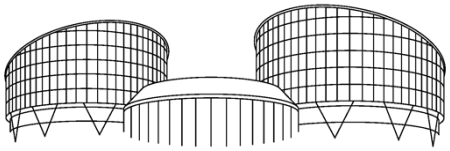

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF SERRANO CONTRERAS v. SPAIN (No. 2)

(Application no. 2236/19)

JUDGMENT

Art 6 § 1 (criminal) • Unfairness of revision proceedings before Supreme Court due to distortion of European Court judgment which had found a violation of the applicant's right to a fair trial • Complaint connected with execution of Court's earlier judgment but sufficiently distinct to permit its examination • Art 6 § 1 safeguards applicable to revision proceedings in present case, in light of the scope of Supreme Court's scrutiny

STRASBOURG

26 October 2021

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

In the case of Serrano Contreras v. Spain (no. 2),

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

Georges Ravarani, *President,*
Georgios A. Serghides,
María Elósegui,
Darian Pavli,
Anja Seibert-Fohr,
Peeter Roosma,
Andreas Zünd, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 2236/19) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Spanish national, Mr Bernardo Serrano Contreras ("the applicant"), on 17 December 2018;

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

the parties' observations;

Having deliberated in private on 21 September 2021,

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

INTRODUCTION

1. The present case concerns the revision of the applicant's criminal conviction after the Court's finding of a violation of Article 6 § 1 of the Convention in its judgment of 20 March 2012.

THE FACTS

2. The applicant was born in 1953 and lives in Fernán Núñez (Córdoba). The applicant was represented by Mr J.D. Pérez Aroca, a lawyer practising in Córdoba.

3. The Government were represented by their Agent, Mr A. Brezmes Martínez de Villarreal, State Attorney.

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

I. BACKGROUND OF THE CASE AND THE FIRST SERRANO CONTRERAS JUDGMENT

5. By a judgment of 11 November 2003, the *Audiencia Provincial* of Córdoba acquitted the applicant and other accused of charges against them

of fraud, forgery of official documents and forgery of commercial documents.

6. Following an appeal on points of law lodged by plaintiffs, by a judgment of 14 October 2005, the Supreme Court – without first holding a hearing – found the applicant and the other accused guilty of fraud, forgery of official documents and forgery of commercial documents. He was sentenced to four years' imprisonment and ordered to pay any damages subsequently awarded.

7. On 29 September 2008 the applicant lodged application no. 49183/08 with the European Court of Human Rights; he complained, *inter alia*, under Article 6 § 1 of the Convention, of the unfairness and undue length of the proceedings.

8. By a judgment of 20 March 2012, the Court found a violation of Article 6 § 1 in respect of the fairness and the length of the proceedings.

9. The details of the proceedings before the national courts prior to the Court's judgment of 20 March 2012 are set out in *Serrano Contreras v. Spain*, no. 49183/08, §§ 6-20, 20 March 2012.

II. THE APPLICATION FOR REVISION AND THE SUBSEQUENT APPEALS

10. On the basis of the Court's judgment of 20 March 2012, the applicant lodged an application for a revision of the judgment ("application for revision" – *recurso de revisión*) with the Supreme Court. In the application, the applicant requested the quashing of the Supreme Court judgment of 14 October 2005 by which he had been convicted of fraud, forgery of official documents and forgery of commercial documents.

11. By a judgment of 19 May 2015, the Supreme Court allowed in part the application for revision and quashed the applicant's conviction in respect of the offence of forgery of official documents. In respect of his conviction for fraud and forgery of commercial documents, it dismissed the applicant's application for revision. The applicant was not heard in person during the revision proceedings as those proceedings were conducted entirely in writing. The Supreme Court did not modify the four-year prison term previously imposed. Concerning the applicant's conviction for forgery of official documents, the Supreme Court noted that in its judgment of 14 October 2005 it had modified the findings of fact, as established by the *Audiencia Provincial* of Córdoba, on the basis of evidence that had not been produced at the public hearing. As regards the applicant's conviction for fraud and forgery of commercial documents, the Supreme Court noted as follows:

> "... it would not be reasonable to assume [*entender*] that the ECHR has disregarded all these statements and the factual and legal considerations contained in the judgments of the *Audiencia Provincial* and the Supreme Court and has declared a

