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REVIEW OF DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN CASES AGAINST THE REPUBLIC OF LITHUANIA IN 2010

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Abstract. *This article presents the review of the cases decided by the European Court of Human Rights against Lithuania during 2010. Authors provide the summary of relevant cases so that the potential reader is updated with the latest developments of human rights protection concerning Lithuania. Among other cases, this article reviews the case Cudak v. Lithuania decided by the Grand Chamber, which clarified the issues of restrictive principle of State immunity in employment disputes.*

Keywords: *human rights, cases, Republic of Lithuania, ECtHR, Article 6, ECHR.*

Introduction

During 2010 the European Court of Human Rights (hereinafter – ECtHR or the Court) heard a total of 14 cases against the Republic of Lithuania (hereinafter – Lithuania). 6 applications were dismissed for various reasons, whereas remaining 8 applications were examined in full.

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Among the dismissed ones, 2 applications (regarding alleged unfairness and excessive length of criminal proceedings[1] and regarding alleged failure to observe positive obligations to take diplomatic, economic, judicial or other measures that were in the State's power as required under Article 1 of the Convention (hereinafter – ECHR or the Convention)[2] to ensure implementation of the applicants' right of free movement and residence in the northern part of Cyprus by exerting diplomatic and legal pressure on Turkey in the context of its negotiations in relation to accession to the EU[3]) were struck out of the list of cases, because the Court reached the conclusion that the applicant does not intend to pursue the application. 2 applications (regarding complaints for breach of the positive obligation incumbent on the State under Article 2 of the Convention to ensure the conduct of an effective, independent investigation into the death of applicant's son[4] and complaints that the national courts had violated Article 10 of the Convention, which protected the applicants' right to freely express their thoughts and opinions[5]*)* were declared inadmissible due to a failure to disclose any appearance of asserted violations. 1 application (regarding length of criminal proceedings) was rejected as inadmisable, as Lithuanian courts had awarded damages to the applicant for the violation of Article 6 § 1 and the Court held that the applicant could no longer be considered to be a victim of a violation of Article 6 § 1 of the Convention[6]. 1 application (in respect of the applicant's complaint of a violation of the reasonable time requirement of Article 6 § 1 of the Convention, involving criminal and civil proceedings to which the applicant was a party) was struck out of the list of cases, because the Court received declarations from the parties for a friendly settlement of the case[7].

The remaining 8 cases, where the Court provided detailed elaboration, shall be analysed below.

1. *Cudak v. Lithuania*[8]

On 23 March 2010 the ECtHR rendered a long-awaited decision in the case Cudak v. Lithuania, initiated by the applicant Mrs. A. Cudak on 4 December 2001. This case was decided by the Grand Chamber of the ECtHR, which only hears cases that raise a serious question affecting the interpretation of the Convention, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment

1 *Petraitis v. Lithuania*, no. 34937/06.

2 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force on 3 September 1953). ETS 5; 213 UNTS 221 (ECHR).

3 *Artemi and Gregory v. Cyprus, Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Sweden*, no. 35524/06.

4 *Šedbarienė v. Lithuania*, no. 27925/08.

5 *Lietuvos Nacionalinis Radijas ir Televizija and Tapinas ir partneriai v. Lithuania*, no. 27930/05.

6 *Giedraitis v. Lithuania*, no. 51392/07.

7 *Aurimaa v. Lithuania*, no. 17144/06.

8 *Cudak v. Lithuania* [GC], no. 15869/02.

previously delivered by the Court. It was only the second case against Lithuania that was heard by the Grand Chamber of the Court and the Grand Chamber found that by granting the Polish Government's objection based on State immunity and by declining jurisdiction to hear the claim of the former employee of the Polish embassy Mrs. A. Cudak the Lithuanian courts had deprived her of her right of access to a court and decided that Lithuania had breached Article 6(1) of the ECHR.

Ms Cudak submited that Article 6 § 1 of ECHR was violated and requested compensation of LTL 327,978.30 (approximately EUR 94,988) in respect of the pecuniary damage she had allegedly sustained and LTL 350,000 (approximately EUR 101,367) for non-pecuniary damage.

The basis of this case was the dispute between Ms Cudak and the Polish Embassy regarding the legality of termination of the employment contract with Ms Cudak and the final judgment of the Supreme Court of Lithuania (hereinafter – the Supreme Court) delivered on 25 June 2001[9]. In its decision the Supreme Court reiterated the position formulated in its previous judgment *V.Stukonis v. USA Embassy*[10], whereas the Supreme Court admitted for the first time that notwithstanding the statutory rule of absolute jurisdictional immunity of the State established in Art. 479 of the Code of Civil Procedure applicable at the time of Cudak case[11], the application of the principle of absolute State immunity is incompatible with the completely different historical circumstances, thus the principle of restrictive State immunity should be followed instead of absolute immunity. Under the principle of restrictive State immunity, individuals or entities from Lithuania were entitled to initiate proceedings against foreign states, as long as such proceedings arose from relationship of private-law nature (*acta jure gestionis*) and not from the one of public-law nature (*acta jure imperii*). However, in Cudak the Supreme Court granted the plea of State immunity and that reasoning on State immunity of the Supreme Court caused some confusion among academics, fearing that such a decision constitutes a step back to the principle of absolute State jurisdictional immunity[12].

