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

THIRD SECTION

CASE OF LEKA v. ALBANIA

(Application no. 60569/09)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (a), (b) and (c) • Fair hearing • Information on nature and cause of accusation • Free legal assistance • Manner in which identity parade carried out not in breach of fair trial requirements • Reclassification by Court of Appeal of charges applicant was convicted of, which was based on the same facts and could have been anticipated • Applicant had time and facilities to prepare his defence • No compelling reasons for restriction of applicant's right to a lawyer at pre-trial stage during prosecution questioning • Very strict scrutiny • In specific case circumstances, overall fairness of criminal proceedings not irretrievably prejudiced by absence of a defence lawyer at that stage

Prepared by the Registry. Does not bind the Court.

STRASBOURG

5 March 2024

FINAL

05/06/2024

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Leka v. Albania,

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

Pere Pastor Vilanova*, President*,
Jolien Schukking,
Yonko Grozev,
Darian Pavli,
Peeter Roosma,
Ioannis Ktistakis,
Oddný Mjöll Arnardóttir*, judges*,
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 60569/09) 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 Durim Leka ("the applicant"), on 9 November 2009;

the decision to give notice to the Albanian Government ("the Government") of the complaints concerning the amendment of the charges against the applicant by the Appeal Court, the applicant's right of access to a lawyer at the pre-trial stage of the criminal proceedings against him and the manner in which the identity parade was carried out and to declare the remainder of the application inadmissible;

the observations submitted by the Government and the observations in reply submitted by the applicant;

third-party comments received from Res Publica, which had been granted leave by the President of the Section to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court);

Having deliberated in private on 13 February 2024,

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

INTRODUCTION

1. The case concerns the alleged unfairness of criminal proceedings against the applicant in which he was convicted of robbery resulting in death, attempted murder and illegal possession of firearms, and was sentenced to life imprisonment.

THE FACTS

2. The applicant was born in 1983 and is serving a life sentence in a high-security prison in Albania. The applicant was represented by Mr S. Puto, a lawyer practising in Tirana.

3. The Government were initially represented by their then Agent, Ms A. Hicka, and subsequently by Mr O. Moçka, General State Advocate.

4. The facts of the case may be summarised as follows.

I. INVESTIGATION

5. At the time of the events at issue the applicant was 22 years old and worked as a bricklayer. On 23 August 2005 one A.S. was shot dead in Shijan, Saranda. His brother P.S. who was present and also shot at but not hit, immediately went to the police and reported the crime. The same day the police carried out an inspection of the crime scene and found two spent cartridge cases on the ground. During a search carried out the following day the police found another spent cartridge case.

6. On 23 and 24 August 2005 the police interviewed the applicant in order to establish his relationship with A.S. because a note with the applicant's telephone number had been found on A.S. At the time of those interviews the applicant was not yet a suspect and he did not make any statements incriminating himself during the interviews. He was only asked whether he knew A.S. and P.S. and replied that he did not.

7. On 24 August 2005 the prosecution, as an urgent secret surveillance measure, planted a hearing device in the waiting room of the Saranda police and obtained a recording of a conversation between the applicant and his brother N.L. which revealed that the applicant had said that he had killed A.S. and had then gone to Saranda, where he had taken a pedal boat out to sea and thrown the gun in the direction of the Grand Hotel in Saranda.

The prosecution subsequently asked the Saranda District Court to approve the secret surveillance measure and it was approved on 28 August 2005.

8. The police arrested the applicant on 27 August 2005 and he was questioned by prosecutors the same day. Before the questioning he was informed of his rights under the Code of Criminal Procedure, which included the rights to remain silent and to be assisted by a lawyer.

The applicant said that he would give a statement without a lawyer and that he would decide later whether to have a lawyer. He signed the record of the questioning, which stated that the applicant had been informed of his rights under Article 309 of the Code of Criminal Procedure (see paragraph 31 below) and that he had made no comment.

The applicant confessed to killing A.S. and shooting at P.S. He said that he had needed money for his sister's wedding which he had not had. On 23 August 2003 at about noon he had met A.S., a foreign exchange dealer, in Saranda, and asked him to exchange 8,000 euros (EUR) for Albanian leks (ALL), even though he did not have that money and he had actually intended to take the Albanian currency from A.S. without giving him any euros in exchange. It had been agreed that A.S. would bring the Albanian currency to the village of Shijan, where the applicant lived. At about 5.30 p.m. the applicant had called A.S. on the telephone and told him to meet him in Shijan at the side of a road. The applicant had taken a gun that he had had at home with him with the intention of scaring A.S. and taking the money from him. A.S. had arrived on a motorcycle with his brother P.S. The applicant had told them that he did not have the money on him but that they had to go to his house. He had taken them to an abandoned house and, when they had arrived there, the applicant had pulled out a gun and demanded money from A.S. A.S. had been walking towards the applicant when the applicant had pulled out the gun and had shot at A.S., who had fallen to the ground. P.S. had started to run away, and the applicant had shot twice in his direction but missed. Immediately the applicant's brother D.L., who had heard the shots, arrived at the scene, where he had found A.S. lying on the ground, bleeding and asking for help. The ambulance had soon arrived and A.S. died on the way to a hospital.

9. Later the same day, at 6 p.m., an identity parade was carried out in which, apart from the applicant, two other persons were lined up. The applicant wore a dark-coloured long-sleeved shirt whereas the two other persons in the identity parade wore white short-sleeved shirts. P.S., as a witness, was first invited to describe the person who had shot his brother. He first gave a detailed description of that person as being 1.70 m tall, slim, with a long, reddish face with stubble on his cheeks, brownish-yellow eyebrows, dirty blond hair, and a thin voice, well-spoken, without any dialect.

During the identity parade the participants were asked to change places three times. Each time, P.S. identified the applicant as the perpetrator of the crime.

The applicant signed the record of the identity parade without making any comment.

10. The forensic report of 30 August 2005 drawn up by the Central Criminal Investigation Laboratory concluded that the two spent cartridge cases had been ejected from a firearm, namely a T.T. model 54 pistol. The gun was never found.

11. The applicant was questioned again by the prosecutor on 14 and 22 September 2005. The record of the questioning states that the applicant was informed of his right to be assisted by a lawyer. He stated that he was informed of the charges and that he would give his statement without a lawyer and that he would decide later whether to have a lawyer. He signed the record without any comments.

On 14 September 2005 the applicant explained that he had taken a pedal boat from Saranda to the sea and had thrown the gun into the sea in the direction of the Grand Hotel in Saranda.

II. INDICTMENT

12. On 4 October 2005 a State-appointed lawyer, S.M., was assigned to represent the applicant on the grounds that the applicant had no means to pay for legal assistance of his own choosing.

13. In the indictment of 5 October 2005, which was served on the applicant and his lawyer the same day, the applicant was charged with the murder of A.S. and P.S. in other specific circumstances under Article 79(dh) of the Criminal Code, and with illegal possession of firearms and ammunition under Article 278 § 2 of the Criminal Code.

