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

THIRD SECTION

DECISION

Application no. 17475/13
Shkelqim QOSJA
against Albania

The European Court of Human Rights (Third Section), sitting on 14 June 2022 as a Committee composed of:

Andreas Zünd, *President,*
Darian Pavli,
Mikhail Lobov, *judges,*
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no. 17475/13) 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 11 April 2012 by an Albanian national, Mr Shkelqim Qosja, who was born in 1977 and lives in Fushë-Krujë ("the applicant") who was represented by Mr Pjetra, a lawyer practising in Tirana;

the decision to give notice of the complaint concerning the absence of the defence from a hearing held before the Supreme Court to the Albanian Government ("the Government"), represented by their Agent, Ms A. Hicka, State Advocate General, 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 the applicant's absence from the hearing before the Supreme Court.

2. The applicant was tried for murder and illegal possessions of weapons before the District Court of Shkodra. In 1999 that court firstly ordered the applicant's detention and later on replaced it with house arrest. The prosecution appealed that decision and then withdrew its appeal. The district

court dismissed the appeal as being withdrawn. Judge M.H. participated in adoption of that decision.

3. On 18 July 2000 the District Court of Shkodra found the applicant guilty as charged and sentenced him to twenty years' imprisonment.

4. On 2 May 2001 the Shkodra Appeal Court, with participation of judge M.H., upheld the judgment of 18 July 2000. At some point before that, the applicant left Albania. He was extradited from the United States of America on 25 February 2010 and placed in detention. The judgment of 2 May 2001 was served on him the same day.

5. On 10 June 2010 the applicant, represented by lawyer M.I. lodged an appeal with the Supreme Court against the judgment of 2 May 2001. The only ground of that appeal was the alleged lack of impartiality of judge M.H. for reasons of his participation in the decision adopted in 1999 (see paragraph 1 above) and his subsequent participation in the trial bench which convicted the applicant in 2001.

6. On 13 April 2011 the Supreme Court scheduled a hearing in the applicant's case for 28 April 2011 at 11.40 a.m. This was publicly announced at the premisses of the Supreme Court and on its website. The applicant and his lawyer were not served with written summons for the hearing before the Supreme Court.

7. A hearing before the Supreme Court was held in the absence of the applicant and his lawyer and in the presence of the prosecutor. The Supreme Court dismissed the applicant's appeal.

8. The applicant then lodged a constitutional complaint. In the proceedings before the Constitutional Court he was represented by his chosen lawyers N.P. and E.A. In his constitutional complaint the applicant put forward two complaints. He firstly complained about the lack of impartiality of judge M.H., the same complaint he had previously advanced in his appeal before the Supreme Court. Secondly, he complained about the fact that neither him nor his lawyer had been summoned by written summons to the hearing held before the Supreme Court on 28 April 2011.

9. The Constitutional Court held a hearing on 19 January 2012 in the presence of the applicant's lawyers who made their oral pleadings. On the same day the Constitutional Court dismissed the applicant's constitutional complaint. It held that the previous participation of judge M.H. had not influenced his impartiality in the applicant's trial. The Court found that the decision adopted by M.H. in 1999 was of formal nature since he only decided to dismiss the prosecution's appeal on the ground that the appeal had been withdrawn, and thus had not given any opinion on the merits of the case.

THE COURT'S ASSESSMENT

A. Scope of the applicant's complaints

10. The Court notes that the applicant, who was represented in the proceedings before the Court, did not raise in his original application his complaint under Article 6 § 1 of the Convention concerning the impartiality of judge F.H. who took part in deciding the applicant's constitutional complaint. As a result, no issue concerning the lack of impartiality of judge F.H. was communicated to the Government, and the Government did not comment on it. The applicant claimed that he had learned about participation of that judge only from the Government's observations. However, the applicant's lawyers were present at the hearing before the Constitutional Court on 19 January 2012. Accordingly, the Court considers that complaint alleging lack of impartiality of judge F.H. does not constitute a mere elaboration on his original complaints to the Court, and therefore it is not appropriate to deal with this newly raised matter in the present case (see *Rafig Aliyev v. Azerbaijan*, no. 45875/06, §§ 69-70, 6 December 2011, with further references).

B. Article 6 §§ 1 and 3 (c) of the Convention

1. The applicant's attendance in person

11. The Government argued that the application had been submitted to the Court out of the six-month time limit because the final domestic decision had been adopted by the Constitutional Court on 2 April 2012 and had been served on the applicant's lawyers on the same day whereas the application had been submitted to the Court on 15 April 2013.

12. The Court notes that the present application was lodged with the Court on 11 April 2012. It follows that it complied with the six-month time-limit.

13. The general principles concerning an accused's personal attendance at a hearing before a superior court have been summarized in the case of *Zahirović v. Croatia*, no. 58590/11, §§ 54-57, 25 April 2013.

14. In principle, the accused's personal attendance is required when a superior court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence or where it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (see *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004). Likewise, personal attendance of the accused is also required where the appellate court is called upon to examine whether the applicant's sentence should be increased and when the appeal proceedings are capable of raising issues including such matters as the applicant's personality and character, which makes such proceedings of crucial

importance for the applicant since their outcome could be of major detriment to him (see *Talabér v. Hungary*, no. 37376/05, § 28, 29 September 2009; and *Zahirović*, cited above, § 57).

