

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

SECOND SECTION

CASE OF KARDIŠAUSKAS v. LITHUANIA

(Application no. 62304/12)

JUDGMENT

STRASBOURG

7 July 2015

FINAL

07/10/2015

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



In the case of Kardišauskas v. Lithuania,

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

Işıl Karakaş, *President,*
András Sajó,
Nebojša Vučinić,
Helen Keller,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Abel Campos, *Deputy Section Registrar,*

Having deliberated in private on 9 June 2015,

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

PROCEDURE

1. The case originated in an application (no. 62304/12) 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 Markas Kardišauskas ("the applicant"), on 20 September 2012.

2. The applicant, who had been granted legal aid, was represented by Ms K. Čeredničenkaitė, a lawyer practising in Vilnius. The Lithuanian Government ("the Government") were represented by their former Agent, Ms E. Baltutytė.

3. The applicant complained that the domestic authorities had failed to ensure his safety in prison, and that the investigation into the circumstances surrounding his injury in prison had been ineffective, in breach of Article 3 of the Convention.

4. On 5 July 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979.

6. On 3 January 2003 the applicant started serving a sentence in the Pravieniškės Prison after his conviction for rape and theft.

7. In subsequent separate proceedings the applicant and his three accomplices were found guilty of murder and robbery committed as part of an organised group in 2000. A final decision in that case was adopted in 2013 by the Supreme Court. The applicant was sentenced to eight years' imprisonment. That sentence was added to the applicant's prior conviction, and a final sentence of thirteen years' imprisonment was imposed.

A. The applicant's injury in prison and the pre-trial investigation that followed

8. On 25 May 2003 the applicant was found beaten up and unconscious in the Pravieniškės Prison after being attacked by other prisoners. A pre-trial investigation into the incident was opened the same day by the Pravieniškės Prison authorities, who informed the Kaišiadorys prosecutor about it. Immediately after the event an investigator of the prison inspected the area where it had taken place.

9. The same day the applicant was taken injured and unconscious to the Prison Department's Hospital (*Laisvės atėmimo vietų ligoninė*) and then to the Emergency Hospital of Vilnius University (*Vilniaus greitosios pagalbos universitetinė ligoninė*), where he underwent an operation. Five days later he was transferred back to the Prison Department's Hospital.

10. On 26 May 2003 the investigators ordered that the applicant be examined by a forensic medical expert. According to the medical record, the applicant had sustained beatings (*muštinė žaizda*) to the head and haematoma.

11. On 5 June 2003 the applicant's mother wrote to the State authorities that she had learned about the incident only a week later, when she wanted to visit her son in the Pravieniškės Prison. She alleged that the prison was dangerous and demanded that those responsible for the assault on her son be found and punished.

12. By a letter of 13 June 2003 the Kaišiadorys prosecutor informed the applicant's mother that a pre-trial investigation into the assault on her son had been opened on the day of the incident. She was also informed that a medical examination had been ordered to establish the severity of the injury.

13. On 1 July 2003 the Pravieniškės Prison investigator wrote to the Kaunas police that the applicant's mother was avoiding coming to the prison and testifying and he therefore requested the police to question her as a witness; it was indispensable to ask her whether her son had ever told her about having disagreements with other prisoners or whether he had received threats. The police were also asked to employ operational measures to identify suspects and determine the circumstances surrounding the severe bodily injury (*sunkus sveikatos sutrikdymas*) of the applicant.

14. On 10 July 2003 the applicant was granted victim status by the investigators. It was explained to him that in that status he could submit requests or lodge complaints, under Article 28 of the Code of Criminal Procedure (see paragraph 43 below). On 10 July and 18 August 2003 the applicant was questioned about the incident. However, he stated that, given his state of health, he did not remember how he had been attacked and injured.

15. According to a medical certificate of 28 August 2003, a severe fracture of the skull had occurred as a result of what the doctors described as two blows to the applicant's head. He had been unconscious for some time just after the assault, and then neurosurgery had been carried out. The doctors concluded that the applicant had sustained a serious head injury and would need a long period of rehabilitation. In August 2003 the applicant was declared Category II disabled, and in March 2004 he was declared Category III disabled (a less severe level of disability). As the applicant's state of health improved, in February 2008 he was declared able to work at ninety percent.

16. On 28 August 2003 the applicant was discharged from the Prison Department's Hospital and returned to the Pravieniškės Prison for outpatient health care. Afterwards, on different dates, the applicant spent time in Lukiškės Remand Prison, Pravieniškės Prison and the Prison Department's Hospital.