14. On 12 October 2005 the prosecution submitted a request for the case to be listed for trial on the charges of the murder of A.S. and P.S. in other specific circumstances and illegal possession of firearms and ammunition, on the basis of the following facts. On 23 August 2005 the applicant had killed A.S. with a firearm in Shijan and at the same time attempted to kill A.S.'s brother P.S. Before that, the applicant and A.S. had agreed that A.S., who was a foreign exchange dealer, would bring ALL 2,000,000 from Saranda to Shijan to give to the applicant in exchange for EUR 8,000. A.S. had brought his brother P.S. with him and they had arrived in Shijan on a motorcycle. P.S. had been carrying the money, some of which had been obtained from V.K., another foreign exchange dealer in Saranda. The brothers had met the applicant on the side of a road and had gone together to a nearby vineyard. Once there, the applicant had pulled out a gun and had shot A.S. once. A.S. had fallen to the ground. The applicant had also shot twice in the direction of P.S., who had managed to run away. He had stopped a passing vehicle and had been driven to the police in Delvina. A.S. had been taken to the Saranda Civil Hospital, where he had died.

It was also alleged that the applicant had contacted A.S. in Saranda on the day of the murder and had asked to exchange EUR 8,000 for Albanian leks, even though the applicant had not had that amount of money. The applicant had asked A.S. to bring the corresponding amount of Albanian currency to Shijan, claiming that he was afraid to carry a large sum of euros with him to Saranda.

III. TRIAL IN THE FIRST-INSTANCE COURT

15. During the proceedings in the first-instance court the applicant was represented by a State-appointed lawyer and gave evidence. The applicant stated that on 23 August 2003 he had met with A.S., who owed him ALL 300,000. A.S. had arrived at the meeting armed and threatened the applicant and a fight between them had ensued. The applicant had taken the gun from A.S. and shot him. The applicant also stated that he had not shot at A.S.'s brother P.S.

16. P.S. also gave evidence and described the events at issue in the same way as the applicant in his statements given to the prosecution (see paragraph 8 above). P.S. said that A.S. had not had enough Albanian currency to meet the applicant's request. He had asked V.K. for help and V.K. had given him ALL 700,000. P.S. also said that he himself had been carrying that money, which was to be exchanged for euros with the applicant. After the applicant

had shot his brother, P.S. had run to the police station and reported the shooting.

17. V.K. also gave evidence and confirmed that he had given A.S. the sum of ALL 700,000 so that he could exchange it for euros with the applicant.

18. D.L., the applicant's brother, also gave evidence and said that he had heard three or four shots and that when he had arrived at the scene he had found one person lying on the ground, bleeding and asking for help.

19. In a judgment of 9 December 2005, the Saranda District Court found the applicant guilty as charged (of the murder of two or more persons in other specific circumstances and the attempted murder of one person under Article 79 (dh) and 22 of the Criminal Code and of illegal possession of weapons under Article 278(2) of the Criminal Code) and sentenced him to life imprisonment.

The judgment had regard to the reports of the inspections of the crime scene, the autopsy reports, the ballistic report, the identity parade and photographs, the data found in the applicant's mobile telephone (see paragraph 6 above), the oral evidence given by P.S., D.L and V.K., the transcript of the recording of the conversation between the applicant and his brother N.L. (see paragraph 7 above), and the applicant's confession to the prosecution.

20. As to the applicant's confession during the investigation, the trial court held as follows:

> "During the investigation the defendant confessed to the charges [laid against him] by describing [the relevant] circumstances. However, at the trial he changed his version of events and alleged that the victims had owed him 300,000 old leks. The defendant stated that it had been the victim [A.S.] who had come armed and threatened him [with a gun] and that after that he, the defendant, had taken the victim's weapon and shot him. The defendant's evidence [given at the trial] cannot be accepted, because the defendant's statement to the prosecution is corroborated by the intercepted [recording] and the evidence of the witness P.S., who described the events [at issue] and [whose description] completely matches the defendant's statement [as given to the prosecution]."

21. The applicant's conviction referred to the facts as described in the prosecution's request for the case to be listed for trial (see paragraph 14 above). It also stated that during his first encounter with A.S. on the morning of 23 August 2005 in Saranda the applicant had already formed an intention to take the money from him, and that with that intention the applicant had asked A.S. to exchange the amount of EUR 8,000 for Albanian currency, and asked him to bring the corresponding amount of leks to Shijan that afternoon.

IV. PROCEEDINGS ON APPEAL

22. On 17 December 2005 the applicant lodged an appeal against the first-instance judgment. In it he said that his lawyer had declined to assist him with it and that he was bringing the appeal in person so as to comply with the time-

limit for lodging it. The applicant was then assigned another lawyer, who attended hearings and presented the applicant's case. He presented the appeal at a hearing before the Gjirokastra Court of Appeal. He argued, *inter alia*, that the applicant's right to be questioned in the presence of a lawyer chosen by him or appointed for him at the pre-trial stage of the proceedings had been violated and that the applicant had signed the record of his questioning by the prosecution under duress.

23. At a hearing held before the Court of Appeal on 16 March 2006 the applicant's lawyer stated that the applicant had not committed the offences he had been convicted of by the first-instance court, but that he could have committed another offence. At a hearing held on 5 April 2006 he asked for the charges against the applicant to be amended from the criminal offence under Article 79 (dh) to the offence under Article 76 of the Criminal Code.

24. On 5 April 2006 the Gjirokastra Court of Appeal found the applicant guilty of attempted robbery causing death, of which A.S. was the victim, under Articles 141 and 22 of the Criminal Code, and of the attempted murder of P.S. with the intent to commit another crime, under Articles 77 and 22 of the Criminal Code, as well as of illegal possession of weapons, under Article 278 § 2 of the Criminal Code, and upheld his sentence.

25. The judgment relied on the record of the inspection of the crime scene, data from the applicant's mobile telephone as physical evidence, the medical report on the cause of A.S.'s death, the ballistic and forensic reports on the weapon and spent cartridge cases, the results of the secret surveillance measure, and the oral evidence of the witnesses P.S., D.L. and V.K.

The judgment did not mention the identity parade at all, or the applicant's confession to the prosecution.

26. The Court of Appeal held that the first-instance court had wrongly applied the law to the established facts when it found that the applicant had murdered A.S. and that therefore under Article 428(b) of the Code of Criminal Procedure the legal characterisation of the offence had to be amended to attempted robbery of A.S. causing death (Articles 141 and 22 of the Criminal Code), and the attempted murder of P.S. (Articles 22 and 77 of the Criminal Code). The Court of Appeal explained that the motive of the applicant had been to rob A.S. of the Albanian currency he had been carrying on his person and that to that end the applicant had misled A.S. from the beginning, making him falsely believe that the applicant had had EUR 8,000 to exchange, whereas the applicant had not had that amount of money. Thus, the main intention of the applicant had been to take the money from A.S., an aim in which he had not succeeded because it was P.S. who had been carrying the money and who had managed to escape.

As regards P.S., the Court of Appeal held that the defendant had not foreseen that A.S. would be accompanied by his brother and that the defendant had shot twice in the direction of P.S. with the intention of killing him, but had not succeeded.

As regards the charge of illegal possession of firearms, the Court of Appeal accepted the characterisation of the first-instance court.

V. FURTHER PROCEEDINGS

27. The applicant's subsequent appeal to the Supreme Court was summarily dismissed.

28. The applicant then lodged a constitutional complaint, which was dismissed on 19 May 2009. In so far as the recharacterisation of the charges was concerned, the relevant part of the Constitutional Court's decision reads:

> "In the case under consideration, the appellate court changed the legal characterisation of the facts without changing [the facts themselves] and at the same time explained the meaning of the law that it needed to implement to ensure the consistent [application of] the law. In that connection, Article 425 § 3 of the Code of Criminal Procedure provides that an appellate court cannot increase the sentence imposed in a case where the defendant is the only appellant, but does not prohibit [an appellate court] from giving the facts a different legal characterisation, including one more serious than the one given by the district court."

