



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

FOURTH SECTION

CASE OF JIDIC v. ROMANIA

(Application no. 45776/16)

JUDGMENT

Art 7 • Heavier penalty • New law opening possibility of a more lenient sentence under certain conditions not found by domestic courts to have been met in applicant's case • Assessment of the leniency to be completed *in concreto*, not *in abstracto* • Assessment of the leniency comprising the manner in which a sentence is to be served

STRASBOURG

18 February 2020

FINAL

18/06/2020

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

In the case of Jidic v. Romania,

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

Jon Fridrik Kjølbro, *President*,

Faris Vehabović,

Iulia Antoanella Motoc,

Branko Lubarda,

Stéphanie Mourou-Vikström,

Georges Ravarani,

Péter Paczolay, *judges*,

and Marialena Tsirli, *Section Registrar*,

Having deliberated in private on 26 November 2019 and 28 January 2020,

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

PROCEDURE

1. The case originated in an application (no. 45776/16) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Romanian national, Mr Stelian Jidic (“the applicant”), on 25 July 2016.

2. The applicant was represented by Ms E. Tudosan, a lawyer practising in Bucharest. The Romanian Government (“the Government”) were represented by their Agent, Ms C. Brumar of the Ministry of Foreign Affairs.

3. Relying on Articles 6 and 13 of the Convention, the applicant alleged, in particular, that the criminal proceedings opened against him had been excessively lengthy and that he had had no effective domestic remedy in that regard. He also alleged, under Article 7 of the Convention, that by applying the old criminal law to his case, the last-instance court had breached the principle of retrospective application of the more lenient criminal law.

4. On 27 April 2017 notice of the above-mentioned complaints was given to the Government and part of the remaining complaints under Article 6 of the Convention, namely the alleged failure of the last-instance court to provide reasons as to why it had opted for such a severe sentence and the additional measures attached to it in the applicant’s case, 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 1964 and lives in Bucharest.

A. Background to the case

6. The applicant was a professional driver and since 1984 had worked for several organisations.

7. On 16 July 2012 the applicant was driving his company car on a public road, accompanied by a friend. They were involved in a heated verbal dispute with individuals travelling in another car. During the incident, the applicant's friend stepped out of the car with the aim of stopping the argument. When his friend was out of the car, the applicant shifted his car into gear. The car started moving, bumping into his friend and injuring him slightly.

B. Criminal proceedings opened by the domestic authorities

8. Police officers were called to the scene and tested the applicant with a breathalyser. The test showed that he had been driving his car with a blood alcohol level over the legal limit of 0.8 grams per litre. They withheld his driving licence, suspended him from driving and took him to the National Institute of Forensic Medicine to have his blood tested.

9. On the same date the police officers carried out a preliminary investigation at the scene, collected evidence and produced reports about the circumstances of the incident and its consequences. In addition, they informed the applicant's friend that he could lodge a criminal complaint against the applicant within two months.

10. On 28 December 2012 the National Institute of Forensic Medicine produced a toxicology report which confirmed that the level of alcohol in the applicant's blood had been over the legal limit of 0.8 grams per litre on the day of the incident.

11. On 22 November 2013 the traffic accidents department attached to the Bucharest Police (hereinafter "the TAD") instituted criminal proceedings against the applicant of its own motion under Article 87 § 1 of Government Ordinance no. 195/2002 on the grounds that he had been driving his car on a public road with a blood alcohol level over the legal limit of 0.8 grams per litre. Later that day the Bucharest prosecutor's office (hereinafter "the prosecutor's office") confirmed the TAD's decision.

12. On the same date the TAD asked the National Institute of Forensic Medicine to produce a forensic report within thirty days to determine the exact level of alcohol in the applicant's blood at the time of the incident. The TAD noted, in particular, that he denied having drunk alcohol that day.

13. On 23 and 25 November 2013 the TAD took statements from the applicant regarding the circumstances of the incident. He admitted to having drunk alcohol, to sitting behind the wheel of his car and to hitting his friend with the car on the day of the incident, all the while stating that the car had

actually been parked and that he had hit his friend when he had moved the car by accident.

14. On 30 April 2014 the TAD changed the legal classification of the acts for which the applicant was being investigated from Article 87 § 1 of Government Ordinance no. 195/2002 to Article 336 § 1 of the new Criminal Code. It held that the new Criminal Code had entered into force on 1 February 2014 and that, unlike the aforementioned Government Ordinance, which provided that the offence under investigation was only punishable by imprisonment, under the new Criminal Code, he could be punished either by imprisonment or a fine. Article 5 of the new Criminal Code also provided that if several criminal laws were in force between the moment an act was committed and the moment the final court judgment was delivered in a case, the more lenient criminal law had to be applied.

15. On 2 July 2014 the National Institute of Forensic Medicine produced the forensic report requested by the TAD on 22 November 2013. It confirmed that the level of alcohol in the applicant's blood had been over the legal limit of 0.8 grams per litre at the time of the incident.