17. On 10 September 2003 the applicant testified that on the day of the incident he was taking exercise when another prisoner approached him and asked him to go to the living quarters of the Pravieniškės Prison Wing no. 5. They went to a place where there were other prisoners, among whom the applicant noticed a person he had known earlier from the time outside the prison. That person was holding a knife, and hit (*smogė*) the applicant on the head. The applicant described him as a tall, well-built man of 40-45, who had previously been convicted of murder. The applicant was confident that he could recognise his attacker. On 25 September 2003 the applicant identified from photographs of forty three persons a suspect who appeared to be a certain E.J.

18. A report of 11 November 2003 from the Pravieniškės Prison showed that E.J. had a conviction for robbery under Article 272 of the Criminal Code, and had been sentenced to three years of imprisonment. According to that report, E.J. had left Pravieniškės Prison on 5 September 2002 for Lukiškės Remand Prison and had come back to the Pravieniškės Prison on 29 May 2003, which was four days after the incident. An extract from E.J.'s personal file indicates that E.J. arrived at Lukiškės Remand Prison on 5 September 2002 and left that prison on 29 May 2003.

19. On 19 December 2003 the Pravieniškės Prison authorities concluded, on the basis of the 11 November 2003 report, that on the day of

the incident E.J. was not being held in the Pravieniškės Prison but was in Lukiškės Remand Prison in Vilnius.

20. According to the Pravieniškės Prison's internal investigation report of 19 December 2003, the authorities questioned twenty eight witnesses, including prisoners, operational investigation measures were ordered, medical examinations were carried out and photographs of possible suspects were shown to the applicant and witnesses.

21. By a letter of 25 February 2004 to the Kaunas police, the Pravieniškės Prison authorities reiterated their request that suspects be identified. The letter also mentioned that, according to the medical report, the applicant had sustained two blows to the head with blunt objects (*sužalojimai padaryti veikiant bukais daiktais – dviem smūgiais*). The prison authorities also observed that the applicant's testimony lacked consistency (*apklausiamas keičia parodymus*) and that he claimed not to remember the circumstances of the incident.

22. On 26 March 2004 the Kaunas police informed the Pravieniškės Prison investigators that no reliable information enabling identification of the perpetrators of the assault on the applicant had been established.

23. On 10 May and 13 July 2005 the Pravieniškės Prison authorities requested the Kaišiadorys prosecutor and the Kaunas and Plungė police authorities to order additional operational measures, *inter alia*, to question three witnesses – inmates of the Pravieniškės Prison at the time when the applicant was injured. The last letter ended with a request for the criminal police "to identify persons who had committed the impugned crime and to find the crime weapon" (*nustatyti asmenis, padariusius minėtą nusikaltimą ir surasti nusikaltimo padarymo įrankius*).

24. On 15 July 2005 the prosecutor ordered the Kaunas police to carry out the aforementioned actions. The prosecutor also informed the applicant's mother that the criminal investigation file had been examined by a prosecutor. Twelve days later, the Plungė police authorities sent the report of questioning to the Pravieniškės Prison investigators.

25. Considering that the process of investigation was not producing any results, in February 2007 the applicant's mother objected to the way the investigation in the case was being conducted and asked the prosecutors to find her son's attackers.

26. By a letter of 27 April 2007 the prosecutor dismissed the complaint by the applicant's mother that the criminal investigation was not effective. According to the prosecutor, even though a number of investigative actions had been carried out, it was not possible to identify the persons who had injured the applicant. It was explained to the applicant's mother that, if she disagreed with the prosecutor's conclusion, she could appeal to a court.

27. On 7 August 2008 the Kaišiadorys district prosecutor refused to comply with a request by the applicant's mother to start an investigation into whether the Pravieniškės Prison authorities had failed to act and to

protect her son's safety and health in prison. In the decision, the prosecutor wrote:

> "The [applicant's mother] cites matters which are relevant to the criminal case concerning the injury to M. Kardišauskas. A pre-trial investigation into this incident is already pending. In the event that a failure of the officers to perform their official duties is established, the question of their criminal responsibility will be decided subsequently. The question of pecuniary and non-pecuniary damage [caused to the applicant] will also be decided within the current pre-trial investigation, once a person or persons who have committed the crime, that is, injured M. Kardišauskas, are identified. If then, due to his state of health or for other reasons, M. Kardišauskas is unable to submit a civil claim on his own account, the prosecutors will have to submit such a claim, as prescribed by Article 117 of the Code of Criminal Procedure."

The decision stated that it could be appealed against within fourteen days to the pre-trial investigating judge of the Kaišiadorys district court.

28. According to a report by the Pravieniškės Prison authorities of 28 December 2007, even though prisoners who had served in that prison as of 2003 had been questioned about the attack on the applicant, no relevant information had been obtained.

