



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

Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights

Right not to be tried or
punished twice

Updated on 31 December 2019

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This Guide was originally drafted in English. It was first published in December 2016 and it will be regularly updated. This update was finalised on 31 December 2019.

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Note to readers

This Guide is part of the series of Guides on the Convention published by the European Court of Human Rights (hereafter “the Court”, “the European Court” or “the Strasbourg Court”) to inform legal practitioners about the fundamental judgments and decisions delivered by the Strasbourg Court. This particular Guide analyses and sums up the case-law on Article 4 of Protocol No. 7 of the European Convention on Human Rights (hereafter “the Convention” or “the European Convention”). Readers will find herein the key principles in this area and the relevant precedents.

The case-law cited has been selected among the leading, major, and/or recent judgments and decisions.*

The Court’s judgments and decisions serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, § 154, 18 January 1978, Series A no. 25, and, more recently, *Jeronovičs v. Latvia* [GC], no. 44898/10, § 109, ECHR 2016).

The mission of the system set up by the Convention is thus to determine issues of public policy in the general interest, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v. Russia* [GC], § 89, no. 30078/06, ECHR 2012). Indeed, the Court has emphasised the Convention’s role as a “constitutional instrument of European public order” in the field of human rights (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 156, ECHR 2005-VI).

This Guide contains references to keywords for each cited Article of the Convention and its Additional Protocols. The legal issues dealt with in each case are summarised in a [List of keywords](#), chosen from a thesaurus of terms taken (in most cases) directly from the text of the Convention and its Protocols.

The [HUDOC database](#) of the Court’s case-law enables searches to be made by keyword. Searching with these keywords enables a group of documents with similar legal content to be found (the Court’s reasoning and conclusions in each case are summarised through the keywords). Keywords for individual cases can be found by clicking on the Case Details tag in HUDOC. For further information about the HUDOC database and the keywords, please see the [HUDOC user manual](#).

* The case-law cited may be in either or both of the official languages (English and French) of the Court and the European Commission of Human Rights. Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber. Chamber judgments that were not final when this update was published are marked with an asterisk (*).

I. Introduction

1. Protocol No. 7 to the Convention was drafted in 1984. 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 (*ne bis in idem*).
2. According to the Court's case-law, the guarantee enshrined in Article 4 of Protocol No. 7 occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency (*Mihalache v. Romania* [GC], § 47).
2. The protection against duplication of criminal proceedings is one of the specific safeguards associated with the general guarantee of a fair hearing in criminal proceedings (*Ibid.*, § 48). However, as Article 4 of Protocol No. 7 is separate from Article 6 of the Convention, complaints under the former will be declared inadmissible if the State in question has not ratified the protocol (*Blokker v. the Netherlands* (dec.)).
3. Article 4 of Protocol No. 7 to the Convention enshrines a fundamental right guaranteeing that no one is to be tried or punished in criminal proceedings for an offence of which he or she has already been finally convicted or acquitted (*Marguš v. Croatia* [GC], § 114; *Sergey Zolotukhin v. Russia* [GC], § 58; *Nikitin v. Russia*, § 35; and *Kadusic v. Switzerland*, § 82). The repetitive aspect of trial or punishment is central to the legal problem addressed by Article 4 of Protocol No. 7 (*Nikitin v. Russia*, § 35).

II. Structure of the Article

Article 4 of Protocol No. 7 - Right not to be tried or punished twice

- “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.”

Related HUDOC Keywords

- Right not to be tried or punished twice (P7-4)
- Criminal offence (P7-4)
- Conviction (P7-4)
- Acquittal (P7-4)
- Jurisdiction of the same State (P7-4)
- Reopening of case (P7-4)
 - New or newly discovered facts (P7-4)
 - Fundamental defect in proceedings (P7-4)

4. Article 4 consists of three paragraphs. The first paragraph sets out the three key components of the *non bis in idem* principle (*Mihalache v. Romania* [GC], § 49):
 1. whether both proceedings were “criminal” in nature,
 2. whether the offence was the same in both proceedings and
 3. whether there was a duplication of proceedings.

The third component in turn consists of three separate sub-issues:

- a. whether there were new proceedings;
- b. if so, whether the first set of proceedings was concluded by a final decision; and
- c. whether the exception in the second paragraph is applicable.

5. The words “under the jurisdiction of the same State” limit the application of the Article to the national level¹. Consequently, complaints regarding duplication of proceedings involving more than one country have been declared inadmissible by the Convention organs (*Gestra v. Italy*, Commission decision, *Amrollahi v. Denmark* (dec.), *Sarria v. Poland* (dec.), § 24, *Krombach v France*, §§ 35-42).

6. In *Krombach v France* (dec.), the applicant was convicted in France of offences in respect of which he submitted that he had previously been acquitted in Germany. The Court held that, since the applicant’s prosecution had been carried out by courts in two different States, that is to say Germany and France, Article 4 of Protocol No. 7 did not apply to the case and declared the complaint incompatible *ratione materiae*. Pursuant to its constant case-law, it held in particular that Article 4 of Protocol No. 7 did not prevent an individual from being prosecuted or punished by the courts of a State Party to the Convention on the grounds of an offence of which he or she had been acquitted or convicted by a final judgment in another State Party (§ 40). Furthermore, the Court considered that the fact that France and Germany were members of the European Union and that European Union law provided a trans-State dimension to the *non bis in idem* principle at the EU level, did not affect the applicability of Article 4 of Protocol No. 7. Moreover, the Court emphasized that the Convention did not prevent States Parties from granting wider legal protection to the rights and freedoms guaranteed under the Convention, including by virtue of their obligations under European Union law or international treaties. By means of its collective enforcement mechanism of the rights it establishes, the Convention reinforces, in accordance with the principle of subsidiarity, the protection provided at the national level without setting any limits on the latter (Article 53 of the Convention) (§ 39).

7. According to the third paragraph, derogation from this Article under Article 15 of the Convention (“in time of war or other public emergency threatening the life of the nation”) is not possible.

1. Several other Council of Europe conventions, including the European Convention on Extradition (1957), the European Convention on the International Validity of Criminal Judgments (1970) and the European Convention on the Transfer of Proceedings in Criminal Matters (1972), govern the application of the principle at international level.

III. Whether both proceedings were “criminal” or “penal” in nature

Article 4 § 1 of Protocol No. 7

“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.

...”