Firstly, the ECtHR examined whether the application of Ms Cudak was admissible, as the Lithuanian Government presented a preliminary objection claiming that, both in theory and in practice, Ms Cudak could have taken proceedings in the Polish courts to complain about the termination of her contract with the Polish Embassy in Vilnius, as the Lithuanian Supreme Court had in fact suggested. The Court decided that such a remedy, even supposing that it was theoretically available, was not a particularly realistic one in the circumstances of the case. The Court was of the opinion that if Ms Cudak had been required to use such a remedy she would have encountered serious practical difficulties

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9 Judgment of the Supreme Court of Lithuania delivered on 15 June 2001, *A. Cudak (Senkevič) v. Embassy of the Republic of Poland* (civil case No. 3K-3-203/2001).

10 Judgment of the Supreme Court of Lithuania, delivered on 5 January 1998 in the case *V.Stukonis v. USA Embassy* (civil case No. 3K-1/1998)

11 The new Code of Civil Procedure of the Republic of Lithuania was adopted on 28 February 2002 and entered into force on 1 January 2003. It replaced the 'old' Code of Civil Procedure which was in force from 1 January 1965 to 1 January 2003, with subsequent amendments.

12 Smaliukas, A.; Goldammer, Y. The Restrictive Theory of State Immunity in Lithuania: Reality or Illiusion. *Baltic Yearbook of International Law*. 2005, 5: 122.

which would have been incompatible with her right of access to a court, which, like all other rights in the Convention, must be interpreted so as to make it practical and effective, not theoretical or illusory. Ms Cudak was a Lithuanian national, recruited in Lithuania under a contract that was governed by Lithuanian law, and the Republic of Poland had itself agreed on this choice of law in the contract. Accordingly the Court decided that the submission of Ms Cudak's complaint to the Polish courts could not be regarded as an accessible or effective remedy.

Secondly, the Court assessed the proposition of the Government that pursuant to a previous decision of the Court in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, § 62, ECHR 2007-IV) the Lithuanian Government could rely on the status of Ms Cudak as a civil servant in excluding her from the protection embodied in Article 6. The Court reiterated its finding reached in the *Vilho Eskelinen and Others* judgment that two conditions must be fulfilled: first, the State in its national law must have expressly excluded access to a court for the post or category of staff in question; secondly, the exclusion must be justified on objective grounds in the State's interest. However, the Court established that Ms Cudak could not be regarded, before the Lithuanian courts, as a civil servant of Lithuania, because she was ultimately the employee of the Republic of Poland. Moreover, the Court decided that even supposing that the *Vilho Eskelinen* case-law was applicable, *mutatis mutandis*, to Ms Cudak case, it could not reasonably be argued that the condition of justification on objective grounds in the State's interest had been fulfilled. The Court decided that it appeared from teh evaluation of the schedule to Ms Cudak's employment contract that her duties at the Polish Embassy consisted of operating the switchboard of the Embassy and consulate general and of recording international telephone conversations; typing up texts in Lithuanian and Polish; sending and receiving faxes; providing information in Polish, Lithuanian and Russian; helping to organise small receptions and cocktail parties; and photocopying documents. In the Court's view, the performance of such duties could hardly give rise to 'objective grounds for exclusion in the State's interest' within the meaning of the above-cited *Vilho Eskelinen* judgment.

Thirdly, the Court examined whether there was a violation of Article 6 § 1 of the Convention. The Court reiterated that the right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the principle of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights. However, the Court noted that the right of access to a court secured by Article 6 § 1 of the Convention was not absolute, but might be subject to limitations; these were permitted by implication since the right of access by its very nature called for regulation by the State. The Court agreed that in this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rested with the Court. The Court indicated that as long as the Court was satisfied that the limitations applied had not restricted or reduced the access left to the individual in such a way or to such an extent that the very essence of the right was impaired, or if that such limitation of the right of

access to a court had pursued a legitimate aim and if there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved, the State could claim that Article 6 § 1 of the Convention was not violated.

The Court declared that the measures taken by a High Contracting Party, which reflected the generally recognised rules of public international law on State immunity could not in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. Considering this, the Court decided that in cases where the application of the principle of State immunity from jurisdiction restricted the exercise of the right of access to a court, the Court was under obligation to ascertain whether the circumstances of the case justified such a restriction.

