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**La Corte EDU conferma la sentenza di condanna del ricorrente per mancata violazione dell'art. 7 della Convenzione**
**(CEDU, sez. V, sent. 4 novembre 2021, ric. n. 54806/18)**

La decisione della Corte EDU definisce il ricorso presentato da un cittadino ucraino, il quale lamentava la violazione dell'articolo 7 della Convenzione ritenendo che, in sede di riesame del procedimento penale, la Corte Suprema avesse comminato una nuova punizione senza tenere conto della sopravvenuta prescrizione. Più specificamente, il ricorrente era stato condannato alla pena complessiva dell'ergastolo per aver commesso un duplice omicidio. A suo avviso, però, non poteva stabilirsi quale parte di quella pena complessiva riguardasse, rispettivamente, l'uno o l'altro omicidio e, pertanto, riteneva che la pena per uno dei due reati fosse stata determinata proprio in sede di revisione del processo e, cioè, diciassette anni dopo la commissione.
Alla luce di tale quadro, la Corte EDU veniva adita per stabilire se nelle circostanze del caso di specie la Grande Camera della Corte Suprema avesse inflitto una nuova condanna al ricorrente e se fosse tenuta a ridurre la pena dell'ergastolo. Nel merito la Corte ha osservato che nella sentenza originaria pronunciata nel 2002 ogni elemento costitutivo di ciascun reato era stato valutato e classificato separatamente ai sensi di ciascuna rispettiva disposizione del codice penale e che la sussistenza di circostanze aggravanti aveva condotto all'inflizione dell'ergastolo. Per conseguenza, a parere dei giudici di Strasburgo, l'ergastolo del ricorrente aveva fondamento giuridico a prescindere dall'annullamento della condanna del ricorrente per uno dei due omicidi e, pertanto, la Suprema Corte non aveva inflitto alcuna nuova pena al ricorrente, stabilendo così e conclusivamente la mancata violazione dell'articolo 7 della Convenzione.

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

FIFTH SECTION

**CASE OF XXX v. UKRAINE (NO. 3)**
*(Application no. 54806/18)*

JUDGMENT
STRASBOURG

4 November 2021

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of XXX v. Ukraine (no. 3),**

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:
Síofra O'Leary, *President,*
Mārtiņš Mits,
Ganna Yudkivska,
Lətif Hüseynov,
Jovan Ilievski,
Ivana Jelić,
Mattias Guyomar, *judges,*
and Victor Soloveytchik, *Section Registrar,*
Having regard to:
the application (no. 54806/18) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr XXX ("the applicant"), on 13 November 2018;
the decision to give notice of the application to the Ukrainian Government ("the Government");
the observations submitted by the Government and the observations in reply submitted by the applicant;
the written comments submitted by the Lviv Forum of Criminal Justice ("the third party"), who was granted leave to intervene by the President of the Section (Article 36 § 2 of the Convention and Rule 44 § 3);
Having deliberated in private on 12 October 2021,
Delivers the following judgment, which was adopted on that date:

## INTRODUCTION

1. The case deals with the applicant's complaint under Article 7 of the Convention that the judicial review of his previous conviction had resulted in a new punishment being imposed on him outside the statutory time-limit.

## THE FACTS

2. The applicant was born in XXX. He is currently serving a life sentence in XXX, Ukraine. The applicant, who was granted legal aid, was represented by Mr M.O. Tarakhkalo, a lawyer practising in Kyiv, Ukraine.
3. The Government were represented by their Agent, Mr I. Lishchyna.
4. The facts of the case, as submitted by the parties, may be summarised as follows.

### I. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

5. In October 2001 Ms K., an elderly person, was found murdered in her flat. In December 2001 Ms S., a minor, was abducted and murdered.

