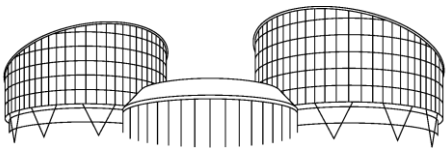

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF IZET HAXHIA v. ALBANIA

(Applications no. 34783/06)

JUDGMENT

STRASBOURG

5 November 2013

FINAL

05/02/2014

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

In the case of Izet Haxhia v. Albania,

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

Ineta Ziemele, *President,*
David Thór Björgvinsson,
George Nicolaou,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Paul Mahoney, *judges,*
Altina Xhoxhaj, *ad hoc judge,*

and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 15 October 2013,

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

PROCEDURE

1. The case originated in an application (no. 34783/06) 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 Izet Haxhia ("the applicant"), on 28 August 2006.

2. The applicant was represented by Messrs. F. Shanaj and Sh. Dizdari, lawyers practising in Tirana. The Albanian Government ("the Government") were initially represented by their then Agents, Ms S. Mëneri of the Albanian Ministry of Foreign Affairs and Mrs E. Hajro of the State Advocate's Office and, subsequently, by Ms L. Mandia of the State Advocate's Office.

3. Mr Ledi Bianku, the judge elected in respect of Albania, was unable to sit in the case (Rule 28 of the Rules of Court). Accordingly, the President of the Chamber decided to appoint Ms Altina Xhoxhaj to sit as an *ad hoc* judge in his place (Rule 29 § 1(b)).

4. The applicant alleged a number of violations under Articles 5, 6 and 7 of the Convention.

5. On 17 March 2008 the President of the Fourth Section, to which the case was 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).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1966. He used to be the bodyguard of the then Albanian President, Mr Sali Berisha. At the time of the introduction of the application, he was detained in Turkey pending the outcome of his extradition to Albania.

7. On 12 September 1998 at about 9.15 p.m. Mr Azem Hajdari, a Member of Parliament ("MP"), and his bodyguards B.C and Z.N were shot as they came out of the Democratic Party ("DP") headquarters in Tirana. Mr Hajdari and B.C died the same day in hospital. The second bodyguard Z.N was seriously injured. Mr Hajdari was a leading member of the DP which was one of the two main political parties in Albania and, at the material time, in opposition. A criminal investigation was opened into the murder.

8. On 13 January 2001 the prosecutor's office issued an arrest warrant in respect of the applicant, on suspicion of involvement in the assassination of the MP and of one of his bodyguards as well as in the attempted murder of the other bodyguard. The arrest of four other people in connection with the murder was also ordered by the prosecutor.

9. On 31 January 2001 the Tirana District Court ("District Court") ordered the applicant's arrest. He was represented by a court-appointed lawyer.

10. On 3 March 2001 the District Court declared the applicant a fugitive after unsuccessful attempts to locate him. The decision stated that the applicant's family did not know of his whereabouts. His neighbours had also mentioned that no one had lived in the applicant's residence for two years.

11. On 13 March 2001 the prosecutor lodged a bill of indictment with the District Court. The applicant and four other co-accused were indicted on charges of having participated in, or organised, the assassination of the MP, his bodyguard and the attempted murder of civilians.

12. The trial proceedings against the applicant were conducted *in absentia*. He was represented by a lawyer appointed by his family in accordance with Article 48 § 3 of the Code of Criminal Procedure ("CCP").

13. On 29 April 2001 the District Court convicted the applicant *in absentia*. He was sentenced to twenty-five years' imprisonment.

14. The applicant's family-appointed lawyer as well as the co-accused appealed against the conviction to the Court of Appeal and the Supreme Court.

15. On 9 July 2002 and 14 February 2003 the Court of Appeal and the Supreme Court, respectively, upheld the District Court's decision. The applicant was represented by the family-appointed lawyer.

16. The applicant's family-appointed lawyer did not lodge a constitutional appeal, owing to the lack of a power of attorney to do so. The constitutional appeals of two of the co-accused, concerning the overall unfairness of the proceedings, were declared inadmissible by the Constitutional Court on 9 July 2003 on the ground that the appeals did not disclose a breach of the right to a fair trial.

