SECOND SECTION

CASE OF NIKITIN v. RUSSIA

(Application no. 50178/99)

JUDGMENT

STRASBOURG

20 July 2004

FINAL

15/12/2004

In the case of Nikitin v. Russia,

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

Mr J.-P. Costa, *President*,
Mr A.B. Baka,
Mr L. Loucaides,
Mr K. Jungwiert,
Mr V. Butkevych,
Mr M. Ugrekhelidze,
Mr A. Kovler, *judges*,
and Mrs S. Dollé, *Section Registrar*,

Having deliberated in private on 13 November 2003 and 29 June 2004,

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

PROCEDURE

1. The case originated in an application (no. 50178/99) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Aleksandr Konstantinovich Nikitin ("the applicant"), on 18 July 1999.

2. The Russian Government ("the Government") were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged that the supervisory review proceedings conducted after his final acquittal constituted a violation of his right to a fair trial and a violation of his right not to be tried again in criminal proceedings for an offence of which he had been finally acquitted.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 13 November 2003, the Chamber declared the application partly admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1952 and lives in St Petersburg.

8. In February 1995 the applicant, a former naval officer, joined an environmental project conducted by Bellona, a Norwegian non-governmental organisation, to work on a report entitled "The Russian Northern Fleet – Sources of Radioactive Contamination" ("the report").

9. On 5 October 1995 Bellona's Murmansk office was searched by the Federal Security Service (*ФСБ РФ* – "the FSB"). The FSB seized the draft report, interrogated the applicant and instituted criminal proceedings on suspicion of treason, since the draft report allegedly contained information, classified as officially secret, concerning accidents on Russian nuclear submarines.

10. On 20 October 1998 the applicant's trial on a charge of treason through espionage and a charge of aggravated disclosure of an official secret began before St Petersburg City Court. After four days of hearings, the case was remitted for further investigation on 29 October 1998. The court considered that the indictment was vague, which impaired the applicant's defence and prevented the court from carrying out an examination on the merits. It also found that the investigation file left open the question whether the report contained any official secrets as such, and that it did not contain a "proper and complete" expert evaluation of possible public sources of the information in question or of the estimated damage. The court ordered the prosecution to conduct an additional expert examination into the possibility that the applicant had obtained the disputed information from public sources and to take other steps to complete the investigation.

11. On 3 November 1998 the prosecution appealed against this decision, claiming that the case was clear enough for determination by a court and that there was no need for further investigation.

12. On 4 February 1999 the order for further investigation was upheld by the Supreme Court of the Russian Federation ("the Supreme Court").

13. On 23 November 1999 the St Petersburg City Court resumed the applicant's trial on the same charges.

14. On 29 December 1999 the St Petersburg City Court acquitted the applicant on all the charges, having found that the applicant had been prosecuted on the basis of secret and retroactive decrees.

15. The prosecution appealed.

16. On 17 April 2000 the Supreme Court upheld the acquittal. The court found that the charges were based on secret and retroactive decrees which were incompatible with the Constitution. The acquittal thus became final.

17. On 30 May 2000 the Procurator General filed a request with the Presidium of the Supreme Court to review the case in supervisory proceedings (*протест на приговор, вступивший в законную силу*). He challenged the judgment on the grounds of wrongful application of the law governing official secrets, the vagueness of the indictment – which had led to procedural prejudice against the applicant – and other defects in the criminal investigation, in particular the lack of an expert report as to whether the disputed information had originated from public sources. He called for a reassessment of the applicable law and of the facts and evidence in the case file, and for the case's remittal for fresh investigation.

18. On 13 September 2000 the Presidium of the Supreme Court dismissed the Procurator General's request and upheld the acquittal. While it acknowledged that the investigation had been tainted with flaws and shortcomings, it found that the prosecution could not rely on them in calling for a remittal, as it had been entirely within the prosecution's control to redress them at an earlier stage in the proceedings. Moreover, the Presidium pointed out that the investigation authority had earlier been required to remedy exactly the same defects as those relied on in the request to quash the acquittal. It observed that on 29 October 1998 the court had expressly instructed the investigating authority, *inter alia*, to conduct a study of information in the public domain in order to ascertain whether the applicant could have obtained the disputed data from public sources.

