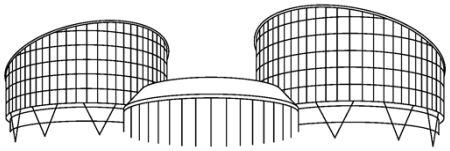

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF SACHARUK v. LITHUANIA

(Application no. 39300/18)

JUDGMENT

Art 6 § 1 (criminal) • Impartial tribunal • Conviction of Parliamentarian after the end of his term of office for voting for another parliamentarian who was absent with the latter's identity card • Objectively justified doubts as to the impartiality of the Supreme Court upholding the applicant's conviction, on account of one of its members having presided over the panel of that court in the first proceedings which quashed the Court of Appeal's acquittal judgment and made findings prejudging his guilt • Legitimate fear that the judge in question might have already reached a preconceived view on the applicant's guilt despite not being legally bound by the Supreme Court's previous finding
Art 7 • *Nullum crimen sine lege* • Conviction • Opening of a criminal prosecution against the applicant in line with Art 7 requirements • Authorities' attitude towards practice of members of parliament voting for each other not amounting to a "conscious toleration" • Iterative instances of such voting, which violated domestic statutory law, not to be treated as a "tradition" • No discernible flagrant non-observance or arbitrariness in the application, albeit novel, of the relevant law to the applicant • Reasonable interpretation of relevant law and application "consistent with the essence of the offence" • No lack of clarity in the legislation or the domestic courts' practice which did not allow the applicant to regulate his conduct • Foreseeable that the applicant's acts would constitute an offence under the criminal law applicable at the material time

Prepared by the Registry. Does not bind the Court.

STRASBOURG

23 April 2024

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Sacharuk v. Lithuania,

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

Arnfinn Bårdsen*, President*,
Jovan Ilievski,
Egidijus Kūris,
Saadet Yüksel,
Lorraine Schembri Orland,
Frédéric Krenc,
Davor Derenčinović*, judges*,

and Dorothee von Arnim, *Deputy Section Registrar,*

Having regard to:

the application (no. 39300/18) 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 a Lithuanian national, Mr Aleksandr Sacharuk ("the applicant"), on 9 August 2018;

the decision to give notice to the Lithuanian Government ("the Government") of the complaints concerning the applicant's right to an impartial tribunal and foreseeability of the applicant's conviction;

the parties' observations;

Having deliberated in private on 26 March 2024,

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

INTRODUCTION

1. The case concerns the applicant's complaint, under Article 6 § 1 of the Convention, that the Supreme Court panel which upheld his conviction had not been impartial. The applicant also complained, under Article 7, that his conviction had not been foreseeable.

THE FACTS

2. The applicant was born in 1977 and lives in Vilnius. He was represented by Mr E. Losis, a lawyer practising in Vilnius.

3. The Government were represented by their Agent, Ms K. Bubnytė-Širmenė.

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

I. THE APPLICANT'S SERVICE AS A MEMBER OF THE *SEIMAS*

5. The applicant was elected to the *Seimas* (the Lithuanian Parliament) and was its member between 18 November 2008 and 16 November 2012. It

is noted on the *Seimas'* internet page that from 2002 to 2007 the applicant was an inspector, commissioner inspector and then commissioner at the Criminal Police Bureau of Lithuania. In 2007 he voluntarily left the state Service and became an advocate.

6. On several occasions between 14 and 19 January 2010 he used the *Seimas* member's identity card (*Seimo nario pažymėjimas*, hereinafter also "parliamentary identity card") of another member of the *Seimas*, L.K., to vote electronically instead of the latter during L.K.'s absence from the *Seimas* sessions. Later, it was established that L.K. had been on holiday in Southeast Asia at the time, without the *Seimas*' authorisation.

7. On 21 January 2010 the *Seimas* Ethics and Procedures Commission concluded that by "many times (*daug kartų*) deliberately vot[ing] for another *Seimas* member between 14 and 19 January 2010" the applicant had breached Article 111 § 4 of the *Seimas* Statute, which reads that *Seimas* members must vote in person and that the right to vote may not be transferred to another parliamentarian (see paragraph 62 below). He had also breached Article 4 § 1 (3) and (5) of the Code of Conduct for State Politicians – which provides that it is a parliamentarian's duty to act honestly and decently (see paragraph 63 below) – and had caused damage to the *Seimas*' reputation and authority. The Commission proposed that, as a sanction for dishonest voting, under Article 20 § 2 of the *Seimas* Statute, the applicant should be given a warning (*įspėjimas*), which would be noted in the [Commission's] hearing record. The Commission also concluded that the other parliamentarian, L.K., had breached Article 111 § 4 of the *Seimas* Statute by allowing the applicant to use his voting right.

8. On 12 May 2010 the *Seimas* Special Investigation Commission (hereinafter "the SSIC"), which had been formed to examine whether the actions of the applicant and L.K. were an impeachable offence, found to be well founded the accusation by (other) parliamentarians that the applicant, by using L.K.'s *Seimas* member's identity card, had deliberately voted for the latter during *Seimas* sittings and had thus presumably breached the *Seimas* member's oath and grossly violated the Constitution. That being so, the Commission held that it could not be established from the evidence gathered and assessed that the applicant and L.K. had had a prior agreement regarding the voting (*turėjo išankstinį susitarimą dėl balsavimo*) in order to cover up the latter's absence from the *Seimas* sessions and in such a manner as to unlawfully obtain money from the State budget.

The Commission also held that it could be concluded from the evidence that the applicant's actions "had contained subjective elements of possible criminal acts" (*yra galimai nusikalstamų veikų subjektyvių požymių*), because he had known the requirements of the Constitution and the law, had not consciously followed them, had deliberately voted using L.K.'s *Seimas* member's identity card and had deliberately sought those consequences – to

register L.K. during the *Seimas* vote and "usurp the expression of L.K.'s will" (*pasisavinti [L.K.] valios išreiškimą*) when voting.

9. On 13 May 2010 the SSIC asked the Prosecutor General's Office to start a pre-trial investigation to determine whether the applicant had committed a crime under Articles 300 and 302 of the Criminal Code (see paragraph 59 below) in connection with his voting in the *Seimas* instead of L.K.

10. Having examined the material submitted, the Prosecutor General's Office asked the *Seimas* to lift the applicant's immunity from prosecution. The prosecutor referred to Article 3 § 1 (3) of the Code of Criminal Procedure, Article 62 § 2 of the Constitution and Article 22 § 3 of the *Seimas* Statute, which barred the opening of a criminal prosecution against the applicant without the *Seimas*' approval (see paragraphs 58, 60 and 62 below).

11. On 17 June 2010 the *Seimas* took a vote regarding the prosecutor's request to lift the applicant's immunity, with forty-six votes in favour, twelve votes against and twenty-eight parliamentarians abstaining. This meant that there were not enough votes to lift his immunity.

12. On 30 June 2010 the Prosecutor General's Office refused to start a pre-trial investigation into the circumstances of the alleged criminal acts committed by the applicant, in the absence of authorisation from the *Seimas* to prosecute him. Even so, it was noted in the decision that there was information in the material provided by the SSIC indicating that the applicant had breached Article 18 § 1 and Article 111 § 4 of the *Seimas* Statute by unlawfully using another parliamentary identity card and thus having falsified the electronic votes. With these actions, the applicant had caused major damage to the State, given that the principles of the rule of law, lawfulness, justice, transparency and loyalty declared by it had been breached; the functions and activity of the *Seimas*, as a State institution, had been distorted; and the name of *Seimas* members had been discredited. Such actions by the applicant had contained elements of the offences set out in Article 228 § 1, Article 300 § 3 and Article 302 § 2 of the Criminal Code.

13. Impeachment proceedings based on the SSIC's conclusions (see paragraph 8 above) were started. During the Constitutional Court proceedings, the applicant did not deny the fact that on 14 and 19 January 2010 he had voted using L.K.'s parliamentary identity card. However, he argued that the only sanction for that "infraction" (*pažeidimas*) was a warning, under Article 20 § 2 of the *Seimas* Statute. Neither the *Seimas* Statute nor any other laws provided for "any other penalties" (*kitos nuobaudos*) for dishonest voting in the *Seimas*. The applicant thus argued that the starting of impeachment proceedings against him amounted to application of a punishment not prescribed by law.

14. As summarised in the Constitutional Court's conclusion of 27 October 2010 (see paragraph 15 below), during the impeachment proceedings before it, the applicant's lawyer had also pleaded that the

violation committed by the applicant had not been the first such violation: the *Seimas* Ethics and Procedures Commission had more than once considered cases where votes had been cast instead of absent members of the *Seimas*, but impeachment had not been initiated in any of these cases. The lawyer pleaded as follows:

> "The Conclusion of the [SSIC] established not only that there had been cases at the *Seimas* when members of the *Seimas*, using the [identity cards] of other members of the *Seimas*, had voted instead of the latter at the sittings of the *Seimas*, but also that violations of the individual mandate of a *Seimas* member and those of the single vote had been known to both the governing body of the *Seimas* and the *Seimas* Ethics and Procedures Commission, a structural unit of the *Seimas* competent to react accordingly and submit recommendations to the *Seimas* in order to prevent such violations being committed in the future (paragraph 4 of Chapter II of the reasoning part of the Conclusion of the [SSIC]). Thus, not only has this practice found its way into the *Seimas* that members of the *Seimas* continually cast votes instead of members of the *Seimas* absent during the sittings of the *Seimas*, more often than not, instead of even more than one member, [there is] also a certain reaction of the *Seimas* towards such cases. Meanwhile, the Conclusion of the [SSIC] provides neither reasoning nor arguments as to why the violation by this member of the *Seimas* is exceptional. A different assessment of the actions of individual members of the *Seimas* would offend against the principle of equality of persons before the law, the court and other State institutions, as well as the principle of justice, as the dangerousness of the violation would be judged not by the violation itself and its dangerousness, but "by personality".
>
> The voting instead of the member of the *Seimas* [L.K], by using his [parliamentary identity card] did not have any influence upon the voting results, as the decisions of the *Seimas* were passed by a great plurality of votes; therefore, this did not lead to any significant, let alone severe consequences."

15. On 27 October 2010 the Constitutional Court presented the conclusion, whereby it held that both the applicant and L.K. had breached the parliamentary oath and grossly violated the Constitution by the applicant having used L.K.'s parliamentary identity card and on 14 and 19 January 2010 having "deliberately" (*sąmoningai*) voted in his place eight times, and by L.K. having gone on a trip abroad and because of this having failed to attend, without justifying the reason, the plenary sittings of the *Seimas* which had taken place on 13, 14, 19, 20 and 21 January 2010, and the sittings of the *Seimas* Committee on Health Affairs which had taken place on 15 and 20 January 2010 (see also paragraph 64 below).

16. As specified by the Government, given that during impeachment proceedings the final decision concerning removal from office belongs to the *Seimas*, on 11 November 2010 the *Seimas* voted on the proposal to annul the applicant and L.K.'s *Seimas* member's mandates for grossly violating the Constitution and breaching the *Seimas* member's oath. In order for the mandate to be annulled, eighty-five votes, that is, no less than three-fifths of the votes of the total number of *Seimas* members, were necessary. The votes for annulment of the applicant's mandate were as follows: eighty votes in

favour, twenty-four against, thirteen abstentions and thirteen damaged. The applicant thus preserved his mandate.

The *Seimas* annulled L.K.'s mandate with eighty-nine votes in favour.

II. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

A. Criminal charges against the applicant

17. In June 2011 the *Seimas* supplemented the Code of Criminal Procedure with a new provision, Article 3^2, to allow prosecution of persons who had lost their immunity (see paragraph 61 below).

18. On 16 November 2012 the newly elected *Seimas* gathered for its first sitting, which resulted in the end of the applicant's term of office as a member of the *Seimas*.

19. On 20 November 2012 the Prosecutor General's Office, referring to Article 169 § 1 of the Code of Criminal Procedure (see paragraph 60 below), annulled the decision refusing to start a pre-trial investigation (see paragraph 12 above) and started one: the applicant's term of office as a *Seimas* member had ended, meaning that he had lost his immunity and the *Seimas*' authorisation to prosecute him was no longer necessary, that is to say, the grounds which had made criminal proceedings impossible had ceased to exist. The Prosecutor General's Office thus opened a criminal investigation against the applicant regarding the criminal charges under Article 228 § 1, Article 300 § 3 and Article 302 § 2 of the Criminal Code.

B. The applicant's acquittal by the Vilnius Regional Court and the Court of Appeal

20. By a judgment of 20 July 2015, the Vilnius Regional Court acquitted the applicant of all three criminal charges. That judgment was upheld by the Court of Appeal on 23 May 2016.

The courts had regard to the *Seimas* Ethics and Procedures Commission's conclusion that as of 27 February 2001 there had been a number of occasions when *Seimas* members would vote not only for themselves, but also in place of other members of the same coalition or same political group (*politinė frakcija*). The Commission would regard such actions as a disciplinary offence and a breach of Article 20 § 2 of the *Seimas* Statute. The Commission would merely recommend to the *Seimas* members in question not to pursue such a practice and not to commit such "infractions" (*nusižengimus*) in future, and not to discredit the name of *Seimas* members. Moreover, Article 20 § 2 of the *Seimas* Statute, as in force at the time the acts had been performed, also provided that "for dishonest voting a warning to a parliamentarian could be recorded in the minutes of the *Seimas* hearing" (*už nesąžiningą balsavimą į posėdžio protokolą Seimo nariui gali būti įrašomas įspėjimas*). Given those

considerations, the appellate court concluded that the trial court had reasonably relied on the testimony of the applicant and other witnesses, some of whom were members of the *Seimas* belonging to the same political group and who confirmed that, within that political group, it had been agreed that members would vote "unanimously" (*vieningai*) in the *Seimas* plenary sessions. Similarly, it was "settled practice" to vote for a member of the same political group if he was not present at the *Seimas* hearing and provided that [the other parliamentarians] had his *Seimas* member's identity card; there was no need to obtain that parliamentarian's prior agreement on the vote. For the appellate court, and contrary to what had been suggested by the prosecutor, such an expression of the will of another member of the same political group could not damage the interests of the latter member or cause him any kind of harm. The Court of Appeal also held that, contrary to the prosecutor's suggestion, there was no evidence in the case allowing it to be concluded that the applicant and L.K. had had an agreement that the former would vote for the latter so that the latter would retain his salary.

