In the Matter of Case No. K19/11

A case initiated by the Commissioner for Civil Rights on access to legal assistance during investigations into petty criminal offences

Submission from the Open Society Justice Initiative to the Polish Constitutional Court

1 December 2011

OPEN SOCIETY
JUSTICE INITIATIVE

INTRODUCTION

1. The intervener, the Open Society Justice Initiative ("the Justice Initiative"), respectfully submits an *amicus curiae* brief in the present case with the leave of the Polish Constitutional Court dated 30 September 2011.

2. This case presents an issue of great significance for the implementation of the rights of people accused or suspected of criminal offences in Poland. In recent years, there have been significant developments and reforms across Europe relating to fair trial rights and criminal procedure. This case is an opportunity for the Constitutional Court to ensure that Polish criminal procedure is consistent with these developments by holding that all people accused or suspected of petty offences in Poland must have the fundamental right to access counsel during the initial investigation stage.

3. In accordance with the grant of leave, these submissions address the question of whether Articles 4 and 20(1) of the *Petty Offences Procedure Code* – to the extent that they restrict access to counsel during the initial investigation stage – breach the European Convention on Human Rights, the International Covenant on Civil and Political Rights and other international standards, and will cover the following questions:

   a) *When does the right to access counsel arise?* Suspects have the right to access counsel from the outset of the investigation.

   b) *Does this right extend to petty offences covered in the Code?* The right to access counsel extends to petty offences in the Petty Offences Procedure Code as they are characterized as criminal charges under Article 6 of the European Convention on Human Rights.

   c) *Is there an obligation to provide a free a legal aid scheme to facilitate this right?* The Polish Government has an obligation to provide a legal aid scheme to facilitate the right to access counsel for people investigated for petty offences in the POPC.

BACKGROUND

4. At present, Article 4 of the *Petty Offences Procedure Code* of 24 August 2001 ("POPC") prohibits access to counsel during the investigative stage of proceedings. The applicant, the Commissioner for Civil Rights, has asked the Court to declare that this aspect of the law is unconstitutional as it violates Articles 2, 31(3), 32(1) and 42(2) of the Constitution of Poland (rights to defense, equality, proportionality, and the principles of a democratic state), and Article 6(3)(c) of the European Convention on Human Rights (right to legal assistance).

5. Article 4 of the POPC states that "a person accused of a petty offence shall have the right to defend himself, including the right to be assisted by counsel, of which he shall be informed". Although this provision appears to guarantee a right to access counsel, Article 20(1) of the POPC strips it of much of its meaning. Article 20(1) defines a person accused of a petty offence as "a person against whom a motion for penalty has been filed in the case of a petty offence". A motion for penalty is filed with the court only *after* the initial investigative stage of the proceedings has been completed. Petty offences are defined as prohibited acts for which the maximum penalty upon conviction includes reprimand, pecuniary penalties, or deprivation of liberty for up to 30 days.

6. Under this legislative framework, suspects are not permitted to access a lawyer – either a private lawyer or a legal aid lawyer – during any part of the investigative stage. This means that people are required to take part in a series of investigative acts, including interrogations and searches, without being able to get advice or assistance from a lawyer. During interrogations, people are required to make complex decisions about

their legal situation, may choose to give evidence, and may file applications to admit evidence. They may be presented for identification, and may have fingerprints or bodily samples taken.

A. SUSPECTS HAVE THE RIGHT TO ACCESS COUNSEL FROM THE OUTSET OF THE INVESTIGATION

7. Under the European Convention on Human Rights ("the ECHR"), suspects in criminal proceedings have the right to access counsel when they are arrested, deprived of their liberty, or their position is significantly affected. This right includes having counsel during any interrogations or questioning by the police. Poland has been criticized for failing to provide such assistance in criminal cases by the European Court of Human Rights, the Committee for the Prevention of Torture of the Council of Europe, and the UN Committee against Torture. Furthermore, Poland's restrictions on the right of early access to counsel contrasts with the current movement across the EU towards setting minimum standards protecting the fair trial rights of suspected and accused persons in criminal proceedings.

European Convention on Human Rights

8. The European Court of Human Rights ("ECtHR") has for many years held that the right to legal assistance arises immediately on arrest.[1] Since 2008 there have been a series of judgments from the ECtHR developing and clarifying this principle. Under this recent jurisprudence, described in detail below, a person must have access to legal assistance as soon as they are placed in custody or their position is significantly affected, which may be before a formal arrest takes place. In particular, nobody should be interrogated or required or invited to participate in investigative or procedural acts without the opportunity to obtain legal assistance.

9. Article 6(1) of the ECHR sets forth the general principle of the right to a fair trial. It states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

10. Articles 6(3)(b) and (c) of the ECHR go on to state that: "Everyone charged with a criminal offence has the following minimum rights … (b) to have adequate time and facilities for the preparation of his defence; and (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."

