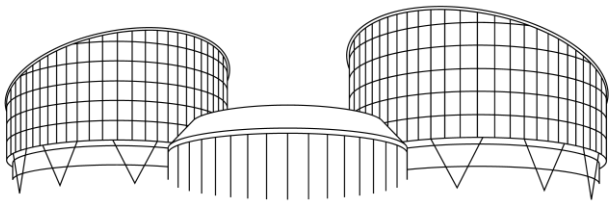

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF SHKALLA v. ALBANIA

(Application no. 26866/05)

JUDGMENT

STRASBOURG

10 May 2011

FINAL

10/08/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Shkalla v. Albania,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
Sverre Erik Jebens,
Päivi Hirvelä,
Ledi Bianku,
Vincent A. de Gaetano, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 12 April 2011,

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

PROCEDURE

1. The case originated in an application (no. 26866/05) 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, Mr Ardian Shkalla ("the applicant"), on 13 July 2005.

2. The applicant was represented by Mr A. Kasapi, a lawyer practising in Tirana. The Albanian Government ("the Government") were represented by their Agents, Ms S. Meneri and, subsequently, by Mrs E. Hajro.

3. The applicant alleged that there had been a breach of his right of access to court under Article 6 § 1 of the Convention and that the criminal proceedings against him held *in absentia* had been unfair.

4. On 16 June 2008 the President of the Fourth Section of the Court to which the case had been allocated decided to give notice of the application to the respondent Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. The applicant and the Government each filed written observations on the admissibility and merits of the case (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in Tirana in 1978 and is currently serving a sentence of life imprisonment.

A. Criminal investigation

7. On 6 June 2001 two people were killed. K was an eye-witness to the incident.

8. On 9 June 2001 the prosecutor decided to proceed with the identification of the perpetrator and invited K to participate. K was given eight photographs and he pointed to the applicant as the perpetrator, after having given a physical description of him. The applicant's lawyer was not present.

9. On 9 June 2001 the police unsuccessfully searched the applicant's home. His whereabouts were unknown.

10. On 9 July 2001 the prosecutor charged the applicant with the offences of murder in aggravating circumstances and unlawful possession of firearms. The notification of the prosecutor's charges was acknowledged by the signature of a lawyer officially-appointed to represent the applicant.

11. On 21 July 2001 the Tirana District Court ("the District Court") ordered the applicant's arrest. However, the order could not be enforced as the applicant could not be located.

12. On 3 October 2001 the police unsuccessfully conducted a further search of the applicant's home. His whereabouts remained unknown.

13. On 11 October 2001 the applicant was declared a fugitive from justice by the District Court in accordance with Article 247 of the Code of Criminal Procedure ("CCP").

B. Judicial proceedings

14. On 12 October 2001 the prosecutor decided to commit the applicant for trial. The applicant's officially-appointed lawyer was duly informed.

15. On 21 December 2001 the prosecutor submitted his final conclusions in which he requested that the applicant be sentenced to life imprisonment. On the same day the applicant's officially appointed lawyer submitted his final conclusions in which he challenged the lawfulness of the identification procedure which had been conducted in the absence of the applicant's lawyer. He requested that the sentence of imprisonment be less than twenty-

five years having regard to the fact that the applicant was not a recidivist and that he was young and had a low level of education.

16. On the same day the District Court found the applicant guilty as charged and sentenced him to life imprisonment. It would appear that the applicant was living in Greece at the material time.

17. On 28 December 2001, in accordance with Article 48 § 3 of the CCP, the applicant's father authorised a lawyer to represent the applicant and lodge all necessary appeals.

18. On 31 December 2001 the lawyer lodged an appeal against the applicant's conviction. The appeal, which also bore the applicant's signature, was based on points of fact and law.

19. On 26 April 2002, following proceedings *in absentia*, the Tirana Court of Appeal ("the Court of Appeal") upheld the District Court's decision. It found that the applicant had been declared a fugitive after unsuccessful attempts to trace his whereabouts and that the first-instance court's notifications had been addressed to his officially-appointed lawyer in accordance with the law.

20. On 17 May 2002 the applicant appealed, through his family-appointed lawyer, to the Supreme Court. He complained *inter alia* that his absence during the lower courts' proceedings had adversely affected him and that he had not been notified of the proceedings in accordance with the law. The applicant stated that he did not deny the charges against him but the circumstances of the case were unique and required a different view of the merits of the case. The appeal bore the applicant's signature and that of the lawyer appointed by his family.

