



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

FOURTH SECTION

CASE OF KRYŽEVIČIUS v. LITHUANIA

(Application no. 67816/14)

JUDGMENT

STRASBOURG

11 December 2018

FINAL

11/03/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kryževičius v. Lithuania,

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

Ganna Yudkivska, *President*,

Paulo Pinto de Albuquerque,

Faris Vehabović,

Egidijus Kūris,

Carlo Ranzoni,

Georges Ravarani,

Péter Paczolay, *judges*,

and Marialena Tsirli, *Section Registrar*,

Having deliberated in private on 23 October 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 67816/14) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Lithuanian national, Mr Donatas Kryževičius (“the applicant”), on 10 October 2014.

2. The applicant was represented by Mr S. Aviža, a lawyer practising in Vilnius. The Lithuanian Government (“the Government”) were represented by their Agent, Ms K. Bubnytė-Širmenė.

3. The applicant alleged that he had been compelled to testify against his wife, contrary to Article 6 § 1 and Article 8 of the Convention. He also alleged that he had not been able to appeal to a higher court against the fine given to him for refusing to testify, contrary to Article 2 of Protocol No. 7 to the Convention.

4. On 11 October 2017 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1983 and lives in Palanga.

6. On 22 November 2013 the director of company M. lodged a complaint with the Klaipėda police, alleging that the applicant’s wife, who had been providing accounting services to company M., had unlawfully

transferred large amounts of money from that company's bank account to other companies. The director claimed that company M. had not obtained any services from those companies and that he had not pre-approved those transfers.

7. On 25 November 2013 the Klaipėda police opened a pre-trial investigation into allegations of embezzlement and falsification of documents, under Article 184 § 1 and Article 300 § 1 of the Criminal Code. The director of company M. was questioned as a witness and stated that in May 2012 he had entered into a contract for accounting services with company A., of which the applicant was the director. In accordance with that contract, the applicant's wife had begun providing accounting services to company M. In the beginning he had been happy with her work, but later he had noticed certain bank transfers which appeared suspicious to him. One such suspicious transfer had been a payment of 120,000 Lithuanian litai (LTL) (approximately 34,750 euros (EUR)) to company A.

8. On 4 December 2013 the applicant's wife was granted the status of a "special witness" in the investigation; in line with the Code of Criminal Procedure (hereinafter "the CCP"), she was questioned about her own possibly criminal activity and was exempted from liability for refusing to testify or giving false testimony (see paragraph 27 below). She stated that all the transfers from company M.'s bank account which she had carried out had been pre-approved by its director. She also stated that the transfer to company A. had been made by mistake, and the entire amount had been returned to company M. within a week.

9. On 9 April 2014 the applicant was called as a witness. He refused to give testimony in relation to his wife's actions and the payment of LTL 120,000 received by company A. from company M.

10. On 26 May 2014 a prosecutor from the Klaipėda regional prosecutor's office gave the applicant a fine of LTL 650 (approximately EUR 188) for refusing to testify, as provided for in Article 163 of the CCP (see paragraphs 31 and 32 below).

11. The applicant lodged a complaint with a senior prosecutor. He argued that the status of a "special witness" was similar to that of a suspect, and therefore he should not have been compelled to testify against his wife, who had such status. He relied on Article 31 of the Constitution, which prohibits compelling a person to testify against his or her family members (see paragraph 18 below).

12. On 9 June 2014 a senior prosecutor from the Klaipėda regional prosecutor's office dismissed the applicant's complaint on the grounds that, in accordance with the CCP, only the family members of a suspect or an accused were exempt from liability for refusing to testify, but the CCP did not extend such a privilege to the family members of a "special witness" (see paragraph 19 below).

13. The applicant lodged a complaint with the Klaipėda District Court, raising essentially the same arguments as those which he had raised before (see paragraph 11 above). He also asked the court to refer the matter to the Constitutional Court for a ruling on whether the CCP provisions which exempted the family members of a suspect or an accused from liability for refusing to testify, but not the family members of a “special witness”, complied with the Constitution.

14. On 9 July 2014 the Klaipėda District Court dismissed the applicant’s complaint and upheld the reasoning in the prosecutor’s decision (see paragraph 12 above). It stated that the applicant’s right not to testify against his wife would have been breached only if his wife had had the status of a suspect and not that of a witness. It also considered that the applicant’s request to refer the matter to the Constitutional Court was “subjective and legally unfounded”. That decision was final and not open to any further appeal.

15. Subsequently, the applicant lodged an appeal with the Klaipėda Regional Court, but on 22 July 2014 that court refused to examine it, on the grounds that there was no provision for such an appeal in law. The applicant then lodged an application to reopen the proceedings with the Supreme Court, but on 23 September 2014 the court ruled that it had no authority to reopen proceedings concerning procedural penalties imposed under Article 163 of the CCP.

16. On 11 September 2014 the applicant was questioned as a witness in the pre-trial investigation. He stated that he was the director of company A., which provided accounting services to other companies. His wife worked as the financial director of company A., and from May to November 2012 she had provided accounting services to company M. The applicant stated that he had not known how or why LTL 120,000 had been transferred to the bank account of company A. He knew only that that entire amount had been returned to company M. within a week, in a transfer carried out by his wife.

