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EGMR Nr. 39660/02 (1. Kammer) - Urteil vom 18. Februar 2010 (Aleksandr Zaichenko v. Russland)

Recht auf konkreten und wirksamen Verteidigerbeistand bei der ersten Vernehmung im Ermittlungsverfahren (Konsultationsrecht; Anwesenheitsrecht; Reichweite der Selbstbelastungsfreiheit; Schweigerecht; prinzipielles Verwertungsverbot für selbstbelastende Aussagen ohne Verteidigerbeistand; Beschuldigtenbegriff der EMRK: substantielle Beeinträchtigung der Situation des Verdächtigen, Zeitpunkt der ersten Belehrung über das Schweigerecht); Recht auf ein faires Strafverfahren (Gesamtbetrachtung; Anwendung im Ermittlungsverfahren; Verzicht auf Konventionsrechte); Sondervotum Spielmann.

Art. 6 Abs. 1 S. 1 EMRK; Art. 6 Abs. 3 lit. c EMRK

Leitsätze des Bearbeiters

1. Art. 6 EMRK erfordert prinzipiell schon für die erste (polizeiliche) Befragung des Beschuldigten im Ermittlungsverfahren den Beistand eines Verteidigers. Das Recht auf Verteidigerbeistand darf insoweit nur eingeschränkt werden, wenn für den Einzelfall zwingende Gründe vorliegen, die eine solche Einschränkung rechtfertigen. Dies gilt uneingeschränkt nur bei einer Inhaftierung des Beschuldigten oder nach der Erhebung einer Anklage iS des Art. 6 EMRK.

2. Die Selbstbelastungsfreiheit kann nicht auf Schuldeingeständnisse oder direkt belastende Äußerungen beschränkt werden. Der Schutz erstreckt sich auch auf Äußerungen, die auf den ersten Blick nicht belastend sind, aber im späteren Strafverfahren die Anklage zum Beispiel deshalb unterstützen, weil sie die Glaubwürdigkeit des Angeklagten unterminieren.

3. Ein Verzicht im Sinne des Art. 6 EMRK ist auch hinsichtlich des Schweigerechts im Ermittlungsverfahren nur wirksam, wenn er eindeutig erklärt wurde und von einem Mindestmaß an prozessualen Schutzinstrumenten begleitet wurde, die seiner Bedeutung entsprechen. Bevor von einem Angeklagten angenommen werden kann, dass er durch sein Verhalten konkludent auf ein Recht des Art. 6 EMRK verzichtet hat, muss der Staat zeigen, dass der Angeklagte dabei die Konsequenzen seines Tuns vorhersehen konnte.

4. Einzelfall der Verletzung des Schweigerechts durch die Verwertung einer inkriminierenden Äußerung, die ein Verdächtiger unbelehrt und ohne Verteidigerbeistand in einer Stresssituation gemacht hat, in der er die Konsequenzen seiner Äußerung nicht vernünftig einschätzen konnte.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1946 and lives in the village of Lazarevo in the Jewish Autonomous Region, Russia. 1

6. The applicant worked as a driver for a private company. 2

7. It appears that at the time there were several reported cases of the company workers allegedly pouring out diesel from their service vehicles. Thus the company's director asked the competent authorities to carry out checks. 3

8. On 21 February 2001 while driving home in the company of another person (Mr Kh), the applicant's car was stopped and inspected by the police. Two cans of diesel were discovered in the car. 4

9. According to the applicant, in reply to the questioning by the police he did not tell about the purchase of the fuel because he felt intimidated and did not have a receipt to prove the purchase (see also paragraph 14 below). That is why he explained that he had poured the fuel from the tank of his service vehicle (see also paragraph 11 below). 5

10. Immediately, a vehicle inspection record was drawn under Article 178 of the RSFSR Code of Criminal Procedure (CCrP) in force at the material time (see paragraph 26 below). The record reads as follows: 6

"Vehicle Inspection Record [drawn] at Birofeld village on 21 February 2001 from 8.50 to 9.20 [pm]. 7

Officers B and L in the presence of attesting witnesses K and P and [the applicant] have carried out an inspection of VAZ-21061 car in compliance with Articles 178 and 179 of the RSFSR Code of Criminal Procedure and have drawn this record under Article 182 of the Code. 8

Before the start of the inspection all the above persons have been informed of their rights to be present throughout the proceeding and to make comments in relation to the inspection... 9

