

Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial

REBECCA K. HELM*

This article develops an interpretative framework to examine when incentives to plead guilty should be found to constrain defendant choice to waive fair trial rights under the European Convention on Human Rights. This framework is informed by existing jurisprudence, specifically the judgments of the European Court of Human Rights in Natsvlshvili and Togonidze v. Georgia and Deweer v. Belgium, and socio-legal literature. According to the framework, an incentive to plead guilty should be found to violate fair trial rights where it makes it unreasonable to expect defendants to exercise their right to a full trial, is independent of the projected outcome at trial, and causes the defendant to plead guilty. An empirical analysis of guilty-plea practice in England and Wales informed by this new framework identifies problematic incentives and suggests such incentives may disproportionately influence vulnerable defendants.

INTRODUCTION

Granting defendants in the criminal justice system a fair trial is central to the rule of law, is part of the self-proclaimed common heritage of the parties to the European Convention on Human Rights (ECHR),¹ and is protected by Article 6 of the ECHR. However, in Europe, and across the world, the full trial is starting to disappear as defendants increasingly agree to waive trial

* *University of Exeter School of Law, Amory Building, Rennes Drive, Exeter EX4 4RJ, England*
R.K.helm@exeter.ac.uk

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1 B. Rainey et al., *Jacobs, White, and Ovey: The European Convention on Human Rights* (2017, 7th edn.) 274.

rights, typically by pleading guilty.² For example, around 87.8 per cent of cases in Georgia, 85 per cent of cases in Scotland, 64 per cent of cases in Estonia, and 64 per cent of cases in Russia are resolved through trial waiver systems rather than through trial.³ In these systems, defendants are typically incentivized to plead guilty, for example, through the offer of a reduced sentence or charge when pleading guilty compared to the sentence or charge that is likely to be received if convicted at trial. When defendants do plead guilty they waive important trial rights contained in Article 6 of the ECHR including the right to a public hearing, the right to provide evidence, and the presumption of innocence, in exchange for receiving the incentive offered. This practice of offering incentives to encourage waiver of trial rights raises important philosophical questions, largely related to the protection of the rights of criminal defendants.⁴

While the ECHR does not prevent incentives being offered to encourage guilty pleas, case law does demonstrate both that guilty pleas amount to a waiver of the fair trial rights⁵ and that:

the waiver of a right guaranteed by the Convention ... must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent ... and without constraint ...⁶

The final requirement, that waivers be made without constraint, is particularly important in the guilty plea context since literature suggests that incentives to plead guilty have the potential to be coercive (and thus constrain decisions to waive trial rights).⁷ Where an incentive to plead guilty is coercive, a defendant's choice to waive trial rights is tainted by constraint, the defendant has not received the substance of a fair trial and, as stated by Lord Steyn in *R v. Brown*, the administration of justice has 'entirely failed'.⁸

The requirement that guilty pleas are made without constraint is particularly important in the current system, where innocent, as well as guilty, defendants appear to be pleading guilty. In England and Wales, of the 128

2 See Fair Trials, *The Disappearing Trial*, at <<https://www.fairtrials.org/publication/disappearing-trial-report>>. For more information on the development of guilty-plea systems across the world, see S. Thaman, *World Plea Bargaining* (2010); J. Turner, *Plea Bargaining Across Borders: Criminal Procedure* (2009).

3 Fair Trials, *id.*, p. 34.

4 R.L. Lippke, *The Ethics of Plea Bargaining* (2011).

5 *Navalnyy and Ofitserov v. Russia*, Apps. 46632/13 and 18671/14, 23 February 2016, para. 100.

6 *D.H. and Others v. the Czech Republic*, App. no. 57325/00, 13 November 2007, para. 202. Note that it is also a requirement that the waiver not run counter to any important public interest, see *Hermi v. Italy*, App. No. 18114/02, 18 October 2006, para. 73.

7 For example, L. Bachmaier, 'The European Court of Human Rights on negotiated justice and coercion' (2018) 26 *European J. of Crime, Criminal Law and Criminal Justice* 236; H.M. Caldwell, 'Coercive plea bargaining: The unrecognized scourge of the justice system' (2011) 61 *Catholic University Law Rev.* 63.

8 *R v. Brown* [2003] 1 A.C. 681, 708.

cases referred to the Court of Appeal by the Criminal Cases Review Commission as potential miscarriages of justice (for review of conviction or conviction and sentence) since 2012, approximately 50 cases involved defendants who initially pleaded guilty.⁹ In the United States (the jurisdiction with the most extensively studied plea system) in 2015, 44 per cent of exonerations followed guilty pleas.¹⁰ In fact, some United States jurisdictions explicitly allow defendants to plead guilty while maintaining that they are innocent through what is known as an *Alford plea*.¹¹ In a recent article, Richard Nobles and David Schiff suggest that the potential for innocent defendants to plead guilty, in addition to the difficulty in appealing a conviction obtained via guilty plea and the widespread prevalence of guilty pleas, means that the modern criminal justice system can only be justified by reference to concepts of autonomy and the autonomous exercise of rights (rather than traditional legitimations of obtaining accurate convictions and avoiding wrong convictions).¹² This is because a guilty plea is not reliably equivalent to a confession or an indication of guilt, but is a voluntary decision of a defendant to change their normative position to that of a convicted person (preferring this to the alternative).¹³ This theory suggests a central role of defendant autonomy in the legitimization of guilty-plea systems. The importance of defendant autonomy is also underlined by legal requirements that pleas be voluntary across jurisdictions,¹⁴ and other commentary justifying guilty pleas through an emphasis on defendant choice.¹⁵ In this context, where defendants who are not guilty appear to be waiving their right to trial and defendant autonomy becomes central to the justification of guilty pleas, it is integral to the right to a fair trial to safeguard defendant autonomy by ensuring incentives to plead guilty are not coercive.

In the European context, the ECHR guarantees the right to a fair trial. The European Court of Human Rights (ECtHR), as a court of review, has an important role to play in establishing minimum standards for protecting that right, and in ensuring that the right to a fair trial is not violated through incentives to plead guilty that constrain defendant choice. This role of the

9 Unpublished raw data from the Criminal Cases Review Commission, on file with author.

10 The National Registry of Exonerations, *Exonerations in 2015*, at <http://www.law.umich.edu/special/exoneration/documents/exonerations_in_2015.pdf>.

11 *North Carolina v. Alford* [1970] 400 US 25.

12 R. Nobles and D. Schiff, 'Criminal Justice Unhinged: The Challenge of Guilty Pleas' (2018) 39 *Oxford J. of Legal Studies* 100.

13 *id.*, p. 109.

14 See, for example, P. Taylor (ed.), *Taylor on Criminal Appeals* (2012, 2nd edn.) para. 9.03 (noting that an appellant may appeal a plea that was involuntary or equivocal).

15 See, for example, in the United States context, F.H. Easterbrook, 'Plea bargaining as compromise' (1992) 101 *Yale Law J.* 1969; R.E. Scott and W.J. Stuntz, 'Plea bargaining as contract' (1992) 101 *Yale Law J.* 1909; J. Bowers, 'Punishing the innocent' (2007) 156 *University of Pennsylvania Law Rev.* 1117.

