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## Constitutional judgment 3-3-1-35-10

### JUDGMENT OF THE SUPREME COURT *EN BANC*

**No. of the case** 3-3-1-35-10

**Date of judgment** 31 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 Ülar Kaas for claiming compensation in the amount of 254,087 kroons for damage caused by the Republic of Estonia.

**Contested judgment** The Tallinn Circuit Court judgment of 16 February 2010 in administrative matter no. 3-08-265

**Basis of proceeding in the Supreme Court** Appeals in cassation of the Police and Border Guard Board and the Office of the Prosecutor General

**Hearing** Written proceedings

## **DECISION**

- 1. To dismiss the appeals in cassation of the Police and Border Guard Board and the Office of the Prosecutor General.**
- 2. Not to amend the decision of the Tallinn Circuit Court judgment of 16 February 2010 and of the Tallinn Administrative Court judgment of 31 March 2009 in administrative matter no. 3-08-265, 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 for unlawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings to be in conflict with the Constitution.**
- 4. To include the securities in public revenues.**

## **FACTS AND COURSE OF PROCEEDINGS**

**1.** Ülar Kaas was employed as a police junior inspector of the Patrol and Traffic Supervision Division of the Public Order Police Department of the Pärnu Police Prefecture. On 2 August 2002 the Police Department of the Police Board commenced proceedings in criminal matter no. 02218000014. Ülar Kaas was suspected of preparing a report, when performing his duties on 16 June 2002, on establishment of a state of intoxication concerning a citizen of Lithuania who was pulled over for exceeding the speed limit. Together with another police officer, Ülar Kaas introduced the prepared document to the citizen of Lithuania as an administrative offence report and demanded the payment on the spot of a fine in the amount of 25 euros for an administrative offence. The police officers failed to prepare a proper administrative offence report and illegally appropriated the 25 euros received as a payment of the fine. On 1 November 2002 Ülar Kaas was charged with commission of a criminal offence provided for in § 143(2)1) of the Criminal Code (CC) (fraudulent conduct by a group of persons).

**2.** The leading inspector of the Police Department of the Police Board suspended Ülar Kaas, by an order of 25 November 2002 sanctioned by a prosecutor, as of 26 November 2002 for the duration of a criminal investigation from the office of a police junior inspector of the Patrol and Traffic Supervision Division of the Public Order Police Department of the Pärnu Police Prefecture. The Pärnu Police Prefect suspended the service relationship of Ülar Kaas by a directive of 26 November 2002 for the duration of a criminal investigation.

**3.** On 12 December 2002 the prosecutor confirmed the summary of charges and sent the criminal matter to court. The Tallinn City Court by a ruling of 2 May 2003 forwarded the criminal matter for an additional pre-trial investigation. The court found that Ülar Kaas should have been charged with misuse of an official position (§ 161 of the CC), not with fraud (§ 143 of the CC).

**4.** The Northern District Prosecutor's Office terminated by a ruling of 11 September 2007 the criminal proceedings in regard to Ülar Kaas. After the entry into force of the Penal Code on 1 September 2002, the elements of the criminal offence provided for in § 289 "Misuse of official position" of the Penal Code (PC) corresponded to the elements of the criminal offence formerly provided for in § 161 of the CC. On 15 March 2007 an act had entered into force which repealed § 289 of the PC and therefore there were no grounds for organising criminal proceedings in regard to Ülar Kaas. The District Prosecutor's Office found that the conduct of Ülar Kaas included also the elements of fraud provided for in § 143 of the CC (later in § 209 of the PC), but the conduct of Ülar Kaas should have been qualified as a misdemeanour according to § 218 of the PC (offences against property involving objects or proprietary rights of small value) because the 25 euros obtained by fraud did not exceed 1,000 Estonian kroons. At the time of the making of the ruling more than three years had passed from the commission of the act and the limitation period of the misdemeanour had passed. On 25 September 2007 the prosecutor complemented the ruling on the termination of the criminal

proceedings and annulled the exclusion of Ülar Kaas from office.

**5.** The Prefect of the Western Police Prefecture renewed by a directive of 1 October 2007 the service relationship of Ülar Kaas as a junior constable of the Public Order Police Department of the Pärnu Police Department of the Western Police Prefecture retroactively from 12 September 2007.

