

# 7 - Children's right to legal assistance

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Children's right to legal assistance is a fundamental element of the right to a fair trial. The right to a lawyer has been recognized as early as 1985 when Rule 14.2 of the [Beijing Rules](#) provided for the right to be represented by a legal adviser throughout the proceedings. This right has gained prominence in recent years, in particular since 2008 when the ECtHR delivered its landmark ruling in the case of *Salduz v. France* (no. 36391/02). Since then, the ECtHR has been faced with many more questions concerning the breath of the right to a lawyer, the specific contents or the limitations of this right.

Within the European Union, [Directive 2013/48/EU](#) is dedicated entirely to the right to a lawyer in criminal proceedings (applicable to both adults and children) whereas the [Procedural Safeguards Directive](#) includes specific provisions on the right of access to a lawyer for children. The Procedural Safeguards Directive is to be seen as *lex specialis* in relation to [Directive 2013/48/EU](#), in that when it comes to children the provisions of the Procedural Safeguards Directive are primarily applicable and if a certain aspect is not regulated therein, the relevant rules of [Directive 2013/48/EU](#) shall be incident.

The right to legal assistance is considered one of the minimum guarantees for children accused or suspected of crimes under Article 40 (b) (ii) and it is further elaborated upon in CRC Committee's [General Comment no. 24](#).

The Council of Europe's [Child Friendly Justice Guidelines](#) equally address children's right to a lawyer. Even if these Guidelines are not binding on States, they compound many of the elements of child-friendly justice as developed through the case law of the ECtHR.

The right to a lawyer applies equally to children and adults. However, as with other elements of child justice, this right bears some specificities for children in light of their vulnerability and developmental characteristics. In addition, it is equally important to highlight that debates on concrete aspects of the right to a lawyer continue to exist to the effect that the international case law on the interpretation of this right continues to evolve.

The sections below detail the key components of the right to legal assistance as well as the sanctions for non-compliance with this right. The right to silence -albeit a separate right- is also briefly addressed as it is closely intertwined in practice with the right to a lawyer. Finally, the standards concerning children's right to free legal assistance are also presented below.

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## 1. Starting moment of the right to access to a lawyer

The practicalities of the criminal justice systems have shown that it is not always evident when a child becomes a suspect of a criminal act. It may happen that the police hear children as witnesses, and during the hearing, on the basis of elements in their declarations, they become suspects of crime. Recital 27 of the **Procedural Safeguards Directive** clarifies that the right to legal assistance applies from the moment children are made aware that they are suspects or accused persons. Children's right to a lawyer also means that the lawyer should be present during the questioning by the police.

The **ECtHR** in its turn has ruled on several occasions on the starting moment for the right to access to a lawyer and the importance of access to a lawyer from the first police interrogation.

The case of [Salduz v. Turkey](#) concerns a 17-year-old applicant who was arrested on suspicion of having participated in a manifestation supporting an illegal organization.

Once apprehended by the police, he was handed a form which he had signed. This form reminded him of his rights, including the right to remain silent. He confessed during the first police interrogation, without access to a lawyer as it was not required under the national law at the material time. He later withdrew his confession, in the presence of a lawyer. He was subsequently finally convicted primarily on the basis of his confession given during the first police interrogation.

Before the ECtHR, the applicant complained that his right to defence under Article 6 (3) (c) of the Convention has been breached as he was not represented by a lawyer during the police interrogation.

In finding a violation of Article 6 (1) in conjunction with Article 6 (3) (c) ECHR, the Court first noted that the applicant's confession was the main piece of evidence used by domestic courts in convicting him. The domestic proceedings had subsequently offered the applicant sufficient procedural guarantees, however, the Court considered that none of these guarantees had been capable of curing the fact that he had not had access to a lawyer during the first police interrogation. The Court did not consider that the information provided to the applicant on his right before the questioning represented a valid waiver of the right to a lawyer.

Under Article 6 of the **Procedural Safeguards Directive**, children shall be assisted by a lawyer from whichever of the following points occurs 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 4;
- c. without undue delay after deprivation of liberty;
- d. where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court."

Paragraph 49 of [General Comment no. 24](#) outlines that children should have the right to legal or other appropriate assistance from the outset of proceedings until all appeals/reviews are

exhausted.

