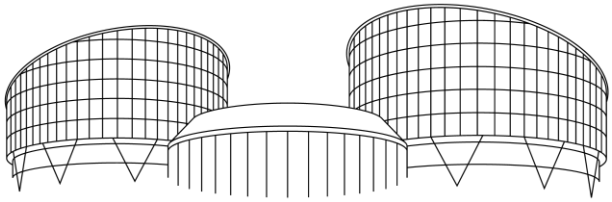

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

DECISION

Application no. 20508/08
by Aurelijus BERŽINIS
against Lithuania

The European Court of Human Rights (Second Section), sitting on 13 December 2011 as a Committee composed of:

Dragoljub Popović, *President*,
Danutė Jočienė,
Paulo Pinto de Albuquerque, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having regard to the above application lodged on 30 September 2006,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Aurelijus Beržinis, is a Lithuanian national who was born in 1952 and lives in Jonava. The Lithuanian Government ("the Government") were represented by their Agent, Ms E. Baltutytė.

A. The circumstances of the case

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

1. The criminal proceedings against the applicant

In February 1997 a pre-trial investigation of fraud was started. On 9 April 1997 a search of the apartment of the applicant's father was carried

out and certain documents were taken. The applicant was detained on the same day.

On three occasions in 1997 the investigation officer discontinued the criminal case against the applicant, but each time the prosecutor quashed the decision and remitted the case for fresh investigation. The last decision to remit the case was taken on 12 December 1997.

On 20 January 1998 the applicant was questioned as an accused. On 12 February 1998 the Kaunas City District Court released the applicant from detention, ordering him not to leave the country.

The applicant requested a pre-trial investigation against the police officers, alleging that during the search they took documents from the flat unrelated to the investigation. The request was refused on 30 April 1998.

On 22 May 1998 a prosecutor issued the bill of indictment, charging the applicant with taking another person's possessions and personal documents by deceit. On 8 June 1998 the applicant was committed for trial.

The applicant failed to attend several court hearings. On 10 February 2000 the Kaunas City District Court placed the applicant under house arrest, based on his persistent failure to appear at the scheduled hearings.

On 11 May, 21 June, 3 October and 21 November 2000 the applicant failed to attend the hearings, having violated the conditions of his house arrest. The police officers were unable to find him. On 21 November 2000 the Kaunas City District Court ordered the detention of the applicant. The applicant failed to attend that hearing as well.

In February 2001 the Kaunas City District Court suspended the examination of the criminal case as the applicant had gone missing.

On 8 June 2001 the police found the applicant. The applicant alleged that on that day the police officers severely injured him at his home. The Government submitted that the applicant tried to flee from the police officers and injured himself falling of the roof of a building. The same day the applicant was placed in the Jonava Hospital.

Later on the applicant was placed in the prison hospital. On 26 September 2001 the prison hospital informed the district court that the applicant refused food as of 25 September 2001 because he was not allowed to undergo treatment in the hospital of his choice. On 16 October 2001 the prison hospital informed the court that the applicant was continuing to refuse any medical assistance, did not follow medical advice and continued his hunger strike.

The prison hospital several times informed the court that the applicant could not participate in the court hearings because of his health.

On 13 March 2002 the applicant refused to be represented by the lawyer assigned to him by the State. By a decision of the Kaunas Regional Court of 21 March 2002 the applicant was released from detention.

On 10 April 2002 the applicant had an operation. The next day the Kaunas City District Court placed the applicant under house arrest, with the exception of medical appointments and court hearings. Following a medical report by the applicant's doctor, on 14 June 2002 the criminal proceedings were further suspended.

The criminal case was resumed and on 26 September 2003, after the applicant failed to attend the hearing, the Kaunas City District Court ordered an expert assessment of the state of the applicant's health. On 22 October 2003 medical experts concluded that he could be brought to hearings by special transport in a lying position.

On 30 January 2004, 9 and 13 April 2004, 3 May 2004, 9 and 14 July 2004, 8 and 28 September 2004, 9 November 2004, 1 and 20 December 2004 the applicant failed to attend the hearings and refused the suggested special transport to take him to the hearings. Each time the court would order that the applicant be brought to the hearing and would warn him about the consequences of not attending the hearing. The applicant would unsuccessfully appeal against those decisions.

On 14 January 2005 the applicant failed to attend the hearing as he had fallen ill on the day of the hearing.

On 28 February and 22 March 2005 the applicant failed to attend the hearings.

On 10 March 2005 the Attorney General addressed the National Courts Administration in compliance with Article 20 § 2 of the Law on the Prosecutor's Office, informing it that the case against the applicant had been pending at the district court since May 1998 and up to that date had not been examined because the applicant had failed to attend the hearings. The prosecutor remarked that the statutory time-limit to prosecute the applicant was about to lapse that year.