**6.** On 11 February 2008 Ülar Kaas filed with the Tallinn Administrative Court an action for compensation for damage caused by exclusion from office. [---]

[Paragraphs 7 and 8 not translated.]

**9.** The Tallinn Administrative Court satisfied in part by a judgment of 31 March 2009 in administrative matter no. 3-08-265 the action of Ülar Kaas and ordered 150,000 kroons from the Office of the Prosecutor General and the Police and Border Guard Board jointly.

**10.** The administrative court found that the exclusion from office from 26 November 2002 until 15 March 2007 was lawful but restricted the appellant's fundamental right to free self-realisation arising from § 29 of the Constitution so severely that the damage shall be compensated for on the basis of § 16(1) of the State Liability Act (SLA). The infringement of the appellant's rights was increased by the duration of the restriction of his rights and the uncertainty of the situation he was in. The infringement of the appellant's rights was diminished by the fact that the appellant was employed elsewhere and was engaged in entrepreneurship during the criminal proceedings. The appellant cannot be reprimanded that he did not seek for new permanent service because he did not know how long the exclusion from office would last. The administrative court did not agree with the opinion of the respondents that § 16(2)1) or 2) of the SLA precludes compensation for damage.

**11.** Upon determining fair compensation the court found that the damage had to have been foreseeable by the public authority. The volume of the damage could have been diminished by expediting the criminal proceedings or by verifying whether the exclusion from office was still justified. The court decreased the damages because the restriction of the appellant's rights was necessary for securing the criminal proceedings, the appellant had the option to be employed elsewhere and to be engaged in entrepreneurship, and the criminal proceedings were terminated due to the occurrence of circumstances precluding proceedings. The court awarded 130,000 kroons to Ülar Kaas for compensation for lawful damage caused from 26 November 2002 until 15 March 2007.

**12.** The administrative court found that after 15 March 2007 the appellant was caused unlawful damage by exclusion from office and the damage shall be compensated for on the basis of § 7 of the SLA. As of 15 March 2007 there was no legal cause for the exclusion of the appellant from office because the act, commission of which he was suspected of, was no longer punishable pursuant to criminal procedure. The respondents failed to demonstrate due diligence because there was a sufficient amount of time to react to the amendment of the Penal Code and to terminate the criminal proceedings in regard to the appellant in due course. However, it was presumable that the appellant was familiar with the legislation, and the use of legal remedies in time could have decreased the damage. The court decreased the damages and awarded 20,000 kroons to Ülar Kaas for the compensation for unlawful damage caused from 15 March 2007 until 11 September 2007.

**13.** The Police and Border Guard Board and the Office of the Prosecutor General filed appeals against the Tallinn Administrative Court judgment of 31 March 2009.

[Paragraphs 14 and 15 not translated.]

**16.** The Tallinn Circuit Court dismissed the appeals by a judgment of 16 February 2010 in administrative matter no. 3-09-202 and did not amend the administrative court judgment.

**17.** The circuit court stated that the lawful exclusion from office restricted the right of Ülar Kaas arising

from § 29(1) of the Constitution to freely choose his area of activity, profession and place of work, and the damage was subject to compensation under § 16(1) of the SLA. The circuit court held that there were no circumstances limiting liability provided for in § 16(2) of the SLA.

**18.** The circuit court was of the opinion that administrative courts cannot, upon adjudication of a request for compensation for damage, start to establish circumstances of criminal law nature and to assess reasons for the termination of criminal proceedings. This would be conceivable only if the legislator would establish a corresponding regulatory framework, clearly defining the circumstances which preclude compensation for damage. Administrative courts are also not competent to assess whether the body conducting the proceedings could have done something in lieu of the termination of criminal proceedings and if so, then what, and how likely such activity would have been successful, and on which considerations the body conducting the proceedings failed to perform such activity.

**19.** The circuit court held that as of 15 March 2007 the exclusion of Ülar Kaas from office was unlawful. After the elements of the criminal offence prescribed in § 289 of the PC were declared invalid, the cause for the exclusion of Ülar Kaas from office ceased to exist and the exclusion from office should have been terminated immediately. In case the criminal proceedings in regard to Ülar Kaas and the application of the exclusion from office could have been continued by amending the charges, it should have been decided immediately. The circuit court did not deem justified the argument of the Police Board that the Police Board should not be liable for the period after 29 March 2007. Based on § 8 of the Code of Criminal Procedure (CCP), safeguarding of rights of participants in proceedings is the obligation of all bodies conducting the proceedings.

