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

FOURTH SECTION

DECISION

Application no. 41126/13
Arsen ARTSRUNI
against Armenia

The European Court of Human Rights (Fourth Section), sitting on 30 November 2021 as a Chamber composed of:

Yonko Grozev, *President,*
Tim Eicke,
Faris Vehabović,
Iulia Antoanella Motoc,
Armen Harutyunyan,
Gabriele Kucsko-Stadlmayer,
Ana Maria Guerra Martins, *judges,*

and Andrea Tamietti, *Section Registrar*,

Having regard to the above application lodged on 21 June 2013,

Having regard to the parties' observations,

Having deliberated, decides as follows:

## THE FACTS

1. The applicant, Mr Arsen Artsruni, is a Lebanese national, who was born in 1961. At the time the application was lodged he was serving a life sentence in Nubarashen Detention Facility. He was represented before the Court by Ms N. Rshtuni, a lawyer practising in Yerevan.

2. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, and subsequently by Mr Y. Kirakosyan, Representative of the Republic of Armenia before the European Court of Human Rights.

## A. The circumstances of the case

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

### *1. The applicant's conviction to the death penalty*

4. On 10 December 1996 the Criminal Division of the Supreme Court convicted the applicant of organised crime, including drug dealing, one count of conspiracy to commit murder and one count of conspiracy to commit aggravated murder (second offence) under Articles 72, 17-100 and 17-99 § 8 of the Criminal Code then in force (hereinafter, "the old Criminal Code" – see paragraph 24 below), sentencing him to the death penalty with confiscation of his personal property. The relevant parts of the judgment read as follows:

> "[The applicant] involved [A.M.], [A.Z.] and [other persons] in an organised criminal group [gang]. Thereafter ... other persons joined the gang, including [A.G.]...
>
> ... [the applicant] ... in prior agreement with ... [A.M.] planned and organised ... [A.N.'s] murder ...
>
> ...
>
> On 12 October 1993 ... [A.M.], [A.Z.] and [A.G.]... fired shots at [A.N.] in his apartment, killing him, and then killed his wife, who had entered the room upon hearing the gunshots ...
>
> ...
>
> In April 1994 [the applicant] instructed A.M. to kill [G.S.] ...
>
> ... on 2 May 1994 ... [A.M.] and [A.G] ... killed [G.S.] near the latter's garage ...
>
> ... it has been established that in ... 1994 [the applicant] sold drugs ... for the purpose of financing the gang ...
>
> For the commission of the above-mentioned crimes, the [prosecution] has brought charges against [the applicant] under Articles 72, 99 §§ 4 and 8 of the [Criminal Code] ...
>
> ...
>
> Having assessed the evidence in relation to [A.N. and his wife's killing], the [court] considers that the [prosecution] has made an erroneous legal assessment of the actions of each of the accused ... Thus, although [A.N.'s] wife was killed upon the collective subjective initiative of [A.M.], [A.Z.] and [A.G.], the [prosecution] has included [A.N.'s wife's] murder within the scope of the charges brought against [the applicant]. However, it transpires from the evidence in the case file that [the applicant] only found out that [A.N.'s wife] had been killed after the murder ...
>
> The body of evidence collected in relation to [A.N. and his wife's killing] shows that ... [the applicant] was the organiser of [A.N.'s murder] and that A.M. acted on his orders ...
>
> ... the charges against [the applicant] in relation to [A.N. and his wife's killing] should be amended ... as he did not personally participate in the murder but organised it ... [the

applicant] should be charged under Article 17-100 of the [Criminal Code] for organising only [A.N.'s] murder ... whereas [A.N.'s wife's] murder should not be imputed to him, given that [her] killing was not part of [the applicant's] prior agreement with [A.M.] ... Therefore, only [A.M.], [A.Z.] and [A.G.] should be held criminally liable for killing two persons under Article 99 § 4 ...

... it has been established that after organising [A.N.'s] murder [the applicant] organised [G.S.'s] murder, in which circumstances his charges in respect of that incident should [also] be amended under Article 17-99 § 8 of the [Criminal Code].

...

Thus ... [the applicant] should be criminally liable under Articles 72, 17-100 and 17-99 § 8 of the [Criminal Code] for creating and heading an organised criminal group ..., for organising [A.N.'s] and [G.S.'s] murders by members of the organised criminal group and drug dealing.

...

In view of the foregoing ... the Criminal Division ... finds [the applicant] guilty ... [and decides to] sentence him to twelve years' imprisonment under Article 72 with confiscation of his personal property ... to twelve years' imprisonment under Article 17-100 and to ... [the] death penalty under Article 17-99 § 8.

... in accordance with the principle of absorption of a lesser penalty ... [decides to] impose the death penalty as the final punishment with confiscation of personal property."

