A suspect's right to an attorney in a Finnish pre-trial investigation in the light of Article 6 of the European Convention on Human Rights

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1. INTRODUCTION

Article 6 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR) includes provisions for a right to a fair trial and for other minimal rights of persons charged with an offence[1]. According to § 3 (c) of the Article referred to, everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing. The Convention was implemented in Finland under an Act entering into force on 10 May 1990. It is thus in Finland directly applicable law, but not, however, at a constitutional level. It does not therefore basically give the right to sidestep another Act that runs counter to it. Section 21 of the Constitution of Finland contains provisions of fair trial. According to it, a court of law must give to the law an interpretation which is in accordance with ECHR.

In this study, we examine a suspect's right under ECHR Article 6 § 3 (c) to an attorney in the pre-trial investigation taking place before the actual criminal proceedings, the related legal praxis of the European Court of Human Rights (ECtHR) and the impacts and implementation thereof in Finland. We also examine the use, as an evidence in criminal proceedings, of statements given in the pre-trial investigation by a suspect without the presence of an attorney. On the other hand, the material conditions to appoint an attorney or the right to free legal advice are not considered later in this study.

2. LEGAL PRAXIS OF THE EUROPEAN COURT OF HUMAN RIGHTS CONCERNING A SUSPECT'S RIGHT TO AN ATTORNEY IN PRE-TRIAL INVESTIGATION

In many of its decisions, ECtHR has taken a view on a suspect's right to be allowed to use an attorney already at an early stage in a criminal investigation. It has adopted the principle under which guarantees of due processes of law in accordance with ECHR Article 6 § 3 (c), including the right to an attorney can, notwithstanding the wording of the Article, be applied also before judicial proceedings inasmuch as failure to comply with the Article would, at that stage, contribute to significantly undermining the fairness of judicial proceedings. Two key cases - *Salduz v. Turkey* and *Panovits v. Cyprus* have been especially chosen from the ECtHR's extensive legal praxis as the basis for the following overview. However, we have first taken a brief look of the legal praxis preceding the decisions referred to and also of the other cases referred to below. The synopsis has sought to present concisely only the essential factors relevant to consideration of the question, together with the judgment of the ECtHR and the statement of reasons for it, which in this respect is just an overview.

[1] Similar provisions are also enshrined in Article 14 of the United Nations' International Covenant on Civil and Political Rights (ICCPR).

2.1 Earlier legal praxis of the European Court of Human Rights

In the case of **Imbrioscia v. Switzerland 24 November 1993**, the applicant had been arrested as a suspect and had been questioned several times without the presence of an attorney despite having requested to be assigned a lawyer already the first time he had been interrogated. In its decision, the ECtHR noted that ECHR Article 6 could also be applied at the pre-trial investigation stage. However, the Article had not been violated in the case because *the judicial proceedings as a whole* had been fair. The reasoning for the decision was, among other things, that the attorney had been allowed to attend the last interrogation and that the applicant had been able to use an attorney also in court. The attorney had, in the main hearing, had an opportunity to examine both the applicant and his co-defendant and to challenge the prosecution's submissions in his address.[2]

In the case of **Murray v. the United Kingdom 8 February 1996,** a different outcome was reached. After having been taken into custody, the applicant was interrogated on a number of occasions without an attorney as being suspected of a crime. He had remained silent but had requested to consult his lawyer. Pursuant to national law, access to his lawyer was delayed for 48 hours from the time he was detained. The ECtHR noted that ECHR Article 6 generally requires a person charged with an offence to be afforded access to legal assistance already in the pre-trial investigation. This right could be restricted for *good cause*, if such restriction did not deprive the accused of his right to fair judicial proceedings when examining the proceedings as a whole. Because under the national law, the applicant's decision either to speak or to remain silent in the pre-trial investigation might have far-reaching consequences with regard to the forthcoming trial, it was particularly important that the suspect could discuss the options with his lawyer already at an early stage. For this reason, the ECtHR deemed that ECHR Article 6 § 1 together with § 3 (c) had been breached.[3]

In the case of **Kolu v. Turkey 2 August 2005,** the ECtHR considered that denying legal assistance to the applicant during the pre-trial investigation had, *irrespective of the justifications*, injured the rights of the accused in a manner that was *subsequently incapable of remedy*. The judicial proceedings had relied on confessions which had been obtained by injuring the accused's privilege against self-incrimination. The confessions had been obtained without the presence of a lawyer whilst the applicant

[2] Voting result (6-3). The dissenting opinions emphasised the importance of early legal assistance and considered that it was not possible to rectify the lack of assistance by the fact that the applicant later received legal assistance.

[3] The right to access to an attorney was delayed on the grounds of national law also in the case of **Magee v. the United Kingdom 6 June 2000**. In the police investigation the applicant was without an attorney and gave incriminating admissions, which he later withdrew, claiming intimidation and ill-treatment. Even though there was no evidence of ill-treatment, according to the ECtHR, fairness would have necessitated in the applicant having been given access an attorney already during the initial stages of the questioning to counterbalance the coercive atmosphere intended to break down the applicant's resolve.

was held in isolation in police custody and the incidents taking place during the time of his detention were suspicious. For these reasons, the ECtHR deemed that ECHR Article 6 § 1 together with § 3 (c) had been breached.[4]

2.2 Salduz v. Turkey 27 November 2008

The applicant, who was underage at the time of the incident, had been arrested on suspicion of an offence falling within the jurisdiction of the state security courts. National law in such cases did not provide for the right of the suspect to a lawyer and the applicant had been heard without a lawyer in the police interrogation. He had then made incriminating statements which he later withdrew claiming that they had been obtained under duress. The conviction, however, was for its part based on the statements referred to.

