

# **'The lawyer in the pre-trial procedure: a European approach'**

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## ***1. Introduction***

In this article the position of the lawyer in the pre-trial procedure will be discussed in the light of the judgements of the European Court on Human Rights (ECHR). Although the ECHR only gives judgements in individual cases, the rulings of the European Court are of great importance to the 40 European parties to the European Convention on Human Rights. The Convention is directly applicable in the participating member states and judgements given by the ECHR in individual cases, can for that reason have great effects on the national criminal codes and procedure.

The ECHR provides a right to a fair trial. Before taking into account the position of the lawyer, we first must try to determine on what moment the fundamental right to a fair trial starts. The Convention sets forth to guarantee the right to a fair trial to everyone who has become subject to a criminal charge against him. But when can we speak about a 'criminal charge'; does the pre-trial phase belong to the 'trial' as meant in article 6? (par. 2) We have to deal with those questions first before answering the question whether the presence of a lawyer or legal counsel in the pre-trial procedure is seen as a fundamental right according to the European Convention. In par. 3 we will try to give an overview of the position of the lawyer according to the text of the Convention.

After that the judgements of the ECHR will be our leading source to determine whether the right of legal counsel in general and the presence of a lawyer or legal counsel during police interrogation in particular is a fundamental human right according to the Convention (par. 4). This paper will end with a short conclusion.

## ***2. The right to a fair trial***

The European Convention for the Protection of Human Rights and Fundamental Freedoms states in article 6 (1) that 'In the determination [...] of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' Article 6 (3) then gives an overview of the minimum rights everyone charged with a criminal offence has:

- a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b. to have adequate time and facilities for the preparation of his defence;
- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

To determine whether a person has the above mentioned rights we will first have to determine whether there is a criminal charge against him.

In the judgements of the European Court we can distinguish three criteria to determine if someone is charged with a criminal offence: the classification-criterion, the nature of the infringement and the nature and severity of the sanction. The first criterion, the classification, looks into the way in which an offence is classified in national law. E.g. a country might distinguish between criminal acts and administrative acts and have different procedures to react to these acts, with different levels of protection for the accused. When an act is deemed criminal by national law, the fair trial-principle will

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apply. However, when an act is not seen as a criminal offence by national law this does not mean that the fair trial-principle does not apply. The European Court is not bound by national rules in determining whether there is a criminal charge.

The second criterion (the nature of the infringement) can be divided into two parts. The fact that a rule applies to all citizens can, as the European Court decided in the case of *Öztürk v. Germany*<sup>1</sup>, indicate that sanctions on the infringement of that rule fall under the reach of article 6. In the *Campbell-case*<sup>2</sup> the Court ruled that rules concerning the internal discipline in a prison are only directed to a limited group (the prisoners) and are therefore disciplinary of nature as long as they do not exceed the boundaries of internal discipline. Article 6 then does not apply. In short, the bigger the group of people that is potentially affected by the rule, the more reason there is to assume that there is a criminal charge. In the case of *Öztürk*, sanctions concerning infringement of traffic regulations apply to everyone and are therefore criminal charges no matter in which way they are described under national law and rules applying to prisoners are directed to a limited group which is reason to assume that they are not criminal charges.

The question to whom a rule applies however is not decisive to conclude whether there is a criminal charge. There still is a third criterion: the nature and severity of the sanction. On one hand, the goal of the sanction can be used in determining a criminal charge and on the other hand the nature and severity of the sanction. If a sanction imposed is 'deterrent and punitive' there is reason to assume a criminal charge. A sanction leading to reparation of the situation existing before the infringement is not deterrent and punitive and can therefore in itself not lead to the conclusion that there is criminal charge.

In the cases of *Weber*<sup>3</sup> and *Demicoli*<sup>4</sup> the European Court decided that the maximum penalty that can be imposed should be leading in determining a criminal charge. The fact that a penalty of imprisonment can be imposed however is not in itself reason to assume that there is a criminal charge. The imprisonment must be imposed 'à titre répressif' and must be to the disadvantage to the person charged.<sup>5</sup> A very short period of imprisonment or an imprisonment which is not imposed with a repressive goal (e.g. the imprisonment of someone who is mentally ill with a goal of protecting that person) will not have to lead to the conclusion that there is a criminal charge.

