



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

SECOND SECTION

CASE OF KUVIKAS v. LITHUANIA

(Application no. 21837/02)

JUDGMENT

STRASBOURG

27 June 2006

FINAL

23/10/2006

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 Kuvikas v. Lithuania,

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

Mr J.-P. COSTA, *President*,

Mr A.B. BAKA,

Mr I. CABRAL BARRETO,

Mr R. TÜRMEŃ,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI,

Ms D. JOČIENĖ, *judges*,

and Mr S. NAISMITH, *Deputy Section Registrar*,

Having deliberated in private on 30 June 2006,

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

PROCEDURE

1. The case originated in an application (no. 21837/02) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Lithuanian national, Mr Edvardas Kuvikas (“the applicant”), on 18 May 2002.

2. The applicant was represented by Mr D. Žiedas, a lawyer practising in Šiauliai. The Lithuanian Government (“the Government”) were represented by their Agent, Ms E. Baltutytė.

3. On 21 June 2005 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1966 and lives in Šiauliai.

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

6. On 29 March 1993 the applicant, a border policeman, was charged with bribery and fraud, allegedly committed with another accomplice. It was suspected that the applicant had demanded and obtained a bribe from a group of 17 Latvian tourists wishing to cross the Lithuanian-Latvian border.

Subsequently, the applicant had allegedly demanded money from German and Belarusian tourists. The suspicion was based on written complaints made by these foreigners.

7. On 29 March 1993 the applicant was remanded in custody.

8. On 31 March 1993 the applicant's home was searched, and certain items of his property were seized.

9. On 7 May 1993 the prosecution confirmed the bill of indictment against the applicant and a co-defendant. In doing so, it stated that the applicant's guilt on the counts against him had been "proved" by the evidence collected in the course of the pre-trial investigation. Having confirmed the bill of indictment, the prosecution sent the case for trial.

10. On 23 June 1993 the applicant was remanded on bail, with the obligation not to leave the country.

11. On 28 October 1993 the Joniškis District Court adjourned the hearing until 16 December 1993 as the victims from Germany, Latvia and Belarus had failed to appear.

12. On 16 December 1993 the case was further adjourned for the same reason.

13. On 3 February 1994 the Joniškis District Court adjourned its examination in view of the applicant's illness.

14. On 17 March, 23 June, 27 October and 28 December 1994 the trial was adjourned in the absence of the representatives of the defendants.

15. On 23 February 1995 the Joniškis District Court referred the case to the Šiauliai Regional Court.

16. On 6 April 1995 Šiauliai Regional Court quashed that decision, returning the case to the Joniškis District Court.

17. On 28 June 1995 the Joniškis District Court adjourned the case in the absence of the co-defendant's lawyer.

18. On 27 September 1995 the Joniškis District Court decided to discontinue the proceedings.

19. The prosecution appealed, and on 26 October 1995 the Šiauliai Regional Court quashed the decision, returning the case for a new examination at first instance.

20. On 28 November 1995 the case was referred to the Akmenė District Court.

21. On 29 May 1996 the Akmenė District Court adjourned the case in the absence of the applicant's lawyer, the victims and witnesses.

22. On 14 August 1996 the case was adjourned in the absence of the victims.

23. On 11 December 1996 the Akmenė District Court adjourned the case in the absence of the defendants' lawyers, the victims and witnesses.

24. On 10 December 1997 and 10 February 1999 the case was adjourned on the same grounds.

25. On 24 August 1999 the applicant's lawyer requested the court to conduct the trial without hearing the foreign victims and witnesses. On the same date the Akmenė District Court acquitted the applicant in view of the lack of evidence.

26. On 13 September 1999 the prosecution lodged an appeal.

27. On 13 January 2000 the Šiauliai Regional Court quashed the judgment of 24 August 1999 because not all the victims had been duly summoned, one victim had not been sent the summons at all, and a number of witnesses had not been informed about the trial hearing of 24 August 1999.