29. On 19 April 2010 the prosecutor informed the applicant's mother that no suspect had been identified during the investigation.

30. The pre-trial investigation was still pending on 7 June 2012, as was later observed by the Supreme Administrative Court in the administrative case for damages (see paragraphs 33-40 below).

31. In reply to a request for information by the applicant's mother, on 9 January 2013 the prosecutor wrote to her that the pre-trial investigation was still pending, no suspect had been identified and no procedural decision had been taken in the criminal case.

32. In their observations of 4 November 2013 on the admissibility and merits of the case, the Government stated that the criminal investigation remained open until new circumstances came to light. On 20 January 2014 the Court received observations from the applicant, in which he noted that the criminal investigation was still continuing.

B. The administrative proceedings for damages against the State

33. In April 2010 the applicant was granted State-guaranteed legal aid and on 18 October 2010 he instituted proceedings against the State.

34. Firstly, the applicant claimed damage to his health resulting from the failure of the prison authorities to protect him from ill-treatment. To this claim the Pravieniškės Prison administration responded that the applicant had never indicated that he was in danger in prison.

35. Secondly, in the rectified complaint of 29 November 2010 the applicant criticized the authorities for not having established who his assailant was. On 3 February 2011, when addressing the Kaunas Regional Administrative Court in writing, the applicant further argued that the

authorities had failed to act diligently and to take all necessary measures so that the crime was solved quickly.

36. During those proceedings the applicant contended that the introduction of his civil claim for damages in respect of the injury had been delayed for objective reasons, namely the state of his health, his continuing stay in prison, the failure of the investigating authorities to indicate suspects and to inform the applicant in a timely fashion of the possibility of submitting such a claim and of his right to legal aid.

37. On 23 March 2011 the Kaunas Regional Administrative Court dismissed the applicant's claim. The court established that the applicant had been injured on 25 May 2003, and the statutory time-limit to lodge a claim for damages caused by health impairment was three years. The applicant had lodged his claim only on 18 October 2010, that is, more than seven years after the injury had been sustained.

38. The applicant appealed. On 14 November 2011 the Supreme Administrative Court remitted the case to the first-instance court to verify whether part of the applicant's claim that the pre-trial investigation had not been effective was also time-barred.

39. On 14 February 2012 Kaunas Regional Administrative Court refused to examine the applicant's claim for damage caused to his health on the ground of prescription. The court established that as early as 2004 the applicant's health had improved; he had been released from hospital and had returned to prison. The applicant had relatives to assist him in making use of his rights, and he could also have asked for free legal aid in a timely fashion. Lastly, it was only the applicant's own unfounded belief that a court action for damages against the Pravieniškės Prison was not possible before the person who had attacked him was identified.

40. By a final decision of 7 June 2012 the Supreme Administrative Court dismissed the claim due to the expiry of the three-year prescription period applicable to claims relating to damage to health. The court rejected the applicant's arguments that he had been misled by the prosecutors investigating the incident, who had convinced him that he would be able to lodge a civil claim for damages only after the person responsible for his injury was identified. The applicant's contention that his health had prevented him from submitting the claim in time was likewise dismissed. The Supreme Administrative Court also observed that the applicant could have appealed against the investigating officers' or prosecutor's actions, if he considered them improper. However, the applicant had not made use of any of his rights under Article 28 of the Code of Criminal Procedure. The pre-trial investigation was not yet over.

II. RELEVANT DOMESTIC LAW AND PRACTICE

41. The relevant provisions of the Civil Code read as follows:

Article 1.125. Time-limits for claims

"8. An abridged three-year limit shall be applied with respect to claims for compensation for damage..."

Article 6.271. Liability for compensation for damage caused by unlawful actions of institutions of public authority

"1. Damage caused by unlawful acts of institutions of public authority must be compensated by the State from the resources of the State budget, irrespective of any fault on the part of a particular public servant or other employee of a public authority institution ...

2. For the purposes of this Article, the notion of 'institution of public authority' shall mean any public-law body (such as State or municipal institutions, officials, public servants or any other employee of these institutions), as well as private individuals performing the functions of a public authority.

3. For the purposes of this Article, the notion of 'action' shall mean any action (or failure to take action) by an institution of public authority or its employees that directly affects the rights, liberties and interests of individuals (legal acts or individual acts adopted by the institutions of State and municipal authorities, administrative acts, and physical acts, with the exception of court judgments, verdicts in criminal cases, decisions in civil and administrative cases, and orders).

4. Civil liability of the State or a municipality subject to this Article shall arise where employees of institutions of public authority fail to act in the manner prescribed by law for those institutions and their employees."