21. On 15 January 2003 the Supreme Court rejected the applicant's appeal. It held that the District Court had properly notified the applicant at his home address. Moreover, his brothers and mother were summoned as witnesses at one of the first-instance court's hearings. The Supreme Court considered that the non-participation of the applicant in the trial reflected his own choice, as evidenced in his appeals, rather than of a lack of opportunity afforded by the lower courts to appear at his trial and to contest the charges. The Supreme Court dismissed, as unsubstantiated, the applicant's argument that the sentence of imprisonment would have been less severe had he attended the proceedings.

22. Still living in Greece, the applicant was informed on 14 June 2003 of the outcome of the above proceedings, namely that he had been sentenced to life imprisonment in Albania. On the same day he surrendered to the Albanian police in order to seek justice in respect of his conviction and allegedly unfair trial *in absentia*.

23. On 12 January 2005 the applicant authorised a lawyer to introduce a constitutional appeal.

24. On 15 January 2005 the applicant lodged a constitutional appeal. He stated that he had been tried *in absentia* and his interests had not been

properly defended before the first-instance court. The officially appointed lawyer had been appointed by the prosecutor instead by the court. The applicant had never been notified of any documents concerning his case. Moreover, the applicant alleged that he had been declared a fugitive on the basis of inconclusive evidence. The fact that he surrendered after the completion of his trial was a further sign that he had not been properly notified of the proceedings. He also contended that his signature on the appeals to the Court of Appeal and the Supreme Court had been forged.

25. On 1 February 2005 the Constitutional Court, having noted that the applicant's appeal had been submitted in an envelope postmarked 17 January 2005, declared the complaint inadmissible as having been filed out of time.

26. In a letter of 15 February 2005 the applicant's lawyer informed the Constitutional Court *inter alia* that, as the time-limit had expired during a weekend (on a Saturday), whereas all domestic procedural rules provided for an automatic extension of the legal time-limit to the following working day, he had posted his constitutional appeal on the following working day, namely on Monday 17 January 2005.

27. On 24 February 2005 the Constitutional Court replied that the applicant had been informed of the grounds for its decision of 1 February 2005. His complaint had been filed out of time on the basis of the postmark on the envelope in which the complaint had been sent to the Constitutional Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

28. The relevant provisions of the Constitution read as follows:.

Article 31

"During criminal proceedings, everyone has the right:

a. to be notified immediately and in detail of the charges brought against him, of his rights, and to have the possibility to notify his family or relatives;

b. to have sufficient time and facilities to prepare his defence;

c. to have the assistance of a translator free of charge, when he does not speak or understand the Albanian language;

ç. to present his own case or defend himself through the assistance of counsel of his own choosing; to communicate freely and privately with him, as well as to be provided free legal counsel when he does not have sufficient means;

d. to examine witnesses who are present and to request the appearance of witnesses, experts and other persons who can clarify the facts".

Article 32

"1. No one shall be obliged to testify against himself or his family or to confess his guilt.

2. No one shall be declared guilty on the basis of evidence collected unlawfully".

Article 33

"1. Everyone has the right to be heard before being judged.

2. A person who is seeking to evade justice may not avail himself of this right".

Article 42 § 2

"In the protection of his constitutional and legal rights, freedoms and interests, or in the event of criminal charges brought against him, everyone has the right to a fair and public hearing, within a reasonable time, by an independent and impartial court established by law".

Article 131

"The Constitutional Court shall decide: ...

(f) in a ruling that shall be final, complaints by individuals alleging a violation of their constitutional rights to a fair hearing, after all legal remedies for the protection of those rights have been exhausted".

B. The Constitutional Court Act (Law on organisation and operation of the Constitutional Court of the Republic of Albania no. 8577 dated 10 February 2000)

29. The relevant provisions of the Constitutional Court Act read as follows:

Section 1 – The scope

"...

2. The Constitutional Court shall take into account the legal provisions that regulate other procedures in so far as issues relating to procedures not governed by this Act are concerned, having regard to the legal nature of the case at issue".

Section 30

"1. The lodging of an appeal before the Constitutional Court shall be subject to the time-limits set out in this law.

2. An individual's appeal for a violation of his constitutional rights may be submitted no later than two years from the occurrence of such violation. If the law provides a remedy, the individual may lodge an appeal with the Constitutional Court after having exhausted all legal remedies for the protection of his rights. In such cases, the time-limit for the lodging of the appeal is two years from the notification of the last instance body's decision".