### *2. The bringing into conformity of the applicant's conviction with the new criminal code*

5. On 18 April 2003 a new Criminal Code was enacted whereby the death penalty was abolished (see paragraph 26 below).

6. By a presidential decree of 1 August 2003 the applicant was granted a pardon and the death penalty was replaced with life imprisonment.

7. By an application of 31 July 2006 the Deputy Prosecutor General requested the Erebuni and Nubarashen District Court of Yerevan ("the District Court") to review the judgment of 10 December 1996 with a view to bringing it into conformity with the new Criminal Code.

8. By a decision of 8 August 2006 the District Court allowed that application, giving the following reasoning:

"In accordance with the Law of 18 April 2003 on bringing the Criminal Code into force, the [old] Criminal Code enacted on 7 March 1961 ceased to be in force from 1 August 2003.

Pursuant to section 3 of the above-mentioned law, the punishment of persons convicted under the [old Criminal Code] who have not yet served their sentence should be brought into conformity with the [new Criminal Code] in cases where a convict's sentence is more severe than the maximum punishment stated in the corresponding provision of the [new Criminal Code], while in accordance with section 6 of the above-mentioned law, the punishment of persons sentenced to the death penalty under ... the [old Criminal Code] is replaced by life imprisonment ...

> ... the judgment ... of 10 December 1996 in respect of [the applicant] and the offences committed by the latter should be brought into conformity with the [new Criminal Code], while the life imprisonment imposed by the [presidential decree] should remain.
>
> [the District Court]... decides ... that the offences committed by [the applicant] correspond to Articles 222 § 1, 38-104 § 1 and 104 § 2 (1) and (15) of the [new Criminal Code] ..."

9. The applicant did not immediately appeal against that decision.

### *3. The abolition of the crime of murder by a person who has previously committed murder*

10. On 23 May 2011 the legislature introduced an amendment to the new Criminal Code whereby Article 104 § 2 (15) (murder by a person who has previously committed murder) was abolished (see paragraph 33 below).

### *4. The applicant's request for review and appeal*

11. On 14 June 2011 the applicant lodged an application with the District Court seeking a review of the Supreme Court's final judgment of 10 December 1996 (see paragraph 4 above) in the light of the amendments of 23 May 2011, in particular the abolishment of Article 104 § 2 (15) of the new Criminal Code.

12. On 22 August 2011 the applicant's lawyer lodged an appeal against the District Court's decision of 8 August 2006 (see paragraph 8 above) arguing that, as a result of the trial judge's negligence, there had been a technical error in the decision in that the offence committed by the applicant had been stated as corresponding to Article 104 § 2 (1) and (15) instead of Article 38-104 § 2 (15) of the new Criminal Code.

13. By a decision of 31 August 2011 the Criminal Court of Appeal left the application of 22 August 2011 unexamined for having been lodged out of time.

14. The applicant's lawyer lodged an appeal on points of law against that decision.

15. By a decision of 25 November 2011 the applicant's lawyer was granted leave to appeal.

16. On 22 December 2011 the Court of Cassation quashed the District Court's decision of 8 August 2006 (see paragraph 8 above) and the Court of Appeal's decision of 31 August 2011 (see paragraph 13 above), and remitted the case to the District Court for fresh examination.

17. On 6 March 2012 the District Court joined the applicant's request of 14 June 2011 (see paragraph 11 above) and his lawyer's appeal against the decision of 8 August 2006 (see paragraph 12 above) into one set of proceedings, on the grounds that both concerned a review of the judgment of the Criminal Division of the Supreme Court concerning the applicant.