RELEVANT DOMESTIC LAW

I. CONSTITUTION

29. The relevant provisions of the Albanian Constitution, as in force at the material time, read as follows:

Article 31

> "During criminal proceedings everyone has the right:
>
> (a) to be notified immediately and in detail of any charge against him and of his rights, and to be given the opportunity to notify his family or those close to him;
>
> (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 defend himself in person or with the assistance of a defence lawyer chosen by him; to communicate freely and privately with the lawyer, and to be provided with a defence lawyer free of charge when he does not have sufficient means;
>
> ..."

II. CRIMINAL CODE

30. The relevant provisions of the Criminal Code, as in force at the material time, read as follows:

Article 22 - Meaning of attempt

"A criminal attempt is considered to have been committed when, even though the perpetrator takes direct action to commit the offence, those actions are interrupted and not completed owing to circumstances independent of his will."

Article 76 - Murder with intent

"Murder committed with intent shall be punished by ten to twenty years' imprisonment."

Article 77 - Murder with intent connected with another crime

"The offence of murder which precedes, concurs with, conceals or follows another crime shall be punished by no less than twenty years' imprisonment."

Article 79 - Murder committed in other specific circumstances

"Murder committed:

...

(d) on more than one occasion;

(dh) of two or more persons;

... shall be punished by no less than twenty years' imprisonment or by life sentence."

Article 141 - Robbery resulting in death

"Robbery ... resulting in the death of a person shall be punishable by fifteen to twenty years' imprisonment or by life sentence."

Article 278 - Illegal manufacturing and possession of military weapons and ammunition

"...

2. Possession of weapons, bombs, mines, or explosive materials without the permission of the appropriate State authorities shall be punishable by a fine or up to seven years' imprisonment."

III. CODE OF CRIMINAL PROCEDURE

A. The Code of Criminal Procedure

31. The relevant provisions of the Code of Criminal Procedure, as in force at the relevant time, provided as follows:

Article 49 §§ 1 and 2

"1. A defendant who has not chosen a lawyer or who has been left without one shall be assisted by a lawyer appointed by the authority conducting the proceedings, if he or she so requests.

2. When the defendant is under the age of eighteen or has a physical or mental disability that prevents him or her from exercising the right of defence, the assistance of a lawyer shall be mandatory."

Article 158 § 1

"1. The following shall not be compellable witnesses:

(a) individuals who are in a close relationship of consanguinity with the defendant ..."

Article 296 § 1 of the Code of Criminal Procedure made it mandatory to have a lawyer present during the questioning of a person under investigation by the judicial police. Under the same provision, when a lawyer could not be found or did not attend a hearing, the prosecutor was required to appoint a State-funded lawyer for the suspect.

Article 309

"1. A defendant who has no defence lawyer shall be notified by the prosecutor that he or she may be assisted by a defence lawyer assigned by [the appropriate] authorities.

2. The defence lawyer chosen [by the defendant] or assigned by [the appropriate] authorities shall receive at least twenty-four hours' prior notice of the questioning [of a defendant] and of [any] examination or confrontation. When delay may have negative consequences for the proceedings, notice shall be served on the defence lawyer urgently.

3. Records of any legal steps carried out by the prosecutor or judicial police which the defence lawyer has the right to attend shall be filed with the prosecutor's office secretariat within three days and the defence lawyer shall have the right to consult them and to make copies."

Article 425

"...

3. When an appeal is lodged by defendant only, an appeal court shall not impose a more severe sentence, a more severe precautionary measure or an acquittal on less favourable grounds, than that in the appealed decision, nor shall it give a more severe legal qualification to the facts."

B. The amended Code of Criminal Procedure (which came into force on 1 August 2017)

32. Article 34/a § 2 of the amended Code of Criminal Procedure requires the authorities to provide a suspect with a written "letter of rights" containing information about his or her defence rights, including the right to remain silent and the right to a lawyer of the suspect's own choosing or free legal assistance subject to certain conditions, before the first questioning takes place.

Article 49 § 1 of the amended Code of Criminal Procedure provides:

"1. The authority conducting the proceedings shall immediately assign a State-funded lawyer to a defendant who has not chosen a lawyer or has been left without one[,] when:

...

(ç) he or she is accused of a criminal offence carrying a sentence of not less than fifteen years;

...”

RELEVANT INTERNATIONAL LAW

I. COUNCIL OF EUROPE

33. Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners (Resolution (73) 5 of the Committee of Ministers of the Council of Europe) provides:

> “An untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representation ... and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him and to receive, confidential instructions. At his request, he shall be given all necessary facilities for this purpose. ... Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official.”

34. Furthermore, the Recommendation of the Committee of Ministers to member States of the Council of Europe on the European Prison Rules (Rec (2006)2), adopted on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies, in so far as relevant, reads as follows:

> “Legal advice
>
> 23.1 All prisoners are entitled to legal advice, and the prison authorities shall provide them with reasonable facilities for gaining access to such advice.
>
> 23.2 Prisoners may consult on any legal matter with a legal adviser of their own choice and at their own expense.
>
> ...
>
> 23.5 A judicial authority may in exceptional circumstances authorise restrictions on such confidentiality to prevent serious crime or major breaches of prison safety and security.”

II. UNITED NATIONS

The International Covenant on Civil and Political Rights (“ICCPR”)

35. Article 14 of the 1966 International Covenant on Civil and Political Rights (“the Covenant”) protects the right to a fair trial. The relevant parts of that provision read as follows:

> **“Article 14**
>
> ...
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> ...
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> ...
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it ...”

36. The Human Rights Committee (HRC) is the body responsible for monitoring the implementation of the Covenant by means of periodic State reports and individual communications.

37. The relevant part of the HRC General Comment No. 31, UN doc. CCPR/C/GC/32 (2007) reads as follows:

> “The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so. For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant.”

38. The HRC considers that legal assistance should be possible not only at the trial stage but at all stages in proceedings (see *Kelly v. Jamaica*, 1991, 253/1987, § 5.10., and *Borisenko v. Hungary*, 2002, 852/1999, § 7.5), including during police questioning (see *Gridin v. the Russian Federation*, 2000, 770/1997, § 8.5). However, in *Levinov v. Belarus* (2011, 1812/2008, § 8.3) the HRC held that in the absence of any investigative measure during the period when the suspect had had no access to a lawyer Article 14 § 3 (b) of the Covenant had not been infringed by the authorities.

39. Moreover, in a number of cases the HRC has found a violation of Article 14 § 3 (d) of the Covenant owing to the failure to inform the accused of his right to legal assistance (see, for example, *Saidova v. Tajikistan*, 2004, 964/2001, and *Khoroshenko v. the Russian Federation*, 2011, 1304/2004).

III. EUROPEAN UNION LAW

A. The right to be informed

40. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142, is founded upon the rights laid down in the Charter of Fundamental Rights of the European Union, and in particular Articles 6, 47 and 48 thereof, by building upon Articles 5 and 6 of the Convention as interpreted by this Court. In its preamble, the Directive explains that the right to information about procedural rights "which is inferred from the case-law" of this Court, should be explicitly established by the Directive.

