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

SECOND SECTION

**CASE OF SIDABRAS AND DŽIAUTAS v. LITHUANIA**

*(Applications nos. 55480/00 and 59330/00)*

JUDGMENT

STRASBOURG

27 July 2004

**FINAL**

*27/10/2004*

[..]

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

1. The first applicant was born in 1951 and lives in Šiauliai. The second applicant was born in 1962 and lives in Vilnius.

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

### A. The first applicant

2. In 1974 the first applicant graduated from the Lithuanian Physical Culture Institute, qualifying as a certified sports instructor.

3. From 1975 to 1986 he was an employee of the Lithuanian branch of the Soviet Security Service (the KGB). After Lithuania declared its independence in 1990, he found employment as a tax inspector at the Inland Revenue.

4. On 31 May 1999 two authorities – the Lithuanian State Security Department and the Centre for Research into the Genocide and Resistance of the Lithuanian People – jointly concluded that the first applicant was subject to the restrictions provided under section 2 of the Law on the evaluation of the USSR State Security Committee (NKVD, NKGB, MGB, KGB) and the present activities of former permanent employees of the organisation ("the KGB Act" – see paragraph 24 below). The conclusion confirmed that the first applicant had the status of a "former KGB officer" (see paragraphs 26-27 below). On 2 June 1999 the first applicant was dismissed from the Inland Revenue on the basis of that conclusion.

5. The first applicant brought an administrative action against the security intelligence authorities, claiming that he had been engaged only in counterintelligence and ideology work while employed by the KGB, and that he had not been involved in the violation of individual rights by that organisation. He argued that his dismissal under section 2 of the KGB Act and the resultant inability to find employment were therefore unlawful.

6. On 9 September 1999 the Higher Administrative Court found that the conclusion of 31 May 1999 had been substantiated and that the first applicant was subject to the restrictions provided under section 2 of the KGB Act. In this respect, the court held that the applicant had the status of a "former KGB officer" within the meaning of the KGB Act, since he had occupied one of the positions mentioned in the list of 26 January 1999.

7. On 19 October 1999 the Court of Appeal dismissed the first applicant's appeal. It found that he had not occupied a KGB position dealing only with criminal investigations and could not therefore benefit from the exceptions listed under section 3 of the KGB Act.

### B. The second applicant

8. On an unspecified date in the 1980s, the second applicant graduated from Vilnius University as a qualified lawyer.

9. From 11 February 1991 he worked as a prosecutor at the Office of the Prosecutor General of Lithuania, investigating primarily cases of organised crime and corruption.

10. On 26 May 1999 the Lithuanian State Security Department and the Centre for Research into the Genocide and Resistance of the Lithuanian People jointly concluded that from 1985 to 1991 the second applicant had been an employee of the Lithuanian branch of the KGB, that he had the status of a "former KGB officer" and that he was thereby subject to the restrictions provided under section 2 of the KGB Act. On 31 May 1999 the second applicant was dismissed from his job at the Office of the Prosecutor General on the basis of that conclusion.

11. The second applicant brought an administrative action against the security intelligence authorities and the Office of the Prosecutor General. He claimed that from 1985 to 1990 he had merely studied at a special KGB school in Moscow and that from 1990 to 1991 he had worked in the KGB as an informer for the Lithuanian security intelligence authorities and should therefore be entitled to benefit from the exceptions under section 3 of the KGB Act. He claimed that his dismissal under the Act and his resultant inability to find employment were unlawful.

12. On 6 August 1999 the Higher Administrative Court allowed the second applicant's claim, quashed the conclusion of 26 May 1999 and ordered him to be reinstated. The court found that the period of the second applicant's studies at the KGB school from 1985 to 1990 was not to be taken into account for the purposes of the KGB Act, that he had worked in the KGB for a period of five months in 1990-91, that he had not occupied a KGB position dealing with political investigations and that, in any event, he had been a secret informer for the Lithuanian authorities. The court concluded that the exceptions under section 3 of the KGB Act applied to the second applicant and that his dismissal had therefore been unlawful.

13. Following an appeal by the security intelligence authorities, on 25 October 1999 the Court of Appeal quashed the judgment of 6 August 1999. It held that, although the first-instance court had properly found that the second applicant had worked at the KGB for only five months, it had not been established that he had worked there as a secret informer for the

Lithuanian authorities. Accordingly, he could not benefit from the exceptions under section 3 of the KGB Act.