The attesting witnesses have been informed of their obligation to attest the fact of the inspection and its results (Article 135 of the Code)... 10

During the inspection one passenger was present in the car; there was a white plastic can with fuel (ten litres). There was another metallic can of fuel (twenty litres) in the car boot... 11

The physical evidence has been seized in order to be attached to a criminal file: the plastic can with fuel (ten litres) and the metallic can with twenty litres of fuel... 12

Requests and comments by the participants: [the applicant] explained that he had poured out the fuel from the company premises. 13

I have read the record and agree with its contents. 14

Signatures: Officer B, attesting witnesses K and P, [the applicant], officer L." 15

11. Having completed the inspection record, officer B put in writing a statement entitled "Explanations", which included a note concerning Article 51 of the Constitution of the Russian Federation on the privilege against self-incrimination (see paragraph 21 below). The "Explanations" read as follows: 16

"Explanations [put in writing] on 21 February 2001 at Birofeld village. 17

I, officer B..., have interviewed [the applicant]... 18

The contents of Article 51 of the Constitution have been explained to me. {[the applicant's signature]} 19

I [the applicant] make the following statement. Since 1997 I have been employed as a driver by a private company. On 21 February 2001 I arrived to my workplace at 9 am. During the day I was repairing my service vehicle. In the evening I poured out thirty litres of fuel from the tank of my service vehicle. I have previously brought the cans, ten and twenty litres each, from home. After work, at around 8 pm, I was driving home in my car and was stopped by the police. The car was inspected in the presence of the attesting witnesses. I poured out the fuel for personal use. 20

{in the applicant's handwriting} I have read this statement. It is correct. {[the applicant's] signature.} 21

{Officer's B signature.}" 22

On the same day, both attesting witnesses made written statements, indicating that they had been present during the inspection of the car and seizure of the fuel. They confirmed that the applicant had explained that he had poured out the fuel from the company premises for personal use. 23

12. The applicant was not detained. On 2 March 2001 an inquirer compiled a report under a so-called record-based procedure (see paragraph 23 below) on the events of 21 February 2001. The report reads as follows: 24

"I, inquirer P, have examined the data concerning theft. As required under Article 415 of the RSFSF Code of Criminal Procedure, I have compiled this report, which states as follows: 25

At 8 pm on 21 February 2001 [the applicant]...being at work intentionally stole from his service vehicle the diesel in the amount of thirty litres. Thereby, he caused to the company pecuniary damage in the amount of 279 roubles. 26

His actions disclose an offence of theft punishable under Article 158 § 1 of the Criminal Code. 27

The above has been confirmed by the following evidence: 28

1. the inspection record . 2. [the applicant's] written statement. 3. Mr K's written statement. 4. Mr P's written statement... 29

{Inquirer P's signature}" 30

13. On the same day, the inquirer's superior opened a criminal case against the applicant on suspicion of theft and summoned him (see paragraph 23 below). The act of accusation read as follows: 31

"I, major K, having examined the [inquirer's] report and the enclosed documents, consider that there are sufficient grounds indicating that [the applicant] had committed the offence of theft punishable under Articile 158 of the Criminal Code. 32

Pursuant to the procedure under Article 415 § 4 of the RSFSR Code of Criminal Procedure, a criminal case should be opened against [the applicant]... 33

The accusation: At 8 pm on 21 February 2001 [the applicant]...being at work intentionally stole from his service vehicle the diesel in the amount of thirty litres. Thereby, he caused to the company pecuniary damage in the amount of 279 roubles. 34

Major K's signature 35

I have been informed of the nature of the accusation, the right to have access to the case file, the right to legal representation, the right to make requests and challenge the inquiring authorities' actions. 36

[the applicant's] signature 37

I have studied the case file and have read this document. I have no requests or motions. I do not require legal assistance; this decision is based on reasons unrelated to lack of means. I will defend myself at the trial. 38

[the applicant's] signature" 39

14. At the trial the applicant was represented by Mr Adamchik, a lawyer practising in Birobidjan. As follows from the trial judgment and the trial record, the applicant contended at the trial that he had purchased the fuel on or around 15 February 2001 at a petrol station; on 21 February 2001 he had put the cans in his car intending to exchange it for firewood later and went to his work; after the working day he was stopped by the police on his way home; when stopped he had not told about the purchase of the fuel because he felt intimidated and had no receipt to prove the purchase. He contended that Mr Kh, who was in his car on 21 February 2001, had seen the applicant purchase the fuel at the petrol station. At the trial the applicant was asked if the inspection record had been drawn up on the spot or in Birofeld. The applicant replied as follows: 40

