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JUDGMENT OF THE SUPREME COURT *EN BANC*

No. of the case 3-3-1-15-10

Date of judgment 30 August 2011

Composition of court Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Priit Pikamäe, Jüri Põld, Harri Salmann and Tambet Tampuu

Court Case An action of K.M. for claiming compensation in the amount of 79,422 kroons for damage caused by the Republic of Estonia

Contested judgment The Tallinn Circuit Court judgment of 15 December 2009 in administrative matter no. 3-09-202

**Basis of proceeding
in the Supreme Court** An appeal in cassation of the Office of the Prosecutor General

Hearing Written proceedings

DECISION

- 1. To dismiss the appeal in cassation of the Office of the Prosecutor General.**
- 2. Not to amend the decision of the Tallinn Circuit Court judgment of 15 December 2009 and of the Tallinn Administrative Court judgment of 11 May 2009 in administrative matter 3-09-202, and to amend the reasoning for the judgments according to the reasoning for this judgment.**
- 3. To declare the lack of a regulatory framework of compensation to a fair extent for lawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings to be in conflict with the Constitution.**
- 4. To include the security in public revenues.**

FACTS AND COURSE OF PROCEEDINGS

1. K. M. was employed as a specialist in the Intelligence Department of the Western Tax and Customs Centre of the Tax and Customs Board (TCB). The Western Police Prefecture commenced on 4 October 2007 proceedings in criminal matter no. 07250000201 where K. M. was suspected of commission of a criminal offence provided for in § 293(2)2) of the Penal Code (PC) (accepting of gratuities by demanding gratuities). The accepting of gratuities provided for in § 293 of the PC is an offence related to office, commission of which breaches the duty of an official to maintain integrity. According to the suspicion, K. M. demanded gratuities by taking advantage of his official position. His action was later re-qualified as an attempted accepting of gratuities pursuant to § 293(1) and § 25(2) of the PC. In the same criminal matter K. M. was suspected of commission of two other criminal offences but these were not related to his office.

2. The prosecutor filed on 2 November 2007 a request with the Pärnu County Court for exclusion of K. M. from office. The court satisfied the request of the prosecutor by a regulation of 5 November 2007 and excluded K. M. from office on the basis of § 141(1) of the Code of Criminal Procedure (CCP). The court was of the opinion that it was justified to suspect that since K. M. was as an official and he was suspected of commission of an offence related to office, K.M. might, by remaining in his office, continue to commit criminal offences. Taking account of the opportunities accompanying his office and the suspicion pertaining to him, the court found that there was sufficient cause to believe that K. M. might damage the criminal proceedings by continuing to commit similar offences. The Director General of the TCB's Western Tax and Customs Centre suspended by a directive of 7 November 2007 the service relationship of K. M. for the duration of the preliminary investigation of the criminal matter as of 6 November 2007.

3. On 29 October 2008 K. M. submitted to the Western District Prosecutor's Office a request on the basis of § 225 of the CCP for termination of the criminal matter. K. M. found that his conduct lacked elements of a criminal offence because he was not an official for the purposes of § 228 of the PC.

4. The Western District Prosecutor's Office terminated by a regulation of 4 November 2008, on the basis of § 199(1) and § 200 of the PC, the criminal proceedings concerning K. M. with respect to attempted accepting of gratuities. The Prosecutor's Office found that the conduct of K. M. lacked the necessary elements of the criminal offence prescribed in § 293(1) of the PC. With respect to other criminal episodes the criminal proceedings concerning K. M. were continued. The Prosecutor's Office waived in the regulation the exclusion of K. M. from office.

5. The Director General of the TCB terminated by a directive of 11 November 2008 the suspension of the service relationship of K. M. retroactively as of 5 November 2008. As of 10 November 2008 K. M. started to perform his duties. On 6 November 2008 the Director General of the TCB informed K. M. that he will be made redundant starting from 1 December 2008.

6. K. M. filed on 23 January 2009 an action with the Tallinn Administrative Court for compensation for damage caused by criminal proceedings. [---]

[Paragraphs 7–10 not translated.]

11. The Tallinn Administrative Court satisfied in part by a judgment of 11 May 2009 in administrative matter no. 3-09-202 the action of K. M. and ordered from the state in favour of K. M. 40,000 kroons (net).

