



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

SECOND SECTION

CASE OF NOVIKAS v. LITHUANIA

(Application no. 45756/05)

JUDGMENT

STRASBOURG

20 April 2010

FINAL

20/07/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Novikas 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,

Nona Tsotsoria, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 30 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 45756/05) 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 Andrejus Novikas (“the applicant”), on 19 December 2005.

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

3. On 25 June 2008 the Court decided to give notice of 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

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1977 and lives in Klaipėda.

5. Following a report to the police by two witnesses, D.K. and S.N., on 22 April 1998 a pre-trial investigation was started regarding several crimes. The investigation of other crimes was joined to the case on various dates. Ultimately 11 different crimes were investigated. On 28 April 1998 the applicant's place of residence was searched. On 30 July 1998 the seizure of the applicant's assets was ordered. However, according to the Government, no assets were discovered. On 17 August 1998 the applicant was questioned as a suspect. On 8 September 1999 the applicant was officially informed of

the accusations, questioned as an accused and ordered not to leave his place of residence. On 13 August 2001 the public prosecutor again informed the applicant of the accusations against him and questioned him. On 20 August 2001 the investigation was officially concluded and, as of that date until 21 December 2001, the applicant and his co-accused had the possibility to acquaint themselves with the case file. On 29 December 2001 the public prosecutor concluded the pre-trial investigation in the case by issuing the final bill of indictment and transferred the case to the courts.

6. The Government specified that the case file consisted of 10 volumes and concerned 9 victims and 10 defendants facing 11 charges. The Government also submitted that, in the course of the pre-trial investigation, D.K. and S.N. had disappeared in June 1998. They were found abroad and returned to Lithuania in November 1998, but absconded again after June 1999. The authorities later received information that D.K. had been killed in March 2000. S.N. was never found again.

7. On 14 January 2002 the Klaipėda Regional Court set the dates for trial. The court held 39 hearings, 17 of which were adjourned because one of the parties, other than the applicant, failed to be present. Several hearings were postponed because one of the co-accused went missing. On 29 January 2003 the court separated the part of the case which concerned the missing co-accused, and continued the examination of remainder of the case. The hearing of 1 September 2003 was delayed until 15 September 2003 as the applicant's lawyer had died and a replacement had to be organised. On 9 December 2003 the applicant failed to appear at the hearing and it was postponed until 17 December 2003, when it was decided to continue the examination of the case in his absence. The court took into account the fact that the applicant had already submitted his final statement at the hearing of 28 November 2003.

8. On 19 January 2004 the Klaipėda Regional Court sentenced the applicant to five years' imprisonment for an organised burglary with 3 other co-accused. He was acquitted of several charges: two due to a lack of evidence and another for being time-barred. The court examined the testimonies of 7 witnesses and 4 victims, as well as the submissions of the police and other evidence. It found that the applicant had not provided any credible evidence to negate the testimonies of the various witnesses. D.K. and S.N.'s testimonies given during the pre-trial investigation were read out at the hearings. One of the co-accused, M.M., also gave a deposition incriminating the applicant. M.M. was sentenced by the same judgment but he was dispensed from carrying out the sentence on mitigating grounds.

9. On 19 January 2005, after four hearings, the Court of Appeal upheld the conviction of the applicant. The court noted that the applicant's request to question D.K. and S.N. had been dismissed because the former had died and the latter was missing. Their testimonies during the pre-trial investigation were read out during the court hearings in accordance with

procedural law and were evaluated in the context of all other evidence and the testimonies of other witnesses. No substantial discrepancies in their submissions existed. The court was able to take into consideration the submissions of these two witnesses, as not only testimony given during hearings, but also that given during pre-trial investigations may be legitimate and relevant for the case under examination. These testimonies were not treated as superior to the other evidence in the case. As regards the submissions of the co-accused M.M., the court also noted that his submissions had been assessed in the context of all other evidence and the relevant procedural rules had been observed. Moreover, there was nothing to put in doubt his mental state and his ability to recollect the facts. The Court of Appeal concluded that the court of first instance had properly assessed all the evidence in the case and clarified the discrepancies. Therefore the case had been thoroughly examined. No bias or unfairness was disclosed in the latter's decision.

10. On 28 June 2005 the Supreme Court, in oral proceedings, dismissed the cassation appeal lodged by the applicant. The court observed that the reading of the testimonies of the two missing witnesses had been justified in the circumstances of the case and had been in accordance with the domestic law. The court also noted that it did not deal with the evaluation of the circumstances of the case as this was the prerogative of the lower courts.

