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

FOURTH SECTION

DECISION

Application no. 22740/10
Donatas IMBRAS
against Lithuania

The European Court of Human Rights (Fourth Section), sitting on 10 July 2018 as a Chamber composed of:

Ganna Yudkivska, *President,*
Vincent A. De Gaetano,
Egidijus Kūris,
Iulia Motoc,
Carlo Ranzoni,
Georges Ravarani,
Marko Bošnjak, *judges,*

and Marialena Tsirli, *Section Registrar,*

Having regard to the above application lodged on 29 March 2010,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

# THE FACTS

The applicant, Mr Donatas Imbras, is a Lithuanian national, who was born in 1979 and lives in Vilnius. He was represented before the Court by Mr S. Zabita, a lawyer practising in Vilnius.

The Lithuanian Government ("the Government") were represented by their Agent, Ms K. Bubnytė.

## A. The circumstances of the case

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

*1. The applicant's arrest*

1. On 3 June 2006, at about 11.30 a.m., the State Border Guard Service (hereinafter "the SBGS") officers stopped two cars on the Kaunas-Klaipėda highway. The applicant was a passenger in one of the cars, a Volkswagen Golf, while another person, V.K., was the driver. The other car, a Volkswagen Transporter, was driven by D.P. and it was in that vehicle that the officers found sixty boxes which contained 30,500 packets of cigarettes with Russian Federation tax stamps.

2. According to the search record (*asmens kratos protokolas*), the SBGS officers searched the applicant from 1 p.m. to 1.10 p.m. on 3 June 2006. They found two mobile phones on him, each with a prepaid SIM card, as well as two other prepaid SIM cards. The officers also found that D.P. and V.K. had one mobile telephone each.

Two mobile telephones without SIM cards were also found in the Volkswagen Golf.

A report was drawn up at 2 p.m. on the same day on the applicant's temporary arrest (*laikinas sulaikymas*), on the basis of Article 140 of the Code of Criminal Procedure (see paragraph 36 below). The applicant signed both the search and temporary arrest records.

3. Later the same day the applicant was taken under temporary arrest to the town of Šiauliai. An SBGS officer, E.Č., charged the applicant with unlawful possession of goods – cigarettes – subject to excise duties (Article $199^2$ of the Criminal Code, see paragraph 41 below), a crime committed in conspiracy with D.P. and V.K., that is, by a group of persons. The same investigator questioned the applicant from 4.20 p.m. to 5 p.m. The applicant chose to testify. He stated that he was a professional soldier in the Lithuanian army. He did not confess to smuggling cigarettes. He stated that on 2 June 2006 he had travelled to Tauragė from Kaunas and that on 3 June he had asked his friend V.K. to drive him back to Kaunas. The applicant testified that he had been travelling as a passenger in V.K.'s car when the SBGS officers had stopped and arrested them on the Kaunas-Klaipėda highway.

The applicant did not have a lawyer during the questioning but signed a record that his right to have one from the moment of his arrest or first questioning had been explained to him. Another record, also signed by the applicant, showed that his other rights, including the right to testify or to appeal against the investigator's actions, had also been explained to him.

4. The bill of indictment read that "D.P. was questioned on 4 and 5 June and on 17 July 2006". He had testified that the applicant and V.K. had been the organisers of cigarette smuggling and that he had acted on their instructions.

5. According to the documents submitted by the Government, E.Č. assigned a legal-aid lawyer to V.K. on 5 June 2006, while still at the SBGS

office in Pasvalys. On 9 June 2006 V.K. also signed a record stating that he wished to have a lawyer during his questioning.

*2. Questioning of the applicant on 5 June 2006 before the pre-trial investigation judge in Pasvalys Court, release from detention and the end of the pre-trial investigation*

6. On 5 June 2006 a prosecutor at the Pasvalys Region District Prosecutor's Office applied to the Pasvalys Region District Court (hereinafter – the Pasvalys Court) for a pre-trial investigation judge to question the applicant. The prosecutor stated that the applicant had not admitted any guilt when served with a notice of a suspicion against him on 3 June 2006, but had "later agreed to testify on the circumstances of the criminal act". The prosecutor considered that the applicant might use his right to remain silent when the criminal charges were examined later in court during the trial (*bylos nagrinėjimo teisme metu*), and that therefore he should be questioned by a pre-trial investigation judge.

The Government stated that "consequently, the applicant was taken from Šiauliai to the Pasvalys Court".

7. Court records show that the applicant was questioned by the pre-trial investigation judge at the Pasvalys Court from 4 p.m. to 6 p.m. on 5 June 2006. His right to have a lawyer present during the questioning, including one appointed through the State legal-aid scheme, was explained to him, but he waived that right and signed a record to that effect, which was countersigned by the pre-trial investigation judge. A prosecutor was present during the applicant's questioning and a court clerk, Ž.K., recorded his testimony. The applicant confessed to taking part in transporting the cigarettes, described the circumstances of the crime and signed the record of his testimony.

8. The documents in the Court's possession show that D.P. had also been questioned by the pre-trial investigation judge at the Pasvalys Court, where he had been taken by SBGS officers, at around 1 p.m. on 5 June 2006. He had confessed to transporting smuggled cigarettes.

