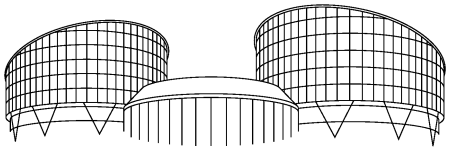

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FORMER SECOND SECTION

CASE OF SIDABRAS AND OTHERS v. LITHUANIA

(Applications nos. 50421/08 and 56213/08)

JUDGMENT

STRASBOURG

23 June 2015

FINAL

23/09/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Sidabras and Others v. Lithuania,

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

Guido Raimondi, *President,*
András Sajó,
Nebojša Vučinić,
Helen Keller,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
Lech Garlicki, ad hoc *judge,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 12 May 2015,

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

PROCEDURE

1. The case originated in two applications (nos. 50421/08 and 56213/08) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Lithuanian nationals, Mr Juozas Sidabras ("the first applicant") and Mr Kęstutis Džiautas ("the second applicant") on 14 October 2008, and Mr Raimundas Rainys ("the third applicant") on 15 November 2008.

2. The first and second applicants were represented by Mr V. Barkauskas, a lawyer practising in Vilnius. The third applicant was represented by Mr A. Paškauskas, a lawyer practising in Vilnius. The Lithuanian Government ("the Government") were represented by their Agent, Ms E. Baltutytė.

3. Ms Danutė Jočienė, the judge elected in respect of Lithuania, was unable to sit in the case (Rule 28). The Government accordingly appointed Mr L. Garlicki, the judge elected in respect of Poland, to sit in her place (Article 26 § 4 of the Convention and Rule 29).

4. The applicants alleged that they had been discriminated against on account of their former employment as KGB agents, in breach of Articles 8 and 14 of the Convention. They also complained that, in breach of Article 46 of the Convention, the State had not respected their rights, even after the Court had ruled in their favour. Finally, they referred to Article 13 in their complaints.

5. On 17 March 2009 the applications were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The first applicant

6. The first applicant, Mr Juozas Sidabras, was born in 1951 and lives in Kaunas.

7. He graduated from the Lithuanian Physical Culture Institute (currently the Lithuanian Sports University), qualifying as a sports instructor.

8. From 1975 to 1986 he was employed by the Lithuanian branch of the USSR State Security Committee (the KGB). After Lithuania declared independence in 1990, he found employment as a tax inspector.

9. On 31 May 1999 the Lithuanian authorities concluded that the first applicant was subject to the restrictions of Article 2 of the KGB Act (see paragraph 64 below). As a result, on 2 June 1999 he was dismissed by the tax authorities.

10. The first applicant brought an administrative action against the security intelligence authorities, claiming that his dismissal under the KGB Act, and the ensuing inability to find employment, were unlawful. The domestic courts dismissed his claims (see *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, §§ 14-16, ECHR 2004-VIII).

11. On 29 November 1999 the first applicant submitted an application to the Court, alleging that he had lost his job and that his employment prospects had been restricted as a result of the application of the KGB Act, in breach of Articles 8 and 14 of the Convention.

12. By a judgment of 27 July 2004 in the case of *Sidabras and Džiautas* (cited above), the Court found a violation of Article 14 of the Convention, taken in conjunction with Article 8. It concluded that the ban on the first applicant seeking employment in various branches of the private sector, in application of Article 2 of the KGB Act, constituted a disproportionate measure, despite the legitimacy of the aims pursued (see § 61 of the judgment). The Court ordered the State to pay the first applicant 7,000 euros (EUR) as compensation for pecuniary and non-pecuniary damage and costs.

13. By a letter of 2 November 2004 the Court informed the Lithuanian Government that, as no request had been made under Article 43 of the Convention for the above-mentioned cases to be referred to the Grand Chamber, the judgment of 27 July 2004 had become final on 27 October 2004, in accordance with Article 44 § 2 of the Convention.

14. In 2005 the Committee of Ministers of the Council of Europe discussed the question of whether the Court's judgments in the cases of *Sidabras and Džiautas v. Lithuania* (cited above) and *Rainys and*

Gasparavičius v. Lithuania (nos. 70665/01 and 74345/01, 7 April 2005) had been executed. As regards individual measures, the Government informed the Committee of Ministers that the sum awarded to the first applicant had been paid to him. As regards general measures, the Lithuanian Parliament was preparing amendments to the KGB Act, which would be adopted in the near future. Moreover, in order to prevent similar violations of the Convention, the Lithuanian courts and other institutions had been informed about the Court's judgment and provided with a translation (see also paragraphs 61-63 below).

15. On 8 December 2006 the first applicant started domestic court proceedings against the State of Lithuania, seeking 257,154 Lithuanian litai (LTL) in pecuniary damages, which he counted as ten years of his tax inspector's salary, and LTL 500,000 in non-pecuniary damages, which he claimed to have suffered because of the continuing violation of his right to respect for his private life under Articles 8 and 14 of the Convention. The first applicant noted that since 1999 he had been unemployed and registered at the Šiauliai Employment Office (*Šiaulių darbo birža*), a State institution that provides assistance for job seekers. He argued that, even though he had not been in the service of the KGB for more than twenty years, owing to the restrictions imposed by the KGB Act he had been unable to gain employment in certain branches of the private sector as of 1999.

16. The first applicant also maintained that the Republic of Lithuania had disregarded its obligations under international treaties and the Convention. Without referring to specific judgments of the Court, he considered that the common principles developed by the Court required that Lithuania execute the Court's judgment in his case without undue delay. It was his view that the Court's judgment in his case obliged Lithuania to amend the KGB Act. However, the Lithuanian Parliament had ignored the Court's judgment and had been stalling any amendment of the KGB Act, which the Court had found to be incompatible with the Convention. He concluded that since 27 October 2004, when the Court's judgment in his case had become final, the Republic of Lithuania had continued to violate his employment rights.

17. On 21 February 2007 at the request of the first applicant, the Šiauliai Employment Office issued him with a document to the effect that he had been registered as a job seeker since 14 June 1999, and that between August 2004 and April 2006 he had been turned down a number of times for jobs proposed to him, "for justified reasons". As it transpires from other documents presented to the Court, those justified reasons included: a lack of professional qualification or work experience for the posts of business manager at a factory producing television sets and at other local companies; another candidate had been chosen for the post of supervisor at a waste management facility; and a lack of English language skills for a job as a hotel manager.

Without further explanation, it was also briefly noted in the document of 21 February 2007 that the first applicant "had not been employed because of applicable restrictions (he could not take up jobs which required him to manage people, pedagogical jobs or work in the security sector) (*bedarbis neįdarbintas dėl taikomų apribojimų: negali dirbti vadovaujantį, pedagoginį darbą, apsaugoje*)".

18. On 13 March 2007 the Vilnius Regional Administrative Court dismissed the first applicant's claims as unsubstantiated. It observed that the Strasbourg Court had awarded him compensation for the pecuniary and non-pecuniary damage he had sustained before the Court had adopted its judgment on 27 July 2004. The first-instance court then turned to the first applicant's claim about the continued discrimination against him after the Court's judgment. On this point, it observed that the Šiauliai Employment Office's document of 21 February 2007 stated that he "had not been employed because of applicable restrictions". Without elaborating any further on the facts, the Vilnius Regional Administrative Court merely observed that that particular document and other materials of the case file did not prove that the first applicant's right to choose a particular private sector job had been infringed because Article 2 of the KGB Act had not been amended after the Court's judgment. Accordingly, his claim for damages for the period after the Court's judgment was dismissed.

19. On 23 March 2007 the first applicant lodged an appeal with the Supreme Administrative Court. In addition to his previous arguments he further maintained that after the re-establishment of Lithuania's independence, he had fully cooperated with the Lithuanian authorities and helped to disclose the identities of former KGB officers before they infiltrated the Lithuanian authorities. However, notwithstanding his loyalty to the independent Lithuania and the Court's judgment in his favour, he had been banned from legal, pedagogical or other jobs because the KGB Act had remained in force. He had been unemployed since June 1999 and thus could not take care of his family.

As it appears from his appeal on points of law, the first applicant did not mention any particular instance when he had been refused a job because of his status. Yet he reiterated his point of view that the principles of the Court required that States execute the Court's judgments without undue delay and within the shortest time possible.

20. On 14 April 2008 the Supreme Administrative Court upheld the lower court's decision. It observed that the Convention formed an integral part of the Lithuanian legal system and that individuals could directly rely on its provisions before the national courts. Moreover, in the event of a conflict between the legal norms of the Convention and national laws, the Convention was to be given priority. The Supreme Administrative Court agreed with the lower court's reasoning that the first applicant's request for compensation for pecuniary and non-pecuniary damage sustained before

27 July 2004 (the date of the Strasbourg Court's judgment in his case) had to be dismissed because an award had already been made by the Court and the applicant had been paid the sum of EUR 7,000.

21. Regarding the first applicant's claim in respect of the damage allegedly suffered since then, on the basis of the Court's judgment in *Scozzari and Giunta v. Italy* ([GC] nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII), the Supreme Administrative Court noted that States undertook to take general and, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible its effects. The States were free to choose how to correct the breach of individual applicants' Convention rights, provided that the means chosen were compatible with the conclusions set out in the Court's judgment. *Restitutio in integrum* was an important aspect of remedying the violation.

22. That being so, even though the legislator had an obligation to ensure legal certainty and to reconcile domestic law with the norms of the Convention, legislative amendment was not the only way to implement the Court's judgment. The fact that the KGB Act had not been amended had not in itself breached the first applicant's rights. A person's rights could also be secured by administrative decisions and domestic court practices. Both the KGB Act and the Strasbourg Court's judgment were in force in Lithuania. For the Supreme Administrative Court, in the event of a conflict between them, priority was to be given to the Court's judgment. Consequently, even though the KGB Act was still in force, a refusal to employ the first applicant in the private sector based on the restrictions contained in the KGB Act would be unlawful. Accordingly, the protection of a person's rights through the direct application of the Court's judgment and before any legislative amendments had been adopted was to be considered proper execution of the Court's judgment.

23. Regarding the facts of the case, the Supreme Administrative Court noted that the first applicant had attempted to obtain employment in the private sector. It observed that on 21 February 2007 the Šiauliai Employment Office had issued him with a document certifying that he had been registered as a job seeker since 14 June 1999 and had not been employed because of the restrictions applied to him (see paragraph 17 above). The appellate court noted that in response to its request to explain the reasons for the first applicant's unemployment in more detail, on 28 December 2007 the Šiauliai Employment Office had provided the appellate court with another document stating that on 14 June 1999 an individual plan for the first applicant's employment had been prepared with a view to employing him as a lawyer (in-house lawyer; *juriskonsultas*), because he had more than ten years' work experience in different companies and institutions in the city of Šiauliai. From 1999 to 2004, more than thirty posts for in-house lawyers had been created in Šiauliai, for which a

university degree in law was required and the salary was just higher than minimal salary. The advertisements for those posts had been shown to the first applicant, but he had not been given any of those jobs because the employers considered that he lacked the relevant qualifications. The Šiauliai Employment Office could therefore no longer offer the first applicant other in-house lawyer posts. To increase his chances of finding a job, at the end of 2003 the first applicant had attended computer literacy courses and courses for professional training in the field of administrative work. In 2004 a new individual plan had been compiled together with the first applicant, so that, because he so wished, he could obtain the job of business manager (*komercijos vadybininkas*). The Šiauliai Employment Office then named six companies which refused the first applicant the job of business manager, administrator and sales manager because other candidates had been chosen or because he lacked knowledge of the English language.