Related HUDOC Keywords

Right not to be tried or punished twice (P7-4)
 Criminal offence (P7-4)
 Conviction (P7-4)
 Acquittal (P7-4)
 Jurisdiction of the same State (P7-4)

A. General Principles

8. As noted in the Explanatory Report to the Protocol, § 32, Article 4 only applies to “criminal proceedings”. Consequently, it does not prevent the person from being subject, for the same act, to action of a different character (for example, disciplinary action against an official) as well as to criminal proceedings.

9. However, the Court has held 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 (*Sergey Zolotukhin v. Russia* [GC], § 52²). It has held that the notion of “criminal 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, respectively³. The Court’s established case-law sets out three criteria, commonly known as the “Engel criteria” (*Engel and Others v. the Netherlands*), to be considered in determining whether or not there was a “criminal charge” (*Sergey Zolotukhin v. Russia* [GC], § 53). For the consistency of interpretation of the Convention taken as a whole, the Court finds it appropriate for the applicability of the principle of *ne bis in idem* to be governed by the same criteria as in *Engel (A and B v. Norway)* [GC], §§ 105-107). 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 rule out 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 (*Sergey Zolotukhin v. Russia*, § 53, *Jussila v. Finland* [GC], §§ 30-31; *Mihalache v. Romania* [GC], § 54).

10. If the first or second set of proceedings is not considered “criminal” or “penal” by the Court, the complaint under Article 4 of Protocol No. 7 will normally be declared inadmissible as being incompatible *ratione materiae* within the meaning of Article 35 § 3 of the Convention (see, by way of example, *Paksas v. Lithuania* [GC], § 69, *Seražin v. Croatia* (dec.), §§ 91-92).

2. Citing *Storbråten v. Norway* which is citing *Öztürk v. Germany*, 21 February 1984, § 49, Series A no. 73.

3. For the scope of Article 6 (criminal aspect) and the concept of a “criminal charge”, the Guide on Article 6 (criminal limb). For the scope of Article 7 and the concept of “penalty”, see the Guide on Article 7. Both Guides are available on the Court’s website (www.echr.coe.int – Case-law).

B. Examples

- *Disciplinary proceedings*

11. A number of cases concern applicants who have been convicted/prosecuted of crimes and also subject to disciplinary proceedings. In *Kremzow v. Austria*, Commission decision, a retired judge was convicted of, *inter alia*, murder and subsequently, in disciplinary proceedings, the same facts were found also to constitute a disciplinary offence and the applicant was sentenced to the loss of all rights connected with his former position as a retired judge including loss of his pension rights. The Commission noted that the Disciplinary Court did not itself "convict" the applicant of the criminal offences concerned; it based itself on the conviction pronounced by the competent criminal court which it considered as binding. The Disciplinary Court's task was in essence limited to an examination of the question whether in the case of the applicant being a retired judge the commission of the serious criminal offences of which he had been found guilty also constituted a disciplinary offence. In the Commission's opinion the disciplinary law sanctions were the typical sanctions which many Contracting States' disciplinary statutes for civil servants provide in such cases: withdrawal of rights connected with the professional status of a civil servant, including loss of pension rights. Since the disciplinary proceedings against the applicant could not be qualified as further "criminal proceedings", Article 4 of Protocol No. 7 was considered not to apply (see also *Demel v. Austria*, Commission decision). In *Kurdov and Ivanov v. Bulgaria* the applicants, while they were employed by the Bulgarian national railway company, had to do some welding on a wagon. While they were doing that, the contents of the wagon caught fire. Administrative proceedings were brought against one of the applicants for non-compliance with safety regulations and he had to pay a fine. Criminal proceedings were then brought against both applicants for deliberately setting fire to items of value. The Court found that the first set of proceedings did not satisfy the criteria in order to be classified as "criminal" for the purposes of Article 4 of Protocol No. 7, having noted *inter alia* that the features of the offence at issue were typically disciplinary (§ 42). See similar findings concerning disciplinary punishments in *Luksch v. Austria* (dec.) (temporary suspension of practicing as an accountant), *Banfield v. the United Kingdom* (dec.) (dismissal of a police officer and forfeiture of his pension), and *Klein v. Austria* (dec.) (losing the right to practice as a lawyer).

- *Tax surcharges*

12. The Court has found in several judgments that the proceedings for imposition of tax surcharges were "criminal" for the purposes of Article 4 of Protocol No. 7 (*inter alia*, *Manasson v. Sweden* (dec.), *Rosenquist v. Sweden* (dec.), *Pirttimäki v. Finland*, §§ 45-48, *Lucky Dev v. Sweden*, § 51). This view was recently confirmed in *A and B v. Norway* [GC], §§ 136-139, and in *Johannesson and Others v. Iceland*, § 43).

- *Withdrawal of driving licence following criminal conviction*

13. In *Hangl v. Austria* (dec.) the applicant was convicted of exceeding the speed limit and sentenced to a fine. Subsequently, his driving licence was temporarily withdrawn twice for two weeks each time. The Court noted that the withdrawal of the applicant's driving licence constituted a preventive measure for the safety of road-users, and consequently it found that the applicant had not in those proceedings been tried or punished again for an offence for which he had already been finally convicted. In *Nilsson v. Sweden* (dec.) the applicant was convicted of aggravated drunken driving and of driving without holding a driving licence. Consequently, his driving license was withdrawn for 18 months. The Court noted that as the latter measure was taken several months after the criminal conviction, its purpose was not only prevention and deterrence for the protection of the safety of road users; retribution must also have been a major consideration. Furthermore, noting that the measure was a direct and foreseeable consequence of the applicant's conviction and, despite domestically being regarded as an administrative measure designed to protect road safety, the Court held that its severity was such as to regard it as a criminal sanction. It therefore concluded

that the withdrawal constituted a “criminal” matter for the purposes of Article 4 of Protocol No. 7 (see also *Maszni v. Romania*, §§ 65-66).

- *Revocation of licences*

14. In *Palmén v. Sweden* (dec.), the applicant was convicted of assaulting his partner. Subsequently the Police Authority revoked his firearms licence on the grounds that he was unsuitable to possess a weapon. It noted that he had been convicted of an assault that was rendered more serious by the fact that the violence had taken place at home and against a person with whom the applicant had a close relationship. The Court found that the revocation of the applicant’s weapons licence was not, as a result of either its nature or severity, a criminal sanction for the purposes of Article 4 of Protocol No. 7. It noted that these proceedings were considered as administrative under national law, that the measure was not an automatic consequence of the criminal conviction, that it was not the decisive factor for the authorities’ revocation of the licence, that the underlying object of the measure was preventive rather than punitive, and that the applicant was not professionally dependent on the licence. A similar approach was adopted in *Manasson v. Sweden* (dec.) concerning the revocation of a traffic licence imposed on the ground that the applicant had failed to fulfil his tax obligations.