6. On 10 December 2001 the applicant was arrested on suspicion of abduction of S. in order to extort money from her parents and of S.'s subsequent murder.
7. On 17 December 2001 the applicant appointed a lawyer.
8. On 19 December 2001 the applicant was charged with the above-mentioned crime, following an investigation during which the applicant showed the police the places in which he had hidden S.'s corpse and some of her belongings. The banknotes received as a ransom from the parents of S. were found in his possession.
9. On 15 February 2002, apparently at his own request, the applicant, was questioned as a witness regarding the circumstances of K.'s death. During the questioning, which took place without the presence of a lawyer, the applicant confessed to K.'s murder. The next day, still acting in the capacity of a witness, the applicant participated without the presence of a lawyer in an on-site reconstruction of the attack on K. On 18 and 22 February 2002 he was again questioned, without a lawyer, about the attack.
10. On 25 February 2002 the investigating prosecutor instituted criminal proceedings against the applicant in respect of K.'s murder and joined them with the criminal case concerning the abduction and murder of S.
11. On 11 July 2002 the Zhytomyr Regional Court of Appeal, acting as a trial court, convicted the applicant of the abduction, hostage-taking, extortion and murder of S., and of the robbery and murder of K. The court decided that the applicant's actions in respect of K. had had the following qualifying features (*кваліфікуючі ознаки*) under the respective Articles of the Criminal Code: robbery (Article 187 § 4) and murder committed in order to conceal a robbery (Article 115 § 2 (9)) (aggravated by the fact that the murder had been committed against an elderly person (Article 67 § 1 (6)). According to the verdict, the qualifying features of the applicant's actions with respect to S. were: the abduction of a person leading to grave consequences (Article 146 § 3), the taking of a hostage (Article 147 § 2), extortion with the threat of murder (Article 189 § 4), murder of a minor (Article 115 § 2 (2)), murder of a hostage (Article 115 § 2 (3)), murder based on motives of personal gain (Article 115 § 2 (6)), and murder committed by a person who had previously committed a murder (Article 115 § 2 (13)). The court sentenced him to life imprisonment for the murders under Article 115 § 2 (2), (3), (6), (9) and (13), and imposed further punishments for the less severe crimes (under Articles 146 § 3, 147 § 2, 187 § 4 and 189 § 4) ranging from ten to fifteen years of imprisonment; those sentences were absorbed by the life sentence (see "Relevant legal framework" below for details). The court furthermore allowed a civil claim for damages lodged by S.'s father and awarded him compensation.
12. Following an appeal by the applicant, on 10 October 2002 the Supreme Court of Ukraine upheld the decision of the trial court of 11 July 2002.

II. THE APPLICANT'S FIRST CASE BEFORE THE COURT

13. On 2 April 2003 the applicant lodged an application with the Court (no. 16404/03) alleging that his conviction for the murder of K. had been based on incriminating evidence that had been obtained in violation of his right to remain silent and his right not to incriminate himself and that he had been hindered in the effective exercise of his right to benefit from the assistance of a lawyer when he had been questioned at the pre-trial stage of the proceedings (see paragraph 9 above).

14. On 19 February 2009 the Court declared the application partly admissible and found a violation of Article 6 §§ 1 and 3 of the Convention (see *XXX v. Ukraine,* no. 16404/03, 19 February 2009).

15. The *XXX* judgment became final on 19 May 2009.

III. RE-EXAMINATION OF THE APPLICANT'S CASE FOLLOWING THE XXX JUDGMENT

16. The applicant's lawyer lodged an application with the Supreme Court for a review of the applicant's criminal case in view of the first *XXX* judgment (cited above). He asked the Supreme Court to quash the trial court's judgment and its own 2002 decision upholding the original conviction. He asked that he and the applicant be present during the examination of the request.

17. The prosecutor's office also applied to the Supreme Court for a review of the case. It asked the court to amend the trial court's judgment and the Supreme Court's 2002 decision by striking out references to the records of the questioning of the applicant as a witness about K.'s murder and to the findings of the on-site reconstruction of that murder.

18. On 30 April 2010 the Supreme Court allowed the above requests in part, quashed its own 2002 decision and remitted the case to a panel of three judges of the Supreme Court for a fresh examination in cassation proceedings.

19. On 9 September 2010 the Supreme Court examined the case in the absence of the applicant but in the presence of his lawyer and a prosecutor. The Supreme Court excluded the applicant's original confessions from the body of evidence but found that the rest of the evidence in the case file was sufficient to support the trial court's finding that the applicant had murdered K. while trying to cover up an attempted robbery.

IV. THE APPLICANT'S SECOND CASE BEFORE THE COURT

20. On 28 February 2011 the applicant lodged his second application with the Court (no. 16404/03), alleging that the Supreme Court, in the course of re-examining his case in cassation proceedings, had breached a number of provisions of Article 6 of the Convention.

21. On 1 June 2017 the Court declared the application admissible and found a violation of Article 6 § 1 of the Convention. The Court found in particular that "the Supreme Court's reasoning and the procedure it [had] followed did not meet the requirements of fairness inherent in Article 6 § 1 of the Convention" and that there had therefore been a violation of Article 6 § 1 of the Convention (see *XXX v. Ukraine (no. 2)*, no. 15685/11, §§ 54 and 55, 1 June 2017). It furthermore stated:

"56. In view of the above conclusions the Court considers that ... only a full retrial could have provided, given the particular circumstances of the case, an appropriate forum for an adequate examination of the impact of the exclusion of the applicant's confessions on the conclusiveness of the remaining evidence about the attack on K."

