SECOND SECTION

AS TO THE ADMISSIBILITY OF

Application no. 74355/01
by Eglė MILINIENĖ
against Lithuania

The European Court of Human Rights (Second Section), sitting on 26 April 2005 as a Chamber composed of:

Mr A.B. Baka, *President*,
Mr J.-P. Costa,
Mr R. Türmen,
Mr K. Jungwiert,
Mr M. Ugrekhelidze,
Mrs A. Mularoni,
Mrs E. Fura-Sandström, *judges*,
and Mr S. Naismith, *Deputy Section Registrar*,

Having regard to the above application lodged on 20 April 2001,

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

Having regard to the fact that Mrs D. Jočienė, the judge elected in respect of Lithuania, withdrew from sitting in the case (Rule 28), and that the respondent Government appointed Mr J.-P. Costa, the judge elected in respect of France, to sit in her place (Article 27 § 2 of the Convention and Rule 29 § 1),

Having deliberated, decides as follows:

THE FACTS

The applicant, Mrs Eglė Milinienė, is a Lithuanian national who was born in 1964. At present she is detained in Sniego prison in Vilnius. The respondent Government were represented by Mrs Danutė Jočienė, of the Ministry of Justice.

A. The circumstances of the case

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

The applicant worked as a judge.

The applicant alleges that on 16 June 1998 she was approached by SŠ, an acquaintance, who offered her a bribe in return for a favourable resolution of a civil dispute.

The Government submit that it was the applicant who demanded a bribe from SŠ during their previous meeting on 10 June 1998 which had been secretly recorded by SŠ.

On 16 June 1998 a special anti-corruption police unit of the Ministry of Interior (STT) applied to the Deputy Prosecutor General, requesting a "Criminal Conduct Imitation Model" ("the model") to be authorised for a period of one year (see the 'Relevant domestic law and practice' part below). It was stated in the application that on 16 June 1998 SŠ had approached the STT, complaining that the applicant had demanded a bribe in the form of a new car. The STT also submitted that SŠ had brought an audio recording of his conversation with the applicant of 10 June 1998, secretly made by

him on his own initiative. The STT requested that SŠ be authorised to give a bribe to the applicant with a view to discontinuing her unlawful actions.

On 17 June 1998 the model was authorised by the Deputy Prosecutor General.

On 8 October 1998 the STT wrote a letter to the Prosecutor General, informing him about the facts based on the conversations secretly recorded by SŠ with the equipment given by the anti-corruption police:

By 16 June 1998 SŠ had spoken to the applicant twice. In the course of their meetings, the applicant had demanded a bribe of USD 10,000 in return for a favourable resolution of SŠ's civil dispute.

Following the authorisation of the model on 17 June 1998, SŠ had been given money by the anti-corruption police. On the same date he had handed over to the applicant USD 10,000, which she used to buy a new car. At their next meeting on 17 June 1998, the applicant had drafted SŠ's civil claim and had instructed him on the further course of the proceedings. On 30 June 1998 the applicant had further instructed SŠ on his case, whilst assuring him of the favourable outcome of the dispute. On 11 September 1998 the applicant had asked SŠ to obtain new winter tyres for her car. On 24 and 25 September 1998 the applicant had informed SŠ that further payments would be required to buy off certain judges of a higher court. On 28 September 1998 the applicant had taken from SŠ a further bribe of USD 500 for the winter tyres. On the same date she had obtained from him USD 1,000 for bribing the higher judges.

The STT stated that the applicant had thus taken a total of USD 11,500 from SŠ, and that she had demanded a further bribe of USD 4,000 to successfully resolve his case. The STT submitted that the case materials disproved any element of provocation against the applicant to accept a bribe, on the basis of the following circumstances:

1) the applicant had recommended a particular lawyer to SŠ for his civil case;

2) she had drafted his claim;

3) the applicant had registered SŠ's case in court and had personally undertaken to examine it;

4) having received the bribe, she had bought a new car; and

5) the applicant had met SŠ on a number of occasions on her own initiative, whilst assuring him of the favourable outcome of the dispute.

On 9 October 1998 the applicant was apprehended in her office whilst receiving a further USD 4,000 from SŠ.

On the same date the STT wrote a further letter to the Prosecutor General, requesting that criminal proceedings be instituted against the applicant, reiterating the information communicated in the letter of 8 October 1998.

On 9 October 1998 the Prosecutor General decided to institute criminal proceedings against the applicant for accepting a bribe (Article 282 of the Criminal Code as then in force).

On 12 October 1998 the Prosecutor General applied to Parliament, requesting that the applicant's judicial immunity be lifted and that she be suspended from her functions pending the outcome of the criminal case. It was noted in this connection that the applicant had demanded and obtained a bribe from SŠ.

On 5 November 1998 Parliament lifted the applicant's judicial immunity.

