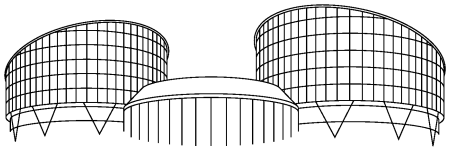

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 54467/12
Jolanta KUŽMARSKIENĖ
against Lithuania

The European Court of Human Rights (Fourth Section), sitting on 11 July 2017 as a Chamber composed of:

Ganna Yudkivska, *President,*
Vincent A. De Gaetano,
Paulo Pinto de Albuquerque,
Egidijus Kūris,
Iulia Motoc,
Georges Ravarani,
Marko Bošnjak, *judges,*

and Marialena Tsirli, *Section Registrar,*

Having regard to the above application lodged on 16 August 2012,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Jolanta Kužmarskienė, is a Lithuanian national who was born in 1973 and lives in Joniškis. She was represented before the Court by Ms D. Balčiūnienė, a lawyer practising in Joniškis.

2. The Lithuanian Government ("the Government") were represented by their Agent, Ms K. Bubnytė.

A. The circumstances of the case

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

1. The applicant's application for the post of psychologist in Šiauliai Remand Prison and her complaints to the Ombudspersons

4. In 2010 Šiauliai Remand Prison (hereinafter, "the prison") published a recruitment notice for a psychologist. The applicant applied for the position.

5. On 14 June 2010 the prison's human resources division sent the applicant for a medical examination at the Central Medical Expert Commission of the Medical Centre of the Ministry of Interior (hereinafter, "the Commission" – see paragraph 23 below).

6. On 7 July 2010 the applicant went for the examination, but after her height was measured the process was terminated and the applicant was told that she was unfit for the position because she was too short. The Commission noted that the applicant's height was 151 cm and she was informed that she was diagnosed as being physically underdeveloped due to lack of proteins and minerals (*sulėtėjusi raida dėl baltymų ir energetinių medžiagų trūkumo)*. The Commission also stated that domestic regulations provided that women smaller than 155 cm were unfit for work within the security and law-enforcement services (see paragraph 25 below).

7. In July 2010 the applicant wrote to the Minister of Interior and the Minister of Health and complained about the fact that she had been found unfit for service by the Commission. The Ministry of Health replied that the Commission's decisions could be appealed against in accordance with the rules of administrative procedure (see paragraph 40 below).

8. The applicant also complained to the Parliamentary Ombudsperson, who in November 2010 established that the Commission had performed the medical examination in accordance with the provisions of domestic law (see paragraph 24 below). The Ombudsperson held, however, that the Ministry of Interior and the Ministry of Health had not replied to a question about the specific reason for setting the height requirements and decided that the applicant's requests had not been fully examined. The Ombudsperson thus suggested that the Ministry of Interior and the Ministry of Health should in the future oblige employees to follow the requirement to provide comprehensive information.

9. The applicant also complained to the Equal Opportunities Ombudsperson, who in November 2010 held that the domestic regulation in question was more favourable to men than women. According to medical experts, men were considered small if their height was between 168 and 171 cm while women were considered small if their height was between 155 and 156 cm. The contested regulation provided that men were unfit for service in the security and law-enforcement bodies if they were smaller than 160 cm while women were considered unfit for such service if they were smaller than 155 cm. The Equal Opportunities Ombudsperson also stated that there was no explanation why officers who did not carry out operational duties were considered unfit for service if they were short.

2. The proceedings before the Vilnius Regional Administrative Court

10. On 31 July 2010 the applicant lodged a complaint with the Vilnius Regional Administrative Court. She asked the court to annul the Commission's decision that she was unfit for the position and the diagnosis that she was physically underdeveloped. On 1 December 2010 the Vilnius Regional Administrative Court decided that there had been no medical examination of the applicant, except for measuring her height. The court also raised doubts as to whether a domestic regulation which referred merely to height for acceptance into government service, without any additional examination (see paragraph 25 below), was in accordance with the Constitution and the Law on Equal Opportunities and decided to refer the matter to the Supreme Administrative Court. The examination of the applicant's case was suspended awaiting the decision of the latter court (see paragraph 28 above).