22. The *XXX (no. 2)* judgment became final on 1 September 2017.

V. RE-EXAMINATION OF THE APPLICANT'S CASE FOLLOWING THE *XXX (No. 2)* JUDGMENT

23. On 5 December 2017 the applicant's lawyer lodged an application with the Supreme Court for a review of the applicant's criminal case in view of the *XXX (no. 2)* judgment. The applicant's representative requested a full review of the trial court's judgment of 11 July 2002 and the decision of the Supreme Court of 9 September 2010 on the grounds that those judicial decisions had been

rendered as a result of an unfair trial. The lawyer furthermore requested that the applicant's detention be substituted with a less strict preventive measure.

24. On 16 May 2018 the Grand Chamber of the Supreme Court, composed of sixteen judges, held a hearing in respect of the applicant's case, with the participation of the applicant's lawyer and a prosecutor. Having reiterated the circumstances of the applicant's case and the findings of the domestic courts and of this Court in its judgments in respect of *XXX* and *XXX (no. 2)* and having concluded that it had the authority to quash in part the previous decisions delivered in respect of the applicant's criminal case, it allowed the application of 5 December 2017 in part.

25. The Grand Chamber of the Supreme Court held, in particular that:

"... D.G. XXX was convicted of a set of crimes, classified under Articles 115 § 2 (2), (3), (6), (9), (13), 146 § 3, 147 § 2, 187 § 4 and 189 § 4 of the Criminal Code of Ukraine. The murder of a minor, preceded by her abduction, and ... [followed by] a demand for ransom ... is covered by the following [provisions]: Articles 115 § 2 (2), (3), (6), 146 § 3, 147 § 2, and 189 § 4. The convict was found guilty under item 2 [of paragraph 2 of Article 115] because he had committed the murder of a minor S. (a ten-year-old), under item 3 because the murdered child had been taken as a hostage, under item 6 because by committing the murder the guilty person had [aimed] to obtain property (money in the amount of twenty thousand [US] dollars). These factual circumstances were established by the first-instance court.

The ... murder and robbery of K. shall be excluded from the ultimate classification of the actions of D.G. XXX, since the case in this part must be reviewed in its entirety, as the ECHR provided in [its] judgment in the case of *XXX v. Ukraine (No. 2)* taking into account the conclusions of the ECHR in the judgment in the case of *XXX v. Ukraine*.

... in exercising such authority as the quashing of a judicial decision in part, a court shall decide on the punishment of a convicted person, taking into account any reduction in the number of acts [of which that person has been accused of], the exclusion of certain criminal activities, reclassification of actions, etc.

...

The murder of a minor, S., by D.G. XXX, namely the nature and location of the bodily injuries, the method of murder chosen by D.G. XXX, the clearly [planned nature] of his actions, [and] the motive of personal gain that [he] placed above the life of a young child testify in sum to [the fact] that D.G. XXX poses a special danger to society.

D.G. XXX, being a young, physically healthy, able-bodied man who did not accord to human life the highest possible value, ruthlessly and cold-bloodedly, by suffocation, killed his neighbour – young S., who had been on her way to school, luring her into his apartment. D.G. XXX was aware that the victim was physically weaker because she had [only] reached the age of ten at the time of the crime and would not have been able to resist an adult, physically healthy man, owing to [her] physical helplessness. Killing the victim, D.G. XXX put his motives of personal gain above the child's life.

The court did not establish any circumstances mitigating or aggravating [D.G. XXX's] liability for the criminal actions against S..

Given these circumstances, the Grand Chamber of the Supreme Court concludes that the isolation of D.G. XXX by means of life imprisonment meets the requirements of justice in the application of

punishment and reflects the proportionality of the crime and punishment, and that only [the imposition of] such necessary and sufficient punishment can rectify him and prevent him from committing new crimes.

...

... the Grand Chamber of the Supreme Court:

DECIDES:

1. To allow in part the application of the defence counsel, M.O. Tarakhkalo, [lodged] in the interests of the convicted D.G. XXX.

2. To quash the sentence of the Zhytomyr Regional Court of Appeal of 11 July 2002 and the decision of the Criminal Chamber of the Supreme Court of 9 September 2010 concerning D.G. XXX in the part concerning his conviction for robbery and the murder of K., [and], in this part, to remit the case for fresh judicial examination to the relevant court of first instance.

