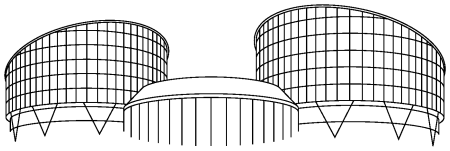

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF ZACHAR AND ČIERNY v. SLOVAKIA

(Applications nos. 29376/12 and 29384/12)

JUDGMENT

STRASBOURG

21 July 2015

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 Zachar and Čierny v. Slovakia,

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

Josep Casadevall, *President,*
Luis López Guerra,
Ján Šikuta,
Kristina Pardalos,
Johannes Silvis,
Valeriu Griţco,
Branko Lubarda, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 30 June 2015,

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

PROCEDURE

1. The case originated in two applications (nos. 29376/12 and 29384/12) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Slovak nationals, Mr Martin Zachar ("the first applicant") and Mr Tibor Čierny ("the second applicant") (together "the applicants"), on 10 May 2012.

2. The applicants were represented by Mr V. Kašuba, a lawyer practising in Martin.

The Government of the Slovak Republic ("the Government") were represented by their Agent, Ms M. Pirošíková.

3. The applicants alleged, in particular, that their trial on a charge of trafficking in drugs had been contrary to the requirements of Article 6 § 3 (c) of the Convention. By arbitrarily downplaying the true nature of the charge at the initial stage of the proceedings, the authorities deprived them of mandatory legal assistance, in the absence of which they had tendered confessions that were subsequently used against them before the courts.

4. On 2 May 2014 the applications were communicated to the Government.

5. Third-party comments on application no. 29384/12 were received from Fair Trials International, which had been granted leave by the President to make written submissions to the Court (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1989 and 1984 respectively. They are currently serving prison terms in the Dubnica nad Váhom and Hrnčiarovce nad Parnou Prisons, respectively.

A. Commencement of the proceedings

7. On 4 August 2009 a criminal investigation was opened into suspected trafficking in drugs within the meaning of Article 172 § 1 (c) of the Criminal Code (Law no. 300/2005 Coll., as amended – "the CC"), an offence with which the applicants would later be charged. The offence was considered an ordinary criminal offence (*zločin*), which carried a penalty of four to ten years' imprisonment and did not require mandatory legal assistance.

8. On 4 November 2009 a warrant was issued for the search of non-residential premises situated in a factory complex, which the applicants were renting and using as a music studio.

9. At 6.10 p.m. on 7 November 2009 the warrant was served on the second applicant on the premises. The search was then carried out by the police between 6.30 p.m. and 7.40 p.m.

According to the search report, the police seized a pair of digital scales, various items used for the consumption and packaging of drugs, and what would later be established to be 11.724 grams of cannabis.

No lawyer representing the applicants or any other of the parties concerned was present.

10. The police also found the first applicant and four other individuals on the premises.

11. At 6.40 p.m. the applicants were taken to the police station (*predvedení*) where it was decided that they would be detained and subsequently questioned by the police as suspects (*podozriví*). The first applicant was thus detained at 9.15 p.m. the same day, while the second applicant was detained at 1.10 a.m. the following day.

No lawyer was involved on behalf of the applicants.

12. The questioning of the first applicant took place between 9.30 p.m. and 10.45 p.m. the same day and that of the second applicant between 1.10 a.m. and 2.00 a.m. the following day.

13. The applicants' police statements were transcribed on pre-printed forms, the relevant part of which was filled in to indicate, *inter alia*, that the applicants were suspected of trafficking in drugs within the meaning of Article 171 §§ 1 and 2 of the CC.

On the first page of the forms there was a pre-printed message stating, *inter alia*, that the person being questioned had the right to remain silent and the right to choose a lawyer. That page, as well as the subsequent pages, was signed by the applicants.

The applicants made their statements without a lawyer and the transcript contains no mention of the issue of legal representation.

14. In his statement, the first applicant described his arrangement with the second applicant concerning the sale to third parties of cannabis sourced by the second applicant and their profit sharing. He identified five individuals as his customers and described how he was selling the drug to them and what he was doing with the profit.

