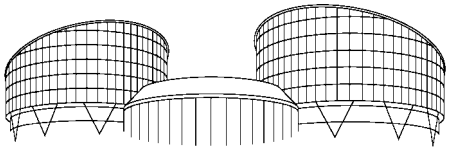

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF DUNGVECKIS v. LITHUANIA

(Application no. 32106/08)

JUDGMENT

STRASBOURG

12 April 2016

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 Dungveckis v. Lithuania,

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

András Sajó, *President,*
Vincent A. de Gaetano,
Boštjan M. Zupančič,
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Egidijus Kūris,
Iulia Antoanella Motoc, *judges,*

and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 8 March 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 32106/08) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Mr Vaidas Dungveckis ("the applicant"), on 20 June 2008.

2. The applicant was represented by Mr V. Sirvydis, a lawyer practising in Kaunas. The Lithuanian Government ("the Government") were represented by their Agent, Ms E. Baltutytė.

3. The applicant alleged, in particular, that he had been punished twice for the same offence.

4. On 6 October 2009 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1978 and lives in Kaunas.

1. Criminal proceedings against the applicant

6. On 6 February 2004 the applicant was notified by the Financial Crime Investigation Service that a criminal investigation had been opened against him on suspicion of fraud committed in an organised group (Articles 25 § 3 and 182 § 2 of the Criminal Code of 2000). It was suspected that from

October 2001 until May 2002 the applicant and his accomplices, using companies founded or acquired for the purpose, had bought large amounts of fish from unspecified persons without paying value added tax (VAT), forged payment documents to show that the applicable VAT had been paid, and then sold the fish to another company for a price that included the applicable VAT – thus appropriating an amount equal to the said applicable VAT. It was suspected that in this manner the applicant and his accomplices had appropriated 261,854.65 Lithuanian litai (LTL, approximately 75,838 euros (EUR)), which should have been paid into the State budget as VAT.

7. On the same day the applicant was prohibited from going abroad or leaving his home without the approval of the investigating authorities (*kardomoji priemonė – rašytinis pasižadėjimas neišvykti*).

8. On 6 May 2004 the prosecutor issued an indictment against the applicant and his accomplices. The applicant was charged with several counts of fraud and forgery of documents committed in an organised group (under Articles 25 § 3, 182 § 2 and 300 § 2 of the Criminal Code of 2000). The indictment noted that the applicant had admitted his guilt and cooperated with the investigative authorities.

9. On 3 February 2005 the Kaunas Regional Court found the applicant guilty of all charges and ordered him to pay a fine of LTL 18,750 (EUR 5,430).

10. On 3 February 2006 the Court of Appeal partly amended the judgment of the regional court. It acquitted the applicant of fraud but upheld his conviction for forgery of documents and sentenced him to two years of imprisonment. The sentence was suspended for two years, during which time an injunction (*įpareigojimas*) was imposed on the applicant: he was prohibited from leaving his home for more than seven days in a row without the approval of the supervising institution (hereinafter, "the sentence for forgery").

11. The applicant began complying with the injunction imposed on him by the Court of Appeal (see paragraph 17 below).

12. On 5 December 2006 the Supreme Court partly amended the judgment of the Court of Appeal. It quashed the applicant's acquittal of fraud and returned that part of the case for re-examination by the Court of Appeal. The remaining of the appellate court's judgment was upheld.

13. On 4 July 2007 the Court of Appeal, after re-examining the above-mentioned part of the case, convicted the applicant of fraud. When determining the sentence, the court took into account various aggravating circumstances (the crime had been well organised, the applicant had played a leading role in its commission, and the value of the appropriated property had been high), as well as mitigating circumstances (the applicant had admitted his guilt, he had a family and a job, and he had been complying with the injunction previously imposed on him). As a result, the Court of

Appeal sentenced the applicant to imprisonment for two years and three months – a sentence which was close to the minimum sentence stipulated in the Criminal Code (see paragraphs 28-29 below). The court combined this sentence with the one previously imposed on the applicant for forgery of documents (see paragraph 10 above) and ordered a consolidated sentence (*subendrinta bausmė*) for the two crimes – imprisonment of two years and three months. The Court of Appeal stated that because the crime of fraud was serious (*sunkus nusikaltimas*), the consolidated sentence could not be suspended (see paragraph 32 below).

14. The applicant submitted a cassation appeal to the Supreme Court. He asked the court to quash the sentence of imprisonment for the crime of fraud ordered by the Court of Appeal and instead restore the fine imposed by the Kaunas Regional Court in its judgment of 3 February 2005 (see paragraph 9 above).

15. On 31 July 2007 the Supreme Court delayed the execution of the Court of Appeal's judgment of 4 July 2007 until the applicant's cassation appeal was examined. The Supreme Court's decision did not explicitly indicate whether the applicant had to continue complying with the injunction imposed on him during the term of suspension of the sentence for forgery (see paragraph 17 below). Nonetheless, during the period of the delay the applicant continued complying with the injunction.

16. On 8 January 2008 the Supreme Court dismissed the applicant's cassation appeal. It found that when determining the sentence the Court of Appeal had correctly assessed the gravity of the crime, the applicant's personality, and all relevant mitigating and aggravating circumstances. It also reiterated that the Criminal Code excluded the possibility of suspending the sentence in the event that the individual concerned had been convicted of a serious crime, such as fraud. However, the Supreme Court partly amended the Court of Appeal's judgment of 4 July 2007 by applying the terms of a 2002 law on amnesty and reducing the applicant's sentence of imprisonment by one fifth. Thus, the applicant's final consolidated sentence was one year and nine months of imprisonment (hereinafter, "the consolidated sentence").