17. A detailed account of the facts, the criminal investigation and the domestic courts' decisions has been described in *Haxhia v. Albania*, no. 29861/03, 8 October 2013, not yet final and *Mulosmani v. Albania*, no. 29861/03, 8 October 2013, not yet final.

18. On 3 June 2006 the applicant was arrested by the Turkish authorities, apparently on the basis of an arrest warrant issued by the Albanian authorities. It would appear that the Albanian authorities requested the applicant's extradition. A copy of the extradition request has not been submitted to this Court. No further information has been provided by the parties as to the outcome of the extradition proceedings in Turkey.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Domestic law

1. Code of Criminal Procedure ("CCP)

19. The relevant provisions of the CCP as regards the appointment of and representation by a counsel read as follows:

> **Article 48 – Counsel appointed by the accused**
>
> "1. The accused has the right to appoint no more than two lawyers.
>
> 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 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".

20. The relevant provisions of the CCP as regards an application for leave to appeal out of time read as follows:

"**Article 147 – Leave to appeal out of time**

"1. The prosecutor, the accused, the private parties and the defence counsel may request the reopening of the time-limit 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 appealing against the decision if he can establish that he has not been notified of the decision.

3. An application for the reopening of the time allowed for appeal must be lodged within ten days of the date ... on which the defendant effectively acquires knowledge of the decision. Leave to appeal out of time cannot be granted more than once in respect of each party and of each stage of the proceeding".

4. The application is examined by the court seized at the time of its introduction (*për kërkesën vendos organi që procedon në kohën e paraqitjes së saj*).

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 148 – The effects of leave to appeal out of time

"1. The court which grants leave to appeal out of time, upon request of the party and in so far as it is possible, orders that those actions in which the party was entitled to participate be carried out again."

21. Articles 449–461 of the CCP govern the application for review of a final judgment.

Article 450 – Cases for review

An application for review may be lodged:

a) when the facts of the grounds of the decision do not comply with those of another final decision;

(b) when the decision has relied on a civil court decision which has subsequently been quashed;

(c) when, subsequent to the decision, new evidence has emerged or has been found which independently or along with previous evidence proves that the decision is wrong; and

(d) when it is proved that the decision was given as a result of the falsification of judicial acts or another fact prescribed by law as a criminal offence".

22. An application for review should be lodged with the Supreme Court.

2. The Act on Jurisdictional Relations with Foreign Authorities in Criminal Matters (Law no. 10193 of 03.12.2009 "Për Marrëdhëniet Juridiksionale me Autoritetet e Huaja në Çështjet Penale" – The Jurisdictional Relations in Criminal Matters Act)

23. Section 51 § 4 of the Jurisdictional Relations in Criminal Matters Act states that "a final criminal decision against an extradited person, which was delivered in his absence, can be reviewed at that person's request, provided that the Minister of Justice gave such an assurance to the requesting State. The application for review should be submitted within 30 days of the applicant's arrival in the territory of Albania and its examination is subject to the provisions of the Code of Criminal Procedure".

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)

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

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".

C. Domestic case-law

1. As regards an application for leave to appeal out of time

(a) Lower courts' case-law

25. On 3 May 2007 and 10 October 2007 the Gjirokastra District Court granted two accused's applications for leave to appeal out of time against their conviction *in absentia*. The accused made their applications following their extradition to Albania. In the meantime, they have lodged two separate applications with this Court (*Hysi v. Albania,* no. 72361/11 and *Malo v. Albania,* no. 72359/11) about the fairness of the re-trial. Those applications are pending on the date of the adoption of the present judgment.

26. On 2 November 2010 the Shkodra District Court granted an accused's application for leave to appeal out of time against his conviction *in absentia*. The accused made that application following his extradition to Albania (see the Supreme Court's decision no. 37/2011 for more information).