15. The second applicant's statement was along the same lines, except that he identified three individuals as his customers and added that cannabis had been smoked on the premises by all those present before the arrival of the police.

16. Around the same time, the police also questioned as witnesses the other four individuals found on the premises. No lawyer for the applicants or those four individuals was present at the questioning. Two of those individuals, A. and B., gave statements incriminating the applicants.

B. Charge, remand and pre-trial proceedings

17. On 8 November 2009 the applicants were charged with conspiracy to possess and traffic in drugs within the meaning of Article 20 § 1 and Article 172 § 1 (c) and (d) of the CC. The parameters of the offence were in line with those of the offence into which a criminal investigation had previously been opened (see paragraph 7 above).

18. The document containing the charge relied on the results of what was termed a "preliminary expert analysis" of the material seized (see paragraph 9 above) and the police statements of the applicants and the four other individuals questioned. It was observed that the applicants had been engaging in the illicit conduct "from the beginning of summer 2009 until the present" and that the number of their customers had not yet been established.

19. Following the bringing of charges against the applicants, they were again questioned by the police, this time as accused (*obvinení*).

20. Neither applicant was assisted by counsel. Their statements were transcribed on a pre-printed form, which contained a pre-printed message stating, *inter alia*, that the person being questioned had the right to remain silent and the right to choose a lawyer. That page, as well as all the other pages of the document, was signed by the applicants.

21. According to the transcript, the first applicant stated that he waived his right to study the investigation file and his right to appeal against the charges. He made a confession in general terms and conceded that the

evidence on which the charge against him was based was accurate. He also declared that he had no wish to appoint a lawyer; that he had been selling the drug because he was unemployed; that he regretted his actions; and that, if released, he would stop selling the drug and limit himself to its consumption.

22. As for the second applicant, according to the transcript he stated that he waived his right to appeal against the charges and maintained his previous statements in full (see paragraph 15 above). He made a confession in general terms, conceded that the elements on which the charge against him was based were true, and expressed his remorse.

He also declared that he did not wish to appoint a lawyer; he had been selling the drug because he had lost his job; he was willing to cooperate with the authorities; he would not flee; and he would be prepared to enter into a plea bargain.

23. On 9 November 2009 the applicants were brought before a judge of the Martin District Court (*Okresný súd*) to be heard in connection with the request by the public prosecution service ("the PPS") that they be remanded in custody.

24. According to the minutes of those hearings, both applicants stated that they had neither appointed a lawyer nor had any wish to appoint one.

In addition, the second applicant submitted that he had commenced the trafficking in the summer of that year, that the drugs found on the premises had belonged to him and the first applicant. He said that he was sorry for his wrongdoing and was ready to cooperate with the authorities.

The first applicant, for his part, admitted possessing the quantities of cannabis as established by the police. He had been trafficking in it since April 2009, taking on average ten bags every three days from the second applicant, selling it and keeping the profit of some 15-20 euros every three days.

25. At the conclusion of their respective hearings on 9 November 2009, the applicants were remanded in custody pending trial on the ground that, if left at liberty, they might continue their criminal activities within the meaning of Article 71 § 1 (c) of the Code of Criminal Procedure (Law no. 401/2005 Coll., as amended – "the CCP"). Following an appeal lodged by the second applicant, the decision to remand him in custody was upheld by the Žilina Regional Court (*Krajský súd*) on 24 November 2009.

26. By virtue of the applicants being remanded in custody, it became mandatory for them to be assisted by a lawyer under Article 37 § 1 (a) of the CCP.

27. On 11 November 2009 the applicants' respective mothers appointed a lawyer to represent them in the proceedings. The applicants endorsed that appointment on 13 November 2009.

28. On 2 December 2009 the applicants' lawyer inspected the investigation file.

29. On 9 December 2009 the police questioned the applicants again. Assisted by their lawyer, they submitted that they wished to avail themselves of their right to remain silent.

Nevertheless, the first applicant added that when he had been questioned on 8 and 9 November 2009 and had confessed and expressed remorse, he had already stated everything he considered relevant. In a similar fashion, the second applicant referred to his confession of 8 November 2009 and stated that he had made it without any pressure and that he had not been under the influence of psychotropic substances.