9. The record of the applicant's release from temporary arrest (Article 140 of the Code of Criminal Procedure, see paragraph 36 below) reads that he was arrested on 3 June 2006 at 2 p.m. on suspicion of smuggling cigarettes and released on 5 June 2006 at 2 p.m. The applicant has signed the record.

After his release on 5 June 2006 another remand measure – an obligation not to leave his place of residence (*rašytinis pasižadėjimas neišvykti iš gyvenamosios ar laikino buvimo vietos*) – was imposed on the applicant.

10. D.P. was also released from temporary arrest on 5 June 2006 and ordered not to leave his place of residence. On 17 July 2007 that remand measure was replaced by the milder one of having periodically to register with the police.

11. V.K. was questioned on 3, 9 and 10 June 2006, but repeatedly denied being involved in the transport of smuggled cigarettes. He also denied that the two mobile telephones found in the Volkswagen Golf had belonged to him. He also asserted that he did not know D.P.

On 5 June 2006, after the forty-eight-hour time-limit for his temporary arrest had expired (see paragraphs 35 and 36 below), the stricter remand measure of pre-trial detention was imposed on V.K. Five days later that measure was changed to an obligation not to leave his place of residence. On 11 September 2007 the measure was further eased to an obligation to periodically register with the police.

12. A year later, on 9 August 2007 the applicant faced additional questioning by the investigator E.Č. He requested a lawyer after his right to have one present had been explained to him. During questioning later in the day, and with a lawyer present, the applicant stated that his earlier testimony of 5 June 2006 had been given under psychological duress because he had incriminated himself in order not to be kept in detention. That particular testimony was therefore null and void.

13. On 7 December 2007 the SBGS investigator E.Č. made a formal decision to inform the applicant that the pre-trial investigation was concluded. The applicant's right to acquaint himself with the case file and to submit requests was explained to him. The same day the applicant asked that the criminal case be discontinued, arguing that he had not committed a crime and had incriminated himself on 5 June 2006 because he had been under psychological duress and had not wished to be deprived of his freedom. Both he and his lawyer signed the request.

14. By a decision of 14 December 2007, on the basis of Article 218 of the Code of Criminal Procedure (see paragraph 38 *in fine* below), a prosecutor rejected the request. The prosecutor considered that there was no information (*duomenys*) to show that the applicant had been put under psychological pressure or forced to confess. The prosecutor also noted that the applicant's actions had corresponded to the characteristics of the crime that he had been charged with.

The prosecutor's decision did not specify whether it could be appealed against.

15. Three days later, on 17 December 2007 the prosecutor drew up a bill of indictment, which among other things stated that the applicant, D.P. and V.K. had been arrested by SBGS officers at "around 11.30 a.m." on 3 June 2006. The case was then transferred to the Šiauliai Regional Court for trial.

### *3. The proceedings before the trial court*

#### (a) The parties' submissions

16. The applicant did not confess to the crime when questioned in court during the trial on 15 July 2008. Instead, he testified that on 5 June 2006,

that is two days into his detention (*buvau sulaikytas ir po dviejų parų*), the SBGS investigators had tried to break him down by exerting psychological pressure on him and interrogating him without drawing up a record. They had also left the applicant in a room alone with the written testimony of D.P., who by that time had confessed to taking part in smuggling the cigarettes and had incriminated the applicant. According to the applicant, the SBGS officers would come into the interrogation room one by one and suggest that unless he wished to remain in detention for three months pending the trial he should corroborate D.P.'s testimony before the Pasvalys Court pre-trial investigation judge. They also told him that D.P.'s testimony would in any case be sufficient to convict him, but that he would be released pending the start of the trial if he confessed. The applicant also testified that the SBGS officers had then taken him to the Pasvalys Court, where he had told the pre-trial investigation judge what he had been instructed to say by the officers, including what payments had been made for smuggling cigarettes. He had thereby incriminated himself during the questioning on 5 June 2006 in order to avoid being detained. According to the applicant's version of events, he had been taken to the Pasvalys Court in handcuffs. After the pre-trial investigation judge had objected, the SBGS officers had taken them off.

The applicant also testified that after the questioning in the Pasvalys Court he had been taken to the town of Šiauliai. It was only there on the evening of 5 June 2006, between 6 and 6.30 p.m. that he had been *de facto* released from detention and had signed the record of his release. The difference between the real time of his release and the officially recorded time of 2 p.m. (see paragraph 9 above) was because the applicant had been stressed and had simply signed the paper he had been given.

17. Before the trial court the applicant also noted that he had not had a lawyer during the 5 June 2006 questioning at the Pasvalys Court. According to the applicant, "he had been told that a lawyer (*advokatas*) would not take part in the questioning and that if he wished to have one he should find one himself. He had not been told that in the courtroom".