- *Residence permits*

15. In *Davydov v. Estonia* (dec.) the applicant was not granted a residence permit partly because of previous criminal convictions. The Court found that a refusal to grant a residence permit is an administrative measure, which does not amount to a criminal punishment within the meaning of Article 4 of Protocol No. 7.

- *Disciplinary proceedings in prison (solitary confinement)*

16. In *Toth v. Croatia* (dec.), §§ 26-39, the applicant, while serving a prison term, was found guilty of verbally insulting prison guards and was punished with twenty-one days of solitary confinement. Subsequently, criminal proceedings were instituted against him and he was found guilty on two counts of making threats in connection with the same events. The Court found that the first procedure was not criminal in nature, noting that the offences were classified as disciplinary in national law, that, even though the nature of the charges was not purely disciplinary, the solitary confinement did not extend the applicant’s prison term and thus did not amount to an additional deprivation of liberty, but only to aggravation of the conditions of his detention.

- *Administrative proceedings and penalties*

17. In *Ruotsalainen v. Finland*, §§ 41-47, the applicant was stopped by the police during a road check and was found to be driving with more leniently taxed fuel than the diesel oil his van should have been running on. Summary penal order proceedings were brought against him and he was fined for petty tax fraud. It was also noted that, the applicant having admitted to refuelling the van himself, there had been a notion of intent behind his offence. Administrative proceedings were also brought against him and he was charged the difference in tax. It was found that he had used his van with fuel more leniently taxed than diesel oil and that, as he had failed to give the Vehicle Administration or Customs prior notification of that usage, the normal difference in tax charge was trebled. The Court noted that the applicant was fined in summary penal order proceedings which were classified as “criminal” in Finnish legislation. Subsequently, the applicant was issued with a fuel fee debit in administrative proceedings that were not classified as criminal but as part of the fiscal regime. The Court noted that the relevant provision was directed towards all citizens rather than towards a group possessing a special status. As the collected fuel fee was trebled the Court held that it was to be seen as punishment to deter re-offending. Consequently, the Court concluded that the nature of the offence was such as to bring the issuing of the fuel fee debit within the ambit of “penal procedure”.

18. In *Grande Stevens and Others v. Italy*, §§ 94-101 and § 222, the Court found that heavy administrative fines imposed on the applicants by the financial markets regulator were also “criminal” for the purposes of both Article 6 and Article 4 of Protocol No. 7. The Court also found that Italy’s reservation to the effect that Article 4 of Protocol No. 7 applied only to offences classified as criminal under Italian law was not valid under the Convention, since it was too general and did not refer to the specific provisions of the Italian legal order which excluded offences from the scope of Article 4 of Protocol No. 7 (§§ 204-211).

19. In *Mihalache v. Romania* [GC], § 56-62, the Court found that an administrative fine for refusing to give a biological sample for determining the blood alcohol level of a driver amounted to a criminal penalty.

- *Minor-offences proceedings*

20. In *Sergey Zolotukhin v. Russia* [GC], the applicant was convicted of “minor disorderly acts” under the Code of Administrative Offences to a three days’ administrative detention. The Court observed that in the domestic legal classification the offence at issue was characterised as an “administrative” one. Nevertheless, the sphere of “administrative” offences in Russia and other similar legal systems embraced certain offences that have a criminal connotation but are too trivial to be governed by criminal law and procedure. Furthermore, the Court noted that by its nature, the inclusion of the offence at issue in the Code of Administrative Offences served to guarantee the protection of human dignity and public order, values and interests which normally fall within the sphere of criminal law. The corresponding provision of the Code was directed towards all citizens rather than towards a group possessing a special status. The reference to the “minor” nature of the acts did 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 necessarily requires a certain degree of seriousness. The primary aims in establishing the offence in question were punishment and deterrence, which are characteristic features of criminal penalties. As to the degree of severity of the measure, the Court noted that the provision at stake provided for fifteen days’ imprisonment as the maximum penalty and that the applicant was eventually sentenced to serve three days’ deprivation of liberty. The penalty liable to be and actually imposed on the applicant involved the loss of liberty, which created a presumption that the charges against the applicant were “criminal”. The Court concluded that the nature of the offence of “minor disorderly acts”, together with the severity of the penalty, were such as to bring the applicant’s conviction within the ambit of “penal procedure” for the purposes of Article 4 of Protocol No. 7 (§§ 54-57). See similarly in *Maresti v. Croatia*, §§ 55-61, concerning a forty days’ imprisonment for minor offences.

- *Impeachment proceedings*

21. In *Paksas v. Lithuania* [GC], §§ 65-68, the Court considered that impeachment proceedings against the President of the Republic for a gross violation of the Constitution or a breach of the presidential oath, entailing his removal from office and (consequent) disqualification from standing for election, lied outside the “criminal” sphere for the purposes of Articles 6 and 7 of the Convention and Article 4 of Protocol No. 7.

- *Preventive measure in the context of the fight against hooliganism*

22. *Seražin v. Croatia* (dec.) concerned exclusion measures prohibiting the applicant from attending certain football matches and obliging him to report to the nearest the police station when the relevant sports competition was taking place. The measures followed the applicant’s conviction in minor offence proceedings on charges of hooliganism. In applying the “*Engel criteria*” the Court noted that in Croatian national law the exclusion measure operated independently of a criminal or minor offences prosecution and conviction of an individual and that its application was not a direct consequence thereof. The exclusion measure was applied to prevent a future threat of possible violence during sports competition or events for the benefit of public safety. This “predominantly preventive nature” of the exclusion measure (§§ 81-84) coupled with its duration and the manner of

its application (§ 85) and its degree of severity (imposition of fine or deprivation of liberty only in case of non-compliance, § 89) led to the conclusion that the application of such measure did not involve the determination of a “criminal charge”. As a consequence, the Court found that Article 4 of Protocol No. 7 did not apply. The Court observed that in the relevant international materials and comparative law there was a strong emphasis on the preventive nature of the exclusion measures in the context of suppression and prevention of spectator violence (§ 70).

