



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

THIRD SECTION

CASE OF MILENKOVIĆ v. SERBIA

(Application no. 50124/13)

JUDGMENT

STRASBOURG

1 March 2016

*This judgment will become final in the circumstances set out in Article 44
§ 2 of the Convention. It may be subject to editorial revision.*

In the case of Milenković v. Serbia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Luis López Guerra, *President*,

Helena Jäderblom,

George Nicolaou,

Helen Keller,

Branko Lubarda,

Pere Pastor Vilanova,

Alena Poláčková, *judges*,

and Marialena Tsirli, *Deputy Section Registrar*,

Having deliberated in private on 9 February 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 50124/13) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Serbian national, Mr Momčilo Milenković (“the applicant”), on 12 June 2013.

2. The applicant was represented by Mr Z. Đušić, a lawyer practising in Leskovac. The Serbian Government (“the Government”) were represented by their Agent, Mrs V. Rodić.

3. The applicant alleged that his right not to be tried twice had been violated.

4. On 15 January 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1969 and lives in Leskovac.

6. On 17 October 2006 the Leskovac police informed the local minor-offence judge and the public prosecutor’s office about a violent incident between the applicant and a certain R.C. that had occurred on 12 October 2006 in a neighbourhood of Leskovac.

A. Conviction of the applicant for a misdemeanour

7. By a decision of 6 November 2007 the misdemeanour court judge in Leskovac (*sudija Opštinskog organa za prekršaje u Leskovcu*) found that at about 5.30 p.m. on 12 October 2006 in Leskovac R.C. had verbally insulted the applicant's children, and the applicant had then punched him several times on the head and injured him. The judge concluded that these actions had been in breach of public order and peace and had thus been contrary to Article 6(3) of the Public Order Act 1992 (see paragraph 21 below under Relevant domestic law and practice). The relevant part of the decision reads:

“Defendant[s] R.C. ... and Momčilo Milenković are guilty in that at about 5.30 p.m. on 12 October 2006, in Subotička street in Leskovac, [the former first swore and insulted the applicant's children], while the latter punched R.C. several times on the head and injured him ...”

8. Each of them was ordered to pay a fine in the amount of 4,000 Serbian dinars (RSD) plus RSD 700 for costs (at that time equivalent to approximately 60 euros (EUR) in total), which in the event of non-compliance would be converted into a prison term of eight days.

B. Criminal prosecution of the applicant

9. After an investigation had been conducted, on 4 April 2007 the Leskovac Public Prosecutor's Office (“the LPPO”) charged the applicant with the criminal offence of inflicting grievous bodily harm on R.C. in connection with the above incident, contrary to Article 121 § 2 of the Criminal Code 1998. The LPPO, as well as the applicant and his family in the capacity of private prosecutors, lodged separate indictments against R.C. for several offences. All the indictments were joined in the same proceedings before the Leskovac Municipal Court.

10. In a judgment of 13 April 2011 the Leskovac Municipal Court found the applicant guilty as charged and sentenced him to three months' imprisonment. R.C. was found guilty and fined for insulting the applicant's family and causing minor bodily injuries to the applicant's mother. The court ordered the applicant to pay RSD 14,739 in court costs, while each party was to cover its own costs and expenses.

The relevant part of the decision reads:

“Defendant Milenković Momčilo ... is guilty in that

at about 4.00 and 4.30 p.m on 12 October 2006 in Subotička Street ... he punched [R.C.] on the left side of the face and, after knocking R.C. down, he continued punching him in the head, thereby causing him a number of grievous bodily injuries dangerous for life, such as: bruising of both eyelids (black eye), bruising of the left cornea, and nose abrasions ...”

11. The applicant appealed, arguing, *inter alia*, that he had already been punished in respect of the same incident by the Leskovac misdemeanour judge, with the result that the principle of *ne bis in idem* had been violated (see paragraph 18 below).

