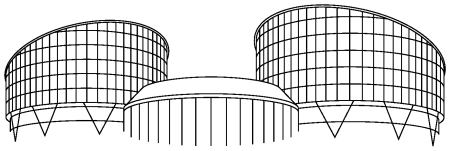

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MAŽUKNA v. LITHUANIA

(Application no. 72092/12)

JUDGMENT

STRASBOURG

11 April 2017

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

In the case of Mažukna v. Lithuania,

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

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

and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 28 February 2017,

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

PROCEDURE

1. The case originated in an application (no. 72092/12) 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 Aleksandras Mažukna ("the applicant"), on 5 November 2012.

2. The applicant was represented by Ms S. Naidenko, a lawyer practising in Antežeriai, Vilnius Region. The Lithuanian Government ("the Government") were represented by their Agent, Ms K. Bubnytė.

3. The applicant alleged that there had not been an effective investigation into the circumstances of an accident at work in which he had been injured. He relied on Article 6 § 1 and Article 13 of the Convention.

4. On 10 September 2014 the application was communicated to the Government under Articles 3, 6 § 1 and 13 of the Convention.

5. On 9 January 2016 the applicant died. His son and legal heir, Mr Marius Mažukna, expressed the wish to pursue the proceedings on the applicant's behalf.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1959 and lived in Pamažupiai, Pasvalys Region.

7. In February 2007 the applicant started working as a welder for the company N. On 17 April 2007 he was working at a factory construction site in the city of Klaipėda. Around 4.20 p.m., while the applicant and two other workers were standing on scaffolding approximately two metres above the ground, the scaffolding broke and all the workers fell to the ground (hereinafter "the accident").

8. According to the applicant, he fell on his back and hit his head on a concrete surface, causing his helmet to break into pieces. One of his co-workers and a metal tool fell on top of him. The applicant lost consciousness. He stated that while he was unconscious, he was moved away from the location of the accident on the orders of his employer and all traces of the accident were removed. At 4.53 p.m. an ambulance was called and the applicant was taken to hospital. It appears that the other workers sustained only minor injuries.

9. The site of the accident was examined the same day by an inspector from the State Labour Inspectorate. He noted that at the time of the examination the scaffolding was intact and no workers were present at the construction site. The inspector spoke to the construction site manager, V.J.S., who stated that he had not seen the accident because he had been elsewhere on the site. The inspector also spoke to the person in charge of work safety in the company N. who informed him that, on the basis of the initial medical examination, the applicant had not sustained any serious injuries. Accordingly, the inspector decided that the State Labour Inspectorate would not investigate the circumstances of the accident.

10. On 31 May 2007 another inspector from the State Labour Inspectorate looked into how the accident had happened and concluded that the applicant had fallen from the scaffolding because of his own recklessness. The applicant submitted a complaint against that conclusion and on 15 July 2007 the Inspectorate adopted a new conclusion, holding that the accident had been caused by "the inappropriate organisation of dangerous work" (*netinkamas pavojingo darbo organizavimas*), in particular because the scaffolding had not complied with the applicable work safety requirements.

A. Pre-trial investigation

11. On 10 September 2007 the applicant asked the Klaipėda city prosecutor's office (hereinafter "the prosecutor") to open a pre-trial investigation into the accident. The investigation was opened on the same day and conducted by an investigator from Klaipėda police (hereinafter "the investigator").

12. On 9 October 2007 the investigator instructed a court medical expert to examine the applicant's medical file in order to determine the number, severity and causes of his injuries. The report on the results of that examination, delivered on 18 October 2007, showed that the applicant had

sustained a large cut on his head, face and right ear, as well as multiple fractures of his facial bones, and a contusion on the chest. The injuries had been caused by blunt objects and flat surfaces, and could have occurred when falling from a height. The report noted that the injury on the head had bled, so there should have been traces of blood at the site of the accident. It concluded that the injuries to the applicant's head and face amounted to a minor health impairment (*nesunkus sveikatos sutrikdymas*) while the injury to his chest amounted to a negligible health impairment (*nežymus sveikatos sutrikdymas*). However, it also noted that the injury to the face would leave a big scar, possibly resulting in disfigurement and impairment of facial expression.

13. On 13 November 2007 the applicant was interviewed as a witness in the investigation. He stated that just before the accident he and five other workers had been carrying a metal platform to attach to a reservoir tank. The applicant and two other workers had been holding the upper part of the platform while standing on the scaffolding and three others had been on the ground, holding the platform's bottom part. The weight of the platform was about 200 kg. Suddenly, the scaffolding had collapsed and all three workers had fallen to the ground. At that point the applicant had lost consciousness. When he had come to, he had realised that he was not lying near the scaffolding, where he must have fallen, but in a different place. He had not seen any debris from the scaffolding around him, or any other traces of the accident.

On the same day the applicant was granted the status of a victim in the investigation.

14. On the same day the investigator instructed a court medical expert to examine the applicant's scars caused by the accident. The report on the results of that examination, delivered on 15 November 2007, found that the facial injury had left a large, rough scar, causing a minor disfigurement and impairment of facial expression. It also found that the scar and the resulting deformation could only be removed by plastic surgery, so the injury was considered as irreparable. As a result, the report concluded that the applicant's injury was legally classified as serious health impairment (*sunkus sveikatos sutrikdymas*).

15. In November and December 2007 the investigator interviewed several of the applicant's co-workers and other people who had worked near the factory construction site. It appears that the co-workers stated that no platform had been carried on the day of the accident. None of those interviewed had seen how the applicant had fallen from the scaffolding. From January to June 2008 more witnesses were interviewed and the investigator requested various documents from the applicant's employer and from several State institutions which had assessed the applicant's health and ability to work after the accident.

16. On 13 August 2008 the applicant was interviewed again. He stated that before the accident he had sometimes felt dizzy and had a feeling of numbness in his legs, but he had been declared fit to work after a medical examination.

17. On 6 October 2008 the prosecutor discontinued the pre-trial investigation. He relied on the State Labour Inspectorate report that no damage to the scaffolding on the day of the accident had been observed (see paragraph 9 above), and noted that none of the witnesses had corroborated the applicant's description of how he had fallen. The prosecutor observed that the applicant may have fallen from the scaffolding owing to his own recklessness (*dėl savo paties neatsargumo*), possibly because of the numbness in his legs. Accordingly, the prosecutor decided that the scaffolding had complied with safety requirements, and that there were no grounds to find that the applicant's employer had violated any laws.