> violation of the right to a fair trial in respect of all the convictions contained in the judgment of this Chamber, when it is clear from the outset that the modification of the findings of fact giving rise to that infringement has only occurred in relation to one part of those findings. Consequently, in order to avoid an irrational interpretation of the ECHR's statements, it must be understood that all of those statements are limited to the facts relating to the forgery of the labels ... These are the only facts, objective and subjective, the establishment of which was modified in the judgment on the appeal on points of law ...
>
> As regards the offence of forgery of commercial documents, this Chamber did not modify the findings of fact ...
>
> As regards the offence of fraud, only the reference [by the Supreme Court] to the existence of a claim for damages lodged by the public authorities ... and refused at first instance ... was altered [in the Supreme Court judgment of 14 October 2005]. This is not an element of the findings of fact that was altered when the appeal was being heard, but rather a clarification in respect of a procedural action ..."

12. On 21 July 2015 the applicant brought an action seeking the annulment of the proceedings.

13. On 18 November 2015 the Supreme Court dismissed the applicant's action, upholding its judgment of 19 May 2015.

14. On 19 January 2016 the applicant lodged an *amparo* appeal with the Constitutional Court. In it he relied on Article 14 (Prohibition of discrimination) and Article 24 (Right to a fair trial) of the Spanish Constitution.

15. By a decision of 20 February 2017, the Constitutional Court held that the Supreme Court's arguments and conclusions in the revision proceedings had been reasonable and in accordance with the relevant law and case-law, and ruled the applicant's *amparo* appeal inadmissible owing to the manifest lack of any violation of a fundamental right.

III. THE SUPERVISION OF THE EXECUTION OF THE FIRST SERRANO CONTRERAS JUDGMENT

16. In its role under Article 46 § 2 of the Convention to supervise the execution of judgments of the Court, the Committee of Ministers of the Council of Europe ("the Committee of Ministers") examined the measures proposed and taken by Spain to execute the judgment in *Serrano Contreras*, cited above. These individual and collective measures, explained in the action reports submitted by the Spanish Government on 15 January 2013 and 13 December 2016 (documents DH-DD(2013)36 and DH-DD(2016)1215-rev respectively), included for the particular case of the applicant the payment of the just satisfaction awarded by the Court, the possibility for the applicant to lodge an application for revision on the basis of the Court's finding of a violation and the publication and diffusion of the Court's judgment, as well as other general measures at legislative level.

17. The Committee of Ministers, by means of the Resolution CM/ResDH(2017)69 adopted on 22 February 2017, and in view of the individual and general measures adopted by the respondent State, declared that it had exercised its functions under Article 46 § 2 and it decided to close the examination of the case.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

18. Under Spanish legislation, an application for revision is regulated under section 954 of the Spanish Criminal Procedure Act. The relevant parts of the section, as in force at the relevant time, read as follows:

Section 954

"An application for revision may be lodged against final judgments in the following cases:

...

4. When, after the delivery of a judgment, new facts or new elements of evidence come to light of such a nature as to establish the innocence of the convicted person."

19. Shortly after the delivery of the Supreme Court's judgment of 19 May 2015, the Spanish authorities, by Law 41/2015, of 5 October 2015, amended section 954 of the Spanish Criminal Procedure Act to explicitly include the right to apply for a revision of a judgment after the finding of a violation by the European Court of Human Rights, as long as the effects of that violation could not be remedied in any way other than by such a judicial revision.

20. In respect of the application for revision in the Spanish legal system, there are several examples in which the Supreme Court, after a judgment of the Court finding a violation of Article 6, decided to reopen the proceedings. These examples include the cases *Almenara Alvarez v. Spain*, no. 16096/08, 25 October 2011; *Lacadena Calero v. Spain*, no. 23002/07, 22 November 2011; *Valbuena Redondo v. Spain*, no. 21460/08, 13 December 2011; *Vilanova Goterris and Llop Garcia v. Spain*, nos. 5606/09 and 17516/09, 27 November 2012; *Porcel Terribas and Others v. Spain*, no. 47530/13, 8 March 2016; and *Gómez Olmeda v. Spain*, no. 61112/12, 29 March 2016.

21. The relevant provisions of the Criminal Code, as in force at the material time, read as follows:

Article 302

"... A public servant who, in abuse of [his or her] position, commits forgery, shall be sentenced ..."

Article 303

"An individual who commits by means of a public or official document, ... or a commercial document, a forgery, as described in the preceding article, shall be sentenced to 'minor imprisonment' [*pena de presidio menor*] and a fine ..."

