



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

THIRD SECTION<sup>1</sup>

**CASE OF BALLIU v. ALBANIA**

*(Application no. 74727/01)*

JUDGMENT

STRASBOURG

16 June 2005

**FINAL**

***30/11/2005***

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

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1. In its composition before 1 November 2004.



**In the case of Balliu v. Albania,**

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

Mr G. RESS, *President*,

Mr I. CABRAL BARRETO,

Mr L. CAFLISCH,

Mr B.M. ZUPANČIČ,

Mr J. HEDIGAN,

Mr K. TRAJA,

Mrs A. GYULUMYAN, *judges*,

and Mr M. VILLIGER, *Deputy Section Registrar*,

Having deliberated in private on 27 May 2004 and on 24 May 2005,

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

## PROCEDURE

1. The case originated in an application (no. 74727/01) 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 Taulant Balliu (“the applicant”), on 3 August 2001.

2. The applicant, who had been granted legal aid, was represented by Mr P. Pavarini, a lawyer practising in Turin (Italy). The Albanian Government (“the Government”) were represented by their Agent, Mr S. Puto.

3. The applicant alleged that the lack of defence counsel at the trial breached his right to be defended through legal assistance. Moreover, because of the absence of defence counsel, he had been unable duly to question witnesses who were present or to obtain the appearance of witnesses on his behalf.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 30 September 2004, following a hearing on admissibility and the merits (Rule 54 § 3), the Court declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within former Section III.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1971 and is currently serving a prison sentence in Peqin Prison in Albania.

9. In criminal proceedings against armed gangs operating during the political turmoil in Albania from March to September 1997, the Elbasan public prosecutor's office accused the applicant of being one of the instigators of an armed gang known as the "Kateshi Gang". The gang, organised as a military commando, aimed to avenge the murder of their members in conflicts with other gangs and was financed by extorting money from various businessmen in the area.

#### A. The criminal proceedings

10. In 1999 the applicant was charged before the Durrës District Court with five counts of murder, two counts of attempted murder, one count of possession of military weapons and one count of creating and participating in an armed gang.

11. At public hearings before the court on 25 June 1999, 13 September 1999 and 10 December 1999 the applicant's lawyer, Mr Leli, was present. However, during the period from 10 December 1999 to 15 February 2000 the lawyer did not assist the applicant, nor did the latter have an officially assigned lawyer. The applicant submitted that at the hearings during that period the public prosecutor's office had summoned witnesses against him, questioned witnesses who were present and also produced other evidence against him. The applicant's lawyer had summoned two witnesses on the applicant's behalf but they did not appear at the trial.

12. According to the applicant's submissions, no defence counsel assisted him during the stage at which the parties made their final submissions. In this context, it transpires from the minutes of the public hearings that the applicant's lawyer was absent without reason and that the applicant refused to make his closing defence submissions himself. In that connection, the applicant complained that he had requested the court to officially assign him a defence lawyer, but had not received a reply.

13. According to the Government's submissions, the first-instance court proceedings lasted seven months and 21 hearings were arranged. The court's hearings were adjourned on several occasions as a result of the unjustified absence of lawyers, especially the applicant's lawyer. The latter was absent at seven consecutive court hearings without giving any reasons.

14. In all, only eleven hearings were actually held and ten could not take place on account of the lawyers' absence. The court then ordered the assignment of Mrs Meta, an official lawyer, who was present at the hearing on 28 January 2000. However, the applicant refused to be defended by a lawyer not chosen by him. The court accordingly discharged the officially assigned lawyer and continued the proceedings in the applicant's presence, but without any defence lawyer.

15. By letter of 13 December 1999 the Durrës District Court informed the Minister of Justice, among others, of the misconduct on the part of the applicant's counsel and requested him to intervene in the matter. However, no disciplinary measures relating to Mr Leli were taken by the Tirana Bar.

16. On 15 February 2000 the Durrës District Court found the applicant guilty and sentenced him to life imprisonment.

17. On 21 February 2000 the applicant lodged an appeal with the Durrës Court of Appeal against the judgment of 15 February 2000. He alleged that during the District Court hearings he had been denied a fair trial in that he had not been assisted by a lawyer during the first two months of the trial. Such a lawyer would have enabled him to prepare his defence and to summon the defence witnesses. He claimed that he had not been assisted even in the presentation of his final submissions. He also claimed that he had been abroad during the period when one or more of the crimes with which he had been charged had been committed, and produced customs stamps in his passport to prove that he had left the country. In his appeal, the applicant did not request the examination of any witnesses.

18. On 19 April 2000 the Court of Appeal upheld the District Court's judgment of 15 February 2000, while making several changes to the sentences imposed for the different counts. The changes concerned did not modify the sentence of life imprisonment.

19. On 19 May 2000 the applicant lodged an appeal with the Supreme Court, alleging that, in breach of his constitutional rights, he had been denied the right to be legally represented in the proceedings. He complained in particular that, although he had not been duly represented, the District Court had proceeded to examine witnesses against him and to consider other evidence.