17. On 22 September 2014 the Klaipėda regional prosecutor’s office discontinued the pre-trial investigation on the grounds that no criminal offences had been committed. It appears that that decision was not appealed against and became final.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Right to refuse to testify against one’s family members and close relatives

18. The relevant part of Article 31 of the Constitution provides:

“It shall be prohibited to compel anyone to give evidence against himself or herself, or his or her family members or close relatives.”

19. Article 82 § 2 of the Code of Criminal Procedure (hereinafter “the CCP”) provides:

“The family members or close relatives of a suspect or an accused can refuse to testify or to answer certain questions (*neduoti parodymų arba neatsakyti į kai kuriuos pateiktus klausimus*).”

20. Article 38 of the CCP defines family members as: (1) parents, adoptive parents, children, adopted children, siblings and their spouses, if they live with the individual in question; (2) a spouse, live-in partner, or person who is engaged to be married to the individual in question; (3) a spouse’s parents; (4) former spouses.

21. Article 248 § 1 of the Criminal Code defines close relatives as parents, adoptive parents, children, adopted children, siblings, grandparents, and grandchildren.

22. In its ruling of 19 September 2000, the Constitutional Court held:

“Article 31 of the Constitution contains a provision setting out that individuals cannot be compelled to give evidence against themselves or against their family members or close relatives. Criminal law allows a witness to refuse to testify on these grounds. However, in cases where such individuals [nonetheless choose to testify and] commit perjury, being aware that they have the right to refuse to testify, they may be held criminally liable.”

23. In its ruling of 4 June 2012, the Constitutional Court held:

“Article 31 of the Constitution enshrines the concepts of ‘family members’ and ‘close relatives’ *expressis verbis*. Even though these concepts are not identical, they may include the same persons. ‘Close relatives’ include people who are biologically related to each other to a certain degree, whereas ‘family members’ may include people who are biologically related to each other and people who are not thus related, such as spouses.

The [act of] striving for an open, just and harmonious civil society and a State under the rule of law, which is enshrined in the Preamble of the Constitution, as well as the prohibition on compelling a person to give evidence against himself or herself, or against his or her family members or close relatives, which is enshrined in Article 31 [of the Constitution] *expressis verbis*, show that close relations are very valuable and protected.”

24. In its ruling of 12 April 2013, the Constitutional Court held:

“The guarantee provided for in Article 31 of the Constitution means that an individual may refuse to give evidence on the basis of which he or she, or his or her family member or close relative could incur criminal liability, [or] another type of legal liability if a possible sanction would amount to a criminal punishment owing to its nature and severity. However, the legal regulation established in Article 31 of the Constitution may not be construed as meaning that an individual may not voluntarily (that is, without anybody compelling him or her to do so) give evidence against himself or herself, or his or her family members or close relatives ...”

25. In its ruling of 26 June 2018 in criminal case no. 2K-225-689/2018, the Supreme Court held:

“Article 82 § 2 of the CCP provides that the family members and close relatives of a suspect or an accused may refuse to testify or to answer certain questions. This provision of the CCP implements the prohibition enshrined in Article 31 of the Constitution on being compelled to testify against oneself or one’s family members or close relatives. [That prohibition] means that there cannot be such legal regulation as would allow law-enforcement officials to require an individual to testify against himself or herself, or his or her family members or close relatives, and to apply sanctions in respect of an individual where he or she fails to comply with such a requirement. The prohibition enshrined in the Constitution is directed at State officials and does not regulate the actions of individuals who are being questioned. However, as already stated, that provision guarantees to the latter the right not to testify against themselves, their family members or close relatives. Such a right for individuals who are being questioned is also provided for in Article 82 § 2 of the CCP.

Although the right of the family members and close relatives of a suspect or an accused to refuse to testify or to answer certain questions is included in the section of the CCP entitled “Witnesses, experts and specialists”, in accordance with the prohibition enshrined in Article 31 of the Constitution, it must be concluded that such a right is granted not only to witnesses but also to other persons who are questioned in the course of criminal proceedings, irrespective of their procedural status – victims, suspects, accused. Article 45 of the CCP provides that a judge, a prosecutor or a pre-trial investigation officer must explain to those involved in criminal proceedings their procedural rights and ensure that they are able to avail themselves of those rights. Consequently, if an individual has to be questioned about his or her family members or close relatives, the right to refuse to testify or to answer certain questions must be explained to him or her, regardless of whether such an obligation is explicitly provided for in the CCP Article which regulates questioning at a particular stage of criminal proceedings.”

B. Status of a “special witness”

26. Until 1 September 2007 Article 80 § 1 of the CCP provided that persons who might give testimony about their own possibly criminal activity could not be questioned as witnesses.

27. An amendment to the relevant parts of the CCP was adopted on 28 June 2007 and entered into force on 1 September 2007. Since that date, Article 80 § 1 of the CCP has provided that persons who might give testimony about their own possibly criminal activity cannot be questioned as witnesses unless they agree to be thus questioned. Article 82 § 3 of the CCP provides that when such persons are questioned, they have the right to legal representation and to ask that they be granted status as a suspect, and they are exempt from liability for refusing to testify or giving false testimony.

