



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

FIRST SECTION

CASE OF MUCHA v. SLOVAKIA

(Application no. 63703/19)

JUDGMENT

Art 6 § 1 (criminal) • Impartial tribunal • Objectively justified doubts as to impartiality of applicant's trial court which had also previously convicted his co-perpetrators on the basis of plea-bargaining arrangements • Wording of judgments against co-perpetrators prejudicial to applicant's right to be presumed innocent • Higher courts' omission to remedy defects in question

STRASBOURG

25 November 2021

FINAL

04/04/2022

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

In the case of Mucha v. Slovakia,

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

Ksenija Turković, *President*,

Péter Paczolay,

Krzysztof Wojtyczek,

Alena Poláčková,

Gilberto Felici,

Erik Wennerström,

Raffaele Sabato, *judges*,

and Renata Degener, *Section Registrar*,

Having regard to:

the application (no. 63703/19) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Slovak national, Mr Pavel Mucha (“the applicant”), on 2 December 2019;

the decision to give notice of the application to the Slovak Government (“the Government”);

the parties’ observations;

Having deliberated in private on 5 October and 2 November 2021,

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

INTRODUCTION

1. The present case concerns the impartiality of a tribunal and the presumption of innocence within the context of that tribunal’s previous decisions on the same subject matter.

THE FACTS

2. The applicant, who was born in 1979 and is serving a term of imprisonment in Leopoldov Prison, was represented by Mr M. Mandzák, a lawyer practising in Bratislava.

3. The Government were represented by their co-Agent, Ms M. Bálintová.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND

5. As established by domestic courts, the applicant was a mid-ranking member of an organised criminal gang that had operated for more than a decade in Bratislava and several other regions of Slovakia.

6. On 1 February and 23 May 2012 he and nine others belonging to the same group were charged with setting up, conceiving and maintaining a criminal enterprise and with multiple specific violent offences.

7. It was originally decided that the prosecution of all these persons would be carried out jointly; however, that decision was then partly superseded by subsequent decisions to prosecute eight of them separately, as those eight were all prepared to enter into a plea-bargaining agreement (*dohoda o vine a treste*). Such agreements may be concluded between the Public Prosecution Service (PPS) and the charged person (*obvinený*) (Article 232 § 9 of the Code of Criminal Procedure (Law no. 301/2005 Coll., as amended) – CCP). They presuppose the charged person's confession and the contents of the case file must tend to support its truthfulness. (Article 232 § 1). These agreements must comprise *inter alia* a description of the criminal action or omission in question in a manner that enables its unequivocal identification, its legal classification, and the definition of the penalty (Article 232 § 8). They are subject to judicial approval as specified below.

II. SEPARATE CONVICTION OF CO-PERPETRATORS

8. In the separate sets of proceedings against eight of the applicant's co-perpetrators, plea-bargaining agreements were reached and submitted to the Specialised Criminal Court (SCC) for approval. They were subject to preliminary review by the president of the relevant chamber, in which the president was under the duty to take into account the contents of the case file (Article 331 § 1 of the CCP). In the absence of a finding of a manifest breach of the procedure or the agreements' being manifestly inappropriate, they were further examined by the chamber at a public session (*verejné zasadnutie*) (Articles 332 § 1 and 333 § 1 of the CCP). In its deliberations, the chamber was bound to examine matters such as, for example, whether the prosecuted action or omission had taken place, whether it constituted an offence and if so which, whether it had been committed by the accused, whether there was a penalty to be imposed and if so which one (Article 169 § 1 of the CCP). In addition, the chamber was to assess the accused person's replies to the questions to be posed to him or her according to the law with a view to safeguarding his or her rights (Article 169 § 2 of the CCP).

9. The proceedings in relation to the eight of the applicant's co-perpetrators were concluded by a judgment delivered by the SCC on 19 December 2012 and by two separate judgments delivered by that court on 7 March 2013.

10. All these proceedings were conducted before, and all the three of above judgments were given by, the same three-judge chamber of the SCC, the members of which were all career judges.

11. The nature of the judgments was such that, having endorsed the plea-bargaining agreements previously reached between the above-mentioned co-perpetrators and the PPS, the SCC found them guilty as charged and sentenced them to various prison terms. The operative part of those judgments is phrased in a style identical to that of ordinary convicting judgments, whereby the court finds an accused person guilty of an offence committed by means of a precisely factually-defined action (or failure to act) and imposes on that person a penalty. The precise factual definition of that criminal action or failure to act (*skutková veta*) is included in the judgment's operative part.

12. In the present case, the precise factual definition of some of the criminal actions attributed to the applicant's co-perpetrators referred to the applicant, who was identified by his initials and in some instances also by an alias. As regards one of the judgments of 7 March 2013, the Government have also submitted the text of the actual plea-bargaining agreements underlying that judgment, in which the applicant is identified by his full name. However, except for the way in which he is identified in them, the references to the applicant in these agreements are identical to those in the judgment approving them.

