THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 4860/02
by Julija LEPARSKIENĖ
against Lithuania

The European Court of Human Rights (Third Section), sitting on 15 November 2007 as a Chamber composed of:

Mr B.M. Zupančič, *President*,
Mr C. Bîrsan,
Mrs E. Fura-Sandström,
Mrs A. Gyulumyan,
Mr David Thór Björgvinsson,
Mrs I. Ziemele, *ad hoc judge*,
Mrs I. Berro-Lefèvre, *judges*,
and Mr S. Quesada, *Section Registrar*,

Having regard to the above application lodged on 5 November 2001,

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

Having regard to the fact that Mrs D. Jočienė, the judge elected in respect of Lithuania, withdrew from sitting in the case (Rule 28) and that the respondent Government appointed Mrs I. Ziemele, the judge elected in respect of Latvia, to sit in her place (Article 27 § 2 of the Convention and rule 29 § 1),

Having deliberated, decides as follows:

THE FACTS

The applicant, Mrs Julija Leparskienė, is a Lithuanian national who was born in 1963 and lives in Šiauliai. She is represented before the Court by Mr R. Andrikis, a lawyer practising in Vilnius. The respondent Government were represented by their Agents, Mrs D. Jočienė and Ms E. Baltutytė.

A. The circumstances of the case

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

On 10 May 2001 police officer TB and another policeman were trying to stop a vehicle driven by the applicant's fifteen-year old son, Justinas Leparskis. Three other persons were in the car together with the applicant's son. As the applicant's son did not stop, TB fired two warning shots. He then fired a shot towards the wheels of the car from a distance of approximately 40 metres. The applicant's son was severely injured as that shot was misfired.

The applicant's son was hospitalised in a coma.

On the same date a prosecutor instituted a criminal investigation into the incident. TB was suspected of exceeding his authority (Article 287 of the Criminal Code as then in force).

On 27 July 2001 the applicant's son died without recovering from the coma.

On an unspecified date criminal proceedings were brought against TB.

On 14 March 2003 the Pakruojis District Court found him guilty of manslaughter (Article 109 of the Criminal Code as then in force) and exceeding official duties (Article 287). In particular, it was found that TB had fired the three shots without any absolute necessity, in breach of the relevant provisions of the Police Activities Act and various ministerial instructions. The court observed that TB had used the gun in the absence of a real threat to the life of a police officer or third persons, and without having made any attempts to verify the identity and the age of the driver of the vehicle. In addition, it was observed that TB had not given the applicant's son any time to react after the two warning shots and had immediately fired the third shot from a rather long distance. TB was thus found to be responsible for recklessly depriving the applicant's son of his life. He was sentenced to one year and nine months' imprisonment, fined 1,250 Lithuanian litai (LTL, ~ EUR 361.48) and banned from employment in the interior authorities for a period of five years. The court also awarded the applicant pecuniary damages against the Ministry of Interior in the amount of LTL 5,216.30 (~ EUR 1,508.47) for funeral expenses. The court did not examine the applicant's claim for non-pecuniary damage, having ruled that it was a matter for a separate civil action.

On 4 June 2003 the Šiauliai Regional Court reclassified the charge of exceeding official duties (Article 287 of the Criminal Code in force until 1 May 2003) to that of abuse of office (Article 228 of the new Criminal Code in force since 1 May 2003), finding TB guilty on the latter count. The conviction of manslaughter remained unchanged. The court imposed a suspended sentence of two years' imprisonment on TB. The fine and the ban were also lifted.

The applicant appealed, claiming *inter alia* that TB should have been punished for murder. In this respect the applicant stated that TB's acts should have been characterised by indirect intent rather than recklessness, as he had executed the criminal acts in a dangerous manner, without any effort on his behalf to protect the lives of other persons. She also claimed non-pecuniary damages in the amount of LTL 1 million.

Upon the applicant's appeal, on 28 October 2003 the Supreme Court quashed the above decision, returning the case for a fresh examination at appeal instance. The Supreme Court ruled in particular that the lower courts had failed to answer the applicant's arguments under Article 6 of the Convention about the effectiveness of the investigation into the death in view of the allegedly mild sentence imposed on TB. The Supreme Court noted that these complaints might also give rise to issues under Article 2 of the Convention. It was observed however that the applicant's claim for non-pecuniary damage should be examined by civil, not criminal, courts. The Supreme Court also emphasised that the applicant's allegations of murder had not been substantiated, TB having committed a negligent rather than an intentional offence.

