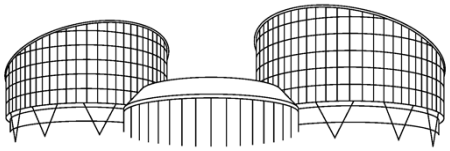

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

# CASE OF CESARANO v. ITALY

*(Application no. 71250/16)*

JUDGMENT

Art 7 • Heavier penalty • Domestic courts' refusal of applicant's request for a reduction of his sentence from life imprisonment to thirty years' imprisonment after he chose to be tried under summary procedure • Assessment not *in abstracto* but based on specific case circumstances • Applicant not entitled to a sentence of thirty years' imprisonment as summary procedure requested long after statutory framework amended in more severe terms, with that term being substituted by life imprisonment without daytime isolation • Procedural choices of a defendant and subsequent terms of any agreement between a defendant and the State pivotal as regards applicable penalty • Length of reduced sentence to be imposed in the event of a conviction to be clearly identified by the law in force at the time of the agreement • Identification of most lenient law among all the laws in force during the period between commission of the offence and the delivery of the final judgment strictly linked to domestic court's agreement to the applicant's request for a summary trial • Offences committed punishable with life imprisonment with daytime isolation but applicant, after trial under summary procedure, sentenced to life imprisonment without daytime isolation, a more lenient penalty
Art 6 § 1 (criminal) • Fair hearing • Request for summary procedure constituting an unequivocal waiver of certain procedural safeguards in exchange for certain advantages, including life imprisonment without daytime isolation • No legitimate expectation on the basis of the legal framework at the material time of incurring another sentence • Imposition of penalty foreseeable



STRASBOURG

17 October 2024

*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 Cesarano v. Italy,**

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

Ivana Jelić*, President*,
Alena Poláčková,
Péter Paczolay,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato,
Alain Chablais*, judges*,
and Ilse Freiwirth, *Section Registrar,*

Having regard to:

the application (no. 71250/16) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr Ferdinando Cesarano ("the applicant"), on 24 November 2016;

the decision to give notice of the application to the Italian Government ("the Government");

the parties' observations;

Having deliberated in private on 24 September 2024,

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

# INTRODUCTION

1. The case concerns the domestic courts' refusal of the applicant's request for a reduction of his sentence from life imprisonment to thirty years' imprisonment stemming, in his view, from his choice to be tried under the summary procedure. In contrast to the case of *Scoppola v. Italy (no. 2)* ([GC], no. 10249/03, 17 September 2009), the applicant was admitted to that procedure at a time when the law he identified as the *lex mitior* (Law no. 479 of 1999) was no longer in force. The application raises issues under Article 7 and Article 6 § 1 of the Convention.

2. The question before the Court is whether, in the light of the principles set out in *Scoppola* (cited above), the time frame to be taken into account for the identification of the most lenient law runs *in abstracto* from the commission of the offence until the final conviction or whether, when it comes to simplified procedures – which depend on a request by the accused person – the time frame begins from the moment at which such a request is formulated.

# THE FACTS

3. The applicant was born in 1954 and is serving a life sentence in L'Aquila. He was represented by Mr M. Vetrano, a lawyer practising in Naples.

4. The Government were represented by their Agent, Mr L. D'Ascia.

5. The facts of the case may be summarised as follows.

## I. THE APPLICANT'S FIRST COMMITTAL FOR TRIAL

6. In 1995 the applicant was committed for trial with other co-defendants on charges of mass murder (*strage*) and murder, crimes committed in 1983, which, at that time, were cumulatively punishable by a life sentence with daytime isolation. At the time of the applicant's trial, defendants liable to a sentence of life imprisonment could not be tried under the summary procedure, a simplified process which entailed a reduction of sentence in the event of a conviction.

7. Law no. 479 of 16 December 1999 entered into force on 2 January 2000 and reintroduced, for defendants liable to a sentence of life imprisonment, the option of being tried under the summary procedure (for a chronology of the relevant domestic provisions, see paragraphs 29-33 below). As amended by that Law, Article 442 § 2 of the Code of Criminal Procedure ("the CCP") provided that, where the crime committed by the defendant was punishable by life imprisonment, the appropriate sentence, following conviction under the summary procedure, would be thirty years' imprisonment (see paragraph 30 below).

8. Pursuant to section 4-*ter* of Decree-Law no. 82 of 7 April 2000, as amended and converted into Law no. 144 of 5 June 2000 (which entered into force on 8 June 2000), defendants liable to a sentence of life imprisonment were allowed to ask to be tried under the summary procedure at their next hearing, provided that evidentiary hearings were still ongoing in their case, either at first instance or on appeal.

9. At the time that provision was enacted, the proceedings in the applicant's case were pending at first instance and evidentiary hearings were ongoing. Hence, at that time, the applicant had the possibility of asking to be tried under the summary procedure and possibly being granted a reduction of his punishment from a life sentence to thirty years' imprisonment. However, he did not do so. It appears from the case file that some of his co-defendants asked for and were granted trial under the summary procedure.

10. On 24 November 2000 Decree-Law no. 341 of 2000 entered into force. Section 7(1) of the Decree-Law provided that "life imprisonment", as referred to in Law no. 479 of 1999, should be taken to mean "life imprisonment without daytime isolation". In other words, only those liable to a sentence of life imprisonment without daytime isolation could be eligible

for a reduction to thirty years' imprisonment, while those liable to a sentence of life imprisonment with daytime isolation, such as the applicant, would only be eligible, in the event of trial under the summary procedure, for a reduction to life imprisonment without daytime isolation.

## II. THE NAPLES ASSIZE COURT'S FIRST INSTANCE JUDGMENT

11. On 25 October 2007 the applicant was convicted by the Naples Assize Court, following a trial under the ordinary procedure. The penalty imposed on the applicant at that stage of the proceedings is not clear from the case file.

12. On 17 September 2009, while the proceedings in the applicant's case were pending on appeal, the Court, in its judgment in *Scoppola* (cited above), concluded that Italy had failed to discharge its obligation to grant the applicant in that case – who had asked to be tried under the summary procedure while Law no. 479 of 1999 had been in force, but had been sentenced to life imprisonment – the benefit of a reduction of his sentence to thirty years' imprisonment as prescribed by that Law, in violation of Article 7 of the Convention. The Court also concluded that Article 6 § 1 of the Convention had been breached as a result of the frustration of the applicant's legitimate expectation that thirty years' imprisonment was the maximum sentence to which he was liable.

