Translation from Lithuanian

Civil case No e3K-3-412-690/2015
Judicial procedure No 2-68-3-39174-2013-9
Procedural decision categories: 44.2.4.2; 44.5.2.5 (S)

SUPREME COURT OF LITHUANIA

R U L I N G
ON BEHALF OF THE REPUBLIC OF LITHUANIA

14 July 2015
Vilnius

The Chamber of Judges of the Civil Cases Division of the Supreme Court of Lithuania, comprised of judges Egidijus Laužikas (the Chairman of the Chamber and the Rapporteur), Gediminas Sagatys and Donatas Šernas,

has investigated (under the written procedure) a civil case in the court hearing under the appeal in cassation of **plaintiffs Q. N and G. M.** regarding the review of the ruling of 19 September 2014 of the Chamber of Judges of the Civil Cases Division of Vilnius Regional Court in the civil case based on the claim lodged by plaintiffs Q. N and G. M. against defendant the State of the Republic of Lithuania represented by the Ministry of Justice of the Republic of Lithuania and the Prosecutor General's Office of the Republic of Lithuania regarding the compensation of property and non-pecuniary damage.

The Chamber of Judges

a s c e r t a i n e d :

I. The substance of the dispute

The case raises legal issues regarding the conditions for invoking the civil liability of the state and the amount of the compensation of non-pecuniary damages.

The plaintiffs requested to award the compensation of the following damage caused by unlawful arrest and conviction: the compensation of non-pecuniary damage amounting to LTL 53,500 and the compensation of the damage to property amounting to LTL 27,820 in favour of Q. N. and the compensation of non-pecuniary damage amounting to LTL 56,000 and the compensation of the damage to property amounting to LTL 29,120 in favour of G. M.

The plaintiffs stated that they were citizens of the Islamic Republic of Afghanistan. On 4 April 2013, upon crossing the border of the Republic of Lithuania they were detained and a preliminary investigation was initiated against them, pursuant to Article 291(1) of the Criminal Code for illegal crossing of the state border. On 5 April 2013, the provisional measure, viz. arrest,

was imposed on the plaintiffs. Detained plaintiffs explained that they were minors seeking asylum in Lithuania. By penal orders issued by the District Court of Ignalina Region on 19 July 2013 and 1 August 2013 the plaintiffs were recognised as being guilty of illegally crossing the state border, and fines were imposed on them; upon reckoning the duration of the temporary detention and the arrest of the plaintiffs, it was stated that the plaintiffs have already served the term of sentence. The plaintiffs were released from Lukiškės Remand Prison–Closed Prison and transported to the Refugees Reception Centre in Rukla. Judgements of 18 September 2013 and 19 September 2013 of the District Court of Ignalina Region recalled the penal orders. The plaintiffs, being asylum seekers, could not have been subjected to criminal liability for unlawful entry into and illegal stay in the territory of the Republic of Lithuania, and there have been no legal grounds for initiating a preliminary investigation. Furthermore, in the absence of any reliable data regarding the actual calendar age of the plaintiffs (which may not coincide with the biological age), the plaintiffs had to be considered minors who were entitled to all rights and guarantees laid down in national and international laws. According to the case-law of the European Court of Human Rights, unaccompanied minors cannot be arrested, while the restriction of freedom of children can be considered to be equivalent to inhuman or degrading treatment banned by Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Unlawful arrest and detention in Lukiškės Remand Prison caused a huge psychological trauma to the plaintiffs, which led to mental suffering and strong negative experiences. As a result of the unlawful arrest and conviction, the plaintiffs have suffered property and non-pecuniary damage.

II. The substance of procedural decisions of the court of first instance and the court of appeal instance

By its judgement of 18 April 2014, the District Court of Vilnius City satisfied the claim in part, viz. it acknowledged that the arrest and conviction of plaintiffs Q. N. and G. M. was unlawful; it ordered defendant the State of the Republic of Lithuania to compensate non-pecuniary damage of LTL 10,700 (EUR 3,098.93) to plaintiff Q. N. and to compensate non-pecuniary damage of LTL 11,200 (EUR 3,243.74) to plaintiff G. M.; it dismissed the remaining part of the claim.

The court has established that the plaintiffs (citizens of the Islamic Republic of Afghanistan) were detained on 4 April 2013 upon crossing the border of the Republic of Lithuania, a preliminary investigation was initiated pursuant to Article 291(1) of the Criminal Code, and the provisional measure, viz. arrest, was imposed on the plaintiffs. At the time of the arrest the plaintiffs claimed they were minors; however, they had no documents that could prove their identity. Even though the plaintiffs' counsel submitted appeals to Panevėžys Regional Prosecutor's Office regarding the discontinuation of the preliminary investigation, they were all dismissed for the reason that at the time of the arrest the plaintiffs failed to submit an asylum request to the State Border Guard officers. Asylum applicants who have unlawfully entered the territory of the Republic of Lithuania from a country where their life or freedom was in danger shall be exempt from liability from unlawful entry into and illegal stay in the Republic of Lithuania, provided they present themselves without delay to competent authorities of the Republic of Lithuania and provide an exhaustive explanation of the reasons of their unlawful entry into the Republic of Lithuania (Article 70 of the Law on the Legal Status of Aliens). The court established that Q. N. and G. M. (who where questioned as suspects) have sufficiently clearly stated the purpose of departing from their country of origin. The District Court of Ignalina Region held that the plaintiffs unlawfully entered Lithuania seeking to exercise the right of asylum, and therefore issued judgements on 18 September 2013 and 19 September 2013 releasing them from criminal liability under Article 291(1) of the Criminal Code. Upon establishing that the plaintiffs illegally crossed the state border to seek asylum, the court has stated that no preliminary investigation should have been initiated or, if initiated, it should have been discontinued. The court has also stated that no undoubted or unambiguous conclusion has been drawn stating that the plaintiffs were adults at the start of a preliminary investigation and when

