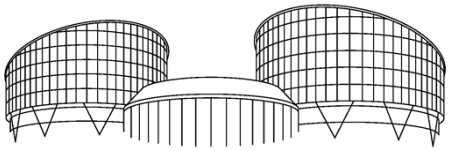

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF ALMAŠI v. SERBIA

(Application no. 21388/15)

JUDGMENT

STRASBOURG

8 October 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Almaši v. Serbia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Vincent A. De Gaetano, *President,*
Georgios A. Serghides,
Paulo Pinto de Albuquerque,
Helen Keller,
Branko Lubarda,
Alena Poláčková,
Gilberto Felici, *judges,,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 17 September 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 21388/15) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr Šandor Almaši ("the applicant"), on 29 April 2015.

2. The applicant was represented by Mr V. Juhas Đurić ("V.J.Đ."), a lawyer practising in Subotica. The Serbian Government ("the Government") were represented by their former Agent, Ms Nataša Plavšić.

3. The applicant complained of having been ill-treated by the police on 18 April 2011, as well as about the respondent State's subsequent failure to conduct an investigation into this incident. The applicant furthermore complained of a lack of fairness in the criminal proceedings that had been brought against him – in particular, that his conviction had been based on his statement of 18 April 2011, which had itself been obtained in breach of his right to the legal assistance of his own choosing and as a consequence of the said police abuse.

4. On 1 April 2016 the applicant's complaints were communicated to the Government, while the remainder of the application was declared inadmissible, pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979 and lives in Male Pijace, Serbia.

6. On 18 April 2011, at around 2 p.m., a certain S.Š. was brought to the Regional Centre of the Border Police (*Regionalni centar granične policije* – "the RCBP") in Subotica to be questioned about the alleged commission of the crime of illegal border crossing and people smuggling (*nedozvoljen*

prelaz državne granice i krijumčarenje ljudi). In his statement S.Š. confessed to taking part in such an operation and named three persons as his accomplices. One of them he identified as Ć, whose residence was in Subotica, while the other two were persons whom he had never met before and did not know by name.

7. On 18 April 2011, at about 4 p.m., the applicant's home was searched by the police on the basis of an order issued by an investigating judge. According to the official record of the search, the applicant waived his right to have a lawyer present while the search was carried out. Moreover, in the course of the search the applicant's phone, among other things, was taken from him. The record of the search was signed (i) by the police officer in charge of the operation, (ii) the official who had compiled the record, (iii) two witnesses who had been present during the search (one of them being the applicant's future sister-in-law), and (iv) the applicant himself.

8. Shortly thereafter the applicant was also brought to the RCBP in connection with the alleged crime of illegal border crossing and people smuggling.

9. At 5 p.m. the police ordered his detention for a period of forty-eight hours. The applicant was also given a forty-eight-hour detention order, which stated that he had been deprived of his freedom on suspicion of having committed the above-mentioned offence.

10. Between 6.10 p.m. and 6.40 p.m. the applicant was questioned by the police in this regard. He was also afforded a legal-aid lawyer. According to the minutes of his questioning, the applicant's confession was preceded by a confidential conversation with R.R., his legal-aid lawyer. The applicant was also informed of his right, *inter alia*, to remain silent and to appoint a lawyer of his own choosing. According to the minutes, the applicant explained that he had committed the crime in question because of his poor financial situation and his need to support his children. The record of his questioning was signed by the police officer who had questioned the applicant, the applicant's legal-aid lawyer, the officer who produced the record, and the applicant himself (after being allowed – at his request – to read it and having registered no objections). The public prosecutor (*javni tužilac*) was informed that the applicant was to be questioned, but did not attend.

11. According to the applicant, his legal-aid lawyer was chosen by the police officers from a list of lawyers supplied by the Bar Association. The applicant stated that immediately prior to the lawyer's arrival, the applicant had been slapped a couple of times across the face by a police officer. He then had confessed to committing the crime in question, fearing further police abuse. Only after the conclusion of the questioning had the applicant been allowed to call L.F., his partner at the time, in order to instruct her to retain the services of V.J.Đ. as the lawyer of his own choosing. According to the applicant, on 18 April 2011, at around 9.00 p.m., L.F. first called

V.J.Đ., and by 10.00 p.m. she had formally signed the relevant power of attorney on behalf of the applicant. On 19 April 2011, at 8.46 a.m., that authorisation was lodged with the Subotica Court of First Instance (*Osnovni sud*).

12. On 19 April 2011 the applicant was taken to the investigating judge (*istražni sudija*). From that moment onwards he was represented by V.J.Đ. In the presence of the public prosecutor the applicant complained to the judge that on the premises of the RCBP he had been slapped a number of times across the face by an officer on 18 April 2011. The applicant submitted that during the questioning two young officers had been present and that he had been slapped by the shorter one of those two. He did not know their names. Furthermore, the applicant submitted that he had not been able to say anything to the legal-aid lawyer about the abuse because the officer who had slapped him had been present in the interview room at all times. The investigating judge asked the applicant whether he needed medical assistance. The applicant replied that although he felt some pain he did not need medical help. As regards the charges against him, the applicant refused to answer any questions. The questioning before the investigating judge lasted from 3.10 p.m. until 3.35 p.m., after which the applicant was released.

13. On the same day the investigating judge heard the co-accused, S.Š., who confessed to the crime in question and implicated the applicant in the same offence.

14. Moreover, on the same day an identity parade was carried out and N.S., a witness, recognised with a degree of 70-80% certainty the applicant as one of the persons who had guided the border crossing on the night in question. Before the identity parade was carried out the witness described the person – whom he subsequently picked out of the identity parade line-up – as having had a hood on and being "dark in the face". He furthermore stated that he was not sure if he could identify the persons who had organised the border crossing but that he had "seen the entire face" of their guide. The applicant's lawyer objected to the procedure, noting that the witness in question had not been certain of his identification, and that the applicant did not have "a dark face".

15. On 20 April 2011, at about 9 a.m., the applicant was examined by a private medical doctor of his own choosing. The doctor noted that the applicant complained of having sustained blunt-force trauma two days earlier. Specifically, the applicant complained to the doctor that he had been hit in the face – around his left eye – which had caused him eye pain and heightened sensitivity to light. The doctor herself found that the tissue around the applicant's temple and left eye was slightly swollen and sensitive to the touch, with no change in colour.

16. On 28 April 2011 the Subotica public prosecutor's office (*Osnovno javno tužilaštvo*) indicted the applicant and S.Š. for the crime in question.

17. On 18 May 2011 the applicant's lawyer provided the Court of First Instance with the above-mentioned doctor's report, maintaining that this proved that he had been ill-treated on 18 April 2011.

18. Between 12 July 2011 and 14 September 2011 four hearings were held or adjourned before the Court of First Instance.

19. The applicant's co-accused, S.Š., reaffirmed his earlier statements, incriminating himself as well as the applicant, but refused to answer any questions.