On 22 March 2005 the Kaunas City District Court ordered the detention of the applicant as he had failed to attend the hearing. The applicant was taken to the court on the same day. The applicant's attorney participated at that hearing. The court observed that, although the applicant alleged that his health had worsened, the applicant's medical care institution had informed the court that his condition had remained stable and that he could be brought to the hearing. The court also noted that upon his arrest the applicant had refused to be checked by medical staff. The court then concluded that the applicant's behaviour was directed at avoiding participation in the proceedings.

While in detention the applicant started a hunger strike and refused any medical services.

At the hearing of 30 March 2005 the applicant was represented by a new lawyer of his choice. On 31 March 2005 another hearing took place. During that hearing the lawyer stated that he had familiarized himself with the case and was ready to proceed.

On 15 April 2005 the applicant was taken to the hearing on a stretcher. Later that month he was hospitalized in the prison hospital.

On 5 May 2005 the Kaunas City District Court found the applicant guilty of embezzlement and sentenced him to four years of imprisonment. The court exempted the applicant from serving the sentence due to his health condition.

On 11 October 2005 the Kaunas Regional Court examined the applicant's appeal and upheld the conviction. The appellate court held that the court of first instance had eliminated all the discrepancies and correctly ruled on the credibility of the evidence in the case. The court further established that there was no indication of bias on the part of the district court. It observed that the applicant's health condition was the consequence of his leap from a building when trying to escape from the police.

On 11 April 2006 the Supreme Court dismissed a cassation appeal by the applicant as unfounded. Before the hearing the applicant had requested the withdrawal of one of the three judges on the ground that this judge used to work as the Attorney General and signed the letter of 10 March 2005. However, the request was rejected, it being observed that the former Attorney General had just performed his administrative duties and had not acted as a prosecutor in that case.

2. Other court proceedings

On 18 and 28 April 1997 the newspaper *Kauno Diena* published articles about the applicant's case. The applicant lodged two civil claims for damages alleging defamation and a breach of his right to presumption of innocence. The claim concerning the publication of 18 April was dismissed by the courts at two instances. The applicant did not lodge a cassation appeal.

The applicant's claim concerning the article of 28 April was partially granted by the first-instance court on 13 November 2007 but no breach of the right to presumption of innocence was found. It was established that most of the statements in the article were true and based on the real facts, while some of them were merely an opinion of the author. With regard to the remaining statements (allegations in the article that the applicant had attempted to bring a professor of the university in for interrogation in a basement, or that the applicant had claimed that a public institution was corrupt and communistic) the court found that they did not correspond to the facts and therefore granted the applicant's claim in part. The court imposed the newspaper to refute the erroneous data and awarded non-pecuniary damages to the applicant. No evidence as to the alleged breach of the presumption of innocence was found, and the article did not include a statement as to the applicant's guilt, but merely the information that the pre-trial investigation was instituted against him. On 19 February 2008 the appellate court upheld that judgment and on

26 May 2008 the Supreme Court refused to examine the cassation appeal by the applicant.

On 8-9 June 2001 the news agency "BNS" and the newspaper *Kauno diena* published information that the applicant had jumped from the fourth floor of a building when trying to escape from the police. The applicant alleged that the information was false and he brought a claim before the courts in this regard. The claim was dismissed by the first instance and appellate courts. The applicant did not lodge a cassation appeal.

Thereafter, the applicant lodged a claim for damages against the State, claiming unlawful detention on remand. On 16 September 2005 the Kaunas Regional Court awarded the applicant 500 Lithuanian litai (145 euros), having found that the applicant's detention had been sanctioned on inappropriate grounds for 20 days in 2002, but declared that the remainder of the detention had been lawful. On 5 July 2006 the Court of Appeal upheld the decision. The applicant did not lodge a cassation appeal.

On 20 April 2005 the applicant launched a complaint with the Prison Department, alleging that the detention facility's officers had tortured him since his detention on 22 March 2005. On 17 May 2005 the Prison Department dismissed the complaint. No ill-treatment by the authorities was established. The department also informed the applicant about the possibility to appeal against that decision but he did not appeal.

The victim in the criminal proceedings against the applicant had also launched separate civil proceedings against him. The final decision in that civil case was taken on 22 August 2005 by the Supreme Court.

COMPLAINTS

1. The applicant complained under Article 6 § 1 of the Convention about the length of the criminal proceedings against him.

2. Invoking Article 3 of the Convention the applicant submitted that his detention conditions and the medical treatment he had received amounted to ill-treatment and torture. He further complained that, when the police arrested him on 8 June 2001, they caused him severe bodily injury, and that the responsible institutions did not investigate the matter.

3. The applicant also raised various complaints in the context of the criminal proceedings against him. In this connection, he invoked Articles 5, 6, 13 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention.