(b) Supreme Court's case-law

27. In its unifying decision no. 2 of 14 October 2002, the Supreme Court Joint Benches ruled that, having regard to its strictly personal character, an application for leave to appeal out of time should be lodged only by the accused or by a lawyer appointed by him, within ten days of the date on which the accused was effectively informed of the decision given *in absentia* (decision no. 2/2002). This right could not be exercised by the accused's family members if the accused was not realistically aware of the decision *in absentia*. The application for leave to appeal out of time shall be examined by the District Court, sitting in a three-judge formation. The District Court's decision can be appealed to the Court of Appeal and, thereafter, to the Supreme Court. However, the last finding was rectified by the Constitutional Court's decision no. 31/2012 (see paragraph 36 below).

28. In its unifying decision no. 1 of 20 January 2011, the Supreme Court Joint Benches examined three issues concerning an application for leave to appeal out of time (decision no. 1/2011). The appellant had been convicted *in absentia*. His family-appointed lawyer was first granted leave to appeal out of time against the conviction *in absentia* to the Court of Appeal. The lawyer's subsequent appeals on the merits of the case were rejected by the Court of Appeal and the Supreme Court. Following his extradition to Albania, the appellant was granted leave to appeal out of time against the Court of Appeal's judgment to the Supreme Court. He was represented by a lawyer of his own choosing in the proceedings before the Supreme Court Joint Benches.

29. In the first place, the Supreme Court Joint Benches ruled that, when an appeal had been previously examined and rejected by a Supreme Court's bench, in proceedings *in absentia* in which the accused was represented by a family-appointed lawyer in accordance with Articles 48 § 3 and 410 § 2 of the CCP, neither the accused nor his lawyer could (re)lodge an application for leave to appeal out of time against a Court of Appeal's decision on the grounds that the accused had not been informed of the decision *in absentia* (*me pretendimin se i pandehuri nuk është vënë në dijeni të vendimit*) as this would run counter to the principle of *res judicata*. The same reasoning would apply to an application for leave to appeal out of time against a District Court's decision.

30. Secondly, the Supreme Court Joint Benches held that only when a higher court dismissed an appeal as having been time-barred, without examining the merits or the lawfulness of the complaints raised in the grounds of appeal, would the accused have a right to lodge an application for leave to appeal out of time in accordance with Article 147 § 1 of the CCP.

31. The third finding concerned the effect of an appeal lodged by an accused, in the absence of a co-accused's appeal, on the latter's application for leave to appeal out of time. The Supreme Court Joint Benches held that, as a rule, "in criminal proceedings against several co-accused, the court should not grant an accused's application for leave to appeal out of time, if it is proved that the [merits of the] case were examined upon the appeal lodged by a co-accused". However, "only when a[n] [co-accused's] appeal has been declared inadmissible on the strength of Article 420 of the CCP [non-compliance with formal requirements] and, only when the court solely examined [the merits of] that co-accused's appeal, can the accused, who did not lodge an appeal, seek leave to appeal out of time against a court's decision given *in absentia*".

32. On 5 October 2011, following two accused's applications for leave to appeal out of time, the Supreme Court, relying on its unifying decision no. 1/2011, rejected those applications (decisions nos. 121/2011 and 122/2011). The Supreme Court held that the accused's lawyers, who had been appointed by family members in accordance with Articles 48 § 3 and 410 § 2 of the CCP, had previously and unsuccessfully appealed against the accused's conviction *in absentia* to both the Court of Appeal and the Supreme Court. Consequently, their conviction *in absentia* "had acquired the force of *res judicata*" which barred any re-trial.

33. Following extradition from Italy, an accused lodged an application for leave to appeal out of time. On 12 October 2011 the Supreme Court, relying on its unifying decision no. 1/2011, rejected that application on the ground that the accused's family-appointed lawyer had previously and unsuccessfully appealed against the accused's conviction *in absentia* to both the Court of Appeal and the Supreme Court (decision no. 130/2011).

34. On 5 September 2012 the Supreme Court, relying on its unifying decision no. 1/2011, held, *inter alia*, that the lower court had erred in granting the accused leave to appeal out of time, since the accused's family-appointed lawyer had previously and unsuccessfully appealed against his conviction *in absentia* (decision no. 218/2012).