21. The courts also considered that the applicant's actions had not been so dangerous as to attract criminal liability. They had not caused major damage to the State or its institutions; not every breach of the law had to be criminalised. Moreover, the applicant's actions had already been condemned by the *Seimas* Ethics and Procedures Commission and he had been given a warning. He had not sought to cause major damage to the State or a natural or legal person, and the prosecutor's statements regarding major damage to the State and the *Seimas*, as a State institution, were not persuasive. No civil claim had been lodged in that case. According to the applicant, he had voted with the full knowledge of L.K. and their political group, and there was no evidence to disprove that statement. After the voting incidents had come to light, no one had asked for a new vote to take place in the *Seimas* regarding the laws that had been passed when the applicant had voted in place of L.K. Thus, no legally significant consequences or major damage had been caused to the State or L.K. The applicant's actions had not been aimed at altering the decisions taken by the *Seimas* or at providing false information about the position of the *Seimas* member whose identity card had been used to vote. Nor had the actions been aimed at demeaning the *Seimas*' authority or otherwise causing major damage to the State or its institutions. Witness statements confirmed that there was an unwritten rule for members of a political group to vote unanimously, and such a manner of expressing the position of another member of the same political group could not breach that member's interests or cause him harm.

22. Further, it had not been established that the applicant had understood that he was committing actions which would attract criminal liability. The courts noted that the applicant had understood that he was committing a disciplinary violation that could attract a warning (*įspėjimas*) under the

Seimas Statute. They also observed that, according to the applicant, he had been unaware that a member of the *Seimas* could be prosecuted for such acts.

23. Lastly, both courts noted that evaluation of the applicant's actions by other State institutions could not serve as an unconditional basis for considering those actions criminal. The other institutions' conclusions had to be assessed together with the entire [criminal] case file when the question of criminal liability was being assessed. The conclusions were not decisive in establishing the applicant's criminal liability. Besides other important documents, it was important to take into account both the Constitutional Court's conclusion regarding the applicant's actions, as well as the *Seimas*' decision adopted when deciding whether to allow his prosecution (see paragraph 11 above), because that decision "was linked to the *Seimas* members' position when assessing the dangerousness of the applicant's actions and the possibility of considering them criminal".

C. The Supreme Court's remittal of the case for fresh examination

24. Following an appeal on points of law lodged by the prosecutor, on 20 December 2016 a three-judge panel of the Supreme Court, composed of Judges D.B. (presiding judge), A.K. and V.P. (reporting judge), quashed the ruling of the Court of Appeal in an oral hearing and remitted the case to it for fresh examination.

25. The Supreme Court noted that Article 302 of the Criminal Code established criminal liability for seizing or, without having legal grounds, acquiring or using a document. However, neither the first-instance court nor the appellate court had given answers to that main question on which the decision as regards the charge brought under Article 302 of the Criminal Code rested – whether the applicant had lawfully obtained and kept L.K.'s parliamentary identity card. Those courts had instead reached conclusions by referring to the testimony of the applicant and other witnesses that voting in place of another parliamentarian was an "established practice" in the *Seimas*. For the Supreme Court, "acknowledgement that there was such a practice did not eliminate its dangerousness or criminal nature, because it had nothing to do with the elements of the crime set out in Article 302 of the Criminal Code".

26. As to Article 300 of the Criminal Code (forgery of a document), that provision protected such values as the authenticity of documents and information contained therein. Any inscription containing information about an event or action, made on paper or electronically, was considered to be a document. The Court of Appeal had been correct in acknowledging that the registration and voting records of *Seimas* members were considered documents.

27. Despite this, when acquitting the applicant under Article 300 of the Criminal Code, the first-instance and appellate courts had paid much attention to the "settled practice" (*nusistovėjusi praktika*) in the *Seimas* of voting for

another member of parliament. Those two courts, referring to the testimony of the applicant and other witnesses, had concluded that such actions would often take place, and that no one had faced prosecution. The first-instance and appellate courts had thus concluded that they saw nothing dangerous in such actions, and that such actions could be examined by the *Seimas* Ethics and Procedures Commission with disciplinary liability possibly being applied. The applicant had likewise understood having committed a disciplinary violation for which only a warning could be applied under the *Seimas* Statute (see paragraphs 20-22 above).

28. The Supreme Court noted that the prosecutor had disputed that conclusion of the lower courts and stated that the illegal practice in the *Seimas* of voting for another member of the *Seimas* not participating in the *Seimas* sitting did not in itself eliminate the criminal nature of the applicant's actions. The Supreme Court's chamber then "agreed with that argument of the prosecutor's cassation appeal and considered that the assessment of the evidence was very one-sided and unlawful, as the mission of a member of the *Seimas*, and the wording of the Constitution of the Republic of Lithuania, the *Seimas* Statute and Article 300 of the [Criminal Code] had not been taken into account." The lower courts' arguments could not refute a person's understanding that an action that he was performing was dangerous. The Supreme Court considered that "thus far" (*iki šiol*) not a single member of the *Seimas* had faced prosecution (*nepatrauktas baudžiamojon atsakomybėn*) for unlawful voting, not because it was not dangerous or not criminal, but because the law-enforcement institutions had not been informed of a single such case.

29. The Supreme Court also held:

> "Article 111 § 4 of the *Seimas* Statute unconditionally (*įsakmiai*) stipulates that the *Seimas* members shall vote in person and that the right to vote may not be transferred to other persons. Thus, neither the *Seimas* Statute nor other legal acts in force in the Republic of Lithuania allow some members of the *Seimas* to vote for other members of the *Seimas*. This is what happened in this case – registration and voting for another person who did not participate in the *Seimas* sitting. It follows that objectively, documents were forged..."

30. The Supreme Court then turned to the first-instance and appellate courts' findings that where actions, such as facts not corresponding to the reality being entered into a document, could not breach a person's rights, or cause him or her or the State major consequences, they were not considered dangerous within the meaning of criminal law and therefore did not attract criminal liability (see paragraphs 20 an 21 above). For the Supreme Court, that theory was correct in principle. Despite this, the lower courts' finding that voting for another person was merely an innocent action that could not breach a natural or legal person's rights or cause those persons or the State major consequences, "raised doubts for the panel" (*teisėjų kolegijai kelia abejonių*), which the Court of Appeal had not dispelled. The *Seimas* was the

highest institution of State power, which decided the most important matters of the State. Practice showed that more than once, owing to a "negligent attitude" (*aplaidus požiūris*) towards the process of passing laws, legislation had been passed that caused confusion and "a significant negative response by society" (*didelį neigiamą rezonansą visuomenėje*), and those laws therefore had to be amended (although this was not the case here). The Supreme Court's ruling read:

> "The panel of judges was not convinced by the lower courts' reasoning that A. Sacharuk's actions lacked legal significance and could, at best, attract disciplinary liability. The provisions of the *Seimas* Statute, which provide that *Seimas* members are discussed by the *Seimas* Ethics and Procedures Commission for unfair voting, do not eliminate the operation of the Criminal Code in this area. Lithuanian law provides for criminal liability only for forgery of a document (Article 300 of the [Criminal Code]). The laws of the Republic of Lithuania do not provide for any other type of liability for forgery of documents. The *Seimas* Statute has no priority over the Criminal Code. Those aspects had not been taken into account by the first-instance and appellate courts."

31. Regarding the applicant's acquittal under Article 228 of the Criminal Code (abuse of office), the Supreme Court held that the Court of Appeal had failed to indicate which powers had been exceeded by him. It was therefore meaningless to examine the question of the consequences of his actions. The Supreme Court added that the appellate court had "one-sidedly examined the prosecutor's arguments" regarding the absence of any element of major damage in the applicant's actions when voting for L.K., and had not taken into account the Constitutional Court's findings of 27 October 2010 as regards compliance of the applicant's actions with the Constitution, wherein it had been held that a *Seimas* member's mandate was individual (see paragraph 64 below).

D. New verdict by the Court of Appeal

32. On 5 June 2017 the Court of Appeal found the applicant guilty of abuse of office, under Article 228 § 1 of the Criminal Code, and of having unlawfully used an official document, under Article 302 § 1. He was given a fine of 1,882 euros.

The criminal proceedings under Article 300 § 1 of the Criminal Code were discontinued as time-barred.

33. The court firstly dismissed the applicant's complaint that, based on the legislative change of 2011 – the introduction of Article 3^2 of the Code of Criminal Procedure (see paragraph 61 below) – there had been a breach of the principle of legitimate expectations and of the right to legal certainty not to be prosecuted. For the court, a mere change in procedural legislation did not mean that there had been a breach of the applicant's rights. When the prosecutor's decision to refuse to start the pre-trial investigation had been adopted (in 2010), the question of the applicant's guilt had not been addressed (see paragraph 12 above). The prosecutor's decision to refuse to start the pre-trial

investigation could not therefore be compared to a decision to terminate the investigation making the criminal proceedings impossible on the same grounds.

34. Regarding the characterisation of the applicant's actions under Article 302 § 1 of the Criminal Code (unlawful seizure and use of a document), the use of a document in the absence of a legal basis for doing so could be considered as active actions of the accused. Besides, a parliamentary identity card was an official document which provided its holder with certain rights and duties, so that a member of the *Seimas* could be identified and his presence in the *Seimas* hearings and voting could be controlled.

35. Regarding the facts, the Court of Appeal noted that when the applicant had voted in place of L.K. in January 2010, the *Seimas* agenda had not been known in advance, before L.K. had left Lithuania. Accordingly, the applicant could not have been representing L.K.'s will when voting with the latter's parliamentary identity card. The applicant's repeatedly voting in place of L.K. demonstrated his direct intent: he had realised the dangerous nature of the criminal act and had wished to act in that way. The applicant's criminal act had been clearly in breach of the law and his oath, and had demonstrated an intentional abuse of his duties as a member of the *Seimas*. His testimony - that he did not realise that he had committed a criminal act and considered that such conduct was only in breach of the *Seimas* Statute and could only be addressed by the *Seimas* Ethics and Procedures Commission and only be punished by way of disciplinary proceedings – was nothing more than his interpretation and attempt to avoid criminal liability. Such conduct could not be justified by a lack of attention or being distracted during the *Seimas* sittings either. The applicant had a law degree, life experience and professional experience at the *Seimas*. He would therefore have realised the gravity of his actions and their being contrary to the law. Lastly, the Court of Appeal held that it had not assessed the witness testimony of other members of the *Seimas*, or the records of the *Seimas* Ethics and Procedures Commission's hearings, pursuant to which other members of the *Seimas* had in the past received disciplinary measures "for similar infractions" (*už panašius pažeidimus*): the mere fact that disciplinary liability had been applied to other persons did not eliminate criminal liability for a person whose actions were dangerous and contrary to the law.

36. As regards the characterisation of the applicant's actions under Article 228 of the Criminal Code (abuse of office), the main criterion which differentiated disciplinary liability from criminal liability was the criterion of major damage, and non-pecuniary damage could arise from discrediting the authority of State institutions. The appellate court then referred to the Constitutional Court's conclusions of 27 October 2010 and noted that the applicant, a State politician and member of the *Seimas* – to whom high professional and ethical requirements applied – had violated, among other, Article 9 § 1 of the *Seimas* Statute and Article 4 § 1 (3) and Article 4 § 1 (5)

of the Code of Conduct for State Politicians (see, respectively, paragraphs 62 and 63 below). It followed that the applicant had abused his office and discredited the authority of *Seimas* members as well as that of the *Seimas*, all of which had caused major non-pecuniary damage to the State.

37. Lastly, when imposing a fine on the applicant, the court noted that he had no prior convictions and had not been punished for any administrative-law violations. After the criminal acts in question and until the adoption of the Court of Appeal's judgment, he had not committed any other crimes. Furthermore, the criminal proceedings had lasted too long – more than seven years – because of which the right to a trial within reasonable time had been breached. Referring to the social and preventive purpose of the punishment, the Court of Appeal concluded that the aim of the punishment in the applicant's case would be achieved by imposing a fine of an amount less than the average fine provided for by law.

E. Proceedings before and the final ruling by the Supreme Court

1. The applicant's appeal on points of law

38. In an appeal on points of law lodged on 4 September 2017, the applicant argued, among other things, that both during the pre-trial investigation and court proceedings he had been unable to challenge the prosecutor's decision of 20 November 2012 (see paragraph 19 above). Even though after the pre-trial investigation had been opened, the charges had not been immediately brought against him. He should have been given the opportunity to become acquainted with the prosecutor's decision and the right to appeal against it, yet that had not been done.

39. On the merits, the applicant argued that criminal liability had been applied to him and his actions considered dangerous and in breach of the constitutional principle that all persons are equal under the law. He referred to the existing practice in the *Seimas* where similar or identical actions by other members of the *Seimas* had only been assessed as procedural violations of the *Seimas* Statute or as disciplinary violations. The applicant was convinced that his actions had not been so dangerous as to be considered a crime.

40. On 26 September 2017 the Supreme Court selection panel (*atrankos kolegija*) accepted his appeal on points of law for examination. The case was scheduled to be examined in an oral hearing. Three judges – A.R., D.B. and A.A. – signed that ruling.

2. Impartiality of Judge D.B.

41. On 7 November 2017 Judge V.P., who was then *ad hoc* Chair of the Criminal Cases Division of the Supreme Court, formed a three-judge panel –

G.J.-G. (the presiding judge), D.B. (reporting judge) and T.Š. – to hear the applicant's case.

42. During the hearing of 13 December 2017, the applicant asked that the panel be changed on the grounds that one year earlier Judge D.B. had already examined his criminal case as the presiding judge of the Supreme Court panel (see paragraph 24 above). With the applicant's consent, the examination of his request was postponed until 9 January 2018, as requests had been received by the court to postpone the examination of the case because his lawyer and the prosecutor could not be present.