12. On 20 March 2012 the Niš Appeals Court upheld the judgment in respect of the applicant and dismissed the charges against R.C. as statute-barred. As regards the principle of *ne bis in idem*, the court held that the applicant had been found guilty of a misdemeanour against public order and peace in the misdemeanour proceedings, whereas he had been convicted of the criminal offence of grievous bodily harm in the criminal proceedings. According to the court, the descriptions of the acts sanctioned therefore clearly differed.

13. On 19 September 2012, the Leskovac Basic Court converted the prison sentence to house arrest without electronic monitoring.

14. On 29 November 2012 the Leskovac Basic Court amnestied the applicant at his request, finding that the conditions for a statutory amnesty were applicable (see paragraph 22 below).

C. Constitutional Avenue

15. In a subsequent constitutional appeal lodged on 25 May 2012 the applicant reiterated that he had been tried and punished twice for the same offence, in breach of Article 34 § 4 of the Constitution (see paragraph 13 below).

16. On 20 May 2013 the Constitutional Court, referring to the reasoning of the Niš Appeals Court as “fully acceptable from the constitutional point of view” (see paragraph 12 above), dismissed the applicant’s appeal as ill-founded. The decision of the Constitutional Court was served on the applicant’s representative on 29 May 2013.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant provisions concerning the principle of *ne bis in idem*

17. The Constitution of the Republic of Serbia (published in the Official Gazette of the Republic of Serbia - OG RS – no. 98/06) guarantees, under Article 34 § 4, that no person may be prosecuted or sentenced for a criminal offence for which he has been acquitted or convicted by a final judgment, for which the charges have been dropped or criminal proceedings have been discontinued by a final decision. The same prohibitions should be applicable to all other proceedings conducted for any other act punishable by law.

18. The language of Article 6 § 1 of the Criminal Procedure Code (*Zakon o krivičnom postupku*, published in the Official Gazette of the SRY,

nos. 70/01 and 68/02 and OG RS nos. 58/04, 85/05, 115/05, 46/06, 49/07 and 122/08), corresponds to Article 34 § 4 of the Constitution 2006 referred to above.

19. According to Article 8 of the Misdemeanours Act 2005 (*Zakon o prekršajima*, published in OG RS nos. 101/05, 116/08 and 111/09) no one shall be sanctioned in minor offences proceedings two or more times for the same misdemeanour, nor may a person be punished for a misdemeanour if he or she has been convicted by a final decision in criminal or commercial proceedings of an offence which has the same essential elements as the misdemeanour in question.

B. Provisions concerning the relevant offences

20. Article 121 § 2 of the Criminal Code of the Republic of Serbia 2005 (*Krivični zakonik Republike Srbije*, published in OG RS, nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012 and 104/2013) provides that “whoever inflicts bodily injury on another or impairs another’s health shall be sentenced to imprisonment for a term of not less than one year and not exceeding eight years.” Under Article 50 § 3 the competent court could impose a sanction below the prescribed minimum in the event that there were mitigating circumstances.

21. Article 6(3) of the Public Order Act (*Zakon o javnom redu i miru*, published in OG RS nos. 851/92, 53/93, 67/93, 48/94, 85/05 and 101/05) provides that anyone who disturbs the peace in a public place by verbally or physically attacking another person, or by inciting or participating in a fight, is committing a misdemeanour against public order and shall be fined in an amount up to RSD 30,000 or to a term of imprisonment not exceeding sixty days.

C. Amnesty law

22. The Amnesty Act (*Zakon o amnestiji*, published in OG RS no. 107/12, came into force on 17 November 2012), stipulated, *inter alia*, that all first offenders who received a prison sentence of up to three months shall be exempted from serving their prison sentence.

