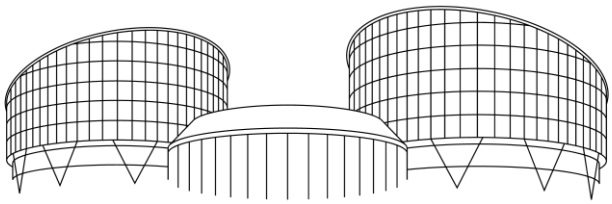

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF CANI v. ALBANIA

(Application no. 11006/06)

JUDGMENT

STRASBOURG

6 March 2012

FINAL

06/06/2012

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

In the case of Cani v. Albania,

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

Lech Garlicki, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*

and Fatoş Aracı, *Deputy Registrar,*

Having deliberated in private on 8 November 2011 and on 14 February 2012,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 11006/06) 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 Besnik Cani ("the applicant"), on 11 March 2006.

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

3. The applicant alleged that the domestic proceedings determining his sentence were unfair.

4. On 1 February 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).

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1969 and is currently serving a prison sentence in Lushnja, Albania.

Judicial proceedings against the applicant

7. Following a number of remittals of the case against the applicant and two other co-defendants, on 4 March 2004 Berat District Court ("the District Court") convicted the applicant of several criminal charges committed in collusion with the co-defendants. The District Court found that the applicant had acted in aggravating circumstances in that he had been the perpetrator of one of the criminal offences, which had led to the death of a person, whereas the co-defendants had assisted in the commission of that offence. As regards the other criminal offences, the District Court found each co-defendant guilty as charged. The District Court sentenced the applicant to a cumulative sentence of life imprisonment. As the District Court had adopted the use of the summary procedure pursuant to the Code of Criminal Procedure ("the CCP"), the applicant's sentence was commuted to twenty-five years' imprisonment.

8. During the District Court proceedings the applicant was mainly represented by court-appointed lawyers. In the final stage of those proceedings, the applicant appointed counsel of his own choosing on the strength of a power of attorney signed on 18 February 2004, which, in so far as relevant, read as follows:

> "...
>
> I hereby authorise S.S as my special counsel and representative to defend and represent me before Berat District Court, the Court of Appeal and the Supreme Court in the trial of the criminal case as regards the charges provided in Articles ... of the Criminal Code. This case has been tried before and by a Court of Appeal decision has been remitted for fresh examination.
>
> In accordance with Article 352 of the CCP I request that the case be tried in my absence.
>
> I accept the charges levied against me and I authorise counsel to request the use of summary procedure pursuant to Article 403 of the CCP.
>
> Counsel has the right to lodge appeals against court decisions that are against my interests.
>
> ..."

9. On 12 March 2004 the applicant lodged an appeal with the Vlora Court of Appeal ("the Court of Appeal"). Although he admitted having committed the criminal offences, he challenged the penalty imposed. He

argued that the trial court had failed to take account of some mitigating factors in his favour such as the remorse he had shown after committing the crime and his surrender to the authorities, his family's difficult financial situation and the fact that he had a minor child, the lack of any previous criminal records and his low educational level.

10. On 4 May 2004 a hearing took place which was adjourned to 26 May 2004 in order to summon the applicant to appear before the court. On the same date, a letter was sent by the Court of Appeal to the Police Commissariat and the local prison authorities, requesting them to escort the applicant to the hearing scheduled for 26 May 2004.

11. The applicant did not attend the hearing on 26 May 2004. The court ordered an adjournment until 4 June 2004. The applicant's representative was present at the hearing. Relevant excerpts from the record of the proceedings read:

> "The defendant Besnik Cani was summoned and did not appear. The file indicates that he has been informed and will attend the hearing (*nga aktet rezulton se ka dijeni dhe do të marrë pjesë në gjykim*)."

12. On 27 May 2004 the Court of Appeal sent a letter to the Ministry of Justice, the Directorate General of Prisons and the local prison authorities requesting that the applicant be escorted to the hearing on 4 June 2004 as he had expressed the wish to attend.

13. The applicant did not appear at the hearing of 4 June 2004. The court ordered an adjournment until 18 June 2004. Relevant excerpts from the record of the proceedings read:

> "The file indicates that the [Police] Commissariat were informed of the need to escort him [to the Court of Appeal] but they did not do so. His lawyer was summoned and was present (*nga aktet rezulton se ka dijeni komisariati për ta sjellë dhe nuk e solli*)."

