 31 December 2007, or that he had been in contact with a lawyer prior to that interview.

26. In parallel to the investigation into the murder of M.B., the applicant was interviewed by the police on four occasions between 6 and 7 March 2008 for "criminal association" in respect of car thefts.

27. When examined again by the investigating judge on 17 March 2008, the judge asked the applicant if he had chosen a lawyer. He replied in the affirmative and mentioned that he had been in contact with a lawyer at the Brussels Bar. The applicant was informed that the psychiatric assessment had been received and that it had identified an antisocial personality disorder. When questioned about the facts related to M.B.'s murder, the applicant confessed to having stolen a document from the case file, although the authorities had been unaware of this. Subsequently, having repeated that the perpetrator of M.B.'s murder was her son, the applicant changed his account of the events. He mentioned the presence of C.L. at the scene of the crime at the time when M.B. was attacked. He explained that he had witnessed an argument between the two women and that he had had to wrest a hammer from C.L.'s hands.

28. On 25 March 2008 the criminal investigation police interviewed the applicant for the purposes of a morality and personality assessment. A second police interview was held on the same day concerning bodily harm inflicted on C.L. on 17 September 2007. The applicant acknowledged that he had invited C.L., then pregnant, to get into his car. He stated that he had

punched C.L. in the face to "protect" her from a possible encounter with M.B. that had been planned with the aim of stealing the latter's mobile phone and bank card. He explained that M.B., with the help of an accomplice, had then pushed C.L. into the canal.

29. A neuropsychological assessment of the applicant was carried out on 28 April 2008 and sent to the investigating judge. The expert psychologist concluded that the applicant had limited verbal skills but that his reasoning was not abnormal. The expert also highlighted his significant lack of empathy and sociability.

30. On 6 June 2008 a reconstruction of the events of 5 November 2007 was held at the scene of the crime. The two eyewitnesses took part in the reconstruction (see paragraphs 10 and 24 above). The applicant's lawyer was absent, as the law did not provide for the attendance of a lawyer at any investigative act (see paragraph 59 below). In the context of the reconstruction, the applicant mentioned when interviewed that another person, A.N., had also been at the scene on the day in question. He changed his version of events again and stated that he had falsely accused the victim's son. He claimed that the fatal blows had in fact been struck by C.L. and that he had fired a gun to intimidate C.L.

31. During the interview conducted on the same day by the criminal investigation police, the applicant challenged the account given by the two eyewitnesses at the reconstruction and confirmed his new version of the facts. There is no evidence in the file that the applicant sought to communicate with his lawyer before or after the reconstruction or the interview of the same day.

32. An arrest warrant was issued on 8 August 2008 extending the investigating judge's remit, on the basis of the submissions of the Crown Prosecutor dated 23 May 2008 and 7 July 2008, to three additional offences: the attempted murder of M.B. on 25 October 2007, and two offences committed on 17 September 2007 against C.L., namely robbery with violence or threats, and fraud.

33. The applicant was examined on that subject by the investigating judge on 18 August 2008. The information provided for by Article 47*bis* of the Code of Criminal Procedure (see paragraph 65 below) was repeated to him; he was also notified of his right to refuse the extension of the charges and to consult with his lawyer on this matter beforehand. The record of the examination shows that he agreed to the extension, thereby renouncing his entitlement to the speciality rule that had been granted by the French authorities (see paragraph 12 above). He also expressed his wish that his lawyer should confirm his position.

34. On 5 December 2008 the applicant was heard by the Crown Prosecutor as to whether he agreed to the extension of the charges. He replied that he wished to consult with his lawyer on this matter.

35. Acknowledging that the applicant had not ultimately given his consent, in a judgment of 13 January 2009 the Investigation Division of the Douai Court of Appeal agreed to extend his surrender for the purposes of a criminal prosecution to the three above-mentioned additional charges.

36. At the close of the judicial investigation stage, the applicant was committed to stand trial before the Assize Court of Hainaut Province by a judgment of 31 August 2009 of the Indictment Division (*chambre des mises en accusation*) of the Mons Court of Appeal. The Indictment Division found that there were serious indications of the applicant's guilt in the light, principally, of the witness statements, the investigators' findings, the real evidence gathered and the forensic medical and psychiatric assessments.

C. Proceedings in the Assize Court

37. At the start of the trial in the Assize Court, on 1 February 2010, the applicant, assisted by his Belgian counsel, filed a submission in which he requested that the records of the interviews conducted without legal assistance and the ensuing acts should be annulled and that the prosecution case should be declared inadmissible. He argued that his lack of access to a lawyer while in police custody, on 31 December 2007, and during the subsequent interviews and examinations had entailed a breach of an essential formal requirement directly affecting his defence rights and thus irretrievably vitiating the arrest warrant. The applicant complained that the absence of a lawyer had necessarily caused him damage.

38. Referring to the Court's case-law and in particular the judgments in *Salduz v. Turkey* ([GC], no. 36391/02, ECHR 2008) and *Dayanan v. Turkey* (no. 7377/03, 13 October 2009), the applicant submitted that it laid down an absolute principle not allowing for any case-specific assessment, given that the restriction arising from Belgian law was one of a general and mandatory nature, and that Belgian law did not meet the requirements of the Convention in such matters.

39. The Assize Court, in an interlocutory judgment of the same day, dismissed the applicant's plea to dismiss the prosecution case. It began by pointing out that the Court's case-law did not guarantee, in an absolute manner, the presence of a lawyer at all stages of the criminal proceedings from the first interview onwards and that the Court had emphasised the need to take account of the proceedings as a whole when assessing whether the right to a fair trial had been upheld. It explained that, in principle, defence rights would be irretrievably affected only where incriminating statements were made. The Assize Court further found that courts had no power to substitute their own solutions for those of the legislature in order to make good the shortcomings complained of by the applicant.

40. As to the consequences of the Court's case-law for the proceedings in the present case, the Assize Court took the view that, in respect of the

French part of the proceedings, the applicant had initially waived his right to legal assistance. Later, before the Investigation Division of the Douai Court of Appeal he had been assisted by a lawyer. The Assize Court dismissed his allegation of pressure by the French gendarmes on the grounds that in one of his interviews (namely in the context of the reconstruction of 6 June 2008 referred to in paragraph 30 above) the applicant had given a different explanation as to why he had falsely accused the victim's son, allegedly under duress, at the time of his arrest.

41. As to the Belgian part of the proceedings, the Assize Court found that the applicant had not incriminated himself in respect of the charges, had not claimed that he had been put under any pressure by the investigators, had not been interviewed in a state of particular vulnerability, had expressed himself freely on the facts and had not in any way been compelled to incriminate himself, even being able to exercise his right to remain silent. The applicant had been able to confer with his lawyer after each police interview and examination by the investigating judge to discuss his defence and had been afforded every opportunity to consult with his lawyer throughout the investigation stage. He had also been able, for the two years of his pre-trial detention, to prepare his defence with his lawyer every time he had appeared before the pre-trial courts (*juridictions d'instruction*), but he had failed, on those occasions, to mention the omission of which he later complained in the Assize Court.

42. Furthermore, the Assize Court noted that the applicant had been committed to stand trial before it in the light of indications of guilt which stemmed primarily from material other than his own statements (see paragraph 36 above) and that he had availed himself of the right to request the performance of additional investigative acts. After pointing out that the jury's inner conviction was formed during the oral proceedings before it, the Assize Court concluded that the applicant's defence rights had been observed and that there was no reason to declare the interview/examination records or prosecution invalid. It therefore declared the prosecution case admissible and ordered that the proceedings be continued.

43. The bill of indictment drawn up by the Principal Crown Prosecutor on 23 November 2009 was read out at the hearing in the Assize Court. Containing twenty-one pages, it set out the facts and how they had occurred, the investigative acts and their results, and the forensic medical assessments, together with the applicant's background and family life. The indictment referred to the particulars that had been acknowledged by the applicant (his presence at the scene of M.B.'s murder, the threatening of a witness and the fact that he had been alone with C.L. and had struck her). It also reproduced the various versions of the events that he had given during his police interviews and examinations by the investigating judge, explaining that those accounts were inconsistent with the investigators' factual findings and were contradicted by the various witness statements.

44. At the close of the trial, on 9 February 2010, the jury found the applicant guilty, principally of the premeditated murder of M.B. on 5 November 2007 and of the attempted premeditated murder of C.L. on 17 September 2007.

45. The jury's reasons were set out in the Assize Court's "reasoning judgment" (*arrêt de motivation*) of the same day. The relevant parts read as follows:

> "... the main reasons for the decision given by the jury are as follows:
>
> – The first and second questions [concerning the murder of M.B. on 5 November 2007]
>
> The jury considered decisive the consistent and mutually corroborative testimony of the youngsters who had seen only the defendant and the victim at the scene of the crime, without any other person being present, the threats previously made by the defendant against his victim and the various steps taken by Philippe Beuze (in particular the fact of hiding the axe in a bush) in preparation for the crime.
>
> – The third and fourth questions [concerning the attempted murder of M.B. on 25 October 2007]
>
> [Finding of not guilty]
>
> – The fifth and sixth questions [concerning the attempted murder of C.L. on 17 September 2007]
>
> The jury found that the following evidence proved both the actual occurrence of the acts and the homicidal intention which had driven the defendant:
>
> – the defendant had deliberately arranged to be alone with a pregnant woman, whom he knew was thus placed in a weakened position;
>
> – he violently struck C.L., as shown by the medical findings, and left her for dead;
>
> – he then fled the scene without calling for help, even though he had the means to do so;
>
> – he subsequently sent text messages clearly showing his intention to kill C.L.
>
> The jury also took the view that the acts committed by the defendant before going off towards the canal at the end of a long walk (simulation of a flat tyre, deliberate car crash, etc.) all constituted evidence of premeditation."

46. In a sentencing judgment dated 10 February 2010, the Assize Court sentenced the applicant to life imprisonment.

D. Proceedings before the Court of Cassation

47. The applicant lodged an appeal on points of law against the Assize Court judgments of 1, 9 and 10 February 2010. Alleging a violation of Article 6 §§ 1 and 3 (c) of the Convention, as interpreted in the Court's case-law, he relied on the right to be assisted by a lawyer and submitted that the presence of a lawyer during questioning was mandatory under the Convention.

48. In a judgment of 26 May 2010 the Court of Cassation dismissed that ground of appeal as follows:

"3. Sections 1, 2, 16(2) and (4), and 20(1) of the Law of 20 July 1990 on pre-trial detention do not provide for the presence of a lawyer to assist the person in police custody during the twenty-four hour period laid down by Article 12, paragraph 3, of the Constitution.

The secrecy imposed by Article 28*quinquies*, § 1, first paragraph, and Article 57 § 1, first paragraph, of the Code of Criminal Procedure precludes, as a rule, the lawyer's attendance at acts performed during the preliminary investigation by the public prosecutor and the judicial pre-trial investigation.

4. These provisions cannot be said in themselves to violate the right to a fair trial. There are two reasons for this. First, the impugned restriction must be assessed in relation to the full set of legal safeguards made available to the defendant with a view to ensuring the effective protection of his defence rights from the time the prosecution is brought. Secondly, the appellant's interpretation of Article 6 of the Convention must be examined with reference to the constitutional principle of the legality of criminal proceedings.

5. In the light of the following elements, there can be no automatic finding that it is irretrievably impossible for a person questioned by the police and the investigating judge without a lawyer to have a fair trial: the formal requirements laid down for the questioning of a suspect in Article 47*bis* of the Code of Criminal Procedure, the brevity of the police custody period, the immediate issuance to the person charged (upon notification of the arrest warrant) 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 his lawyer in accordance with section 20(1) and (5) of that Law, access to the file as governed by section 21(3) of the Law, the lawyer's presence at the recapitulatory examination provided for in section 22(1), (2) and (3), and the rights set forth, in particular, in Articles 61*ter*, 61*quater*, 61*quinquies*, 136 and 235*bis* of the Code of Criminal Procedure.

6. As a rule, Article 12, paragraph 2, of the Constitution does not allow the court to amend the formalities of criminal proceedings as laid down by the law of a democratic State. The only exception is where a domestic rule, if declared incompatible, may be set aside without distortion by the court of the legal framework of which it is part.

On account of its lack of precision, the weight that the appellant attaches to a fair trial cannot trump the above-mentioned principle of legality, whereby the investigation, prosecution and trial can only proceed in accordance with pre-existing and accessible statutes. The submission does not determine the extent to which the court should set aside the domestic statute in order to render the trial fair for the purposes of Article 6 of the Convention according to its proposed evolutive interpretation.

Therefore, neither the appellant nor the case-law on which he relies indicate clearly whether the trial would have been fair on the sole condition that the lawyer had been present during the police custody period or whether it would have been necessary to extend that assistance to all investigative acts.

The right to a fair trial also implies that none of the parties should be placed in a more favourable or less advantageous situation than that of another party. It cannot therefore be regarded as established that the proceedings submitted to the court's review would have been fairer, within the meaning of the appellant's submission,

simply if a lawyer had been present at all his interviews, without an equivalent advantage being secured to the other parties.

7. The submission that the alleged right of the accused is absolute in nature must accordingly be rejected, and it is necessary to consider in concrete terms whether, in the light of the proceedings taken as a whole, the matter complained of by the appellant may have vitiated those proceedings.

This does not appear to have been the case. As can be seen from the following findings of the judgment appealed against [of 1 February 2010]:

(i) the appellant made no self-incriminating statements while in police custody;

(ii) prior to his first interview by the French gendarmerie, he expressly waived the legal assistance to which he was entitled under Article 63-4 of the French Code of Criminal Procedure;

(iii) the appellant was assisted by a lawyer from the time of his appearance before the Investigation Division of the Douai Court of Appeal and for the two years of his pre-trial detention;

(iv) the appellant was at no point compelled to incriminate himself, and at all times expressed himself freely.

The Assize Court therefore acted within the law in refusing to declare the prosecution case inadmissible."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Legislative situation prior to the "Salduz Act" of 2011

49. At the relevant time, the lawyer's role upon the arrest of a suspect and during the judicial pre-trial investigation stage, together with the safeguards surrounding police interviews, examinations by an investigating judge and other investigative acts, were regulated as follows.

1. Arrest and remand in pre-trial detention

50. Article 12, paragraph 3, of the Constitution provided that no one could be deprived of liberty for more than twenty-four hours from the time of arrest without review by a judge. That period has recently been extended to forty-eight hours by an amendment to Article 12 on 24 October 2017.

51. An individual in respect of whom there are serious suspicions creating a presumption that he has committed an offence may be deprived of his liberty and remanded in pre-trial detention (*détention préventive*), which is governed by the Law of 20 July 1990 on pre-trial detention.

