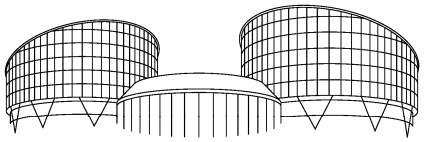

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Applications nos. 49318/07 and 58216/13
Boško MIKULOVIĆ against Serbia
and Predrag VUJISIĆ against Serbia

The European Court of Human Rights (Third Section), sitting on 24 November 2015 as a Chamber composed of:

Luis López Guerra, *President,*
Helena Jäderblom,
George Nicolaou,
Helen Keller,
Johannes Silvis,
Branko Lubarda,
Pere Pastor Vilanova, *judges,*

and Stephen Phillips, *Section Registrar*,

Having regard to the above applications lodged on 31 October 2007 and 9 May 2013 respectively,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicant in the first case, Mr Boško Mikulović, is a Serbian national, who was born in 1955 and is currently serving a prison sentence in Zabela Prison near Požarevac in Serbia. He is represented before the Court by Mr Z. Ilijevski, a lawyer practising in Kragujevac, Serbia.

2. The applicant in the second case, Mr Predrag Vujisić, is a Serbian national, who was born in 1967 and is currently serving a prison sentence in Padinska Skela Prison near Belgrade in Serbia. He is represented before the Court by Mr M. Kovačević, a lawyer practising in Niš, Serbia.

A. The circumstances of the case

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

1. The facts concerning Mr Mikulović

4. On 17 December 1992 the applicant committed a murder.

5. On 20 June 2003 the Kruševac District Court (*Okružni sud u Kruševcu*, hereinafter "the District Court") imposed a forty-year prison sentence for murder on the applicant, under the Criminal Code of Serbia.

6. On 20 November 2003 the Supreme Court of Serbia (*Vrhovni sud Srbije*) quashed that judgment and remitted the case to the first-instance court for retrial.

7. On 21 May 2004 the District Court again sentenced the applicant to forty years' imprisonment for murder.

8. On 4 November 2004 the Supreme Court of Serbia quashed that judgment and remitted the case to the first-instance court for retrial.

9. On 5 August 2005 the District Court again sentenced the applicant to forty years' imprisonment for murder, finding as follows:

> "The court did not accept the defence's argument that, when it comes to the question of the applicable law, the law which was in force at the time of the commission of the crime ought to have been applied, as the Amendments to the Criminal Code of Yugoslavia (*Zakon o izmenama i dopunama Krivičnog zakona Jugoslavije*) had entered into force on 17 November 2001, before the accused was sentenced ... It is clear that with the entry into force of these amendments, the death penalty and a twenty-year prison sentence can no longer be imposed. Furthermore, the Amendments to the Criminal Code of Serbia (*Zakon o izmenama i dopunama Krivičnog zakona Republike Srbije*) ..., which entered into force on 9 March 2002, removed Article 2 of the Code and as a result, a forty-year prison sentence is prescribed for the crimes for which the death penalty had been previously prescribed ... it is therefore clear that upon entry into force of the Amendments to the Criminal Code of Yugoslavia (17 November 2001), the death penalty and the sentence of twenty years' imprisonment were removed from the range of criminal sanctions, and that the Criminal Code of Serbia of 9 March 2002 prescribed a forty-year prison sentence for that particular crime."

10. On 23 November 2005 the Supreme Court of Serbia upheld that judgment.

11. On 19 May 2006 the Supreme Court of Serbia, in another formation, changed the legal classification of the applicant's offence to aggravated murder and upheld the remainder of the judgment.

12. On 28 May 2007 the Supreme Court of Serbia rejected an appeal on points of law lodged by the applicant. The applicant received that decision on 8 August 2007.

2. The facts concerning Mr Vujisić

13. On 5 October 2000 the applicant committed a murder.

14. On 22 August 2005 the Vranje District Court (*Okružni sud u Vranju*) sentenced the applicant to forty years' imprisonment for murder, under the Criminal Code of Serbia.

15. On 22 December 2005 the Supreme Court of Serbia quashed that judgment and remitted the case to the first-instance court for retrial.

