Streszczenie

Paweł Petasz

Kazirodztwo jak przestępstwo seksualne – relikt przeszłości czy wciąż konieczność teraźniejszości?

Artykuł traktuje o przestępstwie kazirodztwa w polskim prawie karnym. W opracowaniu przeanalizowano uzasadnienie istnienia prawnego zakazu kazirodztwa. Autor, badając tę problematykę, odwołuje się do kontekstu historycznego oraz poglądów przedstawicieli doktryny prawa karnego. W końcowej części opracowania sformułowano projekt przepisu w ramach postulatu *de lege ferenda*.

Słowa kluczowe: kazirodztwo, przestępstwo seksualne, wolność seksualna, obyczajność.

Katarzyna Wiśniewska
University of Warsaw, Poland
ka.wisniewska7@uw.edu.pl
ORCID: 0009-0006-4151-5846

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"Fair" and "Inclusive": The Standard of Criminal Proceedings Involving Suspects and Defendants with Special Needs

Heightened public consciousness of the necessity of implementing measures to enhance the functionality of individuals with special needs within society has led to alterations in criminal proceedings. There is a growing recognition among criminal justice professionals[1] and decision-makers of the necessity of providing assistance or adjustments to participants in the criminal justice process who, because of their characteristics or circumstances, may require such support to fully exercise their procedural rights and participate effectively in the process.[2] Nevertheless, the efficacy of the solutions implemented has not yet been fully achieved for all groups with special needs who play different roles within the criminal justice process. This situation is the result of several factors. It is worth setting out the perspectives that are frequently articulated in ongoing discourses and analyses pertaining to this subject matter. First, the noticeable difficulties in implementing adaptations for participants in the criminal justice process can be attributed to the challenge of "codifying" or "universally defining" the concept of vulnerability.[3] Second, these difficulties are a consequence

[1] For example: K. Girdwoyń, *Right to appropriate representation of defendants with intellectual disabilities in criminal proceedings*, "Ius Novum" 2020, vol. 14, no. 3, pp. 67–86; J. Nowakowska, *Wczesna identyfikacja osób wymagających szczególnego traktowania, będących uczestnikami postępowania karnego* [in:] *Osoby z niepełnosprawnością intelektualną. Z uwzględnieniem wyników badań przeprowadzonych przez pracowników Biura Rzecznika Praw Obywatelskich*, eds. E. Dawidziuk, M. Mazur, Warszawa 2017, p. 160; F. Gerry, P. Cooper, *Effective Participation of Vulnerable Accused Persons: Case Management, Court Adaptation and Rethinking Criminal Responsibility*, "Journal of Judicial Administration" 2017, vol. 26, no. 4, pp. 265–275.

[2] For example, Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013/C 378/02); Article 13 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings and on the right to inform a third party of a deprivation of liberty and the right to communicate with third parties and consular authorities during a deprivation of liberty; Article 9 Directive 2016/19 on mutual legal assistance to suspects and accused persons in criminal proceedings and to requested persons in European Arrest Warrant proceedings; Article 3(2) Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

[3] The Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable suspects or accused in criminal proceedings (2013/C 378/02) provides a definition that refers to

of the specificity of the solutions, which are intended to respond to the needs of the participants in a criminal trial. Third, problems stem from the insufficient abilities of those involved in criminal proceedings to identify potential vulnerabilities[4] and to implement measures to prevent their occurrence. Fourth, difficulties are also due to challenges in accurately assessing the efficacy of procedural safeguards for vulnerable persons.

This article identifies the standards set out by the Council of Europe for the treatment of suspects and defendants who have been recognized by European and international bodies as having special needs, or who have defined themselves as such. Analysis of individual cases addresses two key questions: first, whether the current jurisprudence of the European Court of Human Rights provides adequate guidance to national authorities (both legislative and judicial) on how to address the rights of persons with special needs; and second, whether such persons require additional attention from those conducting criminal proceedings.

1. The concept of vulnerability

It is crucial to identify the scope of the term vulnerable person within the Council of Europe framework. It is worth noting that the term vulnerable is derived from the Latin word "*vulnus*," meaning "wound."[5] The term vulnerable refers to an individual who is "susceptible to harm, influence or attack, whether physical or mental."[6] The term has analysed in a variety of ways in the relevant literature. Martha Albertson Fineman defines vulnerability as "a universal, inescapable, enduring aspect of the human condition."[7] Although the word vulnerability is not explicitly referenced in the text of the European Convention on Human Rights,[8] its meaning is nevertheless inferred

"all suspects or defendants who, owing to their age, mental or physical condition or disability, are unable to understand and participate effectively in criminal proceedings," but this is not binding and, as argued in the literature, not fully accepted (for example, L. Mergaerts, *European guarantees for vulnerable suspects and defendants: Good intentions but limited impact in national procedures*, 2020).

[4] M. Vaughan, R. Milne, J. Cherryman, G. Dalton, *Managing investigative interviews with vulnerable suspects in the UK: Do specialist interview managers (IM's) understand vulnerability? Psychology*, "Crime & Law" 2024, pp. 1–20.

[5] B.S. Turner, *Vulnerability and Human Rights*, University Park 2006; A. Adamska-Gallant, *Vulnerable Witnesses in Practice of International Courts – Definition and Trauma as the Key Risk Factor*, "Peace Human Rights Governance" 2024, vol. 8, no. 1, pp. 53–74.

[6] See: *vulnerable* [in:] *Cambridge Dictionary*, https://dictionary.cambridge.org/dictionary/english/vulnerable [accessed: 2024.09.2].

[7] M.A. Fineman, *The vulnerable subject: Anchoring equality in the human condition*, "Yale Journal of Law & Feminism" 2008, vol. 20, no. 1, p. 8.

