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Article

Navigating the right to a fair trial for vulnerable suspects pretrial: a legal and psychological critique of the Strasbourg jurisprudence

Alan Cusack* and Roxanna Dehaghani**

ABSTRACT

Pretrial criminal processes can prove challenging for suspects with intellectual and psychosocial disabilities. In recognition of this, the European Court of Human Rights has emphasized the importance of individualized assessments of vulnerability under Article 6. Yet, recent Strasbourg jurisprudence reveals a juridical willingness to define vulnerability narrowly with significant implications. This article analyses this jurisprudence to excavate the framing of vulnerability vis-à-vis fair trial rights during pretrial processes. Drawing upon a corpus of psychology and law literature, as well as the dissenting judgment in *Hasáliková*, it critiques the narrow formulation of vulnerability that has taken hold in Strasbourg and interrogates the Court's ostensible faith in the safeguarding capacity of lawyers. By using Ireland's weak pretrial procedural framework as a heuristic lens through which the shortcomings of this approach can be understood, it calls for a more generous conceptualization of vulnerability that is sensitive to the ontological and structural dimensions at play.

KEYWORDS: vulnerability, pretrial proceedings, Article 6 European Convention on Human Rights, legal psychology, Ireland.

1. INTRODUCTION

A suspect or defendant in the criminal process may be structurally vulnerable by virtue of their position relative to the State. Further, suspects with intellectual and psychosocial disabilities, owing to limitations in cognitive and communicative functioning,[1] are innately vulnerable and can face particular challenges in negotiating the pretrial forensic formalities adopted by police. In recognition therefore of the unique challenges facing vulnerable suspects in police custody

* Associate Professor in Law, University of Limerick, Ireland. E-mail: Alan.Cusack@ul.ie
** Reader in Law, Cardiff University, United Kingdom

1 See generally, Cusack et al., 'Towards inclusionary policing: a critical inquiry into the pretrial treatment of suspects with intellectual disabilities in Ireland' (2022) 45 (3) *Policing: An International Journal* 421; Dehaghani, 'Vulnerability in Police Custody' in Daly (ed) *Police Custody in Ireland* (2024); Gulati et al., 'Experiences of people with intellectual disabilities encountering law enforcement officials—a narrative systematic review' (2020) 71 *International Journal of Law and Psychiatry* 101609; Henshaw and Thomas, 'Police encounters with people with intellectual disability: prevalence, characteristics and challenges' (2012) 56(6) *Journal of Intellectual Disability Research* 620; Jones and Talbot, 'No one knows: the bewildering passage of offenders with learning disability and learning difficulty through the criminal justice system'

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across Europe, there has emerged a distinct line of Strasbourg jurisprudence in recent years that emphasizes the importance of adopting an individualized assessment of vulnerability. In so doing, Member States can secure compliance with the rights-based exigencies of Article 6 of the European Convention on Human Rights (hereafter the Convention).[2] Most recently, this logic found expression in the Chambers of Strasbourg in the case of *Hasáliková v Slovakia*.[3] Significantly, however, the Court in this case evinced a marked juridical willingness to define 'vulnerability' narrowly so as to exclude, in that case, an individual with a 'slight intellectual disability', thereby, in effect, legitimizing national pretrial formalities that arguably neglected the ontological realities of intellectual impairment. In placing a central emphasis on the perceived safeguarding impact of a range of disparate national procedural measures, including, in particular, the applicant's access to a lawyer during the pretrial investigation, the Court refused to recognize any breach of the applicant's right to a fair trial.

This decision, when viewed in light of the Strasbourg Court's growing internal emphasis upon vulnerability assessments, is at once both normatively puzzling and procedurally alarming. At its core, it appears to represent a principled departure by the European Court of Human Rights from the emergent protectionist stance towards vulnerable suspects that we are witnessing at a policy level within the European Union.[4] *Hasáliková*, by contrast, reveals the Strasbourg Court's growing tolerance for the deployment of rigorous interrogative pretrial practices where such practices do not impact upon the overall integrity of the wider criminal justice proceedings (of which, it should be noted, the applicant's vulnerability is just one narrow component factor). Significantly, this was not the first occasion that an applicant was adjudged by the European Court of Human Rights (hereinafter 'ECtHR') as being nonvulnerable in circumstances where a patent dissymmetry in communicative power existed within the police custodial setting. For example, in the earlier case of *Doyle v Ireland*,[5] the Fifth Section discounted the structural vulnerability of an applicant who was denied access to a lawyer during a police interrogation following consideration of both his innate characteristics (adult, English native speaker), as well as the presence of a range of other pretrial safeguards (including the use of relatively short interviews, police insistence on regular breaks, and telephone access to a lawyer). Through these judgments, the Court appears to have adopted the polarizing stance of defining an individual's 'innate vulnerability' narrowly whilst simultaneously interpreting the remedial impact of national structural accommodations broadly.

Various reasons have been mooted in an effort to understand this 'awkward' juridical approach.[6] Whatever the specific historical explanations of this trend may be, it would now appear self-evident that juridical emphasis will increasingly be directed in the chambers of

(2010) 20 *Criminal Behaviour and Mental Health* 1. Innate vulnerability is also acknowledged to include young age—see Dehaghani, 'Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody' (2021) 30(2) *Social and Legal Studies* 251.

2 See, for instance, *Ibrahim v United Kingdom* (2015) 61 EHRR 9; *Simeonovi v Bulgaria* [2017] ECHR 438; *Beuze v Belgium* (2019) 69 EHRR 1.

3 *Hasáliková v Slovakia* App no 39654/15 (ECHR, 24 June 2021). It should be noted that a request by the applicant to refer this ruling to the Grand Chamber is currently pending.

4 Roadmap for Strengthening the Procedural Rights of Suspected or Accused Persons in Criminal Proceedings (30 November 2009); Recommendation on Procedural Safeguards for Vulnerable Persons Suspected or Accused in Criminal Proceedings (2013/C 378/02). See generally, Verbeke et al., 'Protecting the fair trial rights of mentally disordered defendants in criminal proceedings: Exploring the need for further EU action' (2015) 41 *International Journal of Law and Psychiatry* 67.

5 *Doyle v Ireland* (Application No. 51979/17, judgment 23 May 2019).

6 See generally, Goss, 'The Disappearing "Minimum Rights" of Article 6 ECHR: the Unfortunate Legacy of *Ibrahim* and *Beuze*' (2023) 23 (4) *Human Rights Law Review* 1; Rask Madsen, 'The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court' (2021) 2(2) *European Convention on Human Rights Law Review* 180; Glover, 'Dimitrios Giannoulopoulos: Improperly Obtained Evidence in Anglo-American and Continental Law' (2020) 7 *Criminal Law Review* 650.

Strasbourg on national safeguards (with a particular emphasis on a suspect's access to a lawyer) as part of the Court's assessment of the overall fairness of proceedings under Article 6. Consequently, there is an urgent need to appraise not only the basis for the Court's growing faith in the safeguarding capacity of legal representatives in the custodial environment but also the wider adequacy of the varying ancillary pretrial supports that exist across Member States. Taking inspiration from the dissenting judgments of Judges Turković and Schembri Orland in *Hasáliková,* this article makes the case for the adoption not only of a wider, more ontologically sensitive juridical understanding of 'vulnerability' but also of the types of procedural formalities that Member States must follow when dealing with vulnerable suspects in order to secure meaningful compliance with the rights-based exigencies of Article 6 of the Convention. To this end, the article opens with an excavation of the early Strasbourg jurisprudence on pretrial vulnerability, followed by a critique of the majority judgment in the recent case of *Hasáliková.* In an effort to reveal the shortcomings of the First Chamber's reasoning in that case, the article closes with a case study analysis of the implications of tolerating, and promoting, a narrow conceptualization of vulnerability, and overemphasizing the remedial role of lawyers, in a jurisdiction such as Ireland where the pretrial procedural framework for vulnerable suspects is notably porous.

2. VULNERABILITY IN CUSTODY: A SURVEY OF EARLY STRASBOURG JURISPRUDENCE

Access to a solicitor whilst detained in police custody has long been regarded under international law as an important means of equalizing relations between a suspect and the state in the detention process.[7] Accordingly, in addition to forming the basis of a recent EU Directive,[8] an individual's right of pretrial access to a lawyer has long been expressly enshrined in Article 6(3)(c) of the European Convention on Human Rights, which provides that 'Everyone charged with a criminal offence has [the right] . . . 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'. The parameters of this Conventional right, however, were traditionally narrowly construed in Strasbourg whereby, in a series of cases, the question of fairness was determined by considering national proceedings as a whole.[9]

A departure from this less protectionist approach was unanimously endorsed by the Grand Chamber in the landmark decision in *Salduz v Turkey,*[10] which concerned the admissibility of inculpatory statements made by a 17-year-old who was interviewed by antiterrorism police in the absence of a lawyer. In representing what Giannoulopoulos has termed a 'major re-evaluation of the ECtHR's position on the importance of the investigation stage for the preparation of the criminal proceedings',[11] the Court determined that:

[7] See Cusack et al., 'Calibrating the Right to Reasonable Access to a Lawyer for Vulnerable Suspects in Ireland' in Dehaghani, Fairclough and Mergaerts (eds) *Vulnerability, The Accused, and the Criminal Justice System: Multi-jurisdictional Perspectives* (2023).

[8] 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 whilst deprived of liberty (OJ 2013 L 291). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri¼CELEX:32013 L0048&from¼EN>

[9] *Imbrioscia v Switzerland* (1994) 17 EHRR 441*; Murray v the United Kingdom* (1996) ECHR 3*; Averill v the United Kingdom* (2000) ECHR 212. See generally, Jackson, 'Re-Conceptualizing the Right of Silence as an Effective Fair Trial Standard' (2009) 58 *International and Comparative Law Quarterly* 835, 856; Jackson and Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (2012) at 279.