15. The Court firstly notes that the issue in the present case is not the applicant's trial *in absentia* by the Shkodra Court of Appeal because in his appeal to the Supreme Court he only complained about the lack of impartiality of judge M.H.

16. Even if, in general, the Supreme Court of Albania has the power to review a case both on questions of fact and law, and to increase or lower a defendant's sentence, that was not the situation in present case. In the present case the only issue before the Supreme Court was the alleged lack of impartiality of judge M.H. because that was the only ground of the applicant's appeal. Therefore, since the Supreme Court did not have to decide on the applicant's guilt or asses the facts relevant for the applicant's conviction, or assess the severity of the penalty, under the Court's case-law cited above, the applicant's presence in person was not necessary.

17. Thus, the issue in this case is whether the applicant's right to be represented by a lawyer at the appeal hearing was respected.

2. The applicant's right to be legally represented

18. The Court notes that Article 6 of the Convention does not provide for specific forms of service of documents, including summonses. The question is whether an individual's right to a fair trial has been denied in the circumstances of the case (see, generally, *Teuschler v. Germany* (dec.), no. 47636/99, 4 October 2001; and *Gakharia v. Georgia*, no. 30459/13, § 33, 17 January 2017). If court documents, including summonses to hearings, are not served in person, then an applicant might be prevented from defending himself or herself in the proceedings (see *Ozgur Karaduman v. Germany* (dec.), no. 4769/02, 26 June 2007; *Weber v. Germany* (dec.), no. 30203/03, 2 October 2007; *Zavodnik v. Slovenia*, no. 53723/13, § 70, 21 May 2015; and *Vyacheslav Korchagin v. Russia*, no. 12307/16, §§ 64-65, 28 August 2018).

19. The Supreme Court held a hearing of which neither the applicant nor his defence lawyer were informed by written summons. The Supreme Court announced the date of the hearing by a public announcement in the premises of the Supreme Court, and it was published on the Supreme Court's official website. The Court notes that this appears to have been standard practice of the Supreme Court of Albania at the relevant time.

20. The Court reiterates that its task is not to review the relevant law and practice *in abstracto*, but to determine whether or not the manner in which they were applied to, or affected the applicant, gave rise to a violation of the Convention (see, among other authorities, *Schwarzenberger v. Germany*, no. 75737/01, § 37, 10 August 2006; *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015).

21. According to the Court's case-law, compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (*Beuze v. Belgium* [GC], no. 71409/10, § 121, 9 November 2018). In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1. Those minimum rights guaranteed by Article 6 § 3 are, nevertheless, not ends in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, §§ 251 and 262, 13 September 2016; and *Beuze*, cited above, § 122).

22. It is well-established in the Court's case-law that it is the intervention of a higher court which, in certain circumstances, may remedy an earlier violation of the Convention (see *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, p. 19, § 33; and *Chmelíř v. the Czech Republic*, no. 64935/01, § 68, ECHR 2005-IV).

23. The Court firstly notes that the applicant, assisted by a lawyer, submitted a written appeal to the Supreme Court in which he was able to present all his arguments concerning his only complaint, namely the alleged lack of impartiality of judge M.H. The Supreme Court examined that complaint and rejected it.

24. Further to this the applicant lodged a constitutional complaint where he repeated the same argument about the impartiality of judge M.H. The Constitutional Court held a hearing in the presence of the applicant's chosen lawyers, N.P. and E.A., who were able to advance all arguments they wished as regards the alleged lack of impartiality of judge M.H. It is to be noted that the applicant's lawyers did not develop any new arguments before the Constitutional Court concerning the alleged lack of impartiality of judge M.H. in addition to those which had already been stated in the applicant's appeal to the Supreme Court (compare *Mađer v. Croatia*, no. 56185/07, § 167, 21 June 2011).

25. The Court observes that the Constitutional Court dealt with the complaint raised by the applicant, namely the alleged lack of impartiality of judge M.H., and gave reasons in respect of the points raised by the applicant which reasons do not appear arbitrary and are in line with the Court's case-law on the matter (compare, for example, with *Jasiński v. Poland*, no. 30865/96, § 56, 20 December 2005; *Dāvidsons and Savins v. Latvia*,

nos. 17574/07 and 25235/07, § 49, 7 January 2016; and *Heiszné Szőrös v. Hungary* (dec.)[Committee], no. 18854/14, §§ 17 and 18, 30 June 2020).

26. In conclusion, and without taking a general stance on the impugned practice of the Supreme Court as regards the manner of informing the parties of hearings before that court, the Court considers that, taking the proceedings upon the applicant's complaint about the alleged lack of impartiality of judge M.H. as a whole, in the particular circumstances of the present case, given the nature of the applicant's complaint before the Supreme Court and the fact that subsequently a hearing was held on the same issue before the Constitutional Court in the presence of the applicant's lawyers, the applicant's lawyer's absence from the hearing before the Supreme Court did not violate the guarantees of a fair trial.

27. Accordingly, the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 7 July 2022.

Olga Chernishova Deputy Registrar	Andreas Zünd President