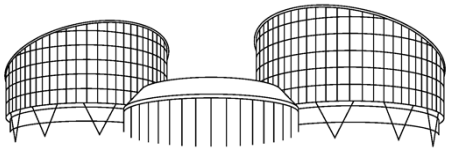

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF ATRISTAIN GOROSABEL v. SPAIN

(Application no. 15508/15)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (c) • Fair hearing • Use at trial of initial confession by terrorist suspect held incommunicado and denied, without individualised reasons, access to lawyer of own choice and legal-aid lawyer • Overall fairness of criminal proceedings undermined

STRASBOURG

18 January 2022

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 Atristain Gorosabel v. Spain,

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

Georges Ravarani, *President,*
Georgios A. Serghides,
Dmitry Dedov,
María Elósegui,
Anja Seibert-Fohr,
Andreas Zünd,
Frédéric Krenc, *judges,*
and Olga Chernichova, *Deput*y *Section Registrar,*

Having regard to:

the application (no. 15508/15) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Spanish national, Mr Javier Atristain Gorosabel ("the applicant"), on 24 March 2015;

the decision to give notice to the Spanish Government ("the Government") of the complaint under Article 6 §§ 1 and 3 (c) of the Convention concerning the impossibility of being represented by a lawyer of his own choosing and of communicating with him before and during his detention incommunicado;

the parties' observations;

Having deliberated in private on 12 October, on 30 November and on 14 December 2021,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The applicant complains under Article 6 §§ 1 and 3 (c) of the Convention that he was denied a lawyer of his own choosing whilst being held incommunicado, and that for this reason he made self-incriminatory statements. His statement enabled the police to obtain the evidence on which his conviction was based.

THE FACTS

2. The applicant was born in 1970. He is currently serving a seventeen-year sentence of imprisonment for membership of a terrorist group and possession of explosives. The applicant was represented by Mr Z. Reizabal Larrañaga, a lawyer practising in San Sebastian and by Mr O. Peter, a lawyer practising in Switzerland.

3. The Government were represented by their Agent, Mr R.A. León Cavero, State Attorney.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. Within the context of an initial anti-terrorist investigation carried out by investigating judge no. 2 of the *Audiencia Nacional*, the applicant was arrested in France under a European arrest warrant and handed over to Spain, where he was remanded in custody for allegedly, along with other individuals, belonging to the terrorist group ETA. On 8 April 2010, the applicant, assisted by a lawyer chosen by him, after denying his alleged membership of ETA, waived his right not to testify before the investigating judge.

6. On 20 April 2010 the applicant was released on condition that he appear before the judge dealing with the case once a week.

7. On 20 June 2010, at the Public Prosecutor's Office's request, the pre-trial phase was discontinued for lack of evidence against the applicant. Other investigations against ETA continued. Within the framework of new inquiries, further evidence against the applicant was found, which led to a second set of proceedings.

8. On 28 September 2010, within the framework of the second set of proceedings, the *Guardia Civil* requested that investigating judge no. 2 of the *Audiencia Nacional* authorise eight entries to and searches of properties used by the cell of ETA to which the applicant belonged. The requested entries and searches were mainly aimed at locating two explosives depots, which investigations had revealed to have been organised and used by the applicant. Various sources of information had indicated that the applicant was a member of ETA and that he was storing a large number of explosives and firearms that were in a fit condition to be used.

9. On 29 September 2010, at 9:45 a.m., the *Guardia Civil* arrested the applicant. On 30 September 2020, investigating judge no. 2 of the *Audiencia Nacional* authorised his detention incommunicado in order to pre-empt the potential frustration of the ongoing investigation, which was primarily aimed at the location of explosives. Simultaneously, a search was carried out at his home, where computer equipment was seized. The detention incommunicado was ordered and supervised by a judge within the framework of a judicial procedure.

10. Once the detention incommunicado had been authorised by the investigating judge, the applicant was assigned legal aid. He was informed of his rights as a detainee – including his right not to testify against himself and his right to remain silent; however because his detention was incommunicado in nature, he was neither authorised to choose a lawyer nor to meet in private with the lawyer that had been assigned to him by way of State-funded legal aid ("legal-aid representative") prior to his being interviewed by the police. During his detention incommunicado, the applicant gave two statements to the police, both in the presence of that legal-aid representative.

11. On 30 September 2010, the investigating judge ordered the extension of the applicant's detention for a period of forty-eight hours in view of the nature of the offences under investigation and the large amount of computer material found during the search of the applicant's home.

12. On 1 October 2010, at 7:23 a.m., in his first statement to the *Guardia Civil*, the applicant stated that he had "cooperated" with ETA and that his activities during his participation in that group's terrorist activities had included acts such as attempted kidnapping, verifying details regarding a certain businessman in order that he could be assassinated, and providing information regarding certain police officers serving in the Basque Autonomous Community so that an attack could be planned against them; he also indicated a storage room where he kept explosives. The applicant's legal-aid representative was present during the interview, and both the legal-aid representative and the applicant signed the applicant's statement to the *Guardia Civil* and a document attesting to the fact that the applicant had been informed of his rights as a detainee. Later, the applicant's legal-aid representative repeatedly tried to make contact with his client. The *Guardia Civil* informed the legal-aid representative that contact with his client was legally restricted because the applicant was being detained incommunicado. After the applicant had given his statement, a search was carried out of a storage space (indicated by the applicant) in the applicant's home used to hide explosives, and a large amount of explosive material and computer equipment relating to the activities of ETA was found.

13. On 3 October 2010, at 3.13 a.m., the *Guardia Civil* took a new statement from the applicant, as there were strong suspicions that he knew of other sites at which was stored explosive material that was in a state to be used. Again, after the agents of the *Guardia Civil* had read out his rights – including his right to remain silent – the applicant made a statement informing them of a hidden place at his home where he still kept a firearm, bullets, various USB keys containing several training handbooks on terrorism, and some false licence plates. He made that statement despite the opposition of his legal-aid representative, who was present and indicated his opposition to the new interview taking place. Subsequently, at the applicant's residence, the *Guardia Civil* found all the equipment that had been listed by the applicant in his latter statement.

