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THE RIGHT TO THE ASSISTANCE
OF THE DEFENSE COUNSEL IN THE LIGHT OF THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

ABSTRACT

The article analyzes the standard of the accused's right to enjoy professional legal assistance as developed in the case law of the European Court of Human Rights. Its purpose is to illustrate the Court's broad understanding of this right, which is supported not only by its essential substantive components but also in its connection to the principle of a fair trial. It highlights the subjective and objective scopes of the accused's right to the assistance of the defense counsel as well as the question of the waiver of this right, the prerequisites for appointment of the public defender, and the criteria for the implementation of the guarantee standard arising from this right. In the conclusion, the author presents several reflections resulting from the juxtaposition of the "conventional" standard of the right to the assistance of the defense counsel with its implementation in the Polish legal order.

Keywords: right to the assistance of the defense counsel; right to defense; the accused's right, the principle of a fair trial, European Court of Human Rights.

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I. Introduction

The right to counsel is an essential component of the accused's right to defense. This almost self-evident statement is unequivocally confirmed in Article 6 of the Code of Criminal Procedure, while on the grounds of the European legal order, it is first and foremost laid down in Article 6.3.c of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[2] from which it follows that a person accused of committing an offense punishable by law has the right to defend himself/herself through legal assistance of his/her own choosing or, if he/she has no sufficient means to pay for legal assistance, to be given it ex officio when the interests of justice so require. At the level of the European Union law, the right to legal advice and assistance of the defense counsel is further explicitly expressed in Article 47 of the Charter of Fundamental Rights of the European Union.[3]

The prominence of the right to the assistance of the defense counsel in the referred regulations demonstrates the importance accorded to it in both national and European dimensions.[4] This should not be surprising if one considers the role of defense counsels in terms of the overall implementation of the accused's right to defense. It can be said that the activity of the defense counsel on the part of the accused directly affects the extent to which that party exercises his/her procedural rights.[5] While complementing them, it also serves to ensure that these rights are exercised in the most efficient manner, based on the professionalism of the defense counsel. It is, therefore, dictated by the professionalism of the legal representative, which can be closely linked to the ability to actually relieve the accused as a party to the litigation, which is of significance in the context of more efficient and easier communication with the trial bodies or their administrative facilities. Professionalism is a prerequisite for the accused to exercise his/her rights in the case of actions covered by the so-called obligatory representation provided by advocates or attorneys-at-law, e.g., appeals against judgments of district courts or cassations, which, in order to be effective, must be drawn up and signed by an attorney-at-law or advocate (Articles 446 § 1 and 526 § 2 of the Code of Criminal Procedure). It is also conducive to maintaining an appropriate distance from the case, allowing relevant aspects of the case to be seen more clearly, to soberly assess the factual and legal status of the circumstances of the case and, consequently, to make proper choices as regards the most optimal defense tactics and strategy. The confidentiality of contact between defense counsel and the accused, in conjunction with the duty of the trial representative to act solely for the benefit of the accused, means that, in terms of the defense in a criminal case, counsel often becomes the most trusted person for the accused, providing him/her with important mental and psychological support.[6]

2 Journal of Laws of 1993, No. 61, item 2854, as amended. The Convention is hereinafter referred to using the abbreviation "ECHR".

3 Official Journal of the European Union of 2016, C 202.

4 As an aside, one may note that, globally, the right to the assistance of counsel is supported by Article 14.3.d of the International Covenant on Civil and Political Rights, opened for signature on 16 December 1966 in New York (Journal of Laws of 1977, no. 38, item 167).

5 P. Wiliński, [in:] *System Prawa Karnego Procesowego*, editor-in-chief P. Hofmański, Vol. III: *Zasady procesu karnego*, part 2, ed. P. Wiliński, Warsaw 2014, p. 1543.

6 The presented arguments for using the assistance of the defense counsel refer to the reasons specified in the literature by S. Waltoś, [in:] S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warsaw 2016, p. 308–309.

The above-mentioned considerations, which emphatically testify to the importance of legal assistance provided to the accused by the defense counsel, also justify an analysis of the contemporary pattern (standard) of the right to assistance of counsel. It is undoubtedly genetically anchored in the content of Article 6 of the ECHR, cited above. The general norm expressed in this provision, and thus the standard originally laid down therein, is developed and detailed in the case law of the European Court of Human Rights (hereinafter referred to using the abbreviation "ECtHR"). It should be stressed that the importance of that case law is not limited to the mere application of law and presentation of the correct understanding of the right to assistance of counsel. In the legal sphere of the European Union, the standard of the right to defense, including the right to assistance of the defense counsel, "forged" in the ECtHR judgments, significantly influences the shape of the EU secondary law, where it is reflected in three directives of the European Parliament and the Council, namely Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings,[7] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty[8] (hereinafter abbreviated as "directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings"), and Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.[9]