The ECtHR first decided the matter in a chamber of ordinary composition of the court and concluded, in the same way as in the *Imbrioscia* decision, that the judicial proceedings had, as a whole, been fair. The Grand Chamber, however, reached the opposite outcome. It noted the importance of the pre-trial investigation for the preparation of criminal case because the evidence obtained at the time determines the framework within which the offence charged will be considered at the trial. An accused is often in a particularly vulnerable position at precisely this stage and, according to the ECtHR, this vulnerability can usually be compensated for by the assistance of a lawyer, whose task, *inter alia*, is to ensure respect of the right of an accused not to incriminate himself. The opportunity for early access to a lawyer is thus part of the most important procedural safeguards, especially in cases where a person is accused of serious offences for which he or she can expect harsh punishment.

The ECtHR noted that 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. This right can be derogated if such right cannot be afforded for *compelling reasons* and if this restriction can be compensated in a later process so that the judicial proceedings as a whole are fair. Denying access to a lawyer, *whatever its justification*, must not prejudice the accused's rights under Article 6 of the ECHR. According to ECtHR, 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.

The applicant had been denied the assistance of a lawyer based solely on the provisions of national law, which, according to the ECtHR, already meant an infringement of the applicant's rights under ECHR Article 6. Even though throughout the trial the appellant had constantly denied the statements

[4] *Inter alia*, in the cases of **Brennan v. the United Kingdom 16 October 2001** and **Öcalan v. Turkey 12 May 2005,** The ECtHR has additionally deemed that a suspect is entitled to *private* consultation with his attorney.

he had given to the police, the national court of law had mainly based its decision on them. Other evidence was either weak or to the applicant's benefit. Thus in these conditions, neither 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. The ECtHR also gave particular weight to the applicant's age and underlined the importance of legal assistance where a minor is in police custody. The ECtHR unanimously held that the applicant's defence rights had been irretrievably prejudiced when he had been denied access to lawyer during his detention. ECHR Article 6 § 1 together with § 3 (c) had thus been violated.

2.3 Panovits v. Cyprus 11 December 2008

The applicant, who was underage at the time of the incidents, was suspected of being linked to a murder. He was arrested and interrogated by the police without the presence of his guardian or attorney. At that time, he had given incriminating statements which were later used as evidence against him. During the court proceedings, the accused claimed that the statement he had given to the police had not been voluntary.

The ECtHR noted that when a charge is brought against a child, it is essential that due regard be given to his age, maturity, level of intellectual and emotional capacity and that he is to be assisted if necessary by, for example, an interpreter, lawyer, social worker or friend to promote his ability to understand the proceedings, his rights and to participate in the proceedings.

The ECtHR noted that a person may waive his right to an attorney, except if this runs counter to any important public interest. Waiver must be unequivocal and be attended by minimum safeguards commensurate to the waiver's importance. Before an accused can be said to have impliedly, through his conduct, waived his right, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. In addition, the waiver by a minor can only be accepted after the authorities have taken all reasonable steps to ensure that he was fully aware of his rights of defence and can appreciate, as far as possible, the consequence of his conduct.

The suggestion by the police department to obtain a lawyer was made only to the applicant's father and during the time the applicant himself was being interrogated. Because the applicant had no-one to assist him during the interrogation, the ECtHR considered it unlikely that he would have known that he was entitled to a lawyer before giving any statements to the police and that he would have sufficiently understood his rights as a suspect. It was also unlikely that he could reasonably appreciate the consequences of him being questioned without the assistance of a lawyer. The ECtHR considered that the applicant's defence rights had been breached *because he had not been given sufficient information* about his right to consult a lawyer before the start of the first police interrogation. Neither the applicant

nor his father had waived that right in an explicit and unequivocal manner.

The ECtHR noted that although the applicant had the benefit of adversarial proceedings in which he was represented by the lawyer of his choice, the nature of the detriment he suffered because of the breach of due process at the pre-trial stage of the proceedings was not remedied by the subsequent proceedings, in which his confession was treated as voluntary and was therefore held to be admissible as evidence. Even though the confession was not the sole evidence on which the applicant's conviction was based, it was nevertheless decisive for the prospects of the applicant's defence and constituted a significant element on which his conviction was based. The ECtHR held by 6 votes to 1 that ECHR Article 6 § 1 together with § 3 (c) had been violated on account of the absence of a lawyer during initial police questioning and on account that the confession obtained in circumstances that irretrievably prejudiced the rights of the applicant were used as evidence in the trial.

2.4 Conclusions about the legal praxis of the ECtHR

In its case law, the ECtHR has adopted the principle by which a suspect must, as a rule, be afforded an *opportunity* to legal assistance as referred to in the ECHR Article 6 § 3 (c) "as soon as the person is charged[5]" and that the authorities have an *obligation to inform* the suspect of this right[6]. The rights of the accused have consistently been considered to have been violated if, during questioning by the police, the accused has given self-incriminating statements without access to an attorney and if these statements have been used as a basis for a conviction. The lack of legal assistance at an early stage of a criminal investigation does not breach the suspect's rights if the suspect has validly waived his right to an attorney before police questioning or if access to an attorney has been restricted for compelling reasons and in a manner that does not deprive the suspect of his right to a fair trial.

The cases of *Salduz* and *Panovits* involved minors and also many other decisions by the ECtHR have been mindful of the rights in pre-trial investigations of groups of people in a somehow more vulnerable

[5] See **Aleksandr Zaichenko v. Russia 18 February 2010** § 42: "Charge", for the purposes of Article 6 § 1, may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [person has been substantially affected". In the case in question, ECHR Article 6 applied, but the suspect's right to an attorney was not deemed to have been violated *inter alia* because the suspect had not been officially arrested or interrogated by the police, but had only been stopped on a road check. Under ECHR "…the circumstances of the case...disclose no significant curtailment of the applicant's freedom of action, which could be sufficient for activating a requirement for legal assistance already at this stage of the proceedings."]