12. The court interpreted the action as a claim for compensation for damage caused by criminal proceedings. As the legal basis of the claim for damages the court deemed § 16 of the State Liability Act (SLA), subsection 1 of which gives grounds for claiming compensation, to a fair extent, for damage caused by a lawful administrative act or measure which in an extraordinary manner restricts the fundamental rights of a person. The court found that by assessing the circumstances as a whole, the exclusion from office restricted the appellant's free self-realisation which is guaranteed as a fundamental right in § 29 of the Constitution. The infringement of the fundamental right was so severe that the elements of § 16(1) of the SLA were deemed existent.

13. The court deemed as a fair compensation for the caused damage to be half of the requested amount. Upon determining the amount of the compensation, the court assessed the severity of the restriction of the appellant's rights to be medium. The court took into account that the appellant's rights were restricted in public interests. Persons have a certain obligation to endure restriction of their rights without receiving full compensation for it. However, the court found that the prosecutor could have assessed earlier whether the exclusion from office was still justified. In case of a criminal offence related to office, one of the first facts established should be whether a person can be a subject of a criminal offence or not. The occurrence of damage had to have been foreseen by the public authorities because in case of exclusion from office the law does not prescribe maintaining of wages or payment of any other compensation. At the same time, it was possible for the appellant to have another job in the private sector. The appellant had not substantiated that he made efforts to find employment elsewhere. The court conceded that in an uncertain situation where the duration of the exclusion from office was unknown, the appellant could not have reorganised his life entirely.

14. The Office of the Prosecutor General and K. M. filed an appeal against the Tallinn Administrative Court judgment of 11 May 2009.

[Paragraphs 15 and 16 not translated.]

17. The Tallinn Circuit Court dismissed both appeals by a judgment of 15 December 2009 in administrative matter no. 3-09-202 and did not amend the Tallinn Administrative Court judgment of 11 May 2009.

18. The circuit court found that the Office of the Prosecutor General is the correct respondent in the matter. The court ruling was the direct basis for the exclusion from office but in regard to the duration of the exclusion from office and the extent of the infringement, decisive were the criminal proceedings organised by the Western District Prosecutor's Office.

19. In the assessment of the circuit court, the appellant's rights were restricted in an extraordinary manner by the fact that his exclusion from office lasted for a year. The circuit court found that § 16(2)2) of the SLA does not preclude the appellant's right of claim. The law does not prescribe that damage caused to a person excluded from office for the duration of criminal proceedings shall not be compensated for. The Public Service Act and the Code of Criminal Procedure, pursuant to which the service relationship was suspended, do not prescribe maintaining of wages for that period nor payment of compensation, but it cannot be concluded from any provision that the law aims for an acquitted person to bear the damage caused by criminal proceedings and loss of wages.

20. The compensation awarded by the administrative court was, in the opinion of the circuit court, fair and comparable to earlier court judgments in similar matters. The appellant requested compensation for damage caused by lawful exclusion from office and therefore upon the determination of the amount of damages, § 16(3) of the SLA was relevant. Violation of the investigation principle did not result in an unfair court decision because the additional evidence submitted by the appellant does not give grounds for changing the

amount of the compensation awarded by the administrative court.

21. The Office of the Prosecutor General filed an appeal in cassation against the Tallinn Circuit Court judgment of 15 December 2009 requesting annulment of the circuit court judgment and rendering of a new judgment dismissing the action of K. M. The Prosecutor's Office found that the restriction of the rights of K. M. was not extraordinary and the Prosecutor's Office is not the appropriate respondent in the administrative matter.

22. The Administrative Law Chamber of the Supreme Court referred the administrative matter by a ruling of 18 June 2010 in matter no. 3-3-1-15-10 to be reviewed by the Supreme Court *en banc* because the adjudication of the matter required adjudication of a matter to be reviewed under the Constitutional Review Court Procedure Act.

[Paragraphs 23–26 not translated.]

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDING

[Paragraphs 27–40 not translated.]

OPINION OF THE SUPREME COURT *EN BANC*

41. First, the Supreme Court *en banc* states that proprietary damage was caused to K. M. by exclusion from office in pre-trial criminal proceedings and the Office of the Prosecutor General is the appropriate respondent in the matter (I). The Supreme Court *en banc* finds that from § 32 of the Constitution arises the state's obligation to compensate, to a fair extent, for proprietary damage caused by the state's lawful actions if the fundamental right of ownership has been infringed intensively in an extraordinary manner (II). The Supreme Court *en banc* ascertains that the applicable law lacks a regulatory framework which would carry into effect the obligation arising from § 32 of the Constitution and would provide for a regulatory framework of compensation, to a fair extent, for lawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings (III). Next, the Supreme Court *en banc* establishes the lawful but extraordinarily intensive infringement of the fundamental right of ownership of K. M. (IV) and declares unconstitutional the lack of a regulatory framework of compensation for damage (V). The Supreme Court *en banc* agrees with the judgments of the administrative courts regarding the amount of fair compensation (VI) and does not amend the decisions of the judgments of the administrative courts but replaces the legal reasoning for the judgments of the administrative courts with the reasoning in the Supreme Court *en banc* judgment (VII). The Supreme Court *en banc* dismisses the appeal in cassation of the Office of the Prosecutor General (also VII).