11. The recent clarification of the scope of these rights started with the 2008 case of *Salduz v Turkey.* This case concerned a minor who was arrested, made admissions during interrogation in the absence of a lawyer, but later retracted his statement saying that it had been obtained under duress. The Grand Chamber of the ECtHR unanimously found that the applicant's lack of access to a lawyer while he was in police custody violated Article 6(1) and 6(3)(c) of the ECHR. Neither the subsequent assistance of a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody.[2] The Court underlined the importance of the investigation stage for the preparation of the criminal proceedings and observed that "in order for the right to a fair trial to remain sufficiently 'practical and effective' Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police".[3] It also held that even where compelling

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[1] *John Murray v United Kingdom,* ECtHR, Judgment of 8 February 1996; *Magee v United Kingdom,* ECtHR, Judgment of 6 June 2000.
[2] *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008, para. 58.
[3] *Ibid*, para. 54-55.

reasons might exceptionally justify denial of access to a lawyer, any incriminating statements made by an accused without a lawyer cannot be used to obtain a conviction.[4]

12. *Salduz* has been followed in over 90 subsequent decisions of the European Court of Human Rights.[5] The *Salduz* case law forms a clear and consistent line of jurisprudence to the effect that the practice by which the police interview suspects in the absence of their lawyers breaches Article 6 of the Convention, a breach that cannot be cured by the subsequent assistance of a lawyer. This series of decisions have also clarified the details of when exactly the right to access counsel arises and what it means to have this right.

13. In *Dayanan v Turkey,* the ECtHR stated that a suspect must have the opportunity to obtain legal assistance as soon as he or she is taken into custody, whether or not they are questioned by the police. The Court stressed that this early access to counsel was meant to ensure that a suspect could obtain the whole range of services inherent to legal advice, such as discussion of the case, organization of the defense, collection of evidence, preparation for questioning, support to an accused in distress, and checking of the conditions of detention.[6]

14. In *Shabelnik v Ukraine,* the ECtHR held that the right to access counsel arises at the point that the person's position is significantly affected, even if they are not formally taken into custody as a suspect. The Court explained that a person's position will be significantly affected as soon as the suspicion against him is seriously investigated and the prosecution case compiled.[7] In this case, the applicant was questioned as a witness, not as a suspect or accused person. The Court held that the point at which the right to access counsel arises does not depend on the formal designation of the person. The Court made a similar point in *Brusco v France*.[8]

15. As a comparison, the Court found that while it was not mandatory to provide a lawyer where a person had been merely pulled over by police at a road stop, any admissions obtained through such an informal process could not subsequently be used against the accused. In *Zaichenko v. Russia,* the applicant was not formally arrested or interrogated in police custody but was simply stopped for a road check and answered questions relating to the search of his car.[9] Since the applicant's freedom of action was not significantly curtailed, the Court held that the absence of legal representation at that point did not violate the applicant's right to legal assistance under Article 6(3)(c) of the ECHR. However, because the police did not inform the applicant of his right to remain silent before they asked him questions at the road stop, the subsequent use at trial of his answers to these questions violated the privilege against self-incrimination and the right to remain silent contained in Article 6.

16. Of particular relevance to the current case is the principle that a person has a right to legal assistance *during* any police interrogation or other investigative act.[10] In *Brusco v France*[11] the applicant was denied a lawyer during police questioning. The Court found that this was a breach of Article 6(3)(c), despite the fact that the applicant had been able to see his lawyer directly after the interrogation.[12] In *Pishchalnikov v Russia*[13] the Court explained why it is fundamental that a suspect be provided with a lawyer during the

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[4] *Ibid*, para. 55.
[5] See the Annex for a list of these decisions up to September 2011.
[6] *Dayanan v Turkey,* ECtHR, Judgment of 13 October 2009, at para. 32.
[7] *Shabelnik v Ukraine,* ECtHR, Judgment of 17 February 2009, at para.57
[8] *Brusco v France,* ECtHR, Judgment of 14 October 2010, at para. 52-54.
[9] *Zaichenko v. Russia,* ECtHR, Judgment of 18 February 2010.
[10] *Demirkaya v Turkey*, ECtHR, Judgment of 13 October 2009; and ECtHR 14 October 2010, *Brusco v France*, No. 1466/07.
[11] *Brusco v France,* ECtHR, Judgment of 14 October 2010 at 44-45
[12] See also *Demirkaya v Turkey*, ECtHR, Judgment of 13 October 2009.
[13] *Pishchalnikov v Russia,* ECtHR, Judgment of 24 September 2009.

investigation stage of proceedings and especially during any questioning or interrogations by the police:

> "[A]n accused often finds himself in a particularly vulnerable position at that stage of the proceedings … In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help to ensure respect of the right of an accused not to incriminate himself".[14]

Adverse Rulings and Criticisms of Poland's Failure to Secure Prompt and Effective Access to Counsel for Criminal Suspects

17. Poland has been subject to adverse rulings by the ECtHR for failing to provide early access to counsel during the initial stages of criminal proceedings. In addition to judicial rulings, Poland has also been criticized by the Human Rights Committee, the Committee for the Prevention of Torture and the UN Committee against Torture on this issue.

18. In *Plonka v. Poland,* the ECtHR held that Poland breached Article 6 due to a failure to adequately explain the right of access to counsel to a vulnerable suspect. The applicant, an alcoholic, had been arrested for killing a colleague but was not provided with a lawyer at the initial stage of the criminal proceedings. The Polish Government submitted that the applicant had been informed of her right to be assisted by a lawyer, and had signed a form to that effect, and therefore she had not been deprived of access to a lawyer because she could have requested one during the initial period of detention. The applicant conceded that she had been informed of her right to a lawyer, but complained that she was not offered any help in appointing one, nor was she asked whether she could afford the cost of legal counsel. The Court held unanimously that the authorities should have taken into account her vulnerable status as an alcoholic when apprising her of the right to be assisted by a lawyer, and that there had not been a clear and unequivocal waiver of the right to counsel. The subsequent reliance upon admissions made in the interview to convict her was unfair, even though she was represented at trial, meaning that Poland had violated Articles 6(1) in conjunction with Article 6(3)(c) by failing to give the applicant access to counsel from the initial stages of proceedings.[15]