2. The applicant's sentence

(a) Injunction imposed on the applicant during the term of suspension of the sentence for forgery

17. After the Court of Appeal's judgment of 3 February 2006 (see paragraph 10 above), the applicant began complying with the injunction imposed on him during the term of suspension of the sentence for forgery. The applicant was not allowed to leave his home for more than seven days without the approval of the supervising institution. He was also obliged to report to the local prison department every two months, which he did from

March 2006 until January 2008. At the applicant's request, on 1 February 2008 the local prison department issued a certificate stating that he had been complying with the injunction and that the term of suspension of his sentence for forgery would end on 3 February 2008.

(b) The applicant's request to be released from serving the consolidated sentence

18. In January 2008 the applicant submitted a request to the Kaunas Regional Court to be released from serving the consolidated sentence. The applicant stated that he had nearly completed serving the term of suspension of the sentence for forgery by complying with the injunction imposed by the Court of Appeal. According to the applicant, given that the sentence for forgery (two years of imprisonment) was longer than the consolidated sentence (one year and nine months of imprisonment) and given that he had served the former, he should be released from serving the latter; otherwise he would have to serve two sentences for one crime.

19. On 28 January 2008 the Kaunas Regional Court dismissed the applicant's request. The court reiterated that the applicant had been convicted of two crimes – one of which (fraud) was serious and the other (forgery of documents) less serious (*apysunkis*) – and the Criminal Code did not permit the suspension of a sentence for a serious crime.

20. On 28 February 2008 the Court of Appeal dismissed the applicant's appeal against the regional court's judgment. The court firstly found that the applicant had not yet finished serving the term of suspension of the sentence for forgery: the completion of the term had to be confirmed by a decision of the relevant district court, but no such decision had been adopted as at that date (see paragraph 33 below). The Court of Appeal further held that the imposition of an injunction during the term of suspension of a sentence (*įpareigojimai, paskirti nuosprendžio vykdymo atidėjimo metu*) did not amount to the serving of that sentence (*bausmės atlikimas*); therefore, the applicant had not actually served his sentence for forgery, so the question of "double punishment" did not arise. The fact that he had been complying with the injunction was relevant only during the determination of the final consolidated sentence, and that had been done by the Supreme Court.

The judgment was final and not subject to appeal.

(c) The applicant's request for the completion of the term of suspension of the sentence for forgery to be confirmed

21. Subsequently the applicant submitted a request to the Kaunas District Court, asking it to confirm that he had completed the term of suspension of the sentence for forgery. On 18 March 2008 the court refused to examine the applicant's request because, under domestic law, a request for the term of suspension of a sentence to be declared completed could

only be submitted by the supervising institution and not by the convicted person (see paragraph 33 below).

22. On 15 April 2008 the Kaunas Regional Court dismissed the applicant's appeal. The court stated that that the applicant had been prohibited from leaving his home since 6 February 2004 (see paragraph 7 above), so during the entire time he had been complying with that restrictive measure and not with the injunction relating to the suspended sentence. The court further held that the Court of Appeal's judgment of 4 July 2007 had annulled the suspension of the sentence for forgery, but that the domestic law did not provide for the possibility to release a convicted person from the obligation to serve a sentence due to the fact that he or she had been complying with an injunction which had subsequently been annulled.

The judgment was final and not subject to appeal.

23. Around the same time the applicant submitted a request to the Kaunas Regional Administrative Court, asking it to order the local prison department to request a district court to affirm that the applicant had completed the term of suspension of the sentence for forgery (see paragraph 21 above). On 9 April 2008 the Kaunas Regional Administrative Court held that it did not have the competence to examine the applicant's request because that request only related to matters of criminal sentencing and not acts of public administration. On 13 May 2008 the Supreme Administrative Court upheld the decision of the lower court on the same grounds.

(d) The applicant's imprisonment

24. On 16 April 2008 the applicant began serving the consolidated sentence in the Pravieniškės Correctional Facility. After serving one-third of the sentence, on 26 January 2009 he was released on probation.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. *Principle of* non bis in idem

25. Article 31 of the Constitution of the Republic of Lithuania provides:

> "... Punishment may be imposed or applied only on the grounds established by law.
>
> No one may be punished for the same crime a second time ..."

26. Article 2 § 6 of the Criminal Code of 2000, in force from 1 May 2003, provides:

> "No one may be punished for the same criminal act twice."

27. In its ruling of 10 November 2005, the Constitutional Court held as follows:

> "In Paragraph 5 of Article 31 of the Constitution the principle *non bis in idem* is articulated. This constitutional principle means a prohibition on [being punished]

twice for a single deed that is contrary to law – that is to say, for the same criminal offence, as well as for the same violation of law which is not a criminal offence ...

The above-mentioned constitutional principle does not mean that different kinds of liability may not be applied to a person in respect of a violation of law ...

In itself, the constitutional principle *non bis in idem* does not deny the possibility of applying more than one sanction of the same kind (i.e. defined by the norms of the same branch of law) to a person for the same violation – such as the main and additional punishment, or the main and additional administrative penalty.

The constitutional principle of *non bis in idem* also means, *inter alia*, that if a person who has committed a deed which is contrary to law has been held administratively but not criminally liable – that is to say, he or she has incurred a sanction (a penalty not for a crime but for an administrative violation of law) – then he or she cannot be held criminally liable for the said deed.

