

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

SECOND SECTION

CASE OF VENSKUTĖ v. LITHUANIA

(Application no. 10645/08)

JUDGMENT

STRASBOURG

11 December 2012

FINAL

11/03/2013

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



In the case of Venskutė v. Lithuania,

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

Guido Raimondi, *President,*
Danutė Jočienė,
Peer Lorenzen,
András Sajó,
Işıl Karakaş,
Nebojša Vučinić,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 20 November 2012,

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

PROCEDURE

1. The case originated in an application (no. 10645/08) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Ms Marytė Venskutė ("the applicant"), on 22 February 2008.

2. The applicant was represented by Mr S. Zabita, a lawyer practising in Vilnius. The Lithuanian Government ("the Government") were represented by their Agent, Ms E. Baltutytė.

3. The applicant alleged that she had been deprived of her liberty in breach of Article 5 § 1 of the Convention. She also alleged that her right to compensation for unlawful detention, as provided for by Article 5 § 5, had been violated.

4. On 25 March 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1978 and lives in Vilnius.

A. Criminal investigation into insurance fraud and the circumstances surrounding the applicant's arrest

6. On 23 May 2005 the State Border Guard Service (hereinafter "the SBGS" or "the Service") informed a prosecutor that on 16 December 2004 an officer at the SBGS, G.B., acting together with the applicant, who had been driving the car, and Š.S., had committed a crime of fraud by simulating a car accident and later claiming payment from an insurance company.

7. The same day the prosecutor asked the SBGS to open a pre-trial investigation on suspicion of fraud, in accordance with Article 167 of the Code of Criminal Procedure (hereinafter "the CCP") (see Relevant Domestic Law below).

Later that day the SBGS opened the pre-trial investigation on the basis of Article 171 of the CCP.

8. On 25 May 2005, at about 10.30 a.m., two men, who introduced themselves as officers of the Service, went to the applicant's workplace, the "Fortas" restaurant, in Vilnius city centre. From then on, the applicant's and the Government's versions of events differ.

9. The applicant stated that the two officers had asked her to accompany them and threatened to use restraining measures should she not comply. She had not been allowed to contact anyone by telephone, except for her supervisor. She had then been taken to the officers' car and driven to the Vilnius headquarters of the Service. On arrival her handbag had been searched, her mobile telephone had been taken away and the officers had read her text messages. The officers had not returned the telephone to the applicant until 8 July 2005. Immediately after the search, the officers had started interrogating the applicant about the circumstances of the car accident of 16 December 2004. She had been threatened with loss of reputation, placement in a detention facility, conviction and loss of career opportunities, unless she gave them information necessary for the insurance fraud investigation. The officers had refused the applicant's request for a lawyer. They had also dismissed her request that a record be made of her questioning, saying that it was for them to decide "what to write down and what not to". Likewise, the officers refused to explain to the applicant what her procedural status was at that moment.

10. The Government did not dispute that the SBGS officers had gone to the applicant's workplace at about 10.30 a.m. on 25 May 2005. However, the Government submitted that no force or threats had been used against the applicant; she had merely been invited to accompany the officers for questioning.

11. According to the report of the applicant's provisional arrest, she was arrested at 3 p.m. the same day. Even though the arrest took place while the applicant was at the Vilnius headquarters of the Service, the arrest report specifies that she had been arrested "at Vilnius international airport" on

suspicion of fraud. The report stated that it had been necessary to arrest the applicant because she might flee from the investigators or prosecutor, or commit further offences.

The officers also made a record of the personal search of the applicant, which stated that the search had been conducted between 3.10 and 3.40 p.m. on 25 May 2005.

Later that day the applicant was taken to a police detention facility; her sister had been informed of her arrest.

12. The same day at 3 p.m. the SBGS arrested Š.S. and questioned him, as a suspect, about the circumstances surrounding the car accident and the suspected insurance fraud.

13. On 26 May 2005 from 3.20 to 3.40 p.m. the SBGS tried to question G.B., as a suspect, about the car accident and insurance fraud, but G.B. refused to give any evidence.

After further questioning as a suspect on 2 June, G.B. testified that the car had been driven by the applicant, but denied any involvement in the insurance fraud.

14. As it transpires from the report of the applicant's interrogation, on 26 May 2005 from 4.15 to 5 p.m., the SBGS investigator questioned the applicant about the insurance fraud. At that time her procedural status was that of a suspect; her lawyer was present at the questioning. The applicant refused to testify.

15. The same day at 6. p.m. the SBGS investigator decided to release the applicant, because "there were no reasons to keep her under arrest". He noted that the applicant "had been arrested on 25 May on the basis of Article 140 of the Code of Criminal Procedure".

B. Investigation of the circumstances surrounding the applicant's arrest by the prosecutors, the Ombudsman and the SBGS

16. On 26 May 2005 the applicant's lawyer complained to the Vilnius Regional Prosecutor's Office that the previous day his client had been arrested by the SBGS officers in breach of Article 140 of the CCP. He also maintained that she "had been questioned before being granted the status of a suspect (*nepareiškus jai įtarimo*) and forced to testify". The lawyer contended that the pre-trial investigation had not been within the SBGS's competence and jurisdiction, as it was related to insurance fraud.

17. On 13 June 2005 the Vilnius Regional Prosecutor's Office replied that the pre-trial investigation had been opened in accordance with the domestic law. The reply did not say that the decision could be appealed against.