14. During his detention incommunicado, the applicant was examined daily by a forensic doctor, to whom he reported that he had not suffered mistreatment by the *Guardia Civil* at any time, although he did claim that the *Guardia Civil* had threatened to arrest his girlfriend if he did not cooperate with them. The doctor submitted a medical report each day to the investigating judge in charge of the case.

15. On 4 October 2010 the applicant was brought before the investigating judge, to whom he indicated that his statements to the *Guardia Civil* had been obtained when being held incommunicado for five days and that for this

reason he had made self-incriminatory statements. On the same day, the applicant's detention incommunicado was lifted, and he was able to appoint a lawyer of his own choosing.

16. On 16 April 2013 the *Audiencia Nacional* convicted the applicant of being a member of a terrorist group and of possession of explosives. He was sentenced to seventeen years' imprisonment. The conviction was based essentially on: material found on the seized computer material linking him to the terrorist group; the explosive material found in both his home and other places that had been indicated by him; incriminating statements given by the applicant's co-defendants; statements given by witnesses; and the fact that the applicant had remained silent in response to questions from the prosecution. With reference to reports by the forensic doctor, the *Audiencia Nacional* ruled out the possibility that the applicant had been mistreated. It deemed that he had given his statements freely and voluntarily (see paragraphs 12 and 13 above), without coercion or pressure of any kind.

17. According to the judgment, it had been proved that the applicant had concealed the following effects, tools and instruments:

> "The following material was found in the search carried out on 1 October 2010 in a storage room used by the defendant:
>
> Six USB keys, detonators and three flap-type devices intended to activate explosive devices – [all] in perfect working order;
>
> a device intended to activate car bombs;
>
> fifty-six kilograms of potassium chlorate and 7 kg of sulphur; ammunition and pistol holsters, forty-six pistol cartridges, twenty detonator fuses;
>
> a CD, with a handbook [produced by] the terrorist group;
>
> five spent cartridges from the gun that had killed two police officers;
>
> seven spent cartridges from a gun that had killed two people;
>
> a reddish plastic with wrapping tape and rubber gloves, containing traces of the following explosive substances: ammonium nitrate, nitroglycerine and dinitrotoluene.
>
> ...
>
> During the search carried out on 3 October 2010 at the applicant's home, the following effects, tools and instrument were found:
>
> a gun;
>
> fifty cartridges;
>
> twenty car registration plates;
>
> two detonators intended to activate [explosive] devices;
>
> a [detonator] timer;
>
> ...
>
> Among the seized computer files were found: several [copies of] handbooks [containing] instructions [on how to behave] in the event of arrest; training videos on

the use of weapons, explosives and security measures; information regarding police officers and politicians; and [plans for] placing a 'van bomb' by a hotel."

Regarding the fact that the applicant's legal-aid representative was not allowed, despite repeated attempts on his part, to communicate with his client, the first-instance court heard the legal-aid representative as a witness at the trial.

18. Following an appeal by the applicant, on 18 March 2014 the judgment of the *Audiencia Nacional* was upheld by the Supreme Court. It concluded that despite the applicant's assertion that the *Guardia Civil* had threatened him with the arrest of his girlfriend, there was no evidence of any torture – either physical or psychological. With regard to the evidence that had been found in the applicant's possession, the Supreme Court concluded that the large amount of material found in his possession, as well as the spent gun cartridges, revealed that not only had he stored explosives, but he had also been part of ETA.

19. On 7 May 2014 the applicant lodged an amparo appeal with the Constitutional Court. He argued that his right to be assisted by a lawyer of his own choosing had been violated (Article 24 § 2 of the Constitution). The amparo appeal was declared inadmissible on 7 November 2014 because the applicant had failed to "specifically and sufficiently justify its constitutional relevance".

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

20. The relevant provisions of the Spanish Constitution read as follows:

Article 17

"1. Everyone has the right to liberty and security. No one may be deprived of his liberty otherwise than in accordance with the provisions of this Article and in the circumstances and form provided by law.

2. Preventive detention may last no longer than the time strictly required in order to carry out the necessary investigations aimed at establishing the facts; in any event, the person arrested must be set free or handed over to the judicial authorities within a maximum period of seventy-two hours.

3. Everyone who is arrested must be informed immediately, and in a manner that he can understand, of his rights and of the reasons for his arrest and cannot be required to make a statement. The assistance of a lawyer is guaranteed to persons detained in police investigations or criminal prosecutions, as provided by law..."

Article 24

"1. Everyone shall have the right to effective protection by the judges and courts in the exercise of his or her rights and legitimate interests; in no circumstances may there be any denial of defence rights.

2. Likewise, everyone has the right to the assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delay and with full guarantees; to the use of evidence appropriate to their defence; to not make self-incriminating statements; to not declare themselves guilty; and to be presumed innocent until proven guilty."

21. The relevant provisions of the Code of Criminal Procedure, as in force at the relevant time, provide as follows:

Article 509

"1. The preliminary investigating judge may exceptionally order that the suspect be held in detention incommunicado ... to avoid the suspect violating the victim's legal rights, concealing or destroying evidence, or committing new criminal acts.

2. Detention incommunicado shall last [only] for the period of time that is strictly necessary in order to implement urgent measures aimed at avoiding the dangers referred to in the preceding paragraph. Detention incommunicado cannot be extended beyond five days ...

3. The decision ordering the detention incommunicado or, where appropriate, an extension thereof, shall state the grounds on which the measure was taken. ..."

Article 510

"1. A detainee held incommunicado may attend, with due precautions, proceedings in which, under this law, [he or she] may intervene, provided that their presence will not undermine the purpose of their being detained incommunicado.

...

3. A detained person shall not be allowed to make or receive any communication. Nevertheless, the judge or court may authorise [contact] that does not defeat the purposes of detention incommunicado and shall, if necessary, adopt appropriate measures.

4. A person detained incommunicado who so requests shall have the right to be examined by a second forensic doctor appointed by the judge or court that has jurisdiction in respect thereof."

Article 520

"...