I

42. K. M. filed with the Tallinn Administrative Court an action requesting award of a fair compensation for damage caused by pre-trial criminal proceedings. The Supreme Court *en banc* finds that K. M. was caused proprietary damage by his exclusion from office in pre-trial criminal proceedings. Due to the exclusion from office, K. M. was unable to work from 6 November 2007 until 4 November 2008 as a specialist in the Intelligence Department of the Western Tax and Customs Centre of the TCB and receive wages.

43. Exclusion from office constitutes means of securing criminal proceedings applied in regard to a suspect or accused on the basis of an order of a preliminary investigation judge or on the basis of a court ruling (§ 141(1) of the CCP). Exclusion of a person from office in order to secure criminal proceedings infringes the fundamental right to freely choose his or her area of activity, profession and place of work guaranteed by the first sentence of § 29(1) of the Constitution. Work is generally the main way to obtain an income and therefore, exclusion from office and infringement of § 29 of the Constitution may be accompanied by an infringement of the fundamental right of ownership provided for in § 32 of the Constitution.

44. Pursuant to the first sentence of § 32(1) of the Constitution, the property of every person is inviolable and equally protected, and according to the first sentence of § 32(2) of the Constitution, everyone has the

right to freely possess, use, and dispose of his or her property. Infringement of the fundamental right of ownership is any restriction of the legal status provided for in § 32 of the Constitution and causing of proprietary loss to the owner (the Supreme Court *en banc* judgment of 31 March 2011 in matter no. 3-3-1-69-09, paragraph 57). During the time a person is excluded from office in criminal proceedings he or she cannot remain in his or her office nor receive wages nor use other proprietary benefits accompanying employment. Consequently, exclusion from office may cause proprietary loss for a suspect or accused.

45. There is no dispute that due to the exclusion from office in criminal proceedings K. M. suffered loss of income, and there is also no dispute regarding the amount of the loss of income. According to the action, if K. M. would have been able to perform his duties from 6 November 2007 until 4 November 2008 he would have received wages in the amount of 79,422 kroons (without taxes).

46. Pursuant to § 12(2)1) of the Code of Administrative Court Procedure (CACP), in pre-trial proceedings an administrative court ascertains the respondent. In an administrative court procedure the respondent is the administrative authority against whose activities an action is filed (§ 14(2)2) of the CACP). In reviewing a claim for damages the respondent is the administrative authority who caused the damage.

47. Unlike the opinion stated in the appeal in cassation of the Office of the Prosecutor General, the Supreme Court *en banc* finds that the Office of the Prosecutor General is the correct respondent in the administrative matter. K. M. was caused damage in pre-trial criminal proceedings by exclusion from office. K. M. was excluded from office on the basis of an order of a preliminary investigation judge. However, in the pre-trial criminal proceedings the preliminary investigation judge lacked the possibility to verify at his or her own initiative the justification of the continuous application of the exclusion from office. A preliminary investigation judge decides on the existence or lack of circumstances which constitute the basis for exclusion from office at the time the Prosecutor's Office requests application of these means for securing criminal proceedings. Termination of exclusion from office and thus, the duration of its application are generally left for the Prosecutor's Office to decide. Pursuant to § 30(1) of the CCP, a Prosecutor's Office shall direct pre-trial proceedings and ensure the legality and efficiency thereof. A Prosecutor's Office may, at any time, verify at its own initiative whether the exclusion from office is still justified and terminate the exclusion from office when the justifications cease to exist.

II

48. According to the second sentence of § 32(1) of the Constitution, property may be expropriated without the consent of the owner only in the cases and pursuant to procedure provided by law, and for fair and immediate compensation. Pursuant to the third sentence of § 32(1) of the Constitution, everyone whose property has been expropriated without his or her consent has the right of recourse to the courts and the right to contest the expropriation of the property, the compensation or the amount thereof.