52. Upon arrest, a record must be drawn up mentioning the time and circumstances of the arrest, the decision and measures taken by the Crown Prosecutor, the manner of their notification, and the precise time at which the person is notified of the decision to arrest (sections 1 and 2 of the Law on pre-trial detention).

53. During the above-mentioned twenty-four-hour period, at the time, the person concerned would usually undergo a police interview and an initial examination by the investigating judge, after which an arrest warrant could be issued. The provision requiring the investigating judge to conduct this initial examination was section 16(2) of the Law on pre-trial detention, which read as follows prior to its amendment by the "Salduz Act" (see paragraphs 72-77 below):

> "(2) Unless the person charged is a fugitive or is evading arrest, the investigating judge shall, before issuing an arrest warrant, question that person about the facts forming the basis for the charges and potentially justifying an arrest warrant, and hear his or her observations. Failure to question the person charged shall entail his or her release.
>
> The investigating judge shall also notify the person charged about the possibility that an arrest warrant might be issued for his or her detention and hear his or her observations on that matter. Failure to satisfy these conditions shall entail the person's release.
>
> ..."

54. It was inferred from the silence of those provisions of the Law on pre-trial detention, and from the secrecy of the preliminary police investigation and judicial pre-trial investigation (under Article 28*quinquies*, § 1, first paragraph, of the Code of Criminal Procedure) that the arrested person could not be accompanied by a lawyer during the twenty-four-hour period in question. Nor was the arrested person entitled to consult with a lawyer, the right to communicate freely with a lawyer only being granted at the end of the first appearance before the investigating judge, which had to take place within a twenty-four-hour period (see paragraph 55 below).

2. Judicial pre-trial investigation phase

55. Section 20 of the Law on pre-trial detention, on which the right to consult and communicate freely with a lawyer was based, was worded as follows, in its relevant part, prior to its amendment by the "Salduz Act":

> "(1) Immediately after the first interview [*sic*], the person charged may communicate freely with his or her lawyer.
>
> ...
>
> (5) The investigating judge's decision to restrict visits, correspondence and telephone calls shall not alter the rights of the person charged as regards the possibilities of consulting with his or her lawyer.
>
> ..."

56. That provision, appearing in Chapter III of the Law on arrest warrants issued by the investigating judge, referred not to the first police interview but to the first examination by the investigating judge.

57. During that first appearance, the investigating judge was required to notify the person charged that he had the right to choose a lawyer. If the

person did not choose a lawyer, the investigating judge would inform the Chair of the Bar Council or his deputy (section 16(4) of the Law on pre-trial detention).

58. Free communication consisted mainly in the possibility for the lawyer to visit his client in prison, to read the investigation file made available to the accused and to counsel for a period of two days prior to any hearings (section 21(3) of the Law on pre-trial detention) and to assist the client on a monthly basis before the *chambre du conseil* of the Court of First Instance in order to discuss any serous indications of guilt and/or the need to maintain the detention measure (section 22, fourth paragraph, of the Law). No later than five days after the notification of the arrest warrant and every month thereafter, or in the case of serious charges every three months (section 22, first and second paragraphs, of the Law), the competent *chambre du conseil* had to rule on the need to extend the detention. During that hearing the person charged was assisted by his lawyer and was entitled to ask the investigating judge for additional acts to be performed (Article 61*quinquies*, § 1, of the Code of Criminal Procedure).

59. The right to communicate with the lawyer did not mean that the latter could attend any subsequent police interviews or examinations by an investigating judge or any other investigative acts during the judicial investigation stage such as reconstructions or confrontations. The Court of Cassation took the view that the secrecy imposed by Article 28*quinquies* § 1, first paragraph, and Article 57 § 1, first paragraph, of the Code of Criminal Procedure precluded, as a rule, the presence of the lawyer at any acts of the preliminary police investigation or judicial pre-trial investigation (see, among other authorities, Court of Cassation, 26 May 2010, in the applicant's case – paragraph 48 above).

60. The main exception was the possibility for the lawyer to attend the recapitulatory examination by the investigating judge, as provided for in section 22, second paragraph, of the Law on pre-trial detention, which read as follows before being amended by the "Salduz Act":

> "At the request of the person charged or his counsel, the investigating judge shall summon the person charged ten days prior to each appearance before the *chambre du conseil*, or the Indictment Division ruling in cases remitted to it in accordance with section 31(4), for a recapitulatory examination; the clerk shall immediately notify the summons, in writing or by fax, to the lawyer of the person charged and to the Crown Prosecutor, both of whom may attend the said examination."

3. Formalities to be observed during interviews and examinations

61. Section 16(7) of the Law on pre-trial detention, prior to its amendment by the "Salduz Act", provided that the record of the first examination by the investigating judge of the person charged, together with the records of all police interviews with the person charged between the time he was deprived of liberty and his first appearance before the

investigating judge, had to mention the time at which the interview started and finished, together with the time of the beginning and end of any interruptions. On the notification of the arrest warrant, a copy of the statement to the investigating judge and copies of other documents listed in section 16(7) (cited above) were to be given to the person charged in accordance with section 18(2) of the Law.

62. Article 47*bis* of the Code of Criminal Procedure further laid down certain rules to be complied with by the police or prosecutor for the organisation of any interviews during the preliminary investigation phase and for the drafting of the interview records. Under Article 70*bis* of the Code of Criminal Procedure, the same rules applied to questioning at the pre-trial investigation stage, in particular the examinations by the investigating judge.

63. Prior to its amendment by the "Salduz Act", Article 47*bis* of the Code of Criminal Procedure read as follows:

> "For the purposes of interviews conducted with any persons questioned in any capacity whatsoever, the following minimum rules shall be complied with:
>
> 1. At the beginning of any interview, the person interviewed shall be informed:
>
> (a) that he or she may request that all questions put and answers given be recorded verbatim;
>
> (b) that he or she may request any investigative act or interview;
>
> (c) that his or her statements may be given in evidence at trial.
>
> ..."

64. The express notification to the person interviewed that his or her statements might be given in evidence at trial was regarded as indirectly enshrining the right to remain silent in Belgian legislation. Such right was not provided for expressly in Belgian law at the relevant time, even though it was one of the defence rights and, according to the Court of Cassation, was part of the general principles of law (Court of Cassation, 13 May 1986, *Pasicrisie*, 1986-I, no. 558).

65. Article 47*bis* of the Code of Criminal Procedure also provided that at the end of the interview, the person interviewed had to be able to read over the statement, unless he or she asked for it to be read out. He or she then had to be asked if the statement should be corrected or complemented. The person interviewed was free to sign the statement or to refuse to do so. He or she could also ask to write it out himself or herself and to request that it be attached to the interview record.

B. Development of the Court of Cassation's case-law after the *Salduz* judgment

66. Following the *Salduz* judgment, the Court of Cassation was, on a number of occasions, called upon to examine – in cases concerning both pre-trial detention and the merits of a criminal prosecution – legal argument based on an alleged violation of Article 6 §§ 1 or 3 (c) of the Convention on the ground that the suspect had not had legal assistance during his or her time in police custody or when questioned by the police or investigating judge.

67. The Court of Cassation took the view that, although Belgian law did not provide for the presence of a lawyer alongside a suspect from the time of his deprivation of liberty, that did not automatically give rise to a violation of the right to a fair trial. In the court's view, that restriction had to be assessed in the light of the proceedings as a whole and of the statutory safeguards generally afforded to the accused in order to ensure respect for his or her defence rights from the time of the decision to prosecute. In that connection the court referred in particular to the following safeguards provided for under Belgian law:

(a) the formalities imposed for the interview of the suspect under Article 47*bis* of the Code of Criminal Procedure;

(b) the brevity of the police custody period under the Constitution (Article 12 § 3);

(c) the immediate remittance to the person charged, upon notification of the arrest warrant, of his interview records;

(d) the right of the person charged to communicate immediately with his lawyer after his first examination by the investigating judge;

(e) access to the file prior to appearance before the pre-trial court;

(f) the lawyer's presence at the recapitulatory examination.

68. The Court of Cassation would then verify *in concreto* if the suspect had made self-incriminating statements without legal assistance during the first police interviews and examinations by the investigating judge, and if so whether those statements had been used by the trial court to find the defendant guilty, and more generally, whether the initial absence of legal assistance had adversely affected the fairness of the trial in the light of the proceedings as a whole.

69. In a judgment of 5 May 2010 the Court of Cassation thus saw fit, on the first appeal it had received against such a conviction, to examine "whether the interviews [with the accused], without a lawyer being present, conducted by the federal criminal investigation police ... and by the investigating judge ... [had] had any impact on the conduct of the trial" (Court of Cassation 5 May 2010 P.10.0257.F; see also Court of Cassation, 26 May 2010 (in the applicant's case, see paragraph 48 above), and Court of Cassation, 22 June 2010, P.10.0872.N).

70. In a judgment of 15 December 2010 (P.10.0914.F), the Court of Cassation quashed for the first time, on account of a violation of Article 6 of the Convention, a trial court decision relying on self-incriminating statements given to the police by a suspect in police custody without any possibility of legal assistance. In response to the appellant's ground of appeal criticising the judgment for basing his conviction in particular on the statements he had made to the investigators and to the investigating judge in the interviews conducted during the twenty-four-hour period after being taken into custody, the Court of Cassation 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(1) 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, by ascertaining whether the defence rights have been observed, 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.
>
> The evidence in the file shows that the appellant challenged, before the trial court, the charges of rape and indecent assault laid against him and of which the first respondent claimed to have been the victim at a time when, as a minor, he could not legally have consented to the sexual acts thus characterised.
>
> In support of their conviction as to the appellant's guilt, the judges of the Court of Appeal noted that, until his release by the investigating judge, the suspect had gradually confessed to the acts described by the complainant before calling everything into question and seeking his acquittal in the trial court.
>
> To explain this change of position, the judgment took the view ... that the appellant had probably not perceived the significance in criminal law of the acts that he had admitted committing, being unaware that oral penetration was also characterised as rape.
>
> Therefore in giving the statement in question, during police custody and without legal assistance, the suspect had incriminated himself because he did not have the legal knowledge which would have enabled him to put his words into a different perspective.
>
> The appellant's confession and the reason for its withdrawal justify, according to the judgment, the fact of not giving credence to his claims that the accusations against him were mere fiction.
>
> Self-incriminating statements given to the police within twenty-four hours of being taken into custody by a suspect who, in the absence of a lawyer, may not, according to

the Court of Appeal, have understood the legal consequences of his words, were thus taken into consideration by that court in finding the criminal complaint credible and accordingly in concluding that the prosecution case was made out.

Being based on that reasoning, the decision breaches Article 6 of the Convention."

71. Lastly, it is noteworthy that in a judgment of 31 October 2017 (P.17.0255.N), the Court of Cassation took the view that in order to gauge the impact of the lawyer's absence from interviews during the judicial pre-trial investigation (interviews which had been conducted in 2010, and thus after the *Salduz* judgment, but before the 2011 "Salduz Act"), the trial court had to take account of a non-exhaustive list of factors enumerated by the Court as set out in *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, § 274, 13 September 2016).

C. The "Salduz Act" and "Salduz *bis* Act"

72. The reform of the domestic law began with the enactment of the Law of 13 August 2011 (known as the "Salduz Act"), which entered into force on 1 January 2012, amending the Code of Criminal Procedure and the Law of 20 July 1990 on pre-trial detention. The relevant provisions were again amended by the Law of 21 November 2016 on certain rights of persons during questioning (known as the "Salduz *bis* Act"), which entered into force on 27 November 2016. This new Law transposes into domestic law the provisions of Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013, L 294, p. 1 – see paragraph 82 below).

73. Under Article 47*bis* § 2 of the Code of Criminal Procedure, as replaced by the "Salduz Act", any person interviewed as a suspect, provided that the potential charges concern an offence that could justify an arrest warrant, is entitled to a confidential consultation with a lawyer prior to the first interview. The "Salduz *bis* Act" has added the possibility for the suspect to be assisted by a lawyer while being interviewed.

74. Article 47*bis* § 2 of the Code of Criminal Procedure, as replaced by the "Salduz Act", also provides that before being interviewed, a suspect must be informed that his statements may be used in evidence and that he cannot be compelled to incriminate himself. The "Salduz *bis* Act" has added that the suspect may choose, after giving his identity, to make a statement, to answer the questions put to him, or to remain silent.

75. For persons in custody, section 2*bis* of the Law on pre-trial detention, as inserted by the "Salduz Act", provides that the police or judicial authorities must enable the arrested person to exercise his or her

right to prior consultation with a lawyer of his or her choosing, or a duty lawyer assigned by the Bar.

76. Under that same section, persons in custody are also entitled to legal assistance when questioned by the police or a judge during the twenty-four hour period following their arrest.

77. The lawyer's role during an interview consists in ensuring that his client's rights are upheld. The "Salduz *bis* Act" has extended that role in particular to enable intervention by the lawyer for the purpose of requesting investigative acts or clarifications, in addition to making observations.

D. The possibility of reopening criminal proceedings

78. In Belgium, Article 442*bis* of the Code of Criminal Procedure enables convicted persons to apply to the Court of Cassation for the reopening of proceedings following a judgment of the Court finding a violation of the Convention. The provision reads as follows:

> "If a final judgment of the European Court of Human Rights has found that there has been a breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms or the Protocols thereto ..., an application may be made for the reopening – in respect of criminal matters alone – of the proceedings that resulted in the applicant's conviction in the case before the European Court of Human Rights or in the conviction of another person for the same offence on the basis of the same evidence."

III. RELEVANT EU AND INTERNATIONAL LAW MATERIAL

A. European Union law

1. The right to be informed

79. On 22 May 2012 the European Union adopted Directive 2012/13/EU of the Parliament and the Council on the right to information in criminal proceedings (OJ L 142, p. 1). As can be seen from Recitals 14 and 18 of this Directive, it is founded upon the rights laid down in the Charter of Fundamental Rights of the European Union ("the Charter"), and in particular Articles 6, 47 and 48 thereof, building upon Articles 5 and 6 of the Convention as interpreted by the Court. In addition, the Directive explicitly establishes the right to information about procedural rights, as "inferred from the case-law" of the Court (Recital 18).

80. Article 1 of Directive 2012/13/EU clarifies that the right to information has two aspects: information on procedural rights and information on the accusation. Pursuant to Article 2 § 1, the Directive applies from the time persons are made aware by the competent authorities of a member State that they are suspected or accused of having committed a criminal offence. Such persons must be provided promptly with information

concerning at least the five procedural rights listed in Article 3 § 1 of the Directive, namely: the right of access to a lawyer; the right to free legal advice; the right to be informed of the accusation; the right to interpretation and translation; and the right to remain silent. Article 8 § 2 provides that suspects must have the right under national law to challenge any failure to provide the requisite information. The Directive, of which the relevant provisions have not yet given rise to interpretation by the Court of Justice of the European Union (CJEU), does not address how evidence obtained before the suspect has been informed of his or her procedural rights should be treated in any subsequent criminal proceedings.