4. Under numerous provisions of the Convention the applicant complained about the breach of his right to presumption of innocence and non-examination of civil cases against a newspaper and a news agency.

5. Finally, the applicant complained about the civil proceedings instigated by the injured party.

THE LAW

1. The applicant complained that the length of the criminal proceedings had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

The applicant argued that the State authorities were responsible for the delays in the proceedings. He submitted that the pre-trial investigation lasted for more than one year, arguing that the criminal case against him was fabricated by a partial prosecutor. The applicant then argued that the court proceedings lasted for seven years at the first level of jurisdiction because the case was examined by a partial court.

The Government argued that the applicant had failed to exhaust all effective domestic remedies in relation to his length of proceedings complaint.

In the alternative the Government also submitted that the applicant had substantially contributed to the delay in the criminal proceedings against him. The competent authorities had constantly taken an interest in the applicant's state of health and the applicant had on many occasions refused treatment and resorted to hunger strikes, thus worsening his condition. The district court had also facilitated the applicant's transportation to the hearings, but the applicant had refused to make use of it.

As to the Government's plea concerning failure to exhaust the domestic remedies, the Court recalls its conclusion in the case of *Maneikis v. Lithuania* (no. 21987/07, § 21, 18 January 2011), to the effect that in 2006, when the applicant lodged his application with the Court, there were no effective remedies in Lithuania that the applicant could use to complain about the length of domestic court proceedings. It follows that the Government's objection as to non-exhaustion of the domestic remedies must be dismissed.

Turning to the applicant's complaint about the alleged violation of his right to be tried within a reasonable time, the Court notes that, until the search of the applicant's place of residence took place on 9 April 1997, no procedural steps were taken with regard to the applicant which might have significantly affected his situation. Accordingly, the period to be taken into account started on 9 April 1997 and ended on 11 April 2006, when the Supreme Court took the final decision in the criminal case. The proceedings therefore lasted nine years at three levels of jurisdiction.

The Court reiterates 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 of the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

The Court has previously found complaints to be manifestly ill-founded in cases where the applicant's behaviour contributed substantially to the delay in the proceedings and no substantial delays were imputable to the State (see, for example, *Ivashchenko v. Ukraine* (dec.), no. 23728/03, 24 March 2009).

Turning to the facts in the instant case, the Court first notes that the criminal proceedings against the applicant cannot be considered as particularly complex.

Assessing further, the Court notes that since the committal for trial on 8 June 1998, the applicant failed to attend scheduled hearings, and eventually went into hiding from the authorities. After the applicant was found on 8 June 2001, the proceedings were further effectively blocked because of his state of health until 26 September 2003.

The subsequent resumption of the proceedings proved ineffective, as the applicant refused to attend the hearings on the ground of his health condition, even after the doctors had certified that he was able to attend the hearings and despite the arrangements by the authorities to facilitate his participation. In fact, the courts were able to continue with the examination of the case only once the applicant was detained on 22 March 2005. The proceedings at the court of first instance were over shortly thereafter. While the Court also recognises that the applicant was in such a state of health that at certain periods his participation in the hearings was impossible, the State may not be blamed for those delays.

Insofar as the conduct of the domestic authorities is concerned, the Court observes that the criminal investigation was completed in about one year. Moreover, after the applicant's detention on 22 March 2005, the courts of three levels of jurisdiction finished the examination of the case within one year and one month.

In the light of the above, the Court considers that the delays in the criminal proceedings were attributable mainly to the applicant. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. Under Article 3 of the Convention the applicant contended that his pre-trial detention, because of his health condition, amounted to ill-treatment and torture. He also complained about the detention conditions and medical treatment.

The Court recalls that, pursuant to Article 35 § 1 of the Convention, it may only deal with the matter after "all domestic remedies have been

exhausted". The above rule requires that an applicant, before complaining to the Court, should make normal use of accessible, effective and sufficient remedies capable of rectifying the situation at issue.

As to the applicant's detention in spite of his health condition and the alleged lack of medical treatment, the Court notes that there is nothing in the case file suggesting that the overall detention in the particular circumstances of this case could have amounted to torture or ill-treatment. What is more, during his detention in 2001-2002 the applicant was kept in the prison hospital where he could receive all the necessary treatment. Neither can the Court overlook the fact that the applicant did not lodge an official complaint in connection with the alleged ill-treatment or claim any redress for it. In so far as the detention after 22 March 2005 is concerned, the applicant did not appeal against the decision of 17 May 2005 of the Prison Department to dismiss his complaint regarding alleged ill-treatment. Therefore, this part of the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

