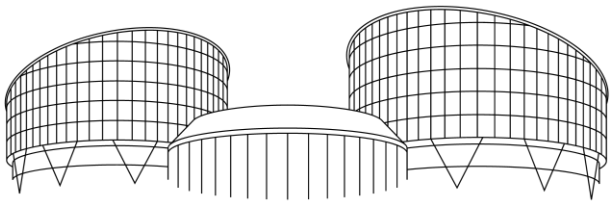

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF LIUIZA v. LITHUANIA

(Application no. 13472/06)

JUDGMENT

STRASBOURG

31 July 2012

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 Liuiza v. Lithuania,

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

Françoise Tulkens, *President,*
Danutė Jočienė,
Dragoljub Popović,
Işıl Karakaş,
Guido Raimondi,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 3 July 2012,

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

PROCEDURE

1. The case originated in an application (no. 13472/06) 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 Laimutis Liuiza ("the applicant"), on 23 March 2006.

2. The applicant was represented by Mr A. Petrulionis, a lawyer practising in Alytus. The Lithuanian Government ("the Government") were represented by their Agent, Ms E. Baltutytė.

3. The applicant alleged that his arrest and detention had been unlawful. He further argued that he had not been informed about the reasons for his arrest. Lastly, the applicant complained that he had not had a fair trial.

4. On 4 January 2008 the application was communicated to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1981 and lives in Rokiškis. He suffers from hebephrenic schizophrenia.

6. In 1998, the Kaunas City District Court established that the applicant had committed six thefts from apartments while in a state of criminal irresponsibility. He was relieved from serving his sentence and placed in a

psychiatric hospital for "general observation" (atidavimas į psichiatrinę ligoninę bendrojo stebėjimo sąlygomis).

7. On 23 April 2004 the Vilnius City First District Court found that the applicant, who had in the meantime been released, had been involved in several more robberies. The medical experts testified in court that the applicant was suffering from hebephrenic schizophrenia and recommended that he be treated in a psychiatric hospital under general observation. On the court's order, the applicant was placed under the above regime.

8. On 26 May 2004 the applicant ran away from the psychiatric hospital.

9. In June 2004 a pre-trial investigation was opened in respect of thefts committed earlier that month by a group of people.

10. On 15 June 2004 the applicant was apprehended and detained by the police. He presented himself under the false name of Mr Linas Jatkonis. The temporary arrest record states that "the applicant was suspected of having committed a crime enumerated in Article 178 § 2 of the Criminal Code [theft]". The applicant signed the record without any further remarks. As it transpires from the investigator's report of the same day, the applicant asked the authorities not to inform his relatives about his arrest.

11. On 17 June 2004 the applicant was questioned by a police investigator in connection with the thefts. The applicant was served with a "notice of suspicion" (pranešimas apie įtarimą), where multiple episodes of theft attributed to him were explained on half a page. The document listed each single allegedly stolen item, its value and owner. The time and location of the crimes were also mentioned. The applicant did not have his passport with him, maintained his false identity and did not confess to the thefts. The lawyer for the applicant, V.B., was present at the questioning. In the record of his questioning, which the applicant signed, he wrote "I understand the charges against me. I do not confess".

12. At a hearing of 17 June 2004 at the Jonava District Court, the applicant continued to present himself as Mr Linas Jatkonis. The judge explained the applicant that he was suspected of thefts but the applicant did not confess to having committed them. The court granted the prosecutor's request that the applicant be detained for a period of ten days, on the ground that he might evade investigation and influence witnesses. The court noted that the applicant did not have a job or source of income and that he was suspected of a rather serious crime. The applicant's lawyer was also present at that hearing.

13. Later on, and on the basis of the applicant's fingerprints, the authorities established that the applicant's true name was Mr Laimutis Liuiza.

14. At a hearing on 25 June 2004 at the Jonava District Court, the applicant confessed that he had earlier lied about his true identity. At the request of a prosecutor, the court extended the applicant's pre-trial detention by two months.

The pre-trial detention was further extended by court orders of 25 August, 24 September and 25 October 2004, where the court noted, inter alia, that the applicant was suspected of having committed "a crime of medium severity" (apysunkį nusikaltimą), had been in a possession of an unauthorised firearm and had disguised his true identity at the beginning of the criminal investigation.

15. By a ruling of 5 August 2004 the Jonava District Court, at the request of a prosecutor, ordered a forensic medical examination of the applicant. The court noted that the applicant had a history of mental illness. It was important to establish whether he could stand trial. The court also ordered the experts from the Žiegždriai Psychiatric Hospital, where the applicant had been treated a number of times, to determine "what medical measures would be appropriate" in respect of the applicant. The following day the applicant was transferred to that hospital.

16. The applicant challenged the appointment of the experts of the Žiegždriai Psychiatric Hospital to examine him. He submitted that earlier he had had conflicts with the administration of that hospital. However, on 24 August 2004 the Jonava district prosecutor dismissed the applicant's claim that the experts of the Žiegždriai Psychiatric Hospital were biased as unfounded.

17. When questioned by an investigator on 25 August 2004 and in the presence of his lawyer V.B., the applicant partly confessed to having fraudulently used a bank card. He denied the charges of theft and unlawful possession of a firearm.

On the same day the investigator informed the applicant in writing that he was suspected of theft, fraud and unlawful possession of a firearm. The applicant signed the document (i.e. the notice of suspicion).

18. On 10 September 2004 the psychiatrists from Žiegždriai Psychiatric Hospital concluded that the applicant "was not able to understand the actions taken within the framework of the pre-trial investigation and no investigative actions could be carried out with his participation". The doctors deemed that the applicant was thus unfit to stand trial and that it was appropriate to keep him under "strict observation in Rokiškis Psychiatric Hospital". In report no. 354 the doctors noted that the applicant had already been treated in psychiatric hospitals on six occasions. In particular, in 1997-1998 he had been treated in Žiegždriai Psychiatric Hospital after a court had established that he had committed several thefts. Later on the applicant had been released; however, subsequent observations revealed unpredictable behaviour. The applicant's mental state would often worsen. When not in in-patient care he would not visit the doctors or take medicine. In January 2004, and in connection with the [fresh] criminal proceedings, the applicant had been placed in Lukiškės prison hospital, where the diagnosis of hebephrenic schizophrenia had been confirmed. The psychiatrists also noted that at the time of their examination the applicant

did not demonstrate a negative view of his illness or the [criminal] acts; he was often antisocial.

