CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 42095/98
by Henrikas DAKTARAS
against Lithuania

The European Court of Human Rights (Third Section) sitting on 11 January 2000 as a Chamber composed of

Mr J.-P. Costa, *President*,
Sir Nicolas Bratza,
Mr L. Loucaides,
Mrs F. Tulkens,
Mr W. Fuhrmann,
Mrs H.S. Greve,
Mr K. Traja, *judges*,

and Mrs D. Dollé, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 11 May 1998 by Henrikas Daktaras against Lithuania and registered on 8 July 1998 under file no. 42095/98;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 29 December 1998 and the observations in reply submitted by the applicant on 25 February 1999;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Lithuanian national, born in 1957. At present he is detained in the Rasų Prison in Vilnius.

He is represented before the Court by Mr R. Girdziušas, a lawyer practising in Kaunas, and Mr V. Sviderskis, a lawyer practising in Vilnius.

The facts of the case, as submitted by the parties, may be summarised as follows.

A. Particular circumstances of the case

The criminal proceedings

The applicant was convicted of affray in 1976 and 1977. In 1987 he was convicted of robbery and sentenced to eight years' imprisonment. He was released from prison in the early 1990's.

With the authorisation (*sankcija*) of the Deputy Prosecutor General, on 3 February 1996 the applicant was arrested under the preventive detention rule (*prevencinis sulaikymas*). His preventive detention was authorised for 60 days, which was confirmed by the President of the Criminal Division of the Vilnius Regional Court (*apygardos teismas*) on 5 February 1996. The preventive detention order in respect of the applicant referred to a general provision of the then in force Article 50-1 of the Code of Criminal Procedure, which permitted preventive detention in connection with banditism, criminal association and terrorising a person. On 12 February 1996 the President of the Vilnius Regional Court dismissed the applicant's appeal against the preventive detention order.

The applicant was suspected of beating up a Lithuanian pop singer and her boyfriend. On 5 February 1996 a criminal case for affray (hereinafter referred to as "the affray case") was initiated by a prosecutor of the Office of the Prosecutor General (*Generalinė prokuratūra*).

On 18 February 1996 the prosecutor also instituted criminal proceedings in a case where the applicant was suspected of being an accomplice in demanding and obtaining a ransom of 7,000 American dollars (USD) in return for recovering a stolen car (hereinafter referred to as "the ransom case").

On 1 April 1996 the applicant was charged on four counts in the ransom case. The main count was that of obtaining property by threats of force. On the same date the applicant was questioned concerning these charges.

On 1 April 1996 a prosecutor ordered the applicant's detention on remand based on the charges against him in the ransom case. On the same date, in a letter addressed to the director of the remand prison where the applicant was detained, the prosecutor requested the prison administration to prohibit, until 15 April 1996, any contacts between the applicant and his defence counsel without the written permission of the prosecution.

On 5 April 1996 two witnesses in the ransom case were assassinated in Vilnius.

On 15 April 1996, in a letter from the prosecutor to the director of the remand prison, the latter was informed that the prosecutor had decided to attend the meetings between the applicant and his lawyers and to control the relevant correspondence; the prison administration was again requested to prevent the applicant from contacting his defence counsel without written permission from a prosecutor.

On 18 June 1996 a judge of the Vilnius Regional Court extended the term of the applicant's detention on remand until 31 August 1996, and on 29 August 1996 the above term was prolonged until 1 October 1996.

On 20 September 1996 the affray case was discontinued.

The pre-trial investigation in the ransom case was concluded on 26 September 1996. From that date until 1 October 1996 the applicant and his counsel were given access to the case-file.

After having had access to the case-file, the applicant submitted his pleadings to a prosecutor arguing that the charges against him were ill-founded.

On 1 October 1996 the prosecutor dismissed these pleadings. The prosecutor held *inter alia* that the applicant's "guilt has been proved by the evidence collected in the course of the pre-trial investigation".

On 2 October 1996 the President of the Criminal Division of the Supreme Court transmitted the case to the Vilnius Regional Court. The case had initially been assigned to the Kaunas Regional Court. However, the President of the Criminal Division of the Supreme Court decided to transfer jurisdiction to the Vilnius Regional Court.

On 7 October 1996 the applicant submitted an application to the Vilnius Regional Court, claiming that there was no proper domestic decision as to his detention on remand and that it was unlawful.

On 18 November 1996 the applicant also submitted an application challenging the Deputy Prosecutor General, claiming that the said officer was not impartial, that he had infringed domestic criminal procedure in authorising the applicant's preventive detention, and that he could not substantiate the accusation at the trial.

On 18 November 1996 a judge of the Vilnius Regional Court committed the applicant for trial. The judge dismissed the applicant's challenge to the Deputy Prosecutor General as being unfounded. A further application challenging the Deputy Prosecutor General was rejected by the judge on 5 February 1997.

On 13 February 1997 the judge of the Vilnius Regional Court found the applicant guilty on two counts of obtaining property by threats of force and inciting the complainant to make false statements. He was convicted as a principal offender in obtaining property by threats of force. He was acquitted on two other counts. The applicant was sentenced to seven years and six months' imprisonment. He was also fined 15,000 Lithuanian litai (LTL) and his property was confiscated.

Based on the statements of several witnesses in the ransom case asserting that the applicant was "an authority in the crime world", the judge said in his judgment: "the court concludes that [one of the aforementioned witnesses] ... being aware of the existing way to recover cars in Kaunas, approached one of the leaders of the underworld, the defendant H. Daktaras" who demanded and obtained the ransom.

