FAIR TRIALS INTERNATIONAL

THIRD PARTY INTERVENTION IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 30460/13

Between

A.T.

(Applicant)

And

LUXEMBOURG

(Respondent)

Written Comments

By Fair Trials International
March 2014

About Fair Trials International

Fair Trials International ('Fair Trials') is a UK-based non-governmental organisation that works for fair trials according to international standards of justice. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused.

We pursue our mission by providing assistance, through our expert casework practice, to people arrested outside their own country. We also address the root causes of injustice through broader research and campaigning, and build local legal capacity through targeted training, mentoring and network activities. In all our work, we collaborate with our Legal Expert Advisory Panel, a group of over 120 criminal defence experts from 28 EU Member States.

Fair Trials is active in the field of EU criminal justice policy and, through our INTERPOL work, international police cooperation, extradition and asylum. Thanks to the direct assistance we provide to hundreds of people each year, we are uniquely placed to offer evidence of how international law enforcement systems affect individual rights.

Acknowledgment

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CLIFFORD CHANCE

OPEN SOCIETY FOUNDATIONS

OAK FOUNDATION

Contact:

Libby McVeigh
Head of Law Reform
+44 (0)20 7822 2380
libby.mcveigh@fairtrials.net

Rebecca Shaeffer
Law Reform Officer
+44 (0)20 7822 2382
rebecca.shaeffer@fairtrials.net

Alex Tinsley
Law Reform Officer
+44 (0)20 7822 2385
alex.tinsley@fairtrials.net

www.fairtrials.org

Registered charity no. 1134586
Registered with legal liability in England and Wales no 7135273
Registered office: Temple Chambers, 3/7 Temple Avenue, London EC4Y 0HP, United Kingdom

PROCEDURE

1. Fair Trials International ('Fair Trials') submits these written comments pursuant to the permission granted by the President of the Fifth Section under Article 36(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'Convention') and Rule 44(2) of the Rules of the Court, notified by letter of the Section Registrar of 13 March 2014.

INTRODUCTION

2. This case requires the Court to consider the limits of the principle enounced in *Salduz v. Turkey*,[1] referred to here as the '*Salduz* principle', where the Court stated: '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 … 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'.[2]

3. In this context, there are three key issues which the Court will need to address: (a) whether access to a lawyer was restricted further to a systematic restriction. If this is the case, a violation arises irrespective of whether the suspect responded to questions in absence of the lawyer and how this evidence was used; (b) whether the right of access to a lawyer was 'waived'. The Court takes a scrupulous approach to allegations that 'waivers' have been given, particularly when legal advice was initially requested prior to the alleged waiver; and (c) if it is not found that a waiver was given, the Court needs to determine whether the fairness of proceedings is compromised by the 'use' of an 'incriminating statement' for a conviction within the meaning of the Salduz principle.

4. Fair Trials will make the following submissions. The right to a lawyer is an essential safeguard which enables the exercise of other rights, and extends beyond protecting a suspect from making confessions (**Part A**). Despite this, many suspects face serious challenges in exercising this right across the European Union ('EU'), notably because of legal and practical restrictions on the right, the prevalence of purported 'waivers' of questionable reliability, and ineffective remedial action by courts when violations arise (**Part B**). As a result, the EU has adopted a Directive enshrining the right to a lawyer, placing safeguards around waiver and imposing a broad remedial duty on courts (**Part C**). In light of these matters, the Court should adopt a scrupulous approach to the issue of systematic restrictions on the right to a lawyer, 'waiver' of that right and the failure of national courts to assess prejudice arising from a restriction, even when no 'confession' is made (**Part D**).