## III. QUASHING OF THE JUDGMENT AND REMITTAL OF THE CASE

13. On 19 February 2010 the Naples Assize Court of Appeal quashed the applicant's conviction and remitted the case to the Rome public prosecutor, who was deemed to have jurisdiction to deal with the case.

14. On 15 May 2012 the applicant was again committed for trial on the same charges as in 1995. At a preliminary hearing held on 2 October 2012, he asked to be tried under the summary procedure.

15. With a view to incorporating the Grand Chamber's findings in *Scoppola* (cited above) into the domestic system, the Constitutional Court, by judgment no. 210 of 3 July 2013, ruled that section 7(1) of Decree-Law no. 341 of 2000 was unconstitutional (for more details, see paragraphs 35 et seq. below).

16. However, that conclusion did not affect the validity of the provision in the applicant's case. Indeed, the replacement of thirty years' imprisonment with a life sentence without daytime isolation remained valid for cases in which the summary procedure had been initiated as from 24 November 2000, that is, the date on which Decree-Law no. 341 of 2000 had come into effect.

## IV. THE ROME PRELIMINARY HEARINGS JUDGE'S FIRST-INSTANCE JUDGMENT

17. On 26 September 2013, following a trial under the summary procedure, the Rome preliminary hearings judge (*giudice dell'udienza preliminare*) found the applicant guilty as charged and sentenced him to life imprisonment without daytime isolation, under section 7 of Decree-Law no. 341 of 2000. As to the penalty imposed on the applicant, the judge took into account certain aggravating circumstances (including the number of individuals involved in the commission of the offences, the abject reasons for committing them and the presence of premeditation), the extremely serious nature of the acts attributable to the applicant and the fact that he had previously participated in other egregious offences, including more than forty murders, extortions, mafia-type crimes and weapon-related offences.

18. Concerning the applicant's request for a reduction of his sentence to thirty years' imprisonment in the light of *Scoppola* (cited above), the preliminary hearings judge set out in detail the principles expressed by the Plenary Court of Cassation in *Giannone* (see paragraphs 43 et seq. below) and observed that the applicant's situation was not comparable to that of the applicant in *Scoppola* (cited above) because he had neither requested nor been granted trial under the summary procedure while Law no. 479 of 1999 had been in force. Therefore, the judge dismissed the applicant's request.

19. Lastly, with regard to the applicant's request that a question as to the constitutionality of section 7 of Decree-Law no. 341 of 2000 be raised, the judge noted that, by its judgment no. 210 of 2013 (see paragraph 35 below), the Constitutional Court had declared section 7(1) of Decree-Law no. 341 of 2000 unconstitutional, stating that that provision was prejudicial to those in situations identical to that of the applicant in *Scoppola* (cited above). However, the provision in question was not applicable to the applicant in the present case, who, unlike Mr Scoppola, had not been granted trial under the summary procedure while Law no 479 of 1999 had been in force.

20. The judgment was deposited with the registry on 6 December 2013.

## V. THE ROME ASSIZE COURT OF APPEAL'S JUDGMENT

21. The applicant lodged an appeal. As to the penalty imposed on him, he again relied on the principles set out in *Scoppola* (cited above) and sought a reduction of his sentence to thirty years' imprisonment, which, he argued, was the most favourable penalty provided for among all the laws in force during the period between the commission of the offences and the delivery of the final judgment.

22. The applicant also raised again a question as to the constitutionality of section 7 of Decree-Law no. 341 of 2000. He argued that the question brought before the Constitutional Court which had given rise to its judgment

no. 210 of 2013 (that is, *Ercolano* – see paragraphs 35 et seq. below) concerned a different situation from his own as, contrary to the situation in that case, the proceedings on the merits were still pending in his case.

23. On 4 November 2014 the Rome Assize Court of Appeal upheld the applicant's conviction and refused his request for a reduction of sentence. Endorsing the reasoning of the preliminary hearings judge, the Assize Court of Appeal reiterated that the applicant's situation differed from that of the applicant in *Scoppola* (cited above). Referring in its turn to the Court of Cassation's judgment in *Giannone* (see paragraphs 43 et seq. below), the Assize Court of Appeal considered that, in the applicant's case, the identification of the applicable sentence was strictly linked to the time at which he had had access to the summary procedure.

24. In sum, it was the date of the request to be admitted to the summary procedure that determined the sanction applicable in relation to the offence committed.

25. The Assize Court of Appeal thus concluded that, in accordance with the well-established domestic case-law (see paragraphs 41-42 below), the principles set out in *Scoppola* (cited above) could not be applied to his case.

26. With regard to the applicant's question of constitutionality, the Assize Court of Appeal considered that the fact that, in the case of *Ercolano*, the defendant's sentence had been final had had no impact on the Constitutional Court's conclusions. Indeed, the substantial nature of the reduction of the sentence had been strictly linked to the type of procedure conducted in the specific case. The Assize Court of Appeal considered that the so called "authentic interpretation law" (that is, section 7 of Decree-Law no. 341 of 2000) had already been deemed inadequate (*insostenibile*) by the European Court of Human Rights (in *Scoppola*, cited above) and by the Constitutional Court (in its judgment no. 210 of 2013), in so far as it deprived the potential beneficiary of a legitimate expectation where access to the summary procedure had already taken place. That idea remained valid irrespective of whether the criminal proceedings were final (as in the case of *Ercolano*) or pending (as in the applicant's case).

## VI. THE COURT OF CASSATION'S JUDGMENT

27. By judgment no. 26519 of 7 January 2016, deposited with the registry on 24 June 2016, the Court of Cassation declared an appeal by the applicant on points of law inadmissible. Relying on its case-law (namely judgment no. 34233 of 19 April 2012, known as "*Giannone*"; see paragraph 43 below) and endorsing the lower courts' reasoning, the Court of Cassation reiterated that in the applicant's case no issue arose as to the more lenient subsequent law to be applied in his case, bearing in mind that at the time when he had been granted trial under the summary procedure, Decree-Law no. 341 of 2000 had been in force. In that respect, the circumstance emphasised by the

applicant that the proceedings in his case were still pending was irrelevant. Therefore, the applicant was not entitled to a reduction of sentence as he had not requested access to the summary procedure under the provisions of Law no. 479 of 1999.

28. Confirming the lower courts' reasoning, the Court of Cassation also refused a request by the applicant to have the case examined by the Constitutional Court.