19. On 28 October 2004 the Jonava District Court ordered the applicant's committal to psychiatric care under "strict observation" (stebėjimas ir gydymas griežto stebėjimo sąlygomis). The detention was ordered until the end of the criminal proceedings against him, which were expected to be terminated on account of the application of compulsory medical measures in respect of the applicant. The court relied on the conclusions of report no. 354 compiled by the medical experts.

20. On 4 November 2004 the applicant was placed in the Rokiškis Psychiatric Hospital.

21. As it transpires from the notice of suspicion provided by the Government, on 17 January 2005 the applicant was informed of and charged with theft, unlawful possession of a firearm and fraudulent use of a bank card. The facts were described in two full pages. The applicant did not sign the document; however, it bears the signature of his lawyer, V.B.

22. On 6 April 2005 another lawyer, A.V., was appointed to represent the applicant.

23. On 20 July 2005 the Jonava District Court received a written response from the Rokiškis Psychiatric Hospital to that court's inquiry of 7 July into the applicant's mental state. The doctors' recommendation was that the applicant be held under strict observation, because he was a threat to others and lacked critical thinking.

24. The applicant's psychiatric confinement under strict observation was extended – pending trial – by the Jonava District Court on 6 April 2005 and 21 September 2005. The court relied on the Rokiškis Psychiatric Hospital doctors' opinion that the applicant could not think clearly, was aggressive and habitually wrote complaints about the doctors and law-enforcement officers. The court also noted that the applicant was charged, inter alia, with unlawful possession of a firearm, and stated that "there was no evidence that [psychiatric confinement under strict observation] should not be applied". Officially-appointed defence counsel was present at the hearings.

25. On 16 January 2006 the applicant lodged a complaint before the Kaunas Regional Court, alleging that the experts had been biased and that report no. 354 was flawed. However, the court dismissed the complaint as unsubstantiated.

26. On 27 January 2006 the Jonava District Court found that the applicant had been in possession of an unauthorised gun, and had been involved in several episodes of theft and unauthorised payment with a bank card belonging to another person. In setting out its reasons the court relied on witness testimonies, material evidence and expert reports. Expert S.Š., one of the four experts who had signed report no. 354, testified in court that at the time the crimes were committed the applicant had been suffering from hebephrenic schizophrenia and could not understand or control his actions. She deemed it appropriate that the applicant be placed in the Rokiškis

Psychiatric Hospital under strict observation. On the basis of that testimony and the conclusions of report no. 354, the court held that the applicant had committed those offences while in a state of lacking criminal responsibility and relieved him from serving his criminal sentence. In accordance with Article 98 of the Criminal Code, the court ordered that the applicant be confined in the Rokiškis Psychiatric Hospital for observation and treatment under strict conditions. The applicant was not present before the court, but was represented by officially-appointed defence counsel.

27. The applicant appealed, arguing that a new expert examination of his mental state was necessary and that the regime of strict observation was too severe a measure, given that he had been charged only in connection with crimes which were not particularly serious. The applicant also confessed to the appellate court that he had fraudulently used another person's bank card twice, but wrote that he regretted that. He denied having committed the other criminal acts.

28. In a report of 23 February 2006 the experts from the Rokiškis Psychiatric Hospital concluded that the applicant had behavioural problems. In particular, he was egocentric, always considered himself right in every situation, and was uncritical of the criminal acts he was charged with. He was also angry, agitated and would terrorise other patients and take their pre-paid telephone cards from them. The applicant also threatened retribution against prosecutors and judges. The doctors also noted that on 12 April 2005 the applicant had attacked a nurse. The doctors recommended that the applicant be treated in a psychiatric hospital under strict observation.

29. On 16 March 2006 the Rokiškis District Court extended the applicant's confinement until the decision of the Jonava District Court of 27 January 2006 came into force. It noted that the applicant still represented a threat to others.

The applicant appealed against that measure, requesting that the conditions of his pre-trial confinement be changed. However, his action was later dismissed as unsubstantiated by the Panevėžys Regional Court. The court noted that there were no procedural irregularities in the detention order.

30. On 6 April 2006 the Kaunas Regional Court dismissed the applicant's appeal in respect of the criminal charges against him. The applicant's lawyer was present at the hearing. The court held that there was no reason to request a fresh expert examination as to the applicant's mental health. Expert report no. 354 was based on long-term observation of him, and the diagnosis of schizophrenia had already been established in 1998. In the court's view, the expert who was questioned at the appellate court hearing also did not say anything that could cast doubt on the reliability of that report.

31. The Kaunas Regional Court also dismissed the applicant's plea that a milder regime at a psychiatric hospital should be applied to him. Whilst

acknowledging that the crimes the applicant had been charged with were not particularly grave, the court nonetheless held that it was appropriate to place the applicant under strict observation because of his aggressive behaviour, as attested by the expert, expert report no. 354 and the data provided by the Rokiškis Psychiatric Hospital. The appellate court lastly observed that the regime could always be varied, provided the applicant's health condition and behaviour ameliorated.

32. On 14 September 2006 the Rokiškis District Court extended the applicant's placement under strict observation. In setting out its reasons, the court relied on the report by the Rokiškis Psychiatric Hospital of 24 August 2006, to the effect that the applicant suffered from hebephrenic schizophrenia. He was still unstable and uncritical of his earlier behaviour as well as remained dangerous to others. The applicant's lawyer was present at the hearing and did not object to the recommendation by the hospital.

33. By a ruling of 16 January 2007 the applicant's appeal on points of law was dismissed. The Supreme Court shared the view of the appellate court to the effect that it was necessary to keep the applicant under strict observation owing to his state of mind and his behaviour; there was no doubt as to the appropriateness of that regime. The Supreme Court also observed that, in accordance with Article 98 § 6 of the Criminal Code, a court should assess the appropriateness of the compulsory medical measures every six months (see "Relevant domestic law" below). Moreover, pursuant to Article 405 of the Code of Criminal Procedure, it was the court of a person's place of residence which decided such questions. It followed that the Supreme Court did not have jurisdiction to change the applicant's hospitalisation regime.