**20.** The Police and Border Guard Board and the Office of the Prosecutor General filed appeals in cassation against the Tallinn Circuit Court judgment of 16 February 2010. [---]

**21.** The Administrative Law Chamber of the Supreme Court referred the matter by a ruling of 18 June 2010 under § 70(1<sup>1</sup>) of the Code of Administrative Court Procedure (CACPP) 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. The Administrative Law Chamber had suspicions about the compliance of the regulatory frameworks concerning compensation for damage caused by acts and measures in criminal proceedings or lack thereof with the Constitution.

[Paragraphs 22–24 not translated.]

## **OPINIONS OF THE PARTICIPANTS IN THE PROCEEDING**

[Paragraphs 25–34 not translated.]

## **OPINION OF THE SUPREME COURT *EN BANC***

**35.** First, the Supreme Court *en banc* states that proprietary damage was caused to Ülar Kaas by exclusion from office, and determines the appropriate respondents in the administrative matter (I). The Supreme Court *en banc* finds that from § 25 of the Constitution arises an obligation to compensate for unlawful damage, but the applicable law lacks a regulatory framework regarding compensation for unlawful damage by exclusion from office in pre-trial criminal proceedings (II). The Supreme Court *en banc* establishes that the exclusion of Ülar Kaas from office after 15 March 2007 was unlawful (III), and declares unconstitutional the lack of a regulatory framework regarding compensation for unlawful damage in pre-trial criminal proceedings (IV).

**36.** The Supreme Court *en banc* emphasizes 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 (V). The Supreme Court *en banc* establishes the lawful, but extraordinarily intensive infringement of the right of ownership of Ülar Kaas from 26 November 2002 until 14 March 2007 (VI). The Supreme Court *en banc* agrees with the judgments of the administrative courts regarding the amount of the compensations 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 appeals in cassation of the Police and Border Guard Board and the Office of the Prosecutor General (VIII).

## I

**37.** Ülar Kaas filed an action with the Tallinn Administrative Court requesting compensation for proprietary damage caused by exclusion from office in pre-trial criminal proceedings.

**38.** Pursuant to the Code of Criminal Procedure, 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). The Code of Criminal Procedure entered into force on 1 July 2004. According to § 129 of the former Code of Criminal Procedure (former CCP), the preliminary investigator decided, upon the bringing of charges against an official, whether the accused shall be excluded from his or her office for the time of the investigation, and prepared a reasoned order which was sanctioned by the prosecutor.

**39.** The Supreme Court *en banc* notes that exclusion from office based on both § 129 of the former CCP and § 141 of the CCP infringes a person's fundamental right guaranteed by the first sentence of § 29(1) of the Constitution to freely choose his or her area of activity, profession and place of work. 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. 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 to a suspect or accused (the Supreme Court *en banc* judgment of 30 August 2011 in matter no. 3-3-1-15-10, paragraphs 44–45).

**40.** In this matter there is no dispute that due to the exclusion from office Ülar Kaas suffered loss of income. In his action, Ülar Kaas has erroneously noted the period of exclusion from office as from 27 November 2002 until 12 September 2007. It appears from the case material that Ülar Kaas was excluded from the office of a police junior inspector of the Patrol and Traffic Supervision Division of the Public Order Police Department of the Pärnu Police Prefecture from 26 November 2002 until 11 September 2007 (including). During this period Ülar Kaas was unable to perform his official duties and he did not receive wages or any other income related to office.

**41.** In this matter there is also no dispute about the amount of the loss of income. According to the action filed with the administrative court, Ülar Kaas suffered loss of wages in the amount of 321,458 kroons, loss of additional remuneration for length of service in the amount of 8,981 kroons and loss of holiday pay in the amount of 24,050 kroons. Ülar Kaas suffered loss of income in the total amount of 354,489 kroons pursuant to the action. Ülar Kaas requested compensation for loss of income in the amount of 254,087 kroons. Wages received from other employment in 2003 and 2004 were deducted from the loss of income due to the exclusion from office.

