



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

SECOND SECTION

CASE OF NORKŪNAS v. LITHUANIA

(Application no. 302/05)

JUDGMENT

STRASBOURG

20 January 2009

FINAL

20/04/2009

This judgment may be subject to editorial revision

In the case of Norkūnas 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

András Sajó,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 16 December 2008,

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

PROCEDURE

1. The case originated in an application (no. 302/05) 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 Viktoras Norkūnas (“the applicant”), on 14 December 2004.

2 The Lithuanian Government (“the Government”) were represented by their Agent, Ms E. Baltutytė.

3. On 5 December 2006 the Court decided to communicate the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3).

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

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

5. On 23 June 1995 criminal proceedings were instituted for possible embezzlement of the property of the Aurabankas commercial bank.

6. On 5 January 1996 the bank filed a civil claim for the recovery of debt against the applicant. The claim was joined to be examined in the criminal proceedings.

7. On 16 January 1997 the applicant was questioned as a witness in the context of the above-mentioned criminal proceedings.

8. On 20 January 1997 the investigation authorities took a decision to seize the applicant's bank accounts. On 4 February 1997 the authorities decided to seize the applicant's apartment in Vilnius, and, on 5 February 1997, to seize his car.

9. On 17 December 1999 the applicant was again questioned as a witness in the context of the aforementioned criminal proceedings.

10. On 31 March 2000 charges were brought against the applicant for fraud on a gross scale by obtaining money under forged agreements to exchange currency. On the same day the applicant was questioned as the accused and a remand measure – an obligation not to leave his place of residence – was imposed on him.

11. On 1 December 2000 upon the approval of the bill of indictment the case was transferred for trial to the Vilnius City First District Court. In accordance with the rules of jurisdiction the applicant's criminal case was transferred to the Vilnius City Second District Court. By order of 12 December 2000 the court committed the applicant for trial.

12. Between 22 January 2001 and 28 June 2002 the case was adjourned thirteen times in view of the failure of certain witnesses or the co-accused to appear at a hearing and/or as a result of the illness of certain participants.

13. On an unspecified date the lawyer of J.P., one of the co-accused in the case, asked the court to order a medical examination to establish whether J.P. would be able to serve a prison sentence if convicted. On 28 June 2002 the Vilnius City Second District Court ordered a medical expert report for this purpose.

14. On 12 September 2002 the officials of the Institute of Forensic Medicine informed the Vilnius City Second District Court that, due to an intensive workload and lack of expert staff, the report in the case would take more time. The trial court was informed that it was planned to complete the report by 21 October 2002. The court adjourned the hearing until 5 November 2002.

15. Of the eighteen hearings between 5 November 2002 and 10 October 2003, three were adjourned because the applicant failed to appear (twice for medical reasons) while the other participants in the proceedings were present. The remaining hearings were adjourned in the absence of the other co-accused or their lawyers.

16. On 10 October 2003 the Vilnius City Second District Court convicted the applicant of fraud. It was also established that the criminal responsibility for forgery had become time-barred. The applicant was sentenced to one year's imprisonment. The court also granted the bank's civil claim.

17. On 12 February 2004 the Vilnius Regional Court upheld the judgment.

18. On 15 July 2004 the Supreme Court dismissed the applicant's cassation appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. Article 30 of the Constitution stipulates:

“A person whose constitutional rights or freedoms are violated shall have the right to apply to court.”

20. The Civil Code, in force until 1 July 2001, provided:

Article 483. General liability grounds for causing damage

“The person who causes damage to a natural person or to his property ... must compensate it fully, except in cases prescribed by laws...”

A person who causes damage is exempted from liability if he proves that the damage was not caused because of his fault.

Damage caused by lawful acts must be compensated only in cases established by law ...”

21. 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 26 below).

22. The ruling of the Constitutional Court of 19 August 2006 stipulates:

“...by virtue of the Constitution, a person has the right to claim compensation for damage caused by the unlawful actions of State institutions and agents, even if such compensation is not foreseen by law; the courts adjudicating such cases ... have the power to award appropriate compensation by directly applying the principles of the Constitution ... as well as the general principles of law, while being guided *inter alia* by the principle of reasonableness, etc”.

23. The relevant article of the Criminal Code, effective from 1 May 2003, provides:

Article 182. Fraud

“2. A person who has by fraud obtained on his own behalf or that of another the property or pecuniary right of another of a significant value (...) shall be punished by imprisonment for a term of up to eight years.”

THE LAW

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

24. The applicant complained that the length of the criminal proceedings had been incompatible with the “reasonable time” requirement of Article 6 § 1 of the Convention, which reads as follows:

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

A. Admissibility

25. The Government submitted that the applicant should have made a claim for damages before a civil court under Article 483 of the Civil Code, in force until 1 July 2001. Relying on the ruling of the Constitutional Court of 19 August 2006, the Government also argued that, even presuming that specific redress had not been enshrined in any law, the applicant could have claimed redress by directly relying on the Constitution or on the general principles of law.