[6] However, most ECtHR decisions have considered situations where the suspect's express request for access to an attorney has been rejected or not immediately been consented to. Such as **Pishchalnikov v. Ruusia 24 September 2009**, **Mehmet Şerif Öner v. Turkey 13 September 2011**, **Stojkovic v. Belgium 27 October 2011** and **Paskal v. Ukraine 15 September 2011**.

position[7]. However, from other cases of the ECtHR it can be concluded that the same rights apply equally to all other people, too.[8] In the case of **Paskal v. Ukraine 15 September 2011**, significance in this respect was however given to the stronger than average position of the applicant, who was a lawyer and a policeman. In the case referred to, the right to a fair trial was not considered as having been breached, even though the suspect had not been given access to an attorney, since the statements he gave had not been obtained by coercion and could not have been considered as being detrimental to the defence arranged by the attorney.

In the cases of *Salduz* and *Panovits*, the suspects had given self-incriminating statements, but according to the ECtHR, restricting the suspect's rights to legal assistance might violate the accused's defence rights also when the accused has not incriminated himself by his statements. Thus the fact that the suspected has denied[9] the offence in police questioning or has remained silent has not in many cases been deemed as being of significance in assessing whether the absence of an attorney has breached ECHR Article 6. In the case of **Dayanan v. Turkey 13 October 2009**, the ECtHR noted that the restriction based on law breached ECHR Article 6 regardless of the fact that the applicant had remained silent throughout his detention. Fairness required the accused to have access to all the assistance an attorney was able to provide. There must be a free opportunity to discuss the case, organise the defence, collect evidence in favour of the accused, prepare for the interrogation, support of the accused in distress and to monitor prison conditions. In the case of **Stojkovic v. Belgium 27 October 2011**, infringement was not remedied by the fact that the applicant admitted his guilt in the same manner as in the pre-trial investigation also in court after having obtained an attorney.

Since the *Panovits* case the question of the requirements for a valid waiver have arisen in many other ECtHR decisions[10]. The ECtHR can be noted as having accepted the fact that a person waives his right to an attorney in the pre-trial investigation unless such waiver runs counter to important public interest. However, a valid waiver must be expressed in an unequivocal manner and be genuinely voluntary. Expression of the intention to waive rights must thus have been given as the result of enlightened, adequate consideration free of irrelevant influences and must additionally be attended by minimum

[7] Eg. **Adamkiewicz v. Poland 2 March 2010** (underage) and **Plonka v. Poland 31 March 2009** (suspect suffering from alcoholism). See also sub ref 11 and cases **Bortnik v. Ukraine 27 January 2011** and **Saman v. Turkey 5 April 2011**.

[8] E.g. **Pishchalnikov v. Russia 24 September 2009** and **Dayanan v. Turkey 13 October 2009**.

[9] E.g. **Mehmet Şerif Öner v. Turkey 13 September 2011**. Otherwise, however, in **Trymbach v. Ukraine 12 January 2012**.

[10] E.g. **Yoldas v. Turkey 23 February 2010**, **Leonid Lazarenko v. Ukraine 28 October 2010**, **Borotyuk v. Ukraine 16 December 2010**, **Bortnik v. Ukraine 27 January 2011**, **Saman v. Turkey 5 April 2011** and **Paskal v. Ukraine 15 September 2011**.

safeguards[11]. On the basis of ECtHR's legal praxis, it can be noted that the authorities have a duty to ensure that a suspect has in fact been able to foresee and understand the importance and consequences of his conduct such as the severity of the punishment he can be sentenced to. If the suspect has originally requested an attorney, additional safeguards are required for the expression of intention to waive rights to be valid. In the case of **Pishchalnikov v. Russia 24 September 2009**, the ECtHR noted that the police must not conduct further questioning without offering legal assistance in a case where the suspect has explicitly stated that he wants an attorney. The situation is different only when contact or exchange of information is instigated at the suspect's own initiative. The fact that the applicant had refused to answer questions and had later explicitly stated that he did not require legal assistance did not remove violation in the case because he was not however considered to have validly waived his right to an attorney. The ECtHR deemed that in the absence of legal assistance, the applicant had been unable to knowingly and fully exercise his rights under the code of criminal procedure.

As in the cases of *Salduz* and *Panovits*, many ECtHR decisions have been about statements that a suspect has given and subsequently withdrawn on claims that they were obtained using irrelevant means[12]. Indeed, the ECtHR would seem to have held that one of a lawyer's tasks in a pre-trial investigation is to act as a safeguard against any abuse of a suspect in a particularly vulnerable position. In the case of **Shabelnik v. Ukraine 19 February 2009**, the absence of an attorney violated national legislation and the ECtHR held that it also breached ECHR Article 6. In the case, conviction was based to a decisive extent on the admission given in the pre-trial investigation and subsequently retracted in court. The circumstances in the case also give reason to presume that the admission was obtained by influencing the applicant's will. On the other hand, in the case of **Trymbach v. Ukraine 12 January 2012**, no violation was found even though legal representation from the time of arrest was obligatory under national law. Mindful of the fact that the applicant had not given statements to the detriment of himself, neither had he claimed that he had been coerced into interrogation without an attorney, the ECtHR held that violation had had no bearing on the fairness of the judicial proceedings. The ECtHR held that the applicant had validly waived his right to a lawyer.