Article 528

"Anyone who, with a view to gaining a pecuniary advantage, engages in dishonest practices in order to deceive another person into transferring property, to the latter's detriment or to the detriment of a third party, is guilty of the offence of fraud.

..."

THE LAW

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

22. The applicant complained that his right to a fair trial, as provided by Article 6 § 1 of the Convention, had been breached on account of the Supreme Court's misinterpretation of the European Court of Human Rights' judgment, upholding without a fresh hearing his convictions for fraud and forgery of commercial documents. The relevant part of 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 ..."

A. Admissibility

23. The Government acknowledged, in view of the judgment in *Moreira Ferreira v. Portugal (no. 2)* ([GC], no. 19867/12, 11 July 2017), that the Court holds jurisdiction to examine the complaint. However, they maintained that the complaint lodged by the applicant raised no new issue separate from those examined by the Court in its judgment of 20 March 2012. The applicant's complaint concerned the supervision of the execution of the Court's previous judgment, which fell within the authority of the Committee of Ministers of the Council of Europe. The Government argued that a new judgment finding Spain to be in breach of the Convention on the same grounds as in the judgment of 20 March 2012 would interfere with the *non bis in idem* principle.

24. The Court recalls that the Committee of Ministers' role in the sphere of execution of its judgments does not prevent it from examining a fresh application concerning measures taken by a respondent State in execution of a judgment if that application contains relevant new information relating to issues undecided by the initial judgment (see *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 33, ECHR 2015). The determination of the existence

of a "new issue" very much depends on the specific circumstances of the case in question, and distinctions between cases are not always clear-cut (see *Moreira Ferreira (no. 2)*, cited above, § 47).

25. In the instant case, the Court notes that although the application is undoubtedly connected with the execution of the Court's judgment of 20 March 2012, the complaint regarding the unfairness of the subsequent judicial proceedings before the Supreme Court both concerns a situation distinct from that examined in that judgment and contains relevant new information relating to issues undecided by that judgment. In the present case the "new issue" that the Court has authority to examine concerns the alleged unfairness of the revision proceedings before the Supreme Court in that, in view of the Court's judgment of 20 March 2012, it annulled the applicant's conviction in respect of the offence of forgery of official documents, while upholding his convictions for fraud and forgery of commercial documents (see, *mutatis mutandis*, *Bochan (no. 2)*, cited above, §§ 37-38).

26. Accordingly, the Court is not prevented by Article 46 of the Convention from examining the applicant's new complaint concerning the unfairness of the proceedings leading to the judgment of the Supreme Court of 19 May 2015.

27. Concerning the applicability *ratione materiae* of Article 6 § 1 to the applicant's complaint in the framework of revision proceedings, the Court recalls the principles set out in *Moreira Ferreira (no. 2)*, cited above. Under the Spanish legal system, section 954 of the Criminal Procedure Act (explicitly after the amendment of Law 41/2015, of 5 October 2015) provides applicants with a remedy entailing the possibility of a revision of a final judgment after the finding of a violation by the Court, as long as the effects of that violation could not be remedied in any way other than by such a judicial revision. In the context of that examination under section 954, the Supreme Court's task is to consider the outcome of the terminated domestic proceedings in relation to the findings of the Court and, where appropriate, order the re-examination of the case with a view to securing a fresh determination of the criminal charge against the injured party. The examination on the basis of section 954 of the Criminal Procedure Act is therefore likely to be decisive for the determination of a criminal charge (see, *mutatis mutandis*, ibid., § 69).

28. Given the scope of the Supreme Court's scrutiny in the present case, pointed out in paragraph 11 above, the Court considers that that scrutiny should be regarded as an extension of the criminal proceedings against the applicant. The Supreme Court once again focused on the determination, within the meaning of Article 6 § 1 of the Convention, of the criminal charge against the applicant. Consequently, the safeguards of Article 6 § 1 of the Convention were applicable to the proceedings before the Supreme Court (see, *mutatis mutandis*, ibid., § 72).

