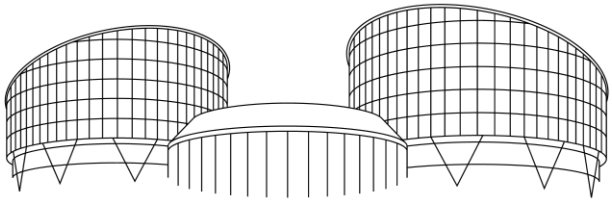

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 41922/06
by Virginijus ČESNULEVIČIUS
against Lithuania

The European Court of Human Rights (Second Section), sitting on 10 May 2011 as a Chamber composed of:
Françoise Tulkens, *President,*
Danutė Jočienė,
David Thór Björgvinsson,
Giorgio Malinverni,
András Sajó,
Işıl Karakaş,
Paulo Pinto de Albuquerque, *judges*,
and Françoise Elens-Passos, *Deputy Section Registrar*,
Having regard to the above application lodged on 3 October 2006,
Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Virginijus Česnulevicius, is a Lithuanian national who was born in 1956 and lives in Vilnius.

A. The circumstances of the case

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

In 1990, after the Republic of Lithuania had re-established independence, the applicant and J.U. started working at the Department of National Defence (*Krašto apsaugos departamentas*).

On the evening of 12 January 1991 the Soviet army launched military operations against Lithuania. Soviet troops entered the television tower of Vilnius and the headquarters of Lithuanian public television, and also tried to take the Lithuanian parliament. Massive crowds of Lithuanian citizens came to the rescue of the institutions of the newly independent Lithuania. Thirteen Lithuanian civilians were killed and hundreds injured during the clash with the Soviet army (see *Ždanoka v. Latvia* [GC], no. 58278/00, § 20, ECHR 2006-IV). At the time of the events, the applicant and J.U. were on the premises of the Lithuanian parliament building, where they worked as guards.

In 2004 a publishing house released a book by J.U. According to the applicant, it contained false and defamatory information about him.

On 12 July 2004 the applicant addressed the publishing house requesting the opportunity to respond critically to the content of the book. In his letter to the publisher the applicant described J.U. negatively and criticised J.U.'s actions during the events of January 1991. The applicant's letter contained allegations that J.U. had deserted his post at the barricades of the Parliament building and that he had not passed the psychiatric check for permission to carry a gun.

Following these events, on 2 March 2005 J.U. brought a private prosecution against the applicant for defamation. The applicant made a counterclaim, alleging that J.U. had defamed him in his private prosecution statement.

The applicant states that during the initial examination of the case by the Vilnius City First District Court he was undergoing medical treatment. He asked for a longer break before the later hearings, for health reasons. The applicant states that the judge suggested that he did not have to be present at the final two hearings of his case, at which J.U. was due to give his final submissions and judgment would be adopted. The applicant admits that no request for a longer break was noted in the official hearing record. Although the applicant then informed the court that he would not be present at the two final hearings, they were not postponed.

On 5 December 2005 the Vilnius City First District Court found the applicant guilty of defamation, given that his statements that "J.U. had deserted his post during the tragic events of January 1991" and "J.U. had not passed the psychiatric check for permission to carry a gun" had not been proved. The applicant was fined 1,250 Lithuanian litai (LTL, 362 euros (EUR)) and ordered to pay compensation for non-pecuniary damage in the sum of LTL 1,000 (EUR 290). The court terminated the proceedings in so far as the counterclaim by the applicant was concerned. J.U. and his lawyer, as well as the applicant, were present at the hearing.

In finding the applicant guilty, the court noted that the applicant had failed to submit credible evidence in support of his statement that J.U. had deserted his post. In this connection the court noted that in an official document J.U.'s superior had given a positive evaluation of J.U.'s behaviour during the events of January 1991. The submissions of one independent witness, J.G., questioned in the courtroom, were also taken into account. The court further established that the statement that J.U. had not passed the psychiatric check for permission to carry a firearm was false, given that the medical records showed that he had passed the examination in respect of his mental health.