In considering Ms Cudak's application, the Court first examined whether the limitation expressed in the judgment of the Supreme Court pursued a legitimate aim. The Court noted that as had been established under its previous practice in *Fogarty* judgment there was a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes, with the exception, however, of those concerning the recruitment of staff in embassies. In this connection, the Court noted that the application of absolute State immunity had, for many years, clearly been eroded and substantiated such a conclusion by the Convention on Jurisdictional Immunities of States and their Property that was adopted in 2004 by the United Nations General Assembly and which was based on the Draft Articles on Jurisdictional Immunities of States and Their Property, adopted by the International Law Commission in 1991. According to the Court, Article 11 of the 1991 Draft Articles created a significant exception in matters of State immunity by, in principle, removing from the application of the immunity rule a State's employment contracts with the staff of its diplomatic missions abroad. The ECtHR acknowledged that Lithuania had not ratified the 2004 Convention, however, as Lithuania did not vote against the adoption of such a Convention, the Court decided to evoke a '*well-established principle of international law that, even if a State has not ratified a treaty, it may be bound by one of its provisions in so far as that provision reflects customary international law, either 'codifying' it or forming a new customary rule (see the North Sea Continental Shelf cases, ICJ Reports 1969, p. 41, § 71)*'[13]. Without further explicit or in-depth deliberations on *opinion iuris* on this matter[14], the ECtHR decided to affirm that Article 11 of the 1991 Draft Articles of the International Law Commission, on which the 2004 Convention was based, constituted and applied to Lithuania as customary international law.

13 *Cudak v. Lithuania* [GC], no. 15869/02, para 69.

14 The author is of the opinion that it would have been of great assistance if the Court had elaborated in more detail its conclusion that both elements of international custom (*opinio iuris* and actual State practice) were met. The author's aim or purpose of this article is not to criticise the decision of ECtHR or its reasoning, as the author quite agrees with the conclusion reached by the Court. However, considering the fact that the regional international tribunal (ECtHR), whose competence under Art. 19 of ECHR is to ensure observance of a regional human rights instrument – the ECHR, determined the contents of an international custom that does not directly rise from the ECHR, the need for a more detailed elaboration is understandable.

The Court further noted that Ms Cudak was not covered by any of the exceptions enumerated in Article 11 of the International Law Commission's Draft Articles: she did not perform any particular functions closely related to the exercise of governmental authority; she was not a diplomatic agent or consular officer, nor was she a national of the employer State; the subjectmatter of the dispute was linked to dismissal (not recruitment) of Ms Cudak. The Court decided that neither the Lithuanian Supreme Court nor the respondent Government had shown how these duties could objectively be related to the sovereign interests of the Polish Government. The Court established that there was no evidence that Ms Cudak had actually performed any functions related to the exercise of sovereignty by the Polish State. Moreover, the Court decided that mere allegation that the applicant could have had access to certain documents or could have been privy to confidential telephone conversations in the course of her duties was not sufficient. On this point the Court emphasised that it should not be overlooked that Ms Cudak's dismissal and the ensuing proceedings arose originally from acts of sexual harassment that had been established by the Lithuanian Equal Opportunities Ombudsman, with whom the applicant had filed her complaint.

Considering all this, the Court decided that by upholding an objection based on State immunity and by declining jurisdiction to hear Ms Cudak's claim, the Lithuanian courts, in failing to preserve a reasonable relationship of proportionality, overstepped their margin of appreciation and thus impaired the very essence of the applicant's right of access to a court.

The Court found that Lithuania violated Article 6 § 1 of the Convention and awarded Ms Cudak EUR 10,000 for all heads of damage combined.

It should be noted that there were 2 concurring opinions in this case. In his concurring opinion Judge Cabral Barreto[15] expressed the concern that the wording of the judgement might create ambiguity, because a State could never be bound by the provisions of an international treaty that it had not ratified; ratification was necessary for those provisions to become binding. In the opinion of Judge Cabral Barreto, it was the customary international law that was binding, whether or not it had been codified, and the wording of the judgement should reflect this idea.

Whereas, in his concurring opinion Judge Malinverni[16] stated that whilst Ms Cudak admittedly claimed compensation, she was above all seeking a court decision to the effect that her dismissal had been unlawful. The Judge was of the opinion that, as Ms Cudak had probably had an interest in such a decision, only the reopening of the proceedings and not compensation would have enabled Ms Cudak to obtain full satisfaction. In Judge Malinverni's opinion, an operative provision covering Ms Cudak's right to seek reopening of domestic proceedings was preferable to an award of compensation.

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15 *Cudak v. Lithuania* [GC], no. 15869/02. Concurring opinion of Judge Cabral Barreto, joined by Judge Popović.

16 *Cudak v. Lithuania* [GC], no. 15869/02. Concurring opinion of Judge Malinverni, joined by Judges Casadevall, Cabral Barreto, Zagrebelsky and Popović, paras 7-8.

2. *Gineitienė v. Lithuania*[17]

On 31 May 2005 Ms. Ilona Gineitienė lodged an application before the ECtHR against Lithuania claiming that the decision to place her two daughters with their father had been in breach of Articles 8, 9 and 14 of the Convention. Gineitiene was dissatisfied with the decisions of the domestic courts, which fixed the father's home as the place of residence for her second daughter, who was living with her in an apartment situated in the same building as the Ojas headquarters from 1 October 2003 to 26 July 2004. She complained that those decisions had been in breach of Article 8 of the Convention, read in conjunction with Article 14, because the courts decided on her daugther's place of residence based on her religious affiliation to Osho/Ojas religious movement and thus interfered into her private and family life and discriminated her on religious grounds.