19. The ECtHR also found against Poland in the case of *Adamkiewicz v. Poland.* In this case, a minor had been arrested and questioned without a lawyer. The Court held that he should have been given a lawyer from the moment he was deprived of his liberty or placed in custody[16] and found a violation of Articles 6(1) and 6(3)(c) of the ECHR.[17]

20. The Human Rights Committee considered the periodic report of Poland in October 2010 and criticized the failure to provide suspects in police detention with early access and confidential communications with counsel. The Committee recommended that:

> "The State party should ensure that persons deprived of their liberty: (a) have immediate access to legal counsel from the beginning of their detention; (b) are able to meet with their lawyers in private, including prior to a court hearing; and (c) can correspond with their lawyer confidentially in all instances, without external monitoring, and in an expeditious manner."[18]

21. The Committee for the Prevention of Torture of the Council of Europe has also criticized Poland for failing to provide early access to counsel. In its Second General

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[14] *Ibid,* at para. 69.
[15] *Plonka v. Poland*, ECtHR, Judgment of 30 June 2009*,* at 40-42.
[16] *Adamkiewicz v. Poland,* ECtHR, Judgment of 2 March 2010, at para. 84.
[17] *Ibid,* at para. 91-92.
[18] Report of the Human Rights Committee, A/66/40 (Vol. I)**,** 2011, page 41.

Report, which provides guidance to States on minimum standards, conditions and practices, the Committee described access to a lawyer by a person detained by the police as one of the "fundamental safeguards against the ill-treatment of detained persons which should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned".[19] The Committee's most recent visit to Poland was in November 2009, during which it inspected a number of police stations and prisons and raised concerns that detained persons were not allowed access to lawyers during the initial investigation period of criminal proceedings:

> "Most detained persons met by the delegation stated that they had been informed of their right of access to a lawyer, upon apprehension or shortly afterwards. However, in practice, it remained extremely rare for persons in police custody to benefit from the presence of a lawyer. There is still no provision in Polish law allowing for the appointment of an *ex officio* lawyer before the stage of court proceedings".[20]

22. The UN Committee against Torture ("CAT") reviewed the periodic report of Poland in 2007 and also criticized the Polish Government for not providing fundamental safeguards to police detainees, including the right to access a lawyer from the outset of detention:

> "7. The Committee is concerned at restrictions that might be imposed on fundamental legal safeguards for persons detained by the police, particularly on the right of access to a lawyer from the outset of the detention, including during the stages of the preliminary investigation, as well as to consult a lawyer in private. (arts. 2 and 11).
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> The State party should take effective measures to ensure that all fundamental legal safeguards for persons detained by the police, particularly the right to access a lawyer and to consult with him/her in private, are respected from the very outset of the detention, including during the stages of the preliminary investigation".[21]

Developments and Recent Reforms in the EU

23. Poland's restrictions on the right of early access to counsel in the POPC stand in contrast to a growing movement in the EU towards protecting the fair trial rights of suspects in criminal proceedings. In response to *Salduz* and subsequent decisions, a number of EU member states have instituted reforms which recognize that the investigative stage is an integral part of all criminal proceedings, that it is at this stage that those suspected of crime are most at risk, and that those arrested and detained by the police should have access to a lawyer. The importance of access to counsel at this stage has also been recognised by the Council of the European Union and the European Commission.

Proposal for a Directive on the right to access a lawyer

24. One of the clearest representations of this movement is the Council of the European Union's *Resolution on a Roadmap for Strengthening Procedural Rights of Suspected*

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[19] Committee for the Prevention of Torture, *2nd General* Report, CPT/Inf (92) 3, 36, available at http://www.cpt.coe.int/en/annual/rep-02.htm. See also European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *CPT Standards*, CPT/Inf/E (2002) 1 - Rev. 2010 at 41, available at www.cpt.coe.int/en/documents/eng-standards.doc

[20] *Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT) from 26 November to 8 December 2009, CPT/Inf (2011) 20, at para. 26. Reports and Government responses from previous visits (June/July 1996, May 2000, October 2004) are published on the CPT's website: http://www.cpt.coe.int/en/states/pol.htm. Emphasis in original.

[21] *Conclusions and recommendations of the Committee against Torture on Poland*, Thirty-eighth session, Geneva, 30 April - 18 May 2007, CAT/C/POL/CO/4, 16 July 2007 at para. 7 and 9.

and Accused Persons in Criminal Proceedings.[22] This Roadmap aims to ensure full implementation and respect of the European Convention on Human Rights standards across the EU by way of binding Directives governing the rights of suspects.

25. In June 2011, the European Commission released the Proposal for a Directive on the right to access a lawyer in criminal proceedings as part of this Roadmap.[23] Article 3 states:

> "Member States shall ensure that suspects and accused persons are granted access to a lawyer as soon as possible and in any event: (a) before the start of any questioning by the police or other law enforcement authorities; (b) upon carrying out any procedural or evidence-gathering act at which a person's presence is required or permitted as a right in accordance with national law, unless this would prejudice the acquisition of evidence; and (c) from the outset of deprivation of liberty. Access to a lawyer shall be granted in such a time and manner as to allow the suspect or accused person to exercise his rights of defence effectively."