81. Directive 2012/13, which had to be transposed by 2 June 2014, applies to all EU Member States except Denmark.

2. The right of access to a lawyer

82. Directive 2013/48/EU (cited above) lays down minimum rules concerning the right of access to a lawyer in criminal proceedings and in proceedings for the execution of a European arrest warrant. In doing so, it promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48 thereof, building upon Articles 3, 5, 6 and 8 of the Convention, as interpreted by this Court (Recital 12). In its Preamble the Directive explains, by reference to case-law of the Court, that where a person other than a suspect or accused person, such as a witness, becomes a suspect or accused person, that person should be protected against self-incrimination and has the right to remain silent. In such cases, questioning by law enforcement bodies should be suspended immediately and may only be continued if the person concerned has been made aware that he or she is a suspect or accused person and is able to fully exercise the rights provided for in the Directive (Recital 21). In addition, the member States should ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the police or by another law enforcement or judicial authority, including during court hearings (Recital 25).

83. Article 2 § 1 of the Directive provides that the rights in the Directive apply to:

> "suspects or accused persons ... from the time when they are made aware by the competent authorities ..., by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty."

84. Article 3 of Directive 2013/48/EU, entitled "The right of access to a lawyer in criminal proceedings", reads as follows:

> "1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.

2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:

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

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

(c) without undue delay after deprivation of liberty;

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

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

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

(b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;

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

(i) identity parades;

(ii) confrontations;

(iii) reconstructions of the scene of a crime.

4. Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons.

Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right in accordance with Article 9.

...

6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:

(a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;

(b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings."

85. Article 12 § 2 addresses the question of remedies and provides that, without prejudice to national rules and systems on the admissibility of evidence, member States must ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3 § 6 (cited above), the rights of the defence and the fairness of the criminal proceedings are respected.

86. Directive 2013/48/EU, which had to be transposed by 27 November 2016, applies to all EU member States except for the United Kingdom, Ireland and Denmark.

B. International and comparative law

87. Article 14 of the International Covenant on Civil and Political Rights of 1966 ("the Covenant") guarantees the right to a fair trial. Article 14 § 3 (d) provides in particular that everyone charged with a criminal offence has the right, in full equality, to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

88. In a number of cases the Human Rights Committee has found a violation of Article 14 § 3 (d) of the Covenant on account of a failure to provide sufficient information to an accused about the right to legal assistance (see, for example, *Saidova v. Tajikistan*, 2004, 964/2001, and *Khoroshenko v. Russian Federation*, 2011, 1304/2004).

89. The Court would further refer to the other international and comparative law material presented in *Ibrahim and Others* (cited above, §§ 218-33).

THE LAW

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

90. The applicant alleged that the fact of being deprived of access to a lawyer while he was in police custody, without being given sufficient information on his right to remain silent and not to incriminate himself,

together with the fact that no lawyer was present during the subsequent police interviews, examinations by an investigating judge and other investigative acts in the course of the pre-trial investigation, had breached his right to a fair trial as secured by Article 6 §§ 1 and 3 (c) of the Convention. Those provisions read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public 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

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

B. Merits

1. The parties' submissions

(a) The applicant

92. The applicant complained that when he had been questioned on 31 December 2007 by the Belgian police, while in police custody, and later by the investigating judge, no lawyer had been present. The fact that he had received legal assistance during the proceedings in France was of no consequence, in his view, as those proceedings had concerned the execution of the European arrest warrant and not the offences with which he had been charged in Belgium. Referring to the Court's case-law, in particular *Salduz v. Turkey* ([GC], no. 36391/02, ECHR 2008) and *Dayanan v. Turkey* (no. 7377/03, 13 October 2009), he submitted that the absence of a lawyer at that stage of the proceedings stemmed from the application of Belgian law which, at the time of the proceedings against him, did not meet the requirements of that case-law as it did not, on account of the secrecy of the judicial investigation, grant legal assistance to a person in custody until after the investigating judge's decision on pre-trial detention.

93. As Article 47*bis* of the Code of Criminal Procedure did not provide for the notification to a suspect of his right to remain silent, the absence of a lawyer at the interview and examination of 31 December 2007 meant that

the applicant had not been specifically informed of that right or of the privilege against self-incrimination. In view of his limited intellectual capacities he had not been able, on his own, to infer the right to remain silent from the caution given to him that his statements could be used in evidence. Moreover, while the applicant had signed the interview record, which mentioned the caution that his statements could be used in evidence, in the absence of a lawyer there was no guarantee that this caution had indeed been read out to him prior to the interview.

94. The applicant pointed out that, while the Belgian Court of Cassation's case-law had evolved favourably, taking account of the *Salduz* judgment, that court had never reached the conclusion that the legislation in itself entailed a violation of the right to a fair trial. Moreover, it was only after the judgment of 15 December 2010 (see paragraph 70 above), and thus subsequent to the applicant's case, that the Court of Cassation had struck down judgments of the trial courts based on self-incriminating statements made during the initial interviews without a lawyer being present.

95. In the applicant's view there had been no compelling reason – and no such reason had even been invoked – to deny him his right to legal assistance. The restriction on the right of access to a lawyer had been the norm at the time and had lasted throughout the pre-trial investigation. In his case, no individual assessment had been made and there had been no urgent need to protect a person from serious harm to that person's life or liberty or from serious injury.

96. As the Court had confirmed in *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, § 265, 13 September 2016), the lack of compelling reasons entailed a presumption of a violation of Article 6. Where the person was not notified of the right to remain silent or of the privilege against self-incrimination, it was even more difficult for the Government to rebut this presumption (ibid., § 273).

97. A finding that there was a general and mandatory statutory restriction on legal assistance should suffice, in the applicant's view, on the basis of the case-law he had cited, for a breach of the requirements of Article 6 to be established, even where the suspect had denied the allegations or exercised his right to remain silent. He pointed out that such an approach had been followed by the Court in a number of cases (*Bouglame v. Belgium* (dec.), no. 16147/08, 2 March 2010; *Simons v. Belgium* (dec.), no. 71407/10, 28 August 2012; *Navone and Others v. Monaco*, nos. 62880/11 and 2 others, 24 October 2013; and *Borg v. Malta*, no. 37537/13, 12 January 2016).

98. While the *Ibrahim and Others* judgment allowed for the respondent Government to demonstrate convincingly why the overall fairness of a trial had not been irretrievably prejudiced by the restriction on access to legal advice, that possibility could only, in the case of a statutory restriction, be afforded on an exceptional basis in the light of the particular circumstances.

99. The applicant submitted, incidentally, that the restriction on his right to legal assistance had irretrievably prejudiced the fairness of his trial as a whole. That conclusion followed from an examination of some of the criteria enumerated in *Ibrahim and Others*. First, the applicant argued that he had been in a particularly vulnerable situation as a result of his detention and that it had been aggravated by his very poor verbal skills. He then pointed out that denials and inconsistent statements, as in the present case, could be detrimental to the accused, especially where they were used to find that the suspect had changed his version of events. Moreover, as the investigating judge had ordered a psychiatric assessment, at the end of his examination on 31 December 2007, the applicant questioned whether he had really been in a fit state to be questioned. He submitted that, while the reasons for his conviction did not directly reproduce his statements, his various interviews and examinations had been cited at some length in the indictment, a key document that had been read to the jury at the start of the trial and handed to them. Certain assertions by the jury had been derived from those statements, for example his statement to the effect that he knew C.L. was pregnant and that he had struck her. Lastly, it was appropriate in the applicant's view to note from the hearing record of 1 February 2010 that the President of the Assize Court had not given any warning to the jury as to the weight they should attach, in their deliberations, to the various statements made by him.

(b) The Government

100. The Government acknowledged that, as a result of the applicable Belgian law at the material time, the applicant had not been able to consult with a lawyer while he was in police custody and no lawyer had been present during the ensuing interviews and examinations or at the reconstruction. However, it could not automatically be inferred that the applicant's trial had not been fair. It was necessary to assess the overall fairness of the proceedings in accordance with the Court's method and case-law which, as reiterated in the *Ibrahim and Others* judgment, showed that the right to legal assistance was not an end in itself.

101. In the present case, that assessment involved first verifying the proceedings at their earliest stages. It was the applicant's arrest by the French authorities which had to be regarded, in the Government's view, as the starting-point for the safeguards enumerated in Article 6. It was noteworthy that the applicant had immediately been granted, upon his arrest by the French gendarmerie, the possibility afforded under French law to be assisted by a lawyer while in police custody. The fact that this possibility was not recognised under Belgian law at the material time was thus of little consequence. Moreover, the fact that the applicant had expressly waived legal assistance at the time of his arrest by the French authorities meant that any restriction of the right of access to a lawyer (the Government referred to

Simeonovi v. Bulgaria [GC], no. 21980/04, § 128, 12 May 2017) could be ruled out. The applicant had subsequently been assisted by a lawyer once he had asked the French authorities to find him one.

102. The only gap in the continuous legal assistance enjoyed by the applicant since his arrest in France concerned the period from the interview and examination of 31 December 2007, following his surrender to the Belgian authorities, when he had ceased to be assisted by the French lawyer, until the time when he came into contact with a Belgian lawyer. The Government acknowledged that there was some uncertainty as to whether the applicant had been advised by this new lawyer at the time of the police interview on 11 January 2008. However, there was no doubt that after the period of police custody on 31 December 2007, the investigating judge had contacted the Chair of the Bar to arrange for the appointment of a lawyer. Subsequently, and throughout his pre-trial detention, the applicant had been able, in accordance with Belgian law as it stood at the time, to make unlimited use of his right to confer confidentially with his lawyer in order to prepare for questioning and organise his defence.

103. In order to show that the proceedings had been fair in spite of any shortcomings in the safeguards afforded at the early stages, the Government emphasised, first, that the applicant had clearly been aware of his rights when he had initially come before the Belgian authorities. He had provided them with a constructed version of the facts and had put forward a defence strategy consisting in pleading his innocence and denying all the charges then laid against him. That was a result of the fact that he had received legal assistance in France prior to his surrender and had previously had dealings with the Belgian justice system. Nor should it be overlooked that the interviews conducted while he was in police custody on 31 December 2007 had served mainly to determine whether his detention was absolutely necessary for public safety, thus justifying the issuance of an arrest warrant. Accordingly, in view of the gravity of the charges, it could be considered that the presence of a lawyer would not have changed the outcome of the interviews.

104. In addition, as shown by the record of each interview, the applicant had been informed of his rights in accordance with Article 47*bis* of the Code of Criminal Procedure. He had fully availed himself, from the time of his first statements, of his right to silence, including the right to be unresponsive, to lie, and to select or conceal facts. He had also been informed of the possibility of adducing evidence and of requesting any additional investigative acts. No correlation, whether positive or negative, could, moreover, be observed between the version of the events adopted by the applicant at any given time and the presence or absence of a lawyer.

105. The Government submitted, secondly, that with the single exception of the confession that he had taken a document from the file during his interview on 17 March 2008, the applicant had never made any

self-incriminating statements. That point was decisive in assessing the overall fairness of the proceedings. Moreover, it could be seen from the committal judgment of the Indictment Division of 31 August 2009 and the Assize Court's sentencing judgment of 10 February 2010 that the accepted indications of the applicant's guilt were derived primarily from witness statements, investigators' findings, real evidence and forensic medical and psychiatric assessments, and that his statements had not been used against him by the trial court.

106. Thirdly, it transpired from the settled case-law of the Court of Cassation, both before and after the judgment delivered against the applicant, that it applied an exclusionary rule which consisted in systematically quashing convictions based on self-incriminating statements made in the absence of a lawyer. The Court of Cassation had thus not waited for the legislature to change the Belgian statutory framework in order to transpose the *Salduz* case-law and, taking the view that the restriction on legal assistance had to be assessed in the light of the proceedings as a whole, it verified that any self-incriminating statements made in the absence of a lawyer could not be used by the trial court for the defendant's conviction. While the Court of Cassation had not quashed the Assize Court judgments in the present case, that was only after examining the situation as a whole and finding that the applicant's right to a fair trial had not been prejudiced by the application of Belgian law. The applicant's conviction had indeed been primarily based on evidence other than the statements in question.

107. Lastly, in addition to the fact that the applicant could not rely on any particular vulnerability or on any allegation of pressure on the part of the police, he had been afforded many other safeguards, as listed by the Court of Cassation in its judgment of 26 May 2010, the practical impact of which had been evident throughout the proceedings, in the Government's view. The right to receive copies of the documents in the file had enabled him to organise and devise the best possible defence, through unlimited consultations with his lawyer; the systematic copies of interview records had helped him to keep to the same version of events, albeit contradicting that of the witnesses; and the judicial investigation had been subject to review by the Indictment Division, before which the applicant had been entitled to challenge the legality of the investigation at any time. In addition, all the decisions taken and all the warrants issued against the applicant had been fully reasoned and he had also enjoyed the procedural safeguards surrounding trial in the Assize Court.

2. The third-party intervener

108. Fair Trials International (FTI) was of the opinion that the present case provided the Court with an opportunity to clarify its approach on a number of points.

109. Firstly, when it came to assessing the conformity of a "systemic" statutory restriction with Article 6 §§ 1 and 3 (c), the Court should clarify whether it would follow its previous approach in *A.T. v. Luxembourg* (no. 30460/13, 9 April 2015) and examine, through an overall fairness assessment, whether any incriminating statements, in a broad sense, obtained without a lawyer were used for the conviction. If that approach were to be taken, FTI suggested that, in line with the subsidiarity principle, the Court should only proceed to conduct its own assessment of the use made of such statements if, in the specific case, the problem had been identified and Convention compliance assessed by the national courts, regardless of the domestic law.

110. Secondly, as to the use of self-incriminating statements, the Court should take the opportunity in the present case to reiterate that when evidence taken without a lawyer – whether or not the restriction was statutory in origin – had any adverse effect at trial, this would cause irretrievable prejudice to the rights of the defence.

111. In FTI's view, the judgment in *Ibrahim and Others* had departed from the post-*Salduz* line by asserting that, even in cases where there were no compelling reasons, there was no reason in principle why such statements should not be used for a conviction, provided that the overall fairness of the proceedings was not affected.

