

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

FIRST SECTION

CASE OF BAVČAR v. SLOVENIA

(Application no. 17053/20)

JUDGMENT

Art 6 § 2 • Presumption of innocence • Statements made by the Minister of Justice and Prime Minister concerning an important political and economic figure who had been convicted of money laundering at first instance and had subsequently appealed • Close temporal proximity between first-instance conviction, Minister's statement and subsequent adjudication of appeal by Higher Court • Cumulative effect of statements capable of prejudicing the decision-making of the Higher Court and encouraging the public to believe applicant guilty before proven so with final effect • Domestic courts examined impugned statements through the prism of lawfulness of decision-making
Art 7 • Retroactivity • Domestic courts' interpretation and application of domestic law consistent with essence of the offence in question and foreseeable

STRASBOURG

7 September 2023

FINAL

19/02/2024

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



In the case of Bavčar v. Slovenia,

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

Alena Poláčková*, President*,
Lətif Hüseynov,
Péter Paczolay,
Ivana Jelić,
Erik Wennerström,
Davor Derenčinović*, judges*,
Vasilka Sancin*, ad hoc judge*,
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 17053/20) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovenian national, Mr Igor Bavčar ("the applicant"), on 3 April 2020;

the decision to give notice to the Slovenian Government ("the Government") of the complaints concerning Article 6 §§ 1 and 2 with regard to a public statement made by the Minister of Justice of Slovenia during pending criminal proceedings, and Article 7 with regard to the applicant's criminal liability for money laundering committed with indirect intent, and to declare inadmissible the remainder of the application;

the decision of the President of the Section to appoint Ms V. Sancin to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 (a) of the Rules of Court), Mr M. Bošnjak, the judge elected in respect of Slovenia, having withdrawn from sitting in the case (Rule 28 § 3);

the parties' observations;

Having deliberated in private on 27 June 2023,

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

INTRODUCTION

1. The case concerns the applicant's right to a fair trial by an independent and impartial court under Article 6 § 1 of the Convention and to the presumption of innocence under Article 6 § 2 of the Convention, on account of a public statement by the Minister of Justice of Slovenia. Given its timing, that statement was allegedly understood to be an instruction and a threat to the Ljubljana Higher Court to uphold the applicant's conviction.

2. Furthermore, the application concerns the right to no punishment without law under Article 7 of the Convention. The domestic courts' interpretation – that indirect intent could engage the applicant's criminal liability for money laundering – allegedly violated the principle of legality.

THE FACTS

3. The applicant was born in 1955 and lives in Stari trg pri Ložu. He was represented by Čeferin, Pogačnik, Novak, Koščak and Partners (*Odvetniška družba Čeferin, Pogačnik, Novak, Koščak in partnerji*), a law firm based in Grosuplje.

4. The Government were represented by their Agent, Ms A. Grum, Senior State Attorney.

5. The facts of the case may be summarised as follows. The applicant and the Government had certain disagreements about the facts.

6. The applicant is a former Slovenian politician who played an important role in the independence process of Slovenia, in particular as the Minister of the Interior during the ten-day war in June 1991. He remained an important figure of the political establishment. He also served as the Minister for European Affairs.

7. In 2002 the applicant moved to the private sector. From 1 June 2007 until 15 May 2009 he was the president of Istrabenz PLC, one of the largest Slovenian holding companies. He allegedly resigned owing to the circumstances related to criminal proceedings against him and the media exposure.

A. Criminal proceedings

8. On 2 August 2012 the Specialised State Prosecutor (*Specializirano državno tožilstvo*) brought criminal charges in respect of offences of economic crime against the applicant and his three co-accused: B.Š, the then director of the Laško Brewery (*Pivovarna Laško*), K.S., a member of the board of Istrabenz, and his brother, N.S., owner and director of the company Microtrust d.o.o.

9. After a number of hearings, on 19 July 2013 the Ljubljana District Court rendered a judgment finding the applicant guilty of inciting (*napeljevanje*) abuse of a position or rights when carrying out an economic activity (*zloraba položaja in pravic pri opravljanju gospodarske dejavnosti*) and money laundering (*pranje denarja*), under Article 244 and Article 252 respectively of the Criminal Code as it stood at the relevant time. The court established in particular that the applicant had received, through illegal means, an amount totalling 21,680,000 euros (EUR) in his bank account and then disposed of the funds. The applicant and his co-defendants were found guilty. He was sentenced, *inter alia*, to seven years' imprisonment.

10. On 30 May 2014, after the applicant and his co-defendants had appealed, the Ljubljana Higher Court ("the Higher Court") quashed the monetary fines *proprio motu* and reduced the prison sentence of one co-defendant. It upheld the applicant's main sentence of seven years'

imprisonment and restitution of the illegally obtained assets (*premoženjska korist*).

11. On 12 September 2014 the applicant filed an application for the protection of legality (*zahteva za varstvo zakonitosti*) with the Supreme Court. His co-defendants also filed similar applications (see paragraph 15 below).

B. Proceedings concerning the serving of the prison sentence

12. On 17 September 2014 the applicant received a summons to serve his prison sentence. On 19 September 2014 he filed an application to stay the execution of the prison sentence under section 24(1) of the Enforcement of Criminal Sanctions Act, as it stood at the material time, on the basis that he could not serve the sentence owing to a serious illness, namely severe and lasting heart problems (*angina pectoris*), which were potentially life-threatening. The courts repeatedly rejected the applicant's subsequent applications for a stay owing to the deterioration of his health. The applicant filed a constitutional complaint challenging the rejections.

13. Subsequently, the applicant's medical condition further deteriorated and he faced emergency hospitalisation. On 9 February 2015 the applicant underwent bypass surgery. After receiving new submissions, on 12 February 2015 the Higher Court stayed the execution of the applicant's sentence until 30 April 2015. On 13 February 2015 the Constitutional Court rejected the applicant's constitutional complaint, on the basis that he no longer had any legal interest in pursuing it.

14. On 29 April 2015 the applicant asked for an extension of the stay owing to post-operative complications. On 21 May 2015 the President of the Ljubljana District Court granted the extension until 11 June 2015. On 10 June 2015 the applicant applied again for the extension of the stay of his prison sentence (see paragraph 16 below).

C. Remittal of the case by the Supreme Court and retrial

15. On 18 June 2015, in the main criminal proceedings, the Supreme Court quashed the part of the Higher Court's judgment in respect of the applicant which related to his criminal liability, in particular since the description of the criminal offence did not cover all statutory elements and remitted the case to the Ljubljana District Court for a retrial.

16. On the same day, by a separate decision, the Supreme Court decided to postpone (*odloži*) the execution of the applicant's prison sentence. On 11 September 2015 the proceedings concerning the execution of the prison sentence were terminated, given that the convictions had been quashed.

17. In the retrial, after a number of hearings, on 5 September 2016 the Ljubljana District Court acquitted the applicant of the criminal offence of

inciting abuse of a position or rights and found him guilty of money laundering under Article 252 §§ 1 and 3 of the Criminal Code, an offence committed between 11 January 2007 and 31 December 2008. The District Court held that the money which was the subject of the criminal proceedings stemmed from the predicate criminal offence of abuse of a position or rights under Article 244, an offence committed by B.Š. in 2007 at the expense of the Laško Brewery.

18. The District Court found that the applicant had acted with direct intent when he had received the money in his personal bank account by two bank transfers made by Microtrust d.o.o. on 24 October 2007 and 4 February 2008, further to a compensation agreement for a waiver of rights (*Dogovor o nadomestilu zaradi odpovedi pravicam*). Compensation agreements had been concluded on 29 March 2007 between K.S. and Microtrust d.o.o., and on 30 August 2007 between the applicant and Microtrust d.o.o., following the signing of "original" option contracts (*opcijski pogodbi*) for two share packages on 11 January and 14 May 2007. Furthermore, two subsequent option contracts for shares that the applicant had signed were antedated (bearing the date of the "original" option contracts). This had constituted a sham formal legal basis for the transaction, the actual purpose being to conceal the illegality of the money's origin. The amount in question was part of the illegal capital gain obtained by Microtrust d.o.o. and based on an illegal transaction with the shares of Istrabenz d.o.o., specifically, the difference between the purchase and sale price of the shares. The director of Microtrust d.o.o. had made several money transfers to the accounts of the co-accused.

19. In particular, the Ljubljana District Court inferred the applicant's knowledge of the money's illegal origin and the purpose of concealing this from specific circumstances, such as the conditions under which the above arrangement had been concluded and the fact that the applicant lacked any financial means to conclude option contracts. Every illegal transaction with the proceeds gave the impression that the transfer was part of a regular transaction, thereby making the identification of the origin of the money and its location more difficult.

20. As regards the money that the applicant had later transferred from his account between 24 October 2007 and 31 December 2008 (seven transfers, including an investment (a 100% stake) in a company in the Netherlands, a gift to his daughter, and purchases of real estate and shares), the court considered that he had acted with indirect intent (recklessly) because he had been aware that he had further concealed the money's origins and had accepted the consequences of such an action. It relied on the Supreme Court's recent case-law on money-laundering cases (see paragraphs 69 and 71 below).

21. The applicant was convicted of the criminal offence of money laundering, an offence committed by two separate alternative legally prohibited acts under Article 252, namely (i) accepting and then (ii) further

disposing of considerable amounts of money (EUR 21,680,000) which he had known had been obtained in a predicate criminal offence and whose origin he had concealed.

22. The applicant was sentenced to five years in prison. His real estate was confiscated, and he was ordered to pay EUR 18,478,267.02 as a sum equating to the remainder of the illegally acquired property (*protipravna premoženjska korist*). The aggrieved party, the Laško Brewery, was directed to institute civil proceedings.

23. The applicant was notified of the judgment on 7 November 2016.

D. Footage of the applicant playing basketball

24. On 27 September 2016 the site 24ur.com published footage of the applicant playing basketball, recorded a day earlier, with the title "Video revealing that Igor Bavčar looks as healthy as a fish (*zdrav kot dren*) and plays basketball". The description read "When he has to go to prison, he is seriously ill, otherwise Igor Bavčar, as a member of the Old Boys' basketball team in Ljubljana Moste, fights for the ball and jumps towards the basket. [This is how] it was on Monday night, as he led his team in the role of the heavyweight centre. So was the illness which [meant] he never went to prison just a disguise with which he deceived the Slovenian judiciary?"

25. Other print and electronic media in Slovenia extensively reported the footage.

E. Television interview with the Minister of Justice and reactions of high-ranking State officials in the media

26. On 27 September 2016, given the media attention, the then Minister of Justice, Mr Goran Klemenčič, gave an interview to POP TV (a commercial television station)[1] against the background of allegedly problematic medical opinions and a system which allowed the execution of prison sentences to be postponed.

27. The interview was entitled "Mr Klemenčič: If the Bavčar case becomes time-barred, a lot of people will have to answer [for that]", and included the relevant passages (translation, emphasis added):

> "Mr Slak [journalist]: ... if you are influential and have money, you can buy yourself a medical opinion in order not to go to jail. When the case is getting close to becoming time-barred, you happily play basketball. ...
>
> Mr Klemenčič, at a political level, you are politically responsible for ensuring the functioning of the judiciary, [and] that there are no such anomalies. But today it seems to me a mockery of both prosecutors and police officers and, last but not least, judges

[1] A recording of the interview of the Minister and a medical doctor (the second video on the page) is available at https://www.24ur.com/novice/slovenija/klemencic-ce-primer-bavcar-zastara-bodo-letele-glave.html

who reached a [decision about] conviction in this case, that Mr Bavčar apparently, having pretended that he was sick (maybe he will sue me for that word), now plays basketball. Is that justified? ...

Mr Klemenčič: What is happening now, however, is absolutely a slap in the face for the Slovenian rule of law. Last year we were also sitting in this studio, presenting the amendments to the Enforcement of Criminal Sanctions Act, leading to significant tightening of the conditions under which, or the [situations where] it is possible to avoid serving a sentence for health reasons. We adopted them not because of Mr Bavčar, but in spite of [him]. Why do I say 'in spite' of [him]? Because it was very difficult to get this bill through the legal procedure, which is in a way understandable, if you perhaps recall that, in the previous government, the Minister of the Interior, Dr Vinko Gorenak, met with him and had lunch. What [has been] forgotten is that the judgment against Mr Bavčar was issued at the time when we changed the law, [and] under [that law] he should have gone on to serve his sentence and could no longer avoid serving his sentence owing to his so-called 'medical reasons', which may or may not have been justified (I am not a doctor), [except the judgment] was overturned by the Supreme Court, and today he is a free man.