By a decree of 10 November 1998, the President dismissed the applicant from her position as a judge.

SŠ died on 12 April 1999.

On 25 May 1999 the applicant was indicted for accepting a bribe in large quantities (Article 282 paragraph 2 of the Criminal Code as then in force), cheating (Article 274) and official malpractice (Article 285).

On 4 August 1999 the prosecution rejected the applicant's request to discontinue the case.

On 9 August 1999 the case was transmitted to a court.

On 17 August 1999 a judge of the Vilnius Regional Court committed the applicant for trial on the above counts.

On 7 October 1999 the applicant requested the Vilnius Regional Court to apply to the Constitutional Court to examine the compatibility of the Operational Activities Act with the Lithuanian Constitution. In particular, she claimed that the Act had not duly protected persons from possible incitement by the investigating authorities. In addition, it was alleged that the power conferred upon the prosecution under the Act to authorise the model - which effectively allows private persons like SŠ to imitate criminal acts but avoid criminal liability - had gone beyond the constitutional competence of the prosecutors, with the result that the authorisation of such models should have been decided by courts. She further claimed that a judicial authorisation should have been required for certain intrusive measures under the Act such as secret recordings of conversations.

On 8 October 1999 the Vilnius Regional Court accepted the request, applying to the Constitutional Court with a view to establishing the compatibility of the Operational Activities Act with the Constitution.

On 8 May 2000 the Constitutional Court found that the Operational Activities Act was generally compatible with the Constitution (see the admissibility decision in *Bendžius v. Lithuania*, no 67506/01).

In the course of the trial, the Vilnius Regional Court reclassified the charge of cheating to that of attempting to take a bribe.

On 22 September 2000 the Vilnius Regional Court convicted the applicant for accepting a bribe in large quantities (Articles 282 paragraph 2 of the Criminal Code as then in force), attempting to take a bribe (Articles 16 and 284) and official malpractice (Article 285), sentencing her to four years' imprisonment. She was acquitted of cheating (Article 274). The court based the conviction mostly on the video and audio recordings made by SŠ when implementing the model, finding that she had accepted a bribe of USD 10,500, and that she had further obtained USD 1,000 with the intention of bribing higher court officials. It was found that, in return for the bribe, the applicant had drafted SŠ's civil claim, had made the necessary arrangements to be appointed as the judge in his case, and had started examining it. The court did not find that the USD 4,000 obtained by the applicant from SŠ on 9 October 1998 had been used for any criminal intent, acquitting her in respect of receiving that amount. As regards the applicant's allegations of incitement, the court held:

> "The acts of [SŠ] as a whole are not considered as a provocation because he acted under [the model] authorised in accordance with the law[;] from his application [of 16 June 1998], it appears that he applied to the law enforcement authorities alleging unlawful actions on the part of [the applicant]. ... The case contains no objective evidence of close or intimate relations between [SŠ and the applicant], or that she would have been threatened ...
>
> The [anti-corruption] police having analysed the preliminary information about [the applicant's] criminal intentions, following the authorisation of [the] model in accordance with the law, [SŠ] "joined" the continuing offences of the applicant ... The chamber considers that [SŠ] did not overstep the limits established by [the] model."

The court excluded from the incriminating evidence against the applicant a transcript of a telephone conversation between her and SŠ on 16 June 1998, as it had been obtained without the appropriate judicial authorisation. However, the court found no domestic unlawfulness in the admission as evidence of the remainder of SŠ's conversations with the applicant, secretly recorded between 16 June 1998 and 9 November 1998.

Upon the applicant's appeal, on 23 November 2000 the Court of Appeal amended the lower judgment, quashing the applicant's conviction for official malpractice, but upholding her conviction for accepting a bribe. The sentence of imprisonment remained unchanged. The Court of Appeal confirmed the exclusion from the evidence of the wiretapped conversation of 16 June 1998. However, the court ruled that the initial recording of the applicant's conversation with SŠ on 10

June 1998, and the rest of the evidence subsequently collected in implementation of the model, had been lawful, there being no signs of incitement to commit the offences.

The applicant submitted a cassation appeal, claiming *inter alia* that she had been incited to accept a bribe by SŠ, acting on the orders of the police authorities.

On 13 March 2001 the Supreme Court rejected the applicant's allegations, upholding her conviction and sentence. It took into account the active steps taken by the applicant to fix SŠ's case unlawfully, and the absence of any indication that the applicant had attempted to stop acting in this manner during the implementation of the model. The Supreme Court held *inter alia* that the offer of a bribe cannot be regarded as "active pressure" to commit an offence. The court also found that the audio and video recordings made by SŠ had been properly admitted as evidence, and that the unlawfully-obtained evidence (the wiretapped telephone conversation of 16 June 1998) had been rightly excluded from the case.