[10] *Salduz v Turkey* (2009) 49 EHRR 19.

[11] Giannoulopoulos, 'Strasbourg jurisprudence, law reform and comparative law: A tale of the right to custodial legal assistance in five countries' (2016) 16(1) *Human Rights Law Review* 103 at 105.

> as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6.[12]

Significantly this maxim, which is now known as the *Salduz* principle, was borne out of an ostensible appreciation by the Grand Chamber of the uniquely formative and irreversible impact that pretrial forensic engagements can have on the trajectory and outcome of criminal proceedings.[13] In recognizing, then, the importance of immediate access (from the point of first interrogation), the Court declared that '[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction'.[14] As Giannoulopoulos explains, through this ruling, the Court effectively established 'an absolute, rights-based, categorical exclusionary rule for confessional evidence obtained during custodial interrogation without access to a lawyer'.[15]

In the circumstances of the case, the Grand Chamber concluded that neither the provision of legal assistance to the applicant during the ensuing legal proceedings nor his entitlement to call witnesses was sufficient to remedy the harm caused by the admission of his pretrial statement, which was elicited in denial of his right of access to a lawyer.[16] Moreover, in arriving at this decision, the Court was critical of the systematic nature of prohibition on custodial access to a lawyer under Turkish national law, which failed to consider the specific vulnerability of the applicant on account of his age:

> the Court notes that one of the specific elements of the instant case was the applicant's age. Having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody (see paragraphs 32-36 above), the Court stresses the fundamental importance of providing access to a lawyer where the person in custody is a minor.[17]

In the aftermath of *Salduz*, 'legal earthquakes'[18] could be felt across Europe as national courts sought 'at a very fast pace'[19] to re-orientate, to various degrees, their pretrial procedural landscapes in order to recognize a suspect's immediate right of access to a lawyer at the point of first interrogation. Indeed, in Strasbourg, the effects of these tremors were particularly felt. In *Panovits v Cyrpus*, for instance, the Chamber swiftly confirmed that 'Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation'.[20] Moreover, in mimicking the approach indirectly endorsed by the Court in *Salduz* (and more explicitly established in *T v United Kingdom*[21]), the Chamber noted the importance of ensuring that national interrogation processes give due consideration to a

[12] *Salduz*, supra n 10 at para 55.
[13] See generally, Conway and Daly, 'From Legal Advice to Legal Assistance: Recognising the Changing Role of the Solicitor in the Garda Station' (2019) 3 *Irish Judicial Studies Journal* 1.
[14] *Salduz*, supra n 10 at para 55.
[15] Giannoulopoulos, *Improperly Obtained Evidence in Anglo- American and Continental Law*, (2018) at 168.
[16] *Salduz*, supra n 10 at para 58.
[17] Ibid. at para 60.
[18] Giannoulopoulos, supra n 11, 112. See also, Jackson, 'Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence' (2016) 79(6) *Modern Law Review* 987.
[19] Giannoulopoulos, supra n 11 at 106.
[20] *Panovits v Cyprus* [2008] 27 BHRC 464 at para 66.
[21] *T v United Kingdom* (16 December 1999), App. No. 24724/94.

suspect's vulnerability in order to vindicate their right to effectively participate in the criminal process:

> The right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police. The authorities must take steps to reduce as far as possible his feelings of intimidation and inhibition (see, mutatis mutandis, *T. v. the United Kingdom*, cited above, § 85) and ensure that the accused minor has a broad understanding of the nature of the investigation, of what is at stake for him or her, including the significance of any penalty which may be imposed as well as of his rights of defence and, in particular, of his right to remain silent (mutatis mutandis, *S.C. v. the United Kingdom*, no. 60958/00, § 29, ECHR 2004-IV). It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker, or friend, should be able to understand the general thrust of what is said by the arresting officer and during his questioning by the police. [22]

Having established, then, the positive obligations resting on State Parties to secure the effective participation of vulnerable suspects in a criminal investigation, the Court concluded that the Cypriot authorities in this case had breached both Article 6 §1 and Article 6 §3(c) of the Convention in circumstances where a 17-year-old boy confessed to murder after being interrogated by four police officers in the absence of his parents and a legal representative. In arriving at this conclusion, the majority of the First Section placed heavy emphasis on 'the lack of provision of sufficient information on the applicant's right to consult a lawyer before his questioning by the police, especially given the fact that he was a minor at the time and not assisted by his guardian during the questioning'.[23] Specifically, in reflecting on the applicant's age, the Court determined that it was 'unlikely . . . that [the applicant] was aware that he was entitled to legal representation before making any statement to the police'.[24] This difficulty was deemed to be compounded by the restriction placed on the applicant's right to access a lawyer or a guardian during the police interview, which, according to the Court, rendered it unlikely that '[the applicant] could reasonably appreciate the consequences of his proceeding to be questioned without the assistance of a lawyer in criminal proceedings concerning the investigation of a murder'.[25]

In articulating the *Panovits* judgment, the Court effectively, and swiftly, consolidated the *Salduz* interpretation of Article 6 ECHR by clarifying that the right not only incorporated a positive obligation on State Parties to ensure that a vulnerable suspect understands his or her right to legal representation pretrial but also that they had a broader understanding of the nature and significance of the criminal proceedings that were confronting them.

Consolidation, however, soon gave way to innovation as the ECtHR moved, beyond confirming the *Salduz* approach, to adapting it. In *Dayanan v Turkey*, for example, the Court interpreted Article 6 as importing a requirement to provide suspects with access to a lawyer 'as soon as he or she is taken into custody . . . and not only while being questioned'.[26] Crucially, in delivering its judgment, the Chamber extended the scope of the protection afforded by Article 6 so as to

[22] *Panovits*, supra n 20 at para 67.
[23] Ibid. at para 73.
[24] Ibid. at para 71.
[25] Ibid. at para 71.
[26] *Dayanan v Turkey* Application No 7377/03 Merits and Just Satisfaction, 13 October 2009 at para 32. See Giannoulopoulos, supra n 11.

extend beyond a mere right to access legal advice during questioning to a 'wider notion of legal assistance that applies during the entire interrogation phase'.[27]

Against such express and evolving juridical support in Strasbourg for the notion of mandatory pretrial access to legal assistance, few could have predicted that within eight short years, a 'radical change of mood' would take hold in the Grand Chamber that would threaten to 'throw off the rails the *Salduz*-instigated revolution of suspects' rights in Europe'.[28] Enter Muktar Said Ibrahim, Ramzi Mohamed, Yassin Omar, and Ismail Abdurahman who, having been found guilty of various offences arising from the failed terrorist attacks in London on 21 July 2005, brought proceedings—in the now landmark case of *Ibrahim v United Kingdom*[29]—challenging the admission in their Crown Court trials of self-incriminating evidence that was elicited in the absence of legal advice.

In following the tone and tenor of post-*Salduz* jurisprudence, the Court pointed to the important role played by legal assistance in addressing the structural vulnerability of suspects in custody[30]:

> Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused.[31]

However, despite accepting that certain inculpatory statements tendered at the trial of the first three applicants were obtained in the absence of legal advice, the Court ultimately found no violation of Article 6 of the Convention. For Giannoulopoulos, this verdict represented a fundamental reconceptualization by the Grand Chamber of the *Salduz* ruling 'in a way that show[ed] a striking indifference to its original understanding'.[32] Specifically, in representing something of a 'pull-back'[33] on its theretofore protectionist stance, the Court emphasized the qualified nature of a suspect's right to a lawyer and confirmed its adherence to a two-stage test when reviewing any challenge relating to access to a lawyer under Article 6 of the Convention.[34] Under this binary test, the Court considers, first, whether or not there are compelling reasons in a given case to justify a restriction on the right of access to a lawyer, and second, whether upon conducting 'a holistic assessment of the entirety of the proceedings', the national proceedings can be considered to be fair overall.[35] In pursuit of this latter inquiry, the court declared (in an

[27] Giannoulopoulos, supra n 11 at 106.

[28] Giannoulopoulos, supra n 15 at 180. See *Dayanan v Turkey* Application No 7377/03 Merits and Just Satisfaction, 13 October 2009 at para 32.

[29] *Ibrahim,* supra n 2.

[30] On the question of the structural vulnerability of suspects during custodial interrogation, the Grand Chamber stressed the risks that are posed during the investigative stage: 'The investigation stage may be of particular importance for the preparation of the criminal proceedings: the evidence obtained during this stage often determines the framework in which the offence charged will be considered at the trial and national laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. An accused may therefore find himself in a particularly vulnerable position at that stage of the proceedings, the effect of which may be amplified by increasingly complex legislation on criminal procedure, notably with respect to the rules governing the gathering and use of evidence'. See *Ibrahim,* supra n 2 at para 253.

[31] *Ibrahim,* supra n 2 at para 255

[32] Giannoulopoulos, supra n 15 at 181.

[33] Conway and Daly, supra n 13 at 106.

[34] 'The test set out in *Salduz* for assessing whether a restriction on access to a lawyer is compatible with the right to a fair trial is composed of two stages. In the first stage, the Court must assess whether there were compelling reasons for the restriction. In the second stage, it must evaluate the prejudice caused to the rights of the defence by the restriction in the case in question. In other words, the Court must examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair'. See *Ibrahim,* supra n 2 at para 257.