D. Practice of domestic courts concerning the principle of *ne bis in idem*

23. On 26 March 2014 and 12 June 2014, the Constitutional Court, sitting in chambers of eight judges, examined complaints concerning the *ne bis in idem* principle in two cases similar to the present one (see Už. 1207/2011 and Už. 1285/2012). In its reasoning the court directly relied on this Court’s case-law established in *Engel and Others v. the Netherlands*,

8 June 1976, Series A no. 22; *Sergey Zolotukhin v. Russia* ([GC], no. 14939/03, ECHR 2009, *Maresti v. Croatia*, no. 55759/07, 25 June 2009; and *Muslija v. Bosnia and Herzegovina*, no. 32042/11, 14 January 2014.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7 TO THE CONVENTION

24. The applicant complained that he had been tried and punished twice for the same offence in respect of an incident that had occurred on 12 October 2006. He relied on Article 4 of Protocol No. 7 to the Convention, which reads as follows:

“1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.”

25. The Government contested that argument.

A. Admissibility

26. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

27. The applicant complained under Article 4 of Protocol No. 7 that, after he had already been convicted and sentenced in misdemeanour proceedings for disorderly acts committed on 12 October 2006, he had been tried, convicted and sentenced again for the same offence in criminal proceedings.

28. The Government accepted that the applicant's conviction in misdemeanour proceedings on 6 November 2007 had been "criminal" in nature. However, they maintained that the offences for which the applicant had been prosecuted should be regarded as distinct, both factually and legally.

29. On the facts, the Government claimed that in the misdemeanour proceedings the applicant had been found guilty of disturbing public order and peace because he had verbally and physically attacked his cousin R.C. The purpose of the sanction in those proceedings had been to protect the well-being of citizens and to safeguard public order and the peace in a broader sense. Hence, the misdemeanour judge was focused on the evidence to establish that offence, namely the discussion and fight and how they had affected the public. Essentially, the fact that the applicant had caused R.C. a number of grievous bodily injuries was not covered by the sanction ordered by the misdemeanour authority. On the other hand, the criminal prosecution of the applicant referred to a physical attack on R.C. that had caused him grievous bodily injury. This crime protects bodily integrity, and the criminal proceedings should have established whether the injuries had been caused or not, regardless of the conduct of the applicant.

30. As to the legal characterisation, the Government acknowledged that the offences were the same in their *actus reus*, both offences resulting from the fact that the applicant had struck R.C. several times. They differed in their consequences however. The definition of misdemeanour does not include the infliction of bodily injury, while the consequence and one of the essential elements of the crime in question is the incurred consequence (bodily injuries), irrespective of the action leading to such a consequence. Therefore, the present case should be distinguished from the *Tsonev* case (see *Tsonyo Tsonev v. Bulgaria (no. 2)*, no. 2376/03, 14 January 2010), because one offence does not embrace the other in its "entirety".

2. *The Court's assessment*

(a) **Whether the first penalty was criminal in nature**

31. The Court observes that on 6 November 2007 the applicant was fined in proceedings conducted under the Misdemeanours Act 2005 which were regarded as "misdemeanours" rather than "criminal offences" under the Serbian legal classification. It must therefore be determined whether these proceedings concerned a "criminal" matter within the meaning of Article 4 of Protocol No. 7.

32. The Court reiterates that the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of *non bis in idem* under Article 4 § 1 of Protocol No. 7. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results

incompatible with the object and purpose of the Convention. The notion of “penal procedure” in the text of Article 4 of Protocol No. 7 must be interpreted in the light of the general principles concerning the corresponding words “criminal charge” and “penalty” in Articles 6 and 7 of the Convention respectively (see, as most recent, *Zolotukhin*, cited above, with further references therein).

33. The Court’s established case-law sets out three criteria, commonly known as the “Engel criteria” (see *Engel and Others*, cited above), to be considered in determining whether or not there was a “criminal charge”. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see *Jussila v. Finland* [GC], no. 73053/01, §§ 30-31, ECHR 2006-XIV, and *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, §§ 82-86, ECHR 2003-X).

34. The Court notes that, regarding the first criterion, the domestic legal classification of the offence at issue was a “misdemeanour” under Article 6(3) of the Public Order Act 1992 (see paragraph 21 above). Nevertheless, the Court has previously found that the sphere defined in the other similar legal systems as “administrative”/“misdemeanour”, including the protection of public order, embraces certain offences that have a criminal connotation but are too trivial to be governed by criminal law and procedure (see *Zolotukhin*, cited above, § 54 with further references therein; see also *Maresti and Muslija*, both cited above, § 58 and § 27 respectively).