49. The Supreme Court *en banc* finds that from § 32 of the Constitution arises the state's obligation to form a legal institute, norms of which regulate compensation, to a fair extent, for proprietary damage caused by a lawful act or measure which in an extraordinary manner restricts the right of ownership. In many cases of restriction of the fundamental right of ownership it is possible to find a reasonable balance between public interests and protection of fundamental rights of individuals. Yet, there might be situations where the state needs to restrict the fundamental right of ownership of individuals in public interests to the extent that it would be unjustified to leave all the damages to be borne by the individual. In case of a restriction in an extraordinary manner of the fundamental right of ownership it is not possible, without the payment of compensation, to find a balance between public and private interests.

50. Based on the aforementioned, from § 32 of the Constitution arises the state's obligation to pay fair compensation also in case of a lawful restriction in an extraordinary manner of the fundamental right of ownership by exclusion from office in criminal proceedings. The state's obligation to compensate for lawful proprietary damage caused in criminal proceedings has been stressed by the Supreme Court *en banc* in a judgment of 31 March 2011 in matter no. 3-3-1-69-09 (paragraph 64 of the judgment). The Administrative

Law Chamber of the Supreme Court has similarly found that "also in cases where exclusion from office was in accordance with the law but the person is later acquitted or the proceedings with respect to him or her are terminated, the person shall have the possibility to obtain fair compensation from the state. In such case a person has suffered loss in the interests of establishing the truth in a criminal matter, and thus in public interests. The legislator shall prescribe the grounds and procedure for such compensation for damage as it has done, for example, for compensation for damage caused by unjust deprivation of liberty in criminal proceedings" (the Administrative Law Chamber of the Supreme Court judgment of 17 April 2001 in matter no. 3-3-1-10-01, paragraph 4).

51. Failing to establish an act regulating the grounds and procedure for payment of fair compensation in case of a lawful restriction in an extraordinary manner of the fundamental right of ownership or a regulatory framework excluding the payment of fair compensation infringes the fundamental right of ownership protected by § 32 of the Constitution and the right to effective judicial proceedings arising from §§ 14 and 15 of the Constitution in conjunction. In such case there are no proceedings which would enable a person whose fundamental right of ownership has been restricted in an extraordinary manner in pre-trial criminal proceedings to have recourse to the courts claiming compensation for caused damage (similarly in the Supreme Court *en banc* judgment of 22 March 2011 in matter no. 3-3-1-85-09, paragraph 119).

III

52. The Supreme Court *en banc* assesses whether the applicable law enables compensation, to a fair extent, for proprietary damage caused by lawful exclusion from office in pre-trial criminal proceedings if the right of ownership has been restricted in an extraordinary manner.

53. The grounds and procedure for the protection and restoration of rights violated upon application of the powers of public authority and performance of other public law functions, and for compensation for caused damage is provided for in the State Liability Act (see the Supreme Court *en banc* judgment of 22 March 2011 in matter no. 3-3-1-85-09, paragraph 110). Upon compensation for damage caused in pre-trial criminal proceedings, § 15(1) of the SLA which regulates compensation for damage caused in judicial proceedings is not applicable (see the Supreme Court *en banc* judgment of 31 March 2011 in matter no. 3-3-1-69-09, paragraph 74).

54. The Supreme Court *en banc* finds that § 16 "Damage caused by lawful administrative act or measure" of the SLA is also not applicable. Pursuant to § 16(1) of the SLA, a person may claim compensation, to a fair extent, for proprietary damage caused by a lawful administrative act or measure which in an extraordinary manner restricts the fundamental rights or freedoms of the person. In the assessment of the Supreme Court *en banc*, the legislator has effected in § 16(1) of the SLA the obligation arising from § 32 of the Constitution to compensate for lawful proprietary damage which in an extraordinary manner restricts fundamental rights, but only for the benefit of administrative activity.

55. Acts issued and measures taken in pre-trial criminal proceedings are not administrative acts and administrative measures for the purposes of § 16(1) of the SLA. A court ruling, made in pre-trial criminal proceedings, which decides exclusion from office, is also not an administrative act because the court does not perform administrative functions thereby. Damage caused by lawful exclusion from office in pre-trial criminal proceedings cannot be compensated for based on § 16(1) of the SLA because it is not an administrative act or an administrative measure (the Supreme Court *en banc* judgment of 31 March 2011 in matter no. 3-3-1-69-09, paragraph 77).

56. The Supreme Court *en banc* is of the opinion that the applicable law lacks a regulatory framework which would provide for compensation, to a fair extent, for lawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings. Grounds for compensation for damage have not been provided for in the State Liability Act which is a general act regulating compensation for damage caused by public authority, or in any other act.