2. Every detained person shall be informed, in a comprehensible manner and immediately, of the facts " in respect of which they are charged and of the reasons for their being deprived of liberty, as well as of the rights to which they are entitled – especially of the following:

(a) the right to remain silent, not to make a statement if they do not wish to, not to answer any or some of the questions put to them or to state that they will only make a statement to a judge;

(b) the right not to make a statement incriminating themselves and not to confess guilt;

(c) the right to appoint a lawyer and to request his or her presence when giving a statement to the police or to a court and for [that lawyer] to be present at any identity

parade in which he or she may participate. If a detainee or prisoner does not appoint a lawyer, one shall be appointed *ex officio*;

(d) the right to inform a relative, or any other person, of the detention and the place of custody in which he or she is being held at any time. Foreigners shall have the right to notify the consular office of their country of the above circumstances.

....

6. Assistance provided by a lawyer shall consist of:

(a) requesting, where appropriate, that the detainee or prisoner be informed of the rights set out in section 2 of this Article and that a medical examination – as provided above ... be conducted;

(b) requesting from the court or the civil servant who conducted the proceedings in which the lawyer has intervened, once [those proceedings] have finished, to declare or expand on any information [the lawyer] deems appropriate, as well as the recording of any incident that may have arisen while the proceedings were underway;

(c) holding a private interview with the detainee at the end of any proceedings at which he or she has been present. ...”

Article 520 bis

“1. All persons arrested as suspects in respect of any of the crimes referred to in Article 384 bis. will be brought before the competent judge within seventy-two hours of their arrest.

However, the detention may be extended for the time needed for investigations [to be carried out], up to a maximum of a further forty-eight hours, as long as, once this extension has been requested in a reasoned manner within forty-eight hours of the arrest, this is authorised by a judge within a further twenty-four hours. Authorisation of or refusal to grant [such an] extension will be given in a reasoned decision.

2. Where a person is arrested for the reasons set out in the previous paragraph, a judge may be requested to order their detention incommunicado, and that judge must reach a reasoned decision within a time-limit of twenty-four hours. Once detention incommunicado is requested, the detainee will, in all cases, be kept incommunicado, without prejudice to their right to a defence and to the provisions of Articles 520 and 527, until the judge has issued the relevant decision.

3. During the detention, the judge may, at any time, request information and make [himself or herself] aware – personally or through [enquiries made by] the investigating judge for the district or demarcation area in which the detainee is to be found – of the detainee’s situation.”

Article 527

“1. The detainee or prisoner, while [being held] incommunicado, may not enjoy the rights set out in the present chapter, with the exception of those established in Article 520, with the following provisos:

a) in every instance, the lawyer will be appointed *ex officio*;

b) he or she shall not be entitled to the [right to contact] provided for in point d) of paragraph 2;

c) neither shall he or she be entitled to the interview with his or her lawyer specified in point c) of paragraph 6."

Article 384 bis

"Once an order for prosecution is final and provisional detention is ordered in respect of a crime [allegedly] committed by the person concerned or related to armed gangs or terrorist or rebel individuals, an accused person who may have held a public post or duty will automatically be suspended from exercising [that duty or post] for as long as that detention lasts."

22. The Code of Criminal Procedure, as currently in force (as amended by Organic Law 13/2015 of 5 October 2015), provides as follows.

Article 509

"1. An investigating judge or court may, exceptionally, by means of a reasoned decision, order detention incommunicado or imprisonment in the event of any of the following circumstances:

a) an urgent need to prevent serious consequences that may place the life, liberty or physical integrity of a person in danger, or

b) an urgent need for immediate action on the part of the examining judge in order to prevent criminal proceedings from being compromised.

2. Detention incommunicado will last for as long as strictly necessary to take urgent legal measures aimed at preventing the risks referred to in the previous paragraph. The detention incommunicado may not last for longer than five days. In cases where imprisonment is ordered on the grounds of one of the crimes referred to in Article 384 bis or of other crimes committed in concert and in an organised manner by two or more persons, the detention incommunicado may be extended by another period of not more than five days.

3. The decision imposing detention incommunicado or, as the case may be, an extension thereof must set out the grounds on which this measure was ordered."

Article 520

"...

"2. All detainees or imprisoned persons will be informed, in writing, in easily understandable language, [and] in a language that they can understand immediately, of the acts of which they are accused and of the grounds giving rise to their imprisonment, and also of their rights, particularly the following:

(a) the right to remain silent – not making a statement if they do not wish to do so or not answering some or any of the questions put to them, or declaring that they will only make a statement to a judge;

(b) the right not to make a statement incriminating themselves and not to confess to their own guilt;

(c) the right to appoint a lawyer, without prejudice to the provisions of paragraph 1 § (a) of Article 527, and to be advised by [him or her] without unjustified delay. In the event that, owing to geographical distance, it is not possible for the lawyer to attend immediately, the detainee will be allowed contact with [him or her] via telephone or video conferencing, except where such contact is impossible;

(d) the right of access to those elements of the proceedings that are essential in order to be able to challenge the lawfulness of the detention or deprivation of liberty.

....

6. The assistance rendered by a lawyer will consist of:

(a) requesting, when appropriate, that the detainee or prisoner be informed of the rights provided in paragraph 2 and, if necessary, that the medical examination ... be carried out;

(b) being present at the taking of statements from the detainee, at the recording of any examination to which [he or she is] subject to and at reconstructions of events in which the detainee takes part. The lawyer may ask the judge or official who conducted proceedings in which [the applicant] took part, after those proceedings have been completed, for a statement or clarification regarding any points that [the lawyer] considers pertinent, as well as a copy of the record of any incident that may have occurred during those proceedings;

(c) informing the detainee of the consequences of giving or refusing consent to ... such legal measures as are requested ...

(d) interviewing the detainee in private, including prior to making a statement to the police, the prosecutor or the judicial authority, without prejudice to the provisions of Article 527.

7. Communication between the accused and [his or her] lawyer will be confidential in nature [and conducted] under the same terms and with the same exceptions as those provided in paragraph 4 of Article 118...”

