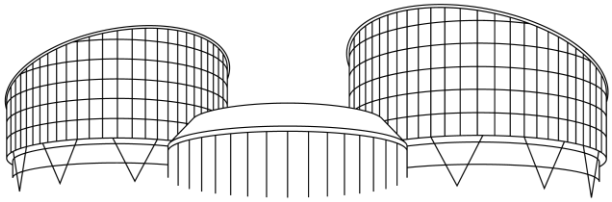

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 27925/08
by Marė ŠEDBARIENĖ
against Lithuania

The European Court of Human Rights (Second Section), sitting on 23 February 2010 as a Chamber composed of:

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Nona Tsotsoria, *judges,*

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having regard to the above application lodged on 26 May 2008,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Marė Šedbarienė, is a Lithuanian national who was born in 1943 and lives in Tauragė.

A. The circumstances of the case

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

On 10 April 2005 the applicant's son, M.Š., who was 20 years old at the time, was found dead in the grounds of a kindergarten. His body showed traces of violence. The same day, the authorities opened a pre-trial investigation on suspicion that a murder had been committed (Article 129 § 1 of the Criminal Code).

On 11 April 2005 the authorities issued the death certificate, which stated that the cause of death had been the loss of body temperature.

On 12 April 2005 the investigator requested the Mykolas Romeris University Forensic Medicine Institute (hereinafter the "MRU FMI") to establish M.Š.'s cause of death.

On 19 May 2005 the MRU FMI's expert, D. Vitkus, in a report (no. M327/05 (03), "the first expert report"), found that M.Š.'s blood alcohol level content (BAC) and urine alcohol level content had been 2.8 and 4.9 respectively, which showed that, before his death, M.Š. had been highly intoxicated and could have died from alcohol poisoning. Given that there were no cracks in M.Š.'s skull and his inner organs had not been damaged, there was no ground to conclude that his death was the result of violence. The expert report also stated that, after sustaining the injuries, the applicant's son could have lived for a few hours and that the injuries which M.Š. had sustained would have amounted to a light health impairment for a living person.

The applicant and her lawyer contacted another expert, A. Garmus, asking if he would conduct a new expert examination. On 17 September 2005 that expert produced his report (no. A-KJ-38-51, "the second expert report"), stating that the cause of M.Š.'s death could have been (*galėjo būti*) a severe head injury, since M.Š. had sustained no fewer than fourteen blows to the head. The expert ruled out alcohol poisoning or loss of body temperature as possible causes of death.

On 31 August 2005 the prosecutors transferred the case to the Tauragė District Court, charging Donatas V. and Darius V. with having lightly impaired the health of the applicant's son, as well as offences of theft and robbery.

On 7 February 2006 the Tauragė District Court, on a request of the prosecutor and the applicant's counsel, commissioned the MRU FMI to conduct a new expert examination.

On 28 March 2006 the MRU FMI's experts, J. Rybalko and R. Sitienė, concluded their examination and presented their results in a report (no. EKM 42/06(01), "the third expert report"), stating that M.Š. had died from alcohol poisoning and that there was no causal link between his death and the injuries he had sustained. Furthermore, there was no evidence that M.Š. had died from a loss of body temperature.

In view of inconsistencies in the expert reports as to the cause of M.Š.'s death, at a hearing held on 18 May 2006 the applicant asked the Tauragė District Court to commission the experts who had already given their

reports, as well as an expert on toxicology and a neurosurgeon, to conduct one more expert examination.

The court dismissed the applicant's request without giving any reasons.

On 22 May 2006 the Tauragė District Court convicted Donatas V. and Darius V. of slightly impairing the health of the applicant's son (Article 138 § 1 of the Criminal Code), theft (Article 178 § 1 of the Criminal Code) and robbery (Article 180 § 1 of the Criminal Code). In so finding, the court noted that, at midnight on 9 April 2005, Donatas V. and Darius V., being intoxicated and with the aim of stealing from the applicant's son, had attacked him, hitting him approximately nine times in the area of his head, face and hands. When M.Š. fell, Donatas V. and Darius V. took his jacket, wallet and two mobile telephones, and ran away.

Donatas V. and Darius V. were sentenced to three years' imprisonment.

The court also granted the applicant's claim for pecuniary damages in the amount of 360 Lithuanian litai (LTL, approximately 105 euros (EUR)).