The applicant's lawyer took part in the hearing.

34. On 26 March 2007 the Rokiškis District Court extended the applicant's in-patient treatment under strict observation. It relied on the report by the doctors of the Rokiškis Psychiatric Hospital of 1 March 2007. The report read that the applicant suffered from hebephrenic schizophrenia, his behaviour was unpredictable and unstable. The applicant was constantly threatening to hang himself or to kill himself with a knife. The applicant's lawyer took part in the hearing and did not oppose the measure.

35. On 19 September 2007 the Rokiškis District Court again extended the applicant's in-patient treatment under strict observation. The court based its decision on a psychiatrists' report dated 30 August 2007 attesting to the destructive behaviour of the applicant. His lawyer was present at the hearing and requested that a milder regime, "increased observation" (sustiprinto stebėjimo sąlygos), be applied to his client.

The applicant was present when his appeal was examined and dismissed as unfounded by a higher court.

36. On the basis of a ruling of 31 March 2008 by the Rokiškis District Court, the applicant was placed under the increased observation regime. The

court relied on a psychiatrists' report dated 28 February 2008, which stated that the applicant's mental health had improved to a certain extent.

37. By a ruling of 1 October 2008, the Rokiškis District Court granted a request by the Rokiškis Psychiatric Hospital that a milder measure, the "general observation" regime (bendro stebėjimo sąlygos), be applied to the applicant. The court noted the psychiatrists' conclusion to the effect that the applicant's mental state had improved, that he had started planning his future, and was critical of the criminal acts he had committed.

38. On 18 May 2009 the Rokiškis District Court changed the applicant's hospitalisation regime to one of "increased observation". The court relied on a doctors' report that the applicant was argumentative and behaved aggressively towards other patients. Furthermore, the stricter regime was justified because of four incidents that had taken place in the reference period. In particular, since 18 November 2008 the applicant had attempted to regurgitate his prescribed medicine, threatened another patient with physical violence, pushed another patient out of the smoking room and grabbed yet another patient by the throat in the canteen. According to the doctors' report, there was a tendency for the applicant's violent behaviour to increase.

39. On 19 June 2010 the Rokiškis District Court extended the applicant's detention under increased observation, on the basis of a doctors' report of 13 May 2010 according to which the applicant continued to show aggression towards others. That ruling was upheld by a higher court.

II. RELEVANT DOMESTIC LAW

40. The Criminal Code, insofar as relevant to this case, provides as follows:

Article 17. Legal Incapacity

"1. A person shall be considered legally incapacitated where, at the time of commission of an act forbidden under this Code, he was unable to understand the dangerous nature of the act or to control his behaviour as a result of a mental disorder.

2. A person found legally incapacitated by a court shall not be held liable under this Code for having committed a dangerous act. The court may order that compulsory medical treatment as provided for in Article 98 of this Code be applied."

Article 98. Compulsory Medical Treatment

"1. Persons who are recognised by a court as being legally incapacitated or of diminished capacity as well as persons who, after committing a criminal act or having received a penalty, develop a mental disorder rendering them incapable of understanding the nature of their actions or controlling them may be subject to a court order for the following compulsory medical treatment measures to be applied:

1) out-patient observation under the conditions of primary mental health care;

2) in-patient treatment under general observation at a specialised mental health care establishment;

3) in-patient treatment under increased observation at a specialised mental health care establishment;

4) in-patient treatment under strict observation at a specialised mental health care establishment.

2. A court shall order out-patient observation where it is not necessary to subject the person in question to observation and in-patient treatment due to the dangerousness of the committed act and his mental state, or where the person may continue out-patient treatment after his mental state improves following in-patient treatment.

3. A court shall order in-patient treatment under general observation where a person needs to be under observation and undergo treatment at a specialised in-patient treatment establishment due to a mental disorder.

4. A court shall order in-patient treatment under increased observation at a specialist establishment where a person has committed a dangerous act and has a mental disorder warranting such a measure.

5. A court shall order in-patient treatment under strict observation at a specialist establishment where a person has made an attempt on a person's life or health and is particularly dangerous to those around him due to a mental disorder.

6. A court shall not set any period of time for compulsory medical treatment. It shall be applied until the person is cured or his mental state improves and he no longer poses a threat to others. At least once every six months, a court must decide, on the basis of a report by a health-care establishment, on the extension of compulsory medical treatment, change of type thereof or discontinuation thereof.

7. Where it is not necessary to subject a person to compulsory medical treatment, or where a court orders that such treatment be discontinued, the person may be transferred by the court into the custody or guardianship of his relatives or other persons and may concurrently be subject to medical observation."

41. The Code of Criminal Procedure provides:

Article 141. Committal of a Suspect to a Medical Institution

"1. Where during the investigation or hearing of a criminal case there is a need for a medical or psychiatric expert examination of a suspect, he or she shall be committed by a court decision to the examining institution before a medical report is submitted to a prosecutor or the court. The time spent at the institution shall be included in the detention term.

2. If a psychiatric expert establishes that the suspect, because of his or her mental disorder, may be dangerous to the public, the court may order extension of his or her stay at the examining institution or the suspect may be transferred to another institution until the court decides upon the issue of employing coercive medical measures.

3. A suspect shall be committed to an examining institution and his period of stay at the institution shall be determined and extended following the same procedure for ordering, extending or appealing against detention.

4. During the pre-trial investigation the detained suspect shall be committed to an examining institution by the decision of a prosecutor.

5. An accused may also be committed to an examining institution."

42. In accordance with Article 405 of the Code of Criminal Procedure, the court shall at least once every six months determine the issue regarding the extension of the maximum period of application of the compulsory medical treatment measure, changing the type of measure or discontinuing its application. A representative of the medical institution that submitted a report about the appropriateness of one or another measure must take part in the hearing. The court may also request that the hospitalised person be present at the hearing, unless his mental state does not allow for it.