20. On 7 December 2000 the Supreme Court upheld the Court of Appeal's decision on the following grounds:

“The violations alleged by the appellant were noted and redressed by the Court of Appeal without having a significant influence on the substance of the first-instance judgment. During the pre-trial stage and also the trial itself, the accused was granted

legal assistance. In the court's opinion, the unjustified absence of defence counsel, in agreement with the accused, in order to adjourn the trial could not have as a consequence the absolute nullity of the District Court's judgment.”

## **B. The Constitutional Court proceedings**

21. The applicant then lodged a complaint with the Constitutional Court, relying on Article 131 (f) of the Constitution. On 19 April 2001 the Constitutional Court, in accordance with section 31 of the Constitutional Court (Organisation and Operation) Act (Law no. 8577) of 10 February 2000, decided *de plano* to declare the complaint inadmissible as being “outside its jurisdiction”.

## **II. RELEVANT DOMESTIC LAW**

### **A. Constitution**

22. The relevant provisions of the Albanian Constitution provide:

#### **Article 31**

“During criminal proceedings everyone has the right:

...

(ç) to defend himself or to be assisted by defence counsel chosen by him; to communicate freely and privately with him, and to be provided with defence counsel free of charge if he does not have sufficient means;

(d) to question witnesses who are present and to request the appearance of witnesses, experts and other persons who can clarify the facts.”

#### **Article 42**

“1. The freedom, property and rights recognised in the Constitution and by law may not be infringed without a fair hearing.

2. In order to protect his constitutional and legal rights, freedoms and interests, or when an accusation has been made against him, everyone has the right to a fair and public trial, within a reasonable time, by an independent and impartial tribunal established by law.”

## **B. Code of Criminal Procedure**

23. Insofar as relevant, the Albanian Code of Criminal Procedure provides:

### **Article 49**

#### **The appointed defence lawyer**

“...

5. Then the presence of a defence lawyer is required and the selected or appointed defence lawyer has not been provided, has not appeared or has abandoned the defence, the court or the prosecutor shall appoint another lawyer as substitute, who shall exercise the rights and assume the obligations of the defence lawyer.”

## **THE LAW**

### **ALLEGED VIOLATIONS OF ARTICLE 6 §§ 1 AND 3 (c) AND (d) OF THE CONVENTION**

24. The applicant complained under Article 6 §§ 1 and 3 (c) and (d) of the Convention that he had been denied a fair hearing as he had not been duly defended through legal assistance and that he had not been able to question certain witnesses or to obtain the appearance of witnesses on his behalf.

The relevant parts of Article 6 of the Convention 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;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

...”

25. The Court reiterates at the outset that the requirements of paragraph 3 (c) and (d) of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1. For this reason, the Court considers it appropriate to examine the applicant's complaints from the standpoint of paragraph 3 taken together with the principles inherent in paragraph 1 (see, among other authorities, *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, p. 15, § 32, and *Van Geyselhem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I). On the whole, the Court is called upon to examine whether the proceedings in their entirety were fair.

#### **A. Alleged violation of Article 6 §§ 1 and 3 (c)**

##### *1. The parties' submissions*

26. The applicant alleged, first, that in the criminal proceedings against him he had not been properly represented by a lawyer as required by Article 6 §§ 1 and 3 (c) of the Convention. This would have been particularly important in view of the complexity of the case and the severity of the sentence.

27. The applicant observed that it was evident both from the Government's submissions and the documents in the file that his lawyer had not duly represented him during the most important parts of the first-instance proceedings before the Durrës District Court. Regardless of the grounds for his counsel's absence no disciplinary measures had been taken by the competent authority in respect of his misconduct.

28. On 26 November 2004 the applicant filed with the Court two statements made before a Durrës notary on 4 July 2003 in which Mr Leli, his counsel, and Mrs Meta, the appointed lawyer, declared that the Durrës District Court had made it impossible for them to provide the applicant with due legal assistance. Furthermore, Mr Leli maintained that the District Court had dismissed him from assisting the applicant during the first-instance proceedings and that he had been threatened by unknown persons.

29. The Government rejected the applicant's allegations. They contended that from the time of the investigation onwards, and in particular at the trial, the applicant had had every opportunity to exercise his right to a fair hearing and, in particular, to be represented by a lawyer. Thus, despite his lawyer's continuous and unjustified absence, the District Court adjourned the hearing on several occasions, giving the lawyer the chance to be present. Furthermore, the District Court assigned the applicant a lawyer under the legal-aid scheme. When the latter introduced herself on 28 January 2000, the applicant declared that he wished to have his own lawyer and did not agree to instruct another lawyer assigned by the court.

30. In the Government's submissions, the decision by the District Court to continue the hearings regardless of the presence or absence of the

applicant's legal representative did not infringe the applicant's constitutional rights. In fact, the applicant's right to be defended through legal assistance was secured even during the hearings before the Court of Appeal and the Supreme Court, at which he was represented by the same lawyer.