24. The Supreme Administrative Court observed that those two documents were contradictory. The court deemed it proper to rely on the report of 28 December 2007 as it was more recent and, in the court's opinion, more comprehensive and explanatory. It concluded that the restrictions which the KGB Act imposed on a person's ability to find employment in certain areas of the private sector had not been applied to the first applicant. The existence of the KGB Act, as such, had not violated his rights and did not entitle him to compensation. The Supreme Administrative Court determined that there was no proof that, after the Court's judgment of 27 July 2004, the first applicant had been prevented from obtaining a private sector job because of the restrictions related to the KGB Act. Furthermore, he had not provided any particular information as to who had refused to employ him on the basis of those restrictions and when. It followed that the first applicant had not managed to secure a job because of the local labour-market situation. Moreover, there was no information that he had attempted to find a job in another manner, that is to say not only relying on the assistance of the Šiauliai Employment Office, but had been refused a job because of the legislative restrictions. To give rise to a violation of the Convention, a breach of a person's rights had to be real, and not hypothetical. Given that there was no proof that after the Court's judgment of 27 July 2004 the first applicant could not obtain a job because the KGB Act remained unchanged, and having concluded that his right to work in the private sector could no longer be restricted because of the direct applicability of the Convention, the first applicant's claim for damages had to be dismissed.

25. On 18 April 2008, four days after the Supreme Administrative Court's final decision in his case, the Šiauliai Employment Office suggested that the first applicant contact two specific private companies for a post as a business manager. On 6 May 2008 the first applicant came back to the Šiauliai Employment Office and stated that he had not taken the business

manager's job in one of those companies because he did not like the conditions offered. He planned to take part in the interview for the business manager's job in the other company.

Later in 2008 the first applicant was refused positions of business manager, insurance consultant and other jobs a number of times because he lacked foreign language skills, qualifications, or the relevant work experience. As it transpires from the documents in the Court's possession, he turned other jobs down simply because he deemed that the salary offered was too low or the work place too far away.

On 23 December 2008 the first applicant was appointed as a carer for his mother (*paskirtas motinos rūpintoju*). The Šiauliai Employment Office therefore discontinued its assistance to him.

B. The second applicant

26. The second applicant, Mr Kęstutis Džiautas, was born in 1962 and lives in Vilnius.

27. On an unspecified date in the 1980s, he graduated from Vilnius University as a lawyer. From 11 February 1991 he worked as a prosecutor.

28. On 26 May 1999 the Lithuanian authorities concluded that, from 1985 to 1991, the second applicant had been an employee of the Lithuanian branch of the KGB and that he was therefore subject to the restrictions provided for by Article 2 of the KGB Act. As a result, on 31 May 1999 he was dismissed from his job as prosecutor.

29. The second applicant brought an administrative action against the authorities, claiming that his dismissal under the KGB Act, which made it impossible for him to find employment, was unlawful. The domestic courts dismissed his claims (see *Sidabras and Džiautas,* cited above, §§ 20-23).

30. On 5 July 2000 the second applicant lodged an application with the Court. Like the first applicant, he alleged that Articles 8 and 14 of the Convention had been violated.

31. By a judgment of 27 July 2004 in *Sidabras and Džiautas v. Lithuania* (cited above), the Court found a violation of Article 14 taken in conjunction with Article 8 of the Convention and awarded the second applicant EUR 7,000 in respect of pecuniary and non-pecuniary damage and costs.

32. On 5 January 2005 the second applicant wrote to the Chairman of the Human Rights Committee of the Lithuanian Parliament, the Prime Minister and the Minister of Justice to enquire whether the State intended to amend the KGB Act and, if so, when. At the same time, he acknowledged that the Lithuanian authorities had already paid him a sum of money awarded to him by the Court.

33. On 11 January 2005 the Government Agent before the Court informed the second applicant that the Ministry of Justice was working on amendments to the KGB Act.

On 26 February 2005 the Chairman of the Human Rights Committee of the Seimas informed the second applicant that the Seimas had set up a working group that was also drafting legislative amendments.

34. According to the Government, as of 29 March 2006 the second applicant was registered in the list of trainee lawyers (*advokato padėjėjas*), which is a precondition to becoming a lawyer. The Government also noted that the second applicant had submitted his traineeship report on 14 May 2009 and was going to take the Bar exam.

35. On 20 October 2006 the second applicant sued the Republic of Lithuania for non-pecuniary damage. He claimed to have lost LTL 100,000 as a result of the State's failure, since 27 July 2004 (the date of the Court's judgment in his case), to amend the KGB Act. This in turn had restricted his prospects of finding employment in certain private sector areas. He argued that the common principles governing the execution of the Court's judgments required the State to execute the judgment without undue delay.

36. On 12 February 2007 the Vilnius Regional Administrative Court dismissed the second applicant's claim. It noted that the judgment in the *Sidabras and Džiautas* case did not oblige the State to amend the KGB Act within a specific time-frame and that the Seimas was in the process of discussing the relevant legislative amendments. During the court hearing the second applicant submitted that he had contacted an insurance company and a commercial bank in order to check what the reaction of potential employers would be. He maintained that those employers had replied that they would be unable to employ him because to do so would breach the KGB Act. The first-instance court, however, noted that the second applicant had not provided any evidence to prove that he had actually applied for and been refused any particular job in the private sector. Accordingly, the court had no basis on which to hold that the second applicant had in reality addressed those two employers and that they had refused to hire him.

37. The second applicant appealed. He pointed out in particular that he had not attempted to obtain employment in the private sector so as not to harm the employers, who would have faced administrative liability if they had employed him. That was the reason why he had no proof of having actually attempted to obtain a job barred to him by the KGB Act.

38. On 18 April 2008 the Supreme Administrative Court dismissed the second applicant's appeal. Its reasoning was similar to that of its decision of 14 April 2008 in the first applicant's case (see paragraphs 20-22 above). It observed that the second applicant had based his claims for damages on the alleged non-execution of the Court's judgment of 27 July 2004. However, referring to the cases of *Scozzari and Giunta* (cited above, § 249) and *Vermeire v. Belgium* (29 November 1991, § 26, Series A no. 214-C), it

observed that under Article 46 of the Convention, Contracting States were free to choose the appropriate individual and general measures to discharge their legal obligation to execute the Court's decisions, albeit monitored by the Committee of Ministers. Moreover, given the abstract nature of the Convention norms, the domestic courts should follow the Strasbourg Court's jurisprudence in order better to comprehend their content.

39. As to the facts of the second applicant's case, the Supreme Administrative Court observed that, because the Court's judgment in *Sidabras and Džiautas* prevailed over the KGB Act, the restrictions on working in certain private sector areas could no longer be imposed on the second applicant. Thus, even though the KGB Act had not been amended, a refusal to employ him on the basis of the restrictions provided for in the KGB Act would be in violation of the Convention and consequently unlawful. It was also the court's view that protecting a person's rights by direct application of the Court's judgments rather than by legislative amendments was an appropriate way to execute those judgments. It followed that, because of the direct applicability of the Convention and the Court's judgments, the State had not failed to act, the latter being a precondition for the State's civil liability.

40. As to the second applicant, he had failed to prove that, after the Court's judgment of 27 July 2004, he had attempted to obtain employment in the private sector and had been refused owing to the restrictions of the KGB Act. The Supreme Administrative Court stressed that "the mere existence of contradictions and ambiguities in the legal system did not in itself provide grounds for a violation of a person's rights and did not harm that person". Similarly, a mere hypothetical violation and a person's idea that his rights had been breached, without any tangible facts, were not sufficient. The Supreme Administrative Court therefore dismissed the second applicant's claim in respect of non-pecuniary damage.

C. The third applicant

41. The third applicant, Mr Raimundas Rainys, was born in 1949 and lives in Vilnius.

42. From 1975 to October 1991 he was an employee of the Lithuanian branch of the KGB. Thereafter he found employment as a lawyer in a private telecommunications company, *Omnitel*.

43. On 17 February 2000 the State Security Department informed *Omnitel* that the third applicant had been a KGB officer and was therefore subject to the restrictions provided for by Article 2 of the KGB Act. As a result, on 23 February 2000 *Omnitel* dismissed the third applicant from his job.

44. After unsuccessful litigation before the Lithuanian courts for reinstatement in his job and for unpaid salary (see *Rainys and*

Gasparavičius, cited above, §§ 11-13), the third applicant lodged an application with the Court, alleging that he had lost his job and that his employment prospects had been restricted as a result of the application to him of the KGB Act, in breach of Articles 8 and 14 of the Convention.

45. In its judgment in the case of *Rainys and Gasparavičius* (cited above, § 36) the Court held that the third applicant's inability to pursue his former profession as a lawyer in a private telecommunications company, and his continuing inability to find private-sector employment because of his "former permanent KGB employee" status under the KGB Act, constituted a disproportionate and thus discriminatory measure, despite the legitimacy of the aims pursued. The Court concluded that there had been a violation of Article 14 taken in conjunction with Article 8 of the Convention.

46. By a letter of 15 July 2005, the Court informed the Lithuanian Government that, as no request had been made under Article 43 of the Convention for the above-mentioned cases to be referred to the Grand Chamber, the judgment of 7 April 2005 had become final on 7 July 2005, in accordance with Article 44 § 2 of the Convention.

47. On 25 July 2005 the third applicant requested that the Supreme Administrative Court reopen the proceedings in his earlier case for unlawful actions and reinstatement in his job at *Omnitel*, on the basis of Article 153 § 2 (1) of the Law on Administrative Court Proceedings (see paragraph 65 below).

48. On 23 February 2006 the Supreme Administrative Court noted that the proceedings in the domestic courts related to the dismissal of the third applicant from his position as a lawyer with a telecommunications company. It observed that the Court's judgment gave reason to doubt the lawfulness of those domestic decisions. It therefore decided to reopen the proceedings which the third applicant had previously instituted against the State Security Department and his previous employer, the private telecommunications company, *Omnitel*.

For reasons of jurisdiction, the case was subsequently remitted to the Vilnius Regional Court, a court of general jurisdiction, for a fresh examination.

49. On 10 July 2007 the Vilnius Regional Court acknowledged that the third applicant had been dismissed from his previous job at *Omnitel* unlawfully. As to the question of his reinstatement, the court relied on Article 297 § 4 of the Labour Code (see paragraph 67 below) and noted that more than seven years had elapsed since the telecommunications company had dismissed the third applicant from his job. During that time the third applicant had worked in companies specialising in other fields, such as railways and television. Moreover, the activities of the telecommunications company had also evolved. In the court's view, because he lacked appropriate qualifications and foreign language skills, after such a long time

the third applicant would no longer be competent to work as a lawyer in that company. The court also noted that at that time the third applicant was working in another company, without specifying what that company was, and therefore had a source of income. The Regional Court also noted the continuing conflict between the third applicant and the company, which could be another reason not to reinstate him to his former job at *Omnitel*. Lastly, the court observed that the KGB Act was still in force. In the court's view, should the third applicant be reinstated, the question of his dismissal could arise *de novo*, or his employer would face the risk of administrative penalties. In the light of those circumstances, the court dismissed the third applicant's claim for reinstatement.