### *5. The District Court's decision on the applicant's request for review and appeal*

18. On 12 July 2012 the District Court delivered its decision, the relevant parts of which read as follows:

> "... having brought [the judgment of 10 December 1996] into conformity with the Criminal Code enacted on 18 April 2003, the court finds that ... the offences committed by [the applicant] correspond to Articles 222 § 1, 38-104 § 1 and 38-104 § 2 (15) of the Criminal Code as in force on 1 August 2003.
>
> ... by the [amendment of 23 May 2011], Article 21 of the Criminal Code, which provided for the repetition of offences, lost its force ...
>
> For this reason, Article 104 § 2 (15) of the Criminal Code (murder committed by a person who has previously committed murder) lost its force.
>
> ...
>
> [The old Criminal Code] and the Criminal Code in force contain an identical description of the offence of organised crime ... therefore, the court finds that the offence imputed to [the applicant] under Article 72 [of the old Criminal Code] corresponds to the offence under Article 222 § 1 of the Criminal Code in force ... therefore the punishment imposed by the judgment under this provision should remain unchanged.
>
> Under [the old Criminal Code], aggravated murder was punishable ... under Article 99, while non-aggravated murder was punishable under Article 100 ...
>
> Article 99 of [the old Criminal Code] provided for two separate elements of a crime rendering a murder aggravated: the murder of two or more persons (Article 99 § 4) and premeditated murder committed by a person who has previously committed murder ... (Article 99 § 8)
>
> Article 104 § 2 of the [Criminal Code] used to consider the murder of two or more persons ... and murder committed by a person who has previously committed murder ... separate elements rendering a murder aggravated.
>
> By the legislative amendment of [23 May 2011] Article 104 § 2 (15) ... lost its force.
>
> Thus, [the old Criminal Code] and the Criminal Code as in force on [1 August 2003] and at present provided and continue to consider the (premeditated) killing of two or more persons ... aggravated murder.
>
> ... the decriminalisation of Article 104 § 2 (15) of the Criminal Code does not ... exclude the existence of the given type of aggravated murder, that is, the murder of two or more persons ...
>
> As a result of the examination of the material of the case, having regard in particular to the purposes of the organised criminal group [led by the applicant] ... it has been established that the killing of a number of persons was envisaged ... and that the two murders in the present case, as a result of the operation of the organised criminal group and the consequences thereof, were included within the context of the creation and operation of the group.
>
> ... the court concludes that the merging of the two counts of conspiracy to commit murder imputed to the applicant by the judgment of ... 10 December 1996 into one offence, that is, conspiracy to commit the murder of two persons, corresponds to

Article 38-104 § 2 (1) [of the new Criminal Code]. The provision in question also provides for life imprisonment.

... the court decides to ... bring the judgment of ... 10 December 1996 into conformity with Articles 222 § 1 and 38-104 § 2 (1) of the [new Criminal Code], [and] to leave [the applicant's] sentence, that is to say life imprisonment, unchanged ..."

### *6. Proceedings before the Criminal Court of Appeal*

19. The applicant lodged an appeal. He argued, in particular, that the District Court had not had the power to re-examine the case on the merits. Having been bound by the conclusions of the final judgment of 10 December 1996 (see paragraph 4 above) as regards the legal assessment of his offences, it should have limited itself to bringing that judgment into conformity with the legislation currently in force. He further argued that the District Court, not having had the material of the case at its disposal, the majority of it having been destroyed, had carried out a legal assessment of his actions, which had already been the subject of examination in the final judgment of 1996, the corresponding sentences having been imposed. In particular, notwithstanding the fact that the Supreme Court had come to the conclusion that the murders solicited by him had been committed at different times and had not been in pursuance of a common intent or committed for the same motive, the District Court had nevertheless found that the two murders had been the result of the activity of the organised criminal group and that the consequences of that activity had been in line with the purposes of the creation and operation of the group. The District Court had merged the two separate offences, that is, one count of conspiracy to commit murder and another of conspiracy to commit aggravated murder, into one count of aggravated murder, which contradicted the Supreme Court's assessment of the offences imputed to him. Lastly, the applicant argued that, under the law in force in 1993, for different murders to fall under Article 99 § 4 (murder of two or more persons) they had to have constituted one crime committed with a common intent either at the same time or at different times. It could not be ruled out that, following the amendments of 23 May 2011 (see paragraph 10 above), the practice could change to apply Article 104 § 2 (1) of the new Criminal Code to multiple murders, but such a change in practice should not extend to crimes committed prior to that change – all the more so in cases where final judgments had been adopted.

20. On 11 September 2012 the Criminal Court of Appeal upheld the District Court's decision of 12 July 2012 (see paragraph 18 above). The decision stated, in particular, the following:

"The Court of Appeal notes that there are differences between the offences set out in Article 104 § 2 (1) and [Article 104 § 2 (15) of the new Criminal Code].

The offence set out in Article 104 § 2 (1) ... is described by a common intent which has resulted in the killing of two or more persons.

The content of Article 104 § 2 (15), which has lost its force, shows that it concerns at least two ... offences committed at different times which have given rise to the consequences stipulated in that provision and that there is a link between those consequences and a common intent. Consequently, Article 104 § 2 (1) has no connection with the repetition of offences.

In view of the above, the Court of Appeal finds that ... there are no grounds for allowing the appeal ..."

*7. Proceedings before the Court of Cassation*

21. The applicant lodged an appeal on points of law, raising similar arguments as in his appeal before the Criminal Court of Appeal (see paragraph 19 above).

22. By a decision of 27 November 2012 he was granted leave to appeal.

23. On 15 February 2013 the Court of Cassation dismissed the applicant's appeal on points of law. The relevant parts of that decision read as follows:

"... the Court of Cassation finds that in the context of the abolishment of Article 21 (repetition of offences) and Article 104 § 2 (15) (murder by a person who has previously committed murder) of the ... [new] Criminal Code and amendments ... to Article 20 (multiple offences) ... as a result of the [amendments of 23 May 2011] ... there is an issue with uniform application of the law with regard to the ... offence (murder of two or more persons) set out in Article 104 § 2 (1) of the Criminal Code ...