ECtHR may be particularly important in the context of current criminal justice systems where national court backlogs and limited resources can compete with defendant rights,¹⁶ and vulnerable and minority defendant rights in particular may be threatened.¹⁷ However, this task is difficult in the context of 47 different criminal justice systems across Europe, and jurisprudence of the ECtHR on this topic is currently very limited. This means that it is difficult to determine where incentives to plead guilty are likely to be found to constrain choice and therefore violate fair trial rights under the ECHR.

The ECtHR provided some insight into this when it considered whether specific incentives to plead guilty violated the right to a fair trial in the relatively recent case of *Natsvlishvili and Togonidze v. Georgia*.¹⁸ In that case, the ECtHR concluded that despite relatively strong incentives to plead guilty being present, the decision of a defendant (the applicant) to waive trial rights had ‘undoubtedly’ been a ‘conscious and voluntary’ decision.¹⁹ This case may seem disappointing to those who believe strong incentives to plead guilty violate the right to a fair trial. Commentary has suggested that judges in the case demonstrated a reluctance to open a ‘Pandora’s box’ by interfering with state guilty-plea procedure.²⁰ This article suggests that while the *Natsvlishvili* judgment does limit the circumstances in which the ECtHR is likely to intervene in state guilty-plea procedure, it does not necessarily (and should not be taken to) indicate a broad hands-off approach to policing incentives to plead guilty. In the context of criminal justice systems in which guilty pleas predominate and defendant autonomy is important in their justification, ECHR standards should have an important role to play in influencing guilty-plea procedure across the Council of Europe jurisdictions, including in England and Wales. A role of the ECtHR is particularly important to consider in England and Wales in light of a 2008 decision of the House of Lords, which seemed to suggest a highly permissive approach to incentives to plead guilty, potentially equating pressure to render a plea involuntary with the threat of illegal action.²¹

16 See Bachmaier, *op. cit.*, n. 7, pp. 236–7:

At present almost all criminal justice systems face the problem of overloaded courts and consequent backlogs, due not only to increased criminality, but also to policies limiting economic and human resources. Although efficiency and costs should not be the parameters for measuring justice and the court’s systems, it is undeniable that they are not only factors that must be taken into account, but also an element that no judicial system can ignore.

17 J. Peay and E. Player, ‘Pleading guilty: Why vulnerability matters’ (2018) 81 *Modern Law Rev.* 929; R. Hood, *Race and Sentencing* (1992).

18 *Natsvlishvili and Togonidze v. Georgia*, App. No. 9043/05, 29 April 2014.

19 *id.*, para. 97.

20 See Bachmaier, *op. cit.*, n. 7, p. 249.

21 *McKinnon v. United States* [2008] UKHL 59.

The first part of this article analyses *Natsvlishvili* in addition to a related ECtHR judgment (which together make up the entire existing jurisprudence relating to when incentives to waive trial rights constrain defendant choice) and socio-legal literature, in order to develop a new interpretative framework to analyse where incentives to waive trial rights should be found to ‘constrain’ defendant choice, and therefore violate the right to a fair trial. It is argued that a defendant’s decision to plead guilty should be seen as constrained where incentives to plead guilty (i) make it unreasonable to expect the defendant to exercise his or her right to a full trial; (ii) are independent of the projected outcome at trial; and (iii) cause the defendant to plead guilty. Where these three conditions are satisfied, any waiver of trial rights should be viewed as ‘tainted by constraint’ and therefore invalid. This framework is intended to be pragmatic and in accordance with the *Natsvlishvili* judgment, while also highlighting the need for intervention in particular circumstances.

The second part of this article goes on to apply this framework in the context of the guilty-plea system in England and Wales in order to identify where current procedure would be in breach of the ECHR under the proposed framework. It attempts to demonstrate how the arguments made in the first part of this article are relevant in a practical way in current practice in England and Wales. This part of the article draws on current guilty-plea regulation and empirical survey data, collected in 2017/2018 from criminal law specialists in England and Wales. This analysis provides much-needed insight into the practical reality of current pressures to plead, and concludes that some current incentives to plead guilty in England and Wales may undermine the validity of defendant trial waivers according to the proposed framework. Specifically, the validity of trial waivers may be being undermined in the current system in two types of case. First, where pleading guilty provides an opportunity for immediate release from custody but going to trial will involve remand in custody, and second, where the time and cost involved in going to trial is prohibitive when compared to the time and cost involved in entering a guilty plea. The empirical survey data provides insight into the cases in which these incentives lead defendants to plead guilty, and where they are likely to be constraining defendant choice. Importantly, the data suggests that such incentives are more likely to constrain choice in certain, often vulnerable, defendants. This includes defendants in cases where the defendant has no fixed abode, cases involving domestic violence, and cases where the defendant has limited financial means. The article concludes that defendants in such cases have the potential to argue that their fair trial rights have been breached, even following the judgment in *Natsvlishvili*.

I. WHEN SHOULD INCENTIVES TO PLEAD GUILTY BE FOUND TO VIOLATE FAIR TRIAL RIGHTS?

To date, the ECtHR has only specifically considered the extent to which incentives to plead guilty may compromise the voluntariness of the waiver of trial rights in one case, *Natsvlshvili v. Georgia*.²² In that case, the relevant applicant was charged with various company-law offences. An agreement was reached between the prosecution and the defence, according to which the applicant would maintain innocence but be convicted without an examination of the merits of his case, in exchange for a reduced sentence. The applicant later complained that this ‘plea-bargaining’ procedure violated his fair trial rights under Article 6 of the ECHR. Amongst other things, he argued that his decision to accept a plea bargain could not be said to be truly voluntary because the plea was the only real opportunity for him to avoid a lengthy term of imprisonment given the 99 per cent conviction rate in the Georgian criminal justice system. He emphasized systemic poor physical conditions in post-conviction custodial institutions in Georgia, and the fact that when he accepted the plea bargain he was detained in poor conditions.

The ECtHR noted that the process of plea-bargaining (in which a defendant could obtain a lesser charge or a reduction in sentence in exchange for a guilty plea) was a common feature of European criminal justice systems and that there was nothing improper about the process itself.²³ However, they also confirmed the potential for trial rights to be breached if the waiver of such rights was not valid. In order for an agreement to plead guilty to be valid, it was noted that the defendant must (i) accept the plea bargain in full awareness of the facts of the case; (ii) accept the plea bargain with full awareness of the legal consequences; and (iii) accept the plea bargain in a genuinely voluntary manner.²⁴ In addition, it was noted that the content of the bargain and the fairness of the manner in which it had been reached must have been subjected to sufficient judicial review and that the bargain must not run counter to any important public interest.²⁵

In the case itself, the majority of the ECtHR found no violation of Article 6. Regarding the requirement that a plea be made in a genuinely voluntary manner, after noting that the plea was arranged at the request of the applicant himself, that the applicant had unequivocally expressed his willingness to repair the damage caused to the state, that the applicant was represented by lawyers, and that the applicant had confirmed he was not subjected to undue influence in negotiations, the Court majority judgment concluded that the

22 *Natsvlshvili*, op. cit., n. 18.

23 *id.*, para. 90.

24 *id.*, para. 92.