16. On 13 November 2006 the Vranje District Court again sentenced the applicant to forty years' imprisonment for murder.

17. On 25 September 2007 the Supreme Court of Serbia upheld that judgment.

18. On 5 September 2008 the Supreme Court of Serbia, acting as a third-instance court, upheld the judgment. In its reasoning on the question of the applicable law the Supreme Court found that the lower courts had correctly applied the more lenient law by sentencing the applicant to a forty-year prison sentence. The Supreme Court stated:

> "... the Criminal Code of Serbia prescribed the death penalty for the crime in question, and the death penalty, contrary to the arguments in the appeal, had not been abolished at any stage during which said law had been in force ... [T]herefore, the [new] Criminal Code should be applied with regard to the crime in question as the more lenient law, which it indeed is, as a prison sentence from thirty to forty years is more lenient than the death penalty ..."

19. On 25 March 2010 the Supreme Court of Cassation rejected an appeal on points of law lodged by the applicant. The Supreme Court repeated that the death penalty remained in the Criminal Code of Serbia during the period between 9 November 2001 and 1 March 2002, when it had been replaced by a forty-year prison sentence. In its reasoning the said Court stated:

> "... the chronology of the changes of the criminal law points to an evident continuity in replacing the death penalty with the prison sentences ..."

20. Having been served with the Supreme Court of Cassation's judgment the applicant lodged a constitutional appeal with the Constitutional Court of Serbia. Relying on Article 7 of the Convention he complained that the most lenient criminal law provision had not been applied. The applicant maintained that during the period between 9 November 2001 and 1 March 2002 the courts could only have sentenced him to a fifteen or twenty years' imprisonment and that, therefore, the law in force during that time had been the most lenient.

21. On 7 February 2013 the Constitutional Court of Serbia rejected the applicant's constitutional appeal. In its reasoning, the Constitutional Court referred to the detailed reasoning in its decision concerning the same issue in another case involving different appellants (Už. 969/09, see paragraph 33 below).

B. Relevant domestic law and practice

22. At the time the applicants committed the crimes in question, the general provisions of the Federal Criminal Code defined which penalties were prescribed on both republic and federal levels. The death penalty was prescribed as one of possible penalties for murder in the Criminal Code of Serbia.

1. The Constitution of the Federal Republic of Yugoslavia

23. The Constitution of the Federal Republic of Yugoslavia (Official Gazette of the Federal Republic of Yugoslavia no. 1/92) was in force from 27 April 1992 until 4 February 2003.

24. The relevant provision of the Constitution reads as follows:

"Article 21.

Human life is inviolable.

The death penalty cannot be imposed for crimes proscribed in the federal criminal code. "

2. The Constitution of the Republic of Serbia

25. The Constitution of the Republic of Serbia (Official Gazette of the Republic of Serbia no. 1/90) was in force from 28 September 1990 until 8 November 2006.

26. The relevant provision of the Constitution reads as follows:

"Article 14.

Human life is inviolable.

The death penalty can exceptionally be prescribed and imposed only for the most heinous forms of severe criminal acts. "

3. Criminal Code of the Socialist Federal Republic of Yugoslavia

27. The Criminal Code of the Socialist Federal Republic of Yugoslavia 1976 (Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 and 54/90, in the Official Gazette of the Federal Republic of Yugoslavia nos. 35/92, 16/93, 31/93, 37/93, 24/94 and 61/01, and in Official Gazette of the Republic of Serbia no. 39/03) was in force until 1 January 2006.

28. The relevant provisions of the Code provided as follows:

"Article 3. Lawfulness in the determination of criminal acts and imposition of criminal sanctions

No punishment or other criminal sanction may be imposed on anyone for an act which, prior to being committed, was not defined by law as a criminal act, and for which a punishment has not been prescribed by statute.

Article 4. Mandatory application of a less severe criminal law

1. The law that was in force at the time a criminal act was committed shall be applied to the person who has committed the criminal act.

2. If the law has been altered one or more times after the criminal act was committed, the less severe law in relation to the offender shall be applied.