PART A: ACCESS TO A LAWYER – THE GATEWAY TO FAIRNESS

5. The Court has recognised that 'the right to counsel [is] a fundamental right among those which constitute the notion of fair trial and ensur[es] the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention'.[3] It has recognised that the accused should have access to the 'whole range of services specifically associated with legal assistance' and that counsel must be able 'to secure without restriction the fundamental aspects of [the accused's] defence'.[4]

6. At the police station, counsel's role extends beyond merely assisting the suspect in not making a 'confession' during interrogations. The lawyer acts as a 'gateway' to other rights and helps prevent prejudice accruing to the suspect's defence in a broad sense. This might include, for instance:

   a. Registering concerns as to the suspect's well-being and asking for medical examinations to be undertaken, particularly important as a suspect's physical or mental state may affect the quality of their evidence, yet they may not voluntarily inform police of any issues;

   b. Where investigative steps, compulsory or otherwise (taking of blood or bodily samples, the holding of identity parades etc) are proposed or taken, ensuring the legal preconditions for this are met and that they are carried out in accordance with procedures;[5]

   c. Ensuring that any written or oral information given about the suspect's legal rights or the allegation has been properly understood, such as to enable the suspect to make an informed choice as to whether or how to respond to the allegation or to invoke their procedural rights;[6]

   d. Advising the suspect to remain silent until such information is provided. This might involve advising a suspect not to speak until the case file has been disclosed, if this only happens later under national law, enabling the suspect to provide an informed response to the allegations;[7]

   e. If questioning is undertaken, ensuring that it respects procedural requirements (length, breaks, availability of drinking water, lighting, positioning of the persons present, formulation of questions, etc); challenging irrelevant questions or advising the suspect not to answer specific questions; and asking additional or clarificatory questions.

   f. Assessing the need for interpretation and, if an interpreter is appointed for consultation with counsel and/or questioning, verifying the credentials of that interpreter and ensuring concerns are flagged regarding possible misinterpretations in order to ensure that a faithful record is made of the statements – whether exculpatory or incriminating – made by that person;[8] and

   g. Linked to all of the above, ensuring a record is kept of proceedings at the police station. This is essential in the absence of audio and/or video recording, leaving only the records compiled by

the police.[9] The lawyer's presence ensures an alternative record is kept of proceedings, enabling courts to form an objective view as to the reliability of the evidence obtained or the need for remedial action. Conversely, if no lawyer is present, the courts may be unable to assess whether the evidence was fairly obtained, its reliability and the need for remedial action.

PART B – ACCESS TO A LAWYER: CHALLENGES IN LAW AND PRACTICE

7. Despite its fundamental importance, the right of access to a lawyer is not sufficiently protected within the EU. In 2013, Fair Trials held a number of meetings with expert criminal lawyers from 25 jurisdictions,[10] during which practitioners raised concerns relating to the three key issues arising before the Court in this context.

Legal and practical restrictions on the right to a lawyer

8. Information received during Fair Trials' expert meetings has shown that, despite the *Salduz* judgment, in practice access to a lawyer at the police station is often not provided for a variety of reasons – legal, or, even where the legal picture appears satisfactory, due to its practical application.

9. By way of illustration, practitioners from the Netherlands reported that lawyers were often absent in interrogations,[11] a fact corroborated by another study which noted that lawyers were present in only nine of 97 interrogations observed.[12] In Ireland, the Supreme Court recently quashed a conviction based on evidence obtained in the context of interrogations begun before the arrival of a lawyer, a practice arising from the qualified nature of the constitutional right of 'reasonable' access to a solicitor.[13] As at June 2013, it was reported that in Malta, defence counsel was still not permitted to be present during the interrogation itself.[14]

10. In addition, even where access to a lawyer is technically provided, practical restrictions deprive the right of its usefulness. In numerous jurisdictions, participation of lawyers in interrogations was said to be ineffective due to the lack of clear regulation, practices restricting lawyers' role to the asking of questions at the end of the interview, and the variation of practices according to the preference of interrogators or the status of the lawyers involved.[15] In Scotland, the practice of providing advice by telephone was said to be ineffective, since the advice to remain silent might be difficult to follow in the context of the interview itself.[16] The Madrid Bar recently had to publicly dismiss a *complaint* from the police suggesting lawyers had overstepped their role by advising clients to remain silent,[17] a fact that demonstrates the still incomplete recognition of the right among law enforcement agents.