[8] The absence of such a formulation is due, on the one hand, to the construction of the ECHR, but also to the fact that the notion of vulnerability is found in more recent instruments of the European order, including the Council of Europe, such as the Council of Europe Convention on preventing and combating violence against women and domestic violence, or Recommendation No. (97) 13 of the Committee of Ministers of the Council of Europe to Member States concerning intimidation of

from the case law of the Strasbourg Court (hereafter referred to as the European Court of Human Rights, ECtHR, or the Court).[9] References to it can be found not only in judgments delivered in the context of criminal proceedings (that is, those on which I focus in this article), but also (or even primarily) connected with other aspects of the activities of public authorities.[10] According to relevant literature, the Court's concept of vulnerability has three characteristics: it is relational, specific, and harm-based.[11]

In the context of criminal proceedings, the Court refers to the concept of vulnerability in relation to the situation of suspects, accused and convicted persons, as well as victims.[12] Drawing on the Court's case law to date, it can be said that vulnerability in the course of criminal proceedings or at a particular stage of such proceedings is determined both by factors of a subjective nature, that is, those relating to the characteristics or profile of the person or his or her state of health, and by factors of an objective nature, that is, those relating to the circumstances of the commission of the offence, detention, or interrogation. In its case law, the Court has thus far considered minors[13] or juveniles,[14] individuals diagnosed with a mental illness,[15] persons with disability,[16] persons suffering from addiction[17] or intoxication,[18] and individuals for whom the language of the proceedings is not their native language[19] as "vulnerable suspects" and "vulnerable defendants." The ECtHR has identified detention or imprisonment[20]

witnesses and the rights of the defence (adopted by the Committee of Ministers on 10 September 1997 at the 600th meeting of the Committee of Ministers), and at European Union level in the Directives on procedural rights.

[9] See the judgment of ECtHR in *Chapman v United Kingdom* (GC), 2001, which is considered the starting point for the creation of the concept of vulnerability in ECtHR jurisprudence.

[10] O.M. Arnardóttir, *Vulnerability under Article 14 of the European Convention on Human Rights Innovation or Business as Usual?*, "Oslo Law Review" 2017, vol. 4, issue 3, pp. 150–171; L. Peroni, A. Timmer, *Vulnerable Groups: The Promise of an Emergent Concept in European Human Rights Convention Law*, "International Journal of Constitutional Law" 2013, vol. 11, no. 4, pp. 1056–1085; M. Domańska, *People with Disabilities as a Vulnerable Group. The Concept of Protection of the Rights of Vulnerable Groups*, "Białostockie Studia Prawnicze" 2018, vol. 23, no. 4, p. 33; I. Truscan, *Considerations of vulnerability: From principles to action in the case law of the European Court of Human Rights*, "Retfærd (Nordic Journal for Law and Justice)" 2013, vol. 36, no. 3/142, pp. 64–83.

[11] L. Peroni, A. Timmer, *Vulnerable Groups*…, p. 1060.

[12] L. Grans, *The Impact of Vulnerability on State Obligations in Criminal Proceedings on Domestic Violence: Interpreting the Istanbul Convention and the European Convention on Human Rights*, "Women & Criminal Justice" 2023 [published online], pp. 1–16.

[13] ECtHR (Grand Chamber), judgment of 11 July 2002 in *V. v the United Kingdom*, application no. 24888/94; ECtHR, judgment of 27 April 2017 in *Zherdev v Ukraine*, application no. 34015/07; ECtHR (Grand Chamber), judgment of 27 November 2008 in *Salduz v Turkey*, application no. 36391/02.

[14] ECtHR, judgment of 24 January 2019 in *Knox v Italy*, application no. 76577/13.

[15] ECtHR (Grand Chamber), judgment of 27 November 2008 in *Salduz v Turkey*, application no. 36391/02.

[16] ECtHR judgment of 12 June 2025 in *Krpelik v the Czech Republic*, application no. 23963/21.

[17] ECtHR, judgment of 8 February 2024 in *Bogdan v Ukraine*, application no. 3016/16; ECtHR, judgment of 31 March 2009 in *Płonka v Poland*, application no. 20310/02.

[18] ECtHR, judgment of 11 May 2023 in *Lalik v Poland*, application no. 47834/19.

[19] ECtHR, judgment of 24 January 2019 in *Knox v Italy*, application no. 76577/13.

[20] ECtHR (Grand Chamber), R, judgment of 27 June 2000 in *Salman v Turkey*, application no. 21986/93; ECtHR, judgment of 13 September 2011 in *Mehmet Şerif Öner v Turkey*, application no. 50356/08.

and participation in proceedings in a country other than the country of residence of the accused[21] as examples of a "vulnerable situation." It is also important to note that the Court recognises that being a suspect in criminal proceedings and being a detained person is a challenging situation, both in terms of the stress involved and the complexity of the rules of criminal procedure. As a result, a suspect may to some extent be considered a "vulnerable person" or a person in a "vulnerable situation"[22] simply by being in these circumstances. Procedural guarantees serve to mitigate the additional distress that may be experienced in such circumstances.

The lack of clarity of the concept of vulnerability at the level of national or European legislation gives rise to difficulties and doubts in practice. At the same time, the use of this concept by the Court in assessing the implementation of fundamental rights and freedoms and in determining the actual situation of a person has a certain value and, from a practical point of view, an advantage.[23] It makes it possible to include within the scope of this category all those who require special protection, without being limited to a closed or precisely defined catalogue of characteristics or circumstances. At first sight, therefore, the advantages of this concept are noticeable, particularly in a situation as complex and individual as a criminal trial.[24] However, further reflection is required to ascertain whether this approach also has disadvantages and whether it leads to negative consequences or is a source of unintended injustice.

2. Overall fairness of the trial

The starting point for interpreting the Council of Europe standard for the treatment of defendants and suspects with special needs in criminal proceedings is an analysis of Article 6 of the European Convention on Human Rights (hereafter, ECHR or the Convention).[25] Article 6 of the Convention provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, to decide on his civil rights and obligations or the merits of any criminal charge against him."[26] The specific nature of criminal proceedings is underlined by the inclusion in paragraph 3 of Article 6 of specific procedural guarantees, including that the accused (a) be informed promptly, in an intelligible language, of the nature and cause of the accusation; (b) have adequate time and facilities for the preparation

[21] ECtHR, judgment of 24 January 2019 in *Knox v Italy*, application no. 76577/13.

