http://dx.doi.org/10.12697/JI.2015.23.13

Anneli Soo

PhD, Lecturer of Criminal Law
University of Tartu

The Right to Choose Counsel in the Pre-trial Stage of Criminal Proceedings and Consequences of its Violation,

by Example of Estonian Supreme Court Decision 3-1-2-2-14

1. Introduction

According to Article 6 (3) c of the European Convention on Human Rights (ECHR),[*1] everyone charged with a criminal offence has the right to choose to defend himself in person; to do so through legal assistance of his own choosing; or, if he has insufficient means to pay for legal assistance, to be given it free of charge when the interest of justice so requires. One does not have to possess a legal education to name the reasons for which accused persons should have counsel by their side in criminal proceedings (including pre-trial proceedings). First, counsel has knowledge of law and experience in court practice, along with skill in both informing the accused about his rights and exercising these rights accordingly (the technical aspect). Secondly, counsel, unlike the accused, is (or at least is supposed to be) objective (the psychological aspect). Thirdly, counsel provides not only technical but emotional support for the accused (the humanitarian aspect). Finally, although the principle *in dubio pro reo* applies in criminal proceedings, which means that the accused does not have to prove himself to be not guilty, participation of counsel guarantees that the accused is able to pursue an active role in the proceedings whenever necessary (the structural aspect).[*2] Or, as the European Court of Human Rights (ECtHR) has put it in brief, the accused's lawyer serves as 'the watchdog of procedural regularity'.[*3]

S. Trechsel has written that a defence conducted with the assistance of chosen counsel is certainly the best of the three alternatives offered by Article 6 (3) c.[*4] He does not explain what he means by the concept

---

1 Convention for the Protection of Human Rights and Fundamental Freedoms. Available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (most recently accessed on 20.2.2015).

2 S. Trechsel. Human Rights in Criminal Proceedings. Oxford: Oxford University Press 2005, pp. 244—247 DOI: http://dx.doi.org/10.1093/acprof:oso/9780199271207.001.0001 ; E. Cape et al. Effective Criminal Defence in Europe. Antwerp: Intersentia 2010, p. 38.

3 *Ensslin, Baader and Raspe v. Germany*, applications 7572/76, 7586/76, and 7587/76, of 8.7.1978, paragraph 114.

4 S. Trechsel (see Note 2), p. 266.

'best'. Since the aim with Article 6 (3) c of the ECHR is the possibility of presenting an effective defence[*5] and a person in a situation wherein he is opposed by a professional lawyer can defend himself effectively with the assistance of professional counsel chosen as he best sees fit, it is clear that the best option among the rights set out in Article 6 (3) c of the ECHR is a person's right to defence with the assistance of counsel of his choice.[*6]

The right to choose counsel is by its nature almost absolute: only the number of individuals representing the accused could be limited; not every person is eligible to act as counsel according to the relevant state's law, and the state is allowed to impose rules to limit the accused's choice of lawyer to members of a specialist bar in higher court instances.[*7] In addition, a lawyer may be excluded for failure to comply with professional ethics and on account of conflict of interests.[*8] In any other case, the ECtHR holds a right to intervene if the state has used its power to regulate participation of counsel in proceedings improperly.[*9] In addition to restrictions imposed by the state, the right to choose counsel may be limited via waiver by the accused. The waiver must be voluntary, knowing, and intelligent.[*10] In Estonian pre-trial criminal proceedings, the consequences of such waiver are the following. If participation of counsel is not mandatory and the suspect does not ask for other counsel, he will defend himself in person up to the point at which participation of counsel becomes mandatory.[*11] If the suspect waives the right to choose counsel and participation of counsel is mandatory, the authorities shall appoint counsel for him. In the appointment of state legal-aid counsel, usually the suspect cannot choose the person who will act as his counsel.