The question whether there is a criminal charge and whether the rights stated in article 6 apply, therefore depends on the three criteria mentioned above. These criteria should be viewed together according to the judgement of the ECHR in the case of *Bendenoun v. France*.<sup>6</sup> The Court stated that 'none of them is decisive on its own, but taken together and cumulatively they made the 'charge' in issue a 'criminal' one.' We will have to take the three criteria into account together to determine a criminal charge.

### **3. The position of the lawyer in the Convention**

Dealing with the position of the lawyer in the pre-trial procedure we will first take a look at the text of the European Convention on Human Rights. Though the position of the lawyer may be an important one in ensuring the rights and freedoms of citizens, there is only very little mention of the lawyer in the text of the Convention. Only article 6 (3) (c) mentions the right of everyone charged with a criminal offence 'to defend himself in person or through legal assistance'. This however doesn't mean that the right to legal counsel is not implied in the Convention. Article 6 (3) (b) states that everyone charged with a criminal offence has the right 'to have adequate time and facilities for the preparation of his defence.' It goes almost without saying that in order to ensure this right someone must have the possibility to seek legal counsel and be able to have contact with a lawyer.

<sup>1</sup> *Öztürk v. Germany*, ECHR 21 February 1984, Publ. ECHR, Series A, Vol. 73.

<sup>2</sup> *Campbell and Fell v. United Kingdom*, ECHR 29 April 1984, Publ. ECHR, Series A., Vol. 80.

<sup>3</sup> *Weber v. Switzerland*, ECHR 22 May 1990, Publ. ECHR, Series A, Vol. 177.

<sup>4</sup> *Demicoli v. Malta*, ECHR 27 August 1991, Publ. ECHR, Series A, Vol. 210.

<sup>5</sup> *Engel and others v. The Netherlands*, ECHR 8 June 1976, Publ. ECHR, Series A, Vol. 22.

<sup>6</sup> *Bendenoun v. France*, ECHR 24 February 1994, Publ. ECHR, Series A, Vol. 284.

But the lawyer could also play an important role in ensuring the right to liberty and security as laid out in article 5 especially in article 5 (1) (c). Article 5 states that 'no one shall be deprived of his liberty save in case of [...] (c) the lawful arrest or detention [...] for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent him committing an offence [...].' The lawyer could play an important role in discussing the lawfulness of the arrest and detention and the reasonableness of the prohibition of torture and of inhuman or degrading treatment or punishment. There, of course, have to be legal possibilities to address a judge in such cases.

The right to seek legal counsel in order to ensure one's right to fair trial isn't stated directly in the Convention, apart from article 6 (3) (c) the right to defend yourself through legal counsel, but seems to be an integral part of the right to a fair trial and is of importance to ensure the rights mentioned in the Convention, although the position and task of the lawyer are not defined.

#### **4. The position of the lawyer according to the Court**

Is the right to a lawyer an integral part of the fair trial-principle laid out in article 6? To answer that question we will look into the position of the lawyer in the pre-trial phase in general and in to the possibility of having a lawyer present in police interrogation in particular. The first case in which the European Commission on Human Rights clearly decides on the right to legal assistance in the first phase of the pre-trial stage is in the case of *Can v. Austria*.<sup>7</sup> In this case the defendant didn't have the opportunity to freely consult with his lawyer, without the presence of a guard, within the first three months of his detention. The Commission stated that 'the investigation proceedings are of great importance for the preparation of the trial because they determine the framework in which the offence charged will be considered at the trial' and that it is therefore 'essential for the defence [...] that the basis for its defence activity can be laid down already at this stage.' According to the Commission the defendant should be able to consult with his counsel in the early stages of the pre-trial procedure and the possibility of free contact between lawyer and accused is a necessary prerequisite in order to ensure his rights. E.g. how could it be possible for the accused to discuss with his counsel the possibility of using the right to remain silent if these conversations are overheard by prosecuting officials?