The applicant appealed, claiming that the lower court had wrongly convicted Donatas V. and Darius V. of robbery, when they should have been convicted of manslaughter. The applicant argued, *inter alia*, that the trial court had restricted her right to submit evidence and make requests. Given that there were different hypotheses as to the reasons for her son's death, she requested a supplementary expert report. However, the trial court dismissed her motion. Moreover, the trial court did not grant her request to have the experts examined at the hearing. Lastly, the applicant submitted that the first-instance court had inaccurately examined the evidence and had therefore reached wrong legal conclusions.

In the meantime, the applicant's counsel approached A. Garmus with a request that, for a second time, he determine the cause of M.Š.'s death. A. Garmus consented and, on 5 July 2006, produced a new report (no. A-KI-42-52, "the fourth expert report"). The applicant's counsel presented that report to the appellate court. The report stipulated that M.Š. had died from multiple head injuries. The report ruled out alcohol poisoning as a possible cause of death, finding that the third expert report had been inconclusive and unfounded.

On 11 September 2006 the Klaipėda Regional Court examined the case on appeal and upheld the lower court's judgment. The appellate court upheld the trial court's decision not to order a new expert examination and not to summon the expert, J. Rybalko, to the hearing, since, under domestic law, an expert is to be summoned only if the court decides that his testimony is necessary to explain or to supplement a written report. The Klaipėda Regional Court also noted that the applicant's right to take part in the criminal proceedings had not been breached, given that she had had a lawyer who had attended the hearing and had been able to put questions to the accused, the witnesses and those experts who had been present before the trial court. Moreover, upon a request by the applicant, the expert,

A. Garmus, had prepared his second expert report. The applicant thus actively participated in the proceedings and the principle of adversarial proceedings had not been breached.

On 13 March 2007 the Supreme Court examined the applicant's cassation appeal. Observing that the appellate court had joined the second expert report by A. Garmus to the case and yet had refused to analyse it without giving any grounds for such a refusal, the Supreme Court concluded that the appellate court had breached the applicant's right to put forward evidence and take part in the investigation.

The Supreme Court also noted that the applicant and her lawyer had asked the appellate court to summon the experts D. Vitkus, J. Rybalko and A. Garmus for questioning in open court, since they had had different views about the cause of M.Š.'s death. Nonetheless, the appellate court dismissed that request, again without explanation. The Supreme Court concluded that the appellate court had committed an essential breach of criminal procedure, restricting the applicant's rights, and had failed to deal with the case thoroughly and impartially and to adopt a fair decision. The case was remitted to the court of appeal for fresh examination.

On 5 July 2007 the Klaipėda Regional Court varied the trial court's judgment. The court noted that the experts had agreed on only one essential point, namely, that the loss of body temperature had not caused M.Š.'s death. However, they had come to different conclusions as regards the actual cause of death. For D. Vitkus, it was alcohol poisoning. For A. Garmus, the likely cause of death was a head injury. In view of diverging conclusions, it was necessary to elucidate which evidence was more reliable.

The appellate court observed that, under domestic law, it was free to assess the evidence, relying on its inner belief. Expert or specialist reports had evidentiary value because they had been drafted by a person having specialist knowledge. Whilst conceding that the judges did not have such specialised competence, the appellate court nevertheless noted that the presence of contradictory evidence was not an absolute ground for a new expert examination to be conducted.

This time, the Klaipėda Regional Court analysed the evidence which had not been examined at first instance. In particular, the appellate court studied the second expert report by A. Garmus. Experts D. Vitkus, J. Rybalko, A. Garmus and an expert in toxicology, P. Martinek, were summoned and questioned.

The appellate court noted that the experts D. Vitkus, J. Rybalko and P. Martinek, when questioned at the hearing, testified that M.Š.'s BAC had been 4.9, which was a lethal dose in medical theory. For the court, A. Garmus, when questioned, was not able to constructively contradict (*konstruktyviai paprieštarauti*) those expert conclusions and agreed that,

had there been no sign of head injuries, the single cause of death could have been certified as alcohol poisoning.