The applicant appealed against the above judgment, invoking various errors of domestic substantive and procedural law. He stated *inter alia* that his rights to defend himself and question witnesses had been breached, and that the court's reference to him as "one of the leaders of the crime world" had been prejudicial and unlawful. In this connection he emphasised that he had never been convicted of an offence pertaining to a criminal organisation. The applicant pleaded that he had been deprived of a fair trial by an independent and impartial court.

On 23 April 1997 the Court of Appeal (*Apeliacinis teismas*) examined the appeal on points of law and decided to hold a full appeal hearing.

On 27 May 1997 the Court of Appeal held a full appeal hearing, the applicant and his two representatives being present. The full appellate court amended the judgment of 13 February 1997. The Court of Appeal considered that, to the extent that the applicant was charged with obtaining property by threats of force, he ought to be convicted as a secondary party but not as a principal offender, as held by the first instance court. Nevertheless, the Court of Appeal maintained the sentence imposed by the Vilnius Regional Court.

The applicant lodged a cassation appeal with the Supreme Court (*Aukščiausiasis Teismas*), pleading that both lower courts had erred in domestic law, and that he had not committed the offence alleged.

On 3 July 1997 the judge of the Vilnius Regional Court, who had delivered the judgment of 13 February 1997, wrote a letter to the President of the Criminal Division of the Supreme Court whereby he contested the conclusions reached by the Court of Appeal in its judgment of 27 May 1997 as to the applicant's participation in the crime. In his letter the first instance judge maintained that the applicant ought to be convicted as a principal, not as a secondary party, in the offence of obtaining property by threats of force. The judge requested the President of the Criminal Division of the Supreme Court to lodge a cassation petition (*kasacinis teikimas*) to quash the appellate judgment and to uphold the first instance judgment.

On 27 August 1997 the President of the Criminal Division of the Supreme Court presented a cassation petition to judges of the Criminal Division of the Supreme Court. The cassation petition provided *inter alia* that: "the Court of Appeal … improperly interpreted and applied the law … . On the basis of the material held it is established that H. Daktaras … executed the conspiracy and the will of the group of persons … and [he] was the principal in obtaining property by threats of force." The President referred to a specific provision of domestic law applicable at the material time of the offence, namely former Article 150 § 3 of the Criminal Code, which should have been applied to the applicant's act. The President petitioned to "quash the judgment of the Court of Appeal of 27 May 1997 … and to uphold the judgment of the Vilnius Regional Court of 13 February 1997".

On 8 September 1997 the President of the Criminal Division of the Supreme Court appointed a judge rapporteur. On 23 September 1997 the President also appointed a chamber composed of three judges of the Criminal Division of the Supreme Court to examine the case.

On 2 December 1997 a cassation hearing was held. The prosecution presented the cassation petition of the President of the Criminal Division of the Supreme Court. The applicant and his counsel were present at the hearing. On the above date the Supreme Court quashed the judgment of the Court of Appeal and upheld the judgment of the Vilnius Regional Court. The cassation court rejected the applicant's appeal and endorsed the cassation petition. The Supreme Court found that the applicant had been the principal offender in obtaining property by threats of force.

The media campaign in connection with the applicant's case

Since the early 1990's the media had pictured the applicant as being responsible for various activities of organised criminals in Kaunas and in other regions of Lithuania. The applicant's arrest and the subsequent criminal proceedings were also discussed in numerous television programmes and in the course of a large-scale press campaign on a nation-wide basis.

On 6 February 1996, an article entitled "Officers against *mafia* boss H. Daktaras" was published in a private daily "Respublika". The Minister of Justice, commenting on the applicant's arrest, was quoted as saying:

(Translation)

> "First of all, this arrest is a welcome thing ... yet it took too long to decide thereon."

A Deputy Chairman of the Seimas (Parliament), was quoted when speaking of the applicant's arrest in the same article:

(Translation)

> "I am convinced that this had to be done ... much earlier. In this case, however, I do not think that the preventive detention was necessary. This could have been effected by applying normal detention on remand. And the sooner such detention is sanctioned, the better. Nevertheless, when considering this arrest in a political sense, I am of opinion that the moment to arrest H. Daktaras was not most properly chosen … . In any event … this arrest … beyond doubt is a correct step."

On 6 February 1996 a journalist of "Respublika" said in an article entitled "The Office of the Prosecutor General versus H. Daktaras":

(Translation)

> "Yesterday evening the Deputy Prosecutor General A. Paulauskas stated that [the assault case] was only one of several reasons which had prompted the Office of the Prosecutor General to act resolutely. The traces of the activities of

H. Daktaras covered the whole of Lithuania, and the prosecution had collected sufficient evidence."

On 18 December 1996 a journalist of the country's biggest private newspaper "Lietuvos Rytas" said in an article entitled "Prosecutor A. Paulauskas - once again against the *mafia* boss":

(Translation)

"As [the Deputy Prosecutor General] A. Paulauskas puts it, the significance of this case is determined by the mere personality of H. Daktaras, a boss of organised criminals in Kaunas. A. Paulauskas asserted that even criminals themselves claim that H. Daktaras is Criminal Number One."

The Deputy Prosecutor General was quoted in the above article:

(Translation)

"And [other] activities of H. Daktaras, as a leader amongst organised criminals, will be further investigated".

A journalist of "Respublika" said in an article of 19 December 1996:

(Translation)

"When asked whether the offences of H. Daktaras would be easily proved before a court, [the Deputy Prosecutor General] A. Paulauskas said he had no doubts as to that; he added that the material of the defendant's other offences was already being collected. 'We will submit that material to a court later, after the judgment in the instant case has been pronounced on the defendant', said A. Paulauskas."

