



Refusal to reopen *res judicata* criminal proceedings following a judgment of the Court finding a violation did not infringe the Convention

In today's **Chamber** judgment¹ in the case of [Kontalexis v. Greece \(No. 2\)](#) (application no. 29321/13) the European Court of Human Rights held, unanimously, that there had been

no violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights

The case concerned an unsuccessful application to have proceedings before the domestic courts reopened following a judgment of the Court.

The Court found in particular that the reasoning of the Court of Cassation which had had the effect of limiting the situations that could give rise to the reopening of criminal proceedings that had been terminated with final effect, or at least making them subject to criteria to be assessed by the domestic courts, did not appear to be arbitrary. It reiterated its settled case-law to the effect that the Convention did not guarantee the right to the reopening of proceedings.

The Court also held that, having regard to the discretion ("margin of appreciation") available to the domestic authorities in interpreting its judgments, the Court of Cassation had been entitled to find that the judgment of 2011 did not call into question the fairness of the proceedings or the independence or impartiality of the trial bench.

Principal facts

The applicant, Panagiotis Kontalexis, is a Greek national who was born in 1952 and lives in Kifissia (Greece).

On 24 November 2008 Mr Kontalexis lodged an application alleging a violation of his right to a "tribunal established by law". He complained that one of the judges who had been due to sit during his retrial had suddenly been replaced by a substitute without any reason being given. In a [judgment](#) of 31 May 2011 the Court found a violation of Article 6 § 1.

On 27 December 2011 Mr Kontalexis applied to the Athens Court of Appeal seeking the reopening of the criminal proceedings. He requested the setting-aside of the criminal court's judgment sentencing him to a suspended term of two years' imprisonment. He stressed that the Court had found that the absence of detailed reasons why the judge had been unable to attend and had suddenly been replaced by a substitute had been sufficient to raise doubts as to the transparency of the procedure and the real reasons for the judge's replacement. The Indictment Division of the Court of Appeal rejected the application on the grounds that the applicant had not sustained any damage as a result of the violation found by the Court.

The Court of Cassation dismissed an appeal on points of law by the applicant on the grounds that the Court's finding of a violation had not concerned the accused's right to be tried by an independent and impartial tribunal. That violation, which had been of a purely formal nature, had been a *fait accompli* and covered by the *res judicata* effect of the Court of Cassation's judgment dismissing the

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.

ground of appeal which the Court had subsequently upheld. Accordingly, the Court's judgment of 31 May 2011 could not call into question the Court of Cassation's decision in the initial proceedings.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial), the applicant alleged that the domestic courts' refusal to order the reopening of the proceedings concerning him had constituted a fresh violation of his right to a fair hearing by a tribunal established by law. Relying on Article 46 (binding force and execution of judgments), he contended that the rejection of his application by the Court of Cassation amounted to a refusal to execute the Court's judgment of 31 May 2011.

The application was lodged with the European Court of Human Rights on 24 April 2013.

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

Kristina **Pardalos** (San Marino), *President*,
Linos-Alexandre **Sicilianos** (Greece),
Aleš **Pejchal** (the Czech Republic),
Ksenija **Turković** (Croatia),
Armen **Harutyunyan** (Armenia),
Pauliine **Koskelo** (Finland),
Tim **Eicke** (the United Kingdom),

and also Renata **Degener**, *Deputy Section Registrar*.

Decision of the Court

Article 6 § 1

The Court examined the question of its jurisdiction to rule on the complaint raised by Mr Kontalexis, where a prior judgment had already been delivered. The application of April 2013 raised a new complaint relating to subsequent proceedings distinct from those that had been the subject of the judgment delivered by the Court in May 2011. The Court therefore had jurisdiction to examine the issue thus raised, without encroaching on the prerogatives of the respondent State and the Committee of Ministers under Article 46 of the Convention.

The complaint of unfairness raised by the applicant was specifically directed against the reasoning of the Court of Cassation. However, the grounds of its judgment of January 2013 constituted an interpretation of Article 525 of the Code of Criminal Procedure, which had the effect of limiting the situations that could give rise to the reopening of criminal proceedings that had been terminated with final effect, or at least making them subject to criteria to be assessed by the domestic courts. That interpretation, which was supported by the Court's settled case-law to the effect that the Convention did not guarantee the right to the reopening of proceedings, and by the lack of a uniform approach among the member States as to the operational procedures of any existing reopening mechanisms, did not appear to be arbitrary.

The Court of Cassation had held that the judgment of 2011 had not called into question the fairness of the proceedings or the independence or impartiality of the judicial bench that had delivered the judgment in question. In view of the margin of appreciation available to the domestic authorities in the interpretation of the Court's judgments, it was sufficient for the Court to satisfy itself that the Court of Cassation had not distorted or misrepresented the above-cited judgment. In the present case the Court could not conclude that the Court of Cassation's reading of the judgment of 2011, viewed as a whole, had been the result of a manifest factual or legal error leading to a denial of justice and thus an assessment flawed by arbitrariness.

Accordingly, there had been no violation of Article 6 of the Convention.

Article 46

The Court reiterated that the question of compliance by the High Contracting Parties with its judgments fell outside its jurisdiction if it was not raised in the context of the “infringement procedure” provided for in Article 46 §§ 4 and 5 of the Convention. Accordingly, in so far as the applicant had complained of a failure to remedy the violation found by the Court in its 2011 judgment, the Court did not have jurisdiction *ratione materiae* to deal with the complaint.

The judgment is available only in French.

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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.