



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

SECOND SECTION

**CASE OF ŠVENČIONIENĖ v. LITHUANIA**

*(Application no. 37259/04)*

JUDGMENT

STRASBOURG

25 November 2008

**FINAL**

**25/02/2009**

*This judgment may be subject to editorial revision.*



**In the case of Švenčionienė v. Lithuania,**

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

Dragoljub Popović,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 4 November 2008,

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

**PROCEDURE**

1. The case originated in an application (no. 37259/04) 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, Ms Jūratė Švenčionienė (“the applicant”), on 1 October 2004.

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

3. The applicant alleged a violation of Article 6 § 1 of the Convention as she had had no possibility to attend the appeal hearing in the civil proceedings which she had brought.

4. On 24 November 2006 the Court decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

**THE FACTS****I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1974 and lives in Kaunas.

6. On an unspecified date the applicant brought civil proceedings for divorce and the division of the matrimonial property. On 13 November 2002 she signed a power of attorney authorising her lawyer to represent her during the first-instance proceedings before the Kaunas City District Court.

7. On 4 December 2003 the Kaunas City District Court granted the divorce and divided the family's property, awarding the applicant monetary compensation in the amount of 8,547 Lithuanian litai (LTL, approximately 2,442 euros (EUR)), for the property assigned to her former husband. The applicant and her lawyer were present at the hearing.

8. The applicant's husband appealed. On 4 February 2004 the Kaunas Regional Court sent a written notice (*pranešimas*) about the forthcoming court hearing to four recipients – the applicant, her lawyer who had represented her before the court of first instance, the defendant and his lawyer. The notice was sent by the ordinary postal service.

9. On 18 February 2004 the Kaunas Regional Court heard the appeal in the absence of the applicant and her lawyer. The court noted that no comments on the appeal had been received from the applicant. The other party was present at the hearing. The court decided to reduce the amount of compensation to LTL 3,547 (approximately EUR 1,013).

10. The applicant lodged a cassation appeal, complaining, *inter alia*, that she had not been duly summoned to the appellate hearing. In particular, the applicant alleged that the notice sent to her had been dispatched to the wrong address. Moreover, she had authorised her lawyer to represent her only before the Kaunas City District Court. Thus, it had been futile to send notice to that lawyer at the appeal stage.

11. On 26 April 2004 the Supreme Court dismissed the applicant's cassation appeal. It noted, *inter alia*, that, in accordance with standard civil procedure, the parties are to be notified about the first hearing by way of summonses (*šaukimais*) served upon them by registered post. However, they are to be informed about subsequent hearings by dispatching a notice via the simple postal service. These arrangements are deemed to speed up proceedings and are based on the assumption that the parties have a duty of care to follow the events in the case.

12. The Supreme Court acknowledged that the notice to the applicant had been dispatched using an incorrect address and noted that the notice had been sent to the applicant's former representative. However, it observed that, in any event, the applicant had failed to show that – had she been present before the appeal court – she would have adduced any evidence that could have led to a different resolution of the dispute. The applicant had not indicated any such information in her cassation appeal.

## II. RELEVANT DOMESTIC LAW

13. Articles 124 and 133 of the Code of Civil Procedure (the Code) provide that the parties to the case shall be informed of the date and place of the court hearing by sending them summonses (*šaukimai*) or written notices (*pranešimai*). Once a summons to a forthcoming hearing has been served upon the parties to the case, information about subsequent hearings is

rendered by sending written notices. When the summons is sent, a note of its receipt by the recipient must be returned to the court. However, when a notice is sent, no such proof of receipt is required. Under Article 118 of the Code, the service of a hearing notice on a party's representative constitutes proper service on that party. Under Article 320 § 1 of the Code, the court of appeal decides questions of law and fact.

14. Pursuant to Article 246, if a party to the case fails to appear and there is no evidence that the party has been duly summoned, the hearing of the first-instance court must be adjourned.

15. Under Article 310 of the Code, an appeal is to be submitted through the first-instance court which adopted the relevant decision. Under Articles 317 and 318, the judge of this court sends a copy of the appeal to all parties to the dispute, who can comment on it in writing.