30. On 22 December 2009 the police heard A., B., and eight other witnesses in the presence of the applicants' lawyer. The depositions of A. and B. as well as of C. and D. may be understood as incriminating the applicants.

31. On 27 January 2010 the first applicant's mother appointed a new lawyer to represent him in the proceedings. The first applicant then dismissed his first lawyer. The second applicant's father appointed the same lawyer for his son on 12 February 2010.

32. Meanwhile, by letters of 29 January and 16 February 2010, the investigator had informed the applicants that, on the basis of information obtained during the investigation, the charge against them would be reclassified as an aggravated form of the same offence within the meaning of Article 172 § 2 (c) of the CC. That provision applied to instances where the offence had been committed "in a more serious manner". Such an aggravated form of the offence carried a penalty of imprisonment for ten to fifteen years and, as such, it amounted to a particularly serious criminal offence (*obzvlášť závažný zločin*). Such a charge required mandatory legal assistance under Article 37 § 1 (c) of the CCP.

33. On 16 and 23 February and 5 March 2010 the police heard five more witnesses in the presence of the applicants' lawyer. Of their depositions, those of a certain E. may be understood as incriminating the first applicant.

34. On 8 March 2010 the investigator informed the applicants' lawyer that she rejected his proposals for further evidence to be taken consisting of face-to-face interviews (*konfrontácia*) between the first applicant and witnesses A. to E. She considered that, on the relevant points, there had been no discrepancies between the accounts of the applicants and those of the witnesses named. She referred to Article 138 (b) and (j) of the CC, which provided that an offence was deemed to have been committed in "a more serious manner" if it had been committed "over a longer period of time" or perpetrated against "several persons". The term "several persons" was in turn defined in Article 127 § 12 of the CC as at least three persons. The investigator observed that the submissions of both the applicants and the witnesses in question had indicated that the offence had been committed over a period of at least five months and perpetrated against several persons.

35. On 22 March 2010 the applicants' lawyer inspected the investigation file together with the first applicant.

36. On 29 March 2010, acting in their name, the applicants' lawyer requested that a plea bargain procedure be initiated. In his request, he referred to the original charge, the decision to reclassify it to the aggravated form of that charge, and the applicants' confessions in their interviews by the police. It was added that the applicants were aware of the wrongfulness of their behaviour and were sorry for it.

37. On 27 April 2010 the applicants met with the PPS for the purposes of negotiating the plea bargain. However, they stated at the outset of the meeting that, having consulted with their counsel, they no longer wished to pursue the matter.

C. Trial

38. On 4 May 2010 the applicants were indicted to stand trial on the aggravated charge before the District Court.

The indictment was based on the statements the applicants had made on 7, 8 and 9 November 2009, the results of the search of 7 November 2009, an expert analysis of the material seized during the search, and – without any indication of the dates when they had been made – statements from five witnesses, A. to E. It was also noted that the applicants each had a previous conviction: the first applicant for robbery, for which he had been sentenced to five months' imprisonment suspended for a year; and the second applicant for fraud, for which he had been sentenced to two years' imprisonment suspended for two years.

39. The District Court heard the case on 17 August, 31 August, 19 October and 23 November 2010.

40. On 7 December 2010 the court found the applicants guilty and sentenced them to six years and eight months imprisonment.

It observed that the applicants had pleaded not guilty before the court, arguing that they had merely consumed the drug but had not been selling it. As to the discrepancy between that version and the version submitted by them in their pre-trial statements of 7, 8 and 9 November 2009, the applicants had submitted before the court that the pre-trial questioning had been conducted in a manipulative fashion and the police had coerced them by promising that they would not be remanded in custody. In addition, the second applicant had submitted that, in the initial questionings, he had still been under the influence of the cannabis he had consumed earlier.

The District Court observed further that the five prosecution witnesses had also changed their testimony before it as compared with their statements made in the pre-trial phase, in that, before the court, they had given no evidence incriminating the applicants.

In so far as the applicants and those witnesses had sought to explain the discrepancies in their versions by alleging that they had been put under pressure by the police at the pre-trial stage, the District Court heard the officers in question and dismissed the allegation as unfounded.