28. An explanatory report of 5 May 2007 accompanying the draft of the above-mentioned amendment to the CCP stated:

“Article 80 of the CCP provides an exception allowing a person who might testify about his or her own possibly criminal activity to be questioned as a witness. Such an amendment is proposed because, in the course of pre-trial investigations, situations arise when, even after all procedural possibilities have been exhausted, the evidence is

insufficient to have a person officially recognised as a suspect, but it is nonetheless necessary to question him or her about circumstances relevant to the investigation. However, such a person cannot be questioned [as a witness] in accordance with the provisions of the Constitution and Article 80 of the CCP currently in force. The person's agreement to being questioned in this way would express his or her procedural willingness to cooperate with the authorities investigating his or her possibly criminal activity. Furthermore, such provisions would allow persons who have immunity from criminal prosecution in accordance with international law to be questioned, as well as persons in respect of whom the law requires permission to be obtained from a competent institution (such as members of parliament or judges). The particularities related to questioning such persons are provided for in Article 82 § 3 of the CCP."

29. The relevant parts of recommendations on questioning a witness in line with Article 80 § 1 and Article 82 § 3 of the Criminal Code, adopted by the Prosecutor General on 9 January 2008 and amended on 4 September 2011, provide:

"1. Article 80 § 1 of the CCP allows a person who might give testimony about his or her own possibly criminal activity to be questioned as a witness during a pre-trial investigation, with that person's consent. This provision of the CCP has created a new type of witness who does not have a separate procedural title. In these recommendations, such a witness is referred to as a special witness.

2. Article 80 § 1 of the CCP constitutes an exception to the prohibition on persons who might testify about their own possibly criminal activity being questioned as witnesses, and it has to be applied in especially rare cases.

...

4. The purpose of this provision is to obtain ... factual information which is essential for the investigation, so that the evidentiary value of that information is ensured without the person's rights being breached and further procedural decisions may be adopted.

5. The source of such factual information is the person whose procedural status is between that of a witness who has no [procedural interest in the outcome of the case] and that of a suspect.

...

7. A person may be questioned as a special witness if there is evidence that there has possibly been criminal activity and that the acts in question have possibly been committed by a specific person, but there is insufficient evidence to grant that person the status of a suspect.

8. If there is sufficient evidence to believe that there has been criminal activity and that the relevant acts have been committed by a specific person (irrespective of whether that person has already been questioned), the provisions of Article 80 § 1 and Article 82 § 3 of the CCP cannot be applied. In such situations, the prohibition on questioning such a person as a witness is applicable, and he or she may only be granted the status of a suspect.

...

10. The prosecutor adopts a decision to question a person as a special witness either at that person's written request or with his consent [to be questioned in this way], or

when the prosecutor determines ... that the conditions set out in Article 80 of the CCP for questioning the person about his or her own possibly criminal activity are present.

...

12. The prosecutor's decision to question a person as a special witness is presented to that person so that he or she may sign it. That decision must explain the rights, duties and liability of a special witness. A person may be questioned as a special witness only with his or her consent. Consent [to be questioned in this way] must be presented in writing and confirmed by the person's signature. If the person does not agree to be questioned about his or her own possibly criminal activity, that must likewise be indicated in writing and confirmed by his or her signature.

...

15. ... A special witness's request to be granted the status of a suspect does not bind the prosecutor ... The prosecutor may grant such a person the status of a suspect, or order a pre-trial investigation officer to do so, only if there is sufficient evidence to establish a minimal likelihood that there has been criminal activity and that the acts in question have been committed by the person who has [asked to be recognised as a suspect] ...

16. If, during the questioning of a special witness, factual information is obtained [indicating] that there has been criminal activity and that the relevant acts have been committed by the person who is being questioned, after the questioning a decision must be made as to whether to grant that person the status of a suspect.

17. When new relevant information is obtained ... the person who has been questioned as a special witness may be questioned as an [ordinary] witness, or he or she may be granted the status of a suspect ...

...

20. Procedural penalties may be ordered and other investigative measures may be carried out in respect of a special witness in the same way as with an [ordinary] witness or any other persons, subject to the exceptions provided for in Article 83 §§ 2 and 4 of the CCP ... A special witness cannot be granted anonymity ...

21. [A special witness] cannot be held liable under Article 83 §§ 2 and 4, that is for failing to appear when summoned by a pre-trial investigation officer, a prosecutor or a court, or for refusing to testify; procedural penalties provided for in Article 163 of the CCP cannot be applied in respect of him or her. [A special witness] cannot be held liable for giving false testimony under Article 235 of the CCP, so he or she is not warned about such liability before being questioned. Such a person can be brought [before a pre-trial investigation officer, a prosecutor or a court] under Article 142 of the CCP. [A special witness] cannot be subjected to remand measures (*kardomosios priemonės*) and he or she cannot be compelled to testify against himself or herself; however, he or she can be given procedural penalties provided for in Article 163 of the CCP for failing to comply with the lawful orders of a pre-trial investigation officer, a prosecutor, a pre-trial investigation judge or a court, or for interfering with the investigation or examination of a criminal case.