13. The references to the applicant in the actual agreements and in the three judgments may be summarised as follows:

- hierarchically speaking, the applicant had belonged to the middle ranks of the criminal group in question, and as such had been giving instructions regarding the perpetration of various criminal activities – including those of which the accused persons were found guilty;

- one of the accused persons, who was found guilty, had participated in an act of extortion; a percentage of the amount forcibly to be obtained thereby was to be handed over to the applicant (as that accused person's hierarchical superior), under the rules of the group;

- using his hierarchical position, the applicant had imposed a financial penalty on a member of the group for having breached the rules of the group, and had instructed other members – including one of the accused persons (who was found guilty) – to enforce that penalty and to ensure that a certain percentage of it was paid to the applicant;

- using his hierarchical position, the applicant had (i) ordered members of the group – including one of the accused persons (who was found guilty) – forcibly to take an amount of money from another member as repayment of a debt and as a penalty for not respecting the group's rules, (ii) arranged for the setting in which the operation had been carried out and (iii) received and distributed its proceeds among the participants.

14. The judgments contained no reasoning other than (i) a recapitulation of the procedural history of the case, (ii) a reference to the applicable legal rules regarding plea bargaining (including the rule providing that the defence rights of accused persons had to be respected and that those persons

had to confess to having committed the crimes covered by the agreement and accept the sentence proposed by the PPS), and (iii) findings by the relevant court that these rules had been adhered to, that the plea-bargaining agreements were not unjust, that the penalties proposed were adequate and that, for those reasons, the plea-bargaining agreements had been endorsed.

15. By operation of law, the three judgments became final and binding on delivery.

III. APPLICANT'S CONVICTION

16. The SCC heard the applicant's case in a separate set of proceedings, sitting as a chamber with an identical composition to the one which had heard the cases of the remaining co-perpetrators. By a judgment dated 7 August 2013 it found the applicant guilty as charged and sentenced him to twenty-three years' imprisonment.

The offences of which he was found guilty consisted of four sets of criminal actions, the precise factual definitions of which were identical to those summarised in paragraph 13 above, apart from any necessary editorial adjustments.

17. The judgment was based on complex documentary, expert and other evidence, including testimony and statements given by the above-mentioned co-perpetrators. Two of them refused to give evidence, and the pre-trial incriminating depositions of one of them were examined instead. The remaining six gave evidence incriminating the applicant to varying degrees in respect of one or more of the offences in question.

18. In its reasoning, the trial court also specifically noted that the convictions of the said co-perpetrators were "a factual and homogenous part of the case under examination" (*sú vecnou a homogénnou súčasťou prejednávanej veci*) and that "these decisions [had been] taken cognisance of (*boli oboznámené*) and [were] contained in the file material". As regards the offence of setting up, conceiving and maintaining a criminal enterprise, the court furthermore noted that any witness evidence incriminating the applicant came mainly from co-perpetrators who had agreed to collaborate with the police, otherwise known also as "penitents" (*kajúcnici*). However, as a matter of principle, that evidence could not be doubted solely on the basis of that fact. In the case at hand, that incriminating evidence was supported by other (albeit indirect) evidence and prevailed over any witness evidence in the applicant's favour.

IV. APPEALS AND COMPLAINTS

19. The applicant challenged his conviction by means of lodging an appeal, an appeal on points of law and ultimately a constitutional complaint. Besides contesting the trial court's assessment of the evidence,

in particular before the court of cassation and the Constitutional Court he also argued that he had been denied his right to (i) a trial by an impartial tribunal and (ii) be presumed innocent, given that the judgments convicting his alleged co-perpetrators had prejudiced the assessment of his own case and had been delivered by a tribunal whose membership was identical to that of the tribunal hearing his own case.

20. The applicant's appeals and complaints were dismissed, with the final decision (that is to say, no further appeals were possible) being delivered by the Constitutional Court on 25 June 2019. In so far as relevant, the reasons were as follows.

21. No error or irregularity was established in the trial court's assessment of the evidence and the application of law. In so far as the applicant was guilty of robbery and extortion, his conviction was based mainly on the evidence of the co-perpetrators who had agreed to collaborate with the police.

22. The applicant's objections regarding the alleged lack of impartiality and violation of the principle of the presumption of innocence were dismissed with reference to the below-mentioned unifying decision (*zjednocujúce stanovisko*) delivered by the Criminal Law Bench of the Supreme Court (see paragraphs 28 et seq. below). It was noted, *inter alia*, that a court endorsing a plea bargain had taken and assessed no evidence and decided only on the action prosecuted, its legal classification and the adequacy of the penalty imposed. Its judgment was binding solely on the convicted person (and on no one else), and there was no room for that court to form an opinion in relation to any other person without examining the relevant evidence.