[22] E.g. ECtHR (Grand Chamber), judgment of 27 November 2008 in *Salduz v Turkey*, application no. 36391/02, para. 54; ECtHR, judgment of 28 October 2010 in *Leonid Lazarenko v Ukraine*, application no. 22313/04, para. 50.

[23] O.M. Arnardóttir, *Vulnerability under Article 14*…

[24] Por. L. Peroni, A. Timmer, *Vulnerable Groups*…

[25] Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on 4 November 1950.

[26] Article 6, Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on 4 November 1950.

of a defence; (c) defend himself in person or through legal assistance and, if lacking sufficient means to pay for legal assistance, be assisted free of charge by legal counsel appointed *ex officio* when the interests of justice so require; (d) examine or cause to be examined the witnesses against him/her; (e) examine or have examined witnesses against him/her and require the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution; and (f) have the free assistance of an interpreter if he/she does not understand or speak the language used in court.

The definition of procedural fairness in the Convention is clarified through interpretation by the European Court of Human Rights as a result of individual cases brought by applicants in different factual and legal situations. The variety of cases brought before the Court makes it possible to clarify the standards of the ECHR based on current problems faced by participants in criminal proceedings and, on the other hand, to take into account in the Court's positions the current realities of the functioning of the criminal justice system. To answer the question posed in the introduction of the text, that is, how the standard of conduct is defined at the European level in the situation of the participation of persons with special needs, it is necessary to answer the question of whether "sensitivity to these needs" is inscribed both in the general concept of "fairness/justice of criminal proceedings" formulated in paragraph 1 and whether it constitutes an ancillary element to each of the specific procedural guarantees set forth in paragraph 3 of Article 6. To do so, it is necessary to determine the relationship between the general concept of "fairness of proceedings" set out in Article 6(1) and the individual guarantees listed in Article 6(3).

In recent years, this discussion has been actively pursued at both the academic and the jurisprudential levels. The debate also encompasses cases involving defendants and suspects with special needs. This article addresses the question of access to a lawyer at the first stage of proceedings for persons who can be considered vulnerable. The choice of this topic is not arbitrary. The right to a defence and the possibility of being assisted by a lawyer are among the cornerstones of criminal proceedings. Furthermore, this is an issue that still arouses much emotion and an area in which the Court's position is still evolving.

The *Salduz v Turkey* case[27] is a significant contribution to this discussion; it has been seen by numerous legal professionals as both a groundbreaking and a crucial development.[28] The Salduz case concerned a juvenile suspected of terrorist acts, thus a person who under European and international standards is considered to require special adjustments due to his age. In his application to the Court, the applicant alleged a violation of Article 6 § 3(c), in conjunction with Article 6 § 1, of the Convention on the ground that he had not had access to legal assistance during his detention, which

[27] ECtHR (Chamber), judgment of 26 April 2007 in *Salduz v Turkey*, application no. 36391/02; ECtHR (Grand Chamber), judgment of 7 November 2008 in *Salduz v Turkey*, application no. 36391/02.

[28] W. Jasiński, *Dostęp osoby oskarżonej o popełnienie czynu zagrożonego karą do adwokata na wstępnym etapie ścigania karnego: standard strasburski*, "Europejski Przegląd Sądowy" 2019, no. 1, pp. 24–30.

had led to his confession to the alleged acts. His interrogation was conducted without the presence of a lawyer, as he was subject to the procedural measures applicable to individuals suspected of involvement in terrorist acts. During a subsequent interrogation, conducted by the public prosecutor and the judge, the applicant denied any involvement in the crime and claimed that his earlier confession had been obtained through coercive actions by the police. In its judgment of 26 April 2007, the Chamber of the Court determines that no violation of Article 6 § 3(c) of the Convention had occurred.[29] The Chamber observes that the applicant had been represented by counsel throughout the trial and appeal proceedings and that the applicant's statements to the police did not constitute the sole basis for the conviction. In the Chamber's view, the applicant was afforded the opportunity to challenge the prosecution's allegations in a manner that did not place him at a substantial disadvantage in comparison to the opposing party. Furthermore, the Chamber observes that the national court had considered the circumstances surrounding the applicant's arrest, expert opinion, and the testimony of witnesses in determining the applicant's sentence. In light of these considerations, the Chamber finds that the lack of legal assistance during the period of police custody did not affect the fairness of the applicant's trial as a whole. The Chamber's decision does not make any reference to the applicant's age or the specific procedural situation that this entails. Nevertheless, such a reference can be found in the dissenting opinion of Judges F. Tulkens and A. Mularoni, who do not share the majority view. In the grounds of their opinion, they stress that the applicant was a minor and that he faced a sentence of several years' imprisonment for the alleged offence.[30] They conclude their opinion by stating that: "The purpose of the Convention is to protect rights that are not theoretical or illusory, but practical and effective. This principle also applies to the right to legal aid. As we all know, key moments in criminal proceedings occur at the very beginning, with the first stages of police intervention, which can ultimately and irreversibly determine the outcome of the proceedings."[31]

The Grand Chamber of the Court modified the Chamber's decision and in its judgment of 7 November 2008 finds a violation of Article 6(3)(c) in conjunction with Article 6(1) of the Convention.[32] The Grand Chamber's reasoning is based on several fundamental assumptions concerning, on the one hand, the situation of the accused and, on the other hand, the nature of the right to a fair trial and the importance of access to a lawyer for this right. From the perspective of this article, it is important to note that in this landmark decision, the Court stresses the particular importance of the applicant's age. It is emphasised that this constitutes one of the most significant aspects of the case.[33] The Grand Chamber holds that, in the circumstances, there had been a violation of Article 6(3)(c) of the Convention, read in conjunction with

[29] ECtHR (Chamber), judgment of 26 April 2007 in *Salduz v Turkey*, application no. 36391/02.
[30] Separate opinion to the judgment of the ECtHR (Chamber) of 26 April 2007 in *Salduz v Turkey*, application no. 36391/02, para. 3.
[31] *Ibid.*, para. 6.
[32] ECtHR (Grand Chamber), judgment of 7 November 2008 in *Salduz v Turkey*, application no. 36391/02.
[33] *Ibid.*, para. 60.