57. The Supreme Court *en banc* holds that § 16(1) of the SLA cannot be applied upon compensation for damage caused in pre-trial criminal proceedings also by way of analogy. A prerequisite for compensation for damage under the State Liability Act is establishment of unlawfulness or lawfulness of an administrative measure or administrative act. The State Liability Act does not provide whether, how and to what extent administrative courts shall assess the lawfulness or unlawfulness of acts and decisions in pre-trial criminal proceedings.

58. Criminal proceedings are specific exercise of the authority of the state which is regulated separately from other exercise of public authority – administrative activity. The lawfulness of measures and decisions in criminal proceedings is generally verified, according to the rules of criminal proceedings and within criminal proceedings, by general courts. In criminal proceedings, pre-trial proceedings are generally followed by court proceedings, within which an assessment, among other, on acts and decisions in pre-trial proceedings is given. Deciding compensation for damage caused in a criminal proceeding based on current principles in the State Liability Act can result in subjection of decisions of general courts to the control of administrative courts. Considering the integrity and structure of the court system, it would be an unreasonable solution and it would probably not facilitate ensuring of legal protection which is effective and without shortcomings (the Supreme Court *en banc* judgment of 22 March 2011 in matter no. 3-3-1-85-09, paragraphs 127–128).

IV

59. K. M. found in the action that his exclusion from office was lawful and compensated for should be lawfully caused proprietary damage. In a situation where administrative courts have not been granted clear competence to assess upon compensation for damage the lawfulness of acts and decisions in pre-trial criminal proceedings, the Supreme Court *en banc* deems it possible to presume that exclusion of K. M. from office was lawful and that the damage was lawful.

60. The administrative court and the circuit court applied § 16(1) of the SLA and found that the lawful exclusion from office infringed the rights of K. M. in an extraordinary manner. The respondent – the Office of the Prosecutor General – found both in the administrative court and the circuit court and also in the appeal in cassation filed with the Supreme Court that the exclusion from office did not restrict the fundamental rights of K. M. in an extraordinary manner. It was possible for K. M. to have other jobs and his arguments about looking for work were, in the opinion of the Prosecutor's Office, of mere words and unsubstantiated.

61. The Supreme Court *en banc* finds that the exclusion from office restricted the fundamental right of ownership of K. M. in an extraordinary way. For nearly a year K. M. was unable to remain in his office at the TCB and lost the possibility to receive wages. The intensity of the restriction is diminished by the fact that K. M. could have found temporary employment or engaged in entrepreneurship during the exclusion from office. He also could have quit his job at the TCB and tried to find new permanent employment. However, it has to be taken into account here that K. M. could have been employed only in a private company because pursuant to § 16(2) of the Public Service Act, a person under preliminary investigation for or a person accused of a criminal offence for which the law prescribes imprisonment shall not be employed in the public service. It also has to be considered that the exclusion from office was temporary and K. M. could not have foreseen the duration of the exclusion. In such a situation it is complicated to find a temporary employment for an undefined term or to engage in entrepreneurship. K. M. can also not be reprimanded for not quitting his office at the TCB. In the course of the criminal proceedings it was established that the suspicion filed against K. M. was partly unfounded.

V

62. The Supreme Court *en banc* found above that from § 32 of the Constitution arises the state's obligation to compensate for proprietary damage caused by lawful exclusion from office if the fundamental right of ownership has been infringed intensively in an extraordinary manner. The Supreme Court *en banc* also held that the applicable law lacks a regulatory framework which would enable compensation, to a fair extent, for

lawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings.

63. The lack of the regulatory framework infringes intensively the fundamental right of ownership arising from § 32 of the Constitution and the right to effective judicial proceedings arising from §§ 14 and 15 of the Constitution in conjunction. Compensation for lawful proprietary damage caused by exclusion from office in criminal proceedings is precluded. There is no regulatory framework which would enable a person whose fundamental right of ownership has been restricted in an extraordinary manner in pre-trial criminal proceedings to have recourse to the courts claiming compensation, to a fair extent, for caused damage. The Supreme Court *en banc* has no information regarding for which purpose the legislator has not established such a regulatory framework, but finds that the need to protect the state's financial interests is not significant enough for justifying such infringement of fundamental rights.