14. On 7 June 2004 the Court of Appeal sent a letter to the Ministry of Justice, the Directorate General of Prisons and the local prison authorities requesting that the applicant be escorted to the hearing on 18 June 2004 as he had expressed the wish to be present at the hearing. A handwritten note at the bottom of the letter read:

> "[they] refused to sign, saying that they are not answerable to the Court of Appeal. [We] do not accompany prisoners. The court does not have any business with us. Send the letter to the Directorate General of Prisons in Tirana."

15. The applicant was not present at the hearing on 18 June 2004, but his lawyer did attend. Relevant excerpts from the record of the proceedings read:

> "the lawyer [S.S.] said, "I represented the accused [Besnik Cani] by means of a power of attorney during [the proceedings in] the first-instance [court]. Thus, let us proceed with the hearing."

16. The Court of Appeal decided to proceed with the hearing in the applicant's absence as he was represented by his lawyer.

17. On 23 June 2004 the Vlora Court of Appeal sentenced the applicant to a cumulative term of twenty-five years' imprisonment, reduced by one-

third as a result of the use of the summary procedure. The relevant parts of the judgment read as follows.

> "... The Court [of Appeal] considers that the District Court characterised the criminal offences correctly, but the sentence [of imprisonment] should be changed in the light of large differences in the penalties imposed on each defendant. All the co-defendants are almost in the same position as far as their collusion is concerned and their respective role in the commission of the offences. Despite the fact that the defendant was the perpetrator of one of the offences, there should not be such a large difference in the sentences imposed. Having regard to Article 141 of the Criminal Code which aims at excluding the application of life imprisonment, having regard to the remorse shown by the defendant during the proceedings, his surrender to the authorities following the commission of the crime, and his role as the perpetrator in the commission of the criminal offence, the court considers that he should be ... cumulatively sentenced to twenty-five years' imprisonment. In these circumstances, having regard to the appeal lodged by the applicant, the District Court decision should be amended in so far as the sentence imposed on the defendant is concerned."

The relevant provisions of the operative part of the judgment read as follows:

> "...
>
> Pursuant to Article 55 of the Criminal Code the accused Besnik Cani is cumulatively sentenced to 25 years' imprisonment.
>
> Pursuant to Article 406 of the Code of Criminal Procedure one third of the sentence imposed on Besnik Cani is reduced."

18. On an unspecified date the prosecutor lodged an appeal with the Supreme Court on the grounds of an erroneous application of the criminal law. He stated, *inter alia*, that the penalty imposed by the Court of Appeal, which had not ordered life imprisonment for the applicant for being the perpetrator of a crime that had resulted in the death of a person, did not correspond to the serious danger to society posed by the applicant and the serious criminal consequences of that offence.

19. It would appear that the applicant did not make any written submissions to the Supreme Court in response to the prosecutor's appeal. On 15 June 2005 the applicant's brother appointed A.K to represent the applicant before the Supreme Court.

20. At the hearing of 15 June 2005 before the Supreme Court, the applicant was represented by A.K, who requested the court to dismiss the prosecutor's appeal. On 15 June 2005 the Supreme Court quashed the Court of Appeal judgment and upheld the District Court judgment. The record of the hearing states that the applicant was represented by his lawyer. The relevant parts of the Supreme Court judgment read:

> "The Supreme Court, having examined the documents in the investigation file and the court file, having examined the grounds of appeal lodged by the prosecutor, considers that the Court of Appeal judgment, which amended the District Court judgment by changing the defendant's [the applicant's] conviction, was taken on the basis of an erroneous application of the criminal law, particularly Article 47 et seq. of the Criminal Code, which determine the manner of imposing a sentence.

The Supreme Court draws this conclusion because the Court of Appeal did not duly consider the severity of the criminal offences committed by the accused, the serious danger to society that the accused poses by continuing to commit criminal offences, the serious degree of guilt, the grave criminal consequences, and the commission of the criminal offence on more than one occasion, using weapons and acting in collusion with others.

