



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

FOURTH SECTION

CASE OF ROLA v. SLOVENIA

(Applications nos. 12096/14 and 39335/16)

JUDGMENT

STRASBOURG

4 June 2019

FINAL

04/09/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Rola v. Slovenia,

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

Jon Fridrik Kjølbro, *President*,

Paulo Pinto de Albuquerque,

Egidijus Kūris,

Iulia Antoanella Motoc,

Carlo Ranzoni,

Georges Ravarani,

Marko Bošnjak, *judges*,

and Marialena Tsirli, *Section Registrar*,

Having deliberated in private on 26 March 2019,

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

PROCEDURE

1. The case originated in two applications (nos. 12096/14 and 39335/16) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Slovenian national, Mr Štefan Rola (“the applicant”), on 4 February 2014 and 4 July 2016 respectively.

2. The applicant was represented by Mr D. Ljubič, a lawyer practising in Ljubljana. The Slovenian Government (“the Government”) were represented by their Agent, Ms J. Morela, State Attorney.

3. The applicant alleged, in particular, that due to the revocation of his licence, which had had a permanent effect, his rights under Article 7 of the Convention, Article 1 of Protocol No. 1 and Article 4 of Protocol No. 7 had been violated.

4. On 2 December 2016 the Government were given notice of the above complaints. The remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1960 and lives in Zgornja Korena.

6. On 3 June 2010 the Maribor Local Court found the applicant guilty, pursuant to the (old) Criminal Code (see paragraph 34 below), of two counts of violent behaviour, which had been committed in the periods between

1 May and 29 June 2003, and between 1 July 2003 and 22 November 2004, respectively. The applicant was given a suspended prison sentence. The judgment became final on 17 June 2011.

A. Granting of the liquidator's licence and its revocation

7. On 9 April 2004 the applicant was granted a licence to work as a liquidator in insolvency proceedings under the Compulsory Composition, Bankruptcy and Liquidation Act (hereinafter “the Bankruptcy Act”) then in force. His name was entered in the Register of Liquidators maintained by the Ministry of Justice. At the time of his appointment the Bankruptcy Act regulated the conditions under which such a licence could be granted and revoked (see paragraph 28 below).

8. On 1 October 2008 a new Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act (hereinafter “the Financial Operations Act”) came into force, replacing the Bankruptcy Act (see paragraph 29 below).

9. On 21 June 2011 the Maribor Local Court informed the Ministry of Justice that the applicant's conviction for the criminal offences committed in 2003 and 2004 had become final (see paragraph 6 above). Accordingly, on 27 June 2011 the Ministry of Justice revoked the applicant's licence, based on section 109 of the Financial Operations Act. It stated that pursuant to that provision, the applicant, having been convicted of an offence prosecuted *ex officio* (hereinafter “publicly prosecutable”) committed with intent, had to be divested of his licence. Three days following the decision the applicant's name was removed from the registry of liquidators.

10. On 25 July 2011 the applicant lodged an administrative action against the decision revoking his licence. He argued that at the time he had committed the criminal offence he could not have foreseen that it would have entailed such a sanction and that section 109 of the Financial Operations Act should not have been applied retrospectively – an issue which in his view had been entirely disregarded by the Ministry of Justice. The applicant also emphasised that at the time he had acquired the licence the law had not provided for the measure of revocation in a case of conviction for a criminal offence. In this connection, he referred to Article 28 of the Slovenian Constitution, which sets out the principle of legality in criminal law prohibiting, *inter alia*, any retroactive application of criminal law. Accordingly, he could not have been expected to anticipate that such legal consequences would have arisen from his actions which, furthermore, had no bearing on the performance of his duties as a liquidator. He argued that over the years in this profession, he had gained extensive experience and had built up his reputation. His job as a liquidator had constituted his only source of income and he and his family had thus

suffered a grave and unexpected loss of earnings following the revocation of his licence.

11. On 7 November 2012 the Administrative Court dismissed the applicant's action, finding that the revocation of his licence had been entirely lawful. As regards the applicant's assertion that the measure should not have been applied retroactively, it found that the time when the offence had been committed was not to be considered relevant since the measure in question pertained to the final conviction, thereby respecting the presumption of innocence.

12. On 21 December 2012 the applicant lodged an appeal on points of law, reiterating the argument that his licence had been unlawfully revoked. He further alleged that the Administrative Court had failed to address that key argument and to provide a reasoned response to his complaints. Moreover, the applicant was of the view that, assuming that the Administrative Court had correctly interpreted the relevant provisions of the Financial Operations Act, those provisions were inconsistent with the Constitution.

13. On 13 February 2013 the Supreme Court rejected the applicant's appeal on points of law as inadmissible, holding that the question he had raised did not meet the standard of "an important legal question" which should be resolved by the Supreme Court. The relevant provision of section 109 of the Financial Operations Act was unambiguous and did not require any particular interpretation; it was clear from its wording that it applied equally to those liquidators who had acquired their licence prior to the enactment of the Financial Operations Act as well as to those who had acquired it after the new Act had come into force. Moreover, the Act did not specifically provide that the measure in question applied only to convictions for criminal offences committed after it had entered into force. Lastly, the Supreme Court held that the applicant had failed to substantiate that the revocation of his licence had had particularly harmful consequences for him.

14. On 19 April 2013 the applicant lodged a constitutional complaint, relying on several constitutional provisions, including those enshrining equal protection of rights, the right to judicial protection and to enjoy the freedom of work. He complained that the lower courts' decisions had been very brief and had not answered his arguments and that no evidence concerning, *inter alia*, his financial situation had been assessed. He continued to aver that when given the licence, he had complied with all the pertinent criteria and that the relevant provisions of the Financial Operations Act were unconstitutional. He also argued that the courts had not applied the more lenient law, which had been the old Bankruptcy Act. Moreover, the courts had disregarded the fact that only a suspended prison sentence had been imposed on him and that the legal distinction to include all criminal

offences committed with intent was arbitrary and not relevant to the aim of maintaining public confidence in the profession at issue.

15. On 6 November 2013 the Constitutional Court decided not to consider the applicant's constitutional complaint, relying on the second paragraph of section 55(b) of the Constitutional Court Act (see paragraph 36 below).

16. In the meantime, as it transpires from a decision granting him unemployment allowance, on 15 April 2012 the applicant was dismissed from the Institute for Insolvency Management. He was subsequently unemployed. From November 2014 to November 2015, he was employed through a programme for older workers.

B. Refusal to grant the applicant a new liquidator's licence

17. On 28 February 2013 the applicant's conviction was expunged from his criminal record.

18. On 8 April 2013 the applicant applied for a new liquidator's licence.

19. On 29 May 2013 the Ministry of Justice rejected his application, citing the Financial Operations Act's provision, pursuant to which a licence could not be granted once it had been revoked (point 2, paragraph 4 of section 108 of the Financial Operations Act – see paragraph 30 below) and noting that the applicant's licence had been revoked on 27 June 2011.

20. On 27 June 2013 the applicant lodged an administrative action against the above decision. He argued that the sanction of permanent revocation was absolutely disproportionate and that neither judges nor lawyers were subject to such strict conditions as both were able to reapply for office after they had been dismissed. The applicant further submitted that he had lost his job virtually overnight and that the companies which had provided support services to him, such as accounting, had also been seriously affected by the measure. He also explained that he was unemployed and found it difficult to provide for his children who were in his sole custody.

21. On 5 January 2014 the applicant lodged pleadings referring to a judgment issued in criminal proceedings unconnected with the present case. He argued that a convicted person could successfully apply for a liquidator's licence after his conviction had been expunged from his criminal record.

22. On 12 March 2014 the Administrative Court dismissed the applicant's action. It found that the refusal to grant a licence was based on a valid law, which prohibited granting of a licence to an applicant whose previous licence had been revoked. It did not address the applicant's argument that further to the expungement of his conviction from his criminal record he should have been able to reapply.

23. Subsequently, the applicant lodged an appeal on points of law.

24. On 10 March 2015 the Supreme Court dismissed the applicant's appeal on points of law on the grounds that he had failed to demonstrate that there was an important legal question, he had not pointed to any inconsistencies in the case-law and he had not shown that he had suffered very severe consequences as a result of the impugned measure, which the court pointed out had been a refusal to grant him a licence and not the earlier revocation.

25. On 27 May 2015 the applicant lodged a constitutional appeal, relying on several provisions of the Constitution including equal protection of rights, the right to judicial protection, freedom of work, as well as Articles 6, 7 and 14 of the Convention. He argued that his case was an important one and that if the current position of the courts remained in effect, he would never be able to work as a liquidator again. The applicant disputed the Supreme Court's decision, which had required him to show that there had been inconsistencies in the case-law. The Supreme Court ignored his argument to the effect that the relevant provisions were unconstitutional and instead took a position that only a departure from case-law would merit the examination of his appeal. The applicant furthermore argued that the interpretation of the relevant legislation had not yet been settled.

26. On 14 December 2015 the Constitutional Court rejected the applicant's constitutional complaint as inadmissible, citing the second paragraph of section 55(b) of the Constitutional Court Act (see paragraph 36 below). The decision was served on the applicant on 4 January 2016.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of the Republic of Slovenia

27. Article 28 of the Constitution enshrines the principle of legality in criminal law and reads as follows:

“No one may be punished for an act which had not been declared a criminal offence under law or for which a penalty had not been prescribed at the time the act was performed.

Acts that are criminal shall be established and the resulting penalties pronounced according to the law that was in force at the time the act was performed, except where a more recent law adopted is more lenient towards the offender.”

B. Bankruptcy Act and Financial Operations Act

28. Pursuant to the Bankruptcy Act (Official Gazette no. 67/1993 with the relevant amendments), which was in force at the time the applicant was granted his liquidator's licence and at the time the criminal offences in question were committed, such a licence was not to be granted if the

candidate had been “convicted for a criminal offence which would render him or her morally unfit to perform [this] function ...” (section 78b). The Bankruptcy Act also set out the conditions for the revocation of the licence, namely breach of duties or abuse of position.

29. On 1 October 2008 the Financial Operations Act (Official Gazette no. 126/07) came into force, replacing the Bankruptcy Act. The Financial Operations Act introduced, in its section 108 (3), certain new conditions for the performance of the role of liquidator. Notably, a person is not considered worthy of public confidence to perform such a role if, *inter alia*, he or she has been convicted, by way of a final judgment, of a publicly prosecutable criminal offence committed with intent and the conviction has not yet been expunged from the individual’s criminal record. Likewise, he or she is not considered worthy of public confidence if he or she has been convicted of certain criminal offences committed by negligence, such as manslaughter, infliction of a serious injury, money laundering, or disclosure of State secret. In such cases, section 109 provides that the Minister of Justice must revoke the individual’s licence.

30. Pursuant to section 108(4)(2) of the Financial Operations Act, the Minister of Justice must reject an application for a liquidator’s licence if the applicant has previously had a licence revoked.