19. On 17 July 2002 the Constitutional Court of the Russian Federation examined the applicant's challenge to the laws which allowed supervisory review of a final acquittal.

20. In its ruling of the same date, the Constitutional Court declared incompatible with the Constitution the legislative provisions permitting the re-examination and quashing of an acquittal on the grounds of a prejudicial or incomplete investigation or court hearing or on the ground of inaccurate assessment of the facts of the case, save in cases where new evidence had emerged or there had been a fundamental defect in the previous proceedings.

21. The Constitutional Court's judgment stated, *inter alia*:

"... Article 4 of Protocol No. 7 to the Convention provides that the right not to be tried or punished twice does not prevent the reopening of the case in accordance with the law and criminal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

It follows ... that, subject to the above requirements, the national legislation may provide for a system by which a case may be reopened and a final judgment be quashed, and may specify where, depending on the case, a procedure for reopening on the grounds of new or newly discovered evidence or a supervisory review should apply.

Any exemption from the general prohibition on resuming proceedings to the detriment of the acquitted or convicted person may be justified only in exceptional circumstances, where a failure to rectify a miscarriage of justice would undermine the very essence of justice and the purpose of a verdict as a judicial act and would upset the required balance between the constitutionally protected values involved, including the rights and legitimate interests of convicted persons and those of the victims of crime. In the absence of any possibility of reversing a final judgment resulting from proceedings tainted by a fundamental defect that was crucial for the outcome of the case, an erroneous judgment of this type would continue to have effect notwithstanding the principle of general fairness ... and the principle of judicial protection of fundamental rights and freedoms.

3.2. Under the [Constitution and the Convention] any possibility provided for at national level of quashing a final judgment and reviewing a criminal case must be subject to strict conditions and criteria clearly defining the grounds for such review, given that the judgment concerned is already binding and determinative of the individual's guilt and sentence.

However, the grounds for review of final judgments provided for in the Code of Criminal Procedure [of 1960] go beyond these limits. When establishing a procedure for the review of final convictions and, especially, acquittals ... definite grounds should have been formulated to ensure that such a procedure would be implemented with sufficient distinctness, precision and clarity to exclude its arbitrary application by the courts. In failing to do so, [the legislature] misapplied the criteria which derive from [the Constitution] and Article 4 of Protocol No. 7 to the Convention for the quashing of final judgments in criminal cases ...

Furthermore, [the power] of a supervisory instance to remit a case for fresh investigation where it concludes, through its own assessment of evidence, that the previous investigation has been prejudicial or incomplete, is incompatible with the constitutional principles of criminal procedure and with the Constitutional Court's jurisprudence, in that it gives the prosecution an unfair advantage by providing it with additional opportunities to establish guilt even after the relevant judgment has become operative. It follows that a court of supervisory instance cannot quash a final acquittal only on the ground of its being unfounded ... Accordingly, the prosecutor is not entitled to request the supervisory review of such a judgment on the ground that it is unfounded ..."

II. RELEVANT DOMESTIC LAW AND OTHER MATERIALS

A. Applicable legislation

22. Section VI, Chapter 30, of the 1960 Code of Criminal Procedure (*Уголовно-процессуальный кодекс РСФСР*) in force at the material time allowed certain officials to challenge a judgment which had become effective and to have the case reviewed on points of law and procedure. The supervisory review procedure (Articles 371-83 of the Code) is distinct from proceedings in which a case is reviewed in the light of newly established facts (Articles 384-90). However, similar rules apply to both procedures (Article 388).

1. Date on which a judgment becomes effective

23. Under the terms of Article 356 of the Code of Criminal Procedure, a judgment takes effect and is enforceable from the date on which the appeal court renders its decision or, if no appeal has been lodged, once the time-limit for appeal has expired.

2. Grounds for supervisory review and reopening of a case

Article 379
Grounds for setting aside judgments which have become effective

"The grounds for quashing or varying a judgment [on supervisory review] are the same as [those for setting aside judgments (which have not taken effect) on appeal] ..."