The reduction of the sentence by the Court of Appeal on the ground that the accused assisted justice by showing remorse for the offences he had committed and by requesting the use of the summary procedure, is not founded in law. The acceptance of the charges by the accused and his request for the use of the summary procedure assist the speedy rendering of justice. The law takes this into account by reducing the penalty by one-third in accordance with Article 406 of the CCP. A further reduction of the defendant's sentence, beyond the reduction entitled to by virtue of the application of Article 406 of the CCP, has resulted in a double reduction of the sentence for the same circumstances."

21. The applicant lodged a constitutional complaint with the Constitutional Court, alleging violations of his right to attend the hearings of the Court of Appeal and of the Supreme Court.

22. On 10 February 2006 the Constitutional Court declared the complaint inadmissible, finding that the grounds of appeal fell outside its jurisdiction (*pretendimet e paraqitura prej ankuesit nuk përfshihen në juridiksionin e Gjykatës Kushtetuese* ...).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

23. The relevant provisions of the Albanian 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 if 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 with free legal counsel if 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 42 § 2

"In the protection of his constitutional and legal rights, freedoms and interests, or when a criminal charge is 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) 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 Code of Criminal Procedure ("the CCP")

24. Article 48 § 3 provides that "the appointment of counsel for a person detained, arrested or sentenced to imprisonment, unless he has appointed counsel of his own choosing, may be carried out by his relatives in accordance with the procedure stipulated in paragraph 2 above."

25. Article 350 provides that "when a defendant, even if in detention, ... does not appear at a hearing and it appears that the absence was caused by *force majeure* or any other obstacle which exempts him from any responsibility, the court, acting, *inter alia*, of its own motion, shall adjourn or suspend the judicial examination, set a date for a new hearing and order the renewal of the summons."

26. Article 352 states that the accused should be represented by counsel when he requests or gives his accord for the judicial examination to continue in his absence.

1. Appeal proceedings

27. Article 422 provides that any party may appeal against a first-instance court decision, which is the District Court decision.

28. Article 425 § 1 establishes the scope of the examination of an appeal by the Court of Appeal. It provides that the examination of a case by the Court of Appeal is not limited to the grounds of appeal but extends to the whole case, namely an examination of both the facts and the law. Article 425 § 3 proscribes *reformatio in peius* stating that "in an appeal lodged solely by the accused, the court cannot impose a heavier criminal sanction, order a more severe measure of restraint, or characterise innocence less favourably than the grounds relied upon in the impugned judgment."

29. The Court of Appeal may make a complete re-assessment of the evidence obtained and examined by the first-instance court, in which case it decides afresh on the appellant's guilt or innocence. Under Article 427 the Court of Appeal could re-open the judicial examination of a case (*përsëritja e shqyrtimit gjyqësor*). In the event that one of the parties requests the re-examination of evidence administered during the first-instance court proceedings or seeks the collection of additional new evidence, the Court of Appeal, when deemed necessary, may decide to reopen the judicial

proceedings, in part or in whole (Article 427 § 1). In so far as evidence has been discovered subsequent to the first-instance court's judgment or, in so far as evidence has been discovered in the course of the appeal proceedings, the Court of Appeal decides on a case-by-case basis about its admission (Article 427 § 2). The re-opening of a case may also be decided *ex officio* when deemed necessary (Article 427 § 3). The Court of Appeal may also re-examine evidence provided that the accused did not attend the first-instance court proceedings, either because he was not notified or because he was unable to attend those proceedings on lawful grounds (Article 427 § 4).

30. Article 428 establishes which decisions may be taken by the Court of Appeal. It provides that the Court of Appeal may decide to dismiss the appeal and uphold the first-instance court decision, to amend the first-instance court decision, to quash the first-instance court decision and terminate the criminal proceedings, or to quash the first-instance court decision and remit the case for a fresh trial.

2. The Supreme Court proceedings

31. Court of Appeal decisions may be appealed against to the Supreme Court in compliance with one of the following requirements of Article 432: a) the criminal law has not been respected or has been erroneously applied; b) there have been breaches which have resulted in the court's judgment being declared invalid in accordance with Article 128 of this Code; c) there have been breaches of procedural rules which have affected the adoption of the judgment.