**42.** 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.

**43.** The Supreme Court *en banc* agrees with the administrative courts and finds that the Police and Border Guard Board and the Office of the Prosecutor General are the appropriate respondents in this matter. Both the Police and the Prosecutor's Office had the possibility to affect the infringement of the rights of Ülar Kaas. The internal audit unit of the Police Board conducted criminal proceedings in regard to Ülar Kaas and the leading inspector decided, under § 129 of the former CCP, to exclude Ülar Kaas from office.

**44.** The reasoned order of the leading inspector was sanctioned by the prosecutor. The Prosecutor's Office also decided the termination of the criminal proceedings and of the exclusion from office on the basis of § 200 of the CCP because circumstances precluding criminal proceedings referred to in § 199 of the CCP became evident. Pursuant to § 22(1) of the former CCP, the duty of the prosecutor was the judicial review of the pre-trial criminal proceeding of criminal matters. The Prosecutor's Office had extensive authority to ensure the legality of the proceedings, and among other, to annul or amend unlawful and unjustified orders of the preliminary investigators and to terminate the criminal proceedings.

**45.** The Code of Criminal Procedure which entered into force on 1 July 2004 extended the role and competence of the Prosecutor's Office upon ensuring the legality of pre-trial criminal proceedings. Pursuant to § 30(1) of the CCP, a Prosecutor's Office shall direct pre-trial proceedings and ensure the legality and efficiency thereof. The Prosecutor's Office had the option to verify, at any time, at its own initiative whether the exclusion from office was still justified, and to terminate the exclusion from office when the justifications ceased to exist. However, according to § 200 of the CCP, the criminal proceedings could have been terminated by the investigative body with the permission of the Prosecutor's Office.

## II

**46.** Pursuant to § 25 of the Constitution, everyone has the right to compensation for moral and material damage caused by the unlawful action of any person. The right to compensation arises from § 25 of the Constitution provided the damage has been caused unlawfully – rights deriving from the law, the Constitution or an international agreement of the person suffering the damage have been violated.

**47.** Only the legislator has a constitutional right to restrict a person's fundamental right to compensation arising from § 25 of the Constitution. However, the legislator is under the obligation to provide for effective proceedings for the exercise and protection of fundamental rights. Failing to establish an act regulating the grounds and procedure for compensation for unlawful damage or a regulatory framework excluding the compensation for damage infringes the fundamental right provided for in § 25 of the Constitution and the right to effective judicial proceedings arising from §§ 14 and 15 of the Constitution in conjunction.

**48.** The State Liability Act is a general act regulating the liability of public authority which regulates compensation for damage caused by public authority insofar as not otherwise regulated by specific law (the Supreme Court *en banc* judgment of 22 March 2011 in matter no. 3-3-1-85-09, paragraph 110).

**49.** 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).

**50.** The Supreme Court *en banc* finds that upon compensation for unlawful damage caused by exclusion from office in pre-trial criminal proceedings § 7 of the SLA is not applicable, and amends the case-law of the Administrative Law Chamber of the Supreme Court regarding this issue (see e.g. the Administrative Law Chamber of the Supreme Court judgment of 20 November 2008 in matter no. 3-3-1-47-08, paragraph 11). Damage can be compensated for on the basis of § 7 of the SLA if the damage was caused by an unlawful administrative act or administrative measure. Acts issued and measures taken in pre-trial criminal proceedings are not administrative acts and administrative measures for the purposes of § 7 of the SLA.

**51.** A prerequisite for compensation for damage under § 7 of the SLA is establishment of the unlawfulness of an administrative act or administrative measure. The lawfulness of acts issued and measures taken in administrative proceedings is verified by an administrative court pursuant to the Administrative Procedure Act and the Code of Administrative Court Procedure. The Code of Administrative Court Procedure which grants administrative courts the competence to review actions concerning compensation for damage caused in public law relationships (§ 3(1)1 and 2), § 6(3)2) of the CACP) does not give an answer to the question whether administrative courts may, upon reviewing actions, assess the lawfulness of acts and measures in

pre-trial criminal proceedings and if so, then to what extent.

**52.** Criminal proceedings have been regulated separately from exercise of other public authority and 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. Application of the provisions of the State Liability Act to compensation for damage caused in criminal proceedings due to the lack of a specific regulatory framework of compensation for damage caused in pre-trial criminal proceedings may result in subjection of decisions of general courts to the control of administrative courts (the Supreme Court *en banc* judgment of 22 March 2011 in matter no. 3-3-1-85-09, paragraphs 127–128).