"[The police] started to draw up the inspection record on the spot. Then a bus arrived. There was a tense situation so we left. The bus was also inspected... 41

The inspection record was signed in Birofeld. It was started on the spot but was not finished there." 42

15. On 20 March 2001 the applicant submitted to the court an invoice for the purchase of diesel. The court refused to accept the invoice in evidence considering that the applicant did not specify why he had not adduced that evidence at the initial stage of the questioning by the police or at the opening of the trial. The applicant, however, indicated that the invoice had been kept by his wife. It also appears that he specified the name and location of the petrol station where he had allegedly bought it and asked the court to verify this fact. It appears that the court did not follow up his request. 43

16. The trial court heard the applicant's wife, who claimed that she had purchased the fuel and had given one petrol can 44

to the applicant and that the applicant had purchased the remainder. The court also questioned Mr Kh who claimed to have seen the applicant purchasing diesel. Mr Kh was with the applicant on 21 February 2001 and told the court that he had not witnessed any threats to the applicant from the police officers. The trial court refused to take those testimonies into consideration, considering that those persons were in close or friendly relationship with the defendant and that their testimonies would therefore be prejudiced.

17. Instead, the trial judge relied on the inspection record and the written statement made by the applicant on 21 February 2001, testimonies from the attesting witnesses who had been present during the inspection and seizure of fuel from the applicant's car. The court also examined a Mr F who explained there had been cases of workers pouring out diesel from their service vehicles, and thus the company's director had asked the competent authorities to carry out checks. The applicant's car was apparently stopped during one of the checks. 45

18. Having examined the evidence, the judge considered that as followed from the inspection record, the applicant had admitted to "have stolen" the diesel from the company premises. By a judgment of 20 April 2001, the Birobidjan District Court convicted the applicant of theft and sentenced him to a suspended sentence of six months' imprisonment. The court held as follows: 46

"It follows from the inspection record that two cans of diesel (thirty litres) were seized from [the applicant's] car...The applicant explained that he had stolen the diesel from the company premises... 47

Assessing the defendant's testimony at the trial, the court considers that it is made-up with a view to avoiding criminal responsibility for the crime committed; this testimony has not been supported by any objective evidence. The court takes into account his pre-trial testimony, from which it follows that on 21 February 2001 after the end of his working day he had poured out fuel from his service vehicle and was stopped on his way back home. This testimony is logical and corresponds to witness statement by Mr F, Mr K and Mr P, as well as to the materials in the case file." 48

19. The applicant and his counsel appealed alleging that there was no proof that any diesel had been stolen from the company and that the applicant had not been apprised of the privilege against self-incrimination while the court then relied on his admissions made on 21 February 2001. In his appeal, the prosecutor considered that the applicant's acts should be reclassified as misappropriation of property. On 24 May 2001 the Court of the Jewish Autonomous Region dismissed the appeals and upheld the judgment. The court confirmed that the applicant had been convicted on the basis of his own pre-trial admission and other evidence obtained by lawful means, including the inspection record. The applicant's allegation of self-incrimination had been rightly rejected as unfounded. 49

II. RELEVANT DOMESTIC LAWAND PRACTICE

A. Russian Constitution

20. Article 48 § 2 of the Constitution provides that an arrested or detained person or a person accused of a criminal offence should have a right to legal representation from the moment of his or her arrest, placement into custody or when charges are brought. 50

21. Article 51 of the Constitution provides that no one should be obliged to give evidence against himself or herself, his or her spouse or close relative. Other exemptions from the obligation to testify may be authorised by a federal statute. 51

B. RSFSR Code of Criminal Procedure

1. Right to legal representation

22. Pursuant to Article 47 § 1 of the Code, counsel could participate in the proceedings from the date when charges were brought or when the person was arrested or detained. If no preliminary inquiry or investigation was required in the case, counsel could participate in the proceedings from the date when the case was submitted for trial (Article 47 § 2). On 27 June 2000 the Constitutional Court declared Article 47 § 1 unconstitutional as regards the limitation on legal representation before charges were brought. The Constitutional Court decided that until the relevant legislation was amended, Article 48 § 2 of the Constitution should be directly applicable with due regard to the interpretation given by the Constitutional Court. 52

2. Record-based procedure

23. Chapter 13 of the RSFSR Code of Criminal Procedure provided for a record-based pre-trial procedure in respect of a number of criminal offences. The general provisions of the Code were applicable in this procedure unless Chapter 13 of the Code otherwise provided (Article 414). Under the record-based procedure, an inquirer was required to determine 53

within ten days the circumstances of the case, identify the offender and collect the evidence (Article 415). The offender should sign an undertaking to present himself on the inquirer's or court's summons. The circumstances of the case and the legal characterisation of the offence should be put in writing in a report.