14. The second applicant appealed against the Court of Appeal's judgment. By a decision of 28 January 2000, the President of the Supreme Court allowed the appeal. However, by a final decision of 20 April 2000, the full Supreme Court refused to examine the appeal and discontinued the proceedings for lack of jurisdiction.

[…]THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION, TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

15. The applicants stated that the current ban under section 2 of the KGB Act on their finding employment in various branches of the private sector breached Article 8 of the Convention, taken alone and in conjunction with Article 14.

Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 states:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

16. The Government submitted that Article 8 was not applicable in the present case as that provision did not guarantee a right to retain employment or to choose a profession. They further stated that, in any event, the application of the KGB Act to the applicants served the legitimate purpose of protecting national security and was necessary in a democratic society. According to the Government, the KGB Act constituted no more than a justified security screening measure intended to prevent former employees of a foreign secret service from working not only in State institutions but also in other spheres of activity which were important to the State's national security. The KGB Act itself did not impose collective responsibility on all former KGB officers without exception. It provided for individualised restrictions on employment prospects by way of the list of positions in the former KGB which warranted application of the restrictions under section 2

of the KGB Act (see paragraph 27 above). The fact that the applicants were not entitled to benefit from any of the exceptions provided for in section 3 of the KGB Act showed that there existed a well-founded suspicion that the applicants lacked loyalty to the Lithuanian State. Given that not all former employees of the KGB were affected by the KGB Act, Article 14 of the Convention was not applicable. Accordingly, there was no violation of Article 8 of the Convention, either taken alone or in conjunction with Article 14.

17. The applicants contested the Government's submissions. They complained in particular that they had been deprived of the possibility of seeking employment in various branches of the private sector until 2009 on the basis of their status as former KGB officers. They submitted that they had been given no opportunity under the KGB Act either to present their personal cases for evaluating and establishing their loyalty to the State or to avoid the application to them of the employment restrictions provided under section 2. In particular, the first applicant stressed that he had left the KGB in 1986 and the second applicant that he had left in 1990, thirteen and nine years respectively before the entry into force of the KGB Act. Furthermore, the first applicant contended that thereafter he had been actively involved in various activities promoting Lithuania's independence. For his part, the second applicant submitted that he had been decorated as a prosecutor for his work in investigating various offences, including crimes against the State. However, none of those facts had been examined by the domestic courts, which had imposed restrictions on their future employment solely on the ground of their former employment in the KGB. Finally, the applicants submitted that as a result of the negative publicity caused by the enactment of the KGB Act and its application to them, they had suffered constant embarrassment on account of their past.

### A. Scope of the applicants' complaints

18. The Court notes that the applicants' complaints under Article 8, taken alone or in conjunction with Article 14, do not concern their dismissal from their former employment as, respectively, a tax inspector and prosecutor. Furthermore, this part of the application is not directed against their inability to find employment as public servants. The applicants' complaints under Article 8 of the Convention, taken alone or in conjunction with Article 14, concern only the ban imposed on them until 2009 on applying for jobs in various branches of the private sector. This ban, effective since 1999, relates to the following private sector activities listed in section 2 of the KGB Act: "[work] as lawyers or notaries, as employees of banks and other credit institutions, on strategic economic projects, in security companies (structures), in other companies (structures) providing detective services, in communications systems or in the educational system

as teachers, educators or heads of institutions[;] ... [work] requiring the carrying of a weapon."

19. The applicants complained that employment restrictions had been imposed on them on the basis of their former employment with the KGB. They essentially alleged discrimination in this respect. Therefore, the Court will first examine their complaints under Article 14 of the Convention taken in conjunction with Article 8, and will then examine their complaints under Article 8 alone.

## B. Applicability of Article 14

20. The Court reiterates that Article 14 of the Convention protects individuals in similar situations from being treated differently without justification in the enjoyment of their Convention rights and freedoms. This provision has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. However, the application of Article 14 does not presuppose a breach of one or more of such provisions and to this extent it is autonomous. For Article 14 to become applicable, it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols (see, *mutatis mutandis*, *Inze v. Austria*, judgment of 28 October 1987, Series A no. 126, p.17, § 36).