II. RELEVANT DOMESTIC LAW AND PRACTICE

11. Article 6.272 § 1 of the Civil Code allows a civil claim to be made for pecuniary and non-pecuniary damage arising from the unlawful actions of investigating authorities or courts 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. In particular, by a judgment of 6 February 2007, the Supreme Court awarded an individual damages under this provision on account of the excessive length of criminal proceedings which had been instituted in 1998 and discontinued in 2004 (see *Norkūnas v. Lithuania*, no. 302/05, §§ 26 and 30, 20 January 2009). Other relevant domestic law concerning domestic remedies for the excessive length of civil proceedings is reproduced in the judgment of *Četvertakas and Others v. Lithuania* (no. 16013/02, § 20-22, 20 January 2009).

THE LAW

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

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

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

A. Admissibility

1. The parties' submissions

13. The Government argued that the applicant had failed to exhaust all effective domestic remedies as he had not applied to the domestic courts, claiming redress for the length of the criminal proceedings under Articles 6.272 of the Civil Code, which can be applied retrospectively. Relying on the Ruling of the Constitutional Court of 19 August 2006, the Government also argued that, even assuming that specific redress had not been enshrined in any law, the applicant could have claimed redress by relying directly on Constitution. Moreover, having regard to the fact that the Convention was a legal act of direct applicability and had precedence over Lithuanian law, the applicant could have relied on it, alleging the unlawfulness of the State authorities' inaction and requesting redress in the domestic courts. Lastly, the Government maintained that the length of the criminal proceedings had been reasonable and therefore this complaint was manifestly ill-founded.

14. The applicant contested these submissions, maintaining that no effective domestic remedies existed.

2. The Court's assessment

15. As the Court has held on numerous occasions, the purpose of Article 35 § 1 of the Convention, which lays down the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations which are made against them before such allegations are submitted to the Court (see *Scordino v. Italy* (no. 1) [GC], no. 36813/97, § 141, ECHR 2006-V). This rule is based on the assumption, reflected 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 (see *Kudla v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI). Nevertheless, the only remedies

which the Convention requires to be exhausted are those which relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, *inter alia*, *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198; *Dalia v. France*, 19 February 1998, § 38, *Reports of Judgments and Decisions* 1998-I; *Mifsud v. France* (dec.) [GC], no. 57220/00, ECHR 2002-VIII).

16. In this connection, the Court refers to its conclusion in the cases of *Šulcas v. Lithuania* (no. 35624/04, §§ 60-63, 5 January 2010) and *Norkūnas v. Lithuania* (cited above, § 30), where it decided that a claim for damages under Article 6.272 of the Civil Code or direct reliance on the Constitution did not satisfy the test of “effectiveness” in contexts of the present kind. The Court finds that the Government have not submitted any convincing arguments which would require the Court to depart from this established case-law.

17. It follows that the Government's objection as to non-exhaustion of the domestic remedies must be dismissed.

18. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

19. First, the Government argued that the period to be taken into consideration started on 17 August 1998 when the applicant was questioned as a suspect because he had only become affected by the criminal proceedings as of this date. The Government submitted in this regard that, during the search of the applicant's place of residence on 28 April 1998, no evidence was found or taken by the police and no property belonging to the applicant was seized under the order of 30 July 1998.

20. Whilst conceding that the applicant had not caused substantial delays, the Government nonetheless submitted that he had contributed to the length of the investigation. The Government stated that the applicant had been responsible for the breaks in the hearings between 1 and 15 September and 9 and 17 December 2003, the first period having been allowed for the applicant to find a replacement lawyer and the second period having been caused by the applicant's failure to appear in court. As of 17 December 2003 the case was examined by the regional court and the higher courts in the applicant's absence as he had absconded.

21. The Government also argued that the case was complex on account of the volume of evidence, the pre-trial investigation in which the authorities had had to carry out a number of procedural actions and investigate the crimes which had occurred years before, the number of charges against the defendant and 9 other co-defendants, the complexity of the crimes and the large number of the witnesses and victims heard, some of whom had needed interpreters. The Government also drew attention to the fact that D.K. and S.N. had left Lithuania. They had been found and returned to Lithuania but then absconded again. The Government noted that the applicant had been allowed to acquaint himself with the case file between 10 October and 3 December 2001, separately from his defence counsel. The Government submitted that, out of 39 hearings, 13 had to be postponed as some of the co-defendants, their counsel, the victims or witnesses had failed to appear. Finally, 3 hearings had had to be postponed as one of the applicant's co-defendants had absconded and the case had to be suspended in respect of this person.