31. The Financial Operation Act further specifies the management of the register of liquidators and the order of their appointment to specific cases. Section 116 provides that every case is allocated to a new liquidator, respecting the order of their appearance on the aforementioned register.

32. In its transitional provisions the Financial Operations Act provides that the liquidator licences which had been issued under the Bankruptcy Act should on 1 October 2008 be considered, with some exceptions (not applicable to the applicant’s situation), equal to licences issued under the Financial Operations Act.

33. Under the Financial Operations Act, a liquidator is a particular official in insolvency proceedings who carries out tasks set out in law with the aim of protecting creditors’ interests. In bankruptcy proceedings, he or she conducts affairs on behalf of the insolvent debtor. He or she assumes the role of representing the debtor the moment the liquidation proceedings against it start. In compulsory receivership proceedings, the liquidator’s role is of a supervisory character. The liquidator also acts as an authority that carries out certain official duties, such as examining the order of claims against the debtor. He or she is obliged to act with diligence, to defend the creditors’ interests and to follow the instructions of the judge where applicable.

C. Criminal Code and Old Criminal Code

34. At the time the crimes at issue were committed the Criminal Code published in Official Gazette no. 63/1994 (“the Old Criminal Code”) was applicable to the case. Its relevant Articles read as follows:

Article 99

(Incurrence of legal consequence of conviction)

“(1) Convictions for particular criminal offences or particular sentences may entail either the termination or forfeiture of certain rights or a bar to the acquisition of certain rights.

(2) Legal consequences cannot be imposed if the person was sentenced to a fine, to a suspended sentence or a court warning or was dispensed from serving the sentence.

(3) Legal consequences may only be prescribed by statute and shall take effect by force of the statute prescribing them.

(4) Only the legal consequences of conviction which were prescribed by statute at the time the crime was committed can be imposed on a convicted person.”

Article 100

(Types of legal consequence of conviction)

“(1) The legal consequences of conviction which refer to the termination or forfeiture of certain rights are termination of authorisation to perform a public function .

(2) Legal consequences which refer to a bar to the acquisition of certain rights include:

1) debarment from the performance of certain public functions or official duties;

2) debarment from entering a certain profession;

3) debarment from obtaining certain permits and endorsements granted by written order of State bodies.

...”

Article 101

(Effect and duration of legal consequences of conviction)

“(1) Legal consequences come into effect on the day the conviction becomes final.

...

(6) The legal consequences of the conviction shall be discontinued with the removal of the conviction from the criminal record.”

35. On 1 November 2008 the (new) Criminal Code published in Official Gazette no. 55/2008 entered into force. Pursuant to Article 3 § 4, the principle that there should be no crime and punishment without a law applied also to the “legal consequence of conviction” concerning forfeiture or limitation of rights. The relevant parts of other provisions are virtually the same: Article 78 of the Criminal Code resembles Article 99 of the Old

Criminal Code, Article 79 of the Criminal Code resembles Article 100 of the Old Criminal Code and Article 80 of the Criminal Code resembles Article 101 of the Old Criminal Code.

D. Constitutional Court Act

36. Subsection (2) of section 55(b) of the Constitutional Court Act, as in force at the material time, reads as follows:

“(2) A constitutional appeal shall be considered:

- if there has been a violation of human rights or fundamental freedoms which has had significant consequences for the complainant; or
- if it concerns an important constitutional question which goes beyond the importance of the actual case.”

E. Constitutional Court’s decision of 1 June 1995

37. On 1 June 1995 the Constitutional Court issued decision no. U-I-344/94 concerning the compatibility of section 8 of the Notary Act with the Constitution. Section 8(5) of the Notary Act set out three elements which needed to be satisfied in order for a person to be considered worthy of public trust for the performance of the functions of a notary, namely (a) the lack of pending criminal proceedings concerning a crime which would render him or her morally unworthy to be a notary; (b) lack of criminal conviction for crime which would render him or her morally unworthy to be a notary; and (c) lack of conduct which would lead to a conclusion that the person would not conduct his or her function conscientiously and justly. The Constitutional Court found that condition (a) was in breach of, *inter alia*, the presumption of innocence. However, as regards condition (b) it did not find it unconstitutional. It noted in this connection that “the contested provision [condition (b)] ... represented the legal consequence of conviction because it banned [the person] from accessing a certain profession”. It further noted that this consequence was not a criminal sanction but a condition for a public-service job. It therefore did not concern sentencing for a criminal offence but the question of the personal suitability of the candidate.

F. Supreme Court’s decision of 8 May 2014

38. The Supreme Court found in its decision no. X Ips 12/2013 that when an enforcement officer’s licence was withdrawn on the basis of a conviction for a criminal offence, by way of a final judgment, the authority withdrawing the licence could not reassess the facts or law of the criminal case.

THE LAW

I. JOINDER OF THE APPLICATIONS

39. Having regard to the related subject matter of the applications, which were lodged by the same applicant, the Court finds it appropriate to examine them jointly (Rule 42 § 1 of the Rules of Court).

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

40. The applicant complained that the revocation of his liquidator's licence was in breach of Article 7 of the Convention, which reads as follows:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

A. Admissibility

1. Significant disadvantage

41. The Government, relying on the Constitutional Court's decisions rejecting the applicant's two constitutional complaints, argued that the applicant had suffered no significant disadvantage.

42. The applicant disputed that argument, submitting that the Court had found a violation of the Convention in a number of cases which had been rejected by the Constitutional Court.

43. The Court notes that the question of whether the applicant has suffered any significant disadvantage represents the main element of the criterion set forth in Article 35 § 3 (b) of the Convention (see *Adrian Mihai Ionescu v. Romania* (dec.), no. 36659/04, § 39, 1 June 2010, and *Korolev v. Russia* (dec.), no. 25551/05, 1 July 2010). The Court has held that the absence of any significant disadvantage can be based on criteria such as the financial impact of the matter in dispute or the importance of the case for the applicant (see *Konstantin Stefanov v. Bulgaria*, no. 35399/05, § 44, 27 October 2015).

44. Turning to the present case, the Court finds it undisputed that in losing his licence to act as a liquidator in bankruptcy proceedings, the applicant also lost his main source of income. The Government provided nothing to show that the financial impact of the matter was such as to

indicate an absence of any significant disadvantage. They merely referred to the Constitutional Court's decisions dismissing the applicants' complaints (see paragraphs 15 and 26 above). Those decisions, however, contain no explanation as to the financial or other impact that the contested measures had on the applicant. The Government's objection must accordingly be dismissed.

2. Applicability of Article 7

45. The Government took the view that the revocation of the applicant's liquidator's licence had not constituted a "penalty" within the meaning of Article 7 of the Convention and that the complaint should be declared inadmissible.

46. The applicant disputed that argument.

47. The Court finds that the objection as to its lack of jurisdiction *ratione materiae*, in the circumstances of the case, is closely linked to the substance of the applicant's complaint under Article 7 of the Convention. It thus decides to join it to the merits.

3. Conclusion

48. The Court observes that this complaint 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

49. The applicant argued that the revocation of his licence, which was of a permanent nature, had constituted a form of oppression which had stemmed from his conviction. He alleged that a penalty had not been provided for by law at the time of the offence and had been retroactively imposed on him. He also argued that because his prison sentence had been suspended, it should not have entailed any legal consequences. Article 99 of the Criminal Code applicable at the time the criminal offences had been committed had clearly stated that no legal consequences would apply if the convicted person was given, *inter alia*, a suspended prison sentence. The aforementioned provision of the Criminal Code could not have been overridden by another statute. This meant that the punishment imposed on him had had no basis in law.

50. Referring to the Constitutional Court's decision no. U-I-344/94 of 1 June 1995 (see paragraph 37 above), the Government submitted that the revocation of the applicant's licence had been a "legal consequence of conviction" but had not had the nature of a criminal sanction. It had been a

measure taken in response to the fact that having been criminally convicted, the applicant had no longer fulfilled the criteria for the job. In particular, no criminal convictions had been one of the conditions which had to have been fulfilled by any candidate – it had related to the suitability of the candidate for the position of a liquidator, which had required a high level of public trust. Liquidators had exercised public powers and therefore had had to have the confidence of debtors, creditors and the public in general.

51. The Government further argued that in any event the measure had not had a retroactive effect. It had been imposed in administrative, not criminal, proceedings. The purpose of the measure had been to ensure that the functions of the liquidator would be carried out by a suitable person; when the crime had been committed had been irrelevant in this regard. The Government also submitted that the applicant's licence had been withdrawn on the basis of the Financial Operations Act because licences acquired under the previous legislation had been treated in the same way as those acquired under the aforementioned Act. They pointed out that the Bankruptcy Act, which had been in force at the time the crimes had been committed, had also included a condition of not having a criminal conviction which would render a person morally unfit to hold such a licence. The competent ministry had been obliged to ensure that those holding a liquidator's licence had been in compliance with the criteria set out in the law. Referring to the Supreme Court's judgment of 8 May 2014 (see paragraph 38 above), the Government argued that the ministry had acted lawfully in the present case as it had based its decision on the law as in force at that time and had been bound by the findings of the criminal court.

52. The Government also submitted that pursuant to the Criminal Code and the Old Criminal Code, "legal consequences of conviction" could be prescribed only by statute. The Financial Operation Act was thus not to be considered *lex specialis* but was merely a partial implementation act within the framework of the Criminal Code or the Old Criminal Code. Sections 108 and 109 of the Financial Operations Act were not in contradiction with the aforementioned Codes.

2. The Court's assessment

(a) Relevant principles

53. The Court reiterates that the concept of a "penalty" in Article 7 has an autonomous meaning. To render the protection offered by this Article effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see *G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], nos. 1828/06 and 2 others, § 210, 28 June 2018).

54. The wording of Article 7 § 1, second sentence, indicates that the starting-point in any assessment of the existence of a “penalty” is whether the measure in question is imposed following a decision that a person is guilty of a criminal offence. However, other factors may also be taken into account as relevant in this connection, namely the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity (see *G.I.E.M. S.R.L. and Others*, cited above, § 211). These factors resemble the criteria to be considered in determining whether or not there was a “criminal charge”, commonly known as the “Engel criteria” (see *Engel and Others v. the Netherlands*, 8 June 1976, §§ 82-83, Series A no. 22), which apply also to Article 7 of the Convention and Article 4 of Protocol No. 7 (see *Lázaro Laporta v. Spain* (dec.), no. 32754/16, § 17, 3 July 2018, and *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, §§ 105-07, 15 November 2016).

55. As to the case-law to date, the Court has found that the automatic dismissal of a customs official who had been definitively sentenced for offences relating to smuggling had not amounted to a penalty within the meaning of Article 7 (see *Vagenas v. Greece* (dec.), no. 53372/07, 23 August 2011). It noted that the dismissal had been imposed solely on the objective basis of a final criminal conviction. The purpose of the dismissal had not been to punish the applicant for the offence he had committed but had been based on the fact that the applicant had no longer possessed, as a result of his conviction, the qualities and guarantees necessary to carry out his job. The Court later noted in *Kapetanios and Others v. Greece* (nos. 3453/12 and 2 others, § 87, 30 April 2015) that in cases such as *Vagenas* (decision cited above) the disciplinary proceedings had had a certain autonomy *vis-à-vis* the criminal proceedings, in particular as regards the manner in which they had been carried out and their purpose.