deciding on the arrest of the plaintiffs. When questioned, the plaintiffs have always insisted they were minors and that they have never had any documents that could prove their identity. Based on Conclusion No MK-O 26/13(01) drawn by a specialist of the State Forensic Medicine Service (hereinafter referred to as SFMS), the biological age of plaintiffs Q. N. and G. M. was 20–24 years. Letter No 1.5-SD-476 of 19 July 2013 noted that the biological age established during an expert examination is not the same as the calendar age and that, furthermore, system errors were possible. Moreover, for the purpose of establishing the age of a person, not only his psychical maturity but also his mental maturity must be assessed. 2009 guidelines of the Office of the United Nations High Commissioner for Refugees provide that should there be any reason to doubt whether the person is an adult, such person should be considered to be a child and should be given the benefit of the doubt. The court stated that transit passports issued by the Islamic Republic of Afghanistan did not state the date of birth or any other identification data of the plaintiffs; passport information about the plaintiffs was of a general nature and essentially reflects data obtained in Lithuania. In this case the human right to freedom has been violated by unlawful arrest; moreover, the plaintiffs, being unaccompanied minors, have neither been taken into temporary guardianship nor placed in the Refugees Reception Centre, nor provided with other rights that unaccompanied minors are entitled to exercise by law (Article 32 and 67(3) of the Law on the Legal Status or Aliens). The plaintiffs, being vulnerable persons, were imprisoned in Lukiškės Remand Prison–Closed Prison together with other grown-up men and, therefore, undoubtedly suffered strong emotional experiences, which harmed their health. The plaintiffs certified in court that in Lukiškės they were bullied because of their nationality, young age and not being able to speak the language, their religious feelings were continuously insulted and their eating habits were not respected. Moreover, in prison they were isolated from each other, their right to contact their relatives in the home country and to see their counsel was restricted. Even though the letter submitted to the case-file by Lukiškės Remand Prison–Closed Prison states that no cases of bullying or degrading treatment of the plaintiffs were established during the entire period of their detention in Lukiškės Remand Prison–Closed Prison, the court holds that this essentially does not deny circumstances indicated by the plaintiffs. The fact that the plaintiffs were psychologically traumatised was also attested by a psychologist who communicated with the plaintiffs and provided them with psychological counselling at the Refugees Reception Centre. She has diagnosed the plaintiffs to have a pronounced psycho-emotional disorder, intense anxiety, moderate depression, suicidal thoughts and sleep disorders. The has court acknowledged that it could not be denied that the plaintiffs have also had negative emotional experiences in their country of origin, which have forced them to leave their country and to seek asylum elsewhere, and that these circumstances must be taken into consideration when assessing the amount of non-pecuniary damage. However, the court noted the psychologist's emphasis that during psychological counselling the plaintiffs emphasised experienced that they had in Lukiškės and, therefore, she thought that the imprisonment had without any doubt intensified the post-traumatic stress that the plaintiffs suffered in their country of origin and crushed the plaintiffs. The court held that the plaintiffs suffered damage as a result of unlawful actions of law enforcement authorities and that the compensation of non-pecuniary damage of LTL 10,700 (EUR 3,098.93) should be awarded to the benefit of plaintiff Q. N. and LTL 11,200 (EN 3,243.74) should be awarded to the benefit of plaintiff G. M.

By its ruling of 19 September 2014, the Chamber of Judges of the Civil Cases Division of Vilnius Regional Court reversed the judgement of 18 April 2014 of the District Court of Vilnius City: it satisfied the claim in part, viz. it acknowledged that the arrest of plaintiffs Q. N. and G. M. was unlawful; it ordered defendant the State of the Republic of Lithuania to compensate non-pecuniary damage of LTL 3,000 (EUR 869) to plaintiff Q. N. and to compensate non-pecuniary damage of LTL 3,000 (EUR 869) to plaintiff G. M.; it dismissed the remaining part of the claim. The Chamber of Judges indicated that, with due consideration to the commenced asylum procedure, the plaintiffs could not have been subjected to further criminal prosecution, i.e. they could not have been arrested and convicted. Even though the Migration Department under the Ministry of the

Interior provided the plaintiffs with additional protection and granted permits for their temporary residence in the Republic of Lithuania, and even though criminal prosecution officials were aware of this circumstance, the criminal prosecution was continued nevertheless. The Chamber of Judges held that the plaintiffs were unlawfully arrested. However, according to the Chamber of Judges, penal orders issued by the District Court of Ignalina Region on 19 July 2013 and 1 August 2013 did not become effective; therefore, the court of first instance unfoundedly held that the plaintiffs were unlawfully convicted. Contrary to the court of first instance, the Chamber of Judges did not establish that the plaintiffs experienced any bullying or degrading treatment during their detainment in Lukiškės Remand Prison–Closed Prison. The Chamber of Judges noted that the case-file contained no supporting evidence to that respect except for the explanation of the plaintiffs themselves. According to the Chamber of Judges, Letter No 9-11793 of 3 June 2013 of Lukiškės Remand Prison–Closed Prison confirms that at the time of the arrest the plaintiffs (who at that time were already represented by a qualified attorney-at-law) failed to inform about the potential violation of their rights; therefore, it can be presumed that the treatment of the plaintiffs at the site of their arrest was essentially appropriate. The Chamber of Judges failed to establish that the plaintiffs were minors and therefore held that there were no grounds for awarding the plaintiffs the compensation of damage associated with the violation of rights granted by the status of a minor asylum seeker. According to the Chamber of Judges, the court of first instance had no grounds for exclusively invoking the explanations of the plaintiffs. The plaintiffs' statements that they were minor at the time of the crossing of the border are declarative in nature and lacking any other supporting evidence. The fact that the plaintiffs were adults at the start of the a preliminary investigation is supported by the following official written evidence: Conclusion No MK-026/13(01) drawn by a specialist of SFMS stating that both plaintiffs were 20–24 years of age; a transit passport allowing to return to the Islamic Republic of Afghanistan stating that plaintiff Q. N. was 23 years of age; a transit passport allowing to return to the Islamic Republic of Afghanistan stating that plaintiff G. M. was 24 years of age. The SFMS specialist performed the test in the facilities of a certified expert body and used the acknowledged scientific method specified in the conclusion, viz. the assessment of the biological age based on the indicators of the skeletal age using X-ray pictures. The SFMS specialist has drawn an assertive conclusion that the biological age of the plaintiffs was 20–23 years. The plaintiffs currently reside in the Refugees Reception Centre and are considered to be adults; no public authorities have taken any steps for taking them into guardianship/curatorship, nor the plaintiffs themselves have initiated any such process even though they are assisted by an attorney-at-law. The presumption indicated by the plaintiffs that in case of any reason to doubt the age of a person, such person should be considered to be a minor, cannot apply because the specialist's conclusion has categorically denied any doubt regarding the age. According to the plaintiffs' counsel, the presumption applies should there be any doubt regarding the age of a person. The Chamber of Judges held that that the plaintiffs suffered non-pecuniary damage as a result of unlawful actions of law enforcement authorities and that the state has to compensate such damage. With due consideration to the fact that the unlawful criminal prosecution of the plaintiffs continued from 5 April 2013 to 18 September 2013 and 19 September 2013, while the temporary detention and arrest of plaintiff Q. N. lasted for 107 days and the temporary detention and arrest of plaintiff G. M. lasted for 112 days, the Chamber of Judges held that the compensation of non-pecuniary damage of LTL 3,000 (EUR 869) should be awarded to the benefit of each plaintiff. The Chamber of Judges referred to the ruling of 2 December 2011 of the extended Chamber of Judges of the Civil Cases Division of the Supreme Court of Lithuania in Civil Case *S. R. v. Republic of Lithuania* (Case No 3K-7-375/2011).