IV. Whether the proceedings concerned the “same offence” (*idem*)

Article 4 § 1 of Protocol No. 7

“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.

...”

Related HUDOC Keywords

Right not to be tried or punished twice (P7-4)
 Criminal offence (P7-4)
 Conviction (P7-4)
 Acquittal (P7-4)

A. General Principles

23. The *non bis in idem* principle prohibits prosecution or trial for the “same offence”. In *Sergey Zolotukhin v. Russia* [GC] the Court acknowledged that it had adopted a variety of approaches in the past, placing the emphasis either on identity of the facts irrespective of their legal characterisation (the “same conduct”, *idem factum*, *Gradinger v. Austria*, § 55), on the legal classification, accepting that the same facts could give rise to different offences (“*concoirs ideal d’infractions*”, see *Oliveira v. Switzerland*, §§ 25-29), or on the existence or otherwise of “essential elements” common to both offences (*Franz Fischer v. Austria*). After examining the scope of the right not to be tried and punished twice as set forth in other international instruments (International Covenant on Civil and Political Rights, Charter of Fundamental Rights of the European Union and American Convention on Human Rights) and noting that the approach which emphasised the legal characterisation of the two offences was too restrictive on the rights of the individual, the Court took the view that Article 4 of Protocol No. 7 should be understood as prohibiting the prosecution or trial of an individual for a second “offence” in so far as it arose from identical facts or facts which were “substantially” the same as those underlying the first offence (§§ 79-82; see also *A and B v. Norway* [GC], § 108). The starting point for the determination of whether the facts in both proceedings were identical or substantially the same should be the statements of fact concerning both the offence for which the applicant had already been tried and the offence of which he or she stands accused (§ 83). The Court emphasised that it was irrelevant which parts of the new charges were 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. It held that its 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 (§§ 83-84).

B. Examples

24. The principles established in *Sergey Zolotukhin v. Russia* [GC] have subsequently been applied in a number of other cases.

25. In *Ruotsalainen v. Finland*, the Court noted that the facts behind both sets of proceedings against the applicant had essentially been the same: they both concerned the use of more leniently taxed fuel than diesel oil. The only difference had been the notion of intent in the first set of proceedings. Consequently, the Court held that the second sanction had arisen from the same facts as the former and there had therefore been a duplication of proceedings in violation of Article 4 of Protocol No. 7 (§§ 50-57).

26. In *Maresti v. Croatia*, the Court noted that in respect of the minor offence and the criminal offence the applicant was found guilty of the same conduct on the part of the same defendant and within the same time frame. In this connection, it noted that the definition of the minor offence does not as such include inflicting bodily injury while this element is crucial for the criminal offence of inflicting grievous bodily injury. However, in its decision, the Minor-Offences Court expressly stated that the applicant was guilty of, *inter alia*, hitting the victim on the head with his fists and of punching and kicking him about his entire body. The physical attack on the victim thus constituted an element of the minor offence of which the applicant was found guilty. In the criminal proceedings before the Municipal Court the applicant was again found guilty of, *inter alia*, hitting the victim. The Court held that it was obvious that both decisions concerned exactly the same event and the same acts. It concluded that the facts constituting the minor offence of which the applicant was convicted were essentially the same as those constituting the criminal offence of which he was also convicted. There had therefore been a violation of Article 4 of Protocol No. 7 (§§ 63-64).

27. In *Tsonyo Tsonov v. Bulgaria (no. 2)* the applicant and a friend got into a violent fight with a third person to whose apartment they had both gone. The police, having arrived upon a call from the neighbours, arrested the applicant. On the basis of the police report drawn up in connection with that incident, a week later, the mayor, applying a municipal law concerning public order, fined the applicant for having broken into the home of a person and beaten him up. Sometime later, in relation to the same event, the prosecution charged the applicant with inflicting bodily harm and breaking into the home of another. The domestic courts found him guilty of inflicting bodily harm only. The Court noted that the same facts – breaking into someone’s apartment and beating a person up – had been at the centre both of the fine imposed by the mayor and the charges brought by the prosecution. As it had not been appealed, the fine had become final. The domestic courts had not terminated the subsequent criminal proceedings, given that the Supreme Court had consistently ruled that criminal proceedings could be opened against persons already punished in administrative proceedings. Accordingly, the Court found that the applicant had been convicted – separately in administrative and criminal proceedings – for the same conduct, the same facts and the same offence, in violation of Article 4 of Protocol No 7 (§§ 52-57).

28. A number of cases concern applicants who have been subject to criminal proceedings concerning tax- and bookkeeping crimes and also proceedings concerning tax surcharges. In *Pirttimäki v. Finland* the tax authorities, following an inspection, considered that the applicant had received disguised dividends from a company in which he held shares. Additional taxes and tax surcharges were imposed on the applicant. Furthermore, additional taxes and tax surcharges were also imposed on the company in which he held shares. Subsequently, the applicant was convicted, on the company’s count, of an accounting offence, for having introduced incorrect and misleading information in the company’s bookkeeping, and of aggravated tax fraud. The Court noted that the first two sets of proceedings arose from the fact that the company as well as the applicant, in his personal taxation declaration, had failed to declare some income for certain tax years. In the second set of proceedings the applicant was accused, as a representative of the company, of aggravated tax fraud for having given incorrect information on behalf of the company to the tax authorities during a certain time period. The two sets of proceedings which were relevant were thus the taxation

proceedings against the applicant as well as the criminal proceedings. The Court found that the two sets of facts were different, noting that the legal entities involved in these proceedings were not the same: in the first set of proceedings it was the applicant and in the second set of proceedings the company. It observed that the circumstances were not the same: making a tax declaration in respect of personal taxation differed from making a tax declaration for a company as these declarations were made in different forms, they may have been made at a different point of time and, in the case of the company, may also have involved other persons. The Court therefore concluded that the two impugned sets of proceedings did not constitute a single set of concrete factual circumstances arising from identical facts or facts which were substantially the same (§§ 49-52).