25 *id.*

decision to plead guilty had ‘undoubtedly’ been ‘conscious and voluntary’.²⁶ In reaching this conclusion, the majority judgment notes that the decision could not be said to have resulted from any duress or false promises made by the prosecution, was accompanied by sufficient safeguards against possible abuse of process, and did not run counter to any important public interest.²⁷ This conclusion of the majority could be taken to suggest that decisions to enter guilty pleas will always be considered voluntary under ECHR standards, provided that they have not resulted from duress, false promises, or abuse of process. However, an examination of another important ECtHR case (*Deweere v. Belgium*), in addition to relevant socio-legal literature suggests that the case should not be read in this way.

Aside from the *Natsvlishvili* case, the ECtHR has not had the opportunity to consider the extent to which incentives to plead guilty may constrain the choice of a defendant. However, incentives to waive trial rights have been considered in a similar context in the much older case of *Deweere v. Belgium*.²⁸ In that case, the applicant owned a small business and was accused of infringing a ministerial decree fixing the selling price of beef and pork. He was faced with the decision either to pay a fine in recognition of the infringement or to face an order for the closure of his shop until judgment was given in a criminal prosecution. Under these conditions the applicant paid the fine. He then contended that the fine was paid under constraint of provisional closure of his establishment and that this represented a violation of his fair trial rights under Article 6.²⁹ In holding that the applicant’s fair trial rights had been violated, the ECtHR stated that waivers of rights in civil and criminal matters did not in principle offend against the constitution, but that the applicant would have, during a period of months, been ‘deprived of the income from his trade’, would have ‘incurred the risk of having to continue to pay his staff and of not being able to resume business with all his former customers once his shop reopened’, and would have ‘suffered considerable loss as a consequence’.³⁰ This meant that the applicant’s waiver of fair trial rights was ‘tainted by constraint’, and thus in breach of Article 6 of the ECHR.

In order to understand where incentives to waive trial rights are likely to be found to breach fair trial rights, it is necessary to distinguish between *Natsvlishvili* and *Deweere*, and to determine what made the waiver in *Natsvlishvili* voluntary, but the waiver in *Deweere* ‘tainted by constraint’. Existing literature discussing the cases has not explicitly answered this

26 *id.*, para. 97. Although this was disputed by the partly dissenting opinion of Judge Gyulumyan, who noted that the high conviction rate in Georgia at the relevant time meant the applicant likely never believed he could obtain an acquittal and therefore had no real option but to accept the prosecutor’s offer.

27 *id.*

28 *Deweere v. Belgium*, App. No. 6903/75, 27 February 1980.

29 *id.*

30 *id.*, para. 51.

question, and has been limited to citing one or both cases as authority for the propositions that waivers of trial rights must be voluntary,³¹ and that Article 6 may be breached where there is a substantial incentive to plead guilty,³² or where the potential outcomes at plea and trial are disproportionate.³³

The cases, when viewed together and alongside existing and important socio-legal literature, suggest that where incentives to plead guilty (i) make it unreasonable to expect the defendant to exercise their right to a full trial, (ii) are independent of the projected outcome at trial, and (iii) cause the defendant to plead guilty, such incentives should be found to violate Article 6 rights, even after the *Natsvlishvili* decision.

First, incentives must make it unreasonable to expect the defendant to exercise their right to a full trial. The court in *Deweer* alludes to this, noting that in that case the nature of the pressure was ‘so compelling’ that it was ‘not surprising that the applicant chose to pay the fine’. In noting this, the ECtHR referred to the disproportionality between the relatively modest fine and the consequences of engaging in criminal proceedings.³⁴ This is clearly an important consideration, and adheres with traditional notions of voluntariness, whereby a decision is not voluntary (that is, consensual) where a person is coerced into doing something (including by circumstances) that would ordinarily signify consent.³⁵ It is also often what the *Deweer* judgment is taken to stand for – where there is such a disproportionality between accepting a certain punishment and going to trial, Article 6 will be breached.³⁶ However, this does not seem to be the only factor that is determinative when considering *Deweer* in combination with the *Natsvlishvili* case where the incentives to plead guilty were also compelling.

In *Natsvlishvili*, the applicant contended that his decision to accept a plea bargain had not been truly voluntary as it was the only real opportunity for him to avoid a lengthy term of imprisonment.³⁷ The applicant could waive his right to trial and receive a fine of 35,000 Georgian Lari (the equivalent of about £11,000).³⁸ If he went to trial, he was very likely to be convicted (given Georgia’s high conviction rates) and face a lengthy custodial sentence, from six to twelve years’ imprisonment.³⁹ In addition, at the time of accepting the plea bargain he was detained in particularly ‘intolerable and

31 For example, K. Vriend, *Avoiding a Full Criminal Trial: Fair Trial Rights, Diversions and Shortcuts* (2016) 144.

32 A. Ashworth, ‘Four threats to the presumption of innocence’ (2006) 10 *International J. of Evidence and Proof* 241, at 256.

33 A. Ashworth and M. Redmayne, *The Criminal Process* (2010, 4th edn.) 313.

34 *Deweer*, op. cit., n. 28, para. 51.

35 J. Kleinig, ‘The Nature of Consent’ in *The Ethics of Consent: Theory and Practice*, eds. F. Miller and A. Werthheimer (2009) 14.

36 Ashworth and Redmayne, op. cit., n. 33, p. 313.

37 *Natsvlishvili*, op. cit., n. 18, para. 64.

38 id., para. 27.

39 id., para. 13.

highly stressful' conditions, sharing a cell with a person who had previously abducted him and a convicted murderer.⁴⁰ Where a defendant has the opportunity to receive a fine by pleading guilty but potentially a sentence of twelve years in prison if convicted at trial, this seems clearly disproportionate and unsurprising that an applicant would choose to plead guilty. In fact, research in cognitive psychology suggests that where pleading guilty will result in a different 'type' of sentence than conviction at trial will, this is likely to be highly psychologically compelling.⁴¹ It seems clear that it is unreasonable to expect a defendant to exercise his or her right to a full trial in these circumstances (although some may choose to do so). The detention in 'intolerable' conditions appears less convincing in making it unreasonable to expect the defendant to exercise his right to a full trial here. This is because at the time the applicant formally entered into the plea agreement on 9 September 2004 he had been removed from the particularly harmful conditions (transferred to a cell away from the person who had previously abducted him and the convicted murderer on the request of the public defender)⁴² and only had six days of his pre-trial detention remaining. Therefore, by the time the plea was formally entered, there was no evidence to suggest that any remaining period of detention would be particularly harmful to the defendant (particularly since the applicant was in a comfortable financial position).

Therefore, in the *Natsvlishvili* case, due to the disproportionality between the sentence when pleading guilty and likely sentence at trial, there seems a strong case that it would be unreasonable to expect the defendant to exercise his right to a full trial while having the option of paying a sum of money he could afford and avoiding an almost certain six- to ten-year custodial sentence. Despite this, the decision of the applicant was found not only to be conscious and voluntary, but to be 'undoubtedly' so.⁴³

This suggests that there is a distinction between the two cases based on something other than the strength of the incentive offered, which leads the decision to waive rights in *Deweer* to be considered 'tainted by constraint' and the decision in *Natsvlishvili* to be considered 'undoubtedly' 'conscious and voluntary'. It is suggested that the important distinction between the two cases concerns the fact that in *Deweer* a constraint existed that not only made it unreasonable to expect the applicant to exercise his right to a full trial, but that was also both independent of the projected outcome at trial (or, to put it another way the constraint would have been harmful to the defendant even if he were innocent and found to be innocent at trial) and caused the defendant

40 *id.*, para. 86.