32. Article 434 provides that the Supreme Court shall examine the appeal in so far as points of law have been raised therein. It has the right to examine and to decide of its own motion and at any stage or instance of the proceedings legal issues which have not been examined before. Section 437 provides that the accused and private parties must be represented by a defence lawyer. As to the procedure, paragraph 5 of the said section states that the judge rapporteur introduces the case, followed by the prosecutor's oral submissions and the defence lawyer's pleadings. No counter-pleas are allowed.

33. Under Article 441 the Supreme Court can decide: a) to uphold the decision of the lower court; b) to modify the qualification of the criminal offence, insofar as the type, sentence and civil consequences are concerned; c) to quash the [lower court's] decision and to adopt a judgment without remitting the case for a rehearing to the lower court; d) to quash the [lower court's] decision and remit the case for a re-hearing; e) to quash the Court of Appeal's decision and uphold the District Court's decision.

3. Summary procedure

34. The summary procedure is governed by Articles 403-406 of the Code of Criminal Procedure ("CCP"). The accused or his representative should make a request in writing for the use of a summary procedure, which is based on the assumption that the case can be decided on the basis of the

case file as it stands, without submitting it to judicial examination. If the court grants the accused's request for summary procedure, when giving its decision on the merits it reduces the penalty by one third. Life imprisonment is commuted to twenty-five years' imprisonment. Both the prosecutor and the accused may appeal against the court's decision.

35. The Supreme Court's unifying decision No. 2 of 29 January 2003 stated, in so far as the summary procedure is concerned, the following.

> "... The summary procedure is important for the sake of judicial economy, because it simplifies and abridges the procedure, increases the expediency and effectiveness of a judicial examination, and consequently results in a benefit to the accused by reducing his penalty by one-third and by not imposing a sentence of life imprisonment.
>
> It is important to underline that this benefit should not be to the detriment of justice. For this purpose, the court accepts the accused's request only when it is persuaded that it could resolve the case on the basis of the case file as it stands, without submitting it to judicial examination. ... The essence of the summary procedure is to admit the documents as collected during the criminal investigation and to avoid the consideration of other evidence at a hearing and the arguments relating thereto.
>
> ...
>
> The collection of other evidence and requests relating to their invalidity are not part of the summary procedure.
>
> The law provides that the case shall be resolved on the basis of the case file as it stands, which implies a mutual acknowledgment of acts and documents by the parties. It is the court's obligation to assess whether a decision could be taken on the basis of the case file as it stands, without undermining justice and interfering with the lawful interests of the accused. The trial proceeds with the submission of the parties' final conclusions, which make reference to the case file as it stands ... and the court takes a decision based thereon.
>
> If the parties complain that acts or documents are invalid, the court should revoke its decision for use of a summary procedure and order the continuation of a normal judicial examination."

Supreme Court's case-law as regards the application of the summary procedure

36. In three decisions (no. 764 of 9 September 2005, no. 720 of 20 October 2005 and no. 224 of 19 April 2006) the Supreme Court upheld the Court of Appeal's decisions which had further reduced the defendants' penalties, despite their having obtained a reduction by way of the application of the summary procedure by the District Courts. In further reducing the penalties, the Court of Appeal had regard to the defendants' admission of guilt and signs of remorse.

37. In three other decisions (no. 2 of 12 January 2011, no. 11 of 10 January 2011 and no. 26 of 9 February 2011) the Supreme Court further reduced the defendants' penalties, which had been imposed and reduced by virtue of the application of the summary procedure by the District Court and upheld on appeal. In reducing the penalties, the Supreme Court had regard

to mitigating circumstances such as the defendants' surrender to the authorities and their deep remorse over the commission of the crime.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

38. The applicant complained that there had been a breach of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c), in that he was denied the right to defend himself at a public hearing before the Court of Appeal and the Supreme Court.

Article 6 §§ 1 and 3 (c) of the Convention, in so far as relevant, read as follows.

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

A. Admissibility

39. The Government did not raise objections to the admissibility of this complaint. The Court finds that this complaint was introduced within the six-month time-limit, running from the final domestic court decision of 10 February 2006 (see *Caka v. Albania*, no. 44023/02, § 74, 8 December 2009). It further considers that this complaint is not manifestly ill-founded. No other grounds for declaring it inadmissible have been found. It therefore declares the complaint admissible.