The following analysis of the pattern of the accused's right to assistance of counsel that emerges from the ECtHR's case law serves to demonstrate the Court's broad and multifaceted approach to this issue, through the prism of which legal solutions governing the right to defense in domestic legal systems of individual states should be evaluated on the European grounds. The realization of this research assumption first requires drawing attention to the subjective scope of the right in question and its clear connection to the principle of a fair trial and the resulting consequences. Against this background, the content components of the right to assistance of counsel, the question of waiver of this right, the prerequisites for the appointment of a public defender, and the criteria for the implementation of the guarantee standard that arises from this right will be illustrated. The final issue is an attempt to take a comprehensive look at the model of the right to the assistance of counsel, which is well-established in the ECtHR case law, taking into account regulations governing this right in the Polish legal system. Taking into consideration the title of the article, in order to avoid misunderstanding, it should be pointed out that it has a dogmatic character, and its core is a logical and linguistic analysis of the ECtHR case law practice and legal norms on which it is based.

7 Official Journal of the European Union of 2012, L 142.

8 Official Journal of the European Union of 2013, L 294.

9 Official Journal of the European Union of 2016, L 297.

II. Subjective scope of the right to assistance of the defense counsel

The question of the subjective scope of the right to the defense counsel boils down to a determination of who the beneficiary of that right is. It is not sufficient in that regard to merely note that, in accordance with Article 6.3 of the ECHR *in principio*, the right in question is granted to the accused person who has been charged with a criminal offense, since it does not yet follow therefrom when this status is acquired, or, looking from another perspective, what determines the acquisition of the status of the accused, which gives the right to defense, including the assistance of counsel. In light of the ECtHR case law, it can be said without any risk of error that the concept of the "accused" should be clarified autonomously from the meaning of that term in the legal systems of the member states of the Council of Europe. Among the undisputed views is one that the concept of the "accused" in the normative sense arising from Article 6 of the ECHR cannot be narrowed in scope by referring to persons against whom an accusation (criminal case) has been brought before a court. On the other hand, in the Polish literature, one can find a standpoint according to which the analyzed notion should be linked in the given context with the official notification by a competent authority of a particular person about an allegation of committing a crime. According to this view, "we are dealing with" the state of accusation in the broad sense within the meaning of Article 6 of the ECHR in the case of formal formulation of charges against a person.[10] It would follow therefrom that the status of the accused according to the cited regulation is determined by the formal institution of a criminal prosecution against that person. It is impossible to accept such a conclusion as well as the position preceding its formulation, which seems to be an expression of rather superficial analysis of the ECtHR case law. After all, it does not require exceptional insight to see that this case law clearly accepts that the existence of an accusation and, therefore, the status of the accused, does not necessarily follow from the official notification by a competent authority of an allegation of an offense, but may be a consequence of other facts that seriously affect the procedural situation of a certain person as the suspect.[11] According to the ECtHR, the conceptual scope of an "accusation in a criminal case" in the autonomous, conventionally understood sense encompasses not only those cases in which a certain person has been formally granted the status of the suspect but also those in which national authorities have credible reasons to suspect the involvement of a certain person in a crime.[12] For example, the Court assumes that the right of access to counsel arises not only when a person is arrested or questioned by the police but may also be relevant and arise in the context of an identification

10 See: C. Golik, *Funkcja informacyjna przedstawienia zarzutów*, "Wojskowy Przegląd Prawniczy" 2021, no. 3, p. 33–34.

11 See, inter alia, ECtHR judgment of 10 December 1982 in Corigliano v. Italy, A 57; ECtHR judgment of 10 December 1982 in Foti and Others v. Italy, A 56; ECtHR judgment of 21 February 1984 in Öztürk v. Germany, Application No. 16500/04.

12 ECtHR judgment of 29.6.2016 in Truten v. Ukraine, Application No. 18041/08; ECtHR judgment of 24.1.2019 in Knox v. Italy, Application No. 76577/13.

procedure or a procedural reconstruction of events as well as an inspection at the scene of the crime.[13]

This position, expressed in the ECtHR case law, is now reflected in secondary EU law, i.a., in Articles 3(2)(a) and 3(3) of the Directive on the right of access to a lawyer in criminal proceedings, which stipulate that the suspect has the right to communicate with his/her lawyer even before he/she is questioned by the police or some or other law enforcement or judicial authority. This is most clearly confirmed by the definition of the Directive's scope of application, which makes it clear that suspects or accused persons under the Directive are not only those who have been officially notified but also those who are otherwise informed that they are suspected or accused of having committed a criminal offense (Article 2(1) of the Directive on the right of access to a lawyer in criminal proceedings). In addition, Article 2(3) of the Directive in question underlines that its provisions apply to persons who are not suspects or accused persons and who acquire this status only in the course of their questioning by the police or other law enforcement authority (Article 2(3) of the Directive on the right of access to a lawyer in criminal proceedings).