Martin v. Estonia is an example of the last situation mentioned. In this case, Keijo Martin, who was suspected of committing murder when he was a minor, waived his counsel Paul Järve's services during pre-trial proceedings. As, according to the Estonian Code of Criminal Procedure (CCP)[*12], §45 (2) 1), participation of counsel was mandatory throughout the proceedings on account of the fact that Martin was a minor at the time the murder was committed, the authorities appointed counsel for him as legal aid. What makes the case interesting and constitutes the reason it came before the ECtHR some years later was the fact that, after waiver of retained counsel, Martin confessed his guilt during the next interrogation in which the state legal counsel participated. He had not done so during previous interrogations, at which Järve was present. The question as to whether his waiver had been voluntary, knowing, and intelligent was on the table for the ECtHR next to the question for both the ECtHR and the Supreme Court of Estonia (SCE) of how the ECtHR finding that it had not been would affect the result of the proceedings (Martin had been convicted of murder by the Estonian courts).

This article focuses on the second question, both providing the reader with an overview of how the ECtHR and the SCE resolved the question and proposing alternative solutions if needed. To this end, the author will firstly provide the reader with the facts of the case and the courts' findings, after which an analysis based on the case law of the ECtHR and the SCE, and on theoretical literature, shall be presented.

5 R.C.A. White, C. Ovey. Jacobs, White & Ovey: The European Convention on Human Rights, 5th edition. Oxford: Oxford University Press 2010, p. 291 DOI: http://dx.doi.org/10.1093/he/9780199543380.001.0001, referring to *Goddi v. Italy*, application No. 8966/80, 9.4.1984.

6 A. Soo. An individual's right to the effective assistance of counsel versus the independence of counsel: What can the Estonian courts do in case of ineffective assistance of counsel in criminal proceedings? – *Juridica International* 2010, p. 254, Note 13.

7 S. Trechsel (see Note 2), pp. 266–268.

8 C. Buckley *et al.* Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights, 3rd edition. Oxford: Oxford University Press 2014, p. 477 DOI: http://dx.doi.org/10.1093/he/9780199606399.001.0001 .

9 *Ibid*., p. 478.

10 *Pishchalnikov v. Russia*, application no. 7025/04, of 24.9.2009, paragraph 77.

11 In Estonia, participation of counsel in a pre-trial proceeding is mandatory from presentation of the criminal file for examination to counsel, which means that if a Prosecutor's Office declares a pre-trial proceeding completed, it gives a copy of the criminal file to the defence counsel, who introduces it to the suspect (CCP, §45 (3), §223 (3), and §224 – especially §224[1]). The participation of counsel is mandatory throughout a criminal proceeding if the suspect was a minor at the time the crime was committed; if he is, for reason of mental or physical disability, unable to defend himself; if the defence is complicated for the same reason; if the person is suspected of a criminal offence for which life imprisonment may be imposed; if the interests of the person are in conflict with the interests of another person, who has counsel; if the person has been under arrest for at least six months; or if the proceedings are conducted for the criminal matter pursuant to expedited procedure (CCP, §45 (2)).

12 Kriminaalmenetluse seadustik. – RT I 2003, 27, 166; RT I, 30.12.2014, 9 (in Estonian). English text available via https://www.riigiteataja.ee/en/ (most recently accessed on 20.2.2015).

2. The judgement of the ECtHR in Martin v. Estonia

On 30th May 2013[*13], the ECtHR concluded in *Martin v. Estonia* that there had been violation of Article 6 (1) and Article 6 (3) c of the ECHR on the basis of the following facts of the case.[*14]

On 21 May 2006, a sixteen-year-old victim was killed, with his body found by the Estonian authorities a few days later. On 19 July, Martin, a schoolmate of the victim, was arrested on suspicion of murder. Until the 25th of July, he was represented by legal counsel R., but on that date his parents hired counsel Järve to defend him. Between the 25th of July and 4th of August, Martin and Järve met occasionally. On Friday, the 4th of August, Martin expressed hope that Järve would visit him on the following Monday. But on Monday, 7th August, Järve was not allowed to meet him. Up to that point, Martin had denied the charges.

In two distinct hand-written requests, dated 7 August, Martin stated his wish to waive the services of Järve. On the same day, the authorities granted him legal aid and appointed R. again as his counsel. Later the same day, Martin was interrogated in his presence and pleaded guilty. He gave detailed statements about the offence. On the same day and the next, he was taken to the crime scene in order to carry out an on-site reconstruction of the events. The investigative activity was video-recorded, with R. present as counsel. The case file also contains copies of two hand-written 'sincere confessions' by Martin, dated 7 and 8 August. In the first, he denied the charges, whereas in the second he admitted to killing the victim. On 11th August, R. learned that a new client agreement for the defence of Martin had been signed, with lawyer G. Meanwhile, although Järve stated that the waiver of his services by Martin had not been voluntary, his complaint was dismissed by the authorities. Martin's following behaviour was contradictory: he confessed to the murder at some points (e.g., when sending a letter to his father) and denied it at others. In the court proceedings wherein Järve was his counsel again, he denied his guilt, but he was nevertheless finally convicted of murder and sentenced to 10 years of imprisonment.