# RELEVANT LEGAL FRAMEWORK AND PRACTICE

## I. DOMESTIC LEGAL FRAMEWORK

### A. The summary procedure

29. The summary procedure is governed by Articles 438 and 441 to 443 of the CCP. It is based on the assumption that a case can be decided as the file stands (*allo stato degli atti*) at the preliminary hearing. A request to be tried under the summary procedure may be made orally or in writing at any time before the parties have made their submissions at the preliminary hearing. If the summary procedure is followed, the hearing takes place in private and is given over to the parties' oral submissions; in principle, they must base their arguments on the documents included in the prosecution's file, even though, exceptionally, oral evidence may be allowed. If the judge finds the defendant guilty, the sentence imposed is reduced by one-third (Article 442 § 2).

### B. Amendment of Article 442 of the CCP by Law no. 479 of 16 December 1999

30. By Law no. 479 of 16 December 1999, which came into force on 2 January 2000, Parliament reintroduced the possibility, which had previously been denied (see paragraph 34 below), of allowing a defendant liable to a sentence of life imprisonment to opt for the summary procedure. Section 30 provides:

**Section 30**

"The following changes shall be made to Article 442 of the Code of Criminal Procedure:

...

(b) in paragraph 2, after the first sentence, the following [second and last sentence] shall be added: 'Life imprisonment shall be replaced by thirty years' imprisonment'".

## C. Decree-Law no. 341 of 24 November 2000

31. Decree-Law no. 341 of 24 November 2000, which came into force on the same day and was converted into Law no. 4 of 19 January 2001, purported to give an "authentic interpretation" of the second sentence of paragraph 2 of Article 442 of the CCP and added a third sentence.

32. Under the chapter entitled "Authentic interpretation of Article 442, paragraph 2, of the Code of Criminal Procedure and provisions regarding the summary procedure in trials for offences punishable by life imprisonment", section 7 of Decree-Law no. 341 of 2000 provided:

**Section 7**

"1. In Article 442, paragraph 2, [second and] last sentence, of the Code of Criminal Procedure, the words 'life imprisonment' should be taken to mean life imprisonment without daytime isolation.

2. In Article 442, paragraph 2, of the Code of Criminal Procedure, the following sentence shall be added *in fine*: 'Life imprisonment with daytime isolation, in the event of cumulative offences or a continuous offence, shall be replaced by life imprisonment.'"

33. The relevant parts of the provisions of the CCP governing the summary procedure, as amended by Law no. 479 of 16 December 1999 and by Decree-Law no. 341 of 2000, read as follows:

**Article 438**

"1. The defendant may request that the case be decided at the preliminary hearing on the basis of the case file as it stands ...

2. The request may be made, orally or in writing, until such time as the final submissions have been made under Articles 421 and 422.

3. The wishes of the defendant shall be expressed in person or through the intermediary of a specially instructed representative (*per mezzo di procuratore speciale*). The signature on the instruction shall be authenticated by means of the formalities detailed in Article 583 § 3 [by a notary, another authorised person or counsel for the defence].

4. The judge shall give a decision on the request in the order adopting the summary procedure.

5. The defendant ... may make his or her request subject to the admission of new evidence necessary for the court to reach a decision. The judge shall adopt the summary procedure if the admission of such evidence is necessary for a decision to be reached and is compatible with the aim of economy inherent in the procedure, taking into account the documents already before the court which can be used. In such cases the prosecution may request the admission of rebutting evidence. ...

..."

**Article 441**

"1. The summary procedure shall follow the provisions laid down concerning preliminary hearings, in so far as they can be applied, with the exception of Articles 422 and 423 [provisions governing the power of the judge to order of his or her own motion the production of crucial evidence and the possibility for the prosecution to amend the charge].

...

3. The summary proceedings shall be conducted in private. The judge shall order the proceedings to be conducted at a public hearing if all the defendants so request.

...

5. Where the judge considers that the case cannot be determined as it stands, he or she shall acquire (*assume*) of his or her own motion the evidence necessary for a decision to be reached. In such cases, Article 423 shall apply.

6. For the purposes of the production of the evidence [referred to] in paragraph 5 of the present Article and in Article 438 § 5, the arrangements adopted shall be those set forth in Article 422 §§ 2, 3 and 4 [these paragraphs permit the parties to put questions to the witnesses and expert witnesses through the intermediary of the judge and give the defendant the right to ask to be questioned]."

**Article 442**

"1. Once the arguments have been heard, the judge shall take a decision under the terms of Articles 529 et seq. [these provisions concern discharge, acquittal and conviction].

1 *bis*. The judge's deliberations shall be based on the documents contained in the file [referred to] in Article 416 § 2 [the file held by the public prosecutor's office on the steps taken in the preliminary investigation], the documents [indicated] in Article 419 § 3 [relating to the steps in the investigation taken after the defendant was committed for trial] and the evidence adduced at the hearing.

2. If the defendant is convicted, the sentence imposed by the judge in the light of all the circumstances shall be reduced by one-third. Life imprisonment shall be replaced by thirty years' imprisonment. Life imprisonment with daytime isolation ... shall be replaced by life imprisonment.

3. The judgment shall be served on the defendant if he or she was not present.

..."

**Article 443**

"1. The defendant and the prosecution may not appeal against an acquittal if the purpose of the appeal is to secure a different form [of acquittal].

...

3. The prosecution may not lodge an appeal against a conviction unless the judgment alters the legal characterisation of the offence (*il titolo del reato*).

4. The appeal proceedings shall be conducted in accordance with the provisions of Article 599."

## II. DOMESTIC CASE-LAW

### A. Constitutional Court's case-law

#### *1. Constitutional Court's judgment no. 176 of 23 April 1991*

34. By judgment no. 176 of 23 April 1991, the Constitutional Court struck down the provisions of the CCP under which the summary procedure had been made available to persons accused of crimes punishable by life imprisonment. It found, in particular, that those provisions had gone beyond the powers that Parliament had delegated to the government with a view to the adoption of the new CCP.

#### *2. Constitutional Court's judgment no. 210 of 3 July 2013*

35. Upon referral by the plenary Court of Cassation in case no. 34472 of 10 September 2012 (known as "*Ercolano*"), the Constitutional Court considered the question of the compatibility of section 7 of Decree-Law no. 341 of 2000 (see paragraph 32 above) with the Italian Constitution and the Convention, as interpreted in *Scoppola* (cited above), with regard in particular to the retrospective effect of that provision in cases where defendants had requested trial under the summary proceedure while Law no. 479 of 1999 had been in force but had been sentenced at a later stage, namely from the afternoon of 24 November 2000, when Decree-Law no. 341 of 2000 had entered into force, and had thus incurred the heavier penalty laid down by that decree.