112. FTI did not support this more flexible approach, arguing that it ran counter to the developments in European legal systems since *Salduz*. The immediate consequence of the *Ibrahim and Others* judgment had been to legitimise situations in which the use of evidence obtained in the absence of a lawyer was tolerated. Moreover, the application of the *Ibrahim* test – a discretionary substantive assessment based on ten non-exhaustive factors – was liable to lead to varying interpretations and results, as shown by the lack of consensus in the Grand Chamber's *Simeonovi* judgment on the overall fairness issue.

113. To avoid any regression, FTI asked the Court to confirm that, in cases where an overall fairness assessment showed that there was a link, however tenuous, between the absence of a lawyer and the outcome of the trial, it would be necessary to consider that the early breach had "crystallised" and to find a violation, regardless of the extent of any prejudice caused to the overall fairness of the proceedings.

3. The Court's assessment

(a) Preliminary comments

114. The Court observes, by way of introduction, that the Grand Chamber has already had occasion, in a number of cases, to rule on the right of access to a lawyer under Article 6 §§ 1 and 3 (c) of the Convention (see,

as recent examples, *Dvorski v. Croatia* [GC], no. 25703/11, ECHR 2015; *Ibrahim and Others*, cited above; and *Simeonovi*, cited above).

115. In the present case, as can be seen from paragraphs 3 and 90 above, the applicant complained first that he had not had access to a lawyer while in police custody and, in addition, that even once he had been able to consult with a lawyer, his lawyer could not assist him during his police interviews or examinations by the investigating judge or attend a reconstruction of events.

116. The applicant's complaints concern statutory restrictions on the right of access to a lawyer, the first alleged restriction being of the same nature as that complained of in the *Salduz* judgment. It should be pointed out that, further to that judgment, the Grand Chamber provided significant clarification on the right of access to a lawyer in its *Ibrahim and Others* judgment, even though the restriction complained of in the latter case was not one of a general and mandatory nature. The present case thus affords the Court an opportunity to explain whether that clarification is of general application or whether, as claimed by the applicant, the finding of a statutory restriction is, in itself, sufficient for there to have been a breach of the requirements of Article 6 §§ 1 and 3 (c).

117. The present case also raises questions concerning the content and scope of the right of access to a lawyer. The Court observes that, since the *Salduz* judgment, its case-law has evolved gradually and that the contours of that right have been defined in relation to the complaints and circumstances of the cases before it. The present case thus affords an opportunity to restate the reasons why this right constitutes one of the fundamental aspects of the right to a fair trial, to provide explanations as to the type of legal assistance required before the first police interview or the first examination by a judge. It also allows the Court to clarify whether the lawyer's physical presence is required in the course of any questioning or other investigative acts carried out during the period of police custody and that of the pre-trial investigation (as conducted by an investigating judge in the present case).

118. Those questions will be examined in the light of the general principles set out below.

(b) General principles

(i) Applicability of Article 6 in its criminal aspect

119. The Court reiterates that the protections afforded by Article 6 §§ 1 and 3 (c), which lie at the heart of the present case, apply to a person subject to a "criminal charge", within the autonomous Convention meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a

suspicion against him (see *Ibrahim and Others*, cited above, § 249, and *Simeonovi*, cited above, §§ 110-11, and the case-law cited therein).

(ii) General approach to Article 6 in its criminal aspect

120. The fairness of a criminal trial must be guaranteed in all circumstances. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see *Ibrahim and Others*, cited above, § 250). The Court's primary concern, in examining a complaint under Article 6 § 1, is to evaluate the overall fairness of the criminal proceedings (see, among many other authorities, *Bykov v. Russia* [GC], no. 4378/02, §§ 94-105, 10 March 2009; *Taxquet v. Belgium* [GC], no. 926/05, §§ 84 and 93-100, ECHR 2010; *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, §§ 118, and 152-65, ECHR 2011; *Dvorski*, cited above, §§ 81-82 and 103-13; *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 101 and 161-65, ECHR 2015; *Blokhin v. Russia* [GC], no. 47152/06, §§ 194 and 211-16, 23 March 2016; *Lhermitte v. Belgium* [GC], no. 34238/09, §§ 69 and 83-85, 29 November 2016; *Ibrahim and Others*, cited above, §§ 274, 280-94, and 301-11; and *Correia de Matos v. Portugal* [GC], no. 56402/13, §§ 118, 120, and 160-68, 4 April 2018).

121. As the Court has found on numerous occasions, compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1 (see, for example, *Salduz*, cited above, § 50; *Al-Khawaja and Tahery*, cited above, § 118; *Dvorski*, cited above, § 76; *Schatschaschwili*, cited above, § 100; *Blokhin*, cited above, § 194; and *Ibrahim and Others*, cited above, § 251).

122. Those minimum rights guaranteed by Article 6 § 3 are, nevertheless, not ends in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (see *Ibrahim and Others*, cited above, §§ 251 and 262, and *Correia de Matos*, cited above, § 120).

(iii) Right of access to a lawyer

123. The right of everyone "charged with a criminal offence" to be effectively defended by a lawyer, guaranteed by Article 6 § 3 (c), is one of

the fundamental features of a fair trial (see *Salduz*, cited above, § 51, and *Ibrahim and Others*, cited above, § 255).

(α) Starting-point of the right of access to a lawyer

124. Where a person has been taken into custody, the starting-point for the right of access to a lawyer is not in doubt. The right becomes applicable as soon as there is a "criminal charge" within the meaning given to that concept by the Court's case-law (see paragraph 119 above) and, in particular, from the time of the suspect's arrest, whether or not that person is interviewed or participates in any other investigative measure during the relevant period (see *Simeonovi*, cited above, §§ 111, 114 and 121).

(β) Aims pursued by the right of access to a lawyer

125. Access to a lawyer at the pre-trial stage of the proceedings also contributes to the prevention of miscarriages of justice and, above all, to the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused (see *Salduz*, cited above, §§ 53-54; *Blokhin*, cited above, § 198; *Ibrahim and Others*, cited above, § 255; and *Simeonovi*, cited above, § 112).

126. The Court has acknowledged on numerous occasions since the *Salduz* judgment that prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody. Such access is also preventive, as it provides a fundamental safeguard against coercion and ill-treatment of suspects by the police (see *Salduz*, cited above, § 54; *Ibrahim and Others*, cited above, § 255; and *Simeonovi*, cited above, § 112).

127. The Court has also recognised that the vulnerability of suspects may be amplified by increasingly complex legislation on criminal procedure, particularly with regard to the rules governing the gathering and use of evidence (see *Salduz*, cited above, § 54, and *Ibrahim and Others*, cited above, § 253).

128. Lastly, one of the lawyer's main tasks at the police custody and investigation stages is to ensure respect for the right of an accused not to incriminate himself (see *Salduz*, cited above, § 54; *Dvorski*, cited above, § 77; and *Blokhin*, cited above, § 198) and for his right to remain silent.

129. In this connection, the Court has considered it to be 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", within the meaning of Article 6, should have the right to be informed of these rights, without which the protection thus guaranteed would not be practical and effective (see *Ibrahim and Others*, cited above, § 272, and *Simeonovi*, cited above, § 119; the complementarity of these rights had already been emphasised in *John Murray v. the United Kingdom*, 8 February 1996, § 66, *Reports of Judgments and Decisions* 1996-I; *Brusco v. France*, no. 1466/07, § 54, 14 October 2010; and *Navone and Others*, cited above, §§ 73-74).

Consequently, Article 6 § 3 (c) of the Convention must be interpreted as safeguarding the right of persons charged with an offence to be informed immediately of the content of the 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 (see *Simeonovi*, cited above, § 119).

130. In the light of the nature of the privilege against self-incrimination and the right to remain silent, the Court considers that in principle there can be no justification for a failure to notify a suspect of these rights. Where a suspect has not, however, been so notified, the Court must examine whether, notwithstanding this failure, the proceedings as a whole were fair. Immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights. However, where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer, his right to remain silent and the privilege against self-incrimination takes on particular importance (see *Ibrahim and Others*, cited above, § 273, and case-law cited therein).

(γ) Content of the right of access to a lawyer

131. Article 6 § 3 (c) does not specify the manner of exercising the right of access to a lawyer or its content. While it leaves to the States the choice of the means of ensuring that it is secured in their judicial systems, the scope and content of that right should be determined in line with the aim of the Convention, namely to guarantee rights that are practical and effective (see *Öcalan v. Turkey* [GC], no. 46221/99, § 135, ECHR 2005-IV; *Salduz*, cited above, § 51; *Dvorski*, cited above, § 80; and *Ibrahim and Others*, cited above, § 272).

132. Assigning counsel does not in itself ensure the effectiveness of the assistance he or she may afford an accused (see *Öcalan*, cited above, § 135; *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 95, 2 November 2010; and *M v. the Netherlands*, no. 2156/10, § 82, 25 July 2017), and to that end, the following minimum requirements must be met.

133. First, as the Court has already stated above (see paragraph 124), suspects must be able to enter into contact with a lawyer from the time when they are taken into custody. It must therefore be possible for a suspect to consult with his or her lawyer prior to an interview (see *Brusco*, cited above, § 54, and *A.T. v. Luxembourg*, cited above, §§ 86-87), or even where there is no interview (see *Simeonovi*, cited above, §§ 111 and 121). The lawyer must be able to confer with his or her client in private and receive confidential instructions (see *Lanz v. Austria*, no. 24430/94, § 50, 31 January 2002; *Öcalan*, cited above, § 135; *Rybacki v. Poland*, no. 52479/99, § 56, 13 January 2009; *Sakhnovskiy*, cited above, § 97; and *M v. the Netherlands*, cited above, § 85).

134. Secondly, the Court has found in a number of cases that suspects have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings (see *Adamkiewicz v. Poland*, no. 54729/00, § 87, 2 March 2010; *Brusco*, cited above, § 54; *Mađer v. Croatia*, no. 56185/07, §§ 151 and 153, 21 June 2011; *Šebalj v. Croatia*, no. 4429/09, §§ 256-57, 28 June 2011; and *Erkapić v. Croatia*, no. 51198/08, § 80, 25 April 2013). Such physical presence must enable the lawyer to provide assistance that is effective and practical rather than merely abstract (see *A.T. v. Luxembourg*, cited above, § 87), and in particular to ensure that the defence rights of the interviewed suspect are not prejudiced (see *John Murray*, cited above, § 66, and *Öcalan*, cited above, § 131).

135. The Court has found, for example, that depending on the specific circumstances of each case and the legal system concerned, the following restrictions may undermine the fairness of the proceedings:

(a) a refusal or difficulties encountered by a lawyer in seeking access to the criminal case file, at the earliest stages of the criminal proceedings or during the pre-trial investigation (see *Moiseyev v. Russia*, no. 62936/00, §§ 217-18, 9 October 2008; *Sapan v. Turkey*, no. 17252/09, § 21, 20 September 2011; and contrast *A.T. v. Luxembourg*, cited above, §§ 79-84);

(b) the non-participation of a lawyer in investigative measures such as identity parades (see *Laska and Lika v. Albania*, nos. 12315/04 and 17605/04, § 67, 20 April 2010) or reconstructions (see *Savaş v. Turkey*, no. 9762/03, § 67, 8 December 2009; *Karadağ v. Turkey*, no. 12976/05, § 47, 29 June 2010; and *Galip Doğru v. Turkey*, no. 36001/06, § 84, 28 April 2015).

136. In addition to the above-mentioned aspects, which play a crucial role in determining whether access to a lawyer during the pre-trial phase has been practical and effective, the Court has indicated that account must be taken, on a case-by-case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention (see *Hovanesian v. Bulgaria*, no. 31814/03, § 34, 21 December 2010; *Simons*, cited above, § 30; *A.T. v. Luxembourg*, cited above, § 64; *Adamkiewicz*, cited above, § 84; and *Dvorski*, cited above, §§ 78 and 108).

(iv) Relationship between the justification for a restriction on the right of access to a lawyer and the overall fairness of the proceedings

137. The principle that, as a rule, any suspect has a right of access to a lawyer from the time of his or her first police interview was set out in the *Salduz* judgment (cited above, § 55) as follows:

> "... in order for the right to a fair trial to remain sufficiently 'practical and effective' ..., Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The 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."

138. The *Salduz* judgment also demonstrated that the application on a "systematic basis", in other words on a statutory basis, of a restriction on the right to be assisted by a lawyer during the pre-trial phase could not constitute a compelling reason (ibid., § 56). In spite of the lack of compelling reasons in that case, the Court nevertheless analysed the consequences, in terms of overall fairness, of the admission in evidence of statements made by the accused in the absence of a lawyer. It took the view that this defect could not have been cured by the other procedural safeguards provided under domestic law (ibid., §§ 52 and 57-58).

139. The stages of the analysis as set out in the *Salduz* judgment – first looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer, then examining the overall fairness of the proceedings – have been followed by Chambers of the Court in cases concerning either statutory restrictions of a general and mandatory nature, or restrictions stemming from case-specific decisions taken by the competent authorities.

140. In a number of cases, which all concerned Turkey, the Court did not, however, address the question of compelling reasons, and neither did it examine the fairness of the proceedings, but found that systematic restrictions on the right of access to a lawyer had led, *ab initio*, to a violation of the Convention (see, in particular, *Dayanan*, cited above, § 33, and *Boz v. Turkey*, no. 2039/04, § 35, 9 February 2010). Nevertheless, in the majority of cases, the Court has opted for a less absolute approach and has conducted an examination of the overall fairness of the proceedings, sometimes in summary form (see, among other authorities, *Çarkçı v. Turkey (no. 2)*, no. 28451/08, §§ 43-46, 14 October 2014), and sometimes in greater detail (see, among other authorities, *A.T. v. Luxembourg*, cited above, §§ 72-75).

141. Being confronted with a certain divergence in the approach to be followed, in *Ibrahim and Others* the Court consolidated the principle established by the *Salduz* judgment, thus confirming that the applicable test consisted of two stages and providing some clarification as to each of those stages and the relationship between them (see *Ibrahim and Others*, cited above, §§ 257 and 258-62).

(α) Concept of compelling reasons

142. The criterion of "compelling reasons" is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the suspect's first police interview, restrictions on access to a lawyer 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 (see *Salduz*, cited above, §§ 54 *in fine* and 55, and *Ibrahim and Others*, cited above, § 258). A finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons.

143. The Court has also explained that 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 (see *Ibrahim and Others*, cited above, § 259, and *Simeonovi*, cited above, § 117).