After his conviction, Martin filed a complaint with the ECtHR on the grounds that his defence rights had been violated as his appointed lawyer had been denied access to him during the pre-trial proceedings, and that his conviction had been based on evidence obtained in those proceedings.

The ECtHR concluded that there had been a violation, presenting the following arguments. Firstly, the Court stressed that the circumstances in which Martin terminated Järve's services are not entirely clear. It is hard to explain why Martin terminated Järve's services on the 7th of August after having agreed to meet him on the 4th of August.[*15] It is noteworthy that after the termination the authorities were in quite a hurry: they interrogated Martin on the same day, with the following crime-scene reconstruction lasting almost until midnight.[*16] In addition, Järve was not informed of the termination of his services and was unable to ascertain whether it had been of the suspect's own volition.[*17] Secondly, even if there was an allegeable conflict between Martin's interests and those of two other suspects Järve had been defending (these people were never convicted of murder), no official proceeding was used to replace him. Reliance on an informal practice gives rise to concern about the respect for the suspect's rights of defence and freedom from self-incrimination. In addition, the legal-aid counsel had been chosen by the police investigator.[*18] Thirdly, as Martin was a minor when the crime was committed, he was in a vulnerable position due to his age.[*19] And, finally, the charges against him were very serious.[*20] On account of these arguments, the Court was not satisfied that Martin's wish to replace counsel of his own could be considered genuine.[*21]

The ECtHR noted that the evidence gathered through breach of Martin's rights was used against him by the county court. The court of appeal, although excluding it from the body of evidence, considered there to be nothing to prevent the use of 'general knowledge' that Martin had confessed to the murder, as it observed that the confession of murder had to a large extent been the reason for which Martin had been sent to trial

13 Application No. 35985/09, of 30.5.2013.

14 Based on paragraphs 6–51 of the judgement.

15 According to paragraph 88 of the judgement.

16 *Ibid*., paragraph 91.

17 *Ibid*., paragraph 89.

18 *Ibid*., paragraph 90.

19 *Ibid*., paragraph 92.

20 *Ibid*., paragraph 93.

21 *Ibid*.

on a murder charge and the investigative measures had been carried out on the basis of that knowledge.[*22] Therefore, 'the applicant's defence rights were irretrievably prejudiced owing to his inability to defend himself through legal assistance of his own choosing'.[*23]

Therefore, the ECtHR had two reprimands for Estonia. The first of these is that the right to choose counsel was violated by the fact that the process of termination of Järve's services at least seemed as if it had not been carried out voluntarily by the suspect. Secondly, the evidence gathered as a result of this violation (mainly Martin's confession) was used for convicting Martin. The court of first instance used it explicitly; the court of second instance excluded it from the body of evidence but relied on it nevertheless. Not surprisingly, Martin's counsel filed a petition for review with the SCE, referring to the findings of the ECtHR.

3. The SCE's response to the petition for review in *Martin v. Estonia*

Section 366 (7) of the CCP provides that criminal proceedings may be reopened if the ECtHR has found a violation of the ECHR that may have affected the outcome of the criminal proceedings and if it cannot be resolved or if damage caused thereby cannot be compensated for in a manner other than reopening of the proceedings. Therefore, in order for the case to be reopened by the SCE, three conditions had to be met. Firstly, the ECtHR had to have established a violation of the ECHR. Second was that said violation **may have affected** the outcome of criminal proceedings. For this condition to be met, it should be determined that without violation the outcome of the proceedings would have been different – it would have resulted either in acquittal of the accused or in less severe consequences for the accused. In any other case, the damages awarded by the ECtHR are sufficient to remedy the violation.[*24] The third condition is that the violation could not have been remedied in any other way than by reopening the case. If the accused would not have been convicted had the violation not occurred, the damages awarded by the ECtHR are not sufficient to cure the violation.[*25] But even if conviction would not have occurred without the violation, reopening is still excluded as an option if that itself would not change the result of the case – e.g., if a person has been convicted for multiple crime episodes, only one of these episodes was affected by the violation, and the punishment imposed on this person in the outcome of reopening would remain the same.[*26] In sum, for resolution of a petition for review, three questions have to be answered: was there a violation, might it have affected the outcome, and in what extent did it affect the outcome?