43. Article 7 of the Law on Mental Health Care provides that hospitalised patients have a right to communicate with others.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

44. Without invoking any Articles of the Convention or its Protocols, the applicant complained that his arrest and placement in a psychiatric institution had been unlawful. He further argued that the courts had arbitrarily ordered his placement under stricter conditions than provided for by law.

45. The Court considers that the above complaints fall to be examined under Article 5 § 1 of the Convention, which reads insofar as relevant as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(...)

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(...)

(e) the lawful detention ... of persons of unsound mind ..."

A. The parties' submissions

1. The applicant

46. The applicant complained about his arrest and subsequent detention in a psychiatric hospital, arguing that the courts had arbitrarily ordered his placement under stricter conditions than provided for by law. In particular, he had been confined under "strict observation", whereas Article 98 § 5 of the Criminal Code reserves such conditions for the most serious offenders. He also alleged that the medical experts who had determined his diagnosis had been biased.

2. The Government

47. At the outset the Government submitted that by keeping important facts from the Court as regards the circumstances surrounding his arrest and detention the applicant had abused his right of petition. It followed that the application was inadmissible.

48. As concerns the circumstances surrounding the applicant's arrest, the Government observed that he was originally arrested and then detained not because of a severe and dangerous mental state, but on the suspicion of having committed a crime. Accordingly, his detention fell within the scope of Article 5 § 1 (c) of the Convention, and not Article 5 § 1 (e). That being so, the applicant's detention during the pre-trial investigation was extended in compliance with the requirements of the Code of Criminal Procedure.

49. The Government further noted that, once the pre-trial investigation was underway the authorities had received information about the applicant's earlier mental health problems and a need had arisen to find out what his mental state was at the moment of committing the criminal acts with which he was charged. On 28 October 2004 the Jonava District Court, relying on the psychiatrists' recommendations in report no. 354, had ordered the applicant's committal to a psychiatric institution for in-patient treatment and observation under a strict regime while the issue concerning the application of compulsory medical measures in his case was pending.

50. Turning to the question of the differences in observation regimes in psychiatric hospitals, the Government explained that Article 98 of the Code of Criminal Procedure, which covered coercive hospitalisation, aimed to replace punishment of a person who has committed a dangerous act provided for in the Criminal Code with treatment. Contrary to the applicant's allegations, that provision did not specify in detail which compulsory medical measure should be imposed by a court for a particular dangerous act. Rather, it defined the basic criteria to be considered by a court. In-patient observation regimes differed and were imposed taking into account the person's mental disorder and its severity, the nature of the act committed and the danger likely to be caused by the person to his own life or health or that of others. As concerns the applicant, the need to keep him

under a particular regime each time had been confirmed by the domestic courts, and strictly on the basis of objective expert opinions, which was one of the guidelines for deciding on the issue. In addition, due emphasis in the applicant's case had to be given to such aspects as his prior escape from the hospital, where, according to the Government, the applicant had been placed under general observation, a regime under which patients are free to walk around and are hardly controlled at all. In that connection the Government also noted that after his escape from the hospital the applicant had committed more criminal acts.

51. In the light of the above considerations the Government submitted that the applicant's complaints were manifestly ill-founded.

B. The Court's assessment

1. Admissibility

52. As to the Government's submission concerning the alleged abuse, the Court recalls that an application may be rejected as abusive under Article 35 § 3 of the Convention if, among other reasons, it was knowingly based on untrue facts. Incomplete and therefore misleading information may also amount to an abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation is given for the failure to disclose that information (see *Bekauri v. Georgia* (preliminary objection), no. 14102/02, § 21, 10 April 2012 and the case-law cited therein). However, on the basis of the material in its possession, the Court is unable to conclude that the applicant has based his allegations on information which he knew to be untrue. Moreover, although the applicant may not have fully and coherently informed the Court about the events surrounding his arrest, in the circumstances of the present case, the Court does not consider that he acted contrary to the purpose of the right of individual petition, as provided for in Article 34 of the Convention. Accordingly, the Government's argument must be rejected.

53. The Court considers that the applicant's complaints raise questions of law which are sufficiently serious that their determination should depend on an examination of the merits, and no other grounds for declaring them inadmissible have been established. The Court therefore declares these complaints admissible.

2. Merits

(a) General principles

54. The Court reiterates that Article 5 § 1 of the Convention contains a list of permissible grounds of deprivation of liberty, a list which is exhaustive. Consequently, no deprivation of liberty will be lawful unless it

falls within one of the grounds set out in sub-paragraphs (a) to (f) of Article 5. However, the applicability of one ground does not necessarily preclude that of another; deprivation of liberty may, depending on the circumstances, be justified under one or more sub-paragraphs (see *Witold Litwa v. Poland*, no. 26629/95, § 49, ECHR 2000-III).

55. The Court also reiterates that in order to comply with Article 5 § 1, the detention in issue must first of all be "lawful", including the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. It requires in addition, however, that any deprivation of liberty should be consistent with the purpose of Article 5, namely, to protect individuals from arbitrariness (see *Herczegfalvy v. Austria*, 24 September 1992, § 63, Series A no. 244; also see, most recently, *Stanev v. Bulgaria* [GC], no. 36760/06, § 143, ECHR 2012). Furthermore, the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law; it must also be necessary in the circumstances (see *Witold Litwa*, cited above, § 78).

56. As regards the deprivation of liberty of mentally disordered persons, an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see *Stanev*, cited above, § 145).

57. As to the second of the above conditions, the detention of a mentally ill person may be necessary not only where the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him, for example, causing harm to himself or others (see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 52, ECHR 2003-IV).

(b) Application of these principles in the present case

58. As concerns the applicant's situation, the Court first notes that, as it had been suggested by the Government, at the time of the applicant's arrest his medical history was not known to the investigators, given that the applicant had presented himself under a false identity. Having reviewed the circumstances surrounding his arrest and placement in detention pending trial, the Court finds nothing to suggest that the measures depriving him of his liberty were applied in an arbitrary fashion or unlawfully. In particular, it notes that at the time of his pre-trial questioning the applicant did not provide a document allowing the authorities to establish his true identity; he

misled them by presenting himself under a false name and, as the domestic court noted, he had no source of income and was suspected of having committed rather serious crimes (see paragraphs 10-12 above). That being so, the Court considers that the applicant's detention at this stage, and until 28 October 2004, satisfied the requirements of Article 5 § 1 (c) of the Convention.