22. The above-mentioned legal provisions should be applied in cases in which a pre-trial investigation is carried out in order to determine whether there has been criminal activity, as well as in cases in which the circumstances of the criminal activity under investigation are not sufficiently clear – for example, possible violations of road traffic safety or vehicle use regulations; violations committed by managers or other authorised persons in enterprises, institutions and organisations; cases of abuse of

office or failure to carry out official duties; breaches of work safety regulations; cases of medical negligence; as well as cases in which the possible perpetrators have not been identified. The above-mentioned legal provisions may also be applied when it is necessary to question persons whose criminal prosecution requires that permission be obtained from a competent institution – State officers and civil servants in respect of whom the law provides limitations as regards opening a pre-trial investigation, and so on.”

30. In its ruling of 31 January 2017 in criminal case no. 2K-55-699/2017, relying on its previous case-law (the ruling of 23 June 2009 in criminal case no. 2K-255/2009 and the ruling of 16 June 2015 in criminal case no. 2K-348-303/2015), the Supreme Court held:

“Article 80 § 1 of the CCP provides that persons who are to give testimony about their own possibly criminal activity cannot be questioned as witnesses unless they agree to be thus questioned, in line with the conditions provided for in Article 82 § 3 of the CCP ... In accordance with the emerging case-law of the [Supreme Court], ... the prohibition on compelling someone to testify against himself or herself will be violated if a person who is questioned as a witness is in fact suspected of having committed a criminal offence but for some reason has not been recognised as a suspect in line with the CCP. Testimony which has been obtained in violation of Article 80 § 1 of the CCP cannot be accepted as evidence ... under the CCP. Whether submitting questions to a witness can be regarded as compelling a person to testify against himself or herself must be decided in accordance with the circumstances of each case.”

C. Liability of witnesses

1. Liability for refusing to testify without good reason

31. Article 83 § 2 of the CCP provides that a witness who, without good reason, does not appear when summoned by a pre-trial investigation officer, prosecutor or court, or refuses to testify without lawful grounds, can be punished in accordance with Article 163 of the CCP. The latter provision establishes that persons who fail to comply with the lawful orders of a pre-trial investigation officer, a prosecutor, a pre-trial investigation judge or a court can be punished by a fine or detention of up to one month.

32. In line with Article 163 §§ 1 and 2 of the CCP, a fine may be ordered by a prosecutor, a pre-trial investigation judge or a court. At the material time, the maximum fine which could be ordered under that provision was LTL 3,900 (approximately EUR 1,130).

33. In line with Article 163 § 2 of the CCP, detention may be ordered by a pre-trial investigation judge or a court, either on their own initiative or at the request of a prosecutor.

2. *Liability for giving false testimony*

34. Article 83 § 4 of the CCP provides that a witness incurs liability for giving false testimony. Article 235 § 1 of the Criminal Code provides that false witness testimony is punishable by community service or a fine, restriction of liberty, detention, or imprisonment of up to two years. Article 235 § 4 of the Criminal Code provides that a victim or witness cannot be held liable for giving false testimony if, in accordance with the law, he or she had the right to refuse to testify but was not made aware of that right before being questioned.

35. In its ruling of 29 March 2010 in criminal case no. 2K-168/2011, the Supreme Court held:

“Criminal liability for giving false testimony is provided for in Article 235 of the Criminal Code. Article 235 § 4 provides that a victim or witness cannot be held liable for giving false testimony if, in accordance with the law, he or she had the right to refuse to testify but was not made aware of that right before being questioned. Instances where an individual has the right to refuse to testify are regulated not only by criminal law, but also other legal instruments; therefore, when deciding on the application of Article 235 of the Criminal Code, these legal instruments have to be analysed and assessed as a whole.”

D. Right to appeal during a pre-trial investigation

36. Article 63 § 1 of the CCP provides that, during a pre-trial investigation, complaints against procedural acts and decisions taken by a prosecutor can be lodged with a senior prosecutor. If a senior prosecutor dismisses a complaint, a further complaint can be lodged with a pre-trial investigation judge. Article 64 § 6 provides that decisions taken by a pre-trial investigation judge are final and not open to any further appeal, except when the CCP provides otherwise.

37. Article 163 § 4 of the CCP provides that a person who has been given a penalty by a pre-trial investigation judge or a court for refusing to testify can lodge a complaint with the same judge or court. The decision taken by that judge or court with regard to the complaint can then be appealed against to a higher court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

38. The applicant complained that he had been punished for refusing to testify in the criminal proceedings in which his wife had had the status of a

“special witness”. He relied on Article 6 § 1 of the Convention and Article 8 of the Convention.