The applicant states that he saw the record of the hearing of 5 December 2005 only on 8 December 2005, at approximately 3 p.m.

The applicant appealed, mainly arguing that the trial court had distorted the testimony of J.G., had misunderstood the circumstances surrounding the events of January 1991, and assessed the evidence and applied domestic law wrongly.

On 11 April 2006 the Vilnius Regional Court upheld the applicant's conviction. In the appellate proceedings the applicant was represented by a lawyer. As the transcript of the hearing on appeal shows, the court deemed it unnecessary to question witness J.G., who had testified before the trial court, again, but granted the applicant's request to add written evidence to the file and to question two more witnesses, J.Ž. and G.G. One more witness, A.Z., was questioned at the request of J.U.

The Vilnius Regional Court dismissed the applicant's argument that the official transcript of the hearing was inaccurate, finding that the applicant had had the right to comment on the record of the hearing within three days of its signing by the judge, if he believed there were mistakes or inconsistencies. However, he had not made use of this right. The court reviewed the findings of the lower court and decided that the latter had assessed the evidence correctly and reached reasoned conclusions. The appellate court also emphasised that J.G., who had testified before the trial court at the request of the applicant, could not unambiguously confirm the fact that J.U. had left his post at the barricades in January 1991. Another witness, A.Z., had testified that J.U. had not deserted his post. The appellate court also noted that written evidence - a report by J.U.'s superior - stated that during the events of January 1991 J.U. was "holding firm".

Lastly, the court observed that the lower court had correctly concluded that the assertion that J.U. had not passed the psychiatric check was a pejorative allusion to his mental health, and thus was damaging to his reputation. No procedural violations were found. This decision was final, as there is no right to appeal on points of law under the domestic law in private prosecution cases.

Subsequently, the applicant unsuccessfully tried to reopen the proceedings, alleging that the courts were unfair. His requests were

dismissed by the public prosecutor and the Vilnius City Second District Court as unsubstantiated; they found no procedural irregularities when handling the applicant's case at both levels of jurisdiction.

B. Relevant domestic law

Articles 57-29 of the Code of Criminal Procedure provide that a participant in the criminal proceedings may raise an objection on the grounds of partiality of a judge.

Article 261 §§ 4-8 of the Code of Criminal Procedure provides that a transcript of a hearing must be prepared and signed by the judge who heard the case and the recording officer of the hearing no later than three days after the hearing took place. The participants in the proceedings have the right to acquaint themselves with the transcript within three days of its signing. Any objections as to the accuracy of the transcript must be put to the judge who heard the case. If the judge agrees with the objections, he or she adds them to the transcript of the hearing. Should the judge deem that the original transcript was accurate, he may dismiss the participant's objections by adopting a ruling in a new hearing.

Article 367 § 3 of the Code of Criminal Procedure provides that an appeal on points of law may not be lodged in cases of private prosecution.

COMPLAINTS

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

2. Invoking Article 6 §§ 1 and 3 as well as Article 13 of the Convention, the applicant complained about various aspects of those criminal proceedings.

3. Under Article 13 of the Convention the applicant complained that in private prosecution cases the domestic law did not provide for the possibility of an appeal on points of law and accordingly he was deprived of the right to such an appeal.

4. In an additional application, lodged with the Court on 14 February 2007, the applicant also complained under Article 10 of the Convention that he had been convicted for expressing his opinions.

THE LAW

1. The applicant alleged a violation of Article 6 § 1 of the Convention in that the criminal proceedings against him had lasted too long.

The Court notes that the period to be taken into consideration commenced on 2 March 2005, when a private prosecution was brought against the applicant. The proceedings ended with the Vilnius Regional Court upholding the applicant's conviction on 11 April 2006. The overall length of the proceedings was thus a little over one year at two levels of jurisdiction. The Court considers that this period in itself was reasonable and did not exceed the "reasonable time" requirement set in Article 6 § 1 of the Convention. Accordingly, this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the thereof.

