CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 45012/98
by Virgilijus KAMANTAUSKAS
against Lithuania

The European Court of Human Rights (Third Section), sitting on 29 February 2000 as a Chamber composed of

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

and Mrs S. Dollé, *Section Registrar*,

Having regard to the above application introduced on 30 October 1998 and registered on 16 December 1998,

Having regard to the Court's partial decision of 2 March 1999,

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 is a Lithuanian national, born in 1963 and living in Joniškis area.

He is represented before the Court by Mr V. Falkauskas, a lawyer practising in Joniškis.

A. Particular circumstances of the case

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

The applicant was suspected of a number of thefts committed whilst on probational release for previous convictions. Several criminal proceedings were brought against him in 1998, the latest being instituted on 29 September 1998. The applicant was arrested on the morning of that day. On the same date the prosecutor requested the Joniškis District Court to order the applicant's detention. An official defence counsel was appointed.

Again on the same day, at 2.50 p.m. a judge of the Joniškis District Court held a 10 minute remand hearing to which the prosecutor, the applicant and his defence counsel had been called. The prosecutor requested the court to order the applicant's remand in custody. The judge questioned the applicant, who admitted that he had committed the offences alleged. Then she permitted the applicant's representative to speak. Counsel requested the court to dismiss the prosecutor's remand application. He stated that there were no grounds for the detention as the applicant had accepted his guilt and would not hinder the investigation.

The judge ordered the applicant's detention on remand until 29 December 1998. According to the written version of the detention order, the object of the detention was to prevent the applicant from committing new offences while he was suspected of having committed an offence, and to facilitate the determination of the truth in the case.

On 30 September 1998 the applicant appealed against the detention order. In the appeal he mentioned that on 29 September 1998:

- his representative had been informed that he had to provide legal assistance to the applicant some 10 - 15 minutes before the hearing of the prosecution's application;

- the lawyer had had no time or facilities to examine the contents of the prosecutor's request or to have access to the case-file, or to discuss defence tactics with the accused, because he had only become aware of the facts of the case during the prosecution's intervention at the hearing;

- the judge had prevented the representative from speaking with the applicant before the hearing had started, allegedly warning the lawyer that the Bar could be informed of his behaviour, and that a disciplinary penalty would be imposed if the lawyer spoke to the applicant without the judge's permission;

- the applicant and his counsel were not permitted to speak to each other or to ask questions throughout the hearing;

- the judge held the hearing without wearing her judge's robe;

- the judge delivered the detention order without retiring to reach a decision, although the transcript of the hearing of 29 September 1998 by the Registry of the District Court wrongly stated that the court had so retired;

- the judge's decision was read out in the courtroom without giving reasons for the detention;

- the detention order was not presented for the applicant's signature;

- the judge had not been impartial, and should have withdrawn because of her relations with the complainant in one set of theft proceedings.

The applicant alleged that the above circumstances involved major breaches of the Courts Act and the Code of Criminal Procedure, and that his detention could not be considered lawful in view of those irregularities.

On 12 October 1998 the Šiauliai Regional Court heard the appeal in the presence of the applicant's representative and a prosecutor. The court dismissed the appeal, holding that the applicant should be in custody because of his propensity to crime, his lack of employment, the fact that he was charged with five offences while still on probational release, and that he risked a custodial sentence of more than one year's imprisonment. The Regional Court ruled that the applicant could reasonably be expected to engage in new offences whilst suspected of having committed an offence, and that therefore his detention was justified. By reference to Article 109-1 § 2 of the Code of Criminal Procedure, the Regional Court concluded that the alleged procedural irregularities of 29 September 1998 did not "alter the substance" of the lawfulness of the applicant's detention.

B. Relevant domestic law

Relevant provisions of the Code of Criminal Procedure
(*Baudžiamajo proceso kodeksas*):

Articles 10 and 104 provide that no one can be detained save by virtue of a decision of a court or judge.

Article 137 provides that a prosecutor, investigator or interrogator can temporarily arrest a person while he is committing an offence or immediately after its commission when there are grounds for detention on remand specified in Article 104 § 3 (see below). This arrest can last for no longer than 48 hours, during which time the arrested person must be brought before a judge who decides whether or not to order detention on remand.

Article 104 § 3 states that a suspect can be detained on remand where it is reasonably believed that he may:

(1) abscond from the investigation and trial;
(2) obstruct the determination of the truth in the case;
(3) engage in new offences whilst suspected of having committed particular crimes.

Article 104-1 provides:

> "… A prosecutor shall bring an arrested person … before a judge within 48 hours after the moment of the arrest, with the application to order his detention on remand … . The judge must hear the person as to the grounds of the arrest. The prosecutor and the counsel shall take part in the inquiry. The judge, of his own motion, or on 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 accept the prosecutor's application and order detention on remand by designating the term of the detention, or refuse to accept the application and refuse to order detention.

