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

Information Note on the Court's case-law 223

November 2018

Beuze v. Belgium [GC] - 71409/10

Judgment 9.11.2018 [GC]

Article 6

Criminal proceedings

Article 6-1

Fair hearing

Article 6-3-c

Defence through legal assistance

No provision for legal assistance during questioning by police and investigating judge in initial phase of criminal proceedings: *violation*

Facts – On 17 December 2007 the applicant was arrested by the French gendarmerie and taken into custody for the execution of a European arrest warrant. After being surrendered to the Belgian authorities on 31 December 2007, he was questioned, both while in police custody and subsequently by the investigating judge, without the assistance of a lawyer.

The Belgian Assize Court dismissed his plea that the statements he had given to the police and the judge should be excluded from the evidence. Following his trial by jury, he was found guilty of premeditated murder and was sentenced to life imprisonment.

The Court of Cassation subsequently dismissed his argument as to the lack of legal assistance at the pre-trial stage, finding that when considering the proceedings as a whole, the applicant's right to a fair trial had been upheld.

Law – Article 6 §§ 1 and 3 (c)

(a) *Existence and extent of restrictions* – The applicant had been surrendered to the Belgian authorities at 10.40 a.m. on 31 December 2007, but his right to consult a lawyer was only recognised once he had been remanded in custody at the end of his first appearance before the investigating judge at 5.42 p.m., when the judge notified the local Bar Council so that a lawyer could be assigned to him. Some uncertainty remained, however, as to the time when the applicant had actually been able to contact a lawyer for the preparation of his defence.

Even though he had subsequently been able to communicate freely with his assigned lawyer, the applicant had continued to be deprived of the lawyer's presence during the 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 an

interpretation of the then applicable law, it had been applied throughout the pre-trial phase, including ten interviews conducted without legal assistance. Nor had the applicant's lawyer participated in the reconstruction of the crime scene held on 6 June 2008.

(b) *Existence of compelling reasons* – The impugned restrictions stemmed from the lack of provision in the Belgian legislation and the interpretation of the law in force at the material time. However, restrictions on access to a lawyer for compelling reasons, at the pre-trial stage, were permitted only in exceptional circumstances, provided they were of a temporary nature and were based on an individual assessment of the particular circumstances of the case. There had clearly been no such assessment in the present case, as the restriction was one of a general and mandatory nature. Furthermore, the Government had failed to demonstrate the existence of any exceptional circumstances. Thus there had been no compelling reasons which could have justified the restrictions on the applicant's right of access to a lawyer.

The applicant had relied on a certain interpretation of the Court's case-law on the right of access to a lawyer suggesting 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 could be seen from the *Ibrahim and Others v. the United Kingdom* [GC] judgment, followed by the *Simeonovi v. Bulgaria* [GC] judgment, the Court had rejected the argument of the applicants in those cases that *Salduz v. Turkey* [GC] had laid down an absolute rule of that nature. The Court had thus departed from the principle set out in various earlier judgments against Turkey, in particular *Dayanan v. Turkey*.

(c) *Assessment of the overall fairness of the proceedings* – The Court was required to apply very strict scrutiny to its fairness assessment, especially where there were statutory restrictions of a general and mandatory nature. The burden of proof thus fell on the Government, which, as they had accepted, had to demonstrate convincingly that the applicant had nevertheless had a fair trial as a whole. The Government's inability to establish compelling reasons weighed heavily in the balance, and the balance might thus be tipped towards finding a violation of Article 6 §§ 1 and 3 (c).

The various factors enumerated in *Ibrahim and Others* and *Simeonovi* were then examined.

(i) *Whether the applicant was vulnerable* – The applicant had not been 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 had not been unusual or excessively long.

(ii) *Circumstances in which evidence was obtained* – Neither the Belgian investigators nor the French gendarmes had exerted any pressure on the applicant.

(iii) *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* – From the end of the police custody period, general safeguards under the legal framework governing pre-trial proceedings had, except during questioning, enabled the applicant to communicate freely and in an unlimited manner with his lawyer. However, since the Belgian law as applied in the proceedings against the applicant was not in conformity with the requirements of Article 6 § 3, the overall fairness of the proceedings could not have been guaranteed merely by legislation providing for certain safeguards in the abstract. It was necessary to examine whether the application of the legal provisions in the present case had had a compensatory effect in practical terms, rendering the proceedings fair as a whole. In the context of this examination, 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. In addition, the date from which the applicant had begun to receive legal assistance was not to be found in the case file. While it was clear that the applicant's defence counsel had changed several times, it was not clear from the case file how frequent the consultations had been, or whether the lawyer had been notified of the dates of the interviews and examinations. The applicant had not therefore been able to prepare for his questioning beforehand with his lawyer, and he had only been able to 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.

In addition, the safeguard of having the judicial investigation 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, had not played a major role in the present case.