... the Court of Cassation notes that in the context of Article 104 § 2 (15) ... having lost its force, the element provided for by Article 104 § 2 (1), that is, the murder of two or more persons, remains an aggravating circumstance for murder ... Having extended the notion of multiple offences (Article 20 § 1 (1) ... ), the legislature has not abolished the [specific] legal provisions establishing liability for offences committed in respect of two or more persons ... including ... Article 104 § 2 (1). In particular, there is multiplicity provided for by law where the legislature considers the commission of more than one offence an element affecting the classification of the given offence, making it aggravated ...

... cases of the murder of two or more persons with the same intent and the premeditated murder of two or more persons for unrelated motives (in other words, a new murder committed by a person who has previously committed murder) should be classified under Article 104 § 2 (1) ... if the person has not been convicted of them ...

... the Court of Cassation notes that ... the [District Court] considered that the murder of two persons solicited by [the applicant] should be classified under the specific provision of the Criminal Code [that is, Article 104 § 2 (1)] ... and not on the basis of the rules on multiple offences provided for in Article 20 § 1 (1) ...

Therefore ... the District Court's decision of 12 July 2012 and the Court of Appeal's decision ... of 11 September 2012 are well-founded ...

... it is evident that, under the criminal law in force at the time when [the applicant] offended, the crimes of the murder of two or more persons and murder by a person who has previously committed premeditated murder ... were set out in Articles 99 § 4 and 8 of the [old Criminal Code] respectively ... Therefore, by the judgment of the Criminal Division of the Supreme Court [the applicant] was found guilty under Articles 72, 17-100 and Article 17-99 § 8 for soliciting the murder of two persons ...

... the offences imputed to [the applicant] have been brought into conformity with the provisions of the [new] Criminal Code in relation to the same factual circumstances ... and ... as a result his situation has not worsened. In other words, [the applicant] has not been convicted twice of the same offence, but the offences imputed to him by a final judgment have been brought into conformity with the [relevant] provisions of the [new] Criminal Code ...

... the Court of Cassation notes that, as a result of the abolishment of Article 104 § 2-(15) by the [amendment of 23 May 2011], the murder of two or more persons as a type of aggravated murder has not been decriminalised and thus [the applicant's] situation with regard to the classification of the offence has not improved.

In view of the foregoing ... there has been no violation of [the principle of retroactivity of the more lenient criminal law] set out in Article 13 of the |new] Criminal Code ... in [the applicant's] case ..."

## B. Relevant domestic law

### *1. The old Criminal Code (in force from 7 March 1961 until 1 August 2003)*

24. The relevant provisions of the old Criminal Code read as follows:

**Article 17: Conspiracy**

"Conspiracy is the deliberate joint participation of two or more persons in the commission of an offence.

...

The organiser is the person who has solicited or directed the commission of an offence.

..."

**Article 72: Organised crime**

"Creating armed criminal groups for the purpose of attacking State and non-governmental enterprises, organisations, bodies or individuals and participating in such groups and in attacks carried out by them is punishable by imprisonment of three to fifteen years with confiscation of property and exile or [by] the death penalty with confiscation of property."

**Article 99: Premeditated aggravated murder**

"Premeditated murder

...

4. of two or more persons;

...

8. by a particularly dangerous reoffender or a person who has previously committed premeditated murder (with the exception of excessive self-defence ... );

... is punishable by imprisonment of eight to fifteen years or the death penalty."

**Article 100: Premeditated murder**

"Premeditated murder committed without the aggravating circumstances stipulated in Article 99 of this Code is punishable by imprisonment of five to twelve years."

25. The old Criminal Code did not contain any definition of "recidivism". Article 23.1 stated that a person could be recognised as a "particularly dangerous reoffender" under Article 99 § 8 by a court judgment and set out a number of conditions, including a list of offences for which the person had to have been sentenced to imprisonment in the past.

*2. The New Criminal Code (in force from 1 August 2003)*

26. The relevant provisions of the new Criminal Code, as in force prior to the amendments of 23 May 2011 (see paragraphs 10 above and 27-33 below), read as follows:

**Article 13: Retroactive effect of criminal law**

"1. A law eliminating the criminality of an act, mitigating the punishment or improving the status of the offender in any way shall have retroactive effect, that is, it shall apply to the persons who committed the act in question before that law has taken effect, including persons who are serving their punishment, or who have served their punishment but still have a criminal record.

2. A law establishing the criminality of an act, making the punishment more severe or otherwise worsening the status of the offender shall have no retroactive effect.

3. A law partially mitigating the punishment and, at the same time, partially making the punishment more severe shall have retroactive effect only in so far as it mitigates the punishment."