D. Appeal and appeal on points of law

41. The applicants lodged an appeal (*odvolanie*), as did the PPS, against the District Court's decision. The applicants subsequently also appealed on points of law (*dovolanie).* Their line of argument may be summarised as follows.

42. In addition to the arguments already presented, they objected that the record of the search of 7 November 2011 was vague, in particular as to the quantity and content of the dried material that had been seized.

Furthermore, they claimed that, during the questioning sessions of 7 and 8 November 2009, they had not been properly informed of their procedural rights, including the rights to remain silent and to choose a lawyer. Their signatures on the relevant pages of the pre-printed forms on which the statements had been transcribed were of no relevance – in particular given that there was no mention of their having been informed of those rights in the transcript.

Those statements had thus been made contrary to the applicable procedural rules. As they were the basis for the decisions to charge and detain them, their trial had taken an unlawful course from the very outset.

In addition, there had been no relevant grounds – for example a substantial change in the evidence – to justify the reclassification of the charge against them from an ordinary criminal offence to a particularly serious criminal offence. Therefore, in the applicants' submission, from the beginning the charge against them had actually been that of a particularly serious criminal offence, in which case legal assistance should have been mandatory. The fact that they had not been informed accordingly at the critical initial stages of the proceedings had had a fatal and irreversible impact on the choice of their defence strategy and had in practice negated their defence rights. This had been manifested, *inter alia,* in that they had been remanded in custody without having appointed a lawyer.

Moreover, a number of further pieces of evidence originating from the pre-trial stage of the proceedings, in particular the witness statements, had also been manipulated. The court should therefore have examined only the evidence taken during the trial and refrained from taking into account the pre-trial statements of the witnesses.

43. The PPS challenged the sentence handed down by the first-instance court on the grounds that they saw no reason for imposing a sentence below the lower end of the penalty scale.

44. In a judgment of 9 March 2011 the Regional Court quashed the judgment of 7 December 2010; adjusted the District Court's findings of fact as to the applicants' conduct which formed the basis of the offence; found them guilty of the offence in its aggravated form; and sentenced them each to ten years' imprisonment. Subsequently, on 10 November 2011, the Supreme Court (*Najvyšší súd*) declared the applicants' appeal on points of law inadmissible. The relevant part of the reasoning of both courts may be summarised as follows.

45. It was acknowledged that it had been an error for the District Court to take into account the applicants' pre-trial statements of 7 and 8 November 2009, respectively, when they had been questioned as suspects prior to being charged. Those statements therefore did not constitute lawful evidence and had to be excluded.

However, the applicants' statements of 8 November 2009 when, having already been charged, they had made a confession in general terms, and their further statements taken on 9 November 2009, which contained a more specific confession, could be taken into account, as could the evidence from the five prosecution witnesses.

E. Final domestic decision

46. On 9 January 2012 the applicants lodged a complaint under Article 127 of the Constitution (Constitutional law no. 460/1993 Coll., as amended) with the Constitutional Court (*Ústavný súd*), advancing essentially the same arguments as mentioned above, and alleging that their rights to liberty and a fair trial had been violated.

47. On 15 February 2012 the Constitutional Court declared the complaint inadmissible. In so far as it was directed against the Regional Court and the Supreme Court, the Constitutional Court rejected the complaint as manifestly ill-founded, quoting extensively from the contested decisions and endorsing them. The Constitutional Court found that the remainder of the complaint was outside its jurisdiction.

The Constitutional Court's decision was served on the applicants on 9 March 2012.

II. RELEVANT DOMESTIC LAW AND PRACTICE

48. In a judgment of 5 September 2011 in case no. 1To/70/2011 (referred to by the criminal law section of the court as no. Jtk 13/11), the Žilina Regional Court held that the legal classification of an offence in the document setting out the charge for that offence must correspond to a correct legal interpretation of the relevant law in order to avoid placing the charged person at a disadvantage. If a wrong (less severe) classification of the offence is used, that person's defence rights may be curtailed.