24. Having examined the report, the inquiring authority should open a criminal case. The person concerned should be informed of the nature of the accusation and be apprised of his right to legal representation and to have access to the file. 54

25. Having received the file, the prosecutor should (i) submit the case to a court or (ii) order an inquiry or preliminary investigation or (iii) discontinue the case. 55

3. Inspection

26. An investigator could carry out an inspection of a crime scene, location, premises, physical objects or documents in order to detect traces of the crime or other physical evidence or to determine the relevant circumstances (Article 178 of the Code). In urgent cases, the inspection could be carried out before opening a criminal case. In such cases, the case was to be opened immediately after the inspection of the crime scene. 56

27. A record had to be drawn up and signed by all persons who took part in the investigative measure (Articles 141 and 182 of the Code). Those persons were to be informed that they had a right to make comments (Article 141). If the suspect, accused or another participant refused to sign the record, a note to this effect should be included in the record (Article 142). 57

4. Admissions

28. An accused had a right to give the testimony on the charges against him, the circumstances of the case and the evidence collected in the case. His or her admission of guilt in the commission of an offence could be used as a basis for criminal charges only if his or her culpability was confirmed by the totality of evidence collected in the case (Article 77 of the Code). 58

C. Code of Criminal Procedure

29. Article 413 of the Code of Criminal Procedure, in force at the present time, provides for a possibility to re-open criminal proceedings on the basis of a finding of a violation of the Convention made by the European Court of Human Rights. 59

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

30. The applicant alleged that the proceedings on 21 February 2001 and the ensuing criminal proceedings before the national courts, taken together, had violated his rights under Article 6 §§ 1 and 3 (c) and (d), Article 7 of the Convention and Article 2 of Protocol No. 7. The Court has examined the applicant's complaint under Article 6 of the Convention, which in the relevant parts reads as follows: 60

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... 61

3. Everyone charged with a criminal offence has the following minimum rights: 62

... 63

(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;..." 64

A. Submissions by the parties

1. Complaints concerning the pre-trial proceedings

31. The applicant alleged that on 21 February 2001 he had admitted the wrongdoing without the benefit of legal advice, fearing incarceration and in the hope of being acquitted at the trial. The applicant submitted that the village in which the questioning had taken place and the proceedings had been instituted had no lawyers. He had not been afforded any time to retain one from a nearby town. 65

32. The Government submitted that the applicant's car had been inspected in the presence of two attesting witnesses; two cans of diesel had been seized from the car. As follows from the inspection record signed by the applicant, he had poured out the diesel from his employer's premises. Thereafter, he had been apprised of his right not to testify against himself and had been questioned under Article 415 of the RSFSR Code of Criminal Procedure (CCrP) (see paragraph 23 above). The applicant confirmed that he had taken the diesel for personal use. The Government contended that Article 47 of the CCrP had not been applicable in the record-based proceedings (see paragraph 22 above). The latter did not require presence of counsel for an on-the-spot interview such as that of the applicant on 21 February 2001. In any event, the applicant waived his right not to testify against himself. 66

2. Complaints concerning the court proceedings

33. The applicant also complained that the trial court should not have convicted him on the basis of his pre-trial statements; the trial judge had arbitrarily rejected the testimonies by the defence witnesses, including the applicant's wife and Mr P and thus had failed to examine them under the same conditions as the prosecution witnesses, who merely attested the fact of the car inspection. He also contended that both the trial and appeal courts had wrongly refused to verify and to take into consideration other exculpatory evidence, including an invoice for the purchase of diesel. 67