Article 527

“In the case of situations set out under Article 509, a detainee or prisoner may be deprived of the following rights, if the circumstances of the case, so justify,

(a) to appoint a lawyer of his or her choice;

(b) to communicate with all or any of the persons with whom they have a right to [communicate], except with the judicial authorities, the Public Prosecutor’s Office ... and the forensic doctor;

(c) to hold confidential meetings with his or her lawyer;

(d) to have access to the proceedings [in question], except for [those concerning] essential elements [necessary] in order to be able to challenge the legality of [his or her] arrest.

2. Detention incommunicado or the restriction of any other right noted in the previous paragraph shall be imposed by a court order. When the restriction of rights is requested by the Judicial Police or by the Public Prosecutor’s Office, the measures provided for in paragraph 1 shall be understood to have been ordered for a maximum period of twenty-four hours. Within this time, the judge must rule on the request, as well as on the appropriateness of ordering the secrecy of the proceedings. Detention incommunicado – and the application in respect of the detainee or prisoner of any of the exceptions referred to in the previous paragraph – will be imposed by a court order that states the reasons justifying the application of each one of the exceptions to the general regime, in accordance with the provisions of Article 509.

The judge will effectively control the conditions under which the detention incommunicado is carried out, for the purpose of which he or she may demand [certain] information [in order] to monitor the state of the detainee or prisoner and [whether] respect [is observed] for the detainee's or prisoner's rights.

3. Medical examinations of a detainee whose [contact] with all or any of the persons with whom [he or she] has the right to [communicate] is restricted will be carried out at least twice every twenty-four hours, depending on the criteria followed by the doctor [in question]."

23. The Spanish Constitutional Court's judgment no. 196/1987, dated 11 December 1987, dealing with the unconstitutionality of Article 527 of the Code of Criminal Procedure (as in force at the relevant time), states as follows:

"...

7. The special nature or seriousness of certain crimes, or the subjective and objective circumstances surrounding them, may render it essential to conduct the police and judicial proceedings in the utmost secrecy. [Such proceedings] would be justified in order to pre-empt escape or evasion of arrest on the part of those involved in the crime under investigation or the destruction or concealment of evidence of its commission.

In view of this, the Code of Criminal Procedure grants the judicial authorities exclusive power to order the detention incommunicado of a detainee. This is an exceptional measure of short duration that aims to isolate the detainee from personal relationships that might be used to transmit news of an investigation to the outside world, to the detriment of its success. In such a situation, the imposition of a legal-aid representative appears to be one more measure that the [legislature], within its capacity to regulate the right to legal assistance, has [prescribed] in order to reinforce the secrecy of criminal investigations.

...

Detention incommunicado imposed under the conditions provided by law serves to protect the values guaranteed by the Constitution and allows the State to fulfil its constitutional duty to provide security to citizens, increasing their confidence in the functional capacity of State institutions. It follows that the [suspension], for a limited length of time, of the [possibility] of a detainee being held incommunicado exercising his right to freely appoint a lawyer ... cannot be considered to constitute an unreasonable or disproportionately restrictive measure, but rather a balanced reconciliation of the right to legal assistance ... with the aforementioned constitutional values. The limitation imposed on that fundamental right is reasonably balanced with the aim pursued, in accordance with the legal requirement of proportionality.

This declaration does not in any way contradict the international conventions signed by Spain, whose interpretative value in relation to fundamental rights and public freedoms is enshrined in Article 10 § 2 of the Constitution. As we have already pointed out, these rights are more restrictive in terms of the provision of legal assistance to a detainee [than are the relevant provisions set out] in our Constitution ...

Consequently, ... Article 527 § (a) of the Code of Criminal Procedure does not violate the essence of the right to legal assistance guaranteed to the detainee by Article 17 § 3 of the Constitution..."

II. RELEVANT INTERNATIONAL LAW MATERIALS

A. The Council of Europe

24. Recommendation Rec (2006)2 of the Committee of Ministers to member States of the Council of Europe on the European Prison Rules, adopted on 11 January 2006, as applicable at the relevant time, reads, in so far as relevant, as follows:

> "Legal advice
>
> 23.1 All prisoners are entitled to legal advice, and the prison authorities shall provide them with reasonable facilities for gaining access to such advice.
>
> 23.2 Prisoners may consult on any legal matter with a legal adviser of their own choice and at their own expense.
>
> 23.3 Where there is a recognised scheme of free legal aid the authorities shall bring it to the attention of all prisoners.
>
> 23.4 Consultations and other communications including correspondence about legal matters between prisoners and their legal advisers shall be confidential.
>
> 23.5 A judicial authority may in exceptional circumstances authorise restrictions on such confidentiality to prevent serious crime or major breaches of prison safety and security.
>
> 23.6 Prisoners shall have access to, or be allowed to keep in their possession, documents relating to their legal proceedings."

25. The relevant parts of the General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of 10 November 2011, entitled "Access to a lawyer as a means of preventing ill-treatment", read as follows:

> "22. The CPT fully recognises that it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer who can be trusted not to jeopardise the legitimate interests of the investigation should be organised. It is perfectly feasible to make satisfactory arrangements in advance for this type of situation, in consultation with the local Bar Association or Law Society.
>
> 23. The right of access to a lawyer during police custody must include the right to meet him, and in private. Seen as a safeguard against ill-treatment (as distinct from a means of ensuring a fair trial), it is clearly essential for the lawyer to be in the direct physical presence of the detained person. This is the only way of being able to make an accurate assessment of the physical and psychological state of the person concerned. Likewise, if the meeting with the lawyer is not in private, the detained person may well not feel free to disclose the way he is being treated. Once it has been accepted that exceptionally the lawyer in question may not be a lawyer chosen by the detained person but instead a replacement lawyer chosen following a procedure agreed upon in advance, the CPT fails to see any need for derogations to the confidentiality of meetings between the lawyer and the person concerned.

24. The right of access to a lawyer should also include the right to have the lawyer present during any questioning conducted by the police and the lawyer should be able to intervene during the questioning. Naturally, this should not prevent the police from immediately starting to question a detained person who has exercised his right of access to a lawyer, even before the lawyer arrives, if this is warranted by the extreme urgency of the matter in hand; nor should it rule out the replacement of a lawyer who impedes the proper conduct of an interrogation. That said, if such situations arise, the police should subsequently be accountable for their action."