Article 6.283. Compensation for damage caused to another person's health

"1. Where the damage sustained by a natural person is bodily harm, i.e. he is mutilated or his health is impaired in any other way, the person liable for the damage caused shall be bound to compensate the aggrieved person for all his damage suffered, including non-pecuniary damage...."

42. The court practice concerning application of time-limits in respect of civil claims relating to damage to health provides that the right to bring an action arises on the day on which a person is injured (the Supreme Court ruling of 10 December 2010 in civil case no. 3K-3-516/2010).

43. The relevant provisions of the Code on Criminal Procedure with regard to conducting pre-trial investigations at the relevant time read as follows:

Article 2. Obligation to disclose criminal acts

"When elements of a crime become apparent, the prosecutor and the pre-trial investigation authorities must take all the measures within their competence to investigate and disclose a criminal activity within the shortest time possible."

Article 28. The victim

"1. A person who, as a result of the crime, sustained physical ... damage, shall be recognized as a victim... by a decision of the investigator, prosecutor or the court.

2. The person having status of the victim may testify in the case. The victim and his representative have a right to: provide evidence, submit requests, ..., have access to the

case-file, take part in the proceedings, appeal against actions of the investigator, prosecutor, investigating judge or the court, appeal against the court ruling...”

Article 62. Complaints against the procedural actions and decisions of the pre-trial investigation officer

“1. Parties to the proceedings may lodge complaints against procedural actions and decisions of the pre-trial investigation officer to the supervising prosecutor. In the event of the complaint being dismissed by the prosecutor, his decision may be appealed against the pre-trial judge...”

Article 63. Complaints against the procedural actions and decisions of the prosecutor

“1. The actions and decisions of the prosecutor in charge of the pre-trial investigation may be appealed against to a higher prosecutor. If a higher prosecutor dismisses the appeal, this decision may be appealed against to the pre-trial judge...”

Article 117. Prosecutor’s duty to lodge a civil claim

“In the event of damage caused to the State or to a person, who because of his minor age, illness, dependence on the accused or other reasons is unable to defend his lawful interests before the court on his own, a prosecutor is under an obligation to lodge a civil claim in criminal proceedings if such claim has not yet been lodged.”

Article 164. Subjects of pre-trial investigation

“1. Pre-trial investigation shall be carried out by pre-trial investigation officers. Pre-trial investigation shall be organised and supervised by a prosecutor. The prosecutor may decide to carry out the entire pre-trial investigation, or part of it, himself...”

Article 165. Pre-trial investigation authorities

“1. The Police are a pre-trial investigation authority...

2. Pre-trial investigation is also carried out by ... officers of the Prisons Department, directors of custody, detention or correctional facilities or officers authorised by them in respect of offences committed in those institutions ...”

Article 170. Prosecutor’s powers during pre-trial investigation

“1. A prosecutor has the right to carry out a full pre-trial investigation or separate phases of a pre-trial investigation.

2. When a pre-trial investigation or some of its actions are carried out by investigators, a prosecutor shall supervise the proceedings.

3. The prosecutor gives investigators orders, and overturns their unlawful or unfounded decisions.

4. Only the prosecutor delivers decisions on:

1) joining and separating investigations;

2) suspension of a pre-trial investigation;

3) termination of an investigation;

4) renewal of a previously terminated pre-trial investigation;

5) completion of the investigation and submission of a bill of indictment.

5. Only the prosecutor may address the pre-trial judge on actions which fall within the latter’s competence. In [certain] cases, the prosecutor’s decisions on the termination and the renewal of a terminated pre-trial investigation shall be approved by the pre-trial investigation judge.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

44. The applicant complained that the Pravieniškės Prison authorities had failed to protect his physical well-being when he was serving his sentence. As a result, he had been seriously injured but had received no compensation for the damage sustained. The applicant also argued that the State had failed to conduct an effective investigation into the circumstances of the attack on him and his injury in the prison.

45. The Court considers that these complaints fall to be examined under Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

1. As regards the complaint about the substantive aspect of Article 3 of the Convention

(a) The parties' submissions

46. The Government noted that the applicant's civil claim for damages against the State concerning his injury in the prison had not been examined on the merits, but had been dismissed by the administrative courts because of the three-year prescription period.

47. The applicant responded that the prosecutor had misled him by telling him that he was entitled to lodge a civil claim for compensation for non-pecuniary damage only after the suspect in the pre-trial investigation had been identified (see paragraph 27 above). In addition, due to his injury the applicant had not been able to make use of his rights to the full. He had learned about his right to State-guaranteed legal aid only after the three-year statutory time-limit had expired.