Article 342
Grounds for quashing or varying judgments [on appeal]

"The grounds for quashing or varying a judgment on appeal are as follows:

(i) prejudicial or incomplete investigation or pre-trial or court examination;

(ii) inconsistency between the facts of the case and the conclusions reached by the court;

(iii) a grave violation of procedural law;

(iv) misapplication of [substantive] law;

(v) discrepancy between the sentence and the seriousness of the offence or the convicted person's personality."

Article 384
Grounds for reopening cases due to new circumstances

"Judgments, decisions and rulings which have become effective may be set aside on account of newly discovered circumstances.

The grounds for reopening a criminal case are as follows:

(i) with regard to a judgment which has become effective, the establishment of false witness testimony or false expert opinion; forgery of evidence, investigation records, court records or other documents; or an indisputably erroneous translation which has entailed the pronouncement of an unfounded or unlawful judgment;

(ii) with regard to a judgment which has become effective, the establishment of criminal abuse of their powers by judges when examining the case;

(iii) with regard to a judgment which has become effective, the establishment of criminal abuse of their powers by investigation officers dealing with the case, where this has entailed the pronouncement of an unfounded or unlawful judgment or a decision to terminate the prosecution;

(iv) other circumstances, unknown to the court at the time when the case was examined, which, alone or combined with other previously established facts, prove a convicted person's innocence or the commission by him or her of an offence which is more or less serious than that of which he or she was convicted, or which prove the guilt of a person who was acquitted or whose prosecution was terminated."

3. Authorised officials

24. Article 371 of the Code of Criminal Procedure provided that the power to lodge a request for a supervisory review could be exercised by the Procurator General, the President of the Supreme Court of the Russian Federation or their respective deputies in relation to any judgment other than those of the Presidium of the Supreme Court, and by the presidents of the regional courts in respect of any judgment of a regional or subordinate court. A party to criminal or civil proceedings could solicit the intervention of those officials for a review.

4. Limitation period

25. Article 373 of the Code of Criminal Procedure set a limitation period of one year during which a request calling for the supervisory review of an acquittal could be brought by an authorised official. The period ran from the date on which the acquittal took effect.

5. The effect of a supervisory review on acquittals

26. Under Articles 374, 378 and 380 of the Code of Criminal Procedure, a request for supervisory review was to be considered by the judicial board (the Presidium) of the competent court. The court could examine the case on the merits and was not bound by the scope and grounds of the request for supervisory review.

27. The Presidium could dismiss or grant the request. If it dismissed the request, the earlier judgment remained in force. If it granted the request, the Presidium could decide to quash the judgment and terminate the criminal proceedings, to remit the case for a new investigation, to order a fresh court examination at any instance, to uphold a first-instance judgment reversed on appeal, or to vary or uphold any of the earlier judgments.

28. Article 380 §§ 2 and 3 provided that the Presidium could, in the same proceedings, reduce a sentence or amend the legal classification of a conviction or sentence to the defendant's advantage. If it found a sentence or legal classification to be too lenient, it was obliged to remit the case for a new examination.

29. On 1 July 2002 a new Code of Criminal Procedure came into force. Under Article 405, the application of supervisory review is limited to those cases where it does not involve changes that would be detrimental to the convicted person. Acquittals and decisions to discontinue the proceedings may not be the subject of a supervisory review.

B. Relevant materials

30. On 19 January 2000, at the 694th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe adopted Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights. The recommendation encouraged the Contracting Parties to examine their national legal systems with a view to ensuring that there existed adequate possibilities to re-examine the case, including the reopening of proceedings, in instances where the Court had found a violation of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7 TO THE CONVENTION

31. The applicant contended that the supervisory review proceedings which took place after his final acquittal constituted a violation of his right not to be tried again in criminal proceedings for an offence of which he had been finally acquitted. He alleged that, at the least, he was liable to be tried again on the same charges, since the very fact of the Procurator General's lodging a request for supervisory review created the potential for a new prosecution. He relied on Article 4 of Protocol No. 7 to the Convention, the relevant parts of which provide:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

..."