B. The European Union

26. Article 48 of the Charter of Fundamental Rights guarantees "respect for the rights of the defence of anyone who has been charged". Article 52 § 3 furthermore states that the meaning and scope of that right is the same as that of the equivalent right laid down by the European Convention on Human Rights.

27. The relevant parts of the opinion of 7 December 2011 of the European Economic and Social Committee on the "Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest" (Com(2011) 326 final. 2011/0154(COD)), provide:

"3.7.2.5.1 The right of access to a lawyer cannot be dissociated from its corollary, the principle of the free choice of lawyer, pursuant to Article 6.3 c) of the European Convention of Human Rights. Having noted that the proposal for a directive makes no reference to this, the EESC proposes reiterating this principle. A derogation might be provided for in cases of terrorism and organised crime at the request of the judicial authorities; the lawyer could then be appointed by the relevant professional body."

28. Directive 2013/48/EU of 22 October 2013 provides, in so far as relevant, as follows:

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;

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 exercise effectively 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...”

C. The United Nations

29. The relevant provision of the International Covenant on Civil and Political Rights provides as follows:

Article 14 § 3 (b)

“Everyone charged with a criminal offence is entitled “[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.”

30. General Comment No. 32 of the Human Rights Committee, entitled “Article 14 – Right to equality before courts and tribunals and to a fair trial”, reads, insofar as relevant, as follows:

“34. The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised

professional ethics without restrictions, influence, pressure or undue interference from any quarter".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (C) OF THE CONVENTION

31. The applicant alleged that the fact that during the time that he had been held in detention incommunicado he had not been permitted to receive assistance from a lawyer of his own choosing, nor to communicate with him before and during his questioning by the police, had breached his right to a fair trial under Article 6 §§ 1 and 3 (c) of the Convention, which, in so far as relevant, reads as follows:

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

A. Admissibility

32. The Court notes that this application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It furthermore notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

33. The applicant stated that when being questioned by the police he had been deprived of the possibility of being assisted by a lawyer of his choosing, since a legal-aid representative had been appointed to him. He claimed that he was vulnerable because he had travelled a long distance by car and he had not slept before the first police interview. Furthermore, his defence had been neither practical nor effective. The legal-aid representative had had no access to the case file, and he had not been allowed to meet with him before or after the police interview. His legal-aid representative had expressed his opposition to the applicant being required to give his second statement to the police, as he had considered that the applicant's rights had not been respected.

34. In the applicant's opinion, the statements that he had given during his detention incommunicado had been unsound, and the police had used them to obtain the evidence that had later been used to justify his conviction.

(b) The Government

35. The Government argued – citing Court's judgment in *Schiesser v. Switzerland*, 4 December 1979, § 36, Series A no. 34 – that Article 5 § 3 of the Convention did not provide that a detained person had to be represented by a lawyer when in police custody. They also submitted that when the Court examined issues concerning the criminal prosecution of individuals, it did not necessarily imply that an applicant had the right to be defended by a lawyer of his or her own choosing (see *Croissant v. Germany*, 25 September 1992, § 29, Series A no. 237-B).

36. The Government asserted that the applicant had been provided with legal assistance from the very first moment of his detention incommunicado, even though such assistance had not been required by Article 5 of the Convention. He had been informed of his constitutional rights before giving each of his statements, including his right to remain silent and his right not to incriminate himself, and had been expressly asked whether he wished to make a statement.

37. The Government noted that the regime governing the applicant's detention incommunicado had been decided by the judicial authorities. The legal period for which the applicant could be detained had been extended by the investigating judge owing to the existence of evidence indicating the applicant's membership of the terrorist group ETA. Moreover, there had been some evidence to indicate that the applicant had been in charge of hiding firearms and material to be used in the preparation of powerful explosives. Therefore, there had been every reason to hold the applicant in detention incommunicado in order to (i) prevent the perpetration of offences and/or the concealment of material to be used in carrying them out, and (ii) prevent the detainee from making contact with a lawyer close to the ETA environment.

38. The applicant's first statement to the police had been made in the presence and with the assistance of a legal-aid representative, with the applicant's express consent. Furthermore, while in the presence of the police officers responsible for taking the statement, the applicant had had the possibility to be orally advised by his lawyer to refrain from testifying or to refrain from testifying in a certain way. The applicant had provided details of the places where IT equipment, firearms, explosives and false licence plates used by the terrorist group in the perpetration of their attacks were hidden. Afterwards, that material had been found during the searches carried out by the *Guardia Civil*.

39. The Government furthermore submitted that when the legal-aid representative had been questioned at the hearing (see paragraph 16 above), he had been unable to specify which of the applicant's alleged rights had been

violated. The applicant's legal-aid representative, who had been called as a witness at the above-mentioned hearing (see paragraph 17 above) before the *Audiencia Nacional*, had not reported that the agents responsible for the applicant's custody had exerted any kind of pressure on him. Furthermore, the judgment delivered by the *Audiencia Nacional* had been based on numerous items of evidence – not only the second statement given by the applicant when he had still been in custody.

2. The Court's assessment

(a) General principles

(i) Applicability and general approach to Article 6 in its criminal aspect at the pre-trial stage

40. The Court reiterates that, even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that Article 6 has no application to pre-trial proceedings. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 249, 13 September 2016, and S*imeonovi v. Bulgaria* [GC], no. 21980/04, §§ 110-11, 12 May 2017, and the case-law cited therein). Thus, Article 6 – especially paragraph 3 thereof – may be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions. As the Court has already held in its previous judgments, the right set out in Article 6 § 3 (c) of the Convention is one element, among others, of the concept of a fair trial in criminal proceedings contained in Article 6 § 1 (see *Dvorski v. Croatia* [GC], no. 25703/11, § 76, ECHR 2015; *Ibrahim and Others*, cited above, § 251; and *Beuze v. Belgium* [GC], no. 71409/10, § 121, 9 November 2018). Those minimum rights guaranteed by Article 6 § 3 are, nevertheless, not ends in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (see the above-cited cases of *Ibrahim and Others*, §§ 251 and 262, and *Beuze*, § 122).