18. When questioned as witnesses during the trial on 16 April 2008, four SBGS officers, not including officer E.Č., testified that they had had prior operational information that the applicant and V.K. had been organising the transport of smuggled cigarettes. The officers had acted on the basis of that information and had trailed the Volkswagen Transporter. The other vehicle, the Volkswagen Golf, had been driving about 800 metres ahead. The officers had then intercepted both vehicles, found cigarettes and arrested the applicant, V.K. and D.P.

19. At a trial court hearing on 23 September 2008 E.Č. denied taking any action that would have led to the applicant refusing the services of a lawyer or that any of the SBGS officers had applied any pressure on him. He noted that the applicant and D.P. had not requested a lawyer at the time

and had therefore been questioned without one. However, V.K. had asked for a lawyer and had had one during his questioning.

E.Č. did not remember when the applicant had been released from detention, but considered that the release record gave the right time. E.Č. also testified that he was not present at the applicant's questioning by the pre-trial investigation judge on 5 June 2006. He submitted that the applicant had agreed to testify and so the SBGS officers had driven him in their official vehicle (*tarnybinis automobilis*) from Šiauliai to the pre-trial investigation judge in Pasvalys Court (a journey of about 70 km) for questioning. E.Č. nevertheless disputed the applicant's allegation that he had been taken there in handcuffs.

20. A court clerk, Ž.K., told the trial court that the pre-trial investigation judge, a prosecutor and the suspect (the applicant) had taken part in the applicant's questioning in the judge's office at Pasvalys Court on 5 June 2006. According to the clerk, such questionings were "organised by the prosecutor, who arranges the time with the pre-trial investigation judge". The court clerk also testified that the applicant had arrived for the questioning with two officers, who had been seated at the back of the judge's office, although the clerk could not explain the reasons for their presence. The officers had stayed in the room during the applicant's questioning. The clerk testified that she "really could not tell whether the applicant [when he came in] had been in handcuffs; he had sat at the [judge's] desk without them". The court clerk also testified that she "did not remember whether the [pre-trial investigation judge] had given any orders to the officers who had brought [the applicant] in (*D. Imbrą atvedę pareigūnai*)". The applicant had not argued with the officers and no incident had taken place. The court clerk assumed that "[the applicant] had been taken to the questioning [at the Pasvalys Court] by convoy, however the officers were not wearing uniforms (*aš manau, kad D. Imbrą į apklausą atvedė konvojus, tik jie buvo be uniformų*)". It appeared to her that the applicant's questioning had started after lunch and had ended at 6 p.m. as that was what had been set down in the court record.

21. In his closing arguments during the same hearing of 23 September 2008, the applicant's lawyer submitted that a scenario where the applicant had been released from detention at 2 p.m. on 5 June 2006 and, after being free for two hours, had later "politely" been driven by the officers to a courtroom to be questioned, belonged to "a world of fantasy (*iš fantastikos pasaulio*)". A visit to the SBGS's offices would suffice to see how politely a person would be talked to, especially if he or she had been previously arrested or detained there. It was plain that the applicant had been taken to the courtroom by force so that he would confess. To hold that the two SBGS officers who had brought the applicant to the courtroom had not influenced his testimony was likewise naïve for those officers' presence during the questioning had been tantamount to a whip being held over the applicant's

head: he had clearly understood that he would face a further period of detention if he departed from the officers' instructions.

The applicant's trial lawyer also argued that the applicant had been pressured and tricked into refusing a lawyer on 5 June 2006. The court documents nowhere indicated that a lawyer had been asked to attend the hearing of 5 June 2006 but that the applicant had waived his right to be represented. The applicant's trial lawyer thus suggested that it had been decided earlier that no lawyer would be provided for the applicant and that once at the Pasvalys Court he had only signed what he had been told to sign.

22. V.K., who had his own defence lawyer during the trial, pleaded not guilty.

23. D.P., who also had his own defence lawyer, testified that the applicant had asked him to transport cargo in return for money. He had agreed and on 3 June 2006 he had met the applicant and V.K. in the town of Akmenė. They had all driven to Tauragė to collect the Volkswagen Transporter truck. He had then been given the keys to the truck and told to drive in a certain direction. The applicant and V.K. had driven ahead of him and had called him from different mobile telephone numbers to give him instructions on where to drive. He had eventually been stopped and arrested by the SBGS officers.

D.P. also testified that he had been questioned by the SBGS officers on 4 June 2006 in Šiauliai. In D.P.'s words, he had neither been "offered a lawyer", nor had seen that a lawyer would have arrived. He had signed a record that he had refused one. D.P. also testified that he had not been put under pressure during the questioning on 4 June 2006 and had confessed of his own volition. D.P. added that the incident was the fourth time he had transported cargo in that way with the applicant and V.K. Both the applicant's and V.K.'s lawyer used the possibility given to them to put questions to D.P.

Lastly, D.P. stated that no lawyer had come to the Pasvalys Court on 5 June 2006, and therefore he had signed a record refusing one.