[11] In the case of **Bortnik v. Ukraine 27 January 2011**, the ECtHR held that the applicant, who was disabled, socially disadvantaged and suffering from chronic alcoholism, had not validly waived his right to an attorney in the pre-trial investigation despite the fact that he had expressly stated several times during the police investigations that he wished to represent himself. In the case of **Saman v. Turkey 5 April 2011**, the ECtHR held that the applicant, who was illiterate and had a poor understanding of Turkish, was unable to sufficiently understand the statements he had given and the consequences of waiving an attorney, nor could he have thus been considered as having waived his right to an attorney "in a knowing and intelligent way" and thus validly.

[12] See e.g. **Shabelnik v. Ukraine 19 February 2009**, **Plonka v. Poland 31 March 2009** and **Oleg Kolesnik v. Ukraine 19 November 2009**.

In its more recent legal praxis, the ECtHR has noted that the right to an attorney can, in principle, be restricted *for compelling reasons* and that significance of the absence of a lawyer must be assessed in the light of the overall proceedings. However, it seems to be reacting increasingly more reservedly to the possibility to restrict the right referred to and to remedy infringement resulting from lack of early legal assistance by overall fairness in judicial proceedings.[13] In many of its more recent rulings, the ECtHR has noted that the lack of the possibility for early legal assistance in the pre-trial investigation results *in principle to the irretrievable* violation of the accused's defence rights. This has been seen to be the case at least when conviction has mainly or to a significant extent been based on a suspect's self-incriminating statements which have been given without access to legal assistance in police interrogations. The right to a fair trial has been deemed to have been violated also when statements given by an accused have decisively prejudiced the success of the accused's defence and formed a significant reason for his conviction or when the refusal of access to an attorney has, in one way or another, hampered organisation of the defence. The subsequent assistance of a lawyer or an adversarial trial have often not, in practice, been considered as being able to remedy the violation of the suspect's rights as a result of not having been afforded a possibility for legal assistance during an early stage of the criminal investigation[14].

3. A SUSPECT'S RIGHT TO AN ATTORNEY IN A PRE-TRIAL INVESTIGATION UNDER FINNISH NATIONAL LAW

3.1 Overview of a Finnish pre-trial investigation

Criminal proceedings in Finland are organised according to the accusatorial process. As a rule, the courts and judges do not take part in settling a case, instead the case is decided on the basis of the trial documents presented by the prosecutor and the defendant. A pre-trial investigation is similarly not accusatorial as the pre-trial investigation authority ensures the case is investigated and at the same time ensures legal protection in conjunction with the investigation. In Finland, the police authorities are as a rule responsible for conducting the pre-trial investigation. A pre-trial investigation does not involve a procedure where an outside investigative judge or the prosecutor leading the investigation oversees and makes decisions related to the investigation. However, to guarantee legal protection against the

[13] As well as the case of *Salduz*, it can also be concluded from the cases of **Zeki Bayhan v. Turkey 28 July 2009**, **Dayanan v. Turkey 13 October 2009**, **Boz v. Turkey 9 February 2010** and **Mehmet Şerif Öner v. Turkey 13 September 2011** that systematic restrictions based on a law cannot be held as acceptable. Restrictions must also be limited in time (Salduz § 54).

[14] E.g. **Plonka v. Poland 31 March 2009** and **Zeki Bayhan v. Turkey 28 July 2009**, **Leonid Lazarenko v. Ukraine 28 October 2010** and **Mehmet Şerif Öner v. Turkey 13 September 2011**. Otherwise, however, **Trymbach v. Ukraine 12 January 2012**.

absence of the most serious fundamental rights, it is the courts of law that decide on use of coercive means. In certain cases, also the prosecutor has competence in situations separately provided for to give the police orders concerning a pre-trial investigation.

Questioning during pre-trial investigations in Finland is recorded in the examinations record. After questioning has ended, the record is checked before being verified by signature of the examinee. Finally, a record of the pre-trial investigation is compiled from the material obtained in the pre-trial investigation. Under Chapter 17, Section 11 of the Code of Judicial Procedure, a statement entered in the record of the pre-trial investigation may not, as a rule, be admitted as evidence in a trial. However, under Chapter 17, Section 32 (2) of the Code of Judicial Procedure and Chapter 6, Section 7 (2) of the Criminal Procedure Act, a statement given in a pre-trial investigation may be referred to if, when examining the suspect in a court of law, a statement deviates from what he earlier claimed or if he states that he is unable or does not wish to testify in the case.

3.2 A suspect's right to an attorney in a pre-trial investigation

The Criminal Investigations Act currently valid in Finland dates from 1987 and has been amended by a new Act which will enter into force on 1 January 2014. Under Section 10 (1) of the existing Act, a party has the right to use an attorney in the pre-trial investigation. Any suspect apprehended, arrested or detained must immediately be informed of this right. Similar provisions are included in Chapter 4, Section 10 of the new Act, with the exception that subsection 1, however, unlike the old provision, explicitly specifies that a party has the right to use *an attorney of his or her own choosing* and that he or she must be informed of this *in writing* before examination. The suspect must be notified of this right in writing *immediately after he or she has forfeited his or her liberty* in conjunction with apprehension, arrest or detention. Subsection 1 of the Section also incorporates a new provision whereby the pre-trial investigation authority must also otherwise ensure, mindful of the factors related to *the crime to be solved, solving the crime and the party's person,* that the party's right to use an attorney *is actually carried out* if he or she so wishes. Under Chapter 4, Section 10 (2) of the new Act, the head of investigation or the prosecutor must, in addition, propose that the suspect be assigned a defence counsel when assignment of a defence counsel is necessary *ex officio*[15].