41. Article 1 of the Directive clarifies that the right to information has two aspects: information on procedural rights and information on the accusation. Pursuant to Article 2, the Directive applies from the time a person is made aware by the competent authorities that he is suspected or accused of having committed a criminal offence. Such a person must be provided promptly with information concerning at least the five procedural rights listed in Article 3, the relevant part of which reads as follows:

> **"Article 3**
> **Right to information about rights**
>
> 1. Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:
>
> (a) the right of access to a lawyer;
>
> (b) any entitlement to free legal advice and the conditions for obtaining such advice;
>
> (c) the right to be informed of the accusation, in accordance with Article 6;
>
> (...)
>
> 2. Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons."

B. The right of access to a lawyer

42. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294, lays down minimum rules concerning the right of access to a lawyer in criminal proceedings and in proceedings for the execution of a European arrest warrant. In doing so, it promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48 thereof, by building upon Articles 3, 5,

6 and 8 of the Convention, as interpreted by this Court. In its Recital 21, it explains, by reference to case-law of this Court, that where a person other than a suspect or accused person, such as a witness, becomes a suspect or accused person, that person should be protected against self-incrimination and has the right to remain silent. In such cases, questioning by law enforcement bodies should be suspended immediately and may only be continued if the person concerned has been made aware that he is a suspect or accused person and is able to fully exercise the rights provided for in the Directive.

The relevant provisions of Directive read as follows:

“Article 2
Scope

1. This Directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.

2. This Directive applies to persons subject to European arrest warrant proceedings (requested persons) from the time of their arrest in the executing Member State in accordance with Article 10.

3. This Directive also applies, under the same conditions as provided for in paragraph 1, to persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons.

(...)

Article 3
The right of access to a lawyer in criminal proceedings

1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.

2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:

(a) before they are questioned by the police or by another law enforcement or judicial authority;

(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;

(c) without undue delay after deprivation of liberty;

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

3. The right of access to a lawyer shall entail the following:

(a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;

(b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;

(c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:

(i) identity parades;

(ii) confrontations;

(iii) reconstructions of the scene of a crime.

4. Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons.

Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right in accordance with Article 9.

5. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of point (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.

6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:

(a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;

(b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

(...)

Article 9
Waiver

1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 10:

(a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and

(b) the waiver is given voluntarily and unequivocally.

2. The waiver, which can be made in writing or orally, shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.

3. Member States shall ensure that suspects or accused persons may revoke a waiver subsequently at any point during the criminal proceedings and that they are informed about that possibility. Such a revocation shall have effect from the moment it is made.

(...)

Article 11
Legal aid

This Directive is without prejudice to national law in relation to legal aid, which shall apply in accordance with the Charter and the ECHR.

Article 12
Remedies

1. Member States shall ensure that suspects or accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of the rights under this Directive.

2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (a), (b) AND (c) OF THE CONVENTION

43. The applicant complained that the criminal proceedings against him had been unfair because of the recharacterisation of the offence by the appellate court and because of the restriction of his right of access to a lawyer during the pre-trial stage and the subsequent use by the trial court of evidence he had given in the absence of a lawyer in convicting him and the manner in which the identity parade had been carried out. He relied on Article 6 §§ 1 and 3 (a), (b) and (c) of the Convention, which, in so far as relevant, reads as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...

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;

...”

A. Admissibility

1. Compliance with the six-month time-limit

(a) The parties’ arguments

44. The Government argued that the application had been submitted outside the six-month time-limit. In that connection they asserted that the final domestic decision, given by the Constitutional Court on 19 May 2009, had been served on the applicant on 1 June 2009 whereas the applicant had submitted his completed application to the Court on 25 February 2010. They relied on the Court’s reasoning in the case of *Kemevauko v. the Netherlands* ((dec.), no. 65938/09, 1 June 2010), citing the following paragraphs:

> “22. In this context the Court emphasises that in principle it is to be provided with the original of the application form, and also of the authority form if the applicant is represented in the Strasbourg proceedings. Transmissions by fax of these documents are, without the originals of these documents being provided to the Court, insufficient to constitute a complete or valid application. Reference is made in this respect to paragraphs 1 and 4-5 of the Practice Direction on the Institution of Proceedings, quoted above. The last-mentioned paragraph states specifically that it is the signed, original application which is to be despatched by post within eight weeks from the date of the Registry’s letter requesting the applicant to complete and return the form.
>
> 23. The fact, therefore, that the completed application form in the present case was transmitted to the Registry by fax on 4 March 2010 is irrelevant as long as the original form was not also despatched within the eight-week period, which ended on 4 March 2010. In this respect, the Court observes that although the cover letter accompanying the application form, as well as that form itself, were indeed dated 4 March 2010, the envelope containing the original completed application form, as well as the signed authority form and copies of all relevant documents, was postmarked 10 March 2010.
>
> 24. In its case-law relating to the question whether an application was introduced within six months from the final decision, the Court has held − in a case which did not involve transmissions by fax − that in order for the date featuring on a first communication to be considered as the date of introduction of an application, it should be posted at the latest on the day after the date which appears on the communication. If that communication is postmarked more than one day later, it is the date of the postmark − rather than the date featuring on the letter or application form − that will be considered as the date of introduction (see *Arslan v. Turkey* (dec.), no. 36747/02, ECHR 2002-X (extracts)). The Court sees no reason to apply a different criterion in respect of the

question whether the original application form has been submitted within the eight-week period.”

45. The applicant submitted that he had sent his first letter to the Court through his representative on 9 November 2009, asking that the application form be sent to him. The Court had sent him the application form together with a letter dated 17 November 2009; however, that correspondence had never reached the applicant’s representative and on 13 January 2010 the applicant had asked the Court to resend the application form and to extend the deadline for submitting the completed application. On 14 January 2010 the Court had resent the application form to him and extended the deadline for submission of the completed application to 28 February 2010. The applicant maintained that he had submitted the completed application form on 25 February 2010 and had thus complied with the six-month time-limit.

(b) The Court’s assessment

(i) General principles

46. The Court notes at the outset that the first letter expressing an intention to lodge an application with the Court was sent by the applicant on 9 November 2009. At that time the following principles had been established in the Court’s case-law.

47. As to the starting point of the six-month time-limit then in force, the Court has consistently held that the object and purpose of Article 35 § 1 of the Convention are best served by counting the six-month period as running from the date of service of the written final decision or judgment adopted in domestic proceedings (see, for example, *Worm v. Austria*, 29 August 1997, § 33, *Reports of Judgments and Decisions* 1997-V; *Aras v. Turkey* (dec.), no. 29643/05, 2 March 2010; and *Marina v. Latvia*, no. 46040/07, §§ 39-44, 26 October 2010).

48. As to the date of the application, the Court has held that in accordance with the established practice of the Convention institutions and Rule 47 § 5 of the Rules of Court, it normally considers the date an application is made to be the date of the first communication indicating an intention to lodge an application and giving some indication of the nature of the application (see *Chalkley v. the United Kingdom* (dec), no. 63831/00, 26 September 2002). Such a first communication, which may take the form of a letter sent by fax, will interrupt the running of the six-month period (see *Kemevauko*, cited above, § 19).

(ii) Application of these principles to the present case

49. The Court notes that, as stated above, the applicant sent the first letter indicating his intention to lodge an application with the Court on 9 November 2009. In that letter the applicant expressed the wish to lodge an application with the Court alleging a violation of Article 6 § 3 of the Convention.

50. The Court sent the application form to the applicant's representative with a deadline of 12 January 2010 for submitting the completed application form. That deadline was extended by the Court to 28 February 2010.

51. In the case of *Kemevauko* (cited above), relied on by the Government, the Court declared the application inadmissible as being lodged outside the six-month time-limit because the application form had not been sent within the time-limit set by the Court for lodging by post, but it had only been sent by fax.

