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

THIRD SECTION

DECISION

Application no. 31948/13
Lulzim CAKA
against Albania

The European Court of Human Rights (Third Section), sitting on 21 May 2024 as a Committee composed of:

Ioannis Ktistakis*, President*,
Darian Pavli,
Andreas Zünd*, judges*,
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no. 31948/13) 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") on 6 February 2013 by an Albanian national, Mr Lulzim Caka ("the applicant"), who was born in 1970, is detained in Lezhë, and was represented by Mr B. Rusi, a lawyer practising in Tirana;

the decision to give notice to the Albanian Government ("the Government"), represented by their then Agent, Ms E. Muçaj, and subsequently by Mr O. Moçka, General State Advocate, of the complaints under Articles 6 § 1 and 13 of the Convention concerning the length of the criminal proceedings against the applicant and the lack of an effective remedy in that respect, as well the complaint under Article 6 § 3 (d) of the Convention on account of the non-attendance of witnesses whose statements were used as evidence for the applicant's conviction and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The case concerns alleged unfairness of criminal proceedings against the applicant on account of his inability to examine three prosecution

witnesses whose statements were used by the trial court to convict him of intentional murder. The applicant also complained about the length of criminal proceedings and the lack of a remedy in that respect.

2. This is the second application the applicant has brought before the Court concerning his conviction for murder. In the case of *Caka v. Albania*, (no. 44023/02, 8 December 2009) the Court found violations of the applicant's rights under Article 6 §§ 1 and 3 (d) of the Convention. Following the Court's judgment in the above case, the applicant requested a review of his conviction. On 7 March 2012 the Supreme Court accepted that request and remitted the case for retrial to the Vlora Court of Appeal (the Court of Appeal).

3. During the retrial, the Court of Appeal subpoenaed three witnesses, B., C. and D., as instructed by the Supreme Court. It was confirmed that witness C. had died before the retrial. The Court of Appeal repeated several times the summoning of the other two witnesses.

4. At a hearing held on 18 October 2012, the Fier Police Directorate informed the Court of Appeal that it could not guarantee the presence of the witnesses B. and D., because they were living abroad, in Greece and Turkey, respectively. The prosecution and the applicants' lawyers requested the court to revoke the decision to summon these witnesses. Neither the prosecution nor the applicant's lawyers submitted any request to the Court of Appeal to summon the witnesses or obtain their testimonies *via* international cooperation with the Greek and Turkish authorities.

5. The applicant, through his lawyers, in his closing arguments maintained that he was innocent, and that the prosecution had failed to prove his guilt. He acknowledged that the Court of Appeal took all the necessary steps to guarantee the presence of witnesses B. and D. and accepted that their attendance at trial was objectively not possible.

6. On 19 December 2012 the Court of Appeal upheld the applicant's conviction for murder. It based its reasoning on the evidence given at trial by witness A., the statements of witnesses B., C., and D. given during the criminal investigation, the crime scene investigation report and the ballistics report.

7. The applicant appealed to the Supreme Court alleging a violation of his right to a fair trial. In particular, he argued that given the absence of the prosecution witnesses B., C. and D. at the trial, their pre-trial statements should have been interpreted in his favour.

8. On 28 April 2015 the Supreme Court declared the applicant's appeal inadmissible as its grounds fell outside the scope of Article 432 of the Code of Criminal Procedure.

9. On 6 March 2017 the Constitutional Court dismissed the applicant's constitutional complaint, holding that the lower courts had acted in accordance with the legal provisions.

THE COURT'S ASSESSMENT

A. Alleged violation of Article 6 § 3 (d)

10. The applicant complained under Article 6 of the Convention that his right to a fair trial had been violated on account of his inability to examine three prosecution witnesses whose pre-trial statements had been used as evidence for his conviction.

11. In their submissions the Government argued that one of the witnesses had died before the trial, therefore he could not have been summoned to the trial against the applicant. As to the other two witnesses, the Government contended that the applicant, by requesting the Court of Appeal to revoke its decision to summon them, had consented to the reading out at the trial of the statements these witnesses had given during the police investigation. Therefore, through his lawyers, he had clearly waived his right to obtain the attendance and examination of witnesses B. and D.