Section 31

"1. A preliminary review of appeals shall be conducted by a panel of three Constitutional Court judges, including the judge rapporteur.

2. If an appeal, despite being within the jurisdiction of the Constitutional Court and submitted by a person who has *locus standi* to lodge it, is not complete, the panel shall send it back to the appellant for completion, indicating the reasons for doing so and a deadline for its completion. When the appeal is completed, it shall be resubmitted for preliminary review by the panel. An incomplete appeal may not be subject to review.

3. If an appeal is lodged by an appellant claimant who has *locus standi* and the case falls within the jurisdiction of the Constitutional Court, the panel shall review the case in plenary session, whereas if it is lodged by a person without *locus standi* or if the case is not within the jurisdiction of the Constitutional Court, the panel shall not review the case in plenary session. In all cases, if one of the judges of the panel has a different opinion, the appeal shall be sent for preliminary review by the full court, which shall decide by a majority of votes whether the case shall be heard in plenary session.

4. In all the aforementioned cases the panel or the full court shall not review the merits of the case".

Constitutional Court's case-law

30. In its decision no. 8 of 12 March 2009 (no. 8/09) the Constitutional Court, having regard to the provisions of the Code of Civil Procedure and the fact that the Constitutional Court Act did not provide for the procedure to be followed in the event that an appellant renounced his right to pursue the appeal, decided to dismiss the case in accordance with section 1 § 2 of the Constitutional Court Act.

31. In its decision no. 30 of 26 November 2009 (no. 30/09) the Constitutional Court examined an appellant's request regarding the unfairness of the proceedings and his conviction *in absentia*, after his application for leave to appeal out of time had been rejected as time-barred by the Tirana District Court, the appellant not having appealed against that court's decision. In its decision, the Constitutional Court did not examine the question of the calculation of the two-year time-limit for filing a constitutional appeal in respect of the unfairness of the proceedings. It would appear that the starting date was the day on which the appellant had been notified of his conviction *in absentia*, namely 4 June 2008. The

applicant had been convicted *in absentia* by a final court decision of 24 March 2000.

C. Code of Criminal Procedure ("CCP")

32. The relevant provisions of the CCP read as follows.

Article 48 – Counsel appointed by the defendant

"1. The defendant has the right to appoint no more than two counsel.

2. The appointment is made by means of a statement before the proceeding authority or by a document given or sent by registered mail to the counsel.

3. The appointment of a counsel for a person detained, arrested or sentenced to imprisonment, unless he has appointed a counsel of his own choosing, may be carried out by his relatives in accordance with the procedure stipulated in paragraph 2 above".

Article 144 – General rules

"1. Procedural time-limits are determined in hours, days, months and years.

2. Time-limits are calculated on the basis of the ordinary calendar.

3. When a time-limit, which has been determined in days, ends at a weekend ("weekly holiday") or on a public holiday, its term is prolonged until the following working day.

..."

Article 147 – Leave to appeal out of time

"1. The prosecutor, the defendant, the private parties and the defence counsel may request the reopening of the time if they establish that they had no possibility to comply with the time-limit owing to unforeseen events or *force majeure*.

2. In the event of conviction *in absentia*, the accused may request the reopening of the time allowed for appeal against the judgment where he can establish that he had no effective knowledge.

3. A request for the reopening of the time allowed for appeal must be lodged within ten days of the date of the cessation of unforeseen events or *force majeure* [in respect of paragraph 1], and in respect of paragraph 2 [within ten days] of the date on which the defendant effectively acquires knowledge of the decision. (...)

...

5. The decision on the reopening of the time allowed for appeal [against a judgment] may be appealed against in conjunction with the decision on the merits of the case.

6. An appeal may be lodged with the Court of Appeal against the decision refusing an application for leave to appeal out of time".

Article 410 – The defendant's appeal

"...

2. The defence counsel may lodge an appeal against a conviction *in absentia* in so far as he has been provided with a power of attorney issued in accordance with the law.

..."

33. Articles 449–461 of the CCP govern the application for review of a final judgment. According to Article 451, the accused or the prosecutor may file a request for review in accordance with the limited grounds of review found in Article 450. The request is submitted to the Supreme Court which may decide to reject or accept it (Article 453).

