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## **RE-ASSESSING THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS ON POLICE INTERROGATION - CASE OF *IBRAHIM AND OTHERS V. THE UNITED KINGDOM***

### **ABSTRACT**

*The article gives an analysis of the judgment of the Grand Chamber of the European Court of Human Rights in the case Ibrahim and others v. the United Kingdom. The analysis is put in the context of standards that the Court established in its Salduz judgment and further developed in its post-Salduz jurisprudence. The author presents and analysis the way in which the Court interpreted the Salduz standards in the instant case, focusing on the standard of “compelling reasons” and the relationship between the use of the statements given in the absence of a lawyer and the fairness of the proceedings as a whole. The central part of the article is dedicated to the critique of the way in which the Court applied these standards to the circumstances of this particular case. The author offers counter-arguments to Court’s findings both in relation to the question whether compelling reasons to restrict the right of access to a lawyer existed in this case, as well as the question of the fairness of the trial as a whole.*

**Keywords:** *European Court of Human Rights, police interrogation, access to a lawyer, compelling reasons, fairness of the trial as a whole*

### **1. INTRODUCTION - THE IMPORTANCE OF THE CASE**

Grand Chamber judgment in the case of Ibrahim and others v. the United Kingdom<sup>1</sup> has probably been the most controversial decision of the European Court for Human Rights in the post-Salduz era. In this case, the Court was given an opportunity to clarify two crucial aspects of the Salduz doctrine. First, it was given an opportunity to clarify the concept of compelling reasons which may exceptionally justify denial of access to a lawyer and second, it was given an opportunity to

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<sup>1</sup> Grand Chamber, Judgment of 13 September 2016, Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09

clarify whether the use for a conviction of incriminating statements made during police interrogation without access to a lawyer may nevertheless leave the right to a fair trial unharmed. The answers that the Court gave to these two questions have left many lawyers and human rights defenders in Europe disappointed. Before we engage in the analysis of the legal reasoning offered by the Court, let us first take a quick look at the circumstances of the case.

## 2. FACTUAL BACKGROUND

The case evolves around a group of men suspected of involvement in terrorist activities which took place in London in July 2005. Two weeks after the terrorist attack on London public transportation system of 7 July 2005 which resulted in fifty-two people killed and hundreds more injured,<sup>2</sup> several further suicide bombers attacks were attempted, but all of them failed.<sup>3</sup> The bombs were detonated, but in each case the main charge failed to explode, due to inadequate concentration of hydrogen peroxide.<sup>4</sup> All the bombers fled the scenes of attempted attacks but their images were captured on close-circuit television cameras and instantly publicly broadcasted.<sup>5</sup> Several days thereafter the bombers were arrested, first three applicants in the case were among them.<sup>6</sup> The fourth applicant became involved in the case primarily as a potential witness, helping police investigation of the case, but got arrested during the process under suspicion of giving shelter to one of the bombers (who was not among the first three applicants) and helping his escape from the country.<sup>7</sup>

The situation with regard to the first three applicants is more or less the same. After being arrested and informed about their rights, they were taken to the police station where they requested to exercise their right of access to a lawyer.<sup>8</sup> But, they were denied this right on two grounds. First, that granting it would lead to delaying the interview, and “delaying the interview would involve an immediate risk of harm to persons or damage to property” and second, that “legal advice would lead to the alerting of other people suspected of having committed offences but

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<sup>2</sup> *Ibid.*, § 14

<sup>3</sup> *Ibid.*, § 15

<sup>4</sup> *Ibid.*, § 16

<sup>5</sup> *Ibid.*, § 17

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, § 18

<sup>8</sup> With regard to the first applicant, see *ibid.*, § 21-22; with regard to the second applicant, see *ibid.*, § 39-41; with regard to the third applicant, see *ibid.*, § 49-50

not yet arrested”.<sup>9</sup> The interviews that needed to be undertaken were the so-called “safety interviews” which can be undertaken without the right of access to a lawyer being granted. These are urgent interviews conducted “for the purpose of protecting life and preventing serious damage to property”.<sup>10</sup> Due to the need to prevent further terrorist attacks, all three applicants were denied the right of access to a lawyer for several hours<sup>11</sup> and were, during that period, subjected to several safety interviews. In the safety interviews, all of them denied any connection with terrorist activities and any knowledge of other persons involved in such activities or their whereabouts.<sup>12</sup>

