CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 37975/97
by Arminas GRAUŽINIS
against Lithuania

The European Court of Human Rights (Third Section) sitting on 2 March 1999 as a Chamber composed of

Sir Nicolas Bratza, *President*,
Mr J.-P. Costa,
Mr L. Loucaides,
Mr P. Kūris,
Mr W. Fuhrmann,
Mr K. Jungwiert,
Mrs H.S. Greve, *Judges*,

with Mrs S. 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 21 July 1997 by Arminas GRAUŽINIS against Lithuania and registered on 1 October 1997 under file no. 37975/97;

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

Having regard to the observations submitted by the respondent Government on 20 March 1998 and the observations in reply submitted by the applicant on 20 April 1998;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Lithuanian citizen born in 1960. He lives in Klaipėda, Lithuania. He is represented before the Court by Dr. K. Stungys, solicitor, of Vilnius.

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

A. Particular circumstances of the case

In May 1997, an owner of a café alleged that the applicant had beaten and threatened him to relinquish the control of his property.

The applicant was arrested on 19 May 1997. On 21 May 1997 he was brought before the Klaipėda City District Court. The court ordered his detention on remand until 21 July 1997.

In the decision the court held that:

> "A. Graužinis demanded that the complainant … hand over the control of [the café] … Following the complainant's refusal, A. Graužinis beat him up …
>
> Considering all circumstances … [the applicant should be remanded] in custody as he is suspected of having committed a serious offence … ."

On 22 May 1995 the applicant was formally indicted for attempting to obtain property by threats of force. On 3 June 1997 a new criminal case was instituted against him. The applicant was also indicted for obtaining property by deception.

On 27 June 1997 the applicant appealed against the decision to remand him in custody, claiming that there was no reason for his detention and asking for bail. He alleged that the Klaipėda City District Court had *de facto* convicted him based on the allegations of the complainant, and that his detention on remand was in breach of Article 5 of the Convention.

On 3 July 1997 the Klaipėda Regional Court dismissed the appeal in the absence of the applicant. The applicant's counsel was present at the above hearing. The Court held that the detention was lawful based on the relevant material of the case-file. The Regional Court also noted that the applicant had been brought before the court when it had initially been considering the question of authorising the detention.

On 17 July 1997 the Klaipėda City District Court extended the term of the applicant's detention on remand until 19 September 1997. The applicant's counsel was present during the hearing. The court held *inter alia* that "the material held permits one to think that A. Graužinis committed the offences" alleged. The court stated that its decision could not be the subject of appeal.

On 5 September 1997 the applicant appealed against the decision of 17 July 1997 claiming that his detention on remand was unlawful and asking for bail. He again complained that the Klaipėda City District Court *a priori* considered him guilty.

On 9 September 1997 a judge of the Klaipėda Regional Court returned the appeal without examination. The judge informed the applicant that the Code of Criminal Procedure did not provide for a possibility to appeal against the decision of a court extending the term of detention.

The applicant submits that in a decision of 20 September 1997 a judge of the Klaipėda District Court committed the applicant to trial and extended the term of his detention, and that the above decision was taken by the judge without convening a hearing.

The charges against the applicant were subsequently replaced as he was indicted for affray. On 24 February 1998 the Klaipėda District Court convicted him thereof. He was sentenced to 1 year and 4 months' imprisonment.

The applicant did not appeal against the first instance judgment.

He has now been released from prison after having completed the sentence.

B. Relevant domestic law

Relevant provisions of the Constitution of the Republic of Lithuania (Lietuvos Respublikos Konstitucija)

(Translation)

Article 30 § 1:

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

Article 31 §§ 1 and 2:

> "A person shall be presumed innocent until proven guilty in accordance with a procedure prescribed by law and based on an effective court judgment.
>
> A person charged with a criminal offence is entitled to a fair and public hearing by an independent and impartial court."

Relevant provisions of the previous Code of Criminal Procedure (Baudžiamojo proceso kodeksas):

(Translation)

Article 104-1 (in force until 24 June 1998):

> "... the arrested person shall be brought before a judge in not more than 48 hours ... The judge must hear the person as to the grounds of his detention. The prosecutor and the counsel of the arrested person may take part in the inquiry. After having questioned the arrested person, the judge may maintain the decision to order detention on remand by designating the term of detention, or may vary or revoke the remand measure.