A. The parties' submissions

32. The Government considered that, for the purposes of Article 4 of Protocol No. 7, the supervisory review proceedings did not constitute a second trial. They contended that the domestic law at the material time did not permit the supervisory instance to convict the applicant, but only to quash the previous judgments and to remit the case for fresh examination in adversarial proceedings. In support of their position, they referred to the Constitutional Court's ruling of 17 July 2002 in the applicant's case. The Government submitted that the applicant's acquittal could not be said to have been invalidated or suspended at any time, given that the Procurator General's request was dismissed by the Presidium.

33. The Government further pointed out that, following the recent change in the legislation, final acquittals could no longer be challenged by way of supervisory review, and other judgments could not be challenged by way of supervisory review if they would be detrimental to a convicted person.

34. The applicant contested the Government's position and submitted that, contrary to the *non bis in idem* principle, the Procurator General's request had made him liable to be tried again for an offence of which he had been finally acquitted. Although the outcome remained unchanged, he had effectively been prosecuted twice for the same offence. He claimed that the supervisory review was not justified as an exceptional reopening - permitted by the second paragraph of Article 4 of Protocol No. 7 - because the Presidium had established no fundamental defect in previous proceedings which would require a re-examination of the case.

B. The Court's assessment

35. The Court notes that the protection against duplication of criminal proceedings is one of the specific safeguards associated with the general guarantee of a fair hearing in criminal proceedings. It reiterates that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision (see, among other authorities, *Gradinger v. Austria*, judgment of 23 October 1995, Series A no. 328-C, p. 65, § 53). The Court further notes that the repetitive aspect of trial or punishment is central to the legal problem addressed by Article 4 of Protocol No. 7. In *Oliveira v. Switzerland* (judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V), the fact that the penalties in the two sets of proceedings were not cumulative was relevant to the finding that there was no violation of the provision where two sets of proceedings were brought in respect of a single act (p. 1998, § 27).

36. Turning to the supervisory review of an acquittal conducted in circumstances such as the present case, the Court will first determine what elements, if any, of Article 4 of Protocol No. 7 are to be found in such proceedings. For this purpose, it will have regard to the following aspects:

– whether there had been a "final" decision before the supervisory instance intervened, or whether the supervisory review was an integral part of the ordinary procedure and itself provided a final decision;

– whether the applicant was “tried again” in the proceedings before the Presidium; and

– whether the applicant became “liable to be tried again” by virtue of the Procurator General’s request.

Finally, the Court will consider whether, in the circumstances of the case, the supervisory review could in principle have given rise to any form of duplication of the criminal proceedings, contrary to the protection afforded by Article 4 of Protocol No. 7.

1. Whether the applicant had been “finally acquitted” prior to the supervisory review

37. According to the explanatory report to Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a “decision is final ‘if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them’ ”.

38. The Court notes that the procedural law at the time allowed certain officials to challenge a judgment which had taken effect. The grounds for supervisory review were the same as for lodging an ordinary appeal. With regard to acquittals, the request for supervisory review could be lodged within one year of the judgment’s taking effect. Assuming that the Presidium granted the Procurator General’s request and that the proceedings were relaunched, the ensuing ruling would still constitute the only decision in the applicant’s criminal case, with no other decision remaining concurrently in force, and that decision would be “final”. Thus, it appears that the domestic legal system in Russia at the time did not regard decisions such as the acquittal in the present case as “final” until the time-limit for making an application for supervisory review had expired. On that basis, the decision by the Presidium of the Supreme Court on 13 September 2000 not to accept the case for supervisory review would be the “final” decision in the case. On such an interpretation, Article 4 of Protocol No. 7 would have no application whatsoever in the present case, as all the decisions before the Court related to the same single set of proceedings.