B. Merits

1. The parties' observations

(a) The applicant

40. The applicant submitted that he had never waived his right to attend the hearings before the Court of Appeal. In fact, he had expressed the wish

to be present at the hearings, a fact which, in his opinion, was mentioned in the letters that the Court of Appeal had sent to the national authorities with a view to securing his attendance.

41. The applicant further contended that despite his wish to attend the hearings before the Court of Appeal, no court notification had reached him in prison. He stated that the prison authorities had prevented him from participating in the court hearings, acting in total defiance of the court's orders.

42. The applicant argued that the Court of Appeal was empowered to examine a case thoroughly, irrespective of the grounds of appeal lodged with it. In light of this fact and considering that he had been sentenced to life imprisonment by the District Court, he considered that his presence was required at the hearings before the Court of Appeal.

43. The applicant maintained that his case was similar to *Kremzow v. Austria*, 21 September 1993, Series A no. 268-B. In the instant case, as in *Kremzow*, the Supreme Court had ruled in favour of the prosecutor's appeal and aggravated the applicant's position by re-imposing the sentence of life imprisonment. Such a conclusion, the applicant argued, could not have been reached solely on the basis of the case file. The Supreme Court should have given him the opportunity to be heard in person in order to rule on the level of his involvement in the crimes he had been charged with. The applicant further submitted that neither he nor his lawyer had made any submissions to the Supreme Court.

(b) The Government

44. The Government submitted that the Court's case-law allowed for restrictions to the accused's right to attend a hearing on appeal, for example, where the accused had participated in the first-instance court proceedings (see *Ekbatani v. Sweden*, 26 May 1988, Series A no. 134).

45. The Government stated that the applicant had requested the use of the summary procedure, which had been granted by the District Court. The summary procedure continued to apply even on appeal. Consequently, the Court of Appeal's jurisdiction was limited in that no judicial examination was allowed. Since the applicant had appealed against the District Court's judgment, this meant that his position would not be aggravated and the Court of Appeal would not impose a heavier sentence.

46. The Government further pointed to the power of attorney of 18 February 2004, which had been signed by the applicant and according to which he had accepted all the charges against him and had explicitly requested in accordance with Article 352 of the CCP to be tried *in absentia*.

47. The Government maintained that the Court had ruled that an accused's presence was not required at hearings before courts which examine appeals on points of law. They explained that the procedure before the Supreme Court required that parties be represented by their own lawyers, who make submissions in writing and orally at a public hearing. They submitted that the applicant had been duly represented by counsel, as required by law, before the Supreme Court. The Supreme Court had not

examined any matters or evidence that would have necessitated his presence at the hearing. At the end of the proceedings, the Supreme Court, observing that the Court of Appeal had misinterpreted the provisions concerning the use of the summary procedure, had decided to uphold the District Court's judgment. In the Government's view this marked the difference between the instant application and the Court's judgment in the case of *Kremzow v. Austria*, cited above.

2. The Court's assessment

(a) General principles

48. The Court reiterates that the guarantees in Article 6 § 3 (c) of the Convention are specific aspects of the right to a fair trial set forth in the first paragraph of this Article. Consequently, the applicant's complaint will be examined under the overall fairness requirements of Article 6 of the Convention.

49. In the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial (see *Lala v. the Netherlands*, 22 September 1994, § 33, Series A no. 297-A; *Poitrimol v. France*, 23 November 1993, § 35, Series A no. 277-A; and *De Lorenzo v. Italy* (dec.), no. 69264/01, 12 February 2004), 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 (see *Sejdovic v. Italy* [GC], no. 56581/00, § 92, ECHR 2006-II).

50. The personal appearance of the defendant does not assume the same crucial significance for an appeal hearing as it does for the trial hearing (see *Kamasinski v. Austria*, 19 December 1989, § 106, Series A no. 168). The manner of application of Article 6 to proceedings before courts of appeal does, however, depend on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see *Ekbatani v. Sweden*, cited above; and *Monnell and Morris v. the United Kingdom*, 2 March 1987, § 56, Series A no.115).

51. Leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 even though the appellant has not been given the opportunity to be heard in person by the appeal or cassation court, provided that there has been a public hearing at first instance (see, *inter alia, Monnell and Morris*, cited above, § 58 (leave to appeal); and *Sutter v. Switzerland*, 22 February 1984, § 30, Series A no. 74 (Court of Cassation)). However, in the latter case the underlying reason is that the courts concerned do not have the task of establishing the facts of the case, but only of interpreting the legal rules involved (see *Ekbatani*, cited above, § 31).

52. Indeed, even where an appeal court has full jurisdiction to review the case on questions both of fact and of law, Article 6 does not always require a right to a public hearing and *a fortiori* a right to be present in person (see

Fejde v. Sweden, 29 October 1991, § 31, Series A no. 212-C). Regard must be had in assessing this question to, *inter alia*, the special features of the proceedings involved and the manner in which the defence's interests were presented and protected before the appellate court, particularly in the light of the issues to be decided by it (see *Helmers v. Sweden*, 29 October 1991, §§ 31-32, Series A no. 212-A), and their importance for the appellant (see *Kremzow*, cited above, § 59; *Kamasinski*, cited above, § 106 in fine; and *Ekbatani*, cited above, §§ 27-28).

53. In legal systems where an appellate court acts not merely as a court of revision but has to examine a case as to the facts and the law and make a fresh re-assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (see *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004; *Strzałkowski v. Poland*, no. 31509/02, § 41, 9 June 2009; and *Sobolewski v. Poland (no. 2)*, no. 19847/07, § 35, 9 June 2009).

54. 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, his entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance (see *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-XII).

(b) Application of these principles to the present case

55. The Court observes at the outset that it is master of the characterisation to be given in law to 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-...). The Court notes that the present case concerns matters of sentencing which involve the determination of a criminal charge, notwithstanding that the question of the applicant's guilt has been determined, and attract Article 6 guarantees (see *Scoppola v. Italy (no. 2)* [GC], cited above, §§ 48-57 and §§ 132-145). Whereas it is for the authorities to determine the sentence to be imposed, the Court's task is to examine whether the applicant was afforded the guarantees of the fairness of the proceedings as a whole.

56. In the circumstances of the instant case, the applicant did not raise any complaints as regards the proceedings before the District Court. He was initially represented by court-appointed lawyers and in the final stage of the proceedings he was defended by counsel of his own choosing who made submissions on his behalf after consulting the case file.

57. The Court notes that on 18 February 2004, by way of his power of attorney, and while the proceedings were still pending before the District Court, the applicant requested of his own volition the use of the summary procedure. The summary procedure entails undoubted advantages for the accused as, in the words of the Supreme Court, it "is important for the sake

of judicial economy, because it simplifies and abridges the procedure, increases the expediency and effectiveness of judicial examination and, consequently results in a benefit to the accused by reducing his penalty by one-third and by not applying life imprisonment." On the other hand, the summary procedure entails a reduction of the procedural guarantees provided by domestic law, in particular the possibility of requesting the admission of new evidence not contained in the case file or the arguments related to the already collected evidence.

58. The Court considers that the applicant, who was assisted by a lawyer, was undoubtedly capable of realising the consequences of his request for the use of the summary procedure. The applicant did not request in his appeals that the use of the summary procedure should be discontinued. However, under the Albanian CCP, the adoption of the summary procedure does not entail a diminution of all procedural safeguards, most notably the accused's right to appeal against the sentence imposed by lower courts and the accused's right to attend hearings (see paragraphs 36-37 above). Nor does the Supreme Court's unifying decision of 29 January 2003 support such an interpretation.

59. In this connection, the Court notes that it was open to the applicant to appeal against the sentence imposed by the District Court. Indeed, he lodged an appeal against his sentence with the Court of Appeal, arguing that his sentence should be reduced on account of the existence of mitigating circumstances. In the event, taking account of his grounds of appeal, the applicant was given a more lenient sentence.

The Court observes that under the relevant provisions of the Albanian law of criminal procedure, the jurisdiction of an appeal court extends to questions of both fact and law (see paragraphs 28 and 29 above). In the grounds for its judgment, the Court of Appeal made findings relevant to the applicant's guilt. In the appeal proceedings, as evidenced and documented by the Court of Appeal itself, the applicant repeated his wish to attend the hearing of his appeal. In response, the Court of Appeal adjourned the hearing three times in order to secure the applicant's presence. It is a matter of regret that the penitentiary service failed to comply with the Court of Appeal orders. On 18 June 2004 the applicant's lawyer requested the court to continue with the proceedings. In the event, and having regard to the particular circumstances of the case, the Court does not consider the applicant's lawyer's statement to constitute a waiver of the applicant's repeated and unequivocal wish to attend the hearing.