26. Irrespective of whether it is adopted, this proposal represents the Commission's understanding of the current minimum standards on the right to access a lawyer, and is based on an analysis of the jurisprudence of the European Court of Human Rights,[24] although the proposal is disputed by five Member States (Belgium, France, Ireland, the Netherlands, and the UK) who have responded by suggesting that there is a lack of clarity on the Directive's relationship to the requirements of the European Convention.[25] If adopted by the EU Parliament and Council, the Directive will become binding and enforceable and all Member States will be required to bring into force the laws, regulations, and administrative provisions necessary to comply with the Directive.

Developments in other EU Member States

27. The majority of the twenty seven member states allow consultation with and representation by a lawyer in interview during police detention.[26] Prior to 2008, only Belgium, France, the Netherlands, Ireland and Scotland expressly prohibited the right to legal representation in interview. However, in recent years, and in particular in light of *Salduz* jurisprudence and the European Union Roadmap, the judiciary or legislature in many of these States have recognized that their legal systems were inadequate and taken steps to redress the issue. Numerous States – including France, the Netherlands, Scotland and Belgium – have already or are currently in the process of implementing reforms to bring their justice systems in line with the European minimum standards.

28. A good example of the reforms can be seen in Scotland. On 26 October 2010, the UK Supreme Court decided in the case of *Cadder v HMA*[27] that the Scottish practice of holding suspects in custody for six hours without access to counsel was contrary to the ECHR. Emergency legislation prepared by the Scottish Government was passed to introduce the right to access counsel before and during any questioning by the police.[28]

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[22] Resolution of the Council of 30 November 1999, (2009/C 295/01).

[23] European Commission, *Proposal for a Directive on the right to access a lawyer in criminal proceedings*, COM(2011) 326/3. This proposal forms Measure C of the Roadmap.

[24] *Ibid.,* at para. 13, 14, 18-21.

[25] Note relating to the Proposed Directive, 22 September 2011, at http://register.consilium.europa.eu/pdf/en/11/st14/st14495.en11.pdf. See also response from a group of non-governmental organisations, 29 September 2011, at http://www.ecba.org/extdocserv/20110929_jointletter_measureC.pdf

[26] T. Spronken et al, *EU Procedural Rights in Criminal Proceedings*, European Commission (Maklu-Publishers, 2009) available at http://arno.unimaas.nl/show.cgi?fid=16315. The study considered all of the Member States of the European Union with the sole exception of Malta since information was not received from the Maltese Ministry of Justice.

[27] *Cadder (Appellant) v Her Majesty's Advocate (Respondent) (Scotland)* [2010] UKSC 43

[28] The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act

29. A similar process of reform occurred in France. On 30 July 2010, the French Constitutional Council declared the system of *garde à vue* (preliminary police custody) to be unconstitutional, in so far as it did not sufficiently guarantee suspects' defense rights.[29] To give time for the French government to implement reform, the Council ordered that its decision would not come into effect until July 2011. However, on 15 April 2011, the Plenary Assembly of the Supreme Court held that a person's right to access counsel as soon as he or she is placed in *garde à vue* should be implemented in France immediately, as it derives directly from article 6(1) of the ECHR. On 1 June 2011, Law 2011-392 on the *garde à vue* system came into force, giving suspects the right to access counsel from the moment they are placed in custody and during any interviews with police or confrontations with witnesses or victims. [30]

Conclusion

30. The European Court of Human Rights considers the right of early access to counsel to be a fundamental guarantee of a fair trial, without which there will be a violation of Articles 6(1) and 6(3)(c) of the ECHR. In recent years, the ECtHR has clarified that the right to access legal assistance arises, at the latest, at the point that the suspect is arrested, placed in custody, or their position is significantly affected, namely when any suspicion against them is seriously investigated and the prosecution case is compiled. In addition, a person suspected or accused of a crime should not be required to endure interrogation or any other investigative or procedural acts without legal representation.

31. Article 4 of the POPC, read together with Article 20(1) of the POPC, denies a suspect access to a lawyer during the investigative stage of the petty offences procedure. The investigation is a complex procedure and the suspect is obliged to cooperate and participate in the process, making it precisely the stage at which a suspect requires the assistance of a lawyer the most. The suspect is interrogated by the police, may choose to give evidence and information, and may file applications to admit evidence during this interrogation. The suspect may be searched, photographed and presented for identification. The police can also take fingerprints, blood, hair, and other bodily secretions. Denying access to a lawyer during this in process is in breach of Articles 6(1) and 6(3)(c) of the European Convention on Human Rights.

32. In addition to these breaches, the POPC is also inconsistent with wider international standards and comparative practice of criminal procedure. Poland has been criticized by both the European Committee for the Prevention of Torture and the UN Committee against Torture for this precise issue – failing to uphold the obligation to provide early access to legal assistance for people accused or suspected of crimes. Currently, there is a powerful movement in the European Union towards reform; there are proposals for binding legislation and mandatory minimum safeguards in this area. Poland still falls behind many of the other EU Member States in protecting the fundamental rights of suspects in criminal proceedings. This case presents an opportunity to ensure that the Polish government undertakes much-needed reform in this area.

B. THE RIGHT TO ACCESS COUNSEL EXTENDS TO PETTY OFFENCES

33. The petty offences regulated by the POPC are “criminal charges” under Article 6 of the ECHR. People investigated under the POPC are therefore entitled to all of the procedural safeguards and fair trial rights in Article 6 of the ECHR, including the right to access counsel.