(ii) Right of access to a lawyer

41. Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as soon as there is "a criminal charge" and, in particular, from the time of the suspect's arrest (see *Beuze,* cited above, § 124). In order for the right to a fair trial to remain "practical and effective", Article 6 § 1 requires that, as a rule, access to a lawyer should be provided from the first

interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see *Salduz v. Turkey* [GC], no. 36391/02, § 55-57, ECHR 2008; *Panovits v. Cyprus*, no. 4268/04, § 66, 11 December 2008; and *Dvorski*, cited above, § 80).

42. Moreover, the Court considers it essential that from the initial stages of the proceedings, a person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing (see *Martin v. Estonia*, no. 35985/09, §§ 90 and 93, 30 May 2013). This follows from the very wording of Article 6 § 3 (c), which guarantees that "[e]veryone charged with a criminal offence has the following minimum rights: ... to defend himself ... through legal assistance of his own choosing ...", and is generally recognised in international human rights standards as a mechanism for securing an effective defence to the accused (see *Dvorski*, cited above, § 78).

43. Notwithstanding the importance of the relationship of confidence between a lawyer and his or her client, this right is not absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where it is for the courts to decide whether the interests of justice require that counsel appointed by them defend the accused (see *Croissant*, cited above, § 29). The Court has consistently held that the national authorities must have regard to the defendant's wishes as to his or her choice of legal representation, but may override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (see *Vitan v. Romania*, no. 42084/02, § 59, 25 March 2008). Where such grounds are lacking, a restriction on the free choice of defence counsel would entail a violation of Article 6 § 1 together with paragraph 3 (c) if it adversely affected the applicant's defence, regard being had to the proceedings as a whole (see *Dvorski*, cited above, § 79).

44. In contrast to the cases involving denial of access to a lawyer, which may be justified only in case of the existence of "compelling reasons" for such a restriction (see *Salduz*, cited above, § 55, and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, §§ 258-259, 13 September 2016), the more lenient requirement of "relevant and sufficient" reasons has been applied in situations raising the less serious issue of "denial of choice". In such cases the Court's task will be to assess whether, in the light of the proceedings as a whole, the rights of the defence have been "adversely affected" to such an extent as to undermine their overall fairness (see *Dvorski*, cited above, § 81; see also *Croissant*, cited above, § 31;

Klimentyev v. Russia, no. 46503/99, §§ 117-18, 16 November 2006; and *Martin*, cited above, §§ 96-97).

45. It is the latter test which is to be applied in cases concerning the restrictions on the right of access to a lawyer of one's own choosing. Against the above background, the Court considers that the first step should be to assess whether it has been demonstrated in the light of the particular circumstances of each case that there were relevant and sufficient grounds for overriding or obstructing the defendant's wish as to his or her choice of legal representation. Where no such reasons exist, the Court should proceed to evaluate the overall fairness of the criminal proceedings (see *Dvorski*, cited above, § 82). In making its assessment, the Court may have regard to a variety of factors, including the nature of the proceedings and the application of certain professional requirements (*Croissant*, cited above § 31; *Vitan*, cited above, §§ 58-64; *Martin*, cited above, §§ 94-95, among others).

(iii) Effectiveness of the defence exercised by the legal representative during the applicant's detention incommunicado

46. When assessing the effectiveness of the defence conducted by the lawyer during the first arrest, it will be necessary to evaluate what the purposes of the free legal aid are. In this respect, the Court has acknowledged on numerous occasions since the *Salduz* judgment that prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody. Such access is also preventive, as it provides a fundamental safeguard against coercion and ill-treatment of suspects by the police (see *Ibrahim and Others*, cited above, § 255). Lastly, one of the lawyer's main tasks at the police custody and investigation stages is to ensure respect for the right of an accused not to incriminate himself (see *Salduz*, cited above, § 54) and for his right to remain silent (*Beuze*, cited above, § 128).

47. In this connection, the Court has considered it to be inherent in the privilege against self-incrimination, the right to remain silent and the right to legal assistance that a person "charged with a criminal offence", within the meaning of Article 6, should have the right to be informed of these rights, without which the protection thus guaranteed would not be practical and effective (see *Beuze*, cited above, § 129).

48. Although Article 6 § 3 (c) leaves to the States the choice of the means of ensuring that the right of access to a lawyer or its content is secured in their judicial systems, the scope and content of that right should be determined in line with the aim of the Convention, namely to guarantee rights that are practical and effective (see the above-cited cases of *Salduz*, § 51; *Dvorski*, § 80; and *Ibrahim and Others*, § 272). Assigning a lawyer does not in itself ensure the effectiveness of the assistance that that lawyer may afford an accused, and to that end, minimum requirements must be met.

49. As a rule, suspects must be able to enter into contact with a lawyer from the time at which they are taken into custody. It must therefore be

possible for a suspect to consult with his or her lawyer prior to an interview (see *Brusco v. France*, no. 1466/07, § 54, 14 October 2010 and *A.T. v. Luxembourg*, no. 30460/13, §§ 86-87, 9 April 2015). The lawyer must be able to confer with his or her client in private and receive confidential instructions (see *Lanz v. Austria*, no. 24430/94, § 50, 31 January 2002). Moreover, the Court has found in a number of cases that suspects have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings (see, *inter alia*, *Brusco*, cited above, § 54). Such physical presence must be of a nature to enable the lawyer to provide assistance that is effective and practical rather than merely abstract (see *A.T.,* cited above, § 87), and in particular to ensure that the defence rights of the interviewed suspect are not prejudiced (see *Beuze*, cited above, § 134).

50. The Court reiterates that an accused's right to communicate with his legal representative out of the hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3 (c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness. The importance to the rights of the defence of ensuring confidentiality in meetings between the accused and his lawyers has been affirmed in various international instruments, including European ones (see *Brennan v. the United Kingdom*, no. 39846/98, §§ 38-40, ECHR 2001-X). However, restrictions may be imposed on an accused's access to his lawyer if good cause exists. The relevant issue is whether, in the light of the proceedings taken as a whole, the restriction has deprived the accused of a fair hearing (see *Öcalan v. Turkey* [GC], no. 46221/99, § 133, ECHR 2005-IV).