**Article 20: Multiplicity of offences**

"1. Multiplicity of offences is:

(1) the commission of two or more offences under different provisions or different parts of the same provision of this Code, none of which the person has been convicted for;

...

2. In cases of multiple offences, a person shall be liable for each offence in accordance with the relevant provision of this Code or part thereof."

**Article 21: Repetition of offences**

"1. Repetition of offences is the commission of two or more offences under the same provision of this Code or part thereof.

..."

**Article 22: Recidivism**

"1. Recidivism is the commission of an offence by a person who has a previous conviction for a premeditated offence.

...”

**Article 38: Types of accomplices**

“...

3. An organiser is a person who has organised and led the commission of a crime, as well as [a person] who has created an organised criminal group or criminal conspiracy or led them ...”

**Article 59: Imprisonment for a certain period of time**

“...

4. When imposing a penalty for multiple offences by fully or partially adding up the terms of imprisonment, the maximum term of imprisonment may not exceed fifteen years, and in cases of multiple convictions, twenty years.”

**Article 66: Imposing a sentence in cases of multiple offences**

“1. In cases of multiple offences the court, by imposing a separate penalty (principal or additional) for each offence, shall set the final penalty by absorbing the more lenient penalty or fully or partially adding up the imposed penalties.

...

4. If multiple offences include serious or particularly serious offences, the final penalty shall be imposed by fully or partially adding up the penalties. In addition, the final term of imprisonment may not exceed fifteen years. If the court imposes life imprisonment for one of the multiple offences, the final principal penalty shall be determined through absorption ...”

**Article 104: Murder**

“1. Murder, that is, the premeditated killing of another, is punishable by imprisonment of six to twelve years.

2. Murder

(1) of two or more persons;

...

(15) by a person who has previously committed murder ... is punishable by imprisonment of eight to fifteen years or life imprisonment.”

**Article 222: Organised crime**

“1. Creating, leading an organised armed group for the purpose of attacking individuals and organisations or participating in attacks carried out by the group is punishable by imprisonment of ten to fifteen years with or without confiscation of property.”

### *3. Amendments introduced in 2011*

27. The Law of 23 May 2011 on making amendments and supplements to the Criminal Code brought about the following legislative changes.

28. Article 20 § 1 (1) was redrafted to state the following:

"1. Multiplicity of offences is:

1) the commission of two or more offences under this Code (different provisions or the same provision or the same or different parts or paragraphs of the same provision), none of which the person has been convicted for;"

29. Article 21 was abolished.

30. Article 59 § 4 was amended to state the following:

"4. When imposing a penalty for multiple offences by fully or partially adding up the terms of imprisonment, the maximum term of imprisonment may not exceed twenty-five years, and in cases of multiple convictions, thirty years."

31. Article 66 §§ 1 and 4 were amended to read as follows:

"1. In cases of multiple offences the court, by imposing a separate penalty (principal or additional) for each offence, shall set the final penalty by fully or partially adding up the imposed penalties.

...

4. If multiple offences include serious or particularly serious offences, the final penalty shall be imposed by fully or partially adding up the penalties. In addition, the final term of imprisonment may not exceed twenty-five years. If the court imposes life imprisonment for one of the multiple offences, the final principal penalty shall be determined through absorption ..."

32. The new Criminal Code was supplemented by Article 67.1, which sets out the sentencing rules in cases of recidivism (as defined in Article 22). The relevant part reads as follows:

"1. When imposing a penalty in cases of recidivism, dangerous and particularly dangerous recidivism [the court] shall take into account the number of offences committed, their nature and gravity, the reasons why the previous penalty has not been sufficient for rehabilitating the offender, as well as the nature, gravity and consequences of the new offence.

..."

33. Article 104 § 2 (15) was abolished. The penalty for murder (Article 104 § 1) was changed to eight to fifteen years' imprisonment and the penalty for aggravated murder (Article 104 § 2) became twelve to twenty years or life imprisonment.

## COMPLAINTS

34. The applicant complained, under Article 7 of the Convention, that the reclassification of the two counts of murder of which he had been convicted by the final judgment of 10 December 1996 to the murder of two or more persons, in the proceedings concerning the review of his sentence imposed by that judgment, had been contrary to the law and legal practice that had existed at the time he had committed the relevant offences. As a result, he had been unable to benefit from the more lenient law following the amendments to the Criminal Code of 23 May 2011.

35. The applicant also complained, under Article 4 of Protocol No. 7 to the Convention, that he had been convicted of the same offences twice, since within the framework of the sentence review proceedings the courts had made a new legal assessment of the offences of which he had already been convicted by the final judgment of 10 December 1996.