28. On 6 June 2000 the Akmenė District Court again adjourned the hearing in view of the failure of the victims to appear.

29. On 17 October 2000 the trial was again adjourned until 23 January 2001 on the same grounds.

30. During the subsequent trial proceedings, six witnesses were questioned in open court in relation to the bribery charges. One foreign witness and 18 foreign complainants failed to appear before the court; their submissions were read out, the applicant's counsel having asked the court to proceed with the case without hearing them (also see paragraph 25 above). Five witnesses were summoned to the trial to testify on the fraud charges, the submissions of the relevant complainants also having been read out.

31. On 5 February 2001 the Akmenė District Court adopted a judgment in the case. The court noted that the efforts to summon the complainants from abroad had been unsuccessful. It was observed *inter alia* that the proceedings had already been lengthy, and that the court could no longer postpone its judgment without breaching the reasonable time requirement of Article 6 § 1 of the Convention. The applicant was convicted on both counts of bribery and fraud. He was sentenced to 3 years' imprisonment and forfeited the right to work in the civil service for a period of one year. However, the sentence was rescinded due to a time-bar which had arisen because of the delays in the proceedings. The seizure of the applicant's property and his remand were revoked.

32. The applicant appealed, claiming *inter alia* that the foreign complainants had not been questioned by the court, and that certain documents in the case file had not been translated from the German and Latvian languages.

33. On 14 June 2001 the Šiauliai Regional Court upheld the conviction.

34. The applicant filed a cassation appeal.

35. On 20 November 2001 the Supreme Court dismissed the applicant's cassation appeal. It was observed that all the foreign complainants and one foreign witness had not been examined in open court, their evidence having been read out during the trial. However, all due efforts had been made by the trial court to ensure the attendance of the complainants. Those efforts had been unsuccessful due to reasons beyond the control of the authorities.

The remainder of the inculpatory evidence had been contested by the applicant in open court by way of adversarial proceedings. It was further observed that all the inculpatory evidence had been presented in the case file in the Lithuanian language.

II. RELEVANT DOMESTIC LAW AND PRACTICE

36. Article 18 of the Code of Criminal Procedure applicable at the material time (in force until 1 May 2003) obliged the authorities to examine a criminal case within a reasonable time.

37. Article 283 of the Code empowered the court to adjourn the examination of the case in view of the absence of the victims or witnesses, and to take due measures to obtain their attendance. Article 300 allowed the court, after having consulted the parties, to proceed with the trial regardless of those persons' failure to attend.

38. Article 316 § 1 (3) permitted witness testimony given during the pre-trial investigation to be read out at the trial, should it prove impossible to obtain the witness' attendance.

39. Article 6.272 § 1 of the new Civil Code (which entered into force on 1 July 2001) allows a civil claim for pecuniary and non-pecuniary damage, in view of the unlawful actions of the investigating authorities or court, in the context of a criminal case. The provision envisages compensation for an unlawful conviction, an unlawful arrest or detention, the application of unlawful procedural measures of enforcement, or an unlawful administrative penalty. According to recent domestic case-law, this provision may also allow claims for damages arising from the excessive length of criminal proceedings (also see paragraph 41 below).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE LENGTH OF PROCEEDINGS

40. The applicant complained that the proceedings against him had lasted too long, in breach of Article 6 of the Convention, which insofar as relevant reads as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by ... [a] tribunal ... ”

A. Admissibility

41. The Government submitted that the applicant should have filed a claim for damages to a civil court under Article 6.272 of the Civil Code, in conjunction with the general domestic provisions on compensation for breaches of personal rights by the authorities. In view of the applicant's failure to use that remedy, this aspect of the case should be rejected for non-exhaustion. In this respect the Government submitted a copy of a judgment by the Vilnius Regional Court of 7 June 2005 whereby a former suspect had been awarded damages under this provision for the excessive length of criminal proceedings which had been instituted on 11 May 2001 and discontinued on 1 March 2004. The Government further submitted that part of the impugned criminal proceedings fell outside the Court's competence *ratione temporis*.

