



Co-funded by the Justice Programme 2014-2020 of the European Union

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## **Practical issues related to the right to a lawyer under Directive 2013/48**

3<sup>rd</sup> March 2017

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Procedural safeguards in the EU, ERA Practical Training

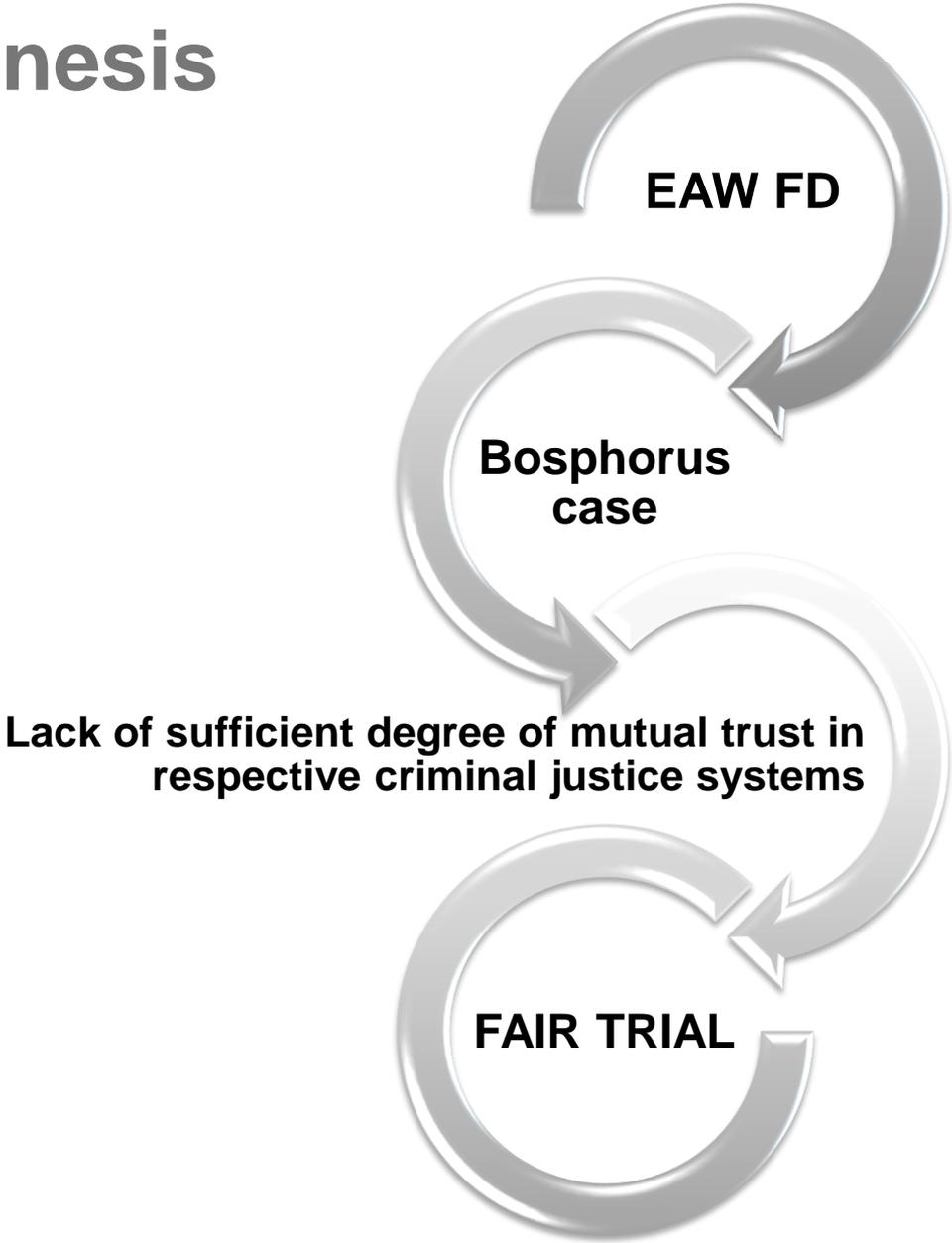
Cracow, 2<sup>nd</sup>-3<sup>rd</sup> March 2017