Section 366 (7) of the CCP was the provision that Martin's counsel Järve relied on in his petition for review to the SCE. He claimed that in the case that the evidence gathered through violation of Martin's rights is excluded from the body of evidence, what is left to the body of evidence afterward does not prove his guilt.[*27] By its judgement 3-1-2-2-14, of 29th September 2014, the SCE dismissed the petition, with the reasoning described below.

The SCE agreed with the ECtHR that the initial stages of the proceedings did not at least seem to be fair.[*28] Nevertheless, it noted that, though the ECtHR established the violation of defence rights, the violation itself occurred in the pre-trial stage of the proceedings and was not associated with the body of evidence as a whole.[*29] Despite the fact that the Estonian Court of Appeal referred to Martin's pre-trial statements as general knowledge that he had confessed to the murder, the violation did not affect the result of the case in a 'decisive manner', as the rest of the evidence did not indicate that reopening the case could lead to acquittal.[*30] In conclusion, although the ECtHR noted in paragraph 107 of its judgement that 'where an individual has been convicted by a court in proceedings that did not meet the Convention requirement of fairness, as

22 *Ibid*., paragraphs 95–96.

23 *Ibid*., paragraph 97.

24 CLCSCd 3-1-2-2-08, 26.1.2009, paragraphs 10 and 16 (in Estonian).

25 CLCSCd 3-1-2-2-14, 29.9.2014, paragraph 9.2 (in Estonian).

26 CLCSCd 3-1-2-5-09, 17.2.2010, paragraphs 9–9.3 (in Estonian).

27 CLCSCd 3-1-2-2-14 (see Note 25), paragraph 6.

28 *Ibid*., paragraph 15.2.

29 *Ibid*., paragraphs 11–12.

30 *Ibid*., paragraph 13.

in the instant case, a retrial, a reopening, or a review of the case, if requested by the applicant, represents in principle an appropriate way of redressing the violation', the violation of the accused's defence rights is cured by the damages awarded by the ECtHR since, according to §366 (7) of the CCP, no grounds for review exist.*[31]

The SCE contested the finding of the ECtHR that for the termination of Järve's services a more formal procedure would have been appropriate. It noted that, according to §55 (2) of the CCP, formal procedure for removal of specific counsel is foreseen only for those cases in which it becomes evident that said counsel has abused his status in the proceedings by communicating with the person being defended, after the person has been detained as a suspect or taken into custody, in a manner that may promote the commission of another criminal offence or violation of the internal rules of procedure of the custodial institution. The CCP does not provide specific procedure for cases in which the suspect wants to terminate his counsel's services, as doing so is an 'expression of his free will'. Lengthy and thorough procedure for removal of counsel in these cases would materially prejudice suspects' right to choose counsel.*[32]

4. Remedies for violation of the right to choose counsel in pre-trial proceedings

4.1. Should Martin's case have been reopened?

In the author's opinion, there are considerable shortcomings in the argumentation of the SCE in Martin's case, which should be discussed here before the remedies for violation of the right to choose counsel in pre-trial proceedings can be proposed, as these shortcomings determine the scope of the proposed remedies.

The SCE has not applied sufficient reasoning in its finding that the violation of Martin's defence right did not affect the result of the case. Furthermore, in paragraph 13, the Court concludes that the violation did not affect the result of the case in a 'decisive manner', although this finding is not in accordance with the law in force. According to §366 (7) of the CCP, a case may be reopened if the violation may have affected the outcome of the proceedings. The law does not specify in which manner it may have occurred. Therefore, the court has to decide whether the violation may or may not have affected the outcome, and if it does find that it may have done so, the case should be reopened (in the event that the third condition discussed in Section 3 of this article is present also). The Court's wording 'decisive manner' indicates that the violation may have affected the outcome but not to an extent that gives grounds for reopening the case, which should be a matter of the third question, the question of whether the violation could be cured in any other way than by reopening the case. As this question focuses precisely on what would change in consequence of reopening of the case, it is proper to ask in what extent the violation did affect the outcome.