16. On 5 August 2014 the prosecutor's office charged the applicant under Article 336 § 1 of the new Criminal Code.

17. On 29 August 2014 the TAD informed him of the charges brought against him and his procedural rights and took a statement from him. He reiterated his statements of 23 and 25 November 2013 (see paragraph 13 above).

18. On 19 March 2015 the applicant asked the prosecutor's office to expedite the proceedings and to send the case to trial as soon as possible. He argued, in particular, that he had been unable to work since 16 July 2012 because he had been suspended from driving. Given his age, he was not in a position to retrain in a different profession and he had almost run out of financial resources. Furthermore, he had done all that he could to expedite the investigation in the case by, amongst other things, admitting from the very beginning to committing the offence for which he had been investigated.

19. On 28 April 2015 the prosecutor's office sent the case to trial.

20. On 28 July 2015 the Bucharest District Court (hereinafter "the District Court"), sitting as a preliminary chamber judge, held that the applicant's indictment was lawful and set the date for the first hearing on the merits of the case for 24 September 2015.

21. On 24 September 2015 the District Court heard evidence from the applicant surrounding the circumstances of the incident and allowed a request by him to be tried under a summary procedure, on the grounds that he had admitted the offence he had been charged with.

22. On the same date the court noted that the prosecutor's office had asked to change the legal classification of the offence from Article 336 § 1 of the new Criminal Code to Article 87 § 1 of Government Ordinance

no. 195/2002 because the latter provision was the more lenient criminal law for him in so far as adapting the applicant's sentence to his individual circumstances was concerned. Moreover, the prosecutor's office asked the court to convict the applicant and urged it to suspend the serving of his sentence for the duration of a supervision period, irrespective of whether the court eventually deemed the new or old criminal law more lenient in his case. In this connection, the prosecutor's office argued that the outcome of the offence had been very serious and could have influenced the applicant's future behaviour given that the alcohol level in his blood had been very high and that a person had been injured.

23. The court also noted that the applicant disagreed with the prosecutor's office's argument concerning the legal classification of the offence. He contended that Article 336 § 1 was the more lenient criminal law in his case in terms of the manner in which the sentence which could be applied to him was to be served because, under that provision, the court had discretion to postpone or waive the imposition of a sentence, which in turn would render the revocation of his driving licence unnecessary. He argued that the conditions for postponing or waiving the imposition of a sentence had been met because, *inter alia*, he had not committed any other unlawful acts either before or after the incident, had admitted his guilt, had regretted his actions and had done everything he could for the proceedings to end expeditiously. Furthermore, he had not been driving his car on a busy street, was a person who was integrated in society and had been employed prior to the incident. Moreover, the criminal investigation had been excessively lengthy even though the case was not complex. Furthermore, he had been unable to work because he had been suspended from driving, and had been forced to sell his apartment in order to be able to live.

24. Lastly, the court adjourned the proceedings for deliberations.

25. On 29 September 2015 the applicant submitted written observations to the court. He argued, *inter alia*, that Article 336 § 1 was the most lenient criminal law in his case because, under that provision, the offence committed by him was punishable either by imprisonment or a fine. Moreover, the court had discretion to postpone or waive the imposition of a sentence. As a result, Article 114 of Government Ordinance no. 195/2002 would not apply in his case and his driving licence would not be revoked. Under Article 87 § 1 of Government Ordinance no. 195/2002, the only form of punishment for the offence was imprisonment. Under the latter criminal-law provision, the court would be forced to convict him, given that he had admitted his guilt. As a result, Article 114 of Government Ordinance no. 195/2002 would become applicable to his case and his driving licence would be revoked, regardless of what sentence he was given, leaving him unable to earn a living for an even longer period of time.

26. The applicant also argued that the educational and punitive purpose of a potential criminal conviction had already been achieved in his case

because since his suspension from driving, he had been unable to work during the entire course of the excessively lengthy proceedings. As a result he had lost his job, had had to sell his apartment in order to be able to live and had developed health problems.

27. The applicant also asked the court not to suspend him from driving during the possible period of probation if it decided to postpone the imposition of his sentence, because driving was his livelihood and at his age it would be impossible to retrain in a new profession.

28. On 1 October 2015 the District Court adjourned the proceedings for further deliberations.

29. On 8 October 2015 the court held that the elements of the offence the applicant had been charged with were made out and found him guilty. It also held that Article 336 § 1 of the new Criminal Code was applicable because in the applicant's case it was necessary to postpone the imposition of the sentence for the act committed by him. Consequently, it concluded that the new legal provisions were the more lenient and decided to dismiss the prosecutor's office's request to change the legal classification of the offence. In sentencing the applicant, the court took into account the general sentencing criteria set out in the new criminal law and the general purpose of penalties. In addition, it held that the limits of the penalty provided for by law had to be reduced by a third in accordance with the new criminal procedure rules concerning admission of guilt. Taking into account the circumstances of the case and the applicant's behaviour, the court held that, as far as the seriousness of his actions was concerned, he had not been driving on a busy road. It further held that, as far as he himself was concerned, he had no previous convictions, had admitted and regretted his actions, had been employed, and was responsible and fully integrated into society. On that basis, the court considered that setting a penalty for the applicant would be sufficient to make him realise the consequences of his behaviour and deter him from repeating it. Consequently, it decided that the immediate imposition of a sentence was unnecessary, but that a period of probation was required. It therefore concluded that the most appropriate manner of dealing with the case was to give the applicant a ten-month prison sentence and postpone its imposition for two years. Lastly, it ordered him to comply with certain conditions during the period of probation, but they did not include a ban on driving a vehicle.