... after the case has been transmitted to the court ... [the court] can order, vary or revoke the detention on remand / arrest."

Article 106 § 3 (in force until 24 June 1998):

"For the purpose of extending the term of detention on remand / arrest [a judge] must convene a hearing to which a counsel and prosecutor and, if necessary, the arrested person shall be called."

Article 109-1 (in force until 24 June 1998):

"An arrested person or his counsel shall have the right during pre-trial investigation to lodge [with an appellate judge] an appeal against the detention on remand / arrest ... With a view to examining the appeal, there may be convened a hearing, to which the arrested person and his counsel or only the counsel shall be called. The presence of a prosecutor is obligatory at such a hearing.

The decision taken by [the judge at appellate instance] is final and cannot be the subject of a cassation appeal.

A repeated appeal shall be determined when examining the extension of the term of the detention on remand / arrest."

Relevant provisions of the present Code of Criminal Procedure (including the amendments of 24 June 1998):

(Translation)

Article 29:

"A judge shall not deal with a criminal case at any procedural stage thereof if … 2) he has … ordered the detention on remand / arrest … [or] examined the appeals thereon … ."

Article 52 § 2 (3) and (8) and Article 58 § 2 (8) and (10) provide, respectively, that the accused and their counsel have the right to

" submit requests; ... " and

"appeal against acts and decisions of an interrogator, investigator, prosecutor and court."

Article 104-1 (in force since 24 June 1998):

"... the arrested person shall be brought before a judge in not more than 48 hours ... The judge must hear the person as to the grounds of his detention. The prosecutor and the counsel of the arrested person shall take part in the inquiry. The judge, of his own motion, or by a reasoned request of the

prosecutor, the arrested person or his counsel, is entitled to hear the prosecutor in the absence of the arrested person and his counsel, or to question the arrested person and his counsel only. After having questioned the arrested person, the judge may maintain the decision to order detention on remand by designating the term of detention, or may vary or revoke the remand measure.

... after the case has been transmitted to the court ... [the court] shall order, extend or revoke the detention on remand / arrest or vary it with another remand measure before expiry of the term thereof, designated during the preliminary investigation or trial."

Article 106 § 3 (in force since 24 June 1998):

"For the purpose of extending, at the stage of pre-trial investigation, the term of detention on remand / arrest [a judge] must convene a hearing to which a counsel, prosecutor and the arrested person, the presence of whom is obligatory, shall be called."

Article 109-1 (in force since 24 June 1998):

"An arrested person or his counsel shall have the right during the preliminary investigation or trial to lodge [with an appellate judge] an appeal against the arrest order or the extension of the term of the detention on remand / arrest ... With a view to examining the appeal, there shall be convened a hearing, to which the arrested person and his counsel or only the counsel shall be called. The presence of a prosecutor is obligatory at such a hearing.

The decision taken by [the judge at appellate instance] is final and cannot be the subject of a cassation appeal … .

A repeated appeal against the same arrest order or the extension of the term for the detention on remand / arrest shall be determined when examining the extension of the term of the detention on remand / arrest."

Article 112 § 2:

"In the course of pre-trial investigation, a prosecutor is entitled to free [the detainee] … in this case the decision of a judge or court to order the detention on remand / arrest ceases to apply."

Article 249 § 1:

"A judge individually or a court in a directions hearing, in deciding whether to commit the accused to trial, shall determine ...

11) whether the remand measure has been selected appropriately."

Article 250 § 1:

"After having decided, that there is a sufficient basis to commit the accused to trial, a judge individually or a court in a directions hearing shall determine the questions ...

2) of the remand measure in respect of the accused ... ."

Article 267 § 1:

"The defendant has the right to ...

3) submit requests; ...

11) appeal against the judgment and decisions of a court."

Article 277:

"In the course of a trial, a court can decide to order, vary or revoke a remand measure in respect of the defendant."