11. On 2 November 2011 the Supreme Administrative Court noted that the Interior Ministry Service Statute provided that a person aiming to be employed by the domestic security and safety services had to be healthy enough to perform such functions (see paragraph 22 below). However, there was no evidence that a person's height, if not related to other health issues, was a reasonable ground to diagnose such a person as being physically underdeveloped. The court did not question the possibility of setting various requirements (including height) to hold certain positions, but held that the contested provision was contrary to the Interior Ministry Service Statute as it did not differentiate the height requirements according to profession and was not based on any inability to perform certain functions.

12. The proceedings before the Vilnius Regional Administrative Court resumed. On 8 November 2011 the applicant was asked to set out her complaint in a more specific way (*patikslinti skundo reikalavimą*) and to ask the court to annul the prison's decision on terminating the employment procedure. On the same day, the prison was asked to provide the court with a document, stating who, when and by what decision terminated the employment procedure.

13. On 22 November 2011 the applicant, following the Vilnius Regional Administrative Court's proposal, stated her complaint in more specific terms and asked the court to also annul the prison's decision to terminate the procedure to employ her. On 29 November 2011 the Vilnius Regional Administrative Court set a time-limit for the applicant to remedy shortcomings in her complaint. The court stated that the applicant had complained about the decision to terminate the procedure to employ her; however, the prison administration had indicated that there had been no separate decision on that issue. The court held that in such cases only a final decision by the director of the institution in question could be complained of and that a decision by the Commission was only an intermediate document. The court thus suggested that the applicant again state her complaint more

specifically and asked the prison to take a decision on terminating the employment procedure. There is no information that the prison had taken that decision in writing (see paragraph 15 below).

14. The applicant set out her complaint again on 7 December 2011. She asked the court to oblige the prison to take a decision on terminating her employment procedure; to annul that decision; to annul the Commission's decision that she was unfit for service; and to annul the Commission's diagnosis that she was physically underdeveloped.

15. On 27 December 2011 the Vilnius Regional Administrative Court decided to terminate the part of the case in which the applicant sought to annul the Commission's decision and decided to annul instead the prison's decision on terminating the employment procedure. The court observed that the Commission had taken its decision without any medical advice and thus it had been unlawful and unfounded. The court further referred to the Supreme Administrative Court's decision of 2 November 2011 (see paragraph 11 above and paragraph 27 below) and held that the regulation that had been found to be contrary to the Interior Ministry Service Statute was not applicable from the date of issuance of the court's decision, 10 November 2011. The court also referred to a Supreme Administrative Court case where the rules for appealing against decisions by the Commission had been explained (see paragraph 41 below). As a result, the Vilnius Regional Administrative Court held that in the applicant's case the decision which had affected her the most was that of the prison and not the Commission's and thus the latter could not be the subject of examination by the court. The court also noted that the prison's decision to terminate the procedure for the applicant's employment had not been set down in writing, but decided that the date it had been taken was when the prison had received the Commission's decision, which was 13 July 2010. The court referred the matter back to the prison so it could examine the applicant's employment application afresh and send her for a special medical examination.

3. The appeal proceedings before the Supreme Administrative Court

16. In January 2012 the applicant, the prison and the Commission lodged appeals with the Supreme Administrative Court.

17. The applicant sought to annul both the Commission's decision and that of the prison to terminate the employment procedure. The applicant disagreed with the Vilnius Regional Administrative Court's conclusion that the Commission's decision had not affected her situation. She argued that the Commission's decision had been the ground for the prison to terminate the employment procedure. She also noted that the prison had not issued a written decision on terminating the employment process and that the procedure to complain about such a decision was unclear. She also stated that she had not asked the court of first instance to refer the matter of her employment back to the prison because by that time the judicial proceedings

had taken more than a year and the position at the prison had probably already been taken.

18. The prison argued that the Commission's decision had been an independent act with legal consequences for the applicant, namely it had prevented her from being a candidate for the position of psychologist. It did not agree that the negative consequences had been caused by its own decision, which had not even been set down in writing. The Commission stated that the applicant's complaint should have been dismissed as unfounded because it was not clear how an employing institution should act if there was a decision by the Commission that a person was unfit for service and that person thought otherwise. In accordance with the case-law of the Supreme Administrative Court, a person in such a situation would lose the possibility to question the lawfulness of the Commission's decision.