52. In the present case the applicant, through his representative, sent the completed application form by regular mail on 25 February 2010, that is to say, within the extended time-limit set by the Court. It follows that the applicant has complied with the six-month time-limit and that the Government's objection has to be dismissed.

2. Conclusion as to admissibility

53. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Identity parade

(a) The parties' submissions

54. The applicant contended that the identity parade had been carried out without his being provided with a defence lawyer and that during the identity parade he had worn a dark-coloured long-sleeved shirt, whereas the two other participants had worn white short-sleeved shirts, which had singled him out and served as an invitation to identify him as the perpetrator. He relied on *Laska and Lika v. Albania* (nos. 12315/04 and 17605/04, §§ 63-72, 20 April 2010), in which the Court had found a violation of Article 6 § 1 of the Convention because the applicants had worn balaclavas of a different colour from those worn by all the other persons in the identity parade.

55. The Government argued that the identity parade had been carried out in conformity with the rules of domestic procedure. As to the applicant's reliance on *Laska and Lika* (cited above), the Government explained that in that case the crucial element of recognition had been the colour of the balaclavas the perpetrators had worn, and that the applicants in that case had been the only persons in the identification parade wearing balaclavas of that specific colour. However, in the present case, the colour of clothes had no significance as regards the identification of the perpetrator because the person being asked to identify the perpetrator in the identity parade was P.S., an eyewitness and one of the victims who had seen the applicant's face clearly.

(b) The third party's observations

56. The third party, Res Publica, made no comments in respect of this complaint.

(c) The Court's assessment

57. As to the manner in which the identity parade was carried out, the Court notes that it is true that the clothes the two other persons in the line-up wore were different than those worn by the applicant (see paragraph 2 above). However, in contrast to the position in *Laska and Lika*, in the present case the clothes worn by the applicant were not of significant relevance since P.S., who identified the applicant as the perpetrator during the identity parade, had already seen his face clearly. Therefore, it cannot be said that he recognised the applicant by the clothes that he wore. Also, before being invited to observe the persons in the parade, P.S. had given a detailed description of the perpetrator.

58. The Court also observes that the appeal judgment did not mention the identity parade in enumerating the evidence on which it had established the applicant's guilt. Witness P.S., who identified the applicant during the identity parade, gave his evidence during the trial and the courts had regard to that evidence in their judgments. As stated above, the evidence given by P.S. at the trial was corroborated by evidence obtained through the secret surveillance measure and the evidence given by D.L. and V.K.

59. It follows that there has been no violation of Article 6 § 1 of the Convention as regards the manner in which the identity parade was carried out.

2. *Amendment of charges by the Court of Appeal*

(a) The parties' submissions

60. The applicant argued that the Court of Appeal had amended the charges against him and that he had not had the opportunity to defend himself against the amended charges because he had learned of the amendment only from the Court of Appeal's judgment.

61. The Government argued that the Court of Appeal had amended the charges against the applicant in accordance with the rules of procedure prescribed by the Code of Criminal Procedure. In that connection they maintained that it was within the power of the courts to give a legal characterisation to established facts. They argued that the Court of Appeal had not changed the nature of the accusation against the applicant but had only given its legal interpretation of the facts of the case, which was indeed the role of a court of law. The Government also contended that the applicant's lawyer himself had asked the Court of Appeal to amend the charges against the applicant. The Government stressed that the Court of Appeal's legal characterisation of the charges indicated by the facts of the case was more

favourable to the applicant than the charges he had been convicted of by the first-instance court, irrespective of the fact that his life sentence had been upheld.

(b) The third party's observations

62. The third party, Res Publica, made no comments in respect of the applicant's complaint about the amendments to the charges against him by the Court of Appeal.

(c) The Court's assessment

(i) General principles

63. The general principles concerning the reclassification of an offence with which an applicant was initially charged have been summarised in *Pélissier and Sassi v. France* ([GC], no. 25444/94, § 62, ECHR 1999-II).

64. The Court has held, in particular, that Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say, the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. 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. Furthermore, the Court has held that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his or her defence (see, among other authorities, *Sipavičius v. Lithuania*, no. 49093/99, § 28, 21 February 2002).

65. In assessing the fairness of criminal proceedings as a whole, the Court has accepted that the reclassification of an offence will not impair the rights of the defence if the accused, in review proceedings, had a sufficient opportunity to defend himself or herself (see *Mulosmani v. Albania*, no. 29864/03, § 132, 8 October 2013, and the cases cited therein; see also *Balette v. Belgium* (dec.), no. 48193/99, 24 June 2004).

66. The Court has found a violation of Article 6 in cases where the constituent elements of the original offence the accused had been charged with differed from those of the reclassified offence, and the accused did not have an opportunity to defend himself or herself against the reclassified offence (see, for example, *Penev v. Bulgaria*, no. 20494/04, §§ 33-45, 7 January 2010, and *D.M.T. and D.K.I. v. Bulgaria*, no. 29476/06, §§ 76-84, 24 July 2012). On the other hand, in cases where the constituent elements of the original offence embraced all the constituent elements of the reclassified offence, the Court has held that the accused already had an effective opportunity to defend himself or herself. Therefore, informing the accused

person of the reclassified charges only upon delivery of a judgment did not constitute an infringement of the applicant's rights under Article 6 of the Convention (see, for example, *Gea Catalán v. Spain*, 10 February 1995, §§ 28-30, Series A no. 309; *De Salvador Torres v. Spain*, 24 October 1996, §§ 30-33, *Reports* 1996; and *Marilena-Carmen Popa v. Romania*, no. 1814/11, §§ 36-49, 18 February 2020).

67. A reclassification of the offence is considered to be sufficiently foreseeable to the accused if it concerns an element which is intrinsic to the accusation (see *De Salvador Torres*, cited above, § 33; *Sadak and Others v. Turkey (no. 1)*, nos. 29900/96 and 3 others, §§ 52 and 56, ECHR 2001-VIII; and *Juha Nuutinen v. Finland*, no. 45830/99, § 32, 24 April 2007). Whether the elements of the reclassified offence were debated in the proceedings is a further relevant consideration (see *Penev*, cited above, § 41).

(ii) Application of these principles to the present case

68. In the proceedings in the first-instance court the applicant was charged with and convicted of the murder of two or more persons in other specific circumstances, under Article 22 and Article 79 (dh) of the Criminal Code, and of illegal possession of weapons under Article 278 § 2 of the same Code.

69. In the appeal proceedings the charges were reclassified as attempted robbery causing the death of A.S., under Articles 141 and 22 of the Criminal Code, and the attempted murder of P.S. with intent to commit another crime, under Articles 77 and 22 of the Criminal Code. The charge of illegal possession of weapons was not altered.

70. The Court notes that the gist of the Court of Appeal's amendment of the charges against the applicant was that he had induced A.S. to come to Shijan on the pretext that he wanted to exchange EUR 8,000, even though he was well aware that he did not have that money and that his true intention had been to take the corresponding amount of Albanian currency from A.S. To that end, the applicant had taken a gun with him and ultimately shot and killed A.S. and attempted to kill P.S. as he was running away from the crime scene.

71. In that connection the Court further notes that the constituent elements of the criminal offence of murder the applicant was initially charged and convicted of at first instance are not necessarily the same under domestic law as those of the criminal offence of robbery resulting in death of a person.