20. G.T., a witness, described what had happened on the night in question but maintained that the applicant had not been involved.

21. T.L., a police officer, stated that the applicant had not been subjected to ill-treatment on 18 April 2011. After being properly advised of his procedural rights, the applicant had said that he did not have a lawyer and that the police should thus provide him with a legal-aid lawyer. T.L. had stated that after the questioning had been concluded the applicant had used a telephone to call someone but that he did not know whom.

22. S.V., another police officer, likewise stated that the applicant had not been abused or threatened on 18 April 2011. He added that the legal-aid lawyer had indeed been selected from a list of lawyers provided by the Bar Association. Whenever certain lawyers were unavailable in a situation such as the applicant's, other lawyers were selected from this list. There was, however, no record of which lawyers may have been contacted in respect of the applicant but had been unavailable on 18 April 2011.

23. R.R., heard in the capacity of a witness, recounted that she had been invited by the police to act as the applicant's legal-aid lawyer on 18 April 2011. She had not noticed any injuries on the applicant's face. Prior to the questioning, she had had a conversation with the applicant during which he had not said that he had been subjected to any ill-treatment. Moreover, the applicant had not objected to being provided with a State-appointed lawyer and had not complained that he had been deprived of his right to a telephone call. Lastly, R.R. acknowledged that she had not been provided with a formal decision by the police authorising her to act on behalf of the applicant.

24. The applicant reaffirmed the statement that he had given to the investigating judge, alleged that he had been unable to contact a lawyer of his own choosing on 18 April 2011 (since his phone had already been taken away by the officers), and claimed that he had been slapped by the police prior to the arrival of the legal-aid lawyer. In respect of the charges brought against him, the applicant remained silent.

25. The investigating judge, heard in the capacity of a witness, stated that during the questioning she had not noticed any injuries on the applicant's face. She added that she had been approximately two metres away from the applicant during that time.

26. The applicant's lawyer proposed that the medical doctor who had examined the applicant on 20 April 2011 be heard as a witness. He also asked the court to hear the applicant's' former partner in the same capacity, as she had allegedly seen the applicant after the questioning of 19 April 2011 and had observed bruising on his body. Lastly, the applicant's lawyer requested that a list of legal-aid lawyers provided by the Bar Association be obtained in order to ascertain whether the appointment of the legal-aid lawyer in the case indicated any irregularities. The Court of First Instance rejected those proposals.

27. On 20 July 2011 the Court of First Instance decided to exclude the applicant's statement of 18 April 2011 from the case file on the basis that the official record prepared on that occasion did not contain any reference to an explicit declaration by the applicant as to whether he wanted to hire a lawyer of his own choosing or would instead be willing to accept a State-appointed lawyer. The record instead merely indicated that the applicant had been informed of his procedural rights in this respect.

28. Following an appeal lodged by the public prosecutor, on 3 August 2011 the Novi Sad Court of Appeal (*Apelacioni sud*) quashed this decision. It noted, *inter alia*, that the applicant had been properly advised of his procedural rights and had clearly made his choice thereafter, through the *de facto* acceptance of his legal-aid lawyer, notwithstanding the absence of an explicit statement to this effect in the record dated 18 April 2011.

29. On 16 September 2011 the Court of First Instance found the applicant and S.Š. guilty of illegal border crossing and people smuggling and sentenced them each to one year's imprisonment. In so doing, it referred, *inter alia*, to the applicant's own confession of 18 April 2011, the statements of the co-accused, S.Š., and the identification of the applicant by N.S., who was, in particular, deemed not to have had a personal interest in not being truthful. The witness G.T., by contrast, was seen as having had reason to exculpate the applicant in view of his connection with the applicant's future sister-in-law. The court also noted that the applicant's procedural rights had been fully respected in terms of choice of counsel and otherwise and opined that there had been no credible evidence of the applicant having been ill-treated in police custody. The court deemed it unnecessary to hear as witnesses the medical doctor who had established the applicant's condition on 19 April 2011 or his partner at the time. As regards the doctor, it considered that the injuries in question "could not be linked" to the applicant's questioning on 18 April 2011, especially in view of the statements given by the witnesses in this regard denying any abuse. Moreover, the medical examination itself had only taken place belatedly. With respect to the applicant's partner, the court held that there was no need to hear her either, given the abundance of other evidence on the issue.

30. On 17 October 2011 the applicant lodged an appeal against this judgment, maintaining, *inter alia*, that: (i) his confession had been coerced

from him by means of police abuse and intimidation; (ii) he had been unable to question the co-accused S.Š., who had incriminated him; (iii) the identification procedure involving N.S. had been flawed; (iv) the appointment of the legal-aid lawyer had been irregular; and (v) it had been unreasonable to reject his proposals that the court hear his partner at the time and the medical doctor who had examined him.

31. On 1 December 2011 the Court of Appeal upheld the first-instance judgment, endorsing its reasoning. It added that the other person accused in the proceedings, S.Š., had been fully entitled not to answer any questions if he so wished, being a defendant in a criminal case himself, and that none of the other irregularities alleged or objections raised by the applicant in his appeal could be accepted. This included the objection regarding the appointment of the legal-aid lawyer where, regardless of any issues connected to the selection procedure, the applicant had clearly accepted this appointment at the time, as evidenced by his cooperation with the said lawyer, his willingness to give a statement in her presence and the absence of any objections in this regard on 18 April 2011.

32. On 22 June 2012 the applicant's lawyer lodged a constitutional appeal wherein he repeated and/or restated the arguments raised earlier. He also provided the Court with a list of lawyers published by the Bar Association, maintaining that the requirement to pick a legal-aid lawyer successively had been disregarded in his case (see paragraph 43 below). Specifically, despite the fact that the legal-aid lawyer appointed to represent the applicant's co-accused, S.Š., had been much higher on that list than the applicant's own legal-aid lawyer no official explanation was ever offered for the selection of the lawyer that was appointed to the applicant. Admittedly, the list attached to the constitutional appeal was not a list of legal-aid lawyers only but rather a list of all lawyers who were members of the bar association in question. However, some 50% of them would probably have been interested in providing legal aid to defendants in criminal cases, which meant that the list was an indicative one. In any event, the criminal courts had been asked to obtain a list of legal-aid lawyers provided by the Bar Association, but had refused to do so.

33. On 31 March 2015 the Constitutional Court (*Ustavni sud Srbije*) rejected the appeal as lacking proper constitutional reasoning; notably, it deemed it as yet another attempt to have reassessed the outcome of the criminal proceedings brought against the applicant.

34. In the meantime, on 23 December 2013, the Court of First Instance apparently released the applicant from serving the remainder of his prison sentence, the applicant having thus served some nine months in all.

35. The Government, for their part, maintained that there was no evidence that the applicant had ever been abused or intimidated by the police. They furthermore contended that there had likewise been no procedural or other shortcomings in the impugned criminal proceedings or

indeed in the overall conduct of the Serbian authorities in respect of the present case.

