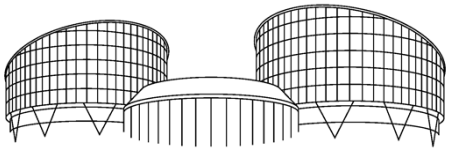

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF LALIK v. POLAND

(Application no. 47834/19)

JUDGMENT

Art 6 § 3 (c) • Informal questioning of intoxicated applicant after arrest, without a lawyer and without sufficiently apprising him of his defence rights • Applicant's statements noted in official note by a questioning officer and not in a formal record as per domestic law • Reliance by domestic courts on statements made at that stage in findings of guilt • Existing procedural guarantees insufficient in case circumstances • Criminal proceedings as a whole not considered as fair

STRASBOURG

11 May 2023

FINAL

11/08/2023

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Lalik v. Poland,

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

Marko Bošnjak*, President*,
Krzysztof Wojtyczek,
Alena Poláčková,
Ivana Jelić,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato*, judges*,
and Liv Tigerstedt, *Deputy Section Registrar,*

Having regard to:

the application (no. 47834/19) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Przemysław Lalik ("the applicant"), on 28 August 2019;

the decision to give notice to the Polish Government ("the Government") of the complaint concerning lack of possibility to consult a lawyer in the earliest stages of the investigation and the domestic courts' reliance on his incriminating statements from the informal questioning, detrimental to his defence, given without the presence of his lawyer;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the Helsinki Foundation for Human Rights and Fair Trials, who were granted leave to intervene by the President of the Section;

the decision to reject the unilateral declaration presented by the Government;

Having deliberated in private on 11 April 2023,

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

INTRODUCTION

1. The applicant complained under Article 6 § 3 (c) of the Convention that his conviction for murder committed with particular cruelty (*zabójstwo ze szczególnym okrucieństwem*) had been largely based on his informal statements, which had been taken without ensuring basic procedural guarantees for his defence. He submitted that the police officers who had informally questioned him after his arrest had not informed him of his rights, nor had they offered him the possibility to consult a lawyer.

THE FACTS

2. The applicant was born in 1995 and is currently serving a prison sentence at Zamość Prison. He was represented by Mr A. Adamczuk, a lawyer practising in Zamość.

3. The Government were represented by their Agent, Mr J. Sobczak, of the Ministry of Foreign Affairs.

4. The facts of the case may be summarised as follows.

I. EVENTS LEADING TO THE DEATH OF T.B. AND THE APPLICANT'S ARREST

5. In the early evening of 26 January 2016 T.B. and M.D. were consuming alcohol close to T.B.'s flat. In the evening M.D. decided to walk T.B. home, as T.B. was heavily intoxicated. On their way home the two men encountered the applicant, who also appeared to be under the influence of alcohol. The applicant offered to buy them beer, which the three drank together. The applicant then bought three more beers and at approximately 8.20 p.m. M.D. left for home, leaving T.B. alone with the applicant.

6. Following M.D.'s departure, the applicant and T.B. entered the building in which the applicant's flat was located and went to the basement. Having finished his beer T.B. collapsed to the floor and lost consciousness. The applicant tried to lift him up but was unable to do so. He then allegedly went through T.B.'s pockets in an unsuccessful attempt to recover a debt (an allegation made by the prosecution, which the applicant denied during his trial). He then set fire to T.B.'s winter jacket with a lighter, exited the basement and went home. He later stated that he had heard T.B. moaning and had thought that T.B. had extinguished the flames and might have started looking for the applicant to retaliate.

7. The smoke coming out of the basement alerted the block's inhabitants, who called the fire brigade but who managed to put out the fire before the arrival of the firefighters. Paramedics were also called to the scene and determined that T.B. had died.

8. T.B. sustained severe burns to sixty per cent of his body and upper respiratory ducts. The autopsy revealed that he had 3.79 per mille of alcohol in his blood.

9. At 11.20 p.m. the applicant was arrested by two police officers, who took him to the police station. A breathalyser test performed at 11.39 p.m. showed that he had approximately 0.65 mg/l of alcohol (1.3 per mille) in his system. The applicant submitted that shortly after midnight on 27 January 2016 he had been questioned by police officers. He did not remember what he had said or signed, or whether he had been informed of his rights at that time. The domestic courts later established that the applicant had not been questioned immediately after his arrest (see paragraph 20 below).

10. According to the Government, on 27 January 2016 at 12.20 a.m. the applicant's arrest record (*protokół zatrzymania*) was drawn up and served on him; at the same time he was informed (by means of another document) of the rights of an arrestee in criminal proceedings (*pouczenie o uprawnieniach zatrzymanego w postępowaniu karnym*), including on the right not to give "statements" (*oświadczenia*) and the right to contact a lawyer. A copy of neither document has been provided by the Government, and their exact content is unknown.

11. At 10.55 a.m. on the same day the applicant was informally questioned (*rozpytanie*) by three police officers (P.R., J.P. and A.M.). It appears that the level of his intoxication was not checked beforehand. No record of the questioning (*protokół przesłuchania*) was drawn up, but P.R. made an official note (*notatka urzędowa*), summarising what the applicant had said. The applicant submitted that he had not been informed of his right "not to give explanations" (*do odmowy składania wyjaśnień*) or his right to have a lawyer present during his questioning. This informal questioning lasted until 1.40 p.m. – that is, for almost three hours. According to the official note prepared by P.R. the applicant stated that he had been in conflict with T.B. due to the fact that T.B. had owed him money. He confirmed that he had set T.B. on fire and could not explain why he had done that. According to the official note, the applicant further said that he had wanted to see if he was capable of such an act. The official note was signed only by P.R. and was added to the case file.

12. Later that day, at 2.40 p.m., P.R. was formally questioned as a witness by the Zamość District Prosecutor (*Prokurator Rejonowy*) and testified that the applicant had voluntarily spoken to the officers, had not been subjected to any form of coercion and that such informal questioning was a routine activity in cases of that type.

13. According to an official note drafted by a different police officer and supplied by the Government, the applicant was able to consult a lawyer (appointed by his father) on 27 January 2016 between 2.55 p.m. and 3.05 p.m. A police officer was present when the consultation took place.