These observations lead to the conclusion that the Convention's standard for the right of defense presupposes a broad understanding of the "accused", according to which, in addition to persons who have been formally notified about criminal charges against them, this status is accorded to persons who have been informed in some other way, for example, by first actions taken against them as part of the prosecution.[14]

III. The relationship between the right to counsel and the right to a fair trial

As regards the content-related analysis of the accused's right to the assistance of the defense counsel, it is necessary to stress that this right is recognized in the ECtHR case law not as an end in itself but as one of the specific aspects of the general right to a fair

13 ECtHR judgment of 17.2.2009 in İbrahim Öztürk v. Turkey, Application No. 16500/04; ECtHR judgment of 23.10.2018 in Mehmet Duman v. Turkey, Application No. 38740/09.

14 Both the Polish Constitutional Tribunal and the Supreme Court take a similar position. See: the judgment of the Constitutional Tribunal of 3 June 2008, ref. no. K 42/07, OTK-A 2008, no. 5; judgment of the Constitutional Tribunal of 11 December 2012, K 37/11, OTK-A 2012, no. 1; judgment of the Supreme Court of 9 February 2004, V KK 194/03, OSNKW 2004, no. 4, item 42. Incidentally, it should be noted that under the criminal procedural law there is a narrower understanding of the term "accused", according to which a beneficiary of the right to defense is a person against whom criminal proceedings have been formally instituted and, as a consequence, he/she has obtained the procedural status of the suspect (*argument ex* Article 71 of the Code of Criminal Procedure). This should be assessed critically not only from the point of view of a broad understanding of this concept on the grounds of the EU but also from the perspective of compliance of the current code regulation with the Constitution of the Republic of Poland. In light of the aforementioned provisions of the Directive, it should be strongly emphasized that the legislator's declaration included in reference 1 to the commented Code, stating implementation of the provisions contained in these regulations, is not supported by detailed solutions of this Code (see more broadly *Kodeks postępowania karnego. Komentarz praktyczny do nowelizacji 2019*, ed. J. Zagrodnik, Warszawa 2020, p. 21—25).

trial.[15] Taking a slightly broader perspective, and considering all rights of the accused to defense, one may say that they are subordinate to ensuring or contributing to ensuring the fairness of the criminal proceedings as a whole. Therefore, they must be interpreted through the lens of the function they perform in the overall context of the proceedings,[16] and their violation is reviewed through the lens of their impact on the irreparable impairment of the integrity of the entire proceedings.

In order to fully illustrate the relationship between the right to the assistance of the defense counsel and the fairness of a criminal trial, it is worth referring to the now classic ECtHR judgment in the matter of Salduz v. Turkey.[17] In this case, the accused had no access to counsel during his interrogation by the police as well as before the public prosecutor and the investigating judge, and the lack of such access was not dictated by special reasons which would justify it but was systemic in the sense that it resulted from the applicable legal provisions. In his explanations to the police, the accused acknowledged that he had committed the alleged acts, and although he consistently denied these explanations during subsequent proceedings, they were used as the basis of his conviction. Turning to the facts outlined in general terms, the ECtHR stated that the presumption of the practicability and effectiveness of the rights guaranteed by the ECHR requires that, in principle, the right of access to the defense counsel must be available to the suspect from his first interrogation by the police. Several compelling reasons support, in the Court's view, ensuring the suspect's right to counsel early in the trial; first of all, the importance of the evidence gathered at this stage for setting the general framework for the recognition of the alleged acts in the course of the criminal trial, and thus, one might say, for shaping the program of the court's recognition of the case.[18] In addition, consideration of the particularly difficult situation in which the suspect finds himself at the preliminary procedural stage, which is exacerbated by the complexity of the applicable rules of criminal procedural law, in particular as regards the rules on the collection and use of evidence in the criminal trial.[19] Compensation for this special situation must be combined with the assistance of the defense counsel and his/her care to respect the rights of the suspect. Access to the counsel at an early stage of the proceedings serves to ensure that procedural steps to prove the charges against the suspect do not lead to testimonies being given under duress or against the suspect's will – in other words, that the very nature of the privilege of freedom from self-incrimination is not violated.[20] In the case of a suspect deprived of his/her liberty, this access is also the primary safeguard

15 ECtHR judgment of 13.9.2016 in Ibrahim and Others v. United Kingdom; Applications No. 50541/08, 50571/08, 50573/08, and 40351/09; ECtHR judgment of 12.5.2017 in Simeonovi v. Bulgaria, Application No. 21980/04. A similar approach to the rights of defense was presented by W. Daszkiewicz, *Prawo karne procesowe. Zagadnienia ogólne*, Bydgoszcz 2000, p. 83.

16 ECtHR judgment of 2.11.2010 in Sakhnovskiy v. Russia, Application No. 21272/73; ECtHR judgment of 13.9.2016 in Ibrahim and Others v. United Kingdom, combined Applications No. 50541/08, 50571/08, 50573/08, and 40351/09.

17 ECtHR judgment of 27.11.2008 in Salduz v Turkey, Application No. 36391/02.

18 ECtHR judgment of 12.7.1984 in Can v. Austria, no. 9300/81.

19 An analogous view is reflected in the ECtHR judgment of 13.9.2016 in Ibrahim and Others v. United Kingdom; Applications No. 50541/08, 50571/08, 50573/08, and 40351/09;

20 ECtHR judgment of 11.7.2006 in Jalloh v. Germany, Application No. 54810/00.

against ill-treatment.[21] The above arguments should be seen as a concretization and exemplification of the reasons presented at the beginning, proving the importance of legal assistance provided by a professional defender.

