Constitutional judgment 3-3-1-22-11

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-3-1-22-11
Date of judgment	29 November 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, Ivo Pilving, Jüri Põld, Harri Salmann and Tambet Tampuu
Court Case	An action of Ljudmilla Dovženko for compensation for damage caused by the Republic of Estonia.
Contested judgment	Tallinn Circuit Court ruling of 29 December 2010 in administrative matter no. 3-09-2215
Basis of proceeding	Ljudmilla Dovženko’s appeal against a court ruling
Hearing	Written proceedings

DECISION

1. To declare that § 56(11) of the State Fees Act in conjunction with Annex 1 thereto (in the wording valid from 1 January 2009 until 31 December 2010), which prescribed that upon filing an action with the administrative court for compensation for damage, a state fee in the amount of 130,000 kroons was required to be paid on a claim in the amount of 2,500,000 to 3,000,000 kroons, were in contradiction with the Constitution.
2. To determine the state fee to be paid on the action of Ljudmilla Dovženko to be 4,425 euros and 88 cents (69,250 kroons).
3. To satisfy Ljudmilla Dovženko's appeal against a court ruling.
4. To annul the Tallinn Circuit Court ruling of 29 December 2010 and the Tallinn Administrative Court ruling of 4 November 2010 in administrative matter no 3-09-2215 and to refer the administrative matter to the Tallinn Administrative Court for decision on acceptance.
5. To return the security.

FACTS AND COURSE OF PROCEEDINGS

1. Based on § 14(1) of the State Liability Act (SLA), Ljudmilla Dovženko filed an action with the administrative court for compensation for proprietary and non-proprietary damage caused by the Republic of Estonia by refusing to issue legislation of general application.
[---]
The person who filed the action also submitted a request for exemption from the payment of a state fee because requiring a state fee on an action filed under § 14 of the SLA for compensation for damage is unconstitutional.

2. By the Tallinn Administrative Court ruling of 12 February 2010 the action of L. Dovženko for exemption from the payment of a state fee was dismissed and a term was set for the payment of the state fee.
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3. L. Dovženko filed an appeal against the administrative court ruling of 12 February 2010 with the Tallinn Circuit Court requesting the annulment of the administrative court ruling and satisfaction of the request or alternatively application of a fee rate of 0.05 per cent.
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4. By the Tallinn Circuit Court ruling of 7 April 2010, L. Dovženko's appeal against the court ruling was dismissed and the administrative court ruling was not amended.
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5. By the Administrative Law Chamber of the Supreme Court ruling of 12 August 2010, L. Dovženko's appeal against the circuit court ruling of 7 April 2010 was not accepted.

6. By the Tallinn Administrative Court ruling of 4 November 2010, the action of L. Dovženko was returned due to failure to pay the required state fee.

7. L. Dovženko filed an appeal against the administrative court ruling of 4 November 2010 requesting that the circuit court annul the administrative court ruling and render a new ruling accepting the action. It was stated in the appeal against the court ruling that the person who filed the action was unable to pay the required state fee due to her economic situation because nearly her entire income is spent on repayment of a housing loan, and the administrative court ruling violates the fundamental rights of the person who filed the action, including the right to a fair court hearing, the right to efficient proceedings for the protection of the

person himself or herself, and the right to protection against the arbitrary exercise of state authority.

8. By the Tallinn Circuit Court ruling of 29 December 2010, L. Dovženko's appeal against the court ruling was dismissed and the administrative court ruling of 4 November 2010 was not amended. The circuit court explained that it verifies only the legality of the administrative court ruling of 4 November 2010, and the statements of the person who filed the action concerning the inability to pay the state fee are not relevant. Since the person who filed the action failed to pay the state fee required by the administrative court ruling of 12 February 2010, the return of the action was lawful. The court had no room for discretion in terms of making a different decision.