29. In *Shibendra Dev v. Sweden* (dec.) the tax authorities found that as the information supplied by the applicant in his tax return was incorrect and the revision had had to be made under a discretionary assessment procedure, given the business's deficient accounting, he was ordered to pay tax surcharges. Criminal proceedings were initiated against him in regard to the above conduct. He was convicted of an aggravated bookkeeping offence and an aggravated tax offence. The offences concerned the same period as the above-mentioned tax decisions. The domestic court found that the bookkeeping of the restaurant business had been seriously deficient and that the applicant and his wife had been responsible for failing to account for considerable proceeds and VAT, which had involved large profits for them. The Court noted that the obligation of a businessperson to enter correct figures in the books was an obligation per se, which was not dependent on the use of bookkeeping material for the determination of tax liability. The applicant, while not having fulfilled the legal bookkeeping requirements, could later have complied with the duty to supply the tax authorities with sufficient and accurate information by, for instance, correcting the information contained in the books or by submitting other material which could adequately form the basis of a tax assessment. Accordingly the Court held that the applicant's submission of the incorrect bookkeeping material to the tax authorities in support of the claims and statements made in his tax return and his failure to provide them with other reliable documentation on which it could base its tax assessment constituted important additional facts in the tax proceedings which did not form part of his conviction for a bookkeeping offence. In these circumstances the Court found that the two offences in question were sufficiently separate to conclude that the applicant was not punished twice for the same offence (§ 51; see also *Manasson v. Sweden* (dec.), *Carlberg v. Sweden*, §§ 69-70).

30. On the contrary, in *Johannesson and Others v. Iceland*, the Court noted that the applicants' conviction and the imposition of tax surcharges were based on the same failure to declare income and that tax proceedings and the criminal proceedings concerned the same period of time and essentially the same amount of evaded taxes. Therefore, the criminal offences for which the applicants were prosecuted and convicted were the same as those for which the tax surcharges were imposed (§ 47). In brief, the *idem* element of the *non bis in idem* principle was present.

31. In *Ramda v. France*, §§ 81-84, the Court recalled the principle of a facts-based assessment of the *idem* element set out in *Sergey Zolotukhin v. Russia* [GC], § 82 and confirmed in *A and B v. Norway* [GC], § 108, and applied it to the prosecution of terrorist offences. The applicant, an Algerian national, was extradited from the United Kingdom to France on charges related to a series of terrorist attacks in 1995 in France. He was first tried and convicted by a criminal court (*tribunal correctionnel*) on charges concerning his participation in a group aimed at preparing terrorist attacks. And he was subsequently tried and convicted by an assize court (*cour d'assises*) on charges of complicity to commit a series of particular crimes such as murder and attempted murder. After carrying out a comparative examination of the numerous facts set out in the decisions rendered in both procedures (§§ 87-93), the Court noted that those decisions had been based on a large number of detailed and distinct facts (§ 94). It concluded that the applicant had not been prosecuted or convicted in the second proceedings for facts which were substantially the same as those of which he had been convicted under the first proceedings (§ 95). Finally, the Court drew on the obligation on the State to prosecute grave breaches of Article 2 developed in *Marguš v. Croatia* [GC], §§ 127-128, and applied it to the terrorism context (§ 96).

32. In *Mihalache v. Romania* [GC], § 68, concerning the applicant’s refusal to give a biological sample for determining blood alcohol level during a road traffic control, the Court laid emphasis on the fact that the two decisions adopted in the applicant’s case – one by the prosecutor and the other by the relevant court – concerned the same facts and the same accusations, which meant that the applicant was tried twice for the same offence.

V. Whether there was a duplication of proceedings (*bis*)

Article 4 § 1 of Protocol No. 7

“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.

...”

Related HUDOC keywords

Right not to be tried or punished twice (P7-4)
Criminal offence (P7-4)
Conviction (P7-4)
Acquittal (P7-4)

A. Whether there was a new set of proceedings

33. Article 4 of Protocol No. 7 prohibits the repetition of criminal proceedings that have been concluded by a “final” decision. Article 4 of Protocol No. 7 is not only confined to the right not to be punished twice but also extends to the right not to be prosecuted or tried twice. It applies even where the individual has merely been prosecuted in proceedings that have not resulted in a conviction (*Sergey Zolotukhin v. Russia* [GC], §§ 110-111, in respect of an acquittal following the second set of proceedings).

34. The Court has held that Article 4 of Protocol No. 7 clearly prohibits consecutive proceedings if the first set of proceedings has already become final at the moment when the second set of proceedings is initiated (*Sergey Zolotukhin v. Russia*).

35. However, Article 4 of Protocol No. 7 does not prohibit several concurrent sets of proceedings (*litis pendens*). In such a situation it cannot be said that an applicant is prosecuted several times “for an offence for which he has already been finally acquitted or convicted” (*Garaudy v. France* (dec.)). There is no problem from the Convention point of view also when, in a situation of two parallel sets of proceedings, the second set of proceedings is discontinued after the first set of proceedings has become final (*Zigarella v. Italy* (dec.)). But, when no such discontinuation occurs, the Court has found that there was a duplication of proceedings in violation of Article 4 of Protocol No. 7 (*Tomasović v. Croatia*, §§ 29-32; *Muslija v. Bosnia and Herzegovina*, §§ 36-37; *Nykänen v. Finland*, §§ 47-54; *Glantz v. Finland*, §§ 57-64).

36. However, the Court has also found, in its case-law concerning withdrawal of driving licenses, that although different sanctions (criminal sanctions and withdrawal of driving licences) concerning the same matter (drunken driving or driving in excess of the speed limit) had been imposed by different authorities in different proceedings, there had been a sufficiently close connection between them, in substance and in time (*Nilsson v. Sweden* (dec.); *Maszni v. Romania*, §§ 68-70). In those cases the Court found that the applicants had not been tried or punished for an offence for which they had already been finally convicted in breach of Article 4 § 1 of Protocol No. 7 to the Convention and that there had been thus no repetition of the proceedings. For instance, in *Boman*

v. Finland the applicant had been convicted of a traffic offence and subject to a temporary driving ban. Subsequently, the Police Authority and the administrative courts, in a separate process, prolonged the driving ban. The Court noted that the imposition of the latter driving ban presupposed that the applicant had already been found guilty of the traffic offence. Furthermore it held that the decision, shortly after the judgment in the criminal proceedings, to impose the second driving ban was directly based on the applicant's final conviction by the District Court for traffic offences and thus did not contain a separate examination of the offence or conduct at issue by the police. Therefore, the Court concluded that the two proceedings were intrinsically linked, in substance and in time, and thus took place within a single set of proceedings for the purposes of Article 4 of Protocol No. 7 to the Convention (see also *Rivard v. Switzerland*, §§ 28-34).