3. To consider D.G. XXX sentenced under Articles 115 § 2 (2), (3), (6), 146 § 3, 147 § 2, and 189 § 4 of the Criminal Code of Ukraine to imprisonment for [the following] terms:

under Article 146 § 3 of the Criminal Code of Ukraine – to a term of ten years' [imprisonment];

under Article 147 § 2 of the Criminal Code of Ukraine – to a term of fifteen years' [imprisonment];

under Article 189 § 4 of the Criminal Code of Ukraine – to a term of ten years' [imprisonment], with confiscation of all property that the convicted person owns;

under Article 115 § 2 (2), (3), (6) of the Criminal Code of Ukraine – to life imprisonment, with confiscation of all property that the convicted person owns.

4. Under Article 70 of the Criminal Code of Ukraine to determine D.G. XXX's final punishment for a set of crimes by way of merging milder punishments into one heavier [punishment] in the form of life imprisonment, with confiscation of all property that the convicted person owns.

..."

26. Three judges of the Grand Chamber of the Supreme Court wrote a separate opinion in which they disagreed with the majority opinion in respect of the separation of the punishments. They noted, in particular:

"... In our opinion, it is erroneous to divide the case and quash the court decisions only in the part relating to conviction for robbery and the murder of K[...], which entailed an incorrect determination of the punishment in the part concerning the acts [undertaken] against S. attributed to D.G. XXX.

...

... From the text of the sentence [of 11 July 2002]: "Since D.G. XXX did not get any money as a result of the robbery of K., he planned a new crime."

Thus, the court established a certain interconnection between the crimes against two persons by virtue of a consistent motive of personal gain.

...

However, the Grand Chamber determined [that] the same punishment [should be imposed on] D.G. XXX under Article 115 § 2 (2), (3) and (6) of the Criminal Code, and in the absence of an aggravating circumstance – [that is to say] the commission of a crime against an elderly person, (K.), which worsened his situation compared to what it was before the splitting of the case, because in fact the scope of the charges decreased (the classification no longer included two of the

qualifying features [set out under] Article 115 § 2 of the Criminal Code) and there were no aggravating circumstances ..."

RELEVANT LEGAL FRAMEWORK

I. 2001 CRIMINAL CODE OF UKRAINE

27. The relevant provisions of the Code read as follows:

GENERAL PART

Article 12

Classification of criminal offences

"1. Depending on their degree of gravity, criminal offences shall be classified as minor offences, medium-gravity offences, grave offences, or especially grave offences.

...

5. An especially grave offence means an offence that merits a main punishment ... consisting of imprisonment of ten to fifteen years or a life sentence."

Article 33

Aggregation of criminal offences

"1. The aggregation of criminal offences shall mean the commission, by one person, of two or more offences listed under different Articles or different paragraphs of one Article of the Special Part (*Особлива частина*) of this Code [containing a list of crimes and offences], in the event that that person has not been convicted of any of these offences. Offences with regard to which the person has been discharged from criminal liability on grounds prescribed by the law shall not be taken into account.

2. In the event of the aggregation of criminal offences, each of [those offences] shall be classified under the appropriate Article or paragraph of the Special Part of this Code."

Article 49

Discharge from criminal liability owing to [the lapse of the relevant statutory] limitation period

"1. A person shall be discharged from criminal liability if the following periods have elapsed between the date of the criminal offence and the effective date of judgment:

...

(5) fifteen years, in the event that an especially grave offence has been committed.

4. Where a person has committed an especially grave offence punishable by life imprisonment, the issue [regarding the lapse of the relevant limitation period] must be decided by a court. In the event that a court rules out the possibility to apply the statutory period of limitation, a life sentence may not be imposed and must be commuted to imprisonment for a determinate term ..."

Article 67

Aggravating circumstances [increasing the severity of] punishment

"1. For the purposes of imposing a punishment, the following circumstances shall be deemed to be aggravating:

...

(6) the commission of an offence against a minor [or] an elderly or helpless person;

...

4. If any of the [identified] aggravating circumstances are those that are listed in an Article of the Special Part of this Code ..., that shall affect the way in which [the offence in question] is classified,

[and] a court may not take [such a circumstance] into consideration again as an aggravating circumstance when imposing a punishment."

Article 70

Imposition of punishment for various criminal offences

"1. In respect of various criminal offences, a court, having determined the punishment (both primary and additional) for each offence, shall impose a final punishment by way of merging milder punishments into a heavier one, or by way of fully or partially adding up imposed punishments.

2. In adding up punishments, the final aggregate punishment must fall within the limits prescribed by the Article of the Special Part of this Code that provides for a heavier punishment. Where at least one of the criminal offences constitutes a grave or especially grave intentional offence, the court may impose a final aggregated punishment not exceeding the maximum term provided in respect of this kind of punishment by the General Part of this Code. Where life imprisonment is imposed in respect of at least one of the criminal offences committed, the final aggregated punishment shall be determined by way of merging milder punishments into the [sentence of] life imprisonment ..."