Proceedings in the Supreme Court

9. On 20 January 2011, L. Dovženko filed an appeal against a court ruling with the Supreme Court for the annulment of the Tallinn Circuit Court ruling of 29 December 2010 and the Tallinn Administrative Court ruling of 4 November 2010.
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[Paragraph 10 not translated]

11. The full panel of the Administrative Law Chamber of the Supreme Court referred the administrative matter by a ruling of 30 May 2011 under § 70(1^1) of the Code of Administrative Court Procedure (CACP) and § 3(3) of the Constitutional Review Court Procedure Act (CRCPA) for review by the Supreme Court *en banc*. The Chamber had suspicions regarding the constitutionality of § 56(11) of the State Fees Act (SFA), i.e. the requirement that the person who filed the action shall pay a state fee of 130,000 kroons may disproportionally restrict the fundamental rights of the person who filed the action arising from § 15 and § 32 of the Constitution.

[Paragraphs 11.1–16.2 not translated]

DISPUTABLE PROVISIONS

17. Subsection (11) of § 56 "Review of statements of claim, petitions and appeals" of the State Fees Act (RT I 2008, 59, 330; RT I, 22.12.2010, 1):
"(11) If an action is filed with an administrative court for the compensation for damage or return of that which was received by way of unjust enrichment, a state fee of 5 per cent of the amount the payment of which is applied for or of the value of the property the return of which is applied for shall be paid but the amount payable shall not be less than 250 kroons and not more than the amount payable upon filing of an action with the same value of action in the course of a civil court proceeding."

18. "Annex 1 to the State Fees Act
FULL STATE FEE RATES FOR FILING OF PETITIONS IN CIVIL PROCEEDINGS (IN KROONS) (RT I 2008, 59, 330 – entry into force 01.01.2009)
Cost of civil matter up to Full state fee rate
(inclusive)
[---]
2,500,000 115,000
3,000,000 130,000"

OPINION OF THE SUPREME COURT *EN BANC*

19. The Supreme Court *en banc* finds the relevant provision (I) and thereafter assesses its constitutionality (II). Finally, the Supreme Court *en banc* adjudicates the matter of the constitutional amount of a state fee and the administrative matter (III).

I

20. The appellant L. Dovženko requested from the administrative court compensation for proprietary and non-proprietary damage in the amounts of 1,355,993 kroons and 1,428,496 kroons respectively, total of 2,784,489 kroons. Pursuant to § 10(6) and § 84(1) of the CACP and § 56(11) of the SFA, the appellant was required to pay a state fee upon filing an action for compensation for damage. On a claim of such volume the appellant should have paid a state fee of 130,000 kroons under Annex 1 to the SFA. Upon filing of the action, L. Dovženko failed to pay the state fee, but submitted a request for exemption from the payment of the state fee. By the Tallinn Administrative Court ruling of 12 February 2010 the action of L. Dovženko for exemption from the payment of the state fee was dismissed under § 11(2) of the CACP (clause 1)) and a term was set for the payment of the state fee (clause 2)). Since the Code of Administrative Court Procedure does not prescribe an option to file an appeal against a court ruling on refusal to proceed with the action and since the ruling does not hinder the further conduct of proceedings, an appeal may not be filed against that ruling (§ 47^1(1) of the CACP).

21. If an action contains deficiencies and the person who filed the action fails to eliminate the deficiencies by the term specified in the ruling on refusal to proceed with the action (e.g. to pay a fee), the action shall be returned under § 11(3) of the CACP. By the Tallinn Administrative Court ruling of 4 November 2010, the action of L. Dovženko was returned because she failed to pay the state fee. An appeal may be filed against a court ruling on return of an action, unlike in the case of a court ruling on refusal to proceed with the action (§ 11(8) of the CACP). Since the person who filed the action may file an appeal against a court ruling on return of an action, the justification of a court ruling on refusal to proceed with the action can be verified only in the course of the verification of the court ruling on return of an action. The verification of justification includes also the verification of whether the legal norm which gave rise to the refusal to proceed with the action is constitutional. L. Dovženko filed an appeal against the administrative court ruling of 4 November 2010 which was dismissed by the Tallinn Circuit Court ruling of 29 December 2010, and the administrative court ruling of 4 November 2010 was not amended. Also the Supreme Court can verify the constitutionality of a fee in a regular appeal procedure only on the bases of an appeal filed against return of an action or refusal to refund overpaid state fee (see also the Supreme Court *en banc* judgment in court case no. 3-2-1-62-10, paragraphs 28 and 31).