Without undermining the arguments put forward in favor of providing the suspect with access to the defense counsel at an early stage of the proceedings, the ECtHR, in the judgment in question, exceptionally allowed for the possibility of restricting such access but subjected it to a two-stage review of such a restriction.

At the first stage, the reasonableness of this restriction is subject to verification. According to the Court's position, there must be compelling reasons for restricting access to the counsel at an early trial stage. Case law emphasizes the strict nature of this criterion, which determines that the restriction is only permissible in exceptional circumstances, and must be temporary and be based on an individual assessment of the specific circumstances of the case. The restriction so qualified may be based, for example, on the urgent need to avoid serious adverse consequences to life, liberty, or bodily integrity in a particular case. A police concern that allowing legal assistance would alert other suspects, and thus lead to a general risk of leaks unsupported by the evidence in a particular case, is not a compelling reason to restrict access to counsel.[22] Nor is it provided by reference to the administrative practice of the authorities.[23]

At the second stage, the prejudice to the right to defense caused by the restricted access to counsel is weighed against the fairness of the proceedings.[24] Even if such a restriction is justified by compelling reasons, it must be deemed impermissible if, in light of the proceedings as a whole, its effect is to deprive the accused of a fair trial. In Salduz v. Turkey, the ECtHR qualified the restriction of access to the assistance of counsel at an early stage of the proceedings in this way, emphasizing the irreversibility of the violation of the right to defense in this way due to the fact that the conviction was based on the suspect's testimonies given to the police without access to the counsel. It is worth noting that underlying this view was the finding that assistance provided by the counsel during the subsequent proceedings and its adversarial nature could not remedy the irregularities which occurred during the police testimony.

In a similar vein, the ECtHR ruled in the matter of Beuze v. Belgium, in which a suspect was interrogated in police custody without the opportunity to consult with counsel

21 The cited rationale justifying the accused's access to the defense counsel was somewhat more broadly presented in the ECtHR judgment of 9.11.2018, in Beuze v. Belgium (Application No. 71409/10), in which the Court stated that such access serves to prevent miscarriages of justice, to ensure equality of arms between law enforcement bodies and the accused, to provide a counterbalance to the vulnerability of suspects in custody, to provide a basic safeguard against coercion and ill-treatment of suspects by the police, to ensure respect for the accused's right to not self-incriminate himself or herself and to remain silent, and to prevent unfairness resulting from the lack of adequate information about the accused's rights.

22 ECtHR judgment of 13.9.2016 in Ibrahim and Others v. United Kingdom; Applications No. 50541/08, 50571/08, 50573/08, and 40351/09.

23 ECtHR judgment of 12.5.2017 in Simeonovi v. Bulgaria, Application No. 21980/04.

24 See also: ECtHR judgment of 13.9.2016 in Ibrahim and Others v. United Kingdom, Applications No. 50541/08, 50571/08, 50573/08, and 40351/09; ECtHR judgment of 12.5.2017 in Simeonovi v. Bulgaria, Application No. 21980/04.

beforehand and without the opportunity to ensure the counsel's presence, and during the subsequent judicial investigation, the suspect's counsel did not participate in the interrogations and other investigative activities. In these circumstances, without being sufficiently clearly informed about the right to refuse to make evidentiary statements, the suspect gave several testimonies which significantly affected the trial situation. The Court found that the described procedural defects, relating to the lack of access to the assistance of defense counsel and sufficient information about the right to refuse to testify, were not remedied in the course of the subsequent criminal proceedings. Finding, consequently, that they translated into the unreliability of the criminal proceedings taken as a whole, the Court expressed the view that in the realities of a particular case and a particular legal system this could result from the denying or obstructing of the defense counsel's access to the case file at the earliest stages of the criminal proceedings or pre-trial investigation, and his/her absence in the course of investigative activities such as confrontations or reconstructions.

The clear *iunctim* between the restricted access to the assistance of counsel and the standard of fairness of the proceedings, as revealed in the ECtHR judgments cited above, prompts us to direct attention towards a non-exhaustive list of factors which, in the opinion of the Court, should be taken into account when verifying procedural irregularities or negligence occurring in the course of pre-trial proceedings, including, of course, access to the assistance of the counsel, in terms of fairness of the criminal process taken as a whole and the impact on its irreversible impairment. These factors relate to the following aspects of the case:

- whether the applicant was a vulnerable person because of his/her age or mental health condition,
- the legal framework governing pretrial proceedings and the admissibility of evidence as well as their compliance with that framework,
- whether the applicant had a chance to confront the authenticity of the evidence and object to its use,
- the quality of the evidence and whether the circumstances under which it was obtained raise doubts as to its reliability and accuracy, taking into account the degree and nature of any potential coercion,
- if the evidence was obtained unlawfully, the nature of that unlawfulness, and when it results from a violation of another provision of the ECHR, the nature of that violation,
- in the case of testimonials, their nature and whether they were promptly withdrawn or amended,
- the issue of the use of the evidence, particularly whether it is an integral or substantial part of the evidence on which the conviction was based, and the value of other evidence in the case,
- whether the assessment of guilt was made by professional judges or assessors, and otherwise by members of the jury,
- the importance of the public safety interest in the course of investigation and punishment of a particular crime,
- other appropriate procedural safeguards provided for by national law and practice.