36. The Constitutional Court's judgment proceeded from the assumption of the referring court that the constitutionality question at stake concerned cases identical to that in *Scoppola* (cited above), that is, cases where the request to be tried under the summary proceedure had been formulated while Law no. 479 of 1999 had been in force.

37. The relevant parts of that judgment read as follows:

> "9. On the merits...
>
> ... The judgment of the European Court of Human Rights of 17 September 2009 in *Scoppola v. Italy* found that Article 442 § 2 of the CCP amounted to 'a provision of substantive criminal law concerning the length of the sentence to be imposed in the event of conviction following trial under the summary procedure' and that, notwithstanding its designation, section 7(1) of Decree-Law no. 341 of 2000 was not in fact an interpretative provision because 'Article 442 § 2 of the CCP did not contain any particular ambiguity; it clearly stated that life imprisonment was to be replaced by thirty years' imprisonment, and made no distinction between life imprisonment with and life imprisonment without daytime isolation'. The *Scoppola* judgment goes on to add that 'the Government have not produced any examples of judicial decisions which could be alleged to have been based on conflicting interpretations of Article 442'.
>
> The above assessments are also indisputable under national law. ...

By its retroactive effect, section 7(1) of Decree-Law no. 341 of 2000 resulted in life sentences being handed down to defendants to whom the previous version of Article 442 § 2 of the Code of Criminal Procedure had applied, under which they should have been sentenced to thirty years' imprisonment.

In the *Scoppola* judgment of 17 September 2009, the European Court of Human Rights, departing from its previous settled case-law, held 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', which was 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'.

Within the context of Article 7 § 1 of the Convention, this principle is analogous to that contained in Article 2 § 4 of the Criminal Code, which has been elevated by the Strasbourg Court to the status of a Convention principle.

The Court therefore found that section 30 of Law no. 479 of 1999 was a subsequent criminal-law provision prescribing a more lenient penalty and that Article 7 of the Convention therefore required the applicant to be granted the benefit thereof."

38. On those grounds the Constitutional Court found that the question concerning the constitutionality of section 7 of Decree-Law no. 341 of 2000 raised in relation to Article 7 of the Convention was well founded and ruled that section 7(1) of Decree-Law no. 341 of 2000 was unconstitutional in that its designation as a law of "authentic interpretation" (see paragraph 32 above) had unduly determined its retrospective application to ongoing proceedings.

39. At the same time, the Constitutional Court specified that section 7(2) of the Decree-Law, amending Article 442 § 2 of the CCP, was limited to laying down the new rules concerning the summary procedure for crimes punishable by a life sentence, to be applied "in a fully operational manner" (*a regime*) and thus in cases (*fattispecie*) following its entry into force. Consequently, the option of a trial under the summary procedure for defendants liable to life imprisonment (with or without daytime isolation) remained open, but with a different sentencing framework.

40. Lastly, the Constitutional Court clarified that a review of the enforcement order was the appropriate procedure for obtaining a reduction of sentence in cases where the defendant's conviction had become final. This concerned, in particular, cases identical to *Scoppola* (ibid.), namely those in which an applicant had been tried under the summary procedure following a request submitted while Law no. 479 of 1999 had been in force.

## B. Court of Cassation's case-law

### 1. *The Court of Cassation's judgments after* Scoppola

41. Following the Court's judgment in *Scoppola* (cited above), many convicted people serving life sentences sought a review of their enforcement orders, requesting that their penalties be reduced to thirty years'

imprisonment. The domestic courts acting as enforcement judges dismissed those applications; the defendants then appealed on points of law.

42. The Court of Cassation repeatedly stated that only defendants who had opted for trial under the summary procedure between 2 January 2000 and 24 November 2000 – that is to say, between the entry into force of Law no. 479 of 16 December 1999 and the entry into force of Decree-Law no. 341 of 24 November 2000 – were entitled to a reduction of sentence (see, *inter alia*, judgments no. 8689 of 2 December 2011, no. 25227 of 10 January 2012, no. 5134 of 11 February 2012, and no. 48329 of 13 November 2012).

### 2. *The plenary Court of Cassation's judgment no. 34233 of 19 April 2012 (known as "*Giannone*")*

43. By judgment no. 34233, deposited with the registry on 7 September 2012, the plenary Court of Cassation held that the principles set out in *Scoppola* (cited above) should be read together with the procedural rules governing the summary procedure. That being so, the date of the submission of the request for trial under the summary procedure was considered to be the decisive element, together with the *tempus commissi delicti* (that is, the time of the commission of the offence), to establish which law was applicable when determining the relevant sentence.

44. According to the Court of Cassation, the issue of the succession of criminal laws examined in *Scoppola* (cited above) arose exclusively in cases where the defendant had asked to be tried under the summary procedure under the *lex mitior* – that is, between 2 January 2000 and 24 November 2000 – thus becoming entitled to the more lenient penalty of thirty years' imprisonment.

45. More specifically, the Court of Cassation stated that, in the light of Article 7 of the Convention as interpreted in *Scoppola* (cited above), the principle of the retrospectiveness of the *lex mitior* guaranteed that the length of the proceedings did not disadvantage the defendant, who might have incurred a heavier penalty than the one imposable if the proceedings had ended earlier. It then considered that the more favourable applicable law had to be identified within a different period from the reference period in trials conducted under the ordinary procedure. Indeed, while in the latter case the reference period ran from the date of the commission of the offence to the date of the final conviction, in trials conducted under the summary procedure the more lenient applicable law had to be identified within the period running from the request for a trial under the summary procedure until the date of the final conviction. It was the Court of Cassation's view that where, following a defendant's decision to be tried under the summary procedure, the applicable sentence had been reconsidered and reduced, the time of the commission of the offence could not be taken into account alone as the identification of applicable sentence was strictly linked to the time at which the defendant accessed the summary procedure.

46. In sum, "it was the date of the request to follow the summary procedure that determined the sanction applicable in relation to the offence committed".