# Outline

- I. Genesis and scope of application
- II. Principles and exceptions
- III. Access to a lawyer in EAW proceedings
- IV. ECHR case law
- V. Polish perspective



# Genesis



# Genesis

- *Given the sophistication of modern legal systems, many adults of normal intelligence are unable to fully comprehend all the intricacies and all the exchanges which take place in the courtroom: this is why the Convention, in Article 6 § 3 (c), emphasizes the importance of the right to legal representation.*
- *[E]ffective participation in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed.*

**Case: S.C. v THE UNITED KINGDOM, ECHR, judgment of 15<sup>th</sup> June 2004,  
Application no. 60958/00**



I have a  
Constitutional  
right to  
represent  
myself.



And I have a  
Constitutional  
duty to advise you  
that exercising  
that right makes  
you an idiot.



Source: Internet



# Scope of application of the Directive

- **Minimum rules concerning:**
  - **The right of the suspect or the accused to a lawyer**
    - In criminal proceedings
    - In EAW proceedings
  - The right to inform a relative, employer or consular official
  - The right to communicate with relatives or the consular authorities
- **Criminal proceedings – limitations**
  - Offences committed in a military context
  - Minor offences (traffic offences or misdemeanours against public order)
  - Accessory proceedings [?] – *Istvan Balogh* case, CJEU → national special procedure for the recognition of a foreign final judicial decision convicting a person for the commission of an offence
  - Only proceedings **labelled** criminal [?]



# Access to a lawyer – principles

- **Moment of *crystallisation* of the right**
  - From the time the suspect or the accused is notified of being suspected or accused of having committed an offence
  - Persons subject of EAW from the time of their arrest
  - Individuals who become suspects or are accused during questioning
- **Without undue delay**
  - Before questioning
  - Before performing an investigative or evidence-collecting act
  - Upon detention
  - When summoned to appear before the court
- **Confidentiality of communication & meeting in private**
- **Participation of a lawyer in:**
  - Questioning (during investigation and trial): asking questions, requesting clarifications, making statements
  - Evidence collection → minimum : identification parades, confrontations, reconstruction of the crime scene



# Access to a lawyer – exceptions

- Only at the pre-trial stage
- Strictly limited in time
- Justified by the circumstances
- Proportionate
- Without prejudice to the overall fairness of proceedings
- Reasons:
  - Serious adverse consequences to the life, freedom or physical integrity of an individual
  - Substantial jeopardy for the criminal proceedings
- When questioned, the suspect or the accused must be informed of the privilege not to incriminate oneself



# Access to a lawyer in EAW proceedings

- **Access to a lawyer in the executing MS**
  - Participation in hearings
  - Communications and meetings with the suspect or accused
  - Legal aid
- **Access to a lawyer in the issuing MS**
  - Upon **request** of the requested person
  - **MS should provide** without undue delay
  - **Information** facilitating the appointment of a lawyer in that MS
  - E.g. a current list of lawyers or the name of a lawyer on duty in the issuing MS who can provide information and advice in EAW cases
- **Aim:** cooperation between lawyers in the executing and the issuing MS



# Access to a lawyer – exceptions: waiver

## Possibility for the suspect or the accused to:

- **Waive** the right to a lawyer in criminal proceedings or in EAW proceedings:
  - Unless the presence or assistance of a lawyer is mandatory
  - Clear and full information about the content of the right of access to a lawyer and the possible consequences of waiving that right
  - Waiver is given voluntarily and unequivocally
- **Revoke** the waiver at any stage of criminal proceedings
  - However, no requirement to proceed again with questioning or any procedural acts that have been carried out during the period when the right to a lawyer was waived



# A case of breach or derogation of the right of access to a lawyer – *Recital 50*

- **Assessment** of statements or evidence
- The right to defence and to a fair trial must be observed
- The right to defence is irretrievably prejudiced when incriminating statements are used to get a conviction
- **However**, such statements can be used
  - To prevent the perpetration of other offences or avert serious negative consequences for third parties
  - To prevent substantial jeopardy of criminal proceedings when access to a lawyer or slow inquiry would irretrievably prejudice an ongoing investigation of a serious crime