34. The ECtHR has held that the concept of a criminal charge has an autonomous meaning, independent of the categorizations employed by the national legal systems of the

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[29] Decision No. 2010-14/22 QPC of 30 July 2010

[30] Law 2011-392 of April 14, 2011, available at: http://legifrance.gouv.fr/affichTexte.do;jsessionid=FB9262585E5074FE420D0BE122FACBA6.tpdjo09v_1?cidTexte=JORFTEXT000023860729&dateTexte

Member States.[31] A "charge" under the Convention is "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 for whether the situation of the suspect has been substantially affected (see para. 14 above).[32] Applying this definition to the current situation, the charge arises against a person suspected of a petty offence at the very beginning of the investigation period, as this is the point at which the person is seriously investigated for the offence, the prosecution case is compiled and the person may be informed that they are suspected of having committed an offence.

35. As to meaning of "criminal", the ECtHR has held that offences classified as petty, regulatory, or administrative may still be considered to be criminal under the Convention.[33] The Court has developed a set of criteria to determine if an offence is criminal, namely:[34]

    a) the classification of the offence in domestic law;

    b) the nature of the offence; and

    c) the severity of the potential penalty which the person concerned risks incurring.

36. Any one of these criteria may make the charge criminal, it does not need to satisfy all of them.[35] Thus, if domestic law classifies an offence as criminal, under the first criterion, then this will be decisive.[36] However, if the domestic law does not classify it as criminal then the ECtHR will go on to consider the second and third criteria, which it considers more important than the first,[37] and will look behind the national classification and examine the substantive reality of the procedure in question.

37. In evaluating the second criterion, the following factors are relevant to whether the nature of the offence is criminal: whether the legal rule in question is addressed exclusively to a specific group, or is of a generally binding character;[38] whether the proceedings are instituted by a public body with statutory powers of enforcement;[39]whether the legal rule has a punitive or deterrent purpose;[40] and whether the imposition of any penalty is dependent upon a finding of guilt.[41]

38. Even if the offence is not formally characterised as criminal in the domestic system or inherently criminal based on the considerations above, under the third criterion the Court will look at the maximum potential penalty which the relevant law provides to determine if a matter is nevertheless "criminal".[42]

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[31] *Adolf v. Austria*, ECtHR, Judgment of 26 March 1982 at para. 30.
[32] See, for example, *Deweer v. Belgium*, ECtHR, Judgment of 27 February 1980 at para. 42 and 46; and *Eckle v. Germany*, ECtHR, Judgment of 15 July 1982 at para. 73.
[33] *Öztürk v. Germany*, ECtHR, Judgment of 21 February 1984, at para. 49.
[34] *Engel and Others v. the Netherlands*, ECtHR, Judgment of 8 June 1976 at para. 82, 83. These principles were subsequently upheld by a number of Grand Chamber judgments, such as: *Ezeh and Connors v. the United Kingdom,* ECtHR, Grand Chamber Judgment of 9 October 2003 at para. 82.
[35] *Jussila v. Finland*, ECtHR, Grand Chamber Judgment of 23 November 2006, at para. 31.
[36] *Ibid.,* at para. 30.
[37] *Ibid.,* at para. 38.
[38] See for example, *Bendenoun v. France*, ECtHR, Judgment of 24 February 1994 at para. 47.
[39] *Benham v. the United Kingdom*, ECtHR, Judgment of 10 June 1996 at para. 56.
[40] *Öztürk v. Germany*, ECtHR, Judgment of 21 February 1984, at para. 53; and *Bendenoun v. France*, ECtHR, Judgment of 24 February 1994 at para. 47.
[41] *Benham v. the United Kingdom*, ECtHR, Judgment of 10 June 1996 at para. 56.
[42] *Campbell and Fell v. the United Kingdom*, ECtHR, Judgment of 28 June 1984 at para 72; *Demicoli v. Malta*, ECtHR, Judgment of 27 August 1991at para. 34.

39. Applying these three criteria in *Öztürk v. Germany*,[43] the ECtHR found that although a traffic offence was described by the state as being a mere "regulatory offence" and the penalty was a fine, the Court held that it was a criminal charge for the purposes of Article 6. The Court took note of the fact that this offence was still considered a crime in most Member States and that the penalty for the office had a punitive and deterrence effect, thus giving it a criminal character. In other cases, the ECtHR has found a range of road traffic offences to fall within the ambit of criminal matters, including those punishable by fines or restrictions concerning the driving license such as penalty points or disqualifications.[44] It has also held a minor offence of causing a nuisance to be a criminal matter.[45]

40. In this case, the offences under the POPC are criminal charges within the meaning of Article 6 of the ECHR. Applying the second criteria, the POPC is of a general binding nature, applicable to all persons in Poland. It is implemented by the State authorities with enforcement powers: the police and the judiciary. It has a punitive and deterrent purpose: to prevent people from committing petty offences and to punish them when they do so. The POPC is connected to and complements the Criminal Code; it is based on the same principles of liability that apply to criminal cases and utilises a largely similar procedural system. Petty offences under the POPC include a range of matters such as exceeding the speed limit, disturbing of night's silence, public indecency, swimming in a prohibited area, and illegal wearing of a medal. Following the jurisprudence of the ECtHR, these petty offences are by their nature to be regarded as criminal matters.

41. Applying the third criteria, the types of penalties imposed for petty offences and crimes are similar, although the range of penalties for petty offences are generally less severe that the penalties for crimes. The penalties for petty offences range from a fine or a reprimand, up to limitations of freedom or deprivation of liberty for up to 30 days. This penalty structure is intended to be of a repressive, punitive and preventative nature and belongs in the criminal sphere.