A journalist of "Respublika" said in an article of 10 January 1997:

(Translation)

"Just before a first court hearing, the Deputy Prosecutor General A. Paulauskas asserted that these four charges [in the ransom case] … were only the beginning of a large task, and that soon [the applicant] will be presented with new, far more serious accusations…"

A prosecutor of the Office of the Prosecutor General, was quoted in the same article when speaking of the charges against the applicant in the ransom case:

(Translation)

"I can firmly state that we will not confine ourselves to these episodes. This is only the commencement … . [The applicant's] conscience should be strained by more than one offence; however, everything must be proved... We are also aware that H. Daktaras fired at another criminal from Kaunas. But nothing can

be done about it. 'The complainant' denies everything, and he would rather consent to being imprisoned than agree to tell us anything. Therefore, with the present state of affairs, it is better to imprison any *mafioso* for an established, even though minor, offence than to set him free."

On 6 February 1997, in an article in "Lietuvos Rytas", the Deputy Prosecutor General was quoted as saying:

(Translation)

"I sanctioned the preventive detention of H. Daktaras; however, the lawfulness thereof was confirmed by a judge's decision. I came to accuse H. Daktaras because he is H. Daktaras."

On 11 February 1997, in an article in the private "Akistata" newspaper a journalist said:

(Translation)

"Last Wednesday [The Deputy Prosecutor General] A. Paulauskas publicly stated that he backed the accusation only because it was the trial of H. Daktaras."

On 1 March 1997 the private "Veidas" magazine published an interview with the Deputy Prosecutor General. When speaking of the applicant's arrest he said:

(Translation)

"[The assault case] was the last straw. Being aware that there ought to be a press review of the incident, which had occurred, we understood that thereafter H. Daktaras could temporarily disappear. Such is THEIR instinct of self-preservation, upon negative information coming out THEY lie low and then it is very hard to find them. Besides, the time had already become ripe to arrest H. Daktaras. The prospect of an article about the beating up of [the pop star] implied that politicians would also start putting pressure on us, whereas we would look ridiculous by defending ourselves; this is why it was decided to arrest him."

During the official presidential election campaign at the end of 1997, extracts with video footage from the applicant's trial were shown on a Lithuanian television channel in an advertisement promoting the candidature of the former Deputy Prosecutor General A. Paulauskas.

B. Relevant domestic law

The relevant provisions of the Code of Criminal Procedure (*Baudžiamojo proceso kodeksas*):

The preventive detention rule

The former Article 50-1 (in force until 30 June 1997) permitted detention in order to prevent the commission of three specific offences: banditism, criminal association and terrorising a person. The person arrested under the above rule could appeal against the decision of the judge confirming the preventive detention. The decision of the higher judge was final and could not be the subject of appeal.

Detention on remand

The former Articles 10 and 104 (in force until 21 June 1996) provided that a person could be arrested and detained based on the order of a court or judge, or the authorisation of a prosecutor. The present versions of the above provisions stipulate that a person can be detained only on the basis of the order by a court or judge.

Pursuant to Article 106 § 3 (version in force from 21 June 1996 until 24 June 1998), for the purpose of extending the term of detention on remand a judge is obliged to convene a hearing to which a counsel and prosecutor and, if necessary, the arrested person must be called. Under Articles 249 § 1 and 250 § 1 a judge individually or a court in a directions hearing, in deciding whether to commit the accused for trial, must determine whether the remand measure in respect of the accused is appropriate.

Former Article 226 § 6 (in force until 24 June 1998) provided that the period while the accused and his counsel had access to the case-file did not count towards the overall term of pre-trial investigation and detention.

Under Articles 52, 58 and 267 the accused and the defendant can "submit requests" for bail.

Under the former Article 372 § 4 (in force until 1 January 1999) decisions of trial courts ordering, varying or revoking detention could not be the subject of appeal.

Pursuant to Article 398 § 2, if an appeal is filed against a judgment of the first instance court, the judgment becomes effective upon the determination of the appeal. Articles 398 § 4 and 399 § 4 provide that the decision of the appellate court becomes effective when it is pronounced. Therefore, a detainee is considered under domestic law as being in detention on remand after his conviction at first instance, until the appellate court determines the appeal against the first instance judgment.

General fairness of the proceedings

Article 14:

> "In administering justice in criminal matters, judges are independent and obey only the law. Judges decide criminal cases in accordance with the law and

based on their conscience, in conditions which make it impossible for them to be affected by outside matters. Any interference with the judge's or court's actions in administering justice is prohibited and gives rise to liability under the law."

Article 76:

"A court, prosecutor, investigator and interrogator shall assess evidence with their inner conviction, based on an extensive, full and objective review of all the circumstances of the case, in accordance with the law and legal consciousness.

No evidence has a prejudicial force on a court, prosecutor, investigator or interrogator."

Impartiality of judges and the possibilities of challenge

Article 29 § 3 states that a judge cannot participate in the examination of a case at any stage of the proceedings if he has an interest in its outcome. Pursuant to paragraph 4 of this provision, parties to the proceedings may point out circumstances that would raise doubts as to the judge's impartiality.

Pursuant to Article 31 a judge, in respect of whom there are lawful grounds to fear a lack of impartiality, must withdraw. On the same ground, the judge can be challenged by the defendant and other parties to the case.

Where the case is examined by a chamber of judges, the challenge in respect of a judge is determined by other judges of the chamber. When the whole chamber is challenged, the chamber determines the relevant application itself by a simple majority vote.

Article 427 § 3 provides that a cassation chamber president, when announcing the composition of the cassation court, must ask the parties whether they challenge the judges.

