

ANNOTATIE

Herziening vanwege schending Salduz-regels. Commentaar bij Hoge Raad 21 april 2020, ECLI:NL:HR:2020:632.

mr. J.H.J. Verbaan

Annotatie bij Hoge Raad, 21-04-2020, ECLI:NL:HR:2020:632 (SR-2020-0141)

De uitspraak van het EHRM is gewezen naar aanleiding van een klacht van de aanvrager. De klacht had betrekking op het aan de aanvrager onthouden van rechtsbijstand tijdens de politieverhoren die hebben plaatsgehad op 20 en 21 augustus 2009. Het EHRM heeft ten aanzien daarvan in zijn uitspraak onder meer het volgende overwogen en beslist:

‘29. After its judgment in *Salduz v. Turkey*, the Court further clarified the general principles to be applied in cases concerning a restriction on the right of access to a lawyer and fairness of the proceedings in *Ibrahim and Others v. the United Kingdom*; and *Simeonovi v. Bulgaria*; and confirmed them recently in *Beuze v. Belgium*.

30. Applying those principles to the present case, the Court observes at the outset that it is not in dispute that, having been arrested on suspicion of distribution of child pornography and finding himself in police custody, the applicant was charged with a criminal offence within the meaning of Article 6 § 3 of the Convention. As such, the guarantees laid down in Articles 6 §§ 1 and 3 (c) as interpreted by the Court entailed that he had, inter alia, a right to be assisted by a lawyer during police interviews, unless there were compelling reasons to restrict that right.

31. In view of the fact that there is no indication in the case file that on either 19 or 21 August 2009 the applicant made any statements that were to play a role in his conviction, the Court will focus its examination on the interviews which took place on 20 August 2009, as statements made by the applicant on that day were used for his conviction.

32. The Court notes that when the applicant at the start of the police interview on 20 August 2009 indicated that he wished to be assisted by his lawyer, he was told that that was not possible. The Court does not discern from the material in the case file that there were any compelling reasons for the restriction of the applicant's rights. Rather, it would appear that the only reason not to allow the applicant's lawyer to be present at the interview was the fact that at the relevant time there was no right in the Netherlands providing for legal assistance during police questioning to adult suspects. The Court has previously held that such a general and mandatory restriction on the right to be assisted by a lawyer during the pre-trial phase of criminal proceedings does not constitute a compelling reason.

33. Whilst the absence of compelling reasons does not lead in itself to a finding of a violation of Article 6, such absence weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The burden of proof falls on the Government, which must demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer.

34. In the present case the Government have not advanced any argument in substantiation of a claim that the applicant nevertheless had a fair trial. That being the case, the Court considers that the aforementioned burden of proof has not been discharged, a finding which is sufficient to enable it to conclude that the failure to allow the applicant to be assisted by his lawyer during the police interviews on 20 August 2009 rendered the proceedings as a whole unfair. There has accordingly been a violation of Article 6 §§ 1 and 3 (c) of the Convention.'

De Hoge Raad overweegt dat op een staat de verplichting rust tot het bieden van rechtsherstel indien het EHRM een schending van een verdragsregel heeft vastgesteld. Dit rechtsherstel kan geheel of gedeeltelijk in het kader van de met het oog daarop gewijzigde herzieningsprocedure gestalte krijgen (vgl. ECLI:NL:HR:2005:AS8858, r.o. 4.3 en 4.4). De Hoge Raad oordeelt dat, gelet op de door het EHRM geconstateerde schending van artikel 6 lid 1 en lid 3 onder c EVRM, herziening noodzakelijk is met het oog op rechtsherstel.