(c) Constitutional Court's case-law

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

36. In response to a referral request by the Supreme Court on the constitutionality of Article 147 §§ 4 and 6 of the CCP, the Constitutional Court, by decision no. 31 of 17 May 2012 (decision no. 31/2012), clarified that the term "the court seized" provided for in Article 147 § 4 referred to the court against which decision the accused is seeking leave to appeal out of time. If the accused sought leave to appeal against an appellate court decision, the application for leave to appeal out of time should be [lodged with and] examined by the appellate court instead of the District Court. What confused the interpretation of the above term was the use of the words "with the court of appeal" in Article 147 § 6 of the CCP. The Constitutional Court decided that those words were unconstitutional and that they could be replaced by the words "with a higher court". Since Article 147 of the CCP did not provide for the parties' [direct] right to appeal against a decision granting leave to appeal out of time (Article 147 § 5 of the CCP) as opposed to the parties' right to appeal against a decision refusing leave to appeal out of time (Article 147 § 6 of the CPP), the Constitutional Court further held that the legislature should separately provide for the parties' right to appeal against the granting of the application for leave to appeal out of time prior to the examination of the merits of the appeal. The law as it stood meant that, in the examination of the merits, the Supreme Court would also have to examine the lawfulness and substantiation of the application for leave to appeal out of time, which was not compatible with the nature of proceedings before that instance.

2. As regards an application for review of a final decision

37. On 17 September 2010 the Supreme Court held that an extradited person could make an application for review of the final conviction *in absentia* under Article 450 of the CCP, provided that the Minister of Justice had given an assurance to the requested State that the extradited person would be re-tried following extradition (decision no. 812/2010). In its reasoning, the Supreme Court relied on Article 3 of the Second Additional Protocol to the European Convention on Extradition which was ratified by Albania and, consequently, took precedence over national law in accordance with the Constitution as well as on section 51 § 4 of the Jurisdictional Relations in Criminal Matters Act (see paragraphs 23 above and 42 below). In that case, the appellant was extradited from Spain on the strength of the Minister of Justice's assurance that he would be given a re-trial. The Supreme Court accepted his application for review of the conviction *in absentia* under Article 450 of the CCP, in spite of the exhaustive grounds of review listed in Article 450.

38. On 19 January 2011 the Supreme Court, relying on its decision no. 812/2010, accepted an appellant's application for review of his conviction *in absentia* under Article 450 of the CCP (decision no. 9/2011). The appellant was extradited from the United Kingdom on the strength of the Minister of Justice's assurance that he would be given a re-trial.

39. On 16 February 2011 the Supreme Court accepted an appellant's application for review of his conviction *in absentia* under Article 450 of the CCP (decision no. 33/2011). The appellant was extradited from Germany on the strength of the Minister of Justice's assurance that he would be given a re-trial.

3. As regards the possibility to lodge a constitutional complaint

40. In decision no. 30 of 26 November 2009 the Constitutional Court accepted an appellant's constitutional complaint against his trial *in absentia*, following his extradition to Albania. The appellant had been convicted by a final decision of the Supreme Court on 24 March 2000 *in absentia*, and was extradited to Albania on 4 June 2008. The Constitutional Court found a breach of the appellant's right of defence on account of the domestic courts' failure to appoint a lawyer to represent him.

41. In decision nos. 83 of 5 July 2013 and 118 of 30 October 2012, the Constitutional Court found that the appellants had failed to lodge a constitutional complaint against their conviction *in absentia* within the two-year statutory time-limit, which had started to run on the date they were extradited to Albania. In both cases, the appellants were separately convicted *in absentia* by Supreme Court decisions of 2001 and 2004. They were extradited on an unspecified date in 2007, one from the United Kingdom and the other from Germany. Upon extradition, they lodged

separate applications for leave to appeal out of time, but these were rejected by the Supreme Court on 6 May 2011 and 19 January 2012 respectively. The Constitutional Court held that, having regard to the Supreme Court Joint Benches' unifying decision no. 1/2011 (see paragraph 28 above), it was not open to the appellants to lodge an application for leave to appeal out of time, as their family-appointed lawyer had previously and unsuccessfully appealed against their conviction *in absentia*. The appellants should have lodged their constitutional complaints within the two-year statutory time-limit, which had started to run on the date of their extradition to Albania, when they had been notified of the decisions given *in absentia*. Instead, they had lodged them upon the conclusion of the proceedings concerning their application for leave to appeal out of time, after the expiry of the two-year statutory time-limit.