34. The Government submitted that the applicant's conviction had been based on his pre-trial statements and witness testimonies by Mr K, Mr P and Mr F. The witnesses suggested by the applicant had been examined by the trial court. Their testimony had not been considered reliable in view of their interest in the outcome of the proceedings. Despite repeated requests from the trial court, the applicant had failed to provide a convincing explanation for the delay in submitting the invoice. Thus, this document had not been accepted in evidence. 68

B. The Court's assessment

1. Admissibility

35. The Court considers that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible. 69

2. Merits

(a) General principles

36. The Court reiterates that Article 6 - especially paragraph 3 - 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 requirements (see Öcalan v. Turkey [GC], no. 46221/99, § 131, ECHR 2005-IV, and Imbrioscia v. Switzerland, 24 November 1993, § 36, Series A no. 275). The manner in which Article 6 §§ 1 and 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In order to determine whether the aim of Article 6 - a fair trial - has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case (Imbrioscia, cited above, § 38). 70

37. In Salduz v. Turkey [GC] (no. 36391/02, §§ 55, 27 November 2008) the Court held that as a rule, access to a lawyer should be provided as 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. 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 (ibid, and more recently, Çimen v. Turkey, no. 19582/02, §§ 26-27, 3 February 2009). 71

38. The Court also reiterates that the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (see Bykov v. Russia [GC], no. 4378/02, § 92, ECHR 2009-..., with further references). The right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, inter alia, J.B. v. Switzerland, no. 31827/96, § 64, ECHR 2001-III). In this sense the right is closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court must examine the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put (ibid.). 72

39. The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence at issue. Public-interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention (see Bykov, cited above, § 93). 73

40. Lastly, the Court reiterates that a waiver of a right guaranteed by the Convention - in so far as it is permissible - must not run counter to any important public interest, must be established in an unequivocal manner and must be attended by minimum safeguards commensurate to the waiver's importance (see Sejdovic v. Italy [GC], no. 56581/00, § 86, ECHR 2006-...). Moreover, before an accused can be said to have impliedly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see Talat Tunç v. Turkey, no. 32432/96, § 59, 27 March 2007, and Jones v. the United Kingdom (dec.), no. 30900/02, 9 September 2003). 74

(b) Application in the present case

41. Having examined all the material submitted by the parties, the Court makes the following findings as to the sequence of events concerning the applicant's self-incriminating statements. As followed from the statement made at the trial by Mr F, there had previously been cases of workers pouring out diesel from their service vehicles, and thus the company's director had asked the competent authorities to carry out checks (see paragraph 17 above). The applicant's car was apparently stopped during one of such checks. It does not transpire from the case file that at any time on 21 February 2001 the applicant was informed of the reason for which his car had been stopped and inspected. Neither was he informed of the nature and cause of any suspicion or accusation against him. After the police inspection of his car, the applicant was asked about the origin of the fuel. He did not tell them about the purchase of the fuel because he felt intimidated and did not have a receipt to prove the purchase. Instead, he stated that he had poured out the fuel from his service vehicle. An inspection record was drawn. This record contained a note indicating that the applicant had poured out the fuel from the company's premises. Shortly thereafter, the applicant was apprised of his right to remain silent and signed a statement to the police confirming that he had poured out thirty litres of fuel from his service vehicle for personal use. 75

42. The Court reiterates that in criminal matters, Article 6 of the Convention comes into play as soon as a person is "charged"; this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened (see Eckle v. Germany, 15 July 1982, § 73, Series A no. 51, and more recently, O'Halloran and Francis v. the United Kingdom [GC], nos. 15809/02 and 25624/02, § 35, ECHR 2007-...). "Charge", for the purposes of Article 6 § 1, may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [person] has been substantially affected" (see Shabelnik v. Ukraine, no. 16404/03, § 57, 19 February 2009; Deweer v. Belgium, 27 February 1980, § 46, Series A no. 35; and Saunders v. the United Kingdom, 17 December 1996, §§ 67 and 74, Reports of Judgments and Decisions 1996-VI). Given the context of the road check and the applicant's inability to produce any proof of the diesel purchase at the moment of his questioning by the police, the Court considers that there should have been a suspicion of theft against the applicant at that moment. 76