59. Turning to the question of the lawfulness of the applicant's confinement and the regime he was placed under at the Rokiškis Psychiatric Hospital until the adoption of the Jonava District Court's decision of 27 January 2006, in which the issue of the application of the compulsory medical measures was finally decided, the Court observes that it was based on Article 141 of the Code of Criminal Procedure. After the applicant's mental illness had been established with certainty by the doctors' report no. 354 of 10 September 2004, the lawfulness of his detention was reviewed twice. As it transpires from the materials before the Court, on both of those occasions the Jonava District Court relied on the doctors' conclusion to the effect that the applicant still showed unproductive, unrepentant and illogical thinking, mood swings and angry outbursts. In addition, the applicant had behaved aggressively towards medical staff and other patients (see paragraph 24 above).

60. The Court further notes that on 27 January 2006 the Jonava District Court relieved the applicant of criminal liability and imposed on him a compulsory medical measure – in-patient observation under strict conditions. In setting out its reasons, the court relied on expert report no. 354, expert testimony in court and other evidence. The Court also notes that on 20 July 2005 the district court had received a letter from the Rokiškis Psychiatric Hospital, which drew attention to the applicant's aggressive behaviour towards hospital staff and other patients. Taking into account the applicant's history of mental troubles, his prior escape from an institution while under general observation and his commission of fresh crimes soon thereafter (see paragraphs 5-8 and 18 above), the Court can accept the Government's position that the compulsory medical measure applied to him by the trial court was lawful and appropriate. Lastly, the Court takes note of the Supreme Court's observation that the appropriateness of the applicable compulsory medical measures should be verified every six months (see paragraph 33 above). Indeed, this is how the events evolved in the applicant's case, given that the Rokiškis District Court periodically reviewed the medical measures applied, each time relying upon fresh medical examination reports, according to which the applicant's mental condition had not improved (see paragraphs 34-39 above).

61. In the light of the above considerations, the Court holds that there has been no violation of Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION

62. The applicant complained that he had not been informed of the grounds for his arrest.

63. The Court considers that the complaint falls to be examined under Article 5 § 2 of the Convention, which reads as follows:

> "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

A. The parties' submissions

64. The applicant argued that upon his arrest the authorities had not informed him of the criminal charges against him in accordance with the law.

65. The Government noted at the outset that when arrested for the first time the applicant had introduced himself as someone else, giving the personal details of that other person in lieu of his own. Even so, the grounds for the detention as well as charges against the applicant, under a false identity, had been explained to him both upon his arrest and placement in detention and each time he was questioned. That information had been conveyed to the applicant in Lithuanian, the language he understood. The reasons and grounds for his detention had been explained to him during his temporary arrest on 15 June 2004, whilst the particular circumstances of the criminal acts he was suspected of having committed had been explained to him when he was served with a notice of suspicion on 17 June 2004. From that day onwards, the applicant's counsel had been present at all times; the relevant records had been signed by both of them. The Government reiterated that the applicant's mental state had not been known when he was first arrested and detained – his lack of criminal responsibility had been discovered only later. Therefore it was important that the applicant's counsel had been present from the very first questioning of the applicant.

66. The Government also pointed out that, after the grounds for the deprivation of his liberty had changed, on 25 August 2004, the applicant had been served with a new notice of suspicion, addressed to Laimutis Liuiza. Yet another notice of suspicion had been served on him on 17 January 2005, informing the applicant of the charges against him. The Government again noted that on those occasions the applicant's counsel had been present and was promptly informed of the grounds for the applicant's detention as well as of the acts he was suspected of having committed.

B. The Court's assessment

67. The Court recalls that Article 5 § 2 of the Convention contains the elementary safeguard that any person arrested should know why he is being

deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. Whilst this information must be conveyed "promptly", it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (see *H.B. v. Switzerland*, no. 26899/95, § 47, 5 April 2001).

68. Turning to the present case, the Court notes that immediately upon his arrest on 15 June 2004 the applicant signed the temporary arrest record in the alias of Mr Linas Jatkonis, where it was mentioned that he was suspected of having committed "a crime enumerated in Article 178 § 2" of the Criminal Code. The Court recalls that such bare indication of the legal basis for the arrest, taken on its own, is insufficient for the purposes of Article 5 § 2 (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 41, Series A no. 182).

69. That being so, following his arrest the applicant was questioned by the police about his suspected involvement in specific criminal acts (see paragraph 11 above). There is no ground to suppose that this questioning was not such as to enable the applicant to understand why he had been apprehended. In particular, the notice of suspicion, served on the applicant on 17 June 2004 and also signed by him, listed the episodes of suspected thefts in detail. Moreover, the applicant and his lawyer both signed the record of his questioning by the investigator on 17 June, where the applicant indicated that "he understood the charges against him, [but] did not confess to the crimes". Lastly, the Court notes that the applicant and his lawyer were present at the hearing of the Jonava District Court, where a judge informed him of the accusations of theft directed against him (see paragraphs 11 and 12 above). The Court holds, accordingly, that the applicant had been well informed, both orally and in writing, of the reasons for the prosecuting authorities' interest in him.

70. The Court next notes that once the investigators had learned the applicant's true identity, that is, in the summer of 2004, and the Jonava District Court had ordered the experts to verify whether the applicant could stand trial, on 25 August 2004 the investigator served the applicant with a new notice of suspicion, only this time addressed to Mr Laimutis Liuiza. In addition to the thefts, the applicant was suspected of unlawful possession of a firearm and fraudulent use of a bank card. As the record of his questioning reads, the applicant denied having committed the thefts, but admitted to unlawful use of a bank card. The Court also observes that one more detailed notice of suspicion was served on the applicant on 17 January 2005 (see paragraphs 17 and 21 above).