26. The Government further contended that the applicant could have applied to the domestic courts claiming redress for the length of the criminal proceedings pursuant to Article 6.272 of the Civil Code, in force after 1 July 2001. In this respect the Government submitted a copy of a judgment by the Supreme Court of 6 February 2007 whereby a person had been awarded damages under this provision for the excessive length of criminal proceedings which had been instituted in 1998 and discontinued in 2004. In view of the applicant’s failure to lodge such a claim in the present case, the complaint about the length of the proceedings should be rejected for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

27. The applicant contested the Government’s argument, stating that no adequate remedy existed which he could exhaust in relation to his Convention complaint as to the excessive length of proceedings.

28. The Court reiterates that the machinery of complaint to the Court is subsidiary to national systems safeguarding human rights. This subsidiary character is reflected in Articles 13 and 35 § 1 of the Convention. The rule in Article 35 § 1 is based on the assumption in Article 13 (with which it has a close affinity) that there is an effective domestic remedy available in respect of the alleged breach of an individual’s Convention rights. Nevertheless, the only remedies to be exhausted under Article 35 § 1 of the Convention are those which relate to the breaches alleged and which at the same time are available and sufficient. The existence of such remedies must

be adequately certain not only in theory but also in practice (see *Baškienė v. Lithuania*, no. 11529/04, §§ 63-65, 24 July 2007).

29. As for the Government's argument that the applicant could have brought a claim based on Article 483 of the Civil Code, in force until 1 July 2001, and the general principles of law or the Constitution, the Court considers that they have not adduced any credible evidence to demonstrate that such a remedy had any reasonable prospect of success, especially before the ruling of the Constitutional Court on 19 August 2006 (see *Gečas v. Lithuania*, no. 418/04, § 51, 17 July 2007 and, *mutatis mutandis*, *Četvertakas v. Lithuania*, no. 16013/02, § 30, 20 January 2009, not yet final).

30. The Court also notes that in similar circumstances it has already decided that the possibility of claiming damages for the excessive length of proceedings under Article 6.272 of the Civil Code had not – at the moment of the introduction of the application – acquired a sufficient degree of legal certainty requiring its exhaustion for the purposes of Article 35 § 1 (see *Gečas v. Lithuania*, cited above, §§ 45-50). The Court sees no reason to depart from that conclusion in the present case. It further observes that as an example of the relevant domestic case-law regarding Article 6.272 of the Civil Code the Government relied on the decision of the Supreme Court of 6 February 2007. However, the key events in the present case occurred long before that – the criminal proceedings lasted from 1997 until 2004 (see paragraph 36 below) and the application was lodged with the Court on 14 December 2004. Therefore there is no indication that such a remedy was available to the applicant at the material time. It follows that this part of the application cannot be rejected for non-exhaustion of domestic remedies.

31. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. As there are no other grounds warranting its rejection, the Court concludes that it must be declared admissible.

B. Merits

32. The Government submitted that the orders to seize the applicant's property had never been executed in practice. Therefore the applicant's situation was only negatively affected as of 31 March 2000, when criminal charges were brought against him, he was questioned as the accused and the remand measure – an obligation not to leave his place of residence – was imposed on him. Consequently, the Government claimed that the period to be taken into account began on 31 March 2000.

33. The Government further argued that, taking into consideration the economical-financial nature of the crimes committed and the number of co-accused, the case was complex. They conceded that the applicant had not caused delays in the course of the pre-trial investigation. The Government

nonetheless contended that, until the applicant started serving his sentence on 7 July 2004, his situation had not been aggravated disproportionately as the only coercive measure imposed on him had been an obligation not to leave his place of residence. As regards the judicial proceedings the Government argued that no delay could be attributed to the courts. The hearings were adjourned twenty-six times because of the failure of co-accused, their counsel or witnesses to appear before the trial court. It further noted that the examination of the case before the court of first instance was aggravated by the fact that one of the co-accused suffered from mental illness and therefore numerous adjournments of the case were necessary. From the above the Government concluded that there had been no breach of the right to a trial within “reasonable time”, conferred by Article 6 § 1 of the Convention.

34. The applicant disagreed, stating that the case was not complex and the authorities’ attempts to summon the co-accused and witnesses were not sufficient to discharge the State of its obligation to respect the reasonable time requirement. The length of the proceedings has been excessive in his case.