[35] *Ibrahim,* supra n 2 at para 262. See, generally, Cusack et al., supra n 7.

approach later endorsed in *Simeonovi v Bulgaria)*[36] that consideration would be given to a range of nonexhaustive factors including, in particular, the question of '[w]hether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity'.[37]

The centrality of vulnerability considerations to the Strasbourg Courts' 'fairness assessment' was brought to the fore subsequently in *Doyle v Ireland* where the ECtHR's Fifth Section was tasked with determining whether the absence of a right for suspects to have a lawyer present at custodial interview in Ireland amounted to a breach of the right to a fair trial under Article 6.[38] It should be noted, by way of context, that the Irish Supreme Court had previously ruled that the constitutional right under Irish law to a trial in due course of law (pursuant to Article 38.1 of Bunreacht na hÉireann) did not incorporate an entitlement to have a lawyer physically present during questioning.[39] Accordingly, in the particular (high-profile) circumstances of this case—where, in a case of mistaken identity, the applicant had killed another man who had no connection with a gangland feud—the Irish Supreme Court upheld the trial judge's decision to admit an inculpatory statement that he made during his 15th police interview following a brief consultation with his solicitor by telephone.[40] In dismissing his appeal, and affirming his conviction for murder, Laffoy C.J. declared 'The constitutional right is a right of access to a lawyer. The right is one of access to a lawyer, not of the presence of a lawyer during an interview'.[41]

When viewed through the lens of the binary assessment preferred in Strasbourg post-Ibrahim, the Supreme Court ruling in *Doyle* is arguably open to—and, in fact, became the target of—justified criticism.[42] In later proceedings maintained by the same applicant in Strasbourg,[43] the ECtHR determined that no compelling reasons existed to justify the 'general nature' of the restriction in Ireland as it was not based on an 'individual assessment of the applicant's circumstances'.[44] However, this Irish practice was ultimately upheld by the Strasbourg Court on the second limb of the test on the reasoning the overall fairness of the applicant's trial had not been 'irretrievably prejudiced' by this restriction.[45]

In arriving at this conclusion under the second limb of the binary test, the Court had regard to a range of considerations, including the innate invulnerability of the applicant, allegations of ill treatment, the existence of other inculpatory evidence, the public interest in prosecuting the crime, and the existence of procedural safeguards such as electronic recording of interviews. Whilst ultimately, the Court upheld Irish pretrial procedure on this occasion, Heffernan notes that this outcome rested on 'the extant access that this applicant had been afforded, the existence of ample other evidence in the case and the range of safeguards'.[46] Going forward, these

[36] *Simeonovi,* supra n 2.

[37] Other factors considered by the Court in this 'fairness assessment' include the legal framework for pretrial proceedings and admissibility of evidence (including the exclusionary rule); the applicant's opportunities to challenge evidence; the quality and reliability of evidence; the existence of unlawfully obtained evidence and related Convention violations; the nature, retraction or modification of any statement; the use and extent of reliance on evidence in question; the training and direction of those assessing guilt; the public interest in investigation and punishment; and other safeguards in domestic law'. See *Ibrahim,* supra n 2 at para 274.

[38] *Doyle,* supra n 5.

[39] *People (DPP) v Doyle* [2017] IESC 1.

[40] See, generally, Celiksoy 'Overruling "the *Salduz* Doctrine" in *Beuze v Belgium*: The ECtHR's further retreat from the *Salduz* principles on the right to access to lawyer' (2019) 10(4) *New Journal of European Criminal Law* 342.

[41] *Doyle,* supra n 39 at para 17.

[42] See generally, Heffernan, 'Irish Criminal Trials and European Legal Culture: A Backdrop to Brexit' (2021) 85(2) *The Journal of Criminal Law* 144.

[43] *Doyle,* supra n 5.

[44] Ibid. at para 92.

[45] See ibid. at para 102: 'The Court finds that, in the circumstances of the present case, notwithstanding the very strict scrutiny that must be applied where, as here, there are no compelling reasons to justify a restriction of the accused's right of access to a lawyer, when considered as a whole the overall fairness of the trial was not irretrievably prejudiced'.

[46] Heffernan, *Evidence in Criminal Trials* (Bloomsbury Professional: 2020) at 687.

same indices of fairness—articulated by the ECtHR in *Doyle*—might have been thought to provide rich scope for challenges to any future admissions made during the course of a police interrogation, particularly in cases involving a vulnerable suspect.[47] Yet, as the recent case of *Hasáliková v Slovakia*[48] has revealed, the threshold for unfairness will not easily be met owing, at once, to a narrow classification of 'vulnerability' and a generous conceptualization of the remedial effect of lawyer assistance in custody. Against such a restrictive juridical approach,[49] pressing concerns remain with regard to the likelihood of meaningfully vindicating the rights of suspects with an intellectual disability under Article 6 of the Convention, particularly in cases where a strong public interest ostensibly justifies what would otherwise be regarded as invasive national forensic techniques.[50]

3. SIGNS OF A NARROWING APPROACH: HASALIKOVA V SLOVAKIA

This case concerned a Slovak national who was serving a 15-year sentence in Levoča Prison following her conviction on charges of 'particularly serious' murder. The primary source of evidence levied against the applicant was a series of inculpatory (albeit contradictory) statements elicited from her co-accused during the pretrial proceedings, as well as a series of repeated confessions that the applicant had made to a range of criminal justice professionals (including an investigator, a medical expert, and a pretrial judge). These pretrial admissions were tendered in the presence of the applicant's court-appointed counsel in circumstances where the applicant had been provided with written information about her rights as well as information concerning the charges against her. In her proceedings before the ECtHR, the applicant contended that the criminal proceedings in Slovakia leading to her conviction had been unfair, thereby constituting breaches of Article 6, Article 5, and Article 17 of the Convention.

At trial, it had emerged that the applicant had a 'slight intellectual disability . . . with infantile features and simplistic thinking'.[51] Moreover, expert psychological evidence suggested that she was 'also very naïve, emotionally immature and easily influenced'.[52] It was the applicant's case that there had been a failure to adjust the Slovakian pretrial framework to take account of her intellectual disability. Specifically, it was contended that, in the absence of special treatment and assistance, the applicant had been unable to understand the various procedural steps involved in her detention, as well as the written information provided to her by the authorities, and, consequently, any inculpatory admissions were unreliable on account of her 'traumatizing situation'.[53] In addition, the applicant maintained that she had been denied an opportunity to appoint her own lawyer prior to her first police interview and she had also been denied an opportunity to attend the interview of her co-accused and to cross-examine him in court.

In ruling that there had been no violation of Articles 6(1) and 6(3) of the Convention, the ECtHR placed a heavy emphasis on the fact that the applicant was notified of the charges against her upon her arrival at the police station; she was presented with information about her right to

[47] Heffernan, too, has noted that the Doyle verdict is heavily contingent on its idiosyncratic facts: 'The fact that the finding of no violation rested to an appreciable extent on the circumstances of the particular application, coupled with the ECtHR's acknowledgement that art 6 embraces the right to have a lawyer in attendance at interview, raises the possibility of a different outcome in a future case, perhaps where the restriction on the right of access is graver, corroborative evidence more slight, and safeguards less substantial'. See Heffernan, supra n 42 at155. See further, Campbell et al., *Criminal Law in Ireland* (Clarus Press: 2020) at 417.

[48] *Hasáliková,* supra n 3.

[49] For a criticism of the Court's *ad hoc* determination of 'overall fairness of proceedings', see Samartzis, 'Weighing Overall Fairness: A Critique of Balancing under the Criminal Limb of Article 6 of the European Convention on Human Rights' (2021) 21(2) *Human Rights Law Review* 409.

[50] See generally, Goss, supra n 6.

[51] *Hasáliková,* supra n 3 at § 21.

[52] Ibid. at § 21.

[53] Ibid. at § 46.

legal assistance, in addition to information about her right to silence and her right to select a legal representative within 30 minutes of being notified of the charges. Moreover, given that the applicant had signed a statement confirming that she had fully understood this information, as well as a copy of her interview record (together with her court-appointed lawyer) and, in light of the fact that she failed to object to her limited freedom to instruct a lawyer, the Court refused to give 'weight to the applicant's allegation that she was limited in her right to choose a lawyer'.[54]

Meanwhile, with regard to the applicant's ancillary allegation concerning the failure of Slovakian authorities to recognize and respond to her individual vulnerability, the Chamber took the opportunity to explicitly repeat the centrality of assessing a suspect's vulnerability in the context of any allegation of pretrial procedural unfairness:

> The Court observes in this context that, when assessing the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, it has to examine, among other things, whether the applicant was particularly vulnerable, for example, by reason of age or mental capacity.[55]

In the unique circumstances of the case, however, and in a juridical approach that calls into question the Court's commitment to meaningfully acknowledging a suspect's vulnerability, the majority refused to recognize the Slovakian authorities as being under an obligation to make appropriate adjustments for the applicant as there were insufficient indicators of her vulnerability. In arriving at this conclusion, the Court placed a heavy emphasis on the fact that the applicant was 'not suffering from any mental illness or disorder',[56] that she was 'able to recognize the dangerousness of her actions and foresee their consequences',[57] and that she 'was an adult and literate'.[58] Further, the Court noted that the applicant 'had been assisted by a lawyer from her very first questioning, during which she confirmed that she fully understood the charges and did not require any further explanation . . . '[59] Moreover, she had not indicated during interviews or examinations 'that she had difficulty understanding or expressing herself',[60] nor did the domestic pretrial court, having interviewed the applicant in the course of the investigation, 'notice anything particular'.[61] In addition, the Court stressed that, if she 'considered herself unprepared for the interviews or in need of any further explanation or assistance',[62] it was 'incumbent on [Hasáliková] and her lawyer to bring such concerns to the attention of the authorities'.[63] Significantly, and somewhat surprisingly, in arriving at these determinations, the Court entirely omitted reference to the only other authority in the *Salduz* jurisprudential progeny that centred upon an ostensibly vulnerable suspect in police custody, namely, the *Panovits* ruling. Whilst the precise basis for this omission can, of course, only be surmised, there is plausible ground for interpreting the majority's approach in *Hasáliková* as representing a further example of the growing retreat in Strasbourg away from the exacting standards of *Salduz* (that is, the requirement to treat violations of the right to legal assistance as *de facto* violations of the right to a fair trial).[64]

[54] Ibid. at § 65.
[55] Ibid. at § 67.
[56] Ibid. at § 68. See also § 49.
[57] Ibid. at § 68. See also § 7.
[58] Ibid. at § 68.
[59] Ibid. at § 68. See also § 11 and 12.
[60] Ibid. at § 68.
[61] Ibid. at § 68.
[62] Ibid. at § 68. See also § 49.
[63] Ibid. at § 68.
[64] For an excellent account of this retreat, see Giannoulopoulos, supra n 15.