47. The court concluded that where a defendant, as in the case at issue, had opted for trial under the summary procedure after the entry into force of section 7 of Decree-Law no. 341 of 2000 (which provided that the penalty of thirty years' imprisonment was to be substituted by life imprisonment without daytime isolation), no breach of the principle of retrospectiveness of the more lenient criminal law occurred and no legitimate expectation of the defendant was frustrated, since during the reference period (from the request for the case to be examined under the summary procedure until the date of the final conviction) the legal system had not provided for the possibility of being sentenced to thirty years' imprisonment.

### *3. The plenary Court of Cassation's judgment no. 18821 of 7 May 2014 (known as "*Ercolano*")*

48. Following the Constitutional Court's judgment no. 210 of 2013 (see paragraph 35 above) and in accordance with its previous *Giannone* judgment (see paragraph 43 above), by judgment no. 18821 of 7 May 2014, the plenary Court of Cassation ruled that enforcement judges had an obligation to reduce life sentences imposed on those who had opted for the summary procedure between 2 January and 24 November 2000, regardless of whether an application had been submitted to the European Court of Human Rights.

49. The reasoning of the judgment, in so far as relevant, reads as follows:

> "5. ...A request for trial under the summary procedure lodged during the validity of the so-called 'intermediate law', namely section 30(1)(b) of Law no. 479 of 1999, relating to crimes punishable by life imprisonment, requires, in the event of conviction, that the more lenient penalty be imposed, despite the fact that, by the end of the trial, the relevant legal framework has been – *medio tempore* – amended in more severe terms.
>
> ...
>
> 5.1 In conclusion, with regard to the succession of criminal laws, the principle at hand operated ... between 2 January and 23 November 2000: specifically, during this time frame the defendant must have submitted a request for trial under the summary procedure, a procedural event that gives rise to the more lenient penalty in force at that time, triggering its retrospective application with regard to the date on which the crime was committed and its continued validity even after the entry into force of a subsequent heavier penalty ..."

50. Following the *Giannone* and *Ercolano* judgments, the Court of Cassation has been consistent in refusing to apply the principles set out in *Scoppola* (cited above) to persons sentenced to life imprisonment as a result of proceedings which were not identical to those in that case, in that the defendants had not asked to be tried under the summary procedure under Law no. 479 of 1999 or had done so, but had later withdrawn their request (see,

*inter alia*, Court of Cassation, no. 15748 of 21 January 2014, no. 34158 of 1 August 2014, no. 7162 of 21 December 2015, and no. 11916 of 21 November 2018).

## III. COUNCIL OF EUROPE MATERIALS

51. Recommendation no. R (87) 18 of the Committee of Ministers to Member States concerns the simplification of criminal justice. This recommendation, which relates to summary and simplified procedures, was adopted by the Committee of Ministers of the Council of Europe on 17 September 1987. The relevant parts read as follows:

> "Having regard to the increase in the number of criminal cases referred to the courts, and particularly those carrying minor penalties, and to the problems caused by the length of criminal proceedings;
>
> Considering that delay in dealing with crimes brings criminal law into disrepute and affects the proper administration of justice;
>
> Considering that delays in the administration of criminal justice might be remedied, not only by the allocation of specific resources and the manner in which these resources are used, but also by a clearer definition of priorities for the conduct of crime policy, with regard to both form and substance, by:
>
> ...
>
> - making use of the following measures when dealing with minor and mass offences:
>
> - so-called summary procedures,
>
> - out-of-court settlements by authorities competent in criminal matters and other intervening authorities, as a possible alternative to prosecution,
>
> - so-called simplified procedures;
>
> - the simplification of ordinary judicial procedures;
>
> ...
>
> **III. Simplification of ordinary judicial procedures**
>
> *a. Judicial investigation prior to and at the trial court hearing*
>
> ...
>
> 4. If there is a preliminary investigation, it should be carried out according to a procedure which excludes all unnecessary formalities and, in particular, avoids the need for a formal hearing of witnesses in cases where the accused does not contest the facts.
>
> ..."

# THE LAW

## I. ADMISSIBILITY

52. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

## II. MERITS

### A. Alleged violation of Article 7 of the Convention

53. The applicant complained that, having been sentenced to life imprisonment, he had been given a heavier sentence than the one prescribed by the law which, of all the laws in force during the period between the commission of the offence and the delivery of the final judgment, had been the most favourable to him.

54. He argued, in particular, that during the criminal proceedings in his case, the domestic courts had "invented a new criterion", entailing the need to have requested trial under the summary procedure within the period in which Law no. 479 of 1999 had been in force. Instead, in the applicant's view, what counted in order to be granted the more favourable sanction was the fact that the offences for which he was being tried had taken place before the more favourable law had come into force. The applicant relied on Article 7 of the Convention, which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

#### *1. The parties' submissions*

##### (a) The applicant's observations

55. The applicant relied on the Court's findings in *Scoppola v. Italy (no. 2)* (GC], no. 10249/03, § 113, 17 September 2009) to the effect that Article 442 § 2 of the CCP was a provision of substantive criminal law concerning the length of the sentence to be imposed in the event of conviction following trial under the summary procedure.

56. The applicant argued that since he had been tried under the summary procedure, he had been entitled to the more lenient penalty provided for by the law within that procedure (namely thirty years' imprisonment under

Article 442 § 2 of the CCP, as amended by Law no. 479 of 1999; see paragraph 30 above).

**(b) The Government's observations**

57. The Government emphasised that the applicant's situation was different from the one examined in *Scoppola* (cited above). In contrast to the applicant in that case, the applicant in the present case had asked to be tried under the summary procedure at a time when the maximum penalty applicable for cumulative offences within that framework had already been amended from thirty years' imprisonment to life imprisonment without daytime isolation. In that connection, the Government observed that, in contrast to the applicant in *Scoppola* (ibid.), the applicant in the present case had not been directly affected by the retrospective application of section 7 of Decree-Law no. 341 of 2000. They also pointed out that, in *Scoppola* (ibid.), the Court had concluded that Article 7 of the Convention had been violated in respect of those defendants, such as the applicant in that case, who had made their request for trial under the summary procedure before 24 November 2000.

58. As regards the principles applicable to the succession of criminal laws, they pointed out that a distinction should be drawn between two types of provisions: those directly regulating the applicable penalty for each offence and those relating to special procedures (such as the summary procedure), which could only possibly have an indirect effect on the sentence. In cases concerning the second type of provision, the defendant entered into an agreement with the State, as part of his or her defence strategy; consequently, the date on which such agreement had been reached was decisive in establishing the applicable penalty that the defendant risked incurring, in accordance with the principles established by the Court of Cassation in *Giannone* (see paragraph 43 above).