Article 297:

"… upon adjourning the examination of a case … a court shall hear requests of the parties to the proceedings and shall adopt appropriate decisions thereon."

Article 372 § 4:

"Decisions of courts ... ordering, varying or revoking a remand measure ... cannot be the subject of appeal ... Pleadings against these decisions can be set out in an appeal against the judgment."

COMPLAINTS

1. Under Article 5 § 1 (c) of the Convention the applicant complains that his arrest and the subsequent detention on remand were arbitrary as there were no grounds thereto, and that he was detained contrary to the procedure prescribed by Article 104-1 of the Code of Criminal Procedure as he was not brought repeatedly before the courts examining his appeal against the arrest order and extending the term of his detention.

2. He complains under Article 5 § 3 of the Convention that he was not repeatedly brought before a judge on 3 July 1997, when the Klaipėda Regional Court examined his appeal against the arrest order, and on 17 July 1997, when the Klaipėda City District Court extended the term of his detention on remand.

3. He complains under Article 5 § 4 of the Convention that he was not able to challenge the lawfulness of the courts' decisions extending the term of his detention on remand, and that the courts extended the term of his detention without bringing him before a judge repeatedly.

4. He further complains under Article 6 §§ 1 and 2 of the Convention that the Klaipėda City District Court in its decisions on detention of 21 May 1997 and 17 July 1997 made unnecessary comments on the merits of the criminal case, failed to show that it was "independent and impartial", and thereby infringed the presumption of innocence. The applicant also invokes the right to a "hearing within a reasonable time".

PROCEDURE

The application was introduced on 21 July 1997 and registered on 1 October 1997.

On 14 January 1998, the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 20 March 1998. The applicant replied on 20 April 1998.

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 LAW

1. The applicant complains about his detention on remand under Article 5 § 1 (c) of the Convention. He asserts that the detention was arbitrary and thus unlawful, and that it was not authorised in accordance with a procedure prescribed by domestic law.

Article 5 § 1 of the Convention, insofar as relevant, provides as follows:

> "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 … ."

The Court recalls that no detention that is arbitrary can ever be regarded "lawful". However, it is in the first place for the national authorities, notably courts, to evaluate whether sufficient evidence has been adduced in order to decide on detention (see e.g., *mutatis mutandis*, Eur. Court HR, Winterwerp v. the Netherlands case, judgment of 24 October 1979, Series A no. 33, p. 18, §§ 39-40). Moreover, any period of detention is in principle "lawful" if it is carried out pursuant to a court order (Eur. Court HR, Benham v. the United Kingdom judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 753, § 42).

On the facts of the case, the Court notes that on 21 May 1997 the Klaipėda City District Court ordered the applicant's arrest based on the prosecution's application suspecting

that the applicant could have committed a crime. On 3 July 1997 the Klaipėda Regional Court dismissed the applicant's appeal against the above arrest order, maintaining that he should remain in custody based on the relevant case-material.

As to the applicant's argument that his subsequent detention was not authorised in accordance with a procedure prescribed by Lithuanian law, the Court notes that this complaint is confined to the allegation that the courts, in dismissing the applicant's appeal against the arrest order and prolonging the term of his subsequent detention on remand, failed to bring him before a judge repeatedly and thus infringed Article 104-1 of the Code of Criminal Procedure.

The Court observes that Article 104-1 of the Code of Criminal Procedure requires that an arrested person be brought before a judge - it does not demand that the detainee should be brought before an appropriate officer repeatedly. Furthermore, the above provision of domestic criminal procedure speaks of how a court should order arrest - it does not govern the procedure for examining appeals against the arrest order or extending the term of detention.

The Court is thus of the opinion that the applicant's arrest and his subsequent detention on remand were "lawful" as there were court decisions thereon based on reasonable suspicion of the applicant having committed an offence. The Court also finds that the applicant's detention on remand was authorised "in accordance with a procedure prescribed by law".

It follows that this part of the application must be rejected as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

2. The applicant complains under Article 5 § 3 of the Convention that he was not brought before a judge repeatedly, as the courts extended the term of his detention.