41 R.K. Helm and V.F. Reyna, 'Logical but incompetent plea decisions' (2017) 23 *Psychology, Public Policy, and Law* 367; R.K. Helm, 'Cognitive theory and plea bargaining' (2018) 5 *Policy Insights from the Behavioral and Brain Sciences* 195.

42 *Natsvlishvili*, *op. cit.*, n. 18, para. 20.

43 *id.*, para 97.

to plead guilty. Although the court did not explicitly note these as being determinative factors, there are good reasons to treat trial waivers more stringently when incentives independent of the projected outcome at trial cause a defendant to plead guilty. In the *Deweer* case the ‘constraint’ complained of by the applicant was not the projected outcome at trial, but the losses that would be suffered due to having to close his business pending trial.⁴⁴ In fact, the court specifically stated that ‘the applicant was probably scarcely apprehensive about criminal prosecution since it was not unlikely that prosecution would result in an acquittal.’⁴⁵ In the *Natsvlishvili* case, the primary contended constraint on voluntariness, as discussed above, was the likely outcome if the case were to go to a full trial (particularly the fact that the applicant would likely have received a custodial sentence given the relevant offence and the 99 per cent conviction rate in Georgia). Although external constraint was present, that constraint did not necessarily make it unreasonable to expect the applicant to exercise his right to trial and that incentive does not appear to be what caused him to plead guilty (put another way, he would have been likely to plead guilty even absent the pre-trial detention due to the high conviction rate in Georgia and associated custodial sentence).

This means that in *Deweer* (but not in *Natsvlishvili*) the decision was not a calculated one about whether to risk trial and the associated penalty, and thus was not made on the basis that the certain outcome of the fine was better than the chance of trial and the associated penalty. In fact, the decision was made completely independently of the projected outcome at trial. Legal and socio-legal literature provide explicit insight into why this distinction is important.

First, this is an important distinction since if pressure external to the central trial waiver decision is causing defendants to waive trial rights, this creates a situation where a defendant (or potential defendant) is no longer rationally weighing up risks and rewards of waiving rights to trial versus going to trial and making a voluntary decision based on those risks and rewards, as the plea process envisions.⁴⁶ Where the pressure is created by the projected outcome at trial, the pressure is simply an aspect of the central decision, preferring a certain outcome to the projected outcome at trial. So, the option to waive rights and receive a certain penalty is seen as more desirable than the option of risking a more severe penalty at trial. This is particularly true since in England and Wales the reduced sentence through plea typically represents a reduction from the sentence that the defendant should be given if convicted at trial according to relevant sentencing guidelines (that is, a reduction from the ‘proper sentence’).⁴⁷ This means that

44 *Deweer*, op. cit., n. 28, para. 51.

45 *id.*

46 J. Bowers, ‘Punishing the innocent’ (2008) 156 *University of Pennsylvania Law Rev.* 1117.

47 See *X v. United Kingdom* [1972] 40 CD 64, 67.

a defendant can gain a benefit by pleading guilty, particularly where it is likely he or she will be convicted at trial. Since even innocent defendants can be convicted at trial, it is only fair that innocent, as well as guilty defendants, should be able to rationally balance risks and rewards in this way.

This is different where decisions are influenced by an external pressure independent of the risks and rewards of trial, such as economic pressure. Here, a defendant or potential defendant may prefer the option of risking a more severe penalty at trial to the option to waive trial rights, but may be unable to pursue this option due to the external pressure. This means that the decision to waive trial rights is constrained, rather than just being the preferable option.

Second, where the decision to waive trial rights is separated from the projected outcome at trial, the people waiving trial rights are no longer those who are (i) likely to be convicted at trial and (ii) making a rational decision to minimize their losses. This is harmful not only because it is likely to lead to an increased number of innocent people waiving their trial rights, but also because it may lead to discriminatory pressure on certain defendants to waive their rights. For example, where the external pressure is economic, it could lead to a situation in which wealthy defendants who are unlikely to be convicted at trial could accept a temporary economic disadvantage and go on to be acquitted at trial whereas those of lower economic means who cannot afford such an economic disadvantage are forced to accept the trial waiver.⁴⁸

Note that the court in *Natsvlishvili* were also influenced by the fact that the applicant in that case had initiated the trial waiver agreement himself.⁴⁹ However, the ECtHR only consider this point as evidencing the fact that the agreement 'could not be said to have been imposed by the prosecution'.⁵⁰ In *Natsvlishvili* the fact that the agreement was initiated by the applicant may raise suspicion that the applicant was 'playing the system'. He obtained a direct benefit from making an agreement in which he avoided an almost certain custodial sentence, and then also wanted to benefit from a full trial. This is much less likely to be the case where a defendant is unlikely to be convicted at trial (or not concerned with the likelihood of conviction at trial) but agrees to waive the right to trial due to external pressure. Here the defendant is not benefiting from the agreement but is essentially forced into a bad agreement or an agreement he or she would not otherwise be willing to

48 For a discussion of this in the United States context, see A. Natapoff, 'Misdemeanors' (2012) 85 *Southern California Law Rev.* 1313. Note, *mutatis mutandis*, that the importance of economic pressure in constraining the voluntariness of rights waiver has also been considered explicitly with relation to Article 11 of the ECHR in the employment context, where it has been held that economic constraints may take away the 'free' nature of consent: see *Sörensen and Rasmussen v. Denmark*, App. nos. 52563/99 and 52620/99, 11 January 2006, para. 59.

49 *Natsvlishvili*, op. cit., n. 18, para. 93.

50 *id.*

make due to external pressure. Here, an agreement is likely to be viewed as ‘imposed’ on the defendant regardless of who initiated it.

Therefore, ultimately, three important elements of trial waiver agreements are likely to be important in determining whether a trial waiver, including a guilty plea, is voluntary. First whether the incentive makes it unreasonable to expect the defendant to exercise his or her right to a full trial; second, whether the incentive is independent of the projected outcome at trial; and finally, whether the incentive caused the defendant to plead guilty (since if the incentive did not cause the plea it was not the incentive that undermined the defendant’s choice to exercise his or her right to a full trial).

Previous research has suggested that a less restrictive approach should be taken, and sentencing discounts in general should be seen as running contrary to fair trial rights (specifically the presumption of innocence, the privilege against self-incrimination, the right not to be discriminated against in the exercise of Article 6 rights, and the right to a fair and public hearing).⁵¹ However, the spirit, and in many ways the letter, of the judgment in *Natsvlishvili* seems to rule out this more expansive approach in favour of a generally permissive approach to plea bargains and incentives to plead guilty, subject to some restrictions.

In the future, this more permissive approach may be challenged, but this is likely to be difficult in the current climate where, as noted in *Natsvlishvili*, obtaining the lessening of charges or sentences in exchange for a waiver of trial rights is a common feature of European criminal justice systems, and is viewed as important in facilitating speedy adjudication, alleviating the workloads of the courts, and reducing sentences imposed and the number of prisoners.⁵² Thus, the proposed framework is intended to represent a compromise in the European context, recognizing practical concerns and the realities of the *Natsvlishvili* judgment in addition to the need to protect defendants in the most extreme cases.⁵³

II. THE GUILTY PLEA SYSTEM IN ENGLAND AND WALES

The majority of defendants in England and Wales choose to waive their right to a trial through pleading guilty. In 2016–2017, 76.9 per cent of defendants (78.1 per cent of defendants in the magistrates’ court, and 70.1 per cent of defendants in the Crown Court) pleaded guilty rather than opting to go to trial.⁵⁴ This represents a high proportion of defendants waiving trial rights

51 Ashworth and Redmayne, *op. cit.*, n. 33, pp. 310–20.

52 *Natsvlishvili*, *op. cit.*, n. 18, para. 90.