14. On 28 January 2016 at 12.31 p.m. the applicant was brought before the Zamość District Prosecutor and charged with the murder of T.B. with particular cruelty. He was informed of his rights and of the fact that his defence lawyer (*obrońca*) had failed to arrive on time. Having consented to being questioned as a suspect without the presence of his defence lawyer, the applicant began the interview by pleading guilty to the charge "in its entirety". He stated that T.B. had owed him money, which he had tried to recover by searching T.B.'s pockets. He could not explain why he had set T.B. on fire, but stated that as he had been leaving the basement, the flames had reached ten to fifteen centimetres high and T.B. had been moaning. The applicant could not explain why he had left the basement.

15. At 12.40 p.m. the applicant's defence lawyer entered the room and the questioning was halted for nine minutes, during which time the applicant consulted his defence lawyer. Following its resumption, the prosecutor read out the explanations given by the applicant thus far. The applicant stated that he wished to rectify what he had said and stated that he had not intended to kill T.B. and did not know why he had set him on fire. He also stated that he had not started the fire because of the fact that T.B. owed money to the applicant. He then refused to give any further explanations.

16. The next day the Zamość District Court (*Sąd Rejonowy*) detained the applicant on remand. During the hearing, the applicant retracted his explanations and stated that he had become afraid of the officers who had questioned him and so had continued to present the same version of events before the prosecutor.

17. During the subsequent investigation the applicant pleaded "not guilty" and refused to give any explanations. The prosecution collected other evidence – namely, witness statements, the investigators' findings, the physical evidence collected at the scene of the crime and the results of the medical and psychiatric assessments (including of the applicant).

II. THE APPLICANT'S CRIMINAL TRIAL

18. During the trial the applicant admitted to having set T.B. on fire but explained that he had never intended to kill him. He explained that in August 2015 he had "pranked" T.B. in a similar manner (by setting fire to a piece of his clothing) but that T.B. had allegedly held no grudge against him. The applicant further stated that he had told the officers about the debt T.B. owed him because he thought it would make him look better. He asserted that he had had good relations with the victim.

19. At a hearing of 19 September 2016, a police officer (J.P.) who had informally questioned the applicant on 27 January 2016 (see paragraph 11 above) testified as a witness. He stated that the informal questioning had taken the form of a conversation during which the applicant had freely and in detail described the incident in question. J.P. testified that since the questioning had been informal, the applicant had not been given any documents to sign. P.R. had also been questioned on that day, shown the contents of the official note of his questioning and confirmed the accuracy of what was written therein (ibid.). A.M. stated that he did not remember whether the applicant had been asked questions or whether he had spoken in a manner that had been "spontaneous".

20. On 27 March 2017 the Zamość Regional Court (*Sąd Okręgowy*) convicted the applicant of murder committed with particular cruelty and sentenced him to twenty-five years' imprisonment. It explained that there was no evidence to prove that the applicant had been questioned immediately after his arrest, while he had been intoxicated. It noted the fact that he had been

informally questioned for almost three hours on the morning after the incident (see paragraph 11 above). In the judgment's written reasoning the court explicitly deemed the initial explanations given by the applicant to be particularly credible, since the applicant had had no chance to think about his line of defence at that time and thus must have been honest. The court also found that the applicant had killed T.B. because the latter had failed to pay his debt, which had also been the motive of the applicant's action in August 2015 (see paragraph 18 above). The court deemed the financial motive of his crime to be an aggravating factor. The court held that the applicant had been hostile towards T.B. and had intentionally killed him in such a manner as to inflict a maximum level of suffering. Those findings were based on what the applicant had said during his informal questioning, carried out by P.R., J.P. and A.M., to which the court explicitly referred.

21. The applicant's defence lawyer appealed against the judgment of 27 March 2017. He argued, in particular, that the Regional Court had breached Article 174 of the Code of Criminal Procedure (*kodeks postępowania karnego*) by reaching factual findings that had been based on the testimony (*zeznania*) of police officers who had informally questioned the applicant after the incident. He also argued that the court had breached Article 7 of that Code by refusing to consider the applicant's explanations credible, in so far as they contradicted the testimony of the police officers. He submitted that the applicant should have been convicted of causing grievous bodily harm leading to death (Article 156 § 3 of the Criminal Code (*kodeks karny*)), which at the time of its commission had carried a penalty of up to twelve years' imprisonment. The lawyer argued that the applicant had not intended to kill T.B. and that the evidence suggested that, at most, he should have realised that he could cause severe injuries by setting T.B.'s clothing on fire.

22. On 16 August 2017 the Lublin Court of Appeal (*Sąd Apelacyjny*) upheld the first-instance judgment. The court held, referring to the jurisprudence of the Supreme Court (*Sąd Najwyższy* – see paragraphs 35-36 below), that there was no prohibition on interrogating a police officer about what an accused had said during informal questioning. It further held that had the applicant been formally questioned and his explanations been replaced by the testimony of an interrogating police officer, it would have rendered the latter testimony inadmissible. No such exclusionary rule applied to testimony given by police officers who had engaged in activities at the scene of the crime and who might recall words spontaneously uttered by a person subjected to so-called "informal questioning", even if such a person were later to be charged with a crime.

23. On 23 May 2019 the Supreme Court dismissed a cassation appeal lodged by the applicant as manifestly ill-founded. No reasoning was provided. The decision was served on the applicant on 25 June 2019.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Domestic law

1. Constitution of Poland

24. The relevant provision of the Polish Constitution reads as follows:

Article 42

"...

2. Anyone against whom criminal proceedings have been brought shall have the right of defence at all stages of such proceedings. He may, in particular, choose a defence lawyer (*obrońca*) or avail himself - in accordance with principles specified by statute - of a defence lawyer appointed by a court.

3. Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court."

2. Code of Criminal Procedure

25. The relevant provisions of the Code of Criminal Procedure ("CCP"), as in force at the relevant time, provided as follows:

Article 6

"The accused shall have the right of defence, including the right to be assisted by a defence lawyer, of which he shall be informed."

Article 7

"Bodies conducting the proceedings form their conviction on the basis of all the evidence examined, evaluated freely taking into account the principles of sound reasoning and the indications of knowledge and life experience."

Article 16

"§ 1. If the authority conducting the proceedings is under an obligation to advise the parties of their rights and duties, and fails to do so or does not instruct them properly, this shall not result in any adverse consequences during the course of the trial to the participant of the proceedings or other persons concerned.