All three were charged with conspiracy to murder.<sup>13</sup> During the trial, their defences had been based on a claim that “their actions had not been intended to kill but had been merely an elaborate hoax designed as a protest against the war in Iraq”.<sup>14</sup> The result of the trial came down to the question whether the failure of the bombs to explode was intended by the applicants or it was a result of an unintentional design-flaw. In order to undermine the defence that the applicants offered, the prosecution wanted to rely on the statements that they gave during the safety interviews.<sup>15</sup> The defence opposed the use of the statements, claiming that their use would have an “adverse effect on the fairness of the proceedings”.<sup>16</sup> After conducting a *voir dire* procedure, the trial judge decided that statements deriving from the safety interviews could be admitted.<sup>17</sup> In July 2007 all the three

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<sup>9</sup> With regard to the first applicant, see *ibid.*, § 28; with regard to the second applicant, see *ibid.*, § 43; with regard to the third applicant, see *ibid.*, § 51. The possibility to delay the right of access to a lawyer was, at the material time, foreseen in the Terrorism Act 2000, in paragraph 8 of its Schedule 8. The exercise of the right could be delayed up to 48 hours. See *ibid.*, § 186-198

<sup>10</sup> *Ibid.*, § 23. The possibility to conduct such interviews was, at the material time, foreseen by paragraph 6.6 of Section 6 of Code C. See *ibid.*, § 191-198

<sup>11</sup> In the case of the first applicant, it was a little over 8 hours, in the case of the second applicant around 7 hours, and in the case of the third applicant about 4 hours, see *Joint partly dissenting, partly concurring opinion of judges Sajó and Laffranque*, § 23

<sup>12</sup> With regard to the first applicant, see *op. cit.* (note 1), § 36; with regard to the second applicant, see *ibid.*, § 45; with regard to the third applicant, see *ibid.*, § 54

<sup>13</sup> *Ibid.*, § 58

<sup>14</sup> *Ibid.*, § 62

<sup>15</sup> *Ibid.*, § 63

<sup>16</sup> *Ibid.*, § 64

<sup>17</sup> *Ibid.*, § 65-95. There are two main provisions of the Police and Criminal Evidence Act (PACE) which regulate the question of the admissibility of evidence. First of them is section 76(2) which foresees that a confession may be considered inadmissible where it was obtained by oppression of the person who made it or where it was obtained in consequence of anything which was likely to render it unreliable. Second is section 78(1) which foresees that the court may refuse to allow evidence if “the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it”, see *ibid.*, § 199-201

were convicted of conspiracy to murder and sentenced to life imprisonment with a minimum term of forty years' imprisonment.<sup>18</sup> All three sought leave to appeal against their convictions, contending primarily the admissibility of the statements given during the safety interviews, but the Court of Appeal refused leave to appeal against the conviction.<sup>19</sup>

The situation with the fourth applicant differs. After being approached by two police officers who sought his assistance as a potential witness in police investigation into the failed attacks of 21 July, he agreed to assist them and accompanied them to the police station.<sup>20</sup> After he arrived to the police station, his interview as a witness soon began. However, soon after the start of the interview, the police officers conducting it concluded that the applicant is in fact giving self-incriminating statements and should therefore be treated not as a witness, but as a suspect – should be cautioned and informed of his right to legal advice. However, senior police officers they addressed with the issue, told them they should continue interviewing the applicant as a witness, and not as a suspect. The interview resumed and the applicant gave a witness statement.<sup>21</sup> After he gave the witness statement, the applicant was arrested and cautioned and, after receiving legal advice, interviewed as a suspect in the presence of a lawyer. In his statement as a suspect he basically confirmed everything he said in the witness statement.<sup>22</sup> He was charged of assisting one of the bombers and of not disclosing information concerning the other bombers.<sup>23</sup> One of the central questions of the fourth applicant's trial was the admissibility of his witness statement. He claimed the statement should be excluded from the evidence, but the prosecution opposed his claim.<sup>24</sup> After conducting a *voir dire*, the judge did not accept that the witness statement should be excluded from the evidence.<sup>25</sup> The applicant also applied to have the proceedings

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<sup>18</sup> *Ibid.*, § 119-120

<sup>19</sup> *Ibid.*, § 121-136

<sup>20</sup> *Ibid.*, § 137-139

<sup>21</sup> *Ibid.*, § 140-146; Continuing the interview with the applicant without giving him a caution and informing him about the right to access a lawyer was contrary to the relevant code of practice which instructed the police officers to suspend the interview and caution the applicant and inform him about his rights. Relevant provisions are contained in paragraph 10.1 of section 10 of Code C. See *ibid.*, § 181