Issues surrounding waiver of the right of access to a lawyer

11. Practitioners at Fair Trials' experts' meetings almost universally underlined serious concerns about the prevalence of purported 'waivers' of the right to a lawyer, with the inadequacy of safeguards giving rise to doubts as to the genuineness of these waivers.[18]

12. Legal conditions for the giving of a waiver differ significantly. For instance, in England and Wales, the custody officer must inform the suspect of the right to legal advice[19] and must record the reasons given for a waiver,[20] but there is no obligation to inform the suspect of the consequences of waiving the right. By contrast, in France, one Court of Appeal has annulled a police custody record for failure to advise the suspect of the consequences of waiving the right to a lawyer.[21]

13. Practitioners also report that, whatever the legal situation, practices at the police station place considerable doubt on the authenticity of waivers. This concern was emphasised in relation to Estonia;[22] Latvia,[23] Poland,[24] Sweden,[25] Finland,[26] Luxembourg[27] and Portugal[28], with practitioners pointing to a variety of causes: the incentivising of waivers by the potential avoidance of delays; the failure to provide prior legal advice as to the consequences of the waiver; citizens' lack of civic awareness of their rights; and ineffective inquiry and remedial action by courts later in the process.

Ineffective remedial action when violations occur

14. Fair Trials is well aware that rules concerning the admissibility of evidence are a matter for the Contracting States, but is mindful that these must in any case be such as to ensure proceedings are ultimately fair.[29] There are concerns that courts take insufficient remedial action in respect of evidence obtained in breach of the right to a lawyer, leaving it doubtful whether prejudice to the proceedings arising from that breach has in fact been repaired.

15. In one expert meeting, participants from Sweden noted that, in the absence of a clear exclusionary rule, the only remedy was to persuade the court to attach less credibility to the evidence; however, the failure of written decisions visibly to show what reliance was placed on the relevant evidence made it difficult to assess whether this was done, and also precluded appeals on this basis.[30] In respect of Estonia, it was reported that there was no principled exclusion or disregarding of evidence obtained in breach of the right to a lawyer, meaning such evidence still had a bearing on decisions on the merits of cases; even if excluded, courts appeared from subsequent decisions to have been influenced by the evidence[31] (a point corroborated by the Court's own findings in *Martin v. Estonia*[32]). Similarly, practitioners from Poland pointed out that evidence obtained in breach of the right to a lawyer can be considered by the courts.[33]

THE ACCESS TO A LAWYER DIRECTIVE

16. Within the EU, issues such as these have given rise to concerns that the Member States do not always comply with the Convention. As a result, in 2009, the EU adopted the Roadmap on strengthening procedural rights,[34] with the aim of providing stronger foundations for mutual trust between the judicial systems of EU Member States by building upon the protection ensured by the Convention through minimum rules on defence rights in criminal proceedings.

17. The third directive adopted under the Roadmap – Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 ('the Directive')[35] – is particularly relevant. Inspired by the Court's *Salduz* judgment,[36] it lays down rules concerning the right to a lawyer, waiver of that right, and remedies in respect of its violation.

18. Article 3 enshrines the right to a lawyer. It requires that suspects or accused persons must have access to a lawyer without undue delay and in any case, 'before they are questioned by the police or by another law enforcement or judicial authority', upon the carrying out of an investigative step, and after deprivation of liberty. It specifies that the suspect must be able to meet in private with the lawyer prior to questioning; that the lawyer must be able to participate effectively during questioning; and that the lawyer be able to attend investigative and evidence-gathering acts.

19. Under Article 9, in relation to any waiver of the right in Article 3, Member States must ensure that the suspect or accused person 'has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it', and that 'the waiver is given voluntarily and unequivocally'.

20. Article 12 requires Member States to ensure there is an effective remedy in the event of a breach of the rights under the Directive. It specifies that 'without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that … in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer … the rights of the defence and the fairness of the proceedings are respected'.

Relationship with the Convention

21. It is well established that 'the Convention must be interpreted in the light of present-day conditions', having regard to changes in domestic legislation and international instruments. The Court regularly takes account of EU directives when interpreting provisions of the Convention.[37]

22. The Directive's recitals state that its provisions are intended to '[build] upon Articles 3, 5, 6 and 8 ECHR, as interpreted by [the Court], which, in its case-law, on an ongoing basis, sets standards on

the right of access to a lawyer'. The Court is therefore entitled to take account of it as an indication of what the Member States of the EU (a significant proportion of the Council of Europe) understand to be their essential obligations in this area, as informed by the Court's own case-law.