18. The applicant appealed against the prosecutor's decision. He also asked for the appointment of a different prosecutor to supervise the case and to carry out a forensic examination in order to determine the causes of the accident. On 27 October 2008 a senior prosecutor dismissed his appeal, noting that around fifty witnesses had been questioned, but nobody had corroborated the applicant's claims. However, on 5 December 2008 the Klaipėda District Court overruled the prosecutor's decision and reopened the pre-trial investigation. The court noted that the prosecutor had not addressed the State Labour Inspectorate's conclusion of 15 July 2007 (see paragraph 10 above), and that other witnesses had only stated that they had not seen how the applicant had fallen from the scaffolding but had not disputed his account. The court also considered that the prosecutor's conclusion that the applicant had fallen because of his own recklessness or a medical condition had been "speculative and not based on any objective facts". However, the court rejected the applicant's request to appoint a different prosecutor as unfounded and did not examine his request to carry out a forensic examination, noting that the choice of investigative measures was the prerogative of investigators and prosecutors.

19. In January and February 2009 the investigator examined the site of the accident and interviewed more witnesses.

20. On 2 April 2009 the prosecutor instructed the investigator to carry out several additional investigative measures. Among other things, the investigator was requested to identify whether on the day of the accident or earlier the applicant and other workers had been ordered by their employer to attach the metal platform to the reservoir tank.

21. In April and May 2009 the investigator carried out additional interviews with several witnesses and requested further information from the applicant's employer and from the medical institutions which had examined him.

22. On 12 May 2009, in response to a prior complaint by the applicant, the deputy chief prosecutor of the Klaipėda city prosecutor's office informed him that there were no grounds to find that the pre-trial investigation in his case had been unduly protracted.

23. On 21 May 2009 the applicant's co-worker V.K. submitted a written statement to the State Labour Inspectorate that on the day of the accident he and other workers had been ordered by their supervisor V.J.S. to attach the metal platform to the reservoir tank. V.K. also submitted that the scaffolding had been made of very thin wood and could have broken at any time. He further alleged that immediately after the accident the director of the company N. had told other workers to repair the scaffolding. V.K. also asserted that he had previously given different testimony because of pressure from his employer.

24. On 8 June 2009, in response to a complaint by the applicant about the length of the investigation, the chief prosecutor of the Klaipėda city prosecutor's office noted that "the investigation had not always been of sufficient intensity" (*tyrimo intensyvumas ne visada buvo pakankamas*) and that the prosecutor had been instructed to set a deadline for completing the investigation. The chief prosecutor also informed the applicant that it was still necessary to interview several witnesses living in various parts of the country and to carry out further investigative measures.

25. On 17 June 2009 the State Labour Inspectorate adopted a new conclusion on the circumstances of the accident, holding that the scaffolding had not complied with applicable safety requirements and that the applicant had not been given appropriate instructions for working at height. Accordingly, the Inspectorate concluded that the applicant's employer had breached the legal requirements concerning safety at work.

26. On 3 July 2009 the prosecutor discontinued the pre-trial investigation. He observed that the applicant and other workers had been using the scaffolding for several days before the accident and there had not been any accidents during that time, so there were no grounds to find that the scaffolding had been unsafe. The prosecutor also concluded that the workers had not been ordered by their employer to attach the metal platform to the reservoir tank because the construction manager, V.J.S., had not been at work on the day of the accident. Accordingly, the employer could not be held responsible for the workers' decision to carry the platform on the scaffolding. The prosecutor further observed that, in any event, the applicant had had the right to refuse to carry out tasks which were unsafe or for which he was unqualified, but he had not exercised that right. The prosecutor therefore concluded that the accident had been caused by the recklessness of the workers and not by the actions or omissions of the employer.

27. The applicant appealed against the prosecutor's decision but on 24 July 2009 a senior prosecutor dismissed his appeal. However, on 13 October 2009 the Klaipėda District Court overruled the prosecutor's

decision and reopened the pre-trial investigation. The court observed that the absence of previous accidents on the scaffolding could not be interpreted as evidence that the scaffolding was safe. It also held that the applicant's right to refuse to carry out tasks in unsafe conditions did not excuse the employer from a duty to ensure that unsafe conditions did not exist at the workplace. The court further noted that attaching the platform to the reservoir tank had clearly been part of the construction work, so the employer had a duty to properly supervise the workers and to instruct them how to carry out that task safely – and by failing to do so, the applicant's employer had acted contrary to the law.

28. The prosecutor appealed against that judgment, but on 28 October 2009 the Klaipėda Regional Court dismissed the appeal. In its judgment the court noted that although more than two years had passed since the accident, the prosecutor had still not determined the precise way in which the accident had happened, and that without doing that it was not possible to determine who had been responsible for it. The court also considered it unlikely that the workers would have decided to attach the platform without receiving an order from their supervisor or at least informing him, so it was necessary to examine whether the construction manager V.J.S. had been present at the construction site at any time that day. Lastly, the court drew attention to the fact that "some witnesses" had admitted to giving false testimony under pressure from the employer and so it was necessary to investigate those claims further.

29. In November and December 2009 the investigator arranged several formal confrontations between witnesses, interviewed additional witnesses, and requested further information from the applicant's employer and the hospital where the applicant had been examined.

30. On 17 December 2009, following a complaint by the applicant, the deputy chief prosecutor of the Klaipėda region prosecutor's office sent a note to the Klaipėda city prosecutor's office, observing that the pre-trial investigation had been going on for more than two years, and requesting that it promptly carry out any necessary further investigative measures in order to make a well-founded final decision.

31. On 7 January 2010, after an application by the prosecutor, the Klaipėda District Court ordered a forensic examination of the precise way in which the accident had happened and its causes. The forensic expert examined the case file and delivered a report on 17 February 2010. The report noted that there was insufficient information in the case file concerning the technical characteristics of the metal platform and the scaffolding, so the way the accident had happened could be established only in part. On the basis of the available material, the report found that the weight of the platform had exceeded the weight limit of the scaffolding and had thus caused it to collapse. Accordingly, it concluded that the scaffolding had not been suitable for the work for which it was used, and that the workers had not been

adequately informed about how to carry out their work safely. The report found that the employer had thereby breached the applicable work safety requirements.

