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

FIRST SECTION

DECISION

Applications nos. 76386/11 and 76408/11
Zois KOKKONIS against Greece
and Nikolitsa CHALILOPOULOU against Greece

The European Court of Human Rights (First Section), sitting on 31 October 2017 as a Chamber composed of:
Kristina Pardalos, *President,*
Linos-Alexandre Sicilianos,
Aleš Pejchal,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Tim Eicke,
Jovan Ilievski, *judges,*
and Renata Degener, *Deputy Section Registrar,*
Having regard to the above applications lodged on 23 November 2011,
Having deliberated, decides as follows:

# THE FACTS

1. The applicant in the first case, Mr Zois Kokkonis, is a Greek national who was born in 1964 and lives in Patra. The applicant in the second case, Ms Nikolitsa Chalilopoulou, is a Greek national who was born in 1968 and lives in Patra. They were represented before the Court by Mr A. Regglis, a lawyer practising in Patra.

## A. The circumstances of the cases

2. The facts of the cases, as submitted by the applicants, may be summarised as follows.

3. On 7 January 2009 the applicants, a married couple, were convicted *in absentia* by the three-member Patras Court of First Instance of an offence of

theft which they were found to have committed jointly, and sentenced to twelve months' imprisonment (decision no. 22/2009). The applicants lodged an appeal, which was scheduled to be heard on 15 February 2011 by the three-member Patras Court of Appeal. However, on that date the applicants applied for an adjournment of the hearing, as their lawyer could not be present, and the hearing was rescheduled for 3 May 2011 (adjournment decision no. 543/2011). The applicants did not attend that hearing, and neither did a lawyer acting on their behalf. The Patras Court of Appeal, taking into account that the applicants had been present on 15 February 2011, considered that it was "as if [they were] present", examined their appeal, and sentenced them to ten months' imprisonment (decision no. 1084/2011).

4. The applicants applied for the annulment of the proceedings under Article 341 of the Code of Criminal Procedure, arguing that they had not been present at the court hearing owing to *force majeure*, which had prevented them from attending the hearing or informing the court of their absence. In particular, Mr Kokkonis submitted that he had been hospitalised on 29 April 2011 owing to acute febrile gastroenteritis, and had left hospital with instructions to stay in bed from 29 April 2011 to 8 May 2011; he attached the relevant documents to his application for annulment. Ms Chalilopoulou argued that she had been prevented from attending the hearing owing to her husband's illness, as she had had to take care of him and their children at home.

5. The applicants' applications for the annulment of the proceedings were heard by the Patras Court of Appeal on 17 May 2011 and the proceedings continued on 25 May 2011. The court dismissed their applications as inadmissible (decision no. 1356/2011). In particular, it held that an application for annulment under Article 341 could only be lodged if the defendant had been tried *in absentia*, and not when he had been tried "as if [he were] present".

## B. Relevant domestic law and practice

6. The relevant parts of the Code of Criminal Procedure read:

**Article 340**

"...

3. If the defendant has been legally summoned but is not present, or is not legally represented by a lawyer, he is tried as if he were present..."

**Article 341**

"1. If, as a result of *force majeure* or other insurmountable obstacles, the convicted defendant could not notify the court of the insurmountable obstacle promptly by any means, so as to request an adjournment of the hearing (Article 349), he can lodge an

application for annulment of the proceedings which took place in his absence or in the absence of his representative...

...

2... If the application for annulment is granted, the decision against which it has been lodged is annulled and the court orders a new hearing for the case on a given date, during which the defendant shall appear without having been summoned. Under no circumstances is the defendant allowed to lodge an application for annulment against the decision [on his application for annulment]."

7. According to the case-law of the Court of Cassation, the decision that is issued following an application for annulment pursuant to Article 341 of the Code of Criminal Procedure is not subject to an appeal on points of law (decision no. 1245/2008 of the Court of Cassation).

## COMPLAINTS

8. The applicants complained under Article 6 §§ 1, 2 and 3, and under Articles 13 and 14 of the Convention.

## THE LAW

### A. Joinder

9. Having regard to the similar subject-matter of the applications, the Court finds it appropriate to join them, pursuant to Rules 42 § 1 and 53 § 7 of the Rules of Court.