53 For a more detailed examination of ethics relating to plea bargaining (much of which also applies to guilty pleas more generally), see Lippke, *op. cit.* n. 4.

54 Crown Prosecution Service (CPS), *Annual Report and Accounts 2016–2017* (2017) HC 115, at <https://www.cps.gov.uk/sites/default/files/documents/publications/annual_report_2016_17.pdf>.

when compared to other jurisdictions. A recent report noted the percentage of cases resolved through trial waiver systems in 20 jurisdictions and found that the percentage in England and Wales was higher than in 16 of the other jurisdictions (Australia, Bosnia and Herzegovina, Chile, China, Colombia, Croatia, Czech Republic, Estonia, Hungary, India, Italy, Poland, Russia, Serbia, Spain, and Ukraine) and lower than only three of the other jurisdictions (Georgia, Scotland, and the United States of America).⁵⁵ It is therefore important to consider the incentives that encourage defendants to plead guilty in England and Wales, and the extent to which such incentives are compatible with the ECHR according to the framework proposed above.

In England and Wales, there are three main types of incentive that may persuade a defendant to plead guilty, and thus will likely be considered by a defendant when choosing whether to plead guilty.⁵⁶ First, defendants can get *charge reductions* in exchange for pleading guilty. Second, defendants can get *sentence reductions* in exchange for pleading guilty. Third, hidden or informal incentives may encourage defendants to plead guilty. These incentives include the opportunity to get out of custody immediately by pleading guilty, and the fact that pleading guilty is significantly quicker and easier than going to trial. Informal incentives, in addition to the more formal incentives, are important to consider under the ECHR. The ECtHR specifically noted in the *Deweer* case (in the context of determining whether a criminal charge was present) the need to look at practical realities rather than just formal rules (noting that because of the prominent place held in society by the right to a fair trial, the court preferred to look behind appearances and investigate the realities of the procedure in question).⁵⁷

For each of the incentive types identified it will be considered whether, in the form they are currently present in England and Wales, such incentives make it unreasonable to expect defendants to exercise their right to a full trial, and are independent of the projected outcome at trial. Where such incentives may be present, empirical evidence will be introduced to provide insight into whether such incentives are in fact causing defendants to plead guilty in the current system. Such empirical evidence is vitally important in understanding current pressures to plead guilty. As noted by Jill Peay and Elaine Player in a recent article, documenting the extent of pressures to plead is made harder by the absence of relevant research or statistical evidence on pleas.⁵⁸ The survey responses are intended to facilitate and demonstrate the application of arguments made in this article in the context of real practice in England and Wales, and should be considered in conjunction with more

55 Fair Trials, op. cit., n. 2, p. 34.

56 Note that some work also suggests defendants may be pressured into pleading guilty by legal advisors: see J. Baldwin and M. McConville, *Negotiated justice: Pressures to plead guilty* (1977) 62.

57 *Deweer*, op. cit., n. 28, para. 44.

58 Peay and Player, op. cit., n. 17, p. 931.

general research on pressures to plead guilty in the criminal justice system (although note that existing empirical research is largely from pre-2007 when the guilty-plea rate increased to its current level).⁵⁹

Specifically, survey data collected in 2017/2018 from criminal law specialists will be drawn on to do this. Survey data presented was gathered from 90 legal professionals practicing criminal law with experience of representing clients deciding whether or not to plead guilty. Participants were recruited through links to an online survey hosted on the Qualtrics survey platform. Links were sent to a wide range of practitioners undertaking criminal defence and prosecution work in England and Wales (identified via online searches) in order to obtain the most representative sample possible. Demographics of participants were also checked (as described below) to ensure representativeness. Approximately 700 emails were sent out, in most cases to individual legal professionals but to legal firms where individual email addresses were not available. Participants came from across England and Wales. The survey asked the legal professionals to respond to questions about their experience of guilty-plea practice and procedure in England and Wales. Ninety-one participants responded to the survey, but one was excluded for not answering a question checking that they had experience advising clients whether to plead guilty or go to trial. This left 90 participants. Participants were 69 per cent male and 31 per cent female, and had an average of 23.08 years of legal experience (Standard Deviation = 11.48); 63 per cent were solicitors (including nine solicitor advocates), 29 per cent were barristers, 2 per cent were qualified as both solicitors and barristers, and the remainder were paralegals/caseworkers/trainee solicitors; 74 per cent of participants worked only in defence, 25 per cent in both defence and prosecution, and 1 per cent in prosecution only.

1. *Charge reductions*

(a) Description

Charge reductions in exchange for guilty pleas occur where a defendant agrees to plead guilty to a lesser charge or fewer charges than the one(s) he or she is charged with. The prosecutor can then decide to accept the guilty plea to the lesser or fewer charge(s) and drop the initial charge(s). This means that by pleading guilty to a lesser charge or fewer charges a defendant can avoid the possibility of conviction of a more serious charge or more charges. The practice of prosecutors in selecting charges and accepting guilty pleas to lesser or fewer charges is regulated by prosecutorial guidelines contained in the Code for Crown Prosecutors.⁶⁰

59 For example, Baldwin and McConville, *op. cit.*, n. 56; A. Ashworth, *The criminal process: An evaluative study* (1998, 2nd edn.) 296.

60 CPS, 'Code for Crown Prosecutors' (2013), at <https://www.cps.gov.uk/sites/default/files/documents/publications/code_2013_accessible_english.pdf>.

(b) Make it unreasonable to expect the defendant to exercise their right to a full trial?

Ultimately, under the guidelines prosecutors should propose the most appropriate charge(s) initially, but may end up accepting a plea to a lesser charge or fewer charges where appropriate. This judgement involves a large amount of discretion and opens the door to ‘charge-bargaining’ between prosecutors and defendants. This, accompanied by the fact that charge-bargaining is not subject to any formal monitoring or regulation, means that prosecutors have the discretion to offer powerful incentives to plead guilty. For example, a reduction from a charge of inflicting grievous bodily harm with intent (with a statutory maximum of life in prison and a sentencing range not including a non-custodial sentence even for the lowest level of culpability and harm⁶¹) to a charge of simple grievous bodily harm (with a statutory maximum of four years in prison and a sentencing range including a low-level community order for the lowest level of culpability and harm⁶²). Such reductions have the potential to make it unreasonable to expect a defendant to exercise their right to a full trial.

(c) Independent of the projected outcome at trial?

Importantly, the pressure to plead that may be created by charge reductions is not independent of the projected outcome at trial. Specifically, charge reductions make the guilty-plea option more appealing which may lead a defendant to pick this option over trial. This means that the decision to plead guilty when offered a charge reduction is the decision of the defendant to take the benefits of a sure outcome rather than risk the potential outcome at trial. This is similar to the situation in *Natsvlishvili*, where the decision to plead guilty was described as ‘conscious and voluntary’, despite the fact that the applicant could obtain a significantly more lenient outcome from a guilty plea than he would obtain if convicted at trial.⁶³ Therefore, charge reductions, at least in their current form, are unlikely to be held to violate the fair trial rights of defendants under the proposed framework.

