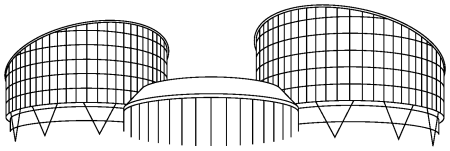

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF KAREMANI v. ALBANIA

(Application no. 48717/08)

JUDGMENT

STRASBOURG

25 September 2018

This judgment is final but it may be subject to editorial revision.

In the case of Karemani v. Albania,

The European Court of Human Rights (Second Section), sitting as a Committee composed of:

Jon Fridrik Kjølbro, *President,*
Ledi Bianku,
Ivana Jelić, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having deliberated in private on 4 September 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 48717/08) against the Republic of Albania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Albanian national, Gazmir Karemani ("the applicant"), on 29 September 2008.

2. The applicant was represented by Mr H. Demaj, a lawyer practising in Vlora. The Albanian Government ("the Government") were represented by their then Agent, Ms L. Mandia of the State Advocate's Office.

3. The applicant complained of the unfairness of the proceedings *in absentia* and breach of his defence rights.

4. On 26 June 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979. He is currently serving a prison sentence.

6. On 17 April 1999 the Fier District Court ("the District Court"), following proceedings in which the applicant did not take part, convicted the applicant and his two co-accused of a number of serious criminal offences. It sentenced the applicant to death *in absentia*.

7. On 1 June 1999 the Vlora Court of Appeal ("the Court of Appeal"), following appeals lodged by the two other co-accused, upheld the District Court's decision of 17 April 1999.

8. On 8 May 2001, following appeals lodged by the applicant's co-accused, the Supreme Court upheld the lower courts' decisions. However, it sentenced the applicant to life imprisonment.

9. On 1 December 2006 the applicant was extradited to Albania from Italy. He was officially informed of his conviction *in absentia* on the same day.

A. Application for leave to appeal out of time

10. On 8 December 2006 the applicant lodged an application with the District Court for leave to appeal out of time.

11. On 25 January 2007 the District Court dismissed the application, finding that the Supreme Court's decision of 8 May 2001 had become *res judicata* and that, consequently, the applicant could not be tried a second time for the same offence.

12. On 8 June 2007 and 2 July 2010, following the applicant's appeals, the Court of Appeal and the Supreme Court, respectively, upheld that decision.

13. On 8 June 2011 the applicant lodged a constitutional appeal against the Supreme Court's decision of 2 July 2010. He also complained about the unfairness of the proceedings *in absentia*.

14. On 21 September 2011, the Constitutional Court, sitting as a full bench, rejected the appeal by a majority. It found that the applicant's complaint against the Supreme Court's decision of 2 July 2010 was manifestly ill-founded. As regards his complaint about the unfairness of the proceedings *in absentia*, and the domestic courts' dismissal of his application for leave to appeal out of time, the Constitutional Court noted that the applicant had not complained about the domestic courts' decisions taken *in absentia* (see paragraphs 6-8 above). It further found that that complaint was in any event time-barred. It also reasoned that in the present case the Supreme Court's unifying decision no. 1 of 20 January 2011 was applicable (see *Izet Haxhia v. Albania*, no. 34783/06, §§ 28-31, 5 November 2013). In addition, it noted that although the appeals before the Supreme Court against the lower courts' decision were lodged by the co-accused and not the applicant, the Supreme Court had examined and amended the lower courts' decisions of 17 April and 1 June 1999 also in respect of the applicant.

B. Parallel constitutional appeal proceedings

15. On an unspecified date in 2007 the applicant lodged a constitutional appeal against the District Court's decision of 17 April 1999, the Court of Appeal's decision of 1 June 1999 and the Supreme Court's decision of 8 May 2001 complaining about his conviction *in absentia*.