Pursuant to Articles 104-3 and 104-4, a judge shall take a reasoned decision on the detention of a person, specifying the offence alleged against him and the grounds for the detention. The detention order shall be pronounced immediately after it is taken or within "the shortest time possible", and it shall be presented for the signature of the detainee, unless the latter cannot or does not want to sign it.

Article 109-1 provides:

> "A detainee or his counsel shall have the right during the preliminary investigation or trial to lodge with an appellate court an appeal against the detention order or the extension of the term of the detention on remand … . With a view to examining the appeal, there shall be convened a hearing, to which the detainee and his counsel or counsel alone shall be called. The presence of a prosecutor is obligatory at such a hearing.
>
> The decision taken by the appellate judge is final and cannot be the subject of a cassation appeal. If the appellate judge … finds procedural irregularities that do not affect the essence of the detention order, he must remedy the defects without quashing the order … ."

Article 58 § 2 (7) of the Code of Criminal Procedure permits the accused's representative to have access to the case-file following the conclusion of the pre-trial investigation.

Article 58 § 2 (3) provides that a prosecuting authority can take part in the meetings of the accused and his defence counsel and "control" their correspondence when it is reasonably believed that unlimited communication between the accused and his representative can have a "negative impact on the investigation" of the case. Article 39 of the Bar Act (*Advokatūros įstatymas*) prohibits any interference with communications between the lawyer and his client save in the cases provided for by law.

COMPLAINTS

1. The applicant complains about the lawfulness of his detention under Article 5 § 1 of the Convention. He alleges in particular that on 29 September 1998 his remand in custody was ordered in breach of domestic criminal procedure and that he was not subsequently released on bail, even though numerous procedural irregularities were found but ignored as "unsubstantial" on appeal by the Šiauliai Regional Court. In his opinion, no detention ordered in the absence of defence rights, an adversarial procedure or equality of arms can be regarded as "lawful" within the meaning of the above provision of the Convention.

2. The applicant also complains about the proceedings in review of his detention under Article 5 § 4 of the Convention. He alleges that his detention was ordered and the appeal dismissed in the absence of any rights of defence, an adversarial procedure or equality of arms. He alleges in particular that his representative had no opportunity to speak with him without interference by the prosecution, pursuant to Article 58 § 2 (3) of the Code of Criminal Procedure. Nor did the defence have access to the case-file or a right to consult other relevant documents in order to challenge effectively the lawfulness of the detention. This was in accordance with Article 58 § 2 (7) of the said Code, which does not permit the defence's access to a case-file where the preliminary investigation has not been concluded. The applicant submits that, thus, he could not effectively challenge his detention, and the appeal procedure of 12 October 1998 did not comply with Article 5 § 4 of the Convention.

PROCEDURE

The application was introduced on 30 October 1998 and registered on 16 December 1998.

On 2 March 1999 the Court decided to communicate the applicant's complaints about his detention on remand to the respondent Government and to declare inadmissible the remainder of the application.

The Government's written observations were submitted on 28 May 1999. The applicant replied on 13 August 1999.

On 21 October 1999 the Court granted the applicant legal aid.

THE LAW

1. The applicant complains about the lawfulness of his detention under Article 5 § 1 of the Convention, which provides, insofar as relevant, 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 Government doubt whether the facts are as alleged by the applicant in his appeal against the detention order, because the transcript of the hearing of 29 September 1998 made no reference to those matters. According to the Government, the lawyer only mentioned the above circumstances on appeal before the Regional Court. Furthermore, the lawyer did not avail himself of the possibility to ask the applicant questions during the hearing of 29 September 1999, although that right was secured by Article 104-1 § 3 of the Code of Criminal Procedure. Nor did he challenge the judge who ordered his detention. He did not therefore exhaust domestic remedies in respect of this part of the application.

In any event, the hearing of 29 September 1998 complied with Article 104-1 of the Code of Criminal Procedure. The applicant’s detention was ordered by a reasoned detention order on suspicion of his having committed several thefts. His remand in custody was ordered in particular to prevent the commission of fresh crimes and to facilitate the establishment of the truth in the proceedings. Moreover, the lawfulness of the detention order of 29 September 1998 was confirmed at appellate instance. In the view of the Government, the period of detention, which resulted from the detention order of 29 September 1998, was “lawful” within the meaning of Article 5 § 1 of the Convention.

The applicant argues that the statutory provisions referred to by the Government were not properly applied in his case. The hearing of 29 September 1998 was concluded in such haste that no protection against arbitrariness was ensured. In fact, he was detained only because of his previous convictions, as there were no valid grounds to warrant his detention otherwise.