**(b) The trial court's verdict**

24. On 29 October 2008 the Šiauliai Regional Court dismissed as unproven the applicant's arguments about undue influence by the SBGS officers and a breach of his rights. The court saw such arguments as a defence strategy. Even though the applicant and V.K. had denied any involvement in the crime of transporting smuggled cigarettes, the court considered that their guilt had been established by the evidence. It had shown that the three co-accused had communicated by telephone, including D.P. and V.K. having talked on the telephone at 8 a.m. on 3 June 2006, the day they had been arrested. There was also the material evidence and the testimony of the SBGS officers who had arrested the three men *in flagrante delicto*. The trial court also relied on D.P.'s testimony regarding the details

of how the cigarettes had been transported. That testimony had been consistent from the very beginning of the pre-trial investigation and had been confirmed by him during the trial. There was no reason not to believe the applicant's testimony to the pre-trial investigation judge on 5 June 2006, all the more so because during that questioning the applicant had disclosed details of the crime – how payments for the cigarettes had been made – which D.P. had not known about.

25. The trial court thus found the applicant, V.K. and D.P., guilty of the unlawful transportation of goods subject to excise duties (Article $199^2$ of the Criminal Code, see paragraph 41 below). D.P. was also convicted of the theft of a telephone. The trial court considered that D.P. deserved a more lenient sentence because he had confessed and his actions in transporting the smuggled cigarettes had been directed by the applicant and V.K. That being so, there was an aggravating circumstance, which applied to all three men, of having acted in an organised group. The court also noted that D.P. had a prior conviction for a moderately serious (*apysunkis*) crime which had not yet expired, while the applicant and V.K. had no prior convictions and had been given positive character references. The trial court fined the applicant and V.K. 22,880 Lithuanian litai each (LTL, approximately 6,600 euros (EUR)) and D.P. LTL 9,880 (approximately EUR 2,900).

### *4. The proceedings before the appellate court*

#### (a) The parties' submissions

26. The applicant appealed, noting in a written statement that he had been arrested at about 12 p.m. on 3 June 2006 and held at the SBGS office until "the afternoon (*popietė*)" of 5 June, when he had been taken to the Pasvalys Court. The applicant therefore argued that he had been detained for more than forty-eight hours without a court order, which he saw as a breach of Article 5 §§ 1 and 3 of the Convention. He further maintained that the investigators had thus abused their powers so that he would confess. There was no plausible explanation for why he had denied his guilt during three questionings in the course of the pre-trial investigation and had confessed only once, that is, on 5 June 2006. The applicant concluded that for the court to take that testimony into account would be a breach of the Convention.

He also noted that under Article 189 of the Code of Criminal Procedure, during a suspect's questioning a judge, a prosecutor, and suspect and, if he or she so wished, his or her lawyer, had to be present. In his case, the SBGS officers who had given him D.P.'s testimony to read and who had put him under psychological pressure had been sitting behind him at the questioning.

The applicant thus asked to be acquitted. He noted that he had no prior convictions and was a professional sportsman who made Lithuania known

worldwide. As noted by the applicant's lawyer in his observations to the Court, the applicant was the world number two in Kyokushin Karate.

27. The prosecutor who testified to the appellate court acknowledged, in reply to the applicant's complaint that the SBGS officers had taken him to the Pasvalys Court for questioning, that "the officers drove and delivered the arrested person [the applicant] to the judge (*atvežė ir pristatė pas teisėją sulaikytąjį Imbrą*)", but that did not mean that there had been any breach of the law. Such procedures were allowed by the regulations of the "convoy service".

28. At the appellate court hearing the applicant's lawyer pointed to the prosecutor's admission that the applicant had been taken to the court by convoy. Accordingly, he had not travelled there of his own free will. Above all, the applicant had been taken to the court after he had been released. For the applicant's lawyer, the prosecutor's insinuation that by taking the applicant to the courtroom the officers had done him a favour was nothing but a whitewash. The applicant's lawyer also submitted that his client's confession of 5 June 2006 had been obtained by a gross (*grubus*) breach of the Convention, employing tactics that were usually seen in detective films. The applicant's lawyer asserted that "it was time to understand" that human rights should be respected.

**(b) The appellate court's verdict**

29. On 13 January 2009 the Court of Appeal dismissed the applicant's appeal. The court considered that the applicant had been released in Šiauliai at 2 p.m. on 5 June 2006 as that was what had been indicated in the record of his release, which he himself had signed (see paragraph 9 above). The appellate court also noted that the applicant had been questioned in Pasvalys Court between 4 and 6 p.m. on 5 June 2006 (see paragraph 7 above), that is after he had been released, as indicated in the record of his release. It was therefore clear that the applicant could not have been delivered to the Pasvalys Court in handcuffs. For the appellate court, the fact that the SBGS officers had "delivered (*pristatė*)" the applicant to the court later that day "raised no suspicions (*nesukelia įtarimų*)". It was only natural that once the prosecutor had decided that the applicant was to be questioned in Pasvalys Court, and he had not objected to such questioning, that the authorities had to "see to the applicant's journey to Pasvalys and his return to Šiauliai (*pasirūpinti D. Imbro nuvykimu į Pasvalį ir grįžimu atgal į Šiaulius*)", where the applicant had been released earlier. Last but not least, the fact that the officers who had brought the applicant to the court had sat in the judge's office during the questioning had not made that questioning unlawful. As the court clerk Ž.K. had noted, the officers had not sat behind the applicant but at the back of the judge's office and no incident had taken place (see paragraph 20 above).