III. Legal arguments of the appeal in cassation and statements of defence

By their appeal in cassation the plaintiffs request to reverse the ruling of 19 September 2014 of the Chamber of Judges of the Civil Cases Division of Vilnius Regional Court and to uphold the

judgement of 18 April 2014 of the District Court of Vilnius City. The appeal in cassation is based on the following arguments:

1. The court has failed to duly evaluate the evidence and has drawn the conclusion that the appellants were adults at the time of crossing the border of the Republic of Lithuania. The conclusion of the specialist of the State Forensic Medicine Service is not categorical. This conclusion indicates the biological rather than the calendar age of the appellants. In its letter of 19 July 2013, the State Forensic Medicine Service confirmed that the biological age of a person is not the same as his calendar age, and the difference may be caused by the variety of reasons, such as individual variation, population differences, social status. The letter of the State Forensic Medicine Service states that population differences are not essential in this case, because the age of skeletal ossification and the chronological age are very close for persons of Southeast Asian origin. It should be noted that Afghanistan is a country in South Asia rather than Southeast Asia. Considering the fact that the assessment of the biological age of the appellants has been performed at the same time when such assessment was performed for a group of aliens from Vietnam, it seems likely that the specialist assessed all aliens uniformly and classified the appellants as residing in Southeast Asia. This means that the assessment of the biological age of the appellants was inaccurate and based on skeletal ossification that was characteristic to population groups of another region. This causes much doubt regarding the reliability of the conclusion. The World Health Organisation states that the biological age of a person does not necessarily coincide with his calendar age. The biological age of a person basically shows the breaking down of his body, i.e. how good or how bad the human body is functioning. It means that if a person whose calendar age is 65 leads a healthy and active life, his body might physiologically be closer to a body of a person of 55 years of age. And vice versa, as a result of a destructive way of life, poor life conditions, etc., the biological age of a younger person might be closer to a body of an older person. It should be noted that the appellants have led the majority of their life under physically difficult conditions. The conclusion of the SFMS specialist determined the breaking down of the body of the appellants, i.e. their biological age, which might be completely different from the actual calendar age; therefore, the court's statement that the conclusion of the SFMS specialist has categorically denied any doubt regarding the age of the appellants is unjustified. The age assessment is a complex test that has to take into account not only the physical appearance of a person but also his psychological maturity (Office of the United Nations High Commissioner for Refugees: Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum). According to the appellants, one cannot solely rely on the conclusion of the radiological assessment of bones where no expert met the appellants face to face or assessed their psychological maturity. It should be noted that age assessment procedures should only be undertaken as a measure of last resort where there are grounds for serious doubt regarding the child's age (Separated Children in Europe Programme: Statement of Good Practice). These principles are also provided in Article 25(5) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), viz. Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor. The court has also unfoundedly based its conclusion on another written evidence, i.e. transit passports of the appellants allowing to return to the Islamic Republic of Afghanistan and stating that appellant Q. N. was 23 years of age and that appellant G. M. was 24 years of age. Pursuant to the Law of the Republic of Lithuania on the Legal Status of Aliens, information provided in an alien's application for asylum as well as information received pending the examination of the application shall not be furnished to the country of origin. The response provided by the Embassy of Afghanistan confirms that Lithuanian authorities have violated their obligation not to disclose information and to take care of the safety of the person. As a result of the

violation of the State's obligation not to disclose information to the country of origin of the alien, transit passports cannot be considered to be lawful and admissible evidence. It should be noted that the Islamic Republic of Afghanistan has failed to state the appellants' precise date of birth or any other personal data in transit passports; rather, it just stated the appellants' age, i.e. 23 and 24 years of age. Furthermore, these data are likely to be unreliable (see reports of various organisations on Afghanistan).

2. International law provides the presumption of minority, i.e. should there be any reason to doubt whether the person is an adult, such person should be considered to be a minor (Office of the United Nations High Commissioner for Refugees, Guidelines on International Protection of 22 December 2009: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees). Office of the UNHCR emphasises the importance of establishing the practice that persons claiming to be under the age of 18 should be considered to be children unless proven otherwise by reliable age assessment tests performed with necessary safeguards. The appellants who claimed to be minor and whose calendar age has not been disclosed had to be considered minors entitled to all rights and guarantees laid down in national and international laws during their very first contact with the officials of the Republic of Lithuania. The court of appeal instance has unfoundedly refused to apply this presumption by stating that any doubts regarding the appellants' age have been categorically denied by the conclusion of the SFMS specialist. As it was said before, this specialist conclusion cannot be considered to be reliable and establishing the actual age of the appellants. Therefore, pursuant to the provisions of international law, the presumption of minority must apply to the appellants.