<sup>22</sup> *Ibid.*, § 147-152

<sup>23</sup> *Ibid.*, § 153

<sup>24</sup> His claim was based on four reasons: police officers acted against the relevant code of practice when they decided not to caution him, after realizing he became a suspect; their misconduct was deliberate; his statement has been induced on a false pretence that he would go home after the statement was completed; he was tired when giving the statement, since it was given in the early hours of morning. *Ibid.*, § 155-156

<sup>25</sup> *Ibid.*, § 157-161

stayed on the grounds that the prosecution was an abuse of process, due to the fact that he was “tricked into giving his witness statement” by the police officers, who told him he would not be prosecuted. This application was also refused by the judge.<sup>26</sup> At the end of the trial, the applicant was convicted and sentenced to a total of 10 years imprisonment.<sup>27</sup> He appealed the conviction arguing, among other, that the trial judge had been wrong in admitting the witness statement. The Court of Appeal dismissed the appeal thereby supporting the reasoning of the first instance court.<sup>28</sup>

### 3. LEGAL QUESTIONS

Applicants, all four of them, addressed the European Court because they considered that circumstances surrounding their police interrogation and the use of the statements they gave in the course of those interviews as evidence at trial, amounted to a breach of their right to a fair trial under Article 6 §§ 1 and 3 (c) of the Convention. With regard to their interrogation by the police, they claimed that the main problem was that they were denied access to a lawyer.<sup>29</sup> By addressing the Court with this argumentation they relied primarily on the standards that the Court established in its famous judgment in *Salduz* case and affirmed in its post-*Salduz* jurisprudence.

#### 3.1. *Salduz* case and post-*Salduz* jurisprudence

*Salduz* standards can be very briefly summarised in the following quote from the judgment:

“[...] 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, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 [...]. The rights of the defence will in principle be irretrievably prejudiced when incriminating state-

<sup>26</sup> *Ibid.*, § 163-165

<sup>27</sup> *Ibid.*, § 173

<sup>28</sup> *Ibid.*, § 174-180

<sup>29</sup> *Ibid.*, § 234

ments made during police interrogation without access to a lawyer are used for a conviction.”<sup>30</sup>

If we compare previously established standard with regard to police interrogation and right of access to a lawyer with the *Salduz* standard, a following conclusion can be made with regard to the latter: it emphasized the exceptional nature of the restrictions to the right of access to a layer, and introduced a presumption that the proceedings as a whole shall be considered unfair whenever incriminating statements made by the accused are used for a conviction.

In the jurisprudence that followed, the Court consistently held the approach adopted in *Salduz* and, even to a certain extent, developed the standard further in the direction of more protection to the rights of the accused. This can be seen from two developments with regard to: the moment from which the accused has the right of access to a lawyer and the relationship between the absence of a lawyer and the fairness of the proceedings as a whole. In relation to the first development, the Court emphasised that the accused has the right of access to a lawyer not only from the moment of his or her first interrogation by the police, but already from the moment of his or her deprivation of liberty.<sup>31</sup> In relation to the second development, the Court clarified that the fairness of the proceedings as a whole may be violated not only by the use of incriminating statements made during police inter-

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<sup>30</sup> Before *Salduz*, the standard applied in the jurisprudence of the Court was a more lenient one. It was the following standard: “[...] Article 6 (art. 6) will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing” (see, among others, *John Murray v. the United Kingdom*, Judgment of 8 February 1996, application no. 18731/91, § 63; *Brennan v. the United Kingdom*, Judgment of 16 October 2001, application no. 39846/98, § 45). Cf. Valković, L., Burić, Z., *Primjena izabranih elemenata prava na formalnu obranu iz prakse Europskog suda za ljudska prava u hrvatskom kaznenom postupku*, Hrvatski ljetopis za kazneno pravo i praksu, no. 2/2011, p. 526-527