The Court noted that it was not the Court's role to substitute itself for the competent Lithuanian authorities in regulating custody and access issues in Lithuania, but rather to review under the Convention the decisions that those authorities had taken in exercising their power of appreciation. The Court stated that its main concern was whether the reasons purporting to justify the actual measures adopted with regard to the Ms. Gineitinė's enjoyment of her right to respect for family life were relevant and sufficient under Article 8.

When evaluating those reasons, the Court was particularly struck by the Supreme Court's emphasis on the views of the children, who had, at all stages of the proceedings, voiced a strong desire to live with their father. The Court emphasised the following circumstances of the case: one daugther of Ms. Gineitienė had alleged that Ms. Gineitinė had not taken proper care of her; the child protection experts had qualified the living conditions offered by Ms. Gineitienė to her daughter as 'unsafe'; the father was able to provide more fitting living conditions; the Lithuanian courts pursued the policy not to separate siblings, especially as they had close emotional ties.

The Court was of the opinion that such reasoning of the Lithuanian courts clearly showed that it was the interests of the children which were considered paramount. It concluded that that reasoning was relevant and sufficient, untainted by any element of arbitrariness. The Court also shared the Supreme Court's view in the present case and noted that Ms. Gineitienė's suitability to have her daughters live with her had not been assessed *in abstracto*. On the contrary, the Court found that the domestic courts did not attribute any particular weight to the applicant's religious affiliation or held it against her.

Considering all this, the EctHR decided that nothing in this case suggested that Ms. Gineitienė's religion had any effect on the court decisions. Consequently, the Court held that there had been no violation of Article 8 of the Convention taken in conjunction with Article 14 and declared the remainder of the application inadmissible.

17 *Gineitienė v. Lithuania*, no. 20739/05.

3. *Pocius v. Lithuania*[18]

On 16 September 2004 Mr. Vidas Pocius lodged an application before the ECtHR against Lithuania claiming that proceedings for removing his name from an 'operational records file' (*policijos operatyvinė įskaita*), a database containing information gathered by law-enforcement authorities, had been unfair in that the principles of fairness and equality of arms had not been respected. Mr. Pocius complained that during the proceedings before the administrative courts to recognise the listing of his name in the operational file he had never been given an opportunity to check the operational records file. Mr. Pocius submited that Article 6 § 1 of ECHR was violated and requested compensation of pecuniar and non-pecuniar damages equal to EUR 100,000.

The Court reiterated that, according to its case-law, the principle of equality of arms – one of the elements of the broader concept of a fair hearing – required each party to be given a reasonable opportunity to present his or her case under conditions that did not place the litigant at a substantial disadvantage *vis-à-vis* the opponent. The Court also noted that in cases where evidence had been withheld from the defence on public interest grounds, it was not the role of this Court to decide whether or not such non-disclosure had been strictly necessary since, as a general rule, it was for the national courts to assess the evidence before them.

However, the Court was of the opinion that in cases where the evidence in question had never been revealed, it had to scrutinise the decision-making procedure to ensure that, as far as possible, the procedure complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.

Considering the application of Mr. Pocius, the Court observed that the Government did not dispute the fact that the content of the operational records file, on the basis of which the courts found against the applicant, had never been disclosed to him. The Court explicitly indicated that it was not insensitive to the goals, which the Lithuanian law-enforcement authorities pursued through their operational activities. Likewise, the Court shared the Government's view that documents, which constituted State secrets, might only be disclosed to persons who possessed the appropriate authorisation. However, the Court noted that Lithuanian law and judicial practice provided that such information might not be used as evidence in court against a person unless it had been declassified, and that it might not be the only evidence on which a court based its decision.

The Court found that the undisclosed evidence related to an issue of fact decided by the Lithuanian courts and that the data in the operational file were, therefore, of decisive importance to Mr. Pocius' case, because had the defence been able to persuade the judges that the police had acted without good reason, Mr. Pocius' name would, in effect, have had to be removed from the operational records file.

Moreover, the Court established that the Lithuanian courts deemed the information contained in the operational records file to be an essential evidence in supporting the

18 *Pocius v. Lithuania*, no. 35601/05.

alleged danger Mr. Pocius posed to society. The Court noted that on numerous occasions Mr. Pocius asked for the information to be disclosed to him, even in part. However, the domestic authorities – the police and the courts – had denied his requests. Whilst, before dismissing Mr. Pocius' case, the Lithuanian judges had examined, behind closed doors and in their chambers, the operational records file, they merely presented their conclusions to Mr. Pocius. Consequently, the Court found that it was not possible for Mr. Pocius to obtain the evidence against him or to have opportunity to respond to it, unlike the police who had effectively exercised such rights.