37. Tax sanctions have been examined by the Court in several cases against Finland and Sweden. (*Häkki v. Finland*, *Nykänen v. Finland*, *Glantz v. Finland*, *Rinas v. Finland*, *Österlund v. Finland*, *Kiiveri v. Finland* and *Lucky Dev v. Sweden*). In these cases the Court noted that, in the Finnish and Swedish systems the criminal and the administrative sanctions had been imposed by different authorities without the proceedings being in any way connected: both sets of proceedings followed their own separate course and became final independently from each other. Moreover, the Court noted that neither of the sanctions had been taken into consideration by the other court or authority in determining the severity of the sanction, nor was there any other interaction between the relevant authorities. Furthermore the Court observed that the tax surcharges had been imposed following an examination of an applicant's conduct and his or her liability under the relevant tax legislation which was independent from the assessments made in the criminal proceedings. This, the Court held, contrasted with the Court's earlier cases relating to driving licences, where the decision on withdrawal of the licence had been directly based on an expected or final conviction for a traffic offence and thus had not contained a separate examination of the offence or conduct at issue. Therefore, the Court concluded that there had not been a close connection, in substance and in time, between the criminal and the taxation proceedings.

38. The issue is then whether there has been a duplication of proceedings (*bis*). In *A and B v. Norway* [GC] the Court examined the Norwegian system of dual criminal and administrative proceedings regarding incorrect information submitted in tax declarations. The Court developed further the principle of "sufficiently close connection in substance and in time" between the proceedings. It held that the surest manner of ensuring compliance with Article 4 of Protocol No. 7 was the provision of a single-track procedure enabling the parallel strands of legal regulation of the activity concerned to be brought together, so that the different needs of society in responding to the offence could be addressed within the framework of a single process. Nonetheless, Article 4 of Protocol No. 7 does not exclude the conduct of dual proceedings, even to their term, provided that certain conditions are fulfilled. The respondent State must demonstrate convincingly that the dual proceedings in question have been "sufficiently closely connected in substance and in time" (§ 130) based on several factors including (§ 132):

- whether the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved;
- whether the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct (*idem*);
- whether the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set;
- and, above all, whether the sanction imposed in the proceedings which become final first is taken into account in those which become final last, so as to prevent that the individual concerned is in the end made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate.

Furthermore, the Court stressed that the extent to which the administrative proceedings bear the hallmarks of ordinary criminal proceedings, *inter alia* its stigmatising features, was an important factor. Moreover, where the connection in *substance* is sufficiently strong, the requirement of a connection *in time* must also be satisfied. The Court held that the two sets of proceedings do not have to be conducted simultaneously from beginning to end as it should be open to States to opt for conducting the proceedings progressively in instances where doing so is motivated by interests of efficiency and the proper administration of justice, pursued for different social purposes, and has not caused the applicant to suffer disproportionate prejudice. However, the connection *in time* must be sufficiently close to protect the individual from being subjected to uncertainty and delay and from proceedings becoming protracted over time, even where the relevant national system provides for an “integrated” scheme separating administrative and criminal components (§ 134).

Applying these principles to the facts of the cases, the Court was satisfied that, whilst different sanctions were imposed on the applicants by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, both in substance and in time, “to consider them as forming part of an integral scheme of sanctions under Norwegian law” for failure to provide information for their tax returns. The dual proceedings did not constitute therefore a proscribed duplication of proceedings so there had been no violation of Article 4 of Protocol No. 7 to the Convention (§§ 144-147 and 149-154).

39. On the contrary, in the case of *Johannesson and Others v. Iceland*, the Court found that even if the two proceedings pursued complementary purposes in addressing the issue of taxpayers’ failure to comply with the legal requirements relating to the filing of tax returns (§ 51), there was no sufficiently close connection between them, due to the limited overlap in time and the largely independent collection and assessment of evidence (§ 55). Consequently, the applicants suffered disproportionate prejudice as a result of having been tried and punished for the same or substantially the same conduct by different authorities in two different proceedings which lacked the required connection.

40. Similarly, in *Nodet v. France*, § 53, concerning two parallel (administrative and criminal) sets of proceedings for market manipulation, the Court took into account the fact that these two sets of proceedings pursued the same purpose and involved, to a certain extent, independent collection of evidence, which led it to a conclusion that there was no sufficiently close connection in substance between them. Moreover, the Court found that there was no sufficient connection in time between the two sets of proceedings. Accordingly, the Court concluded that the applicant suffered disproportionate prejudice for having been tried and punished twice for the same offence.

41. In *Mihalache v. Romania* [GC], § 84, the Court found that the two sets of proceedings – one before the prosecutor and the other before the relevant court – were not combined in an integrated manner such as to form a coherent whole. The Court had regard to the following facts: the applicant was prosecuted in “both” sets of proceedings for a single offence punishable by a single legal provision; the proceedings and the two penalties imposed on the applicant pursued the same general purpose; the “first” set of proceedings as a whole and the initial part of the “second” set of proceedings were conducted by the same authority; in “both” sets of proceedings the same evidence was produced; two penalties imposed on the applicant were not combined; and the “two” sets of proceedings took place one after the other and were not conducted simultaneously at any time.

42. Having reached the conclusion that the two sets of proceedings were not integrated manner such as to form a coherent whole, the Court considered that in order to determine whether, in the case at issue, there was duplication of proceedings (“*bis*”) for the purposes of Article 4 of Protocol No. 7, it was required to examine whether the decision in the first set of proceedings constituted a “final” decision “acquitting or convicting” the applicant. It stressed that, in the affirmative, it should then establish whether a decision to set aside that “final decision” amounted to a reopening of the case compatible with Article 4 of Protocol No. 7 (*ibid.*, §§ 85-86).

B. Whether there was a final decision

43. Article 4 of Protocol No. 7 states that *the ne bis in idem* principle is intended to protect persons who have already been “finally acquitted or convicted”. The explanatory report on Protocol No. 7 states, as regards Article 4, that “[t]he principle established in this provision applies only after the person has been finally acquitted or convicted in accordance with the law and penal procedure of the State concerned”. For a person to qualify for protection under this Article, a final decision is therefore not sufficient; the final decision must also involve the person’s acquittal or conviction. In each case, the Court must therefore determine whether there was an acquittal or conviction. If so, it must determine whether it was a “final” decision for the purposes of Article 4 of Protocol No. 7 (*Ibid.*, §§ 88-89).