...

Article 7. Effectiveness of the General Part

Provisions of the General Part of this Code are applicable to all criminal acts defined in the laws of the federation, republics and autonomous provinces.

...

Article 34. Types of punishment

The following punishments may be imposed on the perpetrators of criminal acts:

1. capital punishment;

2. imprisonment;

3. a fine;

4. confiscation of property.

...

Article 38. Imprisonment

(1) The term of imprisonment may not be shorter than fifteen days nor longer than fifteen years.

(2) The court may impose imprisonment for a term of twenty years for criminal acts eligible for the death penalty."

29. On 17 November 2001 Article 34 of this Criminal Code was amended and the death penalty was deleted from the list of available penalties. It was amended to read:

"Article 38. Imprisonment

(1) The term of imprisonment may not be shorter than thirteen days nor longer than fifteen years.

(2) A prison sentence of forty years may be prescribed for the most serious criminal acts or for the most heinous forms of severe criminal acts. This sentence may only be prescribed as an option alongside a prison sentence of fifteen years [it cannot be a stand-alone penalty] and may not be imposed on a person who was under the age of twenty-one at the time of commitment of the criminal act concerned."

4. Criminal Code of the Socialist Republic of Serbia

30. The Criminal Code of the Socialist Republic of Serbia 1977 (Official Gazette of the Socialist Republic of Serbia nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89, and Official Gazette of the Republic of

Serbia nos. 16/90, 21/90, 26/91, 75/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02, 80/02, 39/03 and 67/03) was in force until 31 December 2005.

31. The relevant provisions of the Code provided as follows:

> **"Article 47. Murder**
>
> Whoever causes the death of another shall be punished with imprisonment for a minimum of five years.
>
> Imprisonment for a minimum of ten years or the death penalty [is prescribed for] whoever:
>
> 1) causes the death of another in a cruel or heinous manner;
>
> 2) causes the death of another by callous violent behaviour;
>
> 3) causes the death of another and with premeditation endangers the life of a third person;
>
> 4) causes the death of another for gain, to commit or conceal another offence, for callous revenge or other base motives."

32. On 9 March 2002 this Criminal Code was amended and the death penalty was replaced with a forty-year prison sentence.

5. The Constitutional Court's case-law

33. On 24 March 2010, in a similar case to that of the applicants, the Constitutional Court rejected a constitutional appeal of D.N. (Už. 969/09). In its decision, the Constitutional Court, *inter alia*, stated:

> "Since the death penalty was prescribed in the Criminal Code of the Republic of Serbia continuously until 1 March 2002, it also was in force at the time of the commission of the crime in question, and was also prescribed for the crime the applicant had been accused and convicted of, the Constitutional Court found that the [new] Criminal Code was without doubt more lenient for the appellant, as it did not prescribe the death penalty as the heaviest penalty in the system of criminal sanctions. According to the Constitutional Court's assessment, any prison sentence is more lenient than the death penalty, because life is of fundamental value to each human being, and it is subject to special protection in both the constitutional and criminal legal spheres. For all the above mentioned reasons, the Constitutional Court finds the rights of the appellant were not violated as guaranteed by the provisions of Article 34 § 2 of the Constitution."

6. The Supreme Court of Cassation's case-law

34. On 25 January 2008 the Supreme Court of Cassation of Serbia (Kzp Ok 3/07) took the view that the death penalty had ceased to be applicable in the republic upon the entry into force of the Amendments to the Criminal Code of Serbia of 9 March 2002, and that this penalty was abolished at that time and replaced with a forty-year prison sentence. The court held:

> "... in the Criminal Code of Serbia, the death penalty continued to be in force during the period between 9 November 2001 and 1 March 2002 when, by the mentioned amendments, it was definitively abolished and replaced with a forty year prison sentence."

COMPLAINT

35. The applicants complained under Article 7 of the Convention that they had been given a heavier sentence than the one prescribed by law which, of all the provisions in force during the period between the commission of the offence and delivery of the final judgment, should have been the one most favourable to them (*lex mitior*).