23. While the Court of Justice of the EU ('CJEU') has responsibility for interpreting the provisions of the Directive, the provisions should inform the Court's consideration in the present case because the Directive reflects the recognition attributed by the 28 Member States of the EU to the right of access to a lawyer as a fundamental element of the right to a fair trial consistent with the standards of the Charter of Fundamental Rights of the EU (the 'Charter') and the Convention. More specific inferences which can be drawn from the Directive as discussed further below.

COMMENTS ON THE APPROACH TO ARTICLE 6(3)(c)

Systematic restrictions on access to a lawyer

24. The Court has developed a straightforward approach to cases in which suspects simply do not have the right of access to a lawyer under national law. The approach was established in *Dayanan v. Turkey*,[38] in which the Court considered the Turkish Government's argument that, since the suspect had remained silent in police custody, the absence of a lawyer had 'in no way affected the observance of his defence rights'. The Court stated that 'a systematic restriction … on the basis of the relevant statutory provisions, is sufficient in itself for a violation of Article 6 to be found, notwithstanding the fact that the applicant remained silent when questioned in police custody'.[39]

25. The approach has been followed for all applications relating to cases in which, by virtue of the applicable statutory regime, there is no right to a lawyer.[40] The Court has not, in these cases, expounded on the rationale for this approach. However, it appears to establish the right of access to a lawyer under Article 6(3)(c) as a fundamental procedural requirement: if the right is denied outright, a violation of that specific provision occurs; the Court need not analyse whether the fairness of the proceedings as a whole was prejudiced such as to produce a violation of Article 6(1).

26. Fair Trials would suggest that despite the Court speaking of the restriction 'on the basis of the relevant statutory provisions',[41] the approach should be applied equally for practices which have the same effect. It would be inconsistent with the Court's insistence upon Convention rights being 'practical and effective' if a formal legal entitlement were deemed sufficient, where as a practical reality the latter was devoid of any substance (as in *Airey v. Ireland*[42] itself).

27. Fair Trials submits that, if the suspect has no choice in the matter, the restriction is beyond his control, whether it arises from the law or from a practice have equivalent effect. This should be regarded as a systematic restriction, in violation of Article 6(3)(c), and no further analysis is needed.

Waiver

28. If the absence of a lawyer is not the product of a systematic restriction, the Court may be called upon to determine whether the existing right was 'waived'. The Court has always recognised that 'nothing in the letter or spirit of the Convention prevents a person waiving, expressly or tacitly, the entitlements to the guarantees of a fair trial. However, to be effective for Convention purposes, a waiver must be unequivocal and attended by safeguards commensurate to its importance'.[43]

29. The Court takes a scrupulous approach to suggestions that the right to a lawyer prior to and during police interrogation has been waived. The Court takes into account factors such as the suspect's assertion that he was forced to sign a printed waiver document;[44] the failure of the police to explain the right to a lawyer separately from the right to silence, and the absence of a signed document waiving the right to a lawyer specifically;[45] the likely confusion in the mind of the suspect at the point of interrogation, and the fact of the suspect initially requesting a lawyer.[46]

30. Where such issues arise, the Court requires concrete evidence verifying that the waiver was given knowingly and intelligently. It takes account of, for instance, the presence of carefully compiled minutes showing rights were duly explained, combined with the suspect's signature of a waiver declaration.[47] The need for such an approach is underlined by Article 9(1)(a) of the Directive, requiring the provision of 'clear and sufficient information in simple and understandable language about the content of the right and the possible consequences of waiving it', and the recording of the circumstances in which the waiver is made.

31. It could be argued that the consequences of exercising a waiver can only fully be understood with advice from a lawyer as to the legal consequences for the defence – particularly given the background, highlighted earlier, of police reminding the suspect of other consequences of waiving the right, such as avoiding delays, incentivising the giving of a waiver.

32. It should be noted here that the Court is particularly sceptical in relation to the suggestion that a 'tacit waiver' can arise where a suspect who originally requested a lawyer then answers questions:

> 'the right to counsel ... is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard ... when an accused has invoked

his right to be assisted by counsel during interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated interrogation.'[48]

33. It is thus clear from the Court's case-law that the right to a lawyer, once invoked, can only be considered effectively waived if it is beyond doubt that the suspect voluntarily chose this course, on the basis of prior information as to the consequences of waiving the right.