The applicant further complained under Article 3 of the Convention that on 8 June 2001 the police caused him severe injury, and that there was no effective investigation into the matter. Even assuming that this complaint was lodged in compliance with the six-month time limit, the Court notes that the applicant failed to make use of his right to request an investigation and bring subsequent appeals, had his request been refused or had he been unsatisfied with the outcome of the investigation. It follows that the applicant failed to exhaust domestic remedies in this respect and this part of the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

3. Under Article 5 of the Convention the applicant complained that his house arrest and pre-trial detention were unlawful. The Court observes that he had lodged the claim for damages against the State for the allegedly unlawful detention but later failed to make use of the domestic remedies properly. In particular, he did not bring a cassation appeal against the decision of 5 July 2006 of the Court of Appeal. It follows that this complaint must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

The applicant also raised complaints under Article 6 of the Convention in respect of the fairness of the criminal proceedings. In particular, the applicant alleged that the Attorney General had put pressure on the courts to examine his case before the statutory time-limit elapsed and then, acting as a judge in the cassation court, dismissed his cassation appeal. The applicant further complained that his right to defend himself through legal assistance of his own choosing before the appellate court was infringed.

The Court observes that its task under long established case-law is to ascertain whether the proceedings in their entirely were fair (see, among

many other authorities, *García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29, ECHR 1999-I).

The Court first notes that the Attorney General only informed the National Courts Administration about the length of the criminal proceedings against the applicant, and did not pressure them to adopt any particular decision in the case. Furthermore, the Attorney General did not sit as a prosecutor in the applicant's case, and was only involved in the case in so far his administrative functions were concerned.

As to the applicant's complaint about an alleged breach of his right to defend himself through a lawyer of his choice, the Court observes that the applicant did not request the removal of his lawyer in the appellate proceedings nor was he prevented from doing so. There is no indication that the domestic courts found that the lawyer had failed to carry out his duties properly.

Under Articles 13 and 14 of the Convention the applicant further complained that on 30-31 March 2005 his new lawyer only had a few hours to get acquainted with his case.

The Court considers that the applicant's complaint falls to be examined under Article 6 §§ 1 and 3 (b) of the Convention. It reiterates that the question of time cannot be addressed *in abstracto,* but only in relation to the circumstances of the case (see for example *Mattick v. Germany* (dec.), no. 62116/00, ECHR 2005-VII). In the present case, the Court draws particular attention to the fact that on 31 March 2005 the applicant's lawyer announced at the court hearing that he had got acquainted with the case, and did not request any additional time to prepare the applicant's defence. After that hearing, a break of several days was taken, and the lawyer had supplementary time to study the case file. As regards the alleged discrimination the Court notes that the applicant did not present any arguments or substantiate his allegations neither before the domestic courts nor in the application before the Court.

In the light of the above the Court concludes that the applicant had the benefit of fair criminal proceedings. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

Under Article 1 of Protocol No. 1 and Article 6 § 1 of the Convention the applicant complained that his property rights were violated on account of the search and seizure of the documents on 9 April 1997.

The Court notes, however, that in so far as the applicant has raised that complaint within the criminal proceedings, the courts reviewed it and found no proof of this allegation. After examining the documents at hand, the Court sees no reason to depart from the Lithuanian courts' decisions that the search was lawful. As a result, this complaint must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

4. Under Article 6 § 2 of the Convention the applicant complained that his right to presumption of innocence was violated by the articles in the *Kauno diena* newspaper. Invoking Article 10 the applicant alleged that he was also defamed by those articles.

The Court recalls that two civil claims concerning the publications of 1997 were examined by the courts and one of them was partially granted. As concerns the first set of civil proceedings, the Court observes that the applicant did not lodge a cassation appeal with the Supreme Court, thus failing to exhaust the domestic remedies available to him. It follows that this part of the application must be rejected pursuant to Article 35 §§ 1 and 4.

The Court further recalls that the claim concerning the publication of 28 April 1997 was partially granted on 13 November 2007 but no breach of the right to the presumption of innocence was found. On 19 February 2008 the appellate court upheld that judgment and on 26 May 2008 the Supreme Court refused to examine his cassation appeal. On the basis of the documents submitted by the parties the Court finds that the domestic courts of three instances carefully assessed the evidence, applied the law and adopted reasoned decisions. The applicant's submissions were given due consideration. As a result, this complaint is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4.

As concerns the publications of 2001, even supposing that this complaint was lodged in compliance with the six month time-limit, the Court cannot but observe that the applicant failed to make full use of the remedies available, given that he did not lodge a cassation appeal against the appellate court's decision. It follows that this part of the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

5. Finally, the applicant also raised complaints in connection with civil proceedings to which the injured party in the present case was also a party.

However, these complaints were already examined and declared inadmissible by this Court in application no. 2523/05 on 18 March 2008. Accordingly, this part of the application must be rejected as essentially the same pursuant to Article 35 §§ 2 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise Elens-Passos
Deputy Registrar

Dragoljub Popović
President