3. The conclusion of the court that penal orders finding the appellants guilty of illegal crossing of the state border did not become effective and, therefore, the appellants were not unlawfully convicted, conflicts with the case-law of the Supreme Court of Lithuania. The Supreme Court of Lithuania has elucidated that the recognition of the fact of unlawfulness of the decision, e.g. the recall of the judgement, which unlawfully convicted a person, following the instance procedure for the reason of its unlawfulness, is sufficient for stating that the conviction is unlawful (the ruling of 24 January 2012 of the Chamber of Judges of the Civil Cases Division of the Supreme Court of Lithuania in Civil Case *E. B. v. Republic of Lithuania* (Case No 3K-3-2/2012), and no requirement for the relevant decision to become effective is stated. The case-law of the Supreme Court of Lithuania shows that unlawful conviction starts on the date of the adoption of the relevant procedural document rather than on the date such procedural document becomes effective (the ruling of 23 November 2005 of the Chamber of Judges of the Civil Cases Division of the Supreme Court of Lithuania in Civil Case *K. R. v. Republic of Lithuania* (Case No 3K-3-604/2005).

4. According to the appellants, the fact that at the time of arrest they failed to inform anybody about the potential violation of their rights does not allow to presume that the treatment of the appellants at the site of their arrest was essentially appropriate. The appellants did not speak Lithuanian and their command of English was poor; therefore, they had no information about a possibility to place an appeal regarding violations that they suffered. They were not aware of the procedure of lodging an appeal and that they had such a possibility at all. The appellants suffered bullying and degrading treatment not only from other prisoners but also from the staff of Lukiškės Remand Prison–Closed Prison; therefore, they were afraid of asking other members of the staff about a possibility to appeal the actions of their colleagues or to inform about inappropriate treatment. Contrary to the statement of the court, the appellants have been represented by a qualified attorney-at-law only since 29 April 2013. Prior to 29 April 2013, both appellants were represented by an attorney-at-law proving state-guaranteed legal aid, and this attorney-at-law has never visited them in Lukiškės Remand Prison–Closed Prison, has never submitted any objections regarding the arrest of appellants, being asylum seekers, and has agreed with penal orders regarding illegal crossing of the state border imposed on the appellants. On 29 April 2013, the representation of the appellants became the concerned of the Lithuanian Red Cross Society. However, the lawyer of the Lithuanian Red Cross Society who represented the appellants in their appeal of the penal

orders of the District Court of Ignalina Region was not allowed to visit the appellants in Lukiškės Remand Prison–Closed Prison (the decision of 7 June 2013 of Panevėžys Regional Prosecutor's Office to dismiss the application). Thus, during their detention in Lukiškės Remand Prison–Closed Prison the appellants neither themselves nor through their legal counsel could have any objective possibilities to take any remedies regarding the violation of their rights. During the hearing at the court of first instance the appellants gave consistent and concurrent testimony that they were continuously called *Al-Qaeda* or terrorists by other persons under arrest and the administrative staff, forced to watch pornographic films and were mocked at the time when they were praying or whenever they refused to eat pork, and testified what other negative emotional experiences they had and how this harmed their health. This was also certified by psychologist J. B. who testified during the hearing at the court of first instance and who provided psychological counselling to the appellants in the Refugees Reception Centre.

5. The appellants do not agree with the amount of the compensation of non-pecuniary damage awarded to their benefit by the court of appeal instance, because the court determined the amount of the compensation only with due consideration to the fact that the appellants were unlawfully arrested. The court has failed to duly consider the facts regarding the minority of the appellants, the unlawful detention of the appellants, being minor, in a prison for adults, emotional experiences suffered in that prison as well as adverse effects caused by such experiences, and the unlawful conviction. The decision of the court regarding the amount of the compensation was unreasonably based on the ruling of 2 December 2011 of the extended Chamber of Judges of the Civil Cases Division of the Supreme Court of Lithuania in Civil Case *S. R. v. Republic of Lithuania* (Case No 3K-7-375/2011), which contained a statement only on the duration of the criminal procedure that was too long and which failed to make a statement on the unlawful application of provisional measures.

By their statements of defence regarding the appeal in cassation, defendant the State of Lithuania represented by the Ministry of Justice of the Republic of Lithuania and the Prosecutor General's Office of the Republic of Lithuania requests to uphold the ruling of 19 September 2014 of the Chamber of Judges of the Civil Cases Division of Vilnius Regional Court. The following arguments support the statements of defence regarding the appeal in cassation:

1. The court assessed the evidence without deviation from the case-law of the court of cassation (the ruling of 10 May 2010 of the Chamber of Judges of the Civil Cases Division of the Supreme Court of Lithuania in Civil Case *Eglutė Association of Owners of Multi-Apartment Buildings v. E. R.* (Case No 3K-3-206/2010), the ruling of 2 July 2010 in Civil Case *R. Ž. v. M. P., et al.* (Case No 3K-3-316/2010), etc.). The court has reasonably decided on the age of the appellants on the grounds of the official written evidence in the case-file (Article 197(2) of the Code of Civil Procedure) based on which the court stated that the plaintiffs were minors at the time the preliminary investigation was initiated. The court has considered data contained in the conclusion of the SFMS specialist and in transit passports and has failed to establish any inconsistency, incomprehensiveness or contradiction to other evidence in the case-file. It should be noted that the SFMS conclusion indicates a possibility of a system error of assessing persons to be younger than their chronological age. Therefore, the appellants' age has been duly assessed; if there is any system error, it would mean that the appellants may be older rather than younger. The court has justifiably failed to apply the presumption of minority.