23. Under the subsidiarity principle, the Constitutional Court had no jurisdiction to entertain any complaint regarding the trial court and the court of appeal. As to the cassation court, no constitutionally relevant unlawfulness, arbitrariness or irregularity was detected in its decision. In addition to the grounds already mentioned, it was noted that, in contrast to cases such as *Ferrantelli and Santangelo v. Italy* (7 August 1996, *Reports of Judgments and Decisions* 1996-III), in the case at hand the applicant had not even argued that the trial court had "cited numerous extracts ... from [its earlier] judgment[s] [convicting his co-perpetrators]".

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CODE OF CRIMINAL PROCEDURE

24. Article 2, which lays down the fundamental principles of criminal proceedings, provides in its fourth paragraph that anyone against whom criminal proceedings are being conducted is to be presumed innocent until found guilty by a court in a convicting judgment.

25. Grounds for a judge and other office holders to be disqualified from taking part in criminal proceedings are set out in Article 31. Under its paragraph 3, which was inserted into the Code by an amendment that entered into effect on 1 January 2019 (under Law no. 321/2018 Coll.), an earlier decision delivered by a judge or a chamber in relation to an accused person, a co-accused person or another accused person whose criminal offences are interrelated constitutes no grounds for disqualifying that judge or chamber from taking part in the criminal proceedings in question. This amendment also introduced further provisions impacting on plea-bargaining agreements as follows. The PPS is to see to it that the precise factual definition of the criminal action or failure to act by the party to the plea-bargaining agreement is formulated in a way not interfering with the presumption of innocence in relation to persons not participating in the agreement (Article 232 § 8 (b)). If circumstances so allow, a part of a case concerning some co-accused persons may be brought to a close in relation to them separately, this being without prejudice to the rights of the remaining co-accused. In so doing, the court is to ensure that there be no interference with the presumption of innocence of the remaining co-accused or other participants in the prosecuted action or omission (Article 238 § 3).

26. Under Article 32 § 6, a challenge of bias based on a certain procedural course of action taken by a court is not to be entertained.

27. The power of the court approving a plea-bargain agreement to decide on the prosecuted action or omission, its legal classification and the adequacy of the penalty is limited to the accused person who has concluded the agreement (Article 334 § 1). The approval of the agreement takes place in the form of a publicly pronounced judgment that is subject to no appeal except for an appeal on points of law in the event of a fundamental breach of the rights of defence (Article 334 § 1).

II. UNIFYING DECISION DELIVERED BY THE CRIMINAL LAW BENCH OF THE SUPREME COURT

28. On 5 April 2017 the Criminal Law Bench of the Supreme Court delivered a unifying decision aimed at consolidating the divergent interpretation and application of certain provisions of the CCP relating to the presumption of innocence and to the impartiality of a tribunal. It was published in the Collection of Standpoints of the Supreme Court under no. 15/2017. The decision noted, *inter alia*, that

“1) Presumption of innocence ... concerns the person accused in the criminal proceedings at hand and is not violated if the participation of that accused person in the criminal activities under examination in the proceedings in question was mentioned in the operative part or reasoning of an earlier judicial decision convicting another person; likewise, cause of action estoppel (*res iudicata*) is constituted only in relation to the convicted person ...; subsequent criminal proceedings may entail the prosecution of another ... person for the same offence.

2) A court approves of a plea-bargaining agreement without examining any evidence ..., whereas this decision ... has legal effect only in relation to the accused person [in question] ...

If a court subsequently decides on [the merits of a case pursued and defined by] a bill of indictment against another accused person (even if for an offence covered by an agreement approved of previously) ..., then in that regard it shall carry out an autonomous assessment of evidence without being in any way bound by the earlier approval of an agreement ... and it may not rely on the approved agreement [*nemôže pri rozhodovaní vychádzať zo schválenej dohody*] ...

3) The objective test of impartiality (or the external appearance thereof) ... pertains to assessment [undertaken] by an impartial observer, who, however, [must be] informed at least of the basic safeguards (*kauteľy*) [to be observed] in the procedures used. As to the question of the presumption of innocence, this includes ... the factors mentioned in points 1) and 2) [above].

4) A judge who takes part in taking a decision on a plea-bargaining agreement does not violate the presumption of innocence ... in relation to any other person who – according to the precise factual definition of the criminal actions (or failures to act) constituting the offence subject to [a] [plea-bargaining] agreement and the judgment [approving it] – took part in the criminal action or failure to act ascribed to the accused [party to the agreement]; such a judge is not excluded ... from [participating in] subsequent proceedings regarding a bill of indictment against the “other” person concerned (this may include a co-accused person [taking part] in the same set of proceedings).”

29. In the reasoning for the above-mentioned operative part of the unifying decision, it was also noted that unless the individual identification of any third-party co-perpetrator was essential for the identification of the offence subject to a plea bargain, it was appropriate to identify any such third party by initials only. Nevertheless, in the light of the contents of the underlying court file, the court examining the plea-bargaining agreement was aware of the full identity of such third parties.