On 15 June 2003 TB was dismissed from his job in the police.

On 12 January 2004 the Šiauliai Regional Court again found TB guilty of manslaughter (under Article 109 § 2 of the old Criminal Code) and abuse of office (Article 228 of the new Criminal Code). He was given a suspended sentence of two years and six months' imprisonment. The applicant's claim of LTL 5,216.30 in reimbursement of pecuniary damage in relation to the funeral of her son was upheld. The court also confirmed that she had a right to an award of non-pecuniary damages, but left the sum to be determined by way of a separate set of civil proceedings. The court further noted:

> "The circumstances of the incident have been fully clarified and the evidence rightly assessed. The evidence shows that [TB] used his firearm ... with the aim of stopping the vehicle the driver of which had not complied with the lawful requirement to stop; at the moment when [TB] used his gun, no danger to life or limb of other persons was present, as the car had already driven some 40 metres away from the point where it had been stopped; furthermore, the policemen were not precluded from chasing the offender in the police car, in order to stop him without recourse to firearms. [TB] endangered the life of the car passengers, exceeded his official duties and consciously acted in defiance of his duty of care, set out in Article 25 of the Police Activities Act ... which defines the conditions for using firearms as an exceptional measure of coercion. He did so by firing shots at the car that

was about 40 metres away from him and was moving away at an increasing speed, there being no danger to the life or limb of the policemen or other people, and without having adequately assessed the situation, in particular, without having sufficient information about the individual features of the driver or the possible presence of other people in the car.

By contrast, there is no indication that [TB] breached Article 25 § 4 of the Police Activities Act, as he had fired his shots at the tyres of the car which had already moved away from the people. Nor there is any evidence that [TB] knew about the presence of the minors in the car, that he aimed at causing the death of the car driver or was indifferent to the fact that he might cause it.

[TB] had been familiar with all the normative acts regarding his duties, *inter alia* those determining the use of [firearms]; he had undergone the training on shooting. However, [TB] irresponsibly overestimated his skills and acted unlawfully, trying to hit the tyres of the car which was swiftly moving away. Such actions were correctly classified as manslaughter."

The court found no procedural irregularities in the investigation or trial. As to the alleged bias on the part of the judges, it noted that the applicant had not requested the withdrawal of a particular judge. To the extent that the applicant complained about the excessive length of the proceedings, the Supreme Court considered that she had not indicated any substantial periods of inactivity by the courts, and that her complaint about the actions of the pre-trial investigation authorities could not be the grounds for quashing the lower court decisions, as this could only further prolong the proceedings. It was concluded that these, as well as other complaints of the applicant under Articles 2 and 6 of the Convention were better suited for examination by way of civil proceedings for non-pecuniary damage.

On 13 February 2004 the applicant submitted a cassation appeal against this judgment. By reference to Articles 2 and 6 of the Convention, the applicant reiterated that the proceedings had lasted too long, that the courts had not been impartial, that they had wrongly established the evidence, that TB should have been found guilty of murder, that his punishment had been absolutely inadequate, and that her claim for non-pecuniary damage should have been allowed by the criminal courts.

On 1 June 2004 the Supreme Court dismissed the applicant's cassation appeal. It noted that the offence had been duly classified and sentence had been correctly assessed. The proceedings had been fair and impartial in compliance with the requirements of Article 6 of the Convention in that the applicant had been provided with all procedural guarantees. Her claims for non-pecuniary damages were duly left to be decided by way of civil proceedings as the criminal procedure rules applicable at the material time provided only for assessment of the material damage (Articles 65 and

§ 2 of the Code of Criminal Procedure). Finally, the Supreme Court opined that the length of the proceedings at the appellate instance was justified by the legal and factual complexity of the case.

B. Relevant domestic law

Article 109 of the Criminal Code as then in force punished the act of manslaughter (*nužudymas dėl neatsargumo*). Article 287 of the Code punished the act of exceeding official duties (*tarnybos pareigų viršijimas*).

Article 228 of the new Criminal Code, which entered into force on 1 May 2003, punishes the acts of abuse of office (*piktnaudžiavimas*).

Article 65 of the Code of Criminal Procedure (in force until 30 April 2003) provided that the victim of a crime was entitled to lodge a civil claim for damages in the criminal proceedings. The claim was examined together with the criminal case.