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

B. Merits

1. The parties' arguments

30. The applicant submitted that the Supreme Court had not made a reasonable interpretation of the Court's judgment of 20 March 2012 and that, as a result, the conclusion reached in its judgment of 19 May 2015 had not accorded with the conclusions of the European Court of Human Rights. The latter had not made any distinction as to whether the violation found in its judgment of 20 March 2012 had only affected some of the convictions and not the others; the Supreme Court's interpretation had therefore been incompatible with the terms of the Court's judgment. The procedural defects acknowledged by the Court in its judgment of 20 March 2012 – that is to say the assessment that there had been criminal intent on the part of the applicant on the basis of evidence not directly examined by the second-instance court – had applied equally to all three offences for which he had been convicted. The applicant affirmed that on the basis of the facts, as established by the *Audiencia Provincial* of Córdoba, no different conclusion as to the existence of criminal intent could be inferred by the Supreme Court without a fresh and direct examination of the evidence. For that reason, he considered that the new set of proceedings before the Supreme Court had been unfair, and that its upholding of his convictions for fraud and forgery of commercial documents without a new hearing had amounted to a fresh violation of Article 6 § 1 of the Convention.

31. The Government submitted that the Supreme Court's judgment of 19 May 2015 had fully complied with the findings of the Court's judgment of 20 March 2012. The Court's judgment had not entailed the automatic nullification of the convicting judgment of 14 October 2005 and it was for the national authorities, within their margin of appreciation, to adopt the most appropriate measures in order to address the violations found by the Court. They stated that in order to put the Court's judgment into effect, the Supreme Court had analysed which of the applicant's convictions had been affected by the violation found by the Court. In its interpretation, the Supreme Court had taken into account the fact that, in respect of the applicant's conviction for forgery of official documents, it had reassessed the facts, as established by the *Audiencia Provincial* of Córdoba; that had required a direct examination by the Supreme Court. However, as regards his convictions for fraud and forgery of commercial documents, the Supreme Court considered that it had simply corrected the legal interpretation adopted by the *Audiencia Provincial* of Córdoba, without altering the proven facts; thus, no direct examination had been necessary.

On the basis of that reasoning, the Supreme Court determined that it should quash only the applicant's conviction for forgery of official documents, while maintaining the other two convictions. The Government found that interpretation reasonable and in line with the requirements of Article 6 § 1 of the Convention.

2. The Court's assessment

(a) General principles

32. The Court reiterates that its judgments have binding force, pursuant to Article 46 of the Convention. Admittedly, States remain free to choose the means to be used in order to comply with them. Moreover, the aim is to put the applicant, as far as possible, in the position in which he would have been had the requirements of the Convention not been disregarded (*restitutio in integrum* – see *Emre v. Switzerland (no. 2)*, no. 5056/10, § 69, 11 October 2011).

33. A finding by the Court of a violation of Article 6 of the Convention does not automatically require the reopening of the domestic criminal proceedings. Nevertheless, this is, in principle, an appropriate, and often the most appropriate, way of putting an end to the violation in question and of affording redress for its effects. In most of the Contracting States the reopening of proceedings is not automatic and is subject to admissibility criteria, whose observance is supervised by the domestic courts, which have a broader margin of appreciation in that sphere (see *Moreira Ferreira (no. 2)*, cited above, §§ 52-53).

34. Likewise, it is not for the Court to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention – for instance where, in exceptional cases, such errors may be said to constitute "unfairness" incompatible with Article 6 of the Convention. The Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable (ibid., § 83).

(b) Application of the aforementioned principles in the present case

35. In the present case, as mentioned in paragraph 25 above, the "new issue" brought before the Court is the interpretation made by the Supreme Court of the Court's judgment of 20 March 2012, within the framework of the applicant's request for the reopening of proceedings. The issue of the applicant's conviction on the basis of evidence not directly examined by the Supreme Court was the object of the Court's previous judgment, and the Court is prevented by Article 46 of the Convention from undertaking a fresh examination of the same issue. In that respect, the Court observes that the Supreme Court's judgment of 19 May 2015 did not freshly

convict the applicant; rather, it upheld the previous conviction in respect of two of the offences, on the basis of the Supreme Court's own interpretation of the Court's judgment of 2012.

36. As regards the Supreme Court's reasoning, the Court notes that the Supreme Court correctly stated that the finding of a violation by the Court does not give rise to any automatic right to the reopening of proceedings and it might even be possible to remedy a violation found by the Court by means of a partial reopening of proceedings, as the Supreme Court envisaged in the present case. Nevertheless, where, in its examination of an extraordinary remedy, a domestic court determines a criminal charge and gives reasons for its decision, those reasons must satisfy the requirements of Article 6 § 1 (see *Moreira Ferreira (no. 2)*, cited above, § 87). In cases as the present one, the domestic court's presentation of the Court's earlier findings should not be grossly arbitrary or even amount to denial of justice, resulting in an effect of defeating the applicant's attempt to have the proceedings against him examined in the light of the Court's judgment in his previous case (see, *mutatis mutandis*, *Bochan (no. 2)*, cited above, § 64).