Article 6(1). The ECtHR accepts that, although the applicant had had the opportunity to challenge the evidence against him at trial and subsequently on appeal, the fact that he had not had access to a lawyer while in police custody had irreparably prejudiced his rights of defence. Thus, in the present case, it was the failure to implement the procedural guarantee in paragraph 3 that determined the violation of the fairness of the proceedings.

A review of the judgment reveals that the pivotal argument presented by the judges pertains to the profile of the applicant, a minor (sixteen years of age) subjected to a distinct criminal procedure for those accused of terrorist activities, and the absence of guarantees of his fundamental right to legal representation. This aspect of the case was not accorded the same level of significance by the Chamber that had previously adjudicated it. In this context, it is clear that the Grand Chamber evaluates the significance of the absence of legal aid with greater precision, considering its impact on the overall fairness and legitimacy of the procedural steps. This is particularly relevant given that the applicant was placed in a challenging situation, which exposed him to the additional disadvantage of an unfair procedure and outcome. This aspect of the Court's decision is particularly emphasized by the doctrinal commentators.[34] It is highlighted that the extent of the right to legal counsel is contingent upon the specific circumstances of the individual facing criminal charges.[35] As Małgorzata Wąsek-Wiaderek observes in the initial post-Salduz judgments, the importance of ensuring access to legal representation and its implications for the admissibility of evidence obtained in the absence of such representation is underscored by the ECtHR, particularly in cases involving "vulnerable suspects."[36] Wąsek-Wiaderek emphasises that the European Court of Human Rights has acknowledged that individuals in such circumstances are not in a position to evaluate their legal situation and deliberately exercise their right to remain silent, even if they have been adequately informed of this right.[37] Subsequently, these cases contributed to the establishment of standards that were made applicable to all suspects. In the literature, the judgments in *Lazarenko v Ukraine*[38] and *Potcovă v Romania*[39] and,[40] among others, have been cited to demonstrate the expansion of the Salduz doctrine's scope of interpretation. It is worth

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[34] A. Sakowicz, *Suspect's access to a lawyer at an early stage of criminal proceedings in view the case-law of the European Court of Human Rights*, "Revista Brasileira de Direito Processual Penal" 2021, vol. 7, no. 3, pp. 1979–2014.

[35] A. Sakowicz, *Zakaz dowodowego wykorzystania wyjaśnień podejrzanego występującego bez obrońcy bądź pod nieobecność obrońcy*, "Europejski Przegląd Sądowy" 2019, no. 1, pp. 47–53.

[36] M. Wąsek-Wiaderek, *Model zakazów dowodowych z perspektywy Konwencji i orzecznictwa ETPCz* [in:] *Nowe spojrzenie na model zakazów dowodowych w procesie karnym*, eds. J. Skorupka, A. Drozd, Warszawa 2015, p. 38.

[37] *Ibid.*

[38] ECtHR, judgement of 28 October 2010 in *Leonid Lazarenko v Ukraine*, application no. 22313/04.

[39] ECtHR, judgment of 17 December 2013 in *Potcovă v Romania*, application no. 27945/07, para. 25–32.

[40] M. Wąsek-Wiaderek, *Model zakazów dowodowych*…, p. 38; A. Sakowicz, *Suspect's access to a lawyer*…

noting that in the case of *Lazarenko v Ukraine*, the Court refers to the "vulnerability of the applicant's position" resulting from the specific procedural situation in which the applicant found himself because of the actions of the investigators.[41] This suggests that in this judgment, the ECtHR adopts a broad interpretation of the concept of vulnerability in the context of criminal proceedings.

In order to further define the Court's approach to assessing the fairness of proceedings for vulnerable suspects, it is useful to consider the case of *Ibrahim and Others v United Kingdom*.[42] While the Court does not identify the applicants in this case as vulnerable suspects, the case's circumstances are worth considering. First, it represents a departure from the *Salduz* doctrine. Second, the case is regarded as being of some significance in terms of the Court's previous views on access to legal counsel in the early stages of legal proceedings. Third, the view of the Court expressed in the case has been confirmed in subsequent judgments of the Court, such as *Simeonovi v Bulgaria*[43] and *Beuze v Belgium*.[44] Fourth, the Court sets out the factors relevant to the assessment of the fairness of the proceedings as a whole in that judgment.[45]

Without citing the entire decision, which is unnecessary given the scope of this article, it is important to note that the Court indicates in reference to its previous case law that "The right to a fair trial under Article 6 § 1 is an unqualified right. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case […]. The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings […]."[46] In light of these considerations, the ECtHR acknowledges that "Compliance with

[41] See para. 54 of the *Lazaranko v Ukaine*: "The Court observes that the applicant was arrested and questioned as the suspect of a non-aggravated premeditated murder punishable by a fixed term of imprisonment (see paragraph 8 above). Having regard to the facts of this case, namely, the discovery of both the victim's dead body and his stolen car prior to the applicant's arrest (see paragraphs 6–7 above), the Court considers that at the time of the arrest, the investigator had every reason to suspect the applicant of premeditated murder for profit, punishable either by a fixed term of imprisonment or life imprisonment, and thus warranting his obligatory legal representation. Accordingly, the Court does not rule out that, as argued by the applicant, the charges against him were artificially mitigated at that stage with a view to circumventing that legal safeguard. The Court is also mindful of the specificity of the aforementioned ground for obligatory legal representation, which the applicant could hardly have been expected to rely on, since any aggravation of the charges against him would obviously have run counter to his interests. This circumstance demonstrates the vulnerability of the applicant's position and his real need for legal assistance, which was effectively denied because of the way in which the investigator exercised his discretionary power in classifying the crime being investigated (see and compare with *Yaremenko v Ukraine*, no. 32092/02, § 88, 12 June 2008)."

[42] ECtHR, judgment of 13 September 2016 in *Ibrahim and Others v the United Kingdom*, application nos. 50541/08, 50571/08, 50573/08 and 40351/09.

[43] ECtHR (Grand Chamber), judgment of 12 May 2017 in *Simeonovi v Bulgaria*, application no. 21980/04.