43. At the oral hearing of 9 January 2018 before the Supreme Court panel consisting of Judges G.J.-G. (presiding judge), T.Š. and D.B., the applicant's lawyers reiterated his request to remove Judge D.B. on the basis of her involvement when the case was first decided on 20 December 2016 (see paragraph 24 above). The applicant's lawyers referred to Article 58 of the Code of Criminal Procedure (see paragraph 60 below) and pointed out that the previous ruling by the Supreme Court panel, when Judge D.B. had been the presiding judge, had "contained some rather strong statements" as to how the first-instance and appellate courts had evaluated the applicant's acts under criminal law, that for the Supreme Court such an evaluation had been incorrect, and that therefore the case had then been transferred to the appellate court for fresh examination. Given that the legal assessment had already been made by the Supreme Court, for the sake of objectivity, the composition of the Supreme Court's chamber should be changed. One of the applicant's lawyers also referred to Article 58 § 2 of the Code of Criminal Procedure, stating that as that provision did not explicitly set out such grounds, the applicant's request to remove the judge was based on general grounds, as the list of grounds was not exhaustive.

44. The Supreme Court panel then adopted a protocol decision dismissing the applicant's request to remove Judge D.B. The panel stated that Article 58 § 2 of the Code of Criminal Procedure did not set out such grounds for removal as those referred to by the applicant's lawyers. In the absence of any other allegations of Judge D.B.'s partiality, the panel saw that the mere fact that she had participated in the previous cassation proceedings did not constitute a legal basis for raising doubts as to her impartiality from the point of view of subjective and objective tests.

3. The Supreme Court's ruling on the merits

45. By a final ruling of 13 February 2018, the three-judge panel of the Supreme Court, in which Judge D.B. was now the reporting judge, dismissed the applicant's appeal on points of law, having examined the case in an oral hearing.

46. As to the lawfulness of the opening of the criminal proceedings on 20 November 2012 (see paragraph 19 above), the Supreme Court referred to Article 169 § 1 of the Code of Criminal Procedure: the prosecutor, once

information had been received that the applicant, whilst a member of the *Seimas*, had possibly committed a criminal act, had not only had grounds but had been obliged to start pre-trial investigation, which he had done. It was essentially mandatory to do so. The basis for opening the pre-trial investigation had been written information from the SSIC (see paragraph 9 above). Immunity, which the applicant had enjoyed while he was a *Seimas* member, had only been an obstacle to investigating the elements of the crime at that time, since in those proceedings the elements of the crime had been inseparable from naming the subject of the crime (*nusikaltimo subjekto*) – the specific person – the *Seimas* member. The applicant's argument that his criminal prosecution had been contrary to Article 62 of the Constitution (see paragraph 58 below) was unfounded.

47. Regarding the crimes of which the applicant had been convicted, the Supreme Court firstly referred to a civil servant's duty to act honestly, transparently and in compliance with the principle of the rule of law. Members of the *Seimas*, as one of the three main State institutions, and as elected representatives of the nation, had to comply with the requirements applied to their activities with particular precision.

48. As far as Article 228 of the Criminal Code (abuse of office) was concerned, the main provisions had been in force: persons were held criminally liable only where actions committed by them had been prohibited by the criminal law in force at the time they had been committed, provided that the persons had been found guilty, and provided that at the time the criminal acts had been committed it had been possible to expect those persons to behave in compliance with the law. In a democratic State based on the rule of law, it was presumed that each person – be it a representative of a State authority or merely a citizen – "had to comply with a common pattern of behaviour" (*privalo laikytis pripažintų elgesio modelių*) and be responsible for improper actions "notwithstanding whether or not he knew the levels of legal liability that were at stake" (*nepriklausomai nuo to, žino jis ar ne gresiančios teisinės atsakomybės lygmenis*). For its part, the legislator, by establishing levels of legal liability and prohibiting dangerous actions, essentially warned persons to refrain from committing criminal acts. Ignorance of the law did not release a person from liability.

49. The Supreme Court then turned to the applicant's arguments that such voting in the *Seimas* had been "settled practice" (*susiklosčiusi praktika*), which merited another type – not criminal – liability, given that other members of the *Seimas* would also vote in a similar fashion but had not faced prosecution. For the Supreme Court, such statements by the applicant showed that he had realised that his actions were "contrary to the law". In the present case, the question of responsibility concerned a *Seimas* member, a representative of the State institution which passed laws, and was related to actions through which a *Seimas* member directly implemented his constitutional rights and duties. Accordingly, a well-understood and

intentional breach of the law had taken place. The appellate court, when drawing a conclusion as to the applicant's guilt, had entirely reasonably had regard to his experience as a member of the *Seimas*, his duties and his university legal education. Thus, the applicant's statements that he did not realise that his actions would be assessed as dangerous and subject to criminal liability, and his declared expectation that his actions would be assessed less strictly, were unfounded.

50. The Supreme Court also held that a case was examined by the court in respect of the accused and only regarding the criminal acts defined in the indictment. It was therefore irrelevant whether other members of the *Seimas* had behaved similarly to the applicant, or what kind of "breaches" (*pažeidimus*) of the *Seimas* Statute when voting in the *Seimas* they had committed or not. Such circumstances were outside the scope of the court's examination of the case at hand. Thus, it had been reasonable for the Court of Appeal not to examine any such circumstances. Questions related to the implementation of criminal liability were to be decided in each individual case. As to whether a criminal act remained undisclosed or a person who had possibly committed it was not brought to criminal justice and not punished was not a criterion which could affect the court's conclusions in the applicant's case regarding the existence or not of a criminal act and his guilt. Likewise, the applicant's allegation that his prosecution for the well-established "wrongful practice" (*ydinga praktika*) of voting by using another member of the *Seimas*' identity card had discriminated him had to be dismissed: in criminal proceedings, a court had to follow the letter of the law, and not "wrongful practice or precedents contrary to the law" (*ne ydinga praktika ar teisei prieštaraujančiais precedentais*) (if such precedents existed).

51. The Supreme Court pointed out that the applicant did not contest the factual circumstances established in the appellate court's judgment. On 14 and 19 January 2010 he had registered in the electronic voting system as L.K. six times and voted in place of him six times, and with these actions had established false data as if L.K. had registered and voted himself in the *Seimas* hearings. Rather, the applicant disagreed with the legal characterisation of his actions, which the Court of Appeal had regarded as actions as having caused major damage to the State (see paragraph 36 above).

52. Regarding the criminal charges under Article 228 § 1 and Article 302 § 1, the Supreme Court referred to Article 111 § 4 of the *Seimas* Statute, which stated that *Seimas* members had to vote in person and thus prohibited a member of the *Seimas* from transferring his or her right to vote. The applicant, when using L.K.'s parliamentary identity card, had not voted in person, but for another person – a member of the *Seimas* – and had thus clearly breached Article 111 § 4 of the *Seimas* Statute. Apart from that, the applicant had breached several other legal provisions (see paragraph 36 above). Furthermore, as noted by the Constitutional Court, the applicant's

voting for L.K. had been considered a gross violation of the Constitution and a breach of oath, and he had been considered to have usurped the mandate of *Seimas* members, shown disrespect to the Constitution and discredited the authority of the *Seimas* as the representation of the nation (see point 15 in paragraph 64 below).

53. In the light of the foregoing, the Supreme Court considered that the applicant's actions had corresponded to the objective elements of Article 228 § 1 and Article 302 § 1 of the Criminal Code.

By actions contrary to the law the applicant had caused the consequences referred to in Article 228 § 1 of the Criminal Code: he had caused major non-pecuniary damage to the State, because he had humiliated and discredited the name of *Seimas* members and the *Seimas*' authority. Pursuant to the courts' practice, when assessing whether major non-pecuniary damage had been caused to the State, one had to take into consideration the specific circumstances of the case: the nature of the actions, their duration, the legal acts which protected those interests, the importance of the duties of the accused, his legal status and the repercussions that the actions had in public life. Breach of the values set out in the Constitution and disregard of the essential requirements applicable to State service were usually acknowledged as major non-pecuniary damage to the State service and the State.

54. In the applicant's case, his status as a *Seimas* member was particularly important in the system of State government – the institution represented by the applicant exercised State powers (Article 5 of the Constitution, see paragraph 58 below). The applicant's actions in breach of the *Seimas* Statute, which had the force of law, as well as of the provisions of the Code of Conduct for State Politicians, had also breached the principle of the free and individual mandate of *Seimas* members, had been active and had been carried out many times. At the time the applicant had registered L.K. as present in the *Seimas* sittings and had voted in his place, the latter had not been temporarily absent from the *Seimas* hall but outside of Lithuania for personal purposes. Clearly, such circumstances showed the great degree of gravity of the applicant's actions, and the essence of the distortion of the *Seimas*' activity. Besides, the applicant's unlawful acts had become public knowledge and debased the authority of the *Seimas*, as a representative of the nation and governmental institution. Because of the applicant's intentional unlawful acts the State had sustained major non-pecuniary damage, and the element of major non-pecuniary damage had been important in separating criminal liability from other types of liability. The applicant was therefore wrong to consider that he had committed procedural violations of the *Seimas* Statute only attracting disciplinary liability. The application of disciplinary liability had not been an obstacle to criminal liability.

55. In sum, the criminal law had been properly applied when convicting the applicant under Article 228 § 1 and Article 302 § 1 of the Criminal Code.

F. Expunction of the applicant's conviction

56. In January 2019 the applicant asked the court to expunge his conviction, referring to the fact that he had paid his fine in June 2017, that as of 2018 he had been working at a private enterprise, and that he had a serious need to travel abroad for business purposes. Conviction was particularly burdensome for such travel because it had to be disclosed when applying for a visa. The actions for which he had been convicted were "intrinsically related" to the functions of a member of the *Seimas*, which he no longer was. After being convicted, he had not committed any administrative–law violations or crimes. He had a family and had been given a positive character assessment. The prosecutor supported the request.

57. By a ruling of 22 February 2019, the Vilnius City District Court expunged the applicant's conviction. The court gave weight to his argument that a conviction was burdensome when seeking to travel abroad for business purposes. The court also noted that the criminal proceedings had taken rather a long time. Overall, the aims of criminal punishment and conviction had been achieved.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT LAW

58. The relevant provisions of the Constitution read as follows:

Article 5

"In Lithuania, State power shall be executed by the *Seimas*, the President and the Government of the Republic, and the Judiciary.

...

State institutions shall serve the people."

Article 59

"The term of office of members of the *Seimas* shall begin to run from the day on which the newly elected *Seimas* convenes for its first sitting. The term of office of the previously elected members of the *Seimas* shall expire at the beginning of this sitting.

An elected member of the *Seimas* shall acquire all the rights of a representative of the nation only after taking an oath at the *Seimas* to be loyal to the Republic of Lithuania.

...

While in office, members of the *Seimas* shall follow the Constitution of the Republic of Lithuania, the interests of the State and their conscience, and shall not be restricted by any mandates."

Article 62

"The person of a member of the *Seimas* shall be inviolable.

Members of the *Seimas* may not be held criminally liable ... without the consent of the *Seimas*. ...”

Article 74

“The President of the Republic, the President and justices of the Constitutional Court, the President and justices of the Supreme Court, the President and judges of the Court of Appeal, as well as any members of the *Seimas*, who grossly violate the Constitution or breach their oath, or are found to have committed a crime, may be removed from office or have the mandate of a member of the *Seimas* revoked by a three-fifths majority vote of all the members of the Seimas. This shall be performed according to the procedure for impeachment proceedings, which shall be established by the Statute of the *Seimas*.”

59. The relevant provisions of the Criminal Code, as in force at the material time, read as follows:

Article 228. Abuse of office

“1. A civil servant or a person treated as such who has abused his official position or exceeded his powers, if this has caused major damage to the State, a public international organisation, a legal or natural person

shall be punished by a deprivation of the right to take up a certain job or to get engaged in a certain activity, or by a fine or by arrest or imprisonment for up to four years. ...”

Article 300. Forgery of a document or possession of a forged document

“1. A person who produces (*pagamino*) a false document, forges a genuine document or ... uses a document known to be false or a genuine document known to be forged,

shall be punished by a fine or by arrest or imprisonment for up to three years.

...

3. A person who commits the acts provided for in paragraph 1 ... of this Article, where this incurs major damage, ...

shall be punished by imprisonment for up to six years. ...”

Article 302. Seizure of a seal, stamp or document or use thereof

“1. A person who steals or without legal grounds acquires, keeps ... uses a ... document ... of a natural or legal person, shall be punished by a fine or by arrest or imprisonment for up to six years.

2. A person who commits the acts provided for in paragraph 1 of this Article in the form of a business or seizes or, without having a legal ground therefor, acquires, stores, transports, forwards, uses or handles a large quantity of seals, stamps, documents ... of a natural or legal person or where this incurs major damage to the State or the natural or legal person, shall be punished by imprisonment for up to six years.”

60. The relevant provisions of the Code of Criminal Procedure, as in force at the material time, read as follows:

Article 3. Circumstances which make criminal proceedings impossible (version valid until 1 September 2011)

"1. Criminal proceedings cannot be started and, if started, must be terminated:

...

3) if a criminal act has been committed by a person ... [where] there is no authorisation of a competent institution to prosecute that person, when such authorisation according to the laws is a prerequisite ..."

Article 57. Right to request removal

"1. A ... person convicted or acquitted ... or their representatives shall have the right to request removal.

2. A request for removal can be submitted with respect to a pre-trial investigation officer, a prosecutor, a pre-trial investigation judge, a judge ..."

Article 58. Grounds for removal

"1. The person indicated in Article 57 § 2 of this Code may not take part in the proceedings if:

...

4) the parties to the proceedings reasonably point to ... circumstances raising reasonable doubts about the impartiality of the person referred to in Article 57 § 2 of this Code.

2. In addition, a judge may not take part in the proceedings and re-examine the same case if:

1) he or she took part in those criminal proceedings as a pre-trial investigation officer, prosecutor or defence counsel;

2) he or she dealt with the suspect's arrest ...;

3) he or she adopted the judgment in the first-instance court; [he or she] may not freshly examine that case on appeal or in cassation, or examine the same case in the first-instance court if his or her judgment has been quashed;

4) he or she adopted the judgment in the appellate court; [he or she] may not examine that case in cassation;

5) he or she adopted the judgment in the cassation court; he or she may not take part when the case is being decided in the appellate proceedings;

6) [he or she] took the decision in the appellate or cassation court; he or she may not decide that case at the first-instance court."

Article 59. Removal

"1. A judge ... shall recuse himself if the grounds set out in Article 58 of this Code exist ..."