From this case we can conclude that the defendant must have the possibility to freely consult with his lawyer and the enforcement of this right should be made possible as early in the pre-trial stage as possible.

The ruling of the Commission in *Can v. Austria* is being affirmed by the Court in the case of *S. v. Switzerland*<sup>8</sup> where the Court states that 'If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective [...]' The cases mentioned above include no ruling on the subject of legal assistance during the interrogation by the police.

In the case of *Imbrioscia v. Switzerland*<sup>9</sup> this question is put forth. The first instance-Court on Human Rights ruled that the applicant had a fair trial because 'the absence of a lawyer at the applicant's various interrogations (did not) led to a disadvantage which was likely to influence the material position of the defence at the trial and therefore also the outcome of the proceedings.' The second instance-Court confirmed the ruling of the Commission making some more remarks. The Court stated that the fact that article 6 (3) (c) doesn't say how the right to legal counsel must be practiced means that it is up to the member states to ensure the means to secure this right in their system and that the Court only ascertains whether the method chosen by the member states is consistent with the requirements of a fair trial. In this case however, the Court also states that the fact that his lawyer had not been present at all interrogations meant that the applicant 'did not at the outset

<sup>7</sup> *Can v. Austria*, ECHR 30 September 1985, Publ. ECHR, Series A, Vol. 96.

<sup>8</sup> *S. v. Switzerland*, ECHR 28 november 1991, Publ. ECHR, Series A, Vol. 220.

<sup>9</sup> *Imbrioscia v. Switzerland*, ECHR 24 november 1993, Publ. ECHR, Series A, Vol. 275.

have the necessary legal support', but that the State could not be held responsible for the actions of the lawyer. The Court seems to express its opinion that the presence of a lawyer at the police interrogation is an important way for the defence to ensure the necessary legal support.

In 1996 in the case of *John Murray v. United Kingdom*<sup>10</sup> the Court dealt with the subject of the presence of the lawyer at the police interrogation. Murray was an alleged IRA-terrorist and interrogated in accordance with the Prevention of Terrorism Act 1989, which states that every person has the right to remain silent but that every fact that the defendant fails to mention and 'which you rely on in your defence in court, your failure to take this opportunity to mention it may be treated in court as supporting any relevant evidence against you. If you do wish to say anything, what you say may be given in evidence.' Furthermore Murray did not have the possibility to confer with his lawyer beforehand and his lawyer was not present at the interrogations. The Court judged that 'the applicant's denial of access to a lawyer during the first 48 hours of his police detention' was a breach of article 6 (3) (c) in connection with the right to fair trial. Especially because Murray had to choose his defence position very early in the pre-trial phase (practicing the right to remain silent or giving a statement) which could be of great importance to his defence in court, the European Court judged that in this case the denial of legal counsel was not in accordance with the right to fair trial.

The situation described in the case of *John Murray v. United Kingdom* was also subject of a court ruling in the cases of *Magee v. United Kingdom*<sup>11</sup>, *Averill v. United Kingdom*<sup>12</sup> and *Brennan v. United Kingdom*.<sup>13</sup> In the first case mentioned (*Magee*) the Court stated that 'The austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he may have manifested at the beginning of his detention to remain silent. Having regard to these considerations, the Court is of the opinion that the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confess to his interrogators.' In short, the Court ruled that, depending on the specific situation of the case, as a counterweight, access to a lawyer is a necessary means of ensuring the right to a fair trial.

In the *Averill*-case the Court has made similar considerations. The Court affirmed 'that it was of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation.' Especially in the situation where the defendant is confronted with a fundamental dilemma relating to his defence. The mere fact that *Averill* was denied access to a lawyer for a shorter period than *Murray* does not mean, according to the Court, that 'the denial to the applicant of access to his solicitor during the first twenty-four hours of detention [doesn't] fail to comply with the requirements of Article 6 § 3 (c) of the Convention.'