Given the above, the appellate court concluded that A. Garmus's previous evaluation, dismissing alcohol poisoning as the cause of death, had to be rejected (*visiškai paneigtas*) as clearly unfounded and based on an unobjective, unilateral and tendentious evaluation of the evidence. In the opinion of the court, having examined all the material in the case file and having had recourse to all possibilities of obtaining supplementary evidence, no objective and reliable data had been established to contradict the other experts' conclusion that M.Š. had died of alcohol poisoning. At the same time, there was no reliable evidence to confirm, without a doubt, a supposition that M.Š. had died from head injuries. Consequently, when resolving the matter of the accountability of Donatas V. and Darius V., the applicant's argument that the true cause of M.Š.'s death had not been established and that therefore yet another expert report was necessary, was unfounded.

The appellate court partly amended the judgment of 22 May 2006, reducing the applicant's award for pecuniary damages to LTL 240 (approximately EUR 70).

On 22 January 2008 the Supreme Court upheld the lower court's reasoning and dismissed the applicant's cassation appeal. It observed that the appellate court had granted the request of the applicant's representative for the third expert report, had admitted in evidence the fourth expert report and examined it, had summoned and questioned the experts and had given reasons for the decision not to grant the applicant's request for yet another expert opinion. The Supreme Court concluded that the applicant's allegation that the lower courts had committed a breach of criminal procedure, because they had not collected enough evidence to establish the cause of her son's death, was unfounded.

B. Relevant domestic law and practice

Article 7 of the Code on Criminal Procedure provides that criminal proceedings are adversarial (*laikantis rungimosi principo*). Both the prosecutor and the defence have equal rights to bring evidence, submit requests and dispute the arguments of the other party. Under Article 20 of the Code, the court decides if any lawfully obtained data can be admitted in evidence. The court evaluates the probatory value of evidence according to its inner belief and relying on all other circumstances of the case which it has carefully and impartially examined. Article 285 of the Code provides that, if the expert report is sufficiently clear and comprehensive, it is read at the court hearing without the expert being present. The court summons the expert for questioning only if the court finds that it is necessary to elaborate on the report or to supplement it.

On 16 January 2006 the Constitutional Court stated that, in the context of criminal proceedings, a person has a right to expect that his or her case would be decided by an independent and impartial court. From that, it follows that the court may not be a mere "passive" observer in the case and justice may not depend solely on the material which has been submitted to the court. In its endeavour to establish all the circumstances of the case and to discover the truth, the court has the power to perform procedural acts itself or to order that other State institutions perform such acts.

COMPLAINTS

The applicant complains under Article 2 § 1 of the Convention that the Lithuanian authorities have not properly investigated the cause of her son's death and have therefore violated her right to establish who was responsible for it and to ensure that those found guilty are properly punished. In that connection she also argues that, in refusing her request to order a new expert examination, the Lithuanian courts have been partial.

THE LAW

The applicant complains of a breach of the State's positive obligation under Article 2 to ensure the conduct of an effective, independent investigation into the death of her son. Article 2 provides as relevant:

> "1. Everyone's right to life shall be protected by law. ..."

The Court observes that the applicant has not laid any blame on the authorities of the respondent State for the actual death of her son; nor has it been suggested that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of M.Š. from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The applicant's case is therefore to be distinguished from those involving the alleged use of lethal force either by agents of the State or by private parties with their collusion (see, for example, *McCann and Others v. the United Kingdom,* judgment of 27 September 1995, Series A no. 324*; Hugh Jordan v. the United Kingdom*, no. 24746/94, judgment of 4 May 2001, ECHR 2001-III (extracts); *Shanaghan v. the United Kingdom*, no. 37715/97, judgment of 4 May 2001, ECHR 2001-III (extracts)), or in which the factual circumstances imposed an obligation on the authorities to protect a person's life, for example where they have assumed responsibility for the individual's welfare (see, for example, *Paul and Audrey Edwards v.*

the United Kingdom, no. 46477/99, judgment of 14 March 2002, ECHR 2002-II), or where they knew or ought to have known that a life was at risk (see, for example, *Osman v. the United Kingdom,* judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII).

However, the absence of any direct State responsibility for the death of M.Š. does not exclude the applicability of Article 2 (see *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V). The Court reiterates that, by requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports* 1998-III, p. 1403, § 36), Article 2 § 1 imposes a duty on that State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see *Osman*, cited above, § 115).