<sup>31</sup> That such a restrictive interpretation of *Salduz* is possible, namely, such where the right of access to a lawyer is granted to the accused only from the moment of police interrogation, was warned already at the moment of the adoption of the judgment, by judges Zagrebelsky, Casadevall and Türmen, in their concurring opinion attached to the judgment (see *Concurring opinion of judge Zagrebelsky, joined by judges Casadevall and Türmen*). However, in its jurisprudence the Court soon clarified that accused has the right of access to a lawyer already from the moment of deprivation of liberty, see *Dayanan v. Turkey*, Judgment of 13 October 2009, application no. 7377/03, § 31-32; *Mader v. Croatia*, Judgment of 21 June 2001, application no. 56185/07, § 153. Cf. Hodgson, J., *The French Garde À Vue Declared Unconstitutional*, Warwick School of Law Research Paper Forthcoming. Available at SSRN: [<https://ssrn.com/abstract=1669915>] Accessed 15 February 2018, p. 3; Valković, Burić, *op. cit.* note 30, p. 529, Costa Ramos, V., *The Rights of the Defence according to the ECtHR - An Illustration in the Light of A.T. v. Luxembourg and the Right to Legal Assistance*, New Journal of European Criminal Law, Vol. 7, Issue 4, 2016, p. 405

rogation without access to a lawyer for a conviction, but also when other evidence obtained in the absence of a lawyer is used for a conviction.<sup>32</sup>

Very strong observation about the Court's consistency in applying the *Salduz* standard has been brought forwards by *Fair Trials International* in its intervention in case of *Ibrahim and others*. This NGO submitted that "when a person is denied access to a lawyer, the Court is clear that the use of incriminating statements for a conviction will infringe Article 6", and, as an example, listed 14 cases where the Court did exactly that.<sup>33</sup> However, the specificity of the case of *Ibrahim and others* was that it was a first case in post-*Salduz* period in which there was a reasonable expectation that the Court would find the existence of compelling reasons that, in particular circumstances of that case, have justified a derogation on access to a lawyer. And the Court has still not been in a position, in the post-*Salduz* period, to answer the question whether the use of incriminating statements for a conviction which were made in the absence of a lawyer in a situation of a lawful derogation may not infringe Article 6.<sup>34</sup> It follows from that that there were two main legal questions that the Grand Chamber had to give an answer to in its judgment: whether there were compelling reasons which justified temporary denial of access to a lawyer and whether the proceedings as a whole were fair, although the statements made in the absence of a lawyer were used for a conviction.

<sup>32</sup> *Mehmet Şerif Öner v. Turkey*, Judgment of 13 September 2011, application no. 50356/98, § 21: "[...] the Court observes that although the applicant did not have access to a lawyer during his police custody, he repeatedly denied the charges against him during his interrogation by the police, the public prosecutor and the investigating judge respectively. Consequently, he did not make any self-incriminating statements. However, the Court finds it important to recall once again that the investigation stage is of crucial importance in criminal proceedings as the evidence obtained at this stage determines the framework in which the offence charged will be considered [...]. In this regard, the Court observes that when the applicant was in police custody, he took part in an identification parade and was identified by the intervening parties as the person who had taken part in the respective armed robberies which had occurred in 1993. The Court further notes that in convicting the applicant the trial court relied heavily on the result of this identification parade. Thus, the applicant was undoubtedly affected by the restrictions on his access to a lawyer during the preliminary investigation. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the applicant's custody period." Cf. Valković, Burić, *op. cit.* note 30, p. 527

<sup>33</sup> *Ibrahim and others v. United Kingdom (Apps. Nos 50541 and others)*, *Third Party Intervention of Fair Trials*, p. 9 and notes 42 and 3

<sup>34</sup> *Ibid.*, p. 9



### 3.2. Compelling reasons

In its judgment, the Chamber accepted that there were compelling reasons in case of all four applicants.<sup>35</sup> What compelled the police to temporarily restrict the right of applicants to access a lawyer was an “exceptionally serious and imminent threat to public safety”.<sup>36</sup> Besides public safety, the reason was also collusion “because the police had been concerned that access to legal advice would lead to the alerting of other suspects”.<sup>37</sup>

The Grand Chamber started its analysis by reminding that the criterion of compelling reasons is a stringent one, the consequence of that being that “restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case”.<sup>38</sup> Grand Chamber rejected the finding of the Chamber that collusion, namely a general risk that lawyers might reveal information from the investigation thereby making it more difficult to arrest those suspected of terrorist activities, but not yet arrested, might qualify as a compelling reason, by stating that “a non-specific claim of a risk of leaks cannot constitute a compelling reason so as to justify a restriction on access to a lawyer”.<sup>39</sup> Grand Chamber further clarified that the absence of compelling reasons does not automatically lead to a violation of Article 6 rights and that it is always necessary to undertake to overall fairness test in order to decide on the violation of Article 6 rights.<sup>40</sup> However, the Grand Chamber also found that the existence or non-existence of compelling reasons has an impact on the overall fairness test. In the case where the Court should find that there were no compelling reasons to restrict the right of access to a lawyer, “the Court must apply a very strict scrutiny to its fairness assessment”.<sup>41</sup>