Transfer of jurisdiction between courts

Article 42 affords the President of the Criminal Division of the Supreme Court the right to transfer jurisdiction between courts in a particular case with a view to ensuring the good administration of justice. Pursuant to Articles 43 and 372 § 4, there can be no dispute between parties as to whether or not a particular court has jurisdiction in the case.

Participation of a prosecutor

Pursuant to Article 44, prosecutors appointed in accordance with the law execute the functions of a prosecutor in the proceedings. Article 44 contains no provisions governing the circumstances in which a particular prosecutor can participate in the case.

Cassation petition

Pursuant to Article 417 § 4 of the Code of Criminal Procedure, the President of the Supreme Court, the President of the Court of Appeal, presidents of regional courts, and

presidents of the criminal divisions of the above courts have the right to submit a cassation petition with respect to a first instance judgment which has come into effect or an appellate judgment. Pursuant to paragraph 5 of Article 417 the procedure for such petitions is the same as that for normal cassation appeals lodged by the parties to the proceedings at issue.

Article 418 § 2 of the Code lays down the requirements for a cassation appeal or cassation petition. Pursuant to the above provision, a cassation appeal or cassation petition should include references to the name of a cassation court, the case and decision at issue, the substance of the decision, the reasons for appealing or petitioning it, and the cassation claims.

COMPLAINTS

1. Under Article 5 §§ 1, 2 and 4 of the Convention the applicant complains about his preventive detention and remand in custody. He submits that he was arrested on 3 February 1996. He states that his arrest and subsequent detention under the preventive detention rule did not comply with the requirements of domestic criminal procedure. There were allegedly no reasons for that detention, nor any possibility to contest the lawfulness thereof. The applicant further complains that from 7 October 1996 until 13 February 1997 he was kept in detention on remand unlawfully since no proper domestic decision was taken as to his remand for that period. Under Article 5 of the Convention the applicant also complains about the conditions of his pre-trial detention, alleging that he was kept in a cell together with a convicted person.

2. Under Article 6 § 1 the applicant complains that he had no access to the Kaunas Regional Court. He alleges that the case initially had to be heard by the above court, but it was eventually transferred to the Vilnius Regional Court. The applicant complains about the transfer of jurisdiction in the case based on a decision of the President of the Criminal Division of the Supreme Court by virtue of Article 42 of the Code of Criminal Procedure. He contends that the above decision was arbitrary.

3. Under Article 6 § 1 of the Convention the applicant complains that the principle of equality of arms was violated before the Vilnius Regional Court as the accusation during the first instance trial was backed by the Deputy Prosecutor General. This officer had previously authorised the applicant's preventive detention and allegedly expressed an unequivocal opinion as to the applicant's guilt more than once before his actual conviction, depicting him as a leader of organised criminals. The applicant had unsuccessfully tried to challenge the Deputy Prosecutor General. The applicant further submits that at the stage of the pre-trial investigation that officer was already preparing himself for the Presidential election and was one of the most likely candidates to win; therefore, he was not placed on an equal footing with the Deputy Prosecutor General before the first instance court.

4. Under Article 6 § 1 the applicant complains that the Supreme Court was not an "impartial tribunal" within the meaning of the above provision because it examined and accepted the cassation petition of the President of the Supreme Court. The above petition was initiated by the first instance judge and presented to the Supreme Court by the President of the Criminal Division of the Supreme Court, who had himself appointed the judges at the cassation instance. The President of the Criminal Division of the Supreme Court petitioned the cassation judges, explicitly pointing out a particular provision of domestic law, which ought to be applied in the instant case. In the cassation petition it was requested that the

applicant be punished as a principal offender and not as a secondary party, thus prejudicing his situation compared to that after the appellate judgment. The applicant further alleges that the above petition was endorsed by a prosecutor as a *sui generis* cassation appeal on the part of the accusation, notwithstanding the fact that the prosecutor had not lodged with the Supreme Court a proper cassation appeal against the appellate judgment. The applicant concludes that, against the above background, the Supreme Court judges could not be impartial within the meaning of the above provision of the Convention.

5. Under Article 6 § 1 of the Convention the applicant complains that he was deprived of a fair trial.

He alleges that the domestic courts, in convicting him, failed properly to apply substantive criminal law. He asserts that he was formally indicted and punished under the relevant provisions of the Criminal Code which were in force in 1994, i.e. the time when the alleged offences were committed. However, in proving the *actus reus*, the courts allegedly *de facto* applied the subsequently amended provisions of the Criminal Code which had expanded the notion of "obtaining property by threats of force".

The applicant also alleges that the press campaign which surrounded the criminal proceedings in question, particularly the statements of the Deputy Prosecutor General and the other State officials (see the 'Facts' part, pp. 5-7), were prejudicial to the fairness of the proceedings at issue.

In his submissions of 29 March 1999 the applicant presented a new complaint regarding fairness of the proceedings. He alleged that in a very similar case in 1996 the Supreme Court had acquitted a defendant of obtaining property by threats of force, convicting that person of compounding an offence. In the above submissions the applicant stated that in his case the Supreme Court had failed to follow its own case-law, convicting him of the more serious offence of obtaining property by threats of force.

In his submissions of 11 October 1999 the applicant presented a further complaint regarding fairness. He alleged that the courts had been wrong in their assessment of the complainant's evidence in the case.