(b) The Court's assessment

48. Article 35 § 1 requires that the complaints intended to be made subsequently in Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used. Where an applicant has failed to comply with these requirements, his or her application should in principle be declared inadmissible for failure to exhaust domestic remedies (see *Vučković and*

Others v. Serbia (preliminary objection) [GC], no. 17153/11 and 29 other cases, § 72, 25 March 2014, and the case-law referred to therein).

(i) As to the civil claim

49. The Court reiterates that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This applies in particular to the interpretation by courts of rules of a procedural nature, such as time-limits for lodging claims. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see, *mutatis mutandis*, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I; also see *Pavle Lončar v. Bosnia and Herzegovina*, no. 15835/08, § 38, 25 February 2014). In the present case it is clear that the domestic courts duly addressed the applicant's allegations about the missed time-limit for lodging the civil claim concerning his safety in the prison and his injury (see paragraphs 37, 39 and 40 above, also see *Vučković and Others*, cited above, § 80). What is more, even assuming that after the incident the applicant had been unwell for some time and had remained in hospital for three months (see paragraph 16 above), it appears that he failed to comply with the applicable domestic rules on prescription, because the three-year time-limit had already been reached in August 2006, thus long before the decision of 7 August 2008 was issued by the prosecutor, and on which the applicant has relied. Lastly, there is no evidence that the applicant's ability to request State legal aid was in any way restricted.

50. In view of the foregoing, the Court accepts the argument of the Government about the non-exhaustion of domestic remedies. Regard being had to the fact that the respective claim was not examined by the national courts, the Court finds this complaint inadmissible, pursuant to Article 35 §§ 1 and 4 of the Convention.

(ii) As to the decision not to prosecute

51. Insofar as the applicant's mother wished to call into question the responsibility of the Pravieniškės Prison for her son's injury, the Court observes that during criminal proceedings the investigators and prosecutors have never queried, nor did so the Government in this case, the applicant's mother's role trying to ensure his interests before the national authorities. Indeed, she made a number of enquiries on behalf of her son (see paragraphs 11, 25, 29 and 31 above). That being so, the Court underlines that neither the applicant's mother, nor the applicant himself appealed against the prosecutor's refusal, as expressed in his decision of 7 August 2008, to investigate whether the Pravieniškės Prison authorities' had failed to act and to protect the applicant's safety and health in prison (see paragraph 27 above).

52. As a result, the complaint is inadmissible for failure to exhaust the domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

2. As regards the complaint about the procedural aspect of Article 3 of the Convention

(a) The parties' submissions

53. The Government observed that the applicant had not exercised his right to submit complaints during the pre-trial investigation against the prosecutors and investigators in respect of his contention as to their alleged inaction in those proceedings.

54. The Government further argued that the applicant had failed to properly bring a civil claim against the State in respect of his allegation of a prolonged and ineffective pre-trial investigation.

55. The applicant disagreed, noting that due to the inaction of the authorities and the absence of any decision determining the outcome of the pre-trial investigation, he had had no action or decision to complain about (the applicant distinguished his case from the facts in *Silickis and Silickienė v. Lithuania* (dec.), no. 20496/02, 10 November 2009). Moreover, all complaints by his mother had proved to be unsuccessful, as they had simply been dismissed by the authorities conducting the investigation. He also noted having raised, in his civil claim to the administrative courts, the issue of the lack of an effective criminal investigation.

(b) The Court's assessment

56. In the present case, the applicant lodged a civil claim for damages before the administrative courts, where he raised the issue of his ill-treatment in the prison and his dissatisfaction that his attacker had not been identified (see paragraphs 35 and 36 above). As it appears from the Supreme Administrative Court's decision, the applicant was considered to have remained a passive observer in the criminal proceedings. Given that the criminal proceedings were still pending, that court implied that those criminal proceedings could not be considered as improper (see paragraph 40 above).

57. In view of the foregoing, the Court considers that the applicant has duly addressed the administrative courts with regard to ineffective pre-trial investigation. The Court also finds that in the present case the question of whether or not the criminal law avenue had been properly exhausted by the applicant is intrinsically linked to the merits of his complaint about the effectiveness of the criminal investigation. It should therefore be joined to the merits.

58. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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

59. The applicant noted that, similarly to the facts in *Česnulevičius v. Lithuania* (no. 13462/06, § 6, 10 January 2012), the attack on him had taken place in the Pravieniškės Prison. The incident of 25 May 2003 had occurred within the prison and involved one victim and only a limited number of potential suspects. Regrettably, his mother had been notified of the incident only a week after it happened. The applicant and his mother had cooperated with the authorities during the pre-trial investigation. The applicant's possibilities to assist the authorities with the investigation were however relatively limited because of his state of health after his injuries, notably considerable memory loss.