In signalling, by contrast, their continued preference for the less absolutist assessment model articulated in *Ibrahim*, the majority addressed the question of the applicant's right to a fair trial exclusively through the prism of 'the overall fairness of criminal proceedings' matrix (that is, the second limb of the test).[65] Yet, in doing so, the Court was arguably highly selective in its approach whereby the perfunctory determination of Hasáliková as nonvulnerable neglected the Court's own emphasis on this as a key factor that needs to go into this post-*Ibrahim* holistic assessment.[66] In, ultimately, upholding the fairness of Slovakian national proceedings, the Court emphasized the operational presence of a range of safeguards that operated to prevent misdecision and false confessions:

> The Court is . . . convinced that there were no defects in the pre-trial stage of the proceedings and that the applicant's statements were obtained lawfully, following the application of the legislative framework in place, and after the applicant had received information about her procedural rights as well as legal advice. There was thus no reason for the courts to exclude her pre-trial statements from the evidence and not use them against her at the trial.[67]

However, it should be noted, that these views were not universally held by all members of the First Section. Indeed, in a striking joint dissenting judgment, the President of the Court, Judge Turković, and Judge Schembri Orland found that there had, in fact, been a violation of Articles 6(1) and (3), owing to a failure by national authorities to counterbalance Hasáliková's vulnerability with appropriate safeguards either during the police investigation or, at trial, through the exclusion of evidence. In their dissenting opinion, Judges Turković and Schembri Orland outlined three main considerations for arriving at this shared conclusion.

The first consideration was Hasáliková's intellectual disability, which, the dissenting judges concluded, gave rise to an innate vulnerability on the part of the applicant. Significantly, in arriving at this finding and in signaling an important departure from the perfunctory post-*Ibrahim* vulnerability analysis adopted by their counterparts in the majority, the judges were influenced by prevailing clinical literature. Specifically, citing the American Psychiatric Association's *Diagnostic and Statistical Manual on Mental Disorders*,[68] they noted that individuals with mild intellectual disabilities 'generally require support in conducting complex daily living tasks and making decisions regarding health or law'.[69] It was notable, in this regard, that the applicant's 'intellectual disability was clearly evident from any conversation with her'[70] and that she had been described by experts as a 'person with infantile features and simplistic thinking, very naïve, emotionally immature and easily influenced'.[71] In contrast to the ontologically insensitive approach adopted by the majority, both Judges Turković and Schembri Orland disregarded the mild nature of the applicant's intellectual disability and the absence of a mental illness or disorder in the case. Indeed, whilst a diagnosis of mental illness or disorder can be comorbid with an intellectual disability, they are separate conditions, as acknowledged by the dissenting judges:

> The fact that she was not suffering from any mental illness or disorder should be irrelevant for assessing the consequences of her intellectual disability. Though many individuals suffer from

[65] *Hasáliková,* supra n 3 at § 67.
[66] See *Ibrahim,* supra n 2, para 274.
[67] *Hasáliková,* supra n 3 at § 72.
[68] American Psychiatric Association, D.S.M.T.F., and D. S. American Psychiatric Association. *Diagnostic and statistical manual of mental disorders: DSM-5*. Vol. 5. No. 5. (American Psychiatric Association: 2013).
[69] *Hasáliková,* supra n 3 at § 10 (Joint Dissenting Opinion).
[70] Citing § 35 of the judgment.
[71] Ibid. at § 10 (Joint Dissenting Opinion).

> both conditions, these conditions are separate. In the criminal justice context, they may pose different challenges.[72]

The judges also pointed, in this regard, towards the Court's '[acknowledgment of] intellectual disability as a ground for particular vulnerability'[73] in the earlier case of *A.-M.V. v Finland*.[74] Moreover, by interpreting the applicant's actions within a lens that was calibrated towards the ontological dimensions of intellectual impairment, the judges drew an important distinction between a suspect understanding the consequences of their actions (for the purposes of criminal responsibility) and understanding the evidentiary formalities of the criminal process:

> Persons with intellectual disabilities may struggle to understand the full implications of various procedures and processes involving arrest and detention of the exercise of their rights and entitlements; the significance of what they are told, of the questions they are asked or of their replies; or may be prone to become confused and unclear about their position; may struggle to communicate effectively; and may be suggestible or compliant. Thus the criteria that are used to establish capacity for criminal responsibility are not the same as the criteria that should be used to establish eligibility for additional procedural protection for persons with intellectual disabilities. In short, the fact that the applicant was capable of understanding her alleged actions and of foreseeing the consequences thereof does not necessarily mean that she was capable of functioning adequately in criminal proceedings

In light of the ostensible heightened challenges that can therefore confront suspects with intellectual disabilities, the judges were critical of the national expert's failure to assess the degree of Hasáliková's vulnerability or fitness for interview and/or to stand trial or indeed any other needs that were to be met or necessary adjustments to be made. They were also critical of the majority's reliance on the domestic-level expert report and their failure to consider the absence of any other assessment, for example, that explored whether Hasáliková was able to engage with the proceedings against her or whether she required procedural accommodations to counterbalance her disability.[75] In light of these shortcomings, the dissenting judges arrived at the striking conclusion that 'the majority did not have the proper premises on which to base their conclusions in relation to her vulnerability'.[76]

The second consideration was the impact of Hasáliková's intellectual disability on the heightened risk of wrongful conviction. It was noted, firstly in this regard, that there is a significant evidence base to support the proposition that persons with intellectual disabilities experience difficulties during the criminal process (see below for greater discussion), including a lesser ability to engage support and provide instruction including from and by legal counsel, their presentation and ability to recall, and their likelihood for over-conviction.[77] Secondly, the dissenting judges noted that 'the Council of Europe and the EU have paid special attention to [potentially vulnerable] suspects' (for example, through a Green Paper and subsequent Resolution on a Roadmap, Measure E,[78] and their Directive on the right of access to a lawyer that

[72] Ibid. at § 9 (Joint Dissenting Opinion).
[73] Ibid. at § 9 (Joint Dissenting Opinion).
[74] *A.-M.V. v Finland*, no. 53251, § 73, 23 March 2017.
[75] *Hasáliková*, supra n 3 at § 12 (Joint Dissenting Opinion).
[76] Ibid. at § 12 (Joint Dissenting Opinion).
[77] Over-conviction is where an accused will not avail of mitigating factors to reduce their culpability or will be convicted of more offences or more serious offences than those that they actually committed.
[78] Council Resolution, Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ L 295/1.

pays particular attention to the vulnerable accused). Both of these considerations were neglected by the majority judgment.

Finally, the dissenting judges highlighted the need for additional protections for suspects with intellectual disability, such as safeguards to: facilitate effective participation (for example, an appropriate adult[79] or another person with training relevant to the vulnerability); ascertain the credibility and voluntariness of confessions (for example, videotaping of interviews); and limit inducements (for example, placing limits on plea bargaining) and require corroboration. For Turković and Schembri Orland, the domestic procedure had 'completely disregarded'[80] the safeguards outlined.[81] Further still, the dissenting judges emphasized, contrary to the majority, that the inadequacy and inactivity of Hasáliková's lawyer served to exacerbate her already vulnerable position.

4. ANALYSING THE JUDGMENT PART I: THE CASE AGAINST UNDERSTANDING VULNERABILITY NARROWLY

As identified by the dissenting judges, there are several problems with the majority judgment in *Hasáliková*. Perhaps most striking is the adoption by the majority of a stubbornly narrow understanding of vulnerability—a status that the judges appear to link almost exclusively with the conditions of mental illness or disorder.[82] Not only is this approach contrary to the Court's own established jurisprudence that '[acknowledges] intellectual disability itself as a ground for a particular vulnerability',[83] but it also neglects the pronounced challenges that persons who fall into this classification can face when negotiating the forensic formalities at the pretrial and trial stages of the criminal process.[84] People with intellectual disabilities, for example, have been found in many instances to experience broad deficits in memory encoding, storage, and retrieval that can inhibit their ability to deliver accurate accounts of eyewitness events at trial.[85] Moreover, studies suggest that these individuals can be more suggestible (willing and open to suggestions), more acquiescent (to go along with something without question), more likely to confabulate (to fabricate imaginary experiences), and more likely to engage in nay-saying than their counterparts within the general population.[86] There is also evidence to suggest that such persons are more

[79] A term widely used in England and Wales, Northern Ireland, and Scotland. The safeguard is largely similar in England and Wales and Northern Ireland, although it differs in scope and applicability in Scotland. See Bath and Dehaghani, 'Vulnerability and the Appropriate Adult Safeguard' in Peel, Smith, Webb and Bannerman (eds), *Police Custody Healthcare for Nurses and Paramedics* (2024).

[80] *Hasáliková,* supra n 3 at § 18 (Joint Dissenting Opinion).

[81] Ibid. at § 19–22 (Joint Dissenting Opinion).