6. Under Article 6 § 2 of the Convention the applicant complains that he was not presumed innocent. He complains about the judgment of the Vilnius Regional Court of 13 February 1997, whereby the judge had held that the applicant was "one of the leaders of the underworld". In this respect he also complains that the Deputy Prosecutor General who backed the accusation at first instance had allegedly expressed an unequivocal opinion as to his guilt more than once before his actual conviction, depicting him as "a leader of the underworld" in the media (see the 'Facts' part, pp. 5-7). In the applicant's view, various other State officials also breached the presumption of innocence in their interviews with the press in connection with the criminal proceedings against him (*ibid.*).

7. Under Article 6 § 2 of the Convention the applicant further complains about the prosecutor's decision of 1 October 1996, dismissing his pleadings against the accusations made, based on the material contained in the case-file, whereby the prosecutor stated that the applicant's "guilt ha[d] been proved by the evidence collected in the course of the pre-trial investigation".

8. Under Article 6 §§ 1 and 3 (b) and (c) the applicant alleges breaches of his defence rights. He asserts in this connection that, from the moment when his detention on remand was ordered on 1 April 1996, he could not confer with his lawyers or exchange confidential information with them without the written permission by a prosecutor.

9. Under Article 7 § 1 of the Convention the applicant further complains of an alleged retroactive application of criminal law in respect of his conviction for obtaining property by threats of force.

PROCEDURE

The application was introduced before the European Commission of Human Rights on 11 May 1998 and registered on 8 July 1998.

On 21 October 1998, the Commission decided to communicate the application to the respondent Government.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

The Government's written observations were submitted on 29 December 1998, to which the applicant replied on 25 February 1999. He presented his additional submissions on 29 March 1999 and 11 October 1999.

On 21 September 1999 the Court decided to adjourn the case pending the appointment of an *ad hoc judge* for Lithuania.

THE LAW

1. The applicant complains about the lawfulness of his preventive detention and the remand in custody, alleging various breaches of Article 5 §§ 1, 2 and 4 of the Convention. The applicant contends that not only was there non-compliance with domestic law, but also there was no possibility to contest the lawfulness of these measures. He also complains, by reference to Article 5, about the conditions of his pre-trial detention, alleging that he was kept in custody with a convicted person.

Article 5 provides, insofar 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: …
>
> 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; …

> 2. Everyone who is arrested shall be informed promptly, in a language, which he understands, of the reasons for his arrest and of any charge against him. …
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. ....”

However, the Court is not required to decide whether or not the facts submitted by the applicant in this part of the application disclose any appearance of a violation of the Convention as, in accordance with Article 35 § 1 of the Convention, the Court finds that this part of the application was submitted out of time.

The Court considers that the date of the “final decision” for the purpose of Article 35 § 1 of the Convention in connection with a period of the pre-trial detention is the date on which the charge is determined by a court at first instance, not the date on which a conviction becomes effective (see, *mutatis mutandis*, the Wemhoff v. Germany judgment of 27 June 1968, Series A no. 7, pp. 23, § 9).

The applicant was convicted at first instance on 13 February 1997. Thereafter he continued to be considered as a remand prisoner under domestic law (Article 398 § 2 of the Code of Criminal Procedure), but for the purposes of the Convention he was a person convicted by a competent court, pursuant to Article 5 § 1 (a) of the Convention. For Convention purposes the applicant’s pre-trial detention ceased on 13 February 1997 and, consequently, the six months’ time-limit under Article 35 § 1, concerning this part of the application, started running on that date. However, the application was not introduced before 11 May 1998, which is more than six months later. The Court finds therefore that the applicant failed to comply with the six months’ time-limit laid down in Article 35 § 1 of the Convention.

It follows that this part of the application must be rejected pursuant to Article 35 § 4 of the Convention.

2. The applicant complains that he was denied access to the Kaunas Regional Court as a result of the decision of the President of the Criminal Division of the Supreme Court to transfer jurisdiction in the case. He invokes Article 6 § 1 of the Convention, which provides, insofar as relevant, as follows:

> “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The Court considers that the decision in question involved the determination of a purely procedural matter whereby the case was transferred from one court to another by virtue of the relevant provision of national law. Moreover, Article 6 would not normally afford the right to have the case examined by a court of one’s own choosing. The Court finds that the present decision to transfer jurisdiction did not have any significant effect on the fairness of the applicant’s trial. Hence, this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

3. Under Article 6 § 1 of the Convention the applicant complains that the principle of equality of arms was violated before the Vilnius Regional Court because the accusation during the first instance trial was supported by the Deputy Prosecutor General.

The Court recalls that the principle of equality of arms means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may meet this requirement. However, whatever method is chosen, it should ensure that the other party is aware that observations have been filed and gets a real opportunity to comment thereon (see, among other authorities, the Belziuk v. Poland judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 570, § 37).

On the facts of the case, the Court notes that the Deputy Prosecutor General was a representative of the prosecution during the first instance trial before the Vilnius Regional Court. The applicant does not submit that the Deputy Prosecutor General took part in the case in breach of Article 44 of the Code of Criminal Procedure. The Court considers therefore that, by supporting the accusation before the first instance court, the Deputy Prosecutor General was fulfilling his functions in accordance with domestic law. The Court further notes that the applicant and his lawyers took part in all the hearings before the Vilnius Regional Court where the Deputy Prosecutor General was present. The applicant presents no evidence to show any procedural inequality with this officer during the court examination of the case, nor does he submit any arguments to explain how his presence could have put the applicant at a disadvantage vis-à-vis the prosecution during the first instance trial. On the contrary, the Court observes, on the basis of the material held that the applicant was aware of the observations filed by the Deputy Prosecutor General, and that he had opportunities to comment thereon. As regards the effect of the proceedings on the situation of the applicant, the Court notes that the first instance judge, in convicting the applicant, accepted only two of the four counts supported by the Deputy Prosecutor General.