Considering all this, the Court decided that the decision-making procedure did not comply with the requirements of adversarial proceedings or equality of arms, and did not incorporate adequate safeguards to protect the interests of Mr. Pocius. Therefore, the Court held that Lithuania violated Article 6 § 1 of the Convention and awarded Mr. Pocius the sum of EUR 3,500.

4. *Užukauskas v. Lithuania*[19]

The case of *Užukauskas v. Lithuania* is almost identical to the facts and legal reasoning of the case *Pocius v. Lithuania*. On 28 April 2004 Mr. Robertas Užukauskas lodged an application before the ECtHR against Lithuania claiming that the proceedings for removing his name from an 'operational records file' (*policijos operatyvinė įskaita*), a database containing information gathered by law enforcement authorities, had been unfair in that the principles of fairness and equality of arms had not been respected. Mr. Užukauskas complained that during the proceedings before the administrative courts to recognise the listing of his name in the operational file he had never been given an opportunity to check the operational records file. Mr. Užukauskas argued that Article 6 § 1 of ECHR was violated and requested compensation of non-pecuniary damages equal to LTL 35,000, approximately EUR 10,135.

The ECtHR provided identical reasoning as in the case of *Pocius v. Lithuania*, and on the same date as that of the judgment in *Pocius v. Lithuania* it was declared that Lithuania violated Article 6 § 1 of the Convention and Mr. Užukauskas was awarded the sum of EUR 3,500.

5. *Balčiūnas v. Lithuania*[20]

On 10 April 2002 Mr. Laimutis Balčiūnas lodged an application before the ECtHR against Lithuania claiming a violation of Article 5 § 3 of the Convention in that his detention had been unlawful and excessively long. Invoking Article 6 §§ 1 and 3 (d) of the Convention, he also asserted that he could not question two witnesses in his case and that therefore he had been denied a fair trial. Mr. Balčiūnas claimed LTL 20,000

19 *Užukauskas v. Lithuania*, no. 16965/04.

20 *Balčiūnas v. Lithuania*, no. 17095/02.

(approximately EUR 5,792) as compensation for loss of earnings and opportunities caused by the violations of Article 5 of the Convention and LTL 200,000 (approximately EUR 57,920) in respect of non-pecuniary damage.

The Court quashed all arguments of Mr. Balčiūnas except that of alleged violation of Article 5 § 3 of the Convention, which manifested in excessively long detention.

Firstly, the Court examined the preliminary objection of the Lithuanian government regarding the failure by Mr. Balčiūnas to exhaust domestic remedies. Lithuania claimed that Mr. Balčiūnas could have sought damages, invoking Article 6.272 of the Civil Code[21] and by failing to institute civil proceedings against the State, he failed to exhaust the domestic remedies. The Lithuanian government also referred to the positive judgment of the Supreme Court of Lithuania delivered on 1 March 2003, which supported the proposition of the Government. The Court acknowledged the important positive nature of that ruling. However, the Court observed that, as it appeared from the content of the Supreme Court ruling, in 2003 the lower courts of civil jurisdiction were rather unwilling to award damages for unacceptably long periods of detention which had been found in criminal proceedings to be lawful. In such circumstances the Court decided that on 10 April 2002, when the complaint was submitted to the Court, the civil remedy concerned was not effective and could not have been exhausted by Mr. Balčiūnas. Consequently, the Government's preliminary objection was dismissed.

Secondly, the Court evaluated whether the detention of Mr. Balčiūnas had not exceeded reasonable time. The Court established that the overall detention of Mr. Balčiūnas lasted from 9 November 1998 to 19 July 2002 and was based on two sets of proceedings: suspected armed robbery allegation of belonging to a criminal organisation and causing explosions (Mr. Balčiūnas was convicted for 15 years for the latter). However, when evaluating the reasonableness of detention the Court reiterated that the reasonableness of the period of detention must be assessed in each case according to its special features. Continued detention may be justified in a given case only if there were clear indications of a genuine public interest, which, notwithstanding the presumption of innocence, outweighs the right to liberty. The Court reminded that under its well-established practice arguments of the courts for and against release while deciding on detention must not be 'general and abstract'. The Court emphasised that the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view. It must be examined with reference to a number of other relevant factors, which may either confirm the existence of a danger of absconding and reoffending or make it appear so slight that it cannot justify detention pending trial.