50. The court then turned to the issue of compensation for lost earnings for the period of 23 February 2000 to 23 March 2007, indicated by the third applicant, for which he requested the sum of LTL 136,464. However, it was to be noted that the Court had already awarded him more than LTL 120,000 for both past and future pecuniary loss. Moreover, after his dismissal from *Omnitel*, the third applicant had worked in different jobs and had received more than LTL 90,000 in salary. Under Lithuanian law, an employee could be awarded no more than three years' unpaid salary. In the third applicant's case the salary in *Omnitel* would amount to LTL 145,440 (LTL 4,040 a month for thirty-six months). Accordingly, the two sums he had already received (LTL 120,000 and LTL 90,000) amounted to more than the award requested. Lastly, the third applicant had acknowledged that since his dismissal from *Omnitel*, he had continued to receive a pension from another State for his work in the KGB, ranging from LTL 500 to 800 a month. It followed that the claim for pecuniary damage had to be dismissed.

51. Both the third applicant and *Omnitel* appealed. At the hearing, the third applicant asked to be paid LTL 167,534 for lost earnings as compensation for the fact that he had still not been reinstated with *Omnitel*.

52. On 11 February 2008 the Court of Appeal rejected both appeals. It upheld the lower court's conclusion that the third applicant had been dismissed from his previous job unlawfully. Moreover, the circumstances mentioned in Article 297 § 4 of the Labour Code existed. Accordingly, the third applicant could not be reinstated in his former job with *Omnitel*. The court added that "the laws that provide for the prohibition on former [USSR] KGB employees from working in the telecommunications sector are still in force, so that if the [third] applicant were reinstated in his previous job, certain problems might arise". Additionally, the applicant was working in another company and receiving a pension for his previous work with the KGB. He therefore had a source of income. The Court of Appeal also endorsed the lower court's view that the third applicant had been compensated by the Strasbourg Court for the pecuniary damage he had suffered as a consequence of his unlawful dismissal. The sum he now asked

for – LTL 167,534 – was lower than the awards of LTL 90,000 and 120,000 he had already received.

53. The third applicant lodged an appeal on points of law, reiterating his claim for reinstatement and for compensation for lost earnings. He argued that Article 42 § 1 of the Law on the Employment Contract was an imperative legal norm and meant that once the court found that an employee had been dismissed unlawfully, that employee was to be reinstated in his or her previous job. It followed that the argument of the Court of Appeal that "if the [third] applicant were reinstated to his previous job certain problems might arise" was arbitrary.

54. *Omnitel* argued that in 2000 it had dismissed the third applicant from his job merely following the letter of the KGB Act. Article 187^6 of the Code of Administrative Law Violations provided that an employer could be fined LTL 3,000 to 5,000 should he not comply with the KGB Act. This was all the more likely to happen since the Constitutional Court had recognised Article 2 of the KGB Act as constitutional in its ruling of 4 March 1999, that is before the third applicant was dismissed. Even though the Court had found a violation in the third applicant's case, the KGB Act was still in force, and therefore the third applicant's reinstatement was barred. Furthermore, in the judgment of 17 March 2005 the Court had not ordered Lithuania to amend the KGB Act. Nor had the Court ordered the Lithuanian courts to have the third applicant reinstated in his previous job. In his written reply to this last argument, the third applicant observed that the Republic of Lithuania, by not appealing against the Court's judgment to the Grand Chamber, had shown its agreement with the interpretation and application of the Convention in the *Rainys and Gasparavičius* judgment. He therefore insisted that the Court's judgment was sufficient legal basis for him to be reinstated in his former job at the private telecommunications company, *Omnitel*, notwithstanding the fact that Article 2 of the KGB Act had not been amended.

55. Lastly, *Omnitel* maintained that the lower courts had been correct in referring to other circumstances why the third applicant could not be reinstated on the basis of Article 297 § 4 of the Law on the Employment Contract, namely, for economic, technological and organisational reasons, and the fact that it could lead to unfavourable conditions for him (see paragraph 49 above).

56. On 20 June 2008 the Supreme Court held:

> "The European Convention on Human Rights is an international agreement, ratified by the Seimas. It is therefore an integral part of the legal system of the Republic of Lithuania... The European Court of Human Rights was established to guarantee the observance of the rights and fundamental freedoms guaranteed by the Convention. In ratifying the Convention, the Republic of Lithuania took an undertaking to execute the Court's final judgments in every case in which it is a party. The Convention norms must be implemented in reality (*Konvencijos normos turi būti realiai įgyvendinamos*). The State itself establishes the manner in which it will ensure implementation of the

> Convention norms. One such method is the reopening of proceedings, provided for in Article 366 § 1 of the Code of Civil Procedure. Namely, a case which had been terminated by a final court decision may be reopened if the Court finds that the Lithuanian courts' decisions are in conflict (*prieštarauja*) with the Convention or its Protocols, to which Lithuania is a party."

57. As to the facts of the case, the Supreme Court noted that the third applicant had worked as a lawyer at *Omnitel* and had been dismissed on 23 February 2000 because of the restrictions provided for in Article 2 of the KGB Act. As the Constitutional Court had held on 4 March 1999, those restrictions were compatible with the Constitution.

58. The Supreme Court nevertheless observed that on 7 April 2005 the Court had found that the third applicant had lost his job as a lawyer in the private telecommunications company on the basis of the application of the KGB Act which the Court had found to be discriminatory, in breach of Article 14 of the Convention, taken in conjunction with Article 8. The Court had also held that the third applicant's inability to pursue his former profession and his continuing inability to find private sector employment because of his "former KGB officer" status under the Act constituted a disproportionate and thus discriminatory measure, even having regard to the legitimacy of the aims sought (paragraphs 36 and 45 of the Court's judgment). The Supreme Court then held:

> "Accordingly, even though the KGB Act, which was the basis for dismissing the third applicant from his job, is in force and even acknowledged as being in conformity with the Lithuanian Constitution, the dismissal from his job on the basis of that Act in essence had been recognised as unlawful by the Court's judgment, that is to say a violation of Article 14 of the Convention, taken in conjunction with Article 8, had been found. This circumstance is not to be questioned when resolving the dispute in the domestic court. Despite the fact that there was no fault in the actions of [the State Security Department or *Omnitel*], which were implementing the obligations stemming from the KGB Act, the undertaking to implement the provisions of the Convention constituted a legal ground for the courts of the first and appellate instances to conclude that the applicant's dismissal was unlawful. It must be emphasised that the ground for such a decision is not the provisions of the Law on the Employment Contract or the Labour Code, which regulate the issue of reinstatement, but the provisions of the Convention and the judgment of the European Court of Human Rights. At the same time it must be emphasised that, while the KGB Act, the compatibility of which with the Constitution had already been verified (*kurio konstitucingumas jau buvo patikrintas*) is still in force, the question of reinstating the third applicant to his job may not be resolved favourably. In the circumstances of this case the recognition of the fact that he had been dismissed from his job unlawfully is sufficient satisfaction for him (*atleidimo iš darbo pripažinimas neteisėtu šios bylos aplinkybių kontekste yra ieškovui pakankama satisfakcija*)."

59. The Supreme Court noted that the third applicant had been awarded compensation by the Court for actual and future pecuniary damage. Given that he had been awarded EUR 35,000 [approximately LTL 120,000], the third applicant had already been fully compensated for the disproportionate and discriminatory measure – dismissal from his job at *Omnitel*. For the

court of cassation, "there was no legal ground for repeatedly awarding compensation for the violation, which the Court had not found to be of a continuous nature (*pakartotinai priteisti žalos atlygimą už pažeidimą, kurio tęstinumo Europos Žmogaus Teisių Teismas savo sprendime nekonstatavo, nėra teisinio pagrindo*)".

60. The Supreme Court thus fully upheld the lower court's decisions. It also observed that "in the context of the [third applicant's] case, other arguments by the parties in the appeals on points of law had no legal relevance for the lawfulness of the lower courts' decisions".

D. Execution of the Court's judgments of 27 July 2004 and 7 April 2005

61. On 9 February 2005 a working group of the Seimas was set up to prepare amendments to a number of laws, including Article 2 of the KGB Act. According to the documents submitted to the Court by the Government, as of January 2005, the Lithuanian Government submitted a number of reports to the Department for the Execution of Judgments of the Council of Europe, explaining individual and general measures regarding execution of the Court's judgments in the applicants' cases. They noted, firstly, that the compensation awarded by the Court had been paid to the applicants. The Government also noted that the Court's judgments and their translations into Lithuanian had been disseminated to the Lithuanian courts.

62. The Government considered that appropriate execution of the Court's judgments required setting up legal regulation giving access to employment in the private sector for the former KGB employees, which was in compliance with the Convention requirements. In that connection they indicated that amendments to Article 2 of the KGB Act had been registered in the Seimas and had been presented to its plenary on 14 June 2005. They expected that the law would be amended at the beginning of the Seimas' autumn session of 2005. The Government also considered that the draft law amending Article 2 of the KGB Act would guarantee the balance between the aims sought and interference with the right to respect for private life. The legislative amendments would also provide appropriate safeguards for avoiding discrimination as well as adequate judicial supervision of the employment restrictions imposed by the KGB Act.

In February 2007 the Government informed the Department for the Execution of Judgments that the amendments to the KGB Act had been presented to the Seimas on 16 January 2007. However, voting in Parliament had failed because the necessary quorum had not been reached. They reiterated their previous statement about the importance of having the KGB Act amended and expected that the relevant amendments would be adopted in the spring of 2008. In October 2007 the Government wrote to the Department for the Execution of Judgments that a draft new law, amending

the KGB Act in its entirety (not only its Article 2), was included in the Seimas' working programme for the autumn session.

In September 2008 the Government informed the Department for the Execution of Judgments that the KGB Act had still not been amended and, to their regret, would most likely not be amended until the Seimas' elections in October 2008. However, a number of specific laws, for example, those regulating the professions of lawyers, bailiffs and notaries, had been amended, so that they no longer banned former KGB employees from taking up those professions. The Government also suggested that the judgments of the Court were directly applicable in the Lithuanian legal system. Therefore, the fact that the KGB Act had not been rectified had no legal consequences for former KGB employees as regards their opportunities to obtain employment in the private sector.

By a letter of 22 January 2009, the Government informed the Department for the Execution of Judgments that as of 1 January of that year, even formal restrictions enshrined in the KGB Act had ceased to be valid.