22. The court returned the action of L. Dovženko and justified it with the fact that the person who filed the action with the administrative court failed to pay a state fee in the amount of 130,000 kroons on the claim for compensation for proprietary and non-proprietary damage in the amount of 2,784,489 kroons. Since the courts returned L. Dovženko’s appeal against a court ruling because the state fee was not paid, the Supreme Court can verify, on the basis of L. Dovženko's appeal against a court ruling filed for the annulment of the Tallinn Circuit Court ruling of 29 December 2010 and the Tallinn Administrative Court ruling of 4 November 2010, the constitutionality of the norm which prescribed the state fee rate which gave rise to the refusal to proceed with the action.

The state fee rate was provided for by § 56(11) of the SFA in conjunction with Annex 1 thereto (in the wording valid from 1 January 2009 until 31 December 2010) which prescribed that upon filing an appeal with the administrative court for compensation for damage, a state fee in the amount of 130,000 kroons was required to be paid on a claim in the amount of 2,500,000 to 3,000,000 kroons. Consequently, based on the circumstances of the court case, the relevant provision, within the meaning of the first sentence of § 14(2) of the CRCPA and the constitutionality of which the Supreme Court assesses, is § 56(11) of the SFA in conjunction with Annex 1 thereto because the obligation to pay a state fee and the amount thereof is established on the basis of the said legal norm. In the case of constitutionality of the disputable provisions, the administrative court should have rendered a judgment different from that in the case of unconstitutionality of the disputable provisions (see the Supreme Court *en banc* judgment of 28 October 2002 in court case no. 3-4-1-5-02, paragraph 15).

The Supreme Court *en banc* finds that the permissibility of the present case does not depend on how the issue of exemption from the payment of the state fee was resolved but, first and foremost, on whether the disputable provision is relevant and whether the Administrative Law Chamber has justified reason to believe

that it is not in conformity with the Constitution (§ 3(3) of the CRCPA).

II

23. L. Dovženko filed an action with the Tallinn Administrative Court for compensation for proprietary and non-proprietary damage caused by the Republic of Estonia by refusing to issue legislation of general application. Thus, she exercised every person's right of recourse to the courts in the case of violation of his or her rights and freedoms, arising from § 15(1) of the Constitution. This is a fundamental right which must guarantee, without gaps, the judicial protection of rights (the Supreme Court *en banc* ruling of 22 December 2000 in court case no. 3-3-1-38-00, paragraph 15). The right to judicial protection prescribed by §§ 13–15 of the Constitution includes persons' right to file an action with the court in the case of violation of rights and freedoms as well as the state's obligation to establish proper procedures for the protection of fundamental rights which is fair and guarantees efficient protection of persons' rights (see e.g. the Constitutional Review Chamber of the Supreme Court judgment of 14 April 2003 in court case no. 3-4-1-4-03, paragraph 16).

24. Infringement of a right is any adverse affect on the sphere of protection thereof (see e.g. the Constitutional Review Chamber of the Supreme Court judgment of 6 March 2002 in court case no. 3-4-1-1-02, paragraph 12). Providing for an obligation to pay a state fee on a claim for compensation for damage filed with the administrative court and the amount of the fee infringe the right of recourse (the first sentence of § 15(1) of the Constitution). A person may have recourse to the courts and obtain a substantive judgment from the court concerning the alleged violation of the person's rights only if he or she pays the state fee or if he or she is partially or fully exempted from the payment of the state fee. If the required state fee has not been paid and the person is not exempted from the obligation to pay the state fee, the acceptance of the case and a substantive judgment are excluded. In such a case the court does not verify whether the person's rights have been violated.

25. Since in the adoption of § 56(11) of the SFA in conjunction with Annex 1 thereto (in the wording valid from 1 January 2009 until 31 December 2010) the legislator has adhered to procedural, competence and formal requirements and the provision has legal clarity, the provision is formally constitutional.

26. Next, the Supreme Court *en banc* analyses the material constitutionality of § 56(11) of the SFA and Annex 1 thereto (in the wording valid from 1 January 2009 until 31 December 2010). For that purpose, the permissible objectives of an infringement of the scope of protection of § 15(1) of the Constitution have to be determined and the proportionality of the state fee of 130,000 kroons as a means with respect to these objectives has to be assessed.