B. Relevant domestic law and practice

The relevant domestic law and practice is set out in the decision on admissibility in the case of *Bendžius v. Lithuania* (decision of 26 April 2005, no. 67506/01).

COMPLAINTS

1. Under Article 6 of the Convention, the applicant complained that she had been unfairly convicted of accepting a bribe. In particular, she stated that she had fell victim to the incitement of the State authorities, acting through an undercover agent, SŠ. According to the applicant, the admission of the evidence collected as a result of the implementation of the model had been unlawful under domestic law and the Convention.

2. Under the above provision, the applicant also complained that the courts in her case had not been impartial as the judges had taken wrong decisions under domestic law and the Convention.

3. Under Article 8 of the Convention, the applicant complained about the admission at trial of the transcripts of her conversations with SŠ which he had secretly recorded. In particular, no judicial authorisation had been obtained for such recordings. Consequently, the transcripts had been admitted in evidence in breach of domestic law.

THE LAW

1. The applicant alleged a breach of her right to a fair trial under Article 6 § 1 of the Convention, which provides, insofar as relevant, as follows:

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

The Government submitted first that the Court was not competent to deal with the applicant's complaints in that they related mostly to questions of fact and the application of domestic law, thus amounting to "fourth instance issues".

The Government contended that in any event there had been no incitement of the applicant, and no breach of Article 6 by the application of the model in her case. The model had been authorised in order to secure the important interests of society, on the basis of the complaint by SŠ, alleging that the applicant had demanded a bribe. The Government stressed that the authorisation of the model and the use of SŠ as an undercover agent had served only to facilitate the investigation of the offences which had been prepared and executed on the applicant's initiative and will. In authorising

and executing the model, the authorities had only sought to "join the applicant's continuing criminal acts." No inappropriate pressure had been put on the applicant. Her active steps in drafting SŠ's civil claim, undertaking to examine it in court and promising to bribe higher court officials, showed that she would have committed the crimes even without SŠ's or the authorities' intervention. In sum, there had been no incitement to commit the crimes, in contrast to the *Teixeira de Castro v. Portugal* case (no. 25829/94, 9.6.1998, ECHR 1998-IV, §§ 34-39).

The applicant stated that there had been a breach of her right to a fair trial in view of the authorisation and implementation of the model against her. She stated that the model had been used in breach of domestic law, and thus the secret recordings had been made and admitted as evidence unlawfully. She further stated that the initial information submitted by SŠ to the authorities on 16 June 1998 had not been sufficient to suspect her of being inclined to bribery. The authorisation of the model in her case had thus served to create evidence of a fresh offence, rather than to investigate an offence which she had been predisposed to commit. She stated that, as a result, she had been entrapped in the crimes set up by SŠ and the authorities. Furthermore, the applicant submitted that the domestic courts had not given an adequate answer to her complaints about the alleged incitement against her. In particular, she drew attention to the statement of the Supreme Court that an offer to accept a bribe could not be regarded as "active pressure" to commit an offence.

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

2. To the extent that the applicant alleged bias on the basis of the decisions which the judges had taken or had failed to take in her case, the Court notes that the applicant simply contested the competence of judges in carrying out their statutory functions. However, she did not present any evidence, of either a subjective or objective nature, which might disclose any appearance of the courts' lack of impartiality within the meaning of Article 6 § 1 (see, by contrast, the *Daktaras v. Lithuania* *judgment*, no. 42095/98, 10.10.2000, §§ 30-38; ECHR 2000-X).

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

3. The applicant also alleged a violation of Article 8 of the Convention, which provides, insofar as relevant, as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime ... ."

In this context, the applicant objected to the admission in evidence at her trial of the transcripts of the conversations secretly recorded by SŠ. The recordings had not been ordered by a judge as, she claimed, was required by domestic law. However, the Court notes that the evidence obtained unlawfully under domestic law (a wiretapped telephone conversation of 16 June 1998) was in fact excluded from the case. The other recordings made by SŠ were deemed to have been obtained lawfully and admitted in evidence. Their lawfulness was confirmed by the courts at three instances, which thoroughly and carefully examined the applicant's allegations in this respect.

Accordingly, the Court finds nothing in the case file which would cast a doubt on the premise that the interference with the applicant's rights was prescribed by law, pursued the legitimate aim of the prevention of crime, and was proportionate to that aim, within the meaning of Article 8 of the Convention (see, *Butkevičius v. Lithuania* (dec.), no. 48297/99, 28.11.2000).

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaint under Article 6 § 1 of the Convention about a breach of her right to a fair hearing as regards an alleged incitement to commit an offence;

Declares the remainder of the application inadmissible.

S. Naismith A.B. Baka
Deputy Registrar President

MILINIENĖ v. LITHUANIA DECISION