2. Pursuant to Article 422 of the Code of Criminal Procedure, the penal order drawn up by the judge shall be served on the accused person. If the accused person objects to the imposition of the fine by the penal order, he shall have the right to file an application requesting to hold a court hearing at the court which issued the penal order within fourteen days following the service thereof. If the accused person files an application requesting to hold a court hearing, the court penal order shall not become effective. Therefore, the court of appeal instance has justifiably stated that the plaintiffs have not been unlawfully convicted. The factual circumstances of the rulings stated in the appeal in cassation are materially different from the factual circumstances of this particular case.

The case-law referred to by the appellant analyses cases where the judgement, which unlawfully convicted a person, has been recalled following the instance procedure for the reason of its unlawfulness, while penal orders issued in this particular case have not become effective.

3. The amount of non-pecuniary damage is established by a court according to the criteria set forth by the law and with due consideration to the established case-law in reference to the circumstances of the case. In this case the court has explicitly stated the criteria that it followed when awarding non-pecuniary damage to the benefit of the plaintiffs and pointed out the relevant ruling of the Supreme Court of Lithuania the provisions of which the court used as a reference. The court of appeal instance has justifiably stated that there was no ground for awarding damages to the benefit of the plaintiffs regarding the violation of rights granted by the status of a minor asylum seeker and regarding unlawful conviction.

The Chamber of Judges

s t a t e s :

IV. Arguments and elucidation of the court of cassation

Regarding the conditions of the civil liability of the state for actions of law enforcement officials or court

Article 6.272(1) of the Civil Code provides that damage resulting from unlawful conviction, or unlawful arrest, as a measure of suppression, as well as from unlawful detention, or application of unlawful procedural measures of enforcement, or unlawful infliction of administrative penalty – arrest – shall be compensated fully by the state irrespective of the fault of the officials of preliminary investigation, prosecution or court. According to the case-law of the court of cassation, the plaintiff requesting the compensation of such damage shall have the burden to prove unlawful actions of officials and/or court, the causality and damage/damages. If at least one of the said conditions of the liability is not proved, the compensation of damage shall not be possible, as there would be no legal grounds for the compensation of damage (e.g. cf. the ruling of 4 February 2009 of the Chamber of Judges of Civil Cases Division of the Supreme Court of Lithuania in Civil Case *M. T. v. Republic of Lithuania* (Case No 3K-3-5/2009); the ruling of 24 May 2010 in Civil Case *A. Š. v. Republic of Lithuania* (Case No 3K-3-219/2010); the ruling of 4 December 2013 in Civil Case *BUAB Nordic investicija v. Republic of Lithuania* (Case No 3K-3-634/2013), etc.).

In its case-law the Supreme Court of Lithuania follows the rules of principle that the acquittal judgement *per se* is not acknowledged to be the grounds for presuming that the initiation of a criminal case or all legal proceedings related to criminal prosecution were unlawful, i.e. the acquittal judgement is the complete vindication of a person as far as criminal procedure is concerned; however, such judgement, no matter how significant a fact it is, shall not form the grounds for stating in a civil case that the initiation of a criminal case, the application of a provision measure or any other prosecution-related legal proceedings were unlawful *abinitio* (e.g. cf. the ruling of 7 June 2006 of the extended Chamber of Judges of Civil Cases Division of the Supreme Court of Lithuania in Civil Case *UAB Naujapilė v. Republic of Lithuania* (Case No 3K-7-183/2006); the ruling of 20 April 2007 of the Chamber of Judges in Civil Case *D. K. v. Republic of Lithuania* (Case No 3K-3-169/2007); etc.). It should be noted that the case-law of the European Court of Human Rights (hereinafter referred to as ECHR) follows essentially the same position stating that the fact *per se* that a person is finally acquitted does not mean that the criminal prosecution of such person was unlawful or otherwise "compromised". The standard of proof applied for the purpose of convicting a person, viz. the elimination of any reasonable doubts regarding his innocence, differs from the standard of proof applied for the purpose of initiating

criminal prosecution of a person for which a reasonable suspicion that a person committed a crime is sufficient (e. g. *Lavrechov v. the Czech Republic*, No 57404/08, judgment of 20 June 2013). Thus, there might be cases when the court investigation of a reasonable suspicion does not lead to the conviction of a person and eliminates any reasonable doubts regarding the stated suspicions; however, even in such cases there does exist a legal interest on the part of the state to duly carry out criminal procedure that would assess the guilt or innocence of the reasonably suspected person and to ensure that this procedure is smooth.