39. The Court, being the master of the characterisation to be given in law to the facts of a case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 114, 20 March 2018), considers that this complaint falls to be examined solely under Article 8 of the Convention, which reads:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

Applicability of Article 8 of the Convention

(a) The parties' submissions

40. The Government submitted that the applicant had been called as a witness in the pre-trial investigation because he was the director of company A., a company which had received a payment from company M. that had been deemed suspicious by the latter company's director. He could therefore have provided testimony about the relationship between those two companies and the circumstances related to that payment, and not necessarily any facts which were directly related to his wife. The Government thus argued that the applicant's family life had not been affected and Article 8 of the Convention was not applicable.

41. The applicant submitted that at the relevant time the only employees of company A. had been himself and his wife, so any questioning about the company's activities would necessarily have related to his wife.

(b) The Court's assessment

42. The Court considers that the Government's objection is so closely related to the substance of the applicant's complaint under Article 8 of the Convention that it should be joined to the merits.

43. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

44. The applicant submitted that the status of a “special witness” was very similar to that of a suspect, because the person was testifying about his or her own possibly criminal activity and could be declared a suspect at any point in the criminal proceedings. He therefore submitted that he should have been exempted from liability for refusing to testify in the investigation in which his wife had had such status.

(b) The Government

45. The Government firstly submitted that the status of a “special witness” had been introduced into Lithuanian law in order to address situations in which there was insufficient evidence for an individual to be recognised as a suspect but it was necessary to question him or her in the context of a criminal investigation, while preserving his or her right to remain silent, among other rights. They submitted that the domestic law prohibited calling as witnesses in criminal cases individuals who satisfied the criteria for suspects – they referred in particular to the Recommendations adopted by the Prosecutor General (see paragraph 29 above) and the case-law of the Supreme Court (see paragraph 30 above).

46. The Government contended that, in line with domestic law, law-enforcement authorities had an obligation to take all necessary steps to investigate possibly criminal activities which had been disclosed to them, and they had limited discretion to refuse to open a pre-trial investigation. The status of a “special witness” therefore allowed the authorities to proceed with an investigation in order to decide whether there had been criminal activity and whether the relevant acts had been committed by a particular person, even in the absence of sufficient evidence to officially recognise anyone as a suspect. The Government pointed out that the Recommendations adopted by the Prosecutor General emphasised the exceptional nature of the status of a “special witness” and provided examples of cases in which it should be applied (see paragraph 29 above).

47. The Government further submitted that if a person was questioned about the actions of his or her close relative who had the status of a “special witness” but was later recognised as a suspect in the same proceedings, such testimony could not be regarded as admissible evidence, as it would have been acquired in violation of the testimonial privilege provided for in Article 82 § 2 of the CCP (see paragraph 19 above).

48. Turning to the applicant’s situation, the Government argued that granting his wife the status of a “special witness” in the pre-trial investigation had been justified by the lack of sufficient evidence, at that

point in the investigation, to officially recognise her as a suspect. For that reason, the authorities had carried out various investigative measures, including multiple witness examinations, in order to collect evidence. As one of the allegedly unlawful transfers made by the applicant's wife had been a payment to company A., headed by the applicant, the Government argued that it had been "reasonable and unavoidable" to call him as a witness, as he could have explained the relationship between companies A. and M. and the circumstances related to that transaction.

49. The Government submitted that "in practice" the authorities applied the testimonial privilege provided for in Article 82 § 2 of the CCP to the family members and close relatives of "special witnesses", "taking into consideration the doubtful status of such evidence in a criminal case and aiming to protect individuals from compelling them to testify against their relatives". However, in the applicant's case, "the factual circumstances of alleged criminal acts were quite uncertain" and the scope of the investigation was "rather broad". In the Government's view, it was therefore "highly likely" that the authorities had intended to ask the applicant questions which were related not only to his wife, but also to the activities of his company. The Government submitted that that was confirmed by the content of the applicant's testimony given on 11 September 2014, in which he had given statements about the structure and financial activities of company A. and had not been asked any questions which could have incriminated his wife (see paragraph 16 above).

50. The Government lastly submitted that the testimonial privilege provided for in Article 82 § 2 of the CCP was not absolute, and that family members and close relatives could nonetheless be called to testify about facts which were not "directly related" to a suspect or an accused. Were it otherwise, law-enforcement authorities would be hindered in fulfilling their duty to take all necessary steps to investigate criminal activities. The Government therefore submitted that the applicant had had the right to refuse to answer questions related specifically to his wife, but not to refuse to testify altogether.

2. The Court's assessment

(a) Whether there has been an interference with the applicant's right to respect for his family life

51. The Court has previously found that an attempt to compel an individual to give evidence in criminal proceedings against someone with whom that individual had a relationship amounting to family life constituted an interference with his or her right to respect for his or her family life (see *Van der Heijden v. the Netherlands* [GC], no. 42857/05, § 52, 3 April 2012). Therefore, in order to determine whether there has been such interference in the present case, the Court has to examine whether the status

of a “special witness”, which was granted to the applicant’s wife, is sufficiently similar to the status of a suspect, to the extent that the criminal proceedings could be said to have been “against” her.