[82] Although it is interesting to note that in England and Wales, learning/intellectual disability is included under the definition of mental disorder—See Department of Health, Mental Health Act 1983: Code of Practice. TSO: 2015, p 26. Available at: https://assets.publishing.service.gov.uk/media/5a80a774e5274a2e87dbb0f0/MHA_Code_of_Practice.PDF [accessed 05/01/2024].

[83] *Hasáliková,* supra n 3 at § 18 (Joint Dissenting Opinion) §9.

[84] Cusack, 'Addressing vulnerability in Ireland's criminal justice system: a survey of recent statutory developments' (2020) 24(3) *International Journal of Evidence and Proof* 280; Clare and Gudjonsson, 'Interrogative suggestibility, confabulation and acquiescence in people with mild learning disabilities (mental handicap): implications for liability in police interrogations' (1993) 32(3) *British Journal of Clinical Psychology* 295; Gudjonsson et al., *Persons at Risk during Interviews in Police Custody: The Identification of Vulnerabilities* (HMSO: 1993); Tully and Cahill, *Police Interviewing of the Mentally Handicapped: An Experimental Study* (The Police Foundation 1984).

[85] Moonen, de Wit and Hoogeveen, 'Mensen met een licht verstandelijke beperking in aanraking met politie en justitie' (2011) 90(5) *Proces, tijdschrift voor strafrechtspleging* 235; Kebbell et al., 'People with learning disabilities as witnesses in court: what questions should lawyers ask?' (2001) 29(3) *British Journal of Learning Disabilities* 98; Perlman et al., 'The developmentally handicapped witness: competency as a function of question format' (1994) 18 *Law and Human Behaviour* 171.

[86] Gulati et al., 'Challenges for people with intellectual disabilities in law enforcement interactions in Ireland; thematic analysis informed by 1537 person-years' experience' (2021) 75 *International Journal of Law and Psychiatry* 101,683; Ericson and Perlman, 'Knowledge of Legal Terminology and Court Proceedings in Adults with Developmental Disabilities' (2001) 25(5) *Law and Human Behaviour* 529; Ternes and Yuille, 'Eyewitness Memory and Eyewitness Identification Performance in Adults with Intellectual Disabilities' (2008) 21 *Journal of Applied Research in Intellectual Disabilities* 509.

likely to obfuscate generic details about an alleged incident,[87] that they will entertain a final option bias in response to closed multiple-choice questions,[88] that their knowledge of the legal process is poor, and that they struggle routinely to comprehend legal terminology.[89] They may, moreover, feel intimidated when they are being interrogated by people in authority[90] and experience difficulty when communicating with others and when interpreting questions and statements.[91] Their regulatory functions such as attention, inhibition and planning, and problem-solving abilities may also be impaired.[92]

Research also indicates that psychological vulnerabilities can be significantly exacerbated by a range of environmental factors associated with the setting in which a witness's narrative is elicited.[93] It is particularly apparent from the research that exists in this area, for instance, that a witness's responses will be biased by both the status of the interviewing actor and the formality of the venue in which the exchange is taking place.[94] Perhaps unsurprisingly, studies have shown that any failure to adapt pretrial or trial proceedings to take account of the 'ontological realities of intellectual impairment' heightens the risk of eliciting a false confession.[95]

Indeed, the stark forensic dangers associated with neglecting the psychological vulnerabilities of a suspect with an intellectual disability were brought into sharp focus in the Irish case of Dean Lyons.[96] This case arose after Dean Lyons—a 24-year-old heroin addict described as being 'borderline learning disabled'[97]—falsely confessed to a double murder. A number of weeks following Dean Lyon's confession, Mark Nash admitted to the murders.[98] A Commission of Investigation into the Dean Lyons Case was subsequently established to consider the forensic developments that contributed to the elicitation of his false admission of guilt.[99] Whilst the Commission ultimately concluded that there had been no deliberate attempt at an investigative stage in proceedings to undermine Lyon's rights, it noted that inappropriate leading questions were inadvertently asked of him by interviewing Gardaí, which equipped him with the information to maintain a credible (albeit false) confession. It was also noted that Lyons was abnormally and exceptionally suggestible and that he had an abnormal tendency to yield to

[87] Kebbell, Hatton and Johnson, 'Witnesses with Intellectual Disabilities in Court: What Questions are Asked and what Influence do they have?' (2004) 9 *Legal and Criminological Psychology* 23; Beail, 'Interrogative Suggestibility, Memory and Intellectual Disability' (2002) 15 *Journal of Applied Research in Intellectual Disabilities* 129.

[88] Heal and Sigelman, 'Response Biases in Interviews of Individuals with Limited Mental Ability' (1995) 39(4) *Journal of Intellectual Disability Research* 331.

[89] Cusack et al., supra n 1; Gulati et al., supra n 86; Ericson and Perlman, supra n 86; Morrison et al., 'Communication and cross-examination in court for children and adults with intellectual disabilities: A systematic review' (2019) 23(4) *International Journal of Evidence and Proof* 366.

[90] Gudjonsson and MacKeith, 'Learning disability and the Police and Criminal Evidence Act 1984. Protection during investigative interviewing: A video-recorded false confession to double murder' (1994) 5 *Journal of Forensic Psychiatry* 35; Gudjonsson, "I'll help you boys as much as I can': How eagerness to please can result in a false confession' (1995) 6 *Journal of Forensic Psychiatry* 333 as cited in St-Yves, 'The psychology of rapport: five basic rules' in Williamson (ed) *Investigative Interviewing: Rights, Research and Regulation* (Cullompton Willan: 2006) at 98.

[91] Moonen, de Wit and Hoogeveen, supra n 85.

[92] Ibid.

[93] McLeod et al., *Court Experience of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity. Report 3: At Court* (Ministry of Justice: 2010).

[94] Gudjonsson, Murphy and Clare, 'Assessing the capacity of people with intellectual disabilities to be witnesses in court' (2000) 30 (2) *Psychological Medicine* 307; Gudjonsson and Gunn, 'The Competence and Reliability of a Witness in a Criminal Court: A Case Report' (1982) 141 *British Journal of Psychiatry* 624.

[95] Cusack, 'Victims of crime with intellectual disabilities and Ireland's adversarial trial: some ontological, procedural and attitudinal concerns' (2014) 68(4) *Northern Ireland Legal Quarterly* 433 at 448. See further, Gudjonsson, *The Psychology of False Confessions: Forty Years of Science and Practice* (2018); Cusack et al., 'People with Intellectual Disabilities as Accused Persons in the Irish Policing Interface' in Daly (ed.) *Police Custody in Ireland* (2024).

[96] Gulati et al., supra n 1.

[97] Birmingham, *Report of the Commission of Investigation (Dean Lyons case): set up pursuant to the Commissions of Investigation Act 2004* (Stationery Office: 2006) at 194.

[98] *Nash v Director of Public Prosecutions* [2015] IESC 32

[99] Birmingham, supra n 97.

leading questions.[100] There was also evidence to suggest that he had a long track record of fabricating stories that were wholly false and relaying them in a convincing manner.[101]

In light, then, of the profound challenges that persons with intellectual disabilities may encounter in responding to allegations of criminal wrongdoing, there is, it is submitted, a particularly urgent need for criminal justice systems to recognize and respond appropriately to the heightened challenges that individuals from this constituency can face whilst in police custody:[102]

> Any failure to adapt forensic procedures at the pre-trial stage of the criminal process to take account of the ontological realities of intellectual impairment, poses not only a material risk of eliciting inaccurate testimony, but also a wider, more pressing danger of securing a wrongful conviction through the admission of false, self-inculpatory evidence.[103]

The majority judgment—in contrast with the dissenting opinion—betrays a lack of understanding of vulnerability and how it manifests, how it is defined, how it is identified (and the challenges herein), and the effect of not addressing it. Against these pressing risks posed by the suspect's vulnerability and the subsequent impact on the reliability of confessions and fairness of proceedings, the Chamber's decision to define vulnerability narrowly on the one hand, whilst simultaneously interpreting the remedial impact of national structural accommodations broadly on the other, is a cause for some concern. At the level of principle, and in contrast to the Court's rhetoric to the contrary, it is suggestive of a weak commitment within the Chambers of Strasbourg to meaningfully consider vulnerability as part of the 'overall fairness of proceedings' matrix that has taken hold in the aftermath of *Ibrahim*.

Whilst the majority in *Hasáliková* neglected to utilize the opportunities afforded in this case to critically engage with the vast and well-established literature on psychological vulnerability and its impact on reliability and fairness, one must be encouraged by the diligence of the dissenting judges who actively engaged with the literature and, in doing so, found that Hasáliková was, indeed, innately vulnerable. It is through this engagement with the literature, acknowledging that disciplines such as psychology and neuroscience hold significant lessons for the law and legal processes, that the dissenting judges were able to adequately assess Hasáliková's innate vulnerability and highlight the failures of the expert report, the subsequent errors in the case against Hasáliková, the impact of these errors on the fairness of criminal proceedings, and the missteps made by the majority. Their robust judgement should be commended for being evidence-based and research-informed and provides reason to be hopeful. That said, the dissenting judges did not provide a clear and unequivocal definition of vulnerability or even attempt to do so,[104] and, in this sense, it is arguable that the dissenting judgment did not go far enough. A careful consideration of vulnerability would allow national and European-level courts to arrive at a fuller and more accurate understanding of a suspect's vulnerability and would provide direction to key decision-makers across Europe.

[100] Birmingham, supra n 97 at 7.