**53.** The Supreme Court *en banc* is of the opinion that the applicable law lacks grounds for compensation for unlawful 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 or in any other act.

### III

**54.** According to the action, the exclusion of Ülar Kaas from office became unlawful as of 15 March 2007.

**55.** Based on the need to effectively protect fundamental rights, the Supreme Court *en banc* deems it possible to assess in this present matter whether Ülar Kaas was caused damage in pre-trial criminal proceedings lawfully or unlawfully. In a situation where there is no regulatory framework providing for grounds and procedure for compensation for damage caused by criminal proceedings, the court cannot fail to compensate for the damage. The proceedings in the criminal matter have terminated, for which reason Ülar Kaas lacks the option to claim establishment of the unlawfulness of the exclusion from office in any other proceedings. The Supreme Court *en banc* assesses the activity in pre-trial criminal proceedings only to the extent inevitably necessary for the effective protection of the fundamental rights of Ülar Kaas.

**56.** In the assessment of the Supreme Court *en banc*, the administrative court and the circuit court reached the correct conclusion that the exclusion of Ülar Kaas from office from 15 March 2007, when § 289 of the PC was repealed, until 11 September 2007 (including) was unlawful.

**57.** The Prosecutor's Office annulled by an order of 25 September 2007 the exclusion of Ülar Kaas from office because on 11 September 2007 it had terminated the pre-trial criminal proceedings. The criminal proceedings were terminated on the basis of § 200 of the CCP because circumstances precluding criminal proceedings referred to in § 199 of the CCP became evident in the pre-trial proceedings. In the assessment of the Prosecutor's Office, the conduct of Ülar Kaas lacked grounds for criminal proceedings (§ 199(1)1 of the CCP). The grounds for a criminal proceeding are constituted by ascertainment of criminal elements in information which refers to commission of a criminal offence (§ 194 of the CCP). According to the order, the Prosecutor's Office did not have an option to re-qualify the act of Ülar Kaas. Considering the circumstances, the bodies conducting the proceedings were under the obligation arising from §§ 200 and 199 of the CCP to terminate the criminal proceedings in regard to Ülar Kaas and his exclusion from office no later than as of 15 March 2007. Due to the unlawful failure to act of the bodies conducting the proceedings, the exclusion of Ülar Kaas from office was unlawful from 15 March 2007 until 11 September 2007.

**58.** Relevant is not the argument of the Office of the Prosecutor General that in the opinion of the Prosecutor's Office Ülar Kaas was guilty of commission of a criminal offence and if the criminal matter had reached the court before 15 March 2007, Ülar Kaas would have been convicted. A person may be convicted of committing a criminal offence only by a court judgment. It depended on the activity of the respondents whether and when the criminal matter of Ülar Kaas reaches the court and the court can give an assessment on his activity.

### IV

**59.** The Supreme Court *en banc* found that from § 25 of the Constitution arises the fundamental right to claim compensation for unlawful damage, and from §§ 14 and 15 of the Constitution in conjunction arises

the fundamental right to effective judicial proceedings for the protection of a person's rights. The Supreme Court *en banc* also held that the applicable law lacks a regulatory framework which would enable compensation for unlawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings.

**60.** The lack of the regulatory framework infringes intensively the fundamental right arising from § 25 of the Constitution to claim compensation for unlawful damage, and the right to effective judicial proceedings arising from §§ 14 and 15 of the Constitution in conjunction. Compensation for unlawful proprietary damage caused by exclusion from office in criminal proceedings is precluded. 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.

**61.** Based on the aforementioned, the Supreme Court *en banc* finds that the lack of a regulatory framework which would prescribe an option to compensate for unlawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings infringes disproportionately the fundamental rights provided for in §§ 25, and 14 and 15 of the Constitution. Pursuant to § 15(1)2<sup>1</sup>) 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 for unlawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings to be in conflict with §§ 11, 14, 15 and 25 of the Constitution.

**62.** In case of lack of a regulatory framework providing for grounds and procedure for compensation for damage, unlawful damage shall be compensated for under § 25 of the Constitution, taking account of the general principles of compensation for damage.

## V

**63.** The Supreme Court *en banc* has found that from § 32 of the Constitution arises the state's obligation 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. 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 (the Supreme Court *en banc* judgment of 30 August 2011 in matter no. 3-3-1-15-10, paragraphs 49–51).