22. The applicant contested the Government's arguments. He argued that the period to be taken into consideration started on 22 April 1998, when the pre-trial investigation had started. He also maintained that the authorities were responsible for the delays in the proceedings.

2. The Court's assessment

23. As regards the period to be taken into consideration, the Court notes that, until the search of the applicant's place of residence, no procedural steps were taken with regard to the applicant which might have significantly affected his situation. The Court has held on several occasions that a search of an applicant's residence constitutes a substantial interference with that individual's life (see, among others, *Strategies and Communications and Demoulin v. Belgium*, no. 37370/97, § 42, 15 July 2002). The Court considers that such a search, even if the authorities fail to find anything relevant for the investigation, in itself substantially affects a person's situation. Accordingly, the Court concludes that the period to be taken into account started on 28 April 1998 with the search of the applicant's home. The proceedings ended on 28 June 2005, when the Supreme Court took the final decision. The proceedings therefore lasted approximately 7 years and 2 months at three levels of jurisdiction.

24. 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 the competent authorities. 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* 1997-IV; *Portington v. Greece*, 23 September 1998, § 21, *Reports* 1998-VI).

25. 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, among many other authorities, the afore-cited *Portington v. Greece*, § 21, and *Norkūnas v. Lithuania*, § 41).

26. Turning to the facts of the present case, the Court considers that the proceedings may be deemed complex, owing *inter alia* to the number of accused and the charges against them, as well as the volume of evidence to be examined (see paragraph 21). Nonetheless, it cannot be said that this in itself justified the entire length of the proceedings. In their submissions, the Government referred to delays caused by the behaviour of certain accused and witnesses (see paragraph 21 above). The Court notes however that it is the responsibility of the authorities to ensure the presence of all persons relevant to the proceedings, and to this end they have a number of measures at their disposal. The Court sees no reason why the case could not have been suspended in regard to the missing defendant at an earlier stage. In contrast, the Court notes that the periods from 1 to 15 September 2003 (related to the death of the applicant's defence counsel) and from 9 to 17 December 2003 (when the applicant had failed to appear in court) are attributable to the applicant, but only account for a total of 22 days.

27. However, the Court cannot agree with the Government that the applicant's absconding caused substantial delays. Although the applicant had absconded before the judgment of the Regional Court was adopted, he had been present for most of the proceedings at first instance, which involved the examination of the evidence and the establishment of the facts. As the Regional Court had pointed out, the applicant had submitted his final statement before absconding. Subsequently the courts continued their examination of the case in the applicant's absence, but in the presence of his lawyer who maintained the defence's position. Thus the applicant's failure to appear at the last hearings of the court of first instance and the hearings of the higher courts did not unduly hinder the examination of the case.

28. Having regard to all the material submitted to it and to its case-law on the subject, the Court considers that in the instant case the overall length of the criminal proceedings was excessive and failed to meet the "reasonable time" requirement.

29. There has accordingly been a breach of Article 6 § 1.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

30. The applicant also complained that he was denied the right to question the witnesses D.K. and S.N., which resulted in unfair trial. He also suggested that his requests to put certain questions to witnesses were denied. He invoked Article 6 § 3 (d), which reads, in so far as relevant, as follows:

"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; ...”

31. The Court first notes that the guarantees of Article 6 § 3 (d) of the Convention are specific aspects of the right to a fair hearing guaranteed by the first paragraph of this provision. Consequently, the complaint will be examined under the two provisions taken together (see, among other authorities, *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, p. 10, § 25).

32. The Court recalls that evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a prosecution witness, either when that person testifies or at a later stage (see *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 51, *Reports* 1997-III).

33. As the Court has stated on a number of occasions (see, among other authorities, *Isgrò v. Italy*, judgment of 19 February 1991, Series A no. 194-A, p. 12, § 34), it may prove necessary in certain circumstances to refer to depositions made during the investigative stage. If the defendant has been given an adequate and proper opportunity to challenge such depositions, either when they were made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions which have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may thereby be restricted to an extent which is incompatible with the guarantees provided by Article 6 (see *Unterpertinger v. Austria*, judgment of 24 November 1986, Series A no. 110, pp. 14-15, §§ 31-33; *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44; *Van Mechelen and Others*, cited above, § 55).