Mr Slak: A free man. ... But Mr Podržaj [Director of the Dob Prison] says he could also play basketball at Dob [a prison], which is a popular sport, but there is something wrong with the system.

Mr Klemenčič: Absolutely. No, he has to be convicted with final effect to play ...

Mr Slak: Make no mistake, *none of us*, none of us here, *is calling upon* (*ne apelira tukaj, da mora sodišče obsoditi*) *the court* to convict Mr Bavčar. It's about everyone having equal power in their hands. And now I will ask you this, Mr Klemenčič: the case may become time-barred, since the judge has been writing the verdict for three weeks, although the trial at first instance was undeniably swift. Do you think there are sufficient reasons to take so long writing the judgment? Because, you know, if the case becomes time-barred, you and your President [Prime Minister] will [suffer] all the political consequences. ... The judiciary will say 'Look, that was the law, Mr Klemenčič did nothing, we could not do anything'.

Mr Klemenčič: It is always like this. The Ministry of Justice, although it has extremely little leverage to put pressure on the prosecution or the judiciary, is always blamed in the end. But I would like to say something. Writing what, I assume, is a very complex judgment in three weeks, I would not like to point the finger at the judge here. However, if in this case, in the case of Bavčar – not because he is Bavčar, but because this concerns one of the important transition stories in the history of the Republic of Slovenia.

Mr Slak: On the basis of which the credibility of the judiciary and the trust in the rule of law is being assessed.

Mr Klemenčič: [That] also. And on the basis of many other cases, and some that should be taken into consideration but are not...*If this case becomes time-barred*, let me say here: I have made a commitment many times on your show, and I hope that I have delivered. *Here I will do everything possible to make heads roll*. As you said, and we are both lawyers, Mr Slak, [I will do this] *not because someone should be convicted or acquitted ..., but because the time-barring of any court case, and we have too many of them [time-barred cases], is the worst possible result*. I believe this will not happen, but *if it does* ... I think *a lot of people will have to answer [for that] and I will be the first to demand answers*. ..."

28. Shortly after the Minister's statement, the President of the Ljubljana District Court, Mr Marjan Pogačnik, responded publicly at a press conference, as reported on 29 September 2016 on the news portal 24ur.com, with the title "Pogačnik: no worries or panic" and the subheading "Pogačnik is offering his head to Klemenčič"[2]. According to the journalist, after the Minister's statement, the president of the court said: if the Minister wants heads, I put mine on a plate (*Če minister želi glave, mu na pladnju ponujam svojo.)*, and also that the Minister should rather "stick to his gardening" (*naj se raje drži svojega vrtička*) and not interfere with the independence of the judiciary.

29. Given that the parties had not yet been notified of the written judgment at the time, the president of the court stated at the press conference as follows: the case was very complex and voluminous, and it will not be possible to respect the thirty-day time-limit. The judge was working on writing the judgment tirelessly, even in her spare time. She will fulfil her duty within a reasonable time.

30. An article, published on the same portal on the same day and submitted by the applicant, conveyed the following: the president of the court stated that most of his colleagues in court had understood the statement as an announcement of sanctions and a determination of responsibility, for which there was no real basis at the material time. Responsibility within the judiciary was determined in prescribed proceedings by certain bodies, such as the Judicial Council, which appointed and dismissed court presidents. The Minister might have a role in proposing the procedure for potentially dismissing a president, but he was certainly not the person who could decide who would be president of a certain court. Mr Pogačnik further emphasised that he would not allow someone who had no competence in that area to threaten a judge before he or she had even made a mistake. The judge would continue to do everything possible so that time-barring would not become a realistic option. The content of the statements of the President of the Ljubljana District Court was not contested by the respondent Government which partly relied on them in their submissions (see paragraph 99).

31. Lastly, the material submitted by the applicant and the Constitutional Court's decision indicate that on 14 November 2016, in a parliamentary debate on a legislative package for the prosecution of banking crime, the then Prime Minister, Dr Miro Cerar, stated in reply to a question put by a member of parliament, in relation to the amendments to the Enforcement of Criminal Sanctions Act, which made the conditions for the postponement of a prison sentence owing to health reasons more severe: "Therefore, our government is preventing something as no [government] has done before, as you said, that

[2] The news item, with the recording of parts of the press conference, and the article are available at: https://www.24ur.com/novice/slovenija/zdravniki-pisejo-opravicila-da-se-obsojenci-izognejo-zaporu.html

those who should probably be serving a prison sentence would not be playing basketball (*Torej, naša vlada preprečuje to, kar ni nobena prej, da ne bodo, kot ste rekli, igrali košarko nekateri, ki bi morali verjetno prestajati zaporno kazen*)".

F. The Higher Court's judgment and the applicant's appeal

32. On 21 November 2016 the applicant appealed against the first-instance judgment on several grounds, including on the grounds of substantial violation of the provisions of criminal procedure. He argued that the criminal offence of money laundering could not have been committed with indirect intent under the relevant provisions of the Criminal Code and the case-law as applicable at the time of the commission of the offence.

33. On 30 November 2016 the applicant supplemented his appeal, stating that the Minister's statement had exerted undue pressure on the judges of the Higher Court, constituting a violation of the right to an independent and impartial court (Article 23 of the Constitution). He also cited the Prime Minister's statement and referred to the infringement of the presumption of innocence under Article 27 of the Constitution (see paragraphs 31 above and 62 below).

34. On 12 April 2017 the Higher Court dismissed the applicant's appeal and found that one could conceal the illegal origin of money with indirect intent, relying on the Supreme Court's judgment of 30 January 2014 (see paragraph 69 below), which was also reflected in the legal doctrine.

35. Moreover, regarding the statements made by senior politicians, the Higher Court did not agree with the applicant's arguments that such statements could influence the outcome of the appeal proceedings. Even if that were true, it considered that the statements were frivolous and intended to advance the standing of the person who had made them (*Citirane izjave, če so resnične, pa [pritožbeno sodišče] ocenjuje kot neresne in namenjene bolj promociji dajalca izjav*). The Higher Court held that such statements could not affect the outcome of the appeal proceedings.

36. Following the dismissal of the applicant's appeal by the Higher Court, the judgment of the first-instance court became final on 23 May 2017.

37. On 27 June 2017 the applicant lodged an application for the protection of legality, relying on several grounds under Articles 371 and 372 of the Criminal Procedure Code and human rights violations under Articles 22, 23, 27 and 29 of the Constitution and Article 6 of the Convention.

38. As to the impugned statement of the Minister, the applicant argued that he could deduce from the second-instance court's judgment that the court had not learned of that statement from the media sources quoted in the appeal. However, the court could have easily verified the veracity of the statement. Furthermore, the applicant also referred to the Prime Minister's statement. The applicant considered that the Higher Court had not met the requirement

of impartiality in this regard. He relied on the Constitutional Court's judgment no. Up 57/14 and on *Krause v. Switzerland* (no. 7986/77, Commission decision of 3 October 1978, Decisions and Reports 13, p. 73), submitting that the presumption of innocence was not limited to procedural guarantees and bound all State authorities.

39. In particular, as to the development of the case-law in relation to money laundering committed with indirect intent, the applicant considered that the provisions of the Criminal Code had been overly interpreted by the courts in his case, which the applicant could not have foreseen, and had also been applied retroactively. He had thus been convicted of a criminal offence that, at the time of its commission, had not been considered a crime. This constituted a breach of the legality principle (Article 28 of the Constitution).

40. The applicant started serving his prison sentence on 18 September 2017.

G. The Supreme Court's judgment

41. On 5 February 2019, dismissing the applicant's application, the Supreme Court held, *inter alia*, that Article 252 of the Criminal Code defined the acquisition, storage and disposal of illegal money as criminal money-laundering activities. This was in line with international instruments on money laundering and the comparative practice and legal theory in Germany, Austria and the United Kingdom. In particular, the Supreme Court relied on the United Nations Convention against Transnational Organized Crime, the Council of Europe's conventions on money laundering and the relevant directives of the European Union (EU) (see paragraphs 76-83 below). The Supreme Court also interpreted Article 252 of the Criminal Code in the light of the Slovenian Acts on money laundering, which further defined the different ways of committing a money laundering offence (*alternativna izvršitvena ravnanja pranja denarja*), such as the acquisition, possession and disposal of money or property derived from criminal activity (see paragraphs 66-67 below).

42. The Supreme Court stressed that the aim of criminalising money laundering was to prevent any spending of money stemming from a criminal offence or its introduction into the monetary system. Such money represented a threat to lawful financial and economic traffic (see paragraph 79 below).

43. As to the acquisition and storage of money derived from illegal activity, Article 6 § 1 (c) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141, "the Strasbourg Convention") stated that the acquisition and possession of such property, when the person in question knew at the time of receiving it that it was the proceeds of illegal activity, constituted money laundering (see paragraph 80 below). Other international instruments and comparative

material cited above in paragraph 41 had similar provisions, allowing for a broad interpretation.

44. The first-instance court had described the applicant's subjective attitude concerning the acquisition of the money as his awareness of the fact that the money derived from a criminal offence when he had received it and that he had intended to conceal its origin. By signing the antedated option agreements and the compensation agreement for a waiver of rights, the applicant had participated in the selling of shares, had been aware of the whole plan and had wanted it ("*zavedel in ... hotel*"). The applicant had therefore acted with direct intent.

45. Moreover, the Supreme Court held that Article 252 of the Criminal Code concerning a perpetrator's subjective attitude was open to interpretation, and allowed for criminal offences being committed with either direct or indirect intent. Such an interpretation was not an arbitrary decision of the court, but a judicial interpretation of the legal provision (see paragraph 69 below). Relying on its case-law which had developed since the beginning of the trial, and the Slovenian Acts on money laundering (see paragraphs 66-67 below), the Supreme Court thus upheld the lower courts' findings that the applicant had been aware that any further disposal of the money by a transfer within the banking system (*nakazilo denarja znotraj bančnega sistema*) would further conceal the money's origin. The applicant had thus accepted the consequences of such an action and had acted with indirect intent.

46. The first-instance court had drawn conclusions as to the applicant's subjective attitude from objective factual circumstances, which reflected Article 6 § 2 (c) of the Strasbourg Convention (see paragraph 80 below). The description of the subjective attitude of the perpetrator had not been in the operative part of the annulled first-instance judgment, and this had been rectified in the retrial. Lastly, the criminal offence of money laundering could even be committed through negligence (Article 252 § 5 of the Criminal Code).

47. Regarding the question of the Higher Court's impartiality in view of the prominence of the case in the media and in politics, the Supreme Court held that the Higher Court's reasoning corresponded to the standard required by the second-instance court, and that the trial had respected the standard of objective impartiality.

48. Concerning the allegations about other State authorities or parts of the judiciary, statements made and reactions to them "did not require a specific response, as their impact on the lawfulness [had] not [been] explained" *([Izčrpne navedbe zahteve] v zvezi z drugimi državnimi organi ali deli pravosodja ter posameznimi izjavami in odzivi nanje niti ne terjajo posebnega odgovora, saj njihov vpliv na zakonitost ni pojasnjen*). Accepting the applicant's allegations would mean that statements made by one branch of power could practically impede the functioning of another branch. The

Supreme Court referred to the clear constitutional framework of checks and balances, and the judiciary's independence in its decision-making.

H. The Constitutional Court's decision

49. Relying on Articles 14, 22, 23, 27, 28 and 29 of the Constitution (see paragraph 62 below), on 7 June 2019 the applicant filed two constitutional complaints, which he later supplemented. The applicant alleged that he had been unable to anticipate the relevant developments in the case-law which had expanded the criminalisation of the offence of money laundering. Bearing in mind the logical and linguistic interpretation of Article 252, he considered that money laundering could be committed with direct intent only.

50. Citing the impugned statement, the applicant further alleged that the Minister had threatened the Higher Court's judges by saying that they would be removed from their judicial office if they issued a judgment which was contrary to his request. The ordinary courts were under pressure from politics, and had not responded adequately to the Minister's statement, while the Higher Court had even feigned ignorance of the statement. The applicant also referred to the statement of the then Prime Minister, Dr Cerar, who had said that the government would prevent someone who should probably be serving a prison sentence from playing basketball (see paragraph 31 above).