64. Based on the aforementioned, the Supreme Court *en banc* finds that the lack of a regulatory framework which would prescribe an option to compensate, to a fair extent, for lawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings infringes disproportionately the fundamental rights provided for in §§ 32, and 14 and 15 of the Constitution. Pursuant to § 15(1)21) of the Constitutional Review Court Procedure Act (CRCPA), the Supreme Court may, in constitutional review proceedings, declare the refusal to issue an instrument of legislation of general application to be in conflict with the Constitution. Based on § 15(1)21) of the CRCPA, the Supreme Court *en banc* declares the lack of a regulatory framework of compensation, to a fair extent, for lawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings to be in conflict with §§ 11, 14, 15 and 32 of the Constitution.

65. The Supreme Court *en banc* holds that the loss of income caused lawfully to K. M. by the exclusion from office in pre-trial criminal proceedings shall be compensated for under the Constitution. The Supreme Court *en banc* does not deem it possible to apply by way of analogy § 16 of the SLA in a situation where the lack of an appropriate legal regulatory framework (legal institute of compensation for lawful damage caused in pre-trial criminal proceedings) has been declared on the basis of § 15(1)2¹) of the CRCPA to be in conflict with the Constitution. By applying analogy there would be no need to declare the lack of a legal regulatory framework unconstitutional on the basis of § 15(1)2¹) of the CRCPA. If the lack of an appropriate regulatory framework is declared under § 15(1)2¹) of the CRCPA to be in conflict with the Constitution, the court has two options. The court may postpone the entry into force of a court judgment and give the legislator time to establish an appropriate regulatory framework, or it may, instead of the legislator, form the lacking norm itself based on the general principles of law. The Supreme Court *en banc* admits that as the state's obligation arising from § 32 of the Constitution to compensate, to a fair extent, for lawful damage caused by an infringement in an extraordinary manner of the fundamental right of ownership has been expressed in § 16(1) of the SLA (for administrative activity), it is possible to follow § 16(1) of the SLA upon compensation for damage.

VI

66. The Supreme Court *en banc* agrees with the reasoning and opinion of the Tallinn Administrative Court that a fair compensation to K. M. for lawful proprietary damage is 40,000 kroons. Upon awarding fair compensation, the administrative court followed § 16(3) of the SLA, pursuant to which the benefit gained by the public authority or advance in public interests which is a result of the restriction of fundamental rights and freedoms, gravity of the restriction, the unforeseeability of damage and other relevant circumstances shall be taken into consideration.

67. The Supreme Court *en banc* notes that exclusion from office in pre-trial criminal proceedings serves public interests. According to § 141(1) of the CCP, exclusion from office shall be applied if a person may continue to commit criminal offences in case he or she remains in the office (clause 1) or if his or her remaining in the office may prejudice the criminal proceeding (clause 2).

68. It can be concluded from the Pärnu County Court ruling of 5 November 2007 that the cause for the exclusion of K. M. from office was the danger that by remaining in his office K. M. would prejudice the

criminal proceedings. The aim of the criminal proceedings was to determine whether K. M. attempted to demand gratuities in return for committing a lawful act by taking advantage of his official position (§ 293(2)2) and § 25(2) of the PC). The Supreme Court *en banc* concedes that establishing the truth in criminal proceedings is an important public interest and K. M. was under the obligation to endure the performance of criminal procedural acts in respect of him and the restriction of his fundamental rights.

69. However, the significance of public interests is diminished by the fact that the pre-trial criminal proceedings in regard to K. M. with respect to attempted accepting of gratuities were terminated according to § 199(1)1) and § 200 of the CCP because there were no grounds for criminal proceedings. In its ruling of 4 November 2008 regarding the termination in part of the criminal proceedings the Western District Prosecutor's Office found that the conduct of K. M. lacked the elements of the criminal offence provided for in § 293 of the PC. The official duties of K. M. were, above all, data processing, and he lacked the competence to decide on the release of seized accounts. By turning to a co-worker with the request to release seized accounts K. M. did not commit an act by taking advantage of his official position.

70. Pursuant to § 293(1) of the PC, an official who consents to a promise of property or other benefits for him or her or a third person or who accepts property or other benefits in return for a lawful act which he or she has committed or which there is reason to believe that he or she will commit, or for a lawful omission which he or she has committed or which there is reason to believe that he or she will commit and, in so doing, takes advantage of his or her official position shall be punished. In the assessment of the Supreme Court *en banc*, the criminal proceedings in regard to K. M. with respect to attempted accepting of gratuities were terminated due to the lack of one element of a criminal offence. K. M. could not have committed the act which he was charged with by taking advantage of his or her official position.