In order to decide on the civil liability of the state for actions of law enforcement officials, one needs to establish whether the initiation of the criminal prosecution of a respective person was supported with sufficient data allowing to suspect that this person committed a crime; the grounds for the discontinuation of the preliminary investigation or the dismissal of a criminal case, or the acquittal of a person are circumstances important with respect to civil liability; the assessment of the lawfulness of criminal or administrative proceedings following the procedure laid down by the law is also significant; all this information must be assessed by the court, which investigates the civil case regarding the compensation of damage, with regards to the laws and regulations regulating civil liability and following the civil procedural rules of proof and of the evaluation of evidence, and the court must decide on the justification of the lodged claim for the compensation of damage based on the drawn legal conclusions. Therefore, when deciding on the civil liability of the state, the court may draw a conclusion regarding the lawfulness of certain proceedings that might be opposing to the one drawn during the criminal procedure (e.g. the ruling of 8 May 2003 of the extended Chamber of Judges of Civil Cases Division of the Supreme Court of Lithuania in Civil Case *J. S. v. Special Investigation Service of the Republic of Lithuania* (Case No 3K-7-381/2003); the ruling of 8 July 2008 of the Chamber of Judges in Civil Case *V. G. v. State of Lithuania* (Case No 3K-3-364/2008); the ruling of 4 February 2009 in Civil Case *M. T., et al. v. State of Lithuania* (Case No 3K-3-5/2009); etc.). Preliminary investigation actions were lawful to the extent they were carried out on the grounds laid down by the law, according to the procedures provided by the law and as specified by laws and regulations, and unlawful to the extent such requirements were not met (the ruling of 30 January 2002 of the Chamber of Judges of Civil Cases Division of the Supreme Court of Lithuania in Civil Case *A. B., et al. v. Ministry of Justice, et al.* (Case No 3K-3-181/2002). The civil liability of the state may arise on the grounds that law enforcement officials fail to perform their general duty to behave with care (to abide by the rules of conduct so as not to cause damage to another by his actions or omissions) (the ruling of 8 May 2003 of the extended Chamber of Judges of Civil Cases Division of the Supreme Court of Lithuania in Civil Case *J. S. v. Special Investigation Service of the Republic of Lithuania* (Case No 3K-7-381/2003); the ruling of 7 June 2006 in Civil Case *UAB Naujapilė v. Republic of Lithuania* (Case No 3K-7-183/2006)). It should be noted that not any violation of law is acknowledged to be an unlawful action giving rise to the civil liability of the state. In this respect, in order to state that actions were unlawful, there must be conclusive proof and acknowledgement that preliminary investigation officials, prosecutors or court made a mistake that had a material and crucial significance for the violation of the plaintiff's rights in the criminal procedure. The court of first instance as well as the court of appeal instance acknowledged in this case that the 107-day arrest imposed on plaintiff Q. N. and the 112-day arrest imposed on plaintiff G. M. was imposed unlawfully and that there were grounds for invoking the civil liability of the state. With due consideration to the fact that no appeal in cassation was filed with respect to this section of court judgements, it should be stated that there was no dispute regarding this matter, and it should be held that it was established in this case that the unlawful arrest was a condition for the civil liability of the state. The appeal in cassation objects to the conclusions of the court of appeal instance that it is only the arrest of the plaintiffs that forms the grounds for invoking the civil liability of the state and that no other unlawful actions stated by the plaintiffs were established.

Regarding the evaluation of evidence and unlawful actions as a condition of the civil liability of the state

The court of appeal instance held that penal orders issued by the District Court of Ignalina Region on 19 July 2013 and 1 August 2013 did not become effective; therefore, the court of first instance unfoundedly held that the plaintiffs were unlawfully convicted. The Chamber of Judges agrees with the arguments of the appeal in cassation, which state that, according to the case-law of the court of cassation, unlawful conviction starts on the date of the adoption of the relevant procedural document rather than on the date such procedural document becomes effective (e.g. cf. the ruling of 23 November 2005 of the Chamber of Judges of Civil Cases Division of the Supreme Court of Lithuania in Civil Case *K. R. v. Republic of Lithuania* (Case No 3K-3-604/2005)), and states that in this case there were grounds for acknowledging that the plaintiffs were unlawfully convicted by penal orders issued by the District Court of Ignalina Region on 19 July 2013 and 1 August 2013.

Having evaluated evidence in the case-file, the court of appeal instance stated that the plaintiffs proved only the fact of unlawful arrest and failed to prove other unlawful actions claimed by the plaintiffs, and inter alia that the specialist's conclusion left doubts regarding their majority; therefore, it had to be presumed that they were minors and they had to be provided with relevant guarantees; also, that, when arrested, the plaintiffs were bullied because of their religion, nationality or race. The court of cassation has repeatedly noted that, pursuant to Article 12 and 178 of the Code of Civil Procedure, the parties have to prove circumstances that they use as grounds for their claims and responses, except in cases of circumstances (facts) that need not be proven (Article 182 of the Code of Civil Procedure). Article 226 of the Code of Civil Procedure provides that during the preparation for hearing the case in court the parties and third parties must provide the court with all available evidence and explanations that are significant for the case; also, they have to indicate evidence that they cannot provide to the court and at the same time indicate circumstances preventing them from doing that, and they must finalise their claims and responses to claims. The objective of proof in the civil case shall be the belief of the court (based on the analysis and evaluation of the evidence in the case-file) that certain circumstances related to the subject of the dispute exist or do not exist (Article 176(1) of the Code of Civil Procedure). The proving of circumstances that are significant for the civil case (the subject-matter of proof) is both the right and the duty of the parties and other persons involved in the case. The said persons exercise these rights and implement these duties by stating legally relevant circumstances, collecting evidence and submitting it to court, and participating in the investigation and evaluation of such evidence. If the burden of proof is not exercised or unduly exercised, the subject-matter of proof (which most often is a party of the proceedings) may incur negative implications, viz. the court may acknowledge relevant circumstances, which the party was proving, as not proven (not existing) and, based on such acknowledgement, make a procedural decision to resolve the dispute on the merits (e.g. cf. the ruling of 24 April 2013 of the Chamber of Judges of Civil Cases Division of the Supreme Court of Lithuania in Civil Case *UAB Dekoras v. UAB Vilniaus vystymo kompanija* (Case No 3K-3-240/2013); etc.). In this case the plaintiffs had the burden to prove unlawful actions as a condition of the civil liability of the state. The court of cassation has repeatedly stated that the courts evaluate evidence submitted by the parties based on the rule of the sufficiency of evidence, while a conclusion regarding the existence of a given factual circumstance is drawn according to the inner belief of the court based on the thorough and objective analysis of all significant circumstances of the case (the ruling of 24 November 2009 of the Chamber of Judges of Civil Cases Division of the Supreme Court of Lithuania in Civil Case *Panevėžys City Municipality v. UAB Panevėžio miestprojektas* (Case No 3K-3-526/2009); the ruling of 8 April 2010 in Civil Case *UAB Interbolis v. State Enterprise Centre of Registers* (Case No 3K-3-155/2010); the ruling of 10 May 2010 in Civil Case *Eglutė Association of Owners of Multi-Apartment Buildings v. E. R.* (Case No 3K-3-206/2010); etc.). Therefore, the court has to evaluate not only the evidentiary value of each piece of evidence, but also the totality of evidence, and must draw conclusions on the presence or absence of