30. The Court of Appeal also rejected the applicant's suggestion that his guilt had been based exclusively on his confession of 5 June 2006. On the contrary, it had been based on the evidence as a whole, in particular on D.P.'s testimony, which had been reliable as far as the main details of the crime were concerned, and the proof of contact between the men – the telephone calls – including on the day they had been arrested. For the Court of Appeal, the trial court had also acted correctly in having regard to the applicant's testimony of 5 June 2006, which had not been in breach of the Convention. It did not say which Convention provision it meant.

*5. The proceedings on the points of law*

**(a) Submissions by the applicant and the prosecutor**

31. The applicant lodged an appeal on points of law. Firstly, he maintained that the Court of Appeal had carried out only a purely formal examination of the lawfulness of his detention, on the basis of the documents indicating the time of his arrest and release. The applicant relied on Article 5 §§ 1 and 3 of the Convention, highlighting that he had been arrested at "about midday on 3 June 2006", held by the SBGS officers until "the afternoon of 5 June 2006", and had then been taken in handcuffs by them to the court in Pasvalys for 4 p.m. that day. Given that the questioning by the judge had lasted until 6 p.m. and that afterwards the officers had taken the applicant back to Šiauliai, his detention had *de facto* lasted fifty-five hours, which had been in breach of Article 140 § 4 of the CCP. The unlawful restriction of his liberty had been corroborated by the testimony of the Pasvalys Court clerk Ž.K. (see paragraph 20 above).

32. Secondly, the applicant argued that the lower courts had ignored the circumstances in which his confession had been obtained. He submitted that he had denied his guilt from the time of his arrest, but that on 5 June 2006, when the time-limit for his temporary arrest had been approaching, he had been questioned unofficially (*neoficialiai*) and put under psychological duress. He reiterated the arguments he had raised before the trial court (see paragraph 16 above). The applicant summed up by saying that his confession had been obtained in breach of the Convention.

Lastly, the applicant repeated word-for-word his argument about the rules of criminal procedure on who could be present during a suspect's questioning (see paragraph 26 above).

33. Responding to the applicant's appeal on points of law, the prosecutor admitted that the officers "who had driven the applicant (*jį atvežę*)" to the Pasvalys Court on 5 June 2006 had been present in the judge's office during his questioning. Even so, no incident had taken place during the questioning. The applicant had testified voluntarily and had made no complaints.

**(b) The Supreme Court's conclusion**

34. On 29 September 2009, the Supreme Court dismissed the applicant's appeal on points of law. It held that the appellate court had been correct to dismiss the applicant's arguments about alleged violations of the rules of criminal procedure and undue influence on him during the pre-trial investigation in order to obtain his confession at the Pasvalys Court on 5 June 2006. The Supreme Court also held that the applicant's guilt had been established on the basis of his own testimony to the pre-trial investigation judge, the testimony of the officers who had arrested him, the circumstances in which he had been arrested, and the information about the co-accused' telephone contacts. The Supreme Court also held that the applicant's testimony to the pre-trial investigation judge had correctly been retained as part of the evidence even though he had withdrawn it later.

## B. Relevant domestic law and practice

35. The Constitution reads:

**Article 20**

"Human liberty shall be inviolable.

No one may be arbitrarily apprehended or detained. No one may be deprived of his liberty otherwise than on the grounds and according to the procedures established by law.

A person apprehended *in flagrante delicto* must, within 48 hours, be brought before a court for the purpose of deciding, in the presence of this person, on the validity of the apprehension. If the court does not adopt a decision to detain the person, the apprehended person shall be released immediately."

**Article 31**

"A person charged with committing a crime shall have the right to a public and fair hearing of his case by an independent and impartial court.

It shall be prohibited to compel anyone to give evidence against himself ...

...

A person suspected of committing a crime, as well as the accused, shall be guaranteed, from the moment of his apprehension or first interrogation, the right to defence, as well as the right to an advocate."

36. Article 140 of the Code of Criminal Procedure read at the relevant time that a person could be placed under temporary arrest if he or she had been caught *in flagrante delicto* and that the measure could last up to forty-eight hours. If the investigator or prosecutor considered that a person should be detained, that person had to be delivered to a judge within those forty-eight hours for a decision on the matter.

37. The relevant provisions of the Code of Criminal Procedure with regard to conducting pre-trial investigations and the rules for body searches at the relevant time stated:

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

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

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

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

**Article 146. Body search (*asmens krata*)**

"1. A body search is conducted under the same rules as a search of premises [that is, as a rule it must be sanctioned beforehand by a court].

2. A body search can be conducted without a court order when:

1) a person is being arrested or detained;

2) when there are sufficient grounds to believe that ... a person may have items or documents on himself or herself which could be relevant for investigating a crime ..."

38. The Code of Criminal Procedure also stated that the person's lawyer (*advokatas*) had the right to be present during the questioning of a suspect and, if so requested by the suspect, could take part in procedural actions performed in respect of that person (Article 48 § 1 (2 and 4)).