18. On 16 June 2005 the applicant wrote to the Ombudsman, the Chief Inspector of the Ministry of the Interior, the Attorney General and the Director of the SBGS. She stated that on 25 May at about 10.30 a.m., two

officers of the SBGS had gone to her workplace at the "Fortas" restaurant in Vilnius. She had been forced to leave with them, and had been taken to the SBGS's Vilnius headquarters and questioned about the car accident. The applicant reiterated that the SBGS officers had refused to record her questioning, had not explained her rights to her, and had not allowed her to make telephone calls. No one had answered her question whether she could leave; nor had they explained what her procedural status was at that time. She had been threatened with conviction, placement in a detention facility, and the end of her career unless she agreed to confirm the SBGS's account of the car accident. Relying on Article 5 of the Convention, the applicant argued that her right to liberty had been breached. She maintained that the SBGS officers had acted in an arbitrary fashion.

19. By a decision of 21 July 2005, the Vilnius Regional Prosecutor's Office found no flaws or abuse of powers in the actions of the SBGS officers and refused to open a pre-trial investigation into their actions. The prosecutor noted that the applicant had been arrested on 25 May 2005 at "3 p.m.", as stated in the provisional arrest report. The following day she had been served with notice of suspicion of the crime of fraud and had been questioned as a suspect from 4.15 to 5 p.m. Therefore the applicant's allegation that she had been questioned without a record being drawn up was false. Lastly, the prosecutor held that it was only because of "a technical mistake" that the report of the applicant's arrest had specified her place of arrest as Vilnius Airport.

The decision stipulated that it could be appealed against to an investigating judge. The applicant did not appeal against the decision.

20. On 25 May and 16 June 2005, the applicant lodged complaints with the Parliamentary Ombudsman.

21. On 5 August 2005 the Ombudsman found the applicant's complaint valid. He noted that under Article 182 § 2 of the CCP investigating officers had the possibility to call a person for questioning orally, without notifying him about it in writing. This could be done, for example, by a telephone call or via family members of the person invited. He stressed that the provision simply referred to the "transfer of a message (*informacijos perdavimas*)" that a person ought to come for questioning. However, in the applicant's case, on 25 May 2005 at about 10 or 11 a.m., the SBGS officers had not merely conveyed a message to her, but had in fact taken her in [by force, *atvesdino*] or even arrested her. On this point the Ombudsman also referred to the written reply by the Head of the SBGS Vilnius Office to the effect that the officers who went to the applicant's workplace had demanded (*buvo pareikalauta*) that she go with them so that she could not contact the other suspects and thereby obstruct the investigation.

22. In the same written reply to the Ombudsman, the Head of the SBGS Vilnius Office also said that once the applicant had been taken to their headquarters, she had told the officers that she knew nothing about the car

accident; accordingly, she had not been questioned as a witness. For the Ombudsman, however, the SBGS officers' actions when trying to find out whether the applicant knew anything about the crime they were investigating had been nothing less than questioning. Such questioning had to be recorded in writing, in accordance with Article 183 of the CCP. Given that no record of questioning had been drawn up until 3 p.m., the Ombudsman considered that, until that time, the applicant had been held at the SBGS headquarters without a reason, and thus unlawfully.

23. The Ombudsman further noted that as of 3 p.m. the applicant had been arrested on suspicion of having committed fraud and on the ground that she might attempt to abscond from the investigation. No sufficiently strong evidence had been submitted to him to justify the applicant's arrest. Furthermore, the prosecutor in charge of the investigation had not subsequently asked a court to sanction the applicant's detention. Lastly, for the Ombudsman, there was no reasonable explanation as to why the fraud relating to the car accident should have been investigated by the SBGS officers.

24. Whilst conceding that it was not within his competence to assess the validity of the actions taken during the pre-trial investigation, on the basis of above considerations the Ombudsman concluded that the conduct of the SBGS investigators had had the sole aim of exerting psychological pressure on the applicant.

25. The Ombudsman also considered that the actions of the SBGS officers had given rise to a suspicion that they had committed a crime. As a result, he notified the Office of the Prosecutor General about the matter. The Minister of the Interior was also to be informed about the episode so that such incidents could be avoided in future.

26. In their reply of 23 September 2005 to a complaint lodged by the applicant on 16 June 2005, the SBGS noted that the applicant's allegations about abuse of power by its officers when arresting her had already been dismissed by the prosecution. The officers who had taken part in the applicant's arrest and their superiors had nevertheless been urged to take into consideration the Ombudsman's conclusions and to ensure that similar incidents were not repeated in future.

C. Outcome of the criminal proceedings for insurance fraud

27. By a decision of 25 November 2005, criminal proceedings against G.B. for insurance fraud were discontinued because of his death. For the same reason, proceedings against G.B. in respect of other charges pending against him (for forgery of an official document and smuggling people over the State border) were also terminated.

28. By a ruling of 5 January 2006, the pre-trial investigation into the charges of fraud by the applicant was discontinued. The prosecutor noted

that the applicant had been notified that she was suspected of the crime on 26 May 2005. However, she had refused to testify on those charges. Neither Š.S. nor G.B. had confirmed the applicant's involvement in the crime. As the applicant and G.B. had been friends, it could be only assumed that she had known about the fraud. Yet, this mere assumption was not sufficient evidence to prove her guilt.

29. On 11 July 2006 the Vilnius City First District Court found that Š.S. had committed fraud by simulating a car accident on 16 December 2004. However, the court relieved Š.S. of criminal liability as he had fully acknowledged his guilt and settled with the insurance company.