51. On 12 December 2019, in its decisions nos. U-I-290/19-9, Up-657/19 and Up-660/19, the Constitutional Court refused to accept the applicant's constitutional complaints and rejected his application for a review of constitutionality. It confirmed that Article 252 of the Criminal Code allowed for the interpretation that the offence of money laundering could be committed with direct or indirect intent. It relied on *Del Río Prada v. Spain* ([GC], no. 42750/09, ECHR 2013), and *Koprivnikar v. Slovenia* (no. 67503/13, 24 January 2017), reiterating that the development of the case-law in relation to the determination of a criminal offence was not at odds with Article 7 of the Convention, provided that the resultant development was consistent with the essence of the offence and could reasonably be foreseen (citing *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 155, ECHR 2015).

52. Relying on the international and EU instruments binding upon Slovenia, as well as on the recommendations of the Council of Europe's second Conference on Money Laundering in States in Transition of 29 November 1994 and of the Financial Action Task Force, the Constitutional Court held that the lower courts had not exceeded the linguistic limits of the interpretation of the relevant provision and described how the commission of the offence had fulfilled all subjective and objective elements (*subjektivni in objektivni znaki*).

53. In its case-law, namely decision no. Up-758/03, the Constitutional Court had already noted that even in the case of indirect intent, a perpetrator consciously and willingly brought about the prohibited consequences (see

paragraphs 73-74 below). Since the offence of money laundering could be committed even through negligence, it would make no sense for indirect intent, where the perpetrator had acted wilfully with respect to the prohibited consequence, not to be criminalised. The development of the case-law had therefore been consistent with the substance of the criminal offence in question and could reasonably have been foreseen by the applicant.

54. Regarding the Minister's statement, the Constitutional Court relied on Article 23 of the Constitution and on the following Court judgments: *Allenet de Ribemont v. France* (10 February 1995, §§ 36 and 41, Series A no. 308); *Turyev v. Russia* (no. 20758/04, §§ 19-23, 11 October 2016); *Krivolapov v. Ukraine* (no. 5406/07, §§ 127-31, 2 October 2018); *Daktaras v. Lithuania* (no. 42095/98, § 44, ECHR 2000-X); and *Krause* (cited above, p. 76). It stressed that, in addition to the procedural guarantees, it was important to alleviate the circumstances that could harm the appearance of the objective impartiality of judicial decision-making or cast doubt on it. In relation to the statements of the representatives of the executive power about pending criminal proceedings, the Court's jurisprudence would consider them from the standpoint of the presumption of innocence (Article 6 § 2 of the Convention). When examining such statements, the Court considered all concrete circumstances and the choice of words.

55. In this regard, the Constitutional Court referred to the reasoning of the Higher Court and the Supreme Court (see paragraphs 35 and 48 above) and emphasised that it clearly indicated that both had distanced themselves from the Minister's statement. The Constitutional Court pointed out that the applicant had not provided the full context in which the Minister had stated the disputed words, despite this being essential under the Court's case-law.

56. After watching the relevant television programme, the Constitutional Court found that the programme covered public reactions to the video of the applicant playing basketball in spite of the fact that he had applied for a stay of execution of a prison sentence owing to a severe, life-threatening illness. The video had been released at a time when the case had been about to become time-barred. The television host had asked the Minister whether the applicant's case becoming time-barred would make a mockery of the Slovenian judiciary and what the Ministry of Justice could do about it. The Minister had replied that his ministry had very little influence on the functioning of the judiciary, but that he would do everything in his power to ensure that, should the statute of limitations run out, heads would roll.

57. The case was important, not only because of the applicant himself, but because it was an important transition story. The Minister had also pointed out that this was not a question of whether the applicant would be convicted or acquitted, but of the time-barring of any criminal proceedings being the worst possible outcome and undermining people's trust in the judiciary. A statement in such a context could obviously not, in the Constitutional Court's view, affect the appearance of a fair trial.

58. Similarly, the statement of the then Prime Minister, Dr Cerar, could not have breached the applicant's right to an impartial court, since it had not touched upon the applicant's guilt, according to the Constitutional Court. Therefore, the Supreme Court's stance that this statement had not required a specific response as its impact on the lawfulness had not been explained was not contrary to Article 23 of the Constitution (*Zato stališče Vrhovnega sodišča, da ta izjava ne terja posebnega odgovora, ker da njen vpliv na zakonitost ni pojasnjen, ni v neskladju s 23. členom Ustave*) (see paragraph 48 above).

59. The constitutional judge Mr Klemen Jaklič, PhD *mult.* submitted a dissenting opinion. He stated that according to the Court's jurisprudence, prior public statements concerning decisions that could be taken only by a court were potentially problematic.

60. The dissenting judge considered that the Minister's statement had not only constituted a certain pressure but had also – wittingly or unwittingly – not been completely innocent with regard to the determination of the applicant's guilt.

61. On 23 June 2021 the applicant finished serving his prison sentence.

RELEVANT DOMESTIC AND INTERNATIONAL LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. The Constitution of the Republic of Slovenia

62. The relevant provisions of the chapter on Human Rights and Fundamental Freedoms of the Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*) (Official Gazette, no. 33/91-I of 1991) read as follows:

Article 23
(Right to Judicial Protection)

"Everyone has the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law.

Only a judge duly appointed pursuant to rules previously established by law and by judicial regulations may judge such an individual."

Article 27
(Presumption of Innocence)

"Any person charged with criminal conduct shall be presumed innocent until found guilty by a final judgment."

Article 28
(Principle of Legality in Criminal Law)

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

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

B. The Criminal Code

63. The offence of money laundering was introduced into the Slovenian Criminal Code (*Kazenski zakonik*, Official Gazette no. 63/94, as amended) in 1996. The relevant provisions applicable at the material time read as follows:

Intent
Article 17

"A criminal offence shall be committed with intent if the perpetrator was aware of his conduct and wanted to [behave in this way], or if he was aware that his conduct could have a prohibited consequence, but accepted [the consequence of that action]."

Negligence
Article 18

"A criminal offence shall be committed by negligence if the perpetrator was aware that a prohibited consequence might result from his conduct but nevertheless recklessly believed that he would prevent it from occurring or that it would not occur; or if he was not aware that such a consequence might occur but should have and could have been aware of that possibility, in the given circumstances and with respect to his personal attributes."

Money Laundering
Article 252

"(1) Whoever accepts, exchanges, stores, holds, disposes of, uses in an economic activity or in any other manner determined by the act, conceals or attempts to conceal by laundering the origin of money or property that was, to his knowledge, acquired through the commission of a criminal offence, shall be punished by [a period of] imprisonment of up to five years.

...

(3) If the money or property referred to in paragraph ... one ... of this Article is of high value, the perpetrator shall be punished by [a period of] imprisonment of up to eight years and a fine.

...

(5) Whoever should and could have known that the money or property had been acquired through a criminal offence, and whoever commits the offences referred to in paragraphs one or three, shall be punished by [a period of] imprisonment of up to two years. ..."

64. On 1 November 2008 the new Criminal Code (Official Gazette, no. 176/21) entered into force, which defined money laundering as a criminal offence under Article 245. The amended Criminal Code increased the potential sentence for that offence, while the description of the criminal offence remained the same.

C. The Criminal Procedure Act

65. Section 370 of the Criminal Procedure Act (*Zakon o kazenskem postopku*, Official Gazette no. 8/06) provides for the following grounds on which a first-instance judgment may be challenged:

Section 370

"A judgment may be challenged:

(1) on the grounds of a substantial violation of provisions of criminal procedure;

(2) on the grounds of a violation of criminal law;

(3) on the grounds of an erroneous or incomplete determination of the factual situation;

(4) on account of a decision on criminal sanctions, confiscation of assets, the costs of criminal proceedings, indemnification claims and the announcement of the judgment in the press and on radio or television."

Section 371

"(I) A substantial violation of the provisions of criminal procedure shall be understood to exist: ...

(11) where the enacting terms of the judgment are incomprehensible or contradictory in themselves, or in contradiction with the reasons [given in] the judgment; where the judgment lacks reasons altogether, or reasons relating to crucial facts are not adduced or are completely vague or considerably inconsistent in themselves; or where there is a considerable discrepancy between the statement of reasons relating to the content of documents or the records of statements given in the course of proceedings on the one hand, and these documents or records themselves on the other."

Section 372

"A violation of criminal law shall exist if the criminal law was violated in respect of the issue of:

(1) whether the act for which the defendant [was] prosecuted is a criminal offence; ..."

Section 388

"(1) The panel of the court of second instance may, in deliberations or on the basis of a trial, dismiss an appeal as out of time or inadmissible, or reject an appeal as unfounded and affirm the judgment of the court of first instance, or annul the judgment and return the case to the court of first instance for retrial and decision, or modify the judgment of the court of first instance. ..."

Section 392

"(1) The court of second instance shall, in accepting an appeal or acting *proprio motu*, annul the judgment of the court of first instance by [issuing] a ruling and return the case for retrial if it finds that there has been a substantial violation of the provisions of criminal procedure ..., or if it considers that a new main hearing before the court of first instance is necessary because of the erroneous or incomplete determination of the factual situation."

Section 394

"(1) The court of second instance shall, in accepting an appeal or acting *proprio motu*, modify the judgment of the court of first instance if it finds that although the material facts were properly determined in the judgment of the court of first instance, in view of the factual determination and from the standpoint of the correct application of the law, a different judgment should have been passed, and shall also modify the judgment in the case of violations referred to in clauses 5, 9 and 10 of the first subsection of section 371 of this Act."

Section 420

"(1) An application for the protection of legality in respect of a final judicial decision and judicial proceedings which preceded that decision may, after the conclusion of the criminal proceedings, be submitted in the following instances:

1. on the grounds of a violation of criminal law;

2. on the grounds of a substantial violation of the provisions of criminal proceedings referred to in the first subsection of section 371 of this Act;

3. on the grounds of other violations of provisions on criminal proceedings, if such violations affected the lawfulness of a judicial decision. ..."

D. Money Laundering Acts

66. The Prevention of Money Laundering Act (*Zakon o preprečevanju pranja denarja*, Official Gazette, no. 79/2001, as amended), substituted by the Prevention of Money Laundering and Terrorist Financing Act (*Zakon o preprečevanju pranja denarja in financiranja terorizma*, Official Gazette, no. 60/2007, as amended), implement EU and international instruments (see paragraphs 83-85 below) and regulate money laundering in further detail.

67. Section 2 of the Prevention of Money Laundering and Terrorist Financing Act provides:

Definitions and scope
(Money laundering and terrorist financing)

"(1) For the purposes of this Act, money laundering shall mean any conduct involving money or property obtained by an offence and shall include:

1. the conversion or any transfer of money or other property derived from criminal activity;

2. the concealment or disguise of the true nature, origin, location, movement, disposition, rights with respect to, or ownership of money or other property derived from criminal activity. ...”

E. Domestic case-law

68. The following judgments of the Supreme Court are particularly relevant.

69. In judgment no. I Ips 59865/2010 of 30 January 2014, the Supreme Court found, in a money-laundering case, that in addition to a perpetrator being aware that property was derived from criminal activity, the perpetrator also had to be aware that what he or she was about to do would conceal the origin of the property or make it more difficult to trace its origin, and thus accept the consequences of that action. Recklessness (indirect intent) would suffice (points 6-9 of the judgment).

70. In judgment no. I Ips 5961/2003 of 14 April 2016, the Supreme Court held that the acquisition of money and further transactions, such as the transfer of money with the intention to conceal its origin, constituted money laundering (points 29-30 of the judgment).

71. In judgment no. I Ips 60793/2011 of 30 January 2014, the Supreme Court noted that an offender’s conduct which was oriented towards concealing the origin of money or property acquired in illicit activity had to be clearly detailed in the specific part of the description of the criminal offence (point 11 of the judgment).

72. In judgment no. I Ips 47710/2014 of 16 November 2020, the Supreme Court referred to its previous jurisprudence and stated that the domestic case-law and recent legal doctrine had clarified that money laundering could also be committed recklessly. In so doing, the court referred to the jurisprudence from 2014 cited in paragraph 69 above and international material (points 18-19 of the judgment).