52. In accordance with domestic law, the status of a “special witness” is granted to an individual who could be questioned about his or her own possibly criminal activity, although at that point in the investigation the evidence is insufficient to officially declare him or her a suspect (see paragraphs 27-29 above). Pursuant to the Recommendations adopted by the Prosecutor General, that status is considered to be between that of a so-called “ordinary” witness, who has no procedural interest in the outcome of the case, and that of a suspect (see paragraph 29 above). Certain rights which are typically reserved for suspects – such as the right to a lawyer and the exemption from liability for refusing to testify or giving false testimony – are applicable to “special witnesses” (see paragraph 27 above). Furthermore, in their observations, the Government stated that “in practice” the testimonial privilege granted to the family members and close relatives of suspects or accused was also granted to the family members and close relatives of “special witnesses”, one of the reasons for that being the need “to protect individuals from compelling them to testify against their relatives” (see paragraph 49 above). It is therefore evident from these facts that, under the Lithuanian law, the status of a “special witness” is close to the status of a suspect in several important aspects.

53. In the light of the above, the Court considers that granting the applicant’s wife the status of a “special witness” in a pre-trial investigation was an indication that the authorities had at least some grounds to suspect that she had taken part in some criminal activity, which precluded them from questioning her as an ordinary witness (see, *mutatis mutandis*, *Stojkovic v. France and Belgium*, no. 25303/08, § 51, 27 October 2011). It also notes that, according to the documents submitted to it by the parties, nobody else was granted the status of a “special witness” or a suspect in those criminal proceedings, thereby indicating the significance of the applicant’s wife’s role in those proceedings.

54. The Government nonetheless argued that the applicant had been called to testify about the structure and activities of his company and not about any circumstances “directly related” to his wife, as demonstrated by the content of his testimony on 11 September 2014 (see paragraphs 40 and 49 above). However, the Court considers that the content of the applicant’s testimony which he gave after being fined cannot be taken as proof that he would not have been asked questions about his wife on a previous occasion, had he agreed to testify – it does not wish to speculate as to what questions the investigating authorities would have asked in that situation. More importantly, the Court has previously held that testimony obtained under compulsion which appears on its face to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, may

be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon statements of the accused or evidence given by him or her during the trial, or to otherwise undermine his or her credibility (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 268, 13 September 2016). Therefore, in the Court's view, the Government have not convincingly demonstrated that it should have been the applicant's responsibility to determine what effect any particular question or answer might have had on the outcome of the criminal proceedings and on his wife's possible liability.

55. Accordingly, the Court finds that punishing the applicant for refusing to testify in the criminal proceedings in which his wife had the status of a "special witness" constituted an interference with his right to respect for his family life.

56. As a result, it dismisses the Government's objection concerning the applicability of Article 8 of the Convention (see paragraph 40 above).

(b) Whether the interference was in accordance with the law

57. The applicant was given a fine by a prosecutor, in accordance with Article 163 of the CCP (see paragraphs 31 and 32 above). The prosecutor, the senior prosecutor and the district court ruled that the applicant was not entitled to refuse to testify in the criminal proceedings because Article 82 § 2 of the CCP did not guarantee such a right to the family members or close relatives of a "special witness" (see paragraph 19 above). The Court is therefore satisfied that the interference in question was in accordance with the law, as required by Article 8 § 2 of the Convention.

(c) Whether the interference pursued a legitimate aim

58. The Court observes that neither of the parties explicitly addressed the question of whether compelling the applicant to testify in the criminal proceedings in which his wife had had the status of a "special witness" had pursued a legitimate aim. Nonetheless, in their observations, the Government stated that the category of a "special witness" was necessary in order to enable the authorities to investigate criminal activities even when there was insufficient evidence to recognise any specific individual as a suspect (see paragraphs 45 and 46 above). The Government also submitted that the testimonial privilege granted to family members and close relatives could not be absolute, as those individuals might be able to provide information which did not directly concern their relatives, but was nonetheless relevant to the investigation (see paragraph 50 above). In such circumstances, the Court is prepared to accept that the impugned interference pursued the aims of the prevention of crime and the protection of the rights and freedoms of others, as provided for in Article 8 § 2 of the Convention.

(d) Whether the interference was necessary in a democratic society

59. An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and, in particular, if it is proportionate to the legitimate aim pursued, and if the reasons adduced by the national authorities to justify it are “relevant and sufficient”. While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 101, ECHR 2008).

60. A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference, and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights. Where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (*ibid.*, § 102, and the cases cited therein).

61. In its case-law concerning the testimonial privilege of the family members of persons suspected of criminal offences, the Court has recognised that, in such situations, two competing public interests are at issue – the public interest in the prosecution of serious crime, and the public interest in the protection of family life from State interference. Both these interests are important, having regard to the common good (see *Van der Heijden*, cited above, § 62).

62. The public interest in the prosecution of crime involves, of necessity, putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions (*ibid.*, and the cases cited therein). The High Contracting Parties are under a duty to deter or punish crime, and the Court has acknowledged that, as a result, it is a “normal civic duty” for individuals to give evidence in criminal proceedings (see *Voskuil v. the Netherlands*, no. 64752/01, § 86, 22 November 2007, and *Van der Heijden*, cited above, §§ 62-63). Nonetheless, it has also recognised exceptions to this civic duty. For instance, the suspect himself or herself enjoys the privilege against self-incrimination, which has been identified by the Court as lying at the heart of the rights which the defence enjoys under Article 6 of the Convention (see *Van der Heijden*, cited above, § 64, and the cases cited therein).