A pre-trial investigation officer, prosecutor or judge had the obligation to explain a suspect's or accused person's right to have a lawyer present from the time of his or her first questioning and to provide the possibility to make use of that right (*suteikti galimybę šia teise pasinaudoti*). Any refusal of a lawyer by a suspect or an accused had to be recorded in writing (Article 50 § 1).

The participation of a lawyer was obligatory if, for example, the suspect was a minor, could not exercise his or her defence rights because of a mental or physical handicap, if a crime could lead to life imprisonment (Article 51 § 1 (1, 2 and 5)), or if the suspect had been detained when a procedural action was being performed (*tiriant ir nagrinėjant bylas, kai įtariamasis ar kaltinamasis yra suimtas*) (Article 51 § 1 (7)).

Once a prosecutor was convinced that sufficient incriminating evidence had been gathered during the pre-trial investigation, he or she informed the suspect that the pre-trial investigation was over and that the person had the right to acquaint himself or herself with the pre-trial investigation material

and request that other evidence be added to the file. The prosecutor afterwards drew up a bill of indictment (Article 218).

39. According to the Convoy Rules (*Konvojavimo taisyklės*), approved by the Ministers of Justice and Internal Affairs on 26 July 2005, the convoy service escorts people who have been arrested, detained or convicted.

40. On 28 June 2007 the Senate of the Supreme Court held that when a court is deciding whether evidence has been obtained lawfully it must examine whether or not the manner in which the evidence was obtained contradicted the requirements prescribed by law.

41. The Criminal Code at the material time read:

**Article 199[2]. Unlawful Possession of Goods Subject to Excise Duties**

"1. A person who, in violation of the established procedure, acquires, stores, transports, forwards, uses or handles goods subject to excise duties whose value exceeds the amount of [LTL 32,500; approximately EUR 9,400]

shall be punished by a fine or imprisonment for a term of up to seven years ..."

## COMPLAINTS

42. The applicant complained under Article 5 of the Convention that he had been unlawfully deprived of his liberty on 5 June 2006, when he had been taken to the Pasvalys Court.

43. He also complained, under Article 6 §§ 1 and 3 of the Convention, that he had not had a lawyer during his questioning at the Pasvalys Court which resulted in his forced confession that, in turn, had been the primary basis for his conviction.

## THE LAW

### A. Complaint under Article 5 of the Convention

44. The applicant complained that on 5 June 2006 he had been arbitrarily deprived of his 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:

(...)

(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; ..."

*1. The parties' submissions*

45. The Government submitted that the applicant had failed to exhaust domestic remedies with regard to his complaint about the unlawful deprivation of liberty. Firstly, if the applicant had seen the events of 5 June 2006, when he had been taken to the Pasvalys Court for questioning, as a deprivation of liberty breaching his rights under the Convention, he could have instituted separate civil proceedings for damages. In that connection, the Government relied on Article 6.272 of the Civil Code and also noted Lithuanian case-law to the effect that even if the actions of an authority, such as an unlawful deprivation of liberty, had been declared lawful in a criminal case, they could still be acknowledged as unlawful in civil proceedings, as noted by the Court in *Venskutė v. Lithuania* (no. 10645/08, §§ 49-51, 11 December 2012) and *Varnas v. Lithuania* (no. 42615/06, §§ 62-68, 9 July 2013). However, the applicant had not availed himself of that civil law remedy.

46. Secondly, in the Government's view, the applicant had also failed to properly exhaust the criminal law avenue, namely by making use of Articles 62 and 63 of the Code of Criminal Procedure (see paragraph 37 above). In particular, he had not appealed against the prosecutor's decision of 14 December 2007 dismissing his complaint that he had incriminated himself because of psychological duress. Furthermore, although he had been informed of his rights during the pre-trial investigation, he had also failed to rely on the aforementioned provisions of the Code of Criminal Procedure. That meant that he had not appealed against the actions of the investigators or those of the pre-trial investigation judge, which he could have done if he had considered that his questioning by the pre-trial investigation judge had been outside the time-limit for his temporary arrest and had thus amounted to a breach of his right to liberty.

47. The applicant noted that although he had raised the matter of the investigators' actions with the prosecutor (see paragraph 13 above), his complaint had been dismissed and the case had been sent for trial. He could also be understood as arguing that the procedure to complain about the actions of pre-trial investigators only existed in formal terms, but did not work in practice. He had afterwards, albeit unsuccessfully, voiced his complaint of an unlawful breach of his right to liberty at all court instances during his criminal trial because the criminal proceedings had been the most important for him. He also stated that there had been no grounds to start separate civil proceedings regarding a breach of his right to liberty because that issue had already been examined and settled in the criminal proceedings, where a final decision had been reached by the Supreme Court.

*2. The Court's assessment*

48. At the outset, the Court notes that the purpose of the exhaustion rule contained in Article 35 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions. Considering the subsidiary role of the Convention machinery, Article 35 § 1 of the Convention obliges applicants to use remedies which relate to the breaches alleged and at the same time are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged (see *Chiragov and Others v. Armenia* [GC], no. 13216/05, § 116, ECHR 2015).

