COUNCIL OF EUROPE CONSEIL DE L'EUROPE

SESSION 4

ROUND-TABLE: RECOMMENDATION (2008)2 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON EFFICIENT DOMESTIC CAPACITY FOR RAPID EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

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The views expressed are those of the author only.

EXPERIENCE OF DRAWING UP OF ACTION PLANS IN RESPECT OF CASES REVEALING COMPLEX PROBLEMS, WITH PARTICULAR FOCUS ON THE IMPLEMENTATION OF THE JUDGMENT OF PAKSAS V. LITHUANIA

1. Introduction

It would be more pleasant to share with you some good Lithuanian practice with respect to the implementation of the ECtHR judgments, but I am here today for sharing with you not so pleasant experience in the execution of 1 particular judgment, I dear to say, adopted in politically most sensitive case of all cases against Lithuania: I mean the case of *Paksas v. Lithuania*, heard in which by the Grand Chamber of the Strasbourg Court (judgment was delivered on 6 January 2011). The applicant in the present case was the former President of the Republic of Lithuania following impeachment proceedings against him, removed from office on 6 April 2004 by the Seimas (the Lithuanian Parliament) for committing a gross violation of the Constitution and breaching the constitutional oath. Following the ruling of the Constitutional Court of Lithuania of 25 May 2004 all persons (including the applicant) removed from office following impeachment proceedings for committing a gross violation of the Constitution and breaching the constitutional oath were disqualified from taking any office in the future for which it was necessary to take an oath in accordance with the Constitution (including that of a member of parliament). The proceedings before the Strasbourg Court were used by the applicant as a certain tool of political revenge in claiming that he will be returned by the Court to the Presidential Office and the justice will prevail. Of course, this was not the case. The Grand Chamber in the case before it has examined a single question: has there been a breach of the applicant's right under Article 3 of Protocol No. 1, in disqualifying him from holding parliamentary office. Having regard especially to the permanent and irreversible nature of the applicant's disqualification from holding parliamentary office, the Court concluded that there had been a violation of Article 3 of Protocol No. 1. The arguments of the Government that the State must be given a wide margin of appreciation in such a delicate issue related to the particularities and peculiarities of its constitutional and political system, that the use of the restriction in question should be regarded as an indispensible tool of an immature democracy for defending itself from such politicians who dear to breach their Constitutional oath, the recall of a subsidiary nature of the Convention machinery and assurance that the restriction in could be lifted when Lithuanian democracy would become mature enough, were not sufficient to persuade the Court.

One could hardly imagine what repercussions the Grand Chamber's judgment had in Lithuania: the applicant announced his victory against the corrupted political elite, the Prime Minister of Lithuania tried to explain for the public that the Grand Chamber's judgment may not return the applicant to the Presidential office, and the Constitutional Court of Lithuania issued unexampled press release in stating that upon the judgement of the Grand Chamber the incompatibility between the Lithuanian Constitution and the Convention occurred which could be eliminated only in making respective constitutional amendments. The situation that we are facing today is one of complex nature indeed: the question emerged as to how to harmonise the sanction flowing out of a constitutional impeachment proceedings with the conventional right to stand for parliamentary election. Against that general background I shall give you few remarks concerning the events preceding the preparation of the action plan for the execution of the judgment of the Grand Chamber of the European Court of Human Rights in the case *Paksas v. Lithuania*.

2. The activities of the Working group on Preparation of the proposals for the execution of the judgment of the Grand Chamber of the Court of 6 January 2011 in the case of Paksas v. Lithuania.

As the general measures estimated concerned possible amendments of legal regulation of constitutional level, following the delivery of the said judgment of the Court, the Prime Minister of

Lithuania by the ordinance of 17 January 2011 had formed the working group on Preparation of the proposals for the execution of the judgment of the Grand Chamber of the Court of 6 January 2011 in the case of *Paksas v. Lithuania*. The said Working group was formed on *ad hoc* basis and consisted of the Government Agent to the ECtHR (the chairperson of the Working group), 6 prominent Lithuanian legal scholars and the Head of the Division of Representation at the ECtHR of the Ministry of Justice. The Working group was commissioned to analyze possible ways of the implementation of the *Paksas* judgment, to draft summarized proposals in this regard and to submit them by 31 May 2011 to the Prime Minister. On 31 May 2011 the Working group upon quite a few meetings submitted its unanimously reached Conclusions whereat summarized proposals for the execution of the said judgment were laid down. Not surprisingly, it was concluded, that in order to comply with the judgment of the Court the amendments of the Constitution of Lithuania are necessary. Such a conclusion was based on the following arguments:

1) the constitutional nature of the restriction found to be in conflict with the provisions of the Convention, 2) the constitutional legal power of the case-law of the Constitutional Court of Lithuania: in accordance with the Constitution of Lithuania rulings and decisions of the CC are regarded as final and binding upon all State institutions, including the Constitutional Court itself, which may not change or revise its case-law without a strong constitutional basis, for example, upon introduction of an amendment to the Constitution, 3) the supremacy of the Lithuanian Constitution over the provisions of international law[1]; 4) the duty of observance of international obligations undertaken on the own free will of Lithuania.