72. However, already in the request for the applicant's case to be listed for trial, the prosecutor had alleged that the applicant had contacted A.S. in Saranda on the day of the events and asked to exchange EUR 8,000 for Albanian currency even though he had not had that amount of money (see paragraph 14 above).

73. Furthermore, the facts underlying the applicant's conviction by the first-instance court included the finding that, during his first encounter with A.S. on the morning of 23 August 2005 in Saranda, the applicant had already formed the intention to take the money from him, and that with that intention

the applicant had asked A.S. to exchange EUR 8,000 for Albanian leks, and had asked him to bring the corresponding amount of Albanian currency to Shijan that afternoon (see paragraph 21 above).

74. The above shows that all the facts underlying the amended charge were known to the applicant from the beginning of his trial. No new factual elements were introduced by the Court of Appeal. It cannot therefore be said that the applicant could not have anticipated the reclassification of the charges against him. Moreover, at hearings held in the Court of Appeal on 16 March and 5 April 2006 the applicant's lawyer asked that court to amend the charges against the applicant and argued that the applicant could be convicted of any offence but murder. He then in his closing arguments asked that the charges be reclassified as murder with intent (Article 76 of the Criminal Code).

75. Given that both the prosecution's request for the case to be listed for trial and the judgment of the first-instance court included the facts on the basis of which the appellate court later amended the charges, namely the applicant's intent to rob A.S. of money, the Court considers that the applicant had adequate time and facilities to prepare his defence to the charges against him, including the allegation that he had intended to rob A.S. of the money he had asked him to bring to Shijan.

76. Indeed, in his statement given during the investigation, the applicant said that, even thought he had told A.S. that he would bring euros with him, he actually had not had any money and had intended to take the Albanian currency from A.S. without giving him any euros in exchange. The applicant also said that he had taken a gun with him with the intention of scaring A.S. and taking the money from him. When he had taken A.S. and P.S. to an abandoned house, the applicant had pulled out a gun and demanded money from A.S. (see paragraph 8 above).

77. At the trial the applicant changed his testimony, claiming that A.S. had owed him money and that A.S. had brought the gun which the applicant took from him and shot at A.S. when a fight had broken out (see paragraph 15 above).

78. It follows that the applicant had an adequate opportunity, during the investigation and at the trial before the first-instance court, to put forward his defence in respect of the constituent elements of the criminal offence of robbery resulting in death of a person, which was not unforeseeable to the applicant in any essential respects. He indeed in his defence addressed the circumstances relevant to the criminal offence of robbery. Therefore, the requalification of the charges by the Court of Appeal had not increased the burden on the applicant.

79. Assessing the fairness of the proceedings as a whole, the Court cannot accept the argument that the applicant was not sufficiently informed of the nature and cause of the accusation against him for the purposes of Article 6 § 3 (a) of the Convention, or that the guarantee under Article 6 § 3 (b) of the

Convention was not respected, or that he was deprived of a fair hearing within the meaning of Article 6 § 1 of the Convention.

80. There has accordingly been no violation of Article 6 §§ 1 and 3 (a) and (b) of the Convention.

3. The applicant's right to free legal assistance

(a) The parties' submissions

81. The applicant argued that he had been questioned by the prosecution in the absence of a lawyer. The authorities had accepted that he had no means to pay for legal assistance, and free legal assistance had therefore been provided to him, but only after the investigation had already been completed. He maintained that it had been clear from the start of the investigation that he had no means to afford legal assistance and that free legal assistance should have been offered and provided from his first questioning as a suspect.

82. The Government contended that the applicant had been informed of his rights to remain silent and to be represented by a lawyer, but had decided to confess without the assistance of a lawyer. In the Government's view the applicant had thus waived his right to legal assistance at the pre-trial stage. The Government also submitted that during the trial the applicant had been provided with free legal assistance.

(b) The third party's observations

83. The third party, Res Publica, stressed the importance of the right of an accused to access to a lawyer, and noted that that right was guaranteed under various international instruments. It referred to United Nations Human Rights Committee's *Concluding observations on the second periodic report of Albania* of 22 August 2013, in which the Albanian authorities had been called upon to ensure that detained persons had access to a lawyer immediately upon arrest. A similar comment had been made by the United Nations Committee Against Torture in 2012 and by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 2010.

84. Res Publica further criticised the guarantees of the rights of the accused under the Albanian Code of Criminal Procedure.

85. They relied on a number of the Court's judgments that addressed the question of an applicant's right to be represented by a lawyer (notably, *Laska and Lika*, cited above; *Kaçiu and Kotorri v. Albania*, nos. 33192/07 and 33194/07, 25 June 2013; *Dvorski v. Croatia* [GC], no. 25703/11, ECHR 2015; and *Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017).

(c) The Court's assessment

(i) General principles as to the right to a lawyer

86. The general principles with regard to the right of access to a lawyer may be found in the Grand Chamber judgments in *Beuze v. Belgium* ([GC], no. 71409/10, §§ 119-50, 9 November 2018); *Simeonovi*, cited above, §§ 110-20; *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, §§ 249-74, 13 September 2016); and *Dvorski*, cited above, §§ 76-82).

87. In particular, the Court has held that the right of everyone "charged with a criminal offence" to be effectively defended by a lawyer, guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial (see *Salduz v. Turkey* [GC], no. 36391/02, § 51, ECHR 2008; *Ibrahim and Others*, § 255; and *Beuze*, § 123, both cited above).

88. Where a person has been taken into custody, the starting point for the right of access to a lawyer is not in doubt. The right becomes applicable as soon as there is a "criminal charge" within the meaning given to that concept by the Court's case-law and, in particular, from the time of the suspect's arrest, whether or not that person is interviewed or participates in any other investigative measure during the relevant period (see *Simeonovi*, §§ 110-11, and *Beuze*, § 124, both cited above).

89. As to the aims pursued by the right of access to a lawyer, the Court held in *Beuze* (cited above, §§ 125-30) as follows:

> "125. Access to a lawyer at the pre-trial stage of the proceedings also contributes to the prevention of miscarriages of justice and, above all, to the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused (see *Salduz*, cited above, §§ 53-54; *Blokhin*, cited above, § 198; *Ibrahim and Others*, cited above, § 255; and *Simeonovi*, cited above, § 112).
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> 126. The Court has acknowledged on numerous occasions since the *Salduz* judgment that prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody. Such access is also preventive, as it provides a fundamental safeguard against coercion and ill-treatment of suspects by the police (see *Salduz*, cited above, § 54; *Ibrahim and Others*, cited above, § 255; and *Simeonovi*, cited above, § 112).
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> 127. The Court has also recognised that the vulnerability of suspects may be amplified by increasingly complex legislation on criminal procedure, particularly with regard to the rules governing the gathering and use of evidence (see *Salduz*, cited above, § 54, and *Ibrahim and Others*, cited above, § 253).
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> 128. Lastly, one of the lawyer's main tasks at the police custody and investigation stages is to ensure respect for the right of an accused not to incriminate himself (see *Salduz*, cited above, § 54; *Dvorski*, cited above, § 77; and *Blokhin*, cited above, § 198) and for his right to remain silent.
>
> 129. In this connection, the Court has considered it to be inherent in the privilege against self-incrimination, the right to remain silent and the right to legal assistance that a person 'charged with a criminal offence', within the meaning of Article 6, should have the right to be informed of these rights, without which the protection thus guaranteed

would not be practical and effective (see *Ibrahim and Others*, cited above, § 272, and *Simeonovi*, cited above, § 119; the complementarity of these rights had already been emphasised in *John Murray v. the United Kingdom*, 8 February 1996, § 66, *Reports of Judgments and Decisions* 1996-I; *Brusco v. France*, no. 1466/07, § 54, 14 October 2010; and *Navone and Others*, cited above, §§ 73 74). Consequently, Article 6 § 3 (c) of the Convention must be interpreted as safeguarding the right of persons charged with an offence to be informed immediately of the content of the right to legal assistance, irrespective of their age or specific situation and regardless of whether they are represented by an officially assigned lawyer or a lawyer of their own choosing (see *Simeonovi*, cited above, § 119).