35. By its nature, the inclusion of the misdemeanour at issue in the Public Order Act 1992 served to guarantee the protection of human dignity and public order, values and interests that normally fall within the sphere of protection of criminal law. This misdemeanour was imposed by general legal provision applying to all citizens rather than towards a group possessing a special status. Any reference to the “minor” nature of the acts does not, in itself, exclude its classification as “criminal” in the autonomous sense of the Convention, as there is nothing in the Convention to suggest that the criminal nature of an offence, within the meaning of the *Engel* criteria, necessarily requires a certain degree of seriousness (see *Ezeh*, cited above, § 104). Lastly, the Court considers that the fine is not intended as pecuniary compensation for damage, but that the primary aims in establishing the offence in question were punishment and deterrence of reoffending, which are recognised as further characteristic features of criminal penalties (*ibid.*, §§ 102 and 105).

36. As to the degree of severity of the measure, it is determined by reference to the maximum potential penalty for which the relevant law provides. The actual penalty imposed is relevant to the determination but it cannot diminish the importance of what was initially at stake (*ibid.*, § 120). The Court observes that at the relevant time that Article 6(3) of the Public Order Act 1992 provided for sixty days' imprisonment as the maximum penalty, although in fact the applicant was eventually sentenced to a fine in the amount of RSD 4,000. As the Court has confirmed on many occasions, in a society subscribing to the rule of law, where the penalty liable to be and actually imposed on an applicant involves loss of liberty, there is a presumption that the charges against the applicant are "criminal", a presumption which can be rebutted in full only exceptionally, and only if the deprivation of liberty cannot be considered "appreciably detrimental" given their nature, duration or manner of execution (see *Engel*, § 82, and *Ezeh and Connors*, § 126, both cited above). In the present case the Court does not discern any such exceptional circumstances.

37. Therefore, in the present case, the Court considers that it is clear that both sets of proceedings are to be regarded as criminal for the purposes of Article 4 of Protocol No. 7 to the Convention. The parties also find this to be undisputed.

(b) Whether the offences for which the applicant was prosecuted were the same (*idem*)

38. The Court acknowledged in the case of *Zolotukhin* (cited above) the existence of several approaches to the question whether the offences for which an applicant was prosecuted were the same. The Court presented an overview of the existing three different approaches to this question. It found that the existence of a variety of approaches engendered legal uncertainty incompatible with the fundamental right not to be prosecuted twice for the same offence. It was against this background that the Court provided in that case a harmonised interpretation of the notion of the "same offence" for the purposes of Article 4 of Protocol No. 7. The relevant principles in that respect read as follows:

"78. The Court considers that the existence of a variety of approaches to ascertaining whether the offence for which an applicant has been prosecuted is indeed the same as the one of which he or she was already finally convicted or acquitted engenders legal uncertainty incompatible with a fundamental right, namely the right not to be prosecuted twice for the same offence. It is against this background that the Court is now called upon to provide a harmonised interpretation of the notion of the 'same offence' – the *idem* element of the *non bis in idem* principle – for the purposes of Article 4 of Protocol No. 7. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 56, ECHR 2007-...).

79. An analysis of the international instruments incorporating the *non bis in idem* principle in one or another form reveals the variety of terms in which it is couched. Thus, Article 4 of Protocol No. 7 to the Convention, Article 14 § 7 of the UN Covenant on Civil and Political Rights and Article 50 of the Charter of Fundamental Rights of the European Union refer to the '[same] offence' ('[même] infraction'), the American Convention on Human Rights speaks of the 'same cause' ('*mêmes faits*'), the Convention Implementing the Schengen Agreement prohibits prosecution for the 'same acts' ('*mêmes faits*'), and the Statute of the International Criminal Court employs the term '[same] conduct' ('[mêmes] actes constitutifs'). The difference between the terms 'same acts' or 'same cause' ('*mêmes faits*') on the one hand and the term '[same] offence' ('[même] infraction') on the other was held by the Court of Justice of the European Communities and the Inter-American Court of Human Rights to be an important element in favour of adopting the approach based strictly on the identity of the material acts and rejecting the legal classification of such acts as irrelevant. In so finding, both tribunals emphasised that such an approach would favour the perpetrator, who would know that, once he had been found guilty and served his sentence or had been acquitted, he need not fear further prosecution for the same act...