### B. Admissibility

10. The applicants argued that dismissing their applications for annulment as inadmissible, on the grounds that the procedure applied only to absent defendants and not those who had been tried "as if [they were] present", had violated their right to a fair trial under Article 6 §§ 1, 2 and 3 of the Convention. In addition, they complained under Articles 13 and 14 of the Convention that they did not have an effective remedy at their disposal to complain about the alleged violation of their right to a fair trial, and that they had been discriminated against on account of their Roma origin.

11. The Court wishes to clarify at the outset that the scope of the present case concerns the proceedings before the Court of Appeal leading to its decision of 25 May 2011 and not the applicants' conviction *in absentia* as such by the first instance court on 7 January 2009, as confirmed by the

Court of Appeal on 3 May 2011 (as regards conviction *in absentia* and safeguard requirements, see, for example, *Sejdovic v. Italy* [GC], no. 56581/00, ECHR 2006-II).

12. The Court will firstly examine whether Article 6 applies to the proceedings at issue. The relevant principles were set out in the Court's judgment *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, §§ 60–67, 11 July 2017). In sum, Article 6 does not apply to proceedings to reopen criminal proceedings, given that someone who applies for his case to be reopened and whose sentence has become final is not "charged with a criminal offence" within the meaning of that Article (see, among other authorities, *Fischer v. Austria* (dec.), no. 27569/02, ECHR 2003-VI). However, Article 6 of the Convention is applicable, in its criminal aspect, to criminal proceedings concerning remedies classified as extraordinary in domestic law where the domestic court is called upon to determine the charge. The Court therefore examines the issue of the applicability of Article 6 to extraordinary remedies by seeking to establish whether, during the consideration of the remedy in question, the domestic court was required to determine the criminal charge (see *Moreira Ferreira* (no 2), cited above, § 65).

13. Turning to the circumstances of the present case, the Court notes that Article 341 of the Code of Criminal Procedure provides those who have been convicted *in absentia* with a remedy entailing the possibility of annulling their conviction, if proven that they were not able to attend the hearing owing to *force majeure* or other insurmountable obstacles which prevented them from notifying the court of their absence. Therefore, in the context of the examination provided for in Article 341 of the Code of Criminal Procedure, the domestic court's task is not to determine the criminal charge but to examine whether the conditions for granting an annulment, and subsequently a retrial, are satisfied; if they are, then the domestic court orders the annulment of the convicting decision and sets a date for a new hearing of the case. The Court therefore considers that the above-mentioned remedy concerning applications for annulment under Article 341 of the Greek Code of Criminal Procedure is akin to proceedings to reopen criminal proceedings.

14. In view of the above-mentioned, the Court concludes that Article 6 does not apply to the proceedings in question brought by the applicants under Article 341 of the Code of Criminal Procedure. It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention, and must be rejected in accordance with Article 35 § 4.

15. In respect of the applicants' complaint under Article 13 of the Convention, the Court reiterates that, in accordance with its case-law, Article 13 applies only where an individual has an "arguable claim" to be the victim of a violation of a Convention right. Having regard to its

considerations above under Article 6 of the Convention, the Court does not find that the applicants have an arguable claim for the purposes of Article 13, which therefore does not apply (see see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI).

16. Lastly, having regard to the fact that Article 14 of the Convention is not autonomous and its conclusion that Article 6 is not applicable, the Court considers that Article 14 does not apply in the instant case. It follows that this complaint is also incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a), and must be rejected in accordance with Article 35 § 4 (see generally *De Bruin v. the Netherlands* (dec.), no. 9765/09, 27 July 2013, and, as a recent example, *Adigun v. Ireland* (dec.), no. 19673/16, 31 January 2017).

For these reasons, the Court, by a majority,

*Decides* to join the applications;

*Declares* the applications inadmissible.

Done in English and notified in writing on 23 November 2017.

Renata Degener
Deputy Registrar

Kristina Pardalos
President