16. On 21 September 2007 the Constitutional Court dismissed the appeal as having been lodged out of time, considering that the two-year time-limit had started to run as from 8 May 2001. The decision was communicated to the applicant's lawyer on 25 September 2007.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. The relevant domestic law and practice at the material time are described in detail in *Shkalla v. Albania*, no. 26866/05, § § 28-35, 10 May 2011, and *Izet Haxhia v. Albania*, no. 34783/06, § § 19-42, 5 November 2013.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

18. The applicant, without relying on any specific Article, complained of the unfairness of the proceedings *in absentia* and that his defence rights had been breached. He also requested the reopening of the proceedings. The Court takes the view that the applicant's complaints should be examined from the standpoint of Article 6 §§ 1 and 3 (c) of the Convention, which reads, in its relevant parts, as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require..."

19. The Government argued that there had been no violation of the applicant's rights.

A. Admissibility

20. The Government submitted that the application had been submitted outside the six-month time-limit provided for in the Convention, the six-month period starting to run on 25 September 2007, when the applicant's lawyer had been informed about the Constitutional Court's decision of 21 September 2007 (see paragraph 16 above).

21. The applicant submitted that he had exhausted all possible effective remedies. He had lodged an application to appeal out of time and a constitutional appeal with the Constitutional Court, which had both turned out to be ineffective.

22. The Court notes that this objection raises the question of the effectiveness of the remedy referred to by the Government.

23. On 21 September 2007 the Constitutional Court rejected the applicant's appeal as being time-barred. The Court confines itself to noting that in *Izet Haxhia* (cited above, § 50), it held that before 26 November 2009, the Constitutional Court was not an effective remedy. The Court must therefore consider the effectiveness of the domestic remedy of which the applicant actually availed himself, namely an application for leave to appeal out of time.

24. The Court, considering the inconsistency of the application of the domestic law at the material time (see *Izet Haxhia*, cited above §§ 25-34) as regards an application for leave to appeal out of time, finds that an application for leave to appeal was, in principle, a remedy appropriate to the applicant's situation and effective in theory. It concludes that the applicant had the right to expect that an application for leave to appeal out of time might provide a remedy in respect of his grievances.

25. The Court notes that the applicant introduced his application on 29 September 2008. At the time, the domestic proceedings concerning the applicant's application for leave to appeal out of time were still pending (see paragraphs 10-14 above). By the time the case was communicated to the Government on 26 June 2012, these proceedings had ended. However, the applicant was met with a refusal (see paragraph 12 above). The domestic courts reasoned that the conviction *in absentia* had acquired the force of *res judicata*. The Constitutional Court in its decision of 21 September 2011 also held that since the other co-defendants had appealed against the proceedings as a whole, the applicant could not apply for a leave to appeal out of time (see paragraph 14 above).

26. For all the above reasons, the Court finds that the present application had been lodged within the six-month time-limit, the final decision having been taken at least on 2 July 2010. The Court therefore rejects the Government's objection.

27. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds (see *Delijorgji v. Albania*, no. 6858/11, §§, 54-55, 28 April 2015). It must therefore be declared admissible.

B. Merits

28. The applicant submitted that the proceedings against him had been unfair as they had been held *in absentia*. He had not been aware of the investigation and trial against him, nor had the members of his family. He had been informed only when he was extradited to Albania. He had at no time waived his right to appear in court.

29. The Government maintained that the application for leave to appeal out of time had been declared inadmissible by the domestic courts. They further noted that the Constitutional Court had found that the constitutional appeal had been time-barred.