[44] ECtHR (Grand Chamber), judgment of 9 November 2018 in *Beuze v Belgium*, application no. 71409/10.

[45] ECtHR, judgment of 13 September 2016 in *Ibrahim and Others v the United Kingdom*, application nos. 50541/08, 50571/08, 50573/08 and 40351/09.

[46] *Ibid.*, para. 250.

the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1 […]. However, those minimum rights are not aims in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole."[47] The Court, therefore, rejects the interpretation of the standard concerning access to a lawyer and the consequences of failure to provide one, as formulated by some academics and practitioners based on the *Salduz* judgment, according to which a failure to provide access to a lawyer at the initial stages of the proceedings and to base a decision on this always prejudices the fairness of the proceedings within the meaning of Article 6(1). As a result, the judgment has been the subject of considerable criticism.[48]

From the perspective of this article, it is of the utmost importance to indicate that the Court enumerates and identifies the circumstances necessary for an examination of the fairness of criminal proceedings as a whole. It is of particular significance to stress that the initial issue identified by the Court pertains to the assessment of whether the applicant was a vulnerable individual on account of his age or mental health. The identification of this aspect of the case as the first demonstrates that both the Court and the national authorities should be particularly attentive and vigilant when dealing with criminal proceedings involving young, elderly, and disabled persons alike. They should also examine whether such circumstances are present in such a case. Furthermore, the fairness of the proceedings is influenced by factors related to the broader process of evidence and assessment, including:

- The legal framework governing the pre-trial phase and the admissibility of evidence, and compliance with that framework; where the exclusionary rule applies, it is particularly unlikely that the proceedings as a whole could be considered unreliable.
- The ability to challenge the authenticity of evidence and to object to its use.

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[47] *Ibid.*, para. 251.

[48] Dissenting and separate opinion to the judgment of 13 September 2016 in *Ibrahim and Others v the United Kingdom*, application nos. 50541/08, 50571/08, 50573/08 and 40351/09, para. 251. This criticism is expressed in: R. Goss, *The Disappearing 'Minimum Rights' of Article 6 ECHR: The Unfortunate Legacy of Ibrahim and Beuze*, "Human Rights Law Review" 2023, vol. 23, no. 4, pp. 1–23; A. Sakowicz, *Suspect's access to a lawyer…*; E. Celiksoy, *Ibrahim and Others v. UK: Watering down the Salduz principles?*, "New Journal of European Criminal Law" 2019, vol. 9, no. 2, pp. 229–246.

- The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability and relevance, taking into account the degree and nature of coercion.
- The nature of the wrongfulness involved in obtaining the evidence and, if the wrongfulness results from a violation of any other provision of the Convention, the nature of that violation.
- The nature of the evidence and, if applicable, whether it was promptly withdrawn or modified. The use made of the evidence, in particular, whether it constitutes an integral or substantial part of the evidence on which the conviction was based, and the value of other evidence in the case.[49]

Other factors taken into account by the Court are the way guilt is assessed and whether the assessment is made by professional judges or assessors and, in other cases, by members of a jury. Other considerations include the importance of the public security interest in the investigation and the punishment of a particular offence. The Court also refers to other relevant procedural safeguards provided by national law and practice.[50] At the same time, the Court makes it clear that this is not a closed catalogue. In subsequent judgments, the Court refers to the same elements and examines their presence in the facts under consideration.

However, it is worth pointing out, following Wojciech Jasiński, that in the light of the *Ibrahim* judgment as a whole, "the fact that the applicant belongs to the category of vulnerable suspects is a factor which strongly weighs in favor of finding a violation of Article 6(1) ECHR in conjunction with Article 6(3)(c) ECHR, although it is not a factor which would always establish a violation of the ECHR. A very important issue is undoubtedly the circumstances in which the evidence was obtained. […] of utmost importance, however, and perhaps even decisive, is how the weight of the evidence obtained in the absence of counsel and the conduct of the evidentiary proceedings before the court are assessed against the background of the rest of the evidence, particularly in the context of the rights of the accused during the proceedings."[51] At the same time, it should be noted that, just as the Court defines as open a catalogue of circumstances that may affect the assessment of the proceedings as a whole in the light of Article 6(1), it must be assumed that the Court treats the category of vulnerable suspects as a kind of open category, without specifying the sources and factors which may determine the existence of a vulnerable situation.

The Court's reasoning in this judgment undoubtedly establishes that attention to the special circumstances of an accused person, which may affect the effectiveness of his or her participation in criminal proceedings, is inherent in the general concept of procedural fairness and should guide criminal justice authorities in ensuring that criminal proceedings meet the requirements of the Convention. The Court's guidelines

[49] ECtHR, judgment of 13 September 2016 in *Ibrahim and Others v United Kingdom*, application nos. 50541/08, 50571/08, 50573/08 i 40351/09, para. 273.

[50] *Ibid.*

[51] W. Jasiński, *Dostęp osoby oskarżonej…*

set out above are not, however, an exhaustive description of the Court's approach to the standard of fairness of criminal proceedings for persons with special needs or who define themselves as such. They are merely an indication of the main thrust of the Court's consideration of cases involving those who can be called vulnerable suspects.

To illustrate the Court's approach in this respect in detail, it is worth discussing the judgment in the case *Hasáliková v Slovakia*, which the Court delivered in 2021.[52] The Court's decision was based on an application submitted by a woman who had been sentenced to fifteen years' imprisonment for murder. The psychiatric-psychological report, prepared as part of the proceedings, indicated that the applicant exhibited mild intellectual disabilities, with an IQ of 64 according to the Raven test and 69 according to the verbal section of the WAIS-R. It was additionally observed that she exhibited infantile characteristics and a tendency towards simplistic thinking. The expert also observed a notable degree of naivety, emotional immaturity, and susceptibility to suggestion. However, it was established that at the time of the events which formed the basis of the criminal proceedings, she was aware that her actions were dangerous to society and was able to foresee their consequences. However, the experts accepted that she had a reduced capacity to control her behaviour because of emotional stress, reduced mental capacity, and alcohol. The experts also noted that during the examination, the applicant initially denied the events and then admitted them.

