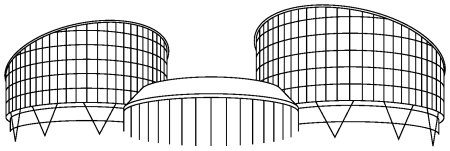

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF FRIDMAN v. LITHUANIA

(Application no. 40947/11)

JUDGMENT

STRASBOURG

24 January 2017

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Fridman v. Lithuania,

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

András Sajó, *President,*
Vincent A. De Gaetano,
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Egidijus Kūris,
Marko Bošnjak, *judges,*

and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 5 January 2017,

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

PROCEDURE

1. The case originated in an application (no. 40947/11) 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 Artur Fridman ("the applicant"), on 9 June 2011.

2. The applicant was represented by Mr V. Onačko, a lawyer practising in Vilnius. The Lithuanian Government ("the Government") were represented by their Agent, Ms K. Bubnytė.

3. The applicant alleged that he had not been duly notified of an oral hearing before the Court of Appeal, in breach of Article 6 § 1 of the Convention.

4. On 7 March 2016 the complaint concerning notification of the hearing was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1980 and lives in Vilnius.

6. On 5 March 2009 the applicant and his grandmother's neighbour, 88-year-old J.S., signed a contract on lifelong maintenance (*išlaikymo iki gyvos galvos sutartis*). Under that contract, J.S. transferred the rights to her apartment to the applicant, who undertook to take care of her until she died

by providing her with food and medication, looking after her apartment, walking her dog, and providing any other necessary assistance.

7. In June 2009 J.S. lodged an application with a court to terminate the contract on the grounds that the applicant had not fulfilled his obligations and had not been taking proper care of her. The applicant objected to the termination and argued that he had complied with the terms of the contract. Relying on the testimony of several witnesses, on 29 January 2010 the Vilnius Regional Court, in an oral hearing at which both the applicant and J.S. were present, granted J.S.'s application and annulled the contract.

8. The applicant appealed, arguing that he had complied with the terms of the contract and that it should therefore not have been terminated. On 11 October 2010 the Court of Appeal held an oral hearing at which J.S.'s lawyer was present but the applicant and his lawyer were not. According to the Government, a notification letter was sent to the applicant on 21 September 2010. During the hearing the court noted that the applicant had been notified of the hearing (*apie posėdį pranešta*) and proceeded to examine the case in his absence. The Court of Appeal delivered its judgment on 22 October 2010, upholding the first-instance judgment in its entirety.

9. The applicant lodged a cassation appeal with the Supreme Court. He complained, *inter alia*, that he had not been duly notified of the hearing before the Court of Appeal and had thus been unable effectively to defend his interests. The applicant submitted that he had received the notification about the time and place of the hearing by standard (non-registered) post only on 14 October 2010, when he had found it in his letter box. However, on 4 November 2010 the Supreme Court refused to examine the applicant's cassation appeal as raising no important legal questions. The applicant lodged two other cassation appeals, but on 6 December 2010 and 10 January 2011 the Supreme Court refused to examine them, citing the same grounds as previously.

II. RELEVANT DOMESTIC LAW AND PRACTICE

10. At the material time, Article 117 § 1 of the Code of Civil Procedure provided that procedural documents could be served by registered post, bailiffs or couriers, or in other ways provided for in the Code. Procedural documents could be served via telecommunication devices in the cases provided for by law and with the consent of the parties to the proceedings.

11. Article 123 § 1 of the Code of Civil Procedure provides that procedural documents are served on individuals in person (*įteikiami asmeniškai*).

12. Article 133 § 1 of the Code of Civil Procedure distinguishes between a summons (*šaukimas*) and a notification (*pranešimas*). It provides that after

a party to the case has been duly informed by a summons, information about further court hearings can be served by notifications.

13. At the material time, the relevant parts of Article 124 of the Code of Civil Procedure read:

> "1. A court summons and a copy of a claim (an application, a complaint, a reply to a claim, a rejoinder) is served on the recipient upon signature by the latter. When a summons or copy of a claim is served by post or by a court courier or bailiff, the recipient must sign a receipt approved by the Minister of Justice, one part of which is given to the recipient and the other returned to the court with the recipient's signature and the date of delivery. ...
>
> 2. A refusal to accept a summons or a copy of a claim or to confirm acceptance by signing constitutes proper delivery ...
>
> ...
>
> 4. Notifications and other procedural documents are delivered by the means and according to the order set out in this Code, without returning a receipt of delivery to the court. Employees of the post office, bailiffs or couriers must record delivery of the notification or other procedural document to the recipient in the relevant registers, indicating the recipient, the date of delivery, and the person who accepted the document and his or her relation to the recipient ... if the document was not served on the recipient himself or herself.
>
> ..."