It should also be mentioned that the constitutional principle *non bis in idem* may not be construed to mean that it does not allow the prosecution and punishment of a person for a violation of law in respect of which the prosecution of such person was started but terminated on grounds which, under procedure established by law, were later recognised as without foundation and/or illegal and the person was not held legally liable – no sanction (imposed punishment or penalty) was applied to him or her.

In itself, the exemption of a person from one kind of legal liability on the grounds and [under the] procedure established in law cannot be an obstacle to ... him or her [being subject to] legal liability of another kind on the grounds and under the procedure established in law."

2. Crimes of fraud and forgery of documents

28. At the material time, the relevant provisions of the Criminal Code of 1961, which remained in force until 1 May 2003, read as follows:

Article 207. Forgery of an official document or use of a forged official document

"... Such conduct which concerns a customs declaration, confirms a tax payment, or concerns another especially important official document, or which has caused significant harm to the interests of the State or society, or rights or lawful interests of others, shall be punished by imprisonment for a term of up to five years and by a fine."

Article 274. Fraud

"Appropriation of other persons' property through fraud or deceit shall be punished by imprisonment for a term of up to three years, with or without a fine.

The same conduct carried out repeatedly or by a pre-arranged group of persons shall be punished by imprisonment for a term of up to five years, with or without a fine.

The same conduct concerning very large amounts shall be punished by imprisonment for a term of one to ten years, with or without a fine."

29. At the material time, the relevant provisions of the Criminal Code of 2000 read as follows:

Article 182. Fraud

"1. A person who, by deceit, acquires another's property for his or her own benefit or for the benefit of other persons, or acquires a property right, avoids a property obligation or annuls it, shall be punished by [being required to perform] community service or by the restriction of liberty, or by arrest, or by imprisonment for a term of up to three years.

2. A person who, by deceit and for his or her own benefit or for the benefit of other persons, acquires a property of a high value or a property right belonging to another person, or avoids or annuls a property obligation of a high value, ... shall be punished by imprisonment for a term of up to eight years."

Article 300. Forgery of a document or possession or use of a forged document

"1. A person who produces a false document, forges a genuine document or stores, transports, forwards, uses or handles a document known to be false or a genuine document known to be forged, shall be punished with a fine or by arrest, or by imprisonment for a term of up to three years.

2. A person who commits the acts listed in paragraph 1 of this Article, where this incurs major damage, shall be punished by imprisonment for a term of up to five years ..."

30. In its ruling of 22 December 1998, the Senate of the Supreme Court of Lithuania held as follows:

"2. The essential element of fraud is the use of deceit in order to appropriate property or to acquire a property right. Deceit is used with the aim of misleading the owner of the property who, as a result, voluntarily transfers the property (or the property right) to the perpetrator, in the belief that the latter has the right to receive them.

3. Deceit can be manifested through the presentation of false documents or incorrect data, or the deliberate failure to mention circumstances which are essential for the owner's decision to transfer the property, or other similar means ...

17. If the perpetrator appropriates property by forging an official document, such activity is qualified as concurrence of the crimes under Article 207 (Forgery of a document) and Article 274 (Fraud) of the Criminal Code.

The use of forged documents for the purpose of fraud does not in itself imply the concurrence of the two crimes because in such cases the forged documents are only used as the means of appropriating property through fraud.

However, if the perpetrator forges the official document himself or herself and uses it as a means of deceit, such activity shall be qualified as the concurrence of the crimes under Articles 207 and 274 of the Criminal Code ..."

3. Sentencing in criminal cases

31. At the material time, the relevant parts of Article 63 of the Criminal Code of 2000 read as follows:

Article 63. Imposing a punishment for the commission of several criminal acts

"1. Where several criminal acts have been committed, a court shall impose a punishment for each criminal act separately and subsequently impose a final

combined sentence. When imposing a final combined sentence, the court may impose either a consolidated sentence or a fully or partially cumulative sentence.

2. Where a consolidated sentence is imposed, the more severe penalty shall cover any more lenient penalty, and the final combined sentence for all the separate criminal acts shall be equal to the most severe single penalty imposed ...

5. A court shall impose a consolidated sentence where:

1) there is a full concurrence of criminal acts (*ideali nusikalstamų veikų sutaptis*);

2) where the criminal acts committed differ markedly in their degree of severity and are designated under different types or categories of criminal acts under Articles 10 or 11 of this Code;

3) where a custodial sentence of a period of twenty years or life imprisonment has been imposed for the commission of one of the criminal acts ..."

32. At the material time, the relevant parts of Article 75 of the Criminal Code of 2000 read as follows:

Article 75. Suspension of a sentence

"1. Where a person is sentenced to imprisonment for a term not exceeding three years for the commission of one or several minor or less serious premeditated crimes or not exceeding six years for crimes committed through negligence, a court may suspend the sentence imposed for a period ranging from one to three years. The sentence may be suspended where the court rules that there is a sufficient basis for believing that the purpose of the penalty will be achieved without the sentence actually being served.

2. When suspending a sentence, a court shall impose on the convicted person one of the penal sanctions provided for in Chapter IX of this Code and/or one or more of the following injunctions:

1) to compensate for or remedy the property damage caused by a crime;

2) to offer an apology to the victim;

3) to provide assistance to the victim in respect of any medical treatment [necessitated by the convicted person's actions];

4) to take up employment or register at a labour exchange, or not to change employment without the consent of the court;

5) to undertake studies, resume studies or acquire a professional speciality;

6) to undergo treatment for alcohol addiction, drug addiction, addiction to toxic substances, or for a sexually transmitted disease, in the event that the convict agrees thereto;

7) not to leave his or her place of residence for a period exceeding seven days without the consent of the institution supervising the suspension of the sentence.