II. RELEVANT DOMESTIC LAW

A. The Criminal Code (*Krivični zakonik*, published in the Official Gazette of the Republic of Serbia – OG RS – no. 85/05, amendments published in OG RS nos. 88/05, 107/05, 72/09 and 111/09)

36. Article 137 of the Code reads as follows:

> "1. Whoever ill-treats another or treats another in a humiliating and degrading manner shall be punished with imprisonment of up to one year.
>
> 2. Whoever causes severe pain or suffering to another for such purposes as obtaining from him or a third person a confession, a statement or information, or intimidating or unlawfully punishing him or a third person ... shall be punished with imprisonment from six months to five years.
>
> 3. If the offence specified in paragraphs 1 and 2 above is committed by an official acting in an official capacity, the official concerned shall be punished for the offence specified in paragraph 1 with imprisonment of between three months and three years, and for the offence specified in paragraph 2 with imprisonment of between one and eight years."

B. The 2001 Code of Criminal Procedure (*Zakonik o krivičnom postupku*, published in the Official Gazette of the Federal Republic of Yugoslavia – OG FRY – no. 70/01, amendments published in OG FRY no. 68/02 and in OG RS nos. 58/04, 85/05, 115/05, 49/07, 20/09, 72/09 and 76/10)

37. Articles 12 and 89 § 8 prohibit, *inter alia*, any and all violence aimed at extorting a confession or a statement from a suspect and/or an accused.

38. Articles 18 § 2 and 178 provide that a court decision may not be based on evidence obtained in breach of domestic legislation, or in violation of ratified international treaties, and that any such evidence must be excluded from the case file.

39. Articles 19, 20, 46 and 235 provide, *inter alia*, that formal criminal proceedings may be instituted at the request of an authorised prosecutor. In respect of crimes subject to prosecution *ex officio*, such as the ones here at issue, the authorised prosecutor is the public prosecutor personally. The latter's authority to decide whether to press charges, however, is bound by the principle of legality, which requires that he must act whenever there is a reasonable suspicion that a crime subject to prosecution *ex officio* has been committed. It makes no difference whether the public prosecutor has learned of the incident from a criminal complaint lodged by the victim or another person, or indeed even if he has only heard rumours to that effect.

40. Article 224 provides, *inter alia*, that a criminal complaint may be lodged in writing or orally, and that a court of law, should it receive such a complaint, shall immediately forward it to the relevant public prosecutor.

41. Article 61 provides that should the public prosecutor decide that there is no basis to prosecute, he must inform the victim of this decision; the victim will then have the right to take over the prosecution of the case on his own behalf, in the capacity of a "subsidiary prosecutor".

42. Article 104 § 1 provides, *inter alia*, that a witness may be required to identify another person in his presence and in the presence of other unknown individuals whose personal characteristics are similar to the ones described by the witness in his prior statement.

43. Articles 5 § 1, 71, 72, 226 §§ 8 and 9, 227 § 2, 228 § 1 and 229 §§ 6, 7 and 8, read in conjunction, provide, *inter alia*, that a person arrested by the police shall have the right to remain silent, as well as the right to be heard in the presence of his chosen counsel, or, in the absence thereof and depending on the seriousness of the charges, to be provided with a legal-aid lawyer paid for by the State. If the arrested person's questioning has been carried out in accordance with the law, a statement given by him on this occasion may be used as evidence in the subsequent criminal proceedings. Legal-aid lawyers must be appointed on a successive basis according to the Cyrillic alphabet (*po azbučnom redu*) from a list of lawyers provided by the Bar Association. Should there be a departure from this rule, the police must provide an explanation and make an official record thereof. The Bar Association itself shall publish, on its website, a list of all lawyers appointed to act as legal-aid lawyers by the police, together with other relevant information.

44. Articles 226 § 8, 228 § 1 and 229 § 5, taken together, furthermore provide that, *inter alia*, a person arrested by the police shall have the right to contact his lawyer, directly or through family members, including by means of a telephone.

45. Article 177 §§ 1 and 2 provides, *inter alia*, that a person arrested by the police shall be entitled to read the record of his questioning before he signs it, or have that record read to him. Should such a person refuse to sign the minutes, this refusal shall be noted on the record, as shall the reason given therefor.

46. Article 75 § 2 provides that a person arrested by the police, while in detention, shall have the right to a confidential consultation with his legal counsel before giving his first statement. This consultation may only be overseen by means of visual, not audio, monitoring.

C. The 2011 Code of Criminal Procedure (*Zakonik o krivičnom postupku*, published in OG RS no. 72/11, amendments published in OG RS nos. 101/11, 121/12, 32/13, 45/13 and 55/14)

47. Under Articles 482 § 1, 483 § 1, 485 §§ 1 and 3, 489 § 3 and 492, a criminal conviction may be overturned or quashed and the case retried where the European Court of Human Rights has found that a convicted person's rights have been violated in the course of the proceedings domestically.

48. This Code of Criminal Procedure entered into force on 1 October 2013, thereby repealing the earlier Code.

III. RELEVANT INTERNATIONAL FINDINGS

49. In its report to the Government on its visit to Serbia from 1 until 11 February 2011, which was made public on 14 June 2012, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) noted as follows:

> "13. The delegation received several allegations of physical ill-treatment by the police (consisting of slaps, punches, kicks and truncheon blows) at the time of apprehension and/or during questioning, in the latter case mostly in order to obtain confessions. As was the case in 2007, it would appear that juveniles suspected of serious criminal offences remain particularly exposed to the risk of physical violence at the hands of the police. Further, the delegation received some accounts of verbal abuse and threats during questioning.
>
> **The CPT recommends that police officers throughout Serbia be reminded that all forms of ill-treatment (including verbal abuse) of persons deprived of their liberty are not acceptable and will be the subject of severe sanctions**.
>
> ...
>
> 15. In the Aleksinac, Niš and Voždovac police establishments, the delegation found – in offices used for police interviews – various unlabelled non-standard items (such as wooden sticks and iron rods). **The CPT calls upon the Serbian authorities to take decisive steps to ensure that any non-standard objects are immediately removed from all police premises where persons may be held or questioned. Any items of evidence relating to cases under investigation should be appropriately labelled, recorded and kept in a dedicated property store**.
>
> ...
>
> 17. At the outset of the visit, the Serbian authorities informed the delegation that there was now a unified system for recording complaints against police misconduct. The Ministry of Interior indicated that some 4,000 such complaints had been registered in 2010, including some 300 concerning torture or other forms of ill-treatment, and that four police officers had been charged with ill-treatment as a result of investigations in the course of that year.
>
> ...

21. Most of the persons interviewed by the delegation confirmed that they had been offered the possibility of contacting a lawyer shortly after apprehension. This usually included the presence of the (most often *ex officio*) lawyer during the questioning and the possibility to meet the lawyer in private.