Insofar as the Government allege non-exhaustion of domestic remedies, the Court notes that the applicant appealed against the detention order, alleging the unlawfulness of his detention in view of various irregularities in connection with the events of 29 September 1998. The Regional Court examined the appeal, without referring to any domestic requirement for the applicant to have raised these matters with the first instance court on 29 September 1998. The Court considers, therefore, that the applicant has exhausted the remedies available to him in this respect under Lithuanian law. The Government’s objection must therefore be rejected.

To the extent that the Government doubt the validity of the facts alleged by the applicant in connection with the hearing of 29 September 1998 on the ground that no such facts were recorded in the transcript of that hearing, the Court notes that the applicant in fact mentioned the allegations at issue in his appeal against the detention order, and that the appellate court did not contest the occurrence of those facts. The Court is satisfied that the facts alleged by the applicant in this respect can be considered as established.

The Court recalls that Article 5 § 1 of the Convention requires that detention be compatible with domestic law, and not arbitrary. A period of detention is, in principle, “lawful” if it is based on a court order. Even flaws in the detention order do not necessarily render the underlying period of detention unlawful within the meaning of Article 5 § 1 (see, the Benham v. the United Kingdom judgment of 10 June 1996*, Reports of Judgments and Decisions* 1996-III, pp. 753-754, §§ 42-47; no. 49107/99, Visockas v. Lithuania, Dec. 6.1.2000, *unpublished*).

The applicant argues that his detention could not be regarded as "lawful" given the hurried nature of the hearing on 29 September 1998 and the alleged constraints on defending himself. However, he has not disputed that on 29 September 1998 the District Court acted within its jurisdiction insofar as it had power to entertain the prosecutor's application and to make an appropriate order in respect of the applicant's detention under Articles 10, 104 and 104-1 of the Code of Criminal Procedure.

The Court observes that Article 104-1 of the Code lays down no particular procedure for the hearing of the prosecutor's application, let alone a requirement for the judge to hear the parties before the appropriate decision is made. Nevertheless, the parties were both heard on 29 September 1998. The fact that certain flaws in the detention order were subsequently found on appeal did not itself mean that the underlying period of detention had been unlawful (see, *mutatis mutandis*, the Benham and Visockas cases mentioned above, *loc. cit.*).

In motivating the need for the applicant to be held in custody, the courts at first and appellate level observed *inter alia* that the applicant had confessed to the offences alleged, and that he risked a custodial sentence. In addition, the facts that he lacked employment and that he was suspected of several different thefts while being on probational release confirmed the authorities' concern to prevent further offences. The above reasons clearly warranted the applicant's detention for the purposes envisaged by subparagraph (c) of Article 5 § 1.

It is true that the speed with which the applicant's arrest and detention were initiated, effected, and judicially controlled in just over half a day is somewhat striking. However, given the obvious grounds for the applicant's remand in custody and the compliance with the domestic law requirements on detention, the expeditious nature of the proceedings does not lead to the conclusion that the District Court which issued the detention order, or indeed the Regional Court which upheld it on appeal, acted in bad faith, or that the courts neglected to attempt to apply the relevant legislation correctly (*ibid.*).

Therefore, the Court does not find that the applicant's remand in custody was arbitrary.

Against the above background, the Court is satisfied that the order to detain the applicant complied with "a procedure prescribed by law", and that the ensuing period of detention was "lawful" within the meaning of Article 5 § 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, and must be rejected pursuant to Article 35 § 4.

2. The applicant also alleges that the review of his detention was ineffective. In this regard he invokes Article 5 § 4 of the Convention, which provides:

> "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 state first that neither the applicant nor his lawyer expressed any disagreement with the way the hearing of 29 September 1998 was conducted. The applicant, did not, therefore, exhaust domestic remedies in respect of this part of the application.

The Government further submit that the Code of Criminal Procedure does not restrict the defence's access to those aspects of the case-file which are relevant for the purpose of challenging the lawfulness of detention. The applicant's lawyer was aware of the alleged offence and the reasons for the detention, as they had been specified in the detention order of 29 September 1998 and the appellate decision of 12 October 1998. In addition, the applicant's representative could have had access to the arrest record and the list of charges against the applicant. Furthermore, counsel could take part in all procedural acts involving the applicant at the stage of pre-trial investigation, and consult the transcripts of those acts.

According to the Government, the restrictions on access to the case-file and on communications between the accused and his counsel were mentioned by the applicant hypothetically, but were not based on the specific facts of the present case as the applicant has not shown that there was any actual interference with his defence rights by the prosecuting authority or the courts. The fact that the judge on 29 September 1998 warned the lawyer not to speak to the applicant was wrongly interpreted, as the judge only sought to ensure the proper conduct of the hearing. The representative was in fact permitted to speak to the applicant and to ask him questions later during the hearing, when given the floor by the judge. However, counsel waived that opportunity.