facts, which are the subject-matter of proof in the specific case, only based on the entirety of evidence (the ruling of 15 February 2008 of the Chamber of Judges of Civil Cases Division of the Supreme Court of Lithuania in Civil Case *A. M. v. DUAB Baltijos garantas* (Case No 3K-3-98/2008); the ruling of 31 July 2009 in Civil Case *BUAB Vombatas v. A. Š.* (Case No 3K-3-335/2009); the ruling of 7 December 2010 in Civil Case *UAB JG Property developments v. A. B.* (Case No 3K-3-500/2010); etc.). The court must evaluate evidence not only according to the rules of proof but also according to the laws of logic, and must draw unbiased conclusions based on its inner belief (the ruling of 30 March 2010 of the Chamber of Judges of Civil Cases Division of the Supreme Court of Lithuania in Civil Case *J. B. v. UAB TELE-3* (Case No 3K-3-139/2010); the ruling of 12 April 2011 in Civil Case *UAB Geosprendimai v. G. K.* (Case No 3K-3-177/2011)). The case-law of the court of cassation notes that, having analysed and evaluated evidence in the case-file, the court must briefly state the established factual circumstances of the case and arguments in the reasoning of the procedural decision, also state why some pieces of evidence were admitted and others were dismissed, provide the evaluation of evidence based on which the court has drawn its conclusion, and provide the legal reasoning of the decision (the ruling of 24 November 2009 of the Chamber of Judges of Civil Cases Division of the Supreme Court of Lithuania in Civil Case *Panevėžys City Municipality v. UAB Panevėžio miestprojektas* (Case No 3K-3-526/2009); the ruling of 19 April 2012 in Civil Case *I. K., et al. v. Kaunas City Municipality, et al.* (Case No 3K-3-176/2012); the ruling of 27 February 2015 in Civil Case *UAB Liuks v. UAB Saulius ir Kristupas, et al.* (Case No 3K-3-98/2015); etc.).

The appeal in cassation states that the court of appeal instance has incorrectly evaluated one of the written pieces of evidence, viz. Conclusion No MK-O 26/13(01) of 5 April 2013 of the specialist of the State Forensic Medicine Service, and that contrary to the statement of the court of appeal instance this conclusion does not confirm that the plaintiffs are adults. Having evaluated the contents of Conclusion No MK-O 26/13(01) of 5 April 2013 of the specialist of the State Forensic Medicine Service, being a written piece of evidence, the Chamber of Judges states that the court of appeal instance has correctly evaluated this conclusion of the specialist and has not deviated from the case-law of the court with regards to the evaluation of evidence when it has held that the specialist has categorically concluded that the biological age of the plaintiffs was 20–23 years. It should be noted that Letter No 1.5-SD-476 of 19 July 2013 of the State Forensic Medicine Service under the Ministry of Justice of the Republic of Lithuania did not form any grounds for doubting the specialist's conclusion and for assuming that the calendar age of the plaintiffs could be even younger than the established biological age. The Chamber of Judges states that this conclusion leaves no doubt that the plaintiffs are adults and there were no grounds for applying the presumption of minority of the asylum seekers stated in the appeal in cassation.

The Chamber of Judges also states that the court of appeal instance has correctly evaluated the evidence in the case-file and has not deviated from the stated case-law of the court of cassation with regards to the evaluation of evidence when it has held that the plaintiffs' explanations alone are not sufficient for establishing circumstances that, when arrested, the plaintiffs have been subjected to bullying because of their religion, nationality and race. The Chamber of Judges agrees with the arguments of the appeal in cassation that the fact that at the time of arrest the plaintiffs failed to inform anybody about the potential violation of their rights does not allow to presume that the treatment of the plaintiffs at the site of their arrest was essentially appropriate; however, it notes that the case-file contains no other evidence (except for the explanation given by the plaintiffs) certifying that the plaintiffs suffered bullying; therefore, pursuant to the stated case-law of the court of cassation with regards to the evaluation of evidence, the court of appeal instance has justifiably held that the said circumstances have not been proven. It should be noted that contrary to the plaintiffs' claims, Letter No 9-11793 of 3 June 2013 of Lukiškės Remand Prison–Closed Prison states that the prisoners arrived on 17 April 2013, no cases of bullying or degrading treatment of the plaintiffs have been established, and vegetarian diet has been prescribed to the plaintiffs because of their religious beliefs. In response to the request of plaintiff Q. N., Letter No 22-1038 of 17 July 2013 of Lukiškės Remand

Prison–Closed Prison stated that no case of harm being done to the plaintiff has been registered; however, the plaintiff still was moved to another cell on 15 July 2013 (Criminal Case No 1-107-286/2013, case-file p. 99).

It should be noted in this respect that the state has the obligation to protect persons deprived of their freedom and placed in hands of public authorities from inappropriate treatment, inter alia bullying, by public officials or private individuals. With due consideration to the nature and gravity of treatment, such obligations may arise under Article 3 (prohibition of inhuman or degrading treatment) or Article 8 (right to respect for private life) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) (e.g. *Tautkus v. Lithuania*, No 29474/09, judgment of 27 November 2012; *M.C. v. Poland*, No 23692/09, judgment of 3 March 2015; *mutatis mutandis Pfeifer v. Austria*, No 12556/03, judgment of 15 November 2007); should there be any reason to believe that the treatment of a person is related to grounds described in Article 14 of the Convention (prohibition of discrimination), the provisions of this Article shall also apply (e.g. *Abdu c. Bulgarie*, n° 26827/08, arr?t du 11 mars 2014). The state has to ensure that persons deprived of their freedom enjoy rights provided in Article 9 of the Convention (freedom of thought, conscience and religion) (e.g. *mutatis mutandis Begheluriand Others v. Georgia*, No 28490/02, judgment of 7 October 2014; *Karaahmed v. Bulgaria*, No 30587/13, judgment of 24 February 2015; also, *Vartic v. Romania (No 2)*, No 14150/08, judgment of 17 December 2013). However, as it was mentioned before, the plaintiffs (who were provided with translation and legal services during the criminal procedure and during this civil case, and essentially there are no doubts regarding the effectiveness of such services) have failed to provide any evidence supporting the said facts (except for their own explanations) and to request the court to order the submission of evidence following the procedure set forth by the Code of Civil Procedure.