42. The applicant contested the Government's argument, stating that no effective remedy had existed at the material time.

43. The Court observes first that it has no competence to examine events which occurred prior to 20 June 1995, i.e. the date of the entry into force of the Convention with regard to Lithuania. Insofar as certain facts of the present case arose before that date, this part of the application should be rejected under Article 35 §§ 3 and 4 as being incompatible *ratione temporis* with the provisions of the Convention.

44. As to the Government's non-exhaustion argument, the Court notes that the remedy suggested is based on a provision of the Civil Code which became effective on 1 July 2001, while the first established example of the relevant domestic case-law in this respect dates from 7 June 2005. However, there is no indication that such a remedy was available to the applicant, at least in theory, in the course of his criminal proceedings, which lasted from 1993 until 2001, or that any such remedy was available to him in practice during the whole of the impugned period (see, *mutatis mutandis*, *Jankauskas v. Lithuania*, no. 59304/00 (dec.) 16 December 2003). The Court is thus not required to examine whether the remedy suggested by the Government should have been pursued for the purposes of Article 35 § 1 of the Convention (see, by contrast, *Charzynski v. Poland*, no. 15212/03, §§ 31-43, 1 March 2005; also see, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 140-149). Accordingly, this part of the application cannot be rejected for non-exhaustion.

45. The remainder of the applicant's complaint about the excessive length of proceedings is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. The Court further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

46. The Government stated that there had been no violation of Article 6 § 1 in that the proceedings had been protracted due to their complexity, not as a result of any inactivity by the authorities. The Government drew the Court's attention to the fact that the proceedings had involved 18 victims and 20 witnesses, all of the victims and two of the witnesses being foreigners. The summonses had been sent to four foreign countries, and the international element of the case had inevitably caused delays. The trial had been adjourned 10 times in view of the victims' or witnesses' failure to appear. It had further been adjourned 6 times as a result of the failure to attend of defence counsel. There had been no significant delays which could have been attributed to the authorities.

47. The applicant disagreed, stating that the complexity of the case and the authorities' attempts to summon the victims and witnesses had not been sufficient to discharge the State of its obligation to respect the reasonable time requirement. The length of the proceedings had been excessive in his case.

48. The Court notes that, although the applicant became a suspect in the criminal case in 1993, the period falling within the Court's jurisdiction, to be taken into consideration, only began on 20 June 1995 and lasted until 20 November 2001 (paragraphs 35 and 43 above). The overall length of the proceedings was thus 6 years and 5 months at three levels of jurisdiction. However, the Court notes that the proceedings had already been pending 2 years and 2 months by 20 June 1995.

49. According to the Court's case-law, the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the authorities dealing with the case (see, among many other authorities, *Šleževičius v. Lithuania*, no. 55479/00, § 29, 13 November 2001).

50. The Court considers that the applicant's criminal proceedings were indeed complex, particularly due to the number of participants and its international aspect. However, the Court notes that some months were wasted with jurisdictional disputes (paragraphs 15-20 above). Some delays were caused by the authorities' attempts to obtain the attendance at trial of the foreign complainants and other witnesses. It is true that these delays may have been imputable partly to the applicant who had insisted on those persons' attendance as part of his defence, the authorities having only responded to his demands to safeguard his defence rights. Nevertheless, ultimately the applicant's case was decided without hearing the foreign complainants. The question arises therefore whether that decision could have been taken earlier (also see paragraphs 53-54 below). Moreover, the

Court notes that the investigating authorities were found at fault by the domestic courts as a result of their failure to duly summon certain victims and witnesses. The need to correct those errors warranted quashing the judgment of 24 August 1999 and caused a further delay in the final determination of the case (see, in particular, paragraphs 27, 30 and 31 above).