60. However, the prosecutor considered that the applicant had been treated too leniently and requested the Supreme Court to reinstate the District Court's sentence. The applicant was represented by counsel before the Supreme Court. Under domestic law, he had no right to attend the hearing in person and, as a matter of Convention law, Article 6 did not guarantee him such rights before the Supreme Court, whose jurisdiction was solely confined to a pure point of legal interpretation, namely the scope of the Court of Appeal's powers of review under the CCP. In the event, the

Supreme Court found that the Court of Appeal had overreached its competence and upheld the District Court's sentence.

61. The Court finds nothing in the Supreme Court's findings to suggest that the Court of Appeal could not have further reduced the applicant's sentence. Indeed, in accordance with Article 428 of the CCP, it was open to the Court of Appeal to modify the sentence imposed by the District Court. The Government did not submit any statute or domestic case-law to the effect that the adoption of the summary procedure stripped the Court of Appeal of its power to reduce the sentence imposed by the first-instance court. The Supreme Court's unifying decision of 29 January 2003 does not lend any support whatsoever to such interpretation.

62. On the contrary, according to domestic case-law, and, particularly, during the time that the applicant's constitutional complaint was being examined by the Constitutional Court, the Supreme Court upheld two Court of Appeal decisions on 9 September 2005 and 20 October 2005, respectively, which had further reduced sentences imposed by District Courts by way of the application of the summary procedure (see paragraph 36 above). Most recently in 2011 the Supreme Court itself handed down more lenient sentences, regardless of whether defendants had obtained reductions by way of the application of the summary procedure by lower courts (see paragraph 37 above). It would therefore appear that this line of case-law and interpretation of the criminal procedure provisions continues to prevail.

63. The Court further notes that at no stage in the appeal proceedings, whether in the proceedings before the Court of Appeal or before the Supreme Court, did the applicant have the opportunity to argue in person that there were mitigating factors, such as his remorse following the crime, his lack of previous criminal convictions, his background and his family's economic hardship, which would have militated in favour of imposing a lower sentence than the one handed down by the District Court. For the Court these are all matters on which, as a matter of fairness, he should have been heard in person. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. 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

65. The applicant claimed 10,000 euros (EUR) in respect of the non-pecuniary damage suffered as a result of the breach of his Convention rights.

66. The Government did not make any comments.

67. Having regard to the violation found in this case, the Court considers that an award for non-pecuniary damage is justified. Making an assessment on an equitable basis, the Court awards the applicant EUR 3,200.

B. Costs and expenses

68. The applicant also claimed EUR 15,290 for costs and expenses incurred before this Court and the Constitutional Court. He submitted two bills justifying the legal costs, the translation costs and postage.

69. The Government did not make any comments.

70. In the present case, regard being had to the information in its possession, the Court considers it reasonable to award the applicant the sum of EUR 3,500 for costs and expenses.

C. Default interest

71. 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;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into its national currency, at the rate applicable at the date of settlement:

(i) EUR 3,200 (three thousand two hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 3,500 (three thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

Done in English, and notified in writing on 6 March 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Lech Garlicki
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge De Gaetano is annexed to this judgment.

L.G.
F.A.

CONCURRING OPIONION OF JUDGE DE GAETANO

I have voted with the majority in this case only because of a particularly grave circumstance, namely the persistent, almost defiant, refusal of the prison authorities to bring the applicant to court for the appeal hearing (§§ 9-14). In the instant case it would appear that the applicant's presence before the Court of Appeal was of crucial importance for that court's, and any subsequent court's, decision as to the punishment to be applied. Although the Court of Appeal did reduce the sentence, the applicant's absence before it meant that his evidence as regards the mitigating factors put forward in his application of appeal, was never taken and, as a result, was not available before the Supreme Court. That, to my mind, undermined the fairness of the proceedings taken as a whole.