III. LAW OF THE EUROPEAN UNION

A. Charter of Fundamental Rights of the European Union

30. The relevant part of the second paragraph Article 47 provides that:

“Everyone is entitled to a ... hearing ... by an ... impartial tribunal previously established by law. ...”

31. Under the first paragraph of Article 48:

“Everyone who has been charged shall be presumed innocent until proved guilty according to law.”

B. Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings

32. Under recitals 1, 9, and 16 in the preamble to the Directive (“Directive 2016/343”):

“(1) The presumption of innocence and the right to a fair trial are enshrined in Articles 47 and 48 of the [Charter], Article 6 of the [Convention], Article 14 of the International Covenant on Civil and Political Rights (the ICCPR) and Article 11 of the Universal Declaration of Human Rights.

...

(9) The purpose of this Directive is to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial.

...

(16) The presumption of innocence would be violated if public statements made by public authorities, or judicial decisions other than those on guilt, referred to a suspect or an accused person as being guilty, for as long as that person has not been proved guilty according to law. Such statements and judicial decisions should not reflect an opinion that that person is guilty. This should be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, such as the indictment, and without prejudice to judicial decisions as a result of which a suspended sentence takes effect, provided that the rights of the defence are respected. This should also be without prejudice to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and are based on suspicion or on elements of incriminating evidence, such as decisions on pre-trial detention, provided that such decisions do not refer to the suspect or accused person as being guilty. Before taking a preliminary decision of a procedural nature the competent authority might first have to verify that there are sufficient elements of incriminating evidence against the suspect or accused person to justify the decision concerned, and the decision could contain reference to those elements.”

33. Directive 2016/343 furthermore provides, *inter alia*:

“Article 1

Subject matter

This Directive lays down common minimum rules concerning:

(a) certain aspects of the presumption of innocence in criminal proceedings;

...

Article 2

Scope

This Directive applies to natural persons who are suspects or accused persons in criminal proceedings. It applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the decision on the final determination of

whether that person has committed the criminal offence concerned has become definitive.

Article 3

Presumption of innocence

Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law.

Article 4

Public references to guilt

1. Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. This shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence.”

C. Jurisprudence of the Court of Justice of the European Union

34. In a judgment of 5 September 2019 in *AH and Others (Presumption of innocence)* (C-377/18, EU:C:2019:670), in response to a “reference” for a preliminary ruling from Bulgaria’s Specialised Criminal Court, the Court of Justice concluded:

“Article 4(1) of [Directive 2016/343] must be interpreted as meaning that it does not preclude that an agreement in which the accused person recognises his guilt in exchange for a reduction in sentencing, which must be approved by a national court, expressly mentions as joint perpetrators of the criminal offence in question not only that person but also other accused persons, who have not recognised their guilt and are being prosecuted in separate criminal proceedings, on the condition that that reference is necessary for the categorisation of the legal liability of the person who entered into the agreement and, second, that that same agreement makes it clear that those other persons are being prosecuted in separate criminal proceedings and that their guilt has not been legally established.”

35. Moreover, the CJEU held that, in order to review compliance with the presumption of innocence, it was always necessary to analyse a judicial decision and its reasoning as a whole, giving due consideration to the circumstances in which it had been adopted. Any explicit reference, in certain parts of a judicial decision, to the absence of guilt of the joint perpetrators would be devoid of sense if other parts of that decision were likely to be understood as constituting a premature expression of their guilt (*ibid.*, § 46). Because it appeared that the plea-bargaining agreement at issue in the main proceedings did not make it clear that the accused persons had been accused separately and that their guilt had not been legally established (which was for the referring court to determine with definitive effect), that agreement was likely to portray those persons as being guilty, whereas their

guilt had not yet been legally established, contrary to Article 4 § 1 of Directive 2016/343 (*ibid.*, § 48).

36. By an order of 28 May 2020 in *UL and VM* (C-709/18, EU:C:2020:411), in response to a “reference” for a preliminary ruling from Slovakia’s SCC, the CJEU ruled in a similar context as follows:

“Articles 3 and 4(1) of Directive 2016/343, read in conjunction with ... the second paragraph of Article 47 and Article 48 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding a national court, first of all, from accepting, in the context of criminal proceedings brought against two persons, by order, the guilty plea of the first person to offences stated in the indictment allegedly committed together with the second person who has not pleaded guilty and, thereafter, from deciding, after taking evidence relating to what the second person is alleged to have done, on the guilt of that person, provided that, first, the reference to the second person as co-perpetrator of the alleged offences is necessary to the characterisation of the legal liability of the person who pleaded guilty and, secondly, that order and/or the indictment to which it refers clearly state that the guilt of that second person has not been legally established and will be the subject of separate taking of evidence and a separate judgment.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

37. The applicant complained that he had been denied (i) a hearing by an impartial tribunal and (ii) the protection of his right to be presumed innocent, as provided in Article 6 §§ 1 and 2 of the Convention, which – in so far as relevant – read as follows:

“1. In the determination ... of any criminal charge against him, everyone is entitled to a ... hearing ... time by an ... impartial tribunal ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

A. Admissibility

38. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Parties’ arguments

(a) Applicant

39. The applicant emphasised the fact that both he and his alleged co-perpetrators had been convicted by a tribunal with an identical composition (that is to say by the same chamber of the same court,

composed of the same judges). Irrespective of whether he had been referred to by his initials or by his full name, the tribunal in question had been aware of his identity, and the wording of the judgments convicting his alleged co-perpetrators had contained specific conclusions in relation to him – both as regards his alleged status within the criminal enterprise and his alleged participation in the criminal actions in issue. When convicting the alleged co-perpetrators, the tribunal had in so doing addressed his alleged status and actions in terms of constituent elements of the offences of which he had been prosecuted and ultimately convicted.

40. The applicant pointed out that the judgments convicting his alleged co-perpetrators had not been excluded from his own case file but had constituted a part of them as a whole and that his own conviction had been to a large extent based on evidence given by those collaborating coperpetrators.

41. The applicant acknowledged that his complaint was essentially about the objective test of impartiality but argued that it was not limited to the simple fact of his having been convicted by the same tribunal as had previously convicted his alleged co-perpetrators. In his view, the Government's observations entirely failed to address individual aspects of the case. The domestic authorities had likewise failed to assess any individual circumstances and had contented themselves with abstract reliance on the unifying decision of 5 April 2017 (see paragraph 28 above). In his opinion, under domestic law there was no procedural avenue enabling anyone effectively to challenge a tribunal under the objective test of impartiality in a situation such as his. At the time of his conviction the matter had been covered by the general provision of Article 32 § 6 of the CCP, which had prevented such a challenge (deeming it to concern nothing more than a tribunal's procedural course of action – see paragraph 26 above). Following an amendment that had entered into force on 1 January 2019 (that is to say after his own conviction) such a challenge was now expressly prevented (see paragraph 25 above). The problem was thus of a systemic nature, and it was unreasonable to hold against him the fact that he had not substantiated his complaints at the domestic level by referring to his individual circumstances.

42. It was true that the applicant's case had also been examined by higher-instance courts, but none of these tribunals had afforded him any remedy. The question of the presumption of innocence was linked to the question of impartiality. Given that the judgments in respect of his alleged co-perpetrators had not made it clear that he was being prosecuted separately and that his guilt had not been legally established, he held objectively justifiable doubts regarding the impartiality of the tribunal that had subsequently convicted him.

(b) Government

43. The Government, for their part, argued that it was not the Court's task to review the applicable law and practice *in abstracto*. The case revolved around the objective test of impartiality, in respect of which the fact that the applicant's trial court had previously convicted his co-perpetrators on the basis of their plea-bargaining agreements (which had referred to his participation in the offences in question) as such presented no Convention issues.

44. When dealing with a plea-bargaining agreement, an examining court reviewed solely the lawfulness and fairness of that agreement, but it did not consider the potential criminal liability of third persons. This had been clearly defined in the unifying decision of 5 April 2017 (see paragraph 28 above) and reflected in the amendment to the CCP that came into force on 1 January 2019 (see paragraph 25 above).

45. The applicant's complaints had been abstract and had involved no allegation that any error had been made by the trial court. In any event, its judgment had subsequently been reviewed by the court of appeal, the cassation court and ultimately the Constitutional Court, the impartiality of which was beyond any doubt. All in all, the applicant had been afforded a fully-fledged and self-standing trial with all the attendant guarantees of fairness, which not even he himself had contested.

46. Regarding the matter of the presumption of innocence, the Government contended that the applicant's conviction had not been based on the convictions of his co-accused but on complex evidence that had been examined and assessed in a manner that did not appear arbitrary. It was accepted under the Convention (and, more widely, within the European legal space) that in complex criminal trials reference could be made to the participation in an offence by third persons who were to be tried separately. Such references had to remain within certain parameters – as indicated, for example, in the cases of *Bauras v. Lithuania* (no. 56795/13, 31 October 2017) and *Meng v. Germany* (no. 1128/17, 16 February 2021) – and they had so remained in the present case.

47. Specifically, the applicant and his co-perpetrators had been tried for offences with a complex organised-crime background, which they had committed together. It had accordingly been only logical to identify his role in such offences, even though those offences had been attributed solely to his co-perpetrators. The factual definition of the offences committed by his co-perpetrators given in their convicting judgments had contained nothing superfluous relating to him. Out of respect for the principle of the presumption of innocence, those judgments had referred by their full names only to those who were being convicted or had already been convicted. The applicant had accordingly been referred to only by his initials and by his alias. Even though the actual plea-bargaining agreements submitted to the Court had identified him by his full name, it was clear that any actual

assessment in them had related only to the parties to those agreements. The previous references to the applicant had therefore in no way prejudiced the decision concerning him.