Article 169. Prosecutor's actions at the start of the pre-trial investigation

"1. Upon receipt of a complaint, statement or report on the criminal act committed, or having established the features of the criminal act him or herself, a prosecutor shall immediately start a pre-trial investigation."

Article 369. Grounds for lodging an appeal on points of law and the cassation procedure

"1. A judgment or ruling shall be appealed against and cases heard in cassation if:

1) the criminal law has been erroneously applied;

2) essential breaches of this Code have been committed.

2. Erroneously applied criminal law [is a situation] where the provisions of the general part of the ... Criminal Code have been erroneously applied, and where the criminal acts have not been classified in accordance with the Articles, paragraphs and sub-paragraphs of the ... Criminal Code under which those acts should have applied.

3. Essential breaches of this Code are such breaches ... that have curtailed the accused's rights guaranteed by law or that have prevented the court from comprehensively and impartially examining the case and adopting a fair judgment or ruling."

Article 372. Procedure for accepting an appeal on points of law for examination

"2. Provided that there are no grounds ... to return the case to the party who has lodged an appeal on points of law ... the case file and the appeal on points of law shall be transferred to the three-judge selection panel formed by the President of the Lithuanian Supreme Court or the Chair of the Criminal Cases Division of that court.

3. The selection panel shall decide the question of accepting an appeal on point of law for examination in written proceedings. An appeal on points of law shall be considered accepted if at least one member of the selection panel has voted in favour of it. A judge's participation in deciding the question whether to accept an appeal on points of law for examination shall not prevent [him or her] from deciding the merits of that appeal on points of law..."

61. On 21 June 2011 the *Seimas* supplemented the Code of Criminal Procedure with Article 3^2. The provision came into force on 1 September 2011, and reads as follows:

Article 3^2. Particularities of criminal procedure for a person who, in compliance with the laws of the Republic of Lithuania ... has immunity from prosecution

"1. Criminal proceedings shall be started against a person who can be prosecuted only with authorisation from the competent institution ... but a notice of suspicion may not be drawn up against him or her, he or she cannot be questioned as a suspect or declared a suspect, and he or she cannot be detained or otherwise have his or her liberty restricted. Other procedural coercive measures may only be applied to such a person in so far as the laws of the Republic of Lithuania ... permit it.

2. If, after all the permitted actions of criminal procedure have been performed and there is no authorisation from the competent institution to start criminal proceedings against a person or when a person has immunity from prosecution, the criminal proceedings shall be discontinued. Criminal proceedings may be reopened when there

is authorisation from the competent institution to bring criminal proceedings against a person or if he or she otherwise loses immunity from prosecution ...”

62. The relevant provisions of the *Seimas* Statute (*Seimo statutas*), at the time of the applicant’s voting in the *Seimas* on 14-19 January 2010, read as follows:

Article 9. Rights of a member of the *Seimas*

“1. A member of the *Seimas* has the right, in compliance with the order set out in this Statute, to:

1) vote on all questions debated in the sessions (*posėdžiuose*) of the *Seimas*, the committee or the commission of which he is a member. ...”

Article 20. Warning to a member of the *Seimas*

“...

2. ... A warning to a member of the *Seimas* may be immediately recorded in the minutes for public threats to colleagues, insulting a member of the *Seimas* or a group thereof, dishonest voting (*už nesąžiningą balsavimą*) or failure to observe the Ethics and Procedures Commission’s recommendation to avoid a conflict of interests. ...”

Article 111. Voting methods and procedure

“...

2. Laws and resolutions of the *Seimas* shall be passed using the electronic vote counting system. Voting shall also take place on individual provisions of an issue under consideration, individual articles or stipulations of a law, protocol decisions and work programme of the session, agenda of sittings and other issues. Data regarding the vote of each member of the *Seimas* shall be public. On the decision of the chair of the sitting, these issues may be voted upon by show of hands.

...

4. The members of the *Seimas* shall vote in person. The right to vote may not be transferred to other persons.”

Article 112. Voting procedure

“1. The chair of the sitting shall announce the opening of the voting procedure.

...

3. Members of the *Seimas* shall stay in their seats during the voting. ...”

Article 121. Repeat voting and adjournment

“1. Before a debate on another issue on the agenda begins, voting by a show of hands or by using the electronic vote counting system may be repeated if doubts arise regarding the accuracy of the vote counting and if so requested by the request of the Speaker of the *Seimas*, chair of the sitting or at least five members of the *Seimas* present at the sitting...

...

4. If a manifest infringement of individual voting is established (*jeigu nustatomas akivaizdus balsavimo vienasmeniškumo pažeidimas*), the vote shall be repeated at the request of the chair of the sitting or a political group (*frakcija*)...”

63. The relevant part of the Code of Conduct for State Politicians (*Valstybės politikų elgesio kodeksas*) reads as follows:

Article 4. Principles of State politicians' conduct

“A State politician in his or her public life shall comply with the following principles of conduct:

...

3) honesty – perform duties honestly and adhere to the highest standards of conduct, and avoid situations that may influence the taking of decisions that may raise doubts in society.

...

5) decency – act properly in accordance with the office held, avoid situations where the politician's conduct could damage his reputation and standing or that of the institution in which he holds office, avoid unfair ways of seeking an advantage, and use official information received only for performing his duties and not to profit from it.”

II. THE CONSTITUTIONAL COURT'S CASE-LAW

64. By a conclusion of 27 October 2010, on the actions of [L.K.] and Aleksandr Sacharuk, members of the *Seimas*, the Constitutional Court held:

“13. ... [T]he constitutional status of a member of the *Seimas* integrates the duties, rights and guarantees of activity of a member of the *Seimas* as a representative of the Nation, and is based on the constitutional principle of the free mandate of a member of the *Seimas*; from the principle of the free mandate of a member of the *Seimas* ... stems the right of a member of the *Seimas* to vote at his own discretion during the adoption of any decision of the *Seimas*, that is, to vote according to his conscience on each issue; under the Constitution, the will of the *Seimas* regarding adoption of corresponding resolutions may not be expressed in any other way than by members of the *Seimas* voting at a *Seimas* sitting and passing a corresponding legal act; the free mandate of a member of the *Seimas* is one of the guarantees of independence of activities and equality of members of the *Seimas*; the free mandate of a member of the *Seimas* is not a privilege of a representative of the Nation, but one of the legal measures ensuring that the Nation will be properly represented in its democratically elected representation, the *Seimas*, and that the representation of the Nation, the *Seimas*, will act only in the interests of the Nation and the State of Lithuania; ...

... [U]nder the Constitution, the mandate of a member of the *Seimas* is individual – it is only conferred on a person who, in accordance with the procedure established by the Constitution and laws, is elected as a member of the *Seimas*; under the Constitution, a member of the *Seimas* has the right and duty to only personally implement the mandate conferred on him by the electorate; the constitutional status of a member of the *Seimas*, which integrates the duties, rights and guarantees of activity, as well as the responsibility of a member of the *Seimas*, implies that a member of the *Seimas* must implement the rights and duties of a member of the *Seimas*, a representative of the Nation, arising from the Constitution and laws that do not contradict the Constitution,

only personally; he may not, in any form, transfer to another person, *inter alia*, a member of the *Seimas*, the discharge of his, as a member of the *Seimas*, rights and constitutional duties; the individuality of the mandate of a *Seimas* member also implies that no person, *inter alia*, a member of the *Seimas*, may take over the rights and duties of another member of the *Seimas*, a representative of the Nation, *inter alia*, the right to vote.

... [T]he right of a member of the *Seimas* to vote at his own discretion during the adoption of any decision of the *Seimas*, which stems from the principle of the free mandate of a member of the *Seimas*, *inter alia*, the requirement of the individuality of the mandate of a member of the *Seimas*, entrenched in the Constitution, may only be implemented by the member of the *Seimas* personally expressing his wishes during the voting at a sitting of the *Seimas*. In cases where the requirement of personal voting by the member of the *Seimas* at a sitting of the *Seimas* is not observed, *inter alia*, where during the voting a member of the *Seimas* votes instead of another member of the *Seimas* and thereby expresses the will not of the member of the *Seimas* instead of whom a vote is being cast, but his own, the requirements for the procedure of passing laws, which stem from the Constitution ... are ignored, voting results are distorted, preconditions are created for violation of the principle of the free mandate of a member of the *Seimas* entrenched in the Constitution.

... [N]ot every violation of the Constitution is in itself a gross violation of the Constitution; when deciding whether a member of the *Seimas* has grossly violated the Constitution with his actions, it is necessary in each case to assess the nature of the actions, their content, the circumstances of their performance, the systemic nature of the actions, their repetition and duration, as well as other significant circumstances. It has also been mentioned that a gross violation of the Constitution is also a breach of the oath.

14. In this conclusion of the Constitutional Court it has been held that, at the plenary sittings of the *Seimas* of 14 and 19 January 2010, the member of the *Seimas* A. Sacharuk used the [parliamentary identity card] of the member of the *Seimas* L.K. and deliberately voted instead of the latter [eight] times during the passing of laws and other acts of the *Seimas*.

15. By voting for the member of the *Seimas* L.K. many times at the plenary sittings of the *Seimas*, the member of the *Seimas* A. Sacharuk disregarded the principle of the free mandate of a member of the *Seimas*, which is entrenched in the Constitution, *inter alia*, paragraphs 2 and 4 of Article 59 thereof, *inter alia*, the requirement of the individuality of the mandate of a member of the *Seimas*, as well as the ban on voting at a sitting of the Seimas instead of another member of the *Seimas* arising therefrom, he did not express the will of the member of the *Seimas* L.K. but his own will, usurped the right of the member of the *Seimas* L.K. to vote at his own discretion during the passing of laws and other acts of the *Seimas*, and distorted the voting results. The member of the *Seimas* A. Sacharuk, while voting for the member of the *Seimas* L.K. during the plenary sittings of the *Seimas*, held his office dishonestly, violated the imperatives arising from the Constitution, showed disrespect for the Constitution and laws, and discredited the authority of the *Seimas* as the representation of the Nation.

Thus, the actions of the member of the *Seimas* A. Sacharuk – using the [identity card] of the member of the *Seimas* L.K. at the plenary sittings of the *Seimas* and deliberately voting instead of the latter – were contrary to the Constitution and, with these actions, the member of the *Seimas* A. Sacharuk grossly violated the Constitution.

16. Taking account of the arguments stated, it needs to be held that the actions of the member of the *Seimas* A. Sacharuk – using [parliamentary identity card] of the member

> of the *Seimas* L.K. at the plenary sittings of the *Seimas* and deliberately voting instead of the latter [eight] times – were contrary to the Constitution. With these actions, the member of the *Seimas* A. Sacharuk grossly violated the Constitution and breached the oath."

65. By a ruling of 24 February 2017, wherein it further interpreted the liability resulting from the impeachment proceedings (see *Paksas v. Lithuania* [GC], no. 34932/04, § 49, ECHR 2011, and *Advisory opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings* [GC], request no. P16-2020-002, Lithuanian Supreme Administrative Court, §§ 51 and 54, 8 April 2022), the Constitutional Court held:

> "10.1.2.1. ... [T]he same unlawful actions may sometimes give rise to both constitutional liability and another type of legal liability such as, for example, criminal liability. Whether, in addition to constitutional liability, such actions also give rise to another type of legal liability, depends on whether the legal system recognises that the same unlawful actions may violate not only constitutional, but also other legal relations. ... [A] constitutional sanction is applied primarily because the person has discredited State authority by committing a violation; therefore, he or she must be removed from office or his or her mandate must be revoked; otherwise, public confidence in the authority of the State, its institutions and officials will not be guaranteed; Parliament shall decide on the application of a constitutional sanction."

III. THE PRACTICE OF THE *SEIMAS* ETHICS AND PROCEDURES COMMISSION

66. The applicant provided the Court with copies of the following decisions by the *Seimas* Ethics and Procedures Commission, regarding members of the *Seimas* who had voted for others.

67. On 12 March 1996 the Commission established that during a vote on draft legislation the Chair of the *Seimas* had pressed the voting button of a *Seimas* member who had not been present in the *Seimas* plenary hall rather than pressing his own voting button. As the Chair of that *Seimas* sitting did not ask for a revote, no revote took place.

68. In 2001 the Commission also discussed an incident on 27 February 2001 in which member R.D. had voted not only for herself, but also for a member of her "coalition", the *Seimas* member V.E. The Commission considered that the voting had been in breach of Article 20 § 2 of the *Seimas* Statute, in which, in the words of the Commission, "dishonest voting had been named as a disciplinary violation of the *Seimas* member" (*nesąžiningas balsavimas įvardinamas kaip Seimo nario drausmės pažeidimas*). It recommended the *Seimas* members not to commit such "infractions" (*nusižengimai*) in the future and "not to discredit" (*nežeminti*) the name of *Seimas* members with their actions.

69. In the same year, the Commission established that on 27 September 2001 the deputy chair of the *Seimas*, G.S., had voted for draft

legislation even though he had been away on a business trip since 26 September 2001 and therefore absent from the *Seimas* hall. The Commission decided to "once again insistently urge the *Seimas* management" (*dar kartą primygtinai paraginti Seimo vadovybę*) to install more modern technical equipment for registration and voting in the *Seimas* hall in order "to avoid discrepancies (*išvengti netikslumų*) during registration and voting procedures".

70. On 24 February 2005 the Commission established that on 10 February 2005 the *Seimas* member A.P. had voted for another parliamentarian, R.V., in breach of Article 11 § 4 of the *Seimas* Statute. However, the Commission held that in that case the breach of the single vote principle had had no influence on the vote that had taken place in the *Seimas*. Newly installed machinery did not prevent such breaches from taking place (on this subject, see also paragraph 71 below).