49. The Court also reiterates that, in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Kalucza v. Hungary*, no. 57693/10, § 50, 24 April 2012; *Mihu v. Romania*, no. 36903/13, § 58, 1 March 2016; and *Jankovskis v. Lithuania*, no. 21575/08, § 49, 17 January 2017 and the case-law referred to therein).

50. The Court recalls that in *Venskutė* (cited above), whose circumstances bear a certain similarity to those in this case in that it also concerned the question of whether the actions of SBGS officers amounted to a deprivation of liberty (see *Venskutė*, cited above, §§ 73 and 74), the Court acknowledged that both avenues – in criminal law and civil law – could in principle, if pursued successfully, have led to a decision determining that the SBGS officers had exceeded their powers (see *Venskutė*, cited above, § 69).

51. In the instant case the Court firstly turns to the Government's argument that the applicant has failed to properly exhaust the criminal law remedy, given that he did not appeal against the prosecutor's decision to dismiss his complaint about incriminating himself as he feared losing his liberty and the decision to transfer the criminal case for trial (see paragraph 14 above). The Court finds that the applicant indeed was required to lodge, pursuant to Article 63 of the Code of Criminal Procedure (see paragraph 37 above), such an appeal to a higher prosecutor and, if unsuccessful, to the pre-trial investigation judge. In that connection the Court is not ready to subscribe to the applicant's arguments that certain facts, such as that three days after the prosecutor's decision his criminal case had been transferred for trial (see paragraphs 14 and 15 above) or that he had voiced his grievance during his trial, absolved him from using the aforementioned criminal procedure avenue. The Court considers that deprivation of the applicant's liberty had not been the principal subject matter and focus of his criminal trial which instead revolved around the issue of the applicant's confession and the strength of evidence on the basis of which he eventually

was found guilty of having smuggled cigarettes (see paragraphs 24 and 34 above).

52. Having found that the applicant had not properly raised a grievance of an unlawful deprivation of liberty in accordance with the rules of domestic criminal procedure, the Court considers that the applicant was therefore obliged to institute separate civil proceedings for damages as an alternative remedy (see *Venskutė*, cited above, §§ 68 and 69). However, he had not availed himself of that avenue either.

53. In the light of the foregoing, the Court cannot but conclude that the applicant has not exhausted any of the available domestic remedies. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention.

## B. Complaint under Article 6 of the Convention

54. The applicant further complained that he had been forced to incriminate himself on 5 June 2006 and considered that he had been convicted primarily on the basis of those statements. The applicant also mentioned in brief that a prosecutor and investigators had been present during his questioning on 5 June 2006, whereas a lawyer was also to be present in such situations, if the suspect so wished.

55. The Court considers that the complaints fall to be examined under Article 6 § 1, which inasmuch as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ..."

### *1. The parties' submissions*

#### (a) The Government

56. The Government echoed their argument that the applicant had not exhausted the criminal law remedies, namely Articles 62 and 63 of the Code of Criminal Procedure (see paragraph 46 above), as he had not complained at the stage of the criminal investigation of having been forced to confess. Nor had he appealed against the prosecutor's decision of 14 December 2007 (see paragraph 14 above).

The Government also asserted that during the trial the applicant had failed to properly complain before the domestic courts that he had not had a lawyer during his questioning on 5 June 2006.

57. The Government argued that the proceedings had to be considered as a whole in order to establish whether the applicant had had a fair trial under Article 6 § 1 of the Convention. Regarding the absence of a defence lawyer during the applicant's questioning on 5 June 2006, the Government argued that it had not been obligatory under Article 51 of the Code of Criminal Procedure (see paragraph 38 above) to have one. Moreover, the applicant's

right to a lawyer had been explained to him, both on 5 June and before his first questioning two days earlier, and on both occasions he had refused one and signed a waiver (see paragraphs 3 and 7 above). In this context the Government also pointed out that the applicant's co-accused V.K. had asked for a lawyer and had been provided with one, unlike in other cases where the Court had had regard to the fact that none of the co-accused had been represented (see paragraph 5 above; they relied on *Pishchalnikov v. Russia*, no. 7025/04, § 82 *in fine*, 24 September 2009). The Government submitted that that could only lead to the conclusion that the applicant had not only had a theoretical possibility for a defence lawyer but that it had also been possible in practice. He had waived his right freely and unequivocally.

58. The Government further submitted that the applicant's testimony to the pre-trial investigation judge had had little effect on his conviction because it had been neither the sole nor a key piece of evidence of his guilt. In fact, the applicant had been convicted on the basis of the evidence as a whole. Moreover, the domestic courts had provided reasonable explanations why the evidence which had proved the applicant's guilt had had to be considered as reliable, whereas the applicant's denial of his guilt had raised questions. The Government also pointed out that D.P., who had incriminated the applicant, had not retracted his statements after getting a defence lawyer at the trial stage of the criminal proceedings (see paragraph 23 above), which implied that D.P.'s testimony had been truthful. Overall, the domestic courts had given due regard to the applicant's complaint that his conviction had rested on an unlawfully obtained confession, but had correctly dismissed that complaint as not proven.