32. In March 2010 the investigator interviewed additional witnesses and arranged formal confrontations.

33. On 19 May 2010 the prosecutor again discontinued the pre-trial investigation. He held that witness testimony and other evidence showed that the applicant's supervisor V.J.S. had not been present at the construction site on the day of the accident and that he had not ordered the workers to attach the platform. As a result, the prosecutor concluded that V.J.S. had not had any duty to ensure the safety of that operation. He further concluded that the accident had been caused by the workers' reckless decision to carry the platform, which had exceeded the weight limit of the scaffolding. The prosecutor noted that although the scaffolding had not fully complied with the applicable safety requirements, that had not been the main cause of the accident and thus the applicant's employer could be held liable only for an administrative offence of failure to comply with work safety requirements (see paragraph 58 below), but not for a criminal offence.

The prosecutor also observed that a separate pre-trial investigation should be opened in order to examine the claims of some witnesses that they had been pressured by their employer to give false testimony. However, from the material available to the Court it appears that no such investigation was opened.

34. The applicant appealed against the prosecutor's decision, but on 7 June 2010 a senior prosecutor dismissed his appeal. However, on 9 August 2010 the Klaipėda District Court overruled the prosecutor's decision and reopened the pre-trial investigation. The court underlined that attaching the platform to the reservoir tank had been an inherent part of the construction work carried out by the applicant and other workers, so it could not be considered that they had decided to do that of their own free will. It referred to the expert report of 17 February 2010, noting that that report had given grounds to believe that the applicant's employer had failed to ensure safe working conditions. The court further noted that V.J.S. had not been officially authorised to leave his workplace on the day of the accident, and thus he had failed to ensure the safety of the workers under his supervision.

35. On 15 October 2010 V.J.S. was officially notified that he, being a person authorised by an employer to supervise construction work, was suspected of violating safety requirements at work, which had resulted in an accident, as set out in Article 176 § 1 of the Criminal Code.

36. In October and November 2010 the investigator interviewed V.J.S. and several witnesses.

37. On an unspecified date the applicant complained to the Prosecutor General's Office that the pre-trial investigation had been protracted, in particular because it had been discontinued and reopened several times. On

26 November 2010 the Prosecutor General's Office dismissed his complaint and stated that the repeated discontinuation of the investigation did not give grounds to find that any requirements of the Code of Criminal Procedure had been violated.

38. In January and February 2011 the investigator carried out additional interviews with several witnesses and requested further information from the applicant's employer.

39. On 14 February 2011 the applicant was informed that the pre-trial investigation had been completed. V.J.S. submitted a request to continue the investigation and carry out additional investigative measures but that request was dismissed.

B. Court proceedings

40. On 1 April 2011 the prosecutor issued an indictment against V.J.S. under Article 176 § 1 of the Criminal Code and on 5 April 2011 the case was transferred to the Klaipėda District Court for examination on the merits. On 28 April 2011 the chairperson of that court noted that the case was complex and large-scale, and allowed an additional thirty days to prepare for its examination.

41. The Klaipėda District Court held the first hearing on 30 June 2011 and decided to adjourn the case until 27 September 2011 because several witnesses were not present.

42. The next hearing was held on 27 September 2011 but several witnesses were absent again and the Klaipėda District Court fined them for failing to appear. The court also decided to adjourn the case until 24 November 2011 in order to ensure the participation of all the necessary witnesses and, as requested by the applicant, to obtain the technical details about the metal platform.

43. It appears that subsequently the case was adjourned again and a new hearing was scheduled for 14 December 2011.

44. On 13 December 2011 V.J.S. submitted a medical certificate to the court indicating that he would be sick from 12 to 16 December 2011, and asked for a further adjournment.

45. The Klaipėda District Court held a hearing on 14 December 2011 but because of the absence of the accused it was decided to adjourn and to schedule a new hearing for 5 January 2012.

46. At the hearing of 5 January 2012 V.J.S.'s lawyer informed the Klaipėda District Court that his client was still sick and had a medical certificate that was valid for another seven days. The court scheduled new hearings for 17, 19 and 24 January 2012.

47. On 16 January 2012 the applicant submitted a civil claim against V.J.S., asking for non-pecuniary damages of 300,000 Lithuanian litai (LTL – approximately 86,886 euros (EUR)).

48. On 17 January 2012 V.J.S.'s lawyer asked the court to adjourn the case again because his client had been admitted to hospital. Later, V.J.S. submitted a medical certificate indicating that he would be sick from 16 to 23 January 2012, which also showed that he would undergo rehabilitation treatment from 23 January to 6 February 2012.

49. The Klaipėda District Court held a hearing on 24 January 2012 and decided to adjourn until 14 February 2012. Subsequently, owing to the continued illness of the accused, the case was adjourned until 17 February 2012, then again until 1 March 2012 and 16 March 2012.

50. On 19 March 2012 the applicant asked the Klaipėda District Court to continue its examination of the case in the absence of the accused, complaining that the latter was deliberately avoiding appearing before the court. The Klaipėda District Court dismissed that application, informing the applicant that V.J.S. had submitted the required medical certificates to prove his illness and that domestic law did not allow for the examination of a criminal case in the absence of the accused. The court also noted that examination of the case had not been unduly protracted because the hearings had been scheduled with as little time between them as possible.

51. Subsequently, owing to the accused's continued illness, the court further adjourned the case to 11 April 2012, 24 April 2012, and then to 8 May 2012.

52. On 7 May 2012 the applicant asked the court to adjourn the hearing because he had to be admitted to hospital for surgery.

53. The Klaipėda District Court held a hearing on 8 May 2012 from which the applicant was absent. During the hearing the prosecutor asked the court to terminate the case against V.J.S. as time-barred. The court adopted a decision on 14 May 2012 and terminated the case. It noted that V.J.S. had been charged with a crime of negligence, and in such cases the statute of limitations, applicable at the time of the accident, was five years (see paragraph 59 below). The court also observed that the domestic law provisions on the statute of limitations, applicable at the time of the accident, were "unconditional" (*besąlygiškos nuostatos*) and did not provide for the possibility to suspend the limitation period. The domestic law was subsequently amended to allow such a decision (see paragraph 60 below), but the new legal framework could not be applied retroactively to the detriment of the accused.