14. Article 319 § 3 of the Code of Civil Procedure provides that when an appellate court holds an oral hearing, the parties to the proceedings are notified of the time and place but failure to appear does not preclude the court from examining the case.

15. Article 246 § 2 of the Code of Civil Procedure provides that when a defendant fails to appear at a hearing and he or she has not been duly notified of the time and place of the hearing and does not have a representative, the court must adjourn the hearing.

16. In a ruling of 27 April 2010 in civil case no. 3K-3-193/2010 the Supreme Court held:

> "The Code of Civil Procedure ... establishes an obligation on an appellate court to notify the parties to the proceedings of the place and time of the hearing; it also provides that failure by the parties to attend an oral hearing does not preclude the court from examining the case. [T]he Code of Civil Procedure ... provides that once a summons has been duly served, information about subsequent court hearings is provided by sending written notifications. Accordingly, information about a hearing before an appellate court may be sent by a notification letter. When information about a court hearing has been sent by a notification and not a summons, there is no requirement to return a delivery report to the court with the person's signature and the date of delivery. The sending of a notification constitutes service and it is considered that the person has been duly notified of the place and time of the hearing. When an appellate court examines a case in an oral hearing, the parties are notified of it, but their absence does not preclude examination of the case if they have been duly notified ... Such a legal requirement implies an obligation on the appellate court, before examining the case at the hearing, to examine whether a party to the

proceedings has been duly notified ... The Supreme Court reiterates that a court cannot examine a case if any of the parties to the proceedings have not been duly notified of the place and time of the hearing, as to do so would be contrary to the right to be heard and the principles of equality of arms and adversarial proceedings ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

17. The applicant complained that he had not been duly notified of the oral hearing of 11 October 2010 before the Court of Appeal, in violation of his defence rights and the principle of equality of arms. He relied on Article 6 § 1 of the Convention, the relevant parts of which read:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

18. The Court notes that this application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

19. The applicant submitted that the notification about the Court of Appeal's hearing of 11 October 2010 had not been served on him in person, as required by the Code of Civil Procedure (see paragraphs 10-13 above), but that it had been put in his letter box after the hearing, on 14 October 2010. The applicant argued that as a result he had been unable to exercise his right to participate in the hearing and to respond to the oral submissions made by the other party's lawyer, or submit additional evidence and explanations to the court.

20. The applicant further submitted that the Court of Appeal had proceeded with the examination of the case in his absence without examining whether he had been duly notified of the hearing. The applicant also argued that his participation at the hearing had been essential because the dispute between him and J.S. had been related to their personal

relationship and that his character and conduct had been relevant in assessing his compliance with the maintenance contract.

(b) The Government

21. The Government submitted that the applicant had been duly notified of the hearing of 11 October 2010. They provided a copy of the Court of Appeal's record of expenses related to the service of procedural documents which showed that a notification letter had been sent to the applicant on 21 September 2010. The Government submitted that they were unable to provide evidence as to the exact date the applicant had received the notification because the envelope in which it had been sent and which the applicant had enclosed with his cassation appeals had already been destroyed, in line with domestic rules on storing case material. However, they contended that postal deliveries in Lithuania typically took no longer than five days, so the applicant must have received the notification sufficiently in advance of the scheduled hearing. The Government also submitted that in the absence of any alert from the post office that the notification had not been delivered, the Court of Appeal had not had any grounds to suspect that the applicant had not been duly notified of the hearing. They also argued that the Supreme Court's refusal to admit the applicant's cassation appeal (see paragraph 9 above) meant that that court had not identified any procedural irregularities, including in the service of the notification letter.

22. The Government further submitted that the applicant had been aware of the pending appeal proceedings as he himself had instituted them, so he had had a duty to keep himself updated. They submitted that the applicant could have found out about the date of the hearing on the Court of Appeal's website, or he could have provided the address of his lawyer to the court, in which case the notification would have been sent to the lawyer. The Government also argued that the applicant should have checked his letter box on a sufficiently frequent basis so as not to miss important documents.