56. Assessing the question under the criminal limb of Article 6, the Court similarly found in *Müller-Hartburg v. Austria* (no. 47195/06, 19 February 2013) and *Biagioli v. San Marino* ((dec.), no. 8162/13, 13 September 2016) that the offences brought against the applicants – a lawyer, and both a notary public and a lawyer respectively – in the disciplinary proceedings had not been criminal but disciplinary in nature. It observed that the fact that acts which could have led to a disciplinary sanction had also constituted criminal offences (specifically in those particular cases fraudulent conversion and making false declarations in public documents respectively) had not been sufficient to consider a person responsible under disciplinary law as having been “charged” with a crime. As regards the nature of the disciplinary offences in question, the Court further noted that the offences had related solely to professional misconduct and the applicable disciplinary law had not been aimed at the general public but to members of a professional group possessing a special status (see

Müller-Hartburg, cited above, § 44, and *Biagioli*, decision cited above, § 54). In both cases the purpose of the proceedings had been to protect the public trust in, and the reputation of, the profession (see *Müller-Hartburg*, cited above, § 45, and *Biagioli*, decision cited above, § 55). The Court further observed in *Müller-Hartburg* that the disciplinary authorities had been required to have particular regard not only to the degree of culpability but to the damage resulting from the commission of the offence, in particular to members of the public (cited above, § 45).

57. As regards the nature and degree of severity of the sanction, the Court noted in *Biagioli* (decision cited above) that although the sanction of disbarment had been severe, its aim had been to restore the confidence of the public by showing that in cases of serious professional misconduct the relevant disciplinary body would prohibit the lawyer or notary concerned from practising. The Court went on to note that, although not crucial to this finding, being disbarred did not necessarily have a permanent effect because a professional who had been disbarred might be reinstated if he or she had been rehabilitated and it were shown that his or her conduct had not been reprehensible (*ibid.*, § 56).

58. On the other hand, in *Welch v. the United Kingdom* (9 February 1995, § 33, Series A no. 307-A) the Court considered that a confiscation order imposed following the applicant's criminal conviction had amounted to a penalty taking into account, in particular, that it had resulted from sweeping statutory assumptions that all property passing through the offender's hands over a certain period had been the fruit of drug trafficking unless he had been able to prove otherwise; that the confiscation order had been directed to the proceeds involved in drug dealing and had not been limited to actual enrichment or profit; that the trial judge had had discretion in fixing the amount of the order, taking into consideration the degree of culpability of the accused; and that there had been the possibility of imprisonment in default of payment by the offender.

59. In *Nilsson v. Sweden* ((dec.), no. 73661/01, 12 December 2005), which concerned the revocation of the applicant's driving licence as a direct consequence of his conviction for driving offences, the Court, considering the complaint under Article 4 of Protocol No. 7, likewise concluded that although under Swedish law this had traditionally been regarded as an administrative measure designed to protect road safety, it had constituted a "criminal" matter. It took into account, *inter alia*, the fact that the licence had been withdrawn a while after the relevant driving offences had been committed, which had meant that prevention and deterrence for the protection of the safety of road users could not have been the only purposes of the measure, and that the severity of the measure, namely suspension of the applicant's driving licence for eighteen months, had been in itself so significant, regardless of the context of his criminal conviction, that it could ordinarily be viewed as a criminal sanction. In a similar, more recent, case

(*Rivard v. Switzerland*, no. 21563/12, § 24, 4 October 2016) the Court, finding under Article 4 of Protocol No. 7 that the revocation of the applicant's driving licence was of a criminal nature, took account of the potential seriousness of the measure, including a possibility of revocation for an unlimited period.

(b) Application of the relevant principles to the present case

60. The Court must now ascertain whether in the present case the impugned measure, namely the revocation of the applicant's liquidator's licence, should be regarded as a penalty within the autonomous meaning of Article 7 (see paragraph 53 above). In this connection, the Court will examine (i) the relationship between the decision in which the person was found guilty and the measure in question; (ii) the procedure involved; (iii) the characterisation of the measure in domestic law; (iv) the nature and purpose of the measure; and (v) the severity of the measure (see paragraph 54 above).

61. The Court notes first of all that the disputed measure was indeed imposed as a result of the applicant's criminal conviction. It observes that the Ministry of Justice revoked the applicant's licence pursuant to section 109 of the Financial Operations Act after being informed that his conviction for criminal offences committed in 2003 and 2004 had become final (see paragraphs 6 and 9 above). Pursuant to the aforementioned provision, a liquidator convicted of a publicly prosecutable offence committed with intent had to be divested of his or her licence (see paragraph 29 above).

62. As regards the procedures for the adoption and enforcement of the measure in question, the Court notes that the measure was imposed by the Ministry of Justice and subsequently reviewed by the Administrative Court in proceedings which essentially fall within the ambit of administrative law (see paragraphs 9 and 11 above, and contrast *G.I.E.M. S.R.L. and Others*, cited above, §§ 228-32). The measure in question was imposed completely separately from the ordinary sentencing procedure (see paragraph 55 above; see also *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-X, and contrast *Gouarré Patte v. Andorra*, no. 33427/10, § 30, 12 January 2016).

63. Regarding the legal characterisation of the measure in domestic law, as noted above, it was prescribed by the Financial Operations Act in a provision aimed at regulating the profession of liquidators in insolvency proceedings (see paragraph 29 above). The measure was thus not set out in criminal law (contrast *Gouarré Patte*, cited above, § 30). Moreover, the Court appreciates from the Constitutional Court's decision of 1 June 1995 that although a measure that prevented a person from obtaining a licence to practise a certain profession amounted to a "legal consequence" of a conviction, it was not to be considered to be a sanction that was criminal in

nature (see paragraph 37 above). Having said that, the Court must interpret the concept of a “penalty” in an autonomous manner (see *G.I.E.M. S.R.L. and Others*, cited above, § 216). It must thus consider whether any other factors (see paragraphs 53 to 54 above) lead to the conclusion that Article 7 is applicable in the present case.

64. In this connection, the Court notes that the relevant provision of the Financial Operations Act provides that in order to be considered suitable to perform the functions of a liquidator, a person must have no prior conviction for, *inter alia*, any publicly prosecutable criminal offence committed with intent (see paragraph 29 above). The purpose of this legal provision does not appear to be to inflict a punishment in relation to a particular offence of which a person has been convicted, but is rather aimed at ensuring public confidence in the profession in question. It is aimed at members of a professional group possessing a special status, specifically liquidators in insolvency proceedings (compare *Müller-Hartburg*, cited above, § 45, and *Biagioli*, decision cited above, § 54). Therefore, the revocation of the licence did not have a punitive and dissuasive aim pertaining to criminal sanctions.

65. The Court further notes that as in the case of *Vagenas* (decision cited above), where the automatic dismissal had not amounted to a penalty within the meaning of Article 7, the measure in the present case was imposed solely on the objective basis of a final criminal conviction (see paragraphs 9 and 29 above). The Ministry of Justice and subsequently the courts reviewing the case seem to have had no discretion as regards the imposition of the measure, and no assessment of culpability was carried out in the impugned proceedings (contrast *Welch*, cited above, § 33).

66. Lastly, as regards the severity of the measure, the Court reiterates that this factor is not in itself decisive, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned (see *Welch*, cited above, § 32). In the present case, the Court observes that as a result of his criminal conviction the applicant’s licence was revoked with permanent effect, which in itself appears to be a rather severe consequence (see paragraphs 18 to 26 and 29 above). However, bearing in mind the above principle and taking into account the considerations made in respect of other factors mentioned in paragraphs 62 to 65 above and the fact that the revocation of the applicant’s licence did not prevent him from practising any other profession within his field of expertise (see, *mutatis mutandis*, *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 93, ECHR 2013), the Court finds that, in the circumstances of the present case, the mere fact that the impugned measure was of a permanent nature does not suffice for the revocation of the applicant’s licence to be regarded as a penalty within the meaning of Article 7.

67. It follows from the above considerations that Article 7 is not applicable in the present case. There has accordingly been no violation of that provision.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

68. The applicants complained that the revocation of his liquidator's licence and the bar on reapplying for the licence had been in violation of Article 1 of Protocol No. 1 to the Convention, which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Admissibility

1. *The parties' arguments*

69. The Government argued that the applicant had no legitimate expectations to possess the licence given that he had failed to satisfy the applicable criteria. The licence included an authorisation to carry out a public service and could not amount to a possession. It had been revoked on the basis of valid law and this could thus not amount to an interference with property. The Government further submitted that the applicant's property had not in any way been affected by the contested measure. Although he could no longer work as a liquidator, he could exercise other professions.

70. The applicant argued that he had exercised the profession of liquidator as his only profession and that as a result of the revocation of his licence, he had remained temporarily unemployed. He also argued that under domestic law, liquidators did not exercise public powers but only acted on behalf of other participants in the relevant proceedings.

2. *The Court's assessment*

71. The Court reiterates at the outset that Article 1 of Protocol No. 1 applies only to a person's existing possessions; it does not guarantee the right to acquire possessions (see *Marckx v. Belgium*, 13 June 1979, § 50, Series A no. 31, and *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, § 121, ECHR 2002-II (extracts)). In previous cases involving professional practices, the Court has taken the view that a restriction on applicants' right

to practise the profession concerned, such as a refusal to register an applicant on a professional list, significantly affected the conditions of their professional activities and reduced the scope of those activities. Where, as a consequence of the restrictions, the applicant's income and the value of his clientele and, more generally, his business, had fallen, the Court held that there had been an interference with the right to peaceful enjoyment of possessions (see *Malik v. the United Kingdom*, no. 23780/08, § 90, 13 March 2012). In cases concerning the granting of licences or permits to carry out a business, the Court has indicated that the revocation or withdrawal of a permit or licence had interfered with the applicants' right to the peaceful enjoyment of their possessions, including the economic interests connected with the underlying business (see *Malik*, cited above, § 91 and the cases cited therein).

72. Turning to the present case, the Court notes that it has not been disputed that due to the revocation of his licence, the applicant was struck off the Register of Liquidators (see paragraph 9 above) and could no longer be assigned any insolvency cases, and that consequently he lost his main source of income (see, by contrast, *Malik*, cited above, §§ 106, 107 and 110).

73. The fact that the applicant's licence had included also permission to carry out certain public services and the fact that after its revocation he could have possibly worked in other professions (see paragraph 69 above) are not in the Court's view sufficient to divest the licence in question of its economic nature. The Court finds it significant in this connection that the licence allowed the applicant to carry out professional practice for which he was paid. He carried out such practice for more than seven years prior to the impugned decision (see paragraphs 7 to 9 above).