Article 340 § 2 of that Code stated that "in exceptional cases, when it is not possible to make a detailed assessment of damages without adjourning the case or obtaining additional evidence ... the court ... shall recognise the right to an award of civil damages, but leave the amount thereof to be determined by way of civil proceedings".

The civil claim is then submitted and examined in accordance with the general rules of the civil procedure (Article 33 § 5 of the Code of Civil Procedure in force as of 1 January 2003).

According to Article 23 § 1 of the Police Activities Act of 2000 (as then in force), a police officer is entitled to use force, including firearms, only where preliminary measures such as attempts to persuade or the use of "psychological force" such as warning shots have not been effective. He or she must select the means of coercion having regard to the particular circumstances, the type of offence at hand and the individual features of the offender. A police officer must try to avoid serious consequences in using the force.

Article 23 § 5 of the above Act stipulates that before using a firearm, a police officer must warn the person about his/her intention, to enable him or her to fulfil lawful requirements, except in cases when delaying the use of a firearm poses a threat to the life or limb of the police officer or another person, or when such warning is impossible.

In accordance with Article 23 § 8, the prosecutor is immediately informed about the use of force by the police officer that caused death or injuries.

Article 23 § 9 provides that police officers must undergo special training and be periodically assessed as to whether they are able to act in situations involving the use of firearms.

Article 25 of the Police Activities Act regulates the use of firearms. It states:

> "1. When other coercive measures are ineffective, the police officer shall have the right to use a firearm as an extraordinary measure.
>
> 2. The police officer shall have the right to use a firearm against persons in the following cases:
>
> 1) when defending himself or another person from an actual or intended criminal attempt which poses a direct threat to life or limb;
>
> 2) when apprehending a person who has committed a criminal act and who evades arrest by active actions, if it is impossible to apprehend him/her in any other way, as well as in cases when the person refuses to fulfil lawful requirements to put down a weapon or another thing with which it is possible to injure an individual, if a threat is posed to the life or limb of the police officer or another individual and it is impossible to disarm him/her in any other way. ...
>
> 3. The police officer shall have the right to use a firearm against a vehicle ... .
>
> 4. It shall be prohibited to use a firearm in public gathering places, if it endangers other people; against pregnant women, as well as against persons who are visibly disabled, and against minors, if the police officer knows their age or their appearance corresponds to their age, except in cases when the said persons resist in a manner dangerous to human life or limb ... ."

COMPLAINTS

Under Articles 2 and 6 of the Convention the applicant complained that police officer TB had unjustly deprived her son of his life, and that she had been afforded no adequate legal remedy to obtain redress in this respect.

THE LAW

The applicant alleged a violation of Article 2 of the Convention, which provides as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

She also alleged in this respect a violation of Article 6 of the Convention, which reads, insofar as relevant, as follows:

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

The Government submitted that the domestic courts had the "prerogative" to assess all the relevant factual and legal elements of this case. The preliminary investigation of the criminal case had been efficient, various procedural steps having been undertaken in this respect such as the official inquiry, investigative experiment, examination of the scene of the crime, questioning of witnesses, ballistic and medical examinations. The case had never been returned to the prosecutors for further investigative measures to be carried out, as a result of which the courts had been enabled to duly establish all the relevant facts of the incident. The domestic courts had also evaluated the acts of TB from the legal point of view, convicting him of manslaughter and abuse of office. Therefore, regardless of the fact that no final decision had yet been taken to the applicant's claim for
non-pecuniary damage, there had been no evidence of the State having breached its negative or positive obligations under Article 2 of the Convention.

The applicant disagreed, stating that the proceedings had lasted too long, that TB should have been found guilty of murder, that his punishment had been absolutely inadequate, and that her claim for non-pecuniary damage had not been allowed by the criminal courts.

As regards the parties' arguments under Article 2 of the Convention, the Court finds that this part of the application raises complex questions of fact and law, the determination of which should depend on an examination of the merits. It cannot therefore be regarded as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

To the extent that the applicant has also raised the same complaint about the alleged ineffectiveness of the impugned investigation of her son's death under Article 6 of the Convention, the Court notes that it has decided to examine the merits of the applicant's complaints in this respect under Article 2 of the Convention. It does not therefore consider it necessary to examine the matter separately under Article 6, the complaint under this provision being subsumed in that to be examined under Article 2 of the Convention.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits.

Santiago Quesada Boštjan M. Zupančič
Registrar President

LEPARSKIENĖ v. LITHUANIA DECISION