71. Similarly, on 11 January 2008 the Commission established that on 20 December 2007 the *Seimas* member J.P. had voted not only for himself, but also for two other members of the *Seimas*, whose parliamentary identity cards had been left at the "workplace" (*darbo vietoje*). The Commission referred to Article 111 § 4 and Article 112 § 3 of the *Seimas* Statute which, besides voting in person, also provided that during the vote parliamentarians must not wander around the *Seimas* sitting hall. In the words of the Commission, "it is noteworthy that certain members of the *Seimas* frequently breach the provisions of the *Seimas* Statute, particularly the ban on walking around the sitting hall. "The ban on transferring a person's voting right to other persons is also frequently disregarded" (*dažnai nesilaikoma ir draudimo perduoti savo balsavimo teisę kitiems asmenims*). The Commission noted that new technical equipment for registration and voting had been installed in the *Seimas* hall. It was expected that that new system would be more seamless and "avoid the problems linked to the breach of the single vote [principle]". However, even after installation of that new system, it had been impossible to guarantee that each parliamentarian would "only vote in person" (*balsuotų asmeniškai*), and that other parliamentarians would not be able to use that right. The Commission also observed that despite repeated calls to avoid such breaches, "one would often observe a situation where only a few members of the *Seimas* would be sitting in the *Seimas* hall, but many more *Seimas* members would vote. There had been occasions when a member of the *Seimas* had left on a business trip, but [the voting system] showed that he had taken part in the *Seimas* sitting]". The Commission thus held that when the vote in question had taken place on 20 December 2007, Article 111 § 4 and Article 112 § 3 of the *Seimas* Statute had been breached. Referring to Article 121 § 4 of the *Seimas* Statute, it recommended that the *Seimas* revote on the draft legislation passed on that date.

72. According to a news article of 14 May 2008, the voting record of the *Seimas* showed that the *Seimas* member G.M. had been present at the *Seimas*

vote and had voted, despite being on holiday in Malta at the time. G.M. was never sanctioned. One of the parliamentarians then expressed discontent that the *Seimas* Ethics and Procedures Commission was applying a double standard: some parliamentarians who had voted for colleagues had been exonerated, whereas others had been "condemned" (*pasmerkia*).

73. On 25 November 2009 the Commission established that during the *Seimas* sitting of 24 November 2009 two parliamentarians, V.G. and P.G., had voted "in favour" even though they had not been physically present in the *Seimas* hall. On the basis of video recordings, the Commission established that it had been another parliamentarian, V.M., who had voted for V.G. and P.G. In the view of the Commission, V.M.'s actions had breached Article 111 § 4 of the *Seimas* Statute, and could also attract a warning under Article 20 § 2 thereof. The Commission also pointed out that it had repeatedly drawn the *Seimas* members' attention to the fact that, when leaving the *Seimas* hall, it was obligatory not to leave the parliamentary voting card in the voting machine and not to create conditions for other parliamentarians to vote dishonestly. In that case, the Commission also recommended that the *Seimas* revote on the draft legislation.

74. On 23 July 2009 the Commission established that during the *Seimas* sitting the day before the *Seimas* member R.A.R. had voted for two other parliamentarians, R.A., D.A.B. and A.M., who had not been present in the *Seimas* hall, and that parliamentarian O.V. had voted for parliamentarian R.A., who had also been absent from the *Seimas* hall. This was in breach of Article 111 § 4 of the *Seimas* Statute and, under its Article 20 § 2, in the words of the Commission, "could attract a warning" (*gali būti įrašomas įspėjimas*). The Commission reiterated that it had already warned members of the *Seimas* more than once not to create conditions for other parliamentarians to vote dishonestly: a member of the *Seimas* who created such conditions, contributed to a possible violation of the single vote principle.

75. On 17 June 2009 the Commission established that on 2 June 2009 the *Seimas* member A.Š. had voted for another parliamentarian, J.O., who had not been in the *Seimas* hall. This was in breach of Article 11 § 4 of the *Seimas* Statute and, under Article 20 § 2 thereof, could attract a warning.

76. According to the Commission's conclusion of 2 May 2013, which is a publicly available document, during the *Seimas* hearing of 25 April 2013 the voting registration system showed that parliamentarian V.M. had voted; however, at the time of the voting, he was not in his workplace. It could be presumed that V.M. had left his *Seimas* member's identity card and that another parliamentarian could have voted in his place. The Commission found this to be in breach of Article 111 § 4 of the *Seimas* Statute and proposed that a revote on the adopted piece of legislation take place, under Article 121 § 4 of the *Seimas* Statute.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

77. The applicant complained that the Supreme Court panel which had upheld his conviction on 13 February 2018 in cassation proceedings had not been impartial. He relied on Article 6 § 1 of the Convention, which reads:

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

A. Admissibility

78. The Government submitted that the complaint was manifestly ill-founded.

79. The applicant made no comment.

80. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

81. The applicant complained of the fact that at Supreme Court level his criminal case had been decided twice with the participation of Judge D.B., which he saw as having deprived him of the right to a trial by an impartial tribunal.

82. To begin with, one had to bear in mind that during the first set of cassation proceedings Judge D.B. had been the presiding judge of the Supreme Court panel. During the second set she had been the reporting judge. Further, on each occasion exactly the same factual circumstances had been examined and the same legal assessment of his actions had taken place: among other things, whether his actions when casting a vote for another member of the *Seimas* should be considered a crime. During the first and second set of proceedings before the Supreme Court, Judge D.B. had dealt with the same evidence and expressed her opinion on the same questions. None of the factual situations referred to by the Court in *Marguš v. Croatia* ([GC], no. 4455/10, § 85, ECHR 2014 (extracts)) judgment corresponded to the situation in his case, where the judge had twice heard the case and made decisions on the same criminal offence on the basis of the same facts in a case before a court of cassation.

83. The Government's conclusion (see paragraph 95 below) that during the first set of cassation proceedings Judge D.B. had not adopted a judgment finding the applicant guilty or innocent and that no evidence relevant for the

determination of those issues had been assessed by the panel of which she had been part was misleading. The Supreme Court's ruling of 20 December 2016 unmistakably showed that, by overturning the acquittals, the cassation court had *de facto* convicted the applicant by holding that his actions had to be considered a crime. Therefore, in accordance with the Court's case-law, when assessing the extent and nature of Judge D.B.'s actions in his case, it was clear that she had not met the requirements of impartiality.

84. Likewise, one could not hold that when hearing his case for the first time the Supreme Court had only dealt with questions of the application of criminal procedure and had not dealt with the substance of criminal law. The Supreme Court was not restricted to reviewing whether lower courts had committed any violations of criminal procedural law: Article 369 of the Code of Criminal Procedure determined its competence to deal with both issues of the application of criminal procedural law and of the application of substantive criminal law (see paragraph 60 above).

85. The impartiality of Judge D.B. could not be confirmed by the fact that she had taken part in the three-judge selection panel when the applicant's appeal on points of law had been accepted for examination (see paragraph 40 above). Under Article 372 § 3 of the Code of Criminal Procedure, it was sufficient for one of the three judges on that panel to vote to accept the appeal for examination (see paragraph 60 above). It was therefore not clear from the decision of 26 September 2017 whether Judge D.B. had voted to accept the applicant's cassation appeal.

86. Furthermore, the Government were not correct in stating (see paragraph 97 below) that Judge D.B.'s duties as reporting judge had been of secondary importance. Such a statement contradicted the Constitution and the Code of Criminal Procedure: the latter did not divide judges into those of primary importance and those of secondary importance. All judges had equal rights with regard to the proceedings and had the same right to vote when adopting the final decision.

87. The applicant pointed out that, besides referring to Article 58 § 2 of the Code of Criminal Procedure as the basis of the request for Judge D.B.'s removal, his lawyer had also referred to a prior and rather strict judgment having been passed regarding the applicant's actions in that earlier Supreme Court ruling (see paragraphs 43 and 60 above). Accordingly, the recusal of that judge had been raised not only because that judge had participated in the first set of proceedings before the Supreme Court as such, but also on the grounds that in that first ruling, adopted on 20 January 2016, conclusions regarding the assessment of the applicant's actions as criminal, assessment of the evidence and other statements on issues of the application of substantive law had been made.

88. The applicant's case had had significant public interest, "which could have led to pressure on Judge D.B. not to change her own earlier adopted

ruling against the applicant". Besides, the applicant noted that the second time Judge D.B. had been appointed to the Supreme Court panel to decide his case as the reporting judge by Judge V.P., who had participated in the Supreme Court panel when the case had been heard the first time, and at that time had been the reporting judge himself (see paragraph 24 above). Thus, there were ascertainable facts which could still raise a justified doubt as to Judge D.B.'s impartiality, and the applicant had a legitimate reason to fear that.

89. Lastly, the applicant did not see as weighty the Government's argument regarding the small number of judges in the Supreme Court's composition. This was not the first time the Government had speculated on that fact, and the Court had already rejected the validity of such arguments (the applicant referred to *Dainelienė v. Lithuania* [Committee], no. 23532/14, § 48, 16 October 2018). Nevertheless, having despite lost the case in the Court, Lithuania had not yet taken measures to ensure impartiality mechanisms in the Supreme Court.

(b) The Government

90. The Government argued that the participation of Judge D.B. in the examination of the applicant's case by the Supreme Court twice – on 20 December 2016 and 13 February 2018 (see paragraphs 24 and 41 above) – did not mean that the Supreme Court panel had been partial. In the second set of cassation proceedings, Judge D.B. had also participated in the selection panel and the adoption of the decision favourable to the applicant – to accept his appeal on points of law for examination (see paragraph 40 above).

91. The applicant's fear that Judge D.B. would be biased had had no grounds under the subjective or objective tests. Under the subjective test, no evidence had been produced as regards the personal bias of Judge D.B., either in the domestic proceedings or in the proceedings before the Court.

92. Regarding the test of objective impartiality, even though Judge D.B. had indeed participated in the examination of the applicant's criminal case twice, her participation in the cassation proceedings had not been subject to absolute restriction: whilst Article 58 § 2 of the Code of Criminal Procedure provided that a judge could not take part in the proceedings and freshly examine the same case, the parts of that provision specified the situations where a judge was prohibited from taking part in the proceedings for the second time (see paragraph 60 above). This had not been the situation in the applicant's case.

93. Cassation was a particular stage of the proceedings, where the case was reviewed only from the point of view of the application of the law. As to facts, the cassation court provided its statements only as far as they concerned the grounds of the cassation. The cassation court's decisions when it decided to return the case to the appellate court for fresh examination, or when it decided to dismiss an appeal on points of law, were also different. Where a decision or a judgment was quashed and the case returned for fresh

examination, the ruling had to state concrete violations of the Code of Criminal Procedure and the reasons in this regard. When the appellate court examined such a case again, it adopted a new decision which was, if appealed against on points of law, a new object of the examination in cassation and was not compared to the decision adopted by the "previous court". Thus, during the second set of cassation proceedings a new document (the appellate court's decision) was scrutinised according to new arguments raised in the new appeal on points of law.

94. In this light, regarding the two rulings of the Supreme Court, the cassation court, when it had examined the prosecutor's appeal on points of law and had returned the case to the Court of Appeal for fresh examination, had aimed to verify the decisions of the lower court from the point of view of the application of the law: at that stage of the cassation proceedings, the lawfulness of the lower court decisions had been verified also with a view to establishing whether those courts had violated criminal procedural law. Thus, in the Supreme Court's ruling of 20 December 2016, that court had established that the appellate court had breached the law of criminal procedure by assessing the prosecutor's arguments one-sidedly and failing to provide convincing reasons. The appellate court had also erred in applying criminal law – Articles 228, 300 and 302 of the Criminal Code – in the light of the well-established constitutional doctrine. The Supreme Court had provided reasons why the application of the criminal law had been improper.

95. In the Government's view, the first stage of the cassation proceedings had not entailed any assessment of the evidence or correction of the "substantive defects". At that stage, the Supreme Court had not ruled that the prosecutor's appeal on points of law should be allowed. Rather, having summarised the circumstances indicated in the prosecutor's appeal on points of law and analysed the deficiencies of the reasoning of the decision of the Court of Appeal, "the cassation court held that the appellate court [had] failed to reply in detail to the prosecutor's arguments to provide persuasive [reasons] why the acquittal had been lawful". In other words, the Supreme Court had provided the Court of Appeal with guidelines as to the application of the law, but had not pronounced itself as regards the result of the examination of the case – the Court of Appeal had to come to the conclusions itself, having examined the criminal case anew. Accordingly, it could be said that during the first set of cassation proceedings, Judge D.B. had not adopted a judgment finding the applicant guilty or innocent, and no evidence relevant for the determination of those issues had ever been assessed by the panel on which she had been sitting. It could therefore be concluded that Judge D.B. had not expressed her opinion on any aspect of the merits of the case.

96. Turning to the Supreme Court's ruling of 13 February 2018, it had reviewed a new object of the cassation – the Court of Appeal's judgment of 5 June 2017, on the basis of new arguments – the applicant's appeal on points of law. In this ruling, the cassation court had already assessed the result reached by

the Court of Appeal from the point of view of the application of the law, by pronouncing itself to the extent necessary on the facts in respect of which the impugned legislation had been applied, as well as with regard to the applicant's guilt established on the basis of these facts. The Supreme Court judges, who had adopted a final ruling on 13 February 2018, had not been in any way bound by their first cassation ruling delivered on 20 December 2016, by which that court had quashed the Court of Appeal's judgment of 23 May 2016.

97. The fact that Judge D.B. had been the reporting judge when adopting the ruling of 13 February 2018 was of secondary importance, if any at all: the functions of the presiding judge of the panel were of a purely organisational nature, and the functions of the reporting judge included preparation of the case and the ruling, but played no more important a role while examining a case and adopting a ruling than the other judges of the panel. When examining the case and setting out the reasoning of a ruling, all judges had equal rights.

98. The Government also stated that Lithuania was quite a small country, and that the Supreme Court was the only such court in the Republic with only sixteen judges in the Criminal Cases Division. It was common practice for lower court judges having made a career to come to work in that court, and they often had to recuse themselves from examining cases in order to avoid repeated examination in compliance with the grounds explicitly set out in Article 58 § 2 of the Code of Criminal Procedure, namely where a judge had previously examined a case as the judge of a lower court. Furthermore, the principle of impartiality was ingrained in domestic law, *inter alia*, Article 31 § 2 of the Constitution. Accordingly, there existed a domestic legal framework which served to ensure the impartiality requirement under Article 6 § 1 of the Convention. Since a violation of the impartiality requirement constituted absolute grounds for acknowledging a court decision as invalid, judges respected and gave due regard to that requirement.

99. Even acknowledging that the applicant's case had attracted great public interest, it could not be agreed with the applicant that that very fact "[could have] led to pressure on Judge D.B. not to change her own earlier adopted ruling" (see paragraph 88 above). The interest in the case had arisen due to the seriousness and nature of the applicant's acts, however the case had been decided by professional judges, including Judge D.B., whose training and experience had allowed external influence to be disregarded. Contrary to what had been suggested by the applicant, it could be stated that public interest in the situation could only have resulted in greater precision by the judiciary.