§ 2. In addition, the authority conducting the proceedings shall, if necessary, inform the parties to the proceedings of their rights and duties, even in cases when this is not explicitly stipulated by law. If the authority fails to provide such advice, and in light of the circumstances this was deemed indispensable, or if the authority does not instruct properly the parties, the provisions of § 1 shall be applied accordingly."

Article 71

"§ 1. A person on whom a decision on the presentation of charges has been issued, or who, without such a decision having been issued, is charged in connection with being questioned as a suspect, shall be considered a suspect (*podejrzany*).

§ 2. A person against whom a bill of indictment has been brought before a court, as well as a person in respect of whom a public prosecutor has submitted a motion referred to in Article 335 § 1 or a motion for conditional discontinuance of proceedings, shall be deemed to be an accused (*oskarżony*).

§ 3. Where this Code uses the term "accused" in a general sense, the relevant provisions shall also apply to a suspect."

Article 78

"§ 1. A suspect who does not have a defence lawyer of choice may request that a defence lawyer be appointed for him if he duly demonstrates that he is unable to bear the costs of his defence without prejudice to the necessary support of himself and his family."

Article 80

"The accused must have a defence lawyer in the proceedings before a regional court if he is charged with a felony (*zbrodnia*). In this case, the participation of the defence lawyer in the main hearing is mandatory."

Article 143

"§ 1. Record shall be taken of:

...

2) questioning of the accused, witness, expert and probation officer;

...

§ 2. A record is taken of other actions if a specific provision requires it or if the person carrying out the action deems it necessary. In other cases, it may be limited to drawing up an official note."

Article 148

"§ 1. The record should include:

1) designation of the activity, its time and place as well as names of persons participating in it;

2) the course of the activity as well as the statements and motions of its participants;

3) decisions and orders issued in the course of the activity, and if a decision or order was drawn up separately, a note of its issue;

4) if necessary, a statement on other circumstances concerning the course of the activity.

§ 2. Explanations, testimony, statements and conclusions as well as statements of specified circumstances by the authority conducting the proceedings shall be included in the record as accurately as possible. Persons participating in the activity have the

right to demand that everything that concerns their rights or interests is recorded in the record with full accuracy.

§ 3. The record of the content of testimony or explanations in the record shall not be replaced by reference to other records.

§ 4. Persons participating in the proceedings have the right to demand that excerpts of their statements included in the record be read out."

Article 150

"§ 1. With the exception of the record of a hearing or session, the record shall be signed by the persons taking part in the activity. Before signing, the record shall be read out and a note shall be made to that effect.

§ 2. A person participating in the activity may, when signing the record, at the same time raise objections as to its content; such objections should be included in the record along with a statement from the person taking the recorded activity."

Article 174

"The contents of documents and notes shall not be substituted as evidence for the explanations of the accused or for the testimony of witnesses."

Article 175

"§ 1. The accused has the right to give explanations; however, he may, without giving reasons, refuse to answer individual questions or refuse to give explanations. He shall be advised of this right.

§ 2. The accused who is present at the taking of evidence shall have the right to give explanations on any evidence."

Article 244

"...

§ 2. An arrested person should immediately be informed of the reasons for the arrest and of his rights, including the right to have the assistance of an advocate (*adwokat*) or attorney-at-law (*radca prawny*), to have the free assistance of an interpreter if he does not speak Polish sufficiently, to make a statement and to refuse to make a statement, to receive a copy of the record of the arrest, to have access to first aid medical treatment and of the rights set forth in Article 245, Article 246 § 1 and Article 612 § 2 as well as the provisions of Article 248 §§ 1 and 2, and should be heard.

§ 3. A record of the arrest shall be drawn up, in which the name, surname and function of the person carrying out this act, the name and surname of the arrested person and, if his or her identity cannot be established, his or her description, as well as the day, time, place and reason for the arrest, stating what offence he or she is suspected of having committed, shall be stated. The statements made by the arrested person should also be included in the record and the information about his or her rights should be noted. A copy of the record shall be delivered to the arrested person.

§ 4. Immediately upon the apprehension of a suspect, the necessary data shall be collected, and the public prosecutor shall be notified of the apprehension. If there are grounds referred to in Article 258 §§ 1-3, a request shall be made to the public prosecutor to submit a motion to a court for detention on remand."

Article 245

"An arrested person shall, upon request, be promptly allowed to make contact with a defence lawyer in an accessible form and to speak with them directly; in exceptional cases justified by particular circumstances, the arresting person may stipulate that he or she shall be present."

Article 300

"§ 1. Prior to the first interrogation, the suspect should be instructed of his rights: to give explanations, to refuse to give explanations or to refuse to answer questions, to be informed about the content of the charges and any changes thereto, to submit a motion to carry out investigative activities, to be assisted by a defence lawyer, including the right to apply for appointment of a defence lawyer in the case specified in Article 78 and about the content of Article 338b, to be finally familiarised with the materials of the preparatory proceedings, as well as with the rights set forth in Articles 23a § 1, 72 § 1, 156 §§ 5 and 5a, 301, 335, 338a and 387 and with the obligations and consequences set forth in Articles 74, 75, 133 § 2, 138 and 139. The instructions shall be delivered to the suspect in writing; the suspect shall confirm the receipt of the instructions by signing them."

Article 301

"The suspect shall be heard, upon request, with the participation of the defence lawyer appointed. Failure of the defence lawyer to appear shall not prevent questioning."

Article 393

"§ 1. Protocols of inspection, search and seizure of property, opinions of experts, institutes, establishments or institutions, criminal record data, results of the community interview and any official documents filed in preparatory or judicial proceedings or other proceedings provided for by law may be read out at the hearing. However, it is not permissible to read out notes on activities for which drafting of a record is required."

Article 540

"§ 3. The proceedings shall be reopened for the benefit of the accused when such a need results from a decision (*rozstrzygnięcie*) of an international body acting on the basis of an international agreement ratified by the Republic of Poland."

3. Criminal Code

26. The relevant provisions of the Criminal Code, as in force at the time, provided:

Article 148

"§ 1. Whoever kills a human being, shall be subject to the penalty of deprivation of liberty for a term not shorter than 8 years, the penalty of 25 years' imprisonment or the penalty of life imprisonment.