Conclusion

42. Under the jurisprudence of the ECtHR, the petty offences covered by the POPC are characterized as criminal matters. Indeed, Article 4 of the POPC essentially recognizes this, as it states that people accused of petty offences have the right to access counsel. Despite the fact that this right is not upheld by the legislation as a whole, no valid argument can be made that Article 6 of the ECHR is not applicable to petty offences on the grounds that they are not criminal matters, and all of the rights and safeguards in Article 6 of the ECHR – in particular, the right to early access to counsel – must be given to all people accused or suspected of petty offences.

C. THE POLISH GOVERNMENT HAS AN OBLIGATION TO PROVIDE A LEGAL AID SCHEME TO FACILITATE THE RIGHT TO ACCESS COUNSEL

43. It is not enough to merely allow a theoretical or illusory right to legal assistance. The right must be practical and effective in the way in which it is applied in practice, and accordingly, people charged with a petty offence in Poland should have access to free legal assistance from the outset of the investigation if they cannot afford to pay for that assistance themselves.

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[43] *Öztürk v. Germany*, ECtHR, Judgment of 21 February 1984, at para. 46-53.
[44] *Lutz v. Germany*, ECtHR, Judgment of 25 August 1987 at para. 182; *Schmautzer v. Austria*, ECtHR, Judgment of 23 October 1995; *Malige v. France*, ECtHR, Judgment of 23 September 1998.
[45] *Lauko v. Slovakia*, ECtHR, Judgment of 2 September 1998.

European Convention on Human Rights

44. Article 6(3)(c) of the ECHR states that a person has the right to free legal aid if two conditions are met. First, if he does not have sufficient means to pay for legal assistance, and second when the interests of justice so require.

45. As for the first condition, the Court holds that the suspect does not have to prove "beyond all doubt" that he lacks the means to pay for his defence.[46] While the Court allows Member States a certain margin of appreciation in choosing how to implement means tests, there must be sufficient guarantees against arbitrariness in the determination of eligibility.[47]

46. With respect to the second condition, the Court has indicated three factors that should be taken into account when determining if the interests of justice require free legal aid to be provided: the seriousness of the offence and the severity of the potential sentence; the complexity of the case; and the social and personal situation of the defendant.[48]

47. As a minimum guarantee, the ECtHR has held that the right to state-funded legal assistance applies whenever the deprivation of liberty is at stake, although this interpretation is regarded by some as too narrow, and as being at odds with the court's rationale for the right to legal assistance.[49] The Court has also held that denying free legal aid for a period during which procedural acts, including questioning of the applicants and their medical examinations, are carried out is unacceptable.[50]

Adverse Rulings and Criticisms of Poland

48. Poland's failure to provide a comprehensive and fair legal aid system to assist indigent defendants has been criticized by both the Committee for the Prevention of Torture and the UN Committee Against Torture.

49. In its November 2009 report, the Committee for the Prevention of Torture followed its criticism about the lack of access to lawyers during the initial investigation period of criminal proceedings, with a recommendation about legal aid:

> "It is clear that without a fully fledged legal aid system, the right of access to a lawyer at this stage of the procedure will remain purely theoretical. **The CPT reiterates its recommendation that a fully fledged and properly funded system of legal aid for persons in police custody who are not in a position to pay for a lawyer be developed as a matter of urgency, and be applicable from the very outset of police custody. If necessary, the relevant legislation should be amended**".[51]

50. During the review of Poland's periodic report in 2007, the UN Committee Against Torture stated that:

> "9. The Committee regrets the lack of an appropriate system of legal aid in Poland and, in particular, the delay in submitting the draft law on access to free legal aid to the Parliament (Sejm) considering the impact that the delay might have on the protection of persons without resources. (art. 2)

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[46] *Pakelli v Germany,* ECtHR, Judgment of 25 April 1983 at para. 34.
[47] *Santambrogio v. Italy*, ECtHR, Judgment of 21 September 2004.
[48] *Quaranta v Switzerland,* ECtHR. Judgment of 24 May 1991 at para. 35.
[49] *Benham v United Kingdom,* ECtHR, Judgment of 10 June 1996; and see E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), p. 41.
[50] *Berlinski v Poland*, ECtHR, Judgment of 20 June 2002.
[51] *Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT) from 26 November to 8 December 2009, CPT/Inf (2011) 20, at para. 26. Emphasis in original.

The State Party should take effective steps to expedite the adoption of the law on access to free legal aid in order to ensure appropriate protection and access to the legal system of persons without resources".[52]

Conclusion

51. Under Article 6(3)(c) of the ECHR, people accused or suspected of crimes must be given access to free legal assistance when they cannot afford it themselves and the interests of justice require it. Poland has been criticized in the international sphere for failing to provide a comprehensive and properly funded legal aid system to assist people charged with criminal offences. Both the CAT and the CPT have observed that without a legal aid system, the right to early access to a lawyer will remain theoretical. While the State has some discretion about when and how to provide legal aid, at a minimum it must be provided in all cases where deprivation of liberty is at stake. Given that the range of penalties for petty offences includes deprivation of liberty of up to 30 days, free legal aid must be provided for people dealt with under the POPC legislative framework.

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[52] *Conclusions and recommendations of the Committee against Torture on Poland*, Thirty-eighth session, Geneva, 30 April - 18 May 2007, CAT/C/POL/CO/4, 16 July 2007 at para. 7 and 9.