D. Civil proceedings for damages on account of the applicant's arrest

30. The applicant instituted civil proceedings for the damage sustained as a result of her allegedly unlawful arrest and questioning. She argued that the SBGS officers had exceeded their powers, because it was not within their competence to investigate crimes concerning road accidents. The applicant maintained that by being arrested at her workplace she had been humiliated in front of her colleagues and her reputation had been tarnished. Her arrest had been made public in the newspapers and on television. Her family and friends had learned about it, which had affected her relationship with them. The applicant maintained that on 25 May 2005 she had been interrogated at the SBGS Vilnius headquarters and forced to incriminate herself. No lawyer had been present, her rights had not been explained to her and she had not been allowed to make a telephone call. She complained that her rights under Article 5 of the Convention had been violated and claimed 4,350 Lithuanian litai (LTL) for pecuniary damage, LTL 100,000 for non-pecuniary damage and LTL 2,000 for litigation costs.

31. At the Vilnius Regional Court hearing on 16 November 2006, the applicant's employer, the manager of the Fortas restaurant, testified that on 25 May he had received a telephone call from her. The applicant had explained that she had been arrested because of a car accident. He said that there were "such stereotypes in society that after someone has been arrested, others regard them with considerable suspicion". Two waitresses who had been working with the applicant the day "when the applicant was arrested" testified that "the applicant was taken away quickly", the officers "showed identification of some kind" and "demanded that the applicant went with them", one waitress had seen "how the officers took the applicant with them". The applicant's colleagues also testified that the events had surprised them, and, although for that day they had remained without a supervisor, "there was no panic among the colleagues, but they asked each other what had happened. Everyone was interested to know what had happened". The applicant's lawyer maintained that his client had been taken from her

workplace by force. He also argued that such actions in front of the applicant's colleagues had stained her reputation. The applicant had left her job four months later.

32. On 30 November 2006 the Vilnius Regional Court dismissed the applicant's claims. It found that the applicant had been suspected of having committed fraud and arrested for fear that she would flee from justice or commit new crimes. The SBGS officers had jurisdiction in the applicant's case on the basis of the prosecutor's decision of 23 May 2005. The court also referred to the Court's judgment in *Labita v. Italy* ([GC], no. 26772/95, ECHR 2000-IV) to the effect that the fact that the applicant's case had not gone to trial at a later stage did not mean that her arrest during the criminal investigation had been unlawful as such. The prosecutor's decision to discontinue the pre-trial investigation in respect of the applicant did not mean that the investigative measures had been unlawful, since the pre-trial investigation had been discontinued because of lack of evidence.

33. The first-instance court noted that reports of the applicant's arrest and questioning as a suspect had been made "after the applicant's arrest", although the court did not specify the exact time when the arrest had taken place. Moreover, as the applicant had conceded at the hearing, "on the day of her arrest" she had been allowed to have a lawyer. Lastly, the court noted that the applicant's claims about her arbitrary arrest and questioning had been dismissed by the prosecutor and the SBGS on 13 June and 21 July 2005 respectively.

34. The applicant appealed, reiterating her complaint about abuse of powers by the SBGS. In the applicant's view, it was not logical to have her arrested half a year after the car accident. The reason given to justify her arrest and detention – that she might hide from the investigators – had been even more preposterous given that there had been no evidence that she intended to flee. She invoked Article 5 of the Convention.

35. At the Court of Appeal hearing of 8 May 2007 the applicant's lawyer argued that his client had been arrested at her workplace and detained for two days, partly in the SBGS's Vilnius headquarters. She had been pressured to give evidence against G.B. The SBGS officers had acted outside their jurisdiction.

The representatives of the State, which was the defendant in the civil proceedings for damages, maintained that the SBGS did have jurisdiction to investigate the crime of insurance fraud. The applicant had been arrested "on 25 May" and charged with fraud "on 26 May". Above all, they stressed that the applicant had been merely "invited" to accompany the SBGS officers when they had arrived at her workplace. No incidents took place at the "Fortas" restaurant and the applicant had accompanied the officers calmly.

36. By a ruling of 22 May 2007 the Court of Appeal concurred with the lower court's conclusion that the prosecutor's decision to discontinue

criminal proceedings in respect of the applicant did not mean that her arrest had been unlawful as such. Moreover, the proceedings against the applicant had been discontinued because of lack of evidence and not for reasons of rehabilitation. The appellate court noted that the applicant's complaints that the SBGS officers had abused their powers had been dismissed by the prosecutor. That being so, the court nevertheless emphasised that it had competence to hear the applicant's civil claim for damages, even though she had not appealed against the prosecutor's decision to drop the criminal charges against the officers. On this point it referred to the Supreme Court's ruling in civil case no. 3K-7-183/2006 (see paragraph 50 below).

37. The Court of Appeal also held that "on 25 May 2005 the applicant had been arrested at 3 p.m." According to the court, the applicant had not been arrested at her workplace; the officers had merely "invited" her to go with them for questioning, in accordance with Article 182 § 2 of the Code of Criminal Procedure. There was no evidence in the case file that by inviting the applicant for questioning in the manner regulated by the above provision, the SBGS officers had breached the law. For the court, "the fact that before arresting her, notifying her of the charges and questioning her as a suspect [all at 3 p.m.], the officers had discussed with her the circumstances relating to a pre-trial investigation, without making a record of that conversation, did not disclose any unlawfulness, because a conversation [between the applicant and the officers] and questioning were two separate notions". Accordingly, the appellate court dismissed the applicant's civil claim, which she had based on Article 6.272 of the Civil Code and Article 5 of the Convention.