With reference to the facts of the instant case, the Court considers that this obligation requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances. The investigation must be capable of establishing the cause of the injuries and the identification of those responsible, with a view to their punishment. Where death results, as in the case of the applicant's son, the investigation assumes even greater importance, having regard to the fact that the essential purpose of such an investigation is to secure the effective implementation of domestic laws which protect the right to life (see, *mutatis mutandis*, the *Paul and Audrey Edwards* judgment, cited above, § 69). Lastly, the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, providing a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see *ibid*, § 71). A requirement of promptness and reasonable expedition is implicit in this context (see *ibid*, § 72).

In the instant case, the Court finds that a procedural obligation arose to determine the circumstances of the death of the applicant's son. The Court will therefore examine whether the investigation complied with the requirements inherent in Article 2, that is, whether it was adequate, whether it guaranteed the sufficient involvement of the applicant, whether the inquiry was instituted promptly and whether it was conducted with reasonable expedition.

Concerning the facts of the case, the Court observes that the prosecutors opened a pre-trial investigation, on charges of murder, on the same day that it became apparent that M.Š. had died. It is also to be observed that the pre-trial investigation lasted four months and, after the case had been committed to trial, the criminal proceedings ended in two and a half years. The Court is therefore satisfied that the proceedings were reasonably expeditious.

The Court cannot but note certain restrictions on the applicant to prove her claims when the case was examined by the trial court and for the first time on appeal. Nonetheless, after the Supreme Court remitted the case for fresh examination, no such hindrances followed. In particular, the fourth expert report was admitted in evidence and examined, and the Klaipėda Regional Court summoned the witnesses and experts, giving the applicant and her lawyer a genuine opportunity to question them. What is more, the inquiry into the death of the applicant's son included the admittance in evidence and the examination of four expert reports. One of them was commissioned by the pre-trial investigator, one by the trial court and two reports were produced on the applicant's initiative. Accordingly, the Court finds that, when examining the facts of the case and establishing the truth, the Lithuanian courts did not limit themselves to a "passive" observer's role.

The Court is not persuaded by the applicant's allegation that the Klaipėda Regional Court was arbitrary because it refused to commission one more, a fifth, expert report. Whilst acknowledging that, owing to the injuries sustained by M.Š., the applicant was entitled to question the cause of her son's death, the Court reiterates that it is not its role to assess the facts which have led a national court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of fourth instance, which would be to disregard the limits imposed on by its mandate (see, *mutatis mutandis*, *Kemmache v. France (no. 3)*, 24 November 1994, § 44, Series A no. 296-C). What matters for the Court, is whether, in refusing the applicant's request, the Klaipėda Regional Court provided adequate reasons.

On the facts of the case, the Court observes that, before rejecting the applicant's request, the Klaipėda Regional Court had examined four previous expert reports and heard the experts in person. As a result, the appellate court found that A. Garmus, the expert on whose reports the applicant so persistently relied, had not been able to constructively contradict the other experts' conclusion that M.Š. had died of alcohol poisoning. For the appellate court, given that there was no evidence to rule out death from alcohol poisoning and no reliable evidence to confirm a violent death, there was no need for yet another expert report. In such circumstances the Court is satisfied that the Klaipėda Regional Court has verified all possible hypotheses relating to the death of the applicant's son. Accordingly, the Court cannot hold that the Klaipėda Regional Court's refusal to order a fifth expert report was arbitrary. In any event, the Court notes that Article 2 does not impose a duty on the investigating authorities to satisfy every request for particular investigative measures made by a relative in the course of this type of investigation (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 348, 15 May 2007).

In the light of the above considerations, the Court finds that the investigation into the circumstances of the death of the applicant's son was

sufficiently thorough to be considered "adequate" for the purposes of Article 2 of the Convention.

Lastly, as to the applicant's linked complaint that those found guilty for her son's death have not been properly punished, the Court reiterates that Article 2 does not entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence or an absolute obligation for all prosecutions to result in a conviction or particular sentence (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 96, ECHR 2004-XII).

Consequently, the Court concludes that the present application does not disclose failure by the respondent State to comply with its positive obligations, including the procedural requirements, imposed by Article 2 of the Convention. It follows that it must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise Elens-Passos	Françoise Tulkens
Deputy Registrar	President