51. In particular, the Court has accepted that certain restrictions can be imposed on lawyer-client contacts in cases of terrorism and organised crime (see, in particular, *Erdem v. Germany*, no. 38321/97, §§ 65 et seq., ECHR 2001-VII (extracts), and *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 627, 25 July 2013). Nonetheless, the privilege that attaches to communication between prisoners and their lawyers constitutes a fundamental right of the individual and directly affects the rights of the defence. For that reason, the Court has held that the fundamental rule of respect for lawyer-client confidentiality may only be derogated from in exceptional cases and on condition that adequate and sufficient safeguards against abuse are in place (see *M v. the Netherlands*, no. 2156/10, § 88, 25 July 2017).

(iv) Proceedings' overall fairness

52. In addition to the above-mentioned aspects, account must be taken, on a case-by-case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance:

discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention (see *A.T. v. Luxembourg*, § 64; *Dvorski*, §§ 78 and 108; and *Beuze*, § 136, all cited above).

53. In determining whether the proceedings as a whole were fair, regard must be had to whether the rights of the defence have been respected. A non-exhaustive list of factors, drawn from case-law, has been developed which the Court will take into account, where appropriate, when examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of criminal proceedings (see *Beuze*, cited above, § 82). It must be examined in particular whether the applicant was given the opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see *Jalloh v. Germany* [GC], no. 54810/00, § 96, ECHR 2006-IX).

54. It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question that must be answered is whether the proceedings as a whole, including how the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found (see *Jalloh*, cited above, § 95).

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

55. The Court observes that, at the time of the events in question, the Spanish Code of Criminal Procedure denied to detainees being held in detention incommunicado, as in cases concerning terrorism such as the present one, the possibility of being assisted by a lawyer of their own choosing although it stipulated that they had to be appointed a legal-aid representative from the moment of their arrest. Detention incommunicado could only be ordered by an investigating judge in exceptional circumstances and only for purposes provided by law. In respect of terrorism cases, an investigating judge could only authorise detention incommunicado by means of a reasoned decision that made reference to the specific circumstances.

(i) Restrictions of the applicant's right of access to a lawyer of his own choosing and of the access to the lawyer before the interviews during his incommunicado detention

(α) Existence and extent of relevant and sufficient reasons to restrict the applicant´s right to access to a lawyer of his own choosing

56. It is not in dispute that the impugned restrictions stemmed from the applicable provisions of the Code of Criminal Procedure in respect of the ordering of detention incommunicado which, as such, was decided by the investigating judge in a case concerning alleged membership of a terrorist group and possession of explosives (see paragraph 8 above). In particular, the incommunicado detention was decided in view of the *Guardia Civil* requests to enter and search properties used by the cell of ETA to which the applicant allegedly belonged and the objective of pre-empting the potential frustration of the ongoing investigation, which was primarily aimed at the location of explosives (see paragraph 9 above). Following the investigating judge's decision, the applicant was entitled to and was granted a legal-aid representative when arrested and prior to his being interviewed by the *Guardia Civil* for the first time on 1 October 2010 (see paragraph 12 above). His legal-aid representative was again present in person when he made his second statement to the *Guardia Civil* during his detention incommunicado (see paragraph 13 above).

57. The Court has held that, in the abstract, if a suspect receives the assistance of a qualified lawyer, who is bound by professional ethics, rather than another lawyer whom he or she might have preferred to appoint, this is not in itself sufficient to show that the whole trial was unfair – subject to the proviso that there is no evidence of manifest incompetence or bias (see *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37).

58. The Court observes yet that in the concrete situation of the applicant's detention incommunicado, the decisions which restricted his right to be assisted by a lawyer of his own choosing were of a general nature, and they were based on a general provision of law. They did not entail an assessment on a case by case basis and were not subject to judicial authorisation in the light of the specific facts, but took into account general suspicions that the applicant had participated in a terrorist organisation and had hidden explosives that could allegedly have been used in a manner posing a severe risk to others' lives.

59. Moreover, national judges did not provide any justification as regards the necessity of the restriction and gave no reason on this point. The fact that the judge must provide reasons for the incommunicado detention in general does not imply a justification about the necessity of the restriction of the right of access to a lawyer of one's own choosing. The national courts failed to demonstrate how the interests of justice required that the applicant should not be able to choose his counsel.

60. In conclusion, the applicant's right of access to a lawyer of his own choosing at the pre-trial stage was restricted, and there were not relevant and sufficient grounds for that restriction, which was not based on an individual assessment of the particular circumstances of the case when the judicial decision to place the applicant in detention incommunicado was adopted, and were, as such, of a general and mandatory nature.

(β) Existence and extent of compelling reasons to prevent the applicant from having access to his lawyer before the interviews and during his incommunicado detention

61. The applicable test under Article 6 §§ 1 and 3 c) of the Convention consists of two stages – first looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer and then examining the overall fairness of proceedings (see the above-cited cases of *Beuze*, §§ 138 and 141, and *Ibrahim and Others*, §§ 257 and 258-62).

62. In *Ibrahim and Others* the Court confirmed, however, that the absence of compelling reasons did not lead in itself to a finding of a violation of Article 6. Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole (see *Ibrahim and Others*, cited above, § 262). Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the criminal proceedings' overall fairness and may tip the balance towards finding a violation (see *Beuze*, cited above, § 145).

63. The Court observes that no concrete justification has been provided by domestic courts on the existence of compelling reasons to justify these restrictions. Although it is true that in the case at hand the applicant's lawyer was present during his interviews, the lack of access to a lawyer before the interviews is also (and logically) covered by this case-law (see *Beuze*, § 133 and *A.T. v. Luxembourg*, in particular §§ 85-91), which emphasises the crucial importance of these confidential meetings. It has not been shown that domestic courts carried out an individual assessment of the particular circumstances of the case. The Court notes that a case-by-case analysis is currently provided by the domestic law, which however was not applicable at the time in question.

(γ) Conclusion

64. Although there was no concrete judicial assessment as to the existence of relevant and sufficient grounds to restrict the applicant's right of access to a lawyer of his own choosing and the restrictions on the applicant's right to have access to his lawyer before the interviews were not justified by individual compelling reasons, the Court has still to assess the overall fairness. In the present case, this control must be very strict, taking into

account the double nature of the restrictions which were particularly extensive.