19. On 21 June 2012 the Supreme Administrative Court amended the Vilnius Regional Administrative Court's decision and held that the Commission's decision could not be regarded as an independent document because it had not been an individual administrative act and the Commission was not a public authority. The court also stated that the Commission's decision had only been an intermediate step in the employment procedure and could not be contested before the domestic courts. Even if it had been held that the Commission's decision could be a matter for an administrative case, the applicant's right to continue the employment procedure would not in fact have been protected because the court could not impose an obligation on the institution where the applicant had aimed to be employed on the grounds of the Commission's allegedly unlawful decision. The court also held that examination of a case by a court was pointless if a person's rights could not be defended. The decision which the applicant could have challenged was the one by the prison. The court stated, however, that the applicant had submitted contradictory claims (*reiškė prieštaringus reikalavimus*), that is, on the one hand she had asked that the prison be obliged to take a decision on terminating the employment procedure and, on the other hand, that the prison annul its decision on terminating the procedure. The court also noted that the applicant had not indicated any remedy in defence of her rights before the court of first instance; however, that court had not held that circumstance to be a shortcoming in the claim. In order to defend the applicant's rights to the maximum, it had applied the provisions of administrative law and had chosen the remedy that had best met the applicant's requirements. That was why the employment matter had been referred back to the prison. The court held that a decision stating that the applicant's rights had been breached had no consequences and was not the right way to protect her rights. The court also underlined that the applicant had not wanted to continue the employment procedure and that she had lodged her complaint with the domestic courts without any indication of possible measures of redress. As a

decision by a domestic court that merely indicated that someone's rights had been breached did not lead to any material or legal consequences for that person, such complaints were not subject to examination by the administrative courts. The court therefore decided to terminate the case.

B. Relevant domestic law and practice

1. Equal opportunities

20. Article 29 of the Constitution provides that everyone is equal before the law, courts, and other state institutions and officials. Human rights may not be restricted; no one may be granted any privileges on the grounds of gender, race, nationality, language, origin, social status, belief, convictions or views.

21. Article 5 § 1 (1) of the Law on Equal Opportunities provides that when implementing equal treatment provisions, an employer, regardless of the person's age, sexual orientation, disability, racial or ethnic origin, religion or beliefs, must apply the same recruitment criteria and employment conditions when employing or recruiting someone to public service, except in cases provided for by law. Those include restrictions on the grounds of age, a requirement to know the official State language, a prohibition on taking part in political activities, different rights applied on the basis of citizenship and special measures applied in the healthcare, work safety, employment and labour market sphere, which at the same time also aim to create and apply conditions and opportunities guaranteeing and promoting the integration of the disabled into the labour market.

2. Requirements for persons aiming to be employed by the domestic security and safety services

22. At the material time, Article 6 § 1 (4) of the Interior Ministry Service Statute (*Vidaus tarnybos statutas*) provided that a person aiming to be employed by the domestic security and safety services had to be healthy enough to perform such functions. The health requirements are set by the Minister of Interior and the Minister of Health.

23. Article 10 § 1 of the Prison Department Statute of Service (*Tarnybos Kalėjimų departamente prie Lietuvos Respublikos teisingumo ministerijos statutas*) provided that people aiming to be employed at the Prison Department had to be citizens of Lithuania, at least 18 years old, with a sufficient knowledge of the Lithuanian language and a sufficient level of education, personal qualities, physical ability and health. Article 10 § 4 provided that candidates' health had to be examined by the Medical Centre of the Ministry of Interior at the request of the Prison Department. Article 11 § 1 (1) provided that a person could not be accepted for work by the Prison Department or related institutions if he or she was found to be

unfit for service by the Commission. Article 11 § 3 provided that appeals against decisions regarding a refusal of employment could be made to a court, in accordance with the Law on Administrative Proceedings.

24. Point 2 of the order of the Minister of Interior of 5 August 2008, No. 1V-299 (*Lietuvos Respublikos vidaus reikalų ministro įsakymas „Dėl specializuotosios medicininės ekspertizės organizavimo ir atlikimo tvarkos aprašo patvirtinimo“*, hereinafter, "the order") provided that the Commission was part of the Medical Centre of the Ministry of Interior, performing specialised medical expert examinations. An expert examination is a decision by Commission doctors indicating a health disorder in accordance with the international statistical classification of health disorders and problems. A person under examination is a person who aims to be employed by the domestic security and safety services, an officer, former officer or student who is sent for examination by the Commission. The status of a person being examined by a medical expert, including the carrying out of laboratory and functional analyses, is equivalent to that of a patient and the provisions of the Law on Patients' Rights and Compensation for Health Damage are applicable.