## 2. Types of proceedings necessitating the assistance of a lawyer/limits

From the perspective of the ECtHR, the right to a lawyer should be ensured whenever a child is considered to be criminally charged; the notion of a criminal charge being autonomous for the purposes of the Convention (see also Factsheet no. 5).

The case of *Blokhin v Russia* concerned the detention of a 12-year-old minor who was under the national age of criminal responsibility. He claimed that his right to legal assistance under Article 6 (1) and 6 (3) (a) ECHR had been breached as he was questioned by the police without the presence of a guardian, social worker or lawyer.

The Court found that the absence of a lawyer during police custody had irremediably affected his defence rights. Even if the proceedings were not qualified as criminal from the perspective of national law, they constituted a criminal charge within the meaning of Article 6 of the ECHR. The Court held that the vulnerability of the accused at the pre-trial stages can only be compensated by the assistance of a lawyer.

The **Procedural Safeguards Directive** exempts Member States from providing the right to access to a lawyer in case of (i) minor offences and (ii) if the child is not deprived of liberty (Recital 14). Further, under Article 6 (6), Member States may derogate from the right to a lawyer during pre-trial stages only where this would not be proportionate to the nature of the offence or the complexity of the case, taking into account of the child's best interests. Further, under the Procedural Safeguards Directive states may exceptionally derogate from the requirement of having a lawyer present in cases of threats to life, liberty or physical integrity of a person or where action is required to prevent substantial jeopardy in relation to a serious criminal offence.

## 3. Procedural acts where the presence of a lawyer is necessary

The ECtHR has so far held that children suspected or accused of having infringed criminal law must have access to a lawyer from the very first police interrogation. Conversely, the Court has held that Article 6 had not been breached if the applicant's clothes were seized in absence of a lawyer or if a lawyer was not present during the identity parade as the applicant had sufficient opportunities to challenge the results during the proceedings and no procedural infringements in the organization of the identity parade had been noted (*Zherdev v. Ukraine*, 34015/07, §§ 142-148). The Court does accept that there are procedural acts where the presence of a lawyer is not mandatory, and it shall assess this on a case-by-case basis depending on the circumstances of the case as a whole.

Article 6 (6) of the **Procedural Safeguards Directive** equally envisages that the presence of a lawyer may not be required if it is not proportionate to the circumstances of the case. However, under Article 6 (4) (c) the presence of a lawyer is necessary during identity parades, confrontations

or reconstructions of the scene of a crime.

## 4. Content of the right to legal assistance of a lawyer

The ECtHR shall assess whether the assistance of a lawyer was effective. A merely passive attitude of the state whereby the child suspect is handed over a paper or is informed briefly of their rights is not sufficient in discharging of the state's obligations (*Panovits v Cyprus*).

In cases of a manifest failure by counsel to provide effective representation, the Convention requires the authorities to intervene. This is more important for children; ECtHR considering that the authorities have a duty to intervene even in cases of a manifest failure to provide effective legal representation of privately appointed lawyers (*Guvec v Turkey*, no. 70337/01).

The case of *Guvec v Turkey* concerns the arrest and trial of a 15-year-old child on charges of secession of part of the national territory carrying out the death penalty. The applicant was represented by a lawyer only six and a half months after his arrest. The lawyer failed to attend 17 of the 25 hearings. During the retrial, the lawyer attended only one hearing. The ECtHR found a violation of Article 6 (1) and Article 6 (3) (c) on the ground of a lack of effective representation. The domestic courts should have been alerted by the lawyer's absences and consider that the applicant was in urgent need of adequate legal representation.

However, in a more recent case, the court found no violation of Article 6 on account of the ineffectiveness of the legal representation. In *Zherdev v Ukraine* such complaints were dismissed as neither the applicant nor his parents complained about the lawyer domestically and there were no indications of the lawyers' failings being manifest or brought to the authorities' knowledge (§ 152).