3. When imposing the injunctions provided for in paragraph 2 of this Article, a court shall lay down a time-limit, with which the convict must comply.

4. Where, during the period of the suspension of sentence, the convicted person:

1) has complied with the penal sanction and/or the injunctions imposed by a court and committed none of the violations listed in sub-paragraph 3 of this paragraph, and

there is a basis for believing that in the future the person will abide by the law and will not commit any further criminal acts, the court shall release the convicted person from the punishment [in question] upon the expiry of the term of the suspension of sentence ..."

33. At the material time, Article 358 § 1 of the Code of Criminal Procedure provided as follows:

Article 358. Cancellation of the suspension of a sentence or changing the conditions of the suspension of a sentence

"1. When the serving of a sentence has been suspended, in line with [Article 75] of the Criminal Code, such suspension can be cancelled or its conditions can be changed by the district court of the convicted person's place of residence, at the request of the institution in charge of supervising the convicted person's behaviour."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 § 1 OF PROTOCOL No. 7 TO THE CONVENTION

34. The applicant complained that he had been punished twice for the same offence because he had had to serve both the term of suspension of the sentence imposed on him for the crime of forgery of documents and the consolidated sentence. He relied on Article 4 § 1 of Protocol No. 7 to the Convention, which reads as follows:

Article 4 of Protocol No. 7. Right not to be tried or punished twice

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

A. Admissibility

35. The Government submitted that Article 4 of Protocol No. 7 was not applicable to the applicant's complaint because he had been convicted of two different crimes. They further argued that the applicant's complaint should be dismissed as manifestly ill-founded.

36. The Court considers that the Government's submissions are closely related to the substance of the applicant's complaint and should therefore be examined on the merits. Accordingly, the present complaint must be declared admissible.

B. Merits

1. The parties' submissions

37. The applicant submitted that he had fully complied with the injunction imposed on him in connection with the suspended sentence that he had received for the crime of forgery of documents. He contended that the injunction was in substance equivalent to a criminal penalty; thus, he considered that he had completed in full the punishment imposed on him for forgery of documents. As a result, the applicant argued that having to serve the consolidated sentence imposed on him for both crimes (fraud and forgery of documents) amounted to his being punished twice for one crime.

38. The Government firstly argued that the *idem* element of the *non bis in idem* principle was absent in this case because the applicant had been convicted of two different crimes. Even though the two crimes had been closely interrelated, the Government contended that each conviction reflected a different aspect of the applicant's conduct: the crime of fraud covered appropriation of property by deceit, whereas the crime of forgery of documents reflected the fact that the applicant had himself forged the documents which he had used to commit the fraud. As a result, the Government submitted that the applicant had been prosecuted and punished for two separate crimes, and thus, the question of "double punishment" for one crime did not arise.

39. The Government further submitted that the Court of Appeal's judgment of 4 July 2007 had explicitly annulled the suspension of the sentence for forgery of documents. The Government noted that in that judgment the court had also referred to the fact that the applicant had been complying with the injunction for more than a year and had taken it into consideration when determining the final sentence; the annulment of the suspension was not affected by the fact that the execution of the judgment of 4 July 2007 had been delayed until the examination of the applicant's cassation appeal. The Government further pointed out that in the domestic proceedings the applicant had had a lawyer who must have been able to understand and to explain to the applicant the legal effect of the Court of Appeal's judgment on the suspension of the sentence. Thus, the Government submitted that after 4 July 2007 the applicant had continued to comply with the injunction "voluntarily", despite no longer being obliged to do so.

40. Lastly, the Government submitted that the injunction imposed on the applicant could not be considered equivalent to a criminal punishment because it had not severely restricted his freedom. The applicant was allowed to leave his place of residence (and even travel abroad) for a period of up to seven days, or for even longer periods if approved by the supervising institution. The Government pointed out that the applicant had never requested such approval, but that in the summer of 2006 he had gone

on holiday abroad for five days, which proved that his freedom had not been unduly restricted by the injunction.

2. The Court's assessment

41. The Court reiterates that the aim of Article 4 of Protocol No. 7 to the Convention is to prohibit the repetition of criminal proceedings which have been concluded by a final decision. This provision requires that a defendant should not be tried or punished in criminal proceedings under the jurisdiction of the same State for an offence of which he or she has already been finally convicted or acquitted (see *Göktan v. France*, no. 33402/96, § 47, ECHR 2002-V, and *Franz Fischer v. Austria*, no. 37950/97, § 22, 29 May 2001).

42. Previously in its case-law the Court has found a violation of Article 4 of Protocol No. 7 when all the following elements were present: (a) the applicant has been convicted or acquitted by a final decision; (b) there has been a duplication of proceedings in respect of the applicant; (c) all those proceedings were criminal in nature; and (d) they all concerned the same offence allegedly committed by the applicant (see *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, §§ 48-122, ECHR 2009; *Muslija v. Bosnia and Herzegovina*, no. 32042/11, §§ 22-40, 14 January 2014; and *Boman v. Finland*, no. 41604/11, §§ 22-44, 17 February 2015).

43. Turning to the circumstances of the present case, the Court firstly notes that it is undisputed that the applicant was convicted of two crimes (fraud and forgery of documents) by the final judgment of the Supreme Court on 8 January 2008. It is also undisputed that the proceedings in question were criminal. However, the Court points out that there was only one set of proceedings concerning both charges against the applicant, and those proceedings were concluded by a single final judgment. Thus, there was no duplication of proceedings and the applicant was not prosecuted more than once (see *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX (extracts)).