16. Article 319 provides that the parties are notified about the date and place of the appeal hearing. If the court decides to hold a public hearing, the parties are invited to attend, but their absence does not preclude the court from deciding the case.

17. Article 324 stipulates that, if the appeal court decides the case by the oral procedure, before the hearing the chairman of the chamber has to verify whether the parties are present. The parties have a right to submit their arguments on the grounds of the appeal. If the court finds it necessary, it can also examine the evidence which was submitted to the court of first instance.

18. According to the practice of the Supreme Court, certain legal norms, which bind the first-instance court when it decides whether a party's right to participate at the hearing has been violated, also apply to the appeal procedure (the ruling of the Supreme Court of 1 March 2004 in case no. 3K-3-149/2004). Likewise, the Supreme Court has recognised the right of a party to receive a copy of the appeal which the opponent has submitted and to be informed of the date and time of the forthcoming hearing at the appeal court (the ruling of the Supreme Court of 7 April 2004 in case no. 3K-3-262/2004).

## THE LAW

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

19. The applicant complained that she had not been duly advised of the hearing on appeal and, therefore, had not been able actively to participate in it and present her arguments. She noted that the appellate court had examined the case in the presence of the defendant. The applicant alleged a

violation of Article 6 § 1 of the Convention which, in so far as relevant, provides as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

#### **A. The parties' submissions**

20. The Government accepted that the notice about the forthcoming hearing of the case before the Kaunas Regional Court had been dispatched to the applicant at the wrong address. The Government contended, however, that the applicant had had a duty to follow the course of proceedings actively and be interested in the speedy examination of the case. The Government observed that a notice about the appeal hearing had been sent to the applicant's attorney, who had represented her at first instance and who had had a professional duty to inform her client. Finally, the Government referred to the conclusion of the Supreme Court, that the applicant had not submitted any new substantial facts or evidence which could have had any influence on the appeal court's ruling had she taken part in the hearing. The Government concluded that the applicant had been guaranteed the right to a fair hearing within the meaning of Article 6 § 1 of the Convention.

21. The applicant observed that, pursuant to Article 317 of the Code of the Civil Procedure, having admitted an appeal, the court of first instance is bound to send the parties a notice informing them that the appeal procedure has been initiated, and enclosing a copy of the appeal. The applicant contended that she had not received such a notice and therefore it was not reasonable to have expected her to follow the appeal process. The applicant contested the Government's argument about alternative service on an appellant's attorney. In her case, the appeal notice had had four addressees, including her attorney. As the court's notice had also been addressed to the applicant, her attorney could have reasonably presumed that she had been duly informed of the appeal. Moreover, the agreement between the applicant and the attorney had only concerned representation at first instance. Therefore, by not informing the applicant about the appellate process, her attorney had not breached her professional duty.

#### **B. Admissibility**

22. In the light of the parties' submissions, the Court finds that the application cannot be rejected as being manifestly ill-founded pursuant to Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. The Government's arguments concern the merits of

the case, which the Court will now proceed to examine. Accordingly, the application must be declared admissible.

### C. The merits

23. The Court reiterates that the principle of equality of arms – one of the elements of the broader concept of a fair hearing – requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place the litigant at a substantial disadvantage *vis-à-vis* the opponent (see, among many other authorities, *Kress v. France* [GC], no. 39594/98, § 72, ECHR 2001-VI). It also implies, in principle, the opportunity for the parties to have knowledge of and discuss all evidence adduced or observations filed with a view to influencing the court's decision (see *Fretté v. France*, no. 36515/97, § 47, ECHR 2002-I).

24. The Court observes that Article 319 of the Lithuanian Code of Civil Procedure provides that, when there is to be an oral hearing before an appeal court, the parties are notified of it. However, the parties' attendance is not mandatory and, if a party does not appear at the hearing without a valid reason after being duly notified, the court can proceed with the examination of the appeal. The Court considers that these provisions are not, in themselves, incompatible with the fair hearing guarantees of Article 6 § 1.