The court did not examine the applicant's civil claim and noted that he had the right to institute separate civil proceedings for damages.

54. On 4 June 2012 the applicant complained to the Klaipėda Regional Court that the examination of the case before the district court had been so protracted that it had become time-barred, and asked the regional court to identify the reasons for that protraction. The court considered that complaint as an appeal by the applicant against the Klaipėda District Court's judgment of 14 May 2012 but refused to admit it because the applicant had not signed

it or properly outlined the reasons for the appeal. The applicant did not submit another appeal against the judgment of 14 May 2012.

55. On an unspecified date V.J.S. appealed against the Klaipėda District Court's judgment of 14 May 2012 and asked the court to examine the case on the merits and to acquit him, but on 13 June 2012 his appeal was dismissed.

56. On 22 November 2012 the Prosecutor General's Office, in response to a complaint by the applicant, informed him that it had analysed the work of the prosecutors involved in the case and had not detected any "substantial violations" (*esminiai pažeidimai*) of the Code of Criminal Procedure.

II. RELEVANT DOMESTIC LAW

A. Liability for violations of work safety requirements

57. At the material time, the relevant parts of Article 176 of the Criminal Code read:

Article 176. Violation of requirements of safety and health protection at work

"1. An employer or a person authorised by him or her who violates the requirements of safety or health protection at work as set out in legislation on safety at work or other legal acts, where this results in an accident involving people or causes other serious consequences, shall be punished by a fine or by imprisonment for a term of up to eight years ...

3. The acts provided for in paragraph 1 of this Article shall be criminal also where they have been committed through negligence."

58. At the material time, the relevant pars of Article 41 of the Code of Administrative Offences read:

"When there has been a violation of labour laws or legal acts on work safety and work hygiene, the employer or a person authorised by the employer shall be fined from five hundred to five thousand Lithuanian litai. ..."

B. Statute of limitations

59. The relevant parts of Article 95 of the Criminal Code, in force from April 2003 until June 2010, provided:

Article 95. Statute of limitations for conviction

"1. A person who has committed a criminal offence cannot be convicted if:

1) the following period has lapsed: ...

b) five years, in the event of the commission of a crime of negligence or of a minor premeditated crime; ...

2) during the period laid down in sub-paragraph 1, the person did not hide from the pre-trial investigation or the trial and did not commit a new criminal offence ..."

60. In June 2010 a new version of Article 95 of the Criminal Code was passed. It provides, in the relevant parts, as follows:

Article 95. Statute of limitations for conviction

"1. A person who has committed a criminal offence cannot be convicted if:

1) the following period has lapsed: ...

b) eight years, in the event of the commission of a crime of negligence or of a minor premeditated crime; ...

2) during the period laid down in sub-paragraph 1, that person did not hide from the pre-trial investigation or the trial and did not commit a new premeditated criminal offence ...

5. During the examination of a case before a court, the statute of limitations is suspended for the period during which:

1) the court adjourns the examination of the case because of the absence of the accused or his or her counsel;

2) the court adjourns the examination of the case until a forensic examination requested by the court or a specialist investigation has been carried out, or until a legal assistance request sent to another State has been executed;

3) the court adjourns the examination of the case and instructs a prosecutor or a pre-trial investigation judge to carry out investigative measures provided in the Code of Criminal Procedure;

4) the court adjourns the examination of the case in order to allow newly appointed defence counsel to get acquainted with the case file ..."

61. In a ruling of 7 November 2006 in criminal case no. 2K-466/2006 the Supreme Court held:

"In accordance with the laws on criminal procedure, a criminal case must be discontinued when the statute of limitations expires ... By providing for such a possibility, the legislator acknowledged that pre-trial investigation institutions or courts in a given criminal case may not fulfil their constitutional duty [to examine the case] within the time-limit provided by law. For that reason, the Criminal Code provides, imperatively and unconditionally, that in such instances a criminal case must be discontinued."

C. Civil claim in criminal proceedings

62. The relevant parts of Article 115 of the Code of Criminal Procedure read:

"1. When adopting a judgment of conviction, the court grants the civil claim in full, in part or refuses it, depending on the evidence as to the well-foundedness and amount of the claim. ...

2. In exceptional instances, when the amount of the civil claim cannot be calculated precisely without adjourning the criminal case or obtaining additional information, the court adopting a judgment of conviction may recognise the civil claimant's right to have

his or her claim granted and leave the question of the amount to be examined in civil proceedings.

3. When adopting a judgment of acquittal, the court:

1) refuses to grant the civil claim if it has not been proven that the accused participated in the criminal act;

2) leaves the civil claim unexamined if the accused is acquitted because a criminal act has not been committed. In such instances the civil claimant may submit the claim in civil proceedings."

63. In a ruling of 14 March 2006 in criminal case no. 2K-260/2006 the Supreme Court held:

"The Code of Criminal Procedure does not explicitly provide for how to deal with a civil claim when the criminal case has been discontinued. In the present case, the proceedings ... were discontinued as time-barred. When the statute of limitations expires, criminal legal relations are terminated and no criminal legal consequences arise for the accused. Since a civil claim in criminal proceedings is an aspect of criminal legal relations, such a claim cannot be granted after the termination of those relations ... Therefore, after a criminal case has been discontinued, the civil claim must be left unexamined. It can be submitted in separate civil proceedings."

THE LAW

I. PRELIMINARY QUESTION

64. The Court notes at the outset that the applicant died after the present application had been lodged. His son and legal heir, Mr Marius Mažukna, has expressed his wish to continue the proceedings before the Court. The Government have not disputed that he is entitled to pursue the application on the applicant's behalf and the Court sees no reason to hold otherwise (see, among other authorities, *Sargsyan v. Azerbaijan* (dec.) [GC], no. 40167/06, § 51, 14 December 2011, and the cases cited therein).