The case-law of the domestic courts

34. On 24 March 2008, 11 November 2008, 19 January and 8 October 2009, the District Court, the Court of Appeal, the Supreme Court and the Constitutional Court, respectively, rejected the defendant's application for leave to appeal out of time on the ground that his conviction *in absentia* had acquired the force of *res judicata* and that the defendant had been effectively defended by a counsel appointed by family members (see *Sulejmani v. Albania*, no. 16114/10, communicated to the respondent Government on 31 May 2010 and pending before the Court).

35. In response to a referral request by the Supreme Court on the constitutionality of Articles 48 § 3 and 410 § 2 of the CCP, by way of decision no. 30 of 17 June 2010 (no. 30/10), the Constitutional Court decided that the appointment of a counsel by a family member should be accepted by the domestic courts in so far as it can be established that this constituted an explicit manifestation of the defendant's intention not to attend the proceedings. The same reasoning applied to a request for leave to appeal out of time made by counsel appointed by the defendant's family members. The authorities should establish that the defendant did not have effective knowledge of his conviction *in absentia* and whether the defendant had effective knowledge of the appointment of counsel by his family members.

D. Other relevant domestic legislation

36. Article 148 of the Code of Civil Procedure provides that, when a statutory time-limit expires at a weekend or on a public holiday, such time-limit will be deferred until the first working day thereafter.

37. Article 62 (b) of the Code of Administrative Law Procedure provides that the calculation of time-limits shall be suspended on a Saturday, a Sunday and a public holiday.

38. Article 2 § 1 of the Decision of the Council of Minister on the duration of working hours and holidays in State institutions (Decision no. 511 of 24 October 2002) stipulates that Saturdays and Sundays are "weekly holidays".

THE LAW

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

39. The applicant complained under Article 6 § 1 of the Convention that the Constitutional Court decision had deprived him of the right of access to court. He further alleged that the criminal proceedings *in absentia* had lacked the guarantees of fairness as required by Article 6 §§ 1 and 3 of the Convention, the relevant parts of which provide:

> "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:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (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;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

A. Scope of the case

40. The Court reiterates that it is master of the characterisation to be given in law of the facts of the case. It does not consider itself bound by the

characterisation given by an applicant or a government (see *Berhani v. Albania*, no. 847/05, § 46, 27 May 2010; and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 54, ECHR 2009-...). Notwithstanding the fact that the applicant's complaints are linked by reason of the Government's objection to the applicant's failure to exhaust domestic remedies (see paragraphs 55-63 below), the Court considers that, given the circumstances of the case, it is appropriate to address the complaints separately.

B. Right of access to court

1. Admissibility

41. Neither of the parties raised any grounds of inadmissibility in respect of this complaint.

42. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) The parties' submissions

43. The Government submitted that the three-judge formation of the Constitutional Court rejected the applicant's constitutional appeal as having been time-barred. The time-limit started to run from the date of the final decision. In the Government's view, since section 30 of the Constitutional Court Act stipulated the time-limit for lodging a constitutional appeal without providing for the procedure to be followed in a case where the time-limit expired on a week-end or a public holiday, the Constitutional Court referred to Article 144 of the Code of Criminal Procedure. The rule contained in that article did not apply to time-limits calculated in months and years, but only to time-limits calculated in days.

44. The Government added that the applicant had not substantiated his claim that he lacked the financial means to introduce a constitutional appeal at an earlier stage. In any event, they maintained that the law provided for free legal assistance for such matter, which the applicant failed to seek.

45. However, in their further comments, the Government admitted that the applicant's right of access to court had been breached on account of the dismissal of his constitutional appeal by the Constitutional Court. They stated that the Constitutional Court had erred in the calculation of the time-limit.

46. The applicant submitted that the instant case did not concern time-limits under the law of criminal procedure but constitutional

time-limits, which required interpretation by the Constitutional Court. In any event, he maintained that the time-limits under the law of criminal procedure were only calculated in days and not in months or years as contended by the Government. Were the Code of Criminal Procedure to apply to the calculation of time-limits, the time-limit for the introduction of a constitutional appeal would be extended to the following working day whenever a time-limit fell on a week-end or a public holiday.

47. The applicant considered abusive the Government's argument that legal assistance was provided to enable an appellant to lodge a constitutional appeal: no legal act existed providing for free legal aid for lodging such appeal with the Constitutional Court. The Government failed to provide any evidence to the contrary.