Article 5 § 3 of the Convention reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The Court considers that the question whether the applicant should have been repeatedly brought before and heard in person by a judge extending the term of his detention also relates to the subsequent proceedings by way of review of the lawfulness of that detention. The right to take such proceedings is guaranteed by Article 5 § 4 of the Convention, and the result required by Article 5 § 4 could in certain cases be attained if a detainee appeared in person before a court deciding on the lawfulness of that detention (see e.g., Eur. Court H.R., Sanchez-Reisse v. Switzerland judgment of 21 October 1986, Series A no. 107, p. 19, § 51).

Indeed, the applicant has also made a specific complaint about the proceedings in which the courts extended the term of his detention on remand, invoking Article 5 § 4 of the Convention, which states as follows:

> "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."

The Government in their observations submit that, in accordance with Article 109-1 of the Code of Criminal Procedure, the applicant's appeal against the arrest order was examined by the Klaipėda Regional Court within 7 days after it was lodged therewith. They further submit that the applicant did not avail himself of opportunities to contest the lawfulness of his detention by submitting to a prosecutor or court "requests" for bail under Articles 52 § 2 (3), 58 § 2 (8) and 267 § 1 (3) of the Code. The Government further state that after the criminal case was transmitted to a court, pursuant to Articles 249 § 1 (11), 250 § 1 (2) and 277 of the Code, a court was either required, or entitled of its own motion, to examine the question whether the applicant should remain in custody. A court was also required by Articles 276 and 297 to adopt reasoned decisions as to the "requests" for bail submitted under Article 267 § 1 (3) of the Code. The Government thus conclude that, given the above statutory provisions, the applicant was able to challenge the decisions authorising his detention on remand.

The applicant contends that the statutory provisions listed by the Government had no practical effect on his situation as he could not in fact challenge the lawfulness of his detention. In particular, he was not heard personally before the courts extending the term of his detention. His "request" for bail of 4 September 1997 was dismissed by the prosecution unilaterally on 8 September 1997; he further states that no "request" to a prosecutor could replace the possibility of review of his detention by a proper court. Moreover, in deciding to commit the applicant to trial and extend the term of his detention on 20 September 1997, a judge of the Klaipėda District Court reached the decision without hearing the parties. Subsequently, in the course of a trial, there was no possibility to appeal against court decisions extending the term of his detention pursuant to Article 372 § 4 of the Code of Criminal Procedure. The applicant finally states that the courts, in extending the term of his detention, did not meet the guarantees of judicial procedure required to fulfil the requirements of Article 5 § 4 of the Convention.

In the light of the parties' submissions, the Court finds that the above complaints under Article 5 §§ 3 and 4 of the Convention raise complex questions of fact and law, the determination of which should depend on an examination of the merits. Therefore, this part of the application cannot be rejected as manifestly ill-founded under Article 35 § 3 of the Convention. No other ground for declaring these complaints inadmissible has been established.

3. Under Article 6 §§ 1 and 2 of the Convention the applicant complains that Klaipėda City District Court in its decisions on the applicant's detention of 21 May 1997 and 17 July 1997 made unnecessary comments on the merits of the criminal case, failed to show that it was "independent and impartial", and thereby infringed the presumption of innocence. The applicant also invokes the right to a "hearing within a reasonable time".

Article 6 § 1 of the Convention, insofar as relevant, states:

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

The second paragraph of the above Article stipulates that:

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

However, the Court is not required to decide whether or not this part of the application discloses any appearance of a violation of the Convention, as the applicant failed to appeal against the judgment of the Klaipėda District Court of 24 February 1998 in order to redress the alleged violations of Article 6. The applicant has not, therefore, exhausted the remedies available under Lithuanian law as required by Article 35 § 1 of the Convention.

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

For these reasons, the Court,

unanimously, **DECLARES ADMISSIBLE**, without prejudging the merits, the applicant's complaint about the proceedings in which the term of his detention on remand was extended and the complaint that he was not brought before a judge repeatedly during such proceedings;

by a majority, **DECLARES INADMISSIBLE** the remainder of the application.

S. Dollé
Registrar

N. Bratza
President