The Court further notes the applicant's argument that the Deputy Prosecutor General, in his subsequent capacity as a private person during the Presidential election campaign, might have taken advantage of the applicant's trial with a view to advertising his presidential candidature. However, this fact could have had no effect, retroactively, on the fairness of the proceedings.

Hence, the Court finds no indication that the Deputy Prosecutor General enjoyed any substantial advantages over the applicant contrary to the principle of equality of arms inherent to Article 6 § 1 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It must therefore be rejected pursuant to Article 35 § 4.

4. The applicant further complains under Article 6 § 1 of the Convention that the Supreme Court which examined his case at cassation instance was not an "impartial tribunal" as the cassation judges were appointed by the President of the Criminal Division of the Supreme Court. The judges were allegedly instructed to apply a certain provision of substantive criminal law in respect of the applicant's case by way of a cassation petition lodged by this same President.

The Government in their observations state that the applicant did not exhaust domestic remedies with respect to this part of the application as he did not challenge the composition of the chamber at cassation instance when the Supreme Court commenced its hearing, or later. The Government submit that, even assuming that he complied with the relevant requirements of Article 35 § 1 of the Convention, the applicant has presented no arguments which might put in question the impartiality of the cassation judges, according to the subjective and objective tests of the Convention case-law. The purpose of the cassation petition was to afford the domestic judicial authorities a possibility to remedy an error of the lower court. The President of the Supreme Court and the President of the Criminal Division of this court took no part in the examination of the case. Lastly, there was no requirement of domestic criminal procedure that the Supreme Court should accept the cassation petition. The Government conclude that in the instant case the Supreme Court was "impartial" as required by Article 6 § 1 of the Convention.

The applicant argues that he had no effective remedies in respect of this part of the application as, even if he had challenged the cassation judges, the President of the Criminal Division of the Supreme Court would have appointed another chamber who would have still been required to examine the cassation petition. Therefore, any hypothetical new judge would have been under the same pressure from the President of the Criminal Division of the Supreme Court. The applicant suggests that the latter, having submitted the cassation petition, could have relinquished his powers to appoint cassation judges in favour of the President of the Supreme Court. However, he did not do so. Furthermore, the cassation petition was initiated by a letter from the first instance judge to the President of the Criminal Division of the Supreme Court; such a procedure had no legal basis in domestic law. Finally, the cassation petition was presented to the Supreme Court by a prosecutor as a kind of cassation appeal on the part of the prosecution. The applicant considers that these circumstances, viewed as a whole, disclose the predetermination and bias of the Supreme Court in the instant case.

The Court recalls the requirement under Article 35 § 1 of the Convention that domestic remedies be exhausted. Only effective remedies should be considered for this purpose.

The Court notes the applicant's argument that no challenge of the cassation judges could redress his grievances about the alleged bias of the Supreme Court, as any new judge in his case would have been required to examine the instructions of the President of the Criminal Division of this court. It has not been disputed that the applicant had no right to contest that system, since the President of the Criminal Division in accordance with the relevant domestic provisions lodged the cassation petition. There were thus no effective remedies that the applicant could exhaust in this respect.

Consequently, the Court dismisses the Government's objection about non-exhaustion of domestic remedies in respect of this part of the application.

In the light of the parties' submissions, the Court finds that this part of the application raises complex questions of fact and law, the determination of which should depend on an examination of the merits. Therefore, this complaint cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

5. Under Article 6 § 1 of the Convention the applicant complains that he was denied a fair trial in connection with the allegedly wrong decisions of the courts and the media campaign surrounding the trial.

In their observations the Government argue that the applicant did not exhaust domestic remedies in respect of his complaint that the media campaign was prejudicial to the proceedings in question as he failed to sue the interviewees or interviewers by way of a civil action for defamation. The applicant could also have instituted criminal proceedings against such persons for knowingly making a false libel. He did not avail himself of these opportunities. As regards the effect of the media campaign on the impartiality of the courts, the Government contend that the applicant did not exhaust domestic remedies in this connection as he failed to challenge the first instance judge and other judges in the course of the proceedings. In any event, with regard to the media campaign surrounding the applicant's trial, the Government submit that no Lithuanian authority can be held responsible for statements made by private persons in private newspapers and magazines. The courts fairly and impartially assessed the evidence before them because the applicant was found guilty on two of the four counts supported by the accusation. The Government state that the applicant received a fair trial, and the media campaign had no impact on the fairness of the proceedings or the impartiality of the tribunals.

The applicant contends that he was not required to exhaust domestic remedies by instituting civil or criminal proceedings against the newspapers or the State officials who spoke about his case. According to the applicant, it was for the officials to denounce the printed statements if they considered them improper. However, no such denouncement was ever made. He points out that it is not his intention to litigate with the media, but with the State authorities, which permitted the media campaign to have a negative effect on the fairness of the proceedings in general. Moreover, the applicant states that no challenge of any particular judge would have dispelled his doubts as to their bias because various allegations against him in the media had been "read by all the judges of the Republic".

To the extent that the applicant complains about the failure of the Supreme Court to follow its own case-law in his case, and about the allegedly wrong assessment of the complainant's evidence, the Court notes that these complaints were first submitted to the Court on 29 March 1999 and 11 October 1999 respectively. However, the final decision concerning the applicant's conviction was given on 2 December 1997, that is, more than six months before the above complaints were submitted. By virtue of Article 35 §§ 1 and 4 of the Convention, the Court is not required to examine this part of the application as it was submitted out of time.