74. Furthermore, in so far the Government refer to the legal basis for the withdrawal of the applicant's licence (see paragraph 69 above), this essentially relates to the merits of the case. As regards the applicability, the Government did not put forward any other argument calling into question the existence, in the present case, of an underlying professional practice of a certain worth that had the nature of a private right and thus constituted an asset (see *Malik*, cited above, § 96). The Court therefore concludes that the applicant's professional practice amounted to a possession within the meaning of the first sentence of Article 1 of Protocol No. 1.

75. The Court further notes that the complaint 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

76. The applicant argued that in view of the criminal-law provisions, his licence should not have been revoked because he had only been given a suspended sentence.

77. The applicant further argued that the withdrawal of the licence had been a disproportionate measure. It was unrelated to the performance of his duties as a liquidator, was harsher than the sanctions applied to judges, public prosecutors and lawyers in similar situations and had worse consequences than those provided for in criminal law. In particular, criminal law allowed for rehabilitation, whereas the revocation of his licence appeared to be for life. The applicant pointed out that someone applying for the first time for a licence could get it even if he or she had previously been convicted, provided that his or her conviction had been expunged from the criminal record, whereas the applicant, who had had his licence revoked, could never get it back.

78. The Government submitted that sections 108 and 109 of the Financial Operations Act were not in contradiction with the Old Criminal Code or the Criminal Code. The purpose of the measure, that is the revocation of the licence, was to ensure that the person exercising the profession of a liquidator was trustworthy. The State could possibly be held responsible for his or her acts in certain situations.

79. According to the Government, the measure had been necessary to achieve the purpose of protecting the public interest. It was based on law and had not placed a disproportionate burden on the applicant. In this connection, they pointed out that other officials exercising public powers, such as judges and public prosecutors, were also subject to conditions concerning their suitability for public office.

2. The Court's assessment

(a) Whether there was an interference with the applicant's possessions

80. Having already established that the applicant had "possessions" within the meaning of Article 1 of Protocol No. 1 (see paragraph 74 above), the Court considers that the revocation of his licence amounted to an interference with the peaceful enjoyment of his possessions.

(b) Whether the interference with the applicant's possessions was justified

81. The Court finds that the revocation of the applicant's licence constituted a measure of control of the use of property, which falls to be considered under the second paragraph of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Tre Traktörer AB v. Sweden*, 7 July 1989, § 55, Series A

no. 159, and *Capital Bank AD v. Bulgaria*, no. 49429/99, § 131, ECHR 2005-XII (extracts)).

82. The first requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions be lawful. Furthermore, a measure aimed at controlling the use of property can only be justified if it is shown, *inter alia*, to be “in accordance with the general interest”. An interference must also strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (see *Vékony v. Hungary*, no. 65681/13, § 32, 13 January 2015, and *Biagioli*, decision cited above, § 101).

83. The Court notes that the domestic authorities in the present case relied on the provisions of the Financial Operations Act as the basis for revoking the applicant’s licence (see paragraphs 9, 11, 29 and 30 above), without addressing the applicability of the relevant criminal-law provisions. However, it cannot be ignored that the Constitutional Court considered the revocation of a licence following a criminal conviction to be a “legal consequence of conviction” (see paragraph 37 above) and that the Government themselves acknowledged the pertinence of the criminal-law provisions to the present situation by submitting that the Financial Operations Act had been “a partial implementation act within the framework of the Criminal Code or the Old Criminal Code” (see paragraph 52 above).

84. In this connection, the Court observes that Article 100 of the Old Criminal Code (as well as Article 79 of the Criminal Code) sets out measures which were to be regarded as “legal consequences of conviction”, including termination of authorisation to perform a public function and a bar to the acquisition of certain rights, such as the right to perform public functions and certain professions (see paragraphs 34 and 35 above). Furthermore, Article 99 of the Old Criminal Code (as well as Article 78 of the Criminal Code) limited the incurrance of a “legal consequence of conviction” to cases of a custodial sentence and explicitly provided that the measure could not be imposed if the person had been given a suspended sentence. It further provided that only the statute could prescribe “legal consequences of conviction” and that the latter should not be applied retroactively (*ibid.*).

85. In view of the foregoing and given that the applicant had committed the criminal offences in 2003 and 2004, when the applicable law had been the Bankruptcy Act (see paragraph 28 above) not the Financial Operations Act (see paragraph 29 above) on which the revocation was based, and had received a suspended sentence (see paragraph 6 above), the Court considers that he could have not reasonably foreseen that his conviction would have automatically led to the revocation of his licence.

86. The impugned measure was thus not lawful within the meaning of Article 1 of Protocol No. 1. This conclusion makes it unnecessary to ascertain whether the other requirements of that provision have been complied with (see *Capital Bank AD*, cited above, § 139).

87. There has therefore been a violation of Article 1 of Protocol No. 1.

IV. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 7 TO THE CONVENTION

88. The applicant complained that the revocation of his licence following his conviction for the criminal offences of violent conduct had constituted double jeopardy in breach of Article 4 of Protocol No. 7 to the Convention, which, in so far as relevant, 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.”

89. The Government disputed this argument.

90. The Court reiterates 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, respectively (see paragraph 54 above; and see *Palmén v. Sweden* (dec.), no. 38292/15, § 20, 22 March 2016, and *Göktan v. France*, no. 33402/96, § 48, ECHR 2002-V). For the reasons explained in the context of Article 7 (see paragraphs 61 to 67 above), the Court finds that the revocation of the applicant’s licence did not amount to a criminal punishment and that Article 4 of Protocol No. 7 is therefore not applicable in the present case.

91. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. 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

93. The applicant claimed 90,000 euros (EUR) in respect of pecuniary damage, which in his submission amounted to half of the income he would

have received for performing the functions of a liquidator in the absence of the violation of the Convention. He submitted that he had been acting as a liquidator in thirty-three cases, which meant that he had lost at least EUR 30,000 for each year in which he had been unable to perform that job. He also claimed EUR 5,000 in respect of non-pecuniary damage.

94. The Government argued that the applicant had failed to substantiate his claim for pecuniary damage as he had failed to prove that he had in fact had thirty-three cases and had not submitted proof of any specific amounts he had received in previous cases. Likewise, they argued that the applicant had failed to explain his claim for non-pecuniary damage.

95. The Court finds the applicant's claim for pecuniary damage unsubstantiated and does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

96. The applicant also claimed EUR 2,316 for the costs and expenses incurred before the domestic courts and EUR 1,680 for those incurred before the Court. As regards the domestic proceedings, he submitted copies of two receipts: one, in the amount of EUR 609, concerning certain undefined legal assistance provided on 5 December 2012, and one, in the amount of EUR 1,707, concerning preparation of the Administrative Court action.

97. The Government disputed the claim as partially unsubstantiated and partly exaggerated.

98. 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. 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 sum of EUR 1,707 for costs and expenses in the domestic proceedings and EUR 1,680 for the proceedings before the Court. In total, the applicant should be awarded EUR 3,387 for costs and expenses.

C. Default interest

99. 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

1. *Decides*, unanimously, to join the applications;
2. *Joins to the merits*, unanimously, the Government's objection that the complaint under Article 7 is incompatible *ratione materiae* with the Convention;
3. *Declares*, unanimously, the complaints concerning Article 7 of the Convention and Article 1 of Protocol No. 1 to the Convention admissible;
4. *Declares*, by a majority, the remainder of the application inadmissible;
5. *Holds*, by four votes to three, that Article 7 is not applicable in the case and that there has accordingly been no violation of this provision.
6. *Holds*, unanimously, that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
7. *Holds*, unanimously,
 - (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:
 - (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 3,387 (three thousand three hundred and eighty-seven 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;
8. *Dismisses*, by four votes to three, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 4 June 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Mariáléna Tsírlí
Registrar

Jon Frídrík Kjølbro
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Joint partly concurring opinion of Judges Kjølbrot and Ranzoni;
- (b) Partly concurring and partly dissenting opinion of Judge Kūris;
- (c) Joint partly dissenting opinion of Judges Pinto de Albuquerque and Bošnjak, joined by Judge Kūris.

J.F.K.
M.T.

JOINT PARTLY CONCURRING OPINION OF JUDGES KJØLBRO AND RANZONI

1. Although we voted for finding a violation of Article 1 of Protocol No. 1, we do not agree with the assessment that the revocation of the applicant's liquidator's licence was not lawful within the meaning of Article 1 of Protocol No. 1 (paragraphs 95 to 99 of the judgment). In our view and as explained below, the interference was a lawful but disproportionate measure.

2. Any interference by a public authority with the peaceful enjoyment of possessions has to be lawful, and the principle of lawfulness presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (see *Broniowski v. Poland* [GC], no. 31443/96, § 147, ECHR 2004-V). However, the Court has limited power to review compliance with domestic law (see *Beyeler v. Italy* [GC], no. 33202/96, § 108, ECHR 2000-I). It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, and unless the interpretation is arbitrary or manifestly unreasonable, the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention (see *Beyeler*, cited above, § 108; *Jahn and Others v. Germany* [GC], nos. 46720/99 and 2 others, § 86, ECHR 2005-VI; and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 149, 20 March 2018).

3. The applicant's liquidator's licence was revoked in 2011 as a consequence of his conviction in 2010 for criminal offences that had been committed in 2003 and 2004 (see paragraph 9 of the judgment). The revocation was based on sections 108 and 109 of the Financial Operations Act, which had entered into force on 1 October 2008, and in accordance with which the Minister of Justice "must revoke" a licence if the person "has been convicted ... of a publicly prosecutable criminal offence committed with intent" (see paragraph 29). It transpires from the transitory provisions that liquidator licences issued under the Bankruptcy Act were to be considered as equivalent to licences issued under the Financial Operations Act (see paragraph 32).

4. The applicant was convicted of a publicly prosecutable criminal offence committed with intent (see paragraph 6) and it is undisputable that the applicant's liquidator's licence had to be revoked if sections 108 and 109 of the Financial Operations Act were to be applied.

5. Before the domestic authorities, the applicant argued that sections 108 and 109 of the Financial Operations Act could not be applied retrospectively and that the question of revocation had to be assessed on the basis of the legislation applicable when the criminal offences were committed. The applicant's arguments were dismissed by the Ministry of Justice and

subsequently by the Administrative Court, the Supreme Court and the Constitutional Court (see paragraphs 9, 11, 13 and 14 of the judgment).

6. If revocation of a liquidator's licence is to be regarded as a "legal consequence of conviction" within the meaning of the Criminal Code, there may seem to be a certain contradiction between Article 99 of the Criminal Code (paragraph 34 of the judgment) and sections 108 and 109 of the Financial Operations Act (see paragraph 29 of the judgment). Thus, Article 99 § 2 of the Criminal Code clearly stipulates that legal consequences cannot be imposed if the person is sentenced to a "suspended sentence" while sections 108 and 109 of the Financial Operations Act provide for revocation in the event of a conviction for a crime committed with intent, even if the sentence is suspended. Likewise, Article 99 § 4 stipulates that only those legal consequences that were prescribed by statute at the time the crime was committed can be imposed, while revocation in the applicant's situation does not seem to have been possible under the provisions of the Bankruptcy Act (see paragraph 28 of the judgment).