30. On 14 November 2015 the applicant asked the District Court to expedite service of the judgment on the parties. He reiterated, *inter alia*, his arguments about the length of the proceedings and the fact that he had been unable to work because he had been suspended from driving.

31. On an unspecified date the prosecutor's office appealed against the first-instance court's judgment, arguing that the decision to consider the applicant's actions less serious and then to give him a ten-month prison sentence and postpone its imposition had been inappropriate, given the

seriousness of the offence. The applicant had had a very high alcohol level in his blood and had consented to driving a vehicle occupied by another person who had eventually been injured. He had not justified in any way why he had committed the offence. The fact that he had committed the offence on a less busy road or that the injured person had not lodged a criminal complaint against him was irrelevant and could not diminish the serious nature of the offence. On the contrary, his actions had made the offence even more serious because the consequences could have been even more severe as far as road safety and the person's life and physical integrity were concerned. Furthermore, the applicant had initially denied having committed the offence and had entered into a heated dispute with individuals travelling in the other car. The fact that he had admitted to having committed the offence in circumstances where the evidence against him was indisputable could not be viewed as mitigating circumstances sufficient to justify postponing the imposition of a sentence. The same could also be said about the absence of previous convictions, as the applicant deserved no particular credit for being in a normal situation specific to most members of society. The fact that he was well integrated in society should have made him foresee the serious consequences that driving a vehicle under the influence might have had. Moreover, the prosecutor's office reiterated its arguments concerning the need to change the legal classification of the offence. It urged the appellate court to give the applicant a sentence which could be suspended for the duration of a supervision period in accordance with the provisions of the old criminal law. It argued that the old criminal law contained more favourable terms for the applicant than the new criminal law in so far as suspending the serving of his sentence for the duration of a supervision period was concerned, because the old criminal law allowed for his automatic legal rehabilitation if he did not reoffend during that period.

32. On 29 January 2016 the applicant presented oral arguments and submitted written observations to the appellate court. He contested the prosecutor's office's arguments and reiterated the arguments he had raised before the first-instance court.

33. By a final judgment of 2 February 2016 the Bucharest Court of Appeal allowed the prosecutor's office's appeal and quashed the first-instance court's judgment. Referring to the general sentencing criteria set out in both the new and old criminal law and applying them to the applicant's case, the court held that the prosecutor's office's arguments were well-founded and that the punishment imposed on the applicant had not been appropriate to ensure his rehabilitation in the sense of respect for the values protected by criminal law, namely general and special prevention. In this connection, the court took into account the particular circumstances in which the applicant had committed the offence, the level of alcohol in his blood at the time of the incident and his conduct thereafter, namely his

involvement in a verbal dispute with one of the witnesses and other individuals. As far as his admission of guilt was concerned, the court held that he would be rewarded with a one-third reduction of his penalty, as provided for by the new domestic criminal procedure rules. As a result, the court decided to impose a penalty on the applicant within the specific limits provided for by law for the offence and reduce it accordingly. For the above-mentioned reasons, the court held that the old criminal law was the more lenient in the applicant's case, given the conditions to be met for suspending the serving of the sentence for the duration of a supervision period.

34. Citing the provisions of the old criminal law and new criminal procedure law only in so far as they concerned the one-third reduction of penalties where there was an admission of guilt, the court convicted the applicant and sentenced him to three years and four months in prison. It also imposed additional penalties, such as the removal of his right to vote or be elected for public office or in public institutions and a ban on him occupying a position involving the exercise of State power. The court subsequently decided to suspend the serving of both his prison sentence and enforcement of the additional penalties for seven years. Moreover, it ordered him to comply with certain conditions, which included a ban on driving a vehicle during the supervision period.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant law

1. *Old criminal law*

35. Article 87 of Government Ordinance no. 195/2002 regarding road traffic, one of a number of provisions of the Ordinance abolished following the entry into force of the new criminal law (see paragraphs 38 and 41 below), provided, *inter alia*, that driving a vehicle on a public road with a pure blood alcohol level over 0.8 grams per litre was punishable by imprisonment of between one and five years.