# THE LAW

36. The applicant alleged that what he considered to have been an unforeseeable legal reassessment of the offences of which he had already been convicted by the Supreme Court's final judgment of 10 December 1996 (see paragraph 4 above), in the proceedings concerning the review of his sentence imposed by that judgment, had deprived him of the possibility to benefit from a legislative change favourable to him, in breach of the requirements of Article 7 of the Convention. He further alleged that the legal reassessment of the offences of which he had already been convicted by the same judgment had resulted in his being convicted twice for the same offences, contrary to the requirements of Article 4 of Protocol No. 7 to the Convention.

37. Being the master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114, 124 and 126, 20 March 2018), the Court finds it appropriate to examine the applicant's complaints solely under Article 7 of the Convention, which reads as follows in its relevant parts:

> "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.
>
> ..."

## A. The parties' submissions

### *1. The Government*

38. The Government submitted that Article 99 § 4 of the old Criminal Code (see paragraph 24 above) had included the premeditated murder of two or more persons as a type of aggravated murder when the applicant had committed the offences in question. Therefore, it had been foreseeable for the applicant that soliciting two murders could be classified as aggravated murder.

39. They further submitted that the proceedings concerning the review of the applicant's sentence had not resulted in a reassessment of the facts of his case. Those proceedings had merely brought the judgment of 10 December 1996 (see paragraph 4 above) into conformity with the new Criminal Code, as amended in 2011.

40. Relying on the decision of the Court of Cassation of 15 February 2013 (see paragraph 23 above), the Government argued that the legislative amendments introduced in 2011 had not decriminalised any of the offences of which the applicant had been convicted by the judgment of 10 December 1996. When the notion of repetition of offences (subsequently Article 104 § 2 (15)) had been abolished (see paragraphs 29 and 33 above), the domestic courts had extended the boundaries of Article 104 § 2 (1). That is, prior to the 2011 amendments, the premeditated murder of two or more persons with a common intent would have been classified under Article 104 § 2 (1), whereas in cases where the perpetrator had had separate intentions, the murder of two or more persons would be classified as aggravated murder under Article 104 § 2 (15). There was nothing to suggest that the factual aspect of killing more than one person had no longer been considered aggravated murder after the legislative amendments of 2011.

41. The Government further submitted that the gravity of the offences committed by the applicant had been so manifest that the domestic courts' findings within the framework of the sentence review proceedings – that he would remain liable for aggravated murder, irrespective of the technical amendments of the law – could not be said to be at variance with the object and purpose of Article 7 of the Convention.

42. In the Government's submission, the fact that the applicant had not been convicted under Article 99 § 4 of the old Criminal Code did not conclusively indicate that his actions had not objectively constituted an offence under that provision at the time they had been committed. If the old Criminal Code had not included Article 99 § 8, the murders solicited by the applicant would have been classified, *inter alia*, under Article 99 § 4, which was equivalent to Article 104 § 2 (1) of the new Criminal Code.

43. Lastly, the Government argued that no issue concerning the principle of retroactivity of the more lenient criminal law arose in the present case, considering that no offence of which the applicant had been convicted had been fully or partially decriminalised as a result of the legislative amendments of 2011; nor had those amendments otherwise prescribed a more favourable situation for the applicant. The abolition of the notion of repetition of offences had only changed the approach as regards the legal assessment of repeat offences.

*2. The applicant*

44. The applicant argued that the reclassification of the two different counts of conspiracy to commit murder on which he had been convicted by the final judgment of 10 December 1996, in the proceedings concerning the review of his sentence imposed by that judgment, had been contrary to the law and legal practice that had existed at the time he had committed the relevant offences. As a result, he had been unable to obtain a review of his sentence in the light of the new sentencing rules introduced in 2011.

45. In particular, by the final judgment of 10 December 1996 he had been found guilty of conspiracy to commit the murders of A.N. and G.S. which, as the Supreme Court had concluded, had not been in pursuance of a common intent (see paragraph 4 above). Hence, in accordance with the law and legal practice that had existed at the material time, the Supreme Court had found him guilty of conspiracy to commit the non-aggravated murder of A.N. (Article 17-100 of the old Criminal Code) and conspiracy to commit the aggravated murder of G.S. (Article 17-99 § 8 of the old Criminal Code, that is, murder committed by a person who has previously committed premeditated murder) (see paragraph 24 above). The applicant argued that he could not have foreseen that A.N. and G.S.'s murders would be classified as conspiracy to commit the murder "of two persons" under Article 38-104 § 2 (1) of the new Criminal Code (see paragraphs 26 and 33 above). Even though the offence of the murder of two or more persons had existed at the time he had been convicted (Article 99 § 4 of the old Criminal Code), the Supreme Court had not convicted him under that provision.