However, as had been the case during the 2007 visit, the legislation in force failed to mention the exact time when the right of access to a lawyer becomes effective. In practice, it would appear that such access was not always granted to persons in police custody as from the very moment when they were obliged to remain with the police. Further, the current law still does not expressly grant the right of access to a lawyer to persons summoned to the police, obliged to remain in a police establishment and interviewed as "witnesses". **The CPT reiterates its recommendation that the Serbian authorities take steps to ensure that the right of access to a lawyer applies effectively as from the very outset of the deprivation of liberty by the police. Anyone who is under a legal obligation to attend and stay at a police establishment (e.g. as a "witness") should also be expressly granted the right of access to a lawyer.**"

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

50. The applicant complained under Article 3 of the Convention of the police ill-treatment of 18 April 2011, and the respondent State's subsequent failure to conduct an investigation into this incident.

51. Article 3 of the Convention reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

52. The Government did not raise any admissibility objections. Since the complaints are neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds, they must therefore be declared admissible.

B. Merits

1. The procedural aspect

(a) The parties' submissions

(i) The applicant

53. The applicant reaffirmed that there had been no proper official investigation into his allegations of police abuse, despite the fact that they had been raised personally (that is to say face-to-face) before the investigating judge and the public prosecutor and that a pertinent medical report had also been provided to the Serbian authorities.

54. Moreover, two particularly relevant witnesses who could have offered valuable testimony in respect of the applicant's injuries – specifically the medical doctor who had examined him on 20 April 2011 and his partner at the time, who had seen him following his release from police custody – were not heard by the criminal courts, without any proper reasoning being given for the decision not to hear them.

55. Lastly, the applicant reiterated that no criminal investigation capable of identifying and punishing the perpetrators of the ill-treatment in question had been opened. The persons who had been heard in respect of the abuse alleged by the applicant had only given statements as part of the criminal proceedings brought against the applicant himself.

(ii) The Government

56. The Government maintained that there had been a proper official investigation into the applicant's allegations of police ill-treatment.

57. The relevant witnesses had all been heard after the applicant had first alleged that he had been ill-treated, although this allegation had only been made a month after the alleged incident. The persons questioned had either denied abusing the applicant themselves or had had no knowledge of the abuse, and none of them had seen any injuries on the applicant's face. As regards the medical doctor who had examined the applicant on 20 April 2011 and the applicant's partner at the time, the Government maintained that the criminal courts had declined to hear them since they would either have been inclined to testify in favour of the applicant on the basis of a close personal relationship with him, or had had no direct knowledge of how the injuries in question had been sustained. In any event, traces of any injuries would have disappeared by then.

58. The criminal courts had nevertheless taken into account the medical report, even though it did not pronounce on the cause of the applicant's injuries, but they ultimately had held that the applicant's abuse allegations, given the available evidence, had lacked credibility and had instead been motivated by his wish to avoid criminal responsibility. Indeed, the applicant had moreover never lodged a formal criminal complaint against the officers concerned or even an objection with the Ministry of Internal Affairs, thus further undermining his allegations of abuse.

59. The Government lastly noted that even though the applicant's statement of 18 April 2011 had been temporarily excluded from the case file, this exclusion had been based on issues regarding the applicant's choice of counsel, not his allegations of police ill-treatment.

(b) The Court's assessment

60. The Court reiterates that where a person raises an arguable claim or makes a credible assertion that he has suffered treatment contrary to Article

3 at the hands of State agents, that provision, read in conjunction with the general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation (see, among many authorities, *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998-VIII; *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV, and *Bouyid v. Belgium* [GC], no. 23380/09, § 124, ECHR 2015).

61. Whatever the method of investigation, the authorities must act as soon as an official complaint has been lodged. Even when, strictly speaking, no complaint has been made, an investigation must be started if there are sufficiently clear indications that ill-treatment has been used (see *Stanimirović v. Serbia*, no. 26088/06, § 39, 18 October 2011).

62. The Court has also held that the investigation should be capable of leading to the identification and punishment of those responsible. If not, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for State agents to abuse the rights of those within their control with virtual impunity (see *Labita*, cited above, § 131). The investigation must also be thorough: the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. Furthermore, the investigation must be prompt and independent. Lastly, it must afford a sufficient element of public scrutiny to secure accountability. While the degree of public scrutiny required may vary, the complainant must be afforded effective access to the investigatory procedure in all cases (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 137, ECHR 2004-IV, and *Krsmanović v. Serbia*, no. 19796/14, § 74, 19 December 2017).

63. Turning to the present case, the Court considers that the applicant's complaint of police abuse was such as to require an effective official investigation (see paragraphs 11 and 12 above), it being noted that even where there is insufficient evidence to show that an applicant had in fact been ill-treated the procedural obligation to investigate may still arise, particularly when, such as in the present case, there is a potential for abuse in a detention context (see, *mutatis mutandis*, *Stepuleac v. Moldova*, no. 8207/06, § 64, 6 November 2007).

64. The Court furthermore notes that the applicant complained of having been abused by the police. He did so before the investigating judge and in the presence of a public prosecutor, as well as the trial and appellate chambers. Yet, despite the Convention and the domestic law requiring that an allegation of this sort be examined *ex officio* (see paragraphs 61 and 39 above, in that order), no separate abuse-related investigation aimed at the identification and punishment of those responsible was ever instituted by

the relevant authorities. The criminal case against the applicant, wherein he raised his abuse complaints in order to have some of the impugned evidence excluded, was certainly not capable of the latter (see, regarding precisely this point, *Hajnal v. Serbia*, no. 36937/06, § 99, 19 June 2012, and *Lakatoš and Others v. Serbia*, no. 3363/08, § 82, 7 January 2014).

65. Moreover, the criminal courts in these proceedings, inadequate as they were for the purpose of affording redress in respect of the ill-treatment alleged, themselves declined to hear two witnesses proposed by the applicant. Specifically, they deemed it unnecessary to hear the medical doctor who had established the applicant's condition on 19 April 2011 or his partner at the time. The former proposed witness was rejected because injuries in question "could not be linked" to the applicant's questioning of 18 April 2011, in view of (i) the statements given by other witnesses denying any abuse or denying having seen any injuries and (ii) the fact that the medical examination itself had only taken place belatedly. At the same time, the latter proposed witness was rejected because it was deemed that there was no need to hear her, given the abundance of other evidence on the issue. The Court, however, cannot accept this reasoning because the medical doctor, if heard, might have explained whether the injuries in question could have been caused in the manner alleged by the applicant and clarified any issues regarding the time it would take for them to become visible, while the applicant's partner stated that she had seen the applicant after his release from police custody and could therefore also have potentially provided meaningful testimony. It is, of course, understood that had those witnesses been heard it would ultimately have been up to the courts themselves to consider those statements in conjunction with the other available evidence and to assess their probative value.

66. In the light of the foregoing, the Court concludes that the respondent State's authorities failed to carry out an effective official investigation into the applicant's allegations of ill-treatment. There has, consequently, been a violation of Article 3 of the Convention under its procedural limb.