2. *The Court's assessment*

(a) **Scope of the case**

48. The Court notes that the present case raises two interlinked complaints – that of an alleged lack of a trial before an impartial tribunal, and that of an alleged violation of the applicant's right to be presumed innocent. Despite being represented by a lawyer, the applicant has not sought to challenge the fairness of his hearing as such (contrast *Adamčo v. Slovakia*, no. 45084/14, § 12, November 2019, and *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, § 102, 23 February 2016). His specific complaints hinge on the fact that he was tried and convicted by the same trial court that had previously convicted his co-perpetrators for criminal acts committed jointly with the applicant and that it had defined those acts in a way that made it clear that he had also participated in them. Accordingly, in so far as the complaint about the prejudicial impact of the judgments against the applicant's co-perpetrators on his own trial has been made in reliance on Article 6 § 2 of the Convention, it refers to essentially the same underlying issue. On the specific facts of the present case, that issue will be examined as a matter concerning the impartiality of a tribunal within the meaning of Article 6 § 1 of the Convention. In that examination, aspects of the applicant's right to be presumed innocent will be taken into account as and if appropriate.

(b) **Applicable principles**

49. General principles on impartiality, as well as those relating to impartiality within the context of a judge's participation in previous decisions on the same subject matter have recently been summarised in the Court's judgment in the case of *Meng* (cited above, §§ 42-52). Of those principles concerning impartiality under the objective test, the Court finds of particular relevance for the initial framing of the present case the following (*ibid.*, §§ 46-48, with further references):

- When applied to a body sitting as a bench, the objective test means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts that may raise doubts as to its impartiality. In this respect, even appearances may be of some importance. When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether such fear can be held to be objectively justified.

- The mere fact that a trial judge has made previous decisions concerning the same offence cannot be held as in itself justifying fears as to his impartiality. Likewise, the mere fact that a judge has already ruled on similar but unrelated criminal charges or that he or she has already tried a co-accused in separate criminal proceedings is not in itself sufficient to cast doubt on that judge's impartiality in a subsequent case.

- An issue as to the judge's impartiality arises, however, where the earlier judgment already contains a detailed assessment of the role of the person judged subsequently in an offence committed by several persons and, in particular, where the earlier judgment contains a specific categorisation of the involvement of the applicant or must be seen to have determined that the person judged subsequently fulfilled all the criteria necessary to have committed a criminal offence. Given the circumstances of the specific case, such elements may be seen as prejudging the question of the guilt of the person on trial in the subsequent proceedings and may thus lead to objectively justified doubts that the domestic court has a preconceived view regarding the merits of the case of the person judged subsequently at the outset of his or her trial.

(c) Application of these principles to the present case

50. It has not been disputed that the applicant was tried and convicted by the same trial court that had previously convicted his co-perpetrators for criminal acts committed jointly with him and that when defining those acts the trial court also referred to the applicant's participation in them.

51. In that respect, the Court observes at the outset that the trial-court chamber in question consisted exclusively of professional judges, who must be assumed to have been more trained, accustomed and prepared than would a lay judge to disengage themselves from their experience of and findings in the previous trial against the applicant's co-perpetrators (see *Meng*, cited above, §§ 51 and 55). It also notes that in the proceedings against the applicant the trial court itself examined witness, expert and other evidence and that in its judgment convicting him it reached its own findings of fact and law (*ibid.*, §§ 50 and 56, with further references), not being bound by the judgments concerning the co-perpetrators in terms of law (in that respect, see the unifying opinion of 5 April 2017 referred to in paragraph 28 above and, for example, *Miminoshvili v. Russia*, no. 20197/03, § 117, 28 June 2011).

52. However, while these are important elements in the examination of the question of whether the trial court met the requirement of impartiality under Article 6 § 1 in the applicant's case, they do not exempt the Court from examining whether its judgments against his co-perpetrators contained findings that actually prejudged the question of his guilt (see *Meng*, cited above, § 57, with further references).

53. At this juncture, the Court notes that, unlike in cases such as *Meng*, the judgments of the applicant's co-perpetrators were not based on an assessment of the evidence against them or anyone else. They were in fact based on plea-bargaining arrangements under which the co-perpetrators had accepted their guilt of offences specifically defined therein. On the specific facts of the present case, however, the Court does not find this distinction decisive, on the following two grounds.