Remedies where the right to a lawyer is restricted

34. If a restriction on the right of access to a lawyer is established, a violation of Article 6 arises if the Court determines that this caused prejudice to the fairness of the proceedings as a whole. This is, in essence, the issue of whether there is a 'use' of an 'incriminating statement' for a conviction within the meaning of the *Salduz* principle.

35. The Court's case-law does not reveal a uniform approach to the application of the *Salduz* principle. As explained below, (1) whilst some decisions point to a narrow approach whereby only the presence of a 'confession', in the classic sense of the word, can raise an issue under Article 6, others suggest that any evidence obtained in the absence of a lawyer which (actually or potentially) causes prejudice to the accused's defence triggers the application of the *Salduz* principle. Further, (2) whilst some decisions point to a narrow approach whereby Article 6 is infringed only if the incriminating evidence obtained in the absence of a lawyer are the 'central platform' or 'sole or decisive' basis for the conviction, others show a stricter approach, finding a violation where the evidence obtained without the lawyer has a bearing upon the conviction.

(1) The concept of an 'incriminating statement'

36. In the paradigm case, the Court deals with straightforward situations where the person has, in the absence of a lawyer, made a statement which can properly be called a 'confession' – a directly incriminating oral statement admitting guilt. However, other decisions make clear that the concept is a broad one referring to evidence which prejudices the defence.

37. For instance, in *Khayrov v. Ukraine*, the applicant made statements which were not direct admissions but statements giving grounds to infer some degree of participation in the offence; these statements 'affected his position' and breach of defence rights arose.[49] Equally, in *Öner v. Turkey*,[50] the Court noted that – despite the suspect's consistent denials of the allegations against him – the suspect had, during the period in which his right of access to a lawyer was restricted, been made to attend an identity parade, which 'affected' his position.[51]

38. This is consistent with the position reflected in Article 12 of the Directive, which requires remedial action 'in the assessment of *statements* made by suspects or accused persons *or of evidence obtained* in breach of their right to a lawyer' (emphasis added). The Directive pointedly does not refer only to 'confessions' or 'incriminating statements', and clearly extends to other forms of evidence.

39. This reflects the fact that actions undertaken at the police station may prejudice the fairness of the proceedings in less obvious and direct manner than a confession. For instance, if the suspect denies the offence, but is confused or unwell, or is misunderstood because of poor interpretation, factual inconsistencies may arise with later denials, potentially adversely affecting his credibility.[52]

40. This can be compared to the drawing of an adverse inference at trial from the suspect's failure to mention a point in police interrogation: the inconsistency between the suspect's account damages the credibility of the defence given at trial. Because of this potential prejudice, the suspect's interrogation cannot validly be held against him if he was denied access to a lawyer at that stage.

41. Fair Trials is of course mindful of decisions such as that in *Trymbach v. Ukraine*,[53] where the Court found no violation because no confession had been made. However, the Court based that conclusion on the fact that the applicant's denials were rebutted by forensic evidence,[54] and that his version of events stayed the same consistently. Where the countervailing evidence is that of another witness, such that the respective credibility of each person becomes crucial, the potential prejudice which may arise from inconsistencies arising between denials would call for a different approach.

42. A broad interpretation of the concept of an 'incriminating statement' is also consistent with the Court's own doctrine on the right not to incriminate oneself. The Court has found, for instance, that although this right generally covers only oral statements, it may also apply where, for instance, emetics are used to compel the production of evidence in breach of Article 3 of the Convention.[55] A trial court may not be in a position to disregard such evidence if no lawyer is present at the police station to ensure records are taken of concerns regarding excessive force used in such procedures.

(2) Incriminating statements being 'used' for a conviction

43. There also appear to be several approaches regarding the quantum of impact which the evidence obtained in breach of the right to a lawyer must have upon the conviction before a violation of Article 6 can be found (in other words: when is an incriminating statement 'used' for a conviction?).