80. The Court considers that the use of the word 'offence' in the text of Article 4 of Protocol No. 7 cannot justify adhering to a more restrictive approach. It reiterates that the Convention must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. It is a living instrument which must be interpreted in the light of present-day conditions (see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 75, ECHR 2002-VI). The provisions of an international treaty such as the Convention must be construed in the light of their object and purpose and also in accordance with the principle of effectiveness (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 123, ECHR 2005-I).

81. The Court further notes that the approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding that the person was prosecuted for offences having a different legal classification it risks undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention (compare *Franz Fischer*, cited above, § 25).

82. Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same.

83. The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*. At this juncture the available material will necessarily comprise the decision by which the first 'penal procedure' was concluded and the list of charges levelled against the applicant in the new proceedings. Normally these documents would contain a statement of facts concerning both the offence for which the applicant has already been tried and the offence of which he or she stands accused. In the Court's view, such statements of fact are an appropriate starting point for its determination of the issue whether the facts in both proceedings were identical or substantially the same. The Court emphasises that it is irrelevant which parts of the new charges are eventually upheld or dismissed in the subsequent proceedings, because Article 4 of Protocol No. 7 contains a safeguard against being tried or being

liable to be tried again in new proceedings rather than a prohibition on a second conviction or acquittal...

84. The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings ...”

39. Turning to the facts of the present case, the Court observes that the applicant was accused of the following:

(i) in the misdemeanour proceedings, for punching R.C. several times on the head and injuring him; and

(ii) in the criminal proceedings, for punching R.C. on the head and thereby causing him grievous bodily harm.

40. The events described in the decisions adopted in both sets of proceedings took place during a fight in Subotička Street in Leskovac on 12 October 2006. Hence, in so far as both sets of proceedings concerned the above charges, the applicant was prosecuted and sentenced twice on the same counts involving the same defendant and inextricably linked together within the same space and time frame, regardless of the fact that the decision of the Misdemeanour Court stated that the event took place at about 5.30 p.m, while the criminal court stated it occurred at about 4-4.30 p.m.

41. As regards the Government's pleading that the definition of a misdemeanour under Article 6(3) of the Public Order Act 1992 does not, as such, include inflicting bodily harm, whereas this element is crucial for the criminal offence of inflicting grievous bodily harm under Article 121 § 2 of the Criminal Code 2005, the Court notes that the Misdemeanour Court expressly stated that the applicant was guilty of, *inter alia*, striking and injuring R.C. Regardless of the legal characterisation of the offence, the physical attack, which caused injuries to R.C., thus constituted an element of the misdemeanour of which the applicant was found guilty in the domestic proceedings (in this connection, see *Maresti*, cited above, § 63). In the criminal proceedings the applicant was again tried and found guilty of causing grievous bodily harm to R.C. It is therefore obvious that both decisions concerned exactly the same event and the same acts.

42. The facts constituting the two offences must therefore be regarded as substantially the same for the purposes of Article 4 of Protocol No. 7.

(e) Whether there was a duplication of proceedings (bis)

43. The aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a “final” decision. According to the Explanatory Report to Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a “decision is final ‘if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable,

that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them”. This approach is well entrenched in the Court’s case-law (see, for example, *Zolotukhin*, cited above, § 107, with further references therein).