D. International law

European Convention on Extradition

42. The European Convention on Extradition was ratified by Albania on 19 May 1998 and it entered into force on 17 August 1998. Article 3 of its Second Additional Protocol states as follows:

> **"Article 3 – Judgments *in absentia***
>
> 1. When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him in absentia, the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence. However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence. This decision will authorise the requesting Party either to enforce the judgment in question if the convicted person does not make an opposition or, if he does, to take proceedings against the person extradited.
>
> 2. When the requested Party informs the person whose extradition has been requested of the judgment rendered against him in absentia, the requesting Party shall not regard this communication as a formal notification for the purposes of the criminal procedure in that State".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

43. The applicant alleged that the criminal proceedings and conviction *in absentia* were unfair within the meaning of Article 6 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. Admissibility

1. The parties' submissions

44. The Government raised two main grounds of inadmissibility. In the first place, they argued that the application had been lodged outside the six-month time-limit. Secondly, they contended that the applicant had failed to exhaust domestic remedies. He did not lodge a constitutional appeal with the Constitutional Court to complain about the unfairness of the proceedings. He did not make an application for either the review of the final conviction *in absentia* under Article 450 of the CCP or for leave to appeal out of time in accordance with Article 147 of the CCP.

45. The applicant submitted that he lodged the application with the Court after he was arrested by the Turkish authorities, when he was informed for the first time of the Albanian authorities' decisions given *in*

absentia. As regards the exhaustion of domestic remedies, he argued that they were ineffective.

2. The Court's assessment

(a) As regards non-compliance with the six-month time-limit

46. The Court reiterates that it "may only deal with [a] matter ... within a period of six months from the date on which the final decision was taken" (see, amongst others, *Alimuçaj v. Albania*, no. 20134/05, § 139, 7 February 2012; and *Paul and Audrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 7 June 2001). The six-month period starts to run from the date on which the applicant has effective and sufficient knowledge of the final domestic decision (see, amongst others, *Baghli v. France*, no. 34374/97, § 31, ECHR 1999-VIII). It is for the State which relies on the failure to comply with the six-month time-limit to establish the date when the applicant became aware of the final domestic decision (*Şahmo v. Turkey* (dec.), no. 37415/97, 1 April 2003).

47. In the present case, the Court notes that the applicant's conviction *in absentia* was upheld by the Supreme Court's final decision of 14 February 2003. The applicant was informed of that decision on 3 June 2006 when he was arrested by the Turkish authorities. This has not been disputed. He lodged the application with this Court on 28 August 2006, within the six-month time-limit of the notification of his conviction *in absentia*. In these circumstances, the Court rejects the Government's objection.

(b) As regards non-exhaustion of domestic remedies

(i) Failure to lodge a constitutional appeal

48. The Court reiterates that applicants are only obliged to exhaust domestic remedies which are available in theory and in practice at the relevant time and which they can directly institute themselves – that is to say, remedies that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success (see, for example, *Sejdovic v. Italy* [GC], no. 56581/00, § 46, 1 March 2006). Furthermore, the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court, although this rule is subject to exceptions which might be justified by the specific circumstances of each case (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V, and *Babylonová v. Slovakia*, no. 69146/01, § 44, ECHR 2006-VIII).

49. In the instant case, the Court notes that the applicant's conviction *in absentia* was upheld by the Supreme Court on 14 February 2003. It would