60. He also maintained that the investigative actions were very few and sporadic, and that not all measures at the disposal of the authorities were used. Essentially, the investigative measures during all those years were limited to questioning witnesses and the applicant and carrying out forensic medical examinations. The weapon used in the attack against the applicant was searched for only two years later. Even though the proceedings were ongoing to this day, the last investigative action took place in December 2007. Therefore, the inaction of the law-enforcement authorities was clearly in breach of the requirements of Article 3 of the Convention, especially given that the pre-trial investigation had already lasted more than a decade without any culprits being identified.

61. The Government disagreed, and submitted that all the procedural requirements of Article 3 of the Convention – independence, promptness, and capacity to establish the facts – had been respected in the present case.

62. It was the Government's view that the pre-trial investigation was prolonged as a result of contradictory statements by the applicant. Most likely, the applicant had provided false information on the possible suspect. Even though he had identified the alleged suspect from the photographs, that version was rejected given that that suspect had not been present in the Pravieniškės Prison at the time of the incident. As to the crime weapon, there was no conclusive information about it, because the forensic medical expert's findings merely indicated that the applicant had sustained beatings (*muštinė žaizda*). Moreover, the phrase in the investigator's letter of 13 July 2005 did not mean that only as of that date had the weapon been searched for.

63. The applicant had been granted victim status early in the criminal proceedings, and had been fully informed of his procedural rights, thus

affording him the right to participate actively in the pre-trial investigation. However, the applicant had never submitted any complaints or requests in the course of the pre-trial investigation. It could therefore be presumed that the applicant was not willing to cooperate with the investigation authorities and to secure a positive outcome to the investigation.

2. The Court's assessment

(a) General principles

64. The Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation (see, *mutatis mutandis*, *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998-VIII, and *Cucu v. Romania*, no. 22362/06, § 89, 13 November 2012). This obligation arises even where ill-treatment is inflicted by one detainee on another (see *Tautkus v. Lithuania*, no. 29474/09, § 59, 27 November 2012). The standard against which the investigation's effectiveness is to be assessed may be less exacting in cases such as the present one in which the ill-treatment has not been caused by use of force or similar direct official action. However, even in such situations, those concerned are entitled to an independent and impartial official investigation procedure that satisfies certain minimum standards as to its effectiveness (see, *mutatis mutandis*, *Česnulevičius*, cited above, § 93).

65. The Court has also held that an obligation to investigate "is not an obligation of result, but of means": not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. Thus, the investigation into serious allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard (see *Chember v. Russia*, no. 7188/03, § 61, ECHR 2008).

(b) Application of these principles to the present case

66. Turning to the facts of the present case, the Court notes that the applicant was injured on 25 May 2003 as a result of an assault by another inmate in the prison. The applicant's serious head injury, namely a severe skull fracture which required urgent surgery followed by lengthy rehabilitation, was confirmed by the medical report of 28 August 2003 and subsequent medical certificates.

67. The Court considers that the applicant's complaint of ill-treatment under Article 3 was, therefore, shown to be "arguable", and the domestic authorities were placed under the obligation to carry out an effective investigation with regard to the circumstances in which the applicant sustained his injury and which was "capable of leading to the identification and punishment of those responsible" (see, *mutatis mutandis*, *Gladyshev v. Russia*, no. 2807/04, § 59, 30 July 2009, and *Cucu*, cited above, § 95).

68. For an investigation to be considered effective the authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, a detailed statement concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, additional medical reports (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 134, ECHR 2004-IV (extracts)).

69. As regards the steps taken by the Lithuanian authorities, the Court observes that the pre-trial investigation was opened on the day the crime was committed. The same day the scene of the incident was inspected by an investigator of the Pravieniškės Prison (see paragraph 8 above). The prosecutor, a person independent from the Pravieniškės Prison authorities, was informed about the incident and oversaw the investigation (see paragraphs 8, 12, 23, 24, 26, 27, 29 and 31 above).

70. The Court reiterates the necessity to promptly gather evidence and perform other investigative actions, which can become impossible or excessively burdensome with the passage of time (see *Jasinskis v. Latvia*, no. 45744/08, § 79, 21 December 2010). It observes that from May to December 2003 the applicant and twenty eight witnesses were questioned, and forensic medical examinations were ordered and carried out (see paragraph 20 above). In July 2003, the authorities granted the applicant victim status. Photos of potential suspects were shown to the applicant and the witnesses (see paragraphs 14, 17 and 20 above; also compare with *Generalov v. Russia*, no. 24325/03, § 141, 9 July 2009).