THE LAW

A. Joinder of the applications

36. The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

B. Complaint under Article 7 of the Convention

37. The applicants complained under Article 7 of the Convention that the domestic courts imposed a heavier sentence than the one prescribed by the law which was the most favourable to them. Article 7 of the Convention provides 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."

1. The parties' submissions

(a) The Government

38. The Government considered that the application was manifestly ill-founded for a number of reasons. They submitted that the death penalty had been prescribed in the Criminal Code of Serbia continuously until the

introduction of the amendments of 9 March 2002. They argued that the domestic case-law was also consistent in respect of the view that the death penalty remained a possible punishment until the entry into force of the amendments of 9 March 2002 and submitted the relevant case-law of the Supreme Court of Cassation of Serbia and the Constitutional Court of Serbia (see paragraphs 33 and 34 above).

(b) The applicants

39. The applicants disputed the Government's argument that the death penalty had remained in the criminal legislation until it had been replaced by a forty-year prison sentence. In their view, once the death penalty had been removed from the list of current penalties in the Federal Criminal Code it could no longer have been imposed by the courts in spite of the fact that it had continued to be prescribed in the Serbian Criminal Code for a further four months. The applicants asserted that the applicable criminal law during those four months had been the most lenient law which thus ought to have been applied by the courts.

2. The Court's assessment

40. The Court reiterates that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection. This is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, so as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010; *Del Río Prada v. Spain* [GC], no. 42750/09, § 77, ECHR 2013 and *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 153, 20 October 2015). The Court has further held that Article 7 § 1 guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, implicitly, the principle of retrospectiveness of the more lenient criminal law; in other words, where there are differences between the criminal law in force at the time of the commission of an offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 109, 17 September 2009).

41. Turning to the present case, it follows from the relevant domestic law and practice set out above that jurisdiction in criminal cases in Yugoslavia was divided between the Federal Republic of Yugoslavia and the Republic of Serbia and Republic of Montenegro. While the Federal Constitution prohibited the imposing of the death penalty for crimes proscribed by the Federal Criminal Code, both the Federal Constitution and the Serbian Constitution allowed the imposing of the death penalty for the

most serious crimes in the Serbian Criminal Code (see paragraphs 23-26 above). The Federal Criminal Code contained general provisions that defined, *inter alia*, which penalties could be prescribed at both the federal and republic levels while the criminal codes of Serbia and Montenegro did not contain such provisions but consistently set out a list of crimes and the punishments for them.

42. Accordingly, in order to abolish the death penalty in the Serbian Criminal Code and replace it with a forty-year prison sentence, a corresponding change was necessary in both Federal and Serbian codes. Given the division of jurisdiction in criminal matters, those amendments had to be passed in two different parliaments (the Parliament of the Federal Republic of Yugoslavia and the Parliament of Serbia). This necessitated a two-stage procedure. The time lag between those two legislative actions is a natural trait of a federal system and it cannot be said that during that time new legislation which was more lenient for the applicants came into being. The removal of the death penalty from the general provisions of the Federal Code and the simultaneous introduction of a forty-year prison sentence in the same Code was therefore only a first step in this process, which was completed when the death penalty was also removed from the Serbian Criminal Code some four months later.

43. Having regard to the above, the Court cannot but agree with the assessment of the Supreme Court of Cassation and the reaffirmation of that assessment by the Constitutional Court by which the death penalty was confirmed to have remained in the range of sanctions in the Serbian legal system during the period between the amendments to the Federal Criminal Code and the Serbian Criminal Code (see, *mutatis mutandis, Karmo v. Bulgaria* (dec.), no. 76965/01, 9 February 2006, where the Court declared a similar complaint inadmissible).

44. The Court indeed recalls in this respect that it does not question the interpretation and application of national law by national courts unless there has been a flagrant non-observance or arbitrariness in the application of that law (see, *inter alia*, *Huhtamäki v. Finland*, no. 54468/09, § 52, 6 March 2012). The Court is unable to find such non-observance or arbitrariness in the present case.

45. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 17 December 2015.

Stephen Phillips
Registrar

Luis López Guerra
President