not have been open to the applicant to lodge a constitutional appeal within two years of the date of the Supreme Court's decision, since it was established that he had not learned of his conviction in absentia until 3 June 2006, when he was arrested by the Turkish authorities (see *Shkalla v. Albania*, no. 26866/05, §§ 52 and 53, 10 May 2011, in which the Constitutional Court, on 1 February 2005, declared the applicant's constitutional complaint time-barred, the time-limit having started to run on the date of delivery of the Supreme Court's decision given *in absentia* instead of the moment the applicant was informed of the Supreme Court's decision). Accordingly, at the time of lodging his application with this Court, the applicant could not have been expected to lodge a constitutional complaint, which at the time did not offer him any reasonable prospect of success (see *Pikić v. Croatia*, no. 16552/02, §§ 30-32, 18 January 2005). The Government did not submit any evidence to the contrary, and there are no special circumstances which would justify making an exception to that rule (compare and contrast *Balakchiev and Others v. Bulgaria* (dec.), no. 65187/10, 18 June 2013; *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, ECHR 2010; *Nogolica v. Croatia* (dec.), no. 77784/01, 5 September 2002; *Andrášik and Others v. Slovakia* (dec.), nos. 57984/00, 60237/00, 60242/00, 60679/00, 60680/00, 68563/01 and 60226/00, ECHR 2002-IX; *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX). The Court therefore rejects this objection.

50. However, having regard to the developments in the Constitutional Court's case-law (see paragraphs 40 and 41 above), the Court would accept that, after 26 November 2009, in cases similar to the present one, applicants cannot be discharged from their obligation to lodge a constitutional complaint against their trial and conviction *in absentia* as soon as they are extradited to Albania and served with a copy of the decision given *in absentia*.

51. For the Court, the question is whether the applicant had a means to seek the reopening of proceedings held *in absentia*. The Court will revert to this matter below.

(ii) Failure to lodge an application for review of a final decision

52. The Court notes that, at the time of the introduction of the complaint and until 2010, the exhaustive grounds of Article 450 of the CCP could not have been relied on to file an application for review of a final decision, not least of a decision *in absentia*. No evidence to the contrary has been submitted by the Government. On 17 September 2010 the Supreme Court extended the application of Article 450 to allow for review of final decisions given *in absentia* in respect of an extradited person, on condition that an assurance had been given by the Minister of Justice that the extradited

person would be given a re-trial. This line of case-law has been applied by the Supreme Court in subsequent cases (see paragraphs 37-39 above).

53. Turning to the present case, while it is likely that an extradition request was made by the Albanian authorities, the Court has not been presented with the terms of any assurance given by Albania to Turkey. Nor does it have any knowledge of any concessions made so as to enable the Supreme Court to be seized under Article 450 of the CCP with a request for a re-trial. In these circumstances, the Court rejects as unsubstantiated the Government's objection under this head.

(iii) Failure to lodge an application for leave to appeal out of time

54. The Court observes that under Article 147 § 2 of the CCP an accused may lodge an application for leave to appeal out of time on condition that the conviction was given *in absentia* and that the accused was not notified of the conviction. The application for leave to appeal out of time must be lodged within ten days of the notification of the conviction *in absentia* with the court which convicted the accused (see paragraph 36 above). Under domestic case-law, the ten-day time-limit begins to run from the date on which the accused is handed over to the Albanian authorities, at which point he is supposed to be notified of the conviction *in absentia* (see the District Court's decision in paragraphs 25-26 above). Once leave to appeal out of time is granted, the accused has the opportunity of appealing against the conviction *in absentia*, by submitting factual and legal arguments he considers necessary for his defence in the course of the appeal proceedings.

55. The Court further observes that, under the recent case-law of the Supreme Court, an accused's application for leave to appeal out of time will not be granted where the family-appointed lawyer had previously and unsuccessfully appealed to the Supreme Court and where a co-accused had appealed against the decision and the merits of the case had been examined as a whole (see paragraphs 28-34 above).

56. Turning to the present case, the Court notes that not only did the applicant's family-appointed lawyer previously and unsuccessfully appeal to the Supreme Court, but the other co-accused previously and unsuccessfully appealed against all courts' decisions. In these circumstances, an application for leave to appeal out of time would be doomed to failure.

57. The Court rejects the Government's objection under this head.

(c) Conclusion

58. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Not being inadmissible on any other grounds, the complaint must therefore be declared admissible.

B. Merits

1. The parties' submissions

59. The applicant maintained that he was tried and convicted *in absentia* and that there existed no remedy to afford him the possibility of a re-trial.