SPECIAL PART

Article 115

Murder

"1. Murder – that is to say the wilful unlawful causing of the death of another person – shall be punishable by imprisonment for a term of seven to fifteen years.

2. The murder ...(2) of a minor ...; (3) of a hostage; ... (6) on the basis of motives of personal gain; ... (9) committed to conceal or facilitate another crime; ... [or] (13) committed by a person who has previously committed a murder ... shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment with the forfeiture of property, under [any of the circumstances] provided by sub-paragraph 6 of paragraph 2 of this Article."

Article 146

Illegal confinement or abduction of a person

"1. The illegal confinement or abduction of a person shall be punishable by restraint of liberty for a term of up to three years, or imprisonment for the same term.

2. The same acts committed against a minor, or for mercenary purposes, or against two or more persons, or by a group of persons who have first conspired to so act, or by a method dangerous to the victim's life or health or causing bodily suffering to him or her, or with the use of weapons, or for a long period of time, shall be punishable by restraint of liberty for a term of up to five years, or imprisonment for the same term.

3. Any acts such as those listed under paragraph 1 or 2 of this Article, where committed by an organised group, or where they caused any grave consequences, shall be punishable by imprisonment for a term of five to ten years."

Article 147

Hostage-taking

"1. Taking or holding a person hostage with the intent to induce relatives of the hostage, any government agency or other institution, business or organisation, any natural person or any

official to undertake or refrain from undertaking any action as a condition for the release of that hostage, shall be punishable by imprisonment for a term of between five and eight years.

2. The same acts committed in respect of a minor, or by an organised group, or accompanied by threats to destroy people, or causing any grave consequences, will be punishable by imprisonment for a term of seven to fifteen years."

Article 187

Robbery

"1. An assault for the purpose of taking possession of somebody else's property, accompanied with violence dangerous to the life and health of an assaulted person, or with threats of such violence (robbery), shall be punishable by imprisonment for a term of three to seven years.

...

4. Robbery in respect of large and especially large amounts, or committed by an organised group, or accompanied by the infliction of grievous bodily injury, will be punishable by imprisonment for a term of eight to fifteen years, with the forfeiture of the property [of the person found guilty of such a crime]."

Article 189

Extortion

"1. A demand that somebody else's property or property title be transferred (or any other such acts in respect of property) – under threats of violence against the victim or his/her close relatives, or threats to restrict their rights, freedoms or lawful interests, or threats of damage or destruction to their property or property entrusted to them or placed in their custody, or threats to disclose information that the victim or his close relatives would like to keep secret (extortion), will be punishable by restraint of liberty for a term of up to five years, or by imprisonment for the same term.

...

4. Extortion that causes especially severe damage to property, or is committed by an organised group, or is accompanied by the infliction of grievous bodily injury, shall be punishable by imprisonment for a term of seven to twelve years, with the forfeiture of property."

II. 2012 CODE OF CRIMINAL PROCEDURE

28. Section VIII of the Code deals with the execution of judicial decisions in criminal cases. Section V of the Code deals with different types of judicial review of judgments, in particular, appellate review, cassation review, review under newly discovered circumstances and extraordinary review. The relevant provisions of Section V of the Code read as follows:

(a) Relevant provisions prior to the amendments of 3 October 2017

Article 445

Grounds for the review by the Supreme Court of Ukraine of judicial decisions

"1. Grounds for the review by the Supreme Court of Ukraine of judicial decisions that have come into force shall be:

1) different application by the court of cassation of the same legal norm foreseen by a Law of Ukraine on criminal liability in similar legal relations, which led to adoption of judgments which are different in meaning (except for the issues of application of sanctions of the criminal law norms, exemption from criminal liability or punishment);