(b) The Court's assessment

48. The Court reiterates that it is in the first place for the national authorities, and notably the courts, to interpret domestic law and that the Court will not substitute its own interpretation for theirs in the absence of arbitrariness. This applies in particular to the interpretation by courts of rules of a procedural nature such as time-limits governing the filing of documents or the lodging of appeals (see *Tejedor García v. Spain*, 16 December 1997, § 31, *Reports of Judgments and Decisions* 1997-VIII; and, *Miragall Escolano and Others v. Spain*, nos. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98, § 33, ECHR 2000-I).

49. The "right to a court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired; lastly, such limitations will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim pursued (see *García Manibardo v. Spain*, no. 38695/97, § 36, ECHR 2000-II).

50. Turning to the facts of the present case, the applicant's constitutional appeal was rejected by the Constitutional Court as having been lodged out of time. The parties dispute the manner of calculation of the time-limit by the Constitutional Court.

51. The Court notes that the Constitutional Court Act provides for a two-year time-limit for lodging a constitutional appeal. The time-limit starts to run from the date of the notification of the decision of the last-instance court. It is further noted that the Constitutional Court Act does not contain any procedural rules for the calculation of the two-year time-limit, and,

notably, in a case where the expiry of the time-limit falls on a public or weekly holiday. However, it provides that, when confronted with procedural issues, the Constitutional Court should refer to other procedural rules having regard to the legal nature of the case (see sections 1 and 30 of the Constitutional Court Act in paragraph 29 above as well as paragraph 30 above).

52. In the instant case, the Constitutional Court calculated the running of the two-year time-limit from the date of pronouncement of the Supreme Court's decision on 15 January 2003. Even assuming that the starting date for the calculation of the two-year time-limit was indeed 15 January 2003, the Court is not convinced that the applicant lodged his constitutional appeal out of time. The Court notes that the statutory time-limit expired on 15 January 2005, which fell on a Saturday. Having regard to the fact that Saturday is a weekly holiday (see paragraph 38 above) and taking account of the manner of calculation of time-limits under Article 144 § 3 of the CCP (see paragraph 32 above), the Court considers that the time-limit should have been automatically extended to the following working day, which in the present case was 17 January 2005. The applicant's constitutional appeal was in fact postmarked 17 January 2005 and therefore his appeal should have been taken to have complied with the statutory time-limit. The Government conceded this fact in their further comments.

53. Moreover, the Court notes that the applicant's proceedings and conviction were conducted *in absentia*. It results from the information in the case file that the applicant took cognisance of his conviction *in absentia* only on 14 June 2003, on which date he surrendered to the authorities. The Court therefore considers that the starting date for the running of the statutory time-limit for the applicant to lodge a constitutional appeal should have been, at the latest, 14 June 2005 (see also the Constitutional Court's case-law referred to in paragraph 31 above).

54. The Court considers that the impugned decision amounted to an unjustified denial of the applicant's right of access to the Constitutional Court. There has accordingly been a violation of Article 6 § 1 of the Convention.

C. Unfairness of the criminal proceedings *in absentia*

1. Admissibility

(a) The parties' submissions

55. The Government submitted that the applicant had not exhausted domestic remedies. He could have lodged a request for leave to appeal out

of time in accordance with Article 147 of the CCP or filed a request for the revision of a final judgment in accordance with Article 450 of the CCP.

56. The applicant contended that an action for leave to appeal out of time was not an ordinary means of appeal. He further argued that the unfairness of the criminal proceedings against him could not have been remedied by a request for review of a final judgment. Instead, he had had recourse to the Constitutional Court pursuant to Article 131 (f) of the Constitution after the domestic courts had finally ruled on the merits of his case.

(b) The Court's assessment

57. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before the Court to use first the remedies provided by the national legal system. The complaints should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (see, amongst others, *Laska and Lika v. Albania*, nos. 12315/04 and 17605/04, § 41, 20 April 2010).

58. Turning to the present case, the Court recalls that it has ruled that a request for the review of a final decision is an extraordinary remedy, which cannot, as a general rule, be taken into account for the purposes of applying Article 35 § 1 of the Convention (see *Laska and Lika*, cited above, §§ 50-51).

59. The Court further notes that Article 147 of the CCP provides an accused with the possibility of requesting leave to appeal out of time. However, the Government failed to provide the Court with domestic case-law on the interpretation in practice of the provisions of that article. The Court reiterates that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV; and, more recently, *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, § 70.., ECHR 2010-...).