43. Applying these principles to the facts of the case, the Court notes that the trial court's use made of the admissions made on 21 February 2001, which led to the institution of criminal proceedings against the applicant and then served for convicting him of theft, is at the heart of the applicant's complaints under Article 6 of the Convention (compare Saunders, cited above, §§ 67 and 74; and Allen v. the United Kingdom (dec.), no. 76574/01, 10 September 2002). It is also noted that the inspection record itself indicated Article 178 of the RSFSR Code of Criminal Procedure as the legal basis for the inspection (see paragraph 26 above). Thus, although the applicant was not accused of any criminal offence on 21 February 2001, the proceedings on that date "substantially affected" his situation. The Court accepts that Article 6 of the Convention was engaged in the present case. Nor was there any disagreement on this point between the parties. 77

44. The Court further notes that the main thrust of the applicant's complaint is that he was convicted on the basis of his pre-trial admissions made without the benefit of legal advice. It is noted that the respondent Government did not plead that the applicant had not exhausted domestic remedies by failing to raise in substance the above issue on appeal against the trial judgment. Thus, the Court will examine the merits of the applicant's complaint. 78

45. Although the Court has accepted that Article 6 of the Convention was applicable in the pre-trial proceedings in the present case (see paragraph 43 above), the Court repeats that the manner in which the guarantees of its paragraphs 1 and 3 (c) are to be applied in pre-trial proceedings depends on the special features of those proceedings and the 79

circumstances of the case assessed in relation to the entirety of the domestic proceedings conducted in the case.

(i) Legal assistance

46. The Court notes at the outset that the applicant only complained that he had not been afforded enough time to contact a lawyer in a nearby town. The Court cannot but note that, as confirmed by the applicant's representative in his letter to the European Court dated 26 July 2002, both on 21 February and 2 March 2001 the applicant "chose not to exercise his right to legal representation with the hope that the court would give him a fair trial even without counsel". 80

47. Moreover, the Court observes that the present case is different from previous cases concerning the right to legal assistance in pre-trial proceedings (see Salduz [GC], §§ 12-17 and Öcalan [GC], § 131, both cited above; see also Shabelnik, cited above, § 59; Panovits v. Cyprus, no. 4268/04, §§ 7-10, 11 December 2008; Kolu v. Turkey, no. 35811/97, §§ 14-22, 2 August 2005; Brennan v. the United Kingdom, no. 39846/98, § 41, ECHR 2001-X; Quinn v. Ireland, no. 36887/97, §§ 10-13, 21 December 2000; Averill v. the United Kingdom, no. 36408/97, § 55, ECHR 2000-VI; Magee v. the United Kingdom, no. 28135/95, §§ 8-15, ECHR 2000-VI; and Imbrioscia, §§ 9-19, cited above) because the applicant was not formally arrested or interrogated in police custody. He was stopped for a road check. This check and the applicant's self-incriminating statements were both carried out and made in public in the presence of two attesting witnesses. It is true that the trial record contains a statement by the applicant suggesting that the writing down of the inspection record and/or his subsequent statement were started on the spot but were completed in the village of Birofeld. Nevertheless, the Court concludes on the basis of the materials in the case file that the relevant events, namely the drawing of the inspection record and the taking of the applicant's explanation, were carried out in a direct sequence of events. 81

48. Although the applicant in the present case was not free to leave, the Court considers that the circumstances of the case as presented by the parties, and established by the Court, disclose no significant curtailment of the applicant's freedom of action, which could be sufficient for activating a requirement for legal assistance already at this stage of the proceedings. 82

49. The Court notes that the role of the police in a situation such as in the present case was to draw up an inspection record and receive the applicant's explanation as to the origin of the cans in his car (see paragraphs 9 and 10 above). Having done so, the police transferred the documents to the inquirer who, in his turn, compiled a report to his superior indicating that there was a case to answer against the applicant on suspicion of theft (see paragraph 12 above). This report prompted the inquirer's superior to open a criminal case against the applicant (see paragraph 13 above). 83

50. At that stage, namely on 2 March 2001, the applicant was apprised of his right to legal assistance. It was open to him to consult a lawyer before attending the meeting on 2 March 2001. At that meeting the applicant was presented with the version of the events based on his statements made on 21 February 2001. The applicant voluntarily and unequivocally agreed to sign the act of accusation and waived his right to legal assistance, indicating that he would defend himself at the trial. 84

51. The foregoing considerations suffice for the Court to conclude that the absence of legal representation on 21 February and 2 March 2001 did not violate the applicant's right to legal assistance under Article 6 § 3 (c) of the Convention. 85