63. In balancing those competing interests, multiple Contracting Parties, including Lithuania, have considered that the public interest in the protection of family life weighs heavier in the scales than the public interest in criminal prosecution (*ibid.*, §§ 31-36 and 62). In accordance with Lithuanian law, the family members and close relatives of a suspect or an accused, such as parents, children, spouses and former spouses, are exempt from the obligation to testify in criminal proceedings (see paragraphs 19-21 above). Furthermore, as held by the highest Lithuanian courts, the testimonial privilege of family members and close relatives extends to any proceedings which may lead to a punishment that could be considered “criminal” because of its nature and severity (see paragraph 24 above), and officials questioning such family members and close relatives have a duty to inform them about their right to refuse to testify, irrespective of whether such a duty is explicitly provided for in the law (see paragraph 25 above). Accordingly, such witnesses are relieved of the moral dilemma of having to choose between giving truthful evidence and thereby, possibly, jeopardising their relationship with the suspect, or giving unreliable evidence or even perjuring themselves, in order to protect that relationship (*ibid.*, § 65).

64. The Government submitted to the Court that the testimonial privilege granted under Lithuanian law was not absolute, and that even the family members and close relatives of a suspect or an accused had only the right to refuse to answer certain questions, but not the right to refuse to provide any testimony at all, as the applicant had done (see paragraph 50 above). However, the Court firstly observes that Article 82 § 2 of the CCP explicitly states that “the family members or close relatives of a suspect or an accused can refuse to testify or to answer certain questions” (see paragraph 19 above), and the Government have not provided any examples of domestic case-law or institutional practice illustrating that the family members and close relatives of a suspect or an accused could indeed be compelled to answer certain questions. Furthermore, the authorities who fined the applicant did not make any reference to any such limitations of the testimonial privilege either, nor did they suggest that the applicant had the right to answer only certain questions – they explicitly stated that the applicant was not entitled to such a privilege at all (see paragraphs 10, 12 and 14 above). The Court therefore does not consider that the issue of the scope of the testimonial privilege is relevant for the present case.

65. The question which the Court has to examine is whether the Lithuanian authorities violated the applicant’s right to respect for his family life under Article 8 of the Convention by not granting him the testimonial privilege in the criminal proceedings in which his wife had the status of a “special witness”, which under the Lithuanian law is similar to that of a suspect (see paragraph 52 above), while that privilege was granted by law to the family members and close relatives of a suspect or an accused.

66. The Court has already found that, under the Lithuanian law, the status of a “special witness” is close to that of a suspect in several important aspects, such as the existence of at least some suspicion that the individual has committed acts constituting criminal activity, and his or her exemption from liability for refusing to testify or giving false testimony (see paragraph 52 above). In the Court’s view, in the present case, it is not called to assess whether the status of a “special witness” as such is compatible with the Convention, or what specific rights a person holding that status should have (see the relevant general principles in paragraphs 59 and 60 above). It observes, however, that none of the domestic legal instruments relating to the status of “special witnesses” addressed the question of the testimonial privilege of family members and close relatives. In addition, neither the explanatory report to the draft amendment of the CCP nor the Recommendations adopted by the Prosecutor General provided any arguments as to why, notwithstanding the similarities between the status of a “special witness” and that of a suspect, that privilege should remain limited to the family members and close relatives of suspects (see paragraphs 27-29 above). In such circumstances, the Court considers that the domestic authorities in the applicant’s case should have provided relevant and sufficient reasons for refusing to grant the testimonial privilege to the applicant, who was a family member of a “special witness”.

67. In his complaints before the domestic authorities, the applicant argued that the statuses of “special witnesses” and suspects were sufficiently similar, and thus the testimonial privilege of family members provided for in Article 82 § 2 of the CCP should be applicable to him (see paragraphs 11 and 13 above). However, neither the senior prosecutor nor the Klaipėda District Court addressed in substance the applicant’s arguments or took note of his particular circumstances – they merely referred to the text of the above-mentioned provision and found that the family members or close relatives of “special witnesses” were not mentioned there (see paragraphs 12 and 14 above). Those authorities did not make any attempt to explain the reasoning behind the testimonial privilege being refused to persons in the applicant’s situation, in particular in the light of the prohibition to compel anyone to testify against his or her family members or close relatives enshrined in the Constitution (see paragraphs 18 and 22-24 above), and the Klaipėda District Court dismissed his request to refer the matter to the Constitutional Court (see paragraph 14 above).

68. Nor did the Government, in their submissions to the Court, provide any arguments as to why the testimonial privilege was limited to the family members and close relatives of a suspect, and refused to those of a “special witness”. On the contrary, the Government seemed to acknowledge the extent of the similarities between those two statuses, by affirming that “in practice” the testimonial privilege was granted to the family members and close relatives of “special witnesses” (see paragraph 49 above).