[15] Under Chapter 2, Section 1 (2) and (3) of the Criminal Procedure Act, on the request of the suspect, a defence counsel is to be appointed for him/her, if: 1) he/she is suspected of or charged with an offence punishable by no less than imprisonment for four months or an attempt of or participation in such an offence; or 2) he/she is under arrest or in detention. A suspect must be assigned a defence counsel *ex officio* when 1) the suspect is incapable of defending himself/herself; 2) the suspect who has not retained a defence counsel is under the age of 18 unless it is obvious that he/she has no need of a defence counsel; 3) the defence counsel retained by the suspect does not meet the qualifications required of a defence counsel or is incapable of properly defending the suspect; or 4) there is some other special reason.

The additions made to the new Criminal Investigations Act emphasise the fact that the pre-trial investigation authority must, where necessary, guide a suspect in matters related to legal assistance and to the assignment of a defence counsel, as well as assist in obtaining an attorney without, however, influencing the choice of attorney. What is essential in executing the right to an attorney is for the examinations and other pre-trial investigation measures to be timed so that the attorney has an opportunity to participate in them. Also the written notice of the right of a suspect to an attorney of his or her choice promotes the inclusion of the attorney from the earliest possible time. When enacting the Act, it was highlighted that the right to an attorney also applies to the stage where the conditions to institute a pre-trial investigation are being examined.[16] The duty of care imposed on the investigating authority concerning effecting the use of an attorney is not, however, unconditional. Based on case-specific consideration, pre-trial investigation measures may start even though the attorney is not present.[17]

Both Section 10 (3) of the existing Criminal Investigations Act and Chapter 4, Section 11 of the new Act contain provisions concerning the contact between attorney and a suspect who has been deprived of his liberty. Under the provisions, a suspect who has been apprehended, arrested or detained is entitled to keep in contact with his attorney by meeting, letter or phone as provided in greater detail in certain other Acts[18]. Chapter 4, Section 11 (2) of the new Act also includes a provision not contained in the existing Act whereby the pre-trial investigation authority must safeguard the *confidentiality of the contact* between the suspect and his attorney.

Section 29 of the existing Criminal Investigations Act and Chapter 7 Section 10 of the new Act both contain provisions concerning notifications to be made to a person being examined in a criminal case before examination takes place. Under both provisions, a person being examined must, before examination, be notified of his position in the pre-trial investigation. In addition, a suspect must be informed of the offence he is suspected of. Before examination, the right of the suspect to an attorney in the pre-trial investigation must be fully explained to him as well as the conditions under which a defence counsel can be assigned to him. Chapter 7 Section 10 (1) of the new Act also contains a

[16] An attorney can be involved in the pre-trial investigation, for example, during the initial briefing when a party's position in the criminal process is still unclear.

[17] The seriousness of the crime is the most important thing favouring obtaining an attorney for a pre-trial investigation. The urgency of the pre-trial investigation measure may, for its part, result in action having to be taken before it is possible to get the presence of an attorney. Also consideration must be given to the personal characteristics of a party.

[18] The Detention Act (768/2005) and the Act on the Treatment of Persons Detained by the Police (841/2006) contain provisions about effecting written correspondence and a detained person's access right and the refusal thereof. In addition to these provisions, it is possible to restrict contact and visitation rights in situations provided for separately in the Coercive Measures Act.

provision absent from the existing Act whereby before examination a suspect must be notified of his privilege against self-incrimination.

The amendments referred to above are largely based on the comments and observations concerning Finland in the reports for 1992 and 2008 of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT Committee) concerning access to an attorney in a pre-trial investigation. The reports in question drew attention to the fact that the right of access to an attorney immediately after the deprivation of liberty was not always effected in practice in Finland, neither had the police systematically given people they had apprehended written information about all their rights. The CPT Committee had also received reports that the police, at least in some cases, had prevented a suspect from freely choosing his attorney.[19]

The amendments to Criminal Investigations Act concerning retaining a lawyer have not been directly based by reference to ECtHR legal praxis. The ECtHR decisions explained above, however, include many such principles related to the use of an attorney the adequate implementation of which in Finland has not been clear according to the reports of the CPT Committee. The decisions of the ECtHR have thus, in part, influenced amendments to the law.

4. ADMISSIBILITY IN A TRIAL OF A SUSPECT'S STATEMENTS GIVEN IN A PRE-TRIAL INVESTIGATION

According to the free consideration of evidence theory provided by Chapter 17, Section 2 of the Code of Judicial Proceedings valid in Finland, courts of law can freely admit in judicial proceedings all factors legally added to trial documents and consider their evidential value. Under Section 4 of the same chapter, a court of law may also freely consider what significance must be given to retraction of admission. Special prohibitions from giving evidence, which as a rule have been provided expressly and coercively by law, in particular restrict unfettered production of evidence.

Under Finnish legislation, the mere fact that a piece of evidence or information contained in a piece of evidence has been obtained in a manner that runs counter to the law or otherwise by procedural irregularity still does not necessarily mean that such evidence may be inadmissible in court. A piece of evidence is usually allowed to be presented, but the shortcomings related to obtaining it are taken into account in some way when assessing the evidence. Also the ECtHR has held that allowing evidence obtained in a manner that runs counter to the law does not in itself breach ECHR Article 6 if the overall procedure satisfies the requirements of a fair trial. In its decision KKO 2011:91, the Supreme

[19] According to the report of the CPT Committee's investigation in 2008, the right to an attorney is in many cases not granted until the first official examination carried out by an investigator and this might take place considerably later than after actual apprehension.

Court of Finland noted, referring *inter alia* to the decision of the ECtHR in the case of **Gäfgen v. Germany 1 June 2010**[20], that refusal to admit evidence can come into question on a case-specific basis if there has been serious infringement in obtaining information contained in a piece of evidence. In such cases the seriousness of the infringement must be weighed against the interest of solving the crime.