Taking into account the distinguished aspects of the assessment of the fairness of criminal proceedings as a whole, there should be nothing surprising in the position that the guarantee of this fairness cannot consist solely in the existence of mechanisms securing it in an abstract way and resulting from the applicable legislation. Its reality and effectiveness need to be verified by checking if these mechanisms worked in a specific case.[25]

IV. Waiver of the right to the defense counsel

Integrally linked to the right to counsel is the problem of waiver of that right. The admissibility of such a waiver has not, in principle, been examined in the ECtHR case law, which seems fully understandable since it is, in a way, part of the very nature of the accused's right which, however, remains at his/her disposal, both in terms of exercising or waiving it. The subject of analysis, however, are the conditions for a proper and effective waiver of the right to counsel. In this matter, the Court adopts the standard of "knowing and deliberate waiver," emphasizing that its necessary prerequisite is that the suspect must be aware of his/her right to counsel and to remain silent, as well as of the privilege of freedom from self-incrimination. Awareness of these rights, on the other hand, requires that the suspect should be informed in advance of their existence, and failure to provide adequate information in this regard generally cannot be excused and disqualifies the effectiveness of the waiver of the right to counsel assistance.[26] The mere awareness of one's rights, however, is not sufficient; for the waiver of access to counsel to be effective, the suspect's statement of will in this regard must be voluntary. This condition almost without doubt precludes the effectiveness of the waiver of the right under review if the accused was subjected to inhuman and degrading treatment by the police.[27] The waiver of the counsel assistance is recognized in the ECtHR case law as revocable, on the understanding that it loses its validity if the accused, following a prior waiver, makes an express request to be allowed access to and the assistance of the counsel.[28]

V. Minimum standard for guaranteeing the right to the counsel

In terms of the subject matter, it is essential to determine the minimum content components of the right to counsel, without which there can be no question at all of its

25 See: ECtHR judgment of 9.11.2018 in Beuze v. Belgium, Application No. 71409/10.

26 See: ECtHR judgment of 13.9.2016 in Ibrahim and Others v. United Kingdom, Applications No. 50541/08, 50571/08, 50573/08, and 40351/09. See also: ECtHR judgment in Dvorski v. Croatia of 20.10.2015, Application No. 25703/11.

27 See: ECtHR judgment of 6.1.2016 in Turbylev v. Russia, Application No. 4722/09.

28 ECtHR judgment of 16.5.2017 in Artur Parkhomenko v Ukraine, Application no. 40464/05.

being realistically guaranteed. The ECtHR case law makes a distinction between two such components, namely:

- the right to contact and consult with the counsel before questioning, including the right to give confidential instructions to the lawyer; and
- the possibility of the physical presence of counsel at the first police interrogation and at every subsequent interrogation during the pre-trial proceedings.[29]

As regards each of these components of the right to assistance of counsel, it can be said, without risk of major error, that they necessarily condition the efficiency and practicality of the provided legal assistance.

As regards the aspect of the right to contact and consult with counsel, the ECtHR focuses mainly on ensuring the confidentiality of this contact. It is without question that the relationship between the defense counsel and the accused is based on mutual trust and understanding, which conditions the effectiveness (practicality) of the defense.[30] Recognizing the importance of the counsel's ability to communicate with the accused without the presence of third persons, the Court allows the possibility of limiting the confidentiality of contact between them only in exceptional cases for compelling reasons. They include proving beyond doubt that there is a risk of collusion as a result of the accused's contacts with the defense counsel, or that there are grounds to question the professional ethics of the defense counsel or legality of his/her actions or reasonable grounds to believe that the counsel will abuse the confidentiality of his/her contact with the accused, or that it involves a risk of committing a serious crime.[31] Dictated by such considerations, restrictions on the accused's ability to communicate with the counsel cannot negate the effective legal assistance to which the accused is entitled.[32] When assessing them from the point of view of irreparable prejudice to the fairness of the proceedings taken as a whole, account must also be taken of the duration of the restrictions in question, the time during which the accused was afforded confidential access to his/her defense counsel in terms of the latter's sufficiency to provide an effective defense, and the extent to which statements made by the accused in a situation in which he/she had no opportunity to communicate with the counsel without the presence of third parties were used in the proceedings.[33] In the ECtHR case law, restricting the confidentiality of the contact between the accused and the defense counsel, which violates the guarantee standards under Article 6 of the ECHR, is seen, inter alia, in the eavesdropping of phone conversations between them, obsessive restrictions on the number and duration of the counsel's visits to the accused, breaches of the confidentiality of communications between them during video-conferencing, obstruction of confidential contact between

29 ECtHR judgment of 9.11.2018 in Beuze v. Belgium, Application No. 71409/10.

30 ECtHR judgment of 2.11.2010 in Sakhnovskiy v. Russia, Application No. 21272/03.

31 See: ECtHR judgment of 28.11.1991 in S. v. Switzerland, Applications No. 12629/87 and 13965/88; ECtHR judgment of 13.1.2019 in Rybacki v. Poland, Application No. 52479/99; ECtHR judgment of 25.7.2013 in Khodorkovskiy and Lebedev v. Russia, Applications No. 11082/06 and 13772/05.