In the domestic criminal proceedings, the court of first instance found the applicant guilty. The court noted that the applicant and the second defendant had repeatedly changed their version of events during the proceedings. The national court underlined that their testimony had been rigorously analyzed and combined with collected evidence. The Court found no reason for the second defendant to falsely incriminate the applicant. In the Court's view, the applicant's guilt was established mainly by the co-accused's testimony, but also by her repeated statements during the trial, the views of the investigation judge and the expert witness. The Court pointed out that her statements contained a very detailed description of events, which she would not have been able to give if she had not been at the scene, and which were largely consistent with the testimony of the other accused. Other evidence, such as recordings of telephone conversations and some witness statements, also proved the applicant's guilt. Furthermore, expert opinions did not rule out the possibility that the victim had been stabbed by two people. Relying on the opinion of an expert psychiatrist, the court found that the applicant's mild mental disability could not in itself lead to diminished legal responsibility. Subsequent attempts to challenge the judgment on the national level were unsuccessful.

In her application to the Court, the applicant alleges a violation of Article 6 § 1 and § 3 (a), (b) and (c) and Article 17 of the Convention. The applicant claims that the criminal proceedings against her had been unfair and had not been adapted to her mental state and state of health. First, she claims that she had not been able to fully understand the charges and the accompanying notification of her procedural

[52] ECtHR, judgment of 24 June 2021 in *Hasáliková v Slovakia*, application no. 39654/15.

rights. She further submits that she had not had sufficient time to choose a lawyer and prepare her defence. She points out that no reasonable steps had been taken to address her mental health until the trial, that is, she had been deprived of adequate legal assistance and any psychological support during the pre-trial activities conducted by the police. In addition, she states that her confession had been given untruthfully. She also points out that the confession she made on that occasion had been used as evidence against her, although she had later withdrawn it and there was ample evidence in her favour. The applicant indicates that the authorities should consider her as a particularly vulnerable person who requires special treatment, namely the assistance of a professional or family member to help her understand the charges and participate meaningfully in the proceedings. Without taking into account her mental state, her testimony and, in particular, her confession, made in such a traumatic situation, could not be accepted.

Following the proceedings and after analyzing the submissions of both the applicant and the Slovak Government, the Court finds that there had been no violation of Article 6 of the Convention in this case. This decision was reached by five votes to two. Such a decision was reached even though the Court accepts that, in considering the impact of procedural irregularities at the pre-trial stage on the overall fairness of the criminal proceedings, it had to consider, *inter alia*, whether the applicant was particularly vulnerable to a violation of her rights, for example, because of her age or mental capacity.

In light of its previous case law, the Court acknowledges that police questioning creates an inherently stressful situation for the suspect. It considers that, in the circumstances of this case, such a condition was all the more acute because the applicant suffered from a mild mental disability, as confirmed by the expert examination. However, the Court observes that the experts had determined that, although the applicant had a reduced mental capacity which, combined with emotional distress and the influence of alcohol, limited her ability to control her behaviour at the time of the events, she did not suffer from any mental illness or disorder and was able to appreciate the danger of her actions and to foresee their consequences. Furthermore, the Court considers that the applicant was an adult, literate, and had been assisted by a lawyer since the first interview, during which she confirmed that she fully understood the charges and did not require any further explanation. The Court acknowledges that the majority of the applicant's interview and examination records did not indicate that she had any difficulty understanding or expressing herself. This was the case at one hearing, but during that hearing, steps were taken to enable the applicant to understand the questions being asked. The wording of the questions was reformulated both based on the applicant's statement and the initiative of a psychological expert.

Furthermore, the Court observes that the court that conducted the interview did not identify any noteworthy aspects regarding the applicant's circumstances. The Court considers that if the applicant felt unprepared for the hearings or needed further clarification or assistance, it was her and her lawyer's responsibility to bring such concerns to the attention of the authorities. The Court notes that the applicant did

not raise any concerns regarding her ability to understand the meaning of the criminal proceedings or to testify about the events until the appeal stage. At that point, the applicant argued that the experts should have assisted her in the pre-trial hearings. In these circumstances, the Court does not consider that there were sufficient grounds to require the authorities to consider the applicant as a vulnerable person and to make appropriate procedural adjustments.

In addition to the facts of the case, the dissenting opinion of Judges K. Turković and S. Orland, the elected judges for Croatia and Malta, also prompts one to present and discuss this case in more detail. In the dissenting opinion, the judges point out that the Court's jurisprudence on the participation of a suspect or defendant with intellectual disabilities in criminal proceedings is underdeveloped. They state that "unfortunately, this case [*Hasalikova v Slovakia*] represents a missed opportunity to properly define the procedural safeguards required in such circumstances and to establish appropriate standards to ensure procedural justice for such suspects or defendants."[53] In their view, both at the pre-trial stage and at the trial stage, the failure to assess the applicant's vulnerability in terms of her ability to be questioned and to stand trial, once the national authorities had established that the applicant was a person with a mental disability, should have been seriously considered by the Court. In their view, this circumstance of the case should have led the Court to consider that the applicant was particularly vulnerable to threats to the fairness of the proceedings. They indicate that, in their view, there had been a violation of Article 6 because of the absence of adequate procedural safeguards to compensate for the applicant's lack of adequate mental capacity. Furthermore, they highlight that the absence of such safeguards had not been adequately considered by the national courts in determining the admissibility of the applicant's statements, including their probative value, and in determining her guilt. In presenting their arguments, the judges highlight that, in addition to the general circumstances of the case, the criminal proceedings involved serious charges with severe penalties. They, therefore, emphasize the importance of guaranteeing the right to a fair trial to the greatest possible extent, as previously established in the *Salduz v Turkey* case.

At the same time, they point out that the lack of such safeguards had not been duly taken into account by the national courts in determining the admissibility of the applicant's statements, including, in particular, their probative value, and in determining her guilt. In presenting their arguments, the judges point out, in addition to the general circumstances of the case, that the criminal proceedings involved serious charges with severe penalties, so the right to a fair trial should be guaranteed to the greatest possible extent, as already held in *Salduz v Turkey*.