36. Articles 72 to 86⁶ of the old Criminal Code provided, *inter alia*, that courts had to consider several criteria before establishing and imposing a penalty, including the seriousness of the offence, the offender's character, any mitigating or aggravating circumstances, and the limits of the penalty provided for by law. In addition, the court also had to consider all the aforementioned criteria in circumstances where the law provided for alternative penalties for the same offence, before choosing one of the alternative penalties and determining its limits. Furthermore, a court could decide to suspend the serving of a sentence for the duration of a supervision period if several conditions were met, including where the main penalty was imprisonment of less than four years. The supervision period was calculated

by adding an additional period of time to the prison sentence set by the court of between two to five years. A court could impose one or more conditions during the supervision period including a ban on driving a vehicle. If the person convicted did not reoffend and complied with conditions imposed on him or her by the court during the supervision period, he or she was automatically legally rehabilitated.

37. Article 320¹ §§ 1 and 7 of the old Criminal Procedure Code provided that the limits of the penalty provided for by law were to be reduced by a third in cases examined under a summary procedure where the penalty was imprisonment and the person charged with the offence had admitted his or her guilt.

2. New criminal law

38. On 1 February 2014 the new Criminal Code and new Criminal Procedure Code entered into force.

39. Articles 74 to 91 of the new Criminal Code provide, *inter alia*, that a court has to consider several criteria before establishing and imposing a penalty, including the circumstances of the case, the nature, seriousness and consequences of the offence, the reason and scope for committing the offence, the nature and frequency of previous offences, the offender's conduct after committing the offence and during the proceedings, and his or her education, age, sex, health, family and social situation. In addition, the court also has to consider the aforementioned criteria in circumstances where the law provides for alternative penalties for the same offence, before choosing one of the alternative penalties. Also, a court has discretion to waive the imposition of a sentence if two conditions are met, including whether the offence is minor. In addition, a court has the discretion to postpone the imposition of a penalty for the duration of a supervision period if several conditions are met, including where the main penalty is a fine or imprisonment of less than two years. The penalty can no longer be imposed on the person for whom the imposition of the penalty has been postponed and he or she is not subject to any ban or limitation flowing from the offence he or she has committed, if he or she does not reoffend during the supervision period, or if the postponement is not revoked or annulled. The supervision period is two years. In the event the imposition of a penalty is postponed, a court may impose one or more conditions during the supervision period, including a ban on driving certain vehicles as specified by the court. Postponement of the imposition of a penalty does not have any effect on the implementation of safety measures or civil obligations set out in the judgment.

40. A court can also decide to suspend the serving of a sentence for the duration of a supervision period if several conditions are met, including where the main penalty is imprisonment of less than three years. The supervision period can be anywhere between two to four years, but cannot

be shorter than the length of the prison sentence. If the person convicted does not reoffend during the supervision period, his or her sentence is considered spent once that period expires.

41. Article 336 § 1 provides that driving a vehicle on a public road with a blood alcohol level over 0.8 grams per litre is punishable either by imprisonment of one to five years or a fine.

42. Article 396 § 10 of the new Criminal Procedure Code provides that the limits of the penalty provided for by law are to be reduced by a third in cases examined under a summary procedure where the penalty is imprisonment and the person charged with the offence has admitted his or her guilt.

3. Government Ordinance no. 195/2002 provisions applicable both under the old and the new criminal law

43. Articles 111 to 116 of Government Ordinance no. 195/2002 (see paragraph 35 above), some of the provisions of the Ordinance still in force even after the entry into force of the new criminal legislation, provide that in circumstances where a person drives a vehicle on a public road with a pure blood alcohol level over 0.8 grams per litre, his or her driving licence must be withheld and a document replacing it issued, but he or she will not be permitted to drive. Once a driver is acquitted of the above-mentioned offence by a final court judgment the driving licence will be returned. If a driver is convicted by a final court judgment of the above-mentioned offence, his or her driving licence will be revoked by the traffic police. A person whose driving licence is revoked may retake a driving test one year after the judgment suspending the serving of the sentence for the duration of a supervision period becomes final.

B. Relevant practice

44. In decision no. 265/2014 of 6 May 2014 published in the Official Gazette no. 372 of 20 May 2014, the Constitutional Court held that a court acted unconstitutionally if, in its attempt to determine the more lenient criminal law, it combined the provisions of successive laws. The Constitutional Court took the view that such an approach would create a third law, which did not fall within a domestic court's competencies.

45. The Government submitted several judgments and interlocutory judgments delivered by the domestic courts concerning complaints raised by applicants about the length of domestic proceedings.

46. They submitted three final judgments delivered by the Iași Court of Appeal on 18 March and 19 July 2016 and one judgment delivered by the Bucharest District Court on 25 April 2016 allowing in part proceedings brought by plaintiffs against the State relying on the general civil law provisions and/or directly on Articles 6 and 13 of the Convention to seek

damages for the excessive length of the criminal proceedings in which they had been involved.