25. At the material time, Point 17 § 2 of the order of the Minister of Interior and the Minister of Health of 21 October 2003, No. 1V-380/V-618 (*Lietuvos Respublikos vidaus reikalų ministro ir Lietuvos Respublikos sveikatos apsaugos ministro įsakymas „Dėl sveikatos būklės reikalavimų asmenims, pretenduojantiems į vidaus tarnybą, pageidaujantiems mokytis vidaus reikalų profesinio mokymo įstaigose, kitose mokymo įstaigose Vidaus reikalų ministerijos siuntimu, bei vidaus tarnybos sistemos pareigūnams sąvado patvirtinimo“*) provided that if a lack of proper development had led to a man being shorter than 160 cm or a woman being shorter than 155 cm, then they were unfit for service in the security and law-enforcement bodies. No exceptions to this rule were provided.

26. Point 17 of the order of the Minister of Interior and the Minister of Health of 6 April 2012, No. 1V-291/V-308, now provides that if a man is smaller than 165 cm or a woman smaller than 151 cm because of inadequate development then they are unfit for service in domestic law-enforcement, security or safety bodies.

27. The Supreme Administrative Court has decided that Point 17 § 2 of the 2003 order (see paragraph 25 above) was contrary to the Interior Ministry Service Statute in so far as it did not differentiate height requirements according to profession and was not based on any inability to perform certain functions (Supreme Administrative Court decision of 2 November 2011, no. I-662-11/2011, taken in the applicant's case – see paragraph 11 above).

3. Examination of cases of compliance of normative administrative acts with a law or Government regulations

28. Article 112 § 1 of the Law on Administrative Proceedings (hereinafter, "the Law") provided that a civil or specialised court had the right to suspend the examination of a case and address a request to an administrative court to decide whether a normative administrative act (or part of it) that had to be applied in a specific case complied with a law or Government regulation. Article 112 § 2 provided that the civil or specialised court would renew its examination of the case after the administrative court's decision.

29. At the material time, Article 115 § 1 (2) of the Law provided that one possible decision for the administrative court was to hold that a normative administrative act (or part of it) was contrary to the law or Government regulation and to annul it.

30. In addition, Article 116 § 1 of the Law provided that a normative administrative act (or part of it) became null and void and inapplicable from the date of the official issue of the administrative court's decision to recognise that act (or part of it) as unlawful.

31. The Supreme Administrative Court has held that public administration bodies have to follow the principle of the rule of law and that *ultra vires* acts must be declared unlawful (decisions of the Supreme Administrative Court of 25 July 2005, No. I^{1}-2/2006; of 28 November 2008, No. I^{444}-4/2008; and of 11 May 2011, No. I^{444}-14/2011).

4. Examination of complaints before administrative courts

32. Article 3 § 1 of the Law provided that administrative courts decided legal disputes in the field of public administration.

33. Article 5 § 1 of the Law provided that any person with an interest in a case had the right to lodge a complaint with a court in order to defend his or her rights or interests.

34. Article 23 § 2 (7) of the Law provided that such a complaint had to set out the applicant's claims.

35. Article 37 § 2 (1) of the Law provided that complaints had to be refused if they were not subject to examination by a court.

36. Article 101 § 1 of the Law provided that a court had to terminate any case if it was not in its jurisdiction, except for cases that were within the jurisdiction of the civil courts.

5. Rules of public administration

37. Article 2 § 1 of the Law on Public Administration provided that public administration was an activity of a public administration body intended to implement laws and other regulations. It comprised the taking of administrative decisions, overseeing the implementation of laws and

administrative decisions, the provision of administrative services provided for in laws, the administration of the provision of administrative services and the internal administration of a public administrative body.

38. Article 6 § 2 of the Law on Public Administration provided that normative administrative acts could only be enacted by public administration bodies.

39. Article 2 § 3 of the Law provided that administration bodies were those that performed the functions of public administration.

6. Complaints against decisions by the Commission

40. Point 79 of the order (see paragraph 24 above) provided that the Commission's decisions could be appealed against in court, in accordance with the Law.