71. The Supreme Court *en banc* notes that the existence of such an element of a criminal offence is one of the first things that the body conducting the proceedings should establish when starting to investigate the criminal offence provided for in § 293 of the PC. In the proceedings with respect to K. M. it took nearly a year for the bodies conducting the proceedings to establish that the official duties of K. M. did not include release of seized accounts. The Office of the Prosecutor General has not pointed out that in these criminal proceedings it was difficult to assess which duties were in fact included in the official duties of K. M. There is also no justification that it was complicated to give a legal assessment on the act of K. M. The Supreme Court *en banc* finds that in this situation which is factually and legally unambiguous there is no justification for spending a year on determining whether or not the conduct of a person comprised an element of the criminal offence provided for in § 293 of the PC. The Supreme Court *en banc* concedes that K. M. was in the same criminal matter suspected of commission of two other criminal offences (provided for in clauses 1 and 4 of § 263 and § 209 of the PC) and there were two other suspects under investigation in the criminal matter. However, establishment of the fact whether K. M. could have committed the act he was suspected of was not related to extensive investigative activities or procedural acts performed in regard to other suspects. The existence of elements of an offence which can be identified without major problems should be addressed also by the court which grants permission for a procedural act restricting fundamental rights or for applying means of securing criminal proceedings.

VII

72. In keeping with the aforementioned, the Supreme Court *en banc* amends under § 72(1)4) of the CACP the legal reasoning for the Tallinn Circuit Court judgment of 15 December 2009 and for the Tallinn Administrative Court judgment of 11 May 2009 in administrative matter no. 3-09-202, and replaces them with the reasoning for the Supreme Court *en banc* judgment, not amending the decisions of the judgments of the administrative courts.

73. The Supreme Court *en banc* dismisses the appeal in cassation of the Office of the Prosecutor General. The security paid upon the filing of the appeal in cassation shall be included in public revenues.

A dissenting opinion of the justices of the Supreme Court Henn Jõks, Villu Kõve and Tambet Tampuu on the Supreme Court *en banc* judgment in matter no. 3-3-1-15-10. The justice of the Supreme Court Peeter Jerofejev has concurred with paragraphs 1 and 2 of the dissenting opinion and the justice of the Supreme Court Jaak Luik has concurred with paragraph 3 thereof.

1. Unlike the majority of the Supreme Court *en banc*, we find that in order to satisfy the action of K. Mällas, it was not necessary for the Supreme Court *en banc* to declare the lack of a regulatory framework of compensation to a fair extent for lawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings to be in conflict with the Constitution. The Supreme Court *en banc* could have amended the legal justifications of the judgments of lower courts by saying that § 16(1) of the SLA applied by the lower courts is applicable by way of analogy.

According to earlier case-law of the Supreme Court, the use of analogy helps to eliminate gaps in the law, i.e. a situation where the norms of the law are insufficient for adjudication of a court case and do not fully meet the requirements of the scope of application (see the Administrative Law Chamber of the Supreme Court judgment of 8 September 2008 in matter no. 3-3-1-38-08, paragraph 16). In choosing an analogous regulatory framework, the interests of every interested person and the expedience of the consequences which would follow the application of one or another regulatory framework shall be considered (see the Administrative Law Chamber of the Supreme Court judgment of 5 June 2003 in matter no. 3-3-1-45-03, paragraph 14).

The Supreme Court *en banc* found that no law regulates an option for compensation for lawful damage caused by exclusion from office in pre-trial criminal proceedings (see paragraphs 55–57 of the judgment of the Supreme Court *en banc*). However, § 16(1) of the SLA provides for an option to claim from a public authority compensation for damage caused by a lawful administrative act or administrative measure if the additional prerequisites specified in that provision exist. Although procedural decisions of a body conducting criminal proceedings are not administrative acts and procedural acts are not administrative measures, they are also by nature individual acts and measures applying the law of a public authority. There is no information that the legislator would have wanted to exclude compensation for damage caused by lawful activities of a body conducting criminal proceedings. Therefore, we feel that this constitutes a gap in the law which can be eliminated by applying analogy.

2. The Supreme Court *en banc* justified not applying analogy in paragraph 57 of its judgment by saying that the State Liability Act does not provide whether, how and to what extent administrative courts shall assess the lawfulness or unlawfulness of acts and decisions in pre-trial criminal proceedings. We find that precisely the lack of such a regulatory framework gives rise to the application of the State Liability Act by way of analogy.