Even if one agrees that the extent to which the violation affected the outcome belongs under the second question, the Court has not justified its finding. It has noted that pieces of evidence existed that were not gathered through violation of Martin's defence rights, but it neither named nor analysed that evidence. On account of this shortcoming, it also has not verified whether collection of that evidence was, in fact, influenced by initial infringement of Martin's right or not. In paragraph 3.3 of the judgement, where the Court gives an overview of the appeals court's findings, it lists the evidence upon which it relied: experts' reports, witness testimony, reports on comparison of statements to circumstances, and Martin's letter to his father in which he confesses to the murder. Nevertheless, the SCE has not itself evaluated the legality of these items.

In its judgement the SCE notes that, although the ECtHR has referred to retrial, reopening, or review of the case as a feasible remedy for Martin's case, grounds for reopening the case do not exist according to §366 (7) of the CCP. In the author's opinion, it would have been possible to interpret §366 (7) of the CCP in a manner more coherent with the findings of the ECtHR. As it does not lay down a comprehensive set of rules for the admissibility of evidence, the ECtHR has left this matter to be regulated by national law.*[33] Nevertheless, in cases wherein the ECtHR has decided to intervene in the state's competence as it did in

31 *Ibid*., paragraph 14.

32 *Ibid*., paragraph 15.1.

33 B. Emmerson *et al*. Human Rights and Criminal Justice, 3rd edition. London: Sweet & Maxwell 2010, p. 599. See also *Schenk v. Switzerland*, application No. 10862/84, 12.7.1988, pp. 45–46; *Khan v. the United Kingdom*, application No. 35394/97, 12.5.2000, paragraph 34; *Jalloh v. Germany*, application No. 54810/00, 11.7.2006, paragraph 95.

Martin's case by declaring that evidence gathered by violation of Martin's rights should not have been used by Estonian courts, the state authorities should take the Court's findings very seriously. The ECtHR comes to this kind of decision only if it deems the violation to have rendered the proceedings as a whole unfair.[*34] Therefore, by stating that some of the evidence was gathered by violation of the applicant's defence rights, the ECtHR has in principle affirmed that two of the three conditions for grounds for review provided for in §366 (7) of the CCP exist in Martin's case. Firstly, there was a violation, and, secondly, it affected the outcome of the case, as the body of evidence would have differed in the case of the corrupted pieces of evidence having been left out. By stating that reopening of the case would constitute appropriate remedy, the ECtHR has essentially also concluded that the damages awarded by it do not cure the violation. In the context of the CCP, this means giving a negative answer to the question of whether the violation could be cured in any other way than reopening, and therefore affirming the grounds for reopening. It is true that the ECtHR's recommendation of reopening a case is not binding, as the just satisfaction provided for in Article 41 of the ECHR covers three types of awards: costs and expenses, awards for pecuniary damage, and awards for non-pecuniary damage.[*35] Nevertheless, the state courts should still consider the ECtHR's recommendations in order to promote fair-trial rights in their country.

It is important to note that the ECtHR's practice with respect to Article 6 (3) has not been coherent. Where the case falls within a specific guarantee of Article 6 (3), it may be considered by the ECtHR to be subject to that specific guarantee alone; in conjunction with Article 6 (1), and therefore with an additional 'fair trial dimension' as was found in Martin's case; or just under Article 6 (1).[*36] It has been suggested that, in order to achieve consistency in its practice, the ECtHR should conduct an analysis of the violation of Article 6 (3) c in isolation from other violations referred to by the applicant. This means that the inquiry should be strictly limited to the question of whether the authorities provided the applicant with the opportunity to choose his counsel and whether they allowed the counsel to participate actively in the proceedings. Reference to the broad notion of 'fair trial' should be avoided when it comes to Article 6 (2) or Article 6 (3) rights. In any other case, the interpretation of Article 6 as a whole would collapse the 258 words into a simple two-word 'fair trial' guarantee.[*37] In Martin's case, it seems that the ECtHR, though referring also to the Article (1) fair-trial right, has looked directly at the nature of the right to choose counsel. The Court found a serious breach and suggested reopening the case as a proper remedy, which indicates that the violation *per se* renders the judgement of the case void. In that case, the violation of the right to a fair trial is not analysed additionally, as violating the right to choose counsel is itself a violation of the right to a fair trial. For curing that violation, any other possibility but reopening the case does not exist.