41. The Supreme Administrative Court has held that only the final decision of an institution could be examined by an administrative court. Many documents are drawn up in the course of administrative procedure, but they are usually intermediate documents and do not decide any issues related to a person's material legal rights. An administrative court cannot examine a document if it has no legal consequences. A Commission decision is only an intermediate document that has no legal consequences (decision of the Supreme Administrative Court of 20 June 2011, No. A-261-69/2011).

7. Complaints for damages

42. At the material time, Article 24 § 1 of the Law on Patients' Rights and Compensation for Health Damage provided that compensation for pecuniary and non-pecuniary damage caused by breaching a patient's rights was provided in accordance with that law itself and the Civil Code. Article 24 § 2 provided that a patient or other persons who had a right to compensation had to send a claim to the Commission on Damage Caused to Patients' Rights. Article 24 § 3 provided that the Commission on Damage Caused to Patients' Rights was a compulsory institution for out-of-court settlements for disputes related to violations of patients' rights and assessments of the amount of damages. Article 24 § 8 provided that any patient or other person who disagreed with a decision by the Commission on Damage Caused to Patients' Rights could lodge a court complaint within thirty days of the decision or the date they found out about the decision.

43. The Supreme Court has held that a doctor's main duty is to provide qualified and diligent health-care services to patients (decisions of the Supreme Court of 14 October 2008, No. 3K-3-478/2008; of 12 February 2010, No. 3K-3-77/2010; and of 12 April 2010, No. 3K-3-158/2010).

44. Article 15 § 1 (3) of the Law (see paragraph 28 above) provides that administrative courts decide cases concerning damage caused by the unlawful acts of public authorities, as provided for in Article 6.271 of the Civil Code (see paragraph 47 below).

45. Article 88 of the Law provides that an administrative court can take the following decisions in respect of a case: 1) reject the complaint as unfounded; 2) satisfy the claim and annul the contested regulation (or any part thereof), or oblige the relevant administrative entity to end the violation in question or execute any other requirement set by the court; 3) satisfy the claim and oblige the administrative body of a municipality to implement the law, or execute a Government or other regulation; 4) satisfy the claim and settle the dispute in any other manner set by the law; 5) satisfy the claim and award damages for unlawful acts by the public authority (Article 6.271 of the Civil Code).

46. Article 6.248 § 1 of the Civil Code provides that civil liability only arises where a person is at fault and a debtor is presumed to be at fault, except where laws or contracts provide otherwise.

47. Article 6.271 § 1 of the Civil Code provides that damage resulting from unlawful acts of institutions of public authority must be compensated for by the State from the State budget, irrespective of the responsibility of a particular public servant or other employee of public authority institutions. Damage resulting from unlawful actions of municipal authority bodies must be redressed by the municipality from its own budget, irrespective of whether an employee is at fault. Article 6.271 § 2 provides that for the purposes of the Article, the notion "an institution of public authority" means any public-law body (a State or municipal institution, official, public servant or any other employee of those institutions, and so forth), as well as a private person executing the functions of a public authority. Article 6.271 § 3 provides that for the purposes of the Article, the notion "act" means any act (active or passive) by an institution of public authority or its employees, that directly affects people's rights, liberties and interests (legal acts or individual acts enacted by the institutions of state and municipal authority, administrative acts, physical acts, and so forth, with the exception of court judgments – verdicts in criminal cases, decisions in civil and administrative cases and orders). Article 6.271 § 4 provides that civil liability on the part of the State or a municipality subject to the Article arises when the employees of public authority institutions fail to act in the manner prescribed by law for those institutions and their employees.

48. The Supreme Administrative Court has held that in order for a right to compensation for damage to arise the law does not require that unlawful acts by public institutions are annulled or declared void in accordance with the law (decisions of the Supreme Administrative Court of 30 March 2007, No. A^{10}-332/2007; of 2 November 2009, No. A^{556}-1241/2009; of

28 January 2010, No. A[822]-207/2010; of 30 November 2010, No. A[822]-1419/2010; and of 16 January 2014, No. A-[492]-80/2014).

49. The Supreme Administrative Court has held that when considering the issue of compensation for damage, courts have to examine the factual grounds of such damage, irrespective of the presence of a dispute with regard to the lawfulness of such grounds (decision of the Supreme Administrative Court of 16 June 2006, No. A[4]-1030/2006).