30. The Court notes that the general principles as regards proceedings *in absentia* were set out as follows in *Sejdovic v. Italy* ([GC], no. 56581/00, §§ 82-95, ECHR 2006-II):

> "82 Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted *in absentia* is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself (see *Colozza*, cited above, § 29; *Einhorn v. France* (dec.), no. 71555/01, § 33, ECHR 2001-XI; *Krombach v France*, no. 29731/96, § 85, ECHR 2001-II; and *Somogyi v. Italy*, no. 67972/01, § 66, ECHR 2004-IV) or that he intended to escape trial (see *Medenica*, cited above, § 55).
>
> 83. The Convention leaves Contracting States wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6. The Court's task is to determine whether the result called for by the Convention has been achieved. In particular, the procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial (see *Somogyi*, cited above, § 67).
>
> 84. The Court has further held that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see *Stoichkov v Bulgaria*, no. 9808/02, § 56, 24 March 2005). Accordingly, the refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a 'flagrant denial of justice' rendering the proceedings 'manifestly contrary to the provisions of Article 6 or the principles embodied therein' (ibid., §§ 54-58).
>
> 85. The Court has also held that the reopening of the time allowed for appealing against a conviction *in absentia*, where the defendant was entitled to attend the hearing in the court of appeal and to request the admission of new evidence, entailed the possibility of a fresh factual and legal determination of the criminal charge, so that the proceedings as a whole could be said to have been fair (see *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003)."

31. With regards to the applicant's complaint about a breach of his defence rights, the Court reiterates that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1. In these circumstances, the Court finds it unnecessary to examine the relevance of paragraph 3 to the case since the applicant's allegations, in any event, amount to a complaint that the proceedings were unfair. It will therefore confine its examination to that point (see *Shkalla*, cited above, § 67).

32. The Court notes that in the present case the applicant was tried and convicted *in absentia*. It has not been shown that the applicant had sufficient knowledge – or, for that matter, any knowledge at all – of the legal proceedings against him. In fact, it was established that he had not been informed of the conviction *in absentia* until 1 December 2006, when he had been handed over to the Albanian authorities (see paragraph 9 above). Nor, consequently, has it been shown that he had unequivocally waived his right to appear in court by deliberately evading justice (see *Izet Haxhia*, cited above, § 63).

33. In the light of the foregoing, the Court finds that the applicant did not have the opportunity of obtaining a fresh determination of the merits of the charges against him by a court which would have heard him in proceedings compliant with the fairness guarantees of Article 6.

34. There has therefore been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

36. The applicant claimed 100,000 euros (EUR) in respect of pecuniary and EUR 50,000 in respect of non-pecuniary damage.

37. The Government did not submit any comments.

38. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

39. The Court considers that the finding of a violation constitutes sufficient just satisfaction in the present case.

40. Furthermore, the Court reiterates its findings in *Shkalla* (cited above, §§ 77-79), and *Izet Haxhia* (cited above, § 70) that when an applicant has been convicted in breach of her or his rights as guaranteed by Article 6 of

the Convention, the most appropriate form of redress would be to ensure that the applicant is put as far as possible in the position in which she or he would have been had this provision been respected. The most appropriate form of redress would, in principle, be a new trial or the reopening of the proceedings if requested.

B. Costs and expenses

41. The applicant also claimed reimbursement of lawyer's fees, to be calculated in accordance with domestic law.

42. The Government did not submit any comments.

43. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. That is to say, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the breaches found or to obtain redress (see *Gjyli v. Albania*, no. 32907/07, § 72, 29 September 2009). The Court requires itemised bills and invoices that are sufficiently detailed to enable it to determine to what extent the above requirements have been met (see Rule 60 of the Rules of Court).

44. In the present case, the Court notes that the applicant did not submit any evidence (bills or invoices) proving that costs and expenses were incurred despite having been made aware of the relevant requirements by the Registry's letter of 21 January 2013.

45. In the absence of any supporting documents submitted by the applicant, the Court will not make any award in respect of costs and expenses (see, among many other authorities, *Musci v. Italy* [GC], no. 64699/01, § 150, ECHR 2006-V (extracts) *K.U. v. Finland*, no. 2872/02, § 58, ECHR 2008; *Saliyev v. Russia*, no. 35016/03, § 81, 21 October 2010; and as a more recent example, *Goryachkin v. Russia*, no. 34636/09, § 87, 15 November 2016).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 September 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Deputy Registrar	Jon Fridrik Kjølbro President