44. Decisions against which an ordinary appeal lies are excluded from the scope of the guarantee contained in Article 4 of Protocol No. 7 as long as the time-limit for lodging such an appeal has not expired. On the other hand, extraordinary remedies such as a request for reopening of proceedings or an application for extension of the expired time-limit are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion. Although these remedies represent a continuation of the first set of proceedings, the “final” nature of the decision does not depend on their being used. It is important to point out that Article 4 of Protocol No. 7 does not preclude the reopening of proceedings, as stated clearly by the second paragraph of Article 4 (*ibid.*, § 108).

45. In the present case, the Court observes that both sets of proceedings were instituted on the basis of the police report of 17 October 2006 on the incident (see paragraph 6 above). The decision in the proceedings was adopted on 6 November 2007 and the parties did not avail themselves of an appeal. Hence, after the time-limit for the appeal had expired, the decision has acquired the force of *res judicata*.

46. In the meantime, the criminal proceedings commenced on 4 April 2007, and the two proceedings were conducted concurrently for a while. At the time the misdemeanour conviction acquired the force of *res judicata*, the criminal proceedings were pending before the first-instance court. In these circumstances, the Court considers that the Municipal Court should have terminated the criminal proceedings following the delivery of a “final” decision in the first proceedings (see *Muslija*, cited above, § 37, with further reference therein). Furthermore, it is to be noted that in his appeal against his conviction by the Municipal Court the applicant complained of a violation of the *non bis in idem* principle. However, the appellate court upheld the applicant’s conviction in respect of the same offence for which he had already been punished by the Misdemeanour Court. Lastly, when deciding the applicant’s appeal the Constitutional Court failed to bring its case-law in line with this Court’s approach taken in the *Zolotukhin* case. In these circumstances, the Court finds that the domestic authorities permitted the duplication of criminal proceedings to be conducted in the full knowledge of the applicant’s previous conviction for the same offence.

47. Lastly, the Court emphasises that the fact that the applicant was eventually amnestied in the criminal proceedings had no bearing on his claim that he was prosecuted, tried and punished for the offence for a second time.

(d) Conclusion

48. In the light of the foregoing, the applicant was “convicted” in misdemeanour proceedings, which can be likened to “criminal proceedings” within the autonomous Convention meaning of this term. After this “conviction” became final and despite his appeal based on the *ne bis in idem* principle, the applicant was found guilty of a criminal offence which related to the same conduct as that punished in the misdemeanour proceedings, and substantially the same facts. The Constitutional Court failed to apply the principles established in the *Zolotukhin* case and thus to correct the applicant’s situation.

49. There has accordingly been a violation of Article 4 of Protocol No. 7.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

51. The applicant claimed RSD 720,000 (6,218 euros (EUR)) in respect of non-pecuniary damage. As regards the amount, the applicant linked it to the amount that a person unlawfully detained for ninety days would receive on account of non-pecuniary damage.

52. The Government considered that the applicant’s claim for non-pecuniary damages should be rejected as he had been amnestied. Were the Court to have another view, the Government considered this amount excessive.

53. The Court considers that the applicant has suffered some non-pecuniary damage which cannot be sufficiently compensated for by a mere finding of a violation of the Convention. It therefore awards the applicant EUR 1,000 in respect of non-pecuniary damage.

B. Costs and expenses

54. The applicant firstly claimed RSD 14,739 (EUR 131) for the costs and expenses requested by the criminal court (see paragraph 10 above). The applicant also claimed a total of approximately EUR 8,000 for the costs and expenses incurred before the domestic courts, as well as for those incurred before the Court. The applicant submitted a fees agreement in this respect.

55. The Government considered the amount claimed for costs and expenses excessive as to quantum. The amount paid to the criminal court has not been contested. As regards the other expenses, the Government contested that only some of the expenses had actually been incurred, as well as certain expenses which were incurred due to the applicant's private indictment. They also contested the exchange rate applied by the applicant.

56. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. That is, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the violation found or to obtain redress. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 2,000 for the costs and expenses incurred domestically, as well as the costs and expenses incurred before the Court.

C. Default interest

57. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 4 of Protocol No. 7 to the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State, at the rate applicable at the date of settlement:
 - (i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 1 March 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Deputy Registrar

Luis López Guerra
President