21. The Court will therefore establish, firstly, whether there has been a difference in treatment of the applicants, and, if so, whether the facts of the case fall within the ambit of Article 8 of the Convention, in order to rule on the applicability of Article 14.

### *1. Whether there has been a difference of treatment*

22. The Court observes that, according to the Government, the fact of the applicants' KGB history cannot give rise to a complaint under Article 14 because not all former KGB officers were subjected to restrictions under the KGB Act. The Government stated that the reason for the enactment of the KGB Act and the employment restrictions imposed on the applicants was the lack of loyalty to the State on the part of former KGB officers. The Court observes that the KGB Act did not restrict the employment prospects of all former collaborators of the Soviet Security Service. Firstly, only those persons who had occupied the positions mentioned in the list of 26 January 1999 were considered to have the status of "former KGB officers" (see paragraph 27 above). Secondly, even those persons deemed to have that status could benefit from the amnesty rule mentioned in section 3 of the KGB Act if they had been engaged only in criminal, as opposed to political, investigations during their time at the KGB (see paragraph 24 above). Thirdly, there was the option of applying to the special presidential commission within a three-month period following the KGB Act's entry

into force on 1 January 1999, asking the commission, in the exercise of its discretion, to lift any restrictions which may have been applied (see paragraph 24 above). Finally, it also appears from the impugned domestic proceedings in the instant case that the domestic courts took into consideration whether the applicants had been informers for the Lithuanian authorities immediately after the declaration of independence in 1990 as a possible ground for relieving them of the employment restrictions imposed on them (see paragraph 22 above).

23. However, the fact remains that the applicants were treated differently from other persons in Lithuania who had not worked for the KGB, and who as a result had no restrictions imposed on them in their choice of professional activities. In addition, in view of the Government's argument that the purpose of the KGB Act was to regulate the employment prospects of persons on the basis of their loyalty or lack of loyalty to the State, there has also been a difference of treatment between the applicants and other persons in this respect. For the Court, this is the appropriate comparison in the instant case for the purposes of Article 14.

*2. Whether the facts complained of fall within the ambit of Article 8*

24. It remains to be examined whether the applicants' inability to apply for various jobs in the private sector as a result of section 2 of the KGB Act has impinged on their "private life" as protected by Article 8 of the Convention.

25. The Court has on a number of occasions ruled that "private life" is a broad term not susceptible to exhaustive definition (see, as a recent authority, *Peck v. the United Kingdom*, no. 44647/98, § 57, ECHR 2003-I). It has nevertheless also observed that Article 8 protects the moral and physical integrity of the individual (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, pp. 11-13, §§ 22-27), including the right to live privately, away from unwanted attention. It also secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his or her personality (see *Brüggeman and Scheuten v. Germany*, no. 6959/75, Commission's report of 12 July 1977, Decisions and Reports 10, p.115, § 55).

26. In *Niemietz v. Germany*,(judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29), the Court stated in regard to the notion of "private life":

> "... it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.
>
> There appears, furthermore, to be no reason of principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or

> business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that ... it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time."

27. In the recent case of *Smirnova v. Russia* (nos. 46133/99 and 48183/99, §§ 96-97, ECHR 2003-IX), the Court examined the effect on an applicant's "private life" of the seizure by the authorities of an official document (internal passport), even though no specific interference had been alleged by that applicant as a result of the seizure. The Court ruled that the absence of the passport itself caused a number of everyday inconveniences taken in their entirety, as the applicant needed the passport when performing such mundane tasks as exchanging currency or buying train tickets. It was also noted in particular that the passport was required by that applicant for more crucial needs such as finding employment or receiving medical care. The Court concluded that the deprivation of the passport in *Smirnova* had represented a continuing interference with that applicant's "private life".

28. The Court has also ruled that lack of access to the civil service as such cannot be the basis for a complaint under the Convention (see *Glasenapp* and *Kosiek v. Germany*, judgments of 28 August 1986 (Series A no. 104, p.26, § 49, and no. 105, p.20, § 35); the above principle was also reiterated in *Vogt v. Germany* (judgment of 26 September 1995, Series A no. 323, pp. 22-23, §§ 43-44). In *Thlimmenos v. Greece*, ([GC], no. 34369/97, § 41, ECHR 2000-IV), where an applicant had been refused registration as a chartered accountant because of a previous conviction, the Court also stated that the right to choose a particular profession was not as such guaranteed by the Convention.