With due consideration to the above, the Chamber of Judges states that the court of appeal instance has duly distributed the burden of proof, has correctly evaluated evidence in the case-file and has not deviated from the stated case-law of the court of cassation with regards to the evaluation of evidence when it has held that the plaintiffs have failed to prove other unlawful actions that they claimed, viz. that the specialist's conclusion has left doubts regarding their majority; therefore, it had to be presumed that they were minors and they had to be provided with relevant guarantees; also, that, when arrested, the plaintiffs were bullied because of their religion, nationality or race.

Regarding the amount of the compensation of non-pecuniary damage

The appeal in cassation also objects to the amount of the compensation of non-pecuniary damage awarded by the court of appeal instance. The Chamber of Judges agrees with the arguments of the appeal in cassation, which state that the decision of the court of appeal instance regarding the amount of the compensation of non-pecuniary damage resulting from unlawful arrest was unreasonably based on the ruling of 2 December 2001 of the extended Chamber of Judges of the Civil Cases Division of the Supreme Court of Lithuania in Civil Case *S. R. v. Republic of Lithuania* (Case No 3K-7-375/2011), which contained a statement only on non-pecuniary damage resulting from the duration of the criminal procedure that was too long and on the criteria for determining such amount, and which failed to make a statement on damage resulting from unlawful arrest. According to the case-law of the court of cassation (e.g. cf. the ruling of 23 December 2014 of the Chamber of Judges of the Civil Cases Division of the Supreme Court of Lithuania in Civil Case *G. A. v. Republic of Lithuania* (Case No 3K-3-563/2014)), in assessing the amount of non-pecuniary damage resulting from the unlawful application of a procedural measure of enforcement, i.e. arrest, the court shall, in addition to general criteria stated in Article 6.250 of the Civil Code, take into consideration legally significant circumstances, such as circumstances of the violation of the right to freedom (the duration of the arrest, the nature of unlawful actions of public authorities leading to the violation of rights, the specific defects of relevant decisions made during the criminal procedure, etc.); the impact of the arrest on personal life (whether the arrested person had a family, minor

children; whether he had special occupations that the arrest terminated); the impact of the arrest on human health, including mental health; the impact of the arrest on professional life; circumstances that may reduce the amount of damage to be compensated, including the economic situation of the aggrieved person and the state (even though the economic situation of the state does not directly reflect the consequences of non-pecuniary damage sustained by the aggrieved person, it must be taken into consideration when assessing the amount of non-pecuniary damage resulting from unlawful actions of law enforcement authorities in order for the awarded amount of non-pecuniary damage to reflect the social context and be just from the social point of view) and the fault of the aggrieved person (Article 6.297 of the Civil Code).

It has been established in this case that the unlawful arrest of plaintiff Q. N. has lasted for 107 days and the unlawful arrest of plaintiff G. M. has lasted for 112 days. According to the Chamber of Judges, when making a decision on further criminal prosecution and arrest of the plaintiffs detained upon illegally crossing the state border of the Republic of Lithuania, circumstances proving that the plaintiffs unlawfully entered the Republic of Lithuania seeking to exercise the right of asylum (Article 291(2) of the Criminal Code) were sufficiently clear (apparent). The Plaintiffs were detained soon after they crossed the border. During the very first interrogation they explicitly stated the purpose of leaving their country of origin (to exercise the right of asylum) and indicated that they are from Afghanistan (with due consideration to the complicated situation in the country, this could be one of the factors proving that such intention was actually real). Furthermore, on 12 April 2013, the Asylum Affairs Division of the Migration Department under the Ministry of the Interior decided to process the plaintiffs' application for asylum in the Republic of Lithuania and to grant temporary admission in the Republic of Lithuania. However, public authorities involved in the criminal procedure have failed to duly and timely take into consideration the status of the plaintiffs as asylum seekers, i.e. vulnerable persons, who are entitled to special protection under international and EU law. By continuing criminal prosecution and refusing to discontinue it, the authorities gave too much weight on formal circumstances or circumstances of no material importance in this context (e.g. that the plaintiffs had no identification documents, incorrectly stated their age, etc.). If the stated status of the plaintiffs had been duly taken into consideration during the criminal procedure, the plaintiffs would have been placed with a special institution for such persons following the procedure set forth by the Law of the Republic of Lithuania on the Legal Status of Aliens and would have enjoyed all guarantees provided to the non-arrested asylum seeker by the said law rather than arrested. The courts established that even though the plaintiffs had negative emotional experienced in their country of origin which they have been forced to leave, their arrest in Lithuania has also had a severe impact on their mental health (the psychologist's opinion of 3 October 2013 and the testimony of psychologist J. B.). With due consideration to the indicated circumstances established by courts, the Chamber of Judges holds that, with due respect to the criteria provided by the court of cassation, the compensation of non-pecuniary damage of EUR 3,098.93 should be awarded to the benefit of plaintiff Q. N. and the compensation of non-pecuniary damage of EUR 3,243.74 should be awarded to the benefit of plaintiff G. M. as the appropriate satisfaction of non-pecuniary damage sustained by the plaintiffs as a result of their unlawful arrest and conviction.

With due consideration to the above, the Chamber of Judges states that the judgement of the court of first instance should be upheld, because the amount of the compensation of non-pecuniary damage awarded by the said judgement should be considered to be the appropriate satisfaction for the unlawful arrest and conviction of the plaintiffs.

Pursuant to Article 359(1)(3) and 362(1) of the Code of Civil Procedure of the Republic of Lithuania, the Chamber of Judges of the Civil Cases Division of the Supreme Court of Lithuania

r u l e s :

To reverse the ruling of 19 September 2014 of the Chamber of Judges of the Civil Cases Division of Vilnius Regional Court and to uphold the judgement of 18 April 2014 of the District Court of Vilnius City.

This ruling of the Supreme Court of Lithuania shall be final, not subject to appeal and shall become effective as of its date.

Judges Egidijus Laužikas

Gediminas Sagatys

Donatas Šernas