60. In addition, the Court notes that, on appeal, the applicant was defended by counsel appointed by members of his family. The Court considers that, had the applicant lodged an application for leave to appeal out of time, the effectiveness of such an application must be considered to be open to doubt, having regard to the domestic courts' decisions in other

cases where an accused's application for leave to appeal out of time was rejected, *inter alia*, on the ground that he had been represented in court proceedings *in absentia* by counsel appointed by his family (see paragraph 34 above). The Court is therefore not persuaded that an application for leave to appeal out of time, when the applicant had been represented on appeal by a lawyer appointed by his family, would have had realistic prospects of success.

61. Notwithstanding the above observations, the Court will examine whether the applicant was indeed required to have recourse to any other domestic remedy. In this connection, the Court reiterates that in the event of there being a number of remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance (see *Croke v. Ireland* (dec.), no. 33267/96, 15 June 1999). In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Moreira Barbosa v. Portugal* (dec.), no. 65681/01, ECHR 2004-V).

62. It would appear that an appeal to the Constitutional Court is an effective remedy for challenging a conviction *in absentia* (see paragraph 31 above). However, in the instant case, the Constitutional Court rejected the applicant's appeal, on grounds which the Court has found to be incompatible with Article 6 § 1, as noted in paragraphs 48-54 above.

63. The Court therefore rejects the Government's objections. The Court notes that this complaint is not manifestly ill-founded. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) The parties' submissions

64. The Government submitted that the applicant was nowhere to be found. As a result, the notifications were sent to his officially appointed lawyer in accordance with the law. The domestic courts declared him to be a fugitive from justice and continued the proceedings *in absentia* after unsuccessful attempts to trace him. The applicant had been assisted by a court-appointed lawyer, who was notified of all actions and had participated and represented him during the criminal investigation and the court proceedings.

65. The applicant submitted that the authorities had intentionally tried him *in absentia* without having conducted a full search of his whereabouts. He contended that the officially appointed lawyer had been appointed by the prosecutor and not by the domestic courts. He alleged that he had not been notified in person of any acts, at least not until the moment his detention was ordered by the District Court, when he was still presumed to be at large.

(b) The Court's assessment

66. The Court notes that the general principles as regards proceedings *in absentia* have been described in *Sejdovic v. Italy* [GC], no. 56581/00, §§ 81-95, ECHR 2006-II.

67. The Court further recalls that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 (see *Edwards v. the United Kingdom*, 16 December 1992, § 33, Series A no. 247-B). In the circumstances of the case it 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 have been unfair. It will therefore confine its examination to this point.

68. In the instant case, the Court observes that after at least two unsuccessful searches of the applicant's home, the applicant was declared a fugitive from justice by the domestic courts on 11 October 2001. A lawyer was appointed to represent him and notified of the charges against the applicant. It was not disputed that the applicant had not received any official information about the charges or the date of his trial.

69. The Court will further examine whether in the absence of an official notification, the applicant may be regarded as having been sufficiently aware of his prosecution and trial to the effect that he might be considered to have waived his right to appear in court.

70. In previous cases concerning convictions *in absentia*, the Court has held that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge cannot suffice (see *T. v. Italy*, cited above, § 28, and *Somogyi v. Italy*, no. 67972/01, § 75, ECHR 2004-IV). The Court cannot, however, rule out the possibility that certain established facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to avoid prosecution. This may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest (see, among other authorities, *Iavarazzo v. Italy* (dec.), no. 50489/99, 4 December 2001), or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces.

71. In the present case, the Court notes that the appeals to the Court of Appeal and the Supreme Court bore the applicant's signature. However, in his constitutional appeal the applicant disputed the authenticity of the signature. As the constitutional appeal was declared inadmissible, the applicant was deprived of the opportunity to present his case to the

Constitutional Court to the effect that the signature was not his and that, consequently, he had not had effective knowledge of the proceedings against him.

72. The fact that the applicant was defended on appeal by a counsel appointed by his father does not mean that he had prior effective knowledge of the proceedings against him. The domestic courts did not examine this question at all and the Government did not submit any proof to the contrary.

73. Finally, the mere absence of the applicant from his home is insufficient to consider that he was aware of the proceedings and, consequently, had escaped. Furthermore, it does not appear that any searches were conducted elsewhere in the country or abroad (see *Ay Ali v. Italy*, no. 24691/04, § 44, 14 December 2006; and, *Zunic v. Italy*, no. 14405/05, § 60, 21 December 2006). Moreover, it transpires from the case file that the applicant surrendered to the authorities in order to challenge his conviction *in absentia* as soon as he took cognisance of the sentence imposed on him.