The Court accepted that the detention of Mr. Balčiūnas might initially have been warranted by a reasonable suspicion that he was involved in organised crimes. At that stage of the proceedings those reasons were sufficient to justify keeping the applicant in custody. However, with the passage of time those grounds became less relevant. The Court noted that taking into account the rather long period of the applicant's detention,

21 For the wording of this article see the unofficial translation of the Civil Code of the Republic of Lithuania available on the website of the Parliament [interactive]. [accessed on 07-10-2011]. <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=404614>.

and noting that he had already been deprived of his liberty for over eighteen months pending the first set of the criminal proceedings, only exceptional reasons could have justified the continuation of detention in the light of Article 5 § 3 of the Convention. Accordingly, the Court held that the authorities were under an obligation not only to analyse personal situation of Mr. Balčiūnas in greater detail and to give specific reasons for holding him in custody but also to conduct the criminal proceedings with particular diligence. The Court found that the reasons given by the courts for extending the detention of Mr. Balčiūnas were just a brief and abstract repetition without specifying the manner in which those grounds applied to the individual case of Mr. Balčiūnas. The Court stated that it could accept that, as submitted by the Government, the fact that the applicant had been charged with serious crimes and his co-conspirators testimonies could have been one of the specific reasons for his continued detention. However, the reasons given in the orders of courts remained general, theoretical and nearly identical throughout time, without examining the personal circumstances of Mr. Balčiūnas, and, therefore, were clearly insufficient to satisfy the requirements of Article 5 § 3.

Considering all this, the Court noted that there was a violation of Article 5 § 3 and awarded Mr. Balčiūnas EUR 6,000 in respect of non-pecuniary damage.

6. *Novikas v. Lithuania*[22]

On 19 December 2005 Mr. Andrejus Novikas lodged an application before the ECtHR against Lithuania claiming that the length of the proceedings had been incompatible with the 'reasonable time' requirement, laid down in Article 6 § 1 of the Convention. Mr. Novikas claimed LTL 135,398, approximately EUR 39,246 in respect of pecuniary and non-pecuniary damage.

Firstly, the Court examined the preliminary objection of the Lithuanian government regarding the failure by Mr. Novikas to exhaust domestic remedies. Lithuania claimed that Mr. Novikas could have sought damages, by invoking Article 6.272 of the Civil Code[23] and that by failing to institute civil proceedings against the State, he failed to exhaust the domestic remedies. However, the Court refered to its conclusion in the cases of *Šulcas v. Lithuania* (no. 35624/04, §§ 60-63, 5 January 2010) and *Norkūnas v. Lithuania* (no. 302/05, § 30), where it decided that a claim for damages under Article 6.272 of the Civil Code or direct reliance on the Constitution did not satisfy the test of 'effectiveness' in contexts of the present kind. The Court found that the Government had not submitted any convincing arguments which would require the Court to depart from this established case-law. Therefore, the Court dismissed the Government's objection as to non-exhaustion of the domestic remedies.

Secondly, the Court examined whether the length of proceedings against Mr. Novikas exceeded the requirement of 'reasonable time'. The Court determined that the

22 *Novikas v. Lithuania*, no. 45756/05.

23 *Supra* note, 21.

proceedings lasted approximately 7 years and 2 months at three levels of jurisdiction. The Lithuanian government argued that the case was complex on account of the volume of evidence, complexity of the crimes and the large number of witnesses and victims heard, some of whom needed interpreters. Moreover, the Goverment submitted that, out of 39 hearings, 13 had to be postponed as some of the co-defendants, their counsel, the victims or witnesses had failed to appear, including Mr. Novikas himself who had absconded from proceedings.

The Court considered that the proceedings might be deemed complex, owing *inter alia* to the number of accused and the charges against them, as well as the volume of evidence to be examined. Nonetheless, the Court did not accept that this in itself justified the entire length of the proceedings. The Court noted that it was the responsibility of the authorities to ensure the presence of all persons relevant to the proceedings, and to this end they had a number of measures at their disposal. Moreover, the Court did not agree with the Government that the absconding of Mr. Novikas caused substantial delays. Although Mr. Novikas had absconded before the judgment of the Regional Court was adopted, he had been present for most of the proceedings at first instance, which involved the examination of the evidence and the establishment of the facts. As the Regional Court pointed out, Mr. Novikas submitted his final statement before absconding. Subsequently, the courts continued their examination of the case in the absence of Mr. Novikas, but in the presence of his lawyer who maintained the defence's position. Thus the failure of Mr. Novikas to appear at the last hearings of the court of first instance and the hearings of the higher courts did not unduly hinder the examination of the case.

Taking all this into account, the Court considered that the overall length of the criminal proceedings against Mr. Novikas was excessive and failed to meet the 'reasonable time' requirement. Consequently, the Court held that Lithuania violated Article 6 § 1 of the Convention and awarded Mr. Novikas EUR 1,800 in respect of non-pecuniary damage.

7. *Impar Ltd. v. Lithuania*[24]

On 30 March 2004 Impar Ltd., a company registered in Lithuania, lodged an application before the ECtHR against Lithuania claiming that 6 years and 1 month for tax litigation proceedings had been incompatible with the 'reasonable time' requirement, laid down in Article 6 § 1 of the Convention. Impar Ltd. claimed LTL 892,992, as a compensation for pecuniary damage and LTL 100,000 in respect of non-pecuniary damage.