**(b) The applicant**

59. The applicant pointed out that he had had no right to acquaint himself with the pre-trial investigation material during an ongoing pre-trial investigation in order to challenge his confession. Once the pre-trial investigation had been concluded, he had therefore asked the prosecutor to discontinue it, also referring to the confession that had been extracted from him. The applicant reiterated that he had not submitted a complaint about the prosecutor's decision of 14 December 2007 to dismiss his request and to transfer the case for trial, because, in his view, such a complaint was futile once a pre-trial investigation had been terminated. That notwithstanding, he underlined the fact that he had raised the complaint about a forced confession during the criminal proceedings before the courts, albeit unsuccessfully.

60. The applicant underlined the fact that he had denied being involved in the crime during his first questioning on 3 June 2006. Afterwards, the SBGS officers had questioned him unofficially and had continued to exert pressure on him so that he would confess. It was while being under that psychological duress that he had been delivered and presented to the

pre-trial investigation judge at Pasvalys Court, where he had been left with no other choice but to incriminate himself. Until that event, or afterwards, he had not had a brush with the law or "been on the authorities' radar". The SBGS officers had used his lack of experience to their advantage. The applicant thus stated that the "unlawful deprivation of his liberty led one to reasonably doubt as to whether the right to a defence had been sufficiently provided for". Despite that, the domestic courts had found that the applicant's statements of 5 June 2006 had been lawful and had admitted them in evidence.

61. The applicant contested the Government's argument that his conviction had not been based on his confession of 5 June 2006. In fact, the Government themselves had acknowledged that the courts had assessed all the evidence, including the applicant's confession. The applicant also submitted that other evidence, such as D.P.'s testimony, had not been reliable. In the applicant's eyes, his unlawfully obtained confession had been the only evidence that he might have committed a criminal act, particularly because the courts had not established that he had communicated with D.P., the driver of the car where the smuggled cigarettes had been transported. In the applicant's view, no party to the criminal proceedings had denied his statement that V.K. had merely been driving him home to Kaunas.

*2. The Court's assessment*

62. The applicant's complaint appears to follow the logic that since he did not have a lawyer at his questioning by the pre-trial investigation judge on 5 June 2006, he had been forced to incriminate himself and that confession had later been the main basis for his conviction. The Court will carry out its analysis accordingly.

63. The Court reiterates at the outset that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see *Salduz v. Turkey* [GC], no. 36391/02, § 59, ECHR 2008, and *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 115, 12 May 2017 (extracts)).

64. On the facts of the case the Court recalls that the applicant was explained the right to have a lawyer as early as on 3 June 2006, when he was questioned by the SBGS officers in the town of Šiauliai. The applicant clearly chose to waive his right to legal assistance for that interview (see paragraph 3 *in fine* above). In this context the Court also points to the fact that the applicant's co-accused V.K. was assigned a legal-aid lawyer whilst he still was held at the SBGS premises on 5 June 2006. V.K. had also

confirmed the preference to have a lawyer during his questioning (see paragraphs 5 and 11 above).

65. Turning to the applicant's questioning on 5 June 2006, the Court firstly notes that at that moment the applicant was not, at least formally, arrested. Neither was he interrogated in police custody. Instead, he was questioned in Pasvalys courtroom, which makes the present case different from previous cases concerning the right to legal assistance in pre-trial proceedings (see *Aleksandr Zaichenko v. Russia*, no. 39660/02, § 47, 18 February 2010, and the case-law cited therein). As can be seen from the court record, the applicant was reminded of his right to legal assistance but chose to waive that right. Although the applicant implied that he had been a victim of the SBGS officers' psychological pressure and subterfuge (see paragraphs 17 and 60 above), the Court points out that the record of the applicant's refusal to have a lawyer had been made in the presence of and countersigned by the pre-trial investigation judge, an independent and impartial authority who directed that hearing (see paragraph 7 above). Likewise, the applicant had not complained, either to the domestic courts or to this Court, of having ever been under physical duress to refuse a lawyer during his questioning. In the light of the above, and even assuming that the applicant in the present case was not free to leave the courtroom in Pasvalys, the Court considers that the circumstances of the case as presented by the parties, and established by the Court, disclose no curtailment of the applicant's freedom of action to insist that a lawyer be present during that questioning, which would have been sufficient for activating a requirement for legal assistance already at this stage of the proceedings (see, *mutatis mutandis*, *Aleksandr Zaichenko*, cited above, §§ 47 and 48). The Court therefore concludes that the applicant had failed to substantiate his complaint that he had been denied a lawyer's assistance (see, *mutatis mutandis*, *Sharkunov and Mezentsev v. Russia*, no. 75330/01, §§ 106 and 107, 10 June 2010), rather, he waived his right to legal assistance voluntarily and unequivocally.

66. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) and should be rejected in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court, by a majority,

*Declares* the application inadmissible.

Done in English and notified in writing on 30 August 2018.

Marialena Tsirli
Registrar

Ganna Yudkivska
President