63. The KGB Act was never amended and is still a valid law.

II. RELEVANT DOMESTIC LAW AND PRACTICE

64. The Law on the Evaluation of the USSR State Security Committee (NKVD, NKGB, MGB, KGB) and the Present Activities of Former Permanent Employees of the Organisation (*Įstatymas dėl SSRS valstybės saugumo komiteto (NKVD, NKGB, MGB, KGB) vertinimo ir šios organizacijos kadrinių darbuotojų dabartinės veiklos* – ("the KGB Act")) was enacted on 16 July 1998 and came into force on 1 January 1999. Article 2 of the KGB Act provided that former KGB employees would be banned from working in certain areas of the private sector for ten years from the date of entry into force of the Act. Thus, they were not allowed to work as lawyers (*advokatai*) or notaries, as employees of banks and other credit institutions, on strategic economic projects, in security companies (structures), in other companies (structures) providing detective services, in communications systems, or in the education system as teachers, educators or heads of institutions, nor could they perform a job requiring the carrying of a weapon (for the text of the KGB Act and the domestic law related to it, see the judgment in the case of *Sidabras and Džiautas*, cited above, §§ 24-29).

65. Article 15 § 1 of the Law on Administrative Court Proceedings stipulates that administrative courts decide cases where the State or a public institution is one of the parties. Article 153 § 2 (1) of that Law allows domestic proceedings to be reopened in an administrative case if the European Court of Human Rights has found that the decision of the national court was contrary to the Convention or its Protocols. Article 366 § 1 (1) of the Code of Civil Procedure provides a similar rule in civil cases. Article 4

of the Code provides that, when applying the law, the lower courts take into consideration the Supreme Court's case-law as to how interpret one or another legal issue.

66. Article 26 § 1 (14) of the Law on the Employment Contract provides that an employment contract is to be terminated if it does not comply with the requirements of the law. Under Article 42 §§ 1 and 2, an employee who disagrees with his or her dismissal may appeal to a court. If the court finds that the employee has been unlawfully dismissed, the court reinstates the employee to his job and the employer must pay the employee compensation for lost earnings. The third paragraph of that article provides that when an unlawfully dismissed employee declares that, if reinstated, working conditions would be untenable, the court may, at that employee's request, refrain from ordering reinstatement and award pecuniary compensation instead.

67. Article 297 §§ 3 and 4 of the Labour Code, regulating disputes over employment contracts, provides that if an employee has been dismissed from his or her job without proper legal grounds, the court will reinstate him or her and order the payment of his or her salary from the time of the unlawful dismissal until the execution of the court's decision. However, should the court establish that the employee may not be reinstated for economic, technological, organisational or similar reasons, or because he may find himself in unfavourable conditions, the court will declare the dismissal unlawful and award severance pay. This payment will depend on the employee's length of service as well as the average salary for the period from dismissal until the court's decision comes into force.

68. Article 418 of the Code of Civil Procedure stipulates that if an employee has made one of the alternative demands provided for by law, the court of first instance, after establishing that there are no grounds for granting the demand made, may on its own initiative, if there is a reason for doing so, apply an alternative measure to protect the employee's interests.

69. Article 187^6 of the Code on Administrative Law Offences stipulates that an employer who has failed to comply with the requirement of the KGB Act to dismiss a "former KGB permanent employee" is liable to a fine of between LTL 3,000 and LTL 5,000.

III. RELEVANT INTERNATIONAL MATERIALS

70. The Rules adopted by the Committee of Ministers on 10 January 2001 at the 736^{th} meeting of the Ministers' Deputies for the application of Article 46, paragraph 2, of the European Convention on Human Rights, insofar as relevant, read as follows:

Rule 3

"Information to the Committee of Ministers on the measures taken in order to abide by the judgment

a. When, in a judgment transmitted to the Committee of Ministers in accordance with Article 46, paragraph 2, of the Convention, the Court has decided that there has been a violation of the Convention or its protocols and/or has awarded just satisfaction to the injured party under Article 41 of the Convention, the Committee shall invite the State concerned to inform it of the measures which the State has taken in consequence of the judgment, having regard to its obligation to abide by it under Article 46, paragraph 1, of the Convention.

b. When supervising the execution of a judgment by the respondent State, pursuant to Article 46, paragraph 2, of the Convention, the Committee of Ministers shall examine whether:

- any just satisfaction awarded by the Court has been paid, including as the case may be default interest;

and, if required, and taking into account the discretion of the State concerned to choose the means necessary to comply with the judgment, whether

- individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention;

- general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations."

71. As examples of individual measures, the Rules name the striking out of an unjustified criminal conviction from the criminal records, the granting of a residence permit or the reopening of impugned domestic proceedings (on this last point see also Recommendation No. Rec(2000)2 of the Committee of Ministers to member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted on 19 January 2000 at the 694th meeting of the Ministers' Deputies).

As examples of general measures, the Rules mention legislative or regulatory amendments, changes of case-law or administrative practice, or publication of the Court's judgment in the language of the respondent State and its dissemination to the authorities concerned.

72. Recommendation Rec(2004)6 of the Committee of Ministers to member States on the improvement of domestic remedies, adopted by the Committee of Ministers on 12 May 2004, insofar as relevant, reads as follows:

The Convention as an integral part of the domestic legal order

"7. A primary requirement for an effective remedy to exist is that the Convention rights be secured within the national legal system. In this context, it is a welcome development that the Convention has now become an integral part of the domestic legal orders of all states parties. This development has improved the availability of effective remedies. It is further assisted by the fact that courts and executive

authorities increasingly respect the case-law of the Court in the application of domestic law, and are conscious of their obligation to abide by judgments of the Court in cases directly concerning their state (see Article 46 of the Convention). This tendency has been reinforced by the improvement, in accordance with Recommendation Rec(2000)2, of the possibilities of having competent domestic authorities re-examine or reopen certain proceedings which have been the basis of violations established by the Court.

8. The improvement of domestic remedies also requires that additional action be taken so that, when applying national law, national authorities may take into account the requirements of the Convention and particularly those resulting from judgments of the Court concerning their state. This notably means improving the publication and dissemination of the Court's case-law (where necessary by translating it into the national language(s) of the state concerned) and the training, with regard to these requirements, of judges and other state officials. Thus, the present recommendation is also closely linked to the two other recommendations adopted by the Committee of Ministers in these areas."

73. Article 26 of, and the third paragraph of the Preamble to, the Vienna Convention of 23 May 1969 on the Law of Treaties, ratified by Lithuania on 15 January 1992, sets forth the principle of *pacta sunt servanda*:

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 8 AND 14, TOGETHER WITH ARTICLE 46 OF THE CONVENTION

74. Relying on Article 46 of the Convention, the applicants complained that Lithuania's failure to repeal the legislative provision banning former KGB employees from working in certain spheres of the private sector, notwithstanding the Court's judgments of 27 July 2004 and 7 April 2005, was not consistent with the Court's findings of a violation of Article 14 of the Convention, taken in conjunction with Article 8. The applicants also referred to Article 13 of the Convention; however, the Court considers that that complaint is absorbed by the principal complaint. Articles 8, 14 and 46 of the Convention read as follows:

Article 8

"1. Everyone has the right to respect for his private ... life ...

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

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... other status."

Article 46

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

...

4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."

A. Admissibility

1. The parties' submissions

(a) The Government

75. In the Government's submission, the present cases were fundamentally different from that of *Mehemi v. France (no. 2)* (no. 53470/99, § 43 *in fine*, ECHR 2003-IV), in that they presented no new issue that had not already been settled by the Court in the judgments of *Sidabras and Džiautas* and *Rainys and Gasparavičius* (both cited above). The Government thus strongly believed that the cases at hand concerned purely issues of execution of the Court's judgments for the purposes of Article 46 of the Convention, and therefore should be declared incompatible *ratione materiae* within the meaning of Article 35 § 3.

76. The Government observed that individual as well as general measures concerning the execution of the above judgments had been implemented. In terms of individual measures, the Government had paid in due time the sums that the Court had awarded the applicants by way of just satisfaction. In terms of general measures, a number of specific laws had been amended, lifting the employment restrictions previously applicable in the private sector. Moreover, the Court's judgments were directly applicable in Lithuania and the restrictions concerning employment possibilities in the private sector were thus considered unlawful. Additionally, as of 1 January 2009 the restrictions provided for in the KGB Act regarding the

employment of former KGB agents were no longer in force, including in the public sector. The attention of the Committee of Ministers had also been drawn to the fact that both judgments of the Court had been translated, published and disseminated.

77. Taking the above into account, the Government were of the view that the Court had no jurisdiction over the Committee of Ministers' supervision of the execution of its judgments where no new issue had occurred in the same case after a judgment (the Government referred to *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, ECHR 2009). The Government asserted that the applicants in the present cases had referred to the same factual circumstances and legal grounds, on account of which the Court had found a violation in its judgments of 27 July 2004 and 7 April 2005 and had awarded redress. The Government thus considered that within the context of the present applications, only the refusal to employ the applicants in those spheres of the private sector from which they were formally banned by the KGB Act and the subsequent failure by the domestic courts to defend their rights could be considered as a "new issue". In the absence of such information substantiated by relevant evidence, the Court lacked jurisdiction over the matters, which were the subject of communication between the Lithuanian Government and the Committee of Ministers.

78. It was also the Government's opinion that the judgments should be considered as duly executed, even without waiting for a formal legislative measure, by virtue of the direct applicability and supremacy of the Convention and the Court's judgments over conflicting provisions of national law. In respect of the first and second applicants, this view had been *expressis verbis* confirmed by the Supreme Administrative Court in the decisions of 14 and 18 April 2008, in which it had held that the refusal of a job on the same discriminatory grounds as those condemned by the Court's judgment of 27 July 2004 would mean a new violation of the Convention and thus be unlawful. The necessity to implement the Convention provisions effectively and to execute the Court's judgments had also been confirmed by the Supreme Court when examining the third applicant's case.

79. The Government thus maintained that, having regard to the translation, publication and dissemination of the Court's judgments, the direct applicability and supremacy of the Convention and the Court's case-law constituted a sufficient general measure with a view to preventing the occurrence of identical violations in the future. Steps to amend the KGB Act had been taken "without unjustified delay". However, since those were legislative measures, they took more time than measures to be taken by other competent State authorities.

(b) The applicants

80. The first and second applicants did not dispute the fact that Lithuania had paid the amounts awarded to them by the Court in respect of non-pecuniary damage. They were of the view, however, that pecuniary compensation constituted just one of the measures involved in executing the Court's judgment and that the finding of a violation of Articles 8 and 14 called for *restitutio in integrum.*

81. Once the Court's judgment in their case had become final, the Republic of Lithuania had been under an obligation to take all necessary measures, including making legislative amendments, to remove from the domestic law all the provisions that were in conflict with the Convention. To this end the two applicants noted that even though the Court had adopted the judgment on 27 July 2004, the KGB Act's restrictions had remained in force until the very day of their expiry – 1 January 2009. They submitted that, when the State had good will, it was able to pass new laws or amend old ones within a few weeks. However, this was not so in their case. Moreover, the Government's suggestion that their complaints were inadmissible *ratione materiae* because the execution procedure had been continuing ever since the Court's judgment of 27 July 2004, was in contradiction with the principle *ex iniuria ius non oritur*, because it meant that the State could not rectify the violation found for a number of years and still be considered as acting lawfully or at least risk nothing.