§ 2. Whoever kills a human being:

1) with particular cruelty,

2) in connection with taking a hostage, rape or robbery,

3) as a result of motivation deserving particular condemnation,

4) with the use of explosives,

shall be subject to the penalty of deprivation of liberty for a term not shorter than 12 years, the penalty of 25 years' imprisonment or the penalty of life imprisonment."

Article 156

"§ 1. Whoever causes grievous bodily harm in the form of:

1) depriving a person of sight, hearing, speech, ability to procreate,

2) other serious disability, serious incurable or long-term illness, life-threatening disease, permanent mental illness, total or significant permanent disability to work in an occupation or permanent, significant mutilation or disfigurement of the body,

shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.

§ 2. If the perpetrator acts unintentionally, shall be subject to the penalty of the deprivation of liberty for up to 3 years.

§ 3. If the consequence of the act specified in § 1 is the death of a human being, the perpetrator shall be subject to the penalty of the deprivation of liberty for a term of between 2 and 12 years."

4. *Ordinance of the Minister of Justice on the manner of ensuring to an accused the assistance of a defence lawyer appointed* proprio motu

27. The Ordinance of the Minister of Justice of 27 May 2015 on the manner of ensuring to an accused the assistance of a defence lawyer appointed *proprio motu* (*Rozporządzenie Ministra Sprawiedliwości z dnia 27 maja 2015r. w sprawie sposobu zapewnienia oskarżonemu korzystania z pomocy obrońcy z urzędu*, "the Ordinance") provided as follows:

Paragraph 11

"(1). A request for the appointment of a defence lawyer submitted by a suspect shall be promptly forwarded by the investigating authority to the court having jurisdiction over the case, together with documents submitted by the suspect to show that he is unable to bear the costs of defence without prejudice to the necessary support of himself and his family.

(2). When transmitting to the court having jurisdiction over the case the motion and the documents referred to in section 1, the investigating authority shall enclose the case file or copies from the case file necessary for the examination of the motion for the appointment of a defence lawyer, in particular enabling the determination of the case reference number, personal data of the suspect and data concerning his family and financial situation.

(3). If the circumstances indicate the necessity for immediate defence, the investigating authority shall:

1) transmit the request and the documents referred to in section 1, together with the copies from the case file referred to in section 2, to the court competent to hear the case

by fax immediately after the request for the appointment of a defence lawyer is submitted;

2) notify, in the manner indicated in Article 137 of the CCP, the court competent to perform in preparatory proceedings the action requiring immediate commencement of defence on submission by the suspect of a motion for appointment of a defence lawyer and on transmission of the motion to the court competent to hear the case, and shall indicate the date of these actions and the name of the court."

Paragraph 13

"If a suspect who has submitted an application for the appointment of a defence lawyer has not duly demonstrated that he is unable to bear the costs of defence without jeopardising the necessary livelihood of himself and his family, the President of the court or a referendary shall promptly set an appropriate time limit for him to supplement the application."

B. Domestic practice

1. Execution of the Court's judgment in Płonka v. Poland (no. 20310/02)

28. On 31 March 2009 the Court delivered its judgment in the case of *Płonka v. Poland* (no. 20310/02, 31 March 2009) and held that there has been a violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c) owing to the applicant's lack of access to a lawyer during her questioning by the police. That judgment became final on 30 June 2009.

29. On 3 November 2015 the Polish Government submitted an action report to the Committee of Ministers concerning the execution of that judgment. With respect to the general measures taken, the Government explained that Articles 300 and 301 of the CCP have been significantly amended, in order to ensure that suspects obtain comprehensive and easily accessible instructions on their rights. Furthermore, referring to the Ordinance, the Government indicated that details of the procedure for appointment of a defence lawyer *proprio motu* had been set out therein.

30. In its resolution CM/ResDH(2015)235, adopted on 9 December 2015 the Committee of Ministers satisfied itself that all the measures required under Article 46 § 1 of the Convention have been adopted, declared that the respondent State had exercised its functions under Article 46 § 2 of the Convention and closed the examination of the case.

2. The [Polish] Commissioner for Human Rights

31. On 18 April 2017[1] and 27 September 2018[2] the [Polish] Commissioner for Human Rights (*Rzecznik Praw Obywatelskich*) requested the Minister of Justice to consider making a proposal of legislative amendments in order to ensure more effective access to a lawyer after one's arrest and thus minimise the risk of ill-treatment in police custody. He indicated that the guarantees in force at that time were illusory and in light of lack of other procedural safeguards (such as video recording of the questioning) increased the risk of torture and inhuman treatment. In this regard, the Commissioner referred to several pending or concluded criminal proceedings in which police officers were charged with abusing suspects during the informal questioning.

32. The Commissioner also contested the effectiveness of transposition of the Directive 2013/48/EU (see paragraph 40 below) into the Polish legal order and expressed his concern over the ineffectiveness of protection offered by the CCP provisions in force at that time.

33. On 25 October 2021[3] the Minister of Justice replied that it would be unfeasible to provide every arrestee with access to a lawyer and, considering the time required for appointment of a lawyer, it would inevitably lead to extension of duration of an arrest. In the Minister's view such a solution would prevent police from being able to talk to the arrestee and/or perform procedural activities with his or her participation. The Minister concluded that the law in force had offered sufficient procedural guarantees to arrestees in early stages of the proceedings and refused to consider introducing a proposal of legislative amendments.

3. Case-law of the Constitutional Court

34. The Constitutional Court in its judgment of 11 December 2012 (case no. K 37/11) held that:

> "The rights of the defence thus apply to everyone from the moment that criminal proceedings are instituted against them. The [Constitutional] Court emphasised that "in practice" that moment is the moment of bringing charges, i.e. the moment when there is already a justified suspicion that an offence has been committed. The [Constitutional] Court, taking into account the jurisprudence of the Supreme Court, assumes that the right to defence referred to in Article 42(2) of the Constitution also refers to that phase of proceedings which precedes the formal bringing of charges against a person. The [Constitutional] Court shares the view of the Supreme Court that "it is not the formal

[1] https://bip.brpo.gov.pl/sites/default/files/Wystapienie%20generalne%20-%20obronca%20od%20poczatku%20zatrzymania.pdf, accessed 10 May 2022.
[2] https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Ministra%20Sprawiedliwo%C5%9Bci%20ws.%20zapewnienia%20dost%C4%99pu%20do%20obro%C5%84cy%20ju%C5%BC%20od%20chwili%20zatrzymania%20.pdf, accessed 10 May 2022.
[3] https://bip.brpo.gov.pl/sites/default/files/2021-10/Odpowiedz_MS_25.10.2021.pdf, accessed 10 May 2022.

raising of a charge of committing an offence, but already the first action of the procedural authorities aimed at prosecuting a given person that makes that person a subject of the right to defence".