**64.** The Supreme Court *en banc* held in its judgment of 30 August 2011 in matter no. 3-3-1-15-10 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 or in any other act (paragraph 56 of the judgment referred to). The Supreme Court *en banc* found that the lack of the regulatory framework infringed disproportionately the fundamental rights provided for in §§ 32, and 14 and 15 of the Constitution, and declared the lack of the regulatory framework to be in conflict with the Constitution (paragraph 64 of the judgment referred to).

**65.** The Supreme Court *en banc* held in the judgment referred to that due to the lack of the regulatory framework, proprietary damage caused by lawful exclusion from office shall be compensated for, to a fair extent, under the Constitution. Upon compensation for damage it is not possible to apply by way of analogy § 16 of the SLA which provides for grounds for compensation for proprietary damage caused by a lawful administrative act or administrative measure, but the said provision may be deemed as an example upon compensation for damage (the Supreme Court *en banc* judgment of 30 August 2011 in matter no. 3-3-1-15-10, paragraph 65).



## VI

**66.** Ülar Kaas found in his action that the exclusion from office was lawful until 15 March 2007 and the lawful proprietary damage shall be compensated for. None of the participants in the proceedings of the administrative matter have contested this opinion. Based on this and the fact that the applicable law lacks a regulatory framework which would provide for clear competence of administrative courts to assess, upon compensation for damage, the lawfulness of acts and measures in pre-trial criminal proceedings, the Supreme Court *en banc* deems it possible to presume that from 26 November 2002 until 14 March 2007 the exclusion of Ülar Kaas from office was lawful and the damage was caused lawfully.

**67.** The Supreme Court *en banc* assesses whether the restriction of the right of ownership of Ülar Kaas accompanying the lawful exclusion from office from 26 November 2002 until 14 March 2007 in pre-trial criminal proceedings was so extraordinary that from § 32 of the Constitution arises an obligation to compensate to Ülar Kaas for proprietary damage to a fair extent. The Supreme Court *en banc* notes that exclusion from office in pre-trial criminal proceedings serves public interests. Establishing the truth in criminal proceedings is a significant public interest and a person has the obligation to endure the performance of criminal procedural acts in respect of him or her and the restriction of his or her fundamental rights (the Supreme Court *en banc* judgment of 30 August 2011 in matter no. 3-3-1-15-10, paragraphs 43–44).

**68.** The Tallinn Administrative Court and the Tallinn Circuit Court found that the lawful exclusion from office infringed the rights of Ülar Kaas in an extraordinary manner, and applied § 16(1) of the SLA. The respondents found that the rights of Ülar Kaas were not infringed in an extraordinary manner.

**69.** The Supreme Court *en banc* finds that the exclusion from office restricted the right of ownership of Ülar Kaas arising from § 32 of the Constitution in an extraordinary manner. The restriction was extraordinary, above all, due to the prolonged exclusion from office. Ülar Kaas was unable to hold his office for more than four years and he lost the option to receive wages during that time. The intensity of the infringement is somewhat diminished by the fact that Ülar Kaas could have found a temporary employment or engaged in entrepreneurship during the exclusion from office. He also could have quit his job at the Police Board and found a new permanent employment. However, it has to be taken into account here that Ülar Kaas could not have been employed in public service 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 not permanent but a temporary restriction and Ülar Kaas could not have foreseen the duration of this restriction. In such a situation it is complicated to find temporary employment for an undefined term or to engage in entrepreneurship.

## VII

**70.** The Supreme Court *en banc* agrees with the reasoning and opinion of the Tallinn Administrative Court that a fair compensation to Ülar Kaas for unlawful proprietary damage was 20,000 kroons. Based on the general principles of compensation for damage, the Supreme Court *en banc* takes into account also the conduct of the person who suffered the damage. Ülar Kaas had the option to protect his rights during the criminal proceedings and this could have decreased or prevented the damage. The Supreme Court *en banc* agrees with the administrative courts that it was presumable that Ülar Kaas as a police officer was familiar with the options to protect and exercise his rights.