2. The substantive aspect

(a) The parties' submissions

(i) The applicant

67. The applicant reaffirmed that he had suffered police abuse on 18 April 2011. He furthermore maintained that the medical report documenting his injuries had been submitted to the Court of First Instance once he had met with his lawyer, V.J.Đ, following the doctor's examination. Since the two did not live in the same town, communication and coordination between them had taken more time and effort than would otherwise have been the case.

68. The applicant had refused the medical assistance offered to him by the investigating judge because he had not felt much pain at that time. Upon his waking up on 20 April 2011, however, his injuries had been more painful and more visible and had required medical attention. In any event, no one had ever disputed the veracity of the findings of the medial report issued on that occasion. Both the investigating judge and the public prosecutor could also have ordered the applicant's medical examination following his first complaint of police ill-treatment, but they had never done so. The applicant would certainly not have opposed such an order.

69. There was, likewise, no credibility to the hypothesis that the applicant could have sustained his injuries anywhere but in police custody. There was no evidence to this effect, or even a theory as to what alternatively could have happened. Since the applicant had been in good health at the time of his arrest and had been in an injured state upon release, it was up to the Government to come up with a plausible explanation as to how other than through police abuse the injuries could have been sustained.

70. The criminal courts had furthermore refused to hear either of the witnesses proposed by the defence – specifically, the medical doctor who had examined him on 20 April 2011 and his partner at the time, each of whom had particularly relevant testimony to offer in terms of the alleged abuse.

71. The applicant lastly noted that although none of the witnesses who had been heard had acknowledged seeing the injuries on his face this was not of particular significance since none of them had been medically trained or had seen the applicant on 20 April 2011, which was when his injuries had become more visible. Moreover, the investigating judge herself had been standing between three and three and a half metres away from the applicant and hence too far to have observed the injuries properly.

(ii) The Government

72. The Government maintained that the applicant had not suffered any ill-treatment while in police custody. His claim to this effect had rather been aimed at avoiding criminal responsibility and had first been made once he had retained the legal services of V.J.Đ.

73. Even though it had been in the applicant's best interests to visit a doctor as soon as possible upon his release on 19 April 2011 at around 3.35 p.m., in order for the alleged injuries to be documented, he had only been medically examined on 20 April 2011 at around 9 a.m. Therefore, while not disputing the accuracy of the doctor's findings following the applicant's examination, the Government maintained that the applicant could have sustained those injuries elsewhere than in police custody. Moreover, the medical report that had been produced on this occasion had been submitted to the Court of First Instance a whole month after the alleged abuse and had not specified the cause of the injuries in question.

Although the applicant had lived in a village some 40 kilometres away from the offices of his lawyer V.J.Đ., there had been regular and cheap transport available, meaning that the two could have met and provided the court with the said medical report earlier.

74. Following the applicant's allegations of police ill-treatment raised before the investigating judge, the latter had asked the former if he needed medical assistance. The applicant, however, had declined this offer, thus rendering his claim of abuse even less credible. Moreover, the investigating judge, who had been some two metres away from the applicant, had personally observed no injuries.

75. As regards the other witnesses who had been heard in respect of the abuse allegations in the course of the criminal proceedings brought against the applicant, none had confirmed them and none had testified that any injuries had been visible on the applicant's face shortly after the alleged incident. In view of the kind of injuries subsequently noted by the medical doctor who had examined the applicant, no medical expertise would have been necessary for those witnesses to have noticed them had they existed at the time.

76. Lastly, the Government contended that the refusal of the criminal courts to hear the medical doctor who had examined the applicant on 20 April 2011 was of no relevance since traces of any injuries would have disappeared by then. The doctor had, moreover, not opined in her medical report – and nor could she have done so – as to what exactly had caused the injuries in question. As regards the applicant's partner, L.F., there was no evidence that she had indeed seen the applicant immediately upon his release, and in any event, her testimony was bound to have been biased in favour of the applicant.

(b) The Court's assessment

(i) The relevant principles

77. The Court reiterates that Article 3 of the Convention must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe (see *Pretty v. the United Kingdom,* no. 2346/02, § 49, ECHR 2002-III). In contrast to the other provisions of the Convention, it is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention (see, *inter alia*, *Chahal v. the United Kingdom*, judgment of 15 November 1996, § 79, *Reports of Judgments and Decisions* 1996-V).

78. According to the Court's settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its

physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Gäfgen v. Germany* [GC], no. 22978/05, § 88, ECHR 2010; *Price v. the United Kingdom,* no. 33394/96, § 24, ECHR 2001-VII; *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX; and *Jalloh v. Germany* [GC], no. 54810/00, § 67, 11 July 2006).

79. Treatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita*, cited above, § 120). Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see *Hurtado v. Switzerland*, 28 January 1994, opinion of the Commission, § 67, Series A no. 280, and *Wieser v. Austria*, no. 2293/03, § 36, 22 February 2007). Slapping by police officers has likewise been deemed to go beyond the threshold of Article 3 (see *Bouyid*, cited above §§ 102-112), as was constant mental anxiety caused by the threat of physical violence and the anticipation of such (see *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, § 73, 27 May 2008).

80. The Court emphasises that, in respect of a person deprived of his or her liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is an infringement of the right set forth in Article 3 of the Convention (see *Bouyid*, cited above, § 88). The requirements of an investigation and the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals (see *Ribitsch v. Austria*, 4 December 1995, § 38, Series A no. 336, and *Tomasi v. France*, 27 August 1992, § 115, Series A no. 241-A).

81. Persons in custody are in a vulnerable position and the authorities are under an obligation to account for their treatment. Where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V). While it is not, in principle, the Court's task to substitute its own assessment of the facts for that of the domestic courts, the Court is nevertheless not bound by the domestic courts' findings in this regard (see, for example, *Ribitsch, cited above,* § 32). In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant

inferences or of similar unrebutted presumptions of fact (see, for example, *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

(ii) The application of these principles to the present case

82. Turning to the present case, the Court notes that none of the persons who saw the applicant on 18 or 19 April 2011 and were also subsequently heard by the Court of First Instance stated that they had seen any injuries on his face. Furthermore, while the two officers who had allegedly abused the applicant could hardly be deemed as not having a personal interest at stake and the applicant's own legal-aid lawyer might also have arguably had a defensive attitude, given the applicant's subsequent complaints that she did not provide him with effective legal counsel, the same cannot be said, on the basis of the available evidence, of the investigating judge, who asked whether the applicant needed medical assistance on her own initiative and would, in any event, appear not to have been too far away to observe any traces of abuse on the applicant's face had they been visible.