(β) The fairness of the proceedings as a whole and the relationship between the two stages of the test

144. In *Ibrahim and Others* the Court also confirmed that the absence of compelling reasons did not lead in itself to a finding of a violation of Article 6. Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole (see *Ibrahim and Others*, cited above, § 262). That latter point is of particular importance in the present case, since the applicant relied on a certain interpretation of the Court's case-law on the right of access to a lawyer (see paragraph 97 above) to the effect that the statutory and systematic origin of a restriction on that right sufficed, in the absence of compelling reasons, for the requirements of Article 6 to have been breached. However, as can be seen from the *Ibrahim and Others* judgment, followed by the *Simeonovi* judgment, the Court rejected the argument of the applicants in those cases that *Salduz* had laid down an absolute rule of that nature. The Court has thus departed from the principle that was set out, in particular, in the *Dayanan* case and other judgments against Turkey (see paragraph 140 above).

145. Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. 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 criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer (see *Ibrahim and Others*, cited above, § 265).

146. 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 (ibid., § 273 *in fine*).

147. Lastly, it must be pointed out that the principle of placing the overall fairness of the proceedings at the heart of the assessment is not limited to the right of access to a lawyer under Article 6 § 3 (c) but is inherent in the broader case-law on defence rights enshrined in Article 6 § 1 of the Convention (see the case-law on Article 6 § 1 cited in paragraph 120 above).

148. That emphasis, moreover, is consistent with the role of the Court, which is not to adjudicate in the abstract or to harmonise the various legal systems, but to establish safeguards to ensure that the proceedings followed in each case comply with the requirements of a fair trial, having regard to the specific circumstances of each accused.

149. As the Court has already observed, subject to respect for the overall fairness of the proceedings, the conditions for the application of Article 6 §§ 1 and 3 (c) during police custody and the pre-trial proceedings will depend on the specific nature of those two phases and on the circumstances of the case.

(γ) Relevant factors for the overall fairness assessment

150. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account (see *Ibrahim and Others*, cited above, § 274, and *Simeonovi*, cited above, § 120):

(a) whether the applicant was particularly vulnerable, for example by reason of 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 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 the 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.

(c) Application of the general principles to the facts of the case

151. By way of introduction, the Court points out that the police interviews, examinations by an investigating judge and other investigative acts conducted without the applicant having had any prior access to a lawyer, and without his lawyer being physically present, took place before the delivery of the Court's judgment in *Salduz*. That being said, it notes that, at his trial before the Assize Court, the applicant referred to that judgment in seeking the exclusion of the statements he had made when questioned without legal assistance. Moreover, the Assize Court, in its interlocutory judgment of 1 February 2010, took account of the *Salduz* judgment in assessing the situation in the present case, and the Court of Cassation also sought to respond to the ground of appeal based on that case-law (see paragraphs 37-39 and 48 above).

152. In addition, the applicant's trial took place a long time before the Grand Chamber judgment in *Ibrahim and Others*. While that judgment should be taken into account in so far as it confirms and consolidates the *Salduz* case-law, the Court is nevertheless aware of the difficulties that the passage of time and the development of its case-law may entail for national courts, even though, as regards Article 6 §§ 1 and 3 (c), such development has been linear since the *Salduz* judgment.

153. The Court also acknowledges the efforts of the Belgian Court of Cassation to take account of the development of its case-law in spite of the restrictions on the right of access to a lawyer which were imposed at the time under Belgian law. As can be seen from an examination of the relevant judgments delivered between 2010 and 2011 (see paragraphs 66-70 above), the Court of Cassation endeavoured to interpret domestic law in such a way as to ensure that it was compliant, to the extent possible, with the principle

laid down in the *Salduz* judgment and applied subsequently by the Court. To that end, it sought essentially to assess the effects of the restriction on the right of access to a lawyer in the context of its assessment of the overall fairness of the proceedings in the case concerned.

(i) Existence and extent of the restrictions

154. The Court observes that the impugned restrictions on the right of access to a lawyer in the present case were particularly extensive.

155. The applicant was unable to communicate with a lawyer between the time of his surrender to the Belgian authorities at 10.40 a.m. on 31 December 2007 and his police interview at 11.50 a.m., or between that interview and the examination by the investigating judge at 4.45 p.m. on the same day. He was only granted the right to consult with a lawyer, in accordance with section 20 of the Law on Pre-Trial Detention, once the investigating judge had remanded him in custody, at the end of the examination at 5.42 p.m., and had notified the Bar to arrange for defence counsel to be assigned (see paragraphs 13 and 54 above).

156. Even though he was subsequently able to communicate freely with his assigned lawyer, the applicant continued to be deprived of the lawyer's presence during the subsequent interviews, examinations and other investigative acts conducted in the course of the judicial pre-trial investigation. In addition to the fact that this restriction derived from a lack of provision in the law and from the secrecy of that investigation, as imposed by the Code of Criminal Procedure, and therefore from the interpretation of the legislation in force at the material time (see paragraphs 54 and 59 above), the restriction was applied throughout the pre-trial phase. In total, between his surrender to the Belgian authorities on 31 December 2007 and the judgment of the Indictment Division of the Mons Court of Appeal of 31 August 2009, committing him to stand trial, the applicant was questioned on the charges without a lawyer five times by the criminal investigation police (not including the interviews of 6 and 7 March 2008 about car thefts), three times by the investigating judge and twice by the Crown Prosecutor. Nor did the applicant's lawyer participate in the reconstruction of the crime scene held on 6 June 2008.

157. The Court further finds that uncertainty remains as to the point from which the applicant was actually in contact with a lawyer for the preparation of his defence, after the investigating judge had, at the end of the police custody period on 31 December 2007, taken the necessary steps to have a lawyer assigned (see paragraph 21 above). There is no reference to this matter in the record of the first subsequent interview on 11 January 2008 or elsewhere in the file (see paragraph 25 above). The only certain information available to the Court, on the basis of the record of the investigating judge's examination on 17 March 2008, is that the applicant had, by that point, chosen a lawyer and met him (see paragraph 27 above).

In response to the questions put to them at the hearing, the Government were not able to provide any more precise information in this connection.

158. Having regard to the foregoing and to the general principles set out above (see paragraphs 119, 125-30 and 131-36), the Court finds that the applicant, who was entitled to the protection of Article 6 of the Convention from the time of his surrender to the Belgian authorities, did not enjoy the right of access to a lawyer under that provision while in police custody and that this right was subsequently restricted throughout the judicial pre-trial investigation.

159. In the Court's view, the Government's observation that the applicant had been assisted by a lawyer in the course of the proceedings in France is of no consequence in this connection. Those proceedings and the legal assistance provided in France concerned only the execution of the European arrest warrant by the French authorities.

(ii) Whether there were compelling reasons

160. It is not in dispute that, at the relevant time, the impugned restrictions stemmed from the lack of provision in the Belgian legislation and the interpretation of the law by the domestic courts (see paragraphs 49-60 above).

161. The Court reiterates that restrictions on access to a lawyer for compelling reasons, at the pre-trial stage, 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 (see paragraph 142 above). There was clearly no such individual assessment in the present case, as the restriction was one of a general and mandatory nature.

162. The Belgian legislation has admittedly been amended by the "Salduz Act", which entered into force on 1 January 2012, and further by the "Salduz *bis* Act", which entered into force on 27 November 2016. The amended legislation confers rights, under certain conditions, to suspects who are questioned or are in custody, such as the right to consult with a lawyer before the police interview and the right to be assisted by the lawyer during any subsequent questioning (see paragraphs 72-77 above). It must be observed, however, that the applicant was unable to benefit from those provisions at the time of the pre-trial proceedings against him.

163. Furthermore, the Government have failed to demonstrate the existence of any exceptional circumstances which could have justified the restrictions on the applicant's right, and it is not for the Court to ascertain such circumstances of its own motion (see *Simeonovi*, cited above, § 130).

164. The restrictions in question were not justified by any compelling reason.

(iii) The fairness of the proceedings as a whole

165. In such circumstances, the Court must apply very strict scrutiny to its fairness assessment, especially where there are statutory restrictions of a general and mandatory nature. The burden of proof thus falls on the Government, which, as they have accepted, must demonstrate convincingly that the applicant nevertheless had a fair trial as a whole. As indicated above (see paragraph 145 above and the case-law cited), the Government's inability to establish compelling reasons weighs heavily in the balance, and the balance may thus be tipped towards finding a violation of Article 6 §§ 1 an 3 (c).

166. In this exercise, the Court will examine, to the extent that they are relevant in the present case, the various factors deriving from its case-law as set out in the *Ibrahim and Others* and *Simeonovi* judgments and reiterated in paragraph 150 above.

(α) Whether the applicant was vulnerable

167. The Government argued that the applicant had not been particularly vulnerable. The applicant, however, contended that he had been in a vulnerable state on account of his detention and that this vulnerability had been exacerbated by his low IQ and extremely poor verbal skills, as shown by a neuropsychological assessment carried out in April 2008 (see paragraph 29 above).

168. The Court notes that the above-mentioned assessment concluded that while the applicant had limited intellectual capacities, his reasoning was nevertheless within the norm. Moreover, the applicant has not pointed to any indication in the records of his interviews and examinations that he had difficulty expressing himself. In addition, no other particular circumstance can be noted which would indicate that the applicant was in a greater state of vulnerability than that in which persons interviewed by investigators would generally find themselves. The interviews conducted while he was in police custody and during the judicial pre-trial investigation were not unusual or excessively long.

(β) The circumstances in which the evidence was obtained

169. The Court observes that the applicant did not allege, either before the domestic courts or before it, that the Belgian police had exerted any pressure on him. As to the allegation that he had been pressurised by the French gendarmes into subsequently accusing a minor at his first police interview in Belgium, this was dismissed by the Assize Court. That allegation was also contradicted by the applicant himself, as in a subsequent version of the events he gave a different explanation as to why he had made a false accusation (see paragraphs 30 and 40 above).

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

170. The Government relied on the general safeguards that, in their view, the applicant had enjoyed as a result of the legal framework governing pre-trial proceedings at the material time, and in particular on the fact that, except during questioning, the applicant had been entitled to communicate freely and in an unlimited manner with his lawyer from the end of the police custody period. Subsequently, except for the record of the police interview of 31 December 2007 – of which a copy was given to him at the end of his first appearance before the investigating judge – he systematically received a copy of all the interview and examination records, thus enabling him to discuss them with his lawyer and to mount his defence.

171. It is true that these safeguards enabled the applicant to benefit, during the judicial investigation phase, from the services of defence counsel and to prepare his defence strategy. In view of the fact, however, that Belgian law as applied in the proceedings against the applicant was not in conformity with the requirements of Article 6 § 3 (see, in particular, paragraphs 160 and 161 above), the overall fairness of the proceedings could not have been guaranteed merely by legislation providing for certain safeguards in the abstract. The Court must examine whether the application of these legal provisions in the present case had a compensatory effect in practical terms, rendering the proceedings fair as a whole. In the context of this examination, which lies at the heart of the second stage of the test set out in the *Salduz* and *Ibrahim and Others* judgments, the Court finds that the applicant's conduct during the police interviews and examinations by an investigating judge was capable of having such consequences for the prospects of his defence that there was no guarantee that either the assistance provided subsequently by a lawyer or the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the period of police custody (see, *mutatis mutandis*, *Salduz*, cited above, § 58). In addition, as mentioned in paragraph 157 above, the date from which the applicant began to receive legal assistance is not to be found in the case file. While it is clear that the applicant's defence counsel changed several times, it is not clear from the case file how frequent the consultations were, or whether the lawyer had been notified of the dates of the interviews and examinations. The applicant could not therefore prepare for his questioning beforehand with his lawyer, and he could only tell his lawyer later on how the interview or examination had gone, if need be with the help of the official record, and then draw the appropriate conclusions for the future.

172. The Government further pointed out that the judicial investigation had been conducted under the supervision of the Indictment Division, before which the applicant could have challenged its lawfulness or

complained of procedural irregularities, with his lawyer's assistance, at any time (see paragraph 107 above). However, that safeguard did not play a major role in the present case. First, the applicant never raised, at that stage, the complaints that he later submitted to the Assize Court, the Court of Cassation and this Court, and secondly, the pre-trial courts did not address, as they could have done of their own motion, the procedural defects at issue in the present case.

173. As pointed out in the *Ibrahim and Others* judgment (cited above, § 254), complaints under Article 6 about the investigation stage tend to crystallise at the trial itself when the prosecution seeks to rely on evidence obtained during the pre-trial proceedings – the phase in which the restrictions on Article 6 rights applied – and the defence seeks its exclusion. In the present case, the question whether the applicant's statements should have been admitted in evidence was examined before the Assize Court at the opening of the trial on 1 February 2010. The applicant, assisted by his lawyer, filed pleadings seeking the nullity of the statements he had given when questioned without a lawyer and the dismissal of the prosecution case. Relying on the *Salduz* judgment, he argued that the systematic deprivation of his right of access to a lawyer from the time of his first police interview sufficed for a violation of Article 6 to be found. In a judgment given on the same day, the Assize Court rejected the applicant's plea and admitted in evidence all the records in question, finding that the applicant could still have a fair trial even though he had not been assisted by a lawyer during the police interviews and examinations by an investigating judge (see paragraph 41 above).

174. It should, however, be observed that the Assize Court did not carry out a more precise examination of either the official records or the circumstances in which the applicant had been questioned by – and had given statements to – the police and the investigating judge (contrast *Ibrahim and Others*, cited above, §§ 69-84 and 282). Thus there is no indication that the court engaged in the requisite analysis of the consequences of the lawyer's absence at crucial points in the proceedings. Such an omission is all the more significant as, on account of the oral nature of proceedings in the Assize Court and the fact that no detailed record of the hearing is kept, it is not possible to assess the impact of the oral argument in the presence of the jury.

175. As regards the subsequent assessment by the Court of Cassation, the Government explained that the settled case-law at the time, which consisted in the systematic quashing of convictions based on self-incriminating statements given in the absence of a lawyer, was tantamount to an exclusionary rule. Where interviews or examinations had been conducted without a lawyer, the Court of Cassation examined whether they had had an effect on the fairness of the trial and it had thus struck down

judgments of trial courts which had taken account of self-incriminating statements given without legal assistance (see paragraphs 66-70 above).

176. The Court observes that the Court of Cassation quashed a judgment on those grounds for the first time on 15 December 2010, and therefore after the trial court judgment in the present case. In that judgment the Court of Cassation pointed out, for example, that it was necessary to assess the influence of improperly obtained evidence on the outcome of the prosecution. In the present case, it does not appear from the Court of Cassation's judgment that it carried out its assessment of the overall fairness of the proceedings from that perspective. Rather, in its examination of the proceedings, the Court of Cassation focused on a lack of self-incriminating statements during the interviews in police custody and, as regards the rest of the pre-trial investigation in which the applicant's right was also restricted, it merely stated that he had never been compelled to incriminate himself and that he had always expressed himself freely (see paragraph 48 above).