In the case of *Beuze v Belgium* (no. 71409/10), the ECtHR has emphasised that the right to legal assistance entails that suspects must be able to enter into contact with a lawyer from the moment they are taken into custody, they should have the possibility to consult with the lawyer (prior to a police interview or even in absence of one) and that such consultation remains confidential (*Beuze v Belgium* § 133). Further (child) suspects have the right to have the lawyer physically present during the initial police interview and whenever they are questioned in the subsequent pre-trial proceedings (*Beuze v Belgium*, § 134). The presence of a lawyer also entails the right to have the lawyer actively assist the client by intervening during questioning to ensure respect for the suspect's rights (*Soytemiz v Turkey* § 44-46, 27).

Article 6 (5) of the **Procedural Safeguards Directive** protects the right to the confidentiality of communications which includes meetings, correspondence, telephone or any other form of communication allowed under national law.

## 5. Waiver of the right to a lawyer

Neither the ECtHR, nor EU law prohibit children suspects or accused of having infringed criminal law from waiving their right to a lawyer. In *Zeherder v. Ukraine*, the ECtHR has established the standard of the 'knowing and intelligent waiver' as follows:

“Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, his entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. Furthermore, it must not run counter to any important public interest [...]. In particular, for a waiver to be effective, it must be shown that the applicant could reasonably have foreseen the consequences of his conduct.”

[Directive 2013/48/EU](#) on the right to access to a lawyer equally envisages the possibility of a waiver and requires authorities to take due account of the age of the suspects or accused.

It should also be noted that a waiver can be revoked at any point during the proceedings and that the revocation has effect from the moment it is made. (Article 9 (3) of Directive 2013/48/EU).

The **CRC Committee** has accepted in [General Comment no. 24](#) that children may waive their right to a lawyer provided that the waiver is voluntary and under impartial judicial supervision ([General Comment no. 24](#) 24), § 51.

## 6. Right to legal or other appropriate assistance

The **ECtHR** has accepted that children could be accompanied by a lawyer or by the holder of parental responsibility during police questioning (*Panovits v Cyprus* § 73, or *Blokhin v Russia* §§ 205-2010).

No such distinction is made under the **Procedural Safeguards Directive**, which entails that for criminal proceedings falling under the subject matter of the Directive children have the right to legal assistance and assistance from their parents (in case of parents, subject to the limitations provided under Article 15 (2) a of the Procedural Safeguards Directive – namely, the best interest of the child; impossibility to reach the holder of parental responsibility or evidence indicates that they could substantially jeopardize the criminal proceedings).

Similarly, the **European Committee on Social Rights** has emphasized that assistance by parents is different from assistance by a lawyer in that the former may lack the specialized knowledge and therefore states should not be allowed to derogate from their obligation to provide legal assistance on the ground that the parents or an adult were present during a certain investigative act (*International Commission of Jurists v Czech Republic*, no 148/2017 § 98).

## 7. Consequences of lack of access to a lawyer

For the **ECtHR**, any confession obtained in absence of a lawyer is not valid and shall not be taken into account as evidence. Conversely, if the evidence obtained was not key for convicting an applicant and such applicant had the opportunity to challenge the legality of the evidence during the trial, the ECtHR will consider that Article 6 has not been breached (*Zherdev v. Ukraine*, 34015/07, §§ 142-148; *Panovits v Cyprus*, §§76, 77).

The **Procedural Safeguards Directive** mandates that states postpone any investigative act which should be carried out in the presence of a lawyer until the lawyer arrives (Article 6 (7)).

## 8. The right to remain silent / the right to not incriminate oneself

The **ECtHR** case-law has shown that a suspect's confession is in many instances the decisive piece of evidence in the conviction (*Salduz v Turkey; Panovits v Cyprus*). The ECtHR considers access to a lawyer to be a procedural guarantee of the privilege against self-incrimination and a fundamental safeguard against ill-treatment, noting the particular vulnerability of an accused at the early stages of the proceedings, when he is confronted with both the stress of the situation and the increasingly complex criminal legislation involved. (*Martin v Estonia*, § 79).