7. That being stated, and having regard to the Court's limited power to review compliance with domestic law, we find it difficult to characterise the interpretation and application of domestic law by the Ministry of Justice, the Administrative Court, the Supreme Court and the Constitutional Court as arbitrary or manifestly unreasonable. The wording of sections 108 and 109 of the Financial Operations Act is unambiguous. The transitory provisions clearly indicate that the provisions of the Financial Operations Act were to be applied, even though the applicant's licence had been issued prior to the entry into force of the Act. Therefore, if the question of revocation of the applicant's liquidator's licence was to be assessed under sections 109 and 108 of the Financial Operations Act as decided by the domestic authorities, the outcome was more than foreseeable, and the interplay between the provisions of the Financial Operations Act and the Criminal Code is a question concerning the interpretation of domestic law which falls to be decided by the domestic authorities.

8. Thus, we cannot subscribe to the reasoning and conclusion according to which the interference was not lawful within the meaning of Article 1 of Protocol No. 1.

9. Consequently, and accepting that the measure pursued the legitimate aim of protecting the public by ensuring the integrity of those carrying out the function of liquidator, it is necessary for us to proceed with an assessment of proportionality.

10. Article 1 of Protocol No. 1 requires of any interference that there should be a reasonable relationship of proportionality between the means employed and the aim pursued. This fair balance will be upset if the person concerned has to bear an individual and excessive burden (see *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 300, 28 June 2018).

11. In the present case, the revocation of the applicant's liquidator's licence was applied as an automatic consequence of the fact that he had been convicted of a publicly prosecutable criminal offence committed with intent. The relevant provisions in the domestic law did not require or allow for a concrete assessment of the specific circumstances of the case, including the nature and the seriousness of the offence, the time elapsed since the offence was committed, whether the offence was related to or had a bearing on the exercise of the function of liquidator and the appropriate duration of the revocation compared to the gravity of the offence. In other words, the relevant domestic provisions did not allow for any concrete assessment of proportionality.

12. As regards the specific circumstances of the applicant's case, there is no indication that his criminal conviction for violent behaviour was related to his professional activities. Furthermore, his licence was revoked more than six years after the offence in question had been committed, although he had been able to perform his job during that time without any legal repercussions. What is more, the revocation was of a permanent nature, since he was unable to reapply for a liquidator's licence even after the conviction had been expunged from his criminal record.

13. Having regard to the foregoing and to the seriousness of the consequences for the applicant, who was unable as a result of the impugned measure ever to resume employment as a liquidator, we consider that a fair balance was not struck between the interference and the aim it pursued. There has therefore been a violation of Article 1 of Protocol No. 1.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE KŪRIS

1. I voted against three points of the operative part: the fourth, the fifth and the eighth. In my opinion, Article 4 of Protocol No. 7 to the Convention, which enshrines the *ne bis in idem* principle, is applicable to the applicant's situation – or, at least, its inapplicability is not duly substantiated in the judgment. Also, the applicant's complaint under Article 4 of Protocol No. 7 to the Convention cannot be assessed as incompatible *ratione materiae* with the provisions of the Convention. What is more, had a proper examination of these two aspects been undertaken, a violation of at least one of the said Articles (or even both) should have been found. A higher amount of money therefore had to be awarded to the applicant by way of *just* (if this word means what it should mean) satisfaction for the infringement of his Convention rights.

2. As to the applicant's complaint under Article 1 of Protocol No. 1 to the Convention, I concur with the finding that there has been a violation of that Article. Still, I am not fully comfortable with the reasoning on which that finding is based. The reasons for that discomfort are to some extent similar to those expounded in the separate opinion of Judges Kjølbrot and Ranzoni. I shall not expand further on these matters.

3. In addition to this partly concurring and partly dissenting opinion, I also have joined the partly dissenting opinion of Judges Pinto de Albuquerque and Bošnjak, with whom I share the views on the outcome of this case, as well as on the flaws of legal analysis and reasoning which have led to such an outcome. In my own separate opinion I will deal with some of the points of my disagreement with the majority, which are sometimes to no small extent parallel to those noted in the separate opinion of my distinguished colleagues, as well as with some additional considerations, in particular as regards the methodology of the majority's reasoning. The underlying problem lies in their approach to the applicant's complaint under Article 7; the finding regarding the complaint under Article 4 of Protocol No. 7 is a mere sequel to the finding regarding the complaint under Article 7. I will therefore deal mostly with the latter.

4. It is duly pointed out in the judgment – and this is a starting-point for the majority's analysis – that the concept of a "penalty" in Article 7 has an autonomous meaning and that "to render the protection offered by this Article effective, the Court must be free to go behind appearances and assess for itself whether a particular measure amounts in substance to a 'penalty' within the meaning of this provision" (paragraph 53 of the judgment). Paragraph 90 contains a similar reminder regarding Article 4 of Protocol No. 7: it is stated 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” (for the sake of accuracy, Article 4 of Protocol No. 7 does not actually contain the words “criminal procedure”, but the words “criminal proceedings”, “penal procedure” and “previous proceedings” are used). It is also rightly reiterated that in any assessment of the existence of a “penalty” account may be taken not only of the impugned measure’s imposition following a decision that a person is guilty of a criminal offence, but also other factors, in particular the nature and the severity of the measure in question. It is stated in paragraph 54 that the factors to be considered in determining whether or not there was a “penalty” (for the purposes of Article 7 § 1) “resemble” the so-called *Engel* criteria (see *Engel and Others v. the Netherlands*, 8 June 1976, §§ 82-83, Series A no. 22). As is rightly noted in *A and B v. Norway* ([GC], nos. 24130/11 and 29758/11, § 105, 15 November 2016), those criteria were “previously developed” (that is to say, as early as in 1976, the year of *Engel and Others*) for the purposes of Article 6 (i.e. to establish the existence of a “criminal charge”), but since then they have been effectively applied also for the purposes of Article 7 and Article 4 of Protocol No. 7. This jurisprudential advancement is deservedly paid heed to in the judgment.

5. Although references to the relevant case-law are provided in the above-mentioned paragraph, the *Engel* criteria themselves are not rehearsed. It is therefore worthwhile to do so here. I am copying the following from the rather recent Grand Chamber judgment of *A and B v. Norway* (cited above, § 105), which is but one (and not even the latest) of numerous authorities on this matter:

- (a) the legal classification of the offence under national law;
- (b) the very nature of the offence;
- (c) the degree of severity of the penalty that the person concerned risks incurring.

6. In the above-cited case of *A and B*, being called upon to clarify the applicability of the *Engel* criteria for the purposes of Article 7 and Article 4 of Protocol No. 7, the Grand Chamber saw no reason to depart from the approach that these criteria were “the model test for determining whether the proceedings concerned were ‘criminal’ for the purposes of Article 4 of Protocol No. 7” (ibid., § 107). The Grand Chamber also stated that, although the *ne bis in idem* principle was “mainly concerned with due process, which [was] the object of Article 6, and [was] less concerned with the substance of the criminal law than Article 7”, it would be “more appropriate, for the consistency of interpretation of the Convention taken as a whole, for the applicability of the principle to be governed by the same, more precise criteria as in *Engel*” (ibid.).

Hardly anyone would disagree that, although “previously developed” (ibid. § 105) for the purposes of the Article of which the “object” is “due process” (that is to say, Article 6), the *Engel* criteria point directly to the very “substance of the criminal law”, because they invoke the two

determinative elements of substantive criminal law: the offence, for which the person concerned is sanctioned, and the penalty (or “punishment”, as both terms are employed interchangeably in the Convention, including Article 7) which may be incurred by the offender.

7. It should also be noted that in the above-cited case of *A and B* the Grand Chamber had not departed (as regards the doctrinal statements, and I will pass over the concrete finding in that case) from the principled stance (as formulated earlier in *Sergey Zolotukhin v. Russia* ([GC], no. 14939/03, § 53, ECHR 2009) that, although a cumulative approach cannot be excluded, the second and the third criteria are “alternative, not necessarily cumulative” (*A and B*, cited above, § 105). This stance was recently confirmed in *Ramos Nunes de Carvalho e Sá v. Portugal* ([GC], nos. 55391/13 and two others, 6 November 2018), with a caveat (which, in turn, had been stipulated in the Court’s case-law since the mid-1980s) that a cumulative approach was allowed “where separate analysis of each criterion [did] not make it possible to reach a clear conclusion as to the existence of a criminal charge” (*ibid.*, § 122).

It is therefore obvious that the alternative approach is a *rule*, and the cumulative approach is an *exception*. Fairness and transparency of judicial decision-making requires that a serious substantiation of each and every instance of departure from the rule in favour of the exception is provided. Needless to say, it should be *made* clear to the parties in the case and other readership – if possible explicitly, even in a succinct manner, – that a “separate analysis of each criterion” is not sufficient to form “a clear conclusion as to the existence of a criminal charge”.

8. What inferences should one draw from all this?

In plain language (and not the sinuous and multi-layered legalese of *A and B*, cited above), it means at least three things (for the purposes of the instant case):

(a) Notwithstanding the legal classification of an offence in domestic law and of the procedure for the imposition of the “second” measure (where that measure may not be formally labelled as “penalty”, “punishment” or “criminal sanction”, etc., even where it is imposed for, in fact, the same offence), Article 7 and, by extension, Article 4 of Protocol No. 7 should be applicable, if the measure in question is as severe as a criminal sanction in the autonomous meaning of the notion of “penalty” (“punishment”), as employed in these Articles.

(b) The consistency of interpretation of the Convention taken as a whole requires that the measure which is assessed as resulting from the “criminal charge” in the autonomous meaning of Article 6, is also assessed as a criminal “penalty” (“punishment”) in the meaning of Article 7 and Article 4 of Protocol No. 7.

(c) The alternative nature of the second and the third *Engel* criteria and the fact that these criteria find a “resemblance” in the factors which

determine the applicability or non-applicability of Article 7 or Article 4 of Protocol No. 7 (see paragraph 4 above), where under domestic law a measure is not classified as “criminal” (that is to say, the first criterion is not satisfied), require that each and every instance of the adoption of the cumulative approach be substantiated, by demonstrating that a “separate analysis of each criterion” is not sufficient to form “a clear conclusion as to the existence of a criminal charge” (*Ramos Nunes de Carvalho e Sá*, cited above, § 122), especially where the adoption of the cumulative approach may result in the non-application of Article 7 or Article 4 of Protocol No. 7.