51. The foregoing considerations are sufficient to enable the Court to conclude that the total length of the impugned criminal proceedings exceeded the “reasonable time” requirement. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 AS REGARDS THE REMAINDER OF THE APPLICANT’S ARGUMENTS

52. The applicant also alleged other violations of Article 6, which insofar as relevant reads as follows:

“2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

... (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

In particular, the applicant complained that his trial had been unfair in that only one foreign witness and none of the complainants had been called and questioned in open court. In this respect the applicant also claimed that he had not been able to contest some of the inculpatory evidence as it had not been translated into the Lithuanian language. Furthermore, he stated that the principle of the presumption of innocence had been breached on account of the wording used by the prosecution in a procedural decision taken prior to sending the case for trial, namely that the applicant’s guilt had been “proved” by the evidence collected during the pre-trial investigation. Finally, the applicant complained that certain articles had been published by the private press about his case, with an adverse effect on the fairness of the trial and the impartiality of the judges.

53. The Court recalls that the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 1 and 3 (d) of Article 6, provided that the rights of the defence have been respected (*Scheper v. the Netherlands* (dec.), no. 39209/02, 5 April 2005). The applicant complained that 18 foreign complainants and one foreign witness - tourists who had been allegedly

subjected to the applicant's unlawful demands - had not been examined at trial. The Court considers that the complainants in the proceedings should, for the purposes of Article 6 § 3 (d) of the Convention, also be regarded as witnesses - a term which enjoys an autonomous interpretation - because their statements, as recorded by the police, were used in evidence to ground the applicant's conviction (*ibid.*).

54. The Court notes that the trial was adjourned many times in order to obtain the attendance of these persons. While errors may have been initially committed in sending the summonses, it is undisputed that all due efforts were subsequently made by the Lithuanian authorities to ensure their hearing (paragraphs 27-31 above). Furthermore, the applicant's conviction was not based solely or to a decisive extent on the foreign tourists' complaints. Their statements were corroborated by other evidence which the applicant had been fully able to contest in open court. In particular, six witnesses were examined by the trial court and the parties in relation to the bribery charges, and five witnesses were questioned on the fraud charges. Therefore, the foreigners' failure to appear did not necessitate discontinuing the prosecution, even more so as the applicant's counsel had himself asked the trial court to proceed with the case without hearing them (paragraphs 25 and 30 above). Furthermore, there is no evidence that the applicant's conviction was based on any document which had been written in a foreign language and which had not been translated into Lithuanian (paragraph 35 above). Therefore the Court is satisfied that the domestic courts' handling of the evidence did not breach the principle of the equality of arms or the applicant's defence rights (see the *Scheper* decision cited above, where the substantial evidence of three alleged victims of rape, who had failed to appear at trial, had been used to found a conviction in conformity with the requirements of Article 6 of the Convention).

55. The Court considers that the applicant's complaint about the wording used by the prosecution in their procedural decision (paragraph 9 above) is similar to that dealt with and rejected by the Court in the case of *Daktaras v. Lithuania* (no. 42095/98, §§ 13 and 39-45, ECHR 2000-X). As in the *Daktaras* case, the Court finds unfortunate the prosecution's use of the word "proved". However, seen in its proper context, the term signified no more than the prosecution's view that the case file disclosed sufficient evidence of the applicant's guilt to justify proceeding to trial (*ibid.*). In addition, the Court notes that there is no evidence of a statement by a State official published by the press, which was capable of raising issues of the presumption of innocence or the impartiality of courts in relation to the applicant's case, even more so as the charges against him were determined by professional judges, and not a jury (see, *Butkevičius v. Lithuania* (dec.), no. 48297/99, 28 November 2000).