39. However, the Court reiterates that a supervisory request for annulment of a final judgment is a form of extraordinary appeal in that it is not directly accessible to the defendant in a criminal case, and its application depends on the discretion of authorised officials. The Court has, for example, not accepted that supervisory review is an effective domestic remedy in either the civil or the criminal contexts (see *Tumilovich v. Russia* (dec.), no. 47033/99, 22 June 1999, and *Berdzenishvili v. Russia* (dec.), no. 31697/03, ECHR 2004-II), and it has found that the quashing of a judgment on supervisory review can create problems as to the legal certainty to be afforded to the initial judgment (see *Brumărescu v. Romania* [GC], no. 28342/95, § 62, ECHR 1999-VII, and *Ryabykh v. Russia*, no. 52854/99, §§ 56-58, ECHR 2003-IX). The Court will therefore assume in the following paragraphs that the appeal judgment of 17 April 2000, by which the applicant’s acquittal became final on that same date, was the “final decision” for the purposes of Article 4 of Protocol No. 7.

2. Whether the applicant was “tried again” in the proceedings before the Presidium

40. The Court observes that the Procurator General’s request for supervisory review of the acquittal was examined by the Presidium. Its determination was limited, at that stage, to the question whether to grant the request for supervisory review. In the circumstances of the present case, the Presidium did not accept the application for review, and the final decision remained that of 17 April 2000.

41. It follows that the applicant was not “tried again” within the meaning of Article 4 § 1 of Protocol No. 7 in the proceedings by which the Presidium of the Supreme Court rejected the Procurator General’s request for supervisory review of the applicant’s acquittal.

3. Whether the applicant was “liable to be tried again”

42. The Court has further considered whether the applicant was "liable to be tried again", as he alleged. It notes that, had the request been granted, the Presidium would have been required, by Article 380 of the Code of Criminal Procedure in force at the time, to choose one of the options set out in paragraph 27 above. Importantly, the Presidium was not empowered to make a new determination on the merits in the same proceedings, but merely to decide whether or not to grant the Procurator General's request.

43. It appears therefore that the potential for resumption of proceedings in this case would have been too remote or indirect to constitute "liability" for the purposes of Article 4 § 1 of Protocol No. 7.

44. Although the elements discussed in paragraphs 40 to 43 above are in themselves sufficient to demonstrate that supervisory review in this case did not lead to a violation of Article 4 of Protocol No. 7, the Court notes that there exists a substantive, and thus more important, reason to reach the same conclusion. It considers that the crucial point in this case is that supervisory review could not in any event have given rise to a duplication of criminal proceedings, within the meaning of Article 4 § 1 of Protocol No. 7, for the following reasons.

45. The Court observes that Article 4 of Protocol No. 7 draws a clear distinction between a second prosecution or trial, which is prohibited by the first paragraph of that Article, and the resumption of a trial in exceptional circumstances, which is provided for in its second paragraph. Article 4 § 2 of Protocol No. 7 expressly envisages the possibility that an individual may have to accept prosecution on the same charges, in accordance with domestic law, where a case is reopened following the emergence of new evidence or the discovery of a fundamental defect in the previous proceedings.

46. The Court notes that the Russian legislation in force at the material time permitted a criminal case in which a final decision had been given to be reopened on the grounds of new or newly discovered evidence or a fundamental defect (Articles 384-90 of the Code of Criminal Procedure). This procedure obviously falls within the scope of Article 4 § 2 of Protocol No. 7. However, the Court notes that, in addition, a system also existed which allowed the review of a case on the grounds of a judicial error concerning points of law and procedure (supervisory review, which is governed by Articles 371-83 of the Code of Criminal Procedure). The subject matter of such proceedings remained the same criminal charge and the validity of its previous determination. If the request was granted and the proceedings were resumed for further consideration, the ultimate effect of supervisory review would be to annul all decisions previously taken by courts and to determine the criminal charge in a new decision. To this extent, the effect of supervisory review is the same as reopening, because both constitute a form of continuation of the previous proceedings. The Court therefore concludes that for the purposes of the *non bis in idem* principle supervisory review may be regarded as a special type of reopening falling within the scope of Article 4 § 2 of Protocol No. 7.