**71.** The administrative courts applied § 7 of the SLA upon compensation for unlawful damage to Ülar Kaas. The Supreme Court *en banc* found above that damage caused in criminal proceedings cannot be compensated for on the basis of § 7 of the SLA and the applicable law lacks a regulatory framework which would enable compensation for unlawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings (see paragraphs 48–53 of this judgment). The Supreme Court *en banc* declared the lack of the

regulatory framework to be in conflict with §§ 11, 14, 15 and 25 of the Constitution (paragraph 61 of this judgment).

**72.** The Supreme Court *en banc* agrees with the reasoning and opinion of the Tallinn Administrative Court also in the part that a fair compensation to Ülar Kaas for lawful proprietary damage was 130,000 kroons.

**73.** The administrative courts applied § 16(1) of the SLA upon compensation for lawful damage to Ülar Kaas. The Supreme Court *en banc* held in its judgment of 30 August 2011 in matter no. 3-3-1-15-10 that § 16 of the SLA is not applicable and 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. The Supreme Court *en banc* declared the lack of the regulatory framework unconstitutional (see paragraph 64 of this judgment; the Supreme Court *en banc* judgment of 30 August 2011 in matter no. 3-3-1-15-10, paragraphs 56 and 64).

**74.** 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 16 February 2010 and for the Tallinn Administrative Court judgment of 31 March 2009 in administrative matter no. 3-09-202, and replaces them with the reasoning for the present Supreme Court *en banc* judgment. The Supreme Court *en banc* does not amend the decisions of the judgments of the administrative courts.

## VIII

**75.** The Supreme Court *en banc* dismisses the appeals in cassation of the Police and Border Guard Board and the Office of the Prosecutor General.

**76.** The Police and Border Guard Board and the Office of the Prosecutor General found in the appeals in cassation that filing the appeals was exempt from state fees and requested annulment of the Tallinn Circuit Court ruling of 11 June 2009 which required payment of a state fee, and refund of the paid state fee. The appellants in cassation proceeded from § 145 of the Code of Civil Procedure.

**77.** The Supreme Court *en banc* does not agree with the opinion of the appellants in cassation that administrative authorities are exempt from payment of state fees, on the basis of § 145 of the Code of Civil Procedure, for filing appeals in administrative court proceedings. The Code of Administrative Court Procedure and the State Fees Act (SFA) regulate in an exhaustive manner payment of state fees in administrative court proceedings and therefore there is no cause to apply § 5(1) of the CACP and § 145 of the Code of Civil Procedure. Neither the CACP nor the SFA prescribe exemption from payment of state fees and securities for the Republic of Estonia and the administrative authorities representing it.

**78.** § 22(1)3) of the SFA provides in an exhaustive manner for grounds when an appeal is exempt from state fees: a state fee is not charged for hearing of a claim for compensation for financial damage caused by unlawful conviction, unlawful criminal prosecution, unlawful preventive detention, other unfounded deprivation of liberty or unlawful imposition of punishment for a misdemeanour.

**79.** The Supreme Court *en banc* is of the opinion that the said norm does not provide for exemption from state fees for filing a claim for compensation for damage caused by exclusion from office as means for securing criminal proceedings. Upon compensation for damage caused by application of means of securing criminal proceedings, § 22(1)3) of the SFA prescribes exemption from state fees only in case of a claim for compensation for proprietary damage caused by detention. Exclusion from office is also not covered by the definition "criminal prosecution" used in § 22(1)3) of the SFA which is based on the repealed Code of Criminal Procedure and Criminal Code. The Supreme Court regarded criminal prosecution as a process in time which started from prosecution (see the full composition of the Criminal Chamber of the Supreme Court judgment of 12 March 1996 in matter no. 3-1-1-32-96; also judgment of 3 October 2008 in matter no. 3-1-42-08, paragraph 11). Limitation period for a criminal offence ended with prosecution. Criminal prosecution did not cover criminal procedural acts performed prior to prosecution and an action filed for

compensation for proprietary damage caused by them was not exempt from state fees. The applicable Code of Criminal Procedure and Penal Code lack an independent institute of criminal prosecution, for which reason the wording of § 22(1)3 of the SFA is no longer up-to-date.

**80.** In keeping with the aforementioned, filing of a claim for compensation for proprietary damage caused by exclusion from office is not exempt from state fees, and the Police and Border Guard Board and the Office of the Prosecutor General were obligated to pay a state fee upon the filing of the appeal.

**81.** The securities paid upon the filing of the appeals in cassation shall be included in public revenues.

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