38. The applicant lodged three appeals on points of law, which, on 18 July and 13 and 24 August 2007, the Supreme Court refused to examine as raising only questions of fact and thus giving no grounds for cassation.

II. RELEVANT DOMESTIC LAW AND PRACTICE

39. Article 20 of the Constitution of the Republic of Lithuania provides that the freedom of a human being is inviolable. No one may be arbitrarily detained or arrested. No one may be deprived of his freedom, except on grounds and according to procedures established by law. A person detained *in flagrante delicto* must be brought before a court within 48 hours for the purpose of obtaining a decision, in the presence of the detainee, on the validity of the detention. If the court does not decide that the detainee should be arrested, he or she will be released immediately.

40. In an opinion of 24 January 1995, the Constitutional Court held that Article 5 of the Convention was in compliance with Article 20 of the Lithuanian Constitution.

41. Article 31 of the Constitution provides that a person suspected of committing a crime will be guaranteed, from the moment of his or her

detention or first questioning, the right to defend himself and the right to a lawyer.

42. Article 182 of the Criminal Code provides for criminal liability for fraud. The offence is punishable by community service, a fine, restriction of liberty, arrest, or imprisonment for a term of up to three years. A pre-trial investigation of the crime of fraud may be started only on the basis of a complaint by a victim or by a prosecutor's order (Article 167 of the Code of Criminal Procedure).

43. The Code of Criminal Procedure provides that a witness is any person who has knowledge about circumstances relevant to a criminal case (Article 78). A witness has the right to have an audio or video recording made of his testimony. He has the right to read the record of his testimony, make corrections and write his own testimony (Article 81 §§ 2 and 4). Anyone called as a witness must testify before the pre-trial investigation officer, failing which he may be fined or arrested (Articles 83 and 167).

44. A prosecutor or an investigator may provisionally arrest a person caught *in flagrante delicto*. Provisional arrest is also possible if there is a reasonable assumption that the person may obstruct the course of justice by influencing other suspects or commit further offences. Provisional arrest may last up to forty-eight hours without the authorisation of a judge (Articles 122 and 140).

45. The Code of Criminal Procedure also provides that any investigative measure, such as the questioning of a witness or suspect, must be recorded. The measure may be documented by audio or video recording or by other means. The record must be drawn up while the investigative measure is being taken (*tyrimo veiksmo metu*) or immediately thereafter. The record must state the place and time of the measure and the persons present. The investigating officer and all those present must sign the record. If the person in respect of whom the measure was taken refuses to sign the record, this must also be noted in the record (Article 179 of the Code).

46. Concerning the way in which a person may be called for questioning, the Code of Criminal Procedure reads as follows:

Article 182. Summons for questioning

> "1. A person shall be called for questioning by summons. The summons shall indicate: the person to be summoned and for what purpose, the place and to whom he is being summoned, the date and time when he has to appear, and the consequences of failure to appear, as provided for in Article 163 of the Code.
>
> 2. A person may also be summoned for questioning by telephone or in any other way. In such cases, coercive procedural measures provided for in Article 163 of this Code may not be taken for failure to appear."

47. The Code then defines the rules for questioning witnesses and suspects. Article 183 of the Code provides that before questioning a witness,

an investigator must explain his rights to him under Articles 81 and 83 of the Code, as well as liability for false testimony. The witness confirms that he has understood by signing the record. The investigator then asks the witness to tell everything he knows about the case. Lastly, the witness's testimony is recorded in accordance with Article 179 of the Code (see above).

Before questioning a suspect, an investigator must tell him what crime he is suspected of and explain his rights to him (Article 187). The suspect is then asked whether he confesses and is offered the opportunity to testify about the circumstances of the crime. As in the case of witnesses, his questioning is recorded in accordance with the requirements of Article 179 of the Code.

48. The Law on the State Border Guard Service provides that when exercising the pre-trial investigation functions assigned to it, the Service operates in the entire territory of the State (Article 2 § 6). Upon receiving information that a crime may have taken place, a prosecutor decides which pre-trial investigation institution is competent to carry out a particular investigation, and assigns the case to it. Afterwards, the designated institution may take all the investigative measures provided for by the Code of Criminal Procedure (Articles 171 and 172 of that Code).

49. As regards civil liability for damages, Article 6.272 § 1 of the Civil Code provides that damage caused as a result of unlawful arrest as a measure of oppression, from unlawful detention, or the application of unlawful procedural measures of enforcement, will be compensated fully by the State, irrespective of whether the officials involved in the preliminary investigation or prosecution were at fault. Article 6.272 § 3 stipulates that in addition to compensation for pecuniary damage, the aggrieved person is entitled to compensation for non-pecuniary damage.

50. On 7 June 2006 the Supreme Court ruled that Article 6.272 § 1 was a directly applicable legal norm. A court of civil jurisdiction could rely on it irrespective of whether the procedural measures which had allegedly caused damage to the plaintiff had been challenged in other [criminal] proceedings. Furthermore, even if in criminal proceedings it had been established that the measures taken by the pre-trial investigators had been lawful, a civil court was free to find that those measures had caused damage to the claimant if all the circumstances examined in the civil proceedings so proved (ruling in civil case no. 3K-7-183/2006).