2. Sentence reductions

(a) Description

Sentence reductions occur where the sentencing judge can reduce the sentence given to a defendant, including reducing a custodial to a non-custodial sentence, where a defendant has entered a guilty plea as opposed to

61 Sentencing Council, ‘Assault: Definitive Guideline’ (2011), at <https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf>.

62 id.

63 *Natsvlishvili*, op. cit., n. 18, para. 97.

contesting guilt at trial. In England and Wales, when a judge is sentencing a defendant, he or she will take into account whether the defendant pleaded guilty and if so, when, under the Criminal Justice Act 2003 and associated sentencing guidelines.⁶⁴ Under the current guidelines, a sentence reduction of one-third should be made (subject to exceptions) where the defendant enters a guilty plea at the earliest possible opportunity. This reduction is then lessened the further along proceedings progress (to a maximum of a one-tenth reduction for defendants who plead guilty on the first day of trial). Importantly, this reduction can result in imposing a different ‘type’ of sentence to that received if convicted at trial, for example, by reducing a custodial sentence to a community sentence, or by reducing a community sentence to a fine.

(b) Make it unreasonable to expect the defendant to exercise their right to a full trial?

Empirical research has examined the sentence reductions awarded in exchange for guilty pleas and this research has suggested that sentencing discounts are largely modest, reasonable, and in line with the sentencing guidelines.⁶⁵ Specifically, researchers found that from 2011–12 (a period in which 86 per cent of offenders appearing for sentence in the Crown courts pleaded guilty), the reduction given in exchange for a guilty plea was of one-third or less. In only 7 per cent of cases was the reduction found to be greater than one-third.⁶⁶ These sentence reductions appear reasonable, and appear consistent with encouraging guilty defendants to confess, rather than relegating factual guilt or innocence to one factor in a complex decision.⁶⁷ Despite this, sentence reductions do have the potential to undermine considerations of guilt or innocence in two ways: (i) when combined with generous charge reductions, sentence reductions may exacerbate differences between plea and trial outcomes that are already large, and (ii) through the reduction leading to a different ‘type’ of sentence being awarded (for example, a community order in place of a custodial sentence or a fine instead of a community order).

64 Sentencing Council, ‘Reduction in Sentence for a Guilty plea: Definitive Guideline’ (2017), at <https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-plea-Definitive-Guide_FINAL_WEB.pdf>.

65 J.V. Roberts and B. Bradford, ‘Sentence reductions for a guilty plea in England and Wales’ (2015) 12 *J. of Empirical Legal Studies* 187.

66 *id.*

67 Although note that sentence reductions in exchange for guilty pleas may result in indirect discrimination: see Hood, *op. cit.*, n. 17; M. Tonry, ‘Abandoning Sentence Discounts for Guilty Pleas’ in *Principled Sentencing: Readings on Theory and Policy*, eds. A. Ashworth et al. (2009).

(c) Independent of the projected outcome at trial?

Again, even where these incentives may lead to pressure that could make it unreasonable to expect a defendant to exercise his or her right to a full trial, this pressure is not independent of the projected outcome at trial. Again, the sentence reduction simply makes the option to plead guilty more appealing, rather than creating an external pressure to plead, even where the potential outcome at trial is custodial, and a non-custodial sentence can be secured by pleading guilty. *Natsvlishvili* provides direct authority for this, since the argument that being able to secure a non-custodial sentence as a result of plea rendered the plea non-voluntary was rejected by the ECtHR.

3. *Immediate release from custody*

(a) Description

Pleading guilty can provide a way to get out of custody immediately. Under current law, a defendant should not be remanded in custody where there is no real prospect of being sentenced to a custodial sentence in legal proceedings.⁶⁸ However, this does not prevent defendants being remanded in custody where they would be able to receive a non-custodial sentence when pleading guilty. This is because a defendant who would receive a custodial sentence if convicted at trial but not as a result of pleading guilty could be remanded in custody awaiting trial. A defendant who would otherwise have qualified for a short custodial sentence (and thus could be remanded in custody) could also be released immediately by pleading guilty and receiving a sentence of time served (that is, a sentence that has already been served while awaiting trial).

(b) Make it unreasonable to expect the defendant to exercise their right to a full trial?

The strength of this incentive can be demonstrated by looking at waiting times to contest guilt at trial compared to waiting times to enter a guilty plea. In 2016, the average waiting time for defendants committed for trial to the Crown Court was significantly longer for those who pleaded not guilty than those who pleaded guilty (32.3 weeks compared to 15.1 weeks).⁶⁹ This is also made worse by the poor conditions in remand prisons, potentially leaving defendants desperate to get out.⁷⁰ In these circumstances, pleading guilty can

68 Bail Act 1976, Sch. 1, as amended by Legal Aid, Sentencing, and Punishment of Offenders Act 2012, Sch. 11.

69 Ministry of Justice (MoJ), 'Criminal court statistics quarterly, England and Wales, January to March 2017' (2017), at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/623096/ccsq-bulletin-jan-mar-2017.pdf>.

70 See HM Inspectorate of Prisons, *Remand prisoners: A thematic review* (2012), at <<https://www.justiceinspectores.gov.uk/hmiprisoners/wp-content/uploads/sites/4/>>

provide the opportunity to get out of custody to resume life, employment, and education and to resume care for dependents. Where pleading guilty is the only way to get out of a remand prison, it may be unreasonable to expect a defendant to exercise their right to a full trial, particularly where the defendant is a single parent and has to care for his or her family, or where the defendant has insecure employment that he or she will lose as a result of remand in custody (note that a plea offering release from custody will not automatically undermine consent, absent harmful conditions that make it unreasonable to expect the defendant to exercise his or her right to a full trial, per *Natsvlishvili*). Thus, there is the potential for such incentives to make it unreasonable to expect a defendant to exercise their right to a full trial.

(c) Independent of the projected outcome at trial?

Importantly, this pressure is not only sufficient to undermine consideration of factual guilt or innocence, it is also independent of the projected outcome at trial. A defendant may plead guilty when innocent even where they do not believe they would be convicted at trial if this provides their only means of release, particularly in the cases identified above where defendants are particularly vulnerable.

(d) Causing defendants to plead guilty in England and Wales?

Empirical data from the survey described above provides additional insight into whether the opportunity to obtain release from custody is causing defendants to plead guilty (and thus may undermine trial rights under the proposed framework where it is also unreasonable to expect them to exercise their right to a full trial). First, surveyed legal professionals were asked: 'Do you have experience advising clients who can get out of jail by pleading guilty but will have to remain in jail awaiting trial if they plead not guilty?' (Yes, significant experience; Yes, but not much; No; Prefer not to answer). They were then asked: 'Please explain your experience in this area, or (if you do not have experience) your knowledge of whether this does occur.'

In answering the first question, 83 per cent of surveyed legal professionals said they had experience advising clients who could get out of jail by pleading guilty but would have to remain in jail awaiting trial if they pleaded not guilty (51 per cent said they had significant experience, and 32 per cent said they had experience but not much); 16 per cent said they did not have experience with this, and 1 per cent said they preferred not to answer. (The full set of responses regarding the legal professionals' experience in this area are available from the author.)