As was noted in the introduction, the right to choose counsel can be waived. This may be done either expressly or tacitly, but it must be 'established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance'.[*38] It 'must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right'.[*39] The EU directive on the right of access to a lawyer[*40] also provides that the right to counsel may be waived on the condition that the person is informed of the content of the right and the possible consequences of waiving it, and that the waiver is carried out voluntarily and unequivocally (Article 3 and Article 9 (1) a and b). In the case considered here, Martin waived the services of the counsel hired by his parents in favour of state legal-aid counsel who had defended him previously (the case file indicates that not only did he agree with the change of counsel but he also accepted the authorities' choice of counsel). Although the ECtHR's reproach to the Estonian authorities that the formal proceeding of removal was not used for termination of Järve's services is contradictory to the law in force, it is still worth discussing. The problem with non-formal waiver is that retrospectively it is difficult to determine whether it meets the conditions laid down by the ECtHR or not. Therefore, although even the directive on the right of

34 *Ibid*.

35 C. Buckley *et al*. (see Note 8), p. 157.

36 *Ibid*., p. 409.

37 R. Goss. Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights. Oxford; Portland, Oregon: Hart 2014, p. 87 DOI – http://dx.doi.org/10.5040/9781474201858 .

38 *Pishchalnikov v. Russia* (see Note 10), paragraph 77; *Saman v. Turkey*, application no. 35292/05, 5.4.2011, paragraph 32.

39 *Pishchalnikov v. Russia* (see Note 10), paragraph 77.

40 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. OJ L 294/1.

access to a lawyer does not require formal procedure for waiver of counsel's services – according to Article 9 (2), it could be carried out in writing or orally – in more demanding situations (e.g., when the suspect in a minor), it would be wise to follow a formal procedure. Thereby, not only the rights of the suspect are respected, but also any possible future disputes, including claims before the ECtHR, could be avoided, since the authorities would have solid proof that the waiver was both voluntary and intelligent. The SCE could have discussed it in Martin's case instead of limiting its argumentation to the law in force.

4.2. How could the violation of Martin's rights have been cured?

Although the ECtHR is reluctant to determine evidentiary rules for the states, it has often discussed whether domestic courts should have left certain pieces of evidence outside the record or not. In *Gäfgen v. Germany*, wherein the Court concluded that there had been violation of Article 3, it noted that one of the factors that influences the fairness of the proceedings is whether the evidence gathered in violation of the accused's rights was or was not decisive for the outcome of the case.*[41] However, the use of evidence obtained in breach of Article 3 always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction.*[42] This means that the Court has set down specific rules for the use of evidence in cases involving Article 3 rights but not for cases dealing with Article 6 rights. In the *Gäfgen* case, the ECtHR also specified the circle of evidence that may not be used in the event of Article 3 being violated. It noted that domestic courts should never rely on evidence that is 'a direct result of ill-treatment in breach of Article 3',*[43] and in paragraphs 171 and 173 it indicates that this circle encompasses both evidence gathered in the course of ill-treatment and evidence that is gathered on the basis of information received via ill-treatment. With *Shishkin v. Russia*,*[44] the ECtHR concluded that there were violations of Article 6 (1) in a case wherein the applicant had been tortured and his access to counsel had been denied, although there was absence of a clear indication that domestic courts had used his statements for his conviction.