130. In the light of the nature of the privilege against self-incrimination and the right to remain silent, the Court considers that in principle there can be no justification for a failure to notify a suspect of these rights. Where a suspect has not, however, been so notified, the Court must examine whether, notwithstanding this failure, the proceedings as a whole were fair. Immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights. However, where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer, his right to remain silent and the privilege against self-incrimination takes on particular importance (see *Ibrahim and Others*, cited above, § 273, and case-law cited therein)."

(ii) General principles as regards the right to free legal assistance

90. The Court reiterates that the right of an accused to free legal assistance, laid down in Article 6 § 3 (c) of the Convention, is one of the elements inherent in the notion of fair trial. That provision attaches two conditions to this right. The first is lack of "sufficient means to pay for legal assistance", the second is that "the interests of justice" must require that such assistance be given free (see *Pham Hoang v. France*, 25 September 1992, § 39, Series A no. 243; *R.D. v. Poland*, nos. 29692/96 and 34612/97, § 43, 18 December 2001; and *Zdravko Stanev v. Bulgaria*, no. 32238/04, § 36, 6 November 2012).

91. As to the first condition, the Court has considered it admissible that the burden of proving a lack of sufficient means should be borne by the person who pleads it (see *Caresana v. the United Kingdom* (dec.), no. 31541/96, 29 August 2000). The Court cannot substitute itself for the national courts in carrying out that assessment; it must rather review whether they considered the issue in line with the requirements of Article 6 (see *R.D. v. Poland*, cited above, § 45, and *Tsonyo Tsonev v. Bulgaria (no. 3)*, no. 21124/04, § 51, 16 October 2012).

92. As to whether the interests of justice required that the applicant receive free legal assistance in the form of court-appointed counsel, the Court will have regard to the severity of the sanction which the applicant might incur, the complexity of the case and the personal situation of the applicant (see *Quaranta v. Switzerland*, 24 May 1991, § 33, Series A no. 205). The Court has held that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation and if the defendant cannot

pay for it himself, public funds must be available as of right (see *Zdravko Stanev*, cited above, § 38).

(iii) Application of these principles in the present case

93. The Court considers that, having been arrested on suspicion of a criminal offence and interviewed by the prosecution, the applicant was subject to a "criminal charge" within the meaning of its case-law (see *Ibrahim and Others*, § 249; *Simeonovi*, §§ 110-11 and 121; and *Beuze*, § 124, all cited above). As such, the guarantees laid down in Articles 6 §§ 1 and 3 (c) as interpreted by the Court meant that the applicant had a right to be assisted by a lawyer during the interviews, unless there were compelling reasons to restrict that right and subject to an assessment of the overall fairness of the proceedings.

(α) Whether the applicant had a right to free legal assistance

94. The Court repeats at this juncture that the right to free legal assistance is subject to two conditions, namely that the accused has no means to afford legal assistance of his own choosing, and that the interests of justice require that he or she be provided free legal assistance (see paragraphs 94 and 95 above).

95. As to the first of these conditions, the Court notes that at the conclusion of the investigation the applicant was provided with free legal assistance on the grounds that he had no means to afford a lawyer of his own choosing. The Government have provided no clarifications as to why such an assessment was not undertaken already at the early stages of the investigation.

96. As to the second condition, the Court notes that there is no indication that the authorities assessed whether the interests of justice required that the applicant be provided with free legal assistance from the beginning of his questioning as a suspect. In that connection, it is evident that the applicant was investigated and then charged with very serious offences, and was potentially liable to being sentenced to life imprisonment. Given the gravity of the applicant's situation, the Court has no doubt that the interests of justice required that he be granted free legal assistance from the outset.

97. As regards the implications of restrictions on the right to free legal assistance, the Court's current approach, as confirmed in several Grand Chamber cases, requires that that question be assessed as an element of the fairness of the proceedings as a whole (see *Hamdani v. Switzerland*, no.10644/17, § 29, 28 March 2023, citing *Jemeļjanovs v. Latvia*, no. 37364/05, §§ 77 and 78, 6 October 2016; *Beuze*, cited above, §§ 120-123; and *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 90, 18 December 2018).

(β) Whether the applicant waived his right to legal assistance at his questioning during the investigation

98. The Court has held that 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, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner; it must not run counter to any important public interest and it must be attended by minimum safeguards commensurate with its importance. Such a waiver need not be explicit, but it must be voluntary and constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Simeonovi*, cited above, § 115). It follows that a waiver of the right to a lawyer, a fundamental right among those listed in Article 6 § 3 which constitute the notion of a fair trial, must be strictly compliant with the above requirements (see, *mutatis mutandis*, *Murtazaliyeva*, cited above, § 118).

99. In this connection, it may be reiterated that the right to counsel is a prime example of those rights which require the special protection of the "knowing and intelligent waiver" standard established in the Court's case-law (see *Dvorski*, cited above, § 100 and the cases cited therein).

100. As to the case at hand, the Court notes that the applicant was questioned by the prosecution on three occasions, on 27 August and on 14 and 22 September 2005. The records of those interviews show that the applicant was informed of his right to remain silent and to be assisted by a lawyer and said that he would give his statement without a lawyer and decide later whether to have a lawyer. The applicant signed those records without making any comment. The applicant did not contest the validity of those signatures (compare *Rusishvili v. Georgia*, no. 15269/13, § 41, 30 June 2022).

101. However, the Court notes that the applicant was informed of his right to a lawyer rather summarily and it was not made clear whether this referred to a lawyer of his own choosing or to a lawyer provided by the authorities free of charge subject to certain conditions. In this connection the Court notes that the authorities' obligation under domestic law to provide defendants with a "letter of rights" containing information about their rights, including their right to remain silent and to have a lawyer of their own choosing or free legal assistance subject to certain conditions, did not come into force until 1 August 2017 (see paragraph 32 above). The applicant was therefore not provided with a "letter of rights" prior to his first questioning.

102. A situation where the applicant was not provided with a "letter of rights" and where the records of the applicant's questioning, although they referred to Article 309 of the Code of Criminal Procedure, were not clear as to whether his right to free legal assistance was explained to him, cannot in the Court's view be seen as satisfying the "knowing and intelligent" standard

established in the Court's case-law for a waiver to be valid (see paragraph 46 above). It falls in the first place on the national authorities to establish in a convincing manner that the applicant's waiver of legal assistance was voluntary (see *Türk v. Turkey*, no. 22744/07, § 53, 5 September 2017, and *Agdağ v. Turkey*, no. 75460/10, § 61, 17 September 2019). Therefore, the Court considers that the Government have failed to demonstrate that the applicant validly waived his right to a lawyer, and in particular to free legal assistance, when giving statements to the prosecution.

103. Therefore, it cannot be said that by signing the records of his questioning and saying that he would give his statement without a lawyer, when he had not been explicitly informed of his right to free legal assistance, the applicant unequivocally waived, either tacitly or explicitly, his right to legal assistance.