(ii) The fairness of the proceedings as a whole

65. The Court notes on the one hand, concerning the circumstances in which the evidence was obtained, and although the applicant argued that the police had exerted pressure on him by threatening to detain his girlfriend, that these elements were duly examined at two judicial instances, and none of them found that the *Guardia Civil* had subjected the applicant to inducements or threats before he had given his second police statement. The applicant was informed of his rights and specifically of his right to remain silent and his right not to incriminate himself. Even so, he was interviewed and made a statement, in the presence of his lawyer, and provided details from which the evidence supporting his conviction was subsequently obtained. Both the applicant and his lawyer added their signatures to the applicant's first statement and to a document confirming that he had previously been informed of his rights as a detainee. As regards the applicant's second statement, which was given despite the opposition of his legal-aid representative, it must be emphasised that the lawyer did not give any specific reasons for his opposition.

66. On the other hand, the Court observes that the applicant's conviction, as he also maintains, was partially based on the evidence obtained as a result of the statements made by him at the police station while being held incommunicado. In particular, those statements were essential in the discovery of the explosive material. As a result of his statements, the police found data and strong evidence that the applicant had committed the offences in question. The conviction was based mainly on the explosives and computer equipment found in the applicant's possession, but also on other evidence, such as the incriminating statements made by co-defendants, the statements of witnesses or the applicant's silence in response to questions from the prosecution (see paragraph 16 above).

67. Although there was other evidence against the applicant, the significant likely impact of his initial confession on the further development of the criminal proceedings against him cannot be ignored. The Court observes in this respect that the Government have not provided any reasons, other than the content of Article 527 of the Code of Criminal Procedure, concerning the necessity to prevent the applicant from contacting his lawyer and having an interview with the legal-aid lawyer assigned to him (paragraphs 10 and 21 above). It also notes that this element has been modified in the Code of Criminal Procedure currently in force (paragraph 22 above), which now requires an individual judicial decision to restrict the right of the detained person to communicate with a lawyer including during incommunicado detention.

68. In this connection, the Court again emphasises the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (see *Salduz*, cited above, § 54). The fairness of proceedings requires that an accused should be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support for an accused in distress and checking of the conditions of detention (see *Dvorski*, cited above, § 108).

69. The Court's role is not to adjudicate in the abstract or to harmonise the various legal systems, but to establish safeguards to ensure that the proceedings followed in each case comply with the requirements of a fair trial, having regard to the specific circumstances of each accused (see *Beuze*, cited above, § 148). The Court is aware of the fact that under the Spanish legal system the right to appoint a lawyer or to benefit from a legal-aid lawyer is guaranteed by the Criminal Procedural Code from the very first moment of the detention (see paragraph 21 above). However, it is not disputed that at that time, although the persons in incommunicado detention had the right to be assisted by a lawyer from the very beginning of the detention, they were restricted to consult with the lawyer prior to the police interviews.

70. The Court observes that the evidence obtained as a result of the statements made by the applicant at the police station formed a significant part of the probative evidence upon which the conviction was based (*Beuze*, § 150). The Court notes in this regard that neither the first instance court, nor the Supreme Court provided any reasoning to justify the applicant's complaint concerning the fact that his legal-aid representative was not allowed to communicate with his client, despite repeated attempts on his part, to communicate with his client (see paragraph 17 above). Moreover, domestic courts did not take into account the fact that the applicant made a new statement despite the opposition of his legal-aid representative, who was present and indicated his opposition to the new interview and refused to sign his agreement (see paragraph 13 above).

71. The Court accordingly considers that the lack of an individual decision on the part of the investigating judge on the specific consequences for the applicant of the impossibility to have access to his lawyer before the interviews, coupled with the absence of appropriate remedial measures during the trial, undermined the fairness of the criminal proceedings brought against the applicant, when considered as a whole, and irretrievably prejudiced his defence rights, as far as he could not receive advice from his representative.

72. In sum, the objective consequence of preventing the applicant's legal-aid lawyer from having access to him at the relevant time as well as from being assisted by a lawyer of his own choosing without giving individualised

reasons was such as to undermine the fairness of the subsequent criminal proceedings in so far as the applicant's incriminating initial statement was admitted in evidence (*Dvorski*, cited above, § 111).

(iii) Conclusion

73. The Court therefore finds that in the circumstances of the present case there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. 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

75. The applicant claimed EUR 50,000 euros in respect of non-pecuniary damage.

76. The Government argued that the applicant's claim was mostly unsubstantiated.

77. The Court is of the view that the applicant must have suffered a certain amount of distress as a result of the violation of his rights under Article 6 of the Convention, which cannot be compensated solely by the finding of a violation or by the reopening of the proceedings (see, *mutatis mutandis*, *Gil Sanjuan v. Spain*, no. 48297/15, § 52, 26 May 2020, and *Elisei-Uzun and Andonie v. Romania*, no. 42447/10, § 78, 23 April 2019). It therefore awards the applicant EUR 12,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

78. The applicant also claimed a total of EUR 18,4756.75 in respect of costs and expenses. This sum was divided as follows: EUR 6,000 for barrister fees incurred in the domestic proceedings; EUR 450 for solicitor (*procurador*) fees incurred in those proceedings; EUR 6,000 and EUR 1,283 respectively for barrister fees incurred by Mr Rezabal Larrañaga and Mr Peter before the Court; EUR 4,742 for translation fees.

79. The Government submitted that pursuant to the Court's case-law claims in respect of costs appertaining to domestic proceedings should be rejected. In respect of the costs in general, they noted that they had not been paid by the applicant but by Ms Ana Atristain Gorosabel, and considered them excessive.

80. 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, duly documented and are reasonable as to quantum. In the present case, having regard to the documents in its possession and the above criteria, the Court dismisses the applicants' claim concerning costs and expenses before the ordinary domestic courts and considers it reasonable to award the sum of EUR 8,000 for the costs and expenses incurred before the Constitutional Court and before the Court.

C. Default interest

81. 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. *Declares* the application admissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 18 January 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernichova Deputy Registrar	Georges Ravarani President