47. They also submitted nine interlocutory judgments not subject to appeal, delivered between 17 May 2016 and 17 July 2017 by the Bucharest District Court, Bucharest County Court, Cornetu District Court, Bacău District Court, Curtea de Argeş District Court and Bucharest Court of Appeal. In seven of these judgments the courts allowed complaints lodged under Article 488¹ of the Criminal Procedure Code by parties to criminal proceedings concerning the length of the criminal investigation carried out in their cases and set a deadline for the prosecution authorities to conclude the criminal investigation in those cases. In the remaining two interlocutory judgments the courts dismissed the complaints after an examination on the merits.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 6 AND 13 OF THE CONVENTION IN RELATION TO THE LENGTH OF THE PROCEEDINGS

48. The applicant complained that the criminal investigation and overall proceedings opened against him had been excessively lengthy even though his case had not been complex. He had agreed to be tried under a summary procedure, had cooperated with the investigating authorities and had not delayed the proceedings. A diligent examination of his case had been very important for him because he had been a professional driver. During the excessively lengthy proceedings he had been unable to work or earn a living and had been forced to sell his apartment in order to cover his living costs. Moreover, the applicant complained that he had had no effective domestic remedy to complain about the length of the criminal proceedings. He relied on Articles 6 and 13 of the Convention, the relevant parts of which read as follows:

Article 6

“In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...”

Article 13

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. Admissibility

1. *The parties' submissions*

49. The Government raised an objection of non-exhaustion of domestic remedies in respect of the applicant's complaint under Article 6 of the Convention. They argued further that the applicant's complaint under Article 13 was manifestly ill-founded.

50. Relying on the observations and relevant domestic practice submitted to the Court in the case of *Brudan v. Romania* (no. 75717/14, §§ 29-51, 10 April 2018), the Government argued that the applicant had failed to bring a civil action before the domestic courts in order to seek damages for the alleged excessive length of the proceedings.

51. The relevant domestic case-law (see paragraphs 45-47 above) confirmed that there had been an effective domestic compensatory remedy for the complaint raised by the applicant.

52. Article 488¹ of the Criminal Procedure Code also contained an additional remedy which was effective for complaints concerning the length of criminal proceedings. However, the Government acknowledged that this remedy had not been available to the applicant because it was only applicable to criminal proceedings instituted after 1 February 2014.

53. The applicant contested the Government's submission that a civil action for damages had been an effective remedy for his complaint. He argued that the domestic practice on the matter was inconsistent and therefore his chances of redress had been purely illusory. Moreover, according to the Court's case-law in respect of Romania, civil proceedings for damages did not amount to an effective remedy for complaints concerning the length of proceedings. Furthermore, neither the old nor current Criminal Procedure Code contained a valid domestic remedy which could have been used by him and which could have benefited his case.

54. The relevant domestic case-law relied on by the Government did not reflect the actual practice of the national courts. Furthermore, they acknowledged that some of the remedies they had referred to had not been available to him.

2. *The Court's assessment*

55. The Court notes that the purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. The rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see *Cocchiarella v. Italy* [GC], no. 64886/01, § 39, ECHR 2006-V).

56. The Court further notes that Article 13 guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time (see *Kudla v. Poland* [GC], no. 30210/96, § 156, ECHR 2000-XI).

57. Turning to the particular circumstances of the instant case, the Court observes that it has already established that since 22 March 2015 a civil action for damages has constituted an effective domestic remedy for complaints raised by applicants with regard to the length of domestic proceedings. The aforementioned conclusion is valid both for domestic proceedings which have ended and for those which are still pending before the authorities (see *Brudan*, cited above, § 88).

58. The Court also observes that the criminal proceedings opened against the applicant ended on 2 February 2016 and that he lodged his application with the Court on 25 July 2016. Consequently, at the time when he lodged his application with the Court, the remedy indicated by the Government was sufficiently certain and was no longer only theoretical or providing only illusory prospects of success (contrast *Brudan*, cited above, § 89, and *Negrea and Others v. Romania*, no. 53183/07, § 57, 24 July 2018).

59. It follows that the applicant's complaint under Article 13 of the Convention is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3(a) and 4.

60. Moreover, there is no evidence in the case file that the applicant brought a civil claim for compensation for the alleged excessive length of the criminal proceedings opened against him. Furthermore, he did not put forward any arguments which could persuade the Court to conclude that he was absolved from the obligation to avail himself of that remedy.

61. In view of the foregoing, the Court considers that the applicant's complaint under Article 6 of the Convention is inadmissible under Article 35 § 1 for non-exhaustion of domestic remedies and must be rejected pursuant to Article 35 § 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

62. The applicant complained that by quashing the judgment of the first-instance court and applying the old criminal law to his case, the last-instance court had breached the principle of retrospective application of the more lenient criminal law. He alleged that, under Article 336 § 1 of the new Criminal Code, the offence committed by him was punishable either by imprisonment or a fine. The domestic courts had also had discretion to postpone or waive the imposition of a sentence. As a result, his driving licence would not have been revoked. In addition, a decision by the court to postpone the imposition of his sentence would have enabled him to recover his driving licence immediately after the proceedings had ended because a

ban on him driving his car during the period of probation could no longer have been imposed. The applicant relied on 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

63. The Court notes 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

(a) The applicant

64. The applicant submitted that the last-instance court had not determined the more lenient criminal law in his case correctly. He argued that it had failed to compare the successive criminal laws in question and had therefore failed to determine in a concrete manner the more lenient law in his case. Having regard to the provisions of the new Criminal Code, the applicant contended that there was little doubt that it had been the more lenient in his case.