II. ALLEGED VIOLATION OF THE PROCEDURAL LIMB OF ARTICLE 3 OF THE CONVENTION

65. The applicant complained that the pre-trial investigation and criminal proceedings concerning the circumstances of the accident had not been effective. He invoked Articles 6 § 1 and 13 of the Convention. The Court, being the master of the characterisation to be given in law to the facts of a case, considers that this complaint falls to be examined under the procedural limb of Article 3 of the Convention, which reads:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

1. As to the exhaustion of domestic remedies

(a) Appeal against the Klaipėda District Court's judgment of 14 May 2012

66. The Government submitted that the applicant had failed to submit a proper appeal against the Klaipėda District Court's judgment of 14 May 2012 to terminate the case as time-barred. They contended that if the applicant had appealed, the appellate court could have settled his civil claim against V.J.S.

67. The applicant argued that an appeal against the decision to terminate the case as time-barred had no prospects of success and was therefore not an effective remedy.

68. The Court reiterates that applicants are only obliged to exhaust domestic remedies which are available in theory and in practice – that is to say, remedies that are capable of providing redress in respect of their complaints and offering reasonable prospects of success (see, among many other authorities, *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II).

69. Turning to the circumstances of the present case, the Court notes that the Klaipėda District Court in its judgment of 14 May 2012 held that domestic law provided for a five-year statute of limitations in cases of crimes of negligence, and that that limitation period had to be applied "unconditionally", as there were no legal grounds to suspend it (see paragraph 53 above; see also the case-law of the Supreme Court of Lithuania in paragraph 61 above). In their preliminary objection, the Government did not argue that the appellate court could have interpreted the domestic law differently so as to overturn that conclusion and return the case for examination on the merits, as sought by the applicant. The Court also notes that the Klaipėda Regional Court examined an appeal submitted by the accused, in which the latter also requested that the court examine the merits of the case, and dismissed it (see paragraph 55 above). Furthermore, the Court observes that, in line with domestic law, the discontinuation of the criminal case as time-barred precluded the courts in the criminal proceedings from examining the applicant's civil claim (see paragraphs 62-63 above). The Court therefore considers that in the specific circumstances of the present case, an appeal against the judgment of 14 May 2012 would not have offered the applicant any reasonable prospect of success in respect of his complaint and thus was not a remedy which he had to exhaust (see, *mutatis mutandis*, *P.M. v. Bulgaria*, no. 49669/07, § 59, 24 January 2012).

70. Accordingly, the Court dismisses the Government's preliminary objection that the applicant failed to exhaust domestic remedies by not appealing against the Klaipėda District Court's judgment of 14 May 2012.

(b) Separate civil proceedings

71. The Government submitted that the applicant had had the right to institute civil proceedings for damages against V.J.S. or any other person whom he considered responsible for the accident, but had failed to do so. They provided examples of domestic case-law where individuals had been awarded damages in civil proceedings, even after the criminal cases had been terminated.

72. The Government further submitted that the applicant had had the right to institute civil proceedings against the State to claim non-pecuniary damages for conducting an ineffective pre-trial investigation. They also provided examples of domestic case-law where such damages had been awarded.

73. The applicant argued that all the cases cited by the Government were different from his. He also submitted that his former employer, company N., had been declared bankrupt in February 2011, thereby making it impossible to claim any damages from it.

74. The Court reiterates that where more than one potentially effective remedy is available, the applicant is only required to have used one remedy of his or her choice (see, among many other authorities, *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 40, 19 February 2009; *Micallef v. Malta* [GC], no. 17056/06, § 58, ECHR 2009; *Karakó v. Hungary*, no. 39311/05, § 14, 28 April 2009; *Nada v. Switzerland* [GC], no. 10593/08, § 142, ECHR 2012; *Göthlin v. Sweden*, no. 8307/11, § 45, 16 October 2014; and *O'Keeffe v. Ireland* [GC], no. 35810/09, §§ 109-111, ECHR 2014 (extracts)). In the present case, the applicant fully exhausted the criminal law avenues against the individual whom he considered responsible for the accident: he asked the prosecutor to open a pre-trial investigation, was granted the status of a victim, participated in the pre-trial investigation and in the court proceedings by giving statements and lodging appeals, and submitted a civil claim in those criminal proceedings (see paragraphs 11, 13, 18, 22, 24, 27, 30, 34, 37, 47 and 50 above). Accordingly, in the circumstances of this case, the Court does not share the Government's view that the applicant ought to have used a separate remedy of civil proceedings either against V.J.S. or the bankrupt company N. (see paragraph 73 above).

75. The Court also considers that a civil claim against the State in respect of the failure to conduct an effective investigation into the accident in which the applicant was injured would not have provided him any redress in terms of ensuring the effectiveness of that investigation (see *Mircea Pop v. Romania*, no. 43885/13, § 61, 19 July 2016).

76. Accordingly, the Court dismisses the Government's preliminary objection that the applicant failed to exhaust domestic remedies by not instituting separate civil proceedings.

2. Conclusion

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

B. Merits

1. The parties' submissions

78. The applicant submitted that the pre-trial investigation into the circumstances of the accident had been protracted and ineffective, in particular because the prosecutor had discontinued it three times without taking into account the findings of the State Labour Inspectorate and the forensic expert that the accident had been caused by unsafe working conditions. He further argued that the examination of the criminal case had been repeatedly adjourned by the domestic court without good reason, until it had become time-barred.

79. The Government submitted that the pre-trial investigation had been opened immediately after the applicant's request, that the applicant had been fully involved in the proceedings, and that the authorities had made a serious attempt to establish all the relevant circumstances – they had questioned more than fifty witnesses, arranged numerous formal confrontations between them, collected relevant documents, and had identified the person responsible for the accident – the construction manager V.J.S.

80. The Government further contended that the length of the pre-trial investigation (three years and seven months) had been caused by the scope and complexity of the case – in particular because many of the witnesses had lived in different parts of the country and thus it had been necessary to request that the respective territorial police departments carry out interviews. They also submitted that the repeated termination and reopening of the investigation did not imply that it had been inefficient but, on the contrary, had shown "the authorities' due regard towards the applicant's complaints". Lastly, the Government submitted that the hearings before the domestic court had been adjourned because of the accused's illness and not because of any omissions on the part of the authorities.

2. The Court's assessment

81. The Court notes at the outset that as a result of an accident at work the applicant suffered injuries to his face and chest, which caused disfigurement and impaired his ability to make facial expressions. A medical examination found that the applicant's injury was irreparable and classified it as serious health impairment (see paragraph 14 above). Accordingly, the Court is of the

view that the situation attains the threshold of severity necessary to fall within the scope of Article 3 of the Convention.