44. One approach – the most relaxed – is where the court finds a violation only when the tainted evidence is the 'central platform' for the prosecution's case or the eventual conviction. This was the approach taken in *Dvorski v. Croatia*,[56] where no violation was found on the basis that the

convicting court relied on a complex body of evidence, contrasting with the (pre-*Salduz*) case of *Magee v. UK* where the incriminating statement had been the 'central platform' of the conviction.[57]

45. Similarly, some cases apply the 'sole or decisive' test used in other areas of the Court's case-law. For instance, in *Shabelnik v. Ukraine*,[58] the violation was established on the basis that the conviction rested 'to a decisive extent, if not solely' on the incriminating statement.[59]

46. In other cases – taking a more rigorous approach – the court has found violations even when the incriminating statement was not central to the conviction. In *Khayrov v. Ukraine*, the violation was found on the basis that the evidence 'had a bearing' upon the final conviction. In *Gök and Güler v. Turkey*,[60] the Court noted that the convicting court had 'attached weight' to the statements, such that the applicants were 'undoubtedly affected' by that restriction.[61]

47. At its most scrupulous, the Court's case-law suggests that a violation will be found unless the national decisions show that the decision on the merits of the case is free of any contamination by the earlier breach. In *Martin v. Estonia*, the Court found that the exclusion of pre-trial statements by an appeal court had not 'completely undone' the earlier breach of the suspect's right to a lawyer of his choosing, as some indirect reliance was placed on the evidence obtained in the context of that breach, despite that court carefully founding its decision on other evidence.[62]

48. Fair Trials suggests that the last approach is the correct one. The Court must be able to satisfy itself that the effects of the restriction have been cancelled out. Article 12 of the Directive, framed as a general duty to safeguard the fairness of proceedings in the assessment of all statements and evidence, clearly points to a broader approach than the mere avoidance of 'sole or decisive' reliance upon tainted confessions.

49. However, to undertake any of these analyses, the Court must be in a position to assess the sufficiency of the remedial action taken by the national courts in the first place. Even following the most relaxed of the approaches described above, the Court can only reach a view as to the extent to which the evidence had a prejudicial bearing on the conviction by taking into account the range of other evidence relied upon.[63] It goes without saying that, taking the more scrupulous approach of *Martin v. Estonia*, the Court depends upon the text of the national decisions in order to establish that the effects of the restriction on the right to a lawyer have been fully cancelled out. Even in dismissing an application because no incriminating statement is present, the Court points to the wording of the national decisions identifying and excluding this evidence.[64]

50. If the national decisions do not allow that analysis, for instance because grievances concerning restrictions on access to a lawyer are ignored by the trial court, the Court will find a violation.[65] In

Khayrov v. Ukraine, it stated that 'in the absence of any court ruling as to the role of those statements which were not expressly excluded from the case file, the Court considers that they had a bearing on the applicant's conviction'[66]. Whatever the precise extent of prejudice caused, the Court cannot begin to form a view if the issue has not been properly considered by the national courts.

51. This is, in fact, reflected in the text of Protocol 14 establishing the 'significant disadvantage' criterion, which provides that 'no case may be rejected on this ground which has not been duly considered by a domestic tribunal': the Court can relinquish its own review only if satisfied that national remedies have been duly applied so as to protect against violations of the Convention.

52. It follows that, where a national court has applied an unsatisfactory approach to the issue of 'waiver', failed for that reason to identify a breach of the right to a lawyer, and accordingly taken no remedial action, the Court cannot conduct this analysis and is left with a breach of the right to a lawyer. This not being visibly remedied at the national level, the Court's subsidiary competence is engaged and a violation of Article 6(3)(c) should be found. Any other approach would involve a dangerously speculative assumption as to the extent of prejudice caused to the trial as a whole.

REFERENCES

[1] *Salduz v. Turkey* App. No 36391/02 (Judgment of 27 November 2008).

[2] Paragraph 55.

[3] *Pishchalnikov v. Russia* App. No 7025/04 (Judgment of 24 September 2009), paragraph 78.

[4] *Dayanan v. Turkey* App. No 7377/03 (Judgment of 13 October 2009).

[5] In respect of the administration of emetics, see *Jalloh v. Germany* App. No 54810/00 (Judgment of 11 July 2006): the methods used to procure material evidence from within a suspect's stomach – which will impact upon its admissibility – are better appraised by a court which has both a police record and a note from a lawyer detailing any concerns raised by the suspect. In respect of the holding of an identity parade, see *Öner v. Turkey* App. No 50356/08 (Judgment of 13 September 2011): the arrangement, clothing and actions asked of the parade participants are clearly issues which must be monitored by the suspect's lawyer to ensure respect for the presumption of innocence, if any reliance is to be placed upon the results.