82. As to the execution of the Court's judgments through judicial practice, the first applicant underlined that, in accordance with Article 15 § 1 of the Law on Administrative Court Proceedings, the administrative courts decided cases in which one of the parties was the State or a public institution. For that reason, the first applicant lodged complaints with the administrative courts in 2000, asking to be reinstated in the civil service. Similarly, in 2006, after the Court's judgment in his favour, he had again sued the State for damages. In contrast, should a private sector employer refuse to hire a person, he or she would have to address the courts of general jurisdiction, beginning with a district court and, if need be, going up to the Supreme Court as the court of cassation. However, the Supreme Court's position, as regards the rights of former KGB employees under Articles 8 and 14 of the Convention, after the Court's judgment of 27 July 2004, was plain: while the KGB Act was still in force, the question of reinstating the third applicant to his job could not be resolved favourably (see paragraph 58 above). The first applicant had no knowledge of any Supreme Court case-law to the opposite effect. That being so, and taking into account that the lower courts of general jurisdiction were bound to follow the Supreme Court's case-law and guidelines, the first applicant's right to respect for his private life would not be defended in court.

83. The third applicant submitted that the KGB Act had not been amended for political reasons.

2. The Court's assessment

84. In the case of *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)* (cited above), the Grand Chamber summed up as follows the criteria to be taken into account in cases of this kind:

> "61. The Court reiterates that findings of a violation in its judgments are essentially declaratory (see *Marckx v. Belgium*, 13 June 1979, § 58, Series A no. 31; *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX; and *Krčmář and Others v. the Czech Republic* (dec.), no. 69190/01, 30 March 2004) and that, by Article 46 of the Convention, the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers (see, *mutatis mutandis*, *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B).
>
> 62. The Committee of Ministers' role in this sphere does not mean, however, that measures taken by a respondent State to remedy a violation found by the Court cannot raise a new issue undecided by the judgment (see *Mehemi v. France (no. 2)*, no. 53470/99, § 43, ECHR 2003-IV, with references to *Pailot v. France*, 22 April 1998, § 57, *Reports* 1998-II; *Leterme v. France*, 29 April 1998, *Reports* 1998-III; and *Rando v. Italy*, no. 38498/97, § 17, 15 February 2000) and, as such, form the subject of a new application that may be dealt with by the Court. In other words, the Court may entertain a complaint that a retrial at domestic level by way of implementation of one of its judgments gave rise to a new breach of the Convention (see *Lyons and Others*, cited above, and also *Hertel v. Switzerland* (dec.), no. 3440/99, ECHR 2002-I).
>
> 63. Reference should be made in this context to the criteria established in the case-law concerning Article 35 § 2 (b), by which an application is to be declared inadmissible if it 'is substantially the same as a matter that has already been examined by the Court ... and contains no relevant new information'. The Court must therefore ascertain whether the two applications brought before it by the applicant association relate essentially to the same person, the same facts and the same complaints (see, *mutatis mutandis*, *Pauger v. Austria*, no. 24872/94, Commission decision of 9 January 1995, DR 80-A, and *Folgerø and Others v. Norway* (dec.), no. 15472/02, 14 February 2006)."

85. In the present case the Government have argued that the applicants' complaint about the continuous discrimination against them on the basis of the non-amended KGB Act related mainly to the issues already examined by the Court and was thus a matter for the Committee of Ministers under Article 46 § 2 of the Convention. The Court does not share that view and observes in this connection that under paragraph 2 of Article 32, "[i]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide". As it has previously found, the powers assigned to the Committee of Ministers by Article 46 are not being encroached on where the Court has to deal with relevant new information in the context of a fresh application (see *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, cited above, §§ 66 and 67; also see, most recently, *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, §§ 33 and 34, 5 February 2015).

86. In order to ascertain whether these are fresh applications which can be distinguished in essence, within the meaning of the above-cited case-law,

from the applicants' initial applications to the Court, it is appropriate to refer to the proceedings that followed the judgments of 27 July 2004 and 7 April 2005. Further to those judgments, the first and second applicants lodged applications with the administrative courts claiming damages for arbitrary discrimination. In the wake of those administrative court proceedings, the Supreme Administrative Court unequivocally acknowledged that the Convention and the Court's case-law could be directly relied upon when defending human rights at the domestic level, and that in the hierarchy of legal norms the Convention took priority over national laws.

87. The third applicant also initiated new court proceedings, seeking reinstatement in his previous job at the private telecommunications company, *Omnitel*. Like the Supreme Administrative Court, the Supreme Court also recognised that the third applicant's dismissal had been unlawful under the Convention. That being so, it unmistakably observed that because Article 2 of the KGB Act was still effective, the question of the third applicant's reinstatement could not be resolved favourably (see paragraph 58 above). This, to the Court, constitutes a relevant new element, which the first applicant saw as manifestly contradicting the Court's earlier judgments in the three applicants' cases.

88. The Court therefore considers that, in the light of the continuous existence of the KGB Act, the elements referred to above and the contradictory conclusions of the highest courts of administrative and general jurisdiction, there was, within the meaning of Article 35 (2) (b) of the Convention, "relevant new information" concerning the rights of former KGB employees, such as the three applicants, under the Convention capable of giving rise to a fresh violation of Article 14, taken in conjunction with Article 8.

89. It further observes that although the Committee of Ministers has begun its monitoring of the execution of the Court's judgments in the applicants' cases, a final resolution has not yet been adopted in these cases (see *Emre v. Switzerland (no. 2)*, no. 5056/10, § 42, 11 October 2011).

90. Accordingly, the Court finds that the three applicants' complaints are compatible *ratione materiae* with the provisions of the Convention and its Protocols.

91. The Court further considers that the complaints by the three applicants are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and are also not inadmissible on any other grounds. The complaints must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

92. The first applicant admitted that he had registered with the Šiauliai Employment Office, which had taken a number of steps to help him find a job. Even so, he had only been offered jobs, for example those of manager, which were not barred to him pursuant to the KGB Act. In other words, he was not offered the private sector jobs that had been barred to him before the Court's judgment, because the prohibition on working in the sectors listed in Article 2 of the KGB Act remained effective. Accordingly, the Lithuanian institutions and in particular the Šiauliai Employment Office had not sought to implement the first applicant's rights under Articles 8 and 14 of the Convention. Nor had their actions assisted in correcting the violation found by the Court. Lastly, he noted that he was a graduate of the Lithuanian Sports University and a qualified sports instructor, allowing him to work as a trainer in schools. However, such jobs at educational establishments were not and could not be offered to him until the very last day whilst the KGB Act-related restrictions remained in force.

93. The second applicant admitted that he had been included in the list of trainee lawyers as of 29 March 2006. However, this was only one of the private sector professions in which he could theoretically have worked in accordance with his education and qualifications, but which remained barred to him because the KGB Act had not been amended.

94. The third applicant submitted that the Lithuanian Supreme Court's refusal to reinstate him in his job at *Omnitel* illustrated perfectly well that the restrictions contained in the KGB Act had applied to him even after the Court's judgment in his favour, and thus had resulted in further discrimination. He disputed the Government's argument that the provisions of the Lithuanian employment legislation were unfavourable to his reinstatement. Whilst acknowledging that States had the freedom to choose how to execute the Court's judgments, the third applicant deemed it important to point out that that freedom did not allow them to suspend the application of the Convention while waiting for the relevant reform to be completed (he referred to *Vermeire*, cited above, § 26). Even though there were no objective reasons not to amend the KGB Act, the amendment had not been passed because of a lack of political will. The third applicant thus contended that his case was similar to another politically sensitive case, *L. v. Lithuania* (no. 27527/03, § 74, ECHR 2007-IV), in that the State had chosen to pay compensation instead of amending the legislation that was in breach of the Convention. The non-execution of the Court's judgments in Lithuania had thus become systematic.

(b) The Government

95. Concerning the personal situation of the first applicant, the Government maintained that there was no evidence that the State's failure to amend the KGB Act in due time had continuously violated his rights. The Supreme Administrative Court has found that the first applicant had not provided any specific information explaining who had refused him employment on account of the restrictions still formally contained in the KGB Act, and when. Nor had he submitted any evidence to the effect that he would fail to receive particular offers because of his KGB past. Above all, the first applicant had not challenged before the domestic courts any alleged refusal, if there were any, arguing that he had been prohibited from applying for a specific job. The Government also considered that the private companies that had refused the first applicant a job did not fall within those areas of the private sector mentioned in Article 2 of the KGB Act. On this last point, the Government also suggested that the first applicant had merely speculated on the basis of the non-amendment of the KGB Act. In reality, he himself had often refused various job offers. Lastly, he had terminated his employment search with the Šiauliai Employment Office several days before the formal restrictions ceased to be valid. Thus it could be presumed that he had sought to keep his unemployed status instead of genuinely searching for a job.

96. With regard to the individual situation of the second applicant, he had not provided any evidence of having been discriminated against because of his KGB past. That fact had been confirmed by the Supreme Administrative Court. Furthermore, according to the Government, as of 29 March 2006 the second applicant had been included in the list of trainee lawyers, which was a precondition to becoming a lawyer, and faced no restrictions from the Lithuanian Bar Association. The Government maintained that on 14 May 2009 the second applicant had submitted the required two-year traineeship report, which had been confirmed by the Bar Association. He had then been put on the list of persons who were going to take the Bar exam. In addition, according to the information in the Government's possession, during the relevant period he was receiving income from several private companies.

97. The Government also considered that the Supreme Court's refusal to reinstate the third applicant in his earlier job at the telecommunications company, *Omnitel*, after the Court's judgment did not amount to a new violation of his rights. A conclusion to the contrary would have the effect of depriving the respondent State of the margin of appreciation to which it was entitled when executing the Court's judgments as it would constitute a straightforward requirement to take particular measures, which did not follow from the Court's judgment in *Rainys and Gasparavičius* (cited above). The reopening of the domestic proceedings thus stood as a means of properly executing the Court's judgment.

98. The Government also found it important to note that when deciding the third applicant's case, the Supreme Court had emphasised the necessity of implementing the Convention provisions effectively, whilst noting that Lithuania had some discretion as regards the means of securing their proper implementation. For the Supreme Court, reopening the civil proceedings, in accordance with Article 366 § 1 of the Civil Code, was one such means. Above all, when modifying the reasoning of the lower courts, the Supreme Court had directly relied on the Court's judgment of 7 April 2005 and acknowledged that the third applicant's dismissal because of his status as a former KGB employee had been unlawful under the Convention (see paragraph 58 above).

99. For the Government, that acknowledgement of the unlawfulness of the dismissal directly relying on the Court's judgment, together with the payment of just satisfaction by the State, constituted proper implementation of the Court's judgment as regards the individual situation of the third applicant. The Government also pointed out that the Court's judgment in no way implied an obligation to reinstate the third applicant in his previous job in the private telecommunications company. On the contrary, the Court had awarded just satisfaction to the third applicant not only for unlawful dismissal, but also in respect of future pecuniary loss. Furthermore, under the domestic law there were two alternative means to remedy unlawful dismissal. If, following unlawful dismissal, reinstatement was not possible, Article 297 of the Labour Code provided for compensation. Both alternatives were considered to be equal and could be availed of when defending the employment rights of an unlawfully dismissed employee. To that end, the courts examining the case, when choosing between the alternatives, were not bound by the demands of the parties to the case. Under Article 418 of the Code of the Civil Procedure, the courts had the power to choose, on their own initiative, to apply the alternative means to defend the rights of the employee and to pay compensation instead (see paragraph 68 above). The Supreme Court even addressed the issue of compensation for the Convention violation, but given that that compensation had already been paid by the State following the Court's judgment, there was no basis for making a second award on the same grounds.