73. As to the Constitutional Court’s jurisprudence, on 23 June 2005, in decision no. Up-758/03, the Constitutional Court found that since statute did not require proof of the *dolus directus* of an offender in order for an offence to be punishable (that case concerned a murder), the *dolus eventualis* of the offender sufficed.

74. Also, in cases concerning *dolus eventualis*, an offender was consciously and wilfully directed towards perpetrating some action with an unlawful consequence. In *dolus eventualis* cases, even a logical interpretation did not prevent an individual being punished for an attempt to commit an offence.

II. INTERNATIONAL LAW AND PRACTICE

A. Presumption of innocence

The EU Directive on the strengthening of certain aspects of the presumption of innocence

75. On 12 February 2016 the EU adopted Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. Its relevant recitals provide as follows:

> "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. ...
>
> 17. The term 'public statements made by public authorities' should be understood to be any statement which refers to a criminal offence and which emanates from an authority involved in the criminal proceedings concerning that criminal offence, such as judicial authorities, police and other law enforcement authorities, or from another public authority, such as ministers and other public officials, it being understood that this is without prejudice to national law regarding immunity."

B. Money Laundering

1. The United Nations

76. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("the Vienna Convention"), signed in Vienna on 20 December 1988, defines in its Article 3 offences and sanctions concerning the conversion or transfer of property derived from offences. This definition inspired the Council of Europe instrument on money laundering offences (see paragraphs 78-81 below).

77. The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organised crime. Slovenia ratified it on 21 May 2004. Its Article 6 provides for the criminalisation of the laundering of proceeds of crime.

2. The Council of Europe

78. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141, "the Strasbourg Convention") opened for signature on 8 November 1990 in Strasbourg. It entered into force on 1 September 1993. Slovenia ratified it on 23 April 1998.

79. The Explanatory Report to the Convention states that the purpose of the confiscation of the proceeds of crime is to prevent the circulation of

unlawful funds in a legal order, it being therefore in the nature of an *in rem* measure (point 23).

80. Its Article 6 provides, *inter alia*:

Article 6 – Laundering offences

"1 Each Party shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, when committed intentionally:

a the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions;

b the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds; and, subject to its constitutional principles and the basic concepts of its legal system;

c the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds;

...

2 For the purposes of implementing or applying paragraph 1 of this article:

...

c knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances."

81. In respect of Article 6, the Explanatory Report to that Convention states as follows, in so far as relevant:

Article 6 – Laundering offences

"32. ...

The first part of paragraph 1 establishes an obligation to criminalize laundering. The second part makes this obligation in respect of certain categories of laundering offences dependent on the constitutional principles and the basic concepts of the legal system of the ratifying State. To the extent that criminalisation of the act is not contrary to such principles or concepts, the State is under an obligation to criminalize the acts which are described in the paragraph. ... "

82. On 26 April 2010 Slovenia also ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS No. 198, "the Warsaw Convention"), which was opened for signature on 16 May 2005 in Warsaw and entered into force on 1 May 2008 (see *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, §§ 142-44, 28 June 2018, see also *Arewa v. Lithuania*, no. 16031/18, § 40, 9 March 2021). Its Article 9 defines money laundering offences.

3. The European Union

(a) EU directives on money laundering

83. On 10 June 1991 the Council of the European Communities adopted Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering, as amended. It was repealed by Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. Furthermore, Directive (EU) 2018/843 of 30 May 2018 ("the 5th Anti-Money Laundering Directive, 5AMLD") amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, was adopted in 2018.

84. Lastly, Directive 2018/1673/EU of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law extends to punishable money-laundering activities when they are carried out by the perpetrator of the criminal activity that generated the property ("self-laundering"), and to the transfer, conversion, concealment or disguise of property resulting in further damage than that already caused by the criminal activity, for instance, by putting into circulation of property derived from criminal activity and the consequent concealment of its unlawful origin. Recital 13 of this Directive reads as follows:

> "This Directive aims to criminalise money laundering when it is committed intentionally and with the knowledge that the property was derived from criminal activity... In each case, when considering whether the property is derived from criminal activity and whether the person knew that, the specific circumstances of the case should be taken into account, such as the fact that the value of the property is disproportionate to the lawful income of the accused person and that the criminal activity and acquisition of property occurred within the same time frame. Intention and knowledge can be inferred from objective, factual circumstances. As this Directive provides for minimum rules concerning the definition of criminal offences and sanctions in the area of money laundering, Member States are free to adopt or maintain more stringent criminal law rules in that area. Member States should be able, for example, to provide that money laundering committed recklessly or by serious negligence constitutes a criminal offence. References in this Directive to money laundering committed by negligence should be understood as such for Member States that criminalise such conduct."

85. The relevant Article of the Directive furthermore provides:

Article 3
Money laundering offences

"1. Member States shall take the necessary measures to ensure that the following conduct, when committed intentionally, is punishable as a criminal offence:

(a) the conversion or transfer of property, knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property

or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action;

(b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity;

(c) the acquisition, possession or use of property, knowing at the time of receipt, that such property was derived from criminal activity.

2. Member States may take the necessary measures to ensure that the conduct referred to in paragraph 1 is punishable as a criminal offence where the offender suspected or ought to have known that the property was derived from criminal activity. ..."

(b) Case-law of the Court of Justice of the European Union (CJEU)

86. In the opinion of Advocate General Hogan delivered on 14 January 2021 in C-790/19, *Parchetul de pe lângă Tribunalul Braşov v LG and MH*, in a case concerning "self-laundering" (the laundering by the perpetrator of the predicate offence), further to a request for a preliminary ruling, it was stated:

> "42. Finally, contrary to the views that have been expressed by the referring court, I do not think that the specification in Article 1(2)(a) of Directive 2005/60 that the perpetrator of money laundering as defined in that provision must 'know ... that such property is derived from criminal activity' necessarily contradicts that interpretation. Indeed, this very precise prohibition in itself indicates that the EU legislature was at pains to ensure that only intentional acts were prohibited, as specified in the first sentence of Article 1(2) of Directive 2005/60. While this condition will necessarily be met where the perpetrator is one and the same person, it is useful to bear this in mind in the event that the two offences – namely, the predicate offence and the money laundering offence – are committed by two distinct persons. In passing, I would note, moreover, that the EU legislature has considered it appropriate to keep this precision in Article 1(3)(a) of Directive 2015/849 and Article 3(1)(a) of Directive 2018/1673, even though, in this latter directive, the Member States are for the first time expressly obliged to create the criminal offence of self-money laundering."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 2 OF THE CONVENTION

87. The applicant complained under Article 6 §§ 1 and 2 of the Convention that his right to an independent and impartial tribunal and to the presumption of innocence had been breached by the Minister's statement during the pending criminal proceedings, which had constituted unacceptable pressure on the Higher Court's judges. Article 6 §§ 1 and 2 of the Convention, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.

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

A. Admissibility

88. The Government argued that this part of the application had to be declared inadmissible on the grounds of being manifestly ill-founded, because the applicant had interpreted the Minister's statement of 27 September 2016 out of context. He had also failed to explain by what institutional mechanisms or measures the Minister could possibly have taken action against the judges, in particular to remove them from their office. The institutional and legal frameworks gave him only limited means to influence the work of judges and courts. The domestic courts had also distanced themselves from the Minister's statement and considered that those statements did not have any potential to influence the trial in question. Lastly, the Minister had also expressly stated that he did not consider that the applicant was guilty of a criminal offence.

89. The applicant contested the Government's submissions, arguing that his right to an impartial and independent tribunal under Article 6 § 1 and to the presumption of innocence under Article 6 § 2 had been breached.

90. The Court finds that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

91. The Court considers that the gist of the applicant's complaints concerns the alleged breach of the presumption of innocence and will first examine the issue under Article 6 § 2 of the Convention.

1. Article 6 § 2 of the Convention

(a) The parties' submissions

(i) The applicant

92. The applicant argued that the controversial statement that the Minister of Justice would do everything in his power to carry out his threat, made on 27 September 2016 on a television programme with very high ratings, also taking into account the Minister's tone and determination, had breached his rights under Article 6, in particular his right to the presumption of innocence under Article 6 § 2 of the Convention. Given that the statute of limitations had been running out, the Minister's statement had meant that the trial court's decision convicting him should be upheld. If the appellate court had reversed the first-instance judgment and remitted the case, the proceedings in respect of him would almost certainly have been statute-barred, since the period had ended on 18 June 2017.

93. Referring to *Konstas v. Greece* (no. 53466/07, §§ 37 and 43, 24 May 2011), the applicant argued that one should assess the impression left by such controversial statements by the highest representatives of the executive, and that the impugned statement had prejudged the adjudication of the case by the competent court. It was entirely irrelevant whether the Minister had had mechanisms at his disposal – either to influence the work of judges or in relation to dismissing them. Thus, even assuming that the Government's position that the Minister had had little chance of influencing the work of the judiciary was correct, which was not the case, this was still inconclusive. The Minister's ability to take action against the judges could not be assessed solely in terms of his formal powers, and also had to be considered from the perspective of his authority. A person in such a position had both formal and informal means at his disposal to carry out his threat.

94. Furthermore, the means available to the Minister of Justice to influence the work of judges and courts were not insignificant. He or she had significant powers in relation to dismissing the president of a court (section 64 of the Courts Act). In addition, he or she had the power to propose the initiation of disciplinary proceedings, whereby the judicial office of a judge could be terminated, and he or she could also propose that an assessment of judicial service should be prepared in respect of a judge whose office might be terminated after a poor assessment (sections 79a and 79b of the Judicial Service Act).

95. The subsequent public statement of the President of the Ljubljana District Court, Mr Pogačnik, confirmed that the judges had understood the Minister's statement to be not only pressure on the judicial branch, but also specific pressure on the judge assigned to the case. Thus, most of his judicial colleagues had understood the Minister's statement to be a declaration of sanctions and a finding of responsibility. Moreover, the dissenting judge of the Constitutional Court had stated that the statement had not in fact been entirely innocent with regard to the determination of the applicant's guilt.

96. Lastly, as to the Government's submissions on his medical condition (see paragraph 103 below), the applicant maintained that he had asked to stay the execution of his sentence owing to a serious and life-threatening condition (see paragraphs 12-13 above). Therefore, the Government's contention that the recording of him playing basketball had been made after he "had succeeded" in staying his imprisonment by obtaining a medical certificate was clearly misleading. The Government had also failed to state that the applicant had been secretly filmed more than two years after he had first applied for the stay, and more than a year and a half after his heart surgery, at a time when he had successfully recovered.

(ii) The Government

97. The Government argued that the applicant had interpreted the Minister's statements out of context. The Minister had reacted to the

publication of the footage in which the applicant had been secretly filmed playing basketball. The footage had been taken after the applicant had been given a stay of the execution of the sentence on the basis of a medical certificate, owing to the deterioration of his life-threatening medical condition (*angina pectoris*) (see paragraph 12 above).

98. The Government countered the applicant's submissions by highlighting that the Minister had explicitly stressed during the interview that the applicant was a free man, meaning that at that time he had only been convicted by a non-final judgment. The Minister had also pointed out that he had not thought that anyone should be convicted or acquitted in the case, but that he had considered that the time-barring of any legal proceedings, which happened all too often in Slovenia, would be the worst possible outcome. He had stressed the importance of any court decisions made being based on the merits of the case, of people's trust in the judiciary and of the integrity of the Slovenian courts.

99. As to the influence on the judiciary, the Minister himself had emphasised that he did not really have means at his disposal to exert pressure on the work of courts. The President of the Ljubljana District Court, Mr Pogačnik, had stressed that the Minister had no power to sanction judges and examine their responsibility, as this competence lay solely with the Judicial Council. The Government subscribed to these views, relying on the Constitution, which provided a system of checks and balances between the branches of power, where judges were appointed and dismissed by the National Assembly solely upon an application by the Judicial Council, which was not comprised of representatives of the executive power (Articles 131 and 132).

100. The Minister of Justice could propose that an assessment of judicial service be prepared in respect of an individual judge, but only within the framework of his powers. He or she could also propose the initiation of disciplinary proceedings against a judge before the disciplinary tribunal of the Judicial Council, which was also composed exclusively of judges. Importantly, judges might only be dismissed from judicial office as an extreme sanction for disciplinary violations. With respect to the operation of courts, the Ministry of Justice only had the power to supervise judicial administration, but had no leverage to influence the work of a judge, especially not in relation to a particular case. He or she also had no competence to influence the assessment of a judge's performance or decisions on a judge's promotion, transfer, dismissal, or any other form of termination of judicial office.