54. First, while there are various models of plea-bargaining procedures and arrangements across the Convention landscape, Slovakia has a system in which the plea-bargaining processes result in a criminal conviction (see *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, §§ 62-75, ECHR 2014 (extracts)). As can be seen on the facts as well as from the applicable legal provisions, plea-bargaining agreements are approved by a court in the form of a publicly delivered judgement (see paragraph 27 above) and their operative part is formulated in the same manner as in ordinary convicting judgments – in particular as regards the finding that by committing the factually-defined action (or failure to act) the accused person in question had committed the offence in question. As to the actual scope of judicial examination in relation to a plea-bargaining agreement, the Court notes a certain incongruity between the position taken by the courts in the applicant's case and the Government, on the one hand, and the applicable legal provisions, on the other. In particular, the courts and the Government suggested that in the judicial approval of the plea-bargain agreements of his co-perpetrators there had been no assessment of anything but the lawfulness and fairness of those agreements (see paragraphs 22 and 44 above). However, the rules on the scope of deliberations on an application for the approval of such agreements appear to suggest that the examining court must carry out that assessment in a wider factual and procedural context (see paragraph 8 above).

55. Second, the Court notes that the judgments approving the plea-bargaining agreements of the applicant's co-perpetrators contained a detailed factual description of their crimes, including the applicant's role in them as a joint perpetrator, while the precise factual description of some of their criminal actions was identical to the precise factual description of the criminal actions attributed to him. Although those judgments do not contain any separate finding of guilt in relation to the applicant *per se* (see also paragraphs 27 and 28 above), they are to be seen in the light of the constituent elements of the offences in question – in particular that of setting up, conceiving and maintaining a criminal enterprise, which presupposes coordinated criminal actions on the part of joint perpetrators. Convicting the applicant's co-perpetrators of these offences on the basis of the given description of their criminal actions, which included a precise factual definition of the applicant's specific role in them, was thus in principle capable of raising doubts as to whether it prejudged the question of whether

he himself fulfilled all the criteria necessary for him to be held to have committed the criminal offences in question (see *Meng*, cited above, § 48, with further references).

56. Referring to the applicant and his actions in such a way may in principle engage the protection of his right to be presumed innocent. The Court is aware that any possible interference with this right would primarily have taken place in the proceedings concerning the applicant's co-perpetrators and that there is no indication of him having challenged it by any direct action. Nevertheless, the possible interference is linked to the applicant's own trial through the identify of his and their tribunal and the fact that, as acknowledged by that tribunal itself, the convictions of his co-perpetrators were a part of the case against the applicant and had as such been noted (see paragraph 18 above).

57. The Court reiterates that the principle of the presumption of innocence will be violated if a judicial decision or a statement made by a public official concerning a person charged with a criminal offence reflects an opinion that he or she is guilty before that person has actually been proved guilty under the law. A fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question. In this regard the Court has emphasised the importance of public officials' choice of words in statements made by them before a person has been tried and found guilty of a particular criminal offence. While the use of language is of critical importance in this respect, the Court has furthermore pointed out that whether a statement made by a public official is in breach of the principle of the presumption of innocence must be determined within the context of the particular circumstances in which the impugned statement was made. Even the use of some unfortunate language may not be decisive when regard is had to the nature and context of the particular proceedings (see *Karaman v. Germany*, no. 17103/10, § 63, 27 February 2014, with further references).

58. It has been accepted by the Court – and more widely at the European level – that in complex criminal proceedings involving several persons who cannot be tried together, references by a trial court to the participation of third parties, who may later be tried separately, might be indispensable for the assessment of the guilt of those on trial and that criminal courts are obliged to establish the facts of the case relevant for the assessment of the legal responsibility of the accused as accurately and precisely as possible, and they cannot present established facts as mere allegations or suspicions. This also applies to facts related to the involvement of third parties, though if such facts have to be introduced, the court should avoid giving more information than is necessary for the assessment of the legal responsibility of those accused in the trial before it (see *Karaman*, cited above, § 64; see also the judgment of the CJEU in the case of *AH and Others (Presumption*

of innocence), § 44, cited at paragraph 34 above). Moreover, the Court also found that, even if the law expressly states that no inferences about the guilt of a person can be drawn from criminal proceedings in which he or she has not participated, judicial decisions must be worded so as to avoid any potential pre-judgment about the third party's guilt in order not to jeopardise the fair examination of the charges in the separate proceedings (see *Karaman*, cited above, § 65; and the CJEU judgment of 18 March 2021 in *Pometon v Commission*, C-440/19, EU:C:2021:214, § 63).

59. Turning again to the facts of the present case, in view of the organised-crime-related nature of the offences of which the applicants' co-perpetrators stood accused, and given that the offence of setting up, conceiving and maintaining a criminal enterprise by nature of things could only have been perpetrated jointly with others, it appears beyond doubt that it was indispensable for the assessment of their cases to refer in the factual definition of their criminal actions to third parties.

60. As to the level of detail contained in the references in the judgments of the applicants' co-perpetrators to another joint perpetrator with a particular status in the gang and a role in the specific prosecuted actions or omissions, the Court finds it questionable whether it was necessary to identify the applicant individually. This is so because it may appear that the crucial point in the legal classification of the prosecuted actions or omissions was the generic presence of a joint perpetrator with a specific status or role, rather than the individual presence of a specific person (see, *mutatis mutandis*, *Karaman*, cited above, § 64). However, the Court considers that it is not called upon to answer this question conclusively because, even assuming that it was indeed necessary, for reasons explained below the references to the applicant and his actions in the judgments regarding his co-perpetrators cannot be accepted as being worded so as to avoid any potential (even if only implicit) pre-judgment regarding his guilt (*ibid.*, § 67).