71. In the light of the principles of its case-law and the above considerations the Court finds that the Lithuanian authorities properly informed the applicant of the reasons for his arrest and of any charge against him. Accordingly, the complaint must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

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

72. The applicant claimed a breach of his right to a fair trial. The Court considers that the applicant's complaints fall to be examined under Article 6 §1 of the Convention, which reads, in so far as relevant, as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by a tribunal ..."

A. The parties' submissions

73. The applicant argued that he had not been granted legal assistance at the time of his first questioning and that his confession to having fraudulently used a bank card had been obtained by way of ill-treatment inflicted by the investigators.

74. The Government maintained that defence counsel had been present at the first questioning of the applicant. This was proved by the record signed by the applicant and his counsel. Therefore, the applicant had made a false allegation to the Court.

75. In the Government's view, the applicant's allegation that his confession had been obtained by way of ill-treatment by the investigators was absolutely unsubstantiated. The Jonava District Court's decision of 27 January 2006 showed that the applicant had not complained about any alleged ill-treatment. No complaints in relation thereto had been filed during the pre-trial investigation either. Above all, the criminal case contained no data as to the applicant's confession, and this evidence had not been relied upon at all. The accusation had been based on the records of inspection of material evidence, the statements of other suspects, and expert opinions. In this context the Government also considered it worth noting that, in order to find the applicant guilty, the Lithuanian courts had been barred from relying on his testimony, given that under the Code of Criminal Procedure a person may not be questioned if, because of his mental defects, he is unable to fully understand the circumstances of the case. The applicant's mental state had been in doubt from the very beginning of the investigation. Moreover, on 10 September 2004 a psychiatric examination of the applicant had been conducted in order to assess his ability to understand the pre-trial proceedings. Lastly, in the view of the Government, the applicant had had plenty of opportunities to challenge the evidence he considered to be false,

given that his case had been decided at three levels of jurisdiction. The principle of an adversarial trial had been respected. It followed that the applicant's complaint that he had not had a fair trial was manifestly ill-founded.

B. The Court's assessment

76. The Court reiterates that, as a general rule, it is for the national courts, and in particular the court of first instance, to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce. The Court must, however, determine whether the proceedings considered as a whole, including the way in which prosecution and defence evidence was taken, were fair as required by Article 6 § 1 (see *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 68, Series A no. 146).

77. Turning to the facts of the instant case, the Court notes that the applicant's lawyer was present when the investigators questioned the applicant on 17 June 2004. The record of the applicant's questioning bears the signature of his lawyer, V.B. Moreover, as it transpires from the documents submitted to the Court by the parties, this was the first time the applicant was interrogated. On 15 June 2004 the applicant had merely signed a record of his arrest.

78. The Court has also reviewed the Lithuanian courts' judgments finding that the applicant had committed the criminal acts he was charged with. It notes that the Lithuanian courts' findings against the applicant were based on the records of the inspection of the crime scene, witness testimonies, expert opinions and material evidence. In contrast to what has been suggested by the applicant, the domestic courts never relied on his partial confession of 25 August 2004 that he had fraudulently used the bank card of another person. The Court also observes that the applicant's lawyers took part in the proceedings before the trial, appellate and even cassation courts, thus ensuring his right to an adversarial procedure. Lastly, whilst noting that the applicant was not present at any of the court hearings in person, the Court notes that this was because of his state of mind, as established by the psychiatrists (see paragraphs 18 and 26 above).

79. In the light of the above considerations, the Court is not ready to hold that the applicant did not have a fair trial within the meaning of Article 6 § 1 of the Convention. It follows that this part of the application is to be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

80. The applicant further contended that his correspondence and complaints to various State institutions had been withheld by the staff of the

Rokiškis Psychiatric Hospital. Lastly, he complained about his medical treatment in the psychiatric hospitals.

81. The Court has examined the remainder of the applicant's complaints as submitted by him. However, having regard to all the material in its possession, it finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaints under Article 5 § 1 admissible and the remainder of the application inadmissible;

2. *Holds* by five votes to two that there has been no violation of Article 5 § 1 of the Convention.

Done in English, and notified in writing on 31 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Françoise Tulkens
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Tulkens;
(b) dissenting opinion of Judges Pinto de Albuquerque and Keller.

F.T.
S.H.N.

CONCURRING OPINION OF JUDGE TULKENS

(Translation)

1. I share the majority's decision that in the present case there has not been a violation of Article 5 § 1 of the Convention, but I wish to address a point, in the applicant's complaints (see paragraph 46 of the judgment), that could be the source of a misunderstanding.

2. As a general rule, the constitutive elements of a criminal offence are respectively the legal element, the material element and the mental element. As regards this last element, which includes the accountability of the perpetrator for the offence, the Lithuanian Criminal Code, like in fact the majority of contemporary criminal codes, lays down rules governing legal incapacity resulting from mental illness. A person will be regarded as "legally incapacitated where, at the time of commission of an act forbidden under this Code, he was unable to understand the dangerous nature of the act or to control his behaviour as a result of a mental disorder" (Article 17 § 1). This provision thus sets out a ground for non-accountability, which precludes the establishment of criminal responsibility and allows the court to order compulsory medical treatment: "A person found legally incapacitated by a court shall not be held liable under this Code for having committed a dangerous act. The court may order that compulsory medical treatment as provided for in Article 98 of this Code be applied" (Article 17 § 2). It is on that basis that the Jonava District Court, on 27 January 2006, held that the applicant had committed the offences in question while lacking criminal responsibility and relieved him from serving the sentence.

3. As to the applicant's confinement in a psychiatric institution during the pre-trial investigation and trial, as ordered by the Jonava District Court on 28 October 2004 and extended on 21 September 2005, it was decided on the basis of Article 141, Articles 208 and 209, and Articles 392 et seq., of the Lithuanian Code of Criminal Procedure. More specifically, Article 403 of the latter refers to Article 98 of the Criminal Code as regards the various measures of compulsory medical treatment.

4. Whilst in some criminal-law systems the rules governing offenders of unsound mind are set out in special statutes, in the present case it was thus Article 98 of the Criminal Code which provided for the various types of treatment that could be ordered. The inclusion of these measures in the Criminal Code does not indicate, however, that they were criminal sanctions, because a person lacking capacity cannot be recognised as having criminal responsibility.