9. Correspondingly (and by way of summing up), the factors which have to be considered in determining whether or not there was a “criminal charge” (or rather “penalty”, “punishment”) for the purposes of Article 7 or Article 4 of Protocol No. 7, not only “resemble” (compare paragraph 4 above) the *Engel* criteria: they effectively include and encompass the latter. This, however, does not mean that these factors may not be described by means of wording which would be different from that by which the *Engel* criteria are defined. Also, this inclusion does not preclude (at least hypothetically) the set of factors to be considered for the purposes of Article 7 or Article 4 of Protocol No. 7 from not being limited to the three *Engel* criteria. Some of these factors (whatever their doctrinal description) may be (and indeed are) covered, in full or in part, by one or more of the *Engel* criteria, whereas there may be others which fall outside the ambit of the latter. In the context of the instant case, it is sufficient to address one of these factors, which is also the third *Engel* criterion: the degree of severity of the impugned measure (even though this measure is not called “penalty” or “punishment”, or “criminal sanction” in domestic law), that is to say, the permanent revocation of the applicant’s licence and, as a sequel, the refusal to grant him a new one.

10. The Chamber examined the five most relevant factors for the determination of whether or not there was a “criminal charge” (i.e. “penalty”, “punishment”) for the purposes of Article 7. The list of these factors is provided in paragraph 60:

- (a) the relationship between the decision in which the person was found guilty and the measure in question;
- (b) the procedure involved;
- (c) the characterisation of the measure in domestic law;
- (d) the nature and purpose of the measure;
- (e) the severity of the measure.

It is evident that the first three factors are a particular dispersion of the first *Engel* criterion (albeit perhaps wider than the latter), and the fourth and fifth factors more or less correspond respectively to the second and third *Engel* criteria.

11. I have no qualms (at least no essential expostulations) as regards the examination, by the majority, of the first three of the above-listed factors. It is rightly noted that the disputed measure was imposed on the applicant as a result of his criminal conviction for a “publicly prosecutable” offence, but separately from the ordinary sentencing procedure (“a measure that prevented a person from obtaining a licence to practise a certain profession amounted to a ‘legal consequence’ of a conviction”); that the proceedings, in which that measure was imposed, “fall within the ambit of administrative law”; and that the impugned measure was “not set out in criminal law” (paragraphs 61-63). These considerations are supported by some other arguments which are spelt out in the context of the examination of the fourth factor (perhaps because they are related to the “nature” of the measure complained of), namely that “the measure ... was imposed solely on the objective basis of a final criminal conviction”, and the institutions which imposed it, as well as the courts which reviewed the case “had no discretion as regards the imposition of the measure” and did not carry out any “assessment of culpability” (paragraph 65).

12. In other words, from the perspective of the first three factors, which, as noted, correspond to no small extent to the first *Engel* criterion, the measure in question is not a “penalty”, not only owing to the fact that it is not a *criminal* sanction under domestic law, but also because it is *not a sanction at all*: it is an additional outcome, which the conviction entails alongside a criminal sanction. Even if a criminal sanction is not imposed on a convicted person (I would like to believe that this is possible under Slovenian law, as in many other systems), that additional outcome is nevertheless incurred.

13. However, this assessment is by no means conclusive; not only does it not exclude the need to look into the issue from the perspective of the fourth and the fifth factors, which correspond to the second and the third *Engel* criteria, it actually requires this. But before turning to the remaining two factors (in paragraphs 18-38 below) I have one more observation to make.

14. In the context of the examination of the third factor, the Constitutional Court’s decision of 1 June 1995 is noted and given some significance. That decision is interpreted as having affirmed that “although a measure that prevented a person from obtaining a licence to practise a certain profession amounted to a ‘legal consequence’ of a conviction, it was not to be considered to be a sanction that was criminal in nature” under Slovenian law (paragraph 63). However, the assessment provided by the national Constitutional Court is not binding on the Strasbourg Court.

15. Firstly, the aforesaid decision of the Constitutional Court concerned – and upheld – the constitutionality of a prohibitive condition for a public-service job (in that case of a notary), namely a “lack of criminal conviction for [a] crime which would render him or her *morally unworthy* to be a

notary” (paragraph 37; emphasis added). The moral unworthiness clause is quite different from – even if to some extent comparable to – the clauses stipulating the prohibitive conditions dealt with in the instant case, which are (i) a lack of criminal conviction for *any* “publicly prosecutable” offence committed with intent, which has not been expunged from the person’s criminal record, and (ii) a lack of previous revocation of the licence, *whatever the grounds for that revocation might have been* (paragraphs 29 and 30). (The relationship between the two conditions, in particular, the nullification, by the second condition, of the rehabilitative force of the expunction of the offence from the person’s criminal record, as consolidated in the first condition, would merit critical consideration from several perspectives, but that would go beyond the scope of this opinion.)

16. Secondly, as explicitly expounded by the Chamber, “it cannot be ignored that the Constitutional Court [itself] considered the revocation of a licence following a criminal conviction to be a ‘legal consequence of conviction’ ... and that the Government themselves acknowledged the pertinence of the criminal-law provisions to the present situation by submitting that the Financial Operations Act had been ‘a partial implementation act within the framework of the Criminal Code or the Old Criminal Code’” (paragraph 83). It is fair to say that this consideration appears quite belatedly, in the context of the applicant’s complaint under Article 1 of Protocol No. 1, and not in the context of Article 7 (see also paragraphs 28 and 33 below; compare also paragraphs 35 and 42 below). Still, it is clear that, from the perspective of the Convention, the provision applied, while not being formally part of domestic criminal law, is nevertheless not so simply detachable from it (although the majority do their best not to mention in any direct manner that the impugned measure has any retributive, let alone punitive, dimension).

17. Thirdly, while the Constitutional Court’s view is noted, the Court’s own duty to interpret the concept of a “penalty” in an autonomous manner is also explicitly acknowledged (paragraph 63). A measure which is not a “criminal sanction” and not even a sanction at all from the perspective of domestic law, thus could still be assessed as being a “penalty” from the perspective of the Convention – for the purposes of Article 7 (and, by extension, Article 4 of Protocol No. 7). In other words, a measure which is not a sanction under domestic law may nevertheless be a sanction – and a criminal one – under the Convention.

18. In order to ascertain whether or not that was so in the instant case, the fourth and fifth factors had to be taken into account. However, things do not go so smoothly from this point.

19. The examination of the fourth factor is where the first difficulty is encountered. In assessing whether the nature and purpose of the impugned measure allowed for its classification as one of a non-criminal nature, the majority note that “the purpose of [the] legal provision [applied] ... aimed at

ensuring public confidence in the profession of liquidator”. However, they consider that the ascertaining of this purpose, which is perfectly legitimate in itself, is sufficient for them to declare that the purpose of the provision in question “does not appear to be to inflict a punishment in relation to a particular offence of which a person has been convicted” and that “the revocation of the licence did not have a punitive and dissuasive aim pertaining to criminal sanctions” (paragraph 64). From the methodological perspective, the reasoning of the majority thus suggests that once the purpose of a legislative provision, as such, is not “typical” of “traditional” substantive criminal law (that is to say, to determine criminal offences and to establish penalties for them), it simply cannot play any punitive role.

20. *Hic iacet lepus*. Such reasoning, however plausible on the surface, is manifestly wrong. Its methodological fallacy lies in the fact that two faculties of law are jumbled, although they must be contradistinguished: the *purpose* of law and its *function* – and, by extension, the purpose and function of the legal provision in question. The distinction between the purpose of law and its function comes from the sociology of law primer. The purpose of law (legislative provision) belongs to the domain of wishful normativity; but its function points to its real impact on individuals and society at large. Moreover, the impact on individuals may diverge from the impact on society as a whole. The function of a legal provision may correspond to its purpose, but often it does not. Many legal provisions *in fact* perform *not one* but *a number of* functions. Even if a provision achieves its purpose and in this sense its function corresponds to its purpose, it often also brings about certain intended or unintended results – just like virtually any medicine produces some side effects.

21. The majority, alas, fail to recognise that in the applicant’s case the application of the provision in question not only (presumably) achieves its *purpose* and in this sense performs a *function* corresponding to that purpose, but also brings about at least one other result and in this sense performs *one more function*. These two functions differ as regards their “addressees” and purport. The provision applied not only ensures that the professional corps of liquidators is composed exclusively of persons with no criminal record containing “publicly prosecutable” offences and thus enhances public confidence in this profession, but also safeguards the said profession from such persons who have ever, in their lives, committed such criminal offences with intent, because they are prohibited for life from practising this profession even after they have served their court-imposed sentences, and furthermore, even after the convictions have been expunged from their criminal record. For such persons, any redemption from their criminal offences appears to be “mission impossible”. The court-imposed sentence may be served, but the additional outcome is to stay forever. The conviction may be formally expunged from the convicted person’s criminal record, but

for the purposes of taking up the profession of a liquidator it is never expunged, as if it is set in stone.

And this is so *irrespective of any conditions*: the type of the “publicly prosecutable” criminal offence; the circumstances, in which it was committed; its relation or the absence thereof to the profession of liquidator; the type and the severity of criminal penalty imposed on the convicted person; the lapse of time since the offence was committed; the personal or family situation of the person concerned; any merit that a person may have, etc. (see also paragraphs 33-37 and 39 below). Nothing matters. Nothing can mitigate the rigidity (“objectivity”) of the provision. *La loi, c’est la loi. Dura lex sed lex.*

22. The *purpose* of the legal provision in question and the function which it performs and which corresponds to it thus may well be *preventive*, aimed at the *society at large* (“ensuring the public confidence in the profession of liquidator”). However, the additional outcome entailed by the conviction and, consequently, the additional function performed by the said provision is aimed at the respective *individual* and is *retributive*. It is therefore simply wrong to hold, as the majority do, that “the revocation of the licence did not have a punitive and dissuasive aim pertaining to criminal sanctions” (see paragraph 19 above). This *a fortiori* applies to the authorities’ refusal to grant the applicant a new licence.

23. To sum up, the measure which is *not a sanction according to its purpose*, is still *a sanction according to its function*.

24. It remains therefore to be ascertained whether the impugned measure – despite its classification in domestic law as being of a non-criminal nature and not even a sanction, as well as a similar assessment from the perspective of the first three factors and even that based on the flawed application of the fourth factor – is nevertheless “criminal” for the purposes of the Convention (Article 7 and Article 4 of Protocol No. 7) according to the fifth factor indicated by the Chamber (which is also the third *Engel* criterion).

This last factor is the stone, on which the majority stumbled, like (as will be shown further) the Slovenian Constitutional Court before them.

25. The majority have devoted three sentences (one single paragraph 66) to an examination of the fifth factor. Their reasoning is the following:

(a) “this factor is not in itself decisive, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned” (this quote is imported from *Welch v. the United Kingdom*, 9 February 1995, Series A no. 307-A, to which reference is made);

(b) “as a result of his criminal conviction the applicant’s licence was revoked with permanent effect, which in itself appears to be a rather severe consequence”;

(c) “bearing in mind the above principle and taking into account the considerations made in respect of other factors ... and the fact that the

revocation of the applicant's licence did not prevent him from practising any other profession within his field of expertise, ... in the circumstances of the present case, the mere fact that the impugned measure was of a permanent nature does not suffice for the revocation of the applicant's licence to be regarded as a penalty within the meaning of Article 7".

Let us have a closer look at these arguments.