4. Case-law of the Supreme Court

35. In its ruling of 1 September 2003 (case no. V KK 12/03) the Supreme Court held:

"It follows from the wording of Article 186(1) of the Code of Criminal Procedure that the prohibition covers only the content of "previously given testimony" and the possibility to make factual findings on its basis. However, this provision does not prohibit the reproduction of statements of a person entitled to refuse to testify made outside the record of examination as a witness - e.g. during arrest by a police officer in the form of a spontaneous statement."

36. On 4 May 2016 the Supreme Court delivered a ruling (case no. III KK 334/15) concerning the character and use of official notes. It held the following:

"There is no doubt that in the light of Article 174 of the CCP, an official note prepared during an informal questioning cannot replace evidence from explanations of the accused or testimony of a witness. Neither can findings of fact contradictory to the accused's explanations or to testimony of a witness be made on the basis of the contents of an official note, as this would amount to substituting the contents of the note for this type of evidence. On the other hand, there is no prohibition of questioning as a witness the police officer who conducted the informal questioning and drew up the official note. Substitution of explanations of the accused or testimony of a witness would take place in the case of questioning of an officer who conducts a formal interrogation about the content of explanations or testimony given during such an interrogation. Conversely, officers' reports on the course of their activities at the scene of the crime, which include spontaneous statements of the person subjected to the so-called informal questioning, do not have such character."

37. In a ruling of 10 September 2020 (case no. IV KK 150/19) the Supreme Court held:

"The reconstruction (in any form, i.e. either through questioning of officers as witnesses or through disclosure of documents containing statements of the later accused) of statements made to police officers prior to questioning a person as a suspect or pursuant to the procedure provided for in Article 308 § 2, last sentence, of the CCP would be possible only if they had contact with the later suspect in connection with extra-procedural official activities and the information was provided to them in a spontaneous manner. Then, however, if the information about the alleged act was obtained at the inspiration of police officers and for the purpose of possible criminal proceedings, the use of statements of a later suspect recorded in a form other than the record of the interrogation constitutes a circumvention of Article 174 of the CCP."

38. On 21 March 2021 the Supreme Court delivered a ruling (case no. IV KK 683/19) concerning the use of information acquired during an informal questioning. It held the following:

"The conduct of the so-called informal questioning may be recorded in the form of an official note (Article 143 § 2 of the CCP). The conduct of such an interview may not,

however, replace the evidence from the accused's explanations and from witness testimony (Article 174 of the CCP). The act of informally questioning a person, who in the future may become a suspect, does not violate Article 74 § 1 of the CCP, as there is no legal obligation for this person to provide, in response to questions from law enforcement officers, information concerning circumstances connected with the act to which the questioning relates. The act of informal questioning does not violate Article 175 § 1 of the CCP either, since the right to remain silent provided for therein is vested in a person who has been charged with a crime. However, another issue ... is the possibility of subsequent evidential use of information obtained in the course of such informal questioning. In view of the wording of Article 174 of the CCP, there is no doubt that an official note prepared during an informal questioning cannot replace evidence from an accused's explanations or testimony of witnesses. Therefore, it is not subject to disclosure during the trial (Article 393 § 1, second sentence of the CCP). On the basis of the content of the official note it is also not allowed to make factual findings contradictory to the explanations of the accused or testimony of a witness, as this would be substitution of this evidence with the content of the note. On the other hand, there are no normative obstacles to questioning a police officer, who drew up the note, as a witness and to use his testimony as evidence alongside the explanations of the accused or the testimony of a witness to confirm and supplement the original testimony or explanation, provided that it does not contradict this evidence."

5. First President of the Supreme Court

39. In her 2017 report entitled "Comments on Detected Irregularities and Loopholes in Law" (*Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie*), the First President of the Supreme Court (*Pierwszy Prezes Sądu Najwyższego*) stated:

"Reservations are raised by the lack of precise regulation of the possibility for a suspect to consult a lawyer before the first interrogation within the institution of presenting charges. It seems that the obligation resulting from Article 313 § 1 of the Code of Criminal Procedure, of the procedural authority to question the suspect without delay after the announcement of the decision on the presentation of charges, combined with the absence of a provision that the suspect must be allowed to consult with his defence lawyer prior to questioning, appears to infringe the right to access to a lawyer 'before questioning', which is precisely defined in Article 3(2)(a) of the Directive [2013/48/EU]. The provision of Article 301 of the Code of Criminal Procedure does provide for the right of the suspect to be questioned with the participation of a defence lawyer, but only of such already "appointed" in the case. Nor does it refer to the suspect being able to consult with his defence lawyer prior to questioning... Irrespective of the requirements of the Directive, the doctrine has long drawn attention to the incorrect regulation in Article 301 of the Code of Criminal Procedure of the issue of access to a lawyer in connection with the first interrogation."

II. RELEVANT INTERNATIONAL LAW MATERIAL

The European Union

40. 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 (the "Directive"), where relevant, reads:

Article 3

"1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.

2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:

a) before they are questioned by the police or by another law enforcement or judicial authority;

b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;

c) without undue delay after deprivation of liberty;

d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

3. The right of access to a lawyer shall entail the following:

a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;

b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;

...

4. Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons.

Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to effectively exercise their right of access to a lawyer, unless they have waived that right in accordance with Article 9.

...

6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:

a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings...”

THE LAW

I. PRELIMINARY REMARK

41. The Government informed the Court, by a letter of 28 September 2021, that they proposed to make a unilateral declaration with a view to resolving the issue raised by the applicant. They requested the Court to strike out the application, in accordance with Article 37 of the Convention.

42. On 18 January 2022 the Court (Chamber of the First Section) examined the declaration in the light of the principles emerging from its case-law (see, in particular, *Tahsin Acar v. Turkey*, [GC], no. 26307/95, §§ 75-77, ECHR 2003-VI) and rejected the Government’s request to strike the application out of its list. It considered that the respect for human rights required not only the acknowledgement of a violation and the payment of compensation but also an undertaking by the respondent State to take the appropriate general measures.