74. In these circumstances, the Court considers that it has not been shown that the applicant had sufficient knowledge of the legal proceedings against him, that he explicitly or implicitly authorised his family members' actions on appeal, or unequivocally waived his right to appear in court by deliberately evading justice.

75. As to whether domestic law afforded him with sufficient certainty the opportunity of having a new trial, the Court recalls its conclusions regarding the lack of effective remedies available to the applicant and the lack of success of those remedies attempted (see paragraphs 57–63 above).

76. There has therefore been a violation of Article 6 § 1 of the Convention in the instant case on account of the unfairness of the proceedings and of the applicant's conviction *in absentia*.

II. APPLICATIONS OF ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

77. Article 46 provides:

Article 46

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

78. The Court reiterates below its findings in *Laska and Lika*, cited above.

"74. In the instant case, the Court found that the applicants' right to a fair trial had been seriously breached by the domestic authorities. The Court observes that when an applicant has been convicted in breach of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial de novo or the reopening of the proceedings, if requested (see *Caka v. Albania*, no. 44023/02, § 122, 8 December 2009; *Salduz*, cited above, § 72; *Xheraj v. Albania*, no. 37959/02, § 82, 29 July 2008; *Öcalan v. Turkey* [GC], no. 46221/99, § 210 in fine, ECHR 2005-IV).

75. The Court accordingly considers that, in the instant case, a retrial or the reopening of the case, if requested by the applicant, represents in principle an appropriate way of redressing the violation. This is in keeping with the guidelines of the Committee of Ministers, which in Recommendation No. R (2000) 2 called on the States Parties to the Convention to introduce mechanisms for re-examining the case and reopening the proceedings at domestic level, finding that such measures represented "the most efficient, if not the only, means of achieving restitution in integrum" (see paragraph 33 above). (...)

76. The Court notes that the respondent State's criminal legal system does not provide for the possibility of re-examining cases, including reopening of domestic proceedings, in the event of this Court's finding of a serious violation of an applicant's right to a fair trial. It is not for the Court to indicate how such a possibility is to be secured and what form it is to take. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its obligation to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (see *Piersack v. Belgium* (Article 50), 26 October 1984, § 12, Series A no. 85), provided that such means are compatible with the conclusions set out in the Court's judgment and with the rights of the defence (see *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX).

(...)"

79. The Court considers that there is no reason to depart from these findings.

B. Article 41 of the Convention

80. Articles 41 of the Convention provides as follows:

Article 41

"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."

1. Damage

81. The applicant claimed 7,000 euros ("EUR") in respect of pecuniary damage and EUR 30,000 in respect of non-pecuniary damage. He submitted that the pecuniary damage related to his expenses in prison such as foodstuffs, medicines and telephone cards.

82. The Government did not submit any comments.

83. The Court reiterates that it will award sums for just satisfaction under Article 41 where the loss or damage alleged has been caused by the violation it has found (see *Sejdovic*, cited above, § 131).

84. In the instant case, the Court makes no award in respect of pecuniary damage as no causal link has been established between the violation it has found and the claims made by the applicant.

85. With regard to non-pecuniary damage, the Court considers that, in the circumstances of the case, the finding of a violation constitutes in itself sufficient just satisfaction (see, amongst others, *Popovitsi v. Greece*, no. 53451/07, § 36, 14 January 2010; *Zunic*, cited above, § 72; *Ay Ali*, cited above, § 57; and, *Sejdovic* cited above, § 134). The Court recalls in this connection its observations in paragraphs 78 and 79 as regards the appropriate form of redress for the violations it has found.

2. Costs and expenses

86. The applicant claimed EUR 7,000 for the costs and expenses incurred in the Strasbourg proceedings, which were broken down into EUR 2,000 in respect of translation costs and EUR 5,000 in respect of legal fees.

87. The Government did not make any comments.

88. Having regard to the information in its possession and to its relevant practice, the Court considers it reasonable to award the applicant EUR 4,000.

3. Default interest

89. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

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 on account of an unjustified denial of the applicant's right of access to the Constitutional Court;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the unfairness of the proceedings and of the applicant's conviction *in absentia*;

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

5. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,000 (four thousand euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	Nicolas Bratza
Registrar	President