26. Firstly, what is meant by stating that "this factor is not decisive" is in fact the majority's reliance on the exception rather than the rule (see paragraph 7 above). Notwithstanding the doctrinal principle of *Sergey Zolotukhin*, as confirmed not long ago in, *inter alia*, *A and B* and *Ramos Nunes de Carvalho e Sá v. Portugal* (all cited above), the cumulative approach is preferred to the alternative. Why? It is nowhere explained. A proper reference would do, but the reference to *Welch* (cited above) does not help at all. That reference is a camouflage. Yes, the phrase, which the majority cite, is in *Welch*. But of much more importance is the point that in that case the Court found a violation of Article 7 § 1! (I will pass over a range of both similarities and differences between the situation examined in that case and the instant applicant's situation.) The reference to *Welch* therefore does not prove the majority's position – it rather effectively disproves it, if only one can spare a few minutes to cast an eye not only at the citation, but also at the judgment cited.

27. No less confusing is the mention, in the context of the first argument, of "many non-penal measures of a preventive nature". The Court's *Guide on Article 7 of the European Convention on Human Rights* (as updated on 31 December 2018 and available *urbi et orbi* at https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf) mentions a number of measures of a preventive nature which are excluded from the concept of "penalty"; however it does not mention even once any preventive measure which would in any way be related to a revocation of or a refusal to grant a licence to practise a given professional activity. In contrast, it mentions as falling within the scope of the notion of "penalty" the "permanent prohibition on engaging in an occupation ordered by a trial court as a secondary penalty" and refers in this context to the rather recent case of *Gouarré Patte v. Andorra* (no. 33427/10, 12 January 2016). *Gouarré Patte* is referred to in the instant judgment in a different context, noting that, unlike in the instant case, that prohibitive measure was set out in criminal law and was not imposed separately from the sentencing procedure (paragraphs 62 and 63). What is noteworthy indeed is that in *Gouarré Patte* the Court found a violation of Article 7. Despite the difference between the nature of the measure examined in *Gouarré Patte* and that of the measure examined in the instant case, the case of *Gouarré Patte* is perhaps the closest to the instant one in the sense that it deals with a conviction-related prohibition. And yet it is ignored in the instant judgment in the sense that it

is not referred to at the juncture where it may be relevant (although it is referred to in other contexts).

28. Secondly, the majority acknowledge that the permanent effect of the revocation of the applicant's licence is a "rather severe consequence". It would be difficult to find to the contrary. It is common sense, and it must be commended that the legal assessment does not go against common sense. In my opinion, this assessment alone should have sufficed for it to be concluded that the impugned measure amounted to a "penalty" in the sense of Article 7, followed by a proportionality analysis. Otherwise, the fifth factor, or the third *Engel* criterion, would be totally unimportant, virtually not a criterion at all. And had the proportionality analysis been undertaken by the Chamber, the finding that the measure in question was disproportionate to the legitimate aim pursued would have been consequential.

The majority, however, stop immediately after admitting that the consequence was "rather severe". What do they make of this important acknowledgement? Nothing.

Or, frankly speaking, – not even as little as "nothing". The next sentence, which comes immediately after this admission and which (this is particularly noteworthy) begins with the word "however" and refers to unidentified "circumstances of the present case" (paragraph 66), serves no other purpose than that of neutralising the acknowledgement. What the left hand giveth, the right hand taketh away, as if the giving was meant only to tease (see also paragraphs 16 above and 33, 35 and 42 below).

29. And not only that. The majority persistently avoid – and this is so throughout the whole text of the judgment – even a hint that the impugned measure had any retributive (which effectively would mean punitive) effect and that by it the applicant was additionally *sanctioned* for his criminal offence (see also paragraphs 16 above and 35 below).

30. Thirdly, the conclusion (at the end of the third, final, sentence, of paragraph 66) that "the mere fact that the impugned measure was of a permanent nature does not suffice for the revocation of the applicant's licence to be regarded as a penalty within the meaning of Article 7" is based on three premises (compare paragraph 25 above). As we shall see, they are all very shaky. These premises are:

- (a) "the above principle";
- (b) "the considerations made in respect of other factors";
- (c) "the fact that the revocation of the applicant's licence did not prevent him from practising any other profession within his field of expertise".

31. In this list, "the above principle" is nothing other than the quotation from *Welch* (cited above). Its dubious appropriateness and no less dubious relevance to the applicant's situation have already been dealt with (see paragraph 26 above).

32. “The considerations made in respect of other factors” include – alongside the least contentious issues of the formally non-criminal nature, under the domestic law, of the legal provision applied and the procedure of its application – the confusion of the purpose of the provision with any other (that is to say, not directly related to that purpose) functions it may perform. This also has been dealt with (see paragraphs 19-23 above).

33. But even the issue of the non-criminal nature, under the domestic law, of the legal provision applied, is referred to by the majority only in the context of “the considerations *made*” (emphasis added). Words matter. At that stage one very important consideration has *not yet been “made”*. It is the one identified in paragraph 14 above – regarding the close relationship between the impugned formally non-criminal measure and the substantive criminal law. At that stage, at which “the considerations made in respect of other factors” have been mentioned, that particular consideration *has yet to be “made”*. It *will be “made” in the further pages* of the judgment, namely in its paragraph 83, in the context of the applicant’s complaint under Article 1 of Protocol No. 1, and not in the context of Article 7 (or, for that matter, Article 4 of Protocol No. 7). But it is *precisely that* consideration which emasculates so substantially the overly formal(istic) classification – not only in domestic law, but also from the perspective of the fourth factor (the second *Engel* criterion), as erroneously applied in this case, – of the measure in question as not belonging to the domain of criminal law (see also paragraphs 16 and 28 above; compare also paragraphs 35 and 42 below).

One cannot therefore assert that the applicant erroneously equated, in his application, the non-punitive measure imposed on him with the criminal sanction. On the contrary, the majority chose to ignore the perdurable relationship between that measure and the applicant’s criminal conviction – and did this at the stage of the examination of the instant case at which that relationship was most relevant. In the judgment, this relationship is noted – in a different context – only *after* the crucial issue of (non-)applicability of Article 7 has been decided (see also paragraphs 14 and 33 above).

34. It is noteworthy that the list of three premises, in which the reference is made only to the “*other factors*”, effectively excludes and thereby dodges one factor, which many (including myself) would see as the most relevant one: *the severity of the impugned measure*. The majority admit that the measure was “rather severe”, but utter these words as if by the way, then neutralise the acknowledgment immediately, thus giving it no prominence whatsoever (see paragraph 28 above).

35. Nor do the majority give any prominence to the concrete circumstances of the applicant’s situation – and this notwithstanding the explicit reference to “the circumstances of the present case”, in which they conclude that the impugned measure is not to be regarded as a “penalty” within the meaning of Article 7! “The circumstances of the present case” are

not dealt with. The reference to them is therefore obscure. In particular, in the context of the applicant's complaint under Article 7 there is no consideration whatsoever of: the fact that the criminal offence for which the applicant was convicted, bore no relation to the profession of liquidator; the fact that his sentence was suspended; his family situation – not only at the time when the applicant's licence was revoked, but also when a new licence was not granted; his inability to find other professional employment (perhaps not owing to a failure to search for it); and – last but not least – the fact that although the applicant was found guilty of domestic violence, he (and not the other parent) appeared in the end to be in sole custody of his children, etc. These circumstances are not at all irrelevant from various perspectives. They clearly call for a proportionality analysis, the outcome of which would indeed be not unpredictable. But the majority attribute no significance to any of them. Or, to be more precise, they briefly mention some of them only later on, in the context of the applicant's complaint under Article 1 of Protocol No. 1, that is to say, they do this only *after* the issue of (non-)applicability of Article 7 has been decided unfavourably for the applicant (see also paragraphs 28 above and 42 below; compare also paragraphs 16 and 33 above).

36. Instead, the majority confer what seems a disproportionately great prominence on the third of the above-listed premises (see paragraph 30 above). The latter merits attention, especially as it is the last point before the interim conclusion that the revocation of the applicant's licence is not a penalty within the meaning of Article 7 (paragraph 66) and then the final conclusion that Article 7 is not applicable in the present case (and that there has accordingly been no violation of that provision) (paragraph 67).

37. That third premise is “the fact that the revocation of the applicant's licence did not prevent him from practising any other profession within his field of expertise”.

This is so wobbly! What is the “field of expertise” of a liquidator in insolvency proceedings? Well, insolvency proceedings, of course. The judgment does not shed any light on what prohibitive conditions are stipulated in Slovenian legislation as regards other jobs in this field, but as far as one can infer from the legal provision applied in the instant case and the comparable (although not identical) prohibitive clause of the Notary Act (which was upheld by the Constitutional Court's decision of 1 June 1995; see paragraphs 14-16 above), it is most likely there are some – and most likely they are no less severe. If not, how come the applicant was (still is?) unemployed (at least in the capacity of a professional), was receiving unemployment benefit, found it difficult to provide for his children, and was able to be employed only “through a programme for older workers” (paragraphs 16, 20 and 70)? The majority are not concerned by this at all. The allusion to the possibilities of “practising any other profession within his field of expertise” is a mere smokescreen with no identifiable content.

38. All in all, the reasoning, on which the conclusion that Article 7 is not applicable in the present case (and that there has accordingly been no violation of that provision) is based, is (to put it mildly) inaccurate.

This reasoning disregards the importance and the strength of the fifth factor (the third *Engel* criterion). It undeservedly favours the cumulative approach (over the alternative one) to the application of the *Engel* criteria and the similar factors to be taken into account in examining the complaints under Article 7 (and, for that matter, Article 4 of Protocol No. 7). At the same time, the preference given to the cumulative approach has not been substantiated in any way – in that sense it has not been demonstrated that a “separate analysis of each criterion” is not sufficient to form “a clear conclusion as to the existence of a criminal [penalty]” (see paragraphs 7 and 8 above). This is especially striking in view of the finding of the non-application of Article 7 (and, by extension, of Article 4 of Protocol No. 7) to the applicant’s situation.

The above-analysed reasoning also overplays the formal non-attribution to the domain of criminal law of a prohibitive and retributive (which virtually amounts to punitive) provision in question and thus displays one of the most compromising fallacies of the legalistic thinking.

On top of that, the majority’s reasoning gives prominence to dubious factual circumstances (and even artificially invents one of them, namely that which pertains to “practising any other profession within [the applicant’s] field of expertise”; see paragraphs 36-37 above), while at the same time neglecting others, among them the important ones.

39. What is most important (and disappointing) is that the reasoning criticised here vividly shows, *how insensitive law can be* and how its “relative autonomy” (on which there are volumes of legal-sociological literature) may be misused or even abused. This insensitivity – if not loftiness – appears to be incidental not only to statutory law (*la loi, c’est la loi; dura lex sed lex*), but also to judge-made law. Alas, even judge-made human rights law.

40. In the latter regard the majority’s reasoning and the finding based on it follows in the footsteps of the two judgments of the Slovenian Constitutional Court, which the latter adopted with regard to the applicant’s constitutional complaints.