100. Lastly, it had to be noted that the *Dainelienė* judgment, as relied on by the applicant (see paragraph 89 above) had concerned the partiality of the selection panels of the Supreme Court exclusively.

2. The Court's assessment

(a) General principles regarding the court's impartiality

101. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII; *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009; *Morice v. France* [GC], no. 29369/10, § 73, ECHR 2015; and *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 287, 4 December 2018).

102. The Court reiterates that, as to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Micallef*, cited above, § 96). In this connection even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports of Judgments and Decisions* 1998-VIII; *Micallef*, cited above, § 98; and *Morice*, cited above, § 78).

103. The principles relating to impartiality in the context of a judge's participation in previous decisions on the same subject matter have been summarised in *Meng v. Germany* (no. 1128/17, §§ 47-51, 16 February 2021).

(b) Application of the general principles to the circumstances of the instant case

104. In the present case, the applicant did not provide any evidence that Judge D.B. had displayed personal bias against him. The same finding was made by the Supreme Court (see paragraph 44 above). The case must therefore be examined from the perspective of the objective impartiality test (see *Teslya v. Ukraine*, no. 52095/11, § 42, 8 October 2020; see also the principles set out in paragraph 102 above).

105. The applicant's fear that the Supreme Court might not have been impartial when upholding his conviction on 13 February 2018 derived from the fact that Judge D.B. had been on the Supreme Court panel that had earlier examined the prosecutor's cassation appeal and had quashed the Court of Appeal's judgment acquitting the applicant (see paragraphs 24-31 above). In that context, the applicant argued that during that first examination of his case, the Supreme Court panel had already demonstrated, among other things, the position that he was guilty of the crimes under Articles 228, 300 and 302 of the Criminal Code.

106. According to the Court's case-law, the mere fact that Judge D.B. was twice a member of the panel of the Supreme Court reviewing the verdict in respect of the applicant in cassation was not, in itself, sufficient to raise objectively justified doubts as to its impartiality (see *Teslya*, cited above, § 44, and the case-law cited therein). The mere fact that a judge has already ruled on similar but unrelated criminal charges is not, in itself, sufficient to cast doubt on that judge's impartiality in a subsequent case. It is, however, a different matter if the earlier judgments contain findings that actually prejudge the question of the guilt of an accused in such subsequent proceedings (see *Poppe v. the Netherlands*, no. 32271/04, § 26, 24 March 2009). Following the same approach, the Court will therefore examine the two rulings delivered by the Supreme Court with regard to the applicant.

107. The Court observes that in the ruling of 20 December 2016 the Supreme Court held, among other things, that "what happened in this case ... [was] ... that objectively, documents [had been] forged" (see paragraph 29 above). The court also agreed with the prosecutor's argument regarding the criminal liability of the applicant's actions when voting for L.K. and considered that the lower courts' "assessment of the evidence [had been] very one-sided and unlawful" (see paragraph 28 above). This clearly speaks of the Supreme Court's assessment of the evidence. In some cases, the Court has considered it a relevant factor in assessing a domestic court's impartiality in a subsequent case that that court had shown that it had carried out a fresh examination of the subsequent case (see *Schwarzenberger v. Germany*, no. 75737/01, § 43, 10 August 2006; *Miminoshvili v. Russia*, no. 20197/03, § 117, 28 June 2011; and *Bezek v. Germany* (dec.), nos. 4211/12 and 5850/12, § 35, 21 April 2015). This applies when it appears from the judgment in the subsequent case that the final analysis of the applicant's case was carried out on the basis of the evidence produced and the arguments heard during the subsequent trial (see *Meng*, cited above, § 50). Yet, it appears from the subsequent judgment by the Court of Appeal, later upheld by the Supreme Court's second ruling, that during that second round of proceedings no new facts were introduced in order to alleviate the assessment of the facts made during the first round of proceedings. The Government did not argue that any

kind of such fresh assessment of any newly introduced facts had taken place either.

108. Next, the Court also observes that in the ruling of 20 December 2016, the Supreme Court also referred to the gravity of the applicant's actions: "the panel of judges is not convinced by the lower courts' reasoning that A. Sacharuk's actions lacked legal significance and could, at best, attract disciplinary liability". The Supreme Court then held that "the *Seimas* Statute [had] no priority over the Criminal Code", and also held that Lithuanian law "[did] not provide for any other type of liability for forgery of documents" but criminal (see paragraph 30 *in fine* above). The Supreme Court likewise held that "acknowledgement that there was such a practice [of voting in the *Seimas*] did not eliminate its dangerousness or criminal nature, because it had nothing to do with the elements of the crime set out in Article 302 of the Criminal Code" (see paragraph 25 above). This characterisation of the applicant's actions must be seen to have determined that the person, subsequently judged by the Court of Appeal, fulfilled all the criteria necessary to have committed a criminal offence (compare *Kriegisch v. Germany* (dec.), no. 21698/06, 23 November 2010, and *Miminoshvili*, § 118, cited above). The Court therefore cannot but find that the Supreme Court carried out a legal assessment of the applicant's actions (see *Meng*, cited above, § 48). The Court has already held that, in the circumstances of a specific case, such elements may be seen as prejudging the question of the guilt of the person on trial in the subsequent proceedings (compare *Poppe*, § 26, and *Miminoshvili*, §§ 116 and 119, both cited above) and may thus lead to objectively justified doubts that the domestic court has a preconceived view on the merits of the case of the person judged subsequently at the outset of his or her trial. It emerges from the case-law cited above that objectively justified doubts were found to arise, in particular, where the domestic courts, in addition to giving an account of the facts regarding the person judged subsequently, also carried out a legal assessment of the acts of that person (see *Meng*, cited above, § 48). The above circumstances lead the Court to conclude that the Supreme Court's first ruling judgment in the applicant's case contained findings that actually prejudged the question of his guilt in subsequent proceedings (contrast *Miminoshvili*, § 119 and compare *Poppe*, § 26, both cited above). Besides, contrary to the facts in *Marguš* (cited above, § 87), where a particular judge had been solely concerned with ascertaining whether the conditions for the application of a law act were met in the applicant's case, in the present case Judge D.B. assessed not only the issue of Article 3^2 of the Code of Criminal Procedure, but also the merits of the criminal charges against him (see, *inter alia*, paragraphs 25 and 27-31 above).

109. It follows that, contrary to the Court's findings in *Kriegisch* (cited above), the Supreme Court's ruling of 20 December 2016 not only implied but seemingly imposed a specific characterisation of the applicant's involvement, as well as of the acts committed by him, short of pronouncing

him guilty of a crime (see paragraphs 25 and 27-31 above; see also, *mutatis mutandis*, *Gómez de Liaño y Botella v. Spain*, no. 21369/04, § 68 *in fine*, 22 July 2008).

110. Likewise, unlike in *Schwarzenberger* (cited above), where in the judgment against the co-accused, the established facts about the applicant's involvement in the crimes were essentially based on the co-accused's submissions and thus did not constitute the court's assessment of the applicant's guilt, in the present case, the applicant's criminal responsibility was the subject of an assessment by the Supreme Court itself. Contrary to the Court's findings in *Schwarzenberger* (cited above, § 43), where the Court noted that "the deciding judges had been aware of the fact that they had not yet examined the case from the applicant's point of view", and where the judges had themselves confirmed and emphasised that "they had been aware of the fact that their sources of knowledge had been limited and that an assessment of the applicant's possible involvement had to be left to the main proceedings against the applicant", in the present case, this had not been the situation: the Supreme Court's second ruling contained similar language, showing that that court, at least in great part, did not undertake a fresh examination of the applicant's case (see, *inter alia*, paragraphs 49, 50 and 52-54 above).

111. The Court also reiterates that in *Poppe* (cited above, § 28) it found it decisive that the applicant's name had been mentioned only in passing in the judgments against the co-accused and that the trial judges had not determined whether the applicant was guilty of having committed an offence. Likewise, in *Miminoshvili* (cited above, § 117) the Court analysed the judgment in the case concerning the co-accused and stressed that the applicant's name had never been mentioned there in any incriminating context. In the present case, however, the Supreme Court's first ruling was clearly focused on the applicant personally, that court holding that the "settled practice" in the *Seimas* of voting for other parliamentarians who had acted in a similar way did not in itself eliminate the criminal nature of the applicant's actions (see paragraph 28 above; see also the Supreme Court's analogous subsequent finding in paragraph 50 above). Besides, information referring to the applicant was presented in the ruling as the Supreme Court's own findings (contrast *Miminoshvili*, cited above, § 119).

112. The Court reiterates that partiality is always subject to assessment, having due regard to other important circumstances and the most significant criteria. To this end, it should be noted that the applicant exercised his right of removal and requested the cassation court to remove Judge D.B. from the panel because she had already examined his criminal case. However, having examined the applicant's request, the cassation court dismissed it on the grounds that the applicant had not submitted any concrete evidence capable of showing that he could objectively have feared that Judge D.B. was biased. Although the Government argued that there had been no formal grounds for

Judge D.B.'s recusal (see paragraph 92 above), the Court observes that, under Article 58 § 1 (4) of the Code of Criminal Procedure, a judge may be removed on the basis of any other circumstances which could reasonably raise doubts as to his or her impartiality (see paragraph 60 above). This, in fact, was precisely the rule relied on by the applicant's lawyers (see paragraph 43 above).

113. Contrary to what the Court found in *Poppe* (cited above, § 28), where "there [was] no specific qualification of the involvement of the applicant or of the acts committed by him, criminal or otherwise", in the present case, the Supreme Court clearly not only characterised the applicant's acts under a number of provisions of the Criminal Code, but also held that his actions had amounted to forgery of documents, for which no liability other than criminal existed in Lithuania (see paragraphs 25 and 28-31 above).

114. Having regard to all the circumstances of the case (see paragraphs 107-113 above), the Court concludes that the applicant had a legitimate fear that Judge D.B. might have already reached a preconceived view on his guilt, even though she was not legally bound by the previous finding of the Supreme Court. It follows that the applicant's doubts as to the impartiality of the Supreme Court, on account of Judge D.B. having been on its bench during the second part of the examination of the applicant's case, were objectively justified.

115. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

116. The applicant complained that his prosecution and conviction had been in breach of Article 7 of the Convention, which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national ... law at the time when it was committed ..."

A. Admissibility

117. The Government did not put forward specific arguments to contest the admissibility of this complaint.

118. The applicant made no specific comments.

119. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

120. The applicant firstly argued that his criminal prosecution had been unlawful *ab initio*. He considered that under the legislation in force at the time of his voting for L.K., namely under Article 3 § 1 (3) of the Code of Criminal Procedure, it had not been possible to reconsider and apply criminal liability once a person had lost immunity, if the pre-trial investigation had previously been refused on the grounds that the consent of the institution had not been obtained. Later on, a new norm – Article 3^2 of the Code of Criminal Procedure – had been introduced, making it possible to prosecute the applicant after the end of his term of office as a member of the *Seimas* (see paragraphs 60 and 61 above). The applicant argued that that amendment to the Code of Criminal Procedure had expanded the circle of persons to be prosecuted. In particular, it had become possible to prosecute persons who could not previously be prosecuted under Article 3 § 1 (3). In this way, the principle of legitimate expectations had been violated, as prosecution of a member of the *Seimas* at the end of his legal immunity and where the *Seimas* had refused to agree to prosecute a person during his term of office had not been possible at the time the actions had been committed.

121. The applicant further complained that he had been convicted of acts not considered a crime under domestic law, in breach of Article 7 of the Convention.

122. Due to the peculiarities of work within political groups, which had developed in the "traditions" of parliamentary activities, the applicant's actions had not been criminalised at all until he had been convicted. The question of the existence of such a "tradition" of the voting procedure did not even arise in his case, given that this fact had been recognised by the courts hearing the case at all levels of jurisdiction, including the Supreme Court. The existence of the "tradition" of voting had not been contested by the Government either. During the history of Lithuanian parliamentarism, several dozen cases of voting for another member of the *Seimas* had been established. Yet, neither before the applicant's term of office as a member of the *Seimas*, nor after his term of office, and even after his criminal prosecution, had other members of the *Seimas* performing similar actions been subject to criminal liability. Besides, even after the criminal prosecution against him had been initiated, other members of the *Seimas* had continued to vote for others or register on behalf of others and had not faced criminal prosecution. Until now, he was the first and only member of the *Seimas* to have been convicted for voting for another member of the *Seimas*, despite the same actions having been committed by others. All this showed discriminatory nature of his prosecution.

123. Neither could one agree with the Government's suggestion that the cases of voting for another member of the *Seimas* had not been a crime because they had been sporadic. Voting for other members of the *Seimas*, with sometimes one parliamentarian having even voted for several other parliamentarians, had been documented in the decisions of the *Seimas* Ethics and Procedures Commission (see paragraphs 66-75 above). Furthermore, such examples of voting for another member of the *Seimas* could hardly be assessed as less significant than the actions of the applicant, who had voted for only one member of the *Seimas*. Overall, it was likely that, if all the videos of the *Seimas* sittings were reviewed, there would be no day when this "tradition" would not have occurred.

124. The applicant's situation was different from that examined by the Court in *Khodorkovskiy and Lebedev v. Russia* (nos. 11082/06 and 13772/05, § 817, 25 July 2013): in the applicant's case, the media had widely informed the public that members of the *Seimas*, other than him, voted for one another. The decisions of the *Seimas* Ethics and Procedures Commission to determine the violators of the *Seimas* Statute were public. Accordingly, the fact that throughout the entire Lithuanian parliamentary history other members of the *Seimas* voted for one another had been known to the law-enforcement institutions, without any action ever having been taken.

125. The fact that voting for another member of the *Seimas* was only considered a disciplinary offence had been confirmed by numerous conclusions (decisions) of the *Seimas* Ethics and Procedures Commission. If that Commission detected elements of a crime, pursuant to Article 78 of the *Seimas* Statute, it had to notify the Prosecutor General's Office, but had never done so. All this demonstrated that the activities of a *Seimas* member, including voting in the *Seimas*, were regulated by the *Seimas* Statute as *lex specialis*, and voting for another member was not considered a crime.