# **ECHR case law - standards of the right of access to a lawyer**



# Salduz v. Turkey [GC]

Application no. 36391/02 - Judgment 27.11.2008

## Facts

- On 29<sup>th</sup> May 2001, Mr Salduz was taken into custody and interrogated in the absence of a lawyer
- Mr Salduz had been reminded of the charges against him and **of his right to remain silent**
- Incriminatory statements during the police interrogation
- On the same day, when interrogated by the prosecutor and the investigating judge - he retracted his statement made to the police, alleging that it had been extracted under duress
- Access to a lawyer after the investigating judge decided to keep Mr Salduz in custody
- **Conviction:** the court took into account the statement made by Mr Salduz to the police, statements of his co-accused and the expert report combined with the report of the police on the arrest – **confession made to the police was considered substantiated**



# Salduz v. Turkey [GC]

## ECHR

- The right to be **effectively** defended by a lawyer → the fundamental element of a fair trial
- Requirements of a fair trial also apply to pre-trial proceedings
- National laws may attach consequences to the attitude of the accused at the initial stages of police interrogation
- The accused often finds himself in a **particularly vulnerable** position at the investigation
- In most cases, **this particular vulnerability** can only be properly compensated for by the assistance of a lawyer → **safe harbor**: respect of the right of the accused not to incriminate himself
- The accused should be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation
- Possible restrictions for good cause – assessment *in concreto* → compelling reasons
- 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 to get a conviction**



# A.T. v. Luxemburg

## Application no. 30460/13 – Judgment of 9<sup>th</sup> April 2015

### Facts

- Mr A.T. surrendered to the Luxemburg authorities by virtue of the EAW
- The police conducted a hearing without the assistance of a defence lawyer
- In compliance with law at the moment of the interrogation but a subsequent change of relevant legislation
- Mr A.T. requested the assistance of a defence lawyer but, when he was informed about the law in force, he agreed to being interrogated
- Mr A.T. denied all the charges against him and made no incriminating statements
- Next day, interrogated by an investigative judge in a presence of a defence counsel
- Prior to the interrogation, there was no laps of time for Mr A.T. and his counsel to communicate
- During the investigation and trial, Mr A.T. kept changing his version of events



# A.T. v. Luxemburg

## ECHR

- The right to a fair trial - **sufficiently “practical and effective”** :
  - Access to a lawyer - as of the initial interrogation of a suspect by the police
  - Unless - compelling reasons to restrict that right and such restriction is not inconsistent with the right to a fair trial
  - The lawyer must be able to provide effective and practical assistance, **not just abstract backing via his presence**, during the first interrogation by the investigating judge
- Violation of Article 6 § 3 (c) of the Convention in conjunction with its Article 6 § 1 :
  - The defendant did not benefit from the assistance of a defence lawyer during his police hearing and
  - The courts failed to provide any redress for the consequences of such lack of assistance
  - The defendant did have a sufficient time to communicate with a defence counsel before a first interrogation by the investigative judge



# Ibrahim and others v. the U.K.

Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09,  
Judgment of 13<sup>th</sup> September 2016, Grand Chamber

## Facts and procedure

- Suicide bomb attacks in London in July 2005
- Individuals suspected of having organised and carried on the attacks → subsequent charges – conspiracy to murder
- Defendants arrested and under custody
- Submitted to “safe interviews” without the assistance of lawyers or prior advice:
  - An interview conducted urgently for the purpose of protecting life and preventing serious damage to property
  - An interview may occur in the absence of a lawyer and before the detainee has had the opportunity to seek legal advice
- The defendants were given caution – new-style caution instead of old-style caution
- ***Voir dire*** = a “trial within a trial” on the admissibility of the evidence