(ii) Privilege against self-incrimination and right to remain silent

52. Concerning the privilege against self-incrimination and the right to remain silent, the Court has already held that the circumstances of the case disclosed the existence of a suspicion of theft against the applicant after he had failed to prove the fuel purchase (see paragraph 42 above). It is not without relevance in that connection that when putting in writing the applicant's "explanations", officer B considered it necessary to apprise him of the privilege against self-incrimination. In the Court's opinion, this fact also gives credence to the argument suggesting that already at that time the authorities suspected the applicant of theft. The Convention is intended to guarantee rights that are practical and effective (see Airey v. Ireland, 9 October 1979, § 24, Series A no. 32). The Court considers that in the circumstances of the case it was incumbent on the police to inform the applicant of the privilege against self-incrimination and the right to remain silent. 86

53. The Court notes that the Government maintained that the applicant had waived his right not to testify against himself. The applicant did not dispute this. It is true that in accordance with Article 51 of the Constitution the applicant was told that he was not obliged to give evidence against himself (see paragraph 21 above). Although it has not been alleged that the above warning was in any way insufficient, Court notes that the applicant was apprised of the right to remain silent after he had already made a self-incriminating statement in the inspection record indicating that he had 87

poured out the diesel from the company's premises.

54. Bearing in mind the concept of fairness in Article 6, the Court considers that the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating (see Saunders, cited above, § 71). Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature - such as exculpatory remarks or mere information on questions of fact - may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility (ibid). 88

55. The Court considers that being in a rather stressful situation and given the relatively quick sequence of the events, it was unlikely that the applicant could reasonably appreciate without a proper notice the consequences of his being questioned in proceedings which then formed basis for his prosecution for a criminal offence of theft. Consequently, the Court is not satisfied that the applicant validly waived the privilege against self-incrimination before or during the drawing of the inspection record. Moreover, given the weight accorded to the applicant's admission at the trial, the Court does not need to determine the validity of the applicant's subsequent waiver of the privilege against self-incrimination in the "Explanations", which derived from his earlier admission (see paragraphs 11 and 40 above). 89

56. In sum, the evidence available to the Court supports the claim that the applicant's pre-trial admission, whether directly self-incriminating or not, was used in the proceedings in a manner which sought to incriminate him. In the Court's view, statements obtained in the absence of procedural guarantees, should be treated with caution (see Lutsenko v. Ukraine, no. 30663/04, § 51, 18 December 2008). 90

57. Hence, what remains to be determined is whether the criminal proceedings against the applicant can be considered fair on account of the use made of the applicant's pre-trial admission. Regard must be had to whether the rights of the defence have been respected and whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. 91

58. The Court notes in that connection that in so far as it can be discerned from the national courts' reasoning, the applicant's pre-trial admission was not considered to have been obtained in breach of domestic law. The Court considers in its turn that although the applicant was represented by a lawyer at the trial, the detriment he suffered because of the breach of due process in the pre-trial proceedings was not remedied at the trial. The trial court expressly referred to the statement made by the applicant in the inspection record and his subsequent statement. It did not draw any distinction or made any comparison between that statement and the subsequent more detailed statement made after the applicant had been apprised of Article 51 of the Constitution. While it is not the Court's role to examine whether the evidence in the present case was correctly assessed by the national courts, the Court considers that the conviction was based on the applicant's self-incriminating statements. The Court finds it regrettable that the courts did not provide sufficient reasons for dismissing the applicant's arguments challenging the admissibility of the pre-trial statements, especially in the light of the weakness of the other evidence presented by the prosecution at the trial. It was, however, the prosecution's obligation under Russian law to prove the offence of theft on the strength of the other evidence because the CCrP required that a defendant's admission of guilt in the commission of an offence could be used as a basis for criminal charges only if his or her culpability was confirmed by the totality of evidence collected in the case (see paragraph 28 above). The Court cannot but observe that two of the witnesses presented by the prosecution only confirmed the fact of the car inspection and the seizure of the fuel. A third person only testified on the circumstances which were capable of clarifying the reasons for and the purpose of the above inspection. 92

59. The Court further observes that, contrary to the applicant's allegation, it follows from the trial record that the trial court examined witnesses on behalf of the applicant. However, it rejected their testimony as unreliable on account of the witnesses' close relationship with the applicant. Lastly, it is also noted that the court refused to accept in evidence the invoice which would allegedly exculpate the applicant (see, by contrast, Bykov, cited above, §§ 95 et seq.; and Heglas v. the Czech Republic, no.5935/02, §§ 89 and 90, 1 March 2007). Thus, the Court concludes that the trial court based the conviction of the applicant on the statement that he had given to the police without being informed of his right to not incriminate himself. 93