51. Concerning civil liability and redress, the Supreme Court, in a decision of 21 December 2007 in civil case no. 3K-3-506, held as follows:

> "When deciding the question of redress within the meaning of Article 6.272 of the Civil Code, ... the parties must prove all the circumstances by which they justify their claims, except where the claims are based on circumstances that [do not have to be proven]. These circumstances are listed in Article 182 of the Code of Civil Procedure. The Supreme Court has held that facts established by the decisions of the pre-trial investigation institutions (prosecutors), contrary to those established by a court

judgment or decision, are not binding (*prejudiciniai*) within the meaning of Article 182 §§ 2 and 3 of the Code of Civil Procedure ... Therefore, according to the statutory regulations and the case-law of the courts, the court deciding questions concerning the redress provided for by Article 6.272 of the Civil Code, where the claim for redress has been lodged regarding a remand measure unlawfully imposed by a pre-trial investigation officer, may justify its findings with any factual data, on the basis of which it shall establish the circumstances substantiating the claims of the parties and other circumstances relevant for the resolution of the case..."

THE LAW

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

52. The applicant complained that on 25 May 2005 she had been arbitrarily deprived of her liberty, in breach of Article 5 § 1 of the Convention, which reads, in so far as relevant, as follows:

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

(...)

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

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

A. The parties' submissions

1. The applicant

53. The applicant argued that the SBGS officers had arbitrarily deprived her of her liberty. She maintained that on 25 May 2005 at about 10.30 a.m., two officers had arrived at Fortas restaurant, where she was working as a supervisor, and had asked her to go with them. Although the domestic courts had found that the applicant had not been detained in her workplace and that the officers had merely asked her to accompany them for a simple conversation, the assessment of the officers' actions did not correspond to the reality and should be viewed critically. As determined by the

Ombudsman, the actions of the SBGS officers could not be regarded as an invitation for an interview because they did not comply with Article 182 § 2 of the Code of Criminal Procedure. That provision indeed provided that a person could be summoned orally. However, it did not restrict his or her decision whether to attend; the legal consequences of such measures were listed in Article 182 § 1. In the instant case it was clear that the applicant had not had any freedom of choice or the right to refuse the SBGS officers' order. Moreover, she had been obliged to accompany them in their car, without the opportunity to use a mobile telephone or contact a lawyer. Nor had the applicant been allowed to complete her shift, even though she had asked the officers to wait until midday when another employee could have replaced her. The applicant maintained that she had been threatened with the "use of special measures", should she not agree to go with the officers. Accordingly, it was not viable to state that she had been "invited" for questioning.

54. The applicant accordingly considered that she had actually been detained at her workplace as of 10.30 a.m. on 25 May 2005. For the following five hours, she had not been allowed to make a telephone call, her mobile telephone and other possessions having been taken away from her. According to the search record, the mobile telephone had been taken from her at between 3.15 and 3.40 p.m. However, had that been true, she could have called her lawyer earlier; she had not done so because she had been unable to act freely. For the applicant, it was also critical to note that she had had no means or possibility of recording the officers' unlawful actions when they had been questioning her regarding the car accident investigation. On this point she also observed that in accordance with Article 21 § 4 of the Code of Criminal Procedure, a suspect had the right to a lawyer from the "moment" of his or her arrest or interrogation. In her case, the SBGS officers had questioned her for a whole five hours, without any record being drawn up and denying her a lawyer.

55. The applicant also submitted that the report of her provisional arrest had been falsified: the officers' statement that she had been arrested at Vilnius International Airport had been made with the sole aim of obtaining jurisdiction to arrest her. This should not have been considered as a merely technical error, although the domestic courts had appeared to consider it as such. The officers should have been punished for falsification, but had been excused following the finding that they had made a "technical mistake".

56. The applicant also disputed the contention that it had been appropriate to hold her under provisional detention on the basis of Article 140 of the Code of Criminal Procedure. In her case there were no such grounds, because she had not been caught *in flagrante delicto* and had had no intention of absconding.

57. The applicant was also dissatisfied that all the complaints that she had lodged with the prosecutors had been without result.

58. Lastly, she argued that by being arrested at her workplace and in the presence of all her colleagues she had been discredited. She maintained that since the events of 25 May 2005 she had felt unsafe in Lithuania, and had therefore suffered serious non-pecuniary damage.

2. The Government

59. The Government submitted, firstly, that the complaint was inadmissible for failure to duly exhaust the domestic remedies. As regards the lawfulness of her arrest, the applicant had failed to address the competent authorities on a number of occasions, although she had been assisted by a lawyer at all times. The institution she had applied to was the Ombudsman, whose conclusions were merely of a recommendatory nature. As the Ombudsman himself had conceded, he did not have the competence to assess the lawfulness and reasonableness of procedural measures taken by the investigating officers.

60. The applicant's complaints had then been examined by the prosecutors, who had dismissed them on 13 June and 21 July 2005. The applicant had failed to appeal against those decisions to higher prosecutors and the criminal courts.

61. Alternatively, the Government maintained that the applicant's complaint was not founded. Their argument was as follows.

62. First, it was essential to note that the applicant had been provisionally arrested in the context of a pre-trial investigation into insurance fraud, committed by a group of persons. It had been important to question all three persons – the applicant, Š.S. and G.B. – at the same time so that they could not talk to each other and corroborate each other's versions. There had been a reasonable suspicion that the applicant had been involved in that crime. When deciding to question the applicant, the authorities had also taken into account that she and G.B. had been in close contact. The pre-trial investigation had eventually been discontinued because of G.B.'s death. As to the applicant, the investigation had been discontinued because of lack of evidence, which the Government considered to be a non-rehabilitating ground.