The Regional Court also held that, for the purposes of a criminal prosecution, and in particular as far as mandatory legal assistance under Article 37 § (c) of the CCP was concerned, the decisive factor was the definition and legal classification of the offence in the decision to charge the suspect.

According to the Regional Court, the definition and legal classification of the offence by the police was not decisive. Any error in the legal classification of the offence could not be tolerated, especially if a police officer were to find the offence to be less serious than it actually was. In such instances the police officer might manipulatively mislead the charged person and thereby severely violate his or her defence rights.

III. EUROPEAN UNION DOCUMENTS

49. At the European Union level, the following documents are of relevance to the matters obtaining in the present case: Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings and Directive 2013/48/EU of the European Parliament and 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 LAW

I. JOINDER OF THE APPLICATIONS

50. The Court notes that the two applications under examination concern the same proceedings and decisions. It is therefore appropriate to join them, in application of Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

51. The applicants alleged that their trial had been contrary to their rights under Article 6 § 3 (a), (b), (c) and (d) of the Convention. Their complaints fall to be examined under the said provisions and Article 6 § 1 of the Convention, which together 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:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"

A. Admissibility

52. The Court notes that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Submissions of the parties and the third party

53. The applicants complained that they had not been informed in due time of the true nature of the charge against them. There had been no relevant grounds for initially classifying the charge against them as an ordinary criminal offence for which legal assistance was not mandatory, and then reclassifying it as a particularly serious criminal offence, for which it was. At the initial stages of the proceedings they had not been properly informed of their procedural rights. Their pre-trial statements and those of the five witnesses against them, as well as the search report of 7 November 2009, should have been excluded from evidence. By obscuring the true nature of the charge against them at the beginning of the proceedings, the authorities had deprived them of their right adequately to mount their defence. Lastly, they complained that their conviction had been arbitrary.

54. In reply, the Government submitted that the fairness of the proceedings should be examined with reference to the proceedings as a whole. They sought to distinguish the present case from that of *Leonid Lazarenko v. Ukraine* (no. 22313/04, 28 October 2010) in that, in the present case, the applicants had tendered their confessions repeatedly, including in the presence and with the assistance of their lawyers. Their confessions had not been the only evidence against them, and they had been corroborated by the search report of 7 November 2009 and the statements from five witnesses.

Moreover, they emphasised that the statements which the applicants had made while merely being questioned as suspects had been excluded from the trial.

In addition, the Government claimed that the applicants had been properly and repeatedly advised about their procedural rights, including the right to legal assistance. It was not plausible that the applicants had not been aware of their procedural rights in view of their experience with their previous prosecution and conviction. They had first opted, of their own free will and without being physically or mentally impaired, not to be legally represented. Legal assistance had only become mandatory for them when they were remanded in custody; they had subsequently appointed a lawyer and from that time on, they had benefited from legal assistance without any restrictions.

The Government pointed out that no allegations of police coercion had been made at the pre-trial stage and that any such allegations had only surfaced at the trial stage, when they had been properly examined. However, the allegations had not been confirmed, despite genuine efforts.

As to the reclassification of the applicants' offence from an ordinary to a particularly serious one, the Government considered that it had been justified by the results of the witness interviews held on 22 December 2009 confirming that the offence of which the applicants were suspected had indeed been perpetrated against several persons.

Moreover, the Government contended that the initial witnesses had been questioned again in the course of the subsequent pre-trial proceedings, with all the applicants' procedural rights being respected.

55. The applicants disagreed and reiterated their complaints. In addition, they contended that, on 7 November 2009 between 6.40 p.m. and 9.15 p.m. for the first applicant and at 1.10 a.m. the following day for the second applicant (see paragraph 11 above), they had been deprived of their liberty in an irregular manner and that it had been at that time that various police officers had threatened them with detention and had thereby coerced them into making their subsequent confessions. In the applicants' view, that inference had violated their right not to incriminate themselves. Moreover, their questioning had been deliberately delayed until the evening so that, even if they had chosen to be assisted by a lawyer, the likelihood of reaching one would be diminished.