The right to remain silent is a core human right in the criminal justice field and for these reasons confessions extracted in absence of a lawyer, without an express waiver of this right, can irretrievably impact on an applicant's right to a fair trial. They infringe both the right to remain silent as well as the right to access a lawyer. Also, the Court has repeatedly held that the passive attitude of the state manifested by handing a child suspect / accused a letter with information on his or her rights is not enough to discharge the state from its obligations under Article 6 (*Panovits v Cyprus*, § 72). Under the ECtHR the right to remain silent is not absolute, the authorities being allowed to draw inferences from silence and to take it into account in assessing the persuasiveness of the evidence presented by the prosecution. (*Murray v The United Kingdom*, § 47).

The right to freedom from incrimination is also provided under Article 40 (2) (iv) of the CRC. The CRC Committee has interpreted this right in a similar way to the ECtHR: confessions obtained by compulsion should not be accepted as evidence at trial ([General Comment no. 24](#), § 58). The Committee has also noted that the assessment of what amounts to a compulsory confession should take into account the child's age and maturity, indicating thus that children can be coerced easier than adults and without the need to resort to physical violence. (General Comment no 24, § 59). Contrary to the ECtHR where adverse consequences may be drawn from the choice to remain silent, the CRC Committee recommends that no such adverse consequences are inferred if children elect to remain silent ([General Comment no. 24](#), § 45).

## 9. Legal aid

Another guarantee for children in criminal trials is the right to free legal aid under certain conditions. Article 18 of the Procedural Rights Directive requires the Member States to ensure that national law in relation to legal aid guarantees the effective exercise of the right to be assisted by a lawyer. In EU law the right to legal aid is regulated in more detail under [Directive 2016/1919/EU](#). The Directive does not include specific reference to children other than the requirement that states consider the needs of vulnerable suspects, accused or requested persons in the implementation of the Directive (Article 9). Under Article 4 of the Directive Member States are to ensure free legal aid to suspects who lack sufficient resources when the interests of justice so require. Thus, legal aid is not available in all cases. Under the Directive, it is permissible to apply a means or a merits test to determine whether a person is eligible for free legal assistance (Article 4).

A similar provision can be found under Article 6 (3) (c) of the ECHR, according to which a person charged with a criminal offence has the minimum guarantee 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 for free when the interests of justice so require.” The Court has accepted that the right to free legal aid only exists when the interests of justice so require and if an applicant proves that he or she does not have sufficient means for this. The Court has developed criteria for determining when the interests of justice require free legal assistance (*Zdravko Stanev v Bulgaria*, § 38; *Benham v The United Kingdom*, § 33, *Quaranta v Switzerland*, § 34). On the means tests for payment for legal assistance, the Court has held that it is sufficient if there are indications that an applicant does not have sufficient resources (*Tsonev v. Bulgaria* (no. 2), § 39).

One further question which has been presented to the ECtHR was whether the right to be assisted by a lawyer of one’s choosing was breached due to the authorities pressuring the applicant to terminate the contract with the self-appointed lawyer and subsequently appointing him a lawyer ex officio (*Martin v Estonia*). The Court has held that this right is not absolute and can be overridden if the interests of justice so require (*Martin v Estonia*, § 90). Nevertheless, in the case of *Martin v Estonia* the Court found a violation of the applicant’s right to be represented by a lawyer of his own choosing as the authorities did not follow an official procedure for removal of counsel. The Court found it relevant that the applicant was 17 years old at the time and the circumstances of that case cast doubts as to whether the decision to change counsel was genuine (*Martin v Estonia*, §§ 91-94).

The CRC Committee has gone further than the ECtHR or the EU and it has recommended that States provide legal assistance, free of charge to all children who are facing criminal charges before judicial, administrative or other public authorities ([General Comment no. 24](#) § 51).

The following international non-binding materials also include standards and guidelines concerning Legal Aid:

- [United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#) (2012)
- [United Nations Basic Principles on the Role of Lawyers](#) (1990)
- [United Nations Guidelines for Action on Children in the Criminal Justice System](#) (1997)
- [Recommendation CM/Rec\(2008\)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures](#)

## Further reading

Right to silence and related rights in pre-trial suspects’ interrogations in the EU: [The EmpRiSe Project](#);

Guidelines for child-friendly legal aid for children in conflict with the law – recommendations and inspiring practices aimed at legal aid providers and policy makers: [The LA Child guidelines](#)

The LA Child guidelines: <https://lachild.eu/the-projects/la-child/guidelines-on-legal-aid-for-children/>