82. In this connection the Court reiterates that Article 3 of the Convention requires that the authorities conduct an effective official investigation into alleged ill-treatment, even if such treatment has been inflicted by private individuals (see *O'Keeffe*, cited above, § 172, and *Kraulaidis v. Lithuania*, no. 76805/11, § 57, 8 November 2016, and the cases cited therein). The procedural obligation under Article 3 of the Convention requires that any investigation should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible for an offence. This is not an obligation as to result, but as to means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, such as taking witness statements and gathering forensic evidence (see *N.D. v. Slovenia*, no. 16605/09, § 57, 15 January 2015, and the cases cited therein).

83. The Court also reiterates that the promptness of the authorities' reaction to complaints is an important factor. In previous judgments the Court has given consideration to matters such as the time taken to open investigations, delays in identifying witnesses or taking statements, and the unjustified protraction of criminal proceedings resulting in the expiry of the statute of limitations (ibid.). Moreover, where the investigation leads to charges being brought before the national courts, the positive obligations under Article 3 of the Convention extend to the trial stage of the proceedings. In such cases, the proceedings as a whole, including the trial stage, must meet the requirements of Article 3. In that respect, the Court reiterates that, regardless of the final outcome of the proceedings, the protection mechanisms available under domestic law should operate in practice in a manner allowing for the examination of the merits of a particular case within a reasonable time (ibid., § 58, and the cases cited therein).

84. Turning to the circumstances of the present case, the Court does not question the assessment of the domestic authorities that the case concerning the applicant's injury was complex, as it required rather specific technical knowledge and involved a large number of witnesses living in different parts of the country. Nonetheless, the Court is of the view that complexity alone cannot justify the duration of the proceedings – three years and seven months in the hands of the prosecutor, and one year and one month awaiting examination by the first-instance court, before the case was terminated as time-barred. While there do not appear to have been any significant periods of inactivity on the part of the authorities, the Court observes that some of the essential investigative measures were taken inexplicably late. The applicant told the investigator during his first interview on 13 November 2007 that the scaffolding had collapsed because of the weight of the metal platform. However, the authorities did not attempt to clarify whether the platform had been carried at the employer's instruction until April 2009 (one year and

seven months after the start of the investigation), and did not request that a forensic expert determine the precise course of events of the accident until January 2010 (two years and four months after the start of the investigation) (see paragraphs 20, 28 and 31 above). In this context the Court notes that on several occasions senior prosecutors acknowledged that the investigation was not being carried out with sufficient promptness (see paragraphs 24 and 30 above), yet it does not appear that effective measures were taken to speed up the investigation.

85. The Court further notes that the prosecutor discontinued the pre-trial investigation three times and that each of those decisions was overruled by courts, finding that the prosecutor had not examined all the essential circumstances of the case or had made conclusions which had been "speculative and not based on any objective facts" (see paragraphs 18, 27, 28 and 34 above). The Court reiterates that the repetition of such decisions may disclose a serious deficiency in the proceedings (see *Wierciszewska v. Poland*, no. 41431/98, § 46, 25 November 2003; *Drozd v. Ukraine*, no. 12174/03, § 66, 30 July 2009; and *Kapustyak v. Ukraine*, no. 26230/11, § 78, 3 March 2016), and in the present case there are no weighty reasons to hold otherwise. In particular, the Court observes that although the applicant consistently claimed that he had fallen from the scaffolding because of its collapse (see paragraphs 7 and 13 above), in the initial decisions to discontinue the investigation the prosecutor did not examine the reasons for that collapse, instead focusing on the alleged recklessness of the applicant himself (see paragraphs 17 and 26 above). The Court also shares the concern of the domestic courts that even though the State Labour Inspectorate and a forensic expert had concluded that the accident had been caused by the employer's failure to comply with work safety requirements, the prosecutor's decisions to discontinue the investigation did not address the findings of those specialist bodies and did not provide any reasons for rejecting them (see paragraphs 18 and 34 above). Furthermore, while there were suspicions that some witnesses had been pressured by the applicant's employer to give false testimony, it does not appear that the authorities examined those suspicions (see paragraphs 23, 28 and 33 above). In such circumstances, the Court is of the view that the pre-trial investigation could not be considered thorough.

86. Lastly, the Court observes that when the case was transferred to the Klaipėda District Court for examination on the merits, only slightly more than one year remained until the expiry of the statute of limitations. In those circumstances the Court considers that the domestic courts should have acted diligently and at a reasonable pace in order to examine the merits of the case and adopt a judgment before the prosecution became time-barred (see, *mutatis mutandis*, *Velev v. Bulgaria*, no. 43531/08, § 58, 16 April 2013). However, the case had to be repeatedly adjourned, first because of the absence of witnesses, and later because of the illness of the accused. As noted by the domestic court, the relevant provisions of the Criminal Code in force

at the time of the accident required the application of the statute of limitations "unconditionally" and did not permit its suspension during adjournments (see paragraphs 53 and 59 above). The Court notes that that legal framework was changed in June 2010 and currently the Criminal Code of Lithuania provides, *inter alia*, that during the examination of a case by a court, the running of the limitation period is suspended when a trial is adjourned because of the absence of the accused (see paragraph 60 above). While it is not the role of this Court to determine what domestic legal framework is the most appropriate for ensuring the rights guaranteed by the Convention (see, *mutatis mutandis*, *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, § 105, ECHR 2012 (extracts), and the cases cited therein), it reiterates that the manner in which the limitation period is applied must be compatible with the requirements of the Convention (see, *mutatis mutandis*, *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, § 326, ECHR 2014 (extracts)). In the present case, while the Court accepts that the case was adjourned for important reasons, it cannot help but notice that the lack of any possibility to suspend the statute of limitations during the adjournment of the case deprived the applicant of the opportunity to have the question of responsibility for his injury examined by a court.

87. The foregoing considerations are sufficient to enable the Court to conclude that there has not been an effective investigation into the circumstances of the accident in which the applicant was injured. There has accordingly been a violation of Article 3 of the Convention under its procedural limb.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

88. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

89. The applicant claimed 17.82 euros (EUR) in respect of pecuniary damage for medical expenses because of his injuries. He also claimed EUR 280,000 in respect of non-pecuniary damage, stating that the accident and the resulting injuries, particularly the disfigurement of the face, had caused him severe physical and psychological suffering.