The applicants emphasised that there had been no relevant change in the evidentiary situation, even taking into account the witness interviews of 22 December 2009 so as to justify changing the legal classification of their offence. The genuine nature of the charge against them had been that of a particularly serious offence from the beginning, and it had thus required mandatory legal assistance. What had been at stake was not the applicants' right to legal assistance but rather the authorities' unfulfilled duty to ensure it. In that regard, the applicants contended that the purpose of the first

interview had been particularly important, not only for the accused but also for the witnesses, since any subsequent correction of their accounts had called for an explanation. Neither their lawyer nor the applicants themselves had been present at the initial questioning of the witnesses against them, to the detriment of the applicants' right to cross-examine the witnesses.

56. The third party intervening in the application of the second applicant (see paragraph 5 above) submitted that the case required the Court to determine whether the right of access to a lawyer and the right to remain silent had been waived effectively and, if such had not been the case, whether the domestic courts had taken adequate remedial action to ensure the overall fairness of the proceedings. They further submitted that the right of access to a lawyer was an essential safeguard which enabled the exercise of other rights, including the right to remain silent, the exercise of which depended on the adequate provision of information about the right. Many suspects faced serious challenges in exercising that right across the European Union and as a result the EU had adopted directives enshrining the right to information and the right of access to a lawyer in criminal proceedings, placing safeguards around waivers and imposing a broad remedial duty on courts (see section "Relevant European texts" above). The Court should adopt a scrupulous approach to the questions of whether any waiver of the right of access to a lawyer and the right to remain silent had been effective and whether there had been any failure on the part of the national courts to take due account of any prejudice arising from any possible restriction of those rights, taking into account recent EU legislation.

57. In a final round of comments, the Government repeated some of their previous arguments and submitted, in particular, that the evidence available when the initial charges had been brought against the applicants had not been sufficient to classify their offence as particularly serious. More specifically, in the Government's submission, at the given time only two witnesses – A. and B. –had confirmed that they had been buying the drug from the applicants. That did not constitute sale of the drug to "several persons" within the applicable legal definition, which was necessary for the offence to be classified as particularly serious.

2. The Court's assessment

(a) General principles

58. The applications comprise several interrelated complaints. In agreement with the third party, the Court finds it opportune to begin their assessment on the merits by focusing on the applicants' rights to defend themselves through legal assistance and not to incriminate themselves.

59. From that perspective, the relevant Convention principles have recently been summarised in the Court's judgment in the case of

Yuriy Volkov v. Ukraine (no. 45872/06, §§ 60-63, 19 December 2013, with further references) as follows:

- 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 so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions.

- The guarantees in paragraph 3 (c) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision, which must be taken into account in any assessment of the fairness of proceedings.

- The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings.

- Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial. As a rule, access to a lawyer should be provided as from the first time a suspect is questioned by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict that right. The right to mount a defence will in principle be irretrievably prejudiced when incriminating statements made during police questioning without access to a lawyer are used for a conviction.

- Early access to a lawyer has been viewed as a procedural guarantee of the privilege against self-incrimination and a fundamental safeguard against ill-treatment, in view of the particular vulnerability of an accused at the early stages of the proceedings when he or she is confronted with both the stress of the situation and the increasingly complex criminal legislation involved. Any exception to the enjoyment of that right should be clearly circumscribed and its application strictly limited in time. Those principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial must be ensured to the highest possible degree by democratic societies.

- The aforementioned principles of the right to defence and the privilege against self-incrimination are in line with the generally recognised international human rights standards. Those standards are at the core of the concept of a fair trial and their rationale relates in particular to the protection of the accused against abusive coercion on the part of the authorities. The principles also contribute to the prevention of miscarriages of justice and to the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused

without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.

60. In addition, the Court reiterates that a waiver of a right guaranteed by the Convention – in so far as it is permissible – must not run counter to any important public interest, must be established in an unequivocal manner and must be attended by minimum safeguards commensurate with the waiver's importance. Moreover, before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen the consequences of his conduct (see, for example, *Aleksandr Zaichenko v. Russia*, no. 39660/02, § 40, 18 February 2010, with further references).