47. The applicant's argument that the supervisory review was unnecessary and amounted to an abuse of process is not relevant to the question of compliance with Article 4 of Protocol No. 7: the manner in which the power was exercised is relative to the overall fairness of criminal proceedings, but cannot be decisive for the purpose of identifying the procedure as a "reopening" as opposed to a "second trial". On the facts of the present case, the proceedings aimed at securing a supervisory review were an attempt to have the proceedings reopened rather than an attempted "second trial".

48. Finally, the Court notes that the conformity with the requirement of lawfulness under Article 4 § 2 of Protocol No. 7 is undisputed in the present case.

49. The Court concludes that the applicant was not liable to be tried or punished again within the meaning of Article 4 § 1 of Protocol No. 7 to the Convention, and that accordingly there has been no violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

50. The applicant maintained that the supervisory review proceedings conducted after his final acquittal constituted a violation of his right to a fair trial. He relied on Article 6 § 1 of the Convention, the relevant part of which provides:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The parties' submissions

51. In their post-admissibility submissions, the Government stated that the supervisory review proceedings did not constitute a new examination of the applicant's criminal charge because the request to quash the acquittal lodged by the Procurator General had been dismissed by the Presidium of the Supreme Court without examining the merits. They informed the Court that, just as Article 380 § 2 of the Code of Criminal Procedure prohibited the Presidium from increasing a sentence or changing a legal classification to a more serious one without remitting the case for new examination, the Presidium itself was unable to replace an acquittal with a conviction while simultaneously granting the request for reopening. They also claimed that, since the supervisory review proceedings had no adverse impact on the applicant's final acquittal, they could not have constituted a violation of the applicant's right to a fair hearing within the meaning of Article 6 § 1 of the Convention.

52. The Government pointed out that the supervisory review in the present case had been conducted in accordance with the procedure prescribed by law. In particular, the Procurator General's request had been lodged within one year of the acquittal taking effect.

53. The applicant disputed those submissions and maintained that the very possibility of challenging the final and enforceable acquittal had violated his right to a fair trial. He stated that, although the supervisory review had complied with the formal requirements imposed by law at the material time, it had not been necessary. He claimed that, in the circumstances of the case, the Procurator General's call for supervisory review proceedings had clearly been an abuse of process and incompatible with the Convention principles.

B. The Court's assessment

54. The Court has found above that the supervisory review in this case was compatible with the *non bis in idem* principle enshrined in Article 4 of Protocol No. 7, which is itself one aspect of a fair trial. The mere fact that the institution of supervisory review as applied in the present case was compatible with Article 4 of Protocol No. 7 is not, however, sufficient to establish compliance with Article 6 of the Convention. The Court must determine its compatibility with Article 6 independently of its conclusion under Article 4 of Protocol No. 7.

55. In particular, the Court reiterates that it has previously held that the institution of supervisory review can give rise to problems of legal certainty, as judgments in civil cases remained open to review indefinitely, on relatively minor grounds (see *Brumărescu* and *Ryabykh*, both cited above). The position regarding criminal cases is somewhat different, at least in so far as acquittals are concerned, as a review could only be requested during a period of one year following the date of the acquittal in question.

56. Moreover, the Court observes that the requirements of legal certainty are not absolute. In criminal cases, they must be assessed in the light of, for example, Article 4 § 2 of Protocol No. 7, which expressly permits a State to reopen a case due to the emergence of new facts, or where a fundamental defect is detected in the previous proceedings, which could affect the outcome of the case. The possibility of re-examining or reopening cases was also considered by the Committee of Ministers as a guarantee of restitution, particularly in the context of the execution of the Court's judgments. In its Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at the domestic level following judgments of the European Court of Human Rights, it urged member States to ensure that their domestic legal systems provided for a procedure whereby a case could be re-examined or reopened.

57. The mere possibility of reopening a criminal case is therefore prima facie compatible with the Convention, including the guarantees of Article 6. However, certain special circumstances of the case may reveal that the actual manner in which it was used impaired the very essence of a fair trial. In particular, the Court has to assess whether, in a given case, the power to launch and conduct a supervisory review was exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice.