(δ) The nature of the statements

177. According to the Assize Court and the Court of Cassation, the statements given by the applicant during the interviews and examinations at issue were not self-incriminating and did not contain any confessions. The Government also relied on that position.

178. The Court reiterates, however, that the privilege against self-incrimination is not confined to actual confessions or to remarks which are directly incriminating; for statements to be regarded as self-incriminating it is sufficient for them to have substantially affected the accused's position (see *Schmid-Laffer v. Switzerland*, no. 41269/08, § 37, 16 June 2015; see also *A.T. v. Luxembourg*, cited above, § 72).

179. In the present case, while it is true that the applicant never confessed to the charges and therefore did not incriminate himself *stricto sensu*, he nevertheless gave detailed statements to the investigators which influenced the line of questioning. He thus admitted on 31 December 2007, while in police custody, that he had been present at the scene of the crime when M.B. was murdered and that he had threatened a witness, as confirmed by eyewitnesses (see paragraph 24 above). When he was interviewed on 25 March 2008 he further stated that C.L. had been pregnant, that he had been alone with her on 17 September 2007 and that he had struck her. Those particulars regarding C.L., which were not corroborated by any testimony other than that of the victim (see paragraph 28 above), must have affected the applicant's position. From that point onwards, the investigators' suspicions about the assault on C.L. could only be regarded, in their view, as well-founded. In addition, as the applicant changed his version of the facts several times in the course of the judicial investigation, thus undermining his general credibility, his first examination by the investigating judge was of crucial importance.

Reiterating that very strict scrutiny is called for where there are no compelling reasons to justify the restrictions at issue, the Court finds that significant weight must be attached to the above factors in its assessment of the overall fairness of the proceedings.

180. The applicant complained that the investigators had obtained information from him on 31 December 2007 while he was in police custody, even though he had not consulted with a lawyer beforehand and had not been notified in a sufficiently explicit manner of his right to remain silent and the privilege against self-incrimination. The Court observes in that connection that at the start of his first police interview the applicant received express information that his statements could be used in evidence (see paragraph 14 above). That information, which he also received at the beginning of each of his subsequent interviews and examinations, was regarded as indirectly enshrining the right to remain silent in Belgian law, whereas the legislation at the time did not expressly provide for that right (see paragraph 54 above).

181. Having regard to the case-law set out above (see paragraphs 129-30), and since the applicant was not able to consult with a lawyer prior to questioning or to secure the presence of one while he was in police custody, the Court is not persuaded, in the circumstances of the present case, that the information thus given by the investigators was sufficiently clear to guarantee the effective exercise by the applicant of his right to remain silent and not to incriminate himself. In that connection, it cannot but note that the applicant made significant statements and fully availed himself of his freedom to select or conceal facts.

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

182. The trial took place in the Assize Court, a non-permanent court made up of professional judges assisted by a jury (see *Taxquet v. Belgium*, no. 926/05, §§ 18-21, 13 January 2009, and *Castellino v. Belgium*, no. 504/08, §§ 45-47, 25 July 2013, for the composition of the Assize Court and rules governing the selecting of the jury; see *Taxquet*, Chamber judgment cited above, §§ 25-31, and *Lhermitte*, cited above, §§ 40-44, for rules governing the trial itself).

183. The indictment was read out at the start of the trial, before the oral argument. It set out, in twenty-one pages, the applicant's family life and background, the facts and how they had occurred, the investigative acts and their results, and the content of the medical assessments. It mentioned the elements that the applicant had acknowledged and his different versions of the facts.

184. The Government challenged the applicant's argument that the indictment was largely based on his statements. The Court observes that the indictment also relied on various material that was unrelated to and

independent of his statements, namely witness statements, the investigators' findings, the real evidence collected before his arrest and the results of the medical and psychiatric assessments (see paragraph 43 above). Nevertheless, as noted above (paragraph 178), the statements given by the applicant from the time of his questioning in police custody contained a detailed account of the events which had occurred on the day of the murder, and were complemented or contradicted by equally detailed subsequent statements, and he never denied being present at the scene of the crime or threatening a witness. He also spontaneously gave information about C.L. which tended to incriminate him. Those statements provided the investigators with a framework which must have influenced the indictment, even though they had already obtained certain evidence prior to the applicant's first interview.

185. As to whether those elements influenced the deliberation and the decision ultimately reached by the jury, the Court takes account of the fact that the indictment is of limited value for an understanding of the jury's verdict, because it is read out before the oral argument, which will necessarily serve as the basis for the jurors' personal conviction (see *Taxquet* [GC], cited above, § 95, and *Lhermitte*, cited above, § 77).

186. That being said, in the present case the jury concluded that the attempted murder of C.L. had been premeditated, as could be established in particular from the applicant's statements (see paragraphs 45 and 179 above). The Court attaches considerable weight to this point, as it demonstrates that the statements given by the applicant without a lawyer being present were an integral part of the evidence upon which the verdict on this count was reached.

187. As to the other counts of the indictment, and in particular the principal one concerning the murder of M.B., the Court agrees with the Government that the jury relied on evidence other than the applicant's statements, namely the consistent and mutually corroborative witness statements of youngsters who had seen only the accused and his victim at the scene, without anyone else being present, the threats that the accused had previously made against his victim and the various steps he had taken in preparing to commit the crime (see paragraph 45 above).

188. Nevertheless, the Court notes from an examination of the record of the 1 February 2010 hearing that the President of the Assize Court did not give any warning to the jury as to the weight to be attached in their deliberations to the applicant's numerous statements. While it is necessary to take account of the special procedural features of trials in assize courts sitting with a lay jury, which decides independently whether or not the defendant is guilty, the Court would point out that, in the context of cases concerning the accused's comprehension of the reasoning behind the verdict, it has emphasised the importance of any directions or guidance given by the president to the jurors as to the legal issues arising or the

evidence given (see *Taxquet* [GC], cited above, § 92, and *Lhermitte*, cited above, § 68). Such directions or guidance may be of particular importance in order to enable the jurors to assess the consequences, for the fairness of the trial, of any procedural defects that may have arisen at the investigation stage (see *Ibrahim and Others*, cited above, §§ 274, 292 and 310). In spite of its efforts to assess the overall fairness of the proceedings having regard to the Court's recent case-law (see paragraph 48 above), the Court of Cassation does not seem to have taken into account, in its review, the impact on the jury's decision of the fact that the jurors had not been informed of particulars which could have guided them in assessing the significance of the statements that had been given by the applicant without legal assistance.

189. The Court therefore takes the view that the total absence, in the present case, of any directions or guidance as to how the jury should assess the applicant's statements in relation to the other evidence in the file and their evidential value, even though they had been taken without a lawyer being present, and, for those given in police custody, without the applicant having received sufficiently clear information on his right to remain silent, is a major defect.

(ζ) Weight of the public interest

190. There is no doubt that sound public-interest considerations justified prosecuting the applicant, as he was indicted in particular on one count of murder and two counts of attempted murder.

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

191. The Court observes that the Belgian Court of Cassation, at the relevant time, took account of a series of procedural safeguards under Belgian law in order to assess the conformity with the Convention of the statutory restrictions on access to a lawyer in police custody (see paragraphs 48 and 67).

192. As the Court has emphasised in paragraph 171 above, the overall fairness of the proceedings is not guaranteed merely by legislation providing for certain safeguards in the abstract. Only through an examination of their application to the case at hand can it be determined whether the proceedings were fair as a whole. In any event, all the safeguards referred to by the Court of Cassation have been taken into account by the Court in its examination of the present case (see paragraphs 165-90 above).

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

193. In conclusion, re-emphasising the very strict scrutiny that must be applied where there are no compelling reasons to justify the restriction on the right of access to a lawyer, the Court finds that the criminal proceedings

brought against the applicant, when considered as a whole, did not cure the procedural defects occurring at the pre-trial stage, among which the following can be regarded as particularly significant:

(a) The restrictions on the applicant's right of access to a lawyer were particularly extensive. He was questioned while in police custody without having been able to consult with a lawyer beforehand or to secure the presence of a lawyer, and in the course of the subsequent judicial investigation no lawyer attended his interviews or other investigative acts.

(b) In those circumstances, and without having received sufficiently clear prior information as to his right to remain silent, the applicant gave detailed statements while in police custody. He subsequently presented different versions of the facts and made statements which, even though they were not self-incriminating *stricto sensu*, substantially affected his position as regards, in particular, the charge of the attempted murder of C.L.

(c) All of the statements in question were admitted in evidence by the Assize Court without conducting an appropriate examination of the circumstances in which the statements had been given, or of the impact of the absence of a lawyer.

(d) While the Court of Cassation examined the admissibility of the prosecution case, also seeking to ascertain whether the right to a fair trial had been respected, it focused on the absence of a lawyer during the period in police custody without assessing the consequences for the applicant's defence rights of the lawyer's absence during his police interviews, examinations by the investigating judge and other acts performed in the course of the subsequent judicial investigation.

(e) The statements given by the applicant played an important role in the indictment and, as regards the count of the attempted murder of C.L., constituted an integral part of the evidence on which the applicant's conviction was based.

(f) In the trial before the Assize Court, the jurors did not receive any directions or guidance as to how the applicant's statements and their evidential value should be assessed.

194. The Court finds it important to emphasise, as it has done in other cases under Article 6 § 1 of the Convention in which an assessment of the overall fairness of the proceedings was at issue, that it is not for the Court to act as a court of fourth instance (see *Schatschaschwili*, cited above, § 124). In carrying out such an assessment, as required by Article 6 § 1, it must nevertheless carefully look at how the domestic proceedings were conducted, and very strict scrutiny is called for where the restriction on the right of access to a lawyer is not based on any compelling reasons. In the present case, it is the combination of the various above-mentioned factors, and not each one taken separately, which rendered the proceedings unfair as a whole.

(iv) General conclusion

195. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

196. 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."

197. The applicant alleged that he had sustained non-pecuniary damage on account of the lack of legal assistance during the pre-trial phase (police custody and judicial investigation) and he estimated this damage at 5,000 euros (EUR).

198. The Government argued that if the Court were to award any sum by way of just satisfaction, it would be reasonable to limit it to EUR 3,000.

199. As the Court has found on many occasions, it does not follow from the Court's finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention in the applicant's case that he was wrongly convicted and it is impossible to speculate as to what might have occurred had there been no breach of the Convention (see *Dvorski*, cited above, § 117, and *Ibrahim and Others*, cited above, § 315). In the circumstances of the present case, the Court takes the view that a finding of a violation constitutes in itself sufficient just satisfaction and it thus rejects the applicant's claim.

200. The Court notes that Article 442*bis* of the Code of Criminal Procedure provides for the possibility of reopening the proceedings against a convicted person (see paragraph 78 above). It reiterates in this connection that while this may be regarded as an important aspect of the execution of its judgments, the reopening of proceedings is not the only way to execute a judgment of the Court. The use of this possibility in the present case will be a matter for assessment, if appropriate, by the Court of Cassation, having regard to domestic law and to the particular circumstances of the case (see, *mutatis mutandis*, *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, §§ 94 and 99, 11 July 2017). It is for the national authorities and not the Court to settle this question.

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* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 9 November 2018.

Johan Callewaert	Guido Raimondi
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint concurring opinion of Judges Yudkivska, Vučinić, Turković and Hüseynov is annexed to this judgment.

G.R.
J.C.

JOINT CONCURRING OPINION OF JUDGES YUDKIVSKA, VUČINIĆ, TURKOVIĆ AND HÜSEYNOV

> "The history of liberty has largely been the history of observance of procedural safeguards."
>
> Felix Frankfurter

> "Form is the twin sister of liberty and the enemy of the arbitrary"
>
> Rudolf von Ihering

A. Introduction

1. We have voted with our colleagues in finding a violation of Article 6 §§ 1 and 3 (c) of the Convention in this case. However, while we agree with this outcome, we respectfully disagree with an essential part of the reasoning of the judgment, namely the part setting out the guiding principles for situations concerning general and mandatory statutory restrictions on the right of access to a lawyer during pre-trial proceedings. It is our opinion that the rationale of the present case makes a significant departure from the case-law of the Court on this subject and stems ultimately from a misinterpretation of that case-law. It contradicts, in particular, the principles established in *Salduz v. Turkey*[1] and subsequent relevant cases. The decision that has been reached in the present case diminishes the significance of the minimum rights or guarantees contained in paragraph 3 of Article 6 of the Convention, regardless of whether they are understood as independent rights or merely as facets of the right to a fair trial or to due process.

2. In our opinion, reliance on the *Ibrahim and Others* judgment[2] as a guiding principle in the present case is misplaced for three principal reasons. First, *Beuze*, which is a *Salduz* type of case, and *Ibrahim and Others* are two very different cases. While in *Salduz* the applicant's complaints concerned statutory restrictions on the right of access to a lawyer, of a general and mandatory nature[3], in *Ibrahim and Others* the restriction was provided for

1. *Salduz v Turkey* [GC], no. 36391/02, ECHR 2008.
2. *Ibrahim and Others v. the United Kingdom*, nos. 50541/08 and 3 others, 13 September 2016.
3. The law imposed restrictions on legal assistance in connection with a whole category of offences (*Salduz*) or generally (*Beuze*) in pre-trial proceedings, and that restriction applied

in law, but it was neither general nor mandatory[4]. The Grand Chamber acknowledges this (see paragraph 116 of the judgment), yet it has decided to view such fundamentally different situations through the same lens without ever analysing these differences in any depth. We believe that these two situations, when it comes to guaranteeing minimum rights to the assistance of a lawyer during pre-trial proceedings, deserve to be treated differently and were treated differently before the present judgment.

3. Second, we respectfully disagree that the *Salduz* judgment set out two stages of the analysis in a way that would always make it necessary to examine the overall fairness of the proceedings (see paragraph 139 of the judgment). On the contrary, we believe that the *Salduz* judgment went in a different direction and that it actually found the trial as a whole to be unfair, automatically, when certain conditions were met. Furthermore, we do not regard the *Ibrahim and Others* case as simply clarifying the *Salduz* principles and thus superseding them. In our view these two cases complement each other, as will be explained below.

4. Third, unlike our colleagues, we do not see in the post-*Salduz* jurisprudence related to *Salduz* type situations any support for the majority interpretation of the *Salduz* case (see paragraph 140 of the judgment). In our opinion, neither in post-*Salduz* Turkish cases, nor in post-*Salduz* cases against other countries, has the Court conducted an examination of overall fairness in *Salduz* type situations. As we will demonstrate, the Court has not done so even in the two cases cited in paragraph 140 of the judgment as examples for the overall fairness examination in *Salduz* type situations[5]. In fact, the scope of protection of the right to pre-trial legal assistance established in the *Salduz* case was not only confirmed in the post-*Salduz* jurisprudence, it was significantly broadened[6].