104. Accordingly, the Court concludes that the applicant's right to legal assistance was restricted.

(γ) Whether there were "compelling reasons" to restrict access to a lawyer

105. The Court reiterates that restrictions on access to a lawyer for compelling reasons at the pre-trial stage are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (see *Simeonovi*, cited above, § 130).

106. The Government have failed to demonstrate the existence of any exceptional circumstances which could have justified the restrictions on the applicant's right. As a result, the restrictions in question were not justified by any compelling reason.

(δ) The fairness of the proceedings as a whole

107. The Court is called upon to examine, in the light of a list of non-exhaustive factors set out in its case-law (see *Ibrahim and Others*, cited above, § 274), whether the restrictions on the applicant's right to a lawyer were such as to prejudice the overall fairness of the criminal proceedings against him through the lens of Article 6 §§ 1 and 3 (c) of the Convention, by applying very strict scrutiny in absence of compelling reasons for that restriction (see the above-cited cases of *Beuze*, § 145; *Ibrahim and Others*, §265; and *Simeonovi*, §§ 118 and 132; see also *Kohen and Others v. Turkey*, nos. 66616/10 and 3 others, § 57, 7 June 2022).

– *Whether the applicant was vulnerable*

108. The Court notes that at the time of the events in question and of his questioning by the prosecution, the applicant was 22 years old and was employed as a bricklayer. There is no indication in the case file that the applicant suffered from any specific impairment, nor did the applicant make

any claim to that effect. From the material on file, it cannot be said that when making his statements to the prosecution the applicant was in such a poor state that he had to be deemed unfit or unwilling to cooperate. Therefore, it cannot be said that the applicant was unable to understand the situation he was in. The Court cannot discern other particular circumstances indicating that the applicant was in a greater state of vulnerability than that in which persons interviewed by investigators would generally find themselves.

– *The circumstances in which the evidence was obtained*

109. The Court reiterates that where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer, his right to remain silent and the privilege against self-incrimination takes on particular importance (see *Ibrahim and Others*, cited above, § 273, and the case-law cited therein). It is noteworthy that, in the present case, the applicant was informed repeatedly, before each round of questioning, of his right to remain silent and of his right to legal assistance (compare *Farrugia v. Malta*, no. 63041/13, § 112, 4 June 2019, and contrast *Beuze*, cited above, § 184; see also paragraphs 8 and 12 above). Irrespective of the fact that the Court has concluded that the applicant did not waive his right to legal assistance during his questioning by the prosecution in the circumstances of the case, it nevertheless follows that the applicant could have chosen to remain silent (compare *Farrugia*, cited above, § 112).

110. Furthermore, there is no suggestion that the applicant had been subjected to ill-treatment by the police or prosecution during the interviews or identity parade (compare *Doyle v. Ireland*, no. 51979/17, § 86, 23 May 2019, and *Farrugia*, cited above, § 111). As to the applicant's contention, submitted for the first time by his lawyer at a hearing before the Court of Appeal, that he was under duress to sign the records of his questioning by the prosecution, the Court notes that the applicant did not raise that issue at all during his trial in the first-instance court (compare *Kuralić v. Croatia*, no. 50700/07, §§ 41, 46 and 49, 15 October 2009), and that there is no indication in the case file of any such duress.

– *Whether the applicant was able to challenge the evidence and oppose its use, the nature of the statement and whether it was promptly retracted or modified*

111. The applicant first confessed during his questioning by the prosecution on 27 August 2005. He repeated his confession and gave some more information during further questioning by the prosecution on 14 and 22 September 2005. During his trial he was able to, and did, challenge the use of the statements he had made during the pre-trial interviews on the basis that they had been obtained in breach of what he argued was his Convention right to have a legal representative present during questioning. He claimed that it was actually A.S. who had owed him money and who had brought a gun to

their meeting, and that only after A.S. had threatened him with the gun had he grabbed A.S.'s hand and accidentally shot him.

112. The Court considers that it was for the national courts to assess the probative value of the applicant's statement at the trial. In this connection, the Court notes that the trial court addressed the applicant's new line of defence, considered it in the light of other evidence and concluded that it was to be rejected (see paragraph 20 above).

– *The use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case*

113. As to the strength of the other evidence, the Court firstly reiterates that it should not act as a court of fourth instance by calling into question the outcome of a trial or engaging in an assessment of facts and evidence or whether the evidence was sufficient to justify a conviction. These matters, in line with the principle of subsidiarity, are the domain of the domestic courts (see *Kohen and Others v. Turkey*, nos. 66616/10 and 3 others, § 59, 7 June 2022). However, as the Court has previously found, "the strength of the other evidence in the case" is a factor to be taken into account in assessing the impact of procedural failings at the pre-trial stage on the overall fairness of criminal proceedings (see *Ibrahim and Others*, cited above, § 274). In that connection, and in the circumstances of the present case, the Court makes the following observations.

114. The Court notes that the criminal investigation in respect of the applicant did not commence with, or as a result of, the statements that he had made without access to legal assistance (compare *Kohen and Others*, cited above, § 60). Before the applicant had made his statements, the police had already been informed of the events at issue by P.S., an eyewitness and one of the victims. The police first developed suspicions about the applicant because they had found his telephone number on A.S.'s person. Furthermore, the police had lawfully obtained a secret recording of the conversation between the applicant and his brother N.L. containing the applicant's confession of the crime in question.

115. The Court also considers it to be of significant importance that the Court of Appeal placed no reliance on the applicant's confession when assessing his guilt. It relied on other substantial evidence pointing to the applicant's guilt. In particular, it had regard to the evidence given by P.S., D.L. (the applicant's brother) and V.K., as well as to evidence obtained through the secret surveillance measure. In that connection the Court notes that the applicant did not challenge the manner in which that evidence was obtained, nor its veracity.

116. The Court is mindful in particular that P.S. was an eyewitness to the events at issue from beginning to end and that throughout the proceedings he gave his evidence clearly and consistently.

– *The weight of the public interest in the investigation and punishment of the particular offence in issue*

117. The Court considers that the nature of the crimes with which the applicant was charged, namely premeditated robbery resulting in the death of one person and the attempted murder of another person with a firearm, implied there was a very strong public interest in the prosecution (compare *Doyle*, cited above, § 96).

(iv) Conclusion as to the overall fairness of the proceedings

118. Given the above assessment, the Court considers that all the criteria indicated in *Ibrahim and Others* (cited above), in so far as relevant in the present case, such as the strength of other evidence, the applicant's lack of vulnerability, the opportunity to challenge the authenticity of the evidence, the quality of the evidence, the assessment of guilt by professional judges and the weight of the public interest, militate in favour of finding that the proceedings were overall fair.

119. Though being mindful of the fact that very strict scrutiny is to be applied to cases where there are no compelling reasons to restrict an applicant's right to a lawyer during a preliminary investigation, the Court considers that, in the specific circumstances of the case, the absence of a defence lawyer during the applicant's questioning by the prosecution was not such as to irretrievably prejudice the overall fairness of the criminal proceedings against him (compare *Kohen and Others*, cited above, § 63; *Doyle*, cited above, § 102; and *Pervane v. Turkey*, no. 74553/11, § 32, 8 September 2020).

120. Accordingly, there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (a), (b) and (c) of the Convention.

Done in English, and notified in writing on 5 March 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Registrar	Pere Pastor Vilanova President