ANNEX

European Court of Human Rights Cases Applying

***Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008**

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1. *Aba v. Turkey,* ECtHR, Judgment of 3 March 2009 at para. 9
2. *Adamkiewicz v. Poland,* ECtHR, Judgment of 2 March 2010 at para. 82, 90-91 (French only)
3. *Aleksandr Zaichenko v. Russia*, ECtHR, Judgment of 18 February 2010, at para. 37, 47
4. *Amer v. Turkey*, ECtHR, Judgment of 13 January 2009, at para 91
5. *Amutgan v. Turkey,* ECtHR, Judgment of 3 February 2009 at para. 12, 17, 25
6. *Arzu v. Turkey,* ECtHR, Judgment of 15 September 2009 at para. 46, 62
7. *Aslan and Demir v. Turkey,* ECtHR, Judgment of 17 February 2009 at para. 9-11
8. *Attı and Tedik v. Turkey,* ECtHR, Judgment of 20 October 2009 at para. 39-41, 53
9. *Ayhan Işık v. Turkey,* ECtHR, Judgment of 30 March 2010 at para. 33-4
10. *Balitskiy v. Ukraine*, ECtHR, Judgment of 3 November 2011, at para. 37
11. *Ballıktaş v. Turkey,* ECtHR, Judgment of 20 October 2009 at para. 42, 54
12. *Baran and Hun v. Turkey,* ECtHR, Judgment of 20 May 2010, at para. 68, 71
13. *Biełaj v. Poland*, ECtHR, Judgment of 27 April 2010, at para. 72
14. *Böke and Kandemir v. Turkey,* ECtHR, Judgment of 10 March 2009 at para. 71
15. *Bolukoç and Others v. Turkey*, ECtHR, Judgment of 10 November 2009 at para. 35
16. *Borotyuk v. Ukraine*, ECtHR, Judgment of 16 December 2010, at para. 79, 92
17. *Bortnik v. Ukraine*, ECtHR, Judgment of 27 January 2011, at para. 39, 47
18. *Brusco v. France*, ECtHR, Judgment of 14 October 2010, at para. 45 (French only)
19. *Bykov v. Russia*, ECtHR, Judgment of 10 March 2009, at para. 38
20. *Caka v. Albania*, ECtHR, Judgment of 8 December 2009, para. at 122
21. *Çimen v. Turkey,* ECtHR, Judgment of 3 February 2009 at para. 26
22. *Ciupercescu v. Romania*, ECtHR, Judgment of 15 June 2010, at para. 149 (French only)
23. *Çolakoğlu v. Turkey,* ECtHR, Judgment of 20 October 2009 at para. 37
24. *Cudak v. Lithuania*, ECtHR, Judgment of 23 March 2010, at para. 8
25. *Dayanan v Turkey,* ECtHR, Judgment of 13 October 2009 at para. 30-33
26. *Demirkaya v. Turkey,* ECtHR, Judgment of 13 October 2009 at para. 16-7
27. *Desde v. Turkey*, ECtHR, Judgment of 1 February 2011, at para. 127, 131-132
28. *Ek and Şıktaş v. Turkey,* ECtHR, Judgment of 17 February 2009 at para. 11-2
29. *Elawa v. Turkey*, ECtHR, Judgment of 25 January 2011, at para. 38-39
30. *Eraslan and others v Turkey,* ECtHR, Judgment of 6 October 2009 at para. 13

31. *Fatma Tunç v. Turkey (no. 2),* ECtHR, Judgment of 13 October 2009 at para. 15
32. *Feti Ateş and Others v. Turkey*, ECtHR, Judgment of 21 December 2010, at para. 23-24
33. *Fikret Çetin v. Turkey,* ECtHR, Judgment of 13 October 2009 at para. 36
34. *Gäfgen v. Germany*, ECtHR, Judgment of 1 June 2010, at para. 177
35. *Geçgel and Çelik v. Turkey,* ECtHR, Judgment of 13 October 2009 at para. 15
36. *Gök and Güler v. Turkey,* ECtHR, Judgment of 28 July 2009 at para. 57
37. *Guiso-Gallisay v. Italy*, ECtHR, Judgment of 22 December 2009, at para. 22
38. *Gürova v. Turkey,* ECtHR, Judgment of 6 October 2009 at para. 13
39. *Güveç v. Turkey,* ECtHR, Judgment of 20 January 2009 at para. 126
40. *Hakan Duman v. Turkey,* ECtHR, Judgment of 23 March 2010 at para. 46-47
41. *Halil Kaya v. Turkey,* ECtHR, Judgment of 22 September 2009 at para. 18-19
42. *Hovanesian v. Bulgaria*, ECtHR, Judgment of 21 December 2010, at para. 32-33, 37 (French only)
43. *Hüseyín Habíp Taşkin v. Turkey,* ECtHR, Judgment of 1 February 2011, at para. 21-22
44. *Huseyn and Others v. Azerbaijan*, ECtHR, Judgment of 26 July 2011, at para. 171
45. *Ibrahim Oztürk v. Turkey*, ECtHR, Judgment of 17 February 2009 at para. 51-2
46. *Ilatovskiy v. Russia*, ECtHR, Judgment of 9 July 2009, at para. 10
47. *Jamrozy v. Poland,* ECtHR, Judgment of 15 September 2009, at para. 47
48. *Katritsch v. France*, ECtHR, Judgment of 4 November 2010, at para. 53 (French only)
49. *Kuraliċ v. Croatia*, ECtHR, Judgment of 15 October 2009, at para. 44, 47
50. *Kysilková and Kysilka v. The Czech Republic*, ECtHR, Judgment of 10 February 2011, at para. 36
51. *Laska and Lika v. Albania*, ECtHR, Judgment of 20 April 2010, at para. 62, 68, 74
52. *Leonid Lazarenko v. Ukraine*, ECtHR, Judgment of 28 October 2010, at para. 49-51, 57
53. *Leva v. Moldova*, ECtHR, Judgment of 15 December 2009, at para. 71
54. *Lisica v. Croatia*, ECtHR, Judgment of 25 February 2010, at para. 47
55. *Lopata v. Russia*, ECtHR, Judgment of 13 July 2010, at para. 130-131
56. *Luchaninova v. Ukraine*, ECtHR, Judgment of 9 June 2011, at para. 63
57. *Mađer v. Croatia*, ECtHR, Judgment of 21 June 2011, at para. 149, 154
58. *Mehmet Şerif Öner v.Turkey*, ECtHR, Judgment of 13 September 2011, at para. 21-22
59. *Mehmet Zeki Doğan v. Turkey*, ECtHR, Judgment of 6 October 2009, at para. 13
60. *Melnikov v. Russia*, ECtHR, Judgment of 14 January 2010, at para. 79
61. *Micallef v. Malta*, ECtHR, Judgment of 15 October 2009, at para. 81
62. *Musa Karataş v. Turkey,* ECtHR, Judgment of 5 January 2010 at para. 90
63. *Nechiporuk ans Yonkalo v. Ukraine*, ECtHR, Judgment of 21 April 2011, at para. 262-265
64. *Oğraş v. Turkey,* ECtHR, Judgment of 13 October 2009 at para. 19-20
65. *Oleg Kolesnik v. Ukraine*, ECtHR, Judgment of 19 November 2009, at para. 35