32 ECtHR judgment of 2.11.2010 in Sakhnovskiy v. Russia, Application No. 21272/03.

33 ECtHR judgment of 13.1.2019 in Rybacki v. Poland, Application No. 52479/99; ECtHR judgment of 25.7.2013 in Khodorkovskiy and Lebedev v. Russia, Applications No. 11082/06 and 13772/05; ECtHR judgment of 2.11.2010 in Sakhnovskiy v. Russia, Application No. 21272/03.

the accused and the counsel in the courtroom due to the exercised supervision, unjustified restriction of the confidential contact by the public prosecutor present during such contact, and threats of sanctions against the accused should he/she pass confidential information to the defense counsel.[34]

Regarding the possibility of the counsel's physical presence during the interrogation, it should be emphasized that in order to guarantee the right to assistance of the counsel, it is not sufficient to allow his/her passive presence during the interrogation. It is necessary to create opportunities to actively assist the accused and intervene in order to ensure respect for the suspect's rights, including by pointing out to the accused during his/her interrogation that he/she has the right to remain silent and refuse to answer the questions. The suspect's right to assistance of the counsel is not limited merely to the question and answer phase of the interrogation but extends to those parts of the interrogation in which the evidentiary statements made are read out and the suspect is asked to confirm and sign them. Taking into account the already given arguments in favor of guaranteeing the suspect access to counsel at an early procedural stage, and the practice of Polish law enforcement bodies, which is not always compatible with the right to defense thus understood, one should explicitly emphasize the ECtHR's view that the police are generally obliged to refrain from questioning, or obliged to postpone if the suspect invokes the right to the assistance of the counsel during interrogation until the counsel is present and able to assist the suspect.[35]

VI. Choosing the defense counsel and using the services of the public defender

It is clear from the provision of Article 6.3.c of the ECHR that the accused's right to assistance of the counsel may be exercised either through the selection of a lawyer who will represent his/her rights and defend his/her procedural interests in this role or through the appointment of the public defender.

While the ECtHR generally takes the position of protecting the autonomy of the accused's choice of defense counsel, this autonomy is not absolute. The Court allows this choice to be restricted, with a double caveat here, as in the case of restricting access to the defense counsel during the early stages of the proceedings. First, the court assumes that such a restriction may take place if there are substantial and sufficient grounds for believing that it is indispensable due to the interests of justice.[36] This can be linked to the

34 ECtHR judgment of 27.11.2007 in Zagaria v. Italy, Application No. 58295/00; ECtHR judgment of 2.11.2010 in Sakhnovskiy v. Russia, Application No. 21272/03; ECtHR judgment of 25.7.2013 in Khodorkovskiy and Lebedev v. Russia, Applications No. 11082/06 and 13772/05; ECtHR judgment of 13.1.2019 in Rybacki v. Poland, Application No. 52479/99; ECtHR judgment of 25.7.2017 in M. v. the Netherlands, Application No. 2156/10.

35 ECtHR judgment of 27.11.2018 in Soytemiz v. Turkey, Application No. 57837/09.

36 See: ECtHR judgment of 26 7 2002 in Meftah and Others v. France, Applications No. 32911/96, 35237/97 and 34595/97; ECtHR judgment of 25.8.1992 in Croissant v. Germany, Application No. 13611/88.

requirement of adequate specialization of lawyers entitled to take certain procedural actions. Second, if the indicated grounds are not present, the obligation arises to examine the restriction of the autonomy to choose the defense counsel through the prism of its impact on the fairness of the proceedings as a whole. A set of factors to bear in mind in such a review can be found in Dvorski v. Croatia.[37] These include the specific nature of particular proceedings in conjunction with particular qualification requirements of the defense counsel, the circumstances surrounding the choice of the defense counsel, and questioning of that choice by pressure on the accused instead of using existing legal instruments in this regard,[38] the effectiveness of assistance provided by the defense counsel, respect for the accused's privilege of freedom from self-incrimination, age of the accused, the court's use, even if only indirectly, of evidentiary statements made by the accused at the time when he/she was not provided with access to the defense counsel of his/her choice as *sui generis general knowledge*, and the extent to which such statements were used to make the factual findings that form the basis of the conviction.