The Court further notes the Government's argument that the applicant failed to institute civil or criminal proceedings against various journalists and State officials in order to exhaust domestic remedies for the purposes of Article 35 § 1 of the Convention. However, the Court considers that the above provision only requires exhaustion of those remedies which relate to the breaches of the Convention alleged and are capable of remedying the criticised state of affairs directly, and not merely indirectly. The Court concurs in this respect with the applicant that no separate action, either civil or criminal, against various private persons or State officials, not parties to the above court proceedings, would have constituted an effective remedy for the purpose of Article 35 § 1 of the Convention. The Court considers that in the instant case the applicant was only required to mention his complaints about the

alleged lack of fairness to the competent domestic courts called upon to determine the charges against him in the course of the criminal proceedings.

The Court observes in this connection that the applicant, in his appeal against conviction, alleged breaches of a fair trial. Consequently, the Court dismisses the Government's objection about non-exhaustion of domestic remedies in respect of this part of the application.

To the extent that the applicant complains that the domestic courts denied him a fair trial in that they wrongly convicted him, the Court recalls that it is not its task to review alleged errors of fact and law committed by the domestic judicial authorities and that, as a general rule, it is for the national courts to assess the evidence before them and to apply domestic law. The Court's task is to ascertain whether the proceedings as a whole were fair (see, *mutatis mutandis*, the Bernard v. France judgment of 23 April 1998, *Reports* 1998-II, p. 879, § 37).

To the extent that the applicant alleges that the media campaign surrounding the trial was prejudicial to the fairness of the proceedings at issue, the Court considers that a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion, and, consequently, jurors called upon to decide the guilt of an accused (see, *inter alia*, Eur. Comm. HR, no. 10486/83, Hauschildt v. Denmark, Dec. 9.10.1986, D.R. 49, pp. 86, 101). At the same time, the Court notes that the press coverage of current events is an exercise of freedom of expression guaranteed by Article 10 of the Convention. If there is a virulent press campaign surrounding the trial, what is decisive is not the subjective apprehensions of the suspect concerning the absence of prejudice required of the trial courts, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified (see, *mutatis mutandis*, the Castillo Algar v. Spain judgment of 28 October 1998, *Reports* 1998-VIII, p. 3116, § 45).

The Court notes that the applicant's arrest and trial were discussed in a large number of television programmes and in the course of a nation-wide press coverage. The Court considers that the interest of the media in the "Daktaras case" and the considerable effect it had on public opinion were largely the result of organised criminal activities in Lithuania in the early 1990s. The media's interest may also have been stimulated by the fact that two witnesses in the ransom case were assassinated in the course of the proceedings.

The Court observes that the press almost unanimously depicted the applicant as a "*mafia* boss". However, it must be noted that in some instances the authorities emphasised the danger of a premature trial (see, the interviews of the prosecutors published on 19 December 1996 and 10 January 1997 reproduced in the 'Facts' part, pp. 6-7). It must be further taken into account that the charges against the applicant were to be determined by professional judges who were less likely than a jury to be influenced by the media coverage of the case. The Court observes that the trial judges took due account of the particular circumstances of the case and assessed the evidence carefully, convicting the applicant on two counts of the four counts against him. The Court considers therefore that the applicant's fears of prejudice by the courts on the ground of the media campaign in question were not "objectively justified".

Against the above background, the Court cannot establish any indication of a lack of impartiality caused by the media campaign, or, in general, a violation of the principle of a fair

trial within the meaning of Article 6 § 1 of the Convention in connection with this part of the application.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It must therefore be rejected pursuant to Article 35 § 4.

6. The applicant complains that he was not presumed innocent, referring to the judgment of the Vilnius Regional Court whereby the judge called him "one of the leaders of the underworld". In this respect he also refers to the statements by the Prosecutor General and other State officials who allegedly presumed him guilty in their interviews with the press. The applicant invokes Article 6 § 2 of the Convention, which provides as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

In their observations the Government reiterate that the applicant did not exhaust domestic remedies in respect of his complaint about the statements of the public officials in the media as he failed to sue the interviewees by way of civil or criminal actions. In the Government's view, such proceedings would have been relevant to establish the actual words said by the State agents as their statements could be distorted by the journalists. In any event, the statements reproduced in the 'Facts' part (pp. 5-7 above) contain no declarations that the applicant committed the crimes alleged in the ransom case. Moreover, the Minister of Justice and the Deputy Chairman of the Parliament were quoted in the above articles in early 1996; neither of them held office in 1997 when the applicant's case was being examined by the courts. According to the Government, the fact that the courts found the applicant guilty on two of the four counts against him shows that he was presumed innocent until proved guilty in accordance with law. They further submit that, by saying that the applicant was "one of the leaders of the underworld" in the reasoned part of its judgment, the Vilnius Regional Court only re-phrased the relevant witness statements. The Government state that the first instance court in fact rejected the allegation that the applicant was "one of the leaders of the underworld", this phrase not being included in the operative part of the first instance judgment. Therefore, the statement could not be deemed to confirm the applicant's guilt of a specific crime.

The applicant refutes the Government's objection and repeats the arguments summarised above (p. 16). In the applicant's view, the Vilnius Regional Court on 13 February 1997 of its own motion mentioned the allegation that he was "one of the leaders of the underworld". There was no need for the court to do so, as it had never examined the validity of that allegation. Furthermore, the statements by the Deputy Prosecutor General and other State officials did in fact breach the presumption of innocence.

To the extent that the Government allege non-exhaustion of domestic remedies, the Court recalls that no separate action, either civil or criminal, against persons who were not parties to the above court proceedings, could constitute a remedy for the purpose of Article 35 § 1 of the Convention (also see above, pp. 16-17). The Court observes in this connection that the applicant, in his appeal against conviction, alleged breaches of the presumption of innocence. Consequently, the Court dismisses the Government's objection about non-exhaustion of domestic remedies in respect of this part of the application.