66. *Öngün v. Turkey,* ECtHR, Judgment of 23 June 2009 at para. 33-5
67. *Özcan Çolak v. Turkey,* ECtHR, Judgment of 6 October 2009 at para. 46
68. *Panovits v. Cyprus*, ECtHR, Judgment of 11 December 2008, at para. 42, Joint Concurring Opinion of Judges Spielmann and Jebens
69. *Paskal v. Ukraine*, ECtHR, Judgment of 15 September 2011, at para. 76
70. *Pavlenko v. Russia*, ECtHR, Judgment of 1 April 2010, at para. 101
71. *Pishchalnikov v. Russia*, ECtHR, Judgment of 24 September 2009, at para. 73, 76, 79, 93
72. *Płonka v. Poland*, ECtHR, Judgment of 31 March 2009, at para. 35, 37, 40
73. *Prežec v. Croatia,* ECtHR, Judgment of 15 October 2009, at para. 28
74. *R.H. v. Finland*, ECtHR, Judgment of 2 June 2009, at para. 38
75. *S. H. and Others v. Austria*, ECtHR, Judgment of 1 April 2010, at. para 92
76. *S.T.S. v. The Netherlands*, ECtHR, Judgment of 7 June 2011, at para. 73
77. *Şaman v. Turkey*, ECtHR, Judgment of 5 April 2011, at para. 30, 34
78. *Savaş v. Turkey,* ECtHR, Judgment of 8 December 2009 at para. 69-70
79. *Šebalj v. Croatia*, ECtHR, Judgment of 28 June 2011, at para. 250, 263
80. *Seyithan Demir v. Turkey,* ECtHR, Judgment of 28 July 2009, at para. 54
81. *Shabelnik v. Ukraine*, ECtHR, Judgment of 19 February 2009, at para. 53
82. *Sharkunov and Mezentsev v. Russia*, ECtHR, Judgment of 10 June 2010, at para. 97
83. *Shishkin v. Russia*, ECtHR, Judgment of 7 July 2011, at para 140-141
84. *Shkalla v. Albania*, ECtHR, Judgment of 10 May 2011, at para. 78
85. *Soykan v. Turkey,* ECtHR, Judgment of 21 April 2009 at para. 57
86. *Soykan v. Turkey,* ECtHR, Judgment of 21 April 2009 at para. 57
87. *Stefanou v. Greece*, ECtHR, Judgment of 22 April 2010, at para. 80
88. *Stojkovic v. France and Belgium*, ECtHR, Judgment of 27 October 2011, at para. 49-55 (in French)
89. *Şükran Yıldız v. Turkey,* ECtHR, Judgment of 3 February 2009 at para. 36
90. *Şükran Yıldız v. Turkey,* ECtHR, Judgment of 3 February 2009 at para. 34-7
91. *Tağaç and Others v. Turkey,* ECtHR, Judgment of 7 July 2009 at para. 35-6
92. *Taşçıgil v. Turkey,* ECtHR, Judgment of 3 March 2009 at para. 36
93. *Taxquet v. Belgium*, ECtHR, Judgment 16 November 2010, at para. 93
94. *Ümit Gül v. Turkey,* ECtHR, Judgment of 29 September 2009 at para. 65-8
95. *Vanfuli v. Russia*, ECtHR, Judgment of 3 November 2011, at para. 94, 95
96. *Vladimir Krivonosov*, ECtHR, Judgment of 15 July 2010, at para .161-162
97. *Yunus Aktaş and others v. Turkey,* ECtHR, Judgment of 20 October 2009, at para. 55
98. *Yusuf Gezer v. Turkey,* ECtHR, Judgment of 1 December 2009, at para. 44
99. *Zdravko Petrov v. Bulgaria*, ECtHR, Judgment of 23 June 2011, at para. 47