The judges express disagreement with the Court's conclusion that there were insufficient grounds for requiring the authorities to consider the applicant as a vulnerable person and to make reasonable adjustments. The dissenting opinion

[53] Dissenting opinion to the judgement of 24 June 2021 in case *Hasáliková v Slovakia,* application no. 39654/15.

highlights that in the case of *O'Donnell v United Kingdom*,[54] cited by the majority, there was not one but two assessments of the defendant's capacity to give evidence, subject to certain safeguards. Furthermore, in this case the judge allowed the jury to consider evidence about the applicant's mental capacity and its potential impact on his ability to give evidence on his behalf.[55] These considerations were also reflected in the judge's instructions to the jury. This was not the case in the present case. The dissenting judges point out that in the Slovak case, the applicant had not undergone an assessment to determine her eligibility for additional protection, nor had she been granted such protection based on her disability.

The case cited and the doubts that have been raised about it concern both the definition of the scope of the concept of vulnerability and the determination of the circumstances that give rise to the need to treat a given person as someone with special needs or the obligation to consider whether a person should be included in this group and, consequently, to adapt his or her procedural situation accordingly. Roxanna Dehaghani argues that the Court's ruling "betrays a lack of understanding of vulnerability and how it manifests itself, how it is defined, how it is identified (and the challenges it poses) and the consequences of its absence."[56]

It is worth noting that the case of *Mikołajczyk v Poland*,[57] which is currently pending before the Court, may provide an opportunity to re-examine the standard of procedural fairness in cases involving defendants with special needs.[58] The applicant – a man diagnosed as mildly disabled – was sentenced to twenty-five years' imprisonment by a Polish criminal court for the murder of two women. Appellate courts and the Supreme Court (twice) have upheld the District Court's sentence without addressing the defence's objections.

In the course of the criminal proceedings, a team of experts (composed of psychologists and psychiatrists) prepared a report on the applicant's mental state. It states that the applicant had a very limited vocabulary, answered questions mainly in single words, and needed to be asked short and direct questions to understand. The experts assess his IQ at 62 but conclude that he was sane at the time of the offence. To the extent that he claimed not to remember the details of the murders, the experts state that this was an excuse that constituted a line of defence, as he had

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[54] ECtHR, judgment of 7 April 2015 in *O'Donnell v the United Kingdom*, application no. 16667/10.

[55] Dissenting opinion to the judgment of 24 June 2021 in case *Hasáliková v Slovakia,* application no. 39654/15, para. 26.

[56] R. Dehaghani, *Not vulnerable enough? A missed opportunity to bolster the vulnerable accused's position in Hasáliková v. Slovakia*, https://strasbourgobservers.com/2021/11/23/not-vulnerable-enough-a-missed-opportunity-to-bolster-the-vulnerable-accuseds-position-in-hasalikova-v-slovakia [accessed: 2024.08.8].

[57] Case of *Mikołajczyk v Poland*, application no. 13951/17, communicated to the Government of the Republic of Poland on 15 May 2023.

[58] The standard established in the *Hasalikova v Slovakia* ruling is further developed in the *Kreplik v the Czech Republic* ruling (application no. 23963/21, judgment of 12 June 2025), thus contributing to the advancement of the standards related to the effective participation of intellectually disabled persons in criminal proceedings.

given detailed statements about the exact course of events to the police and the prosecutor a few days before the examination. The experts also state that, because of his intellectual disability, the applicant needed the assistance of a defenc lawyer to participate effectively in the proceedings.

The applicant, during an informal conversation shortly after his arrest, confessed to the police officers that he had committed the murder. Nevertheless, he was subsequently questioned as a witness and only then as a suspect. It was only at the stage of questioning as a suspect that he was informed of his procedural rights, including the right to refuse to answer. The first contact between the accused and defence counsel took place three months after the arrest (although formally the appointment of the defence counsel took place five days after the arrest). It was only after a conversation with his defence counsel that the accused withdrew his earlier statements.

While the Supreme Court upheld the judgments of the lower courts, it points out in its decision that "It should be emphasized that in a situation where the basis for establishing the suspect's guilt is self-incrimination in pre-trial proceedings which was not subsequently upheld in the pre-trial recognition proceedings before the court, a special, heightened standard of assessment of such evidence must be maintained, especially when the crime charged is murder and there is no other evidence directly pointing to the suspect's guilt, and in addition the suspect shows signs of mental impairment (however slight) and no professional defence counsel was involved in the pre-trial proceedings. Although the applicable Code of Criminal Procedure does not exclude the possibility of making findings of fact based on self-incriminating statements made under the conditions described above, doubts may then arise as to compliance with the standards arising from the principle of *nemo se ipsum accusare tenetur*, which should be examined in detail by the court. A general questioning of the possibility of making such findings remains in the realm of – perhaps worthy of consideration – *de lege ferenda* proposals."[59] It can therefore be concluded that the judges have recognised an issue that may be the subject of future legislative amendments aimed at making the situation of persons with special needs more secure.

In his application to the Court, the applicant alleges, *inter alia*, a violation of Article 6 § 1 and § 3(c) of the Convention on the ground that the proceedings against him were unreliable because they were based solely on statements made by the applicant without the presence of a lawyer. He further submits that his limited intellectual capacity prevented him from fully understanding the consequences of the implied waiver of counsel. By its questions to the Polish Government, the Court seeks to ascertain whether the criminal proceedings against the applicant were fair overall, as required by Article 6 § 1 of the Convention. In particular, the Court seeks to ascertain whether there was a violation of Article 6 § 1 and § 3(c) of the Convention because the applicant, although a person with a mental disability, did not have the assistance of a lawyer during his pre-trial interrogation by the police and before the prosecutor.

[59] Order of the Supreme Court of 23 June 2016, ref. II KK 39/16.

The next aspect to be examined by the Court is whether the applicant waived his right to counsel and, if so, whether this waiver met the Court's standard of a "knowing and intelligent waiver"[60] in light of his limited intellectual capacity.