83. The Court also notes that the applicant was released from police custody on 19 April 2011 at around 3.35 p.m. On 20 April 2011, at about 9.00 a.m., he was examined by a medical doctor. The doctor found that the tissue around the applicant's temple and left eye were slightly swollen and sensitive to touch, with no change in colour. The medical examination thus took place more than seventeen hours after the applicant's release and did not pronounce as to the cause of the injuries. While the applicant had apparently been in good health at the time of his arrest there is, in these circumstances, no medical substantiation to the effect that he was injured at the time of his release (compare and contrast to, for example, *Bouyid*, cited above, § 79, where the delay between the applicant's release and his medical examination had been significantly shorter – that is to say no more than two hours). Indeed, as noted by the Government, there is also no evidence that the applicant's partner, L.F., had seen the applicant immediately upon his release from police custody. It cannot therefore be said that the burden of providing a plausible explanation as to how the injuries in question had been caused had shifted onto the respondent State.

84. Moreover, the said medical report was itself submitted to the Court of First Instance almost a month after the applicant's examination and following his indictment, indicating a certain lack of urgency. The explanation offered for this delay by the applicant would also seem to be in contradiction with (i) the relative proximity between his own residence and that of his chosen lawyer and (ii) the available cheap means of transport referred to and documented by the Government.

85. In view of the foregoing and particularly given that the investigation carried out by the Serbian authorities themselves had not fully clarified the relevant facts, the Court is unable to conclude that the applicant was ill-

treated as alleged. There has, accordingly, been no violation of the substantive aspect of Article 3 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION

86. The applicant also complained under Article 6 §§ 1 and 3 (c) of the Convention about the lack of fairness in the criminal proceedings that had been brought against him. In particular, he complained that his conviction had been based on his confession of 18 April 2011, which had itself been obtained in breach of his right to the legal assistance of his own choosing.

87. The said provisions of the Convention, in so far as relevant, read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> ..."

A. Admissibility

88. The Government did not raise any admissibility objections. Since these complaints are neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds, they must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

89. The applicant maintained that should the Court find that his statement of 18 April 2011 had been given as a consequence of police abuse it should furthermore conclude that the whole trial against him had been unfair, irrespective of the statement's decisiveness for his ultimate conviction. In addition or in the alternative, should the Court be of the opinion that the applicant's right to legal assistance of his own choosing had been violated, that alone should likewise lead to the same conclusion, particularly bearing in mind the said statement's significance for the conviction.

90. Turning to the details of the case, the applicant contended that he had not been allowed to use the telephone in order to freely choose his counsel before giving his statement to the police on 18 April 2011. Officer T.L. himself, when heard in court, had implicitly confirmed this.

91. The legal-aid lawyer had never provided the applicant with an effective defence. Moreover, she had had no basis to act on the applicant's behalf, having never been authorised by the applicant to do so and there having been no formal decision taken on her appointment as the applicant's lawyer.

92. Furthermore, there had been no legal grounds for the search of the applicant's home. Specifically, the applicant's co-accused had been heard on 18 April 2011 but had not identified the applicant by name as having been involved in the crime in question. In the absence of any suspicion in that regard the search itself had been unlawful. While the record prepared during the search contained a remark to the effect that the applicant had been informed of his right to engage a lawyer who would be present during the search, this was immaterial because the applicant had not known at the time that he would subsequently be questioned as a suspect. In other words, waiving the right to have one's lawyer present during a search does not amount to a waiver in respect of one's right to have a lawyer of one's own choosing present during any subsequent police questioning.

93. While it was true that the applicant ultimately had contacted L.F., as his partner at the time – rather than persons who had witnessed the search and were related to his future wife – in order to engage counsel on his behalf, this too was of no consequence. What mattered was that L.F. could have and in fact had retained the services of V.J.Đ. – but unfortunately, only after the applicant had already given his statement to the police, who had denied him the opportunity to call V.J.Đ. earlier.

94. The applicant lastly maintained that any reference to his procedural choices in other, unrelated, criminal proceedings – including the selection of defence counsel – remained both unsubstantiated and irrelevant to the adjudication of the present case.

(b) The Government

95. The Government reaffirmed that the applicant's confession of 18 April 2011 had been given without any ill-treatment or coercion on the part of the police. They furthermore noted that the applicant's statement had nevertheless been temporarily excluded from the case file on the basis of alleged issues regarding the applicant's free choice of counsel. In this respect, however, the Government fully endorsed the reasoning of the Court of Appeal, explaining that the applicant had been duly advised of his procedural rights and had made his free choice thereafter, through the *de facto* acceptance of his legal-aid lawyer and despite the absence of an explicit declaration to this effect (see paragraph 28 above).

96. The applicant's arrest had, moreover, been preceded by a search of his home, which had taken place in the presence of two witnesses. On that occasion, however, the applicant had been informed of his right to engage a lawyer but had stated that he did not need one.

97. Indeed, the taking of the applicant's mobile phone in the course of the search had been standard procedure and had indicated no attempt to restrict the applicant's rights. Indeed, landline telephones could be used instead of mobile telephones by persons detained by the police in order to contact their families and/or counsel. It could be presumed that the applicant had decided not to call his family before giving his statement because of personal reasons involving the presence of his future sister-in-law at his home at that time. The subsequent testimony of officer T.L. likewise offered no substantiation for the claim that the applicant had been denied the opportunity to call a lawyer of his own choice before giving his statement to the police on 18 April 2011.

98. In fact, on this occasion the police had informed the applicant of his procedural rights in the criminal proceedings that had been brought against him. These had included, *inter alia*, the right to a lawyer of his own choice and the fact that if he could not engage such a lawyer a legal-aid lawyer would be appointed instead. The applicant had also stated that he had been in a difficult financial situation at the time. He had furthermore had a conversation with the legal-aid lawyer before giving his statement, but had decided not to remain silent and had confessed, in some detail, to the charges levelled against him. Ultimately, the applicant had signed the statement without any objections. This had had the same effect as a formal decision would have had on the appointment of R.R. as his legal-aid lawyer.

99. The Government lastly maintained that the applicant's later conduct also seemed relevant. Namely, in 2015 he had again been arrested for people smuggling and illegal border crossing but had opted for a legal-aid lawyer rather than private counsel of his own choosing. He would surely not have done so had he suffered a bad experience in this regard in 2011.

2. The Court's assessment

(a) The relevant principles

100. The Court reiterates that it is not its function to deal with errors of fact or law allegedly committed by national courts unless and in so far as they may have infringed rights protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140; *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports,* 1998-IV; and *Heglas v. the Czech Republic*, no. 5935/02, § 84, 1 March 2007). It is, therefore, not the role of the Court to determine, as a

matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question that must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found (see *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; and *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX).

101. However, particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3. The Court has held that the admission of statements obtained as a result of torture or other ill-treatment as evidence to establish the relevant facts in criminal proceedings renders the proceedings as a whole unfair. This finding applies irrespective of the probative value of the statements and irrespective of whether their use has been decisive in securing a conviction (see *Gäfgen*, cited above, § 166).