50. The Supreme Administrative Court has held that courts have to fully examine the lawfulness of acts that might have caused someone damage, irrespective of separate court proceedings on the lawfulness of such acts (Supreme Administrative Court decision of 16 June 2006, No. A[556]-1655/2008).

COMPLAINTS

51. The applicant complained under Article 6 § 1 and Article 13 of the Convention that the domestic courts had at first recognised the unlawfulness of the Commission's decision but had then terminated the case and deprived her of the opportunity to start court proceedings for damages.

52. The applicant also complained under Article 8 taken alone and in conjunction with Article 14 of the Convention that she had suffered discrimination in the recruitment procedure on the grounds of her height.

THE LAW

53. The applicant complained that although the domestic courts had stated that the Commission's decision had been unlawful, they had decided to terminate the case, thus depriving her of the possibility to seek damages. She also argued that she had suffered discrimination in the recruitment procedure on the grounds of her height. The applicant relied on Articles 6 § 1, 13, 8 and 14, the relevant parts of which read as follows:

Article 6

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

Article 8

"1. Everyone has the right to respect for his private and family life ...

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."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. The parties' submissions

1. The Government

54. The Government raised the argument of non-exhaustion of domestic remedies with regard to all of the applicant's complaints.

55. They observed that in connection with her complaint about the Commission's decisions to declare her unfit for the position and that she was physically underdeveloped (see paragraph 6 above), the applicant should have turned to the civil courts rather than administrative courts and sought damages in accordance with the provisions of the Law on Patients' Rights and Compensation for Health Damage (see paragraph 42 above). The Government referred to the domestic legislation providing that when a person was examined by medical experts, as was the applicant's case, he or she should be treated as a patient (see paragraph 24 above). In that regard, the applicant should have used the extrajudicial procedure of lodging her complaint with the Commission on Damage Caused to Patients' Rights and later with the civil courts (see paragraph 42 above).

56. The Government further argued that employment procedures were a matter of public administration and thus administrative courts had jurisdiction. The issue of damages in that area was dealt with by administrative courts in accordance with the provisions of civil law and the damage had to be caused by the unlawful act of a public authority (see paragraph 47 above). However, the applicant had challenged a decision by the Commission, which was only an intermediate document and could not be examined by the administrative courts. She had indicated that she did not want the prison to examine the employment procedure again, which would have been a remedy for her complaint. The Government noted that the domestic courts had helped the applicant to state her complaint clearly and had held that although she had failed to indicate a remedy to protect her rights, they had not considered that as a shortcoming and had proceeded with their examination of the case (see paragraph 19 above). If she had

merely submitted a request to annul the Commission's decision, the case would have been dismissed as not being within the jurisdiction of the administrative courts.

57. The Government also noted that the termination of the applicant's administrative case had not precluded her from claiming damages as the provision of the regulation referring to height requirements for both men and women to be accepted into government service had been found to be contrary to the Interior Ministry Service Statute for not differentiating on height according to profession and for not being based on any inability to perform certain functions (see paragraphs 11 and 27 above). The Government maintained in that connection that the applicant had been able to sue the State for damages, which was a domestic remedy offering real prospects of success within the meaning of Article 35 of the Convention.

2. The applicant

58. The application responded to the Government's argument of non-exhaustion by stating that she had used all the effective domestic remedies available to her.

59. The applicant argued that there had been no possibility to seek damages in the civil courts in accordance with the Law on Patients' Rights and Compensation for Health Damage as the Commission's decision had not caused any damage to her health.

60. She noted that, in reply to her complaints, the Ministry of Health, the Parliamentary Ombudsperson and the Equal Opportunities Ombudsperson had stated that she could appeal against the Commission's decisions under the Law on Administrative Proceedings (see paragraph 40 above). She submitted that the prison's decision to terminate the employment procedure could also be appealed against under that law. As neither the Commission's nor the prison's decision had been declared unlawful, although they could have been under the provisions of domestic law (see paragraph 45 above), the applicant considered that she had been deprived of the possibility to seek damages as one of the necessary conditions for such a claim, namely an unlawful act by the authorities, had been missing.

61. The applicant also argued that obliging the prison to examine her employment application anew would not have been in her favour as the position had already been filled and the prison administration would have had a negative attitude towards her. The applicant thus maintained that that would not have been an effective remedy.