59. In sum, the time frame for identifying the most favourable provision under the criminal law ran from the date of the request for trial under the summary procedure until the date of the conviction.

60. Therefore, the Government contested that any retroactive application of the criminal law to the applicant's detriment had taken place in his case.

*2. The Court's assessment*

**(a) General principles**

61. The Court reiterates that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its object and purpose, in such a way as to

provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 77, ECHR 2013; *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 153, ECHR 2015; and *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 202, 4 December 2018).

62. The Court further reiterates that Article 7 § 1 of the Convention guarantees not only the principle of the non-retroactivity of the harsher criminal law, but also, implicitly, the principle of the retroactivity 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*, cited above, § 109; *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, § 81, 29 May 2020 ("*Advisory opinion P16-2019-001*"); and *Jidic v. Romania*, no. 45776/16, § 80, 18 February 2020). The principle of retrospective application of the more lenient criminal law also applies 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, and *Advisory opinion P16-2019-001*, cited above, § 82).

63. It is not the Court's task to review *in abstracto* whether the alleged failure to retroactively apply the new criminal law is, *per se*, incompatible with Article 7 of the Convention. This matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case, and notably whether the domestic courts have applied the law whose provisions are most favourable to the defendant (see *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 65, ECHR 2013, and *Jidic*, cited above, § 82). What is crucial is whether, following a concrete assessment of the specific acts, the application of one criminal law rather than the other has put the defendant at a disadvantage as concerns the sentencing (see *Maktouf and Damjanović*, cited above, §§ 69-70, and *Jidic*, cited above, § 85).

**(b) Application of the above principles to the present case**

64. It is not disputed that, in the present case, the crimes of which the applicant stood accused were cumulatively punishable by life imprisonment with daytime isolation and that, at the time they were committed, in 1983, the CCP did not afford the possibility of trial under the summary procedure (see paragraph 6 above).

65. The applicant was first committed for trial in 1995, at which time, in view of the Constitutional Court's judgment no. 176 of 1991 (see paragraph 34 above), he was still prevented from requesting the summary procedure.

66. When Law no. 479 of 1999 reintroduced the possibility of allowing defendants liable to a life sentence to opt for the summary procedure and as a result face a maximum sentence of thirty years' imprisonment, the proceedings in the applicant's case were pending at first instance.

67. Pursuant to the transitional provisions contained in section 4-*ter* of Decree-Law no. 82 of 2000, which entered into force on 8 June 2000, it was open to defendants to request trial under the summary procedure at the next available hearing. However, the applicant did not avail himself of that possibility (see paragraphs 8-9 above).

68. The Court notes that the applicant's first-instance conviction was quashed by the Naples Assize Court of Appeal, which remitted the case to the public prosecutor for a fresh indictment before the competent court (see paragraph 13 above). On 2 October 2012, having been committed for trial again, the applicant asked to be tried under the summary procedure (see paragraph 14 above). The applicant was granted access to that procedure and, following trial, was sentenced to life imprisonment without daytime isolation (see paragraph 17 above).

69. The Court takes note of the fact, emphasised by the Government and stemming from the domestic decisions on the merits of the case as well as from the well-established domestic case-law, that, unlike the applicant in *Scoppola* (cited above), the applicant in the present case requested the summary procedure long after the statutory framework concerning sentencing within the summary procedure had been amended in more severe terms, since the maximum term of thirty years' imprisonment had been substituted by life imprisonment without daytime isolation by section 7 of Decree-Law no. 341 of 2000, which entered into force on 24 November 2000.

70. At this juncture, the question that the Court needs to answer is whether, in the light of the principles set out in *Scoppola* (cited above), the time frame within which the most lenient law is to be identified runs *in abstracto* from the commission of the offence until the final conviction or whether, when it comes to simplified procedures – which depend on a request by the accused person – the time frame begins from the moment at which such a request is formulated. Indeed, it is at that time that the accused becomes entitled to the benefit of a reduction of sentence, deriving from his or her choice to waive certain procedural rights.

71. The Court reiterates from the outset that the principle of retrospectiveness of the more lenient criminal law entails 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).

72. It further observes that the parties disagreed as to the identification of Article 442 § 2 of the CCP, as amended by Law no. 479 of 1999, as the most lenient criminal law in the case at hand.

73. Indeed, the applicant, relying on *Scoppola* (cited above, § 119), argued that that provision contained the most lenient penalty provided for by the law within the summary procedure among all the laws enacted between the time of the commission of his offences and the delivery of the final judgment.

74. Conversely, according to the Government and to the domestic case-law relied upon by them (namely the plenary Court of Cassation's *Giannone* judgment; see paragraph 43 above), it was the date of the defendant's request for trial under the summary procedure which marked the beginning of the time frame to be taken into account for the identification of the law prescribing the more lenient penalty. From that point of view, therefore, the penalty of thirty years' imprisonment provided for by Law no. 479 of 1999 would be the most lenient penalty only if the defendant had asked to be tried under the summary procedure when the provisions of that Law were in force, which the applicant had not done.

75. The Court reiterates that its scrutiny does not involve a review *in abstracto* of whether the alleged failure to retroactively apply the new criminal law is, *per se*, incompatible with Article 7 of the Convention, since such a review must be carried out taking into consideration the specific circumstances of each case (see *Jidic*, cited above, § 85; *Maktouf and Damjanović*, cited above, § 65; and *Mørck Jensen v. Denmark*, no. 60785/19, § 45, 18 October 2022).

76. It further notes that the introduction of the summary procedure by the Italian legislature aimed expressly to simplify and thus expedite criminal proceedings and that Recommendation no. R (87) 18 of the Committee of Ministers to member States concerning the simplification of criminal justice (see paragraph 51 above) urged the member States, while taking into account the constitutional principles and legal traditions specific to each State, to introduce simplified and summary procedures (the latter also referred to as "plea bargaining" or "*transactions pénales*"), with the specific aim of dealing with the problems raised by the length of criminal proceedings (see *Di Martino and Molinari v. Italy*, nos. 15931/15 and 16459/15, § 34, 25 March 2021).

77. Against that background, the Court cannot overlook the fact that, as highlighted in domestic practice (see paragraphs 43 et seq. above), in the context of the summary procedure, substantive and procedural aspects are closely interrelated, in that the summary procedure consists of an agreement between the defendant and the State whereby the defendant waives a number

of procedural safeguards in exchange for a fixed reduction of the penalty (see *Scoppola*, cited above, § 143).