101. The Government emphasised that both the Higher Court and the Supreme Court had commented on the Minister's statement in their judgments. They had both distanced themselves from the Minister's alleged statement (or the manner in which it had been understood and perceived by the applicant). The courts had not considered that the statement had had any

potential to influence the trial before the Higher Court (see paragraphs 35 and 48 above). Similarly, in its judgment of 12 December 2019, the Constitutional Court had taken a position on the Minister's statement, after verifying what he had actually said (see paragraphs 55-58 above). It had held that the applicant had interpreted the Minister's statements out of context and had failed to see or identify any elements that would affect the independence and/or impartiality of the court, or any violation of the applicant's presumption of innocence.

102. Thus, the applicant had failed to demonstrate, either by means of domestic legal remedies or in the application, by what institutional mechanisms and devices the Minister of Justice could possibly have taken action against the judges. In particular, the Minister could not have removed them from their office. In sum, the Minister's statements made during the television programme had not revolved around the applicant's guilt or conviction. Furthermore, the Constitutional Court had explicitly subscribed to this view (see paragraphs 54-58 above).

103. Lastly, as to the applicant's medical condition, the Government submitted that the prison sentence had been postponed only on the basis of the fact that the applicant had allegedly undergone urgent surgery and had had to recover after the operation. Given that he had been able to play in a dynamic basketball match about a year and a half after the surgery, the whole context of the situation had raised doubts among the public and among the judges deciding on the stay of the sentence.

(b) The Court's assessment

(i) General principles

104. The Court reiterates that the presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of a fair trial that is required by paragraph 1. The presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. One of the aspects of the presumption of innocence is to protect individuals in respect of whom criminal proceedings have been discontinued from being treated by public officials and authorities as though they are in fact guilty of the offence charged (see *Allen v. the United Kingdom* [GC], no. 25424/09, § 94, ECHR 2013). It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty. A premature expression of such an opinion by the tribunal itself will inevitably run foul of the said presumption (see, among other authorities, *Deweer v. Belgium*, 27 February 1980, § 56, Series A no. 35; *Minelli v. Switzerland*, 25 March 1983, §§ 27, 30 and 37, Series A no. 62; *Allenet de Ribemont*, cited above, §§ 35-36;

Daktaras, cited above, §§ 41-44; and *Matijašević v. Serbia*, no. 23037/04, § 45, ECHR 2006).

105. Furthermore, a distinction should be made between statements which reflect the opinion that the person concerned is guilty and statements which merely describe "a state of suspicion". The former infringes the presumption of innocence, whereas the latter have been regarded as unobjectionable in various situations examined by the Court (see, *inter alia*, *Lutz v. Germany*, 25 August 1987, § 62, Series A no. 123, and *Leutscher v. the Netherlands*, 26 March 1996, § 31, *Reports* 1996-II).

106. The freedom of expression, guaranteed by Article 10 of the Convention, includes the freedom to receive and impart information. Article 6 § 2 cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (see *Allenet de Ribemont*, cited above, § 38, and *Peša v. Croatia*, no. 40523/08, § 139, 8 April 2010).

107. The Court has considered that in a democratic society it is inevitable that information is imparted when a serious charge of misconduct in office is brought (see *Arrigo and Vella v. Malta* (dec.), no. 6569/04, 10 May 2005). It has acknowledged that in cases where an applicant was an important political figure at the time of the alleged offence the highest State officials, including the Prosecutor General, were required to keep the public informed of the alleged offence and the ensuing criminal proceedings. However, this circumstance could not justify any use of words chosen by the officials in their interviews with the press (see *Butkevičius v. Lithuania*, no. 48297/99, § 50, ECHR 2002-II (extracts)). The Court reiterates that what counts as regards the application of the above-mentioned provision of the Convention is the real meaning of the remarks made, not their literal form (see *Lavents v. Latvia*, no. 58442/00, § 126, 28 November 2002; *Gutsanovi v. Bulgaria*, no. 34529/10, § 191, ECHR 2013 (extracts); and *Konstas*, cited above, § 33).

108. The Court has emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence. Nevertheless, whether a statement of a public official is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made (see, *inter alia*, *Adolf v. Austria*, 26 March 1982, §§ 36-41, Series A no. 49, and *Daktaras*, cited above, § 41). In any event, the opinions expressed cannot amount to declarations by a public official of the applicant's guilt which would encourage the public to believe him or her guilty and prejudge the assessment of the facts by the competent judicial authority (see *Butkevičius*, cited above, § 53, and *Garycki v. Poland*, no. 14348/02, § 70, 6 February 2007).

(ii) Application of the above principles to the present case

109. The Court notes that it is a matter of common knowledge that the applicant is one of the important political and economic figures of the Republic of Slovenia, particularly in relation to its transition to a democratic State, and that his activities have been of great interest to the general public. In the criminal proceedings for abuse of a position or rights and money laundering, he faced charges involving a considerable sum of money, with serious economic repercussions, involving the flagships of the Slovenian economy. Therefore, the interest that the media showed in the high-profile criminal proceedings concerning the applicant and his co-accused is fully understandable.

110. The Court notes that the applicant was convicted by the first-instance court on 5 September 2016, and he was waiting to be notified of the judgment when he was filmed playing basketball on 26 September 2016. The Minister of Justice gave the television interview the following day (see paragraphs 24 and 26 above). There was therefore a close temporal proximity between the applicant's conviction at first instance, the impugned statement by the Minister and the subsequent adjudication of the case by the Higher Court.

111. In the Court's view, it is understandable that the footage showing the applicant playing basketball, which was extensively reported on all over the media, after he had previously asked for a stay of the execution of his prison sentence on medical grounds, could call for a reaction by the highest State officials. However, this duty to inform the public cannot justify all possible choices of words and has to be carried out with a view to respecting the right of suspects to be presumed innocent (see *Peša*, cited above, § 142).

112. The Court has also acknowledged that, generally speaking, words spoken by high-ranking State officials carry more weight (see, although in a different context, *Mesić v. Croatia*, no. 19362/18, § 104, 5 May 2022). It has accordingly found violations of Article 6 § 2 of the Convention on account of prejudicial statements made by various high-ranking State officials, such as a State president (see *Peša*, cited above, §§ 148-51), a prime minister (ibid.; see also *Gutsanovi*, cited above, §§ 194-98, a minister of justice (see *Konstas*, cited above, §§ 43 and 45) and a speaker of parliament (see *Butkevičius*, cited above, § 53).

113. In the present case the Minister's impugned statement on television, in particular "if this case becomes time-barred ... I will do everything possible to make heads roll", triggered a reaction by the President of the Ljubljana District Court and the Prime Minister. Whereas the applicant's arguments before the Court primarily concerned the Minister's statement and its timing, the Court considers that it is important to also examine separately the other statements made by high-ranking State officials, in particular since the statements in question were made by two of the highest representatives of the executive branch of the State. The Court is of the view that these high-ranking officials were duty-bound to respect the principle of the presumption of

innocence (see *Konstas*, cited above, § 38; see also point 17 of the EU Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence; paragraph 75 above).

114. In this regard, the Court considers that blunt and imprudent language used by a high-ranking State official was likely to influence public opinion as regards the applicant's guilt and to give the impression that it was high time for the domestic courts in question to convict the applicant, with final effect. The Court draws attention, in particular, to the specific political post the Minister occupied at the time. As the Minister of Justice, he embodied *par excellence* the political authority responsible for the organisation and proper functioning of the courts. He should therefore have been particularly careful not to say anything that might give the impression that he wished to influence the outcome of proceedings pending before the Higher Court (*Konstas*, cited above, §§ 42 and 43). This impression could not have been made nuanced by the Minister saying, "not because someone should be convicted or acquitted, but because the time-barring of any court case ..., is the worst possible result" (see paragraph 27 above), since the Court must look beyond the literal meaning of the words and focus on the reality of the situation (see *Lavents*, cited above, § 126).

115. It remains to be ascertained whether the principle of the presumption of innocence under Article 6 § 2 of the Convention could have been prejudiced at that stage of the criminal proceedings (see *Konstas*, cited above, § 34).

116. The Court is particularly mindful of the fact that the impugned statement by the Minister was made on 27 September 2016, shortly after the first-instance court had found the applicant guilty. However, on 18 June 2015 the Supreme Court had ordered the stay of the execution of the applicant's sentence, which remained in force, and the applicant was not in prison. In spite of the conviction at first instance, it is clear that the principle of the presumption of innocence still applied (see *Konstas*, cited above, §§ 36 and 38).

117. The Court further notes that the applicant later challenged the first-instance judgment on several grounds, including on the grounds of substantial violation of the provisions of criminal procedure (see paragraph 32 above). According to the domestic law, the Higher Court had three options when deciding on the merits of the applicant's appeal: (1) to reject it as unfounded; (2) to annul the judgment and return the case to the court of first instance for retrial and decision; or (3) to modify the judgment of the court of first instance (Sections 370, 371 and 388 of the Criminal Procedure Act, cited in paragraph 65 above). In the Court's view, had the Higher Court granted the applicant's appeal and remitted the case for a retrial, as provided for by Article 392 of the Criminal Procedure Act (see paragraph 65 above), it is almost certain that the criminal proceedings would have become time-barred and in consequence discontinued.

118. On 12 April 2017 the Higher Court gave its judgment, dismissing the applicant's appeal and upholding the conviction when the absolute limitation period was nearing its end, as it was to expire in June 2017.

119. The Court notes that the Minister referred to the Ministry of Justice's "extremely little leverage to put pressure on the prosecution or the judiciary" and takes due account of the fact that within the framework of his official duties, the Minister took no action to trigger any proceedings against the judges. However, it is not for the Court to speculate what the Minister would have done had the first-instance judgment been quashed and the case remitted to the first-instance court for retrial.

120. Furthermore, the President of the Ljubljana District Court, who expressed the view of his fellow judges, perceived the Minister's statement as an announcement of sanctions and a determination of the judges' responsibility (see paragraph 30 above). A serious doubt about the impact of the Minister's statement therefore remains, and the Court considers that the words used by him were capable of prejudging the decision-making of the Higher Court.

121. The Court also reiterates that the Prime Minister stated that the government would prevent someone who should "probably be serving a prison sentence" from "playing basketball". His statement, also examined by the Constitutional Court, further enforced the impression given by the Minister's statement. The Court considers that in the circumstances of the case, this statement could have been interpreted as implying confirmation of the applicant's guilt (see, *mutatis mutandis*, *Peša*, cited above, § 143, and *Butkevičius*, cited above, § 51).

122. The Court therefore considers that the cumulative effect of the imprudent statement of the Minister, in particular bearing in mind the potential threat as perceived by the domestic judges and its timing, and the Prime Minister essentially making a declaration of doubt about the applicant's innocence, were capable of prejudging the decision-making of the Higher Court. Given that the officials in question held senior positions, they should have exercised particular caution in their choice of words concerning the pending criminal proceedings. The Court finds that their statements could have encouraged the public to believe that the applicant was guilty before he had been proved guilty with final effect in accordance with the law (see *Peša*, cited above, § 150).

123. The Court accepts the Government's submission that the domestic courts at all levels of jurisdiction addressed the applicant's complaints about the impact of statements by high-ranking politicians on the pending criminal proceedings (see paragraphs 35, 48 and 101 above). Moreover, the Constitutional Court relied on the Court's case-law in respect of the presumption of innocence under Article 6 § 2 of the Convention (see paragraph 54 above). The Court finds, in particular, that the Supreme Court examined the applicant's allegations through the prism of a potential breach

of the lawfulness of decision-making, as construed by Article 420 of the Criminal Procedure Code (see paragraphs 48 and 65 above), determining therefore whether a decision was unlawful for lack of material consistency, which is a different issue. This stance was upheld by the Constitutional Court (see paragraph 58 above).