71. Following those actions and statements by the applicant on 10 and 25 September 2003, a certain E.J. was identified as a potential suspect in respect of the applicant's injury. Subsequently E.J. was questioned by the investigator. However, having regard to his statement and the additional information collected from E.J.'s personal file, the investigator concluded that E.J. should not be considered a suspect, given that he was in another prison at the time of the incident (see paragraphs 17-19 above). Having

examined the documents in its possession, the Court finds no reason to doubt the investigator's conclusion in that respect. At this juncture the Court cannot but observe that throughout the criminal investigation the applicant simply claimed memory loss and did not point to another person to assist the criminal investigation (see paragraphs 14 and 59 above; also see, *mutatis mutandis*, *Mehmet Şahin and Others v. Turkey*, no. 5881/02, § 34, 30 September 2008).

72. Turning to the Government's argument that the applicant himself was not active enough in speeding up the proceedings, the Court reiterates that it has already acknowledged the applicant's mother having tried to ensure his interests (see paragraph 51 above). In respect of detainees the Court has held that, as regards the States' positive obligations under Article 3 of the Convention, the State authorities cannot leave it to the initiative of the victim or his family members to take responsibility for the conduct of any investigative procedures (see, in context of Article 2, *Petrović v. Serbia*, no. 40485/08, §§ 73 and 74, 15 July 2014). Accordingly, the Court dismisses the Government's objection that the applicant failed to exhaust the criminal law remedy.

73. The Court further observes that since December 2003 the actions taken by the investigators have been less frequent. Additional operational measures were ordered and performed in May-July 2005 and in 2007, which, however, did not produce any leads to pursue (see paragraphs 21-24 and 28 above).

74. During the proceedings before this Court the applicant claimed that the investigator had ordered the search for the crime weapon only in July 2005. Whilst noting that the applicant had mentioned the knife during his questioning on 10 September 2003, the Court observes that the medical reports, including the one prepared immediately after the crime, describe the applicant's wounds as the result of beating, without mentioning stabbing wounds (see paragraphs 10, 15, 17 and 21 above). Moreover, the scene of the crime was inspected on the day of the event (see paragraph 8 above). The applicant in this case did not point to any other measures of investigation that were available to the authorities but which they did not avail themselves of (contrast with *Šečić v. Croatia*, no. 40116/02, §§ 56-58, 31 May 2007).

75. The applicant gave much weight to the fact that to this day the pre-trial investigation has lasted for nearly twelve years, but the perpetrators are yet to be identified. That notwithstanding, the Court reiterates its constant position that the obligation on the State to conduct an effective investigation is one of means, not of result (see *Milanović v. Serbia*, no. 44614/07, § 86, 14 December 2010; also see *Ay v. Turkey*, no. 30951/96, § 68, 22 March 2005, with further references). Having regard to the facts of this case, and in the absence of tangible omissions on the part of the investigators, the Court is unable to find that the Lithuanian authorities were unwilling to bring to

justice the person or persons who injured the applicant whenever the available evidence so warranted.

76. In the light of the foregoing, the Court holds that there has been no violation of the procedural aspect of Article 3 of the Convention.

FOR THESE REASONS, THE COURT

1. *Joins to the merits* unanimously the Government's preliminary objection as regards the exhaustion of the criminal law remedy as regards the procedural aspect of Article 3 and dismisses it;

2. *Declares* by a majority the complaint concerning the substantive aspect of Article 3 of the Convention inadmissible on account of failure to lodge a civil claim;

3. *Declares* unanimously the complaint concerning the substantive aspect of Article 3 of the Convention inadmissible on account of failure to appeal against the decision not to prosecute;

4. *Declares* unanimously the complaint concerning the procedural aspect of Article 3 of the Convention admissible;

5. *Holds* unanimously that there has been no violation of Article 3 of the Convention under its procedural aspect.

Done in English, and notified in writing on 7 July 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Işıl Karakaş
Deputy Registrar	President

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

A.I.K.
A.C.

CONCURRING OPINION BY JUDGE KŪRIS

1. I consider this judgment fair.

As a rule, judgments are fair when the conclusions reached are based on consistent reasoning. Of course, this is not the only condition for achieving fairness, but it is nevertheless an indispensable one.

Or so it would seem in theory, but it is not always true in practice. At least not in this case.

2. The reasoning which led to the finding of non-violation of Article 3 of the Convention under its procedural aspect, as it appears on paper, lacks consistency. An essential argument has been passed over in silence.