The issue of the appointment of the public defender has attracted more attention in the ECtHR case law. In this regard, the Court exposes two conditions, clearly referring to the content of Article 6.3.c of the ECHR. Namely, it assumes that the right to assistance of the public defender is granted to the accused, firstly, if he/she shows that he/she does not have sufficient funds to pay for legal assistance[39] and secondly if there are interests of justice speaking in favor of providing such assistance by the state.[40]

In order for the first condition to be considered fulfilled, it is not required to prove beyond a reasonable doubt that the accused did not have sufficient funds to pay for the costs of the defense of his/her choice. In this regard, the ECtHR is satisfied by the existence of facts indicating that the accused lacks funds to pay for the defense and that there are no clear grounds for making a different finding (*the absence of clear indications to the contrary*).[41] Noteworthy is the ECtHR's position according to which refusal to appoint the public defender to prepare a cassation appeal if the same court only a few months earlier assessed differently the need to provide the accused with the public defender by appointing the counsel in appeal proceedings, and there is no evidence that would indicate a significant change in the financial condition of the accused, does not withstand confrontation with the guarantee standard set forth in Article 6.3.c *in fine* of the ECHR.[42]

Verification of the second condition, which refers to the interest of justice, requires consideration of all factual and legal circumstances of the case. Based on this, the ECtHR case law assumes that from the perspective of compliance with Article 6.3.c of the ECHR, the reasonableness of the decision to "grant" the accused the assistance of the public defender should be evaluated not only on the basis of analysis of the procedural

37 See: ECtHR judgment of 20.10.2005, Application No. 25703/11.

38 See more: ECtHR judgment of 30.5.2013 in Martin v. Estonia, Application No. 35985/09.

39 ECtHR judgment of 29.8.2008 in Caresana v. United Kingdom, Application No. 31541/96.

40 ECtHR judgment of 24.5.1991 in Quaranta v. Switzerland, Application No. 12744/87.

41 ECtHR judgment of 25.4.1983 in Pakelli v. Germany, Application No. 8398/78.

42 ECtHR judgment of 18.12.2001 in R.D. v. Poland, Applications No. 29692/96 and 34612/97.

situation at the time the decision was taken, but also analysis of the situation prevailing at the time of adjudicating on the merits of the case.[43] This analysis should take into account the complexity of the case, the gravity of the crime, and the severity of the punishment faced by the accused as well as the accused's personal situation, including, inter alia, his/her age, foreign origin, lack of professional education, "underprivileged" background, or long criminal past.[44] In the case of appellate proceedings, the analysis, in addition to the gravity of the offense, should include the scope of the appellate court's authority and the punishment imposed on the accused in the lower instance.[45] Highly meaningful is the importance attributed in the ECtHR case law to the gravity of the crime and the associated punishment, showing that the penalty of imprisonment essentially determines that, in the interest of justice, the accused should be able to have the assistance of counsel and such assistance should be provided ex officio.[46] It follows that the right to free legal assistance is broadly defined. If the interests of justice speak in favor of guaranteeing the indicated right in a particular case, then the mere fact that this has not occurred means a failure to comply with the guarantee standard set forth in Article 6.3.c *in fine* of the ECHR. Taking a slightly different perspective, it can be said that this failure occurs regardless of whether the lack of assistance by the public defender, when its provision was dictated by the interests of justice, resulted in a real prejudice to the accused's exercise of the right to defense.[47]

VII. Practicability and effectiveness of the right to the defense counsel

From the practical point of view, the essential measure of the accomplishment of the guarantee standard consisting of the provision of professional legal assistance to the accused is whether this assistance is practicable and effective. It is, of course, about its effectiveness in terms of using existing opportunities, within the limits of legitimate actions by the defense counsel, to undertake activities in the procedural interests of the accused, not in terms of "winning" the case. A formal appointment of the defense counsel does not guarantee this by itself. Taking this position, the ECtHR case law points out that the lack of a practicable and effective defense may be dictated by objective circumstances such as the death of the defense counsel or his/her serious illness or may result from subjective circumstances related to the defense counsel's evasion of his/her duties

43 ECtHR judgment of 28.3.1990 in Granger v. UK, Application No. 11932/86.

44 ECtHR judgment of 24.5.1991 in Quaranta v. Switzerland, Application No. 12744/87.

45 ECtHR judgment of 19.11.2015 in Mikhaylova v. Russia, Application No. 46998/08.

46 ECtHR judgment of 10.6.1996 in Benham v. United Kingdom, Application No. 19380/92; ECtHR judgment of 24.5.1991 in Quaranta v. Switzerland, Application No. 12744/87.