41. The Slovenian Constitutional Court was seized twice of the issue of the severity of the impugned measure. First it decided not to consider the applicant’s constitutional complaint regarding the revocation of his licence (on 6 November 2013, paragraph 15). Then it rejected the applicant’s second constitutional complaint regarding the refusal to grant him a new licence as inadmissible (on 14 December 2015, paragraph 26).

42. The second paragraph of section 55(b) of the Constitutional Court Act, on which the Constitutional Court relied in both these cases, commands it to be ascertained, for the consideration of a constitutional complaint,

whether the alleged violation of human rights or fundamental freedoms has had “significant consequences for the complainant” or if it concerns “an important constitutional question which goes beyond the importance of the actual case” (paragraph 36). It is not indicated which of the two alternative conditions for the consideration of constitutional complaints the Constitutional Court found not to be met. One perhaps could concede (albeit grudgingly) that these complaints may have not raised “an important constitutional question which goes beyond the importance of the actual case” (after all, domestic courts are better placed to interpret the provisions of domestic law, especially against the factual background of a respective country). But they clearly met the condition of “significant circumstances”. The Chamber has explicitly confirmed this by assessing the revocation of the applicant’s licence as a “rather severe consequence”. This is even more evident from the Chamber’s dismissal of the respondent Government’s objection, based on the Constitutional Court’s decisions, that “the applicant had suffered no significant disadvantage”. The Chamber found “it undisputed that in losing his licence to act as a liquidator in bankruptcy proceedings, the applicant also lost his main source of income”. It also noted that “the Constitutional Court’s decisions dismissing the applicant’s complaints ... contain no explanation as to the financial or other impact that the contested measures had on the applicant” (paragraphs 41 and 44). But, as has been shown, these considerations have no bearing on the majority’s finding as regards the (non-)applicability of Article 7 in the instant case (see also paragraphs 28 and 35 above; compare also paragraphs 16 and 33 above).

43. In this context it should be noted that the applicant complained not only under the Articles explicitly indicated in the judgment, but also under Article 6 § 1. That complaint was not communicated to the respondent Government, for it was declared inadmissible by another judicial formation. Even assuming that the reasons for its dismissal might have been valid at that stage, I have serious doubts as to their convincingness now, in the light of the above considerations. However, the Chamber has held that at this stage of proceedings it is precluded from examining the applicant’s complaint under Article 6. The reluctance to re-communicate the case to the Government under that Article is regrettable, especially in the light of the Court’s self-assumption, with an increasingly high count of cases, of its role as “master of the characterisation to be given in law to the facts of the case”, even contrary to “the characterisation [of these matters] given by an applicant [or] a government” (see, among abundant authorities, *Radomilja and Others v. Croatia*, [GC], nos. 37685/10 and 22768/12), 20 March 2018).

44. It follows, however, that, having found that Article 7 is inapplicable in the instant case, the majority have also found that the complaint under Article 4 of Protocol No. 7 is incompatible *ratione materiae* with the

provisions of the Convention (paragraph 91; point 4 of the operative part, where the “remainder” of the application is declared inadmissible). The brief reasoning underlying this conclusion, as provided in one short paragraph, boils down to the reliance on the finding of the inapplicability of Article 7, which is based on the assessment of the impugned measure as such, which is not only of a non-criminal nature, but not even a sanction at all (paragraph 90). Indeed, if a measure entailed by a conviction is not a criminal sanction not only under domestic law, but also in the autonomous meaning of Article 7 (“the revocation of the applicant’s licence did not amount to a criminal punishment”; *ibid.*), it hardly makes sense to speak of a person being “punished twice”.

45. Be that as it may, there is hopefully still some sense in pointing out the fundamental flaws of the overly legalistic, applicant-unfriendly reasoning, in which the findings of inapplicability of Article 7 and, by extension, incompatibility *ratione materiae* with the provisions of the Convention of the complaint under Article 4 of Protocol No. 7, are rooted.

JOINT PARTLY DISSENTING OPINION OF
JUDGES PINTO DE ALBUQUERQUE AND BOŠNJAK,
JOINED BY JUDGE KŪRIS

1. We cannot agree with the majority that Article 7 of the Convention is inapplicable in the present case. Furthermore, we are of the opinion that the case at hand discloses a violation of Article 7 of the Convention. On this point, we wish to acknowledge the separate opinion of Judge Kūris, who voted with us on the issue of the Article 7 complaint and with whom we largely share the views on this particular matter.

2. In respect of the applicant's complaint under Article 7 of the Convention, we agree with the majority that the applicability of that provision depends upon whether the impugned measure constituted a "penalty" within its autonomous meaning. According to the principles stated in the judgment, which ultimately reformulate the *Engel* criteria, the Court needed to examine (i) the relationship between the decision in which the person was found guilty and the measure in question; (ii) the procedure involved; (iii) the characterisation of the measure in domestic law; (iv) the nature and purpose of the measure; and (v) the severity of the measure.

3. Regarding the first criterion, namely the relationship between the applicant's conviction and the impugned measure, we note that the Ministry of Justice revoked the applicant's licence pursuant to section 109 of the Financial Operations Act after being informed that his conviction for criminal offences committed in 2003 and 2004 had become final (see paragraphs 6 and 9 of the judgment). The disputed measure was imposed as an automatic consequence of the applicant's final criminal conviction. No assessment of the relevance of the criminal offence in question to the applicant's suitability for the profession of liquidator was carried out by the competent administrative authority and the applicable legislation in fact left no room for such assessment. In this connection, the legislation, that is the Financial Operations Act, contained an irrebuttable presumption (*praesumptio iuris et de iure*) that a person convicted of any publicly prosecutable criminal offence committed with intent was to be considered unfit to be a liquidator and was to be divested of his or her licence (see, by contrast, *Müller-Hartburg v. Austria*, no. 47195/06, § 44, 19 February 2013). This criterion speaks unequivocally for the penal nature of the measure.

4. As regards the second criterion, the measure was imposed by the Ministry of Justice and subsequently reviewed by the Administrative Court in proceedings which fall within the ambit of administrative law. However, the administrative authority and the domestic courts were not called to consider the applicant's particular circumstances, but had to merely rely on the fact that he had been criminally convicted by way of a final judgment and, based on that fact alone, to apply the measure in question. We therefore

consider that the nature of the proceedings cannot in the present case carry any particular weight in the determination of the existence of a “penalty”.

5. Regarding the third criterion, namely the legal characterisation in domestic law, the measure in question admittedly did not fall within any of the formal categories of criminal sanctions as so characterised by the Criminal Code or the Old Criminal Code. Instead, as rightly and unanimously held by the Chamber in the framework of its examination of the applicant’s complaint under Article 1 of Protocol No. 1, the measure is to be characterised as a “legal consequence of conviction”. However, this issue alone does not detach the impugned measure from the applicability of the provisions of criminal law, i.e. in the specific context of the domestic law of the respondent State, of its Criminal Code or Old Criminal Code. Notably, the basis, incurrence and limits of a “legal consequence of conviction” were set out in the criminal law. In particular, Article 100 of the Old Criminal Code (as well as Article 79 of the Criminal Code) set out measures which were to be regarded as “legal consequences of conviction”, including termination of authorisation to perform a public function and a bar to the acquisition of certain rights, such as the right to hold public office and to practise certain professions. Furthermore, Article 99 of the Old Criminal Code (as well as Article 78 of the Criminal Code) limited the incurrence of a “legal consequence of conviction” to cases of a custodial sentence. It further provided that only a statute could prescribe “legal consequences of conviction” and that the latter should not be applied retroactively (*ibid.*). We wish to highlight that these requirements are expressions of two fundamental principles of criminal law, namely the principle of legality and the prohibition of retroactive application of law, as embodied in Article 7 of the Convention (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 78, ECHR 2013).

6. The intrinsic link between the impugned measure and the provisions of criminal law has been acknowledged by the Government in their assertion that the Financial Operations Act had been “a partial implementation act within the framework of the Criminal Code or the Old Criminal Code” (see paragraph 52 of the judgment). Nevertheless, the domestic authorities failed to address whether the impugned measure was of a criminal-law nature or to determine whether the relevant provisions of the Criminal Code were applicable to the applicant’s case.

7. As regards the fourth criterion, namely the nature and purpose of the measure, we note the fact that the applicant was unable to reapply for a licence once the criminal conviction had been expunged from his criminal record. This feature of the measure is in our view the decisive factor, because it shows that the measure’s purpose was not merely to ensure the applicant’s suitability for the professional activity in question. Maintaining an inability to reapply for the licence beyond the time limit of legal rehabilitation clearly indicates that the measure’s purpose was essentially

punitive, adding another, and in many respects much heavier, legal burden upon the applicant than the imposed criminal sanction itself.

8. Last but not least, in respect of the fifth criterion, we emphasise the particular severity of the measure imposed on the applicant. Such severity obviously impacts upon the characterisation of a measure as a penalty under Article 7 of the Convention. The Court has held that lifelong disqualification from a profession or withdrawal of a licence, which constitute the primary means of subsistence of an individual, are particularly grave (see, for example, *Rivard v. Switzerland*, no. 21563/12, § 24, 4 October 2016).

9. We therefore consider that the strict and automatic link between the criminal conviction and the contested measure, leaving no room to the competent authorities for an assessment of circumstances or the exercise of discretionary powers, together with the essentially punitive purpose of the measure and its rather severe consequences for the applicant, lead to the conclusion that the impugned revocation of his licence is a “penalty” within the meaning of Article 7. We accordingly believe that the Court should have dismissed the Government’s objection and concluded that Article 7 is applicable in the present case.

10. Turning to the assessment of whether the contested measure complied with the requirements of Article 7 of the Convention, we reiterate that this provision prohibits the retrospective application of criminal law to the detriment of the accused person. More generally, it embodies the principle that only the law can define a crime and prescribe a penalty (see *Koprivnikar v. Slovenia*, no. 67503/13, § 46, 24 January 2017).

11. We further observe that in the present case at the time the criminal offences in question were committed, under the applicable law, that is to say the Bankruptcy Act, the relevant conditions for a liquidator’s licence were limited to the absence of a criminal conviction which would render the person morally unfit to perform the functions of a liquidator. It is undisputed that this law was not applied to the applicant’s case, but instead a later law (the Financial Operations Act) extending the condition to, *inter alia*, the absence of any publicly prosecutable criminal offences committed with intent, was applied. This, in our opinion, amounted to a retrospective application of the law to the applicant’s disadvantage and was therefore in violation of Article 7 of the Convention (see *Del Río Prada*, cited above, § 116).

12. In addition, we observe that, pursuant to both the Old Criminal Code and the Criminal Code, a suspended prison sentence, which was the sentence imposed on the applicant by the criminal court, could not have entailed any legal consequences. We think that the applicant should not have been made to face a “penalty” which had been explicitly proscribed by the criminal law when the offence in question had been committed.

13. In sum, we consider that for all of the above reasons, the revocation of the applicant's licence contravened the principle of legality embodied in Article 7 of the Convention and that there has been a violation of that Convention provision.