2012/08/remand-thematic.pdf> (noting that 29 per cent of remand prisoners said they had spent less than two hours out of their cells each day, only 42 per cent had spent more than four hours out of their cell, and only 41 per cent of remand prisoners said they had access to outside exercise three or more times a week).

Some legal professionals had no experience with this and/or believed the situation did not occur or occurred rarely (for example, ‘This rarely happens. Most defendants are in prison on bail for serious matters which are going to have longer sentences than the time served’). However, many responses suggested that pleading guilty to get out of jail was a relatively common occurrence:

I have advised clients in this situation as the time it takes to get to trial these days this is not an uncommon scenario. Most defendants value their freedom and take pragmatic approach and plead guilty.

Liberty is a highly persuasive factor in a defendant’s choice as to plea.

I have practiced in Criminal Defence work since 1993. The above is a regular occurrence.

Responses provide important insight into what are likely to be the most common cases in which defendants are able to secure release by pleading guilty when otherwise they would be remanded in custody, and where this may make it unreasonable to exercise their right to a full trial. Common themes include cases where the defendant would receive a sentence of time served by pleading guilty:

It is not uncommon for a prisoner who has been on remand to find themselves in a position where they are likely to be released immediately (on time served) if they plead guilty rather than risking conviction at trial

and cases where the defendant has no fixed abode and so is denied bail even where the offence involved is relatively minor:

This is particularly acute with homeless or foreign national defendants who, due to their personal circumstances are refused bail, despite facing relatively minor offences.

People who have no fixed abode rarely get bail – the court will take the view that they are unlikely to come back to court on bail. So, if they plead not guilty their case is adjourned for a trial and they are remanded to prison. Frequently the sentence they would serve if they pleaded guilty is less than the time they spend on remand.

Typically, cases where client is of no fixed abode in the UK.

Responses also identified domestic violence cases as cases in which this was particularly likely to be a risk:

It particularly occurs in domestic violence cases where a non-custodial outcome is highly feasible on conviction. The defendant may have no other address to offer the court or has already breached a restraining order such that bail becomes problematic for them.

This issue tends to arise out of DV [domestic violence] cases where prosecutors are sensitised by the fear of bad publicity to ask for remands in custody out of fear that they are going to be ‘that prosecutor’ who agreed a bail package only to have the defendant seriously harm or kill a complainant. The problem is that the offences committed are rarely serious enough to merit immediate custodial sentences but the courts remand defendants until trial with the outcome being that their livelihoods are destroyed before the matter comes to trial.

It could easily happen in a domestic violence case because the defendant may not have an address for bail (as he was previously living with the victim), yet a guilty plea to a common assault won't usually result in immediate imprisonment.

Domestic Violence cases in particular are normally charged as summary only offences so can carry max 6 months prison, there are grounds to have them remanded in custody but the delay to trial is longer than the likely sentence so they plead. This is prevalent in these types of cases as defendants are more likely to be remanded in custody but it applies to anyone in prison who has to weigh up likely sentence compared to delay to trial.

Thus, responses of our surveyed legal professionals suggest that there are cases in England and Wales where defendants are able to secure immediate release from custody by pleading guilty where they would be remanded in custody if they wanted to go to trial. Importantly, many responses also confirm that this is causing defendants to plead guilty often in cases involving vulnerable defendants where conditions are (at least arguably) likely to make it unreasonable to expect them to exercise their right to a full trial.

4. Pleading guilty is significantly quicker and easier than trial

(a) Description

Pleading guilty may provide a quicker and easier way to resolve a case than choosing to contest guilt at trial. Going to trial is expensive, and cuts to the legal aid system mean that some defendants are unable to afford the costs.⁷¹ Where defendants do not feel they can afford legal representation and are not able to effectively represent themselves at trial, they may feel compelled to plead guilty to save both time and money.

71 The rules about who qualifies for legal aid are set out in the Legal Aid Sentencing and Punishment of Offenders Act 2012 and accompanying regulations (primarily the Criminal Legal Aid (Financial Resources) Regulations 2013). To qualify for legal aid, a defendant must meet the interests of justice test (a merits-based test) and be financially eligible (a means-based test). In the magistrate's courts, anyone with an adjusted household income of £22,325 or more is not eligible for any legal aid. In the Crown Court, anyone with a household disposable income of £37,500 or more is not eligible for legal aid. This can be particularly harmful and even lead to bankruptcy in defendants of moderate means who must exclusively use their own disposable income and savings to fund their legal defence. This potential threat can be demonstrated by the case of Sally Clark, a solicitor who was accused of murder, whose legal fees prior to her eventual exoneration brought her family to the brink of bankruptcy and forced them to sell their house: see J. Moir, 'No redemption for Sally Clark' *Telegraph*, 21 March 2007.

(b) Make it unreasonable to expect the defendant to exercise their right to a full trial?

The strength of this incentive can be investigated by looking at the relative speed with which a matter can be resolved when a guilty plea is entered, compared to a not-guilty plea. In 2016, the average hearing time was 13.8 hours when a defendant pleaded not guilty compared to 1.6 hours when a defendant pleaded guilty.⁷² This is likely to be particularly important in low-level offences where in some cases guilty pleas may be entered online, avoiding any significant time and expense.⁷³ Defendants who may be disproportionately disadvantaged by having to take time off from work or child care may be particularly influenced by this consideration. For such defendants, this incentive has the potential to be strong enough to make it unreasonable to expect them to exercise their right to a full trial.

(c) Independent of the projected outcome at trial?

As in the case of the ability to secure release from custody, this incentive operates independently of the probability of conviction at trial. As in *Deweer*, a defendant may plead guilty not because of their projections regarding trial but because of the damage that will be done to them in awaiting and attending trial.

(d) Causing defendants to plead guilty in England and Wales?

Empirical data from the survey described above provides insight into whether the fact that pleading guilty is significantly quicker and easier than trial may be causing defendants in England and Wales to plead guilty. Surveyed legal professionals were asked: 'Do you think some defendants plead guilty just because it is quicker and easier to do so than to go to trial?' (Yes, frequently; Yes, but not often; No; Prefer not to answer). In order to provide further insight into this incentive, those who answered yes to that question were then asked to explain whether they believed that innocent as well as guilty defendants plead guilty for this reason. Ninety per cent of the legal professionals said that they do think that some defendants plead guilty just because it is quicker and easier than going to trial (34 per cent said they thought that this happened frequently, and 56 per cent said they thought that this happened, but not often). Ten per cent of legal professionals said they did not think that this happened. When asked whether they believed that this included innocent as well as guilty defendants, responses fell into three main categories: 'Yes', 'No (or very rarely)', and 'It is impossible to say since I do

72 MoJ, op. cit., n. 69.

73 A. Sulleyman, 'Criminals to plead guilty online as justice system goes digital' *Independent*, 9 February 2017, at <<https://www.independent.co.uk/life-style/gadgets-and-tech/news/plead-guilty-online-criminals-digital-court-a7571411.html>>.

not know whether clients are factually guilty', with 61 per cent of legal professionals saying yes, 26 per cent saying no, and 13 per cent that it was not possible to say (the full set of responses to this question are available from the author).

Although some legal professionals stated that innocent defendants do not plead guilty for this reason, for example:

Not innocent defendants. But it does include defendants who the Prosecution might not have been able to prove the case against.

No we would not be party and would withdraw from such cases.

many believed that they did:

I do think this does include innocent defendants and one reason is the extra cost to go to trial, especially in the magistrates' courts.