# Ibrahim and others v. the U.K.

- Mr Ibrahim was not given the opportunity to speak over the phone with a lawyer who tried to contact him – the court concluded that **there was an infringement of the defence rights but that it was not material** – in the circumstances of the case it would not be possible for a lawyer to give a detailed and informed advice
- **Balance** between safe interviews and denial of the right of access to a lawyer
- The defendants claimed that the aim of bombing was a hoax
- Detailed and sensible **summing up for the jury** – in assessing whether to hold the defendants' lies against them, the jury should take into account that:
  - A safeguard of the access to a lawyer prior to a hearing was denied
  - Incorrect cautions were administered
- The first-instance judgement – by an unanimous decision, the jury found the defendants guilty of conspiracy to murder
- The court of appeal did not give the leave for an appeal



# Ibrahim and others v. the U.K.

ECHR : No violation of Article 6 §§ 1 and 3 (c) of the Convention

- **Suspicion of terrorism is not an automatic waiver of fair trial rights**

*„In these challenging times, [...] it is of the utmost importance that the Contracting Parties demonstrate their commitment to human rights and the rule of law by ensuring respect for, inter alia, the minimum guarantees of Article 6 of the Convention. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration.”*

- **Prompt access to a lawyer:**

- Important counterweight to the vulnerability of suspects in police custody
- Fundamental safeguard against coercion and ill-treatment of suspects by the police
- Prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused



# Ibrahim and others v. the U.K.

- **A two-stage test** to assess whether postponing the access to a lawyer at the very first stage of the proceedings was justified:
  1. Compelling reasons for restriction
  2. The impact of the restriction on the overall fairness of the proceedings – evaluation of a prejudice caused to the right to a fair trial
- **ECHR defines *in Ibrahim case law*:**
  - The notion of compelling reasons for delaying access to the lawyer → to avert serious adverse consequences for life, liberty or physical integrity in the given case
  - The overall fairness of the proceedings
    - The existence of compelling reasons does not automatically provide adequate justification for limiting suspect's access to legal advice → a comprehensive assessment of the entirety of the proceedings must be conducted to determine whether these reasons were fair
    - The absence of compelling reasons does not lead in itself to a finding of a violation of Article 6 of the Convention



# Ibrahim and others v. the U.K.

## Criteria of the overall fairness

- Particular vulnerability of the defendant (age or mental capacity)
- Compliance with the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial (application of the exclusionary rule)
- Possibility to challenge the authenticity of the evidence and to oppose its use
- Quality of the evidence and its reliability taking into account the degree and nature of any compulsion
- Unlawful nature of collected evidence depending on the type of violation of the Convention
- In the case of a statement, the nature of the statement and whether it was promptly retracted or modified
- The use of the evidence – whether it based the conviction
- Whether the assessment of guilt was performed by professional judges or lay jurors + the content of jury instructions
- The weight of the public interest in the investigation and punishment of the particular offence at issue
- Other relevant procedural safeguards afforded by domestic law and practice



# Waiver of the right to a lawyer

## Effectiveness of a waiver in ECHR case law

- **Sejdovic v. Italy : the waiver must be established unequivocally**  
Application no. 56581/00, Judgment of 1<sup>st</sup> March 2006, Grand Chamber
- **Idalov v. Russia : it must be shown that the applicant could reasonably foresee the consequences of his conduct (of the waiver)**  
Application no. 5826/03, Judgment of 22<sup>nd</sup> May 2012
- **Dvorski v. Croatia : the waiver must be knowing and intelligent  
→ it is a matter of special protection inherent to the right to a lawyer**  
Application no. 25703/11, Judgement of 20<sup>th</sup> October 2015



# Polish perspective

- **Legal aid :**
  - May be granted to the suspect or accused for the entire length of the proceedings including the investigation, or for a particular part of the investigation
  - If the accused or suspect is unable to pay the defence costs without prejudice to his/her and his/her family's necessary support and maintenance
- *Quasi* legal aid in judicial proceedings 1.07.2015 – 15.04.2016
- **Duty counsels** – a project being worked on by the Warsaw Bar  
→ Secrétaires de la Conférence (France)
- Lawyers speaking the language of the suspect or the accused → in a perfect world this would be possible





Thank you for your attention

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