29. Nevertheless, having regard in particular to the notions currently prevailing in democratic States, the Court considers that a far-reaching ban on taking up private sector employment does affect "private life". It attaches particular weight in this respect to the text of Article 1 § 2 of the European Social Charter and the interpretation given by the European Committee of Social Rights (see paragraph 31 above) and to the texts adopted by the ILO (see paragraph 32 above). It further reiterates that there is no watertight division separating the sphere of social and economic rights from the field covered by the Convention (see *Airey v. Ireland,* judgment of 9 October 1979, Series A no. 32, pp. 14-16, § 26).

30. Turning to the facts of the present case, the Court notes that, as a result of the application of section 2 of the KGB Act to them, the applicants have been banned from 1999 until 2009 from engaging in professional activities in various branches of the private sector on account of their status as "former KGB officers" (see paragraph 27 above). Admittedly, the ban

has not affected the applicants' ability to engage in certain types of professional activity. The ban has, however, affected their ability to develop relationships with the outside world to a very significant degree and has created serious difficulties for them in terms of earning their living, with obvious repercussions on the enjoyment of their private lives.

31. The Court also notes the applicants' argument that, as a result of the publicity caused by the adoption of the KGB Act and its application to them, they have suffered constant embarrassment as a result of their past activities. It accepts that the applicants continue to be burdened with the status of "former KGB officers" and that fact may in itself be considered an impediment to the establishment of contacts with the outside world – be they employment-related or other – and that this situation undoubtedly affects more than just their reputation; it also affects the enjoyment of their "private life". The Court accepts that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence. Furthermore, during the considerable period which elapsed between the fall of the former Soviet Union (and the ensuing political changes in Lithuania) and the entry into force of the impugned legislation in 1999, it can reasonably be supposed that the applicants could not have envisaged the consequences their former KGB employment would entail for them. In any event, in the instant case there is more at stake for the applicants than the defence of their good name. They are marked in the eyes of society on account of their past association with an oppressive regime. Hence, and in view of the wide-ranging scope of the employment restrictions the applicants have to endure, the Court considers that the possible impediment to their leading a normal personal life must be taken to be a relevant factor in determining whether the facts complained of fall within the ambit of Article 8 of the Convention.

32. In the light of the above, the Court considers that the impugned ban affected, to a significant degree, the applicants' ability to pursue various professional activities and that there were consequential effects on the enjoyment of their right to respect for their "private life" within the meaning of Article 8. It follows that Article 14 of the Convention is applicable in the circumstances of this case taken in conjunction with Article 8.

### C. Compliance with Article 14

33. According to the Court's case-law, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see *Inze*, cited above, p.18, § 41).

34. The Court considers that, as a matter of principle, States have a legitimate interest in regulating employment conditions in the public service as well as in the private sector. In this respect, it reiterates that the Convention does not guarantee as such the right to have access to a particular profession (see, *mutatis mutandis*, *Vogt*, cited above, pp. 22-23, § 43; see also *Thlimmenos*, cited above, § 41). In the recent *Volkmer* (no. 39799/98, 22 November 2001) and *Petersen* (no. 39793/98, ECHR 2001-XII) decisions concerning Germany, the Court also ruled in the context of Article 10 of the Convention that a democratic State had a legitimate interest in requiring civil servants to show loyalty to the constitutional principles on which the society was founded.

35. The Court notes the decision of the Lithuanian Constitutional Court of 4 March 1999, which stated that the KGB Act restricting the employment prospects of former KGB officers was intended to ensure the protection of national security and proper functioning of the educational and financial systems (see paragraph 28 above). In their justification of this ban before the Court, the respondent Government have submitted that the reason for the imposition of employment restrictions under the KGB Act on the applicants was not their KGB history as such, but their lack of loyalty to the State as evidenced by their former employment with the KGB.