102. The Court furthermore reiterates that, even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 – especially paragraph 3 thereof – may be relevant before a case is sent for trial if and in so far as the fairness of the trial is liable to be seriously prejudiced by an initial failure to comply with its provisions. As the Court has already held in its previous judgments, the right set out in Article 6 § 3 (c) of the Convention is one element, among others, of the concept of a fair trial in criminal proceedings contained in Article 6 § 1 (see *Imbrioscia v. Switzerland*, 24 November 1993, §§ 36-37, Series A no. 275; *Salduz v. Turkey* [GC], no. 36391/02, § 50, ECHR 2008; *Dvorski v. Croatia* [GC], no. 25703/11, § 76, ECHR 2015; and *Beuze v. Belgium* [GC], no. 71409/10, § 121, 9 November 2018).

103. In order to exercise his right of defence, the accused should normally be allowed to have the effective benefit of the assistance of a lawyer from the initial stages of the proceedings because national laws may attach consequences to the attitude of an accused at the initial stages of police questioning that are decisive for the prospects of the defence in any subsequent criminal proceedings (see *Salduz*, cited above, § 52). The Court has also recognised that an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, and in most cases this can only be properly compensated for by the assistance of a lawyer, whose task is, among other things, to help to ensure that the right of an accused not to incriminate himself is respected (ibid., § 54; see also *Pavlenko v. Russia*, no. 42371/02, § 101, 1 April 2010, and *Dvorski*, cited above, § 77).

104. In such circumstances, the Court considers it important that from the initial stages of proceedings a person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing (for more detailed reasoning, see *Martin v. Estonia*, no. 35985/09, §§ 90 and 93, 30 May 2013). This follows from the very wording of Article 6 § 3 (c), which guarantees that "[e]veryone charged with a criminal offence has the following minimum rights: ... to defend himself ... through legal assistance of his own choosing ..." (see *Dvorski*, cited above, § 78).

105. Notwithstanding the importance of the relationship of confidence between a lawyer and his client, this right is not absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them (see *Croissant v. Germany*, 25 September 1992, § 29, Series A no. 237-B). The Court has consistently held that the national authorities must have regard to the defendant's wishes as to his or her choice of legal representation, but may override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (see *Dvorski*, cited above, § 79, with further references therein). Where such grounds are lacking, a restriction on the free choice of defence counsel would entail a violation of Article 6 § 1 together with paragraph 3 (c) if it adversely affected the applicant's defence, regard being had to the proceedings as a whole (ibid.).

106. Moreover, having regard to the considerations mentioned above, as the Court affirmed in its judgments in *Salduz* and *Dvorski*, Article 6 § 1 requires that, as a rule, access to a lawyer should be provided from the first questioning 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 a 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 statements made during police questioning without access to a lawyer are used for a conviction (see *Salduz*, § 55-57, and *Dvorski*, § 80 – both cited above).

107. Unlike in *Salduz*, where the accused, who was being held in custody, had been denied access to a lawyer during police questioning, the present case concerns a situation where the applicant was afforded access to a lawyer from the time that he was first questioned, but not (according to his complaint) a lawyer of his own choosing – just like in the case of *Dvorski*. In contrast to the cases involving denial of access, the more lenient requirement of "relevant and sufficient" reasons has been applied in situations raising the less serious issue of "denial of choice". In such cases

the Court's task will be to assess whether, in the light of the proceedings as a whole, the rights of the defence have been "adversely affected" to such an extent as to undermine their overall fairness (see *Dvorski*, cited above, § 81, together with further references cited therein).

108. The Court considers, as regards the latter test, that the first step should be to assess whether it has been demonstrated in the light of the particular circumstances of each case that a defendant wished to have a lawyer of his or her own and, where that wish was overridden, that there were relevant and sufficient grounds for overriding or obstructing the defendant's wish as to his or her choice of legal representation. Where no such reasons exist, the Court should proceed to evaluate the overall fairness of the criminal proceedings. It is furthermore mindful that the Convention is intended to guarantee rights that are practical and effective and not theoretical and illusory and that in determining Convention rights one must frequently look beyond appearances and concentrate on the realities of the situation (see, among many other authorities, *Dvorski*, cited above, § 82).

(b) The application of these principles to the present case

109. Turning to the present case, the Court notes that the applicant had only mentioned not being allowed by the police to use the phone, in order to retain the services of his private lawyer, in a hearing before the Court of First Instance, there being no reference to this in his first statement given to the investigating judge on 19 April 2011.

110. In this respect the Court would furthermore note that the record prepared during the search of the applicant's home contains a note to the effect that the applicant was informed of his right to engage a lawyer who would be present during the search but that he declined to do so. While a waiver of the right to have one's lawyer present during a search at a point when one has still not been formally charged with anything does not amount to an unequivocal waiver in respect of one's right to have present a lawyer of one's own choosing during any subsequent questioning by the police relating to specific charges, it may nevertheless, depending on the context, be seen as a possible indicator of one's intent in terms of choice of counsel.

111. Regarding the applicant's said questioning, officer T.L. stated that he had seen that the applicant, once he had already given his statement, call someone on the phone but that he did not know whom. This in itself, however, does not confirm the applicant's allegation to the effect that he had not been allowed to use his phone prior to his questioning on 18 April 2011.

112. On 20 July 2011 the Court of First Instance decided to exclude the applicant's confession of 18 April 2011 from the case file on the basis that the official record prepared on that occasion did not contain an explicit statement by the applicant as to whether he wanted to hire private counsel or would instead be willing to accept a State-appointed lawyer. The reasoning

of the Court of Appeal on 1 December 2011 in overturning this decision, however, was that regardless of any issues connected to the selection procedure the applicant had clearly accepted the appointment at the time, as evidenced by his cooperation with the said lawyer, his willingness to give a statement in her presence and the absence of any objections made in this regard on 18 April 2011. In this connection the Court would fully endorse the reasons offered by the Court of Appeal and would also note that the applicant himself had, in any event, not voiced, up to that point in time, his alleged wish to retain the services of a private lawyer.

113. In view of the available evidence, the Court cannot conclude that the applicant had in fact been restricted in his free choice of counsel, which then makes it unnecessary for it to address the issue of whether the fairness of the criminal proceedings as a whole was prejudiced in any way.

114. In these circumstances the Court finds that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

115. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

116. The applicant claimed compensation for the non-pecuniary damage suffered as a consequence of the alleged violations of the Convention as follows: (i) for the substantive violation of Article 3, 5,000 euros (EUR); (ii) for the procedural violation of Article 3, EUR 3,500; (iii) for the violation of Article 6 § 1, EUR 3,000; and (iv) for the violation of Article 6 § 3 (c), EUR 2,000.

117. The applicant furthermore sought the reopening of the criminal proceedings resulting in his conviction (see paragraph 47 above).

118. The applicant's lawyer, V.J.Đ, lastly stated that it was the applicant's wish that any compensation awarded to him be paid directly into his lawyer's bank account. V.J.Đ. would then transfer the funds or otherwise secure payment to the applicant personally.