The question whether the applicant's statements should have been admitted in evidence had been examined before the Assize Court at the opening of the trial. The applicant, assisted by his lawyer, had 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 had 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 had 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 pre-trial questioning.

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. Thus there was no indication that the court had engaged in the requisite analysis of the consequences of the lawyer's absence at crucial points in the proceedings. Such an omission was 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 was kept, it had not been possible to assess the impact of the oral argument in the presence of the jury.

Where interviews or examinations had been conducted without a lawyer, the Court of Cassation could examine 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. It had quashed a judgment on those grounds for the first time on a date that was subsequent to the trial court judgment in the present case. In its examination of the proceedings, the Court of Cassation had 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 had also been restricted, it had merely stated that he had never been compelled to incriminate himself and that he had always expressed himself freely.

(iv) *The nature of the statements* – 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. While it was true that the applicant had never confessed to the charges and therefore had not incriminated himself *stricto sensu*, he had nevertheless given detailed statements to the investigators which had influenced the line of questioning. In addition, as the applicant had 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 had been of crucial importance.

At the start of his first police interview and at the beginning of each of his subsequent interviews and examinations, the applicant had received express information that his statements could be used in evidence, thereby indirectly enshrining the right to remain silent in Belgian law. However, in the circumstances of the present case, the information thus given by the investigators had not been sufficiently clear to guarantee the effective exercise by the applicant of his right to remain silent and not to incriminate himself. In that connection, the applicant had made significant statements and had fully availed himself of his freedom to select or conceal facts.

(v) *The use of evidence and, in a case where guilt is assessed by lay jurors, the content of any jury directions or guidance* – The trial had taken place in the Assize Court, a non-permanent court made up of professional judges assisted by a jury.

The indictment had been read out at the start of the trial, before the oral argument. It mentioned the elements that the applicant had acknowledged and his different versions of the facts. The prosecution had also relied on various material that was unrelated to and independent of his statements. Nevertheless, the statements given by the applicant from the time of his questioning in police custody had contained a detailed account of the events which had occurred on the day of the murder, and had been complemented or contradicted by equally detailed subsequent statements. He had never denied being present at the scene of the crime or threatening a witness. He had also spontaneously given information which tended to incriminate him. Those statements had 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.

The indictment was of limited value for an understanding of the jury's verdict, because it was read out before the oral argument, which would necessarily serve as the basis for the jurors' personal conviction. That being said, the jury had concluded that one of the attempted murders with which the applicant had been charged had been premeditated, as could be established in particular from his statements. The Court attached considerable weight to this point, as it demonstrated that the statements given by the applicant without a lawyer being present had been an integral part of the evidence upon which the verdict on this count had been reached.

Moreover, the President of the Assize Court had not given any warning to the jury as to the weight to be attached in their deliberations to the applicant's numerous statements. In spite of its efforts to assess the overall fairness of the proceedings having regard to the Court's recent case-law, the Court of Cassation did not seem to have taken into account 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.

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, was a major defect.

(vi) *Weight of the public interest* – There was no doubt that sound public-interest considerations justified prosecuting the applicant, as he had been indicted in particular on one count of murder and two counts of attempted murder.

(vii) *Whether other procedural safeguards were afforded by domestic law and practice* – The Belgian Court of Cassation, at the relevant time, would take 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.

(viii) *Conclusion as to the overall fairness of the proceedings* – The criminal proceedings brought against the applicant, when considered as a whole, had not cured the procedural defects occurring at the pre-trial stage, among which the following could be regarded as particularly significant:

– The restrictions on the applicant's right of access to a lawyer had been particularly extensive. He had been 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 had attended his interviews or other investigative acts.

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

– All of the statements in question had been 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.

– While the Court of Cassation had examined the admissibility of the prosecution case, also seeking to ascertain whether the right to a fair trial had been respected, it had focused on the absence of a lawyer during the police custody period 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.

– The statements given by the applicant had played an important role in the indictment and, as regards the count of attempted murder mentioned above, constituted an integral part of the evidence on which the applicant's conviction had been based.

– In the trial before the Assize Court, the jurors had not received any directions or guidance as to how the applicant's statements and their evidential value should be assessed.

Conclusion: violation (unanimously).

Article 41: finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

(See *Ibrahim and Others v. the United Kingdom* [GC], 50541/08 et al., 13 September 2016, Information Note 199; *Simeonovi v. Bulgaria* [GC], 21980/04, 12 May 2017, Information Note 207; *Salduz v. Turkey* [GC], 36391/02, 27 November 2008, Information Note 113; and *Dayanan v. Turkey*, 7377/03, 13 October 2009, Information Note 123. See also *Taxquet v. Belgium* [GC], 926/05, 16 November 2010, Information Note 135; *Schmid-Laffer v. Switzerland*, 41269/08, 16 June 2015, Information Note 186; *A.T. v. Luxembourg*, 30460/13, 9 April 2015, Information Note 184; and *Lhermitte v. Belgium* [GC], 34238/09, 29 November 2016, Information Note 201)

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