2. Relying on Article 6 § 1 of the Convention the applicant alleged a violation of his right to an impartial tribunal, in that the courts were partial at both levels of jurisdiction. The applicant also submitted that the Vilnius City First District Court had failed to send him all summonses and notifications. Under Article 6 § 3 (c) the applicant alleged a breach of his right to defend himself through legal assistance and to receive free legal aid, in that the court of first instance had not informed him of his right to a lawyer. He also maintained that his financial situation had not been taken into account when the level of the damages was set.

As regards the above complaints the Court reiterates that under Article 35 § 1 it may only deal with the matter after all domestic remedies have been exhausted. Applicants must have provided the domestic courts with the opportunity, in principle intended to be afforded to Contracting States, of preventing or putting right the violations alleged against them (see, among many authorities, *McFarlane v. Ireland* [GC], no. 31333/06, § 107, ECHR 2010-...). Having examined the materials presented to it, the Court observes that the applicant did not raise any of the above complaints in his eight pages long appeal. It must be further noted that the applicant also did not use his procedural right to challenge the composition of the appellate court at the hearing.

The Court finds no justification for the applicant's silence on these points, given that he contested various other aspects of the case before the Vilnius Regional Court and that during the appellate proceedings he was represented by a lawyer, who had to be well aware of the procedural rights of the accused. It follows that the Court is not required to determine whether the facts submitted by the applicant in this part of the application disclose any appearance of a violation of Article 6 § 1 of the Convention, as the applicant failed to exhaust domestic remedies in this respect as required by Article 35 § 1 thereof. It follows that this part of the application must be rejected pursuant to Article 35 § 4.

Invoking Article 6 §§ 1, 2 and 3 (b) and (d) of the Convention the applicant further complained that the Lithuanian courts had wrongly interpreted witnesses' testimony and written evidence, and incorrectly applied domestic law. In particular, he argued that the record of the hearing of 5 December 2005 before the trial court had been falsified, distorting the

testimony of witness J.G. He was also displeased with the appellate court's decision not to summon J.G. for further questioning in the courtroom. He further submitted that the appellate court had ignored the testimony of G.G., given that that testimony corroborated the applicant's version of events. Overall, for the applicant, the Lithuanian courts had handled the case in a manner which was more beneficial to J.U.

The Court considers that the applicant's complaints are in essence related to an alleged violation of his right to a fair trial guaranteed by Article 6 § 1 of the Convention, on which the Court will concentrate its examination in this case.

In this connection the Court reiterates that it is not its function to deal with errors of fact or of law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *Schenk v. Switzerland*, 12 July 1988, § 45, Series A no. 140). In other words, it is not the Court's task to substitute its own assessment of the facts and the evidence for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair (see *Bernard v. France*, 23 April 1998, § 37, *Reports of Judgments and Decisions* 1998-II).

On the basis of the materials submitted by the applicant, the Court observes that within the framework of the criminal proceedings the applicant was able to introduce arguments necessary for his defence, himself or through his counsel, and the domestic judicial authorities gave them due consideration. The Court notes in this regard that one witness for the applicant was questioned at the court of first instance, and two additional witnesses on appeal. A very large number of documents submitted by the applicant were included in the case file. The factual and legal reasons for the first-instance decision were set out at length. The applicant presents no tangible evidence to show any procedural inequalities vis-à-vis the other party during the examination of the case.

The Court also observes that the applicant was present at all but one hearing of the trial court. The applicant did not adduce to the Court any evidence that he requested postponement of that hearing. Furthermore, the applicant was present with his counsel in the appeal court, which dealt with the case on points of both fact and law and thus had all power to remedy any possible irregularities.

In so far as the applicant's allegation that he was unable to make comments about the official transcript of the hearing of the district court is concerned, the Court finds no reason to depart from the conclusions of the appellate court in this regard. The Court therefore considers that the applicant was able to familiarise himself with the transcript and make any

comments on its content between 8 and 11 December 2005, but he failed to make proper use of this opportunity.