65. In determining the more lenient criminal law, the domestic courts should have focused their assessment on the penalty for the offence contained in both the old and new criminal legislation. Moreover, the last-instance court should have taken into account that, under the new Criminal Code, the imposition of the sentence could be postponed.

66. The domestic authorities had aimed to punish him harshly for his acts. The courts had also imposed unjustified additional penalties on him – such as the removal of his right to vote and be elected for public office or in public institutions and a ban on him occupying a position involving the exercise of State power – even though he had been convicted of an offence unconnected with the exercise of such rights. Moreover, the overall suspension of his right to drive for ten years and seven months was unlawful and excessive. Furthermore, the suspension of the serving of his sentence had only been ordered with the aim of preventing him from driving, which could no longer be done under the provisions of the new Criminal Code.

(b) The Government

67. The Government contested the applicant's argument that the domestic authorities had aimed to punish him harshly for his acts and contended that they were pure speculation.

68. They explained that the more lenient criminal law was not determined in an abstract manner, but rather by following several steps and taking into consideration the circumstances of each case. Generally, a domestic court would first determine if the elements of an offence were made out. Subsequently, it would examine the statutory penalty for the offence. If two criminal laws were in force between the moment an act was committed and the moment the final court judgment was delivered and under one of those laws the penalty for the offence was imprisonment and under the other either the same term of imprisonment or a fine, the judge would consider the latter law more lenient only if he or she decided to sentence the defendant to pay a fine. In other words, the mere existence of a potential alternative penalty would not render a law more favourable. If, however, the two laws in question provided different terms of imprisonment for the same offence, the domestic courts would determine the more lenient criminal law by taking into account the specific prison sentence it intended to impose. Therefore, if the court intended to give a sentence which was closer to the statutory maximum sentence, the more lenient criminal law would be that which provided the shortest statutory maximum sentence. Likewise, if the court intended to give a sentence which was closer to the statutory minimum sentence, the more lenient criminal law would be that which provided the shortest statutory minimum sentence. Lastly, if the offence carried the same penalty under both laws the court, depending on the chosen penalty, would be called upon to examine other elements, such as the requirements for suspending the serving of the sentence.

69. The domestic courts had followed the aforementioned steps to determine the more lenient criminal law in the applicant's case. Because he had agreed for his case to be examined under the summary procedure, the statutory limits for his sentence under both the old and new criminal legislation had been reduced to between eight months and three years and four months.

70. The last-instance court considered that the applicant's conduct had required a penalty closer to the maximum limit of three years and four months. That penalty was provided for and could be imposed under both the old and new criminal legislation. The reasons behind the last-instance court's decision to impose this penalty were related to its assessment of the applicant's conduct and the seriousness of the offence and were not connected to the determination of the more lenient criminal law. Consequently, the domestic courts had had to examine the conditions for serving the prison sentence in question in order to determine the more lenient criminal law in the applicant's case.

71. A three-year and four-month prison sentence could not be suspended or its imposition postponed under the provisions of the new Criminal Code and therefore the applicant would have been forced to serve that sentence. Since the serving of the sentence could be suspended during a period of probation under the old criminal law, the last-instance court had correctly considered that the latter law was the more lenient in the applicant's case.

72. The Government submitted that they were not arguing that suspending the serving of a sentence during a supervision period was more favourable than postponing the imposition of such a sentence. However, they contended that such an assessment was not relevant for the determination of the more lenient criminal law in the applicant's case.

73. Following the entry into force of the new Criminal Code, a person who committed the same offence and received the same sentence as the applicant would not find him or herself in a more favourable situation than the applicant. Consequently, it could not be argued that the new Criminal Code would have been the more lenient criminal law in the applicant's case.

74. Since the domestic courts had correctly determined the more lenient criminal law in the applicant's case, his arguments in fact reflected his dissatisfaction with the domestic courts' assessment of the seriousness of the offence committed by him. He actually would have wanted the last-instance court to start its assessment with the conclusion that postponement of the imposition of his sentence would have been more convenient for him because he could have recovered his driving licence, and then for the domestic court to set a sentence for him which could be postponed. However, the domestic courts were only called upon to choose the manner in which a sentence was to be served after they had determined the penalty to be imposed.

75. According to the Court's case-law, Article 7 did not come into play in circumstances where a sentence was increased during appeal proceedings, but did not exceed the statutory maximum sentence which could have been imposed on an applicant during his or her trial at first instance.

2. The Court's assessment

(a) General principles

76. The Court reiterates that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 77, ECHR 2013; *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and

34179/08, § 66, ECHR 2013 (extracts); and *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 153, 20 October 2015).

77. Article 7 of the Convention is not confined to prohibiting the retrospective application of criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see *Del Río Prada*, § 78, and *Maktouf and Damjanović*, § 66, both cited above).

78. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him or her criminally liable and what penalty he or she faces on that account (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 140, ECHR 2008, and *Del Río Prada*, cited above, § 79).

79. When speaking of "law", Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability. These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries (see, among other authorities, *Del Río Prada*, cited above, § 91).

80. The Court reiterates further that Article 7 guarantees not only the principle of non-retroactivity of more stringent criminal laws but also, implicitly, the principle of retroactivity of more lenient criminal laws; in other words, where there are differences between the criminal law in force at the time of the commission of an offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 109, 17 September 2009).

81. The Court also notes that criminal procedure rules which are entirely concerned with the length of the sentence to be imposed in the event of conviction following trial under the summary procedure, in particular the requirement to reduce the penalty fixed by the court by a third, are provisions of substantive criminal law and therefore fall within the scope of Article 7 of the Convention (*ibid.*, §§ 111-13).

82. The Court reiterates that it is not its task to review *in abstracto* whether the alleged failure to retroactively apply the new criminal law is, *per se*, incompatible with Article 7 of the Convention. This matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts have

applied the law whose provisions are most favourable to the defendant (see *Maktouf and Damjanović*, cited above, § 65).

83. In addition, the Court reiterates that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation, so that its role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I; *Kononov v. Latvia* [GC], no. 36376/04, § 197, ECHR 2010; and *Ruban v. Ukraine*, no. 8927/11, § 43, 12 July 2016). It will not therefore question the interpretation and application of national law by national courts unless it has produced consequences that are inconsistent with the Convention (see, among other authorities, *mutatis mutandis*, *Kononov*, cited above, § 198, and *Plechkov v. Romania*, no. 1660/03, § 67, 16 September 2014).

(b) Assessment of the present case

84. Turning to the present case, the Court notes that in their submissions (see paragraphs 65 and 68 above) the parties seem to suggest that there may be different ways of assessing which criminal law is more lenient or favourable to a defendant. The applicant seems to be of the view that such an assessment should be made by taking into account the offence committed in general and the successive maximum and minimum penalties set out in the competing laws for it, as well as the manner in which a sentence is to be served. At the same time, the Government appear to take the view that the assessment should be made by taking into account the very specific circumstances in which the particular offence was committed, as determined by the national judge, whether as a result the sentence was viewed to be closer to the maximum or the minimum penalties provided for by the competing laws, and, where relevant, the manner in which a sentence is to be served.

85. In this connection, the Court notes, as already indicated above (see paragraph 82), that the assessment of which criminal law is more lenient or favorable to a defendant – the law in force when the defendant committed the act or the law in force when he or she was found guilty – does not depend on an abstract comparison of the two criminal laws in question. What is crucial is whether, following a concrete assessment of the specific acts, the application of one criminal law rather than the other has put the defendant at a disadvantage as concerns the sentencing (see *Maktouf and Damjanovic*, cited above, §§ 69-70).

86. The Court notes at this juncture that, while the applicant's case is in some respects similar to the case of *Maktouf and Damjanović* (cited above), in so far as in both cases the courts (i) had established the more lenient criminal law in the context of two competing laws – that which was in force at the time when the acts were committed and that which entered into force before the applicants were convicted – by taking into account the specific

circumstances in which the particular offences was committed and (ii) had imposed prison sentences which were close to the statutory limits provided for by the relevant legislation, the two cases also present notable differences. In particular, unlike in the case of *Maktouf and Damjanović*, in the applicant's case the domestic courts took into account in their assessment of the more lenient criminal law not only the statutory maximum and minimum prison sentence that could have been imposed on the applicant, but also the possibility provided for by the new law to impose a fine and the manner in which a sentence was to be served under both the new and the old law – more specifically, whether the serving of the sentence could be suspended or the imposition of a penalty postponed. The above elements had a bearing on the applicant's effective right to drive a car. This right was considered of paramount importance by him, given that his earning a living depended on this (see paragraph 27 above).

87. In this context, the Court notes that in the applicant's case the definition of the offence concerning the driving of a vehicle on a public road under the influence of alcohol is practically the same in the old criminal law, which was applicable at the time the offence was committed, as in the new criminal legislation, which came into force prior to the applicant's conviction and which he viewed to be the more lenient criminal law in his case. Moreover, the applicant did not dispute that his actions had constituted a criminal offence defined with sufficient accessibility and foreseeability at the time when it had been committed. The lawfulness of his conviction is therefore not an issue in the instant case.

88. However, the two criminal laws provide for different sentencing frameworks regarding driving a vehicle on a public road under the influence of alcohol. Under the old criminal law, driving a vehicle under the influence was punishable by imprisonment for a term of one to five years. The courts could suspend the serving of a sentence for the duration of a supervision period if several conditions were met. One or more conditions could also be imposed by the court during the supervision period, including a ban on driving a vehicle. Moreover, the penalty had to be reduced by a third in cases examined under a summary procedure.

