

Police questioning in the presence of the lawyer: changes in the Netherlands

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The Netherlands in the pré-Salduz era

- Caution right to silence
- Legal assistance at the police station *after* questioning
- No right to consult lawyer before or during interrogation.



Regulation after Salduz judgment as from 1 april 2010

- Right to consultation before interrogation (30 minutes)
- Assistance during police interrogation only for juveniles
- Waiver of right to legal assistance

Case law Supreme Court

- HR 1 April 2014 ECLI:NL:HR:2014:770
Lawyer may not be present during police interview
- HR 22 December 2015 ECLI:NL:HR:2015:3608
Lawyer may be present during police interview as from 1 March 2016
 - Legal basis?
 - Exclusionary rule?
- HR 13 September 2016 ECLI:NL:HR:2015:2068
 - Litigation regarding the role of the lawyer in the interrogation room

Legislation pending at Dutch Parliament (Kamerstukken 34 157)

- **Right to consult lawyer during 30 min. previous to first interrogation if suspect is detained at the police station.**
- **Free legal assistance in case of suspicion of crimes that can be punished with more than 4 years of imprisonment**
- **Lawyer may be present during police interrogation**
- ***Presence of lawyer may be refused if interests of investigation so require.***

Ibrahim and others v. UK



ECtHR Grand Chamber 13 september 2016,
applications nos. 50541/08, 50571/08, 50573/08 and 40351/09

London metro bombings 2005

Witness:

Ismail
Abdurahman



Main questions before the Court

- Status of safety interviews in relation to evidence gathering
- May access lawyers be refused when they arrive at the police station?

Grand Chamber

Par. 252:

- No question watering down fair trial rights for sole reason of suspicion of involvement in terrorism
 - Nevertheless public interest may be taken into account

Par. 254:

- Not the role of the Court to determine whether unlawfully obtained evidence is admissible
- The Court assesses whether proceedings as a whole are fair
 - Exception: statements obtained by torture or ill treatment in breach with art. 3 Convention

Introduction of: A two stage test

Par. 257:

- I Are there compelling reasons for restriction?**

- II What is the prejudice caused to the rights of the
 defence in the case in question?**

Compelling reasons?

Par. 258:

- On case-by-case basis
- Restrictions must be:
 - Temporary
 - Based on individual assessment of circumstances of the case
 - Have basis in domestic law
 - Scope and content must be circumscribed in a sufficient way to offer guidance to the police

Par. 259:

“A non specific claim of risk of leaks cannot constitute compelling reasons so as to justify a restriction on access to lawyer”

The proceedings as a whole test

Par. 262:

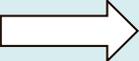
Absence of compelling reasons does not in itself lead to a finding of a violation of article 6

Non exhaustive list of factors to be taken into account par. 274

- a. Vulnerability and age suspect
- b. Legal framework; exclusionary rule
- c. Possibility to challenge the evidence
- d. Quality of the evidence
- e. Does unlawfulness of evidence stem from a Convention violation?
- f. The nature of the statement
- g. Was the evidence important for the conviction?
- h. Assessment of evidence by professional judges or lay judges/jury?
- i. The weigh of the public interest in the investigation and punishment
- j. Other procedural safeguards

Findings Grand Chamber

Ibrahim, Omar and Mohammed  no violation

Abdurahman (witness)  violation

Downplay

Par. 278:

“The possibility of restricting access to legal advice in exceptional circumstances such as those arising in the present case recognises the unique and highly difficult conditions.

It is not surprising that in such a high-intensity situation, a minor “breakdown of communications” may occur.

In the exceptional circumstances with which the police in London were faced in July 2005, it was appropriate for them to focus maximum attention and resources on investigations and interviews and they cannot be criticised for having failed to realise that there was a small opportunity in which a consultation room with a telephone socket was available and in which Mr Ibrahim could therefore have been afforded access to a lawyer by telephone.”

Compelling reasons for restriction accepted!

Directive 2013/48/EU, art. 3 par 5 and 6

5. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of point (c) of paragraph 2 where the **geographical remoteness** of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.

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.

Recital 32 on derogations

[...] where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings, in particular to prevent destruction or alteration of essential evidence, or to prevent interference with witnesses. [...]

the competent authorities may question suspects or accused persons without a lawyer being present, provided that they have been informed of their right to remain silent and can exercise that right, and provided that such questioning does not prejudice the rights of the defence, including the privilege against self-incrimination.

Questioning **may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to prevent substantial jeopardy to criminal proceedings**. Any abuse of this derogation would in principle irretrievably prejudice the rights of the defence.

Do hard cases make bad law?

- The loss of the bright line rule
- The handicaps of hindsight view
- Legal assistance is in a league of her own

Separate opinions JUDGES SAJÓ AND LAFFRANQUE

‘The fact that there is an urgent need to save lives does not explain why and how the advice and presence, in particular, of a lawyer, that is, of a right, would, as a matter of principle, be detrimental to saving lives.’