35. The Court reiterates that in criminal matters the “reasonable time” referred to in Article 6 § 1 begins to run as soon as a person is “charged”; this may occur on a date prior to the case coming before the trial court. A “charge” may be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, a definition that also corresponds to the test whether the situation of the suspect has been substantially affected (see *Eckle v. Germany*, 15 July 1982, § 73, Series A no. 51).

36. The Court recalls that on 16 January 1997 the applicant was questioned as a witness in the criminal proceedings for the possible embezzlement of the property of a commercial bank. On 20 January 1997 the investigation authorities took a decision to seize the applicant’s bank accounts. Nothing in the case file indicates that the above-mentioned decision or subsequent decisions to seize the applicant’s apartment and car were not executed in practice. For that reason the Court considers that by 20 January 1997 the applicant’s situation had already been affected to a degree amounting to a “charge” within the meaning of Article 6 § 1 of the Convention, and that the period to be taken into consideration started on that date (see *Šleževičius v. Lithuania*, no. 55479/00, § 26, 13 November 2001). The criminal proceedings ended with the decision of the Supreme Court of 15 June 2004. They thus lasted almost seven years and five months (seven years, four months and twenty-six days) at three levels of jurisdiction.

37. The Court will assess the reasonableness of the length of the proceedings in the light of the particular circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant

authorities. On the latter point, what is at stake for the applicant has also to be taken into account (see, among many other authorities, *Philis v. Greece* (no. 2), 27 June 1997, § 35, *Reports of Judgments and Decisions* 1997-IV, and *Portington v. Greece*, 23 September 1998, § 21, *Reports* 1998-VI).

38. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present application (see *Mattoccia v. Italy*, no. 23969/94, §§ 75-81, ECHR 2000-IX, and *Kangashuoma v. Finland*, no. 48339/99, §§ 29-36, 20 January 2004).

39. Applying these principles to the instant case, the Court considers that the proceedings may be deemed complex, owing, *inter alia*, to the number of participants and the illness of one of the co-accused as well as the nature of the offences - financial impropriety by the applicant. Furthermore, there were some delays not entirely imputable to the authorities, given the failure of certain participants to attend court hearings and the need to order a medical expert report (see paragraphs 12-15 above).

40. As to the conduct of the authorities, the Court nonetheless notes that three years elapsed from the moment the applicant's bank accounts and property were seized until the charges were brought against him (see paragraphs 8 and 10 above). The Court also observes that pre-trial investigation and the proceedings at first-instance lasted almost six years and nine months. As the Government conceded, no significant delay was caused by the applicant himself during the pre-trial investigation. Nor can it be considered that the applicant had contributed to the length of criminal proceedings before the trial court (see paragraph 15 above). The Court also has regard to the fact that it took more than four months for the experts to produce a medical report due to the lack of staff (see paragraphs 13-14 above).

41. 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. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

42. The applicant further complained that he had been imprisoned for debt. He relied on Article 1 of Protocol No. 4 which reads:

"No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation."

43. The Court reiterates that in the present case the applicant was convicted of fraud, which is a crime under domestic law, and imprisoned as a result. It follows that the applicant's complaint is not related to imprisonment for an inability to fulfil a contractual obligation. Accordingly, this complaint is incompatible *ratione materiae* within the meaning of

Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 §§ 3 and 4 thereof.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. The applicant claimed 40,000 euros (EUR) in material damages for the loss of his job, caused by the violations of the Convention. He also claimed EUR 10,000 in respect of non-pecuniary damage.

46. The Government considered these claims to be unjustified.

47. 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, *Simonavičius v. Lithuania*, no. 37415/02, § 51, 27 June 2006). Consequently, it finds no reason to award the applicant any sum under this head.

48. However, the Court considers that the applicant has suffered certain non-pecuniary damage as a result of the excessive length of the criminal proceedings, which is not sufficiently compensated by the finding of a violation (loc. cit., § 52). Making its assessment on an equitable basis, the Court awards the applicant EUR 2,000 under this head.

B. Costs and expenses

49. The applicant also claimed 6,500 Lithuanian litas (LTL, approximately EUR 1,880) for costs and expenses incurred before the domestic courts and before the Court. In support of his claim the applicant submitted the pay slips for a sum of LTL 2,500 (approximately EUR 725) which he had paid for his legal representation.

50. The Government contested these claims as unsubstantiated and unreasoned.

51. 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. 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 applicant the sum of EUR 725 under this head.

C. Default interest

52. 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 applicant's complaint concerning the excessive length of criminal 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 first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following sums, to be converted into the currency of the responded State at the rate applicable at the date of settlement:
 - (i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, and
 - (ii) EUR 725 (seven hundred and twenty-five euros) in respect of costs and expenses, plus any tax that may be chargeable to this applicant;
 - (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 claims for just satisfaction.

Done in English, and notified in writing on 20 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President