The Court also considers that the appeal by the applicant was adequately addressed by the Vilnius Regional Court. In this regard the Court reiterates that although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument. Thus, in dismissing an appeal, an appellate court may in principle simply endorse the reasons for the lower court's decision (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I). Even so, in the present case it must be noted that the appellate court did not disregard the rights of the defence, given that it examined three additional witnesses, two of them at the request of the applicant. The court commented on the main issues raised by the applicant, such as examination of the evidence and establishment of the facts, reasoning, and the alleged violation of procedural rights with regard to the transcript of the hearing of the district court.

In so far as the applicant's complaint in regard to refusal to call witness J.G. for further questioning at appeal is concerned, the Court also notes that the guarantees of a fair trial do not require the attendance and examination of every witness on the accused's behalf. Its essential aim, as indicated by the words "under the same conditions", is a full "equality of arms" in the matter. It leaves it to the appropriate national authorities to decide on the relevance of the proposed evidence in so far as is compatible with the concept of a fair trial (see, among other authorities, *Engel and Others v. the Netherlands*, 8 June 1976, § 91, Series A no. 22, and *Perna v. Italy* [GC], no. 48898/99, § 29, ECHR 2003-V).

Examination of the facts shows that witness J.G. was questioned at the hearing of the district court. As to the alleged mistakes in the official transcript concerning his testimony, the applicant had a right to make comments, which he did not avail himself of. The Court further observes that during the proceedings at the court of first instance only this one witness was questioned, as a witness for the applicant, while during the appellate proceedings two new witnesses, J.Ž. and G.G., were questioned at the applicant's request, and only one witness for J.U. Whilst observing that the testimony of G.G. was not reflected in the appellate court's ruling, the Court is not able to find that that circumstance alone deprived the applicant of an opportunity to prove his accusations of desertion and unsound mind, as directed towards J.U.

In the light of the preceding considerations, the Court arrives at the conclusion that the applicant had the benefit of fair proceedings within the meaning of Article 6 § 1 of the Convention. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It must therefore be rejected pursuant to Article 35 § 4.

The applicant also complained that the criminal proceedings were unfair, relying on Article 13 of the Convention. In this context the Court notes,

however, that the complaint under Article 13 arises from the same facts as those it has examined when dealing with the complaint under Article 6 of the Convention. Having regard to its decision on Article 6 § 1, the Court considers that it is not necessary to examine the case under Article 13, since its requirements are less strict than, and are here absorbed by, those of Article 6 § 1 (see, among other authorities, *Osu v. Italy*, no. 36534/97, § 43, 11 July 2002).

3. The applicant also alleged a violation of Article 13 of the Convention in that his right to appeal on points of law was denied. As a result, the alleged mistakes of the Vilnius Regional Court when handling his case could not be remedied by the Supreme Court.

The Court reiterates that the Convention does not compel the Contracting States to set up courts of appeal. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 (see, *mutatis mutandis*, *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11). As regards the present case, it must be noted that Article 367 § 3 of the Lithuanian Code of Criminal Procedure explicitly excludes appeal on points of law in private prosecution cases. Consequently, the Court holds that the Lithuanian State has not instituted cassation courts for such cases within the meaning of the Convention and the case-law of the Court. In this context the Court also notes its finding above that the criminal proceedings as regards the applicant were not in breach of fair trial requirements.

It follows that this part of the application is incompatible *ratione materiae* within the meaning of Article 35 § 3 of the Convention and must therefore be rejected pursuant to Article 35 § 4.

4. Lastly, relying on Article 10 of the Convention, the applicant complained that he had been found guilty for expressing his opinion. The Court notes, however, that this complaint was first presented to it on 14 February 2007, whereas the final decision concerning the applicant's conviction was given on 11 April 2006. It follows that this part of the application has not been lodged within six months of the final effective measure or decision, as required by Article 35 § 1 of the Convention. Consequently, this complaint must be rejected pursuant to Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President