44. The Court further notes the Government's argument that the applicant was convicted of two charges which covered different aspects of his conduct: fraud under Article 182 § 2 of the Criminal Code covered the appropriation of amounts of money equal to the unpaid VAT, whereas forgery of documents under Article 300 § 2 of the Criminal Code reflected the fact that the applicant had himself forged the VAT declarations which he subsequently used to commit fraud (see paragraphs 6 and 38 above). Under such circumstances, the Court is convinced that the two crimes of which the applicant was convicted did not arise from identical facts or facts which were substantially the same; thus, they did not constitute the "same offence" for the purposes of Article 4 of Protocol No. 7 (see *Sergey Zolotukhin*, cited above, § 82).

45. In this connection, the Court notes that the applicant did not argue that the crimes of fraud and forgery of documents, of which he had been convicted, constituted the same offence. Instead, he complained that he had not been released from serving the consolidated sentence for the two convictions after he had allegedly completed serving the term of suspension of his sentence for one of those convictions.

46. The Court notes that the Court of Appeal's judgment of 4 July 2007 explicitly stated that the consolidated sentence for two crimes, one of which was serious, could not be suspended. The same was reiterated in several subsequent domestic court judgments as well (see paragraphs 16, 19 and 22 above). In this context, the Court also reiterates that it is not its role to determine what sentence is appropriate for what offence, and that matters of appropriate sentencing largely fall outside the scope of the Convention (see *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, ECHR 2001-VI). Accordingly, the Court finds that the annulment of the suspension of the applicant's sentence and the ordering of a consolidated sentence of imprisonment did not in itself raise an issue under the Convention.

47. The Court further notes that, at the applicant's request, the execution of the judgment of 4 July 2007, which had annulled the suspension of the sentence, was delayed until the examination of his cassation appeal. The Supreme Court's decision to delay the execution of that judgment did not explicitly indicate whether the applicant had to continue complying with the injunction during that delay (see paragraph 15 above). In their observations the Government stated that the delay of the execution had not affected the annulment of the suspension of the applicant's sentence, and thus he was no longer obliged to comply with the injunction after 4 July 2007 but continued to do so "voluntarily" (see paragraph 39 above). However, in fact, after that date the local prison department continued to hold regular interviews with the applicant, who reported to its office every two months (see paragraph 17 above). The Court finds it disconcerting that the authorities failed to clarify to the applicant his legal obligations for nearly six months (from the Supreme Court's decision of 31 July 2007 until the applicant's final interview at the local prison department on 29 January 2008).

48. Nonetheless, the Court notes that the applicant did not complain either to the domestic authorities or to the Court that he had been led to believe that he had to continue complying with the injunction during that period. Furthermore, the applicant did not complain that the injunction itself (obligation to report to the local prison department every two months and prohibition to leave his home for more than seven days) unduly restricted his rights, nor did he ever request the domestic authorities for a permission to leave his home for more than seven days. Therefore, in view of the lack of a proper complaint, and taking into account the nature of that particular injunction, the Court is not persuaded that the applicant's rights guaranteed in the Convention and the Protocols thereto have been violated.

49. The foregoing considerations are sufficient to enable the Court to conclude that there has not been a violation of Article 4 § 1 of Protocol No. 7 to the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

50. The applicant also complained under Article 6 § 1 of the Convention that the length of the criminal proceedings had been excessive. The Court has previously found that Lithuanian law provides an effective domestic remedy in cases relating to excessively long proceedings – a civil claim for damages against the State under Article 6.272 of the Civil Code – and that this remedy must have been exhausted before all applications lodged with the Court after 6 August 2007 (see *Savickas and Others v. Lithuania* (dec.), no. 66365/09, §§ 86-88, 15 October 2013). The applicant lodged his application on 20 June 2008 without having previously brought a claim for damages before the domestic courts. Accordingly, the Court holds that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

51. Lastly, the applicant complained under Article 13 of the Convention that he had not had an effective remedy in respect of the failure of the local prison department to request from the district court confirmation that he had completed serving the term of suspension of the sentence.

52. In this connection, the Court firstly reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI).

53. The Court further reiterates that matters of appropriate sentencing largely fall outside the scope of the Convention (see *Sawoniuk*, cited above). Therefore, the Court is not persuaded that the applicant had an "arguable complaint" under any of the provisions of the Convention or the protocols thereto. It follows that the complaint under Article 13 must be declared incompatible *ratione materiae* with the provisions of the Convention and the Protocols thereto within the meaning of Article 35 § 3 (a) and must be rejected, pursuant to Article 35 § 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning Article 4 § 1 of Protocol No. 7 to the Convention admissible and the remainder of the application inadmissible;

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

Done in English, and notified in writing on 12 April 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	András Sajó
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Zupančič is annexed to this judgment.

A.S.
F.E.P.

CONCURRING OPINION OF JUDGE ZUPANČIČ

I agree with my colleagues concerning the outcome in this case.

1. However, since the case has been effectively decided only via a procedural shortcut, I should like to elaborate on a few substantive issues. These comments might be useful in future cases where the Court encounters the same combination of double jeopardy (*ne bis in idem*) on the one hand and the notions of concurrence of offences (ideal and real/material) on the other.

2. The procedural solution to this case may be found in paragraph 48, where the Court *"notes that the applicant did not complain either to the domestic authorities or to the Court that he had been led to believe that he had to continue complying with the injunction during that period."* Previously, in paragraph 47, the Court *"finds it disconcerting that the authorities failed to clarify to the applicant his legal obligations for nearly six months..."* In other words, the material question, as mentioned above, would have arisen only if the applicant had in fact complained, domestically and before this Court, concerning the double punishment allegedly imposed on him as a result of this officially induced mistake of law concerning his duty to comply with the injunction during the critical period.