27. The Supreme Court *en banc* found in court case no. 3-2-1-62-10 (paragraph 44) that since a state fee is established according to § 4(1) of the SFA based on the costs related to the performance of an act (cost principle), the first objective of the state fee is compensation in full or in part by the participant in the act for the costs incurred by the state in performing the act in public law (see also the Supreme Court *en banc* judgment of 22 December 2000 in court case no. 3-4-1-10-00, paragraph 24). From § 4(2) of the SFA arises also the possibility to establish a state fee based on the purpose of an act, the benefits received as a result of the act, or material public interest and on different basis than the cost principle. The Supreme Court *en banc* considers the objective of the regulatory framework of state fees to be also procedural economy. The European Court of Human Rights has similarly defined the objective of state fees as protection of the judicial system from burdensome appeals (*FC Mretebi v Georgia*, request no. 38736/04, paragraph 48).

In the second reading of the draft legislation 194 SE the speaker representing the Legal Affairs Committee of the Riigikogu justified the general two to five times increase of state fees by unreasonably low state fee rates up to then and by the need to change civil court procedure to so-called cost-oriented, also by the need to avoid excessive and vexatious appeals, and to find additional finances for the state budget (XI Riigikogu shorthand notes, 3 December 2008).

As of 1 January 2009 the state fees in civil court procedure and consequently, in administrative matters regarding compensation for damage through § 56(11) of the SFA were increased. From 1 January 2007 until 31 December 2008, in the administrative court a state fee of 69,250 kroons had to be paid on claims for compensation for damage in the amount of 2,700,000 to 2,800,000 kroons, and then as of 1 January 2009 the state fee was 130,000 kroons on a claim for compensation for damage in the same amount.

28. Regarding the objective of the restriction on a fundamental right provided for in § 24(5) of the Constitution the Supreme Court *en banc*concluded in court case no. 3-2-1-62-10 (paragraph 45) that permissible according to the Constitution can be deemed the objective that in an action, at least in case of monetary disputes, the state costs on administration of justice shall be borne on the account of the fees paid by the participants in the proceeding (participation of the participants in bearing the legal costs principle). The Supreme Court *en banc* found that this principle cannot be expanded in a way that the participants should similarly fully finance also the court proceedings where public interests are at stake, e.g. disputes regarding children and family, disputes with the state or, for example, offence proceedings. However, the Supreme Court *en banc* held that legitimate cannot be deemed the possible objective of court fees to earn extra income for the state and to finance from it other expenses of the state if the fee is higher than is necessary for bearing the legal costs and for ensuring procedural economy because it would be in contradiction with the nature of fees arising from § 113 of the Constitution.

The Supreme Court *en banc* also found that in civil matters, the legitimate objectives of requiring the payment of a state fee on appeals are the participation of the participants in the proceeding in bearing the costs of administration of justice and procedural economy. Provision of the obligation to pay a state fee upon having recourse to the courts serves in civil court procedure the objective to guarantee economical use of state budget funds taking account of public interests, more precisely participation in bearing the costs of administration of justice and procedural economy.

29. Restrictions of the fundamental right provided for in the first sentence of § 15(1) of the Constitution can only be justified by other fundamental rights or constitutional values (the Supreme Court *en banc* judgment of 16 May 2008 in court case no. 3-1-1-88-07, paragraph 43 and case-law referred to therein).

29.1. Procedural economy is a legal value of constitutional ranking (the Supreme Court *en banc* judgment of 17 March 2003 in court case no. 3-1-3-10-02, paragraph 9). The Supreme Court *en banc* is of the opinion that in administrative court procedure a legitimate objective of state fees is also procedural economy in order to avoid, inter alia, excessive and vexatious appeals since it may result in the court system's inability to offer effective legal protection within a reasonable time (see also the Constitutional Review Chamber of the Supreme Court judgment of 15 December 2009 in court case no. 3-4-1-25-09, paragraph 23). The obligation to pay a state fee in the amount provided for in § 56(11) of the SFA in conjunction with Annex 1 thereto (in the wording valid from 1 January 2009 until 31 December 2010) may prevent persons from having recourse to the courts which results in a lower number of heard court cases and thus, the hearing of court cases in process becomes more efficient. As a result, other participants in proceedings connected to such appeals, the court system and the state budget are less burdened.