12. The general principles concerning the examination of absent witnesses and use by the courts of the evidence given by those witnesses, laying down a tripartite test, have been summarised in *Schatschaschwili v. Germany* ([GC], no. 9154/10, §§ 100-31, ECHR 2015) and *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, §§ 118-47, ECHR 2011). The Court notes in particular that the use as evidence of statements obtained at the stage of a police inquiry and judicial investigation is not in itself inconsistent with Article 6 §§ 1 and 3 (d), provided that the rights of the defence have been respected (see *Schatschaschwili*, cited above, § 105).

13. Further to this, 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 (see *Dvorski v. Croatia* [GC], no. 25703/11, § 100, ECHR 2015, and the cases cited therein). Moreover, before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen the consequences of his conduct (see *Hermi v. Italy* [GC], no. 18114/02, § 74, ECHR 2006-XII, and *Sejdovic v. Italy* [GC], no. 56581/00, § 87, ECHR 2006-II).

14. As to the case at issue, the Court accepts that witness C. could not have attended the trial because he had died. As to witnesses B. and D., the Court notes that at a hearing held on 18 October 2012, following the information provided by the police, the applicant's defence lawyers asked the

Court of Appeal to revoke its order to summon these witnesses (see paragraph 4 above).

15. The Court notes that there is no suggestion that the applicant's actions had not been voluntary or had run counter to any important public interest. At the trial the applicant was represented by two lawyers of his own choosing. Nothing suggests that they were not aware of the consequences of their request to revoke the witnesses' subpoenas. The applicant, through his lawyers, could reasonably have foreseen what the consequences of such conduct would be.

16. Furthermore, nothing in the applicable legislation or in judicial practice prevented the defence from lodging motions to request international cooperation to ensure the presence of those witnesses. However, the applicant and his lawyers chose not to use that possibility. Regard must also be had to the fact that at no point in the proceedings, either before the domestic courts or the Court, did the applicant raise any objections concerning the conduct of his lawyers.

17. The above considerations are sufficient to enable the Court to conclude that the applicant waived his right to examine witnesses B. and D. The waiving of that right was explicit and an expression of the applicant's free will. The Court also observes that the applicant had the possibility to comment on the witnesses' statements during the trial.

18. As regards the applicant's claim that the domestic courts should have interpreted in his favour the statements given by witnesses B. and D. during the investigation phase, it must be noted that in line with the principle of subsidiarity, it is not appropriate for the Court to rule on whether the available evidence was sufficient for an applicant's conviction and thus to substitute its own assessment of the facts and the evidence for that of the domestic courts. The Court's only concern is to examine whether the proceedings in a given case were conducted fairly and were compatible with the Convention, while also taking into account the specific circumstances, the nature and the complexity of the case (see *Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010; *Al-Khawaja and Tahery*, cited above, § 118; and *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 149, 18 December 2018).

19. The above considerations, and in particular the fact that the applicant was given the opportunity to put forward his defence arguments, are sufficient to enable the Court to conclude that, regard being had to the proceedings as a whole, the overall fairness of the criminal proceedings against the applicant was ensured.

20. In view of the foregoing, this complaint must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. Length of proceedings and a remedy in that respect

21. As regards the alleged violation of the "reasonable time" requirement under Article 6 § 1 of the Convention, the general principles concerning the length of proceedings have been summarised in *Frydlender v. France* ([GC], no. 30979/96, § 43, ECHR 2000-VII).

22. The proceedings complained of lasted three years and eleven months before three levels of jurisdiction.

23. The Court finds that no delay may be attributable to the applicant's conduct.

24. As to the conduct of the domestic courts, the Court observes that it did not take any of the instances more than two years and one month to deliver a decision. Having regard to the latter and its case-law on the matter (see, for example, *L.Z. v. Slovakia* (dec.), no. 27753/06, 27 September 2011, and *Lyszczyna v. Germany* (dec.), no. 34863/04, 4 January 2008), the Court considers that the overall length of three years and eleven months before three levels of jurisdiction, did not exceed what could be considered reasonable in the circumstances (compare *Ekholm v Finland* (dec.), no. 5952/03, 10 July 2007, and *Steiner v. Austri*a (dec.), no. 32637/96, 22 November 2001).

25. The Court therefore finds that this part of the application is manifestly ill-founded and must be rejected under Article 35 § 4 of the Convention.

26. As to the Article 13 complaint, the Court notes that it is inextricably linked to the one examined above and must therefore likewise be declared inadmissible (see *Ljubičić v. Croatia* (dec.), no. 17338/05, 10 May 2007).

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 13 June 2024.

Olga Chernishova Deputy Registrar	Ioannis Ktistakis President