Not long ago, in 2012, in *Česnulevičius v. Lithuania* (no. 13462/06, 10 January 2012), the Court found a violation of Article 2 § 1 of the Convention under its procedural aspect (under the substantive head, too). The events mentioned in *Česnulevičius* and *Kardišauskas* had taken place in the same prison, except that *Česnulevičius* was an Article 2 case because the inmate died.

The *Česnulevičius* judgment reads (§ 99) (emphasis added):

> However, in the instant case, the Court finds that anonymous witnesses do not appear to have been the only source of evidence. Although it is not the Court's role to assess the probative value of each piece of evidence, it cannot fail to note that on 4 April 2000 a metal bar and masks with holes were found at the crime scene and that, according to the applicant, the guards apprehended three identified prisoners nearby. Lastly, *the Court also gives substantial weight to the Kaunas Regional Prosecutor's suggestion that the anonymous witnesses could have been questioned once they had finished serving their sentences ... . Given that more than eleven years have passed since the death of the applicant's son, it is not unreasonable to assume that at least some of those witnesses are at large by now. Nonetheless, the Government have not provided any information as to whether those witnesses, except for one of them ..., have been questioned by the prosecutors again with a view to compelling them to testify.*

And § 73 of the present judgment states:

> The Court further observes that since December 2003 the actions taken by the investigators have been less frequent. Additional operational measures were ordered and performed in May-July 2005 and in 2007, which, however, did not produce any leads to pursue (see paragraphs 21-24 and 28 above).

Full stop.

We are now in the year 2015, eight years after the last "operational measure". In *Česnulevičius*, "substantial weight" was attached to a period of eleven years. In the present case, a time-lapse of eight years was deemed to merit not even one line of comment.

There are several outstanding differences pertaining to the procedure of investigating the crime (i.e. the procedural aspect either of Article 3 or Article 2 § 1 of the Convention) between *Kardišauskas* and *Česnulevičius* (see in particular § 96 of the latter judgment). First of all, unlike in *Česnulevičius*, the investigation in *Kardišauskas* had not been frequently

closed and reopened. Secondly, unlike in *Česnulevičius*, in the present case the authorities did not fail to order proper expert examinations. Thirdly, unlike in *Česnulevičius*, there is nothing in this case to suggest that the investigation was not carried out by competent, qualified and impartial experts. Fourthly, unlike in that earlier case, where there was obvious inaction on the part of the investigating authorities, in *Kardišauskas* the investigation is continuing, albeit slowly and with no success as yet.

But even given all these differences, the "eleven years" argument had been of special importance in *Česnulevičius*, a pinnacle of its line of reasoning. Therefore, it would have been logical for the Court in this case to reach a conclusion similar to that in *Česnulevičius*. Instead, the "eight years" circumstance was not even addressed, and the opposite conclusion was reached, namely no violation.

Why did the Court make a different finding? It has provided no explanation. This omission might be interpreted as tacitly setting a "threshold" for the "permissible" protraction of an investigation: eight years might be all well and good, but eleven years would constitute a violation of the procedural head of Article 2.

Such an interpretation would be utterly wrong. The Court should not have left any possibility for it.

The possibility of such speculation could have been eliminated (or at least minimised) had the Court explicitly stated what transpires from the case file, namely: (i) that the timing of "additional operational measures" was dependent on the possibilities for the investigators to question potential witnesses who had been inmates of the prison in May 2003 and who had already finished serving their sentences; (ii) that that was the strategy pursued by the investigators; and (iii) that such a strategy was neither unreasonable nor belated.

3. One further aspect has been passed over in silence. The judgment does not mention that, as it (also) transpires from the case file, the applicant's conduct in prison was far from commendable. True, in 2003-2011 he was commended six times for good behaviour; but he was also warned or received disciplinary penalties on sixteen occasions for breaching prison rules, namely for being intoxicated and (*sic!*) using physical force against another prisoner. Given this record of disciplinary violations, the applicant could hardly be considered a genuinely vulnerable type of prisoner.

Nor could he be considered credible. He had misled the investigation on several counts, including the weapon and the nature of the attack on him, as well as the personality of the alleged attacker (see, respectively, paragraphs 17, 21 and 74, 17-19 and 71 of the judgment). The authorities showed leniency by refraining from investigating the manner in which the deliberate false accusation, by the applicant, of an uninvolved person of having committed a serious offence were dealt with under criminal

legislation.

Against this whole background, one might wish that more weight had been given in the judgment to the Government's submission that "the applicant was not willing to cooperate with the investigation authorities and to secure a positive outcome to the investigation" (§ 63 of the judgment). *Curantes iura iuvant*, and, I believe, vice versa.