89. Under the new criminal law, driving a vehicle on a public road under the influence of alcohol attracts imprisonment for a term of one to five years or a fine. The courts may waive or postpone the imposition of a penalty, or suspend the serving of a sentence for the duration of a supervision period if several conditions are met. One or more conditions may also be imposed by the court during the supervision period. Where the court decides to postpone the imposition of a penalty, one of the conditions which may be imposed on a person found guilty of an offence during the supervision period includes a ban on driving certain vehicles. Moreover, the penalty has to be reduced by a third in cases examined under a summary procedure where the penalty is imprisonment.

90. The Court notes that an overall comparison of the punitive regime under each of the criminal laws applicable to the applicant shows that the only presumed penalty which could be imposed in his case under the old criminal law was imprisonment for a term of one to five years. By contrast, under the new criminal law the domestic courts could choose between imprisonment for a term of one to five years and a fine. Moreover, even though both criminal laws provided, subject to certain conditions, that the sentence imposed on the alleged offender could be suspended and/or reduced, only the new criminal law provided that the imposition of the sentence could be waived or postponed.

91. The Court further notes that a long or maximum prison sentence is subject to a more stringent regime under the new criminal law than under the old law because, under the new criminal law, any prison sentence over three years has to be served.

92. In these circumstances, the Court will examine whether the specific assessment made by the last-instance court in the applicant's case, which led to the application of the old criminal law, could reasonably be considered the most favourable for him in terms of sentencing.

93. The Court observes in this regard that the last-instance court considered the general sentencing criteria set out in both the new and old criminal law and applied them to the particular circumstances in which the applicant had committed the offence. It accepted the prosecutor's office's arguments that the offence committed by him was serious and pointed out that the sentence imposed on him by the first-instance court had not been appropriate to ensure his rehabilitation. It then sentenced the applicant to the maximum sentence provided for by the old criminal law, namely three years and four months' imprisonment. Had the new criminal law been applied, the maximum prison sentence imposed on the applicant would have been the same.

94. The Court notes that the applicant argued that the new criminal law had been more lenient for him than the old criminal law, given that under the newer provision the courts had had the option to sentence him to a fine. The Court also notes, however, that none of the courts which examined his case took the view that a fine could be imposed in his case given the particular circumstances of the incident he was involved in. In so far as his argument may be understood to amount to a general complaint about the severity of the penalty imposed on him by the last-instance court, the Court reiterates that issues relating to the appropriateness of a penalty do not fall within the scope of Article 7, as it is not the Court's role to decide the length of a prison sentence or the type of penalty which is suited to any given offence (see *Hummatov v. Azerbaijan* (dec.), nos. 9852/03 and 13413/04, 18 May 2006; *Hakkar v. France* (dec.), no. 43580/04, 7 April 2009; and *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and 2 others, ECHR 2013 (extracts)).

95. What is important for the Court is whether there was a real possibility that the applicant could have received a more favourable sentence had the new criminal law been applied in his case. As already observed above (see paragraph 93) the last-instance court did not consider the offence minor and sentenced him to the maximum prison sentence, which was over three years. The Court notes at this point that the new criminal law requires that the offence under examination be minor or that the prison sentences set for or imposed on defendants be three years or less for the various manners in which a sentence is to be served to take effect and to be applicable in any given case. Since in the applicant's case the offence committed by him and the prison sentence imposed on him did not meet these requirements, he would have been forced to serve his prison sentence had the new criminal law been applied.

96. Accordingly, the Court finds nothing to support the applicant's allegation that the last-instance court applied the more stringent criminal law in his case. On the contrary, since there was no obvious possibility that the application of the new criminal law would have operated to his advantage as concerns sentencing, it cannot be said that he was not afforded effective safeguards against the imposition of a heavier penalty.

97. The Court's conclusion is not affected by the fact that when the last-instance court reduced the applicant's prison sentence by a third, it referred to the new criminal procedure rules concerning the length of the sentence to be imposed when a case had been dealt with under a simplified procedure (see paragraph 34 above). Similar provisions were also available under the old criminal law and would have had the same effect as regards the applicant's sentence. Therefore, the Court considers that the approach of the last-instance court could not be viewed as an unlawful attempt to create a new law (see paragraph 44 above) or that it has produced consequences that are inconsistent with the Convention requirements.

98. Accordingly, the Court considers that there has been no violation of Article 7 of the Convention in the particular circumstances of the present case.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

99. Relying on Article 6 of the Convention, the applicant complained that his suspension from driving for an unlimited amount of time pending the outcome of the criminal proceedings opened against him, without a court order and an effective remedy that would have allowed him to challenge the suspension, had amounted to a breach of his right to be presumed innocent.

100. The Court has examined the complaint as submitted by the applicant. However, having regard to all the material in its possession, and in so far as it falls within its jurisdiction, the Court finds that it does not

disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

101. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning Article 7 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 7 of the Convention.

Done in English, and notified in writing on 18 February 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Maridalena Tsirli
Registrar

Jon Fridrik Kjølbro
President