62. Finally, the applicant argued that she had not been able to seek damages owing to the height rules for government service being declared contrary to the Interior Ministry Service Statute because the negative effects had been caused to her by individual legal rules, that is the decisions by the Commission and the prison, which had not been declared unlawful.

3. The Court's assessment

(a) General principles

63. It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI). This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of Contracting States, whose responsibility is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule is based on the assumption, reflected in Article 13 of the Convention, with which it has close affinity, that there is an effective remedy available in respect of the alleged violation. The rule is therefore an indispensable part of the functioning of this system of protection (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 69, 25 March 2014).

64. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (ibid., § 70).

65. The Court further reiterates that the obligation under Article 35 § 1 of the Convention requires only that an applicant should have normal recourse to the remedies likely to be effective, adequate and accessible (see *Sofri and Others v. Italy* (dec.), no. 37235/97, ECHR 2003-VIII, and *Sejdovic v. Italy* [GC], no. 56581/00, § 45, ECHR 2006-II). The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. At the same time, the remedy required by Article 13 must be "effective" in practice as well as in law, in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred (see *Kudła*, cited above, §§ 157-158, and *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 80, ECHR 2007-II).

66. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints, and offered reasonable prospects of success (see *Sejdovic*, cited above, § 46). However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact used or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special

circumstances absolving him or her from the requirement (see *Vukelić v. Montenegro*, no. 58258/09, § 81, 4 June 2013, and *Vučković and Others*, cited above, § 77). An applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case-law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail (*Kleyn and Others v. the Netherlands* [GC], nos. 39343/98 and 3 others, § 156, ECHR 2003-VI, and *Petschulies v. Germany*, no. 6281/13, § 94, 2 June 2016). However, the existence of mere doubts as to the prospects of success of a remedy which is not obviously futile is not a valid reason for failing to have recourse to it (see *Van Oosterwijck v. Belgium*, 6 November 1980, § 37, Series A no. 40; *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX; and *Kane v. Cyprus* (dec.), no. 33655/06, 13 September 2011). In other words, if there are doubts about the effectiveness of a remedy, the issue must be tested in domestic proceedings (see *Kirilov v. Bulgaria*, no. 15158/02, § 46, 22 May 2008).

67. The Court would emphasise that the application of this rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism (see *Akdivar and Others v. Turkey*, 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996-IV, and *Džinić v. Croatia*, no. 38359/13, § 46, 17 May 2016). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically: in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see *Sargsyan v. Azerbaijan* [GC], no. 40167/06, § 116, ECHR 2015).

(b) Application of the above principles to the present case

68. The Court finds that it is not necessary to address all the issues raised by the parties because the applicant's complaints are in any event inadmissible for the following reasons.

69. The Court notes that according to the Government the applicant had both civil and administrative domestic remedies available to her. The Court will address the accessibility and effectiveness of each of them separately.

(i) Civil remedy

70. Firstly, the Government argued that applicant had a civil remedy available to her, namely to seek damages in the civil courts in accordance with the Law on Patients' Rights and Compensation for Health Damage (see paragraph 55 above). The Court cannot accept the applicant's argument that she was not able to use the out-of-court procedure because the

Commission's decision had not caused any damage to her health (see paragraph 59 above). The rule that the status of a person being examined by a medical expert is equivalent to that of a patient had a clear basis in domestic law and was sufficiently certain (see, by contrast and *mutatis mutandis*, *Sürmeli v. Germany* [GC], no. 75529/01, §§ 110-112, ECHR 2006-VII). In the context of that rule, the duty of a medical expert is in general to make every effort to fulfill his or her civil obligations towards a patient, that is to provide a qualified and diligent health-care service. That rule has been thoroughly examined in the national case-law relating to individuals who have had recourse to the remedy in question in the civil courts (see paragraph 43 above).

71. Accordingly, the Court concludes that there is sufficient support for the Government's position in the relevant practice at national level.

72. Moreover, as regards the present case, the administrative courts clearly stated that the Commission's decision was not an independent act that could be challenged before them (see paragraphs 15 and 19 above). It is true that the domestic courts did not suggest that the Commission's decision could be appealed against using the special out-of-court procedure and, after that, before the civil courts. However, they did indicate that the Commission's decision was unlawful and unfounded (see paragraphs 15 and 19 above), and thus created a basis for the applicant to challenge it under regular procedure, with the assistance of a lawyer, if need be. However, the applicant took no action to comply with the out-of-court procedure in order to pursue her case in the first-instance civil court, which would then have been amenable to judicial review on appeal and to appeal on points of law. Furthermore, no other evidence has been provided to show that the remedy at issue could be considered ineffective.