124. The Court recalls in this connection , that it dismissed in the case of *Peša*, cited above, §§ 132-34, the Croatian Government's plea of non-exhaustion of domestic remedies as premature, holding that the statements made by certain high-ranking State officials and published in newspaper could not serve as grounds for an appeal or for the use of any other remedy in the context of the criminal proceedings against the applicant in that case since, under the relevant domestic laws, such grounds consisted of errors of fact and law as well as procedural errors. The impugned statements did not fall within any of these categories. While the applicant in the present case did use all available remedies at his disposal, in the Court's view, the Slovenian courts' approach to this issue reveals a similar conceptual deficiency. The Court further recalls in this respect that an applicant should be able to have alleged breaches of distinct fair-trial guarantees under Article 6 of the Convention (compare, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 137-38, 1 December 2020, for the right to a "tribunal established by law" and the guarantees of "independence" and "impartiality" under Article 6 § 1 of the Convention) duly and thoroughly examined by domestic courts, the presumption of innocence being above all a procedural safeguard and one of the elements of a fair trial required by Article 6 of the Convention (see *Konstas,* cited above, § 29; see also, for illustrative purposes, *Savvaidou v. Greece* [Committee], no. 58715/15, § 11, 31 January 2023).

125. Accordingly, the Court finds that the applicant's right to be presumed innocent was not respected. There has therefore been a violation of Article 6 § 2 of the Convention.

2. Article 6 § 1 of the Convention

126. The Court notes that the applicant and the Government relied under Article 6 § 1 of the Convention essentially on the same arguments as those advanced in respect of the presumption of innocence under Article 6 § 2 of the Convention (see paragraphs 92-103 above).

127. Having regard to the Court's conclusions regarding Article 6 § 2 of the Convention (see paragraphs 119-125 above), the Court considers that it is not necessary to examine separately whether there has also been a breach of the applicant's right to an "independent and impartial tribunal" under Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

128. The applicant alleged that his conviction for money laundering on the basis of his indirect intent had breached 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

129. The Government argued that this part of the application had to be declared inadmissible as manifestly ill-founded, because the applicant had been convicted of one criminal offence of money laundering which he had committed through two separate criminal acts: (i) accepting money (two transfers to his bank account) derived from criminal activity in a manner which showed that he had had direct intent to conceal the illicit origin of that money, on the basis of a fictitious agreement, and then (ii) disposing of that money through several transfers, agreeing (recklessly) to further conceal its origin.

130. Under Article 252 of the Criminal Code as it had stood at the time, the commission of the relevant criminal offence could take several different forms. It was completed as soon as the perpetrator carried out one of the specified acts. Considering that it was sufficient that the domestic courts had established that the applicant had committed one form of that offence, that is, accepting the money, with direct intent, the Government argued that Article 6 of the Strasbourg Convention and other international instruments in the field of money laundering also referred to that understanding, interpretation and application of several separately defined criminal acts, whereby the criminal offence was deemed to have been committed if one of the specified prohibited acts had been committed. Thus, at least one of the separate criminal acts had been committed with direct intent.

131. The applicant contested the Government's submissions.

132. The Court finds that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

133. The applicant complained that the domestic courts' reasoning that indirect intent (recklessness) also constituted criminal liability for money laundering had violated the principle of legality under Article 7 of the Convention. The domestic courts had departed from the established domestic case-law applicable at the time of the commission of the offence in 2007 and 2008 and at the time of the first trial, according to which the criminal offence of money laundering could only be committed by direct (specific) intent. At the time, the same views had been accepted in legal theory.

134. In the applicant's view, such a development of the case-law had not been foreseeable when he had committed the acts in question or consistent with the substance of the offence; nor had it relied on domestic jurisprudence (see, for instance, paragraphs 69 and 71 above). In sum, the new and exceedingly extensive interpretation of Article 252 of the Criminal Code adopted by the courts in the applicant's case had been neither reasonably foreseeable nor consistent with the essence of the criminal offence (compare *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 87, 3 December 2019). Last but not least, the applicant relied on Article 6 § 1 (a) of the Strasbourg Convention, according to which the criminal offence should be committed intentionally "... *knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property*" (emphasis added). He also contested the Supreme Court's interpretation of the relevant international instruments and the comparative case-law (see paragraphs 41 and 43 above).

135. The applicant submitted that he had ultimately been convicted of a single criminal offence of money laundering. However, he argued that the mere fact that the allegation of money laundering was bipartite did not give grounds for concluding that any direct intent (which had not existed) underlying the first part of the alleged criminal offence would have compensated for the lack of subjective statutory elements underlying the second part of the offence (the additional disposal of the money received). Owing to the legislation on money laundering, he was aware that the receipt and further disposal of large sums of money were monitored by the authorities. Therefore, he had not acted with any intention of concealing the origin of the money in question, and the domestic courts had failed to establish subjective elements proving his intent to conceal the illicit origin of the money. He further argued that it was not apparent from the challenged judgments that the purpose of the agreement had been to conceal the origin of the money, nor was there any reasonable basis for such a conclusion. He emphasised that he had received the money in his sole bank account

136. Furthermore, the purpose of concealing the money was the very statutory element that separated this offence from the criminal offence of concealment under Article 221 of the Criminal Code, as in force at the material time. That offence was punishable by a significantly lower penalty, which is why the criminal offence of money laundering required a perpetrator's direct intent.

137. The applicant further contested the Government's allegation that the change in the case-law had been foreseeable for him, since, at the material time, the criminal offence could also have been committed by negligence. However, negligence in the sense of Article 252 § 5 referred only to the perpetrator's knowledge that the money originated from a criminal offence (the first part of the perpetrator's subjective relationship), but not to the perpetrator's attitude towards the prohibited consequence, that is, the concealment of the origin of the money, where intent had to be proven.

(b) The Government

138. The Government argued that the safeguard of Article 7 was part of the basic set of elements of the rule of law, with a general principle that only the law might define what a criminal offence was and set out the punishment for it. The safeguard was also aimed at prohibiting the extension of the scope of criminalised conduct under the existing criminal law to conduct not previously considered criminal. It prohibited the extensive application of criminal law to the detriment of the accused.

139. However, the Court's case-law also recognised and accepted that no matter how precise and clear a legal provision was, including a provision in a criminal code, there was inevitably an element of judicial discretion in each individual case, which often needed to be clarified and adapted to changes in society. Every law was to some extent open to interpretation, and it was a court's role to clarify such issues. Preventing progressive clarification was not the purpose of the safeguards in Article 7, provided that judicial interpretation remained within the scope of the criminal provision, so the development of the case-law could reasonably have been foreseen.

140. Thus, the provision of Article 252 § 1 of the Criminal Code, which criminalised the intentional commission of the criminal offence of money laundering, was open to interpretation, allowing for a judicial interpretation that both direct intent and recklessness were criminalised. Last but not least, the Constitutional Court had already ruled that, even in the case of recklessness, a perpetrator consciously and willingly aimed to bring about the prohibited consequences (see paragraphs 69-73 above). In addition, the criminal offence of money laundering could be committed through negligence as well (Article 252 § 5 of the Criminal Code).

141. While acknowledging that the case-law concerning indirect intent had changed after the applicant had committed the criminal offence in question and before the retrial, the Government pointed out that the evolution

had occurred in another case, and not in the applicant's case. Such an interpretation of the criminal offence in question had been consistent with both international instruments and comparable German case-law. Taking into account that money laundering could be committed even through negligence, the applicant could reasonably have foreseen that there would be an evolution of the case-law, according to which indirect intent sufficed for a conviction.

142. Lastly, the Government submitted decisions of the Supreme Court to the effect that money laundering under Article 252 of the Criminal Code could be committed recklessly (see paragraphs 69-72 above).

2. The Court's assessment

(a) General principles

143. The general principles developed in the Court's case-law as regards the requirements of legal certainty and foreseeability under Article 7 of the Convention were recently set out in the *Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* ([GC], request no. P16-2021-001, Armenian Court of Cassation, § 67, 26 April 2022).

144. In particular, the Court reiterates that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (see *Del Río Prada*, cited above, § 92, and *Parmak and Bakır*, cited above, § 59). Moreover, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *S.W. v. the United Kingdom*, 22 November 1995, § 36, Series A no. 335-B; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, § 50, ECHR 2001-II; and *Vasiliauskas*, cited above, § 155). The lack of an accessible and reasonably foreseeable judicial interpretation can lead to a finding of a violation of the accused's Article 7 rights (see, in connection with the constituent elements of an offence, *Pessino v. France*, no. 40403/02, §§ 35-36, 10 October 2006, and *Dragotoniu and Militaru-Pidhorni v. Romania*, nos. 77193/01 and 77196/01, §§ 43-44, 24 May 2007; see, as regards penalties, *Alimuçaj v. Albania*, nos. 20134/05, §§ 154-62, 7 February 2012). Were that not the case, the object and the purpose of this provision – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated (see *Del Río Prada*, cited above, § 93).

145. The Court finds that, as opposed to cases concerning a reversal of pre-existing case-law, an interpretation of the scope of the offence which was consistent with the essence of that offence must, as a rule, be considered as foreseeable (see *Jorgic v. Germany*, no. 74613/01, § 109, ECHR 2007-III).

146. When examining if the domestic courts' broad interpretation of the text of the law was reasonably foreseeable for the purposes of Article 7 § 1 of the Convention, the Court has regard to whether the interpretation in question was the resultant development of a perceptible line of case-law or its application in broader circumstances was nevertheless consistent with the essence of the offence (see *Parmak and Bakır,* cited above, § 65). The domestic courts must exercise special diligence to clarify the elements of an offence in terms that make it foreseeable and compatible with its essence (ibid., § 77).

147. Lastly, the scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying out a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see *Vasiliauskas*, cited above, § 157, and *Advisory opinion P16-2019-001*, cited above, § 61). Particular caution in assessing whether specific conduct may entail criminal liability may be required from professional politicians or high-office holders (ibid., § 68).

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

148. The Court firstly notes that, in the retrial proceedings, the applicant was convicted by the first-instance court of the criminal offence of money laundering, committed through two separate legally prohibited acts under Article 252 of the Criminal Code, namely (i) accepting and then (ii) further disposing of considerable amounts of money (EUR 21,680,000) which he had known had been obtained in a predicate criminal offence and whose origin he had also concealed. The first act was committed with direct intent (*dolus directus*) and the second act was committed with indirect intent (*dolus eventualis*) (see paragraphs 17-21 above).

149. The main question under Article 7 of the Convention in the case at hand concerns the element of judicial interpretation in the retrial proceedings: whether the domestic courts' interpretation that indirect intent (*dolus eventualis*) could engage the applicant's criminal liability for money laundering was consistent with the essence of that offence and was

foreseeable within the meaning of the relevant provision of the Criminal Code.

150. Secondly, it is not disputed between the parties that the applicant was convicted under the law in force at the time of his commission of the criminal offence. However, there was an evolution of the domestic case-law with regard to the grading of the intent (*mens rea*) behind the criminal offence at issue in the period between its commission and the pronouncement of the judgment against the applicant which later became final.

151. Thirdly, in his appeal to the Higher Court, his application for the protection of legality before the Supreme Court and his constitutional complaint, the applicant alleged that the development of the domestic case-law had introduced an additional (subjective) statutory element to such criminalisation (that is, that the perpetrator acted with specific intent). The Government made the argument that the applicant's conviction had been foreseeable in accordance with Article 252, given that such a development had been supported by the domestic case-law and special domestic legislation on money laundering, as well as international and comparative material. In that connection, the Court observes that the Government presented the Court with examples of domestic case-law (see paragraphs 69-72 above).

152. In this regard, the Court notes that the domestic courts at all levels carefully examined the development and relied on a line of jurisprudence unrelated to the present case, both as regards the money-laundering offences and other criminal offences (see paragraphs 20, 34, 45, 53 and 69-73 above). In so doing, they referred to Article 28 of the Constitution, which provides for the principle of legality in substantive criminal law in its first paragraph and for the principle of non-retroactivity in its second paragraph (see paragraph 62 above).

153. In particular, relying on the Court's case-law, the Supreme Court and the Constitutional Court replied to the applicant's arguments in full and held that such interpretation was also in line with international and EU material, comparative law and the domestic Acts on money laundering (see paragraphs 41-43 and 51-53). Such a development is also supported by the subsequent EU material (see paragraphs 84-86 above). In this connection, the Court reiterates that it is in the first place for the national authorities, notably the courts, to interpret and apply national law (see *S.W. v. the United Kingdom*, cited above, § 42).