[101] Birmingham, supra n 97 at 6. In the aftermath of the publication of the Commission's findings, and in contemplation of the publication of similar concerns by the Morris Tribunal, an entirely new interview model—the Garda Siochana Interview Model—was introduced in Irish policing operations. See generally, Noone, 'An Garda Síochána Model of Investigative Interviewing of Witnesses and Suspects' in Pearse (ed), *Investigating Terrorism: Current Political, Legal and Psychological Issues* (2015).

[102] Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (2003); Gudjonsson, 'Psychological vulnerabilities during police interviews. Why are they important?' (2010) 15 *Legal and Criminological Psychology* 161.

[103] Cusack et al., supra n 1 at 424.

[104] This regrettably follows a broader trend of a failure to adequately define vulnerability, which has significant impacts on the uptake of safeguards. See Mergaerts and Dehaghani, 'Protecting vulnerable suspects in police investigations in Europe: lessons learned from England and Wales and Belgium' (2020) 11(3) *New Journal of European Criminal Law* 313.

5. ANALYSING THE JUDGMENT PART II: THE CASE AGAINST OVEREMPHASIZING ACCESS TO A LAWYER

A secondary patent edict to have emerged from the majority's ruling in *Hasáliková* is that national authorities are not inhibited by the exigencies of the Convention from engaging in a rigorous forensic interrogation of suspects (including, as in this case, a detainee with an intellectual disability) provided that this interrogation is scaffolded by a procedural framework that safeguards the right to a fair trial. In adopting this approach, the *Hasáliková* judgment can be seen to represent a further attempt by the officials in Strasbourg, following the cases of *Ibrahim* and *Doyle,* to regulate 'the relatively hidden arena of the interview room'[105] by reconciling the public interest in investigating crime on the one hand, with the countervailing need to guard against procedural impropriety on the other. Yet, the capacity of Slovakia's pretrial process, to appropriately balance those competing interests in that case, appears to have been anything but certain.

Of particular concern, in this regard, is the essentialist ideology that underpinned the Court's outstanding faith in the supposed safeguarding effect of providing suspects with access to legal advice.[106] Whilst, as we have seen, this logic has found increasing expression in Strasbourg in the post-*Salduz* era, it is arguably grounded in the Court's mainstream approach (as most clearly articulated in *Ibrahim*) of regarding all suspects under interrogation as being vulnerable. Such an assumption might be accurate generally (in the sense that all accused persons could be considered as being, to some extent, structurally vulnerable); it nevertheless poses a risk of neglecting the heightened challenges that are uniquely faced by those with an intellectual disability who may require additional adjustments beyond the general support that is provided by a lawyer. These additional adjustments may arise in the form of specific supports, or alterations, to established process(es). Accordingly, as Dehaghani has pointed out, whilst a lawyer might be in a position to address structural legal needs, they are not a sufficient counterbalance to innate vulnerability: 'whilst [Hasáliková] was attended by a lawyer, the majority erred by implying that the lawyer's assistance ameliorated [her] vulnerability'.[107] To put it more succinctly, the lawyer might best be regarded as a general safeguard for all accused persons rather than as a specialist safeguard designed to address the specific needs of vulnerable people.

Indeed, international studies reveal that lawyers are routinely ill-equipped to address the needs of particularly vulnerable clients such as those with intellectual disabilities.[108] The failure of the Irish legal profession, for instance, to understand the difficulties posed by the adversarial criminal justice for people with disabilities has been noted in Irish victimological discourse.[109] At the pretrial stage of criminal proceedings meanwhile, the clear need to 'mainstream' disability awareness training amongst all relevant agencies was noted as far back as 1996[110] and, again, in

[105] Vaughan and Kilcommins, *Terrorism, Rights and the Rule of Law* (Willan 2008) at 101.

[106] In determining that there was no unfairness in the pretrial proceedings, the Court placed an express emphasis on the applicant's access to legal advice: 'The Court is . . . convinced that there were no defects in the pretrial stage of the proceedings and that the applicant's statements were obtained lawfully, following the application of the legislative framework in place, and after the applicant had received information about her procedural rights as well as legal advice'. *Hasáliková v Slovakia,* para 72.

[107] Dehaghani, Not vulnerable enough? A missed opportunity to bolster the vulnerable accused's position in Hasáliková v. Slovakia (2021) *Strasbourg Observers*. Available at: https://strasbourgobservers.com/category/cases/hasalikova-v-slovakia/ [accessed 08/08/2024].

[108] See generally, Swift et al., *What happens when people with learning disabilities need advice about the law?* (University of Bristol: 2013) Available at: https://www.legalservicesconsumerpanel.org.uk/ourwork/vulnerableconsumers/Legal%20Advice%20Learning%20Disabilities%20Final%20Report.pdf [accessed 09/01/2024].

[109] Edwards, Harold, and Kilcommins, *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork: 2012).

[110] Commission on the Status of People with Disabilities, *A Strategy for Equality: Report of the Commission on the Status of People with Disabilities* (Stationery Office: 1996)

a landmark report in 2018.[111] Moreover, supposing a lawyer is sensitive to, and aware of, the unique needs and concerns of a suspect with an intellectual disability, they must also to know how to respond to them. Specialist safeguards, it is important to note in this regard, are not infallible,[112] but they are an important step towards promoting fair trial rights. By interpreting vulnerability narrowly, the majority have potentially denied suspects with intellectual disabilities access to specialist supports, and, for Hasáliková, they have denied that her fair trial rights were infringed. Doing so also enabled them to claim that any general legal vulnerability was addressed by provision of a lawyer.

Their judgement, moreover, demonstrates a misunderstanding of the myriad factors underlying reliability[113] and has a heavy propensity towards responsibilization[114] of the suspect [for example, by expecting Hasáliková to raise concerns regarding her (lack of) preparedness or her additional needs with her lawyer]. The dissenting judgment, by contrast, was considerably more nuanced in acknowledging the shortcomings of legal advice and assistance, namely, that the lawyer lacked training in relation to and experience of supporting suspects with intellectual disabilities and that, in Hasáliková's case at least, the inability and ineffectiveness of the lawyer further exacerbated her innate vulnerability, rather than remedying it. Although the dissenting judges refrained from commenting on how the role of the lawyer could be bolstered, it is necessary to acknowledge that, alongside specific safeguards designed around innate vulnerabilities, well-trained and knowledgeable lawyers are essential to protecting the fair trial rights of an innately vulnerable suspect.[115] Relatedly, the suspect's vulnerability must be acknowledged when considering how—and indeed whether—they instruct, or engage with, a lawyer. The dissenting judgment is thus to be commended but, again, it did not go far enough in addressing specifically how a suspect's innate vulnerability ought to be addressed.

The decision, then, by the majority of the Chamber to adopt a broad view of the suitability of Slovakian procedural safeguards in the case (based on notional access to a lawyer)—and, thereby overlook, the innate and structural vulnerability of the applicant—raises questions about the extent to which Member States need to adjust their criminal procedures to meaningfully accommodate suspects with intellectual disabilities in order to comply with the positive exigencies of Article 6. To put it more simply, it raises questions about the level of due process protection that can truly be offered to such suspects through a 'vulnerability' assessment that forms merely one factor within a wider 'fairness of proceedings' matrix. Indeed, these questions become particularly pressing when understood in the context of Goss' persuasive theory that regards *Hasálikova* as one authority in a wider trend of Strasbourg jurisprudence that is increasingly tolerant of invasive forensic formalities on the basis of public interest

[111] Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland* (Commission on the Future of Policing in Ireland: 2018).

[112] See, for example, Dehaghani, 'Interpreting and Reframing the Appropriate Adult Safeguard' (2022) 42(1) *Oxford Journal of Legal Studies* 187; Dehaghani, *Vulnerability in Police Custody: police decision-making and the appropriate adult safeguard* (2019); Dehaghani, 'Defining the "Appropriate" in Appropriate Adult: Restrictions and Opportunities for Reform' [2020] *Criminal Law Review* 1137.

[113] Threats and overt coercion are not the only circumstances that can produce false confessions. False confessions can occur voluntarily or can be subtly coerced. Suspects with intellectual disabilities may be particularly prone to coerced-compliant and coerced-internalized false confessions. Coerced-compliant false confessions occur when the suspect seeks to gain something, for example, early release from custody or early conclusion of an interview. Coerced-internalized confessions occur when the suspect, because of memory problems, an eagerness to please, or a propensity to succumb to pressure, believes that they have committed the offence without any memory of having done so. See Gudjonsson, supra n 102 at 192–242.

[114] See, for example, Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001); Liebenberg, Ungar and Ikeda, 'Neo-Liberalism and Responsibilisation in the Discourse of Social Service Workers' (2015) 45 *British Journal of Social Work* 1006; Phoenix and Kelly, 'You have to do it for yourself': Responsibilization in Youth Justice and Young People's Situated Knowledge of Youth Justice Practice' (2013) 53 *British Journal of Criminology* 419.

[115] The lawyers in Conway and Daly's research expressed concern that they would find it difficult to identify vulnerability in their clients—see Conway and Daly, *Criminal Defence Representation at Garda Stations* (2023) at paras 6.15 and 6.16.

considerations.[116] Accordingly, for disciples of this line of logic, any future adoption by the Court of a broader understanding of vulnerability within the *Ibrahim* test might not of itself be sufficient to safeguard the fairness of proceedings where a series of countervailing exigencies (including, in particular, the demands of national legal frameworks and countervailing public interest concerns) must also be considered by the Court.[117]

In an effort to arrest any perception of a 'turn to subsidiarity' then,[118] a better approach—it is submitted—would have been for judicial authorities to consider the question of fairness, not by reference to the perceived remedial role of legal representatives but rather by holistically locating the position of a vulnerable suspect (broadly understood) in a matrix that takes into account all of the procedural formalities and safeguards that shape their custodial experience. As the remainder of this article will show (through an Irish case study heuristic), such a juridical approach would raise difficult questions for Member States where pretrial safeguards (including access to a lawyer) are under-developed or under-used.