1. The existence of an “acquittal or conviction”

44. As explained in *Mihalache v. Romania* [GC], §§ 95 and 97, in order to determine whether a particular decision constitutes an “acquittal” or a “conviction”, the Court has to consider the actual content of the decision in issue and assess its effects on the applicant’s situation. In this context, judicial intervention is unnecessary for the existence of a “decision” and the decision in question does not have to take the form of a judgment.

45. Referring to the text of Article 4 of Protocol No. 7, the Court considered that the deliberate choice of the words “acquitted or convicted” implied that the accused’s “criminal” responsibility has been established following an assessment of the circumstances of the case, in other words that there has been a determination as to the merits of the case. In order for such an assessment to take place, it is vital that the authority giving the decision is vested by domestic law with decision-making power enabling it to examine the merits of a case. The authority must then study or evaluate the evidence in the case file and assess the applicant’s involvement in one or all of the events prompting the intervention of the investigative bodies, for the purposes of determining whether “criminal” responsibility has been established (*Ibid.*, § 97).

46. Thus, the finding that there has been an assessment of the circumstances of the case and of the accused’s guilt or innocence may be supported by the progress of the proceedings in a given case. Where a criminal investigation has been initiated after an accusation has been brought against the person in question, the victim has been interviewed, the evidence has been gathered and examined by the competent authority, and a reasoned decision has been given on the basis of that evidence, such factors are likely to lead to a finding that there has been a determination as to the merits of the case. Where a penalty has been ordered by the competent authority as a result of the behaviour attributed to the person concerned, it can reasonably be considered that the competent authority had conducted a prior assessment of the circumstances of the case and whether or not the behaviour of the person concerned was lawful (*Ibid.*, § 98).

47. In *Mihalache* (§§ 99-101), the Court referred to the fact that under domestic law the public prosecutor’s office was called upon to participate in the administration of criminal justice. The prosecutor had jurisdiction to investigate the applicant’s alleged actions, questioning a witness and the suspect to that end. Subsequently, he applied the relevant substantive rules laid down in domestic law; he had to assess whether the requirements were fulfilled for characterising the applicant’s alleged acts as a criminal offence. On the basis of the evidence produced, the prosecutor carried out his own assessment of all the circumstances of the case, relating both to the applicant individually and to the specific factual situation. After carrying out that assessment, again in accordance with the powers conferred on him under domestic law, the prosecutor decided to discontinue the prosecution, while imposing a penalty on the applicant that had a punitive and deterrent purpose. The penalty imposed became enforceable on the expiry of the time-limit for an appeal by the applicant under domestic law. In these circumstances, the Court found that, irrespective of any judicial involvement, the prosecutor’s decision amounted to a “conviction” within the meaning of Article 2 of Protocol No. 7.

48. In *Smoković v. Croatia* (dec.), §§ 43-45, the Court did not consider that a ruling terminating the proceedings against the applicant on the basis of the expiry of the statutory limitation amounted to a “conviction” nor an “acquittal” for the purposes of Article 4 of Protocol No. 7 to the Convention. In particular, it was clear that the termination of the proceedings did not amount to a “conviction”. As to the question whether the decision constituted an acquittal, the Court had regard to the following considerations: the decision was not based on any investigation into the charges brought against the applicant; it was not based on any findings of fact relevant for determining the applicant’s guilt or innocence; it did not take cognisance of the facts, circumstances or evidence relating to the alleged acts, evaluate them or rule to acquit him; and it did not amount to an assessment of whether the applicant bore responsibility for the impugned offence, which would normally precede an acquittal.

2. The “final” decision

49. The aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings (*non bis in idem* principle) 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 (*Sergey Zolotukhin v. Russia* [GC], § 107). 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 (§ 108). On the other hand, extraordinary remedies such as a request for the reopening of the 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 (§ 108).

50. In *Sundqvist v. Finland* (dec.) the Court found that a decision by a prosecutor not to prosecute was not to be regarded as a “final” decision, in the light of the domestic law applicable. Accordingly, a subsequent decision by the Prosecutor General to prosecute the applicant and the following conviction did not amount to new proceedings falling under the sphere of Article 4 of Protocol No. 7. The Court has already held that the discontinuance of criminal proceedings by a public prosecutor does not amount to either a conviction or an acquittal, and that therefore Article 4 of Protocol No. 7 finds no application in that situation (*Smirnova and Smirnova v. Russia* (dec.), *Harutyunyan v. Armenia* (dec.), *Marguš v. Croatia* [GC], § 120; see also a provisional psychiatric internment ordered by the prosecutor in *Horciag v. Romania* (dec.)). This provision is neither applicable to the termination of criminal proceedings on the basis of an amnesty for acts which amounted to grave breaches of fundamental rights, such as war crimes against the civilian population (*Marguš v. Croatia* [GC], §§ 122-141). The Court has held that granting amnesty in respect of the killing and ill-treatment of civilians would run contrary to the State’s obligations under Articles 2 and 3 of the Convention. It has also noted that there is growing tendency in international law to see the granting of amnesties in respect of grave breaches of human rights as unacceptable. Therefore, bringing a fresh indictment against a person who has been granted an amnesty for these acts should not fall within the ambit of Article 4 of Protocol No. 7.

51. In *Mihalache v. Romania* [GC], § 115, the Court further clarified its methodology for the assessment of the finality of a decision. It explained that, in establishing the “ordinary” remedies in a particular case for the purpose of Article 4 of Protocol No. 7, it takes domestic law and procedure as its starting-point. Domestic law – both substantive and procedural – must satisfy the principle of legal certainty, which requires that both the scope of a remedy for the purposes of Article 4 of Protocol No. 7 be clearly circumscribed in time and that the procedure for its use be clear for those parties that are permitted to avail themselves of the remedy in question. In other words, for the principle of legal certainty to be satisfied, a principle which is inherent in the right not to be tried or punished twice for the same offence, a remedy must operate in a manner bringing clarity to the

point in time when a decision becomes final. In particular, the requirement of a time-limit in order for a remedy to be regarded as “ordinary” is implicit in the wording of the explanatory report itself, which states that a decision is irrevocable where the parties have permitted the “time-limit” to expire without availing themselves of such a remedy. A law conferring an unlimited discretion on one of the parties to make use of a specific remedy or subjecting such a remedy to conditions disclosing a major imbalance between the parties in their ability to avail themselves of it would run counter to the principle of legal certainty.