The Supreme Court *en banc* has found in paragraph 65 of its judgment that it does not deem it possible to apply by way of analogy § 16 of the SLA in a situation where the lack of an appropriate legal regulatory framework (legal institute of compensation for lawful damage caused in pre-trial criminal proceedings) has been declared on the basis of § 15(1)²¹ of the CRCPA to be in conflict with the Constitution. Since the Supreme Court *en banc* declared in the aforementioned part the legislator's failure to act to be in conflict with the Constitution in the same matter, it can be said that the Supreme Court *en banc* itself established an obstacle preventing the application of analogy. In paragraph 65 of its judgment the Supreme Court *en banc* has justified not applying analogy also by saying that in applying analogy, there would be no need to declare the lack of a legal regulatory framework unconstitutional on the basis of § 15(1)²¹ of the CRCPA. We find that declaring the legislator's failure to act unconstitutional is not an objective on its own. Application of an analogy which guarantees effective protection of a person's rights should be preferred.

As a justification of exclusion of application of analogy can also be construed the opinion of the Supreme Court *en banc* in paragraph 58 that deciding compensation for damage caused in a criminal proceeding

based on current principles in the State Liability Act can result in subjection of decisions of general courts to the control of administrative courts and that considering the integrity and structure of the court system, it would be an unreasonable solution. However, the Supreme Court *en banc* has recently expressed a different opinion by declaring precisely the State Liability Act to be in conflict with the Constitution in the part which does not prescribe compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings and by saying that claims for compensation for such damage are subject to proceedings in the administrative court (see the Supreme Court *en banc* judgment of 23 March 2011 in administrative matter no. 3-3-1-85-09). Moreover, the Supreme Court *en banc* has noted in paragraph 65 of its judgment that in this matter it is possible to follow § 16(1) of the SLA upon compensation for damage. The Supreme Court *en banc* has not explained how application of analogy differs from following another law.

3. We do not agree with the opinion of the majority of the Supreme Court *en banc* that based on §§ 14, 15 and 32 of the Constitution, the state is obligated to pay fair compensation in case of a lawful restriction in an extraordinary manner of the fundamental right of ownership by exclusion from office in criminal proceedings (see paragraphs 50 and 51 of the Supreme Court *en banc* judgment). We hold that the state is under such an obligation on the basis of those provisions only in conjunction with § 25 of the Constitution.

Regarding application of § 32 of the Constitution, the Supreme Court *en banc* has referred to paragraph 64 of the Supreme Court *en banc* judgment of 31 March 2011 in administrative matter no. 3-3-1-69-09 but has failed to note that in paragraph 60 of the same judgment the Supreme Court *en banc* found that disproportionate infringement of the fundamental rights provided in §§ 32 and 12 of the Constitution results in unlawful proprietary loss, obligation of compensation for which arises from § 25 of the Constitution. Consequently, pursuant to an earlier opinion of the Supreme Court *en banc*, § 32 of the Constitution does not provide for an independent obligation to compensate for damage. It should have been clarified whether or not the Supreme Court *en banc* changes its earlier opinion on application of § 25 of the Constitution.

4. It must be noted that the justifications of the Supreme Court *en banc* as to why § 15(1)2¹) of the CRCPA shall be applied are, in our opinion, insufficient and unlike previous opinions of the Supreme Court *en banc*. The Supreme Court *en banc* has justified the unconstitutionality of the lack of a relevant regulatory framework in paragraph 63 of its judgment where it notes only that the need to protect the state's financial interests as a presumable objective of the infringement is not significant enough for justifying such infringement of fundamental rights in question. Pursuant to earlier case-law, the Supreme Court has not assessed, in the course of verification of constitutionality of legislation, the significance of the objective of the infringement of fundamental rights but the legitimacy of the objective and whether an infringement with a legitimate objective is necessary, appropriate and moderate for the achievement of that objective (see e.g. the Supreme Court *en banc* judgment of 7 June 2011 in constitutional review matter no. 3-4-1-12-10, paragraphs 40–58).

5. It is unclear from the Supreme Court *en banc* judgment whether the legislator has failed to establish the regulatory framework in question intentionally or whether it is an oversight. In the first case the Supreme Court *en banc* should have assessed the constitutionality of the provision infringing the fundamental right and, if necessary, applied § 15(1)2) of the CRCPA, i.e. it should have declared that provision to be in conflict with the Constitution and invalid. In the second case the Supreme Court *en banc* could have applied § 16(1) of the SLA by way of analogy without commencing constitutional review proceedings.

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