CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF BIRUTIS AND OTHERS v. LITHUANIA

(Applications nos. 47698/99 and 48115/99)

JUDGMENT

STRASBOURG

28 March 2002

FINAL

28/06/2002

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

In the case of Birutis and Others v. Lithuania,

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

Mr G. RESS, *President*,
Mr L. CAFLISCH,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mr J. HEDIGAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs H.S. GREVE, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 7 March 2002,

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

PROCEDURE

1. The case originated in applications (nos. 47698/99 and 48115/99) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Lithuanian nationals, Kęstutis Birutis and Vidmantas Byla, and Laimonas Janutėnas ("the applicants"), on 11 and 15 January 1999 respectively. They were represented before the Court by Mr J. Jasiulevičius, a lawyer practising in Vilnius.

2. The Lithuanian Government ("the Government") were represented by their Agent, Mr G. Švedas, Deputy Minister of Justice.

3. The applicants alleged, in particular, that they had been deprived of a fair trial and that their defence rights had been breached because they had been convicted on the basis of anonymous evidence.

4. The applications were allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

5. The Chamber decided to join the proceedings in the applications (Rule 43 § 1).

6. On 24 January 2000 the applicants were granted legal aid under the Court's legal aid scheme.

7. On 6 October 2000 the Chamber declared the applications partly admissible.

8. On 13 November 2000 the applicants were requested to formulate before 10 January 2001 their proposals on friendly settlement (Article 38 of the Convention) and their claims for just satisfaction (Article 41 of the Convention). On 12 January 2001 the above time-limit was extended until

8 February 2001, but the applicants did not submit any proposals or claims in this respect.

9. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

THE FACTS

10. The first applicant, Kęstutis Birutis, is a Lithuanian national born in 1974. The second applicant, Vidmantas Byla, is a Lithuanian national born in 1968. The third applicant, Laimonas Janutėnas, is a Lithuanian national born in 1976. At present the first and the second applicants are detained in the Lukiškės Prison in Vilnius. The third applicant is currently detained in the Pravieniškės Prison in the Kaunas region.

I. THE CIRCUMSTANCES OF THE CASE

11. The applicants, while completing their sentences in the Pravieniškės Prison, were suspected of participating in a riot that took place in the prison on 15 January 1997. 21 detainees, including the applicants, were accused of causing or taking part in the riot.

12. The third applicant was released from prison after completing his original sentence on 14 February 1997. He was arrested on 25 June 1997 in the context of the proceedings for riot. The first and the second applicants were still completing their original sentences throughout these proceedings.

13. During the pre-trial investigation two witnesses were examined on behalf of the third applicant. During the trial one witness was called by the Kaunas Regional Court on the third applicant's behalf. The first and second applicants called no witnesses.

14. On 3 November 1997 the Kaunas Regional Court convicted all the defendants in the case, including the applicants. The court found that the first and the second applicants had organised the riot and that they had also committed affray. They were sentenced to ten years' imprisonment. The third applicant was found guilty of having actively taken part in the riot and sentenced to six years' imprisonment.

15. In establishing the first applicant's guilt, the court referred to the statements of 17 anonymous witnesses who were mostly other detainees. These statements had been recorded by the prosecution during the pre-trial investigation. The secret witnesses testified that the first applicant had organised the riot. The court further referred to the statements at the pre-trial investigation of three co-accused, J, S and T, confirming the first applicant's

guilt. The Regional Court noted that J, S and T had subsequently changed their testimony, alleging *inter alia* that prosecutors had forced them to inculpate the first applicant. However, the court considered that the initial statements of J, S and T had been valid, and that they had only changed their evidence upon intimidation by the other defendants. The court also took account of the statements given during the trial by a complainant, a detainee belonging to "a lower caste among prisoners". The latter had testified that the first applicant had assaulted him on 15 January 1997. The court further noted the evidence given at the trial by five members of the prison staff, alleging that the first applicant had organised the riot. The Regional Court found that on the day of the riot the first applicant had been under the influence of alcohol. In concluding that the first applicant was guilty of riot and affray, the court also mentioned indirect evidence: on-site inspection records, material evidence and expert examinations.

16. In finding the second applicant guilty, the Regional Court referred to the statements by 19 anonymous witnesses recorded by the prosecution during the pre-trial investigation. The anonymous statements testified that the second applicant had also been an organiser of the riot. As was the case with the first applicant, the court rejected the later statements of J, S and T, finding that their original testimonies given during the pre-trial investigation had constituted sufficient grounds for establishing the second applicant's guilt. The court also took account of the statements delivered at the trial by two complainants who were detainees belonging to "a lower caste among prisoners". The latter had alleged that on 15 January 1997 the second applicant had beaten other detainees, attacked members of the prison staff and barricaded the prison. Evidence along the same lines was given by six members of the prison staff summoned during the trial. The Regional Court found that during the riot the second applicant had been under the influence of alcohol. The court also noted that the second applicant's guilt in committing riot and affray was indirectly proved by on-site inspection records, material evidence and expert examinations.