The ECHR contains no specific provision concerning protection against self-incrimination. According to the legal praxis of the ECtHR, the main guarantees of the fair trial referred to in ECHR Article 6 include, however, also the principle of protection against self-incrimination[21]. Protection against self-incrimination means that a suspect or an accused cannot be coerced or compelled into producing inculpating evidence. The privilege against self-incrimination requires the prosecutor to try to substantiate the charge without relying on evidence obtained by coercion or under duress without regard to the will of the accused. In its legal praxis, the ECtHR has noted that protection against self-incrimination lies at the heart of the notion of a fair procedure under Article 6 of ECHR[22].

As the ECtHR has noted in its legal praxis, ECHR Article 6 contains no provisions about admissible evidence. Therefore admissibility of evidence is primarily a matter for regulation under national law.[23] On the contrary, the role of the ECtHR is to examine *whether the trial as a whole, including the way evidence has been obtained, has been fair*. ECHR Article 6 has been held to have been violated when a suspect's statements that have been obtained under circumstances that irretrievably infringe his rights is admissible as evidence in a trial[24]. The free evidence theory complied with in Finland and the accused's protection against self-incrimination enjoy a tense relationship to each other since the free consideration of evidence serves to establish the material truth as fully as possible, whereas the role of protection against self-incrimination is to safeguard the position of the accused.

Based on the legal praxis of the ECtHR, it is difficult to draw any direct conclusions as to whether statements given by a suspect in a pre-trial investigation without the presence of legal assistance are admissible in a subsequent trial. Interpretation of the ECtHR's extensive legal praxis is hampered by

[20] In its decision, the ECtHR noted that, irrespective of its evidential value, evidence obtained by torture is not admissible as proof against an accused.

[21] E.g. **Murray v. the United Kingdom 8 February 1996** § 45

[22] E.g. **Gäfgen v. Germany 1 June 2010** § 168.

[23] E.g. **Gäfgen v. Germany 1 June 2010** § 162: "…While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (…)."; § 163: "It is, therefore, not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible."

[24] E.g. **Panovits v. Cyprus 11 December 2008**, **Brusco v. France 14 October 2010** and **Lazarenko v. Ukraine 28 October 2010**.

the lack of similarities between the facts and the circumstances forming the basis of the decisions. Neither does legal praxis appear to be entirely consistent in all respects. It would appear that if a suspect has admitted an offence or otherwise given statements that are unfavourable to himself in pre-trial questioning in a situation where his right to an attorney has been violated, the statements given could not at least always be admissible as evidence supporting the charge.

In conclusion, from the above decisions considered by the ECtHR, it can be noted that the seriousness of an offence and the presumed severity of any punishment basically require the presence of an attorney already at the pre-trial investigation stage. Also a suspect's personal situation might require greater obligation on behalf of the authorities to inform the suspect of his right to an attorney in examination and to safeguard the availability of an attorney. Possible waiver of the right to an attorney must be unequivocal and the factors referred to above must be taken into account in waiver situations. Judging by its view of the facts of each case and thus reflecting that it was counter to ECHR Article 6 § 3 (c), because the suspect's rights have been irretrievably violated, the ECtHR would appear to take a negative view of the admissibility as evidence of statements supporting guilt given by a suspect without access to an attorney in pre-trial investigations. However, the ECtHR has not mentioned banning admissibility because it considers that the rules of admissibility are a matter for national law. Even though the facts of the cases differ, in all the situations there is reason to take into account the suspect's personal circumstances, the nature of the offence and the ensuing obligations arising from the legal background and the authorities. Assessment of any ban on admissibility must be mindful especially of the circumstances under which statements have been made, in other words how the suspect has been treated, how he was informed of his rights to have an attorney present during questioning and whether he has understood the consequences of waiving access to an attorney as far as the consideration and outcome of the case are concerned.

The ECtHR's legal praxis and requirements related to a fair trial for the procedure to be adversarial, as well as the equality of arms principle speak for the suspect's right to an attorney, even to an attorney assigned *ex officio*, in cases of serious crimes. This right can be restricted only for compelling reasons. In the light of the ECtHR's legal praxis, it is not excluded to consider fairness to require an absolute ban on admissibility directed at evidence obtained in circumstances that violate the suspect's fundamental rights when infringement has deprived the suspect of the right to a fair trial.

5. ASSESSMENT AND FUTURE OUTLOOK

5.1 Impacts of the European Court of Human Right's legal praxis on EU right

The European Commission has given a proposal for a Directive on the right of access to a lawyer in criminal proceedings. This proposal is centred on ECHR Article 6 § 3 (c). The preamble to the

proposal for a Directive refers to Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, which provide for a fair trial and guarantee the right of defence of every suspect. The proposal for a Directive applies, *inter alia*, to implementation in Member States of the right provided by ECHR Article 6 § 3 (c). What makes the proposal for a Directive interesting is that, regardless of the fact that the EU is not a party to the European Convention on Human Rights, many points in the proposal refer directly to the ECHR and the legal praxis of the ECtHR.

Once the proposal for a Directive has been definitively adopted, certain identical minimum aims will be imposed on EU Member States to implement Articles 47 and 48 of the Charter of Fundamental Rights of the European Union on the one hand and also ECHR Article 6 § 3 (c) on the other. Pursuant to the Directive, the right to an attorney must be granted also at such a time and in such a manner that the suspect or accused is able to effectively exercise his right to a defence counsel. According to Article 13 § 3 of the proposal for a Directive, Member States must ensure that statements of evidence given by a suspect or an accused that have been obtained in breach of the right to a lawyer or that have otherwise deviated from this right by consent obtained under Article 8 must not be used as evidence against him at any stage of the proceedings, except where the use of such evidence does not affect rights of defence.