58. The Court attaches particular weight to the argument that, in the applicant's case, the Presidium was indeed only deciding the question whether the case was to be reopened or not. Had it quashed the acquittal, this would necessarily have entailed a separate set of adversarial proceedings on the merits before the competent courts. The decision by the Presidium thus marked a procedural step which was no more than a precondition to a new determination of the criminal charge. The Court notes that the Presidium of the Supreme Court dismissed the Procurator General's request, having found that it relied on defects which it had been entirely within the prosecution's control to redress before, not after, the final judgment. The Procurator General's request could itself be criticised as being arbitrary and an abuse of process. However, it had no decisive impact on the fairness of the procedure for reopening as a whole, which was primarily a matter for the Presidium's deliberation (see, *mutatis mutandis*, *Voloshchuk v. Ukraine* (dec.), no. 51394/99, 14 October 2003, and *Sardin v. Russia* (dec.), no. 69582/01, ECHR 2004-II). Accordingly, the arbitrariness of the Procurator General's request for a reopening could not be, and was not, prejudicial for the determination of the criminal charges in the present case.

59. The Court concludes that the authorities conducting the supervisory review in the present case did not fail to strike a fair balance between the interests of the applicant and the need to ensure the proper administration of justice.

60. As to the proceedings before the Presidium of the Supreme Court, their outcome was favourable to the applicant and he cannot therefore claim to be a victim of a violation of his right to a fair hearing in respect of those proceedings. Moreover, according to the established case-law of the Convention organs, Article 6 does not apply to proceedings concerning a failed request to reopen a case. Only the new proceedings, after the reopening has been granted, can be regarded as concerning the determination of a criminal charge (see, *inter alia*, *X v. Austria*, no. 7761/77, Commission decision of 8 May 1978, Decisions and Reports (DR) 14, p. 171 at p. 174, and *Ruiz Mateos and Others v. Spain*, no. 24469/94, Commission decision of 2 December 1994, DR 79-B, p. 141).

61. Accordingly, the Court finds no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 4 of Protocol No. 7 to the Convention;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 20 July 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. Dollé J.-P. Costa
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Loucaides is annexed to this judgment.

J.-P.C.
S.D.

CONCURRING OPINION OF JUDGE LOUCAIDES

I have voted with the majority that there has been no violation of Article 4 of Protocol No. 7 and Article 6 § 1 of the Convention in this case. However, the reasons for my finding as regards the applicant's complaint under Article 4 of Protocol No. 7 are different from those of the majority. In my opinion, the applicant was not a victim in respect of this complaint.

In order to examine the merits of the complaints in question, we should first be satisfied that the applicant was either tried or prosecuted (see *Zigarella v. Italy* (dec.), no. 48154/99, ECHR 2002-IX) through, or as a result of, the request by the Procurator General to the Presidium of the Supreme Court that the case be reviewed in supervisory proceedings.

However, the Presidium of the Supreme Court dismissed the Procurator General's request, with the result that no supervisory proceedings against the applicant ever took place. In the circumstances, I do not see how the applicant can be considered a victim as regards his complaint that supervisory review proceedings took place after his final acquittal, and that such proceedings constituted a violation of his right not to be tried again in criminal proceedings for an offence of which he had been finally acquitted.

In other words, the Procurator General's request for a review of the case having been dismissed, one cannot speak of any commencement or recommencement of prosecution or trial of the applicant.

It is true that Article 4 of Protocol No. 7 refers to the right not to be "*liable* to be tried or punished again ... for an offence ..." (emphasis added). However, in my opinion, no one can be considered "liable" to be tried or prosecuted, in any real sense, for an offence unless all the necessary legal prerequisites for that trial or prosecution, according to the relevant national legal system, are satisfied. In this case, one of the essential prerequisites for the further trial or prosecution of the applicant, at the material time, was approval of the Procurator General's request for review of the case, a condition that was not satisfied.

Moreover, since his acquittal, the applicant has not faced any other charge in whatever form. In the absence of such measures, I do not see how he could be considered as having been "liable" to prosecution for the purposes of Article 4 of Protocol No. 7, unless we stretch the concept of "prosecution" beyond its normal or established meaning.

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