69. Therefore, notwithstanding the legitimate aim sought by the measure in question (see paragraph 58 above), in the present case the Court is unable to discern any relevant and sufficient reasons for the applicant being denied the testimonial privilege in the criminal proceedings in which his wife was a “special witness”, when such a privilege was granted to the family members and close relatives of suspects.

70. In the light of the above, the Court concludes that the domestic authorities failed to demonstrate that compelling the applicant to testify in the criminal proceedings in which his wife had the status of a “special witness” was “necessary in a democratic society” within the meaning of Article 8 of the Convention. There has therefore been a violation of the applicant’s right to respect for his family life.

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 7 TO THE CONVENTION

71. The applicant complained that he had not been able to appeal to a higher court against the punishment given to him for refusing to testify. He relied on Article 2 of Protocol No. 7 to the Convention, which reads:

“1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.”

Admissibility

1. The parties’ submissions

(a) The Government

72. The Government firstly submitted that the fine given to the applicant for refusing to testify had been a procedural penalty, provided for in the CCP and aimed at ensuring the smooth course of criminal proceedings. They argued that such a “purely procedural measure” could not be considered a “criminal offence” within the meaning of Article 2 of Protocol No. 7 to the Convention.

73. The Government further submitted that, in any event, the offence for which the applicant had been fined was “of a minor character” within the meaning of Article 2 § 2 of Protocol No. 7 because it was not punishable by detention. They referred to Article 163 of the CCP, in accordance with which detention could only be ordered by a court (see paragraph 33 above); in that case, an appeal to a higher court was provided for in domestic law

(see paragraph 37 above). However, the applicant had been given a fine by a prosecutor, who was not authorised to order detention (see paragraph 32 above). The Government also contended that the fine given to the applicant (EUR 188) had been “symbolic” and that he had not provided any arguments substantiating its adverse effect on him.

(b) The applicant

74. The applicant submitted that he had not been able to appeal to a higher court against the decision of the Klaipėda District Court, as such an appeal was not provided for in domestic law (see paragraphs 14 and 15 above). He also submitted that the fine given to him could not be considered small, and that he could have been fined an unlimited number of times for refusing to testify.

2. The Court’s assessment

75. The Court considers that, in the present case, it is not necessary to address the Government’s argument that the offence for which the applicant was punished was not “criminal” within the meaning of Article 2 § 1 of Protocol No. 7 to the Convention (see paragraph 72 above). It observes that the fine for refusing to testify was given to the applicant by the prosecutor (see paragraph 10 above). In accordance with domestic law, the prosecutor did not have the authority to order the applicant’s detention (see paragraphs 31-33 above). In this connection, the Court notes that it has previously found that offences which were not punishable by imprisonment were of a minor nature and thereby fell within the exceptions permitted under Article 2 § 2 of Protocol No. 7 to the Convention (see *Luchaninova v. Ukraine*, no. 16347/02, § 72, 9 June 2011, and the cases cited therein). By contrast, had the applicant been at risk of being detained for refusing to testify, he would have had the possibility of an appeal to a higher court, as provided for by the domestic law (see paragraphs 33 and 37 above).

76. In the light of the foregoing circumstances, the Court considers that this complaint is manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

78. The applicant claimed 357 euros (EUR) in respect of pecuniary damage, an amount consisting of the fine which he had been given for refusing to testify (EUR 188) and a bailiff's expenses for execution proceedings (EUR 169). He provided a copy of a receipt showing that he had paid that amount. He also claimed EUR 3,000 in respect of non-pecuniary damage.

79. The Government submitted that the bailiff's expenses for execution proceedings could not be considered to have been necessarily incurred because they had resulted from the applicant's unwillingness to pay the fine voluntarily. They also submitted that the claim in respect of non-pecuniary damage was excessive and unsubstantiated.

80. The Court has found a violation of Article 8 of the Convention in view of the fact that the applicant was given a fine for refusing to testify in the criminal proceedings in which his wife was a "special witness". It considers that the amount claimed by the applicant in respect of pecuniary damage is directly linked to the violation found, and therefore awards him EUR 357 under that head.

81. The Court also considers that the applicant must have experienced distress and inconvenience as a result of the violation of his right to respect for his family life. It therefore awards him EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

82. The applicant also claimed EUR 1,210 for the costs and expenses incurred before the Court. He provided a copy of a receipt showing that he had paid that amount to his lawyer.

83. The Government argued that the receipt provided by the applicant did not sufficiently specify what legal services he had received.

84. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court will uphold claims for costs and expenses only in so far as they are related to the violations it has found, and will reject them in so far as they relate to complaints that have not led to the finding of a violation, or to complaints declared inadmissible. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 605 covering costs for the proceedings before the Court, plus any tax that may be chargeable on that amount.

C. Default interest

85. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins to the merits* the Government's objection concerning the applicability of Article 8 of the Convention and *dismisses* it;
2. *Declares* the applicant's complaint under Article 8 of the Convention admissible and the remainder of the application inadmissible;
3. *Holds* that there has been a violation of Article 8 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 357 (three hundred and fifty-seven euros), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (iii) EUR 605 (six hundred and five euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 December 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Maridalena Tsirli
Registrar

Ganna Yudkivska
President