According to a statement on the proposal for a Directive issued by the Legal Affairs Committee of the Parliament of Finland, the provisions of the Directive must take into account the legal protection aspects and safeguard solving the crime. Moreover, attention has been given to the fact that the provisions of the Directive must be appropriate and practical in use, as well as take into account the national peculiarities, which in Finland relate, *inter alia*, to the division of competence between the authorities and to free consideration of evidence. The Legal Affairs Committee has adopted a cautious view of the proposal for a Directive presumably because of the collision between the free consideration of evidence theory espoused by national procedural law and the ban on admissibility as explained above. The view adopted by the Directive on banning the admissibility of evidence in situations where the suspect's right to access an attorney has been denied would seem to comply with the adopted policies in the ECtHR's legal praxis and is thus in our opinion justified.

5.2 Implementation of a suspect's rights in Finland

The background of the ECtHR's interpretative practice of ECHR Article 6 § 3 (c) can be considered as influencing two types of aim. The presence of an attorney enables proper subsequent control of pre-trial investigations, in addition to which the involvement of an attorney furthers taking into account the overall rights of a defence. All in all, the existing Criminal Investigations Act and the forthcoming Act in Finland would largely seem to be in compliance with the principles adopted by the ECtHR's in its

case law. Properly applied, they would thus provide effective guarantees of legal protection to access an attorney and to implement a suspect's rights in pre-trial investigations.

As regards the admissibility of statements given by a suspect without an attorney, it can be noted that Finnish legislation does not currently include a norm that signifies a ban on admissibility in the situation referred to. As we understand it, Finnish courts have, on the whole, taken a negative view of the possibility to restrict the free consideration of evidence by banning admissibility categorically. Banning the admissibility of statements given by a suspect in a pre-trial investigation seems, however, to be, in the light of the ECtHR's case law, the only – even though not necessarily sufficient – way to prevent causing irretrievable detriment to the suspect's rights referred to in ECHR Article 6 in a situation where statements have been obtained in circumstances that seriously infringe the suspect's right to an attorney.

Taking into account the above, it is to be recommended that also Finland adopts effective guarantees to ensure legal protection to exclude from the trial documents statements that have been obtained in violation of a suspect's right to an attorney. In late 2011, the Supreme Court of Finland granted leave to appeal in a matter where the issue was whether or not the accused had validly waived his right to an attorney in the pre-trial investigation examinations and whether the statements he had given without an attorney can be used as evidence in the case. Based on the legal praxis of the ECtHR, what would seem to be important in the Supreme Court's forthcoming preliminary ruling is the circumstances in which the suspect waived his right to the presence of an attorney in the pre-trial investigation. Preliminary information indicates that a ruling will be handed down in spring this year. The ruling will probably comply with the ECtHR's praxis and the admissibility of statements arising in it will probably be considered in the light of the points of view adopted by the ECtHR. The ruling will be a preliminary ruling in the Finnish legal system and the rules adopted in it will probably be complied with in Finnish legal praxis. However, rulings by the Supreme Court are only weakly binding sources of law and failure to apply them does not result in sanctions for an offence in office. At the same time our legislation also includes provisions on free consideration of evidence which has the strongly binding status of law and which thus ranks higher in the norm hierarchy than preliminary rulings. The Supreme Court's preliminary ruling will therefore not necessarily be sufficient to safeguard the consistency of legal praxis and provide sufficient guarantees in situations where a suspect's defence rights have been violated in a pre-trial investigation.

Owing to a certain degree of open interpretation, it might be justified to include also in national law a provision explicitly concerning a ban on admissibility. This would clarify the interpretation of the norm applying to a suspect's right to an attorney and would emphasise the importance of the right

mentioned. This will probably be done if the EU's proposal for Directive is implemented[25]. However, an outcome that is largely similar to a ban on admissibility can be reached also within the framework of the free consideration of evidence theory by according such evidence, where required, almost no evidential value. This is why as we see it, any ban on admissibility included in the law should be limited to applying only to the most serious violations of a suspect's rights. Thus the norm in any case would inevitably include a large about of case-specific consideration.

Section 21 of the Constitution of Finland requires guarantees of a fair trial to be provided by law. As the suspect's right to an attorney referred to in ECHR Article 6 § (3) is included in guarantees of a fair trial, we consider that a ban on admissibility that safeguards implementation of the right mentioned should be based on law. A situation in which it is, in principle, possible to interpret a suspect's right at constitutional level so that there might be a risk of it losing its significance due to a provision (free consideration of evidence) in ordinary law is, as we see it, unsatisfactory from the aspect of implementing constitutional and human rights[26].

5.3 Outlook in Finland and conclusions

To date, there has been minor use of an attorney in criminal proceedings and participation of an attorney in criminal investigations in Finland[27]. We consider the interpretation of the importance of criminal investigations adopted by the ECtHR to be something new and welcome in Finland, as the evidence collected at the time determines the framework in which an offence is considered in the trial. In practice, use of an attorney in preliminary questioning currently impacts adversely on the availability of attorneys. In addition to this, the scant appearances of attorneys in a pre-trial investigation examination can also be explained by the fact that knowledge of the right to an attorney

[25] In Finland, also a working group has been set up to clarify the amendment of Chapter 17 of the Code of Judicial Procedure, which concerns evidence. The group may also have to form an opinion about how an admission made in a pre-trial investigation must be assessed as evidence.