154. As to the existence of a mental link through which an element of liability may be detected in the conduct of the person (see *G.I.E.M. S.R.L. and Others*, cited above, § 242, and *Sud Fondi S.r.l. and Others v. Italy*, no. 75909/01, § 116, 20 January 2009), the Court finds that the reasoning of the domestic courts concerning the applicant's subjective attitude towards both acts of money laundering was exhaustive (see paragraphs 18-20, 34, 44-46 and 53 above). The domestic courts also described the methods and techniques of judicial interpretation, stating that Article 252 of the Criminal

Code concerning a perpetrator's subjective attitude was open to interpretation, allowing for criminal offences that could be committed with either direct or indirect intent. In this regard, the Court observes that it is not its task to substitute itself for the domestic courts as regards the assessment of the facts and their legal classification (see *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 51, ECHR 2015), or to rule on the applicant's individual criminal responsibility (see *Kononov v. Latvia* [GC], no. 36376/04, § 187, ECHR 2010).

155. The Court is therefore satisfied that the impugned interpretation in question in the applicant's case was the resultant development of a perceptible line of case-law compatible with the essence of the offence (compare *S.W. v. the United Kingdom*, cited above, § 43, and *C.R. v. the United Kingdom*, 22 November 1995, § 41, Series A no. 335-C; contrast *Soros v. France*, no. 50425/06, §§ 54-62, 6 October 2011, where the applicant was the first person to be prosecuted in France for the criminal offence of insider trading who had not had any professional or contractual relations with the company in which he had purchased shares and where the Court found no violation of Article 7 of the Convention).

156. The Court further notes that the grading of intent is a general principle of the Criminal Code (see paragraph 63 above). In addition, it 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*, cited above, § 197; and *Ruban v. Ukraine*, no. 8927/11, § 43, 12 July 2016).

157. In sum, the Court considers that the interpretation and application of national law by national courts have not 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).

158. There has accordingly been no violation of Article 7 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

159. 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

160. The applicant claimed 1,137,893 euros (EUR) in respect of pecuniary damage, of which EUR 913,290 related to his loss of earnings from 23 May 2017 (the date of the final judgment) until 21 August 2021 (when his claim for just satisfaction was submitted) after his resignation from his post as president of the management board of the company Istrabenz PLC, and EUR 224,603 for default interest in relation to this period. According to the applicant, there was a direct causal link between the challenged first-instance court judgment and the pecuniary damage calculated.

161. He further claimed EUR 420,000 in respect of non-pecuniary damage, on the basis that the prison sentence which he had served had been unlawful and unjustified and his fair-trial rights had been violated.

162. The applicant specified that in the event of a favourable judgment, he also reserved his right to seek compensation for pecuniary damage before the competent national courts.

163. The Government argued that the applicant's claims were unsubstantiated and excessive. In particular, his claims in respect of loss of earnings and default interest were unrealistic, given that the company had been declared bankrupt shortly after the applicant's departure.

164. Lastly, the Government submitted that if the Court were to find a violation of the applicant's rights, a declaratory finding by the Court should suffice as just satisfaction. The applicant would be able to apply for the reopening of criminal proceedings (see *Benedik v. Slovenia*, no. 62357/14, §§ 137-38, 24 April 2018).

165. The Court does not discern any causal link between the violation of Article 6 § 2 of the Convention found and the pecuniary damage alleged, it therefore rejects this claim.

166. Lastly, having regard to the nature of the violation found in the present case and to its case-law on the matter (see *Pasquini v. San Marino (no. 2)*, no. 23349/17, § 69, 20 October 2020), the Court awards the applicant EUR 10,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

167. The applicant claimed EUR 24,543.96 for the costs and expenses incurred before the domestic courts, on the basis of the Attorney Tariff Act, both in the main criminal proceedings and before the Court, as well as an additional sum of EUR 5,000 for the proceedings for the stay of the execution of his sentence. The applicant specified that he had already deducted EUR 10,411.72 which he had been awarded in the main domestic criminal proceedings.

168. The Government contested the amount claimed. Furthermore, they argued that the applicant was not entitled to the reimbursement of costs related to proceedings conducted before the national authorities or the Court for the purpose of remedying an alleged violation.

169. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

170. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses related to the ancillary proceedings in the amount of EUR 5,000. It further notes that the case involved the perusal of a certain amount of factual and documentary evidence and required a fair degree of research and preparation. Although the Court does not doubt that the fees claimed were actually incurred, it considers it reasonable to award the sum of EUR 6,000 (compare *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 427, ECHR 2012 (extracts)).

FOR THESE REASONS, THE COURT

1. *Declares* unanimously, the application admissible;

2. *Holds*, by 6 votes to 1, that there has been a violation of Article 6 § 2 of the Convention;

3. *Holds*, unanimously, that there is no need to examine separately the complaint under Article 6 § 1 of the Convention;

4. *Holds*, unanimously, that there has been no violation of Article 7 of the Convention;

5. *Holds*, by 6 votes to 1,
   (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 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a

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

6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 September 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Alena Poláčková
Registrar	President

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

(a) Concurring opinion of Judge Peter Paczolay;
(b) Partly dissenting opinion of Ad Hoc Judge Vasilka Sancin.

A.P.L.
R.D.

CONCURRING OPINION OF JUDGE PACZOLAY

I agree with the Chamber's judgment in that it found the application admissible, that there is no need to examine Article 6 § 1 of the Convention separately and also that there has been no violation of Article 7 of the Convention. I also agree with the decision that there has been a violation of Article 6 § 2 of the Convention; however, I have views on the extent of and the reasons for that violation which are partly different from those set out in the judgment.

The present case concerned the procedural aspect of the presumption of innocence, namely the requirements in respect of premature expressions of the applicant's guilt. His claim concerning Article 6 § 2 of the Convention was that his right to an independent and impartial tribunal and to the presumption of innocence had been breached by the Minister's statement during the pending criminal proceedings, which had constituted unacceptable pressure on the Higher Court's judges.

In cases of unfortunate language, it is necessary to look at the context of the proceedings as a whole and their special features in order to determine whether the statements breach Article 6 § 2 (see *Fleischner v. Germany*, no. 61985/12, § 65, 3 October 2019).

The practice of this Court differentiates between three different types of breach of the right to the presumption of innocence by prejudicial statements. First of all and most obviously, a breach of that right will occur if a judicial decision concerning an accused person reflects an opinion of guilt before guilt has been proved according to law.

Secondly, the presumption of innocence may be infringed not only by a judge or court but also by other public authorities, such as police officials (see *Allenet de Ribemont v. France*, 10 February 1995, §§ 37 and 41, Series A no. 308), the President of the Republic (*Peša v. Croatia*, no. 40523/08, § 149, 8 April 2010), the Prime Minister or Minister of the Interior (*Gutsanovi v. Bulgaria*, no. 34529/10, §§ 194-98, ECHR 2013 (extracts)), the President of the Parliament (*Butkevičius v. Lithuania*, no. 48297/99, § 53, ECHR 2002-II (extracts), and by the Minister of Justice (*Konstas v. Greece,* no. 53466/07, §§ 43 and 45, 24 May 2011).

And thirdly, a virulent press campaign can also adversely affect the fairness of a trial by influencing public opinion without respecting the defendant's right to the presumption of innocence.

The present case belongs to the second group, i.e. the applicant claimed that a public official – the Minister of Justice – had made such a premature statement entailing a breach of his rights. Article 6 § 2 covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect or accused is guilty and prejudge the assessment of the facts by the competent judicial authority. It suffices, even in the absence of any formal finding, that there is some reasoning

suggesting that the court or the official regards the person as guilty (see *Karaman v. Germany*, no. 17103/10, § 41, 27 February 2014).

In a previous case, in *Butkevičius v. Lithuania* (cited above, § 50), the Court found that in cases where an applicant was an important political figure at the time of the alleged offence, the highest State officials were required to keep the public informed of that offence and the ensuing criminal proceedings. However, that circumstance could not justify all choices of words by the officials in their interviews with the press. The Court found that the opinions expressed could not amount to declarations by a public official of the applicant's guilt which would encourage the public to believe him or her guilty and prejudge the assessment of the facts by the competent judicial authority.

Consequently, the breach of the right to the presumption of innocence can have two different effects: (i) encouraging the public to believe that someone is guilty or (ii) prejudging the assessment of the facts by the competent judicial authority, thereby impairing the court's objectivity. In my view, the two effects are by no means equivalent, the latter being more serious and hazardous to the democratic operation of the State and the rule of law. I fail to see, however, a clear differentiation between these two impacts in the judgment.

I endorse the conclusion in paragraph 122 of the judgment that the statements made by the Minister of Justice could have encouraged the public to believe that the applicant was guilty before his guilt had been proved with final effect. But the Chamber's judgment also addressed the independence and impartiality of the court, which I believe are not involved in this case, thus I cannot agree with the other conclusion that the impugned statements would have been capable of prejudging the decision-making of the Higher Court.

To decide whether there has been a shortcoming in the impartiality and independence of the court, more aspects should have been examined. Whether a statement of a public official is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made (see *Adolf v. Austria*, 26 March 1982, §§ 36-41, Series A no. 49).

Turning to the facts of the present case, one can see that shortly after the Minister's statement, the President of the Ljubljana District Court, M.P., responded publicly that he was surprised by the statement since there was no hierarchical relationship between the three branches of government and also because the Minister was an excellent lawyer.

The president of the court stated that most of his colleagues in the court had understood the statement as an announcement of sanctions and a determination of responsibility, for which there was no real basis at the material time. Responsibility within the judiciary was determined in prescribed proceedings by certain bodies, such as the Judicial Council, which

appointed and dismissed court presidents. The Minister might have a role in proposing the procedure for potentially dismissing a president, but he was certainly not the person who could decide who would be president of a certain court. Such an arrangement was determined by the National Assembly, and not by the judiciary.

The President of the Ljubljana District Court, reiterating that there was no hierarchical relationship between the three branches of government in Slovenia, requested that the representatives of different branches of power remain within the limits of their competence. He emphasised that he would not allow someone who had no competence in that area to threaten a judge before he or she had even made a mistake.

In my view, the question to consider is whether the impugned statements by the Minister of Justice could undermine the impartiality and independence of the court at all. To take a view on this question, it is not indifferent whether the statement was made by a person outside or inside the judicial organisation. The violation would be rather obvious if the statements had been made by someone within the judicial organisation, especially if that person held a high-ranking court position. However, the statement in question was made by a person outside the judiciary (even though that person was the Minister of Justice).

In a democratic society, due to the separation of powers, a statement made by a politician, an individual outside the judiciary, will not be bound to exert pressure on individual judges or the judicial organisation, regardless of his or her intentions. It would have been necessary to examine the actual impact of such statements.

In the present case, the President of the District Court rejected an external statement that was intended to violate the independence of the court and was otherwise capable of encouraging the public to believe that the applicant was guilty. However, the objectivity of the court was not affected by this incident since the independent work of judges is guaranteed in Slovenia. This is also confirmed by the fact that the decisions of the Higher Court and the Supreme Court do not show that they were made under the influence of the Minister's statement; the decision was not flawed, biased, or influenced in any way.

To conclude, I consider that the majority opinion evaluating the Minister's statement as "capable of prejudging the decision-making of the Higher Court" is exaggerated and not sufficiently justified.

PARTLY DISSENTING OPINION OF AD HOC JUDGE SANCIN

1. Regretfully, I do not share the view of the majority in this case with respect to Article 6 § 2 (presumption of innocence), in relation either to the outcome or to the reasoning of the judgment. I am of the opinion that there has been no violation of Article 6 § 2.

2. Article 6 § 2 enshrines the right of an accused person to be presumed innocent until proved guilty according to law. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence as charged; the burden of proof is on the prosecution, and any doubt should benefit the accused (see *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 77, Series A no. 146). What transpires from these maxims is that the Court is competent to assess that in the domestic judicial decision-making there were no non-rectified preconceived ideas as to the applicant's guilt, that the burden of proof was on the prosecution and that the accused was given the benefit of any doubt. None of these deficiencies were demonstrated in the case at hand.