34. In regard to the circumstances of the present case, the Court observes that *in contrario* to *Lucà v. Italy* (no. 33354/96, ECHR 2001-II) the statements made by D.K. and S.N. were not the sole evidence on which the domestic courts' findings were based (see paragraphs 8 and 9 above). Furthermore, the Court cannot overlook the fact that it became impossible for the authorities to have these witnesses examined at court hearings due to factual circumstances. The Court notes that the testimony of these two witnesses was read out in the hearing before the Regional Court. In the circumstances of the case, the measures taken in that respect may be

considered to have been sufficient to enable the applicant to challenge such testimony and its credibility in the course of the criminal proceedings (see *mutatis mutandis* *S.N. v. Sweden*, no. 34209/96, § 52, ECHR 2002-V). The Court observes that a decisive role in the applicant's conviction was played by M.M.'s depositions, the importance of whose testimony was recognized by the applicant himself, as well as by the other evidence in the case supporting the testimonies of these three people. Finally, the Court observes that the applicant did not raise any complaints in his appeals about the questioning of witnesses. Nevertheless, having regard to the various elements considered above, the Court concludes that the complaints under paragraphs 1 and 3 (d) of Article 6 are to be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

35. The applicant complained separately under Article 6 § 1 of the Convention that he was deprived of a fair and impartial hearing in that his procedural requests were denied and his conviction had allegedly been based solely on the testimony of one witness and the co-accused M.M. He challenged the courts' examination of the depositions by D.K. and S.N. and the credibility of the depositions by his co-accused M.M. Under Article 6 § 2 of the Convention, the applicant alleged that the presumption of innocence was violated as a consequence of the unfair trial. The Court considers that these complaints all fall to be examined under Article 6 § 1 cited above (paragraph 12).

36. In this connection the Court reiterates that the examination of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Court also notes that there is no absolute right under the Convention to have all procedural requests satisfied and it is primarily for the domestic courts to assess the necessity of the measure requested. The Court has nevertheless to ascertain whether the proceedings considered as a whole were fair, as required by Article 6 § 1 (see *García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29, ECHR 1999-I; *Lucà v. Italy*, no. 33354/96, § 38, ECHR 2001-II), which in the case of criminal proceedings includes the observance of the presumption of innocence.

37. The Court notes at the outset that the issue of the credibility of the testimony by the co-accused M.M. was fully addressed by the domestic courts.

38. On the basis of the materials submitted, the Court observes that, within the framework of these proceedings, the applicant was able to introduce all necessary arguments in his defence and contest the evidence he considered false. Moreover, the judicial authorities gave his submissions due consideration. The conviction was based on the testimony of several witnesses, as well as on the supporting evidence (see paragraphs 8 and 9 above). The case was examined at three levels of jurisdiction and the applicant's appeals were dismissed as unfounded. The decisions of the

domestic courts do not appear to have been unreasonable or arbitrary. The Court notes that the applicant adduced no evidence showing any bias in the domestic courts, either from the objective or subjective standpoint.

39. The Court next observes that the Regional Court convicted the applicant after adversarial proceedings, in which he had the possibility to challenge the evidence produced against him. The applicant's conviction was upheld by the Court of Appeal and by the Supreme Court after a full review of the case in oral hearings. There is no indication that the domestic courts had a preconceived idea of the applicant's guilt.

40. Having regard to the foregoing, the Court considers that the criminal proceedings against the applicant were fair and satisfied the requirements of Article 6 § 1 of the Convention. It follows that this part of the application must also be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. 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. The applicant claimed 135 398 Lithuanian litas (“LTL”; approximately 39,246 euros (“EUR”)) in respect of pecuniary and non-pecuniary damage.

43. The Government contested these claims as unsubstantiated and excessive.

44. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, deciding on an equitable basis, it awards the applicant EUR 1,800 in respect of non-pecuniary damage.

B. Costs and expenses

45. The applicant also claimed LTL 14 722, 60 (approximately EUR 4,267) for the costs and expenses incurred before the domestic courts and the Court.

46. The Government contested this claim.

47. 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.

48. In the present case, the Court notes that part of the fees claimed concerned the applicant's defence to the criminal charges against him before the domestic authorities. These fees do not constitute necessary expenses incurred in seeking redress for the violation of the Convention which the Court has found under the "reasonable time" aspect of Article 6 § 1 of the Convention (see *Graušlys v. Lithuania*, no. 36743/97, § 74, 10 October 2000). In the light of the documents in its possession, the Court finds it reasonable to award the applicant EUR 1,500 for costs and expenses.

C. Default interest

49. 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 concerning the excessive length of the 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, the following sums, to be converted into the national currency of that State at the rate applicable on the date of settlement:
 - (i) EUR 1,800 (one thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage,
 - (ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, for costs and expenses;
 - (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 20 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President