78. The Court reiterates that while Article 7 of the Convention guarantees that criminal offences and the relevant penalties must be clearly defined by substantive criminal law, it does not set any requirements as to the procedure in which those offences must be investigated and brought to trial (see *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 789, 25 July 2013). The Court considers that the procedural choices of the defendant and the subsequent terms of any agreement between the defendant and the State are pivotal when it comes to the applicable penalty, since the length of the reduced sentence that may be imposed in the event of a conviction is clearly identified by the law in force at the time of the agreement to which the defendant subscribes.

79. It is in fact the penalty applicable at the time of the agreement in question that the defendant chooses to incur; therefore, it is that penalty that must be compared with the subsequent penalties provided for by the legislature in the context of the summary procedure in order to identify the most lenient law, whereas penalties applicable within the summary procedure before a defendant has chosen to be tried under that procedure remain inapplicable in the defendant's specific situation.

80. Consequently, it is within that framework that the domestic courts' compliance with the obligation to apply, from among several criminal laws, the one whose provisions are the most favourable to the accused (see *Scoppola*, cited above, § 108) must be assessed. Indeed, while the principle remains 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, due consideration must be given to the fact that the legislature may legitimately make the application of some or all of the subsequent provisions of law conditional upon specific events, such as – in particular – a request by and/or the agreement of the accused, within a set time-limit, to be tried under the summary procedure (compare, *mutatis mutandis*, *Di Martino and Molinari*, cited above, §§ 34 et seq.).

81. In this connection, the Court observes that, in contrast to the applicant in *Scoppola* (cited above), who requested the summary procedure at the preliminary hearing immediately after the enactment of Law no. 479 of 1999, in the instant case the applicant did not avail himself of the possibility of requesting trial under the summary procedure at the first hearing following the entry into force of Law no. 479 of 1999, as he would have been entitled to do by the relevant transitional provisions. Instead, he deliberately chose to submit such a request several years later, after being committed for trial afresh, on 2 October 2012 (see paragraph 14 above).

82. At that time, as further confirmed by the Constitutional Court (see judgment no. 210 of 2013, cited in paragraph 39 above), Article 442 § 2 of the CCP, as amended by section 7 of Decree-Law no. 341 of 2000, provided that in the event of conviction under the summary procedure for crimes punishable by life imprisonment with daytime isolation, the appropriate sentence would be life imprisonment without daytime isolation. Hence, by the time the applicant requested the summary procedure, the penalty of thirty years' imprisonment was no longer a possible sentence for the crimes of which he stood accused at his trial under that procedure.

83. The Court is mindful of the following considerations set out in *Scoppola* (cited above, § 115, emphasis added):

> "... Having regard to the fact that, at the applicant's request, the preliminary hearings judge subsequently *agreed* to apply the summary procedure ..., the Court considers that section 30 of Law no. 479 of 1999 is a subsequent criminal-law provision prescribing a more lenient penalty. Article 7 of the Convention, as interpreted in the present judgment ..., therefore required the applicant to be granted the benefit thereof."

Indeed, rather than being considered *in abstracto*, the identification of the most lenient law among all the laws in force during the period between the commission of the offence and delivery of the final judgment (ibid., § 119) was strictly linked in the present case to the agreement of the domestic court to the applicant's request to be tried under the summary procedure.

84. The Court further observes that Italian law offers an accused person the option of different procedures, some of which grant a benefit in the form of a reduced sentence in exchange for a waiver of certain procedural safeguards. There are several such procedural paths and related penalties open to the accused. Consideration must be given to the passage from one track to another, with the associated reduction of penalties, which depends on the procedural and defence choices made by the accused person and plays a role (from the commission of the offence to the final conviction) in determining the starting-point of the time frame within which the most lenient penalty is to be identified, until the final adjudication of the case. Therefore, the penalties applicable in the abstract in summary procedures before the individual's choice is made should not be considered among those relevant for the identification of the *lex mitior* in a given case, as they do not pertain to the legal instruments applicable *in concreto* in the accused's situation. A conclusion to the contrary would undermine the rationale behind offering a benefit in exchange for waiving procedural safeguards, which is at the core of the Italian legislature's choice to expedite criminal proceedings in such a way (see paragraphs 51 and 76 above).

85. In the circumstances of the present case, it is therefore the date of the applicant's request to be tried under the summary procedure which marked the beginning of the time frame to be taken into account for the identification of the law prescribing the more lenient penalty. The Court further agrees with the Government's arguments, based on the relevant domestic case-law

referred to in the decisions on the merits of the applicant's case (see the Court of Cassation's *Giannone* and *Ercolano* judgments cited in paragraph 43-49 above and the Constitutional Court's judgment no. 210 of 2013, cited in paragraphs 35 et seq.), that the facts of the present case differ from those in *Scoppola* (cited above) in that the applicant had requested, and had been granted, trial under the summary procedure at a time when Law no. 479 of 1999 was no longer in force and, in any event, long after the statutory domestic framework concerning the fixing of sentences had been amended in more severe terms.

86. In that respect, the applicant has failed to give any reason which could justify his belated request and his choice not to make such a request while Law no. 479 of 1999 was in force, even though it was open to him to do so (see paragraphs 55 and 56 above).

87. Given the interplay between the substantive and procedural aspects in the context of the summary procedure (see paragraph 77 above), the Court finds that, having chosen the summary procedure at a time when the provisions of Law no. 479 of 1999, providing for a maximum sentence of thirty years' imprisonment, had been replaced by those of section 7 of Decree-Law no. 341 of 2000, providing for a maximum sentence of life imprisonment without daytime isolation, the applicant was no longer entitled to a sentence of thirty years' imprisonment.

88. Having regard to the fact that, at the applicant's request, the preliminary hearings judge agreed to apply the summary procedure, which had not been available at the time of the commission of the offences, the Court considers that section 7 of Decree-Law no. 341 of 2000, which was in force at the time of the applicant's request to be tried under the summary procedure, is a subsequent criminal-law provision prescribing a more lenient penalty.

89. In the light of the foregoing, the Court concludes that, having sentenced the applicant to life imprisonment without daytime isolation pursuant to that provision, the domestic courts did in fact apply the more lenient punishment in his case (see, *mutatis mutadis*, *Ruban v. Ukraine*, no. 8927/11, § 46, 12 July 2016).