2) different application by the court of cassation of the same legal norm foreseen by this Code, which led to adoption of judgments which are different in meaning;
3) inconsistency of the judicial decision of the court of cassation with the conclusion on application of legal norms set forth in the decision of the Supreme Court of Ukraine;
4) a finding by an international judicial body, whose jurisdiction is accepted by Ukraine, of a violation by Ukraine of its international obligations during the judicial examination of a case."
(b) Relevant provisions after the amendments of 3 October 2017
Article 436
Powers of the court of cassation after a cassation complaint has been examined
1. On the basis of the results of the court of cassation's review of a cassation complaint, the court may:
...
4) change the court decision [in question]."
Article 459
Grounds for conducting criminal proceedings in the light of newly discovered or exceptional circumstances
"1. Court decisions that have taken legal effect may be reviewed in the light of newly discovered or exceptional circumstances.
...
3. The following shall be recognised as constituting exceptional circumstances:
1) unconstitutionality, constitutionality of the law, other legal act or their separate provision, applied by the court in resolving the case, as established by the Constitutional Court of Ukraine
2) the establishment by an international judicial institution, whose jurisdiction is recognised by Ukraine, of a violation of Ukraine's international obligations in the resolution of a case by a court;
3) establishment of a judge's guilt in committing an offense or abusive act by an investigator, public prosecutor, investigating judge or court within the criminal proceeding, which led to adoption of the [contested] court decision ..."
Article 461
Time-limit for lodging a request for the review of a court decision in the light of newly discovered or exceptional circumstances
"1. A request for the review of a court decision upon the discovery of new circumstances may be lodged within three months of the date on which the person lodging such a request learned or could have learned of such circumstances.
...
5. An application for the review of a court decision in the light of exceptional circumstances may be lodged:
...
2) on the grounds provided in sub-paragraph 2 of paragraph 3 of Article 459 of this Code by a person in whose favour a decision has been taken by an international judicial institution whose jurisdiction is recognised by Ukraine no later than thirty days after the day on which that person learned or could have learned that that decision was final ..."
Article 467

Court decision following criminal proceedings, in the light of newly discovered or exceptional circumstances

"1. A court shall be entitled to quash a judgment or ruling and render a new judgment or make a ruling, or dismiss a request for a court decision to be reviewed, in the light of newly discovered or exceptional circumstances. When delivering a new judgment, that court will exercise the powers of a court of the relevant instance.

As a result of reviewing a court decision in the light of newly discovered or exceptional circumstances, the Supreme Court may also quash a court decision (or decisions) in whole or in part and remit the case for fresh consideration to the first-instance or appellate court. (The second part of paragraph 1 of Article 467 was amended by an Act that was adopted on 7 December 2017 and came into force on 6 February 2018).

III. 2006 EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS ACT

29. Section 10 of the Act provides for additional individual measures to be taken with a view to the execution of judgments of the Court including reviewing of a case by a court and reopening of judicial proceedings.

**THE LAW**

ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

30. The applicant complained that the Grand Chamber of the Supreme Court of Ukraine, by its decision of 16 May 2018, had imposed a new punishment on him for a crime committed seventeen years earlier, despite the fact that under law such crimes became time-barred after the passage of fifteen years. He furthermore complained that the Grand Chamber of the Supreme Court of Ukraine had ignored this issue completely in the reasoning of its decision and had not analysed the applicability of the statute of limitation in respect of the applicant's criminal case. He relied on Articles 6 and 7 of the Convention.

31. The Court, being the master of the characterisation to be given in law to the facts of the case, considers that the applicant's complaint is to be examined solely under 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

32. The Government submitted that the partial quashing of the original judgment and upholding the remaining sentence by final decision of 16 May 2018 had concerned the enforcement of an existing penalty rather than the imposition of a new one. They considered, therefore, that Article 7 was inapplicable. The applicant reiterated his complaints.

33. The Court, in its case-law, has drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty". In consequence, where the nature and purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7. However, the Court has also acknowledged that in practice the distinction between a measure that constitutes a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty" may not always be clear-cut. (see, *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 83 to 88, ECHR 2013, with further references).

34. In the present case the Court notes that, as it transpires from the relevant provisions of the Code of Criminal Procedure, namely Article 445 § 1 prior to amendments of 3 October 2017 and Article 459 § 3 following the abovementioned amendments (see paragraph 28 above), the grounds for extraordinary review by the Supreme Court of final judgments do not appear to be in any way related to the procedure for the enforcement of judgments, which is dealt with – moreover - in a separate Section of the Code (*ibid*.). In these circumstances, and having regard to the fact that the Government did not elaborate on their position according to which the decision of 16 May 2018 in the applicant's case had concerned the enforcement of an existing penalty, the Court cannot accept this position.

35. The Court further reiterates that Article 7 guarantees not only the principle of non-retroactivity of more stringent criminal laws but also, implicitly, the principle of retroactivity of more lenient criminal laws; 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).

36. The Court notes that the applicant's contentions regarding the failure of the Supreme Court to address the issue of the statute of limitation in respect of the criminal case against him under Article 7 of the Convention are based on his allegation that the Supreme Court in the review of his case imposed a new punishment on him. Thus, the applicability of Article 7 of the Convention in the present case rests on the said allegation. From the relevant provisions of the Code of Criminal Procedure as to the powers of the Supreme Court in review of the final judgments in the extraordinary appeal proceedings (see paragraph 28 above) it appears that such review may lead to situation in which the original sentence could no longer stand and thus the domestic courts would be called to apply Article 49 of the Criminal Code on the statutory limitation period (see paragraph 27 above) and their failure to do so could raise an issue under Article 7 in light of the precited principle of retroactivity of more lenient criminal laws (see paragraph 35 above). Therefore, the Court is called to decide whether in the circumstances of the present case the Grand Chamber of the Supreme Court, by its decision of 16 May 2018, did impose a new punishment on the applicant and thus was under the obligation to apply Article 49 § 4 of the Criminal Code and to reduce the applicant's life sentence to fifteen years' imprisonment.