63. Furthermore, contrary to the Ombudsman's conclusions, the domestic courts had found that the SBGS officers had had the authority to carry out the pre-trial investigation in the applicant's case. The SBGS's powers derived from Articles 165, 171 and 172 of the Code of Criminal Procedure and Article 2 of the Law on State Border Guard Service. On that basis the officers of the Service had had full authority to take all the necessary investigative measures, including any coercive measures necessary for the speedy investigation of the crime, in the entire territory of the State.

64. Next, it was necessary to identify the moment from which the applicant could have been considered as deprived of her liberty. On this

point the Government maintained that the applicant had not been arrested at her workplace. Rather, she had been "invited" by the SBGS officers to accompany them for questioning, although the Government did not specify whether as a witness or as a suspect. The domestic courts had reached the same conclusion and, moreover, had not established that the applicant had refused to accompany the officers. Also, contrary to the applicant's allegation, it had not been established that the officers had threatened her when inviting her for questioning. The civil courts had also dismissed that accusation as unsubstantiated. Hence, a clear distinction had to be made between the invitation for questioning at the applicant's workplace and the moment of her true arrest. Accordingly, in the Government's view, the applicant had been provisionally arrested at 3 p.m. on 25 May 2005 and only from that moment had she been deprived of her liberty. Furthermore, it had not been proven that the officers had taken any procedural measures – until the moment of the applicant's arrest at 3 p.m. – that would have placed the applicant in a procedurally vulnerable position.

65. As to the legal grounds for depriving the applicant of her liberty, she had been provisionally arrested (*sulaikyta*) pursuant to Article 140 of the CCP which, in turn, referred to Article 122 of the CCP. In that the Government appeared to argue that the applicant's arrest had been based on the likelihood of her absconding or obstructing justice in the criminal case for insurance fraud. Furthermore, under the domestic law, the detention could last no longer than 48 hours, and this rule had been observed in the instant case, given that the applicant had been released from provisional arrest at 6 p.m. on 26 May, once the last and main suspect in the fraud case, G.B., had been questioned.

66. Whilst acknowledging the discrepancy as regards the place of the applicant's provisional arrest indicated in the arrest report, the Government submitted that that had been a technical mistake. The civil courts had reached the same conclusion. Furthermore, had the officers talked to the applicant without drawing up a record, the information thus obtained could not have been used against her in judicial proceedings and would have been excluded from the evidence. Therefore, and referring to *Mooren v. Germany* ([GC], no. 11364/03, § 84, 9 July 2009), the Government were certain that the applicant's provisional arrest had not rendered the underlying detention unlawful within the meaning of Article 5 § 1 of the Convention.

67. In the light of the foregoing arguments the Government maintained that the applicant's deprivation of liberty had been in accordance with the procedure prescribed by law and there were no indications of alleged arbitrariness on the part of the SBGS officers.

B. The Court's assessment

1. Admissibility

68. The Court first turns to the Government's argument that the applicant failed to properly exhaust the available domestic remedies, as she did not appeal against the prosecutor's decisions of 13 June and 21 July 2005 dismissing her complaints that the SBGS officers had abused their authority and unlawfully deprived her of her liberty. Whilst sharing the Government's observation as to the facts, it notes, nevertheless, that the applicant made full use of the remedy provided by the civil law procedure.

69. For the Court, in the circumstances of the instant case, it appears that both avenues – the criminal law one and the civil law one – could, in principle, if pursued successfully, have led to a decision determining that the SBGS officers had exceeded their powers during the events of 25 May 2005. Above all, the Court notes the appellate court's conclusion to the effect that the applicant's failure to appeal against the prosecutor's decision did not bar her from lodging a civil complaint so that the alleged misconduct of the investigating officers could be assessed in the framework of civil litigation (see paragraph 36 above). In this context the Court also lends considerable weight to the case-law of the Lithuanian Supreme Court, which held that the decisions of investigating officers in criminal proceedings, unlike those of a court, were not binding upon the courts of civil jurisdiction adjudicating a claim for damages (see paragraph 51 above). Lastly, given that in her application to the Court the applicant argued, *inter alia*, that her reputation had been tarnished by her arrest at her workplace, and complained under Article 5 § 5 that she had not received pecuniary compensation for her suffering, the Court sees no ground to hold that, in the light of the facts pertinent to the present case, there was a particular reason for the applicant to pursue, till the end, a criminal law remedy in addition to a civil law one, the effectiveness of which, all the more so, has not been disputed by the Government (see paragraph 84 below).

70. Accordingly, the Court finds that the applicant has exhausted the domestic remedies. The Court further notes that the complaint under Article 5 § 1 of the Convention is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Whether there was a deprivation of liberty

71. According to the Court's case-law, in order to determine whether there has been a deprivation of liberty, the starting-point must be the

specific situation of the individual concerned, and account must be taken of a whole range of factors arising in a particular case, such as the type, duration, effects and manner of implementation of the measure in question (see *Guzzardi v. Italy*, 6 November 1980, § 92, Series A no. 39). The Court must look beyond the appearances and concentrate on the realities of the situation complained of (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 38, Series A no. 50).

72. The right to liberty is too important in a "democratic society", within the meaning of the Convention, for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention. Detention may violate Article 5 even though the person concerned has agreed to it (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12; *Osypenko v. Ukraine*, no. 4634/04, § 48, 9 November 2010).