6. CASE STUDY: THE RIGHT TO A FAIR TRIAL IN IRELAND

In Ireland, the ramifications of the *Hasáliková* ruling are likely to resonate with particular magnitude on account of the Irish Supreme Court's refusal to interpret Article 6 of the Convention as importing a right for suspects to have a lawyer physically present during a police interview.[119] Indeed, whilst the ECtHR may have opted against formally overruling this determination in Strasbourg proceedings,[120] it has nevertheless been openly critical of the general nature of Ireland's prohibition against permitting physical access to a lawyer in police custody settings.[121] Significantly, in *Doyle*, the Chamber declined to classify the applicant as vulnerable, a decision that was arguably attributable to the idiosyncratic facts of the high-profile case in hand, including the fact that the applicant was an 'adult and a native English speaker' and was 'physically and mentally strong throughout the interviews'.[122] However, the likelihood of a Strasbourg Court taking an equally noninterventionist approach in an Irish case involving a more ostensibly deserving vulnerable suspect—such as an adult with an intellectual disability—is significantly less certain.[123]

It is notable, in this regard, that a key consideration for the Court in upholding the fairness of Slovakian proceedings in *Hasáliková* was the applicant's right of access to a lawyer. The absence of such a right on a statutory basis in Ireland—as well as the practical difficulties that currently exist in terms of accessing a lawyer/solicitor whilst in custody[124]—raises questions concerning the reconcilability of Irish pretrial procedure with the exigencies of Article 6 ECHR. Moreover,

[116] Goss, supra n 6.

[117] See *Ibrahim*, supra n 2 at para 253.

[118] Rask Madsen, supra n 6 at 185.

[119] *Doyle*, supra n 39 at para 17.

[120] *Doyle*, supra n 5.

[121] 'In the present case it is important to stress that while a majority of the Supreme Court . . . was correct in concluding that where there have been procedural defects at pre-trial stage . . . it failed to recognize that the right of an accused to have access to a lawyer. Ibid at § 101. See generally, Cusack et al., supra n 7.

[122] Ibid. at § 85.

[123] Support for this proposition can be found in the strong dissenting judgment articulated by Judge Yudkivska in *Doyle* where, in criticizing the brevity of the legal advice available to the applicant, as well as the coercive techniques adopted by the Irish police officials, it was determined that the overall fairness of the proceedings was compromised. See ibid. (Dissenting Opinion).

[124] It is worth noting that there is no constitutional or statutory right to have a lawyer in the interview room. In practice, however, if a lawyer is requested it is typically permitted, and, if it were denied, it would undoubtedly be a concern for the Irish courts (although see *People (DPP) v Dekker* [2022] IECA 173 concerning admissions made at interview in the absence of a requested solicitor that were admitted by the Court). Notwithstanding the evolution of this practice on a nonstatutory basis, there remains a number of operational concerns including, for instance, a shortage of lawyers available to undertake police station work, coupled with a relatively high threshold for legal aid, as well as obstacles in terms of how lawyers are selected and a lack of training for lawyers in recognizing and addressing particular vulnerabilities in their clients.

this absence, means, almost inevitably, that the integrity and fortitude of other procedural safeguards will come under increased scrutiny in any future claim of a violation of an applicant's Article 6 rights (even if the Court persists with its narrow interpretation of vulnerability as part of the fair trial matrix). Indeed, whilst the fairness of Ireland's pretrial machinery may ultimately have been upheld in *Doyle*, the invulnerability of the applicant, in that case, conspired to ensure that the Court focused almost exclusively on the operation of general pretrial safeguards (in particular, periodic access to a lawyer and the video recording of interviews). This obviated the need for a broader consideration of the adequacy of other ancillary safeguards that exist under Irish law in order specifically to protect child suspects and individuals with an intellectual disability.

6.1. The responsible adult safeguard

For adults with intellectual disabilities, one of the most important safeguards enshrined in Irish law is the recognition of a right to be accompanied by a 'responsible adult' during the course of an investigative interview.[125] Specifically, pursuant to Regulation 22(1) of the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 ('Custody Regulations'), any adult detainee who the member in charge 'suspects or knows to be mentally handicapped' must not, save with the authority of that member, be questioned in relation to an offence or asked to make a written statement 'unless a parent or guardian is present'.[126] Derogations from this standard are both envisaged and tolerated by the legislation.[127] These exceptions, however, will only assist members of An Garda Síochána in extremely narrow circumstances where overriding interests related to the protection of life, the protection property, or procedural efficiency are at stake.[128] Moreover, before any derogation from the 'responsible adult' safeguard will be countenanced, a member in charge must as a matter of first recourse (unless it is impractical to do so) arrange for 'the presence during questioning of . . . the other parent or another guardian . . . an adult relative, or . . . some other responsible adult'.[129] Regulation 22(2) of the Custody Regulations expressly provides that where the member in charge arranges for the presence of 'some other responsible adult other than a member', the responsible adult referred to in that provision must, where practicable, 'be a person who has experience in dealing with the mentally handicapped'.

In many respects, the 'responsible adult' safeguard enshrined in the Custody Regulations is analogous to the 'appropriate adult' safeguard that currently operates in England and Wales.[130] Prompted by public disquiet at the treatment of two child suspects and one adult with an intellectual disability who confessed under duress to being involved in the death of Maxwell Confait in 1972,[131] as well as the publication of the Royal Commission on Criminal Procedure report in 1981,[132] the appropriate adult safeguard was introduced for the purpose of safeguarding the

[125] Cusack et al., supra n 7.

[126] Regulation 22(1) of the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 read in conjunction with Regulation 13(1) of the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987.

[127] See generally, Cusack, 'An Overview of the Legal Position of Vulnerable Suspects and Defendants in Ireland' *Irish Criminal Justice Agencies Annual Conference* (Dublin, 4 June 2021).

[128] Regulation 13(1), Custody Regulations 1987.

[129] Regulation 13(2), Custody Regulations 1987.

[130] See generally, Dehaghani, 'He's Just Not That Vulnerable: Exploring the Implementation of the Appropriate Adult Safeguard in Police Custody' (2016) 55(4) *Howard Journal of Crime and Justice* 396; Dehaghani and Bath, 'Vulnerability and the appropriate adult safeguard: examining the definitional and threshold changes within PACE Code C' (2019) 3 *Criminal Law Review* 213; Gulati et al., supra n 1.

[131] Price and Caplan, *The Confait Confessions* (Marion Boyars: 1977).

[132] Dehaghani, supra n 130.

'rights, entitlements and welfare of juveniles and vulnerable persons'.[133] According to paragraph 11.15 of Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, a person of any age who is suspected by an officer to either be 'vulnerable' or a juvenile (those under 18 years of age), must not—save in limited circumstances—'be interviewed regarding their involvement or suspected involvement in a criminal offence or offences, or asked to provide or sign a written statement under caution or record of interview, in the absence of the appropriate adult'. According to Dehaghani and Bath:

> The AA [appropriate adult] performs a number of different, but overlapping and complementary, functions. He or she must support, advise and assist the suspect; ensure that the police act properly and fairly, informing a senior officer if not; assist with communication whilst respecting the right to silence; and ensure rights are protected, respected and understood by the suspect.[134]

The appropriate adult has a role, moreover, not only in interviews but also whenever the suspect is given or asked to provide information or participate in any procedure:

> This includes when warnings in relation to adverse inferences are given, when rights and entitlements are explained, when samples—such as fingerprints, photographs, and DNA—are to be taken, when strip or intimate searches are to be conducted, and during charge, bail and police cautions.[135]

The appropriate adult role is distinct from that of the lawyer and, as Dehaghani and Newman have previously argued, whilst lawyers may possess 'some of the suitable characteristics of the appropriate adult, [they] could not realistically perform such duties in practice (or conceptually)'.[136] The role of appropriate adult and lawyer can therefore be complementary, yet they are—and should be—distinct.

In Ireland, by contrast, there is considerably less clarity with regard to the parameters of a 'responsible adult's' operational authority. The origins of this ambiguity must be, at least in part, traced to the vagueness of Ireland's subsisting statutory and policy framework, which has failed not only to replicate the detailed standards contained in the England and Wales *Code of Practice* but also to address the unmet operational need amongst members of An Garda Síochána for a detailed Guidance Note on the operation of the safeguard.[137] Equally, the absence of a dedicated Irish training body for individuals tasked with fulfilling this role can also be seen to have played a key role in preserving the hidden status of this facility within Ireland's criminal justice framework.[138] The underutilization of this facility was thrown into sharp relief in a recent report by the Garda Inspectorate, which, upon conducting a review custody facilities across five policing divisions in Ireland, concluded as follows:

[133] Home Office, *Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers* (The Stationery Office: 2018) at para 1.7A.

[134] Dehaghani and Bath, 'Vulnerability and the appropriate adult safeguard: examining the definitional and threshold changes within PACE Code C' (2019) 3 *Criminal Law Review* 213 at 214.

[135] Dehaghani and Bath, supra n 132 at 214.

[136] Dehaghani and Newman, 'Can—and should—Lawyers be Considered "Appropriate" Appropriate Adults?' (2019) 58 (1) *Howard Journal of Crime and Justice* 3 at 3.

[137] See generally, Cusack, supra n 125; Kilkelly and Forde, *Children's Rights and Policing Questioning* (Policing Authority: 2021).

[138] McNamara, 'Building a collaborative approach to policing in an age of disability human rights law' (2021) 28 (1) *Journal of Psychiatric and Mental Health Nursing* 107.