(b) Application of these principles in the present case

61. The Court observes that the applicants' principal contention appears to be that the authorities misled them about the genuine nature of the charges against them by falsely presenting the charges first as concerning an ordinary offence, whereas they actually concerned a particularly serious offence, with the attendant implications as to whether legal assistance was mandatory or not. In the applicants' submission, the authorities thereby deprived them of the benefit of legal assistance due to them. In line with that contention, the applicants further submitted that the case was essentially not about their right to legal assistance, but rather about the authorities' duty to ensure it.

62. The Court notes that there is a dispute between the parties about the legal classification of the charge against the applicants at the beginning of the proceedings, which further translates into a dispute under domestic law as to whether at the early stage of the proceedings legal assistance had been mandatory.

63. On that count, the applicants alleged specifically that in the later stages of the pre-trial proceedings, there had been no relevant change in the evidentiary situation since the initial stage so as to justify the legal reclassification of their offence.

64. The Court notes that under the domestic law the aggravated form of the offence imputed to the applicants could have been justified, *inter alia*, by the fact that the offence was perpetrated against at least three persons. In their initial statements the applicants admitted having sold the drug to respectively five and three individuals (see paragraphs 14 and 15 above). In view of those admissions the Court finds some merit in the applicants' contention. Moreover, their contention is supported by the fact that, on the pre-printed forms in which their initial statements were transcribed, the authorities also referred to paragraph 2 of Article 171 of the CC, which precisely pertains to the aggravated form of the offence in question (see paragraph 13 above).

65. Nevertheless, the Court reiterates that, in accordance with Article 19 of the Convention, its duty is to ensure that the obligations undertaken by the Contracting Parties to the Convention are observed. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *Garćia Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, with further references).

66. In view of these limitations on its powers of review, the Court does not find it necessary to rule conclusively on whether or not the applicants' offence should have been treated as a particularly serious one from the outset and whether, consequently, they should have been assisted by a lawyer. Even assuming that the assistance of a lawyer was not mandatory, and irrespective of the distinction drawn in that respect by the applicants themselves, they had the right to legal assistance under Article 6 § 3 (c) of the Convention. In these circumstances, the Court finds that the relevant question is whether or not that right as such was respected.

67. The Court notes that at the beginning of the proceedings the applicants unequivocally waived the right in question.

68. The Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his or her own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see, for example, *Salduz v. Turkey* [GC], no. 36391/02, § 56, ECHR 2008). However, if such a right was waived, the Court must examine whether the circumstances surrounding the waiver were compatible with the requirements of the Convention.

69. The freedom as such of the applicants' will when they chose not to resort to legal assistance has not been called in question. It remains to be ascertained whether their doing so ran counter to any important public interest and was attended by minimum safeguards commensurate with the importance of such a waiver.

70. With that in mind, the Court observes that any instructions as regards the applicants' procedural rights were given to them via the first pages of the pre-printed forms on which their pre-trial statements had been transcribed. Such instructions went as far as informing the applicants, without providing any commentary or further explanation, that they had the right to remain silent and the right to choose a lawyer. Conversely, there has been no allegation or other indication that any individualised advice about their situation and rights was provided to the applicants.

71. It was in such a context and with reference to the offence imputed to them as ordinary that the applicants chose not to be assisted by a lawyer.

72. However, the Court is of the view that there must have been a distinct possibility at the relevant time that the offence might be reclassified to a particularly serious one. In that regard, the Court notes that in both of the classifications in question, the applicants' offence essentially consisted of the same elements, save for the fact that in its particularly serious form it had to have been perpetrated against at least three persons. That relatively small distinction, however, had grave consequences in terms of the applicable penalty, the ordinary offence being punishable by imprisonment for a term of four to ten years, while the serious offence attracted a prison sentence of ten to fifteen years (see paragraphs 7 and 32 above).

73. However, there is no indication that any such distinction, or the attendant risk of a significantly heavier penalty, was explained to the applicants (see *Leonid Lazarenko*, cited above, § 56).

74. In these circumstances, the Court cannot but conclude that any waiver on the applicants' part of their right to legal representation was not attended by minimum safeguards commensurate with the waiver's importance.