23. Lastly, the Government argued that the proceedings taken as a whole had complied with the requirements of Article 6 § 1 of the Convention. They submitted that in the hearing of 11 October 2010 the other party's lawyer had only replied to the applicant's appeal and had not presented any important new facts, and the Court of Appeal had not conducted a fresh examination of the evidence. They further submitted that the proceedings before the first-instance court had provided the applicant with adequate guarantees to present his case and reply to the other party's submissions.

2. The Court's assessment

24. The Court firstly reiterates that Article 6 § 1 of the Convention does not guarantee the right to be present in court in cases which do not concern a determination of a criminal charge, but rather a more general right to

present one's case effectively before a court and to enjoy equality of arms with the opposing side. Article 6 § 1 leaves States a free choice as to the means to be used in guaranteeing litigants those rights (see *Steel and Morris v. the United Kingdom*, no. 68416/01, §§ 59-60, ECHR 2005‑II; *Artyomov v. Russia*, no. 14146/02, § 201, 27 May 2010; and *Buterlevičiūtė v. Lithuania*, no. 42139/08, § 55, 12 January 2016).

25. The Court also reiterates that the Convention is intended to guarantee rights that are practical and effective and not those that are theoretical or illusory (see, among many other authorities, *Cudak v. Lithuania* [GC], no. 15869/02, § 58, ECHR 2010). It considers that the right to a public hearing would be devoid of substance if a party to a case were not apprised of a hearing in such a way as to have an opportunity to attend it, should he or she decide to exercise the right to appear established in the domestic law (see *Yakovlev v. Russia*, no. 72701/01, § 21, 15 March 2005).

26. The Court further reiterates that Article 6 § 1 cannot be construed as conferring on litigants a right to obtain a specific form of service of court documents, such as by registered post (see *Kolegovy v. Russia*, no. 15226/05, § 40, 1 March 2012; *Perihan and Mezopotamya Basın Yayın A.Ş. v. Turkey*, no. 21377/03, § 39, 21 January 2014; and *Avotiņš v. Latvia* [GC], no. 17502/07, § 119, ECHR 2016). Nonetheless, the Court considers that in the interests of the administration of justice a litigant should be notified of a court hearing in such a way as to not only have knowledge of the date and place of the hearing, but also to have enough time to prepare his or her case and to attend the court hearing. A formal dispatch of a notification letter without any confidence that it will reach the applicant in good time cannot be considered by the Court as proper notification (see *Kolegovy*, cited above, § 40, and the cases cited therein).

27. In the present case there is no dispute that a notification of the hearing of 11 October 2010 before the Court of Appeal was sent to the applicant's home address and that the applicant eventually received it. However, the applicant argued before the domestic courts and this Court that the notification had not been put in his letter box until 14 October 2010 (see paragraphs 9 and 19 above). The Government contested that argument, claiming that the notification had been sent on 21 September 2010 and most likely reached the applicant within five days at the latest. However, they were unable to provide any evidence to that effect because the relevant case material had already been destroyed (see paragraph 21 above). The Court observes that in previous cases it has considered that it was incumbent on the Government to submit evidence showing that a notification had reached an applicant in good time (see *Mokrushina v. Russia*, no. 23377/02, § 20, 5 October 2006; *Prokopenko v. Russia*, no. 8630/03, § 18, 3 May 2007; *Kolegovy*, cited above, § 41; and *Buterlevičiūtė*, cited above, § 59), and it sees no reason to adopt a different approach in the present case.

Accordingly, in the light of the material in its possession, the Court concludes that the applicant was not notified of the hearing of 11 October 2010 in due time. The Court also notes that the domestic law did not require the applicant to identify a legal representative at the appeal stage or to look up the schedule of hearings on the Court of Appeal's website (see paragraphs 10 and 15 above), so the fact that he did not do so cannot relieve the Government of the obligation it had to duly notify the applicant of the hearing.