<sup>35</sup> *Ibrahim and others v. the United Kingdom*, Judgment of 16 December 2014, application nos. 50541/08, 50571/08, 50573/08 and 40351/09

<sup>36</sup> *Op. cit.* (note 1), § 235

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, § 65. Cf. Valković, Burić, *op. cit.* note 30, p. 526-527, Costa Ramos, *op. cit.* note 31, p. 407

<sup>39</sup> *Op. cit.* (note 1), § 259

<sup>40</sup> *Ibid.*, § 260-262. In this regard, the judgment also raises some important issues with regard to the internal structure of Article 6 and the relationship between Article 6 (1) and Article 6 (3) of the Convention. More on this issue see in Goss, R., *Out of Many, One? Strasbourg's Ibrahim decision on Article 6*, *The Modern Law Review* (2017)80(6), p. 1137-1163

<sup>41</sup> *Ibid.*, § 265. The Grand Chamber continued its reasoning by stating that „[t]he failure of the respondent Government to show compelling reasons weighs heavily in the balance when assessing the overall fairness of the trial and may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (c) [...]. The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice.”



The Court separately analysed the issue of existence of compelling reasons in the situation of the first three applicants and in the situation of the fourth applicant.

In relation to the first three applicants, the Court found that there were compelling reasons to temporarily restrict their right to legal advice. The Court accepted that there was “an urgent need to avert serious adverse consequences for life, liberty or physical integrity”<sup>42</sup> and that the overriding priority of the police was “quite properly, to obtain as a matter of urgency information on any further planned attacks and the identities of those potentially involved in the plot”.<sup>43</sup> Additionally, the restriction also fulfilled additional needed factors in that it had a basis in domestic law, it was based on an individual assessment of the particular circumstances of the case and it was temporary in nature.<sup>44</sup>

It is very difficult not to agree with the finding of the Court that, at the time when the right to legal advice was restricted and when the safety interviews were conducted, the need to prevent further terrorist attacks was an overriding priority. However, what is missing from the reasoning of the Court is the establishment of a link between that need and the need to restrict right to legal advice. What was it in the restriction of this right that made the achievement of the overriding priority more plausible? Or, in other words why was granting an access to a lawyer for the first three applicants in the view of the police seen as an obstacle in the achievement of this security objective? This is a question that the Grand Chamber did not touch upon in its reasoning and it is an issue which definitely merited attention. There are two reasons why the police could have had an interest, in the circumstances of the case, to restrict access to legal advice for the applicants. One of them is the possibility of delay in conducting the safety interviews if applicants were given an opportunity to consult a lawyer before the interview. This is a reason which the London police did primarily emphasize in the reasoning of its decisions on restriction. However, it is also possible to imagine other reasons. The police could have had an interest to restrict access to a lawyer because it believed that the

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<sup>42</sup> It is probably the text of Article 3 § 6 of the 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 (OJ L 294, 6. 11. 2013, p. 1) which has inspired the Court to adopt this standard. More on this provision, see in Ivičević Karas, E., Burić, Z., Bonačić, M., *Unapređenje procesnih prava osumnjičenika i okrivljenika u kaznenom postupku: Pogled kroz prizmu europskih pravnih standarda*, Hrvatski ljetopis za kazneno pravo i praksu 1, 2016, p. 51-53

<sup>43</sup> *Ibid.*, § 276

<sup>44</sup> *Ibid.*, § 277. For an analysis of this part of the judgment, see Ivičević Karas, E., Valković, L., *Pravo na branitelja u policiji – Pravna i stvarna ograničenja*, Hrvatski ljetopis za kazneno pravo i praksu 2, 2017, p. 421-423

applicants would be more open to cooperation with the police without the help of a lawyer. In other words, they could have believed that the presence of a lawyer before and during the safety interviews might make it more difficult for the police to achieve its preventive objectives.