73. The Court is thus satisfied that the applicant could have used this civil remedy, which she had failed to do.

(ii) Administrative remedy

74. Secondly, as to the possibility for the applicant to claim damages in the administrative courts, the Court notes that the applicant could have asked for damages together with her claims before those courts, in accordance with the provisions of domestic law (see paragraph 44 above). However, she never raised such a claim and argued that she had been deprived of the possibility to start proceedings for damages as the administrative courts had not declared the Commission or prison decisions unlawful (see paragraph 60 above). The Court cannot accept this argument; it notes, in the first place, that the administrative court could not decide to award damages because of the lack of such a claim and, secondly, that the applicant was still able to seek damages in separate administrative proceedings, by also raising an argument that the regulation on height for

government service had been found on 2 November 2011 to be contrary to the Interior Ministry Service Statute (see paragraphs 11 and 27 above).

75. The Court considers that it has not been shown that a claim for damages would have been dismissed if it had fulfilled the relevant requirements. The Supreme Administrative Court has consistently held that the law does not require that the unlawful acts of public institutions be annulled or declared void in separate court proceedings in order for a right to compensation to arise (see paragraph 48 above). The administrative courts with jurisdiction over such matters could therefore have examined whether the legal conditions of civil liability had been met and whether the applicant had suffered damage, as she alleged to the Court.

76. The Court is thus satisfied that the applicant could have submitted a claim for damages before the administrative courts, which she had failed to do.

77. The Court further notes that when the applicant failed to submit accurate claims, the administrative courts did what was in their competence and helped her reformulate them, although not entirely comprehensively (see paragraphs 12 and 13 above). The Court observes that the authorities were prepared to treat the applicant's allegations seriously and did not dismiss them outright. Even when the applicant still submitted contradictory claims, the Vilnius Regional Administrative Court tried to protect her rights and decided to annul the prison's decision to terminate the applicant's employment procedure, referring the matter back to the prison for fresh examination (see paragraph 15 above). However, the applicant was dissatisfied with that decision and submitted an appeal (see paragraphs 16-17 above). As she did not indicate any other means to defend her rights, did not request damages and declared that she did not want the prison to reconsider the issue of her employment, the Supreme Administrative Court had to respond to her appeal by terminating the case (see paragraph 19 above). In that context, the applicant's claims were duly assessed by the court, in compliance with the relevant legislation (see paragraphs 33 and 34 above). Furthermore, her claim was examined to the extent that was possible, considering the substance of her complaint and the competence of the domestic courts (see paragraphs 19 and 34 above). The fact that she was not happy with the decision did not mean it was unlawful or that the remedy suggested, namely, reconsidering her employment application, would have been ineffective.

78. In the light of the above the Court considers that, had the applicant properly presented her claims before the domestic administrative courts, the latter could have provided her with appropriate redress.

(iii) Conclusion

79. The Court finds that the applicant has not put forward any convincing arguments as to the inadequacy or ineffectiveness of having

recourse to the civil or administrative courts in the particular circumstances of the case or pointed to any special circumstances absolving her from the requirement of making use of the remedies available to her. It also notes that the applicant has not referred to any domestic case-law demonstrating that a complaint to a civil or administrative court in such circumstances would clearly have been futile.

80. The Court reiterates that a remedy has to be tried, even if there are doubts as to its success (see paragraph 66 above). Although there can be no absolute certainty about the outcome of the case if the applicant had lodged a complaint in accordance with the out-of-court procedure or with an administrative court, it was still her obligation to exhaust available domestic remedies before submitting her application in Strasbourg.

81. In the overall circumstances of the case, the Court is unable to accept that the applicant did everything that could reasonably be expected of her to exhaust domestic remedies.

82. Having regard to the above, the Court concludes that the Lithuanian legal system afforded the applicant effective remedies, which she has failed to use. Accordingly, her complaint under Article 13 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention. Her complaints under Article 6 § 1 and Article 8 taken alone and in conjunction with Article 14 must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 14 September 2017.

Marialena Tsirli
Registrar

Ganna Yudkivska
President