Firstly, the Court examined whether Article 6 § 1 could be applicable for the proceedings that concerned tax litigation. On this point the Court noted that it had consistently held that, generally, tax disputes fell outside the scope of 'civil rights and

24 *Impar Ltd. v. Lithuania*, no. 13102/04.

obligations' under Article 6 of the Convention, despite the pecuniary effects which they necessarily produced for the taxpayer (see *Ferrazzini v. Italy* [GC], no. 44759/98, § 29, ECHR 2001-VII). However, after considering the circumstances of the case, the Court found that the general character of the legal provisions imposing fines for persistent tax law violations, the purpose of the penalty, which was both deterrent and punitive, as well as its severity (the original fine imposed by the tax authority was equal to 25% of Impar Ltd. annual income), sufficed to show that, for the purposes of Article 6 of the Convention, Impar Ltd. was charged with a criminal offence (see *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, §§ 76-82, 23 July 2002, and *Jussila v. Finland* [GC], no. 73053/01, §§ 30-38, ECHR 2006-XIII). Consequently, the Court found no trouble in continuing the examination of the case.

Secondly, the Court evaluated the preliminary objection of the Lithuanian goverment regarding the exhaustion of domestic remedies. The Court recalled its case law to the effect that in 2004, when the present application was lodged with the Court, no such effective domestic remedies were available in Lithuania (*Norkūnas v. Lithuania*, no. 302/05, §§ 28-30, 20 January 2009; *Vorona and Voronov v. Lithuania*, no. 22906/04, §§ 23-25, 7 July 2009; *Naugžemys v. Lithuania*, no. 17997/04, §§ 27-29, 16 July 2009). As a result, the Government's objection was dismissed.

Finally, the Court determined whether tax litigation proceedings of Impar were compatible with the 'reasonable time' requirement. The Court reiterated that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities. The Court noted the Government's objection that it was the applicant company which had requested Vilnius City First District Court to stay the proceedings pending the result of the expert examination of the company's documents. However, the Court noted that this resulted in a two year delay for an expert report, which ultimately proved to be unnecessary. The Court considered that the domestic authorities were in part accountable for this delay, given their responsibility for the examination of the case in a timely fashion.

After considering all the circumstances of the case and particularly taking into account the overall duration of the proceedings, the Court found that the length of those proceedings was excessive and failed to meet the 'reasonable time' requirement. Consequently, the Court held that Lithuania violated Article 6 § 1 of the Convention and awarded Impar Ltd. EUR 900 in respect of non-pecuniary damage.

8. *Šulcas v. Lithuania*[25]

On 2 June 2003 and on 1 October 2004 Mr. Donatas Šulcas lodged an application before the ECtHR against Lithuania claiming that 8 years and 9 months to examine a criminal case regarding fraud, forgery and unlawfully obtaining the property of another

25 *Šulcas v. Lithuania*, no. 35624/04.

was not a reasonable period of time within the meaning Article 6 § 1 of the Convention. Moreover, Mr. Šulcas also asserted that there were no effective remedies against the excessive length of proceedings and this violated Article 13 of the Convention. Mr. Šulcas claimed LTL 6,450,624 (approximately EUR 1,868,121) in respect of pecuniary damage for the loss and depreciation of his property caused by the violations of the Convention and LTL 9,000,000 (EUR 2,606,429) in respect of non-pecuniary damage.

First of all, the Court examined the preliminary objections presented by the Lithuanian government that Mr. Šulcas failed to exhaust domestic remedies and that he had an effective domestic remedy. The Government contended that Mr. Šulcas could have applied to the domestic courts claiming redress for the length of the criminal proceedings, pursuant to Article 6.272 of the Civil Code, and indeed did have recourse to that measure. In particular, on 25 January 2006 Mr. Šulcas presented a lawsuit with Vilnius Regional Court claiming that the judicial proceedings against him had been too lengthy and had been unlawful. The Government claimed that Mr. Šulcas had had in practice access to an effective domestic remedy within the meaning of Article 13 of the Convention. The Government maintained that, taking into account the fact that the complaint of Mr. Šulcas regarding redress for the allegedly lengthy proceedings was still pending before the domestic courts, his complaints under Articles 6 § 1 and 13 of the Convention were to be rejected for non-exhaustion of domestic remedies pursuant to Article 35 § 1 and 4 of the Convention.

The Court disagreed with the Government's position on various points. In the beginning the Court referred to its conclusion in the case of *Norkūnas* (*Norkūnas v. Lithuania*, no. 302/05, § 30), where it held that a claim for damages under Article 6.272 of the Civil Code did not satisfy the test of 'effectiveness' in contexts of the present kind. Then the Court noted that the object of the claim lodged by Mr. Šulcas before Vilnius Regional Court, as that court found in its decision of 21 June 2006, was the damage caused by Panevėžys Regional Court's allegedly unlawful decision in the civil case with regard to the reasonableness and amount of the creditors' claims but not the damage Mr. Šulcas allegedly suffered due to the length of the criminal proceedings. Furthermore, the Court stipulated, that although the Government argued that Mr. Šulcas could have brought a claim based on the Constitution, it had not adduced any evidence to demonstrate that such a remedy had any reasonable prospect of success, especially before the ruling of the Constitutional Court on 19 August 2006. In the Court's opinion, the Government did not provide any practical examples showing that the applicant could have relied effectively on the Convention at the domestic level before lodging his supplement to the application with the Court on 1 October 2004. Considering all this, the Court dismissed the Government's objection as to non-exhaustion of domestic remedies.