126. The applicant's impeachment, including the *Seimas*' vote on revocation of his mandate, had taken place not on the grounds that he had committed a crime, but on the grounds that he had broken his oath. Besides, violations of the *Seimas* Statute were not related to corruption or other illegal relations, which would actually harm the State and the *Seimas* as an institution. Legal regulation could not be interpreted in such a manner so as to allow a member of the *Seimas* to be prosecuted for voting in violation of the *Seimas* Statute, when the *Seimas* itself had refused to allow prosecution of that person. It was pertinent that the *Seimas* member L.K., who had breached the *Seimas* Statute by transferring his right to vote to the applicant, had not been prosecuted; he had only appeared in the criminal case as a witness.

127. The fact that the law applied to the applicant had not been clear and foreseeable was also confirmed by the fact that even six extremely highly qualified and highly experienced judges hearing the case at first instance and

on appeal had not considered his actions when voting for another member of the *Seimas* a criminal offence.

128. It could therefore be concluded that the applicant could not have foreseen that voting for another member of the *Seimas*, an action for which other members of the *Seimas* had not been held liable or, at worst, had received a disciplinary penalty – a warning – by the *Seimas* Ethics and Procedures Commission, would be tantamount to a crime. All this showed that he had been convicted of an act not considered a crime either in law or in the courts' practice. In his case, the courts had adopted a new approach which he could not have foreseen.

(b) The Government

(i) The lawfulness of the applicant's prosecution

129. The Government firstly wished to explain why the Code of Criminal Procedure had been supplemented with Article 3^2. Under Article 3 § 1 (3), criminal proceedings could not be started and, if started, had to be terminated in the absence of authorisation of the competent institution to prosecute a person, where such authorisation was necessary under law. The regulation in force at that time had thus prevented the authorities from investigating criminal acts, allegedly committed by persons who enjoyed immunity from prosecution. It had therefore been suggested to supplement the Code of Criminal Procedure with a provision stating that, when a criminal act had allegedly been committed by a person who had immunity from prosecution, criminal proceedings could be started and all the necessary investigative acts could be carried out, except for recognising such person as a suspect or accused and the application of restrictive measures. Where there had been grounds to recognise such a person as a suspect or an accused, to apply restrictive measures in respect of him, or to prosecute him, permission from a competent institution had to be obtained. If a competent institution refused to lift immunity, the criminal proceedings had to be terminated, but could later be renewed.

130. Notwithstanding the above, Article 3^2 of the Code of Criminal Procedure had been of no relevance to the applicant's case, and the prosecutor had not even referred to Article 3^2 of the Code in his decision to start a pre-trial investigation. At that time there had been no procedural obstacles making criminal proceedings impossible, because the applicant's term of office as a member of the *Seimas* had come to an end and he had lost his immunity. In other words, had the amendments at issue not been introduced, the applicant could still have been prosecuted after the expiry of his term of office.

131. In the light of the foregoing, the Government were of the view that the pre-trial investigation with respect to the applicant had been started lawfully. Besides, although not decisive, it was pertinent to note that the

applicant's prosecution had been started soon after his term of office as a member of the *Seimas* had ended, without any unreasonable delay.

132. Lastly, Article 3^2 of the Code of Criminal Procedure was only a procedural norm which regulated the conditions and order of the criminal procedure. The Government thus considered that its application did not fall within the scope of Article 7 of the Convention. The fact that Article 3^2 of the Code had come into force *per se* could not have had any influence on the applicant's prosecution and his criminal liability as it did not define offences and penalties and could be construed as laying down a simple precondition for the assessment of the case (*Borcea v. Romania* (dec.), no. 1845/08, § 80, 22 September 2015; *Previti v. Italy* (dec.), no. 1845/08, § 80, 12 February 2013; and *Khodorkovskiy and Lebedev,* cited above, §§ 789-90).

(ii) The accessibility and foreseeability of the applicant's conviction

133. At the time the applicant had performed the actions which had led to his being prosecuted and convicted, there had been legal provisions in force which had made that act punishable, and the punishment imposed had not exceeded the limits fixed by that provision.

134. The Government did not contest the fact that the working practice of voting instead of another member of the *Seimas* had indeed existed. However, these had been isolated cases attracting disciplinary liability for offenders who, under the *Seimas* Statute, would also receive a warning. Be that as it may, the domestic courts, when holding that the applicant's actions had attracted criminal liability, had clearly explained that such actions went beyond the limits of disciplinary liability, and had given the reasons why: it was the gravity of the applicant's actions which had caused major damage to the State. The applicant had also been the first parliamentarian whose actions while voting in place of another parliamentarian had attracted constitutional liability – the Constitutional Court had concluded that with these actions he had grossly violated the Constitution and breached his oath. That conclusion had not been revoked by the *Seimas*, given that no State institution or official could change or revoke a conclusion of the Constitutional Court, even if the latter had not annulled the applicant's mandate. The events related to the applicant's actions at issue had become public, which, according to the domestic courts, had contributed to greater damage to the State. The fact that he had understood that his actions were in breach of the law had also been established by the domestic courts. Last but not least, the *Seimas*' decision not to annul the applicant's mandate had caused wide repercussions throughout the Lithuanian society and the legal community, and was heavily criticised.

135. The Government were of the view that the applicant's statement that "voting in the *Seimas* [was] a 'tradition'" was wholly unsubstantiated. Similar actions of *Seimas* members attracted self-control and parliamentary control – an assessment by the *Seimas* Ethics and Procedures Commission, which,

depending on the gravity of the acts, resulted in constitutional or criminal liability. Even if the applicant's case was the only one, where such actions due to their gravity had attracted not only constitutional but also criminal liability, there were numerous cases where *Seimas* members had received a disciplinary sanction: the *Seimas* Ethics and Procedures Commission would hold that Article 111 § 4 of the *Seimas* Statute had been violated. Thus, voting in the *Seimas* in place of another member was not a "tradition" and, depending on the gravity, did attract some kind of legal liability.

136. With regard to the applicant's argument that his conviction had been an isolated case, the Government considered that no decisive importance should be attached to the lack of comparable precedents. Where domestic courts were called on to interpret a provision of criminal law for the first time, an interpretation of the scope of the offence which had been consistent with the essence of that offence had to, as a rule, be considered foreseeable. This had been the situation in the applicant's case.

137. Regarding the applicant's argument that, as far as Article 7 of the Convention was concerned, the impeachment had been initiated on the grounds that he had broken his oath, but not on the grounds that he had committed a crime (see paragraph 126 above), the Government felt the urge to explain that the applicant's acts in the case at issue had been *ab initio* separated by the SSIC, as in its Conclusion, which had been approved by resolution of the *Seimas*, it had made two findings: that there were grounds to initiate impeachment proceedings as regards the breach of the *Seimas* member's oath and gross violation of the Constitution, and that there were grounds to apply to the Prosecutor General's Office with a request to establish whether the applicant had committed criminal acts (see paragraph 8 above). The issues related to constitutional liability and those related to criminal liability had had to be dealt with separately. Since the *Seimas* had refused to grant the request of the Prosecutor General to lift the applicant's immunity, only the applicant's constitutional liability had been decided while he had still been a member of the *Seimas*. Criminal liability had been decided by the judiciary afterwards – as soon as the circumstances preventing the pre-trial investigation from starting at the time of the events had ceased to exist.

138. In reply to the applicant's statement that "until now, [he was] the first and only member of the *Seimas* to be convicted for voting for another member of the *Seimas*, despite the same actions ...", the Government observed that he had been the only member of the *Seimas* and State official to be held liable not only constitutionally for his actions grossly violating the Constitution and breaching the oath, but also criminally.

139. In sum, in the particular circumstances of the case, there had been a sufficiently clear legal basis for the applicant's conviction. Moreover, such judicial interpretation of the applicant's criminal acts had even been necessary in the situation at issue. The manner of judicial interpretation,

which had been sufficiently clear, had been consistent with the requirements of Article 7 of the Convention.

140. The domestic courts' decisions had been far from arbitrary and the proceedings in general had provided the applicant with procedural guarantees. The applicant had participated in the proceedings, which had been oral, had been represented by a lawyer, and the courts had addressed all his complaints and rendered well-reasoned decisions taking into account all the relevant circumstances.

141. Last but not least, one had to bear in mind that the Court of Appeal, by imposing a fine on the applicant, had given priority to the preventive and social purpose of the punishment. Besides, it had taken into account his personality and the principles of efficiency and expedience of the application of the punishment and had decided to give the applicant a fine, the amount of which had been less than the average provided for in the Criminal Code. The penalty had thus been proportionate. The Government added that by the decision of 22 February 2019, the Vilnius City District Court had granted the applicant's request to have his conviction record annulled (see paragraph 57 above).

142. Accordingly, the conviction, based on domestic law, had been sufficiently foreseeable and therefore in conformity with Article 7 of the Convention.

2. The Court's assessment

(a) General principles

143. The general principles as to the principle of *nullum crimen, nulla poena sine lege* and the foreseeability of criminal law in the context of Article 7 of the Convention have been summarised in the judgment of *Del Río Prada v. Spain* ([GC], no. 42750/09, §§ 77-80 and 91-93, ECHR 2013, and more recently in *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, §§ 237-42, 26 September 2023).

144. The Court has acknowledged in its case-law that, however clearly drafted a legal provision may be, in any system of law there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adapting to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The role of adjudication vested in the courts is precisely to dissipate such interpretation doubts as remain (see, among many authorities, *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, § 568, 20 September 2011). In this context, it must be reiterated that, as the Court has held on numerous occasions, the progressive development of the criminal

law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *S.W. v. the United Kingdom*, 22 November 1995, § 36, Series A no. 335-B; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, § 50, ECHR 2001-II; and *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 155, ECHR 2015). The lack of an accessible and reasonably foreseeable judicial interpretation can lead to a finding of a violation of the accused's Article 7 rights (see, in connection with the constituent elements of an offence, *Pessino v. France*, no. 40403/02, §§ 35-36, 10 October 2006, and *Dragotoniu and Militaru-Pidhorni v. Romania*, nos. 77193/01 and 77196/01, §§ 43-44, 24 May 2007). Were that not the case, the object and the purpose of this provision – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated (see *Del Río Prada*, § 93, and *Yüksel Yalçınkaya*, § 239, both cited above).

145. When examining if the domestic courts' broad interpretation of the text of the law was reasonably foreseeable for the purposes of Article 7 § 1 of the Convention, the Court has regard to whether the interpretation in question was the resultant development of a perceptible line of case-law or its application in broader circumstances was nevertheless consistent with the essence of the offence (see *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 65, 3 December 2019). The domestic courts must exercise special diligence to clarify the elements of an offence in terms that make it foreseeable and compatible with its essence (ibid., § 77). In this context, the Court reiterates that even when a point is ruled upon for the first time in an applicant's case, a violation of Article 7 of the Convention will not arise if the meaning given is both foreseeable and consistent with the essence of the offence (see *Jorgic v. Germany*, no. 74613/01, § 114, ECHR 2007 III; *Custers and Others v. Denmark*, nos. 11843/03 and 2 others, 3 May 2007; and *Huhtamäki v. Finland*, no. 54468/09, § 51, 6 March 2012).

146. The Court would also point out that its task is not to review the relevant domestic law and practice *in abstracto* (see, for example, *Allen v. the United Kingdom*, no. 18837/06, § 40, 30 March 2010). Its task is rather to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention or its Protocols (see, among other authorities, *Mežnarić v. Croatia*, no. 71615/01, § 28, 15 July 2005, and *Fruni v. Slovakia*, no. 8014/07, § 133, 21 June 2011). In this context, the Court would reiterate that it is not its task to substitute itself for the domestic courts as regards the assessment of the facts and their legal classification, provided that these are based on a reasonable assessment of the evidence (see, *mutatis mutandis*, *Florin Ionescu v. Romania*, no. 24916/05, § 59, 24 May 2011). As to the question of whether the measure was in

accordance with the law, the Court's case-law has established that a measure must have some basis in domestic law, the term "law" being understood in its "substantive" rather than its "formal" sense. In a sphere covered by statutory law, the "law" is the enactment in force as the competent courts have interpreted it. Domestic law must further be compatible with the rule of law and accessible to the person concerned, and the person affected must be able to foresee the consequences of the domestic law for him or her (see, *inter alia*, *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13 and 2 others, § 332, 25 May 2021; see also *Société Colas Est and Others v. France*, no. 37971/97, § 43, ECHR 2002-III; *Wolland v. Norway*, no. 39731/12, § 62, 17 May 2018; and *Särgava v. Estonia*, no. 698/19, § 86, 16 November 2021). It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The Court's role is thus confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I; *Korbely v. Hungary* [GC], no. 9174/02, §§ 72-73, ECHR 2008; and *Kononov v. Latvia* [GC], no. 36376/04, § 197, ECHR 2010). According to the Court's general approach, it does not question the interpretation and application of national law by national courts unless there has been a flagrant non-observance or arbitrariness in the application of that law (see, *inter alia*, *Société Colas Est and Others*, cited above, § 43, ECHR 2002-III; *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002; and *Huhtamäki*, cited above, § 51); given the subsidiary nature of the Convention system, it is not its function to deal with errors of fact or law allegedly committed by a domestic court, unless and in so far as they may have infringed rights and freedoms protected by the Convention and unless that domestic assessment is arbitrary or manifestly unreasonable (see, *inter alia*, *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 83, 11 July 2017, and *Alparslan Altan v. Turkey*, no. 12778/17, § 110, 16 April 2019).

147. However, the Court's powers of review must be greater when the Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and sentence. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant's conviction and, in particular, it must satisfy itself that the result reached by the relevant domestic courts was compatible with Article 7. To accord a lesser power of review to this Court would render that provision devoid of purpose (see *Kononov*, cited above, § 198, and *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 52, ECHR 2015). The Court must therefore verify that at the time when an accused person performed the act that led to his being prosecuted and convicted there was in force a legal provision that made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision. While the text of the Convention is the starting-point for such an assessment, having regard to its aim, which is to protect rights

that are practical and effective, the Court may take into consideration the need to preserve a balance between the general interest and the fundamental rights of individuals and the notions currently prevailing in democratic States (see *Coëme and Others v. Belgium*, nos. 32492/96 and 4 others, § 145, ECHR 2000-VII, and *Jasuitis and Šimaitis v. Lithuania*, nos. 28186/19 and 29092/19, § 114, 12 December 2023).