The exclusionary rule that can be derived from ECtHR case law is well known in the USA. It has two rationales. Firstly, there is a preventive aim, which means that if the officials know that in court proceedings the state cannot take advantage of their illegal actions, they refrain from violating constitutional rights. Secondly, it serves an aim of protecting judicial integrity.*[45] However, critics have pointed out considerable costs of this doctrine. In the main, it frees guilty people – i.e., prevents the courts from seeking the truth*[46] – which, in turn, promotes cynicism among members of the public and parties within the criminal justice system.*[47] In addition, there are proper remedies for curing the violation, such as civil actions and criminal prosecution of officials who have violated the rights of the accused.*[48] The exclusionary rule does not apply only to the direct products of governmental illegality; it also covers the secondary evidence that is 'fruit of the poisonous tree'.*[49] From the *Gäfgen* case it can be concluded that the ECtHR has also relied on this doctrine, although not specifying its contents. For the sake of the search for the truth, the US Supreme Court has narrowed the exclusionary rule, including the 'fruit of the poisonous tree' principle, considerably. Firstly, there is an independent-source doctrine, which means that evidence that is not causally linked to illegal governmental activity (even in cases wherein police officers have illegally entered the suspect's home, found the evidence, asked for a warrant while simultaneously keeping the house under

41 Application No. 22978/05, 1.6.2010, paragraph 164.

42 See paragraph 165. However, it should be noted that the Court failed to apply this rule on the facts of Gäfgen's case, as it still analysed whether the evidence that had been gathered in violation of the accused's Article 3 rights was decisive for his conviction or not. Since it concluded that it was not, it denied violation of Article 6. See also B. Emmerson *et al.* (see Note 33), p. 636.

43 See paragraph 167.

44 Application No. 18280/04, 7.7.2011.

45 J. Dressler. Understanding Criminal Procedure, 3rd edition. New York; San Francisco: Matthew Bender 2002, p. 381. In Gäfgen v. Germany (see Note 41), paragraph 175, one finds: 'Indeed, there is also a vital public interest in preserving the integrity of the judicial process and thus the values of civilised societies founded upon the rule of law.'

46 *Ibid*., p. 393. Also in *Gäfgen v. Germany* (see Note 41), paragraph 175.

47 *Ibid*., p. 394.

48 *Ibid*., p. 395.

49 *Ibid*., p. 413.

surveillance, and then entered the house legally) is not deemed fruit of a poisonous tree.*[50] Secondly, there is an inevitable-discovery rule, according to which the evidence does not fall under the exclusionary rule if the official instances would have found it in the course of their legal activities anyway.*[51] Thirdly, the attenuated-connection principle is applied, under which the secondary evidence may be used if it is free of the original taint.*[52] Finally, there is the good-faith exception, under which if the authorities rely upon a defective search warrant in good faith, the evidence acquired thereunder may still be used.*[53] The ECtHR's case law is not that detailed yet, as can be seen from the *Gäfgen* case.

In Estonia, the violation of procedural rules during collection of evidence does not always result in application of the exclusionary rule. In rare cases, the law provides directly that such evidence shall not be used in criminal proceedings (e.g., according to §126[1] (4) of the CCP, information obtained through surveillance activities is evidence – i.e., it could be used in proceedings – if the application for and granting of authorisation for surveillance activities and the conduct of those surveillance activities are in compliance with the requirements of the law*[54]). In cases wherein the law does not provide such guidelines, the court has to take into account on one side the materiality of the violation and from the other side the gravity of the offence and the public interest in conducting the proceedings. In addition, the aim of the provision that was breached and the issue of whether the evidence could have been collected without violation of that provision should be considered.*[55] In any case, the SCE has not yet confirmed that violation of the accused's constitutional rights would automatically result in application of the exclusionary rule.*[56] However, if one considers the seriousness of violation of the constitutional rights of the accused, it is difficult to argue that public interests (among them the need for punishment for serious crimes) outweigh the violation. To the contrary, the more serious the charges the accused faces, the more his rights should be respected*[57], as illegally obtained evidence increases the probability of conviction based on unreliable evidence.*[58]

In Estonia, even when a higher court concludes that a lower court should have left the tainted piece of evidence out, the circumstances may not result in annulment of the lower court's decision. The latter depends on whether the piece of evidence was decisive.*[59] For instance, in a recent case*[60] the SCE concluded that the authorities violated the suspect's right to counsel during the pre-trial stage of proceedings in a situation in which the suspect faced lifetime imprisonment. The suspect had been questioned several times: first with his counsel present, then with him not being present, and then again with counsel present. Martin confessed his guilt during an interrogation in which his counsel was not present and continued to do so in subsequent interrogations. The SCE concluded that the courts should have excluded the statements received during these interrogations from the body of evidence.*[61] Nevertheless, it confirmed the legality of the judgements of the lower courts, as these statements were not of a decisive nature (there were also witnesses' statements, documents, and other pieces of evidence named in the SCE's judgement).*[62] However, although the SCE has practice with the exclusionary rule, even in the area of the right to counsel, as could be seen from this case, it has never dealt with 'fruit of the poisonous tree'.