25. However, the Court recalls that the Convention is intended to guarantee not rights which are theoretical or illusory but rights which are practical and effective (see, among many authorities, *Multiplex v. Croatia*, no. 58112/00, § 44, 10 July 2003). It considers that the right to equality of arms would be devoid of substance if a party to the case were not apprised of the hearing in such a way as to have an opportunity to attend it, should he or she decide to exercise the rights established by domestic law, while the other party had effectively exercised such rights.

26. Turning to the present case, the Court observes that the Government do not deny the fact that the notice about the forthcoming appeal hearing had been sent to the applicant at the wrong address. This had also been recognised by the Supreme Court. The Court has regard to the Government's argument that, in order to achieve the objective of expeditious proceedings, the applicant had been required to follow the course of the proceedings actively. The Court attaches importance to that objective, which does not, however, justify disregarding such a fundamental principle as the right to adversarial proceedings (see *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports of judgments and decisions* 1997-I, § 30).

27. Relying on the documents presented to it, the Court notes that the applicant's attorney was not authorised to represent her in the appellate proceedings. Moreover, there is nothing in the case file to prove that the applicant's attorney actually received the notice, as it was not sent by

registered post. However, even assuming that she did receive the notice, the Court attaches credence to the applicant's argument that her attorney, not representing her at the appellate stage and having seen that the notice had also been addressed to the applicant, could have reasonably presumed that the applicant had thereby been aware of the hearing date. That being so, the Court considers that, without being duly informed about the appellate hearing, the applicant was effectively deprived of an opportunity to participate in it actively. Moreover, this lacuna was aggravated by the fact that the defendant took part in the hearing and was given an opportunity to present his arguments. The Court also notes that the appeal court overruled the first-instance judgment in the defendant's favour. In addition, the Supreme Court, albeit having explicitly acknowledged that the applicant had not been duly summoned, upheld the appeal court's ruling.

28. The Court is of the view that, in the present case, respect for the right to a fair hearing, guaranteed by Article 6 § 1 of the Convention, required that the applicant be properly informed about the appellate process in the Kaunas Regional Court and that she be given the opportunity to comment on the submissions of the defendant. Moreover, according to the national law (see paragraphs 13-18 above) that was indeed the normal practice on appeal. However, as the appeal court did not verify whether the applicant had been duly apprised of the hearing, that practice was not followed in this case.

29. The Court further notes that the submission of the appeal and participation at the hearing enabled the defendant to state his arguments on the merits of the case, arguments which were not communicated to the applicant and to which she could not reply. Thus, the effect which the applicant's observations might have had on the appellate decision cannot be assessed. More importantly, what is at stake here is a litigant's confidence in the workings of justice, which is based on, *inter alia*, the knowledge that an opportunity will be given to express views on every document in the file (see *Nideröst-Huber*, cited above, § 29).

30. In the light of the foregoing considerations, the Court concludes that there was an infringement of the applicant's right to equality of arms and adversarial proceedings.

Accordingly, there has been a violation of the right to a fair hearing enshrined in Article 6 § 1 of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. 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

32. The applicant claimed 10,000 Lithuanian litai (approximately 2,896 euros (EUR)) in respect of pecuniary and non-pecuniary damage.

33. The Government considered the applicant’s claims excessive and unreasoned.

34. In the light of the parties’ submissions and the material in the case file, the Court does not discern any causal link between the violation found and the pecuniary damage alleged, therefore it rejects this claim. The Court considers that, in view of the violation of Article 6 § 1, the applicant has suffered non-pecuniary damage which is not sufficiently compensated by the finding of a violation. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of EUR 2,800 under this head.

### B. Costs and expenses

35. The applicant did not submit any request for reimbursement of legal costs and expenses. Thus, the Court makes no award under this head.

### C. Default interest

36. 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 application admissible;
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 2,800 (two thousand eight hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, which sum is to be converted into the national currency of that 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 amount 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 25 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé  
Registrar

Françoise Tulkens  
President