52. In *Mihalache* (§§ 117-125), the Court examined a situation where a higher-ranking prosecutor’s office had a possibility to examine of its own motion, in the context of hierarchical supervision, the merits of decisions taken by a lower-level prosecutor’s office and to set it aside. The Court considered that a possibility to reopen the proceedings and reconsider the merits of a decision without being bound by any time-limit did not constitute an “ordinary remedy” and thus did not affect the question of finality of the decision taken by the lower-level prosecutor’s office.

53. It has to be noted that, in some cases concerning two parallel sets of proceedings, the issue as to whether a proceedings is “final” or not may be devoid of relevance if there is no real duplication of proceedings but rather a combination of proceedings considered to constitute an integrated whole (*Mihalache v. Romania* [GC], § 82; *Johannesson and Others v. Iceland*, § 48). In *Johannesson and Others v. Iceland*, the Court did not find it necessary to determine whether and when the first set of proceedings – the tax proceedings – became “final” as this circumstance did not affect the assessment of the relationship between the proceedings at stake. Nevertheless, in *Nodet v. France*, § 46), the Court considered it relevant to determine the moment when one set of proceedings had become final. Similarly, in *Korneyeva v. Russia**, § 58, where it was clear that the two sets of proceedings could not be regarded as forming an integrated legal response to the applicant’s conduct, the Court did not consider it important to go in detail into the issue of the moment of finality of the first set of proceedings.

C. Exceptions

Article 4 § 2 of Protocol No. 7

“...

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.

...”

Related HUDOC Keywords

Reopening of case (P7-4)
 New or newly discovered facts (P7-4)
 Fundamental defect in proceedings

54. Article 4 § 2 of Protocol No. 7 sets a limit on the application of the principle of legal certainty in criminal matters. The requirements of legal certainty are not absolute, and in criminal cases, they must be assessed in the light of Article 4 § 2 of Protocol No. 7, which expressly permits Contracting States to reopen a case where new facts emerge, or where a fundamental defect is detected in the proceedings (*Mihalache v. Romania* [GC], § 129).

55. Article 4 of Protocol No. 7 draws a clear distinction between a second prosecution or trial, which is prohibited by the first paragraph of that Article, and the resumption of a trial in exceptional circumstances, which is provided for in its second paragraph. Article 4 § 2 of Protocol No. 7 expressly envisages the possibility that an individual may have to accept prosecution on the same charges, in

accordance with domestic law, where a case is reopened following the emergence of new evidence or the discovery of a fundamental defect in the previous proceedings.

56. In *Nikitin v. Russia* the applicant was tried for treason through espionage and aggravated disclosure of an official secret. By judgment of the Supreme Court his acquittal became final. The Prosecutor General's subsequent request to the Presidium of the Supreme Court to review the case in supervisory proceedings (encompassing a reassessment of the applicable law, of the facts and evidence on the case file, and for its remittal for fresh investigation) was dismissed. The Court noted that national legislation allowed for such review on the grounds of a judicial error concerning points of law and procedure. As the ultimate effect of the supervisory review, if granted, would be to annul all decisions previously taken by courts and to determine the criminal charge in a new decision, it was held to be a kind of reopening of the first trial which fell within the scope of Article 4 § 2 of Protocol No. 7 (§§ 42-49; see also *Bratyakin v. Russia* (dec.), *Fadin v. Russia*, §§ 30-32, *Goncharov v. Russia* (dec.), *Savinskiy v. Ukraine* (dec.), *Xheraj v. Albania*, §§ 71-74). In *Korppoo v. Finland*, the Commission held that in order to enable the prosecution to assess whether a reopening should be requested the police could not be prevented under Article 4 § 1 of Protocol No. 7 from pursuing its investigation following the acquittal of a suspect.

57. In *Kadusic v. Switzerland* the applicant had been convicted of various offences and was serving a prison sentence. Following the re-assessment of the applicant's mental state, the domestic court ordered an institutional therapeutic measure, namely a change of punishment after the delivery of the initial judgement and during the term of the ensuing sentence, and suspended the length of the sentence still to be served by the applicant. This therapeutic measure was based on the applicant's serious mental illness that was already present but not detected at the time of the initial judgment. The Court held that the measure did not breach Article 4 of Protocol No. 7. The domestic authorities had viewed the re-assessment of the applicant's mental state as a newly disclosed circumstance and had amended the original judgment by applying the rules on revision by analogy. The Court noted that the applicant had not explained in what sense the reopening of the case had not taken place "in accordance with the law and penal procedure of the State concerned" (§ 85).

58. In *Mihalache v. Romania* [GC], § 131-133, the Court clarified the concepts of new or newly discovered facts or the discovery of a fundamental defect in the previous proceedings. It explained that they are alternative and not cumulative conditions.

59. In particular, circumstances relating to the case which exist during the trial, but remain hidden from the judge, and become known only after the trial, are "newly discovered". Circumstances which concern the case but arise only after the trial are "new". Moreover, the term "new or newly discovered facts" includes new evidence relating to previously existing facts.

60. The concept of "fundamental defect" within the meaning of Article 4 § 2 of Protocol No. 7 suggests that only a serious violation of a procedural rule severely undermining the integrity of the previous proceedings can serve as the basis for reopening the latter to the detriment of the accused, where he or she has been acquitted of an offence or punished for an offence less serious than that provided for by the applicable law. Consequently, in such cases, a mere reassessment of the evidence on file by the public prosecutor or the higher-level court would not fulfil that criterion. However, as regards situations where an accused has been found guilty and a reopening of proceedings might work to his advantage, Article 4 of Protocol No. 7 does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to the benefit of the convicted person. In such situations, therefore, the nature of the defect must be assessed primarily in order to ascertain whether there has been a violation of the defence rights and therefore an impediment to the proper administration of justice.

61. Lastly, the Court explained that in all cases, the grounds justifying the reopening of proceedings must, according to Article 4 § 2 of Protocol No. 7 in fine, be such as to "affect the outcome of the case" either in favour of the person or to his or her detriment.

62. Against the above principles, in *Mihalache* (§§ 134-138), the Court did not accept the Government's argument that the need to harmonise prosecutorial practice fell under the exceptional circumstances referred to in Article 4 § 2 of Protocol No. 7, nor did it consider that a mere reassessment of the facts in the light of the applicable law constituted a "fundamental defect" in the previous proceedings.

List of cited cases

The case-law cited in this Guide refers to judgments or decisions delivered by the European Court of Human Rights and to decisions or reports of the European Commission of Human Rights.

Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber.

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