This issue was also addressed by judges Sajó and Laffranque in their separate opinion in which they stated that “[t]he fact that there is an urgent need to save lives does not explain why and how the advice and presence, in particular, of a lawyer, that is, of a right, would, as a matter of principle, be detrimental to saving lives”.<sup>45</sup> The circumstances of the case gave a lot of room to the Court to address this question. Namely, as already mentioned judges point put in their separate opinion, in the case of the first applicant, access to legal advice was delayed for a little over 8 hours, during which time he was questioned for a total of about 3 hours. In the case of second applicant the ratio was 7 hours of delay, half an hour of questioning, and with the third applicant 4 hours of delay, 18 minutes of questioning.<sup>46</sup> Taking all these facts into account, it is very difficult not to question oneself whether there was a danger in delay in conducting safety interviews due to the need to allow consultation with a lawyer before the interview. In our opinion, this is a question that the Grand Chamber should have answered and it should have used the possibility to express a clear standard that denying access to legal advice is only permissible where such access would, due to time constraints, cause a delay in the achievement of a safety objective.

In the case of the fourth applicant, the Court decided to proceed in the same manner as in the case of the first three applicants by deciding “whether there were compelling reasons for the restriction of the fourth applicant’s access to legal advice”.<sup>47</sup> We find it very difficult to agree with this approach. Namely, the situation of the fourth applicant significantly differs from the situation of the first three applicants. The latter were cautioned and informed about their right to legal advice, but this right was temporarily restricted. The former was not cautioned at all and not informed about his right to legal advice. He was denied knowledge about the change in his procedural position, from being a potential witness to becoming a suspect.

The way that the Court proceeded runs contrary to the standard that it previously established in the same judgment when it said that “[i]n the light of the nature of the privilege against self-incrimination and the right to silence, the Court considers that in principle there can be no justification for a failure to notify a suspect

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<sup>45</sup> *Op. cit.* (note 11), § 21

<sup>46</sup> *Ibid.*, § 23

<sup>47</sup> *Op. cit.* (note 1), § 297

of these rights”.<sup>48</sup> What the Court did was logically wrong. It applied the same standard to two situations which are fundamentally different. With this approach, the fact that the fourth applicant was “mislead as to his procedural rights”, as the Court put it, was pushed into the background, by being taken into consideration as only one of the factors that the Court considered when deciding whether there were compelling reasons for the restriction of the fourth applicant’s right to legal advice. This issue, rather than being considered among other factors, should have been put in the foreground of the Court’s analysis.

True, in the end the Court found that there were no compelling reasons in the case of the fourth applicant. The Court accepted that in his case, like in the case of the first three applicants, there existed “an urgent need to avert serious adverse consequences for life, liberty or physical integrity”. But, other factors that the Court requires in order to establish the existence of compelling reasons, and which existed in the case of the first three applicants, did not exist, the Court found, in the case of the fourth applicant. Primarily, there was complete absence of any legal framework regulating the conduct of the police in the case of the fourth applicant.<sup>49</sup> Namely, there was no possibility in the domestic law to proceed the way that the police proceeded in the fourth applicant’s case.

### 3.3. The fairness of the proceedings as a whole

As already mentioned The Grand Chamber clarified that the *Salduz*-test is always a two stage test. This means that establishment of non-existence of compelling reasons is never for itself enough to establish a violation of Article 6 rights. Compelling reasons found or not found, it is always necessary for the Court to conduct an assessment of the fairness of the trial as a whole in order to decide about a violation of Article 6 rights.<sup>50</sup> However, the existence or non-existence of compelling reasons plays an important role in the overall fairness test (see *supra* 3. 2.). Besides existence or absence of compelling reasons, the Court, as the Grand Chamber stressed, will take into account a whole range of other factors when conducting the overall fairness test. Among others, the quality of the evidence, the use to which the evidence was put, and the weight of the public interest in the investigation and punishment of the offence in issue.<sup>51</sup>

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<sup>48</sup> *Ibid.*, § 273

<sup>49</sup> *Ibid.*, § 299-300

<sup>50</sup> *Ibid.*, § 257, 260-262

<sup>51</sup> For the full, but non-exhaustive list, see *ibid.*, § 274. Cf. Costa Ramos, *op. cit.* note 31, p. 410

The Chamber found that in the case of all four applicants “no undue prejudice has been caused by the admission of the statements at trial having regard in particular to the counterbalancing safeguards contained in the legislative framework, to the trial judge’s rulings and directions to the jury and to the strength of other evidence in their case”.<sup>52</sup> The Grand Chamber came to the same conclusion in the case of the first three applicants. However, it reached a different conclusion in the case of the fourth applicant. We shall now analyse the arguments that the Grand Chamber offered for these findings.