47 ECtHR judgment of 19.2.1991 in Artico v. Italy, Application No. 11910/85. Without risk of major error, one may say that *sui generis* guidelines for guaranteeing the right of access to professional legal assistance in a manner consistent with the principle of fair trial, stemming from the referred ECtHR case law, are reflected on the normative level in the previously referenced directives of the European Parliament and Council 2013/48/EU and 2016/1919/EU.

or performing them in a clearly unreliable manner.[48] Although by virtue of the independence of legal professions, the manner in which the defense assistance is provided is a matter of the relationship between the accused and the counsel, trial authorities cannot remain indifferent to the exemplified circumstances, which put into question the practicability and effectiveness of the defense. The rationale for this view seems fairly obvious. Suffice it to note that if the occurrence of such circumstances were ignored, considering the formal appointment of the defense counsel as authoritative, the right of the accused to benefit from his/her assistance would turn out to be purely theoretical and illusory. At the same time, while unequivocally opposing this, the ECtHR stipulates the duty of procedural authorities to be proactive in order to ensure that the accused has effective access to the assistance of the defense counsel if the lack of effective representation on his/her part is obvious or has been sufficiently brought to the attention of the authorities.[49] This activity is necessary when the defense counsel simply fails to act for the accused[50] at all or fails to meet important procedural requirements, and this cannot be seen as the result of an unconsidered line of defense or a simple lack of argumentation.[51] It is also justified when the accused is assisted by the defense counsel of his/her choice, while the circumstances of the case, such as his/her age, high gravity of the charged crime, testimonies of the prosecution witnesses that appear to contradict each other, the accused's repeated absence during interrogations, and above all, the obvious lack of adequate representation on the part of the defense counsel, lead to the conclusion that it is necessary to urgently provide the accused with adequate protection of his/her rights.[52]

The practicability and effectiveness of the guarantee of the right to assistance of the defense counsel dictate that the counsel's assistance should no longer be subjected to unduly formalistic conditions. Objections to the accused's participation in the trial, providing that the counsel's ability to act depend on this presence, have been considered as such in the ECtHR case law. By questioning this reliance, the Court unequivocally opted for allowing the defense counsel, who appears at the trial with the obvious purpose of defending the absent accused, to take action.[53]

VIII. Summary

The above reconnaissance of the ECtHR's case law regarding the right to defense counsel has demonstrated a broad and clearly pro-guarantee understanding of this right, and

48 See, inter alia, ECtHR judgment of 13.5.1980 in Artico v. Italy, Application No. 6694/74; ECtHR judgment of 9.4.2015 in Vamvakas v. Greece (No. 2), Application No. 2870/11.

49 ECtHR judgment of 21.4.1998 in Daud v. Portugal, Application No. 22600/93; ECtHR judgment of 24.10.1993 in Imbrioscia v. Switzerland, Application No. 13972/88.

50 ECtHR judgment of 13.5.1980 in Artico v. Italy, Application No. 6694/74.

51 ECtHR judgment of 10.10.2002 in Czekalla v. Portugal, Application No. 38830/97.

52 ECtHR judgment of 20.1.2009 in Güveç v. Turkey, Application No. 70337/01.

53 ECtHR judgment of 21.1.1999 in Van Geyseghem v. Belgium, Application No. 26103/95; ECtHR judgment of 22.9.1994 in Pelladoah v. the Netherlands, Application No. 16737/90.

a high standard of its protection under the Convention. This standard is based on determining the semantical scope of the right in question not only through the prism of its essential content but also in terms of the impact its restriction exerts on the fairness of the criminal process as a whole.

The model of the right to counsel assistance developed in the cited ECtHR judgments is, as has already been mentioned, a point of reference for assessing the implementation of this right in the domestic legal systems of individual states party to the ECHR. In the case of the Polish legal order, it is largely embodied in the provisions of the Code of Criminal Procedure. However, its reproduction cannot be said to be fully satisfactory. The regulation of the right to counsel at the stage of instituting a criminal prosecution against a given person should be strongly criticized. This is not just because it is necessary to end the situation in which access to the defense counsel depends on having the status of a suspect. The problem also lies in the fact that it is necessary to ensure a real right to contact the defense counsel before the first interrogation by the trial authority. Article 301 of the Code of Criminal Procedure regulates this issue insufficiently by far from the point of view of the Convention standards as well as EU secondary law. From the practical point of view, it may be a truism to observe that the lack of contact with the defense counsel before the first interrogation and his/her absence during this procedural action usually casts an irreversible shadow over the defense action and the full use of defense opportunities during the subsequent criminal trial. In view of the far-reaching interference in the sphere of legal freedoms brought about by the use of provisional detention as well as the resulting restrictions on the actual access to the assistance of the defense counsel and the effectiveness of the defense itself, it is necessary to advocate a *de lege ferenda* guarantee of the defense counsel's participation in the detention hearing and contact with the accused prior to questioning at that hearing in any case in which the court decides on the application of this preventive measure, not only when the defense counsel has already been appointed. In turn, given the threat of long minimum imprisonment, at least concerning felony cases, it would be appropriate to extend the guarantee of professional defense, resulting from the mandatory defense provided *de lege lata* in these cases with regard to court proceedings, to the pre-trial stage of the criminal process (Article 80 of the Code of Criminal Procedure). It is perhaps superfluous to point out that the implementation of these several postulates regarding the regulation of the accused's access to the defense counsel would certainly be a significant sign of progress in bringing legal regulations applicable in this regard closer to the standard of guaranteeing the right to assistance of the defense counsel under provisions of the ECHR, ECtHR case law and EU secondary law.

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