60. The Government accepted that the applicant was tried and convicted *in absentia*. However, relying on the submissions in the case of *Haxhia v. Albania* (no. 29861/03), they argued that the domestic proceedings had not been unfair. They also contended that he was represented either by a court-appointed lawyer or by a family-appointed lawyer and that the applicant's defence rights were respected.

2. The Court's assessment

61. The Court recalls the general principles as regards proceedings *in absentia* described in the *Sejdovic* judgment, cited above (references omitted).

> "81. Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present (...).
>
> 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 (...) or that he intended to escape trial (...).
>
> 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 (...).
>
> 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 (...). 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" (...).

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 (...).

86. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (...). However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (...). Furthermore, it must not run counter to any important public interest (...).

87. The Court has held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from his status as a "fugitive", which was founded on a presumption with an insufficient factual basis, that he had waived his right to appear at the trial and defend himself (...). It has also had occasion to point out that, before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (...).

88. Furthermore, a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure (...). At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control (...).

89. Under the terms of paragraph 3 (a) of Article 6 of the Convention, everyone charged with a criminal offence has the right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". This provision points to the need for special attention to be paid to the notification of the "accusation" to the defendant. An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on notice of the factual and legal basis of the charges against him (...).

90. The scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (...).

91. Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (...). A person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial (...). It is of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal (...).

92. At the same time, it is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses. The legislature must accordingly be able to discourage unjustified absences, provided that any sanctions used are not disproportionate in the circumstances of the case and the defendant is not deprived of his right to be defended by counsel (...).

93. It is for the courts to ensure that a trial was fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence is given the opportunity of doing so (...).

94. While it confers on everyone charged with a criminal offence the right to "defend himself in person or through legal assistance ...", Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (...). In this connection, it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (...).

95. Nevertheless, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes or by the accused. It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether appointed under a legal aid scheme or privately financed (...). The competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or is sufficiently brought to their attention in some other way (...)."

62. It 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).

63. In the present case it was not disputed by the parties that the applicant was tried and convicted *in absentia*. It has not been shown that he had sufficient knowledge of the legal proceedings against him. In fact, it was established that he was informed of the conviction *in absentia* only on 3 June 2006, when he was arrested by the Turkish authorities. Nor has it been shown 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. Under the domestic law there was no possibility for the applicant to request a re-trial of his case (see paragraphs 48-57 above).

64. 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.

65. There has therefore been a violation of Article 6 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

66. The applicant raised complaints under Article 5 §§ 1 and 2, Article 6 § 2 as well as under Article 7 of the Convention, which are similar to those raised by two of his co-accused in the cases of *Haxhia,* cited above, not yet final and *Mulosmani,* cited above, not yet final.

67. The Court has examined the above complaints as submitted by the applicant. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

69. The applicant did not submit a claim for damages. Accordingly, the Court considers that there is no call to award him any sum on that account.

70. The Court reiterates its findings in *Shkalla v. Albania* (no. 26866/05, §§ 77-79, 10 May 2011), that when an applicant has been convicted in breach of 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 he would have been had this provision been respected. The most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings if requested (see, also, *Xheraj v. Albania*, no. 37959/02, § 82, 29 July 2008; *Caka v. Albania,* no. 44023/02, § 122, 8 December 2009, and *Laska and Lika*, cited above, §§ 73-77).

B. Costs and expenses

71. The applicant claimed ALL 200,000 (EUR 1,409) for the costs and expenses incurred before this Court and ALL 275,000 (EUR 1,937) for those incurred before the domestic courts.

72. The Government did not submit any comments.

73. 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. In the present case, regard being had to the fact that it was not clearly proved that the applicant incurred the expenses claimed before the domestic courts, the Court considers it reasonable to award the sum of EUR 1,400 for the proceedings before the Court.

C. Default interest

74. 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* admissible the applicant's complaint under Article 6 of the Convention regarding his conviction in absentia and the remainder of the application inadmissible;

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

3. *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 1,400 (one thousand four hundred euros) in respect of costs and expenses, plus any tax that may be chargeable, to be converted into the national currency at the rate applicable at the date of settlement;
   (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;

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

Done in English, and notified in writing on 5 November 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	Ineta Ziemele
Registrar	President