73. In the present case it is disputed by the parties whether at about 10.30 a.m. on 25 May 2005 the applicant accompanied the SBGS officers to their Vilnius headquarters of her own free will or as a result of mental coercion by the officers. In this context the Court notes that during the civil proceedings the applicant's colleagues at the "Fortas" restaurant testified that "the applicant was arrested", "the applicant was taken away quickly", the officers "showed identification of some kind" and "demanded that the applicant went with them", and "the officers took the applicant with them". Even though in their decisions the civil courts did not mention that evidence, the Court finds that it gives certain credibility to the applicant's argument that there was an element of coercion which affected the applicant's liberty and that she was arrested already at her workplace. Furthermore, the fact remains that from the moment the applicant was taken to the SBGS's premises, the investigators questioned her about the insurance fraud. This element was acknowledged by the Head of the SBGS Vilnius Office (see paragraph 22 above). It has not been contended by the Government, and it would be unrealistic to assume, that during that period of her questioning and until her "official" arrest at 3 p.m. the applicant was free to leave the SBGS's Vilnius headquarters at will, particularly bearing in mind that the Service officers apparently believed that she had been G.B.'s accomplice and were carrying out investigative measures in the criminal proceedings that had been instituted against her two days before her questioning (see *Osypenko*, cited above, § 49).

74. Lastly, the Court recalls that Article 5 § 1 of the Convention may also apply to deprivation of liberty of a very short duration (see, for instance, *Guenat v. Switzerland*, no. 24722/94, Commission decision of 10 April 1995, Decisions and Reports (DR) 81, p. 134; and, more recently, *Creangă v. Romania* [GC], no. 29226/03, § 93, 23 February 2012). It also considers that the applicants' involuntary stay at the SBGS's premises had not been dictated by the strict necessity to accomplish certain formalities

(see, in contrast, *Foka v. Turkey*, no. 28940/95, § 75, 24 June 2008), and that the SBGS officers had acted far from "humanitarian considerations" (see *Guenat*).

In these circumstances, the Court concludes that between 10.30 a.m. and 3 p.m. on 25 May when the Service investigators drew up the report of her provisional arrest, she was *de facto* deprived of her liberty within the meaning of Article 5 § 1.

(b) Compliance with Article 5 § 1 of the Convention

75. The Court reiterates that Article 5 of the Convention enshrines a fundamental right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. In proclaiming the "right to liberty", paragraph 1 of Article 5 contemplates the physical liberty of the person; its aim is to ensure that no one is deprived of that liberty in an arbitrary fashion. The Court also points out that paragraph 1 of Article 5 makes it clear that the guarantees it contains apply to "everyone". Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds. Where the "lawfulness" of detention is at issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see *Creangă*, cited above, § 84).

76. The Government appeared to argue that the applicant's arrest had been necessary for the effectiveness of the pre-trial investigation because she had been a suspect in an insurance fraud case. The SBGS officers had had full jurisdiction to investigate that crime. The applicant's arrest thus could be justified under sub-paragraph (c) of Article 5 § 1 of the Convention.

77. On the facts of the case the Court observes that on 23 May 2005 the prosecutor did indeed order the Vilnius city SBGS officers to open a pre-trial investigation on the basis that one of their colleagues was suspected of having committed a crime of fraud. It also notes that under Articles 167, 171 and 172 of the Code of Criminal Procedure, and Article 2 § 6 of the Law on State Border Guard Service, the SBGS officers are allowed to

conduct pre-trial investigations. The Court thus finds that the officers had the competence to take investigative measures in respect of the applicant.

78. The Court notes that the parties dispute the applicant's status until 3 p.m. of that day, when the record of her provisional arrest was drawn up. The applicant contended that she had been treated as a suspect, while the Government appeared to maintain that the applicant had merely had a conversation with the investigators and thus did not yet have the status of suspect.

79. Be that as it may, the Court cannot overlook the fact that, in pursuance of Article 179 of the Code of Criminal Procedure, an investigating officer is under an obligation to draw up a report of the questioning of a suspect or a witness, either from the moment of questioning or immediately afterwards. The Court has already found that during the time at issue the applicant was questioned by the investigators, yet no record of her questioning was drawn up. Accordingly, the applicant did not have her rights explained to her, in accordance with Articles 183 and 187 of the CCP (paragraph 47 above), either as a witness or as a suspect. In this context the Court notes that a record of the applicant's questioning as a suspect was not drawn up until the following day at 4.15 p.m. (see paragraph 14 above). The Court finds this particularly troubling, given that the investigating officers appear to have relied on tactics where someone was first brought to their premises to testify as a witness or even in an unspecified capacity, while in reality they considered that person to be a suspect. Such approach may deprive the alleged suspect of the procedural guarantees that follow from the requirements of fair trial (see, *mutatis mutandis*, *Salduz v. Turkey* [GC], no. 36391/02, § 54, ECHR 2008). That being so, the Court finds that the SBGS officers' intention was to threaten the applicant in order to extract information from her about the crime they were investigating.

80. Lastly, the Court has had occasion to hold that the absence of an arrest record must in itself be considered a most serious failing, as it has been the Court's constant view that unrecorded detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and discloses a most grave violation of that provision. The absence of a record of such details as the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it must be seen as incompatible with the requirement of lawfulness and with the very purpose of Article 5 of the Convention (see *Fedotov v. Russia*, no. 5140/02, § 78, 25 October 2005; *Menesheva v. Russia*, no. 59261/00, § 87, ECHR 2006-III; and *Belousov v. Russia*, no. 1748/02, § 72, 2 October 2008). In the instant case the Court has already concluded that as of 10.30 a.m. on 25 May 2005 the applicant was under the control of the Service officers. Whilst acknowledging that the record of her provisional arrest was drawn up some four hours later, the Court nonetheless observes that that document indicated the applicant's

arrest time as 3 p.m. The lack of a proper record of the applicant's arrest is therefore sufficient for the Court to hold that her confinement for that time was in breach of Article 179 of the CCP (paragraph 45 above), which provides that each investigative action must be documented, and contrary to the requirements implicit in Article 5 of the Convention for the proper recording of deprivations of liberty (see, *mutatis mutandis*, *Anguelova v. Bulgaria*, no. 38361/97, § 157, ECHR 2002-IV; *Menesheva*, cited above, §§ 87-89; and *Belousov*, cited above, § 73). Given the SBGS officers' intentional omission to apply the relevant legislation correctly, the Court also finds that the applicant's detention until 3 p.m. was "arbitrary" (see *Mooren*, cited above, § 78).