17. As to the grounds for the third applicant's guilt, the Regional Court referred solely to the statements by six anonymous witnesses recorded by the prosecution during the pre-trial investigation.

18. The Regional Court concluded that the first and the second applicants had been the apparent organisers of the riot of 15 January 1997, that they had been drunk, and that they had "induced detainees of lower castes to get involved in the offence". The court also ruled that "the level of participation in the crime by [the third applicant] had been lower".

19. The applicants appealed, stating that they had not committed the offences alleged, that the statements of anonymous witnesses had been invalid, that the secret evidence had not been scrutinised either by the defendants or the court, and that the Kaunas Regional Court had ignored certain evidence given during the pre-trial investigation by other detainees. In their opinion, almost 300 inmates had taken part in the events of

15 January 1997. The applicants stated they had been victimised by the prison administration who had encouraged anonymous testimonies by other detainees, promising them favourable treatment. Furthermore, the "secret witnesses" had themselves allegedly taken part in the riot and had collaborated with the authorities in order to avoid prosecution. The prosecution also appealed against the first instance judgment, requesting more severe sentences.

20. On 29 April 1998 the Court of Appeal dismissed the appeals, finding that the Regional Court had properly established the applicants' guilt and imposed the correct sentences. It held that domestic criminal procedure permitted the first instance court to take account of evidence given by secret witnesses at the stage of pre-trial investigation, without summoning those witnesses to the trial.

21. The applicants lodged a cassation appeal with the Supreme Court, complaining *inter alia* that the lower courts had not clarified the alleged controversy over the anonymous testimonies.

22. On 20 October 1998 the Supreme Court rejected the appeals, finding that the lower courts had properly decided the case. It noted that the first and the second applicants had been convicted not only on the basis of the anonymous testimonies, but also by reference to the statements of the complainants and the prison staff. The Supreme Court found that the third applicant had basically been convicted by reference to the statements of anonymous witnesses. However, in the view of the cassation court, those statements had been consistent and supplementary to other evidence confirming his guilt. No procedural irregularities were found in connection with the courts' refusal to examine the anonymous witnesses.

II. RELEVANT DOMESTIC LAW AND PRACTICE

23. Pursuant to Article 156-1 § 1 of the Code of Criminal Procedure (*Baudžiamojo proceso kodeksas*), in cases pertaining to serious offences a prosecutor or investigator is entitled to keep the identity of a witness secret with a view to ensuring that person's safety. Under paragraph 2 of this Article, at the stage of pre-trial investigation no one is entitled to have access to the personal details of the anonymous witness except the prosecutor or the investigator. Paragraph 3 provides that any data on the anonymous witness are a State secret. Only prosecutors, investigators and judges are entitled to have access to the personal details of that person.

Article 118-1 § 1 of the Code provides that the identity of an anonymous witness is classified under a code name. The data on the witness are kept in a special investigative record, which is separate from the case-file.

Pursuant to Article 317-1 § 1 of the Code, where the identity of a witness is secret, a court may dispense with hearing that person by reading out the anonymous statement at a trial hearing. Paragraphs 2 and 3 provide a

possibility for the court, of its own motion, to question the anonymous witness in the absence of the parties. Paragraph 4 of the Article states that the court may also question the witness in the parties' presence at a non-public hearing. In such a case, the court must create acoustic and visual obstacles to prevent the parties from establishing the identity of the secret witness.

Article 265 of the Code provides that a defendant at the trial has equal rights to adduce and contest evidence, and that the trial is conducted by way of an adversarial procedure. Article 267 § 5 specifies that the defendant has the right to take part in the examination of all evidence, and to question witnesses, experts and other persons in order to state his case at the trial, let alone in cases provided for in Article 317-1 of the Code.

24. Article 31 of the Constitution (*Konstitucija*) guarantees the right to a fair trial and lists specific defence rights.

On 19 September 2000 the Constitutional Court held that Articles 267 § 5 and 317-1 of the Code of Criminal Procedure, to the extent that they did not guarantee the right of the defendant to question anonymous witnesses while preserving the secrecy of their identity, unjustifiably limited the defendant's defence rights in breach of Article 31 of the Constitution.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 and 3 (d) OF THE CONVENTION

25. The applicants alleged a violation of Article 6 §§ 1 and 3 (d) of the Convention which states, insofar as relevant, as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] tribunal ... .
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ... ;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ... ."

26. The applicants complained that they had been deprived of a fair trial and that their defence rights had been breached because they had been convicted on the basis of anonymous evidence, which had not been scrutinised by themselves, their representatives or the courts.

27. The Government stated that the applicants' conviction had not been based exclusively or to a decisive extent on the anonymous evidence. Three identified witnesses had been examined during the proceedings on the third applicant's request, while the first and second applicants' conviction had been based on the evidence of the three co-detainees, complainants, prison staff and the indirect evidence. According to the Government, the anonymous evidence had been read in open court as it had been recorded by the investigating authorities. Subsequently, the trial court and the appeal courts had not scrutinised the anonymous statements, as the applicants' had not requested the courts to do so. The Government concluded that the applicants' defence rights and the principle of a fair trial had not been violated in the present case.