The Government "neither confirm nor contest" that the judge threatened the lawyer with Bar disciplinary sanctions. While there was clearly no domestic legal basis for such a warning, the occurrence of that warning was not recorded in the transcript of the hearing of 29 September 1998, nor was it mentioned by the lawyer in the applicant's appeal against the detention order. Finally, the lawfulness of the applicant's detention was examined upon his appeal by the Regional Court on 12 October 1998. During the appellate hearing the representative enjoyed the full guarantees of an adversarial procedure, satisfying the requirements of Article 5 § 4 of the Convention.

The applicant states that, by giving the warning before the hearing of 29 September 1998, the first instance judge effectively prevented the lawyer from performing his defence functions, and the inquiry procedure conducted on 29 September 1998 was only a formal realisation of the provisions of the Code of Criminal Procedure. It had no practical effect on his right to challenge the detention. The Government's argument that the existence of the remark in question was doubtful as it was not recorded in the hearing transcript is without substance, as the warning was made before the hearing had even started.

The applicant states that Article 104-1 of the Code of Criminal Procedure entitles a judge to establish the appropriate course of procedure on the prosecution's application for a detention order. Therefore, no adequate remedy is available against the judge's procedural decisions during the hearing. Given the judge's remark that the lawyer should refrain from speaking with the applicant and her subsequent failure to permit the representative to communicate with the accused on 29 September 1998, there was no possibility to contest the lawfulness of the detention. Subsequently, no effective opportunity for such a challenge existed at the appellate instance, as the review procedure before the Regional Court was not truly adversarial.

In the applicant's view, the right of the defence to consult the records of the procedural acts conducted during the pre-trial investigation were insufficient for him to contest the lawfulness of his detention on an equal footing with the prosecution. The applicant was prevented by Article 57 § 2 (7) of the Code of Criminal Procedure from having full access to the case-file. According to the applicant, any request for access to any aspect of the case-file at the stage of pre-trial investigation could be dismissed by the prosecuting authority by reference to Article 58 § 2 (7) of the Code of Criminal Procedure on the ground of the secrecy of the investigation. Therefore, no request to disclose the case-file before the trial can be regarded as an adequate remedy. Overall, the applicant alleges that he could not properly challenge the lawfulness of his detention, as guaranteed by Article 5 § 4 of the Convention.

With regard to the Government's argument about non-exhaustion of domestic remedies, the Court recalls its finding above that the applicant did try the remedies available to him in respect of his detention.

Article 5 § 4 of the Convention entitles arrested or detained persons to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of their deprivation of liberty. In addition, a court examining an appeal against detention must provide the guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties - the prosecutor and the detainee. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see, the Nikolova v. Bulgaria judgment of 25 March 1999, *unpublished*, § 58).

Turning to the facts of the present case, the Court notes that the applicant alleges numerous procedural irregularities at the hearing before the first instance court on 29 September 1998. However, he was entitled to appeal against the detention order to the Regional Court. The applicant has not disputed that the appellate court was fully competent to review all questions of fact and law pertaining to the circumstances in which his detention was ordered. The Court considers that it is therefore the appellate procedure, which requires careful scrutiny under Article 5 § 4 of the Convention.

The applicant alleges that the review procedure before the Regional Court was not truly adversarial. In this respect he only refers to the absence of unlimited access to the case-file during the pre-trial investigation.

The Court notes that the applicant's counsel had access to all the procedural decisions taken in his case in order to prepare the appeal against the detention order. Although the applicant has hypothetically suggested that any request for full access to the case-file at the stage of pre-trial investigation would have been rejected, neither in his appeal against the detention order, nor at the hearing of 12 October 1998, did he make a request to consult any specific aspect of the case-file, or suggest that he lacked such access. The Court is therefore unable to establish that the accessibility of a specific aspect of the case-file was essential to ensure the applicant's effective challenge to his detention. The Court finds no evidence that the applicant was deprived of the possibility to contest his detention in adversarial proceedings.

Having heard the parties, the Regional Court acknowledged that some flaws had indeed occurred at the hearing on 29 September 1998, but that those defects had been insufficient to affect the underlying lawfulness of the applicant's detention. The fact that some errors in the detention order were found on appeal did not mean that the applicant's release was automatically warranted for the purpose of Article 5 § 4.

In the light of the above considerations, the Court concludes that there was compliance with the guarantees of Article 5 § 4 in the present case.

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

For these reasons, the Court, by 5 votes to 2 (Mr L. Loucaides and Mrs H.S. Greve),

DECLARES THE APPLICATION INADMISSIBLE.

S. Dollé
Registrar

N. Bratza
President