I.

3. The first issue here is whether there was a real or ideal concurrence of offences. The Lithuanian Supreme Court resolved the question correctly, as cited in paragraph 30 *in fine* of the judgment: *"[I]f the perpetrator forges the official document himself or herself and uses it as a means of deceit, such activity shall be qualified as the concurrence of the crimes under Articles 207 and 274 of the Criminal Code..."* The Supreme Court was probably referring to the so-called real (material) concurrence of offences. The domestic resolution of this case thus hinged on the distinction between the real and the ideal concurrence of offences.

4. We speak of the ideal concurrence of offences where the elements of the second offence, as legally formulated, completely overlap with the elements of the first offence. The elements of one offence are absorbed by the other offence. For example, in the offence of homicide, the elements of slight bodily injury progressing to serious bodily injury and ultimately to the death of the victim are absorbed in the crime of homicide. Another example of an ideal concurrence of offences is the famous American case (*Ashe v. Swenson*, 397 U.S. 436, 1970) of somebody having, on the same occasion, in the same room, robbed several different poker players. The prosecution failed to obtain a conviction for the robbery of the first poker

player. Subsequently, the prosecution attempted to indict for the robbery of the second poker player. This was duly defined as double jeopardy (*ne bis in idem*); the facts of the second robbery completely overlapped with the facts of the first robbery.

5. However, as we shall see below, in all double jeopardy cases one has to be very careful when considering the "facts". The rule of thumb in such cases is the question whether the proof of the second offence does or does not require proof of something else (a different element of the offence) when compared to the evidence required for the first offence. In our case, clearly, the conviction for *forgery* as per Article 207 of the Lithuanian Criminal Code required that the perpetrator forge the official document himself or herself, whereas the conviction for *fraud* as per Article 274 speaks only of the requisite deceit; it does not mention the personal counterfeiting of the document to be used for defrauding.

6. For this reason, we have two different offences and therefore the real (material) concurrence of offences. Incidentally, the criminal law's distinction between the ideal and the real (material) concurrence of offences is the substantive counterpart to the procedural banning of double jeopardy.

II.

7. A more difficult problem relates to the criteria for double jeopardy (*ne bis in idem*) as postulated in the case of *Sergey Zolotukhin v. Russia* ([GC], no. 14939/03, ECHR 2009), in § 82 of that judgment).

The criteria are as follows. *First*, the applicant must be convicted or acquitted by a final decision of the domestic court; *second*, there must have been a duplication of proceedings for the same applicant; *third*, the proceedings in question must be criminal; and *fourth*, the proceedings in question must concern the *"same offence"* allegedly committed by the same applicant.

8. We have no problem with the first three criteria. They derive directly from Article 4 § 1 of Protocol No. 7, which reads as follows: *"No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."*

However, *Sergey Zolotukhin's* fourth criterion of *"the same offence"* flatly replicates the above language, referring to *"an offence for which he has already been finally acquitted or convicted"* –, except that neither of the two languages has the requisite advisory power.

At the end of paragraph 44 of the present judgment, the Court refers to the more specific aspect of *Sergey Zolotukhin*, § 82: *"[T]he Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the*

prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same."

9. It is impossible to answer the question of whether forgery (as per Article 207 of the Lithuanian Criminal Code) and fraud (as per Article 274 of the same Criminal Code) were prosecuted here from "identical facts of facts which are substantially the same". Deceit is the constituting element of fraud; in turn, forging and using counterfeited documents is (in terms of intent and of criminal conduct) a constitutive element of deceit. Do the two forms of behaviour then refer to "substantially the same facts"? Obviously, the fourth criterion in *Sergey Zolotukhin* is of no help in answering this question!

III.

10. In order to attempt to answer this question we must take a step back and examine the contradictory implications of the term "facts".

Continental criminal law rests wholly on its principle of legality. It is spelled out in Article 7(1) of the Convention: no crime, no punishment without previous law (*nullum crimen, nulla poena sine lege praevia*). It is no accident that – as opposed to the numerous procedural safeguards in the Convention – substantive criminal law is covered by this single provision of Article 7.

This primary legal safeguard starts from the premise that substantive criminal law in its definitions of all offences enumerates exhaustively all of the potential major premises. The "facts of the case" in particular cases must correspond to one or more of these definitions if a particular defendant is to be convicted. This is a question of formal logic and the courts must reason out their decisions in terms of this logic if the case is to be sustained on appeal. (Obviously, this is not completely possible in jury trials; see *Taxquet v. Belgium* [GC], no. 926/05, ECHR 2010). Thus the whole safeguarding apparatus is *in abstracto* based on the notion that the norms of criminal law on the one hand, and the facts of particular cases on the other, are clearly separable.

11. Every new pattern of facts in every new criminal case is subject to legal classification (*la qualification juridique*). Legal classification is usually anticipated by the public prosecutor, in the light of the facts as discovered and tentatively qualified by the police.

At this stage of criminal proceedings, therefore, the facts are already seen through the specific chosen legal prism, that is, their legal classification. In view of this *qualification juridique* certain facts become central and essential: they bring out the abstractly defined "elements of the crime".

In turn, other facts become irrelevant and are ignored because they do not fit in with the definition of the offence. Also *in concreto*, the facts of the case are inseparable from the legal prism through which they are perceived.