148. In sum, the Court must examine whether, in the light of the above-mentioned principles, there was a sufficiently clear legal basis for the applicant's conviction (see *Kononov*, cited above, § 199).

(b) Application of the general principles to the circumstances of the instant case

149. The Court firstly turns to the applicant's argument that his prosecution had been unlawful, because it had been based on Article 3^2 of the Code of Criminal Procedure (see paragraph 120 above). The Court reiterates that Article 7 guarantees that criminal offences and the relevant penalties must be clearly defined by substantive criminal law. It does not, however, set any requirements as to the procedure in which those offences must be investigated and brought to trial (see *Khodorkovskiy and Lebedev*, cited above, § 789).

150. That being so, responding to the applicant's general grievance regarding his prosecution (see paragraph 120 above), the Court notes that the applicant's criminal prosecution only started when his term as a member of the *Seimas* had come to an end in November 2012, and when his immunity from prosecution expired (see paragraphs 18 and 19 above). This was also noted by the domestic court (see paragraph 46 above). The Court also acknowledges the Government's explanation that Article 3^2 of the Code of Criminal Procedure had been introduced so that criminal investigation measures could be performed even before a person's immunity expired (see paragraph 129 above). Besides, the Court cannot but find that Article 3^2 of the Code was irrelevant for the applicant's prosecution: that provision was not relied upon by the prosecutor when opening the criminal investigation against the applicant. Instead, the prosecutor referred to Article 169 of the Code of Criminal Procedure, which was in force at the time when the applicant committed the impugned offence and has not been changed since, and which pointed to information received by the prosecutor, namely, the conclusion from the SSIC, as the basis for starting a criminal investigation (see paragraphs 8, 9 and 46 above). Also, the applicant has not presented the Court with any proof (domestic case-law, *travaux préparatoires* or other) which would allow to infer that, had Article 3^2 not been introduced to the Code of Criminal Procedure, this would have prevented him from criminal prosecution under Article 169 of the Code of Criminal Procedure upon the expiration of his mandate of a *Seimas* member. The Court also observes that it was not the right but the obligation of the prosecutor to start a criminal investigation, a fact that was referred to by the Supreme Court (see

paragraph 46 above). In the light of the foregoing, the Court finds that the opening of a criminal prosecution against the applicant was in line with the requirements of Article 7 of the Convention.

151. Examining further, the Court reiterates that the applicant had been found guilty of abuse of office and of the seizure of the document, under Article 228 § 1 and Article 302 § 1 of the Criminal Code respectively (see paragraph 59 above). It follows from the limitations referred to in paragraph 146 above that the Court is not called upon to rule on the applicant's individual criminal responsibility, that being primarily a matter for assessment by the domestic courts (see in this respect, *Rohlena*, § 55 and *Yüksel Yalçınkaya*, § 243, both cited above). What the Court must examine is whether the applicant could know from the wording of the relevant provisions and, if need be, with the assistance of the courts' interpretation of them and after taking appropriate legal advice, what acts and/or omissions were to make him criminally liable (see, *mutatis mutandis*, *Cantoni v. France*, 15 November 1996, § 29, *Reports* 1996-V; see also *Kafkaris v. Cyprus* [GC], no. 21906/04, § 140 ECHR-2008; and *Del Río Prada*, cited above, § 79). Foreseeability must be appraised from the angle of the convicted person (possibly after the latter has taken appropriate legal advice) at the time of the commission of the offence charged. The foreseeability of judicial interpretation relates to the elements of the offence (see *Pessino*, §§ 35-36, and *Dragotoniu and Militaru-Pidhorni*, §§ 43-47, both cited above; see also *Dallas v. the United Kingdom*, no. 38395/12, §§ 72-77, 11 February 2016).

152. The core of the applicant's arguments consisted in maintaining, firstly, that the domestic courts unjustifiably extended the reach of the criminal law to his case, in contravention of the guarantees of Article 7 of the Convention, given that his actions when voting for L.K. had been consistent with the "tradition" in the *Seimas* to vote for other members of the same political group, and, secondly, that he had been discriminated against because to this day his conviction had been exceptional and thus arbitrary. The Court now turns to those arguments.

153. The Court finds that the practice of the *Seimas* members voting for each other undoubtedly had been known to the Lithuanian authorities, if only on the basis of the records of the *Seimas* Ethics and Procedures Commission (see paragraphs 67-75 above). Indeed, as it appears from those decisions of the Commission that, concerned with such voting, which had been in breach of the single vote principle, as explicated, *inter alia*, in the Constitutional Court's case-law and enshrined in the *Seimas* Statute (see paragraphs 14 and 62 above), the Commission would urge *Seimas* members to refrain from such practice. Moreover, the Commission would constantly insist that such practice was brought to an end and that technical measures were taken in order "to avoid discrepancies during registration and voting procedures", including the voting of some *Seimas* members instead of the others (see, among others, paragraphs 69 and 71 above), and on several occasions it

initiated the revote on respective pieces of legislation (see paragraphs 71, 73 and 76 above). Therefore, although the measures the Commission took against the concrete *Seimas* members who had breached the single vote principle were limited to noting down a warning in the minutes of the Commission's hearing (see, among others, paragraphs 71, 73 and 74 above), the Court cannot find that the authorities' attitude towards such a practice of voting in the *Seimas* amounted to a "conscious toleration" (contrast, *mutatis mutandis*, *Khodorkovskiy and Lebedev*, cited above, § 820). The Court is therefore not inclined to treat the iterative instances of voting, which had been recognised by the Commission to have been violations of statutory law, as a "tradition" (which is the categorisation used by the applicant), let alone such "tradition" which would be capable of superseding statutory law (compare paragraph 146 above). The Court, however, acknowledges that, as pointed out by the applicant, and not refuted by the Government or by the domestic courts, there was no situation in which the Commission, which is body of the *Seimas*, would have deemed it appropriate that any kind of proceedings, and not necessarily criminal proceedings, should be initiated against those, or any other members of the *Seimas*, whose actions had been similar to that of the applicant in that respect that they also had voted instead of other *Seimas* members. Rather, the Commission, having assessed the particular circumstances of every such irregular voting under their examination, would characterise the breaches of the single vote principle as "dishonest voting [and] a disciplinary violation" (see paragraph 68 above), "discrepancies" (see paragraph 69 above), or "the related ban being disregarded" (see paragraph 71 above). Except for the applicant's case, the Commission never before had decided to refer the matter of the breach of single vote principle to a prosecutor for investigation within criminal proceedings. In this regard, the Court accepts the applicant's claim that his criminal case had no precedents.

154. That being so, the Court takes notice of the Supreme Court's argument that, unlike the applicant, those other persons had not been on trial and that the breaches of the *Seimas* Statute that those other persons might have committed or not when voting in the *Seimas* were irrelevant for the applicant's case; likewise, the Court, reiterating its long-held stance that in a sphere covered by statutory law, the "law" is the enactment in force as the competent courts have interpreted it (see paragraph 146 above), takes no issue with that court's position that in criminal proceedings a court had to follow the letter of the law, rather than "wrongful practice or precedents contrary to the law" (see paragraph 50 above). The Court acknowledges the existence of those "wrongful" cases and facts, or any other such cases of voting in the *Seimas*, which were noted in the official documents – the decisions of the *Seimas* Ethics and Procedures Commission, and thus can be relied upon by the Court in the instant case as publicly available information (see *Rinau v. Lithuania*, no. 10926/09, § 210, 14 January 2020). Even so, the fact, in and

of itself, that they were not examined by the Court of Appeal or the Supreme Court when finding against the applicant for what the Court finds as plausible reasons (see paragraphs 35 *in fine* and 50 above), is not sufficient for the Court to find lack of foreseeability of the applicant's prosecution and conviction under Article 228 § 1 and Article 302 § 1 of the Criminal Code in the light of those courts' explanation of the gravity of the applicant's actions and his guilt, an issue to which the Court turns next.

155. As noted by the Court of Appeal, when voting for L.K. the applicant had acted with direct intent, having understood the dangerous nature of his actions; he had not only life experience and professional experience at the *Seimas*, but also a law degree (see paragraph 35 above); as transpires from his official biography on the *Seimas* internet page, before becoming a *Seimas* member, he had worked as a police commissioner and an advocate (see paragraph 5 above). As noted by the Supreme Court, he did not contest the factual circumstances regarding his actions – having registered and voted in place of L.K. six times, only contesting whether those actions had caused major damage to the State (see paragraph 51 above).

156. As regards the causing of major damage to the interests of the State, which is a condition for criminal liability under Article 228 § 1 of the Criminal Code, the Court observes that this assessment was made by the Court of Appeal and the Supreme Court. Firstly, the Court of Appeal referred to a number of legal acts, including the Constitutional Court's conclusion of 27 October 2010, on the high professional and ethical requirements applied to the *Seimas* members, which the applicant had violated, thus discrediting the authority of the *Seimas*' members as well as that of the *Seimas*, all of that having caused major non-pecuniary damage to the State (see paragraph 36 above). That conclusion was upheld by the Supreme Court, which suggested that a violation of the law – namely Article 111 § 4 of the *Seimas* Statute – by the applicant in itself served as an irrebuttable presumption that he had caused major non-pecuniary damage to the interests of the State. The Supreme Court further referred to the Constitutional Court's conclusion concerning the applicant and L.K., to the effect that the applicant's voting for L.K. had amounted to having usurped the mandate of the *Seimas* members, shown disrespect to the Constitution and discredited the authority of the *Seimas* as the representation of the nation (see paragraph 52 above). As explained by the Supreme Court, the applicant's status as a *Seimas* member was particularly important in the system of State government (see paragraph 54 *in limine* above), and, under the domestic case-law, breach of the values set out in the Constitution and disregard of the essential requirements applicable to State service were usually acknowledged as major non-pecuniary damage to the State service and the State (see paragraph 53 above). Referring to the Supreme Court's and the Constitutional Court's findings regarding the applicant having usurped another *Seimas'* member's mandate, the Court also recalls having consistently emphasised, in the context

of Article 3 of Protocol No. 1 to the Convention, the importance of establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see, *mutatis mutandis*, *Tănase v. Moldova* [GC], no. 7/08, § 154, ECHR 2010). Similarly, the broad margin of appreciation which the States have in the sphere of electoral rights and the Court' subsidiary role regarding the establishment of facts, whilst reiterating its power to verify whether the State had complied with its obligations under Article 3 of Protocol No. 1, have been noted in the *Advisory opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings* [GC], cited above, §§ 77-79).

157. That being so, in the present case, the Court does not find that the domestic courts' interpretation and application of the criminal-law provisions in question, in particular, in the light of the Constitutional Court's case-law, to establish that the applicant had caused "major" damage – that he, as a member of an institution exercising State powers, had distorted the *Seimas*' activity and humiliated and discredited the name of *Seimas* members and the *Seimas*' authority (see paragraphs 36, 53 and 54 above) – would have involved the use of such broad notions or such vague criteria that the criminal-law provisions in question did not meet the quality required under the Convention in terms of their clarity and the foreseeability of their effects, in particular to a person with solid professional background and experience in legal matters.

158. The Court has consistently held that the guarantee enshrined in Article 7 of the Convention, which is an essential element of the rule of law, should be construed and applied, as it follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Rohlena*, cited above, § 50; *S.W. v. the United Kingdom*, cited above, § 34; and *Kafkaris*, cited above, § 137). The Court takes notice of the applicant's argument that, as acknowledged by the Government and the Supreme Court (see paragraphs 28 and 135 above), no one has ever been prosecuted in Lithuania for voting instead of other *Seimas* members, even in the period between the applicant's prosecution and conviction and the latest submissions received from the parties in the present case, despite the authorities being aware of such practice (see paragraph 76 above). That notwithstanding, the Court has held that no decisive importance should be attached to a lack of comparable precedents prior to the decision to prosecute the applicant (see, *mutatis mutandis*, *K.A. and A.D. v. Belgium*, nos. 42758/98 and 45558/99, § 55, 17 February 2005), and it finds that the authorities' view towards the gravity of a breach of the single vote principle weighs heavily in the balance when assessing whether the applicant's conviction was devoid of arbitrariness and whether it was foreseeable. The Court thus notes that L.K., for his part, did not get away

with a slap on the wrist, for he was impeached (see paragraphs 16 above). That being so, the Court cannot find that the Court of Appeal (during the second set of criminal proceedings) and the Supreme Court's interpretation of the criminal law in the applicant's case could be said to have constituted a development inconsistent with the essence of the offences (see *Liivik v. Estonia*, no. 12157/05, § 94, 25 June 2009).

159. As mentioned (see paragraph 146 above), Article 7 of the Convention is not incompatible with judicial law-making and does not outlaw the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen. The applicant may have fallen victim to a novel application of the concept of "major non-pecuniary damage to the State" insofar casting a vote for another member of the *Seimas* is concerned, yet it was based on a reasonable interpretation of Articles 228 § 1 and 302 § 1 of the Criminal Code and "consistent with the essence of the offence" (see, *mutatis mutandis*, *Khodorkovskiy and Lebedev*, cited above, § 821). Neither the Court can discern any flagrant non-observance or arbitrariness in the application of the law in question to the applicant.

160. In the light of the specific circumstances of the instant case and the foregoing considerations, the Court does not find that there had been the lack of clarity in the legislation, or the domestic courts' practice, which did not allow the applicant to regulate his conduct (see, *mutatis mutandis*, *Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V). In other words, it was foreseeable that the applicant's acts would constitute an offence under the criminal law applicable at the material time. There has accordingly been no violation of Article 7 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

161. 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."

162. The applicant argued that he had suffered significant non-pecuniary damage as a result of his unjustified conviction but considered that the finding of a violation would be sufficient. He did not make a claim for costs and expenses.

163. The Government assented to the applicant's request, should a violation of Article 6 of the Convention be found by the Court.

164. The Court considers that, in the circumstances of the present case, the finding of a violation of Article 6 § 1 of the Convention constitutes in

itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been no violation of Article 7 of the Convention;

4. *Holds* that the finding of a violation of Article 6 § 1 of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

Done in English, and notified in writing on 23 April 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Dorothee von Arnim Deputy Registrar	Arnfinn Bårdsen President