[6] In respect of an oral caution given by police, the Court stated in *Pishchalnikov v. Russia* (cited above, note 3) that this 'barely meets the minimum aim of acquainting the accused with the rights which the law confirms [confers?] on him'; in *Panovits v. Cyprus* App. No 4268/04 (Judgment of 11 December 2008), the Court justified the need for the lawyer's presence on the basis that it was unlikely that 'a mere caution in the words provided for in the domestic law would be enough to enable him to sufficiently comprehend the nature of his rights' (paragraph 74).

[7] This was reported to be ordinary practice in the Czech Republic at one of Fair Trials' experts' meetings.

[8] Article 6 of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF, requires Member States to ensure 'training of judges, prosecutors and judicial staff involved in criminal proceedings to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication' – a clear reflection of the potential for misunderstandings, which the lawyer may seek to identify and note in the context of police interrogation.

[9] The record-keeping function of the lawyer was (implicitly) highlighted by the European Commission's Proposal for Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (COM(2004) 328 final) available at http://www.statewatch.org/news/2007/apr/eu-crim-proced-com-328-2004.pdf, which envisaged at Article 9 requiring the recording of proceedings to ensure the reliability of what was said.

[10] During 2012 and 2013, Fair Trials hosted two series of expert meetings in EU Member States, the first of which addressed practices relating to pre-trial detention in six EU Member States (Spain, Poland, Hungary, Greece, Lithuania and France), and the second of which gathered the views of legal experts from 23 Member States on fair trial rights issues more generally at five meetings (held in Hungary, Lithuania, France, UK and the Netherlands). All communiqués are available at www.fairtrials.org.

[11] Communiqué issued after the meeting 'Advancing Defence Rights in the EU', 20 September 2013, Amsterdam, Netherlands ('Netherlands ADR Communiqué') (**Annex I**) available at http://www.fairtrials.org/wp-content/uploads/Amsterdam-ADR-Communique.pdf, paragraph 53.

[12] Sproken et al., *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions*, Intersentia, Cambridge: 2014, page 386.

[13] Communiqué issued after the meeting 'Advancing Defence Rights in the EU', 26 June 2013, London, UK ('London ADR Communiqué') (**Annex 2**) available at http://www.fairtrials.org/wp-content/uploads/London-ADR-Communique.pdf, paragraphs 49-50.

[14] London ADR Communiqué, paragraph 53.

[15] Communiqué issued after the meeting 'Advancing Defence Rights in the EU', 10 May 2013, Vilnius, Lithuania ('Vilnius ADR Communiqué') (**Annex 3**) available at http://www.fairtrials.org/wp-content/uploads/Fair-Trials-International-Lithuania-ADR-communique.pdf, paragraphs 49, 61 and 64; Communiqué issued after the meeting 'Advancing Defence Rights in the EU', 14 June 2013, Paris ('Paris ADR Communiqué') (**Annex 4**) available at http://www.fairtrials.org/wp-content/uploads/Paris-ADR-communique.pdf, paragraphs 49 and 62; Amsterdam ADR Communiqué, paragraphs 47 and 59.

[16] London ADR Communiqué, paragraph 57.

[17] See the decision of the *Ilustre Colegio de Abogados de Madrid* of 19 March 2014 (available at http://web.icam.es/bucket/ACUERDO%20I_P_%20277-14%281%29.pdf) archiving without further action file number 277/14 arising from the complaint of the *Brigada Provincial de Información* of Madrid of 11 February 2014 (available at https://docs.google.com/file/d/0ByaSopTTggsPQ0dNNE1oWk1IX2M/edit).

[18] See Vilnius ADR Communiqué, paragraph 75(a); Amsterdam ADR Communiqué, paragraph 63(e); Paris ADR Communiqué, 'Common themes' section, page 15, point (e).

[19] Code of Practice C issued under the Police and Criminal Evidence Act 1984, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117589/pace-code-c-2012.pdf, paragraphs 3.1 and 6.1.

[20] Paragraph 6.5.

[21] Cour d'appel d'Agen, 18 février 2010.