100. Lastly, the Government submitted that, as established by the court of first instance, at the time of the second set of proceedings the third applicant no longer possessed the qualifications necessary for the post of lawyer (see paragraph 49 above).

2. The Court's assessment

(a) As to the three applicants' complaint under Article 46 of the Convention

101. The Court recalls that the three applicants claimed that the State had not respected their rights, even after the Court had previously ruled in their favour, and had thus also violated Article 46 of the Convention.

102. As to the three applicants' reference to Article 46 of the Convention, the Court observes that in its previous judgments of *Sidabras and Džiautas* and *Rainys and Gasparavičius* (cited above), the Court did not provide for any individual or general measures to be taken by the Government in its operative part or its reasoning. Furthermore, the Court has previously held, both in the reasoning and in the operative part, that there had been a violation of a substantive provision of the Convention – in that instance Article 8 – taken together with Article 46, in a follow-up case after the Court had previously found a violation in the same applicant's case (see *Emre v. Switzerland (no. 2)*, cited above). As in the present case, the solution adopted in *Emre (no. 2)* was in line with the Court's Grand Chamber judgment in *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* (cited above), in so far as the Court found that it had jurisdiction to examine whether a decision delivered by a domestic court following the finding of a violation in Strasbourg satisfied the requirements of Article 46. However, it went further, since in the *Verein gegen Tierfabriken Schweiz (VgT)* case, the Grand Chamber did not formally find a violation of Article 46. The findings of the Court in *Emre (no. 2)* were made within the context of new proceedings at domestic level which directly confronted the national courts with interpreting and applying the Court's previous judgment in the applicant's case. The Court thus considered that "the most natural execution of its judgment, and that which would best correspond to the principle of *restitutio in integrum*, would have been to annul purely and simply, with immediate effect, the exclusion measure ordered against the applicant" (see *Emre (no. 2)*, cited above, § 75).

103. The Court notes that in its judgment in the case of *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria (no. 2)* (nos. 41561/07 and 20972/08, § 66, 18 October 2011), the Court observed that it is very doubtful whether Article 46 § 1 may be regarded as conferring upon an applicant a right that can be asserted in proceedings originating in an individual application. Although the Court can examine whether measures taken by a respondent State in execution of one of its judgments are compatible with the substantive clauses of the Convention (see *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, cited above, §§ 61-68 and 78-98), it has consistently ruled that it does not have jurisdiction to verify, by reference to Article 46 § 1, whether a Contracting Party has complied with the obligations imposed on it by one of the Court's judgments (see *Akdivar and Others v. Turkey* (Article 50), 1 April 1998, § 44, *Reports of Judgments*

and Decisions 1998-II; *Mehemi (no. 2)*, cited above, § 43; *Haase and Others v. Germany* (dec.), no. 34499/04, 7 February 2008; *Wasserman v. Russia (no. 2)*, no. 21071/05, § 31 *in fine*, 10 April 2008; *Burdov v. Russia (no. 2)*, no. 33509/04, § 121, ECHR 2009; and *Kafkaris v. Cyprus* (dec.), no. 9644/09, § 74, 21 June 2011). So did the former Commission (see *Times Newspapers Ltd. and Others v. the United Kingdom*, no. 10243/83, Commission decision of 6 March 1985, Decisions and Reports (DR) 41, p. 123; *Ruiz-Mateos and Others v. Spain*, no. 24469/94, Commission decision of 2 December 1994, DR 79-B, p. 141; and *Oberschlick v. Austria*, nos. 19255/92 and 21655/93, Commission decision of 16 May 1995, DR 81-A, p. 5). The new paragraphs 4 and 5, added to Article 46 by Article 16 of Protocol No. 14, seem to confirm that as well.

104. Taking account of the facts of the present case, the Court considers the above approach adopted in the case of *The United Macedonian Organisation Ilinden – Pirin and Others (no. 2)* to be particularly relevant as regards the three applicants' complaint under Article 46. The Court observes that this case is materially different from *Emre v. Switzerland (no. 2)*, (cited above), for two main reasons. Firstly, in contrast to the situation in *Emre (no. 2)*, it is clear in the present case that the Government executed the previous judgments of the Court from 2005, as regards the three applicants, inasmuch as it concerns payment of compensation for pecuniary and non-pecuniary damage awarded by the Court under Article 41. Secondly, although the abrogation of the KGB Act of 1999 must have constituted the most appropriate general measure for the Government to remedy the domestic legal situation forming the basis of the Court's judgments of 2004 and 2005, it is for the Committee of Ministers under Article 46 of the Convention to supervise the execution of such general measures.

105. In view of these considerations, and noting that in any event the issues that might arise under Article 46 § 1 of the Convention are closely intertwined with those arising under Article 14, taken in conjunction with Article 8 of the Convention, the Court will examine the complaint solely by reference to the latter provisions (see, *mutatis mutandis*, *The United Macedonian Organisation Ilinden – Pirin and Others (no. 2)*, cited above, § 67).

(b) The legal principle as established in the previous case

106. In paragraphs 36–38 of the judgment in the third applicant's case of 2005 (see *Rainys and Gasparavičius*, cited above), the Court stated the following:

> "36. As to the justification of this distinction, the Government's main line of argument was that the application of the Act was well balanced in view of the legitimate interest to protect national security of the State, the impugned employment restrictions being imposed on persons such as the applicants by reason of their lack of

loyalty to the State. However, the Court emphasises that the State-imposed restrictions on a person's opportunity to find employment with a private company for reasons of lack of loyalty to the State cannot be justified from the Convention perspective in the same manner as restrictions on access to their employment in the public service (see *Sidabras and Džiautas*, §§ 57-58). Moreover, the very belated nature of the Act, imposing the impugned employment restrictions on the applicants a decade after the Lithuanian independence had been re-established and the applicants' KGB employment had been terminated, counts strongly in favour of a finding that the application of the Act vis-à-vis the applicants amounted to a discriminatory measure (loc. cit., § 60). The respondent Government have thus failed to disprove that the applicants' inability to pursue their former professions as, respectively, a lawyer in a private telecommunications company and barrister, and their continuing inability to find private-sector employment on the basis of their "former KGB officer" status under the Act, constitutes a disproportionate and thus discriminatory measure, even having regard to the legitimacy of the aims sought after (see, *mutatis mutandis*, *Sidabras and Džiautas*, cited above, §§ 51-62).

37. Consequently, there has been a violation of Article 14 of the Convention, taken in conjunction with Article 8.

38. The Court considers that, since it has found a breach of Article 14 of the Convention taken in conjunction with Article 8, it is not necessary also to consider whether there has been a violation of Article 8 taken alone (ibid., § 63)."

(c) Application of these principles to the instant case

(i) As to the first and second applicants

107. The Court notes that, as can be derived from the above-cited judgment in the third applicant's first case (see *Rainys and Gasparavičius*, cited above, § 36), it is at the outset for the applicants claiming the discriminatory application of the KGB Act to plausibly demonstrate that a discriminatory act has occurred, either in the form of dismissal from a job previously held or by them being prevented from taking up a job on the basis of a refusal by a prospective employer in the private sector. If applicants succeed in plausibly demonstrating direct consequences of the Act for them, it is then for the Government to "disprove that the applicants' inability to pursue their former professions ... and their continuing inability to find private-sector employment on the basis of their "former KGB officer" status under the Act, constitutes a disproportionate and thus discriminatory measure, even having regard to the legitimacy of the aims sought after" (see ibid, § 36).

108. On this basis, the Court will proceed to determine whether the first and the second applicants have plausibly demonstrated that the KGB Act has again had direct consequences for them by preventing them from obtaining private sector employment, so as to reverse the burden of proof and to require the Government to disprove the existence of a discriminatory measure in violation of Article 14, taken in conjunction with Article 8.

109. Turning to the facts of the first applicant's case the Court recalls that as of 1999 he received assistance from the Šiauliai Employment Office

to re-train and seek other employment. The Court cannot overlook the fact that the first document issued by the Šiauliai Employment Office mentioned that the first applicant "had not been employed because of applicable restrictions" (see paragraph 17 above). That being so, the reasons for his unemployment were explained in more detail in the Šiauliai Employment Office's 28 December 2007 written response to the Supreme Administrative Court. On the basis of that information the Supreme Administrative Court concluded that there was no proof that, after the Court's judgment of 27 July 2004, the first applicant had in fact been prevented from obtaining a private sector job because of the restrictions contained in the KGB Act. Furthermore, the first applicant had not provided any particular information as to who had refused to employ him as a result of those restrictions, or when (see paragraphs 23 and 24 above). Having regard to the documents in its possession, the Court perceives nothing to contradict the conclusion of the domestic court to the effect that after August 2004, that is after the Court's judgment in his case, the first applicant was unemployed for justified reasons, specifically because he lacked the necessary qualifications (see paragraphs 17 and 23 above). At this juncture it is also important to note that the applicant himself had turned down a number of job offers, thus further compounding his situation (see paragraph 25 above).

110. With regard to the second applicant, he has acknowledged having been a trainee lawyer as of 2006. The Court therefore considers that the second applicant has failed to substantiate the claim that, after the judgment of 27 July 2004 in *Sidabras and Džiautas* case, he continued to be discriminated against on account of his status. Moreover, he himself acknowledged that he had never attempted to obtain other private sector jobs (see paragraph 37 above).

111. In the light of the foregoing, the Court finds that the first and the second applicants have not plausibly demonstrated before the Court that they have been discriminated against after the Court's judgments in their case.

112. Accordingly, there has been no violation of Article 14 of the Convention, taken in conjunction with Article 8, with regard to these two applicants.

(ii) As to the third applicant

113. Turning to the judgment of the Supreme Court of 20 June 2008 in the third applicant's case, the Court notes that the court of cassation acknowledged that the third applicant's dismissal was unlawful under the Convention (see paragraph 58 above). The third applicant considered that the most natural execution of the Court's judgment in his case, and that which would best correspond to the principle of *restitutio in integrum*, would have been simply to reinstate him in his former job at *Omnitel*.

114. The Court observes that it is not for it to decide whether the provisions of the Law on the Employment Contract or those of the Labour Code were applicable to the third applicant's case and whether, therefore, the Lithuanian courts erred in not reinstating him in his former job at *Omnitel*. However, the Court does not lose sight of the fact that the Supreme Court limited its analysis to the question of the place of the Convention and the Court's judgments in Lithuanian law. Although the Government and *Omnitel* have insisted that the reasons for not reinstating the third applicant in his former job at the telecommunications company were economic, technological and organisational (see paragraphs 55 and 99 above), the Supreme Court not only left those other reasons unexamined, but even declared that the other arguments made by the parties in their appeals on points of law were legally irrelevant (see paragraph 60 above). Moreover, the Supreme Court stated explicitly that "while the KGB Act ... is still in force, the question of reinstating the third applicant to his job may not be resolved favourably" (see paragraph 58 above).