5. In our view, and we would so argue, upholding the so-called "*Salduz* doctrine" is important in order to preserve the integrity of the judicial process and thus the values of civilised societies founded upon the rule of law[7].

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automatically. Whatever the circumstances in a particular case, a suspect or an accused was not entitled to legal assistance.

4. The restriction on legal assistance applied to certain offences, but on an *ad hoc* basis in the light of the circumstances of the case. Thus there was generally a right to the assistance of a lawyer, but it could be excluded under certain pre-defined circumstances.

5. *Çarkçı v. Turkey (no. 2)*, no. 28451/08, 14 October 2014, and *A.T. v. Luxembourg*, no. 30460/13, 9 April 2015.

6. See paragraph 9 below.

7. *Gäfgen* v. *Germany* [GC], no. 22978/05, § 175, 1 June 2010.

B. *Salduz* – automatic violation *v.* overall fairness assessment

6. The central issue in the *Salduz* case (cited above) concerned the admission in evidence against the applicant of a confession he had made during a police interrogation at a time when he was denied access to a lawyer on the basis of a general and mandatory statutory restriction on the right to legal assistance during police custody. The Chamber took a traditional approach to this case, assessed the overall fairness of the proceedings and on the basis of such assessment[8] found no violation. The Grand Chamber, unlike the Chamber, after establishing that no justification had been given by the Turkish Government for denying the applicant access to a lawyer, other than the fact that this was provided for on a systematic basis by the relevant legal provisions, concluded that "[a]s such, this already [fell] short of the requirements of Article 6 ..." (ibid., § 56 *in fine*). In short, it seems that the Grand Chamber decided unanimously to depart from the traditional holistic approach and opted for a finding of an automatic violation[9].

7. However, the Grand Chamber's *Salduz* judgment did not stop there, but indeed continued to examine the substance of the case. For our colleagues in the present case, the mere fact that the analysis was continued meant that the *Salduz* case established a two-stage test (first looking at whether or not there were compelling reasons and second examining the overall fairness of the proceedings) which was supposed to apply equally to cases concerning statutory restrictions of a general and mandatory nature as to those concerning restrictions stemming from case-specific decisions by the competent authorities (see paragraph 139 of the judgment). In our view this is an overly simplistic interpretation, at odds not only with the spirit of the *Salduz* case but with the very language used in that case[10]. After all, why

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8. "... the applicant had been represented during the trial and appeal proceedings by a lawyer and ... the applicant's statement to the police was not the sole basis for his conviction. ... the applicant had had the opportunity of challenging the prosecution's allegations under conditions which did not place him at a substantial disadvantage *vis-à-vis* his opponent." *Salduz*, cited above, § 46 (summarising the Chamber judgment of 26 April 2007).

9. One possible interpretation of that paragraph could be that a lack of compelling reasons for restricting the right of access to a lawyer is sufficient in itself to find a violation of Article 6. This interpretation has been explained by Judge Serghides in his partly dissenting opinion in the *Simeonovi* case (see Partly Dissenting Opinion of Judge Serghides, §§ 5-7, appended to *Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017).

10. In particular, we refer to two important sentences. First, "[t]hus, no other justification was given for denying the applicant access to a lawyer than the fact that this was provided for on a systematic basis by the relevant legal provisions. **As such**, this already **falls short of the requirements of Article 6** in this respect, as set out at paragraph 52 above" (*Salduz*, cited above, § 56 *in fine*, emphasis added); and second, "[t]hus, in the present case, the applicant was undoubtedly affected by the restrictions on his access to a lawyer in that his statement to the police was used for his conviction. **Neither the assistance provided**

would the Court in *Salduz* have made an effort to draw a distinction between the different situations identified above, only to conclude that they had to be treated equally?

8. Our colleagues actually fail to acknowledge that the additional analyses were conducted purely in the form of further observations ("The Court further observes ...", ibid., § 57). Thus, on the one hand, these additional analyses could be understood as stemming from excessive caution, *ex abundanti cautela*, as Judge Serghides explained in great detail in his partly dissenting opinion attached to the *Simeonovi* judgment[11]. On the other hand, these additional analyses could be seen as necessary to verify that the applicant himself was undoubtedly affected by such restriction. It seems that the Court used the opportunity to confirm the principle that in the context in which a lack of compelling reasons coincides with a general and mandatory statutory restriction on the right of access to a lawyer, the mere fact that the applicant's statement given to the police without a lawyer was subsequently used for his conviction is in itself sufficient proof that the applicant was undoubtedly affected by such restriction. The Court emphasised that in such a situation the overall fairness review would be futile because "[n]either the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody" (*Salduz*, cited above, § 58). In short, the Court introduced a presumption that the proceedings as a whole must be considered unfair whenever incriminating statements made by the accused in a *Salduz* type situation are used for a conviction. The Court simply considered the first questioning of a suspect by the police as a crucial moment of great importance for the criminal proceedings as a whole – a moment which deserved special treatment.

In such a situation, denial of access to a lawyer cannot be seen as a harmless error, regardless of any other possible procedural safeguards that might be available. In this way, the Court also took care to make it clear that finding an automatic violation in such circumstances should not be mistaken for an abstract review of domestic law[12].

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subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody" (ibid., § 58, emphasis added).

11. See the Partly Dissenting Opinion of Judge Serghides, § 9, appended to *Simeonovi v. Bulgaria*, cited above.

12. It was important for the Grand Chamber to demonstrate that it was not engaging in an abstract review of Turkish law, but that its sole task was to determine whether the manner in which the contested legislation was applied to the applicant was consonant with Article 6 of the Convention.

C. Post-*Salduz* case-law

9. The principles established in *Salduz* concerning statutory restrictions on the right of access to a lawyer of a general and mandatory nature, where restrictions were either applied across the board or were limited to certain offences, were rather faithfully followed and even further developed in subsequent cases of the same type[13]. In most of these cases, the majority against Turkey but some against other States such as Monaco, Luxembourg, Malta, Belgium and France, the Court has not analysed the overall fairness of the proceedings, but has found an automatic violation on the basis of a systematic statutory restriction (see *Dayanan*, cited above, § 33,[14]; *Boz v. Turkey*, no. 2039/04, § 35, 9 February 2010[15]; *Yeşilkaya*, cited above, § 31,[16]; *Stojković v. France and Belgium*, no. 25303/08, §§ 51-57, 27 October 2011[17]; *Navone and Others v. Monaco*, nos. 62880/11, 62892/11

13. For instance, the right of access to a lawyer arises also during procedural actions, such as identification procedures or reconstructions of events (*İbrahim Öztürk v. Turkey*, §§ 48-49; and *Türk v. Turkey*, § 47). Furthermore, a violation was found despite the fact that the applicant had remained silent while in police custody (*Dayanan v. Turkey*, no. 7377/03, § 33, 22 September 2009), and despite there being no admission of guilt in the statements given by the applicant (*Yeşilkaya v. Turkey*, no. 59780/00, 8 December 2009). *Dayanan* (cited above, § 32) also mandated that a suspect should be assisted by a lawyer "as soon as he or she is taken into custody … and not only while being questioned", and should be able to "obtain the whole range of services specifically associated with legal assistance". Finally, in *Brusco* the Court removed any doubt about the lawyer's presence at interviews, by holding that the defendant had the right to be assisted by a lawyer from the beginning of his detention "*ainsi que pendant les interrogatoires*" – and also during questioning (*Brusco v. France*, no. 1466/07, §§ 45 and 54, 14 October 2010).

14. In *Dayanan* (cited above, § 33) the Court stated: "A systemic restriction of this kind [not having legal assistance in police custody], on the basis of the relevant statutory provisions, is sufficient in itself for a violation of Article 6 to be found ..." In *Dayanan*, automaticity was strictly applied even though the applicant had remained silent while in police custody. The latter fact was deemed irrelevant due to the character of the restriction – it was a systematic restriction based on the law, which according to *Salduz* did not require any further review of the fairness of the trial as a whole.

15. In *Boz* (§ 35) the Court again confirmed the same principle: "En soi, une telle restriction systématique sur la base des dispositions légales pertinentes, suffit à conclure à un manquement aux exigences de l'article 6 de la Convention."

16. In *Yeşilkaya* (§ 31), again automaticity was strictly applied even in a case where there was no admission of guilt in the statements given by the applicant. The later fact was irrelevant due to the character of the restriction: a systematic restriction based on the law, which according to *Salduz* did not require any further review of overall fairness.

17. "La Cour considère que si la restriction du droit en cause n'était pas, à l'origine, le fait des autorités françaises, il appartenait à celles-ci, à défaut de motif impérieux la justifiant, de veiller à ce qu'elle ne compromette pas l'équité de la procédure suivie devant elles. À cet égard, l'argument selon lequel cette restriction résulte de l'application systématique des dispositions légales pertinentes est inopérant et suffit à conclure à un manquement aux exigences de l'article 6 de la Convention (voir, entre autres, *Salduz*, précité, § 56, et, *mutatis mutandis*, *Boz c. Turquie*, no. 2039/04, § 35, 9 février 2010)." (*Stojković*, § 55). Consequently, in *Stojković*, the Court relying on *Salduz* concluded that proceedings before

and 62899/11, §§ 80-85, 24 October 2013[18]; and *Borg v. Malta*, no. 37537/13, §§ 59-63, 12 January 2016[19]).

10. Moreover, as it clearly transpires from the above list, the *Salduz* principles have been followed in respect of different jurisdictions and not only Turkey as is suggested in the present judgment (see paragraph 140)[20]. We find this suggestion not only unfounded but detrimental, because it might be concluded that the Court has acted in a biased manner towards one country, in this case Turkey, which of course is not true, because indeed the very same principle, as demonstrated above, has been applied in cases against other countries which had imposed, in their laws, systematic restrictions on the right of access to a lawyer during pre-trial proceedings.

11. Furthermore, it is asserted in the present judgment (ibid.) that in most of the relevant cases the Court has opted for a less absolute approach and has conducted an examination of overall fairness. To substantiate this argument, the Grand Chamber refers to "other authorities", but cites only two cases, *Çarkçi v. Turky* ((no. 2), no. 28451/08, §§ 43-45, 14 October 2014), and *A.T. v. Luxembourg* (cited above). However, in the first case, the applicant complained not only that he had not been provided with legal assistance at the early stages, but also that unlawfully obtained evidence (a statement not bearing his signature and allegedly drafted while he was unconscious) had been used against him. The Court thus found it necessary to address both issues because of the precision and seriousness of each complaint, and not because it felt that it had to perform an overall fairness assessment to establish a violation deriving from the systematic statutory restriction on access to a lawyer. The Court also reiterated that in these

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the Belgian authorities were contrary to Article 6 merely on the basis of a systematic statutory restriction of the right of access to a lawyer, without assessing the overall fairness of these proceedings. It ultimately concluded that nothing that had been done later on in France could cure this initial failure, which originated in Belgian law.

18. "Par ailleurs, elle a déjà jugé qu'une application systématique de dispositions légales pertinentes qui excluent la possibilité d'être assisté par un avocat pendant les interrogatoires suffit, en soi, à conclure à un manquement aux exigences de l'article 6 de la Convention (voir, en premier lieu, *Salduz*, précité, §§ 56 et 61-62)." In *Navone* automaticity was strictly applied and the Court found it irrelevant for finding the violation whether a waiver of the right to assistance of the lawyer had been properly exercised.

19. In paragraph 62 of *Borg* the Court emphasised: "It follows that, also in the present case, the applicant was denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This already falls short of the requirements of Article 6 namely that the right to assistance of a lawyer at the initial stages of police interrogation may only be subject to restrictions if there are compelling reasons (see *Salduz*, cited above, §§ 52, 55 and 56)." Furthermore, the Court observed that in such cases no reliance could be placed on the assertion that the applicant had been reminded of his right to remain silent and that the waiver of a right that was not available was in any event impossible.

20. "In a number of cases, which all concerned Turkey, the Court did not, however, address the question of compelling reasons, and neither did it examine the overall fairness of the proceedings".

circumstances "neither the assistance provided subsequently by lawyers nor the adversarial nature of the ensuing proceedings could remedy the defects which had occurred earlier" (*Çarkçi*, cited above, § 45; see also *Salduz*, cited above, § 58).

12. In *A.T. v Luxembourg* (cited above) the parties disagreed as to which legislation was applicable to the applicant's questioning by the police. It was the Government's submission that the applicant could have benefited from legal assistance but that he had waived this right. The Court did not agree with this statement. It found in particular that, as regards the police interview, the statutory provisions then in force implicitly excluded the assistance of a lawyer for persons arrested under a European arrest warrant issued by Luxembourg. Since the domestic court had not remedied the consequences of that lack of assistance, by excluding from its reasoning the statements taken during the interview, the Court found on this point that there had been a violation of Article 6. The Court, in short, in a *Salduz* type situation, relied on the presumption introduced in the *Salduz* case. Since incriminating statements were not excluded from the file, the Court considered the proceedings as a whole automatically unfair.

13. As regards the applicant's first appearance before the investigating judge, the Court held that the possibility for the applicant to consult his lawyer before that hearing had to be guaranteed unequivocally by the legislation. In so far as A.T. had not been able to converse with his lawyer before the hearing in question, the Court thus found a violation of Article 6. In none of these two situations did the Court perform an overall fairness review.

14. As shown above, there had been no significant divergence among post-*Salduz* cases. Contrary to what is asserted by the Grand Chamber, none of the above cases involved an overall fairness assessment under Article 6.

D. *Salduz* and *Ibrahim* – partly overlapping and partly complementing each other

15. We respectfully disagree that a two-step approach to violations of procedural rights of the defence during pre-trial proceedings (which consists of, first, assessing whether compelling reasons exist, and, second, examining the overall fairness of the proceedings) applied, prior to the judgment in the present case, equally to the legal context in which there had been a general and mandatory statutory restriction on the right of access to a lawyer and one in which there had been none (see paragraph 139 of the judgment). As we have explained above, the *Salduz* judgment considered Article 6 § 3 (c) of the Convention to have been violated, without any need for a subsequent overall fairness analysis, in a situation where the lack of compelling reasons coincided with a general and mandatory statutory restriction of the right of access to a lawyer. In *Ibrahim and Others*, the

Grand Chamber did not expressly address the question whether the two-stage approach was valid in the presence of a systematic, i.e., general and mandatory, statutory restriction. The Grand Chamber, in that case, simply did not have that situation before it. There the Court dealt with a situation of delayed access to a lawyer affecting individuals suspected of terrorism in a "ticking-bomb" situation, where the exceptional deferral of access was precisely circumscribed by counter-terrorism legislation. Accordingly, cases concerning statutory restrictions of a general and mandatory nature remained covered by the *Salduz* judgment, even subsequent to *Ibrahim and Others*.