The questions addressed to the Polish Government suggest that the present case may be another opportunity to analyze the standards that should accompany people with intellectual disabilities and other persons with special needs during criminal proceedings. The Court's decision may thus resolve the doubts that arose in the Slovak case described above. It can also be expected to provide an answer to the question of the extent to which the special needs of participants in criminal proceedings, and particularly of the accused, should influence both how the implementation of specific procedural guarantees, such as access to a lawyer or the right to information, is assessed in practice and how the fairness of criminal proceedings is assessed overall. Furthermore, it can contribute to the ongoing discussion of the concept of vulnerability as developed by the Court.

3. Conclusions

This article presents the Court's approach to the assessment of the fairness of proceedings conducted against persons with special needs, with the use of the example of cases involving minors and persons with disabilities. The cases selected for examination are those in which the lack of access to legal aid in the initial stages of proceedings, or the ineffectiveness of such access, is identified as a concern.

The judgments and cases discussed above demonstrate that the standard in this respect in the ECtHR's jurisprudence is still evolving in response to new conditions for conducting criminal proceedings. The cases presented above demonstrate that protection against the risk of being harmed by unfair proceedings is an integral part of the right to a fair trial. Furthermore, the cases brought before the European Court of Human Rights demonstrate that the national provisions currently in force in Council of Europe countries lack sufficient precision and definition in this respect. Additionally, there is a discrepancy between the heightened awareness observed in the public debate regarding the treatment of persons with disabilities or children and the attentiveness of criminal justice authorities to these circumstances.

However, it is important to note that the fairness of procedures for individuals with special needs is not solely determined by legal norms and their precision. Rather, it is primarily influenced by practice, which is also shaped by the sensitivity and preparedness of those within the justice system who interact with individuals with special needs. It is not only the role of the justice system to demonstrate sensitivity and attentiveness. Rather, it is the duty of the individuals who make up the system

[60] ECtHR (Grand Chamber), judgment of 12 May 2017 in *Simeonovi v Bulgaria*, application no. 21980/04, para. 115; ECtHR, judgment of 5 September 2017 in *Türk v Turkey*, application no. 22744/07, para. 48–53; ECtHR, judgment of 24 September 2009 in *Pishchalnikov v Russia*, application no. 7025/04, para. 77.

to embody these qualities. To cultivate sensitivity and attentiveness, it is essential to gain a comprehensive understanding of special needs, the methods for identifying them, and the safeguards that can be put in place to prevent additional distress for individuals appearing before the justice system.

As highlighted in the introduction, the lack of clarity of the concept of vulnerability in the context of criminal procedure and the jurisprudence of the European Court of Human Rights may be viewed as an advantage, as it permits some flexibility at the stage of assessing human rights violations. Nevertheless, an analysis of the cases discussed reveals that an undefined concept may present challenges when its interpretation imposes specific positive obligations on states and criminal justice authorities. It would, therefore, be desirable for the Court to provide further clarification, both in terms of the factors on which the Strasbourg concept of vulnerability is based and in terms of the consequences that this concept has in criminal proceedings. Such clarification would have positive implications both for states, as it would facilitate the implementation of pertinent regulations, and for the parties involved in the proceedings, who would be in a better position to exercise their rights.[61]

Finally, it is also important to acknowledge that complaints from vulnerable suspects and defendants, and subsequent judgments, contribute to the broader discussion of the general standards of fairness in the criminal justice system. This is exemplified by the extensive discussion that followed the *Salduz v Turkey* judgment, which illuminated the challenges that individuals involved in criminal proceedings may encounter. This caveat serves to establish the broader context of the analyses presented in this article.

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Summary

Katarzyna Wiśniewska

"Fair" and "Inclusive": The Standard of Criminal Proceedings Involving Suspects and Defendants with Special Needs

It is increasingly clear to those working in the criminal justice system, as well as to those responsible for formulating policy, that there is a need to provide additional support to individuals involved in the criminal justice process. This is because, as a result of their particular characteristics or the circumstances of their case, particular individuals may require special assistance in order to be able to exercise their procedural rights fully and to participate effectively in the proceedings. The aim of this article is to identify the standards of treatment for suspects and accused persons who have been identified by European and international bodies or self-defined as having special needs. Through the analysis of specific cases, the text attempts to answer the question of whether the current jurisprudence of the European Court of Human Rights is an appropriate guideline for national authorities, including lawmakers and law enforcement personnel, on how to ensure the rights of persons with special needs and on whether they require additional attention from those conducting the proceedings.

Keywords: fairness, vulnerability, defendant, criminal justice, needs.

Streszczenie

Katarzyna Wiśniewska

„Rzetelny", ale i „wrażliwy", czyli o standardzie postępowania karnego z udziałem podejrzanych i oskarżonych wymagających szczególnego wsparcia

Zwiększenie świadomości profesjonalistów zaangażowanych w wymiar sprawiedliwości w sprawach karnych, jak również decydentów i projektodawców, prowadzi do dostrzeżenia potrzeb uczestników procesu karnego, którzy ze względu na różne cechy lub okoliczności faktyczne mogą potrzebować szczególnego wsparcia, aby w pełni zrealizować swoje prawa procesowe i efektywnie uczestniczyć w prowadzonym postępowaniu. Celem artykułu jest wskazanie standardów dotyczących traktowania osób podejrzanych i oskarżonych, które przez organy europejskie i międzynarodowe są identyfikowane jako osoby o szczególnych potrzebach lub które się tak samodefiniują. Tekst, poprzez analizę konkretnych spraw, będzie zmierzał do odpowiedzi na pytanie, czy obecnie orzecznictwo Europejskiego Trybunału Praw Człowieka może stanowić właściwy drogowskaz dla krajowych organów – zarówno stanowiących, jak i stosujących prawo – w zakresie ochrony praw osób o szczególnych potrzebach oraz czy osoby te wymagają dodatkowej uwagi ze strony organów prowadzących postępowanie.

Słowa kluczowe: sprawiedliwość, wrażliwość, oskarżony, wymiar sprawiedliwości w sprawach karnych, potrzeby.