115. In view of the foregoing, the Court reiterates its findings in the third applicant's previous case that the application of Article 2 of the KGB Act to his situation, which excluded him from seeking private sector employment on the basis of his "former KGB officer" status, constituted a disproportionate measure in violation of Article 14, taken in conjunction with Article 8 (see *Rainys and Gasparavičius*, cited above, §§ 36 and 37).

116. In the light of the aforementioned statement by the Supreme Court in the new domestic proceedings, examined in the present case, the Court finds that the Government have not convincingly demonstrated that the Supreme Court's reference to the KGB Act was not the decisive factor forming the legal basis on which the third applicant's claim for reinstatement was rejected. Accordingly, there has been a violation of Article 14, taken in conjunction with Article 8, in this case.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

117. 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."

A. Damage

118. The third applicant claimed 194,854 Lithuanian litai (LTL; approximately 56,479 euros (EUR)) in respect of pecuniary damage suffered as a result of not receiving his salary. The amount was calculated taking the number of months from his dismissal on 23 February 2000 to

23 October 2008, 104 months in total. He submitted a letter from *Omnitel* indicating that on the date on which his contract had been terminated, his salary had been LTL 4,040. The third applicant also claimed LTL 50,000 (approximately EUR 14,493) in respect of non-pecuniary damage, which he had suffered as a result of the Lithuanian courts' failure to reinstate him to *Omnitel*.

119. The Government disputed the claim. They stated that the just satisfaction awarded to the third applicant by the Court's judgment of 7 April 2005 had covered future pecuniary losses as well. They also noted that the third applicant was employed and had received income during the relevant period. Accordingly, his claims for pecuniary damage were groundless.

Lastly, the Government submitted that there was no link between the non-pecuniary damage claimed and the violation of the third applicant's rights under the Convention.

120. The Court reiterates that it has found a violation of Article 14, taken in conjunction with Article 8 of the Convention. There is thus a clear causal link between the alleged pecuniary damage and the violation of the Convention it has found. However, having regard to paragraph 47 of the *Rainys and Gasparavičius* judgment, the Court observes that it has already awarded the third applicant just satisfaction in respect of both past and future pecuniary loss. That being so, the Court dismisses the third applicant's claims under this head. However, the third applicant is entitled to claim that he has, again, suffered non-pecuniary damage in the new proceedings for reinstatement. Consequently, given the particular circumstances of the case, the Court, on an equitable basis, awards the third applicant EUR 6,000 under this head.

B. Costs and expenses

121. The third applicant claimed LTL 17,000 (approximately EUR 4,900) for legal expenses incurred before the Court.

122. The Government argued that the above amount was excessive.

123. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court.

C. Default interest

124. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the three applicants' complaint concerning their inability to obtain employment in the private sector admissible;

2. *Holds* by four votes to three that there has been no violation of Article 14 of the Convention, taken in conjunction with Article 8, on account of the first and second applicant's inability to obtain employment in the private sector;

3. *Holds* unanimously that there has been a violation of Article 14 of the Convention, taken in conjunction with Article 8, on account of the third applicant's inability to obtain employment in the private sector;

4. *Holds* unanimously
   (a) that the respondent State is to pay the third applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the third applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

5. *Dismisses* unanimously the remainder of the third applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 June 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Guido Raimondi
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Keller;
(b) joint concurring opinion of Judges Spano and Kjølbro;
(c) joint dissenting opinion of Judges Sajó, Vučinić and Garlicki.

G.R.A.
S.H.N.

CONCURRING OPINION OF JUDGE KELLER

1. I agree with my concurring colleagues Judges Spano and Kjølbro that the present case raises an important issue with regard to Article 46 of the Convention. I also share their concern that the attempt in the judgment to reconcile diverging case-law, by distinguishing the present case from *Emre v. Switzerland (no. 2)* (no. 5056/10, 11 October 2011), is not entirely convincing and that the Court has in part failed to address some important questions with regard to Article 46 of the Convention. However, whilst my colleagues make an arguable case that the object and purpose of Article 46 of the Convention warrant a departure from the Court's approach in the *Emre (no. 2)* judgment, I shall explore an alternative reading of the Convention which attempts to take into account the broader perspective of the Court's evolving role with respect to the implementation of its judgments.

2. According to the Court's established case-law, a complaint from an individual who invokes the failure of the State to execute or comply with a judgment finding a violation will be declared inadmissible *ratione materiae* with the provisions of the Convention (among many examples, see *Günes v. Turkey* (dec.), no. 17210/09, 2 July 2013). At the same time, however, it is undisputed that the Committee of Ministers' role in the sphere of execution of the Court's judgments does not prevent the Court from examining a fresh application concerning measures taken by a respondent State in execution of a judgment if that application contains relevant new information relating to issues undecided by the initial judgment (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, §§ 61-63, ECHR 2009).

3. As is highlighted in the concurring opinion of my colleagues, the current case-law on the question diverges to a certain extent. While in *Emre (no. 2*) a Chamber of the Second Section found a violation of Article 46 in conjunction with Article 8 of the Convention, in *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria (no. 2)* (nos. 41561/07 and 20972/08, 18 October 2011), a Chamber of the Fourth Section assessed the applicants' complaint only under Article 11, while stating that it is "very doubtful whether Article 46 § 1 may be regarded as conferring upon an applicant a right that can be asserted in proceedings originating in an individual application" (§ 66).

4. It follows that the crucial issue underlying the present case is the extent to which the Court may assess admissible follow-up applications not only under a substantive right (of which there has allegedly been a fresh or continuing breach) but also under Article 46. In that respect, my colleagues argue in their concurring opinion that the Court should generally be precluded from assessing whether a judgment was duly executed, because

this is a task for which the Committee of Ministers is exclusively responsible and because Article 46 does not confer ascertainable rights on individuals that may be invoked before the Court.

5. I concur that Article 46 of the Convention does not confer on individuals a freestanding right that may be invoked separately before the Court. There is no doubt that such an interpretation would not only go against the well-established case-law referred to above (see § 2) but would also fundamentally challenge the separation of powers between the Court and the Committee of Ministers (Article 46 § 2 of the Convention).

6. That being so, however, this does not in my view hinder the Court from assessing an admissible follow-up application also under Article 46, as it did in *Emre (no. 2)*. In fact, the Grand Chamber had already stated in *VgT (no. 2)* that the Convention must always be read as a whole and that the examination of whether there has been a fresh violation of a substantive Article must take into account the importance in the Convention system of effective execution of the Court's judgments in accordance with Article 46 of the Convention (see *VgT (no. 2)*, § 83). In the same judgment, the Grand Chamber also made reference to Article 32 § 1 of the Convention, according to which the Court's jurisdiction extends "to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34 and 47". Moreover, Article 19 of the Convention provides that it is the Court's task "to ensure the observance of the engagements undertaken by the High Contracting Parties" to the Convention, one of which also appears to be the obligation to comply with the Court's judgments (Article 46 § 1 of the Convention). In light of *VgT (no. 2)* and the above-cited provisions of the Convention, I am not convinced that the Court's jurisdiction to consider an admissible follow-up application also under Article 46 of the Convention is necessarily dependent on the prior recognition of an individual right under the said Article. Contrary to what my concurring colleagues suggest, the introduction of the infringement procedure under Article 46 § 4 of the Convention seems, in fact, to confirm that the Court may examine the execution of a judgment under Article 46, despite the absence of an individual right in that regard.

7. A difficult question remains, of course, namely that of ascertaining in which situations the Court may examine a follow-up application under Article 46 and make a finding in this respect without thereby encroaching upon the powers of the Committee of Ministers. Arguably, we could have addressed this question in greater detail in the judgment. Although we conclude that the applicants' complaint under Article 46 of the Convention is closely linked to the complaint under Article 14 read in conjunction with Article 8 (see paragraph 105 of the judgment), by distinguishing it from *Emre (no. 2)* we decided to examine the complaint solely under the latter provisions. One may ask whether the distinction we employ between the

present application and *Emre (no. 2)* is fully convincing (see paragraph 104 of the present judgment). For instance, the statement that the abrogation of the KGB Act of 1999 is a general measure and therefore to be supervised by the Committee of Ministers seems to imply that the Court can only examine individual measures under Article 46. In my view, such a differentiation would have warranted more careful reasoning.

8. In cases such as the present one, I see two possible criteria for establishing the Court's competence under Article 46 of the Convention. First, one can rely on the material link between the fresh application and the issue of non-execution. The argument here is that whenever a fresh or continuing violation of the Convention is the (direct) result of the failure by a State to comply with a previous judgment by the Court, it becomes highly artificial, if it is even possible, to separate the occurrence of the fresh or continuing violation from questions of implementation. Therefore, the Court should be in a position not only to examine the substantive rights under the Convention but also to make an incidental finding under Article 46 of the Convention on the execution of a judgment. Such an approach would, however, imply that the *Emre (no. 2)* precedent has so far been applied in an overly restrictive manner (see, in particular, *Bochan v. Ukraine (no. 2)*, no. 22251/08 [GC], §§ 33–39, 5 February 2015). A second approach would be to link the Court's competence in follow-up applications to its practice under Article 46 (compare § 9 below). One could argue, for instance, that the Court can only make a finding under Article 46 in conjunction with a substantive provision in those cases in which it actually indicated specific measures under Article 46 (individual or general) in a previous judgment. The Court's jurisdiction to review incidentally the execution of its judgments could then be justified in that, in such cases, the leeway of the Committee of Ministers in exercising its supervisory functions has already been considerably reduced by the fact that the Court had identified certain measures necessary to execute the first judgment. However, the problem of this second approach is that *Emre (no. 2)* itself was, in fact, a case in which the Court, in its first judgment, did not give any indications as to how it was to be executed.

9. Finally, the present case should also be appraised with due regard to the broader context of the Court's role in the implementation of its judgments. In the Convention system today, securing judgment compliance is increasingly perceived as the shared responsibility of a multitude of actors, including the Court.[1] The Court's case-law under Article 46 has, in certain situations, continuously evolved towards indicating to the respondent State the specific individual or general measures required for

[1] Background Paper prepared by the Organising Committee for the Opening Seminar of the Judicial Year of the ECHR, 31 January 2014, Implementation of the Judgments of the European Court of Human Rights: A Shared Judicial Responsibility? (available at http://www.echr.coe.int/Documents/Seminar_background_paper_2014_ENG.pdf).

implementing a judgment (see, for instance, *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013, §§ 193 et seq.). An interesting formulation in this regard was chosen by the Court very recently in the case of *Mukhitdinov v. Russia* (no. 20999/14, 21 May 2015, not final yet). In § 109 of that judgment, "being concerned with ensuring binding force and execution of the present judgment", the Court saw itself "compelled to examine certain aspects of the present case under Article 46 of the Convention." The question with which we are confronted in the present case and the Court's role in the post-judgment phase must be viewed within this evolving context, in which the complementary role of the Court during the execution of its own judgments has gradually become acknowledged.[2]

10. To summarise, it is not asserted that Article 46 of the Convention confers an ascertainable, freestanding right on individuals that may be invoked separately before the Court. However, where an admissible claim of a fresh or continuing violation of a substantive provision of the Convention is closely linked to non-compliance with a previous judgment of the Court, there are good reasons why the Court should be in a position to assess the applicants' complaints also under Article 46 and to make an incidental finding thereunder. Whilst such an approach may neither correspond to the traditional "Convention wisdom" nor to the interpretation offered by my concurring colleagues, it is in line with the evolving role of the Court under Article 46 of the Convention and the current trend of interpreting implementation as a shared responsibility. In my view, therefore, the present case would have been a good opportunity to confirm the *Emre (no. 2)* judgment more explicitly and to clarify the scope of application of this peculiar precedent in more detail.