IV.

12. An antinomy is a situation in which two entities, here the norms and the facts, are simultaneously separate from one another — in addition to merging into one another. An antinomy is a paradox that cannot be resolved. If identified, it serves as a deconstruction of a particular (legal) premise. In our case, the facts are selectively perceived from the point of view of the norm (forgery, fraud) as if they were completely different from the norm. This is precisely the premise from which the fourth criterion in the *Sergey Zolotukhin* case is constructed –, the assumption being that these "facts" are different and separable from the norm (of substantive criminal law).

13. However, such an assumption overlooks the above-mentioned selective apperception of the "facts", which only come into legal being once, for example, the prosecutor has produced his legal classification. To put this in other terms, unless there is a preceding norm of criminal law there are no facts to speak of. Thomas Hobbes, for example, understood this when he wrote: *"Civil laws ceasing, crimes also cease"*[1]. For the purpose of criminal law, there are no "facts" unless they are seen through one of the major premises reposing in substantive criminal law. If the legal qualification of the "facts" is altered, different facts come into purview. Other facts evaporate. However, if the legal classification is further improved, they may come back into play as essential. Thus everything depends on the particular legal classification determining the selective apperception of the circumstances of the case.

14. It has to be noted here that in Kantian terms there is an important difference between mere *perception* of the facts and the *apperception*. When we perceive the facts we see them with a blank mind, i.e., we do not superimpose any concept defining these facts. In turn, *apperception* presupposes a conceptual framework through which we "understand" the facts. To recapitulate, the conundrum is how to escape from this circular antinomy in which facts determine the choice of legal norm and the choice of legal norm in turn determines the selective apperception of the facts.

15. Since (the legally relevant) facts do not exist without a preceding legal norm, it is impossible to maintain, as is the premise in *Sergey Zolotukhin*, that the facts are separable from the norm. The choice of the norm does depend on the facts, but it then predetermines their selective apperception to the point where certain facts become essential (the elements of the offence), whereas others disappear.

This refers to the analogous antinomy between the theory and the facts.[2] The theory and the facts are supposed to be separate and independent from one another. The perception of the facts leads to a new theory, a new

[1] Thomas Hobbes LEVIATHAN, Chapter XXVII

[2] See Roberto Mangabeira Unger, KNOWLEDGE AND POLITICS, Free Press, 1974, Chapter One, The Antinomy of Theory and Fact.

apperception. This new theory will then lead to the perception of new facts of which we previously had no notion. In this way, old facts merge into a new theory and the new theory literally produces heretofore unknown facts. These facts are merely *perceived* (as not understood) until the discovery of a new theory, which enables them to be *apperceived* (understood).

V.

16. How does this apply to the case at hand?

The applicant engaged in an intentional defrauding pursuit, in which the fabrication and the use of forged documents were, as part and parcel of the same *dolus coloratus* (specific intent) and its protracted conduct, to serve his unremitting deception. It was only after the two legal classifications, separating this continuing conduct into two separate offences, that the forgery of an official document and the fraudulent use of the same document became two separate offences.

Such was the consequence of the two different legal classifications, which divided the one single intentional criminal pursuit into two separate forms of behaviour. Under a different legal provision the applicant's intent and conduct could be inversely perceived as a single line, either of a *delictum continuatum* or of a *delictum continuum.*

17. In paragraph 44 of the judgment we flatly maintain that *"the Court is convinced that the two crimes of which the applicant was convicted did not arise from identical facts or facts which were substantially the same; thus they did not constitute the same offence for the purposes of Article 4 of Protocol No. 7"* (citing *Sergey Zolotukhin*, § 82). If the judgment is not in a position to explain why *"the two crimes did not arise from identical facts or facts which were substantially the same"*, this is in consequence of precisely the antinomy on which we have expounded so far.

18. The formula *"identical facts or facts which were substantially the same"* refers to a series of behaviours of the applicant that was, by the said legal qualifications, artificially split in two. It is possible to imagine that the forging of the documents for the purpose of the fraud would have been an aggravated (qualified) version of simple fraud, defined as such in the Lithuanian Criminal Code.

VI.

19. There is another problem never recognised as affecting the celebrated principle of legality. The choice of legal norm, it being the major premise in the criminal law's syllogism, is not always inescapable. Other possible definitions of a particular offence may be available, but will not have been used for the purpose of prosecuting a particular defendant. There is no way of being absolutely certain that a particular legal classification is

the only one possible. But even if this were to be the case, one must bear in mind that criminal law's applicable major premise is always *a combination* of various other major premises in the criminal code.

20. The criminal code is composed of its general part (containing the rules which apply to every offence) and of the special part (defining particular offences). The legal classification of a particular offence is always combined with at least one provision from the general part, that referring to the levels of liability: intent, recklessness, negligence, etc.

21. In this sense the amalgamated major premise in a particular case is always a combination of at least two major premises. The matter first arose in the famous constitutional-law triangle *Winship–Mullaney–Patterson* of American cases: *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977).

There, the issue was the burden of proof upon the prosecution, which was obliged to prove "every element of the offence". The question arose as to what were "the elements of the offence", where the defence of "extreme emotional disturbance" was to be found in the general part of the criminal code, and not in the definition of the particular offence.

22. This brings up the combinations of different doctrines and rules in the general part of the criminal code, in conjunction with one or two or more offences in the special part of the criminal code. The upshot of this is the realisation that it is simplistic to assume that there is only one major premise governed by the principle of legality, i.e., only the specific one deriving from the definition of a particular offence. This is all the more true in cases where, apart from liability on the part of the defendant, the rules and the doctrines of attempt, insanity (as in *Patterson v. New York (supra)*), duress, self-defence, etc. may also be part of the *combined major premise* under which the defendant may be eventually convicted.