In reaching the conclusion that the proceedings in relation to first three applicants were overall fair and that therefore there has not occurred a violation of their Article 6 rights, the Grand Chamber relied on a number of factors. It particularly took into consideration that the police “adhered strictly to the legislative framework which regulated how they had to conduct their investigation”,<sup>53</sup> that applicants had the opportunity to challenge the authenticity of the evidence and oppose its use,<sup>54</sup> the quality of the evidence and its lawfulness under domestic law,<sup>55</sup> the fact that “the statements were merely one element of a substantial prosecution case against the applicants”,<sup>56</sup> the quality of directions which the trial judge gave to the jury,<sup>57</sup> and lastly the strength of the public interest in the investigation and punishment of the offences in question.<sup>58</sup>

It is noteworthy that the Grand Chamber invested a lot of effort in giving reasons for the conclusion it reached. However, what is striking from the reasoning given by the Grand Chamber is the absence of analysis of purpose for which the safety interviews were conducted and the impact of this factor on the fairness of the proceedings as a whole. Namely, safety interviews were conducted for preventive purposes, in order to help the police to prevent potential further terrorist attacks and identify, locate and arrest all those involved in their preparation and cover-up. In order to achieve that goal, access to one of the minimum Article 6 § 3 rights for the applicants was denied. And so far it seems like a fair bargain. However, the use

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<sup>52</sup> *Ibid.*, § 235

<sup>53</sup> *Ibid.*, § 281

<sup>54</sup> *Ibid.*, § 282-284

<sup>55</sup> *Ibid.*, § 285-287

<sup>56</sup> *Ibid.*, § 288-291

<sup>57</sup> *Ibid.*, § 292

<sup>58</sup> *Ibid.*, § 293. When analysing this issue, the Grand Chamber stated that “[t]he public interest in preventing and punishing terrorist attacks of this magnitude, involving a large-scale conspiracy to murder ordinary citizens going about their daily duties, is of the most compelling nature”. Generally on the question of exclusion of evidence and its relationship with the seriousness of the crime prosecuted, see Thommen, M., Samadi, M., *The Bigger the Crime, the Smaller the Chance of a Fair Trial*, European Journal of Crime, Criminal Law and Criminal Justice 24, 2016, p. 65-86

of the statements obtained for preventive purposes for an investigative goal does not seem fair. If the State considered it necessary to restrict some minimum rights in order to achieve a preventive objective, how fair is it to use the results of such a restriction in the punishment of those whose rights were restricted for preventive purposes?<sup>59</sup> To us, this seems inherently unfair and therefore we find it difficult to agree with the conclusion of the Grand Chamber that the proceedings, as a whole, with regard to the first three applicants was fair.

With regard to the fourth applicant, the Grand Chamber again, as was the case with compelling reasons, proceeded in the same way as it did in the case of the first three applicants. However, the Court, at the outset, reminded that the situation with the fourth applicant is different, in that “in the absence of compelling reasons for the restriction of the [...] right to legal advice, the burden of proof shifts to the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice”.<sup>60</sup> We agree that the Court’s attitude towards the case of the fourth applicant should be different than its attitude towards the situation of the first three applicants, but we do not agree on the reasons. In our opinion, it is not the absence of compelling reasons to restrict the right of access to legal advice, but the fact that the fourth applicant was induced by the police, who misled him as to his procedural rights, to give a self-incriminating statement. He was induced, true, for preventive purposes, but that does not change the fact that in the context of the criminal proceedings against him it is a self-incriminating statement.

The Grand Chamber proceeded by analysing extensively all the circumstances surrounding the criminal proceedings against the fourth applicant. It analysed, basically, all the factors that have been analysed in the case of the first three applicants (whether the police adhered to the legislative framework which regulated how they had to conduct their investigation, whether there was a possibility for the fourth applicant to challenge the use of his witness statement, quality of the statement, its importance for the prosecution case, direction given by the trial judge to the jury, and nature of the offence). In analysing all these factors, the Grand Chamber found a number of shortcomings: the decision to continue to question

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<sup>59</sup> Same concern is voiced by judges Sajó and Laffranque in their separate opinion: “When it comes to preventing attacks, the aim of the safety interviews can be a different matter (up to a point) and we do not rule out the possibility of restricting access to a lawyer for preventive purposes (if it is demanded by an imminent threat). What we cannot understand is why an instrument that is necessary for the prevention and protection of life and limb is accepted for the purposes of punishment (which serves the desire of justice, understood as retribution)?”, *op. cit.* (note 11), § 31