5. Article 98 § 5 of the Lithuanian Criminal Code provides that "[a] court shall order in-patient treatment under *strict observation* at a specialist establishment where a person has made an attempt on a person's life or health and is particularly dangerous to those around him due to a mental

disorder". This provision lays down the criteria that may be taken into consideration when determining the measure to be ordered.

6. The reference in Article 98 § 5 to "an attempt on a person's life or health" does not necessarily concern the offences with which the applicant was initially charged, namely theft, unlawful possession of a firearm and fraudulent use of a bank card (paragraph 21 of the judgment), although the possession of firearms may perhaps constitute a danger to the lives of others. That provision, as worded, does not require, for the measure of placement under strict observation, that the individual must actually have committed a *crime* against persons, but it concerns more generally any attempts on a person's life and the danger represented by the offender as a result of mental illness.

7. In the present case, the judicial authorities observed on numerous occasions, on the basis of medical reports, that the applicant, who had been confined in a psychiatric institution since the start of the proceedings, represented a threat to others (paragraphs 23 and 26 of the judgment), was aggressive (paragraphs 24 and 31 of the judgment), and had attacked a nurse (paragraph 28 of the judgment), his behaviour being destructive both for himself and for others (see paragraphs 34 and 35 of the judgment).

8. Lastly, in my view, a safeguard against arbitrariness seems to be provided by the fact that in-patient treatment under strict observation at a specialist establishment is decided by the court. In addition, the fact that the court for the person's place of residence must assess the appropriateness of the compulsory medical measures every six months (Article 98 § 6 of the Criminal Code and Article 405 of the Code of Criminal Procedure) also has the potential to prevent any abuse.

DISSENTING OPINION OF JUDGES PINTO DE ALBUQUERQUE AND KELLER

1. To our regret, we are unable to follow the opinion of the majority in this case. In our opinion, the applicant was not detained in accordance with a procedure prescribed by law as required by Article 5 § 1 of the European Convention on Human Rights (the Convention).

I. The Facts

2. The applicant has a long criminal record. He committed various crimes and was treated several times in psychiatric hospitals. He suffers from hebephrenic schizophrenia.

3. In a first phase (1998-2004), the applicant was convicted of thefts and robberies. Lacking criminal responsibility, he was placed in a psychiatric hospital under "general observation". In June 2004, the applicant escaped from the psychiatric hospital, but was detained shortly afterwards by the police. On 24 August 2004, he was informed that he was suspected of *thefts, fraud and unlawful possession of firearms*.

4. On 10 September 2004 an expert psychiatric report concluded that the applicant was unable to understand his actions, and recommended that he be kept "under strict observation" in the psychiatric hospital. The expert qualified the applicant's behaviour as antisocial. It is important to emphasise that at that time the expert did not qualify the applicant as particularly dangerous.

5. On 28 October 2004 the Jonava District Court ordered that the applicant be admitted to psychiatric care under "strict observation".

6. On 17 January 2005 the applicant was charged with *theft, unlawful possession of a firearm and fraudulent use of a bank card*.

7. On 20 July 2005 the psychiatric hospital recommended keeping the applicant "under strict observation", because he was a threat to others and lacked critical thinking. The hospital gave no further explanation as to the nature of the threat, but stated that the applicant was aggressive.

8. Finally, on 27 January 2006 the applicant was convicted of unauthorised possession of a firearm, theft and fraudulent use of a bank card, but was found criminally irresponsible and relieved from serving a prison sentence. Instead, the court ordered his confinement in a psychiatric hospital "under strict observation".

9. In a report of the psychiatric hospital dated 23 February 2006, the applicant's alleged dangerous character was referred to again. The report concluded that the applicant was egocentric, considered himself right in every situation, and was uncritical of the criminal acts he was charged with. He was also angry and agitated, and would terrorise other patients and take their pre-paid telephone cards from them. The applicant also threatened to take revenge on his prosecutors and judges. The doctors also mentioned that

on 12 April 2005 the applicant had attacked a nurse. Apart from the last point, the particularly dangerous behaviour of the applicant seems not to be obvious from this report. The attack on the nurse is not described in more detail.

10. On 26 March 2007 a report from the psychiatric hospital indicated that the applicant was constantly threatening to hang himself or to kill himself with a knife.

11. On 31 March 2008 the applicant was placed under the increased observation regime; on 1 October of that same year he was placed under general observation, and on 18 May 2009 he was again placed under increased observation.

II. The National Law

12. In Lithuanian law a mentally sound person is given a sentence after being found guilty of a criminal act committed with *mens rea*. A mentally ill person, on the other hand, is subjected to a security measure based on the criminal act committed and the danger he or she represents to the community. This twin-track system of sanctions is common in continental Europe. As the Government have acknowledged, the person's mental illness, the nature of the act committed and the danger likely to be caused by the person are the relevant factors the trial court has to take in account in ordering a security measure. The law defines different types of compulsory medical treatment for persons who cannot be made to serve a criminal sentence under Article 17 of the Lithuanian Criminal Code because they do not understand the meaning of their actions or they cannot control their own behaviour.

13. Article 98 of the Lithuanian Criminal Code provides for four different forms of compulsory medical treatment for mentally ill persons who are not responsible for their acts: 1) out-patient observation; 2) in-patient treatment under "general observation" – under this regime patients are free to walk around and are hardly controlled at all; 3) in-patient treatment under "increased observation", where the possibility of movement is restricted, and finally, 4) in-patient treatment under "strict observation": under this regime the patients are kept in locked rooms; they are entitled to 15-minute walks in the hospital's courtyard at least four times a day, and their rights to correspondence and visits are restricted.

14. Out-patient observation is applied when the mentally ill person who has committed a criminal act does not need in-patient treatment.

15. In-patient treatment under general observation is applied when the mentally ill person who has committed a criminal act needs observation and treatment at a specialised mental health care establishment.

16. In-patient treatment under increased observation depends on two conditions: first, the mentally ill person must have committed a dangerous criminal act and, second, such observation must be deemed necessary. The

law does not require any particular gravity of the criminal act other than its "dangerous" character.