[22] Vilnius ADR Communiqué, paragraph 54.

[23] Vilnius ADR Communiqué, paragraph 60.

[24] Vilnius ADR Communiqué, paragraph 68.

[25] Amsterdam ADR Communiqué, paragraph 58.

[26] Amsterdam ADR Communiqué, paragraph 48.

[27] Paris ADR Communiqué, paragraph 55.

[28] Paris ADR Communiqué, paragraph 57.

[29] See, inter alia, *Schenk v. Switzerland* App. No 10862/84 (Judgment of 12 July 1988), paragraphs 74-75.

[30] See Amsterdam ADR Communiqué, paragraph 60.

[31] See Vilnius ADR Communiqué, paragraph 58.

[32] *Martin v. Estonia* App. No 35985/09 (Judgment of 30 May 2013).

[33] Vilinius ADR Communiqué, paragraph 74.

[34] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings (OJ 2009 C 295, p. 1) available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF.

[35] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on 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 (**Annex 5**) available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0001:0012:EN:PDF.

[36] See the European Commission's Proposal for a Directive of the European Parliament and of the Council for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (COM(2011) 326 final) available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011PC0326, explanatory memorandum, paragraph 13.

[37] See, for instance, *M.S.S. v. Belgium and Greece* App. No 30696/09 (Judgment of 21 January 2011), paragraph 251; see also the concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić Souza in *Ribeiro v. France* App. No 22689/07 (Judgment of 13 December 2012); see *Sufi and Elmi v. United Kingdom* Apps. Nos 8319/07 and 11449/07 (Judgment of 28 June 2011), paragraphs 220-226.

[38] *Dayanan v. Turkey*, cited above, note 4.

[39] Paragraph 33.

[40] See, for example, *Siray v. Turkey* App. No 29724/08 (Judgment of 11 February 2014; see also *Pakshayev v. Russia* App. No 1377/04 (Judgment of 13 March 2014, paragraph 30.

[41] *Dayanan v. Turkey*, cited above note 4, paragraph 33.

[42] *Airey v. Ireland* App. No 6289/73 (Judgment of 9 October 1979).

[43] See, among many, *Pishchalnikov v. Russia*, cited above note 3, paragraph 77.

[44] *Tarasov v. Ukraine* App. No 17416/03 (Judgment of 31 October 2013), paragraph 94.

[45] *Khayrov v. Ukraine* App. No 19157/06 (Judgment of 15 November 2012), paragraph 77.

[46] *Stojkovic v. France and Belgium* App. No 25303/08 (Judgment of 27 November 2011), paragraphs 53 and 54.

[47] *Dirioz v. Turkey* App. No 38560/04 (Judgment of 31 May 2012, paragraph 33.

[48] *Pishchalnikov v. Russia*, cited above note 3, paragraph 79.

[49] *Khayrov v. Ukraine*, cited above note 45, paragraph 78.

[50] Öner v. Turkey App. No 50356/08 (Judgment of 13 September 2011).

[51] Paragraph 21.

[52] *Magee v UK* App. No 28135/95 (Judgment of 6 June 2000).

[53] *Trymbach v. Ukraine* App. No 44385/02 (Judgment of 12 January 2012).

[54] Paragraph 64.

[55] See *Jalloh v. Germany*, cited above note 5.

[56] *Dvorski v. Croatia* App. No 25703/11 (Judgment of 28 November 2013).

[57] *Magee v UK,* cited above, note 52, Paragraph 106.

[58] *Shabelnik v. Ukraine* App. No 16404/03 (Judgment of 19 February 2009)

[59] Paragraph 106.

[60] *Gök and Guller v. Turkey* App. No 74307/01 (Judgment of 28 July 2009)

[61] Paragraph 57.

[62] *Martin v. Estonia*, cited above note 33, paragraph 96.

[63] *Dvorski v. Croatia*, cited above note 55, paragraph 106.

[64] *Ursu v. Romania* App. No 21949/04 (Admissibility decision of 4 June 2013), paragraph 32

[65] See, for example, *Lopata v. Russia* App. No 72250/01 (Judgment of 13 July 2013), paragraph 143.

[66] *Khayrov v. Ukraine*, cited above note 45, paragraph 78.