II. ALLEGED VIOLATION OF ARTICLE 6 § 3 (C) OF THE CONVENTION

43. The applicant complained that his conviction had been largely based on his informal statements, taken without ensuring basic procedural guarantees for his defence, without testing his intoxication level prior to his informal questioning and without him having been informed of his rights, including to the presence of a lawyer, as provided in Article 6 § 3 (c) of the Convention, which reads:

“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

44. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

45. The applicant submitted that his informal questioning had lacked any procedural guarantees. In particular, the level of his sobriety had not been tested before that questioning had taken place and that its exact time had not been recorded. The applicant further alleged that he had not been aware of his right to refuse to answer specific questions or to remain silent. The officers who had questioned him had made official notes of his statements, even though nothing had prevented them from preparing a formal record that would have to be signed by all participants in the questioning. According to the applicant, the drafting of an official note offered no such possibility, allowing the questioning party to reformulate his statements. He further alleged that his conviction for murder committed with particular cruelty had been based on explanations given by him without the presence of his lawyer.

(b) The Government

46. The Government submitted that Article 6 § 3 (c) of the Convention did not specify the manner of exercising the right of access to a lawyer or the content of that right. They further argued that appointing a lawyer did not – in and of itself – ensure the effectiveness of the assistance that a lawyer might afford the accused. They acknowledged that suspects had to be able to enter into contact with a lawyer from the time when they were taken into custody, prior to an interview (see *Brusco v. France*, no. 1466/07, § 54, 14 October 2010, and *A.T. v. Luxembourg*, no. 30460/13, §§ 86-89, 9 April 2015). In that regard, they indicated that the applicant's father had appointed a lawyer for his son and that the applicant had been able to consult him on 27 January 2016.

47. The Government further observed that the domestic authorities conducting the criminal proceedings had relied as a whole on the evidence gathered in the proceedings when reaching their findings. They submitted that because the Supreme Court had dismissed the applicant's cassation appeal as manifestly ill-founded, the alleged irregularities had had no impact on the further conduct of the evidentiary proceedings and the courts' findings.

2. The third-party interveners

(a) Helsinki Foundation for Human Rights

48. The Helsinki Foundation for Human Rights ("the Foundation") submitted that the legislative framework regulating access to a defence lawyer in police custody was affected by serious shortcomings that undermined the effective exercise of that right. The Foundation indicated that

instructions for arrestees and suspects were worded in a complicated manner that impeded their effective understanding and disregarded the situational stress caused by the arrest. Moreover, in the intervener's view, the practice of domestic authorities was such that an arrestee's or suspect's failure to explicitly indicate their wish to receive the assistance of a lawyer was considered an implied waiver of that right.

49. The Foundation further submitted that police officers were unwilling to help an arrestee find a lawyer, especially when taking that arrestee into custody. Police stations had no rotas of lawyers available; hence arrestees who did not have a lawyer already appointed had in practice nobody on whom to call. The lack of precise legislation in this regard prevented arrestees who were not in possession of their lawyers' contact details from being effectively assisted. The Foundation also stated that the practice of conducting informal questioning was widespread among police officers and that, even though official notes could not be used in court to replace recorded testimony, police officers usually testified as witnesses in respect of what an accused had said during his informal questioning. Moreover, the official note taken by the police was always included in the case file and accessible to a judge, even if its author had not been called to testify.

50. Lastly, the Foundation provided extensive submissions contesting the effectiveness of the implementation of the Directive. In particular, the intervener – referring to various domestic and international sources (see paragraph 39 above) – argued that the domestic legislation did not ensure an effective and practical right of access to a lawyer immediately after one's arrest – or, in any event, without undue delay before questioning by the police, as required by Article 3 § 2 (a) of the Directive.

(b) Fair Trials

51. Referring to the practice of informal questioning, Fair Trials, a non-governmental organisation (NGO), submitted that such a method was aimed at bypassing the protection offered by Article 6 § 3 (c) of the Convention by creating a separate category of questioning that was not subject to safeguards ensuring the right to a fair trial. It further stated that according to the Court's well-established case law, any conversation between a detained criminal suspect and the police must be treated as formal contact and cannot be characterised as informal questioning or an informal interview (see *Ayetullah Ay v. Turkey*, nos. 29084/07 and 1191/08, § 137, 27 October 2020).

52. The intervener indicated that the questioning of a suspect without the presence of a lawyer could offer multiple direct and indirect advantages for the prosecution's case, even where the statements made by the suspect were not recorded or were formally excluded from the criminal case file. The content of statements obtained unlawfully, even where they were formally challenged and excluded from the evidence, was physically available to trial judges and would likely influence their decision making.

53. Fair Trials lastly submitted that under the overall "fairness test" (see *Beuze v. Belgium* [GC], no. 71409/10, § 150, 9 November 2018), a robust and detailed examination of the legal framework and domestic practice governing the admissibility and the exclusion of evidence was necessary. Where an exclusionary rule was applied, the Court should not consider it "unlikely that the proceedings as a whole" had been unfair (ibid.) before carrying out an in-depth analysis of the application of the exclusionary rule in practice.

3. The Court's assessment

(a) General principles

54. The general principles concerning the right to notification of the right to remain silent, the privilege against self-incrimination and the right of access to a lawyer, its starting point, aims pursued and the content of that right were summarised in the Court's judgment in *Beuze* (cited above, §§ 123-36).

55. The privilege against self-incrimination and the right to remain silent are generally recognised international standards that lie at the heart of a fair procedure. Their aim is to provide an accused person with protection against improper compulsion by the authorities and thus to avoid miscarriages of justice and secure the aims of Article 6 (see *John Murray v. the United Kingdom*, 8 February 1996, § 45, *Reports of Judgments and Decisions* 1996-I). Moreover, early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination (see, *mutatis mutandis*, *Jalloh v. Germany* [GC], no. 54810/00, § 101, ECHR 2006 IX).

56. The Court recalls that it is inherent in the privilege against self-incrimination, the right to silence and the right to legal assistance that a person "charged with a criminal offence" for the purposes of Article 6 has the right to be notified of these rights (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 272, 13 September 2016). These rights are quite distinct: a waiver of one of them does not entail a waiver of the other. Nevertheless, they are complementary, since persons in police custody must *a fortiori* be granted the assistance of a lawyer when they have not previously been informed by the authorities of their right to remain silent (*Navone and Others v. Monaco*, nos. 62880/11 and 2 others, § 74, 24 October 2013).