23. In the case at hand, this combination of major premises from the general part and the special part of the (Lithuanian) Criminal Code did not represent a problem. At the same time, however, the defendant's behaviour fell under two different provisions in the special part of the Lithuanian Criminal Code, which engendered the problem we are dealing with here. In this case it seems to be clear that the applicant's behaviour was exhaustively covered by Articles 207 and 274 of the Lithuanian Criminal Code, but it is not impossible to imagine that some other incrimination from the special part of the criminal code (*fraudulent breach of trust, abuse of official authority, abuse of office, trading in influence,* etc.) could also be applicable.

24. Since in the Continental legal systems the principle of legality is so central a safeguard for all defendants, it is good to remember that the burden of proof for the prosecution in view of the effective presumption of innocence may cover various combinations of different rules of substantive criminal law. Every code, at least since the French Civil Code (*Code*

Napoléon, 1804), works as an alphabet recombining the letters into words (here: offences). Compared to precedent-based law (the common law) this is a strategic simplification, but there are nonetheless literally billions of possible combinations –, if we only take into account the potential congregations of two, three, four or five rules and doctrines from the general and special parts of a criminal code.[3]

25. Of course even this is an understatement. The articles in the criminal code, especially in its general part, are not singular provisions. These rules are further composed of different sub-rules. In the special part, too, one may find all kinds of mitigated and/or aggravated (qualified) versions of the same offence. In other words, it is not in principle ineluctable that a particular choice of legal classification is the only possible one.

VII.

26. The complaint by the applicant in this case refers to double punishment. This derived from the grievance that *"he had not been released from serving the consolidated sentence for the two convictions after he had allegedly completed serving the term of suspension of his sentence for one of those convictions"* (see paragraph 45 of the judgment).

27. The annulment of the suspension of the applicant's primary sentence through the ordering of a consolidated sentence of imprisonment, as per our judgment, does not raise an issue under the Convention. Meanwhile, and crucially, the Lithuanian Supreme Court's decision to delay the execution of the second judgment had omitted to advise the applicant that he did not need to continue complying with the injunction. Because of this, the local prison department, presumably likewise uninformed, continued to hold regular interviews with the applicant, i.e., he reported to their office every two months.

28. As pointed out above, the applicant failed to complain to the domestic authorities and to the Court that he had been required to continue with his first punishment (that it, complying with the injunction) pending the decision concerning his second and subsequent punishment. This failure to raise a complaint effectively resolves the issue before this Court, but it does not answer the question as to whether we are speaking of the proscribed two punishments for the same offence, in violation of Article 4 § 1 of Protocol No. 7 to the European Convention on Human Rights.

29. It has been established beyond doubt that the applicant was serving his suspended sentence (the injunction) in view of his preceding conviction for forgery. Indubitably, the conviction of 3 February 2006 was a criminal sentence of two years' imprisonment. That sentence was suspended for

[3] In the *travaux preparatoires* of the French Civil Code of 1803, the Editors (Portalis, Maleville, Bigot de Préameneu and Tronchet) specifically refer to this combinatorial idea.

two years, in view of which an injunction was imposed, prohibiting him from leaving his home for more than seven days without the approval of the supervising institution and requiring him to report at regular intervals to the local prison department. The applicant, as pointed out above, complied impeccably.

30. On 5 December 2006 the Supreme Court of Lithuania quashed the applicant's acquittal for fraud and returned the case to the Court of Appeal. On 4 July 2007 the Court of Appeal again convicted the applicant of fraud. The Court of Appeal took into the account the first sentence for forgery, and produced a consolidated sentence for both crimes (forgery and fraud) of two years and three months.

31. This is the point in the procedure where the previous conditional sentence (injunction) was merged into the new consolidated sentence of two years and three months' imprisonment. However, the applicant submitted a cassation appeal to the Supreme Court. On 31 July 2007 the Supreme Court postponed execution of the above sentence while it examined the question on appeal. However, it is because the Supreme Court omitted to indicate whether the applicant should or should not continue complying with the injunction that the issue of double punishment for that particular period in time arose in the first place. In other words, the applicant would have been complying with the conditional sentence between 3 February 2006 and presumably 3 February 2008 since he was originally sentenced with an injunction for the period of two years.

32. The Supreme Court judgment of 8 January 2008 was delivered just before the end of the original two-year sentence (the injunction). The applicant was therefore under the impression that he had "served his time" for forgery, which would make the imprisonment a double punishment for him inasmuch as the sentence imposed by the Supreme Court's judgment of 8 January 2008 was "consolidated", i.e., it took into account both the original forgery as well as the fraud. If the conviction and sentence for fraud had not been a "consolidated sentence" in this sense, there would be no merit to the applicant's supposition that he was doubly punished for the crime of forgery.

33. The applicant had already served 96 percent of the original sentence. After just one single month, he would have served 100 percent of that primary sentence. Thereafter the Supreme Court could have convicted the applicant separately, and only for fraud.

34. The question is whether the Supreme Court did in fact take this one remaining month of the first sentence into account when pronouncing the "consolidated" sentence. Whether this was true or not ought to have been apparent from the reasoning of the Supreme Court's final judgment of 8 January 2008. Does the reference to "consolidation" imply that the Supreme Court was aware of the minimal remainder of the first sentence to

be served? There are doubts as to this question, given that the applicant had not previously been notified.