81. In the light of foregoing considerations, the Court holds that here has been a violation of Article 5 § 1 of the Convention on account of the applicant being deprived of her liberty from 10.30 a.m. to 3 p.m. on 25 May 2005.

II. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

82. The applicant also complained that the dismissal of her civil action for damages for her unlawful arrest was in breach of Article 5 § 5 of the Convention, which reads as follows:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. The parties' submissions

83. The applicant argued that her arrest at her workplace in front of her colleagues had humiliated her and tarnished her reputation. She alleged that the SBGS officers who had arbitrarily detained her had harassed and intimidated her, and she had lost her sense of security. However, the civil courts had refused to hold the SBGS officers accountable for their unlawful actions and to award the applicant compensation.

84. The Government submitted that the applicant had an effective and enforceable right to compensation for allegedly unlawful detention. She had exercised that right successfully by lodging a civil claim for damages with the domestic courts on the basis of Article 6.272 of the Civil Code. The civil claim had been examined without arbitrariness and dismissed as unfounded. It followed that the requirements of Article 5 § 5 of the Convention had been met in the instant case.

B. The Court's assessment

85. The Court reiterates that Article 5 § 5 guarantees an enforceable right to compensation to those who have been the victims of arrest or detention in contravention of the other provisions of Article 5 (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 81, *Reports of Judgments and Decisions* 1998-VII).

86. In the present case the Court has found a violation of Article 5 § 1, in conjunction with which the present complaint is to be examined. It follows that Article 5 § 5 of the Convention is applicable. The Court must therefore establish whether Lithuanian law afforded the applicant an enforceable right to compensation for the breach of Article 5 § 1 of the Convention in her case.

87. The Court notes that the issue of compensation for unlawful arrest is regulated in Lithuania by Article 6.272 of the Civil Code, which provides that the State will compensate a person for pecuniary and non-pecuniary damage he or she has sustained as a result of the unlawful actions of investigating officers. As the Supreme Court held in case no. 3K-7-183/2006, a court of civil jurisdiction could apply that legal provision irrespective of whether the procedural actions which had allegedly caused damage to the plaintiff had been challenged in criminal proceedings. Furthermore, even if in criminal proceedings it had been established that the actions of the pre-trial investigators were lawful, a civil court was free to find that those actions had caused damage to the claimant if all the circumstances examined in the civil proceedings so proved (see paragraph 50 above). Likewise, the Court draws attention to ruling no. 3K-3-506 by the Lithuanian Supreme Court, in which it held that the decisions of the investigative officers and prosecutors did not have a prejudicial value when assessing whether particular actions by the investigating authorities had been lawful (see paragraph 51 above). The Court notes that in the instant case the applicant's civil claim for pecuniary and non-pecuniary damages was dismissed as unfounded. Yet the Court is reluctant to find that this fact, in itself, is sufficiently conclusive to hold that no legal procedure was envisaged for bringing proceedings in order to seek compensation for the deprivation of liberty found by the Strasbourg Court to be in breach of one of the other paragraphs of Article 5 (see, for the opposite conclusion, *Klishyn v. Ukraine,* no. 30671/04, §§ 97 and 98, 23 February 2012).

88. Against this background, the Court finds that the applicant had an enforceable right to compensation for her unlawful detention, as required by Article 5 § 5 of the Convention. There has, therefore, been no violation of that provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

89. 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

90. The applicant claimed 350 Lithuanian litai (LTL; approximately 100 euros (EUR)) in respect of pecuniary damage, for clothes spoiled during her detention. She admitted, however, that she had no documents to support the claim. She also claimed LTL 345,000 (approximately EUR 100,000) in respect of non-pecuniary damage.

91. The Government disputed the claims as unsubstantiated and excessive.

92. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 7,500 in respect of non-pecuniary damage.

B. Costs and expenses

93. The applicant also claimed LTL 4,000 (EUR 1,160) and LTL 2,000 (EUR 580) for the legal costs and expenses incurred before the domestic courts in criminal and civil proceedings respectively, and LTL 5,000 (EUR 1,150) for those incurred before the Court. Lastly, she submitted a copy of a bank transfer in the sum of LTL 720 (EUR 210) for translation costs in connection with the Court proceedings.

94. The Government argued that the expenses incurred for the applicant's legal representation in the criminal proceedings were irrelevant to the instant case before the Court. They also submitted that the remaining claims had not been properly substantiated.

95. 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 rejects the claim for costs and expenses in the domestic proceedings before the domestic courts of criminal jurisdiction. However, the Court considers it reasonable to award the sum of EUR 2,000 for the costs and expenses in the proceedings before the domestic courts of civil jurisdiction and before the Court.

C. Default interest

96. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been no violation of Article 5 § 5 of the Convention;

4. *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 amounts, to be converted into Lithuanian litas at the rate applicable at the date of settlement:
      (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (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;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 December 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President