57. The Court further reiterates that the privilege against self-incrimination is not confined to actual confessions or to remarks that are directly incriminating; for statements to be regarded as self-incriminating it is sufficient for them to have substantially affected the accused's position (see *Schmid-Laffer v. Switzerland*, no. 41269/08, § 37, 16 June 2015; see also *A.T. v. Luxembourg*, cited above, § 72).

58. The Court emphasises once again the importance of the investigation stage for the preparation of criminal proceedings, as the evidence obtained during this stage determines the framework within which the offence with which an accused is charged will be considered at trial (see *Salduz v. Turkey* [GC], no. 36391/02, § 54, ECHR 2008). Any conversation between a detained criminal suspect and the police must be treated as formal contact and cannot be characterised as informal questioning or as an informal interview, thus allowing for a circumvention of basic procedural rights enshrined in Article 6 § 3 of the Convention (see *Ayetullah Ay*, cited above, § 137).

(b) Application of the general principles to the facts of the case

(i) Existence and extent of the restrictions

59. At the outset, the Court notes that the Government, with reference to the relevant provisions of domestic law requiring the authorities to inform persons charged with a criminal offence of their rights (see paragraph 25 above), submitted that the applicant had received that information just after his arrest. Although this statement has not been contested by the applicant, the Court notes that the Government have not provided a copy of the relevant document.

60. In any event, it appears that the applicant did not receive similar information about his rights prior to being informally questioned in the late morning after his arrest (see paragraphs 11 and 19 above). Neither was the applicant's sobriety tested prior to the commencement of this informal questioning (see paragraph 11 above; also compare and contrast *Fąfara v. Poland* (dec.) [Committee], no. 60136/13, § 6, 9 November 2021). He was only informed of his rights as a suspect by the prosecutor prior to his formal questioning as a suspect (see paragraph 14 above).

61. The Court further notes that the applicant did not communicate with a lawyer between the time of his arrest at 11.20 p.m. on 26 January 2016 and his informal questioning by the police at 10.55 a.m. on the following day. He only started to consult with a lawyer on 27 January 2016 at 2.55 p.m. (more than fifteen hours after his arrest), having already been informally questioned for almost three hours at that point (see paragraph 11 above) and in the presence of a police officer (see paragraphs 9-11 and 13 above). At the same time, it does not appear that during this questioning the lawyer ever requested the possibility to consult in private with his client.

62. The Court reiterates that the receipt by the accused of information about the rights to remain silent, not to incriminate himself and to consult a lawyer is one of the guarantees enabling him to exercise his defence rights (see *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 128, 12 May 2017). In the described above circumstances, the Court is not persuaded that the information given to the applicant by the investigators was sufficiently clear

to guarantee the effective exercise by the applicant of his rights to remain silent, not to incriminate himself and to consult a lawyer.

63. Having regard to the foregoing, the Court finds that the applicant, who was entitled to the protection of Article 6 of the Convention from the time of his arrest (see *Simeonovi,* cited above, § 111), was not sufficiently apprised of his rights.

(ii) The fairness of the proceedings as a whole

64. The Court reiterates that it is necessary to view the Article 6 § 3 rights as specific aspects of the overall right to a fair trial rather than ends in themselves (*Ibrahim and Others*, cited above, §§ 250-51). In consequence, despite the fact that the applicant did not explicitly cite Article 6 § 1, the Court will examine whether the proceedings as a whole were fair, considering that the need for such an examination derives from the well-established case law on that matter (see *Beuze*, cited above, §§ 147-48). 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 fact that the applicant was not properly informed of his rights (see, *mutatis mutandis*, *Ibrahim and Others*, cited above, § 265).

65. The Convention is intended to guarantee rights that are practical and effective and not theoretical and illusory. In this context, the Court recalls that Article 6 § 3 (c) of the Convention must be interpreted as safeguarding the right of persons charged with an offence to be informed immediately of their defence rights, irrespective of their age or specific situation and regardless of whether they are represented by an officially assigned lawyer or a lawyer of their own choosing (see *Beuze*, cited above, § 129).

66. In its analysis of the overall fairness of the proceedings, the Court will examine, to the extent that they are relevant in the present case, the various factors deriving from its case-law as set out in the *Beuze* judgment (cited above, § 150).

(α) Whether the applicant was vulnerable

67. The parties did not comment on whether the applicant had been vulnerable. However, owing to his intoxication (see paragraph 9 above), the applicant was in a vulnerable position at the time of his arrest and the authorities should have taken this into account when apprising him of his rights (see, *mutatis mutandis*, *Płonka v. Poland*, no. 20310/02, § 38, 31 March 2009).

(β) The circumstances in which the evidence was obtained

68. There is no suggestion that the applicant was subject to ill-treatment by the police after his arrest or during his informal questioning, although he

later asserted that he had become scared of the officers (see paragraph 16 above). The Court is nevertheless concerned that the course of that informal questioning was recorded in a single official note – signed only by P.R. (see paragraph 11 above) – thus denying the applicant an opportunity to raise objections as to its contents or indicate his reservations as to the manner in which he had been questioned, which would have been possible had a formal record been drafted (see Article 150 § 2 of the CCP, quoted in paragraph 25 above).

(γ) The assessment by the domestic courts

69. The Court recalls that failure by the domestic courts to at least analyse the need to exclude the statements recorded during the initial phase of the proceedings and thus to provide redress for the consequences of the failure to provide the applicant with legal assistance during the police questioning may, in itself, lead to a conclusion that the proceedings were overall unfair (see, *mutatis mutandis*, *A.T. v. Luxembourg*, cited above, § 73).

70. The Court is concerned that the exclusionary rule set out in Article 174 of the CCP was in practice ineffective. Even though an official note should not have been used to replace the accused's explanations, that prohibition was essentially circumvented when the note was included in the case file (see paragraph 11 above) and the officer who drafted it questioned as a witness (see paragraph 19 above), with the content of that note shown to him by way of an *aide-mémoire*.