119. The Government contested these claims.

120. The Court considers that the applicant has certainly suffered some non-pecuniary damage. Having regard to the nature of the procedural violation of Article 3 of the Convention, as established in the present case, and making its assessment on an equitable basis, as required by Article 41

of the Convention, the Court awards the sum of EUR 3,000 to the applicant personally.

121. It is furthermore noted, in this context, that the Court has not been provided with any form of authorisation signed by the applicant to the effect that any compensation awarded to him should instead be paid to V.J.Đ. directly. The request that the award be paid into the bank account of the applicant's lawyer must therefore be rejected (compare and contrast to, for example, *Hajnal*, cited above, § 148, and *Lakatoš*, cited above, § 118; see also the Practice Direction on Just Satisfaction Claims, § 22).

122. As regards the applicant's compensation claims under Article 6 §§ 1 and 3 (c) of the Convention, as well as his related request for the reopening of the domestic proceedings in question, and the additional compensation claim concerning the substantive aspect of Article 3, the Court must reject them all having found no violation of the Convention in this respect.

B. Costs and expenses

123. The applicant also claimed EUR 3,008 for the costs and expenses incurred domestically and EUR 730 for those incurred before the Court.

124. The applicant's lawyer, V.J.Đ, lastly stated that it was the applicant's wish that any costs and/or expenses awarded to him be paid directly to his lawyer's account. V.J.Đ. would then transfer the funds or otherwise secure payment to the applicant personally.

125. The Government contested those claims.

126. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to their quantum. In the present case, regard being had to the documents submitted by the parties and the above criteria, the Court considers it reasonable to award the sum of EUR 3,500 to the applicant personally, covering costs under all heads.

127. It is furthermore noted, in this context, that while the Court has been provided with a specification concerning the legal work done by V.J.Đ. on the applicant's case, no fee agreement between the applicant and himself has been provided. There is also no direct authorisation by the applicant in the case file to the effect that any costs and expenses awarded to him should be paid to V.J.Đ. directly. The payment request of the applicant's lawyer must therefore be rejected (compare and contrast to, for example, *Hajnal*, cited above, § 153, and *Lakatoš*, cited above, § 124; see also the Practice Direction on Just Satisfaction Claims, § 22).

C. Default interest

128. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, unanimously, that there has been a violation of the procedural aspect of Article 3 of the Convention;

3. *Holds*, unanimously, that there has been no violation of the substantive aspect of Article 3 of the Convention;

4. *Holds*, by six votes to one, that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention;

5. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of the non-pecuniary damage suffered as a consequence of a violation of the procedural aspect of Article 3 of the Convention; and
      (ii) EUR 3,500 (three thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Vincent A. De Gaetano
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Keller is annexed to this judgment.

V.D.G.
J.S.P.

PARTLY DISSENTING OPINION OF JUDGE KELLER

1. I respectfully disagree with the Court as regards the applicant's complaint about the lack of fairness in the criminal proceedings brought against him. In my view, there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention in this case.

2. As the Court explains at paragraph 10 of its judgment, the applicant's confession was preceded by a conversation with R.R., a lawyer who subsequently signed the record of his questioning. According to the applicant, R.R. was appointed by the police. This is borne out by R.R.'s own testimony before the national Court of First Instance, to which the Court refers at paragraph 23 of its judgment. R.R. also acknowledged that, although she had purported to act as the applicant's legal-aid lawyer, she had not been formally authorised to do so by the police.

3. There is nothing in the record to suggest that the applicant ever explicitly chose to accept R.R.'s assistance, as the Court of First Instance noted in the decision which the Court discusses at paragraph 27 of its judgment. Nor is there any evidence as to how this choice would have been made: the applicant does not appear, for example, to have been presented with a list of lawyers from which to select counsel.

4. Nevertheless, the national appellate courts admitted the confession into the case file. They reasoned that, while it was not done explicitly, the applicant had tacitly accepted R.R. as his lawyer. In short, they took the applicant's mute acquiescence in his questioning as circumstantial evidence of a decision to accept R.R.'s counsel. They did so despite the applicant's allegation that he had been slapped by a police officer prior to R.R.'s arrival – an allegation which the Court now unanimously recognises as credible – and his testimony that the same officer was present throughout his interaction with R.R. (see paragraph 12 of the judgment).

5. Today, the Court "fully endorse[s]" this reasoning at paragraph 113 of its judgment. In support of the conclusion reached by the national appellate courts, it appears to offer (at paragraph 111 of its judgment) an additional reason of its own: the applicant's apparent waiver of his right to have counsel present during the search of his home. However, the Court immediately (and, in my opinion, correctly) undercuts this dubious point by acknowledging that "a waiver of the right to have one's lawyer present during a search at a point when one has still not been formally charged with anything does not amount to an unequivocal waiver in respect of one's right to have present a lawyer of one's own choosing during any subsequent questioning by the police relating to specific charges".

6. I cannot join the Court in endorsing the reasoning of the national appellate courts as compatible with the demands of Article 6 §§ 1 and 3 (c). The Court, sitting as a Grand Chamber, has already explained that national authorities – and particularly national courts – are obliged under Article 6

§§ 1 and 3 (c) to carefully scrutinise allegations that the appointment of a lawyer to represent a suspect influenced or led to the making of an incriminating statement by that suspect at the outset of the criminal investigation (see *Dvorski v. Croatia* [GC], no. 25703/11, § 109, ECHR 2015). Once a credible allegation of police abuse has been made, a *careful* national court cannot possibly rely on the alleged victim's failure to object to the appointment of a lawyer in the presence of the alleged abuser unless it first investigates and dismisses that allegation. An investigation of this kind would be necessary even in the absence of a complaint involving Article 3 of the Convention, such as that in the present case (see, *mutatis mutandis* and among other authorities, *Mehmet Duman v. Turkey*, no. 38740/09, § 42, 23 October 2018).

7. No such investigation was undertaken here, as the Court concludes at paragraph 66 of its judgment. That the applicant was nevertheless held by the national appellate courts to have accepted R.R. as his lawyer in the absence of any direct evidence to that effect reflects an absence of the careful scrutiny called for in *Dvorski*.

8. The approach adopted by the national appellate courts and now endorsed by the Court renders the protection afforded by the Convention to those suspected of crime "theoretical or illusory" rather than "practical and effective" (contrast *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37). Of course, individuals may make implicit decisions as to their legal representation and in such cases the national authorities must rely on circumstantial evidence, including their conduct, to discern those decisions. As the Court very recently reiterated, this is true even of decisions to waive rights secured by Article 6 (see *Akdağ v. Turkey*, no. 75460/10, § 46, 17 September 2019, not yet final). However, to do so incautiously, on the basis of evidence as equivocal as the evidence in this case and in the face of a credible allegation which calls into question the voluntary nature of the applicant's conduct (contrast *Akdağ*, cited above, §§ 46, 50-61), creates a grim possibility that rights secured by the Convention will be disregarded when individuals fall silent out of fear.

9. I have accordingly voted against the Court's finding as to Article 6 §§ 1 and 3 (c) of the Convention.