Yes – there is clearly a risk that defendants plead guilty to avoid the court process and delay that involves.

Importantly, many legal professionals cited the cost of trial as being a reason that innocent defendants may plead guilty, noting concerns regarding affording legal representation and possible prosecution costs. The responses suggest that, in England and Wales, the time and cost involved in trial are causing defendants to plead guilty, and that this is independent of the projected outcome at trial (that is, guilty pleas in these cases are not generally being entered based on consideration of risks and benefits). Therefore, where circumstances are also present that make it unreasonable to expect a defendant to exercise his or her right to a full trial (for example, the defendant suffering significant economic loss as the result of trial), fair trial rights may be undermined.

REVISTING RIGHTS RELATED TO GUILTY PLEAS IN ENGLAND AND WALES

When defendants waive their right to trial by pleading guilty, they no longer enjoy the safeguards associated with the full trial, and protected by Article 6 of the ECHR. This means that in England and Wales in 2016–17, 76.9 per cent of defendants were convicted without the safeguards of a full trial. The preceding analysis suggests that, following the *Natsvlishvili* judgment, three conditions should be satisfied in order for an incentive to plead guilty to be considered to constrain defendant choice for the purposes of the ECHR. First, the incentive should make it unreasonable to expect a defendant to exercise their right to a full trial. Second, the incentive must be independent of the projected outcome at trial. Third, the incentive must cause the defendant to plead guilty. Formal incentives to plead guilty in England and Wales may, and likely do, create a pressure to plead guilty, but this is through creating a sentence and/or charge discrepancy between plea and trial (that is, making the plea appealing compared to the potential outcome at

trial). Thus, the *Natsvlishvili* judgment seems to rule out a breach of ECHR rights, and the incentives are unlikely to undermine the voluntariness of a trial waiver under the proposed framework (although note that other requirements must be met for the waiver to be valid, for example, the requirement of knowledge of the consequences of the guilty plea).

However, formal incentives are not the only incentives that can lead a defendant to plead guilty. This article has identified two informal incentives that are leading defendants in England and Wales to plead guilty. Specifically, pleading guilty can provide an opportunity for immediate release from custody where going to trial will involve remand in custody, and the time and cost involved in going to trial can be prohibitive when compared to the time and cost involved in entering a guilty plea. Both of these incentives may make it unreasonable to expect a defendant to exercise his or her right to a full trial and cause the defendant to plead guilty, and both are independent of the projected outcome at trial. These incentives are likely to be important to the ECtHR who have emphasized the need to ‘look behind the appearances and investigate the realities of the procedure in question.’⁷⁴

These incentives are likely to be more influential to those of lower socio-economic status since they are more likely to have an urgent need to be released from custody, or find the time and costs involved in trial to be prohibitive. This can lead to those of low socio-economic status disproportionately pleading guilty independently of projected outcomes at trial, and those who can afford to go to trial having the ability to maintain their innocence and secure an acquittal at trial.⁷⁵ This is supported by empirical data collected, which highlights specific types of case where there may be a heightened risk of constrained choice to exercise trial rights based on this framework, including cases where the defendant has no fixed abode, cases involving domestic violence, and cases where legal fees are likely to be difficult for the defendant to pay. Importantly, many of these risk factors are associated with economic or social vulnerability. This is in many ways analogous to the *Deweer* case where economic pressure (rather than belief in conviction at trial or fear of potential consequences at trial) led the applicant to plead guilty rather than go to trial. Although this is not considered in any detail in this article, this may also be compared, *mutatis mutandis*, to ECtHR jurisprudence in the context of Article 11 and employment contracts, where economic constraints on an individual have been said to take away the ‘free’

⁷⁴ *Deweer*, op. cit., n. 28, para. 44.

⁷⁵ This was the case for a defendant named Erma Faye Stewart in the United States. Ms. Stewart was accused of drugs offences based on the word of a confidential informant. She was remanded in custody and pleaded guilty as she needed to get out of custody to care for her children. Co-defendants who had been able to afford to remain in custody ended up having charges against them dropped since the informant was discredited, but Ms. Stewart’s conviction remained as a result of her plea. For a discussion of this case, see J.H. Blume and R.K. Helm, ‘The Unexonerated: Factually innocent defendants who plead guilty’ (2014) 100 *Cornell Law Rev.* 157.

nature of consent.⁷⁶ Thus, analyses suggest that work needs to be done to protect defendants who are particularly vulnerable.⁷⁷ Crucially, this protection should not involve preventing defendants in vulnerable groups from pleading guilty and leaving them to suffer unreduced sentences.⁷⁸ Rather, the state has an obligation to ensure the substance of a fair trial in such cases by making a full trial, as well as plea, accessible to such defendants. This may involve providing financial assistance, or utilizing monitoring devices to allow release on bail. Where this does not happen, the defendant may claim not to have received the substance of a full trial since the decision was tainted by constraint.

The new framework developed in this article has the potential to provide insight into the types of case in which incentives to plead guilty may be found to breach fair trial rights under the ECHR. Such a framework may guide decisions as to whether to contest a guilty plea on the basis of fair trial rights. The framework should also assist policy makers in ensuring that plea procedure is consistent with Article 6 rights and current ECtHR jurisprudence. For example, regulation should, as far as possible, ensure that only defendants who will receive a custodial sentence as a result of a guilty plea are remanded in custody, and should consider the vulnerabilities of defendants remanded in custody, how to protect them from harm, and how to facilitate fair trial rights. Infrastructure should also support those wishing to contest their guilt at trial by ensuring that exercising the right to trial is not significantly costlier and more time consuming than pleading guilty. Current initiatives aimed at speeding up the administration of justice may have the opposite effect, by making it easy to plead guilty but hard to go to trial. For example, the ability to plead guilty online for petty offences improves the speed and ease with which you can plead guilty but does not directly facilitate easier access to trial for those who wish to contest guilt.⁷⁹

CONCLUSION

The proposed framework and accompanying analyses provide insight into when incentives to plead guilty should be found to undermine the voluntary nature of the waiver of trial rights under the ECHR. This framework adopts a

76 See *Sørensen and Remussen v. Denmark*, App. nos. 52563/99 and 52620/99, 11 January 2006, para. 59.

77 See, also, Peay and Player, *op. cit.*, n. 17; R.K. Helm, 'Conviction by Consent? Vulnerability, Autonomy and Conviction by Guilty Plea' (2019) 83 *J. of Criminal Law* 161.

78 Note that preventing vulnerable groups from pleading guilty would likely result in their suffering longer sentences overall, as the tendency of minority defendants to insist on trial has been shown to lead them to suffer longer sentences than white defendants: see Hood, *op. cit.*, n. 17.

79 Sulleyman, *op. cit.*, n. 73.

pragmatic approach, balancing practical realities following the *Natsvlishvili* judgment with a recognition of the importance of autonomy in guilty-plea systems, and the need to protect the most vulnerable defendants. In practice, while a more restrictive approach to incentives may be unrealistic given the current reliance on trial-waiver systems, true voluntariness may be undermined in a greater number of cases than the ECtHR is likely to acknowledge. Identifying cases in which defendant choice is clearly constrained is a vital first step in contesting constrained guilty pleas by vulnerable defendants and in opening the way for additional challenges to trial waivers in the future.