Not making any incriminating admissions in the period that he was denied access to a lawyer however, lead the Court to believe that there had not been a violation of the provisions of Article 6 (1) and (3) (c) in the case of *Brennan v. United Kingdom*.

In this case the Court once more confirmed that 'Article 6 § 3 normally requires that an accused be allowed to benefit from the assistance of a lawyer at the initial stages of an interrogation' and furthermore that 'an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial and follows from Article 6 § 3 (c).' It had been impossible for *Brennan* to confer with his lawyer without surveillance by a government official, thus leading to the conclusion that the right of legal assistance lost much of its usefulness.

## 5. Conclusion

The European Convention for the Protection of Human Rights and Fundamental Freedoms provides a right to a fair trial for everyone charged with a criminal offence. In order to determine whether the right to a fair trial applies, it is necessary to determine if there is a criminal charge. From

<sup>10</sup> *John Murray v. United Kingdom*, ECHR 8 February 1996, Application number 00018731/91.

<sup>11</sup> *Magee v. United Kingdom*, ECHR 6 June 2000, Application number 00028135/95.

<sup>12</sup> *Averill v. United Kingdom*, ECHR 6 June 2000, Application number 00036408/97.

<sup>13</sup> *Brennan v. United Kingdom*, ECHR 16 October 2001, Application number 00039846/98.

the judgements of the European Court it can be derived that there is a criminal charge when (1) an act is deemed criminal by national law, (2) the nature of the infringement must lead to the conclusion that it is criminal, because it applies to all citizens or (3) the goal, nature and severity of the sanction must lead to the conclusion that the charge is a criminal one. If there is a criminal charge, article 6 is fully applicable and the defendant has the rights mentioned in this article. Amongst the rights explicitly mentioned in article 6 is the right to legal assistance in order to be able to defend oneself. In the convention itself is little mention of the position of the lawyer. Apart from article 6 (c) (3) there is no mention of the position of the lawyer in the European Convention. This however doesn't mean the lawyer could not play an important role in ensuring the rights mentioned in the Convention.

We can only turn to the judgments of the European Court in order to determine whether legal assistance is a fundamental human right under the Convention. In several cases the right to legal assistance has been subject of the rulings of the Court and the Commission. In the case of *Can v. Austria* the Commission stated that the defendant should be able to consult with his counsel in the early stages of the pre-trial procedure and the possibility of free contact between lawyer and accused is a necessary prerequisite in order to ensure the rights of the defendant.

The European Court ruled that the right to fair trial also incorporates to the pre-trial procedure. In the case of *S. v. Switzerland* the Court states that the possibility to confer confidentially with a lawyer is necessary to make legal assistance useful. In the case of *Imbrioscia v. Switzerland* the Court for the first time explicitly mentions the presence of the lawyer at the police interrogation and states that the applicant, whose lawyer had not been present at all police interrogations 'did not at the outset have the necessary legal support', but that the State could not be held responsible for the actions of the lawyer. The possibility of legal counsel is also subject to debate in the cases of *John Murray*, *Magee*, *Averill* and *Brennan* where the defendants were deprived of contact with their lawyers in the initial stage of the proceedings. It were the specific circumstances of these cases, the harsh conditions in which the defendants were held, the consequences their attitude in the interrogation (remaining silent or giving statement) could have on their defence in court that led the Court to the conclusion that under these circumstances the deprivation of contact with a lawyer meant a breach of the right to a fair trial.

Although not explicitly mentioned in the Convention a defendant has, under the European Convention, a right to legal assistance. This legal assistance does not necessarily hold the right to have a lawyer present at the police interrogation. Given the circumstances of the case however the lack of possibilities to consult with a lawyer could result in a breach of the right to a fair trial. In short, the participating member states have an obligation to ensure the right to a fair trial and might be obliged to give a defendant the possibility to confer with a legal counselor before or even during the police interrogation.