



Driver prosecuted twice for the same traffic offence

In today's **Grand Chamber** judgment¹ in the case of [Mihalache v. Romania](#) (application no. 54012/10) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 4 of Protocol No. 7 (right not to be tried or punished twice) to the European Convention on Human Rights.

In this case, Mr Mihalache submitted that he had been prosecuted twice for having refused to undergo a blood test in the framework of a police control with a view to determining his alcohol blood level.

The Court found that Mr Mihalache had been prosecuted twice for the same offence, in breach of the *ne bis in idem* principle, and that the reopening of the proceedings had not been justified. Mr Mihalache had been the subject of an initial set of criminal proceedings, during which the public prosecutor's office had imposed an administrative fine on him, which became final on expiry of the time-limit set out in Article 249¹ of the Code of Criminal Procedure (CCP). Subsequently, the higher-ranking prosecutor's office set aside the lower prosecutor's decision and committed Mr Mihalache for trial. He was sentenced to one year's imprisonment, suspended.

Principal facts

The applicant, Erik Aurelian Mihalache, is a Romanian national who was born in 1975 and lives in Tulnici (Romania).

In May 2008 Mr Mihalache was stopped in his car by the police as a preventive control measure. He underwent a breathalyser test, which proved positive. The police officers then asked him to accompany them to a hospital for a blood test, but Mr Mihalache refused.

In July 2008 the public prosecutor's office instituted criminal proceedings against him for refusing to undergo biological tests to determine his blood alcohol level. On 7 August 2008 the public prosecutor's office terminated the proceedings on the grounds that the acts committed were not sufficiently serious to constitute an offence. However, it ordered Mr Mihalache to pay an administrative fine equivalent to around 250 euros. No appeal was lodged against that order, and Mr Mihalache paid the fine, together with court fees, on 15 August 2008.

In January 2009 the higher-ranking public prosecutor's office decided, *ex officio*, to set aside order of 7 August 2008 on the grounds that an administrative penalty had not been appropriate in the light of the degree of general and specific danger to society posed by the facts of the case. Subsequently, the case was referred back to the prosecutor's office with a view to continuing the criminal investigation.

In March 2009 Mr Mihalache was committed for trial. In November 2009 he was sentenced to a suspended term of one year's imprisonment for refusing to undergo a blood test. He appealed against that decision, but the Galati Court of Appeal dismissed his appeal by final judgment delivered on 14 June 2010.

1. Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In March 2013 the Chief Prosecutor invited the financial authorities to refund the fine paid by Mr Mihalache pursuant to the order of 7 August 2008. In October 2013 a police officer went to the applicant's home to inform him of the procedure for reimbursing the fine. According to the documents on file, the applicant never requested the reimbursement of the sums paid.

Complaints, procedure and composition of the Court

Relying on Article 4 of Protocol No. 7 (right not to be tried or punished twice), the applicant complained that he had been tried and convicted twice for the same offence. He also submitted that the reopening of the proceedings against him had been inconsistent with the criteria set out in that provision

The application was lodged with the European Court of Human Rights on 10 September 2010. On 27 March 2018 the Chamber relinquished jurisdiction in favour of the Grand Chamber.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Guido Raimondi (Italy), *President*,
Angelika Nußberger (Germany),
Linos-Alexandre Sicilianos (Greece),
Robert Spano (Iceland),
Vincent A. De Gaetano (Malta),
Ganna Yudkivska (Ukraine),
Paulo Pinto de Albuquerque (Portugal),
Helen Keller (Switzerland),
Egidijus Kūris (Lithuania),
Iulia Antoanella Motoc (Romania),
Branko Lubarda (Serbia),
Stéphanie Mourou-Vikström (Monaco),
Georges Ravarani (Luxembourg),
Georgios A. Serghides (Cyprus),
Marko Bošnjak (Slovenia),
Péter Paczolay (Hungary),
María Elósegui (Spain),

and also Søren Prebensen, *Deputy Grand Chamber Registrar*.

Decision of the Court

[Article 4 of Protocol No. 7 \(right not to be tried or punished twice/"ne bis in idem"\)](#)

The Court pointed out that the "*ne bis in idem*" principle comprised three elements.

Firstly, both sets of proceedings had to be criminal in nature. In the instant case the Court concluded that both sets of proceedings – that resulting in the order of 7 August 2008 (administrative fine) and that resulting in the 14 June 2010 judgment of the Galați Court of Appeal (suspended prison sentence) – had been criminal in nature.

Secondly, both sets of proceedings had to concern the same facts. The Court noted that in both sets of proceedings Mr Mihalache had been prosecuted and punished for refusing to undergo a blood alcohol test during the night from 2 to 3 May 2008, following a police road traffic check. Both decisions therefore concerned the same facts and the same charges.

Thirdly, there had to have been duplication of proceedings. The Court pointed out that Article 4 of Protocol No. 7 was geared to prohibiting duplication of finally closed criminal proceedings. The Court

observed that the prosecution order of 7 August 2008 constituted a conviction (a deterrent and punitive sanction) which had become final, within the autonomous meaning of the Convention, on the expiry of the 20-day period laid down in Article 249¹ of the Code of Criminal Procedure (CCP) in force at the material time. In that connection, the Court pointed out that only the option set out in Article 249¹ of the CCP as in force at the material time had constituted an “ordinary” remedy to determine whether the 7 August 2008 order had become final, and not the remedy available to the higher-ranking public prosecutor (Articles 270 and 273 CCP) in order to set aside *ex officio* the decision given by the lower prosecutor’s office. Owing to the absence of a time-limit, Romanian law had failed to regulate with sufficient clarity the manner in which that remedy should be used, thus causing Mr Mihalache genuine uncertainty as to his legal situation.

Given that the 7 August 2008 order had constituted a “final decision” within the autonomous meaning of the Convention, its annulment by the higher-ranking prosecutor and the reopening of the proceedings constituted duplication of the latter. Such duplication of proceedings could be compatible with Article 4 of Protocol No. 7 if the second set of proceedings constituted a reopening in accordance with the conditions set out in Article 4 § 2 of Protocol No. 7. In the present case, the Court noted that the higher-ranking prosecutor had given his decision on the basis of the same case file and that no new fact had been presented or adduced in the file. The reopening of the proceedings had therefore not been justified by the emergence of new or newly-discovered facts or by any fundamental defect in the previous proceedings. The Court therefore considered that the reasons put forward by the higher-ranking prosecutor’s office to justify the reopening of the proceedings were inconsistent with the strict criteria laid down in Article 4 of Protocol No. 7, and that the reopening of the proceedings had not been justified.

Consequently, the Court found that Mr Mihalache had been convicted on the basis of the 7 August 2008 order, which had become final at the time of commencement of the new proceedings. Given that none of the situations permitting the combination or reopening of proceedings had been observed in the present case, the Court concluded that Mr Mihalache had been tried twice for the same offence, in breach of the *ne bis in idem* principle. There had accordingly been a violation of Article 4 of Protocol No. 7 to the Convention.

Just satisfaction (Article 41)

The Court held that Romania was to pay the applicant 5,000 euros (EUR) in respect of non-pecuniary damage and EUR 470 in respect of costs and expenses.

Separate opinions

Judges Raimondi, Nussberger, Sicilianos, Spano, Yudkivska, Motoc and Ravarani expressed a joint concurring opinion. Judges Pinto de Albuquerque and Serghides each expressed a concurring opinion. Judge Bošnjak expressed a concurring opinion, joined by Judge Serghides. These opinions are annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.