36. The Court must have regard in this connection to Lithuania's experience under Soviet rule, which ended with the declaration of independence in 1990. It has not been contested by the applicants that the activities of the KGB were contrary to the principles guaranteed by the Lithuanian Constitution or indeed by the Convention. Lithuania wished to avoid a repetition of its previous experience by founding its State, *inter alia*, on the belief that it should be a democracy capable of defending itself. It is to be noted also in this context that systems similar to the one under the KGB Act, restricting the employment prospects of former security agents or active collaborators of the former regime, have been established in a number of Contracting States which have successfully emerged from totalitarian rule (see paragraphs 30-32 above).

37. In view of the above, the Court accepts that the restriction on the applicants' employment prospects under the KGB Act, and hence the difference of treatment applied to them, pursued the legitimate aims of the protection of national security, public safety, the economic well-being of the country and the rights and freedoms of others (see, *mutatis mutandis*, *Rekvényi v. Hungary* [GC], no. 25390/94, § 41, ECHR 1999-III).

38. It remains to be established whether the impugned distinction constituted a proportionate measure. The applicants' principal argument before the Court was that neither the KGB Act nor the domestic proceedings in their cases established their actual loyalty to the Lithuanian State. They argued that the impugned restrictions were imposed in the abstract and that they were punished solely on the basis of their status as former KGB

officers without any account being taken of the special features of their own cases. For the following reasons, however, the Court does not consider it necessary to rule on the question of whether the applicants were given an opportunity to provide evidence of their loyalty to the State or whether their lack of loyalty was indeed proved.

39. Even assuming that their lack of loyalty had been undisputed, it must be noted that the applicants' employment prospects were restricted not only in the State service but also in various branches of the private sector. The Court reiterates that the requirement of an employee's loyalty to the State is an inherent condition of employment with State authorities responsible for protecting and securing the general interest. However, there is not inevitably such a requirement for employment with private companies. Although the economic activities of private sector players undoubtedly affect and contribute to the functioning of the State, they are not depositaries of the sovereign power vested in the State. Moreover, private companies may legitimately engage in activities, notably financial and economic, which compete with the goals fixed for public authorities or State-run companies.

40. In the Court's view, State-imposed restrictions on a person's opportunity to find employment with a private company for reasons of lack of loyalty to the State cannot be justified from the Convention perspective in the same manner as restrictions on access to their employment in the public service, regardless of the private company's importance to the State's economic, political or security interests.

41. Furthermore, in deciding whether the measures complained of were proportionate, the Court cannot overlook the ambiguous manner in which the KGB Act deals with, on the one hand, the question of the lack of loyalty of former KGB officers such as the applicants – be it assumed on the basis of their KGB past or duly proved on the facts – and, on the other hand, the need to apply the restrictions to employment in certain private sector jobs. In particular, section 2 of the KGB Act lists very concisely the private sector activities from which the applicants, as persons deemed to be lacking in loyalty, should be excluded (see paragraphs 24 and 40 above). However, with the exception of references to "lawyers" and "notaries", the KGB Act contains no definition of the specific jobs, functions or tasks which the applicants are barred from holding. The result is that it is impossible to ascertain any reasonable link between the positions concerned and the legitimate aims sought by the ban on holding those positions. In the Court's view, such a legislative scheme must be considered as lacking the necessary safeguards for avoiding discrimination and for guaranteeing adequate and appropriate judicial supervision of the imposition of such restrictions (see, *inter alia*, the conclusions pertaining to access to the public service reached in regard to similar legislation in Latvia by the ILO Committee of Experts on the Application of Conventions and Recommendations, referred to in paragraph 32 above).

42. Finally, the Court observes that the KGB Act came into force in 1999, that is, almost a decade after Lithuania declared its independence on 11 March 1990; in other words, the restrictions on the applicants' professional activities were imposed on them thirteen years and nine years respectively after their departure from the KGB. The fact of the KGB Act's belated timing, although not in itself decisive, may nonetheless be considered relevant to the overall assessment of the proportionality of the measures taken.

43. In view of the above, the Court concludes that the ban on the applicants seeking employment in various branches of the private sector, in application of section 2 of the KGB Act, constituted a disproportionate measure, even having regard to the legitimacy of the aims pursued by that ban.

44. There has therefore been a violation of Article 14 of the Convention taken in conjunction with Article 8.

**[…]**

[…]

## FOR THESE REASONS, THE COURT

1. *Holds*, by five votes to two, that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

[…]