In Martin's case, the fruit of that tree was something that the SCE should have considered. This principle should not be ignored by the members of the ECtHR, as the ECtHR itself applied it in *Gäfgen v. Germany*. It should be noted that, according to the court of appeal, Martin's confession of murder was to a large extent why Martin had been sent to trial on a murder charge, and the investigative measures had been carried out on the basis of that knowledge. As the confession itself was a result of violation of Martin's

50 *Ibid*., pp. 414–415.

51 *Ibid*., p. 416.

52 *Ibid*., p. 417.

53 *United States v. Leon* (468 U.S. 897).

54 CLCSCd 3-1-1-22-10, 26.5.2010, paragraph 14.3 (in Estonian).

55 CLCSCd 3-1-1-31-11, 28.4.2011, paragraph 15 (in Estonian).

56 U. Lõhmus. Põhiõigused kriminaalmenetluses (Constitutional Rights in Criminal Procedure), 2nd edition. Tallinn: Juura 2014, p. 84.

57 *Gäfgen v. Germany* (see Note 41), paragraph. 175.

58 U. Lõhmus (see Note 56), p. 85.

59 CLCSCd 3-1-1-22-10 (see Note 54), paragraph 14.6.

60 CLCSCd 3-1-1-1-15, 19.2.2015, paragraph 9 (in Estonian).

61 *Ibid*., paragraph 9.

62 *Ibid*., paragraph 10.

defence rights, the courts should have analysed which pieces of evidence were actually permissible for use in the proceedings against Martin in light of the 'fruit of the poisonous tree' principle. The duty of the state to impose effective remedies under national law in the event of a breach of the right to counsel comes directly from the EU directive on the right of access to a lawyer, Article 12 (1). In Martin's case, the courts did not ensure such remedies, either in the course of criminal proceedings or in the review proceedings. It might be speculated that a stricter approach by the court of appeal and the SCE would have remedied the violation during the criminal proceedings and there would not have been a need for the ECtHR's guidelines four years later, with the person imprisoned in the meantime.*[63] At the same time, as can be seen from the analysis above, the SCE did not remedy the violation, even after the ECtHR's decision.

What should the SCE have done in Martin's case? Firstly, it should have reopened the case, as discussed in the previous paragraph. Secondly, it should have given clear guidelines for the county court on how to cure the violation. In light of the 'fruit of the poisonous tree' doctrine, it should be borne in mind that merely ordering the lower court to leave Martin's statements out from the body of evidence may not be enough. The SCE should have also decided what to do with the evidence collected on the basis of information supplied by Martin. It was up to the SCE to decide whether exceptions to the rule apply, but it is clear that the stance of the ECtHR in *Gäfgen v. Germany* should have been considered. Only after reordering the body of evidence by taking into account the exclusionary rule and the 'fruit of the poisonous tree' doctrine should the Estonian courts have made a decision on Martin's guilt.

5. Conclusions

The suspect's decisions in pre-trial proceedings, including those on whether or not to give statements, may determine the fate of the case. Therefore, it is extremely important that he have counsel whose advice he can rely on. If the suspect's right to make the choice of contractual counsel is violated, the defence actions and strategy up to the trial are jeopardised. Under these circumstances, the ECtHR has acknowledged the need for a proper remedy, including applicability of the exclusionary rule and the 'fruit of the poisonous tree' principle. In Estonia, the SCE has applied the first, but whether the latter also applies is a question that remains unanswered, since the SCE did not reopen Martin's case, proceeding from an argument that no grounds for reopening existed. In Martin's case, not only should the courts have not admitted Martin's statements that were given during interrogations wherein his chosen counsel was not present, but they should also have decided what to do with the pieces of evidence gathered in consequence of the information received from Martin during these interrogations, in order to cure the violation of the suspect's right to choose counsel entirely.

[63] A. Tinsley. Protecting criminal defence rights throughout EU law: Opportunities and challenges. – *New Journal of European Criminal Law* 2013/4, p. 474.