46. The applicant further argued that, as Article 104 § 2 (15) of the new Criminal Code (that is, the aggravating factor of the commission of murder by a person who has previously committed premeditated murder) had been abolished by the amendments to the Criminal Code of 23 May 2011 (see paragraph 33 above), G.S.'s killing should have been classified as non-aggravated murder and his sentence should have been reviewed accordingly with the application of the new sentencing rules in cases of multiple offences (see paragraphs 30 and 31 above). However, because of the domestic courts' unforeseeable reclassification of the two counts of conspiracy to commit murder under Article 38-104 § 2 (1) of the new Criminal Code, he had been deprived of the opportunity to benefit from retrospective application of the more lenient criminal law.

### B. The Court's assessment

47. The relevant principles emerging from the Court's case-law under Article 7 of the Convention are summarised in *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* ([GC], request no. P16-2019-001, Armenian Constitutional Court, §§ 60-62, 29 May 2020), as well as in *Del Río Prada v. Spain* ([GC], no. 42750/09, §§ 77-93, ECHR 2013) and *Rohlena v. the Czech Republic* ([GC], no. 59552/08, §§ 50-53, ECHR 2015).

48. The Court reiterates that Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there

are differences between the criminal law in force at the time of the commission of the 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). While this principle is not explicitly stated in Article 7 of the Convention, it was first established in the case of *Scoppola* (cited above, §§ 106-09) and subsequently applied in *Gouarré Patte v. Andorra* (no. 33427/10, §§ 28-36, 12 January 2016) and *Koprivnikar v. Slovenia* (no. 67503/13, § 59, 24 January 2017) in the context of legislative changes concerning applicable penalties and sentencing. Furthermore, the Court has found that the principle of retrospective application of the more lenient criminal law also applied in the context of an amendment relating to the definition of the offence (see *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 64, 3 December 2019; *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law*, cited above, § 82).

49. Although the issue of the applicability of Article 7 to the facts of the present case was not addressed by the parties in their observations, the Court reiterates that the compatibility *ratione materiae* is an issue which it must examine on its own motion (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III, and *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 58, ECHR 2008).

50. The Court observes that by the final judgment of the Supreme Court of 10 December 1996 the applicant was convicted of organised crime, including drug dealing, conspiracy to commit murder and conspiracy to commit aggravated murder (committed by a person who had previously committed murder) under Articles 72, 17-100 and 17-99 § 8 of the old Criminal Code respectively (see paragraphs 4 and 24 above) and sentenced to the maximum applicable penalty under the latter provision, the death penalty. Following the enactment of the new Criminal Code in 2003, the applicant's death penalty was replaced by life imprisonment (see paragraphs 5 and 6 above).

51. The Court further observes that the new Criminal Code contained identical provisions in relation to the offences the applicant had been convicted of by the Supreme Court (see paragraph 26 above). In particular, the offences under Articles 72 (organised crime), 100 (premeditated murder) and 99 § 8 (premeditated murder committed by a person who has previously committed murder) of the old Criminal Code (see paragraph 24 above) corresponded to Articles 222, 104 § 1 and 104 § 2 (15) of the new Criminal Code respectively (see paragraph 26 above). Although in its decision of 8 August 2006 the District Court stated that the offences of which the applicant had been convicted corresponded to Articles 222 § 1, 38-104 § 1

(murder of two or more persons) and 104 § 2 (1) and (15) of the new Criminal Code (see paragraph 8 above), that decision was quashed by the Court of Cassation following an appeal by the applicant (see paragraphs 12 and 16 above). Subsequently, in its decision of 12 July 2012 (see paragraph 18 above) the District Court confirmed that the offences of which the applicant had been convicted by the final judgment of 10 December 1996 corresponded to Articles 222, 38-104 § 1 and 38-104 § 2 (15) of the new Criminal Code, these being the provisions which punished the offences of organised crime, murder and murder by a person who has previously committed murder.

52. As a result of the amendments to the new Criminal Code introduced on 23 May 2011, the offence of "murder committed by a person who has previously committed murder" under Article 104 § 2 (15) (identical to Article 99 § 8 of the old Criminal Code) was removed from the list of aggravated murders set out in Article 104 § 2 (see paragraph 27 and 33 above).

53. Following those legislative amendments, the applicant sought a review of his life sentence (see paragraph 11 above). When examining the applicant's request in that regard, the domestic courts were called upon to bring into conformity, that is, decide on the legal classification under the amended new Criminal Code of the offences of which he had been convicted by the Supreme Court's judgment of 10 December 1996 (see paragraph 4 above) – particularly as regards the offence of murder committed by a person who has previously committed murder, which no longer existed as a type of aggravated murder (see paragraph 33 above). The applicant argued, in particular, that his conviction for conspiracy to commit the aggravated murder of G.S. under Article 99 § 8 of the old Criminal Code should be classified as non-aggravated murder given that the corresponding Article 104 § 2 (15) of the new Criminal Code had been abolished as a result of the legislative amendments of 23 May 2011 (see paragraphs 19 and 33 above). On 15 February 2013 the Court of Cassation, in a final decision, upheld the District Court's decision to maintain the applicant's life sentence, finding that the legislative amendments at issue had not brought about a more favourable situation for him in terms of the legal classification under the new Criminal Code of the offences of which he had been convicted by the Supreme Court's judgment of 10 December 1996 (see paragraphs 18 and 23 above).