37. Thus, the Court concludes that Article 7 is applicable in the present case and notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

*1. The parties' submissions*

38. The applicant maintained that on 11 July 2002 the trial court had imposed an overall punishment on him for the commission of two crimes. According to him it was not possible to determine which part of that overall punishment related to, respectively, the murder of K. and the murder of S. Neither was it possible to know what punishment the trial court would have imposed on him for having committed one murder only. Therefore, he considered that the punishment for the murder of S. had not been determined in 2002 but only by the Supreme Court on 16 May 2018.

39. The applicant furthermore maintained that both crimes had been categorised overall under Articles 115, 146, 147, 187 and 189 of the Criminal Code. He maintained that the exclusion of one of them (the murder of K.) from the crimes for which he (the applicant) had been sentenced had affected the categorisation of the other (the murder of S.), as it had initially been categorised as a "murder committed by a person who had previously committed a murder" (under Article 115 § 2 (13) of the CCU). The absence of that characterisation meant that the overall categorisation of the murder of S. should have been determined anew and a new punishment imposed on the applicant. He compared his case to that of *Yaremenko v. Ukraine (no. 2)* (no. 66338/09, § 56, 30 April 2015), in which the Court had concluded that the Supreme Court – in excluding some items from the body of evidence following the Court's judgment in *Yaremenko v. Ukraine* (no. 32092/02, 12 June 2008) and reassessing the remainder of the evidence before concluding that the applicant's conviction could stand – had undertaken a re-examination of the case (see *Yaremenko v. Ukraine (no. 2)*. Similarly, in the present case the Supreme Court had also assessed the sufficiency of the remaining evidence and had concluded that the conviction could stand.

40. The Government noted that the Grand Chamber of the Supreme Court had reviewed the applicant's criminal case when executing the judgments in *XXX* and *XXX (no. 2)* (see paragraphs 11-13 and 18-20 above). Given that the findings in those cases had concerned only the investigation into the murder of K. and that the violations found by the European Court of Human Rights had taken place during the period of the investigation that had preceded the joinder of that case with the case concerning the murder of S. (see paragraphs 7 and 8 above), the Government submitted that, under the principle of legal certainty, the Supreme Court had had no reason to quash the impugned conviction in the part relating to the abduction and murder of S., as the proceedings in that regard had not been tarnished by the procedural violation established in the above-mentioned judgments of the European Court of Human Rights.

41. The Government furthermore maintained that the Supreme Court had had the authority to quash the reviewed decision in part and that it had acted in accordance with law. They deemed that upholding the life sentence imposed on the applicant had not constituted the imposition of a new penalty but simply the adjustment of the original penalty, which had become necessary after the Supreme Court had quashed the original judgment in part. The Government maintained that the original decision imposing a sentence had referred to only an insignificant factual link between the two murders, namely, that the applicant, having failed to obtain a pecuniary gain from murdering K., had planned, for motives of personal gain, another crime (see paragraph 28 above). In the Government's view, this factual reference was not relevant to the applicant having been found guilty of killing S. For the Government, the applicant's mercenary motives for killing S. had been demonstrated by the applicant's demand for and receipt of a ransom from the parents of S.

42. The Government furthermore noted that the Supreme Court had not found it possible to reduce the penalty imposed by the trial court. Therefore, the applicant had been and remained (after the decision of the Supreme Court) sentenced to life imprisonment for the aggravated murder of S., and the exclusion of the other crime could not turn his original conviction into a "new" conviction, requiring the imposition of a fresh penalty.

43. They lastly maintained that the acts for which the applicant had been originally convicted in 2002 had constituted crimes under the national law at the time of their commission.

44. The third party submitted, in particular, that where a person is convicted of several crimes, this required a separate classification under the relevant criminal law provisions, to allow for the imposition of a separate punishment for each such crime. However, the exclusion of some qualifying features of a crime under the same Article of the Criminal Code did not necessarily require a revision or change of the punishment. If the nature and dangerousness of an act did not change in the event of the exclusion of certain qualifying features, the imposition of a new punishment had no legal or social sense. That would be particularly the case where each of several qualifying features was in itself considered sufficient to justify the imposition of the maximum punishment.