90. The Government contended that the receipts submitted by the applicant did not specify what medical services were provided and whether

they had been related to the accident. They also submitted that the applicant's claim in respect of non-pecuniary damage was excessive and unsubstantiated.

91. The Court notes that just satisfaction can be awarded in so far as the damage is the result of a violation found, and that no award can be made for damage caused by events or situations which have not been found to constitute a violation of the Convention, or for damage related to complaints declared inadmissible. In the present case the Court has found a violation of the procedural limb of Article 3 of the Convention on account of an ineffective investigation into the circumstances of the applicant's injuries. It considers that the applicant's medical expenses cannot be directly linked to that violation and therefore rejects the applicant's claim in respect of pecuniary damage.

92. On the other hand, the Court considers that the violation found in the present case undoubtedly caused the applicant distress and frustration. However, it considers the amount claimed by the applicant excessive. Making its assessment on an equitable basis, the Court awards the applicant EUR 6,500 in respect of non-pecuniary damage.

B. Costs and expenses

93. The applicant also claimed EUR 369.65 for the costs and expenses incurred before the domestic courts and before the Court. He submitted supporting documents for legal and photocopying expenses amounting to EUR 309.

94. The Government contended that the receipts submitted by the applicant did not specify what legal services had been provided to him and whether any of the photocopying expenses had been specifically related to the present case.

95. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court awards the sum of EUR 309 covering costs under all heads.

C. Default interest

96. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, that the applicant's heir has standing to continue the present proceedings in his stead;

2. *Declares*, by a majority, the application admissible;

3. *Holds*, by six votes to one, that there has been a violation of Article 3 of the Convention under its procedural limb;

4. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicant's heir (see paragraph 64 above), within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 6,500 (six thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 309 (three hundred and nine euros), plus any tax that may be chargeable, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 April 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

András Sajó
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) joint concurring opinion of Judge Sajó and Judge Tsotsoria;
(b) dissenting opinion of Judge Bošnjak.

A.S.
M.T.

JOINT CONCURRING OPINION OF JUDGES SAJÓ AND TSOTSORIA

This judgment follows a line of the Court's case-law that disregards the Grand Chamber judgment in *Calvelli and Ciglio v. Italy* ([GC], no. 32967/96, ECHR 2002-I) and, without making a proper distinction, applies to private negligence the case-law that has been developed and applied in relation to inhuman and degrading conduct on the part of State agents exercising physical power. Together with other colleagues, we expressed our reservations in *Kraulaidis v. Lithuania* (no. 76805/11, 8 November 2016) and we cannot agree with the present judgment to the extent that its finding of a violation of Article 3 is based on the assumption that *O'Keeffe v. Ireland* ([GC], no. 35810/09, ECHR 2014 (extracts)) requires the same standard to apply irrespective of whether the inhuman or degrading treatment by private individuals was inflicted voluntarily or not. Moreover, we are of the view that where a more effective remedy exists than the criminal one, applicants must avail themselves of that remedy, although in the circumstances of the case no such remedy was available and therefore the application is admissible.

Contrary to the situation in *Kraulaidis* and its progeny, there was enough evidence in the present case for the prosecutor to indict the construction site manager for a non-negligent crime (see paragraph 40 of the judgment), although this does not apply to the initial period of the investigation, when the available information, including official reports to the State Labour Inspectorate, indicated only formal breaches of safety rules. Moreover, in 2009 a court had already found that "some witnesses" had admitted to giving false testimony under pressure from the employer (see paragraph 28). In view of the above, there must have been grounds for treating this case with all the care that is due when an investigation is conducted into a substantiated allegation of at least serious recklessness. However, the domestic courts did not exercise proper diligence, even though they should have been aware of the fact that the prosecution would soon become time-barred.

DISSENTING OPINION OF JUDGE BOŠNJAK

1. Unfortunately, I cannot agree with the majority that the application in the present case should be declared admissible. Furthermore, even assuming that the conditions for the application's admissibility were met, it is my belief that the Chamber should not find a violation of Article 3 of the Convention.

2. Following the workplace accident which resulted in serious impairment of the applicant's health, he decided to seek a criminal-law response against those responsible for the incident, by turning to the Klaipeda city prosecutor's office. In the course of the ensuing criminal proceedings, the applicant lodged a claim for civil damages. On 8 May 2012 the Klaipeda District Court terminated the case against V.J.S. on the ground that the prosecution had become time-barred. The court decided that the applicant's civil claim should not be examined and that the applicant should instead institute civil proceedings. Such a decision was in accordance with the relevant provisions of the Lithuanian Code of Criminal Procedure and the case-law of the Supreme Court of Lithuania. This legal framework is not unique to Lithuania – indeed, it can be encountered in several other High Contracting Parties to the Convention. Its logic is clear: while there may exist procedural or/and substantive obstacles to finding a defendant criminally responsible, there may still be grounds to grant the related civil claim, but these are to be determined in separate civil proceedings. The Government have provided the Court with examples of successful civil actions brought by plaintiffs subsequent to criminal proceedings in which the defendants were not convicted. It appears from those examples that the applicant in the present case could possibly have been successful with his claim had he continued to pursue it in civil proceedings, as instructed by the Klaipeda District Court. For reasons unknown to our Court, he failed to act accordingly and thereby discontinued his action against V.J.S.

3. It may well be considered reasonable for a victim to join the criminal proceedings against a defendant by lodging a civil claim, rather than by instituting separate civil proceedings. However, if a criminal-law action against a defendant does not lead to a conviction and consequently, in view of the provisions of the particular legal system, no decision on the merits of the civil claim is taken, this claim will remain to be decided in civil proceedings. Although burdensome for the victim, this path is to be considered legally coherent and acceptable. Since the applicant in the present case did not use it, his civil claim remained undecided on the merits by the courts of the respondent State. In my opinion, this should lead to a conclusion that the applicant failed to exhaust the available domestic legal remedies. Consequently, the application should have been declared inadmissible.