54. In this connection, a question arises as to whether Article 7 of the Convention applies to the proceedings whereby the applicant sought a review of his sentence following the legislative changes of 2011, which resulted in the abolishment of the aggravating circumstance of one of the offences of which he had been convicted by a final judgment rendered in 1996.

55. In this context, the Court refers to its settled case-law that the principle of retroactivity of the more lenient criminal law is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the 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*, cited above, § 109). Hence, the applicant's argument that he should be granted the benefit of a more favourable law enacted around fifteen years after his conviction became final is not supported by the Court's case-law.

56. That said, the Court notes that in its judgment in the case of *Gouarré Patte* it extended the guarantees of Article 7 concerning the retrospectiveness of the more lenient criminal law to the possibility of a retrospective review of the final sentence if domestic law provided for such a possibility (see *Gouarré Patte*, cited above, §§ 33-36; see also *Koprivnikar*, cited above, § 49). In that case, however, the Court applied the principle of retroactivity of the lighter penalty to a finally convicted person inasmuch as domestic law expressly required the domestic courts to review a sentence ruling of their own motion where a subsequent law had reduced the penalty applicable to an offence (see *Gouarré Patte*, cited above, §§ 33 and 34). In the Court's view, this was not the situation in the present case.

57. In particular, although the new Criminal Code (see paragraph 5 above), which was in force at the time the applicant requested a review of his sentence (see paragraph 11 above), provided for the retroactive effect of a law eliminating the criminality of an act, mitigating the punishment or improving the status of the offender in respect of individuals serving their punishment (see Article 13 of the new Criminal Code, cited in paragraph 26 above), that provision was not as specific as under Andorran law (see *Gouarré Patte*, cited above, §§ 17 and 34) and, more importantly, the domestic courts found that it could not serve as a basis for the revision of the applicant's case. Indeed, making a factual and legal assessment, they considered that his situation had not changed with regard to the legal classification under the amended new Criminal Code of the offences of which he had been convicted by the Supreme Court's judgment of 10 December 1996 (see paragraphs 18, 20 and 23 above).

58. Thus, having carefully examined the arguments raised by the applicant in his appeals (see paragraphs 19 and 21 above), in its final decision of 15 February 2013 (see paragraph 23 above) the Court of Cassation came to the conclusion that the legislative amendments introduced on 23 May 2011 (see paragraphs 27-33 above) had not changed the situation in the applicant's favour. In doing so, the Court of Cassation, taking into account the legislative amendments of 2011, including the changes to Article 20 of the new Criminal Code (see paragraph 28 above), adopted a new approach with regard to the interpretation of the aggravating circumstance provided for by Article 104 § 2 (1) of the new Criminal Code. It decided, in particular, that, contrary to the practice which existed prior to those amendments, the premeditated murder of two persons for unrelated motives should also be classified as "murder of two persons" for the purposes of Article 104 § 2 (1) (see paragraph 23 above).

59. In this context, the Court reiterates that it has acknowledged in its case-law that in any system of law, including criminal law, there will always be a need for elucidation of doubtful points and for adaptation to changing circumstances by means of judicial interpretation (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 141, ECHR 2008).

60. The Court further reiterates the fundamental principle established by its case-law on the interpretation and application of domestic law. In particular, it is not the Court's task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation, so that its role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Korbely v. Hungary* [GC], no. 9174/02, § 72, ECHR 2008; and *Kononov v. Latvia* [GC], no. 36376/04, § 197, ECHR 2010). The Court will not therefore question the interpretation and application of national law by national courts unless it has produced consequences that are inconsistent with the Convention (see, *mutatis mutandis, Kononov*, cited above, § 197, and *Plechkov v. Romania*, no. 1660/03, § 67, 16 September 2014). In the present case, the Court does not see any appearance of arbitrariness or manifest unreasonableness in the conclusions reached by the domestic courts while interpreting Articles 13 and 104 § 2 (1) of the new Criminal Code in the light of the changes introduced to the same code by the 2011 amendments.

61. In view of the foregoing, and having regard to the principles established in its case-law (see, in particular, paragraphs 48, 55, 59 and 60 above), the Court finds that the proceedings in question did not fall within the scope of Article 7 of the Convention.

62. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court, unanimously,

*Declares* the application inadmissible.

Done in English and notified in writing on 13 January 2022.

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| Andrea Tamietti<br>Registrar | Yonko Grozev<br>President |