



## Following conviction of war crimes in his absence, defendant should have had a real possibility of a rehearing of his case

In today's **Chamber** judgment<sup>1</sup> in the case of [Sanader v. Croatia](#) (application no. 66408/12) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 6 § 1 (right to a fair trial)** of the European Convention on Human Rights

The case essentially concerned the complaint by a man convicted in his absence of war crimes – committed in 1991 as a participant in Serb paramilitary forces – that he was unable to obtain a rehearing of his case.

The Court found that the possibilities under Croatian law to obtain a retrial, as suggested by the Croatian Government, had not provided Mr Sanader with sufficient certainty with the opportunity of appearing at a new trial. In particular, by obliging him to appear before the national authorities and to provide an address of residence in Croatia in order to request a retrial, the Croatian authorities had created a disproportionate obstacle to his use of the remedy.

### Principal facts

The applicant, Mile Sanader, is a Croatian and Serbian national who was born in 1957 and lives in Vrdnik (Serbia).

In November 1992 the Croatian prosecuting authorities charged Mr Sanader with war crimes against prisoners of war. He was suspected of having participated in a group of Serb paramilitary forces who, in September 1991, had shot 27 prisoners of war. He was tried in his absence and – on the basis of several witnesses' statements – convicted as charged, and sentenced to 20 years' imprisonment. The judgment was eventually upheld by the Croatian Supreme Court in September 2000. The courts subsequently issued an arrest warrant in his respect.

After Mr Sanader had learned of his conviction, he asked the Croatian courts to reopen the proceedings, denying that he had committed the crime. His request was dismissed in a decision eventually upheld by the Supreme Court in January 2011. His constitutional complaint was declared inadmissible in February 2012.

### Complaints, procedure and composition of the Court

Relying on Article 6 §§ 1 and 3 (c) (right to a fair trial and right to legal assistance of own choosing), Mr Sanader complained that he was unable to obtain a rehearing after his conviction in his absence, and that he had not been effectively represented by a legal-aid lawyer during the proceedings conducted in his absence.

The application was lodged with the European Court of Human Rights on 14 September 2012.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

Judgment was given by a Chamber of seven judges, composed as follows:

Isabelle Berro (Monaco), *President*,  
Elisabeth Steiner (Austria),  
Khanlar Hajiyev (Azerbaijan),  
Mirjana Lazarova Trajkovska ("The former Yugoslav Republic of Macedonia"),  
Erik Møse (Norway),  
Ksenija Turković (Croatia),  
Dmitry Dedov (Russia),

and also Søren Nielsen, *Section Registrar*.

## Decision of the Court

### Article 6

The Court observed that at the time the proceedings against Mr Sanader were opened – given the escalating war in Croatia and the fact that he lived on territory outside the authorities' control – it had been impossible for the authorities to notify him of the proceedings or to secure his presence. In such circumstances, it was possible under national law to hold a hearing in the absence of the defendant if there were highly important reasons for doing so. The Court accepted that a trial in the Mr Sanader's absence, having regard to the circumstances of the case, namely the gravity of the alleged crime and the public interest in effectively prosecuting war crimes, had not in itself been contrary to Article 6.

However, having regard to Mr Sanader's position, namely the fact that he had had no knowledge of his prosecution and of the charges against him and that he had not attempted to evade trial or waive his right to appear in court, the crucial question for the Court was whether national legislation provided him with sufficient certainty with the opportunity of appearing at a new trial. The Croatian Government, in their submissions to the Court, had referred to two possibilities under national law to obtain a retrial: first, a remedy specifically applicable to trials held in the absence of the defendant; and second, a general remedy for seeking the reopening of the proceedings.

As regards the first remedy, the Court observed that according to the case-law of the national courts, it required a person in Mr Sanader's position to appear before the national authorities and to provide an address of residence in Croatia during the criminal proceedings. However, this would in the ordinary course of action lead to his detention based on the conviction in his absence. The possibility that the enforcement of the sentence before obtaining a retrial could be postponed, as the Croatian Government had suggested, was not very likely in practice.

The Court underlined that under its case-law there could be no question of an accused being obliged to surrender to custody in order to secure the right to be retried, as that would mean making the exercise of the right to a fair hearing conditional on the accused offering up his liberty as a guarantee. Moreover, under the relevant national law the mere reopening of the proceedings would not have an effect on the validity of the judgment delivered in the previous proceedings. Such judgment would remain in force until the end of the retrial and only then could it possibly be set aside. Against that background the Court considered that by obliging Mr Sanader to appear before the national authorities and to provide an address of residence in Croatia during the criminal proceedings in order to request a retrial, the Croatian authorities had created a disproportionate obstacle to his use of the remedy.

As regards the second – general – remedy to which the Government had referred, the Court noted that it was applicable only to a restricted category of cases, since the condition for its use was the existence of new evidence or facts capable of leading to acquittal or a more lenient sentence. The

Court noted that Mr Sanader, having been tried in his absence, had had no opportunity to challenge the factual findings of the judgment by which he had been convicted.

The Court concluded that Mr Sanader had not been provided with sufficient certainty with the opportunity of obtaining a fresh determination of the charges against him by a court in full respect of his defence rights. There had accordingly been a violation of Article 6.

In view of that finding, the Court did not consider it necessary to examine Mr Sanader's complaint about the alleged inadequacy of his legal representation by the legal-aid lawyer during the proceedings conducted in his absence.

#### **Just satisfaction (Article 41)**

The Court held that Croatia was to pay Mr Sanader 4,000 euros (EUR) in respect of non-pecuniary damage and EUR 2,500 in respect of costs and expenses.

*The judgment is available only in English.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.