37. In order to decide on the applicant's application for revision, the Supreme Court extensively examined the grounds for his conviction contained in its judgment of 14 October 2005 (see paragraph 11 above). On that basis the Supreme Court considered that the applicant's convictions for fraud and forgery of commercial documents did not entail any breach of Article 6 § 1 and that, for that reason, the Court's findings in the judgment of 20 March 2012 could only apply to his conviction for forgery of official documents. However, the question whether the applicant's convictions complied with Article 6 § 1 had actually been the object of the Court's judgment of 2012. That issue had been settled – in the Court's view with sufficient clarity – for the reasons set out below. It follows that, despite the margin of appreciation that the national authorities enjoy when deciding on the reopening of proceedings, the Court's findings in its earlier judgment should have been respected.

38. In its judgment of 20 March 2012, the Court found a violation of Article 6 § 1 of the Convention on account of the applicant's conviction by the Supreme Court on the basis of deductions arising from the findings of fact, as established by the *Audiencia Provincial* of Córdoba, without the Supreme Court having heard the applicant in person. In paragraphs 39-42 of that judgment the Court referred to the proceedings before the Supreme Court as a whole and made no distinction as to whether the findings concerned only some of the convictions and not the others. Nonetheless, in paragraphs 36 and 37 of its judgment of 20 March 2012 the Court specifically mentioned elements that clearly addressed either the applicant's conviction for forgery of official documents, his conviction for fraud or his conviction for forgery of commercial documents. The statements in these paragraphs left no doubt as to the scope of the Court's finding of a violation.

Therefore, the Court considers that the Supreme Court's interpretation, namely that the violation of Article 6 § 1 found by the Court concerned only the offence of forgery of official documents, contradicted the findings of the Court in its earlier judgment in the applicant's case.

39. Thus the Supreme Court, when making its own interpretation as to the scope and the meaning of the Court's findings in the judgment of 20 March 2012, went beyond the national authorities' margin of appreciation and distorted the conclusions of the Court's judgment; the impugned proceedings therefore fell short of the requirement of a "fair trial" under Article 6 § 1 of the Convention (see, *mutatis mutandis*, *Bochan (no. 2)*, cited above, §§ 63-65; also contrast *Moreira Ferreira (no. 2)*, cited above, § 98).

40. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

42. In respect of non-pecuniary damage, the applicant claimed EUR 1,000,000 and that his civil liability for any damages arising from the conviction should be annulled.

43. The Government contested the applicant's claim, stating that the sum sought in respect of non-pecuniary damage was unsubstantiated and disproportionate, and argued that the criteria followed by the Court in its judgment of 20 March 2012 concerning the same applicant should be maintained.

44. The Court has consistently held that where, as in the instant case, an individual has been the victim of proceedings that have entailed breaches of the requirements of Article 6 of the Convention, the most appropriate form of redress would, in principle, be a retrial or the reopening of the case in question, at the request of the person concerned (see, among other authorities, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003). In this regard, it notes that paragraph 3 of section 954 of the Spanish Criminal Procedure Act, as amended by Law 41/2015, of 5 October 2015, provides for the possibility of the revision of a final decision where it has been determined in a ruling of the Court that there has been a violation of the Convention or one of the Protocols thereto.

45. At the same time, the Court is of the view that the applicant must have suffered a certain amount of distress as a result of the violation of his rights under Article 6 § 1 of the Convention, which cannot be compensated solely by the finding of a violation or by the reopening of the proceedings (see, *mutatis mutandis*, *Gil Sanjuan v. Spain*, no. 48297/15, § 52, 26 May 2020, and *Elisei-Uzun and Andonie v. Romania*, no. 42447/10, § 78, 23 April 2019). It therefore awards the applicant EUR 9,600 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

46. The applicant also claimed a total of EUR 72,556.44 in respect of costs and expenses. This sum was divided as follows: EUR 61,424.44 for barrister's fees incurred in the application for revision and the action for the annulment of the proceedings before the Supreme Court; EUR 1,452 for fees incurred in respect of the *amparo* appeal lodged with the Constitutional Court; and EUR 9,680 for the fees incurred before the Court.