75. It must therefore be further examined whether that flaw was rectified during the subsequent trial and whether the proceedings as a whole can be considered as fair within the meaning of Article 6 § 1 of the Convention.

76. From that perspective, it is true that the Regional Court excluded from the evidence the pre-trial statements made by the applicants on the night from 7 to 8 November 2009, when they were questioned as suspects but had not yet been charged. However, those statements undeniably affected the subsequent statements of 8 and 9 November 2009, which were again made without counsel and were nevertheless used against the applicants at the trial, despite the fact that the applicants retracted their pre-trial confessions before the courts.

77. As in *Leonid Lazarenko* (cited above), while not being the sole basis for the applicants' conviction in the present case, the impugned confessions undoubtedly influenced the courts, which relied on at least those of 8 and 9 November 2009. It is true that, as the Government have objected before the Court, the applicants subsequently endorsed those statements in the presence of their lawyer on 9 December 2009. However, the Court does not find that fact decisive, for the following reason.

78. In *Leonid Lazarenko* (§ 57, with further references), the Court emphasised that the extent to which the applicant's initial confession had affected his conviction was of no importance. That it had irretrievably prejudiced his defence rights was presumed once it had been established that it had had some bearing on the conviction. In that judgment, the Court also held that it was not for it to speculate on what the applicant's reaction or his lawyer's advice would have been had he had access to a lawyer at the initial stage of the proceedings.

79. The Court finds that the applicants' initial position as to the accusations against them, taken without the assistance of a lawyer, must have affected their subsequent position, despite the legal assistance available to them at those later stages, and thereby affected the entire subsequent course of the trial. Thus, in response to the Government's argument, the Court finds no relevant distinction between the present case and that of *Leonid Lazarenko*.

80. In addition, the Court finds the domestic courts' reliance on the applicants' pre-trial confessions of 8 November and 9 December 2009 all the more striking given that, strictly speaking, they concerned the ordinary criminal offence with which the applicants had initially been charged but not the particularly serious criminal offence for which they were indicted and ultimately convicted.

81. In these circumstances, the Court concludes that the guarantee of fairness enshrined in Article 6 of the Convention required that the applicants should have had the benefit of the assistance of a lawyer from the very first stage of police questioning. That did not happen, and it was remedied neither by the subsequent legal assistance provided to them nor by the adversarial nature of the ensuing proceedings.

82. The foregoing considerations, combined with the use at the applicants' trial of self-incriminatory statements made by them at the pre-trial stage, are sufficient to enable the Court to conclude that their right to legal representation and the privilege against self-incrimination were not respected.

There has accordingly been a violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention.

In view of that finding the Court considers it unnecessary to examine separately the merits of the applicants' complaints made under the remaining provisions of Article 6 § 3 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."

A. Damage

84. The applicants submitted no claim in respect of damage. They stated that their objective was to have the proceedings reopened and to receive a fair trial.

85. The Court notes that, following its above finding under Article 6, the domestic law entitles the applicants to challenge the conclusions of the domestic courts by a request for the reopening of the proceedings. That possibility constitutes the most appropriate redress in the circumstances of the case (see *Harabin v. Slovakia*, no. 58688/11, §§ 60 and 178, 20 November 2012, and, *mutatis mutandis*, *Vojtěchová v. Slovakia*, no. 59102/08, §§ 27 and 48, 25 September 2012).

B. Costs and expenses

86. The applicants claimed 284.08 euros (EUR) each for legal costs incurred before the Court.

87. The Government had no objection to the claim.

88. 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 quantum.

In the present case, regard being had to the documents in its possession and the above criteria, the Court considers that the amounts claimed should be awarded in full. It therefore awards each of the applicants EUR 284.08, plus any tax that may be chargeable to them, for the proceedings before the Court.

C. Default interest

89. 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, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

3. *Holds* that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention;

4. *Holds* that there is no need to examine separately the merits of the complaints made under the remaining provisions of Article 6 § 3 of the Convention;

5. *Holds*

(a) that the respondent State is to pay each of the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 284.08 (two hundred and eighty-four euros and eight cents), plus any tax that may be chargeable to them, 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 21 July 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	Josep Casadevall
Deputy Registrar	President