28. The Court further observes that the Court of Appeal in the hearing of 11 October 2010 merely noted that the applicant "had been notified of the hearing" (see paragraph 8 above) but there is nothing in the transcript of the hearing or in the text of the judgment to suggest that the court examined whether the applicant had been notified in due time. The Court notes that the domestic law states that employees of the post office, bailiffs or couriers serving a notification must record its delivery in the relevant registers, indicating, *inter alia*, the date (see paragraph 13 above). It also notes that the domestic law lays an obligation on a court to verify whether the party who is absent from a hearing has been duly notified (see paragraphs 15-16 above). In those circumstances, the Court is of the view that the Court of Appeal had both the obligation and the possibility to examine whether the applicant had been duly notified of the hearing of 11 October 2010, and, if he had not been, whether examination of the appeal should have been adjourned (see, *mutatis mutandis*, *Yakovlev*, cited above, § 22; *Gusak v. Russia*, no. 28956/05, § 26, 7 June 2011; and *Kolegovy*, cited above, § 41). Although the Government argued that if there had been any shortcomings in the proceedings before the Court of Appeal, the Supreme Court would have examined the applicant's appeal on points of law (see paragraph 21 above), the Court reiterates that it is not its role to speculate whether the Supreme Court should have examined the applicant's appeal, or for what reasons it may have decided not to do so (see, *mutatis mutandis*, *Pyrantienė v. Lithuania*, no. 45092/07, §§ 75-76, 12 November 2013).

29. Lastly and most importantly, the Court does not lose sight of the fact that the other party's representative was present at the hearing of 11 October 2010 and provided submissions in reply to the applicant's appeal (see paragraph 8 above). Contrary to the Government's arguments (see paragraph 23 above), the Court considers that it should not speculate on whether the hearing before the Court of Appeal was important to the applicant, because the very fact that the other party had the opportunity to submit observations on the applicant's appeal – whereas the applicant was not able to express his views on those observations – was sufficient to undermine his confidence in the workings of justice (see, *mutatis mutandis*, *Švenčionienė v. Lithuania*, no. 37259/04, § 29, 25 November 2008, and *Gusak*, cited above, § 27).

30. The foregoing considerations are sufficient to conclude that there was an infringement of the applicant's right to a fair hearing enshrined in Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. 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

1. The parties' submissions

(a) The applicant

32. The applicant submitted that since he had not been duly notified of the Court of Appeal's hearing, he should be reimbursed for all the expenses which he had suffered as a result of that court's judgment. He claimed a total of 91,195 euros (EUR) in respect of pecuniary damage, consisting of:

(a) EUR 88,913 for the market value of the apartment which he had lost as a result of the termination of the contract with J.S. (see paragraph 6 above);

(b) EUR 1,758 for the stamp duty which he had had to pay for his appeal against the Vilnius Regional Court's judgment of 29 January 2010 (see paragraph 7 above);

(c) EUR 524, which he had been ordered to pay J.S. to cover her litigation expenses at the appellate stage.

33. The applicant also claimed EUR 14,500 in respect of non-pecuniary damage.

(b) The Government

34. The Government submitted that there was no causal link between the pecuniary damages claimed by the applicant and the violation of his rights under Article 6 § 1 of the Convention. They contended that the Court should not speculate on what the outcome of the domestic proceedings would have been if the violation had not occurred.

35. The Government further submitted that the applicant's claim in respect of non-pecuniary damage was excessive and unsubstantiated.

2. The Court's assessment

36. In the present case, the Court has found a violation of Article 6 § 1 of the Convention on account of the fact that the applicant was not duly notified of an oral hearing before the Court of Appeal and was thus unable to be present and defend his interests. However, it does not follow that if he had been so notified, the court would have delivered a decision in his favour. Therefore, the Court considers that the applicant did not sufficiently establish that the pecuniary damage alleged can be directly linked to the violation found (see *Kingsley v. the United Kingdom* [GC], no. 35605/97, § 40, ECHR 2002-IV, and the cases cited therein).

37. On the other hand, the Court considers that the applicant must have suffered distress and frustration in view of the violation found. However, it considers the applicant's claim in respect of non-pecuniary damage excessive. Making its award on an equitable basis, the Court awards the applicant EUR 1,500 under this head.

B. Costs and expenses

38. The applicant also claimed EUR 2,264 for the costs and expenses incurred before the Court consisting of:

(a) EUR 2,000 for lawyer's fees;

(b) EUR 144 for the translation of documents from English to Lithuanian;

(c) EUR 120 for the translation of documents from Lithuanian to English.

He submitted receipts for those expenses.

39. The Government submitted that the lawyer's fees were excessive and that the translation expenses had not been necessarily incurred because, according to the website of the Lithuanian Bar Association, the applicant's lawyer spoke English.

40. 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. In the present case, the Court observes in particular that the applicant did not submit any documents which had been translated from Lithuanian to English, nor justified why translation from English to Lithuanian had been necessary; it therefore rejects that part of the claim. As to the lawyer's fees, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,200.

C. Default interest

41. 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. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *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 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,200 (one thousand two hundred 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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 January 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	András Sajó
Registrar	President