The Court reiterates that the presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of a fair trial required by Article 6 § 1 (see, the Bernard v. France judgment cited above, *loc. cit.*). It will accordingly consider this complaint from the standpoint of these two provisions taken together. It is further recalled that the requirement of respect for presumption of innocence is binding not only upon a judge or court but also upon other public authorities (see, the Allenet de Ribemont v. France judgment of 10 February 1995, Series A no. 308, p. 17, §§ 38 and 41). Given the right to receive and impart information under Article 10 of the Convention, Article 6 § 2 cannot prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (*loc. cit.*, § 38).

This being so, a distinction should be made between statements which reflect the opinion that the person concerned is guilty and statements which merely describe "a state of suspicion". The former infringe the presumption of innocence, whereas the latter have been regarded as unobjectionable in various situations examined by the Court (see, *inter alia*, the Lutz v. Germany judgment of 25 August 1987, Series A no. 123, p. 25, § 62; the Englert v. Germany judgment of 25 August 1987, Series A no. 123, p. 55, § 39; the Nölkenbockhoff v. Germany judgment of 25 August 1987, Series A no. 123, p. 80, § 39; and the Leutscher v. the Netherlands judgment of 26 March 1996, *Reports* 1996-II, p. 436, § 31).

The Court observes that the reference by the Vilnius Regional Court to the applicant as "one of the leaders of the underworld" emerged from the evidence given by several witnesses who testified against the applicant. Therefore, by reiterating the witnesses' testimony in this respect, the trial court did not mean to suggest that the applicant was guilty of any specific offence.

As regards the statements of the State officials published in the press before the applicant's conviction of 13 February 1997, the Court notes the interviews of the then Minister of Justice and the then Deputy Chairman of the Seimas published on 6 February 1996 (see the 'Facts' part, p. 5). The remarks of these high-ranking officials were made in a political context with the aim of providing the public with an explanation of the administrative authorities' conduct in effecting the applicant's arrest. The Court considers that the above remarks were prompted by the uncontested facts, such as the applicant's previous convictions and the newly instituted proceedings for affray, but they could not be understood as confirming his guilt for a specific offence. The same is true of the words of the prosecutors referred to by various journalists in the newspaper articles published on 6 February 1996, 18 December 1996, 19 December 1996, 10 January 1997, 6 February 1997 and 11 February 1997 (see the 'Facts' part, pp. 5-7), whereby the applicant's dangerous character was emphasised or "a state of suspicion" against him was described to provide the public with an account of the ensuing criminal proceedings. Those were not formal declarations of the applicant's guilt which could encourage the public to believe him guilty or prejudge the assessment of the facts by the competent judicial authority (see, *mutatis mutandis,* the Allenet de Ribemont judgment cited above, p. 17, § 41).

Against this background, the Court does not find any infringement of the presumption of innocence established in connection with this part of the application, which is accordingly manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It must therefore be rejected pursuant to Article 35 § 4.

7. Under Article 6 § 2 of the Convention the applicant also complains about the prosecutor's decision of 1 October 1996 in which the prosecutor stated that the applicant's "guilt had been proved by the evidence collected in the course of the pre-trial investigation".

The Government state that the prosecutor in his decision of 1 October 1996 did not make any statements breaching the applicant's right to be presumed innocent as he only set out the reasons to reject the applicant's request to discontinue the proceedings. The Government contend that a prosecutor should be convinced that an accused has committed the offence alleged, otherwise there is no point pursuing the case.

In the light of the parties' submissions, the Court finds that this part of the application raises complex questions of fact and law, the determination of which should depend on an examination of the merits. Therefore, this complaint cannot be rejected as being manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

8. Under Article 6 §§ 1 and 3 (b) and (c) the applicant alleges breaches of his defence rights. He complains in this connection that, from the moment when his detention on remand was ordered on 1 April 1996, he could not confer with his lawyers or exchange confidential information with them without the written permission by a prosecutor.

Article 6 § 3 provides, insofar as relevant, as follows:

"Everyone charged with a criminal offence has the following minimum rights:
…

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; … ."

The Court notes that the above complaint is limited to the allegation that the applicant had no absolute right to communicate with his defence counsel without a prosecutor's permission. The Court considers however that the above provisions of the Convention do not guarantee the right to confer at any time with one's counsel and to exchange confidential indications or information with him without any restriction. The applicant does not allege that any of his requests to speak with or write to his lawyers were not granted. Consequently, the Court cannot find that the decision by the prosecution to control the applicant's communication with his defence counsel had any practical consequences for his defence rights under Article 6 §§ 1 and 3 (b) and (c) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It must therefore be rejected pursuant to Article 35 § 4.

9. The applicant further complains about the allegedly retroactive application of criminal law in respect of his conviction for obtaining property by threats of force. He invokes Article 7 of the Convention, which states as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

The Court notes that the applicant does not contest the fact that, at the time when the alleged offence was committed, obtaining property by threats of force constituted a crime under national law, as envisaged by the first paragraph of the above provision. Moreover, the applicant does not argue that the acts committed by him could not be considered "criminal" for the purpose of the second paragraph of Article 7.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It must therefore be rejected in accordance with Article 35 § 4.

For these reasons, the Court, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaints that the Supreme Court was not an impartial tribunal, and that the prosecutor breached the presumption of innocence in his statement of 1 October 1996;

DECLARES INADMISSIBLE the remainder of the application.

S. Dollé
Registrar

J.-P. Costa
President