17. In-patient treatment under strict observation can only be ordered when "a person has made an attempt on a person's life or health and is particularly dangerous to those around him because of a mental disorder". In other words, the strict observation regime can only be applied if both of the above conditions are met: the mentally ill person has committed a crime against another person's! life or health and he or she is especially dangerous. In our view, these two conditions are cumulative: first, the provision uses the conjunction "and", and second, otherwise there would be no substantive difference between the legal conditions of internment under increased observation and those of internment under strict observation.

18. At this juncture, it is important to note that these are four different sanctions applicable to mentally ill persons who have committed crimes and are relieved from serving a criminal sentence for lack of criminal responsibility. These are not, as the letter of Article 98 alone and read in conjunction with Article 17 clearly shows, different forms of one single sanction for mentally ill criminals. In fact, the law itself speaks of "the following compulsory treatment measures" in the plural, and each one of these "measures" requires specific conditions to be applied in a particular case. The most important of these legal conditions is the nature of the crime committed.

19. Finally, Article 141 of the Lithuanian Code of Criminal Procedure provides for the admission of a suspect to a medical institution during a criminal investigation. If the suspect is "dangerous to the public", he or she may be retained at the examining institution while the criminal proceedings are pending.

III. The Applicant's Claim

20. Without relying on any particular Article of the Convention, the applicant argued that the national courts had arbitrarily ordered his placement under stricter conditions than provided for by law.

IV. The Violation of Article 5

21. Article 5 § 1 of the Convention stipulates that any deprivation of liberty must be "*in accordance* with a procedure prescribed by law". Although it is in the first place for the national authorities to decide whether the relevant domestic law has been complied with or not, the Court regularly finds a violation of Article 5 § 1 of the Convention where an infringement of the principle of legality is apparent (among many other authorities, see *Koendjbiharie v. the Netherlands*, no. 11487/85, 25 October 1990; *Van der Leer v. the Netherlands*, no. 11509/85, 21 February 1990; and *Zervudacki v. France*, no. 73947/01, 27 July 2006).

22. We do not dispute the lawfulness of the applicant's pre-trial detention from 17 June 2004 to 28 October 2004. On this last date the Jonava District Court ordered that he should be placed in psychiatric care "under strict observation", which measure took effect on 4 November 2004.

23. Unlike the majority, we consider that the applicant's confinement "under strict observation" after 4 November 2004 breached the relevant domestic law, namely Article 98 of the Criminal Code. Whereas Article 141 of the Code of Criminal Procedure allows for admission to a medical *examining* institution pending criminal proceedings, it is Article 98, paragraphs 2–5 of the Criminal Code that provides the relevant provisions for the deprivation of liberty during compulsory medical treatment of persons recognised as legally incapacitated or of diminished capacity (in-patient treatment under general observation, increased observation and strict observation; see our paragraphs 14-17).

24. Although the offences the applicant was charged with on 17 June 2004 and 17 January 2005 were serious (theft, unlawful possession of a firearm and fraudulent use of bank cards), none of these charges were related to crimes against a person's life or health, nor was his aggressive character apparent at that time. Since the charges levelled against the applicant did not match the requirements mentioned in Article 98, paragraph 5, of the Criminal Code, he should not have been submitted to the most stringent form of internment. In our view, the principle of legality does not allow the application during criminal proceedings of a form of internment more stringent than that applicable at the end of the proceedings.

25. It was only at a later stage in the criminal proceedings, in April 2005, that the applicant allegedly became violent towards the medical staff and other patients, but these facts were not imputed to the applicant. No new criminal charges were brought against him based on these alleged new criminal acts. Thus, when on 27 January 2006 the Jonava District Court found that the applicant had committed the offences with which he was charged (theft, unlawful possession of a firearm and fraudulent use of bank cards), but relieved him from serving his criminal sentence and ordered his in-patient treatment "under strict observation", the cumulative conditions set forth in Article 98, paragraph 5 were clearly not met. In view of the nature of the crimes the applicant was found to have committed, after 17 January 2005 Article 98 of the Criminal Code only allowed for him to be placed under general observation (Article 98, paragraph 3) or increased observation (Article 98, paragraph 4), the principle of legality impeding the application of a security measure more stringent than the one provided for by the strict conditions set out in the Criminal Code.

26. The Kaunas Regional Court based its assessment of the lawfulness of the imposed security measure on the applicant's "aggressive behaviour" referred to in expert report no. 354. In so doing, the domestic court not only based the applicability of the most stringent security measure on a vague non-legal criterion, but it also used new non-proven criminal facts which

had allegedly occurred after the applicant had been charged. That interpretation of Article 98, paragraph 5 does not respect the principle of legality. Yet the Supreme Court, like the majority of this Court, confirmed that assessment. The majority of the Court put forward three motives for considering the treatment under strict observation "lawful and appropriate": the applicant's history of mental troubles, his prior escape from an institution while under general observation and his commission of fresh crimes soon thereafter (see paragraph 60 of the judgment). These motives do not correspond to the strict conditions required for the application of the security measure provided for in Article 98, paragraph 5 of the Criminal Code. While being sufficient for the application of a security measure of internment under increased observation, they are not sufficient to justify the application of internment "under strict observation", for which the requirements are more demanding. Hence, the interpretation of the disputed provision advanced by the domestic courts and confirmed by the majority breaches the principle of *nulla poena sine lege stricta*, which is applicable to security measures (on the applicability of the principle of legality to security measures, see *M. v. Germany*, no. 19359/04, §§ 125-133, 17 December 2009).

27. Without prejudice to serious Article 8 issues related to the stringent nature of the security measure of internment "under strict observation", which should have deserved the Court's attention, we find that both the period of internment between 4 November 2004 and his conviction on 27 June 2006, and the period between this last date and 31 March 2008 were not lawful. It follows that the psychiatric confinement of the applicant "under strict observation" after 4 November 2004 failed to comply with the principle of legality of security measures. We are therefore of the opinion that the deprivation of the applicant's liberty was not "*in accordance* with a procedure prescribed by law" as required by Article 5 § 1 of the Convention.