3. Admittedly, the presumption of innocence may be infringed not only by a judge or a court but also by other public authorities, such as police officials (*Allenet de Ribemont v. France*, 10 February 1995, §§ 37 and 41, Series A no. 308), the President of the Republic (*Peša v. Croatia*, no. 40523/08, § 149, 8 April 2010), the Prime Minister or Minister of the Interior (*Gutsanovi v. Bulgaria*, no. 34529/10, §§ 194-98, ECHR 2013 (extracts)), the Minister of Justice (*Konstas v. Greece*, no. 53466/07, §§ 43 and 45, 24 May 2011), the President of the Parliament (*Butkevičius v. Lithuania*, no. 48297/99, § 53, ECHR 2002-II (extracts), a prosecutor (*Daktaras v. Lithuania*, no. 42095/98, § 42, ECHR 2000-X), and other prosecuting authorities (*Khuzhin and Others v. Russia*, no. 13470/02, § 96, 23 October 2008)[1]. However, Article 6 § 2 prohibits statements by public officials about pending criminal investigations *which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority* (*Ismoilov and Others v. Russia*, no. 2947/06, § 161, 24 April 2008, and *Butkevičius*, cited above, § 53; emphasis added).

4. As a preliminary remark, there are two angles from which the presumption of innocence can be viewed (*Allen v. the United Kingdom* [GC], no. 25424/09, §§ 93-94, ECHR 2013). First, it can be viewed as a procedural guarantee in the context of a criminal trial itself, and, second, it can be viewed as a guarantee to protect individuals who have been acquitted of a criminal

[1] See ECHR-KS, Key Theme - Article 6 (criminal) Presumption of innocence, https://ks.echr.coe.int/documents/d/echr-ks/presumption-of-innocence (last consulted 4 August 2023).

charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence in question. The present case concerns only the first angle, as the applicant was found guilty as charged, and thus the majority's reference to the second aspect in paragraph 104 of the judgment is somewhat curious.

5. Turning now to the main reasons why, in my opinion, there had been no violation of presumption of innocence as a procedural guarantee in the context of the applicant's criminal trial in this case. The above-mentioned well-established and consistent jurisprudential standard for assessment of whether a violation occurred in Article 6 § 2 cases contains two conjunctive (not disjunctive!) elements. The first element requires an assessment of whether a public official's statement(s) as to the applicant's guilt would encourage the public to believe him or her guilty, and the second – indispensable element – requires an assessment of whether such public official's statement(s) actually prejudged the assessment of the facts by the competent judicial authority. The majority correctly refer to ample case-law that unequivocally uses this standard (see, for example, *Allenet de Ribemont*, cited above, § 41; *Turyev v. Russia*, no. 20758/04, § 21, 11 October 2016; *Krivolapov v. Ukraine*, no. 5406/07, § 131, 2 October 2018; *Garycki v. Poland*, no. 14348/02, § 70, 6 February 2007; *Peša*, cited above, § 138; and *Konstas*, cited above, §§ 37 and 43, 24 May 2011). In order to find a violation, the Court therefore needs to determine that the impugned statements have prejudiced the assessment of the facts by the competent judicial authority.

6. In the case at hand, applying this established standard would mean that the Court would need to find that the High Court which dealt with the issues – and consequently also the Supreme Court and the Constitutional Court of the State party – were prejudiced in assessing the facts of the case. There are several reasons why there is no factual support for such a conclusion in the present case.

7. It is important to note that the presumption of innocence applies to the entirety of the proceedings (*Konstas*, cited above, § 36), which is relevant in the case at hand where the controversial statements were made after the applicant had already been found guilty of the offence in question by the first-instance court. The statements were therefore made *ex post facto* in relation to the first-instance court's judgment.

8. First, I wish to note that the majority satisfy themselves with the following finding (paragraph 122):

> "The Court therefore considers that the cumulative effect of the imprudent statement of the Minister, in particular bearing in mind the potential threat as perceived by the domestic judges and its timing, and the Prime Minister essentially making a declaration of doubt about the applicant's innocence, were capable of prejudging the decision-making of the Higher Court. Given that the officials in question held senior positions, they should have exercised particular caution in their choice of words concerning the

> pending criminal proceedings. The Court finds that their statements could have encouraged the public to believe that the applicant was guilty before he had been proved guilty with final effect in accordance with the law (see *Peša*, cited above, § 150)."

They further recognise (paragraph 123) that "the domestic courts at all levels of jurisdiction addressed the applicant's complaints of the impact of statements by high-ranking politicians on the pending criminal proceedings" and that "[m]oreover, the Constitutional Court relied on the Court's case-law in respect of the presumption of innocence under Article 6 § 2 of the Convention (see paragraph 54 above)".

Nevertheless (ibid.):

> "The Court finds, in particular, that the Supreme Court examined the applicant's allegations through the prism of a potential breach of the lawfulness of decision-making, as construed by Article 420 of the Criminal Procedure Code (see paragraphs 48 and 65 above), determining therefore whether a decision was unlawful for lack of material consistency, which is a different issue. This stance was upheld by the Constitutional Court (see paragraph 58 above)."

In the reasoning provided, the majority thus posit that the impugned "statements could have encouraged the public to believe that the applicant was guilty before he had been proved guilty with final effect in accordance with the law", which could potentially – I also disagree that any evidence to this effect was provided – satisfy the first element of the requisite standard. However, for the second – mandatory – element, the majority provide no reasoning that would demonstrate that the impugned statements in fact prejudiced the domestic courts in assessing the facts of the case. The majority even acknowledge that the three instances of domestic courts (the High Court, the Supreme Court and the Constitutional Court) addressed the applicant's allegations, and that the Constitutional Court, after having also considered this Court's relevant jurisprudence, found no basis for the alleged violation of presumption of innocence, taking into account the statements, circumstances and context of the case. In my view, the second and fundamentally important element for finding a violation under Article 6 § 2 thus remains unreasoned by the majority and therefore the preconditions for finding a violation are not met.

9. Moreover, in paragraph 105, the judgment correctly states that a distinction should be made between statements which reflect the opinion that the person concerned is guilty and statements which merely describe "a state of suspicion". The former infringe the presumption of innocence, whereas the latter have been regarded as unobjectionable in various situations examined by the Court (see, *inter alia*, *Lutz v. Germany*, 25 August 1987, § 62, Series A no. 123, and *Leutscher v. the Netherlands*, 26 March 1996, § 31, 1996-II). To recall the facts of the case at hand, it is important to note that in contrast to other referenced case-law of this Court, where the controversial statements had been made at the beginning of the criminal proceedings prior to any judicial pronouncement as to guilt, in the present case, the controversial

statement made on 27 September 2016 on a television programme that the Minister of Justice would do everything in his power to ensure that the applicant's case did not become statute-barred, and that if this happened "heads would roll", was made after the applicant had already been found guilty by the first-instance court. The facts of the present case are thus starkly different from, for example, the case of *Peša v. Croatia* (cited above, § 136), where "the applicant argued that the impugned statements by four high-ranking State officials, published in the days immediately following his arrest, amounted to the pronouncement of his guilt before he had been found guilty by a court of law, in violation of his right to be presumed innocent". The issue in the present case is therefore not whether the impugned statements had any effect on the judicial assessment of facts or the decision finding the applicant guilty, but whether there were potential effects on the appeal courts when they came to reassess, to the extent permissible, the facts of the case.

10. The judgment correctly refers to the jurisprudence (*Adolf v. Austria*, 26 March 1982, §§ 36-41, Series A no. 49, and *Daktaras*, cited above, § 41) emphasising the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence and the context of the particular circumstances in which the impugned statement was made. In this regard, it is important to recall, first, the context of the television interview, which was about allegedly problematic medical opinions and a system which allowed the execution of prison sentences to be postponed, as rectified by the amendments to the Enforcement of Criminal Sanctions Act, leading to significant tightening of the conditions under which, or the situations where, it is possible to avoid serving a sentence for health reasons (paragraphs 26 and 27), and second, what the minister actually stated in the interview:

> "If this case becomes time-barred, let me say here: I have made a commitment many times on your show, and I hope that I have delivered. Here I will do everything possible to make heads roll. As you said, and we are both lawyers, Mr Slak, [I will do this] not because someone should be convicted or acquitted ..., but because the time-barring of any court case, and we have too many of them [time barred cases], is the worst possible result. I believe this will not happen, but if it does ... I think a lot of people will have to answer [for that] and I will be the first to demand answers. ..."

This statement was preceded by an explicit statement of the host, Mr Slak, stating:

> "Make no mistake, none of us, none of us here, is calling upon (*ne apelira tukaj, da mora sodišče obsoditi*) the court to convict Mr Bavčar. It's about everyone having equal power in their hands."

It is therefore, in my opinion, only by employing significantly extensive, and in my view unjustified, inferences, that the majority have interpreted the statements of the Minister, and the statement of the Prime Minister – referring to the time when the applicant's serving of the sentence was postponed for medical reasons (therefore no doubt existed that in the absence of medical

reasons, the applicant "should probably be serving a prison sentence and would not be playing basketball" – relating to respect for the criminal proceedings not the question of guilt) as expressing an opinion on the guilt of the applicant. In any case, even if that were tenable, the mandatory requirement of demonstrating that the impugned statements in fact prejudiced the domestic courts in assessing the facts of the case remains unfulfilled.

11. Additionally, in cases of unfortunate language, it is necessary to look at the context of the proceedings as a whole and their special features in order to determine whether the statements breached Article 6 § 2 (*Fleischner v. Germany*, no. 61985/12, § 65, 3 October 2019). *Mutatis mutandis*, one would expect the Court to look at the context of the events leading to the controversial statements as a whole, including the situation where individuals face high-profile criminal proceedings for economic crimes and they become time-barred in the State party, for which a minister of justice bears certain political responsibility.

The majority instead took into account the Minister's alleged "tone and determination", and made an assumption that "given that the statute of limitations had been running out, the Minister's statement had meant that the trial court's decision convicting him should be upheld", regardless of the fact that the three subsequent judicial benches addressed these allegations, in the light of the Constitutional provision providing for the presumption of innocence and the Court's relevant jurisprudence, and found that the statement of public officials had no bearing on the independent and impartial functioning of the judiciary. Although it might be true that the reasoning of the High and Supreme Courts could have been clearer, the majority nevertheless chose to reinterpret the Slovenian domestic law and in particular decided outright to contradict the findings of the Constitutional Court.

12. The majority's decision in my view marks a departure from the *jurisprudence constante* in Article 6 § 2 cases, without providing good (or for that matter any) reasons or explanations for doing so. Nor do the majority distinguish the facts of this case from those in previous decisions, although this case is factually and legally different from the previous ones, where there were explicit statements made by public officials expressing themselves on the guilt of the applicants; the impugned statements, in contrast to the present case, had been made before any domestic courts pronounced judgment on the guilt of the applicants, so that they could potentially have prejudiced the assessment of facts; and where, in other cases, domestic higher courts did not address and decide on the allegations of the violation of the presumption of innocence in domestic proceedings, unlike in the present case where, even referring to the relevant jurisprudence of the Court, the domestic courts relying on the separation of powers principle decided on the issue. In my view, the majority have not, first, been clear as to what standard of scrutiny the domestic courts should apply in such instances, and second, and as a consequence of the first problem, the examination of the domestic

proceedings has not sufficiently grasped what exactly was done by the domestic courts, which determined that the impugned statements could not and did not have any effect on the functioning of the judiciary in the concrete case. The conclusion of the majority as to a violation of Article 6 § 2 thus departs from the Court's case-law and seems incompatible with the principle of subsidiarity and the fourth-instance doctrine. It appears to introduce a new approach to deciding presumption of innocence cases, where if any suspicion arises that a public official's statements had affected the presumption of innocence, and as in the present case, where such statements could not in fact have influenced a decision of the first trial court as the statements were made after the conviction in the first-instance court, the only potentially acceptable remedy provided by the State party would be that the higher courts annul the judgment and return the case to the court of first instance for retrial and a fresh decision (although the first-instance court could not in the first place have been affected by the *ex post facto* impugned statements), in addition to deciding to modify the judgment (unaffected by the *ex post facto* impugned statements) of the court of first instance in favour of the applicant. The domestic appeal courts would, following such an approach, be effectively deprived of the right to adjudge that there was no violation of Article 6 § 2 domestically and it is even hard to imagine how the first-instance court could, following such an approach, satisfactorily remedy the situation in a case of retrial. This to me seems an unacceptable prospect and a situation that merits very serious further reflection.