90. It follows that there has been no violation of Article 7 of the Convention.

### B. Alleged violation of Article 6 § 1 of the Convention

91. The Court referred to the parties, of its own motion, a question under Article 6 § 1 of the Convention concerning the applicant's expectation of incurring a maximum penalty of thirty years' imprisonment following trial under the summary procedure. Article 6 § 1 reads as follows:

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

*1. The parties' submissions*

92. The applicant did not make any submissions in relation to this issue.

93. The Government observed that the applicant could have had no legitimate expectation of incurring a sentence other than life imprisonment since he had requested the summary procedure after the enactment of the law providing for the harsher penalty (namely Decree-Law no. 341 of 2000).

*2. The Court's assessment*

94. The Court reiterates that although the Contracting States are not required by the Convention to provide for simplified procedures (see *Hany v. Italy* (dec.), no. 17543/05, 6 November 2007, and *Morabito v. Italy* (dec.) no. 21743/07, 27 April 2010), where such procedures exist and have been adopted, the principles of a fair trial require that defendants should not be deprived arbitrarily of the advantages attached to them (see *Scoppola*, cited above, § 139).

95. In the present case, it is undisputed that by requesting the summary procedure, the applicant, who was assisted by a lawyer of his choice, and was therefore in a position to ascertain the consequences of that request, unequivocally waived his right to a public hearing, to have witnesses called, to produce new evidence and to examine prosecution witnesses (ibid.).

96. The Court notes that such a waiver was made in exchange for certain advantages, which, at the time of the submission of the applicant's request, on 2 October 2012, included the non-imposition of daytime isolation with the penalty of life imprisonment in the event of a conviction, as provided for by Article 442 § 2 of the CCP as amended by section 7 of Decree-Law no. 341 of 2000, which entered into force on 24 November 2000.

97. On the basis of the legal framework in force at the time when the applicant requested the simplified procedure, he could not legitimately have expected to receive any other penalty than life imprisonment without daytime isolation, as a result of the procedural choice he had made.

98. In the light of the above, the Court finds that the imposition of that penalty was foreseeable and therefore did not infringe the applicant's right to a fair trial. It follows that there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been no violation of Article 7 of the Convention;

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

Done in English, and notified in writing on 17 October 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| | |
|---|---|
| Ilse Freiwirth<br>Registrar | Ivana Jelić<br>President |

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

# PARTLY DISSENTING OPINION OF JUDGE FELICI

1. With all due respect to my colleagues in the majority, I am unable to concur with either their reasoning, or their conclusion that Article 7 has not been violated.

The reason is very simple and self-evident; the reasoning and the consequent conclusion go against the principle already established by the Grand Chamber judgment in *Scoppola v. Italy (no. 2)*.

2. That judgment states: "It follows that the applicant was given a heavier sentence than the one prescribed *by the law which, of all the laws in force during the period between the commission of the offence and delivery of the final judgment, was most favourable to him*. ... In the light of the foregoing, the Court considers that the respondent State failed to discharge its obligation to grant the applicant the benefit of the provision by prescribing a more lenient penalty which had come into force after the commission of the offence. It follows that in this case there has been a violation of Article 7 § 1 of the Convention." (See *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, §§ 119-21, 17 September 2009).

The applicant in the present case committed the crime for which he was convicted in 1983; he chose to make use of the summary procedure, and the final ruling of the Court of Cassation was delivered on 7 January 2016 (see paragraphs 6-28 of the judgment).

Until 1999 it was not possible for defendants liable to a sentence of life imprisonment (like the applicant) to opt for the summary procedure; from 2 January 2000 to 24 November 2000 (Law no. 479 of 16 December 1999), those persons liable to a sentence of life imprisonment who were found guilty under the summary procedure were eligible for a reduction in their sentence to thirty years' imprisonment; from 24 November 2000 (Decree-Law no. 341 of 24 November 2000), the reduction was to life imprisonment without daytime isolation (see paragraphs 29-33 of the judgment).

The applicant was sentenced to the latter penalty, even though – exact quotation – *the law which, of all the laws in force during the period between the commission of the offence and delivery of the final judgment, was most favourable to him* provided for a sentence of thirty years' imprisonment.

3. The decision taken by the Chamber is flagrantly at odds with the above-cited principle established by the Grand Chamber; no further addition is needed. The case should have been dealt with by a Committee, under Article 28 § 1 (b) of the Convention. Or, if it was considered that there were reasons to amend this clearly established principle, it should have been relinquished to the Grand Chamber in accordance with Article 30 of the Convention. Instead, it was dealt with by a Chamber.

4. In paragraph 70, the judgment introduces an element that is entirely exogenous to the assessment which the Court is called upon to carry out. In

so doing, it limits the scope of the principle established by the Grand Chamber, posing the question whether the time frame within which the most lenient law is to be identified runs *in abstracto* from the commission of the offence until the final conviction or whether, when it comes to simplified procedures – which depend on a request by the accused person – the time frame begins from the moment at which such a request is formulated. Paragraph 83 provides the answer: "the identification of the most lenient law among all the laws in force during the period between the commission of the offence and delivery of the final judgment was strictly linked in the present case to the agreement of the domestic court to the applicant's request to be tried under the summary procedure." This conclusion, in addition to being based, as mentioned, on an exogenous element, is completely disconnected from the case-law of the Court, it does not provide acceptable reasoning and it introduces confusion between the procedural and substantive aspects, in contrast with what was clearly established by the *Scoppola* judgment ("the Court considers that Article 442 § 2 of the CCP is a provision of substantive criminal law concerning the length of the sentence to be imposed in the event of conviction following trial under the summary procedure"). It is not possible, therefore, to carry out a fruitful distinguishing exercise between the *Scoppola* case and the present one.

Moreover, the answer to this question is already clear in the *Scoppola* judgment: the broad principle set out in paragraph 119 of that judgment was adopted by the Grand Chamber despite the fact that the applicant had complained that "the penalty imposed at first instance had been increased to life imprisonment, which was not the penalty prescribed by the law in force at *the time when the applicant had agreed to be tried under the summary procedure*" (see *Scoppola*, cited above, § 87).

5. The departure from the firm and clear principles already established by the Grand Chamber in a Chamber case may prove to be extremely detrimental with respect to the comprehensibility, at the national level, of the Court's case-law, risking weakening its preceptive force, and harming the expansion of the principle of subsidiarity, despite this being one of the key themes to which the Court has paid the most attention in the last decade.