71. Despite the fact that the applicant challenged the use of explanations that he had given to the police, his arguments were dismissed by the domestic courts. In particular, the Court of Appeal referred to the relevant jurisprudence of the Supreme Court, which held that the CCP did not prohibit the reproduction of statements made by a person entitled to refuse to testify – for example, during his or her arrest by a police officer in the form of a spontaneous statement (see paragraph 36 above). The Court cannot consider that the explanations given by the applicant inside the police station were spontaneous, given that they were made in the presence of three police officers, who themselves described the activity – which lasted for almost three hours – as "questioning" (albeit informal). Moreover, no reference was made to the failure to test the applicant's level of intoxication before the start of the informal questioning; nor was any reference made to the applicant's allegation that he had become scared of the officers who had questioned him.

72. Although the applicant explicitly challenged in his cassation appeal the use of the explanations given to the police without him having been notified of his basic rights, the Supreme Court dismissed the cassation appeal as manifestly ill-founded, thereby absolving itself of an obligation to draft a statement of reasons (see paragraph 23 above).

(δ) The nature of the statements

73. In the present case, it is beyond any doubt that the applicant confessed to the charge at the moment of his informal questioning and therefore incriminated himself (see paragraph 11 above). In addition, given that the applicant changed his version of the facts several times in the course of the trial (thus undermining his general credibility), that questioning became of crucial importance. Domestic courts made explicit references to the explanations that he had given in the course of his informal questioning; by relying on them, those courts established the applicant's intent and financial motive for the crime, which was considered to constitute an aggravating factor (see paragraph 20 above). The Court finds that significant weight must be attached to the above-noted factors in its assessment of the overall fairness of the proceedings.

(ε) The use of evidence

74. The Government challenged the applicant's argument that his conviction had largely been based on his statements, referring to other evidence collected by the authorities.

75. The Court observes that the prosecution indeed relied on various items of material that were unrelated to and independent of the applicant's explanations – namely witness statements, the investigators' findings, the physical evidence collected at the scene of the crime, and the results of the medical and psychiatric assessments (see paragraph 17 above). Nevertheless, as noted above (paragraph 73), the statements given by the applicant at the time of his informal questioning in police custody contained a detailed account of the events that had occurred on the day of T.B.'s death. Furthermore, it appears that the content of the applicant's explanations that were given without him having been appraised of his rights, including his right to the presence of a lawyer, served as a key evidence in establishing his intent to kill T.B., with the domestic courts making several direct references thereto (see paragraph 20 above). This, in turn, justified the applicant's conviction for murder (see paragraph 21 above).

76. In particular, when referring to the applicant's explanations from the informal questioning, the Court of Appeal stated that the applicant's subsequent explanations (apparently those given before the prosecutor – also in part given without the lawyer present, see paragraphs 14-15 above) confirmed what he had said to P.R. Be that as it may, however, the Court considers that that reasoning ignored the fact that the explanations given by the applicant during the informal questioning had already influenced the course of the investigation – especially given the fact that P.R. had (at that point) been questioned as a witness by the prosecutor (see paragraph 12 above).

77. Therefore, the Court accepts that the use of the applicant's explanations given during his informal questioning, without him having been properly informed of his right to remain silent and without the presence of his lawyer, significantly affected the course of the investigation and, eventually, the domestic courts' findings.

(ζ) Weight of the public interest

78. There is no doubt that sound public interest considerations justified prosecuting the applicant, as he was charged with murder. However, this does not imply that the domestic authorities may restrict an arrested person's fundamental rights contained in Article 6 of the Convention, in particular the right to silence and the right not to incriminate oneself (see *Saunders v the United Kingdom*, 17 December 1996, § 68, *Reports of Judgments and Decisions* 1996-VI).

(η) Whether other procedural safeguards were afforded by domestic law and practice

79. The Court notes that the Polish law provides for certain procedural guarantees for the defence. In particular, the applicant was represented by a lawyer throughout the judicial proceedings. He has been given the opportunity to give his own version of the events and to cast doubt on the credibility of the evidence gathered, as well as possibility to put forward further evidence. He could once again challenge the contested evidence in his appeal and his cassation appeal. The domestic courts had the obligation to assess the contested piece of evidence and to justify their factual findings under the principle of free assessment of evidence. However, as noted above (paragraphs 70-72), the existing guarantees proved insufficient in the instant case.

(θ) Conclusion as to the overall fairness of the proceedings

80. The Court considers that the practice of conducting a session of informal questioning after arrest, in breach of the guarantees enshrined in Article 6 § 3 of the Convention, and in particular in the absence of any information to the arrestee about his/her rights, combined with questioning during the trial of an officer who prepared an official note, puts the arrestee at a disadvantageous position from the very start of the investigation in question. It finds it concerning that the domestic courts not only endorsed such an approach, but also made direct references to the applicant's initial explanations (given in the morning after the incident, when he had "no time yet to think what would be beneficial to him and what detrimental") and considered them particularly credible (see paragraph 20 above). In the Court's view, such reasoning goes against the concept of a fair trial (see *Salduz*, cited above, § 53).

81. In conclusion, the Court finds that the criminal proceedings brought against the applicant, when considered as a whole cannot be considered as fair.

82. There has accordingly been a violation of Article 6 § 3 (c) of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. 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."

84. The applicant claimed 200,000 euros in respect of pecuniary and non-pecuniary damage.

85. The Government observed that the claim was completely unsubstantiated and, in any event, exorbitant.

86. As the Court has found on many occasions, it is impossible to speculate as to the outcome of the proceedings had there been no breach of the Convention (see *Dvorski v. Croatia* [GC], no. 25703/11, § 117, ECHR 2015, and *Ibrahim and Others*, cited above, § 315).

87. The Court notes that Article 540 § 3 of the CCP provides for the possibility of reopening criminal proceedings when such a need results from a judgment of the Court (see paragraph 25 above). The wording of that provision affords the domestic courts a margin of appreciation in that regard. The use of this possibility in the present case will be a matter for assessment, if appropriate, by the domestic court, having regard to the particular circumstances of the case (see, *mutatis mutandis*, *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, §§ 94 and 99, 11 July 2017). It is for the national authorities and not the Court to settle this question.

88. In the circumstances of the present case, the Court takes the view that a finding of a violation constitutes in itself sufficient just satisfaction and it thus rejects the applicant's claim.

89. The applicant did not claim anything in respect of costs and expenses. In consequence, there is no reason to award him anything under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

4. *Dismisses*, the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 May 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt Deputy Registrar	Marko Bošnjak President