28. The Court recalls that criminal evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (the *Lüdi v. Switzerland* judgment of 15 June 1992, Series A no. 238, p. 21, § 49).

29. The Court has stated in the *Doorson v. the Netherlands* judgment of 26 March 1996 (*Reports of Judgments and Decisions* 1996-II, p. 470, § 69) and the *Van Mechelen and Others v. the Netherlands* judgment of 23 April 1997 (*Reports* 1997-III, p. 711, § 52) that the use of statements made by anonymous witnesses to found a conviction is not in all circumstances incompatible with the Convention. However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. Accordingly, the Court has recognised that in such cases Article 6 § 1, taken together with Article 6 § 3 (d), require that the handicaps under which the defence labours be sufficiently counterbalanced by the procedures followed by the judicial authorities. With this in mind, an applicant should not be prevented from testing the anonymous witness's reliability (also see the *Kostowski v. the Netherlands* judgment of 20 November 1989, Series A no. 166, p. 20, § 42). In addition, no conviction should be based either solely or to a decisive extent on anonymous statements (see the aforementioned *Van Mechelen and Others* judgment, p. 712, §§ 54-55).

30. In the present case, it has not been alleged that any use of anonymous evidence must be excluded. Indeed, given the nature of the offence alleged against the applicants, i.e. a prison riot, the authorities were justified in protecting anonymous witnesses, possibly the applicants' co-detainees. However, this circumstance, as such, could not justify any choice of means by the authorities in handling the anonymous evidence.

31. The Court observes that the third applicant was convicted solely on the basis of anonymous evidence (see § 17 above). While, according to the

Government, he was permitted to question three witnesses in open court during the trial, the domestic courts did not base his conviction on any evidence given by the witnesses mentioned by the Government. As the Convention effectively prohibits a conviction based solely on anonymous evidence (see § 29 above), the third applicant's defence rights and his right to a fair trial have been violated in this respect.

32. As regards the first and the second applicants, it is noted that they were found guilty on the basis of, respectively, 17 and 19 anonymous statements.

At the same time, the first applicant's conviction was also based on the evidence given by a complainant and five members of prison staff. The second applicant's conviction was equally based on the statements of two complainants and six members of prison staff. In addition, the trial court, in finding the first and the second applicants guilty, referred to the initial evidence given by detainees J, S and T, and the indirect evidence, i.e. on-site inspection records, material evidence and expert examinations (see §§ 15 and 16 above). It has not been established that the first and the second applicant's could not challenge this part of the evidence against them in accordance with the requirements of Article 6 §§ 1 and 3 of the Convention.

Against this background, the Court considers that the first and the second applicants' conviction was not based solely, or to a decisive extent, on the anonymous evidence. This being said, the number of the anonymous statements taken into account by the trial court effectively demonstrated that the statements in question were among the grounds upon which the first and the second applicants' conviction was based.

33. It is also noted that, in their pleadings before the trial court and in their appeals against the conviction, the first and the second applicants alleged inconsistency in anonymous statements, on the ground that the anonymous witnesses, possibly other detainees, had collaborated with the prison administration in order to obtain better treatment or, in view of the large scale character of the riot, to avoid prosecution. This allegation was supported by the co-detainees J, S, and T who had changed their initial evidence inculpating the first and the second applicants, stating that they had been forced to give false evidence (see §§ 15, 16 and 19 above).

34. However, despite the allegations that the credibility of the anonymous evidence was open to question, the first and the second applicants or their representatives were not enabled to question the anonymous witnesses. Nor did the courts avail themselves of the statutory opportunity (Articles 156-1 and 317-1 of the Code of Criminal Procedure) to examine, of their own motion, the manner and the circumstances in which the anonymous statements had been obtained. In fact, the statements in question were read before the trial court as they had been recorded by the investigating authorities. The trial court then referred to the anonymous statements to base the first and the second applicants' conviction. In such

circumstances, the handicaps on the first and the second applicants' defence rights were not counterbalanced by the procedures followed by the domestic judicial authorities. The courts' failure to question anonymous witnesses, and to conduct a scrutiny of the manner and circumstances in which the anonymous statements had been obtained, was unacceptable from the point of view of the first and the second applicants' defence rights and their right to a fair trial under Article 6 §§ 1 and 3 (d) of the Convention. There has thus been a breach of this Article in this respect.

35. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. Article 41 of the Convention provides:

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

37. The Court notes that the applicants have submitted no claims under Article 41 of the Convention (see § 8 above). It is further noted that they have been granted legal aid to present their case before the Court (see § 6 above).

38. In these circumstances, the Court considers that it is not required to rule under Article 41.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;

2. *Holds* that the Court is not required to rule under Article 41 of the Convention.

Done in English, and notified in writing on 28 March 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER Registrar	Georg RESS President