61. The references in question were in no way worded in such a manner as to indicate that at the given time the applicant merely stood accused and was being prosecuted in separate criminal proceedings. At the same time, no such wording or any other explanation to the effect that his guilt had not been legally established appears in the reasoning of the judgments convicting the co-perpetrators or anywhere else (see the judgment of the CJEU in the case of *AH and Others (Presumption of innocence)*, cited at paragraph 34 above).

62. It is true that the judgments convicting the co-perpetrators referred to the applicant by his initials and an alias only. However, as also noted in the unifying decision (see paragraphs 29 below), it is manifest that the trial court was perfectly aware of his identity. Moreover, and more importantly (since the precise factual definition of the applicant's own criminal actions is identical to that of his co-perpetrators), there can be no doubt that his

participation in their criminal actions was specifically and individually defined in the judgments finding those co-perpetrators guilty.

63. When confronted with the applicant's complaints, both the domestic courts and the Government cited the unifying decision of 5 April 2017. As can be seen from its contents, this decision is concerned with consolidating the divergent interpretation and application of certain provisions of the CCP concerning the presumption of innocence and the impartiality of a tribunal within a plea-bargaining context at an abstract level. In other words, it provides interpretative guidance in relation to the applicable legal provisions and is accordingly concerned purely with issues of lawfulness. In particular, as regards the impartiality of a tribunal that consecutively convicts joint co-perpetrators, the unifying decision suggests that it should be assessed from the point of view of a neutral observer who is however informed at least of the basic safeguards applicable in the procedures used. In view of how those procedures were set up, no issue of impartiality arose. Leaving aside the feasibility of a third-party observer having the requisite understanding of the procedures in question (given that judicial interpretation of the applicable rules had diverged so as to necessitate consolidation by way of the above-mentioned unifying decision), the Court notes that that decision in no way addressed the linguistic or any other individual aspect of the judgments in question.

64. As the applicant's trial court considered the convictions of his co-perpetrators a part of the case against him, at least on the face of things it had an obvious incentive in his to remain consistent with its earlier set of judgments, because any conflicting findings made in the former could undermine the credibility of the latter (see *Navalnyy and Ofitserov*, cited above, § 108). Similarly – given that the applicant's own conviction was to a large extent based on evidence given by the co-perpetrators who had already incriminated him through the confessions that they had given in the plea-bargaining process – they also had an obvious incentive not to contradict their earlier statements (*ibid.*, § 109).

65. To the extent that the Government argued that the applicant's own complaints had been expressed in abstract terms only, which is consistent with the Constitutional Court's observation that he had not advanced any argument to the effect that the trial court had cited numerous extracts from the judgments convicting his co-perpetrators (see paragraph 23 above), the Court finds striking that this observation by the Constitutional Court appears to ignore the fact that the entire factual definition of the criminal actions attributed to the applicant was entirely identical to those of the criminal actions of his co-perpetrators. Moreover, the Court notes the applicant's reply to the Government – namely that the domestic system effectively did not provide for a procedure by which to invoke any individual aspects of a given case. The Government have not replied to this argument, focusing mainly on the general features of the functioning of the

plea-bargaining system in the light of the unifying decision and the above-mentioned amendment to the CCP that came into force in 2019.

66. Accordingly, the Court finds that, although the general procedural safeguards identified in the unifying decision of 5 April 2017 were undoubtedly relevant, in the light of the specific facts of the present case they were not sufficient. In view of their wording, the judgments against the applicant's co-perpetrators were prejudicial to the applicant's right to be presumed innocent until proven guilty. Given the role they played in the applicant's own trial, which took place before the same court, his doubts as to its impartiality were objectively justified.

67. Lastly, the Court reiterates that a higher or the highest court might, in some circumstances, make reparation for defects that arose in first-instance proceedings. Although the higher courts in the applicant's case had the power to quash the trial court's judgment on the grounds that it had not been impartial and that there had been other fundamental procedural irregularities, they did not, and thereby provided no remedy in respect of the defects in question (see *Meng*, cited above, § 64, with further references).

68. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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

70. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

71. The Government considered the amount of the claim to be overstated.

72. The Court awards the applicant EUR 7,800 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

73. The applicant also claimed EUR 630 for the legal costs and expenses incurred before the Court.

74. The Government requested that the claim be decided in accordance with the Court's case-law.

75. 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 were 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 that the claim should be awarded in full. It accordingly awards the applicant EUR 630, plus any tax that may be chargeable to him, for the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 7,800 (seven thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 630 (six hundred and thirty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 November 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Renata Degener
Registrar

Ksenija Turković
President