[2] Linos-Alexander Sicilianos, 'The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments Under Article 46 ECHR', 32 *Netherlands Quarterly Of Human Right*s 3 (2014), 234–262.

JOINT CONCURRING OPINION OF JUDGES SPANO AND KJØLBRO

1. The present case raises an important issue concerning Article 46 of the Convention in the context of an individual application lodged with the Court that is a follow-up to an earlier judgment finding a violation of the Convention.

2. The applicants complained that by failing to repeal the relevant provisions of the KGB Act, Lithuania had failed to comply with the Court's judgments of 27 July 2004 (nos. 55480/00 and 59330/00) and 7 April 2005 (no. 70665/01) and thereby had violated their rights under Article 46. Thus, the application raises the question whether Article 46 of the Convention confers assertable rights on individuals that may be invoked before the Court in an individual application.

3. In the judgment, the Court does not give a clear answer to that question. Instead, it concludes that the complaint under Article 46 of the Convention is closely linked to the complaint under Article 14 read in conjunction with Article 8 and therefore decides to "examine the complaint solely by reference to the latter provisions" (see paragraph 105).

4. The judgment attempts to reconcile diverging case-law of the Court in this area, in particular *Emre v. Switzerland (no. 2)*, no. 5056/10, 11 October 2011, and *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria (no. 2)*, nos. 41561/07 and 20972/08, 18 October 2011. In both cases the applicants had invoked Article 46, but the Court adopted different approaches in determining whether to apply that Article to the facts. In *Emre*, in its reasoning and the operative provisions the Court found a violation of Article 8 "taken together with Article 46 of the Convention" (§ 77 and point 2 of the operative provisions). However, in *Ilinden* the Court stated that "it is very doubtful whether Article 46 § 1 may be regarded as conferring upon an applicant a right that can be asserted in proceedings originating in an individual application" (§ 66). It thus proceeded to examine the complaint on the basis of the substantive provisions invoked by the applicants (§ 67).

5. In the judgment in the present case, the Court solves the problem of this divergence of case-law by distinguishing this case from *Emre* and following the approach adopted in *Ilinden*. However, in our view, the Court should rather have stated clearly that Article 46 does not confer assertable rights on individuals that may be invoked before the Court in an individual application. For the reasons explained below, such reasoning would in our view have been more in accordance with the wording and purpose of Article 46 of the Convention and the Court's case-law.

6. The High Contracting Parties have undertaken to abide by final judgments of the Court in any case to which they are parties (Article 46 § 1 of the Convention). This implies a legal obligation for the respondent State

not just to pay the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 487, ECHR 2004-VII).

7. It falls within the competence of the Committee of Ministers to supervise the execution of a final judgment of the Court (Article 46 § 2 of the Convention). Therefore, the Court cannot deal with a complaint from an individual about a failure by the State to execute a judgment of the Court or to redress a violation already found by the Court. Such a complaint will, in accordance with the Court's case-law, be declared inadmissible *ratione materiae* with the provisions of the Convention (see, for example, *Öcalan v. Turkey* (dec.), no. 5980/07, 6 July 2010; *Steck-Risch and Others v. Liechtenstein* (dec.) no. 29061/08, 11 May 2010; *Günes v. Turkey* (dec.), no. 17210/09, 2 July 2013; and *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 35, ECHR 2015).

8. However, the role of the Committee of Ministers in the sphere of execution of the Court's judgments does not prevent the Court from examining a fresh application concerning measures taken by a respondent State in execution of a judgment if that application contains relevant new information relating to issues undecided by the initial judgment (see *Bochan*, cited above, § 33). Thus, the Court may, for example, entertain a complaint that a retrial at domestic level by way of implementation of one of its judgments gave rise to a new breach of the Convention (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 62, ECHR 2009).

9. The fact that the Court may deal, in the context of a fresh application, with relevant new information that is capable of giving rise to a fresh violation of the Convention does not alter the fact that the Court cannot, as mentioned, deal with a complaint alleging failure to execute one of its judgments or to redress a violation already found by it.

10. This interpretation of the Court's jurisdiction in individual applications is also supported by Article 46 § 4 of the Convention, enacted by Protocol No. 14, which provides that the Committee of Ministers, under certain conditions, may institute infringement proceedings in the Court against a State that, in the view of the Committee of Ministers, refuses to abide by a final judgment in a case to which it is a party. In such cases it is for the Court to decide whether the State has failed to fulfil its obligations resulting from the judgment finding a violation of the Convention. As stated by the Court in *Bochan* (cited above, § 33), "[t]he question of compliance by the High Contracting Parties with the Court's judgments falls outside its

jurisdiction if it is not raised in the context of the 'infringement procedure' provided for in Article 46 §§ 4 and 5 of the Convention".

11. In the original judgments of 27 July 2004 and 7 April 2005, which were referred to by the applicants in the present case, the Court found that the ban on the applicants seeking employment in various branches of the private sector, in application of section 2 of the KGB Act, constituted a violation of Article 14 read in conjunction with Article 8 and ordered the State to pay compensation to them.

12. It falls within the competence of the Committee of Ministers to assess whether Lithuania has failed to fulfil its obligations resulting from the judgments of 27 July 2004 and 7 April 2005 by not repealing the relevant provisions of the KGB Act. This does not, however, preclude the Court from assessing whether the consequences of the KGB Act in the applicants' case amounted to a fresh violation of Article 14 read in conjunction with Article 8, as indeed the Court has done in the present case.

13. Therefore, and to conclude, the Court should, in our view, have stated clearly that Article 46 of the Convention does not confer assertable rights on individuals that may be invoked before the Court in an individual application. We admit that this would entail a departure from *Emre*, but it would, in our view, be in accordance with the wording and purpose of Article 46 of the Convention and the Court's case-law.

JOINT DISSENTING OPINION OF JUDGES SAJÓ, VUČINIĆ AND GARLICKI

1. To our regret, we cannot agree with the majority's finding that there has been no violation of Article 14, taken in conjunction with Article 8, on account of the inability of the first and second applicants to obtain employment in the private sector.

In our opinion, this case raises at least two serious problems of interpretation of the Convention, but neither of them have been resolved in a satisfactory manner.

2. The position of the majority is based on the finding that neither the first nor the second applicant "plausibly demonstrate[d] that a discriminatory act [had] occurred" (paragraph 107). Only after such a "plausible demonstration" has been successfully made by an alleged victim, and only then, will the burden of proof shift to the Government. The majority refer here to paragraph 36 of the *Rainys and Gasparavicius v. Lithuania* judgment (nos. 70665/01 and 74345/01, 7 April 2005), but it should be noted that the term "plausibly demonstrated" is absent from that paragraph.

We are not convinced that the "plausible demonstration" requirement can be applied in the present case. Both of the applicants in question claimed to be victims of the continuing existence of the KGB Act. As the Court has held on several occasions (starting with the *Klaas*[1], *Marckx*[2] and *Dudgeon*[3] cases), the mere existence of legislation permitting interference with a Convention right may be sufficient to confirm the standing of all those who are affected by it. Therefore, a practical attempt to circumvent such legislation cannot necessarily be required. This would be particularly problematic in situations where such an attempt could expose the applicant (or any cooperating persons) to a criminal or administrative penalty. In such situations, applicants can only be required to demonstrate that they fall within the scope of the disputed legislation.

3. There is no doubt that the applicants, as former KGB agents, fell at the material time within the scope of the KGB Act. This was also confirmed by the Court in its 2004 and 2005 judgments.

In our opinion, nothing changed in the applicants' situation following those judgments, at least not until the expiry of the KGB Act. Although the Government informed the Committee of Ministers of their intention to amend the Act, no modification took place. It is true that the Supreme Administrative Court expressed an opinion that the Court's judgments prevailed over the KGB Act, thus removing the employment ban imposed

[1] *Klaas v. Germany*, 22 September 1993, Series A no. 269.
[2] *Marckx v. Belgium*, 13 June 1979, Series A no. 31
[3] *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45

by the Act. However, a practical attempt by the third applicant failed as the Supreme Court held that the refusal to reinstate him was unlawful, but nevertheless valid ("while the KGB Act ... is still in force, the question of reinstating ... may not be resolved favourably" – see paragraph 58 of the judgment). It can reasonably be assumed that, had the first and second applicants attempted to obtain one of the "proscribed employments", the same conclusion would have applied to their cases. It seems that there was no effective remedy available to the applicants and that, therefore, they could not be expected to bring legal proceedings with no prospect of success.

It should also be noted that, since under the KGB Act a potential private-sector employer risked an administrative penalty, the prospects for the applicants to be recruited were at best illusory.

This state of the domestic law and jurisprudence should be regarded as a sufficient demonstration that the first and second applicants continued to be affected by the employment ban. This shifts the onus to the Government and it seems obvious that the Government were not able to plausibly demonstrate that no discrimination had taken place in those applicants' cases.

4. The lack of any practical attempt to test the continuous applicability of the KGB Act does not remove the victim status of the first and second applicants.

5. Therefore, a violation of Article 14 in conjunction with Article 8 should have been found in the present case. In our opinion, the mistake of the majority was to apply the "plausible demonstration" requirement to a case in which legislation constituted the direct source of interference. This mistake is, at least in part, due to the lack of clearly established criteria on "victim status" and "practical attempts" in such cases. As the present judgment may contribute to further confusion, it may be time for the Grand Chamber to clarify the issue.

6. Nor is there any clarity as to the question whether there can be a separate violation of Article 46. There are conflicting approaches in the case-law and it may now be appropriate for the Grand Chamber to intervene in the *Emre*[4]*-Ilinden*[5] controversy, as also observed in Judge Keller's separate opinion. The present case would offer a perfect opportunity for such intervention. The original judgments have not been implemented, the Committee of Ministers has been unable to ensure compliance, and the situation has evolved into a continuous (or new) violation.

7. In brief, we are not only of the opinion that the case was wrongly decided. We are also convinced that both of the above-mentioned problems should be characterised as serious questions affecting the interpretation and

[4] *Emre v. Switzerland (no. 2)*, no. 5056/10, 11 October 2011.

[5] *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria (no. 2)*, nos. 41561/07 and 20972/08, 18 October 2011.

application of the Convention within the meaning of Article 43 § 2 of the Convention and, therefore, should attract the interest of the Grand Chamber.