16. However, the above view does not apply to another part of the *Salduz* judgment, that in which the Court confirmed the position taken in *Murray* and subsequent case-law[21] to the effect that even when there are compelling reasons for restricting access to a lawyer during police custody it is necessary to examine the overall fairness of the proceedings (*Salduz*, cited above, § 55). The Court took that position because even a justified restriction is capable of depriving the accused of a fair hearing (ibid., § 52). Here the *Salduz* judgment confirmed the need for a second stage of analysis consisting in an overall fairness review, but it did so only in relation to cases in which compelling reasons had been identified, and with an important caveat that the rights of the defence would in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer were used for a conviction (ibid., § 55). This part of the *Salduz* judgment was further clarified and consolidated in *Ibrahim and Others* by providing a definition of "compelling reasons" and by defining criteria according to which the overall fairness review should be carried out[22].

17. Finally, the *Salduz* judgment did not opine about the situations in which the right of access to a lawyer would be denied to a suspect or an accused during police custody without compelling reasons and in contravention of a law which provides for such a right[23]. That the

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21. *John Murray v. the United Kingdom*, § 63, 8 February 1996, *Reports of Judgments and Decisions* 1996-I; *Magee v. the United Kingdom*, no. 28135/95, § 45, ECHR 2000-VI; and *Brennan v. the United Kingdom*, no. 39846/98, § 44, ECHR 2001-X.

22. The present judgment describes the development of this case-law since the *Salduz* judgment as being "linear" (see paragraph 152). Of course, the dissenting and partly dissenting opinions in *Ibrahim* and *Simeonovi* call that statement into question. The clarifications in those two cases certainly took, in certain aspects, unexpected turns and were often not so far-reaching in the protection of defence rights as desired in many quarters and as made possible by the *Salduz* judgment itself. See the Joint Partly Dissenting, Partly Concurring Opinion of Judges Sajó and Laffranque, §§ 2-21, appended to the *Ibrahim and Others* judgment, cited above.

23. However, the passages in *Salduz* (cited above); first: "Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right has so far been considered capable of being subject to restrictions for good cause.... [t]he question, **in each case**, has therefore

methodology developed in *Salduz* does not apply in such situations was already established in post-*Salduz* Turkish cases which dealt with a denial of access to a lawyer imposed by the competent Turkish authorities, without compelling reasons, after Turkey had changed the contested law and had removed the general and mandatory statutory restriction on access[24]. In those cases, the Court took the position that the traditional overall fairness review should be performed. Later on, in *Ibrahim and Others* (cited above), the approach to such cases was further clarified and it was emphasised that in exercising an overall fairness review in such cases the Court must apply very strict scrutiny and that the onus was on the Government to convincingly demonstrate why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings had not been irretrievably prejudiced (ibid., § 265). In this way, *Ibrahim* in fact developed this particular standard further in the direction of greater protection for the rights of the accused when compared to the pre-*Salduz* case-law.

18. We agree with our colleagues that the *Salduz* case could be seen as introducing two parameters (justification – whether or not there are compelling reasons or not, and the legal context – whether or not there is a general and mandatory statutory restriction of access to a lawyer) to distinguish between four different sets of circumstances (categories of situations, almost "ideal types") in which an applicant could be deprived of legal assistance during pre-trial proceedings (see *Salduz*, cited above, §§ 55 and 56, see also paragraph 139 of the present judgment). We also agree that the analysis in the *Salduz* and *Ibrahim and Others* cases could, to a certain degree, be seen as developed along these lines. However, we strongly disagree that the two-step approach set out in *Ibrahim* is mere clarification and further linear development of the two-step approach that we find in the *Salduz* case, as is claimed (see paragraphs 139, 141 and 152 of the present judgment). While this could be said of the test related to situations in which there are compelling reasons for restricting the right of access to a lawyer (see paragraph 16 above)[25] this cannot be said of the tests related to

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been **whether the restriction was justified and, if so,** whether, in the light of the entirety of the proceedings, it has not deprived the accused of a fair hearing, for even a justified restriction is capable of doing so in certain circumstances ..." (*Salduz*, § 52, emphasis added); and second: "**[e]ven where compelling reasons may exceptionally justify** denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6…" (*Salduz*, § 55, emphasis added); as Judge Serghides pointed out in his partly dissenting opinion, appended to the *Simeonovi* judgment (cited above, §§ 5-7), indicate that the overall fairness assessment might be required **only** where there are compelling reasons for the restriction.

24. See *Şaman v. Turkey*, no. 35292/05, §§ 34-38, 5 April 2011.

25. Neither *Salduz* nor *Ibrahim and Others*, nor any other case to our knowledge, has divided the situations in which the right to a lawyer has been restricted for compelling reasons into further sub-categories depending upon the legal context in question.

situations in which there are no compelling reasons for such restriction. There *Salduz* and *Ibrahim* developed two different tests, each addressing a different legal context. The *Salduz* test (introducing a presumption that Article 6 is violated if a self-incriminatory statement given to the police by the accused without the assistance of a lawyer is used for conviction) addresses the situation in which there is a general and mandatory statutory restriction of the right of access to a lawyer (see paragraphs 8 and 15 above), while the *Ibrahim* test (requiring an overall fairness assessment with very strict scrutiny) addresses the situation in which there is no such general and mandatory statutory restriction (see paragraph 17 above). Thus, the *Salduz* and *Ibrahim* cases should be seen as partly overlapping and partly complementing each other. They overlap in situations in which there are compelling reasons for denying the assistance of a lawyer, both going in the direction of applying the overall fairness test. They complement each other in situations in which there are no compelling reasons, such that the *Salduz* "presumption test leading to an automatic violation" covers situations where there is a general and mandatory statutory restriction of the right of access to a lawyer, and the *Ibrahim* "strict scrutiny overall fairness test" covers situations where there is no such restriction.

E. Overruling the *Salduz* test

19. We regret that the present judgment departs from the standards of a fair trial as determined in *Salduz* and *Ibrahim and Others*, taken together, under the guise of interpreting them. As we have demonstrated above, the application of the *Ibrahim* test, related to situations when there are no compelling reasons, could not be stretched to cover the *Salduz* type of cases without overruling not only *Dayanan* (cited above) and other judgments against Turkey (as claimed in the present judgment, see paragraph 144), but also overruling *Salduz* itself and all the cases that have applied the *Salduz* test. The judgment in the present case actually distorts and changes the *Salduz* principle and devalues the right that the Court established previously.

20. Moreover, the present judgment also weakens, if not overrules, the jurisprudence in which the Court has laid down several other conditions which the domestic authorities must respect in restricting the Article 6 safeguards, including the right of access to a lawyer: first, that no restriction should be such as to destroy or extinguish the very essence of the relevant Article 6 right[26]; second, that the restrictions may in general be imposed if

26. In the *Jalloh* case, relying on *Heaney and McGuinness v. Ireland* (no. 34720/97, § 58, ECHR 2000-XII), the Court emphasised that "public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention" (*Jalloh v. Germany* [GC], no. 54810/00,§ 97, ECHR 2006-IX. See also *Heglas v. the Czech Republic*,

they pursue a legitimate aim[27]; third, that the restriction should be reasonably proportionate to the aim sought to be achieved[28]. That is to say, in the present case, the Grand Chamber took the position that the right to a fair trial may be preserved even in a situation in which a lack of compelling reasons for restricting the right of access to a lawyer (i.e. even when there is no legitimate aim) coincides with the general and mandatory statutory restriction or complete denial of the right of access to a lawyer (i.e. even when the very essence of that right is extinguished) and even when this is done during the crucial stage of criminal proceedings (such as the first interrogation by the police) and even if the statement given to the police under these conditions is used for the applicant's conviction (apparently in complete disregard of proportionality). According to our colleagues (see paragraph 144 of the judgment) all these could, in the concrete case, be counter-balanced by some other procedural safeguards and the fairness of the trial as a whole could still be preserved in the case at hand (see *a contrario*, *Salduz*, cited above, § 58).

21. Apparently, such a sacrosanct understanding of the overall fairness assessment (see paragraph 147 of the judgment) is consistent with the role of the Court, which is not to adjudicate in the abstract or to harmonise the various legal systems (ibid., § 148). In our opinion, it is simply wrong to assume that finding a violation of Article 6 on the basis of any assessment other than the overall fairness assessment is equal to an abstract review of the law (see paragraph 8 above). It is also wrong, in our view, to suggest that the States would not be forced to harmonise their legal systems only if the Court performs an overall fairness assessment. It is also false to treat the automaticity found in *Salduz* as laying down a binding rule of uniform application. *Salduz* established a right to custodial legal assistance as an implied right under the Convention, leaving States free to find their own ways of implementing that right[29]. It is a fact that the member States are constantly adjusting their systems to the ECHR standards[30], but in doing so they are free to choose the best means, as long as the system chosen does

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no. 5935/02, § 87, 1 March 2007, and *Bykov v. Russia*, no. 4378/02, § 93, 10 March 2009). It seems that the inquiry about the essence of the right has been designed as a safeguard against excessive consideration of public interest factors.

27. See also *Kostovski v. the Netherlands*, 20 November 1989, § 44, Series A no. 166.

28. See, in the context of the right of access to a court, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999-I.

29. Indeed, the reforms of custodial legal assistance in Europe, triggered by the *Salduz* judgment, have considerably varied among different national legal systems.

30. See J. Hodgson, "Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform", 51 *International and Comparative Law Quarterly* (2002), p. 782; I. Motoc and I. Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (Cambridge, Cambridge University Press 2016).

not contravene the principles set forth in the Convention[31]. As the Court explained in the case of *Al-Khawaja and Tahery*[32], there should be no conceptual disagreement in observing "substantial differences in legal systems and procedures" but the same ECHR standards.

F. Conclusion

22. In sum, we believe that it is vital to make a distinction between the *systematic* defects and the *particular* defects which are found in individual cases as a result of targeted and context-specific restrictions (e.g. in terrorism cases) or as a result of mistakes and shortcomings in individual cases. It is not correct for the Court to consider the overall fairness of an individual applicant's case when a systematic ban exists, affecting every other individual in the applicant's position and in the absence of any assessment by the relevant national authorities.

23. The formulation of the exception is extremely clear: any derogation must be justified by compelling reasons pertaining to an urgent need to avert danger for the life or physical integrity of one or more people. In addition, any derogation must comply with the principle of proportionality, which implies that the competent authority must always choose the alternative that least restricts the right of access to a lawyer and must limit the duration of the restriction as much as possible. In accordance with the Court's case-law, no derogation may be based exclusively on the type or seriousness of the offence and any decision to derogate requires a case-by-case assessment by the competent authority. Finally, derogations may only be authorised by a reasoned decision of a judicial authority.

24. The Court must apply a strict approach to a blanket prohibition on the right to legal assistance; otherwise we will end up in conflict with the overall direction of both the case-law of the Court and EU law.

25. The *Salduz* judgment led to a revolution for fair-trial rights, stating firmly that any restriction on the right of access to a lawyer must be *exceptional* and *capable of justification*: "Article 6 § 1 requires that, *as a rule*, access to a lawyer should be provided as from the first interrogation of a suspect by the police" and that, as further clarified in *Ibrahim and Others*, "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". The

31. *Taxquet v. Belgium* [GC], no. 926/05, § 83, ECHR 2010.

32. "While it is important for the Court to have regard to substantial differences in legal systems and procedures, including different approaches to the admissibility of evidence in criminal trials, ultimately it must apply the same standard of review under Article 6 §§ 1 and 3 (d), irrespective of the legal system from which a case emanates." See *Al-Khawaja and Tahery* v. *the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 130, 15 December 2011.

Beuze judgment in this respect represents a regrettable counter-revolution: it has overruled the "*as a rule*" requirement – already repeated in more than one hundred judgments widely known as the "*Salduz* jurisprudence" – and has dramatically relativised it to the detriment of procedural safeguards.

26. What is more, the present judgment will also disgruntle the member States which have thus far made amendments to their domestic law and practice in order to better follow the earlier decision of the Court[33]. The *Salduz* judgment has also triggered and to a large extent inspired a series of measures at the EU level, with its Stockholm Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings, including Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings. The intention behind that Directive was to ensure stronger protection of procedural rights of suspects and accused in criminal proceedings[34]. Its goal was to strengthen the *Salduz* principles by clarifying them to ensure their practical effectiveness, thereby applying not a restrictive but an expansionist interpretation of the Court's case-law.

27. It is also worth mentioning that one of those States which has enacted new legislation in response to the *Salduz* case is Belgium. Today, some nine years later, the Grand Chamber is explaining to Belgium that they are free to weaken the protections they established as a reaction to the

33. The *Salduz* judgment led to, or at least set in motion, reforms of custodial legal assistance in, among other States, France, Belgium, Scotland, Ireland and the Netherlands, countries which had long resisted giving full effect to the right of access to a lawyer in police interviews. For example, in the case of *Cadder v Her Majesty's Advocate* ([2010] UKSC 43) the UK Supreme Court examined the legislation in Scotland as it related to the restrictions on access to a lawyer. While the Scottish criminal law system provides a variety of protections to accused persons that at times even go further than those offered by other systems, the court held that these protections did not make up for the lack of a right to avail oneself of legal advice before being questioned*:* "A right of access to a lawyer, which is implied in order to protect a right at the heart of the notion of a fair procedure under article 6, must itself lie near that heart. For this reason, there is not the remotest chance that the European Court would find that, because of the other guarantees that Scots law provides for accused persons, it is compatible with article 6(1) and (3) (c) for the Scottish system to omit this safeguard – which the Committee for the Prevention of Torture regards as 'fundamental' – and for suspects to be routinely questioned without having the right to consult a lawyer first. On this matter Strasbourg has spoken: the courts in this country have no real option but to apply the law which it has laid down." (ibid., § 93). The Supreme Court went as far as to state that "there is no room for any escape from the *Salduz* ruling" (ibid., § 50). This is how our domestic counterparts have understood and interpreted *Salduz*: "The conclusion that I would draw as to the effect of *Salduz* is that the contracting states are under a duty to organise their systems in such a way as to ensure that, unless in the particular circumstances of the case there are compelling reasons for restricting the right, a person who is detained has access to advice from a lawyer before he is subjected to police questioning" (ibid., § 48).

34. See Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ 2009 C 295/1, Recital 2).

Court's previous ruling; Belgium and other member States were apparently too hasty in complying with *Salduz*.

28. It is most worrying that this disappointing radical shift is happening in the sphere of procedural rights – the heart of the rule of law principle. As we know from Plutarch, a garden that is often replanted will not bear fruit.