[26] Under Section 106 of the Constitution of Finland, if, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution. Because interpretation of the guarantees of legal protection ensured by the Constitution is consistent with Finland's human rights obligations, the judge interpreting the ECtHR's legal praxis can already now rule a suspect's statement as inadmissible if he/she deems that its admissibility would violate the suspect's right to a fair trial. However, as we understand it, in accordance with the above-mentioned, Finnish courts are not often prepared to act in this way. Additionally, in Finland we are used to all the main factors relating to the progress of a trial being written into the law. Our existing legal system does not therefore currently necessarily ensure sufficient guarantees to implement the suspect's rights.

[27] According to enquiries, only around a quarter of the suspects might have an attorney at the pre-trial investigation stage or in about 10 per cent of cases. Even were an attorney to have been present at the pre-trial investigation stage, he would not necessarily have participated in the questioning. Even in the most serious criminal cases, attorneys might not have been obtained until the approach of the main hearing in the court of lower instance.

in a pre-trial investigation examination reaches the suspect at such a late stage that he is unable to consider to a sufficient degree the necessity of an attorney, which means that the right to an attorney is waived on light grounds. As far as the interest aspect of an attorney's job is concerned, sitting in a pre-trial investigation might be considered as being frustrating and unnecessary, after all the case will subsequently be considered in court, where an attorney is present. However, the new criminal investigations legislation has addressed the remedying of the practical shortcomings arising, in addition to which, mindful of the decisions of the ECtHR and the EU's Directive initiative, Finland has begun to find out ways to improve the availability of attorneys and also to ascertain other actions whereby a suspect's rights can be safeguarded also, if needed, without the presence of an attorney.

On 28 November 2011, Finland's Office of the Prosecutor General (The Office) made an initiative about the use of an attorney in pre-trial investigations. The Office drew attention to the fact that in most charges evidence is based entirely or partly on the admission of the accused, even though also other evidence is required in more serious offences. Should an admission or other statement given without an attorney in pre-trial investigations not be taken as evidence, this would jeopardise the implementation of criminal liability because most of the charges would be rejected. In order to implement rights in accordance with ECtHR legal praxis and the EU's Directive, The Office has considered it important that attention in pre-trial investigations be given to an increasing extent to the fact that the suspect is actually capable of assessing his need for an attorney and that any waiver of an attorney be documented so that its voluntariness, reliability and validity can be assessed later. Other practical measures proposed include requesting the person to be heard to bring the attorney along to the examination and any decision to waive an attorney could be made in the presence of the attorney. Should a person have been deprived of his liberty, an attorney is called *ex officio*. In less serious cases, there might be justification to video the suspect's admission and any notice of waiver of an attorney so that the court could later assess the circumstances of the admission and the voluntariness of the waiver.

Finnish advocates have also drawn attention to the fact that the participation of an attorney in the criminal process already at the investigation stage is an important guarantee of a fair trial. Both prosecutors and advocates have drawn attention to the comprehensively safeguarding the availability of attorneys across the country and that it must be possible to organise an attorney for a suspect within reasonable time.

Before the ECtHR's decisions concerning the use of attorney and the admissibility of statements given without an attorney, Finnish courts had not really paid attention to the circumstances in which an admission had been given let alone whether an attorney or defence counsel was present during questioning. If there has been a claim that the admission, which later during criminal procedure was retracted, was due to some shortcoming relating to the pre-trial investigation examination, it has been

disregarded through appointing the police that carried out the questioning to witness of the facts relating to the questioning. Neither have the interrogation records generally conveyed any exact picture to the court as to how the suspect's right to an attorney in pre-trial investigations and examinations has been safeguarded. In practice, examination records include a point that mentions that the suspect has been informed of his right to an attorney and of the possibility to obtain a legal attorney. The criminal investigation authority's notification might thus be fairly routine and especially for a first-timer being questioned by the police, the importance of access to an attorney in the matter might remain unclear. With the decisions of the ECtHR and the imminent decision to be issued by the Supreme Court, more attention will probably be attached to the use of an attorney in pre-trial investigations. In this respect, it is important from the point of view of the courts and the progress of the procedure in general that at least the pre-trial investigation records show sufficiently clearly how the suspect has in this specific case been informed of his right to an attorney.

It can be observed from ECtHR's case law and the EU's proposal for a Directive described above that the focus of the criminal procedure, especially in extensive and serious criminal cases, is increasingly shifting to the pre-trial investigation. When the statements given in a pre-trial investigation have a central role in a criminal trial, there is justification for the parties in the procedure to be equal in accordance with the equality of arms principle already at the pre-trial investigation stage. Also the principle of hearing the opposing party requires the suspect to have the right to ask the witnesses and persons to be heard questions already during the pre-trial investigation. In future and after any amendments to the law, based on the policies of the ECtHR's legal praxis, it might be an everyday occurrence for an attorney to have a more active role than at present in pre-trial investigations. The presence of an attorney in pre-trial investigations brings fluency both to the investigations and to the trial, too and thus safeguarding the availability of capable attorneys is in everyone's interest. This also requires attorneys as a professional body to adopt a new mindset to a pre-trial investigation.

As stated above, in Finland the pre-trial investigation is headed by the police. In this respect, the Finnish pre-trial investigation diverges from that of some other European states. The ECtHR's decisions have addressed that the legal authorities are heading the pre-trial investigation (prosecutor or investigating judge). In Finland, there is no requirement for police heading an investigation to have Master of Laws degree, nor can only a person with police training act as a party in the criminal procedure. Whether the prosecutor should be responsible for conducting the pre-trial investigation has already been the subject of discussion over a longer period between the prosecuting authorities and the police authorities in Finland. Shifting the focus of the procedure and the actual presence of attorneys in a pre-trial investigation might in result in future pressure to also examine the authority between the prosecutor and the police and lead to even large structural changes in Finland.

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