<sup>60</sup> *Op. cit.* (note 1), § 301

the fourth applicant as a witness had no basis in national law, trial court did not hear oral evidence on reasons why this decision was rendered and the decision itself was not made in writing and was not reasoned, the judge left the jury with excessive discretion as to the manner in which the witness statement was to be taken into account.<sup>61</sup>

However, the most important issue, in our mind, in the case of the fourth applicant is the use to which the witness statement was put. The Grand Chamber correctly noted that the statement “clearly formed an important part of the prosecution case”, that there is “no doubt that these admissions were central to the charges laid against him”, that it “provided a narrative of what had occurred during the critical period, and it was the content of the statement itself which first provided the grounds upon which the police suspected the fourth applicant of involvement in a criminal offence”, that “it provided the police with a framework around which they subsequently build their case and the focus of their search for corroborative evidence”, and that it, for all these reasons “formed an integral and significant part of the probative evidence upon which the conviction was based”.<sup>62</sup> This, in our opinion, is *per se*, taking into account the circumstances in which the statement was obtained, namely in a situation where the applicant was induced by the police to give a self-incriminating statement by false presentation of his procedural position and kept in ignorance about his procedural rights, enough to find the proceedings against the fourth applicant as a whole unfair. Having the circumstances under which his witness statement was obtained and its central position in the prosecution’s case against him in mind, it is, in our mind, impossible to imagine any subsequent procedural safeguards or mechanisms which might make the proceedings against him fair.

#### 4. CONCLUSION

The case of *Ibrahim and Others v. the United Kingdom* indicates a step back in the in the development of the protection of the rights of access to a lawyer in the jurisprudence of the European Court for Human Rights. This can be seen in the general standards that the Court established in its judgment in this case, as well as in the application of these standards to the specific circumstances of this case.

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<sup>61</sup> *Ibid.*, § 303-311. With regard to the strength of the public interest in the investigation and punishment of the offences in question, the Grand Chamber noted that the “offences for which he was indicted were not of the magnitude of the offences committed by the first three applicants”, *ibid.*, § 311

<sup>62</sup> *Ibid.*, § 307-309

With regard to the general standards, the Court established that the absence of compelling reasons to restrict the right of access to a lawyer does not itself present a violation of Article 6 rights. Further, it also established that the use of incriminating statements which were obtained in the absence of a lawyer, does not automatically lead to a violation of Article 6 rights, in other words, it is always necessary to undertake an overall fairness test. Accepting both of these standards can be seen as watering down the level of protection of the right of access to a lawyer which was established in the *Salduz* case and confirmed in the post-*Salduz* jurisprudence.<sup>63</sup>

The way that the Court applied those standards to the specific circumstances of the case is also difficult to accept. First of all, the Court did not establish a clear connection between the restriction of the right of access to a lawyer and the preventive goal pursued by the police. The Court should have made it clear that the restriction of the right of access to a lawyer is legitimate only if such an access, due to time or other factual constraints, would be in contradiction with the achievement of an overriding preventive objective. Furthermore, it is disappointing that the Court viewed two fundamentally different situations through the same lenses. Namely, the situation of the first three applicants, on the one side, and the situation of the fourth applicant, on the other. By doing this, the Court missed an opportunity to address appropriately the issue of police misconduct with regard to the fourth applicant. The way that the Court resolved the issue of fairness of the proceedings as a whole in this case is also disappointing. The Court failed to address the issue of relationship between police actions undertaken for preventive purposes and the use of results of these actions for investigative and punishing purposes.

The Grand Chamber judgment in this case can also be seen in the broader context, by not looking at the right of access to a lawyer solely, rather by looking at the new tendencies in the Strasbourg jurisprudence, with regard, for example, to the application of *ne bis in idem* principle. In this broader context, this judgment can be viewed as an indicator in the shift of attitude of Strasbourg judges to the question of human rights protection in general. It seems that the Court in Strasbourg has entered a period where standards of human rights protection will be sacrificed to other important social interests, security and effective prosecution of criminal offences being among them.

<sup>63</sup> *Pivaty* states that „*Salduz* and *Dayanan* judgments interpreted together, when contrasted with *Ibrahim* and *Simeonovi*, present two very different, and arguably incompatible, views of the scope and content of the right to custodial legal assistance“. See Pivaty, A., *The Right to Custodial Legal Assistance in Europe: In Search for the Rationales*, European Journal of Crime, Criminal Law and Criminal Justice 26, 2018, p. 68



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