31. In respect of the applicant's statements filed on 26 November 2004, the Government maintained that in the District Court's file there were no indications to support the claim that the District Court had dismissed the applicant's counsel.

## 2. *The Court's assessment*

32. The Court reiterates that, as a general principle based on the notion of a fair trial, a person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing; if he does not have sufficient means to pay for such assistance, he is entitled under the Convention to be given it free when the interests of justice so require (see *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, p. 45, § 99, and *Pakelli v. Germany*, judgment of 25 April 1983, Series A no. 64, p. 15, § 31).

33. Having regard to the purpose of the Convention, which is to protect rights that are practical and effective, the Court has consistently found that, while States cannot be held responsible for every shortcoming on the part of lawyers appointed for legal-aid purposes, it is for the competent authorities to take steps to ensure that, in the particular circumstances of the case, applicants effectively enjoy the right to which they are entitled (see *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, p.18, § 36).

34. In the present case, the Court must examine whether the State can be made responsible for the failure of the lawyer chosen by the applicant to fulfil his duty, in breach of the defendant's rights under the Convention.

35. The Court notes that, as the applicant did not wish to defend himself in person and his chosen lawyer did not fulfil his duty, different courses were open to the Albanian authorities. Either they could cause Mr Leli, the applicant's chosen lawyer, to fulfil his duty, or they could replace him with an officially appointed lawyer. However, it was impossible, in view of the independence of the Bar, to force the applicant's counsel to act. Moreover, the applicant refused to be defended through the officially appointed lawyer. Thus, the domestic court chose a third course, namely to adjourn the hearings and then to proceed in the absence of the applicant's counsel, albeit in the applicant's presence.

36. The Court further notes that the applicant never informed the Durrës District Court of any shortcomings on the part of his representative or of the officially appointed lawyer, nor did he ask for a different one.

37. In this situation the Court finds that the authorities adequately discharged their obligation to provide legal assistance, both by adjourning

the hearings in order to give the applicant's counsel an opportunity to fulfil his duty and by appointing a lawyer under the legal-aid scheme.

38. Bearing in mind also the authorities' obligation under Article 6 § 1 of the Convention to conduct the proceedings “within a reasonable time”, the circumstances of the applicant's representation during his trial do not disclose a failure to provide legal assistance as required by Article 6 § 3 (c) of the Convention or a denial of a fair hearing under paragraph 1 of that provision.

## **B. Alleged violation of Article 6 §§ 1 and 3 (d)**

### *1. The parties' submissions*

39. The applicant complained, next, that he had been unable to question certain witnesses, as required by Article 6 §§ 1 and 3 (d) of the Convention.

40. In particular, the District Court had failed to comply with the provisions of domestic law which, in the applicant's view, required it to summon witnesses on his behalf. Moreover, he could not accept the Government's assertions about the possibility of summoning witnesses during the proceedings before the Court of Appeal. He argued that the improper attitude of his lawyer in the first-instance proceedings had clearly continued even during the proceedings before the Court of Appeal.

41. The Government contended that the failure of defence witnesses to appear at a time when the defence had wished them to give evidence before the District Court was not that court's responsibility. In particular, the applicant had, as part of his defence strategy, deliberately chosen to remain passive and not to exercise his rights under the Convention. Indeed, the trial as a whole had been fair, as required by law and the Convention, and the applicant had effectively had the opportunity to exercise his rights during the proceedings.

### *2. The Court's assessment*

42. The Court reiterates that the admissibility of evidence is primarily governed by the rules of domestic law and that, as a rule, it is for the national courts to assess the evidence before them. The task of the Convention institutions is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair. As a rule, these rights require that the defendant should be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings (see *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, p. 56, § 43, and *A.M. v. Italy*, no. 37019/97, § 25, ECHR 1999-IX).

43. In the present case, it must, therefore, be examined whether the applicant was provided with an adequate opportunity to exercise his defence rights within the meaning of Article 6 of the Convention in respect of the evidence given by the witnesses.

44. At the hearings before the Durrës District Court both the applicant and his counsel, when confronted with the witnesses for the prosecution, had the opportunity to put questions to them, though they chose not to do so: the applicant's lawyer by being absent and the applicant by remaining silent.

45. Accordingly, it cannot be said that the authorities did not comply with their duty under Article 6 §§ 1 and 3 (d) to afford the applicant sufficient opportunity to question witnesses at the trial.

### **C. Conclusion**

46. In conclusion, the Court considers that, taken as a whole, the criminal proceedings against the applicant could not be regarded as unfair. Thus, no breach was established under Article 6 §§ 1 and 3 (c) in relation to the legal assistance received by the applicant in particular during the trial at first instance before the Durrës District Court. There has equally been no violation of the applicant's rights under Article 6 § 3 (d) of the Convention in respect of the possibility of questioning witnesses in these proceedings.

## **FOR THESE REASONS, THE COURT UNANIMOUSLY**

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

Done in English, and notified in writing on 16 June 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Mark VILLIGER  
Deputy Registrar

Georg RESS  
President