47. The Government did not contest these claims.

48. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 for the costs incurred before the Supreme Court, EUR 1,452 for those incurred before the Constitutional Court and EUR 2,000 for those incurred before the Court. In total, the applicant should be awarded EUR 6,452 for costs and expenses.

C. Default interest

49. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaint under Article 6 § 1 of the Convention admissible;

2. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*, by six votes to one,

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts:
(i) EUR 9,600 (nine thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 6,452 (six thousand four hundred and fifty-two euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

4. *Dismisses*, by six votes to one, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Milan Blaško
Registrar

Georges Ravarani
President

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

G.R.
M.B.

SEPARATE OPINION OF JUDGE SERGHIDES

1. The case concerns the revision of the applicant's criminal conviction after the Court's finding of a violation of Article 6 § 1 of the Convention in its judgment of 20 March 2012. The present judgment (paragraph 39) finds that the Supreme Court, when making its own interpretation as to the scope of the meaning of the Court's findings in the said judgment, went beyond the national authorities' margin of appreciation and distorted the conclusions of the Court's judgment. Consequently, as the present judgment goes on to hold, the impugned proceedings fell short of the requirement of a "fair trial" under Article 6 § 1 of the Convention, and there has accordingly been a violation of that provision (paragraph 40).

Violation of Article 46 § 1 of the Convention

2. I subscribed to the present judgment in finding that there had been a violation of Article 6 § 1 of the Convention, and I, therefore, voted in favour of points 1 and 2 of its operative part; my disagreement, however, concerned the omission of the judgment in failing to make an express or direct finding of a violation of Article 46 § 1 of the Convention and the corresponding failure to hold in the operative part that there had been a violation of that provision as well. Due to this additional violation, I would award a higher amount in respect of non-pecuniary damage.

3. In my view, the power of the Court to find a violation of Article 46 § 1 of the Convention is based on Article 32 § 1 of the Convention, which provides for the jurisdiction of the Court to interpret and apply the Convention, expressly including Article 46, as well as on the latter provision, and on the Court's inherent power. In *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* ([GC], no. 32772/02, § 66, 30 June 2009) the Court, based on Article 32 of the Convention, rejected the Government's submission that the case should be declared inadmissible *ratione materiae* on the ground that, by virtue of Article 46 of the Convention, execution of the Court's judgments fell solely within the jurisdiction of the Committee of Ministers.

4. This jurisdiction of the Court in no way undermines but, on the contrary, enhances the role of the Committee of Ministers in supervising the execution of the Court's judgments under Article 46 § 2 of the Convention. It would be odd for the Court to have the power to find a violation of Article 46 § 1 in impeaching proceedings under paragraphs 4 and 5 of the same Article, when the issue is referred to the Court by the Committee of Ministers, and not to be able to do so in any other appropriate case, such as the present one. Similarly, it would be odd for the Court to have the power to rule on questions of interpretation of its judgments when the issue is referred to it by the Committee of Ministers under Article 46 § 3, but to be

precluded from doing so in any other appropriate case. And, of course, the Court, in the present case, was not precluded from finding unanimously that there had been a misinterpretation of the Court's ruling of 20 March 2012 by the Supreme Court; hence, there would be no justification for similarly omitting to find a violation of Article 46 § 1. The above powers of the Court enable it to be involved in the implementation of its own judgments, as do its powers to deliver pilot judgments or to request the adoption of general and/or individual measures.

The importance of finding a violation of Article 46 § 1 and the principle of effectiveness

5. The principle of effectiveness as a norm of international law, enshrined at the outset in the impugned provision of Article 6 of the Convention, subsequently incorporated in the Court's judgment of 20 March 2012 and finally transmitted to the execution mechanism, by Article 46 § 1, requiring Spain to abide by the final judgment of the Court, would be an empty shell without the proper implementation of this judgment. However, the Committee of Ministers closed the examination of the case (see paragraph 17 of the judgment) while the Supreme Court misinterpreted the said judgment and therefore, to a great extent, failed to implement it (see paragraphs 11, 22, 35, 38-39).

6. To conclude, without a finding that there has been a violation of Article 46 § 1, the principle of effectiveness as a norm of international law would not be satisfied and its entire "journey" from Article 6 to the delivery of the judgment, and finally to the judgment's implementation stage, would be futile.