The Working group in formulating the alternatives for possible amendments to the Constitution aimed at proposing intervention of minimal extent[2]. It was suggested to enshrine in some respective article of the Constitution a precise term of 10 years of disqualification for the person removed from office following impeachment proceedings for committing a gross violation of the Constitution and breaching the constitutional oath from taking a Member of Parliament office. Though the Working group drew attention to the fact that in amending even one article of the Constitution one would intervene into the existing constitutional regulation taken as a whole and might misbalance it[3].

The proposals of the Working group were approved at an ordinary meeting of the Government of 6 June 2011 and, as the Government do not enjoy powers to submit a motion for altering the Constitution[4], it was decided by the Government at the said meeting to proclaim publicly the conclusions of the Working group and to transmit them for the Seimas[5].

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[1]The Constitutional Court of the Republic of Lithuania has enshrined the primacy of the Lithuanian Constitution over international legislation in concluding more than once that " in cases where a national legal act (**save the Constitution itself, it goes without saying**) establishes a legal regulation conflicting with the legal regulation set down in an international treaty, the international treaty is to be applied" (the Rulings of 14 March 2006 and of 21 December 2006).

[2] It was rejected the possibility of providing for in the Constitution some new mechanism to enable to individualize possible restrictions to be applicable as a constitutional sanction for the persons who were removed from office following the impeachment procedure for committing a gross violation of the Constitution or a breaching of constitutional oath.

[3] Thus, the need of amending some other related articles of the Constitution might arise as well (for example, the question would arise what to do with the remaining restrictions of permanent nature, following the case-law of the Constitutional Court, for those persons who were removed from office following impeachment proceedings for committing a gross violation of the Constitution and breaching the constitutional oath to take other offices in the future for which it was necessary to take an oath in accordance with the Constitution, first of all, that of President, also the Members of the Government, the judges and the State Controller).

[4] Under Article 147 § 1 of the Constitution of Lithuania a motion to alter or supplement the Constitution of the Republic of Lithuania may be submitted to the Seimas by a group of not less than 1/4 of all the Members of the Seimas or not less than by 300,000 voters.

[5] The Government in transmitting the Conclusions of the Working group have noticed that in accordance with Article 46 of the Convention the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. The attention of the Seimas was also drawn to the fact that such a restriction of the right to stand for the parliamentary election for the persons who were removed from office following impeachment proceedings for

3. Submission of information concerning action plan in the case at issue

Following the new *Working methods for supervision of the execution of the European Court of Human Rights' judgments* on 6 June 2011 (i.e. 6 months after the final judgment), the Agent of the Government submitted the information concerning the action plan for the execution of the judgment of the Grand Chamber of 6 January 2011 in the case *Paksas v. Lithuania* to the Department for the Execution of Judgments of the ECHR. It should be noted that under the new twin-track supervision system the case at issue is classified as the one to be examined under standard procedure, at least, so far. The information provided by the Government Agent concerned 3 major points, namely, 1) information as regards the description of Convention violation found – to describe the complexity of the problem the Lithuania is facing with, 2) information regarding individual measures and 3) information regarding general measures.

The Government Agent considered that an appropriate general measure to be adopted in the present case would necessarily comprise in itself an individual measure – in restoring as far as possible the situation existing before the breach. As concerns general measures – the Government Agent gave reference to the Conclusions of the said above Working group formed by the Prime Minister and informed of their transmission to the national Parliament. The Agent of the Government committed to keep the Committee of Ministers informed on further developments in the legislative process.

4. Some concluding remarks on possible further developments

It should be noted in this regard that a national legislator acts under a free mandate and might choose not to follow any of the proposals provided for by the said above Working group: the Lithuanian Parliament – the Seimas may choose simply to amend some ordinary legislation and not the Constitution or may even delay in demonstrating a particular political will for the adoption any new legislation in order to implement the judgment in the *Paksas* case at least until the forthcoming parliamentary election (the next parliamentary election shall take place in Lithuania in October of 2012). The possibility of new case before the Constitutional Court of Lithuania may not be discounted as well, as any new piece of legislation would certainly have to pass the exam of its constitutionality[6]. Without speculating what could be the outcome of the proceedings before the Constitutional Court, it should be noticed that the implementation of the *Paksas* judgment might appear in certain deadlock due to constitutional dimension it contains, on one hand, and due to the fact that the Court in delivering its judgment in this particular case did not, in our view, fairly take into consideration that it might to some extent misbalance the entire constitutional and political system of the State, and cause serious difficulties in the process of execution of such a judgment, as well. Be that as it may, Lithuania, as all the Contracting Parties to the Convention, has undertaken to abide by the final judgments of the Court in any case to which it is a party, though it is obvious that to execute this particular judgment which touches the core of the constitutional system of the country will be not an easy task to puzzle out and will take some more time than usual.

committing a gross violation of the Constitution and breaching the constitutional oath is possible but should be of proportionate nature and should be established with regard to the Lithuanian law and its legal doctrine.

[6] Or, if no steps would have been taken by the Seimas as regards the implementation of the judgment of *Paksas v. Lithuania* until then – one can hypothetically imagine the situation that if the applicant R. Paksas would intend to stand as a candidate for those parliamentary election, the Central Electoral Commission could refuse to register him as a candidate. Then the applicant could lodge a complaint with the administrative courts of Lithuania which, in its turn, could suspend the consideration of the case and could apply to the Constitutional Court.