60. In the light of the above considerations, given the particular circumstances of the present case and taking the proceedings as a whole, the Court concludes that there has been a violation of Article 6 § 1 of the Convention. 94

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. Article 41 of the Convention provides: 95

"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." 96

A. Damage

62. The applicant claimed 20,000 euros (EUR) in respect of pecuniary and non-pecuniary damage. 97

63. The Government considered that the applicant's claim concerned only non-pecuniary damage and was unsubstantiated. 98

64. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, making its assessment on an equitable basis, and having regard to the nature of the violation found, the Court awards the applicant EUR 3,000 in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant. 99

65. The Court also reiterates that when an applicant has been convicted despite an infringement of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position that he would have been in had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial de novo or the reopening of the proceedings, if so requested by the person concerned (see Öcalan [GC], cited above, § 210, and Vladimir Romanov v. Russia, no. 41461/02, § 118, 24 July 2008). The Court observes, in that connection, that Article 413 of the Code of Criminal Procedure of the Russian Federation provides that criminal proceedings may be reopened if the Court has found a violation of the Convention (see paragraph 29 above). 100

B. Costs and expenses

66. The applicant made no claim in respect of costs and expenses. The Court considers that there is no call to make an award under this head. 101

C. Default interest

67. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points. 102

FOR THESE REASONS, THE COURT

1. Declares unanimously the application admissible;

2. Holds by six votes to one that there has been no violation of Article 6 § 3 (c) of the Convention on account of the issue of legal assistance;

3. Holds unanimously that there has been a violation of Article 6 § 1 of the Convention on account of the issue of the privilege against self-incrimination and the right to remain silent;

4. Holds unanimously

(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, EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. Dismisses unanimously the remainder of the applicant's claim for just satisfaction.

PARTLY DISSENTING OPINION OF JUDGE SPIELMANN

1. I am unable to subscribe to point 2 of the operative part and to the finding of the majority that there has been no 103

violation of Article 6 § 3 (c) of the Convention on account of the issue of legal assistance.

2. The applicant was convicted on the basis of the admission he made to the police without the benefit of legal advice. 104

3. In Salduz v. Turkey the Court held that as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police (see Salduz v. Turkey [GC], no. 36391/02, § 55, ECHR 2008-...). The Court also held that the lack of legal assistance during a suspect's interrogation would constitute a restriction of his defence rights and that these rights would in principle be irretrievably prejudiced when incriminating statements, made during police interrogation without access to a lawyer, were used for a conviction. The Court took a similar approach in the equally important judgment in Panovits (Panovits v. Cyprus, no. 4268/04, §§ 66 and 70-73, 11 December 2008). 105

4. In the present case the applicant was not initially informed of any suspicion or accusation against him. Admittedly, the applicant was not formally arrested or interrogated in police custody. However, the interview on 21 February 2001 took place in circumstances that can in no way be compared to those normally observed during routine road checks. 106

5. Quite the contrary. It transpires from the file and from the judgment that the checks were carried out on the initiative of the company's director (see paragraph 7 of the judgment). During the inspection two cans of diesel were seized from the car and the police immediately organised a full-scale interview on the spot, leading to the drawing up of a written inspection record in which it was stated that the applicant had taken the diesel from his employer's premises. The applicant had also been asked to sign this record, immediately, on the spot (see paragraph 10). It was only shortly thereafter that the applicant was apprised of the privilege against self-incrimination and that he then added that he had taken the diesel for "personal use" (see paragraph 11). The relevant steps, namely the drawing up of the inspection record and the taking of the applicant's explanation, were carried out as part of a direct sequence of events (see paragraph 47). 107

6. Contrary to what is said in paragraph 48 of the judgment, I cannot agree that the circumstances of the case disclose no significant curtailment of the applicant's freedom of action. I am of the opinion that those circumstances were sufficient to activate a requirement for legal assistance. 108

7. Nothing should have prevented the police officers from apprising the applicant immediately (that is, on 21 February and not on 2 March 2001) of his right to legal assistance and asking him to accompany them to the police station, where the interview could have been conducted in conditions complying with the requirements of Article 6 § 3 (c). 109