4. Notwithstanding the issues of admissibility, I believe that in the present case there was no violation of Article 3 of the Convention. While it is true that under the case-law of this Court (see, for example, *O'Keefe v. Ireland*,

[GC], no. 35810/09, ECHR 2014), Article 3 of the Convention requires that the authorities conduct an effective official investigation into alleged ill-treatment even where such treatment has been inflicted by private individuals, one must first discern the conduct that can possibly fall within the ambit of Article 3. The case-law of the Court, adjudicating on the positive obligation of the High Contracting Parties under the procedural limb of Article 3 of the Convention, has dealt with cases of rape, sexual abuse or violence (see *O'Keeffe v. Ireland*, cited above; *C.A.S. and C.S. v. Romania*, no. 26692/05, 20 March 2012; *M.C. v. Bulgaria*, no. 59297/12, 25 March 2014; *Y. v. Slovenia*, no. 41107/10, 28 May 2015), in certain instances coupled with illegal confinement (see *S.Z. and others v. Bulgaria*, no. 29263/12, 3 March 2015). Some of the cases examined have concerned family violence (see *M. and M. v. Croatia*, no. 10161/13, 3 September 2015) or violent beating and injuries in a fight (see *Sakir v. Greece*, no. 48475/09, 24 March 2016; *Dimitar Shopov v. Bulgaria*, no. 17253/07, 16 April 2014; *Biser Kostov v. Bulgaria*, no. 32662/06, 10 January 2012; and *Beganović v. Croatia*, no. 46423/06, 25 June 2009). What these cases have in common is conduct containing elements of violence, inducing feelings of humiliation and degradation in the victim. In each case, this conduct was directed against a specific victim (who later became an applicant before the Court), more specifically against his or her life or limb and/or personal integrity. It was committed intentionally, with the possible exception of the case of *Muta v. Ukraine* (no. 37246/06, 31 July 2012), where it remained open whether the perpetrator had acted intentionally or with negligence – in all other aspects, that case did not differ from the above-mentioned cases of ill-treatment by private individuals. Apparently, there exist important similarities between the conduct qualified as ill-treatment in those cases and the brutality inflicted by police and other State agents that was at the heart of the Article 3 case-law as it was developed over the decades.

5. Recently, a Chamber of the Fourth Section delivered a judgment in the case of *Kraulaidis v. Lithuania* (no. 76805/11, 8 November 2016). It found a violation of the procedural limb of Article 3 in a case concerning a traffic accident. This judgment is inconsistent with the existing well-established case-law. Previously, any deficiencies in judicial proceedings concerning traffic and other accidents were analysed under Article 6 of the Convention (see, for example, *Dragomir v. Romania*, no. 43045/08, 14 June 2016; *Atanasova v. Bulgaria*, no. 72001/01, 2 October 2008; and *Buonfardieci v. Italy*, no. 39933/03, 18 December 2007). The judgment in *Kraulaidis v. Lithuania* created considerable unease among four judges of the composition, who decided to write a concurring opinion. They explicitly highlighted the absence of the ill-treatment aspect in a car accident caused by negligence (see § 12 of the concurring opinion) and called upon the Grand Chamber to stop the drift into trivialisation of Article 3 rights (see § 7 of the concurring opinion). Nevertheless, this majority within the Chamber chose not to vote

against the finding of a violation of the procedural limb of Article 3 of the Convention.

6. The judgment in the present case goes a step further. It is inconsistent with the case-law cited in § 4 of this dissenting opinion. The specific conduct resulting in the applicant's accident has never been established, but it is allegedly related to the deficient organisation of the construction site. In contrast to the acts qualified as ill-treatment in the above-mentioned cases, such failure to ensure deficient organisation was not a violent act and did not on the face of it include any element of humiliation and debasement of the victim, that is, of the applicant. What is more, it was not directed against the applicant[1], let alone against his life, limb or personal integrity. Instead it appears from the provisions of Article 176 of the Lithuanian Criminal Code (hereinafter referred to as the LCC) that the criminalisation of acts under this provision is targeted at the protection of safety and health at work, which are legal goods only remotely and indirectly connected with the physical and personal inviolability of an individual. The alleged perpetrator, V.J.S., was initially accused of intentional and subsequently of negligent disregard of workplace safety rules. However, this mental element of the offence did not relate to the serious bodily injury sustained by the applicant. According to the wording of Article 176 of the LCC, a violation of the requirements of safety protection at work is considered a criminal offence when it results in an accident involving people or causing other serious consequences. The offender's intent (or negligence, if § 3 of Article 176 of the LCC is applicable) relates to the violation of safety or health requirements and not to the consequence, which in the present case was the serious bodily harm suffered by the applicant. The result is the so-called objective condition of criminalisation (in German, *die Objektive Bedingung der Strafbarkeit*). In other words, according to Article 176 of the LCC, neither intent nor negligence is required in relation to the bodily harm suffered by the victim (the applicant in our case). This illustrates an additional trivialisation of the Court's case-law with regard to Article 3.

7. Finally, one should not forget that the applicant never claimed a violation of Article 3. He never asserted that he had been tortured or treated in an inhuman or degrading manner. Instead, he relied upon Articles 6 and 13 of the Convention. Nevertheless, the Chamber decided to examine the case under Article 3 of the Convention, relying upon the Court's role as the master of legal characterisation. It is my belief that this role should be exercised with the utmost caution. To be specific, there exists an imminent danger of reading into an application facts and circumstances that are not contained within it, and in consequence, examining it under an angle that was never envisaged by the person who lodged it. In such cases, the Court decides *ultra petitum*,

[1] According to its settled meaning, the word treatment (Fr. *le traitment*) relates to the act or manner of dealing with someone.

which is incompatible with its role as a court. It is likely that in the present case the Chamber decided to rule in favour of the applicant due to a feeling of sympathy for the injustice arguably experienced by the applicant. In order to pave the way for this outcome, the Chamber identified Article 3 of the Convention as the provision best suited to that purpose and interpreted it in the manner described above.

8. I have to dissent from such an approach. While it is true that the Convention is a living instrument, its interpretation cannot be construed beyond the meaning of its provisions. It is unlikely that an average qualified observer would characterise an unsafe construction site as an instance of the inhuman or degrading treatment that the High Contracting Parties have a positive obligation to prevent and investigate. For this reason, I decided to vote against finding a violation of Article 3 of the Convention.