*2. The Court's assessment*

45. The Court notes with respect to the applicant's criminal case that in two previous judgments (see *XXX v. Ukraine*, no. 16404/03, 19 February 2009, and *XXX v. Ukraine (no. 2)*, no. 15685/11, 1 June 2017), it found a number of violations of Article 6 of the Convention. However, all the complaints lodged by the applicant and all the findings of the Court in the above judgments concerned only one of the two crimes that were the subject matter of the domestic proceedings – namely the murder of K. The Court did not find any violations of the Convention in relation to the criminal proceedings concerning S.'s murder.

46. As a result, in the 2017-2018 review proceedings, as described in paragraphs 23 to 26 above, the Supreme Court of Ukraine quashed the judgment in the applicant's criminal case only in so far as the murder of K. was concerned. In doing so it had to separate the respective punishments imposed for two different crimes and it went on to uphold the punishment that concerned only the abduction and murder of S.

47. As to the applicant's argument that the punishment had been imposed on him for two crimes and that it could not be determined which proportion of that punishment related to the murder of S., the Court notes that in the original sentence delivered by the trial court on 11 July 2002, each constituent element of each crime was assessed and categorised separately under each respective provision of the Criminal Code (see paragraph 11 above). Furthermore, Article 115 of the Criminal Code provided for the possibility to impose an aggravated penalty for murder, including life imprisonment, whenever at least one of the thirteen aggravating factors mentioned in its paragraph 2 was established. In the original judgment, five aggravating factors were established under Article 115 § 2 (2), (3), (6), (9) and (13) of the Criminal Code (see paragraph 11 above) and each of those was a sufficient legal basis for the imposition of a life sentence (see paragraph 2 of Article 115 of the CCU in paragraph 25 above). Therefore, it cannot be considered that the applicant's life sentence had no legal basis following the quashing of the applicant's conviction of K.'s murder: while this development undoubtedly resulted in the elimination of two of the

aggravating factors, which concerned situations where the perpetrator had already committed a previous murder, three other aggravating factors remained.

48. The question remains as to whether the exclusion of the element of repeated offence led to the reassessment of the evidence examined in the applicant's criminal case. In this respect the Court notes that the two crimes that were the subject of the proceedings in the instant case were not factually related. According to the trial court, the two crimes were linked because it was only after failing to gain any money from the murder of K. that the applicant decided to commit another crime – that is to say the abduction and murder of S. – in order to obtain money. The dissenting judges of the Supreme Court relied on this conclusion in their opinion regarding the interconnection of the two crimes (see paragraph 26 above). Leaving aside the grounds for such an assumption regarding the applicant's motives on the part of the trial court, the Court notes that, as pointed out by the Government, that assumption had no bearing on the classification by the domestic courts of one of his acts against S. as murder for personal gain (given the fact that he had claimed a ransom and had received it, and that the ransom money had been found in his possession – see paragraphs 6, 8 and 41 above). Furthermore, as the applicant's guilt for murder of K. was no longer considered as established by the court, there was no basis for concluding that the murder of S. was a repeat offence, so that classification was excluded. After the exclusion of all classifications that were no longer valid, the Supreme Court deemed that it would be justified in upholding the part of the previous punishment imposed for the murder of S. without any need for reassessment, but with an adjustment of the punishment, as described in paragraph 25 above.

49. The Court considers that in the light of the above considerations, the Supreme Court cannot be said to have imposed a new punishment on the applicant and that, therefore, no issue arises as to the lawfulness of the applicant's sentence for alleged failure by the Supreme Court to address, in 2018, the issue of the statute of limitation in respect of the criminal case against the applicant (see paragraph 30 above).

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

**FOR THESE REASONS, THE COURT**

1. *Declares*, by a majority, the complaint under Article 7 admissible;

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

Done in English, and notified in writing on 4 November 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar

Síofra O'Leary President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the statement of partial dissent of Judge O'Leary is annexed to this judgment.

S.O.L.

V.S.

**STATEMENT OF PARTIAL DISSENT BY JUDGE O'LEARY**

I consider that the applicant's complaint in relation to Article 7 of the Convention should have been declared inadmissible and therefore voted against operative part 1. Paragraphs 34 to 36 of the judgment do not provide a convincing explanation for the applicability of Article 7 in the circumstances of this case. The applicant's conviction for the murder of S. was never challenged, led in any event to the imposition of a life sentence pursuant to domestic law and was not the subject of the Supreme Court's extraordinary review. The latter concerned only the murder of K. and the follow up to two previous judgments of this Court in that regard. Even if one were to have considered Article 7 applicable, the relevant complaint is manifestly ill-founded and could have been disposed of summarily by a decision.