Secondly, the Court determined whether criminal proceedings against Mr. Šulcas were compatible with the 'reasonable time' requirement. The Government presented several arguments in support of the reasonableness of the criminal proceedings. It asserted that, the beginning of the period to be taken into consideration, to which the criterion of 'reasonable time' applied, was 20 June 1995, when the Convention entered

into force with regard to Lithuania. Moreover, the Government noted that, due to the financial nature of the criminal acts with which Mr. Šulcas had been charged, the case was complex. The charges against Mr. Šulcas amounted to 40 counts of fraud, forgery and unlawfully obtaining the property of another. In addition, the case was voluminous; when transferred for trial, it had consisted of 6 volumes with more than 1,500 pages. Government contended that throughout the entire criminal proceedings Mr. Šulcas had not been detained, but was only required not to leave his place of residence. Last but not least, the Government argued that, by submitting numerous unsubstantiated requests to the investigative authorities and the courts, the applicant himself had caused considerable delays to the criminal proceedings and, as a result, had benefitted from their lengt.

The Court shared the view of the Lithuanian Government that it was the latter date, when the recognition by Lithuania of the right of individual petition took effect, from which the period to be taken into consideration had to be counted. It also agreed that the case was complex. Neither could the Court fail to observe that Mr. Šulcas' conduct contributed to the length of the proceedings. Specifically, the Court noted that Mr. Šulcas himself successfully protracted the proceedings by a few months by making frivolous allegations of partiality on the part of the courts and, in addition, attempted to protract them further by submitting unnecessary requests for supplementary expert examinations or by insisting that the proceedings be suspended. Nevertheless, the Court found that some delays in the proceedings were occasioned by mistakes or inertia on the part of the domestic authorities. As a result, the case had to be returned for further investigations and to the trial court. Therefore, having regard to the above and to its case-law on the subject, the Court decided that the overall length of the proceedings was excessive and failed to meet the 'reasonable time' requirement. Accordingly, it held that there was a violation of Article 6 § 1 of the Convention.

Finally, the Court assessed the question on whether there was any effective remedy against the excessive length of proceedings in Lithuania. The Court reiterated that Article 13 of the Convention guaranteed the availability at national level of a remedy to deal with the substance of an 'arguable complaint' under the Convention and to grant appropriate relief (see *Kudła*, cited above, § 157). The Court, taking into account its conclusion with regard to the excessive length of the proceedings, established that Mr. Šulcas had an arguable claim of a violation of Article 6 § 1. It also noted that the objections and arguments as to the availability of an effective domestic remedy as regards the length of the criminal proceedings, which the Government put forward, have been rejected in local remedies part. Accordingly, the Court considered that in the present case there was a violation of Article 13 of the Convention on account of the lack of an effective remedy under domestic law whereby at the material time, on 1 October 2004 when he submitted his complaints to the Court, the applicant could have obtained a ruling upholding his right to have his case heard within a reasonable time, as set forth in Article 6 § 1 of the Convention.

In the light of the parties' submissions, yet taking account of the partially obstructive behaviour of Mr. Šulcas during the criminal proceedings, the Court awarded him, on an equitable basis, EUR 1,700 in respect of non-pecuniary damage.

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EUROPOS ŽMOGAUS TEISIŲ TEISMO 2010 METŲ SPRENDIMŲ PRIEŠ LIETUVĄ APŽVALGA

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Santrauka. *Šioje apžvalgoje aptariamos 2010 m. Europos Žmogaus Teisių Teisme (toliau – EŽTT) prieš Lietuvos Respubliką nagrinėtos bylos. Apžvalgos autoriai pateikia nagrinėtų bylų santraukas, kad skaitytojas galėtų susipažinti su naujausia ir aktualiausia jurisprudencija, susijusia su Lietuvos Respublika žmogaus teisių apsaugos srityje.*

2010 m. EŽTT išnagrinėjo 14 peticijų prieš Lietuvos Respubliką, iš jų tik 8 peticijos

buvo nagrinėtos iš esmės. Šioje apžvalgoje ir aptariamos minėtos 8 bylos, tarp jų ir Cudak prieš Lietuvą byla, kurią nagrinėjo Europos Žmogaus Teisių Teismo Didžioji Kolegija ir kurioje buvo pateiktas ribotos valstybės imuniteto doktrinos taikymo darbo santykiuose išaiškinimas.

Reikšminiai žodžiai: *Europos žmogaus teisių konvencija, Europos Žmogaus Teisių Teismas, žmogaus teisės, bylos, Lietuvos Respublika.*

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