56. In sum, the Court finds no indication in the case file of any grossly unfair or arbitrary conclusion drawn by the domestic courts, and recalls that

the admissibility and assessment of evidence are matters that fall to be decided primarily at the domestic level. It concludes that the applicant's trial, taken as a whole, was fair within the meaning of Article 6. It follows that this part of the application must be rejected as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

57. The applicant further complained that his detention on remand had been unlawful, in breach of Article 5 § 1, which provides, insofar as relevant, as follows:

“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... ;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...”

58. However, the applicant's detention for the purposes of Article 5 § 1(c) ended when he was released on bail on 23 June 1993. As the pertinent events relate to a period prior to the entry into force of the Convention with regard to Lithuania (20 June 1995), this part of the application must be rejected as being incompatible *ratione temporis*, pursuant to Article 35 §§ 3 and 4 of the Convention (see, *mutatis mutandis*, *Jėčius v. Lithuania*, no. 34578/97, § 44, ECHR 2000-IX).

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

59. Under Article 2 of Protocol No. 4 to the Convention, the applicant also complained that his bail conditions had been incompatible with his right to freedom of movement. He further complained under Article 1 of Protocol No. 1 about the seizure of his property in the context of the impugned criminal proceedings. However, he failed to show either the domestic unlawfulness of those measures, or that they had been disproportionate in relation to the general interest, within the meaning of these provisions. Accordingly, this part of the application must also be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. 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

61. The applicant sought 126,000 Lithuanian litai (LTL), about 36,437 euros (EUR), as a compensation for the loss of his job, earnings and opportunities, caused by the violation of the Convention. He also claimed EUR 250,000 for non-pecuniary damage.

62. The Government considered these claims to be unjustified.

63. The Court is of the view that there is no causal link between the violation found under Article 6 and the alleged pecuniary damage (see the *Šleževičius* case cited above, § 35). Consequently, it finds no reason to award the applicant any sum under this head.

64. However, the Court finds that the applicant has suffered non-pecuniary damage as a result of the excessive length of proceedings, which is not sufficiently compensated by the finding of a violation (*loc. cit.*, § 38). Making its assessment on an equitable basis, the Court awards the applicant EUR 2,000 under this head (see, *mutatis mutandis*, *Meilus v. Lithuania*, no. 53161/99, § 33, 6 November 2003; also see, *Girdauskas v Lithuania*, no. 70661/01, § 35, 11 December 2003).

B. Costs and expenses

65. The applicant claimed LTL 4,754, about EUR 1,375, by way of legal costs and expenses incurred during the domestic and Convention proceedings.

66. The Government considered the claims unjustified.

67. As the amount claimed does not appear excessive, the Court considers it reasonable to award it in full (see the aforementioned cases of *Meilus*, §§ 36-37, and *Girdauskas*, §§ 38-39).

C. Default interest

68. The Court considers it appropriate that the default interest 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 UNANIMOUSLY

1. *Declares* the complaint under Article 6 § 1 concerning the length of proceedings admissible, and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (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, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage, EUR 1,375 (one thousand three hundred and seventy-five euros) for costs and expenses, plus any tax that may be chargeable, which sums are to be converted into the currency of the respondent State at the rate applicable on the date of settlement;
 - (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* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. NAISMITH
Deputy Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of the Court, the concurring opinion of Mrs Mularoni is annexed to this judgment.

J.-P.C.
S.H.N.

CONCURRING OPINION OF JUDGE MULARONI

I agree with the majority that there has been a violation Article 6 § 1 of the Convention as regards the length of the proceedings.

However, I would like to underline that I consider that the national authorities' attempts to obtain the attendance at trial of the foreign complainants and other witnesses should not be reproached (see § 50 of the judgment, sentences 3 to 6).

On the one hand, I believe that all efforts made by national authorities to ensure the attendance of witnesses before trial courts should be appreciated.

On the other hand, these attempts enabled the Court to conclude that there has been no violation of Article 6 § 1 of the Convention from the standpoint of unfairness of the trial (see § 54 of the judgment).