> During the examination of custody records, the Inspectorate found that support from an adult was rarely obtained for people over the age of 18 who the custody record showed to have a learning difficulty or poor mental health or to have engaged in self-harm. Although a number of those with identified vulnerabilities requested that a third party be notified of their being in custody, few records showed that an appropriate adult had been called. While the third party may be a suitable person to act as an appropriate adult, the records did not indicate that they undertook this role. During inspection visits, the Inspectorate found that gardaí were well aware of the requirement to have an adult present when a child is in custody. There was, however, a lesser degree of awareness or consideration of the need to provide support to a person who has an intellectual disability or learning difficulty . . . There was a mixed response from gardaí when asked if they would explain the role to the person in custody and to the adult, with many assuming that those concerned understood the role. There is no document explaining the role of the adult that could be given to the person in custody and to the adult to ensure that they understand what they should or should not do.[139]

6.2. The Notice of Rights

In addition to the 'responsible adult' safeguard, the Custody Regulations seek to further offset the power imbalances in Ireland's police interview room by recognizing the right of suspects to be provided with a Notice of Rights. Specifically, Regulation 8(2) insists that 'a member in charge shall without delay give the arrested person or cause him to be given a notice' containing specified information relating to the right to consult a solicitor and the right to have notification of custody sent to another person. Where the arrested person is 'mentally handicapped' or a child under 18 years of age, the notification of custody to another person is mandatory[140] and is accompanied by a request 'to attend at the station without delay'.[141]

In order to comply with this requirement, it is now the practice of An Garda Síochána to issue a *Notice of Rights: Form C.72(s)—Information to Persons in Custody* to all arrested persons in garda custody. However, this form is not without its shortcomings. In its current format, for instance, the document fails to contain a complete summary of an arrested person's rights.[142] The right to silence, and the right to an interpreter, for example, are currently absent from the document. Moreover, many of the limited rights that are enumerated in the text of the Notice of Rights, are framed in an unclear manner, incorporating reference to other statutory provisions. In addition, the absence of detailed or easy-read explanation of relevant rights further undermines the accessibility of the document.[143]

6.3. A note on the Custody Regulations

Owing to these significant procedural lacunae in the due process framework architected by the Custody Regulations, the degree to which the needs of vulnerable suspects are meaningfully addressed by this statutory instrument is uniquely ambiguous. This concern is heightened,

[139] Garda Síochána Inspectorate, *Delivering custody Services: A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations* (Garda Síochána Inspectorate: 2021), 54–5.

[140] Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987; Reg. 22(2)

[141] Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987; Reg. 8(1)(c)(ii). It is important to note that whilst information relating to a suspect's right to consult a solicitor is provided in the Garda Custody Regulations, it does not extend to include a right to have them notified of a suspect's detention in custody.

[142] Gulati et al., 'The Collaborative Development through Multidisciplinary and Advocate Consensus of an Accessible Notice of Rights for People with Intellectual Disabilities in Police Custody' (2022) 83 *International Journal of Law and Psychiatry* 101815.

[143] Cusack et al., supra n 1.

moreover, by the porous lawful authority of the Regulations themselves.[144] According to section 7(3) of the Criminal Justice Act 1984:

> A failure on the part of any member of the Garda Síochána to observe any provision of the regulations shall not of itself render that person liable to any criminal or civil proceedings or of itself affect the lawfulness of the custody of the detained person or the admissibility in evidence of any statement made by him.

Accordingly, the elicitation of any evidence from a suspect in contravention of the safeguards enshrined in the Regulations does not automatically render the relevant proofs inadmissible, nor does it render the individual's detention unlawful. Rather, in such circumstances, the admissibility of any inculpatory evidence will fall to be determined on a case-by-case basis at the discretion of the presiding trial judge.[145] This ad hoc approach, it is submitted, provides an unruly template for securing a lasting consensus around the pretrial safeguards that must be observed in order to vindicate the due process rights of all suspects, and in particular, those who are vulnerable, within the Irish justice system.[146]

When viewed, then, in the context of Ireland's absent statutory right to legal assistance, the weakness of these ancillary pretrial safeguards fails to incite confidence that Irish pretrial procedures will be adjudged to satisfy 'the overall fairness of proceedings' assessment in any future cases involving a suspect with an intellectual disability where a pressing public interest is not engaged. Indeed, this is likely to be the case even if the Strasbourg Court persists with its post-*Hasalikova* approach of excluding such suspects from its narrow categorization of 'vulnerability', given the considerably more relative right of access to a lawyer in Ireland (compared to Slovakia), the paucity of procedural safeguards (beyond a requirement of electronic recording), and the lesser weight of public interest.

Consequently, in light of such a spectrum of procedural frailties, it would be somewhat naïve to suggest that the *de facto* provision of access to a solicitor on a statutory basis will, of itself, be a panacea for all the ills of Ireland's pretrial procedural architecture. Rather, it is suggested that the introduction of such a facility should be understood as representing only one factor in the Strasbourg Court's increasingly 'impressionistic assessment of the overall fairness of the proceedings'.[147] Indeed, whilst Irish policymakers may, until now, have been shielded from the worst of the Grand Chamber's denunciatory gaze due to the overt public policy considerations that operated to insulate Irish pretrial proceedings in *Doyle*, the continued tolerance in Strasbourg for Ireland's porous pretrial rights regime, particularly as it extends to vulnerable suspects or those in less high-profile cases, is anything but certain.

With this in mind, the *Garda Síochána (Powers) Bill*—which is currently passing through Ireland's parliament—arguably presents policymakers with a unique opportunity, to not merely align Irish pretrial procedure with Strasbourg jurisprudence but indeed to go one step further. Specifically, through the statutory recognition of a broad definition of vulnerability so as to cover 'persons with impaired capacity' (owing, *inter alia*, to a mental health condition, intellectual disability, or physical disability),[148] this draft legislation promises to look beyond the narrow Strasbourg approach by adopting a nuanced and ontologically sensitive account of the innate

[144] In this regard, the legal authority of the Custody Regulations mimics the nonbinding authority of the commitments enshrined in Code C in England and Wales. See Police and Criminal Evidence Act 1984, s 67(10).

[145] *DPP v Spratt* [1995] 1 IR 585

[146] See, for example, *People (DPP) v Darcy* (unreported, Court of Criminal Appeal, 29 July 1997).

[147] Goss, supra n 6 at 9.

[148] Garda Síochána (Powers) Bill, Head 8.

and structural factors that can compound the custodial and interrogative experience of suspects.[149] In addition, the draft legislation appears to be premised on a distinct appreciation of the relative safeguarding impact that *de facto* legal assistance can offer to such suspects. Accordingly, beyond belatedly enshrining a statutory right to legal assistance,[150] the Bill also promises to strengthen the range of ancillary procedural safeguards that are to be extended to vulnerable suspects in future by promoting the future publication of 'guidelines' to this effect by the Garda Commissioner.[151] Through these steps, Irish pretrial procedure (and the policy underpinning it) has the potential to become a model of best practice in safeguarding the overall fairness of the custodial formalities that confront vulnerable suspects in police stations.

7. CONCLUSION

The ECtHR has long recognized that the constituent elements of a fair trial are both many and mutable.[152] This logic, which initially found expression in Strasbourg in *Ibrahim,* has evolved (through subsequent affirmations in *Simeonovi, Doyle* and, most recently, *Hasáliková*) to become the cornerstone of a line of impressionistic judgments. These assert unequivocally that the overall fairness of criminal proceedings can only truly be gauged by assessing national pretrial measures through the lens of a nonexhaustive matrix of factors including consideration of a suspect's vulnerability. Crucially, however, it appears that this latter concept will be narrowly construed in the chambers of Strasbourg. In failing, at once, to recognize both the accepted diagnostic traits of intellectual impairment and the established associated cognitive and communicative challenges, the majority judgment in *Hasáliková* is arguably rooted in an ableist value system that appears to be blind to the ontological realities of intellectual disability. Moreover, in championing the safeguarding role of legal representatives in the custodial environment, the Court effectively eschewed engaging in any meaningful interrogation of the true level of procedural protection afforded to vulnerable suspects within national legal regimes.

Consequently, in jurisdictions such as Ireland—where extant pretrial safeguards are both underdeveloped and underused—the ramifications of this jurisprudence could hardly be more alarming. On one hand, it represents a valuable missed opportunity by Strasbourg officials to embed an awareness amongst Irish criminal justice agencies of the importance of adopting an evidence-informed, broad view of vulnerability so as to ensure that appropriate accommodations are offered to those who need it most whilst in police custody. Whilst, simultaneously, the Court's growing faith in the seemingly universal remedial impact of *de facto* access to a lawyer, might, on the other hand, lead Irish policymakers to mistakenly see the introduction of this reform (without updating the country's wider arsenal of ancillary procedural safeguards—including the Notice of Rights and Appropriate Adult) as the antidote for the pretrial landscape's ableist features.

Yet, as evidenced in the principled joint dissenting judgment of Judges Turković and Schembri Orland, all hope is not yet lost. In challenging accepted procedural traditions and dismantling the reified exigencies of a fair trial, this dissent has, it is submitted, the potential to act as an emboldening reference point for Strasbourg (and Irish) officials going forward. Indeed, until such time as a majority of those sitting on the Strasbourg Bench subscribe to a wider, holistic conceptualization of vulnerability that is sensitive to both innate and structural dimensions at

[149] Garda Síochána (Powers) Bill, Head 8(4).
[150] Garda Síochána (Powers) Bill, Head 42.
[151] Garda Síochána (Powers) Bill, Head 8(2).
[152] Cusack et al., supra n 7.

play, any attempt to engage in an evaluation of the 'overall fairness of criminal proceedings'—pursuant to the Court's own interpretation of the rights-based exigencies of Article 6.1—will almost inevitably be incomplete.

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