29.2. The Supreme Court *en banc* is of the opinion that in the interests of using state budget funds economically and in public interests, also the principle of bearing, in part, the costs of administration of justice in administrative matters can be deemed a constitutional value. However, when leaving the costs of administration of justice to be borne by the participants in the proceedings, it has to be taken into account that in addition to adjudication of the legal dispute, the administrative court system needs to carry out the principle of separation of powers and balance. Since the judicial power verifies also the activity of the executive and legislative authority of the state, participants in proceedings in administrative matters are not required to participate in bearing the costs incurred upon hearing a court case in full, but only in part. Therefore, the objective, pursuant to which in the case of appeals for compensation for damage in administrative matters a participant in the proceedings bears only in part the costs incurred by the state in administration of justice in his or her own court case, is legitimate.

30. The Supreme Court *en banc* holds that a state fee of 130,000 kroons is an appropriate measure for carrying out the principle of procedural economy and the objective of bearing the costs of administration of justice in part.
The requirement to pay a state fee of 130,000 kroons on an action for compensation for damage may prevent the filing of excessive and vexatious actions for compensation for damage. A state fee in such an amount also covers the costs of administration of justice at least in part.

31. The Supreme Court *en banc* holds that a state fee of 130,000 kroons is not a necessary measure for carrying out the principle of procedural economy or the objective of bearing the costs of administration of justice in part.

31.1. A state fee of 130,000 kroons is *ca*. 30 times the minimum wage (§ 1 of the Government of the Republic regulation of 11 June 2009 no. 90 "Establishment of minimum wages") and *ca*. 10.5 times the average monthly wage (data of the Statistical Office regarding the first quarter of 2011).

However, according to the regulatory framework of fees valid until 1 January 2009, the person who filed the action would have been required to pay upon filing the action a fee nearly half as much, i.e. 69,250 kroons which would be *ca*. 16 times the minimum wage and *ca*. 5.6 times the average monthly wage. Considering the average monthly wage and the minimum wage in Estonia, a state fee in such an amount or somewhat smaller may also prevent people from filing excessive and vexatious appeals, and achieve the objective of procedural economy as efficiently while restricting the rights of persons less. However, the higher the state fees the more the courts have to deal with adjudicating requests for exemption from the payment of a state fee. An appeal all the way to the Supreme Court may be filed against a ruling dismissing an appellant's request for exemption from the payment of a state fee. In such a case, the courts' resources are spent more on adjudicating procedural and not substantive issues.

31.2. In addition to state fees, return of actions also contributes to procedural economy. Pursuant to § 11(3^1)5) of the CACP, an administrative court shall return an action if the person filing the action cannot have the right of recourse to administrative court, presuming that the circumstances alleged by him or her have been proved. According to the case-law of the Administrative Law Chamber of the Supreme Court, an action may be returned under the said provision if the administrative act or administrative measure against which the action is filed cannot obviously violate the rights of the person who filed the action or restrict his or her freedoms (the Administrative Law Chamber of the Supreme Court ruling of 15 May 2008 in court case no. 3-3-1-9-08, paragraph 15; ruling of 8 September 2008 in court case no. 3-3-1-38-08, paragraph 13; ruling of 11 September 2008 in court case no. 3-3-1-34-08, paragraph 9; ruling of 30 October 2008 in court case no. 3-3-1-45-08, paragraph 11; ruling of 23 October 2008 in court case no. 3-3-1-53-08, paragraph 8), and the action obviously has no perspective, i.e. the achievement of the desired objective by the means of the filed action is not possible (the Administrative Law Chamber of the Supreme Court ruling of 22 June 2010 in court case no. 3-3-1-20-10, paragraph 10). Consequently, irrespective of state fees the regulatory framework of return of actions guarantees that administrative courts need not hear unfounded matters. However, the state fees are in principle necessary in order to force a person to consider the necessity of having recourse to the courts in matters which are unlikely to succeed but which are obviously not without a perspective in the terms of § 11(3^1)5) of the CACP.

31.3. According to the data of the Ministry of Justice regarding the year 2009, the average cost of administrative proceedings in the administrative court was 10,749 kroons in 2009. Also a state fee of 69,250 kroons would exceed that many times. Consequently, a state fee in such an amount or somewhat smaller also guarantees the achievement of the objective of bearing the costs of administration of justice in part.

31.4. In keeping with the aforementioned, the Supreme Court *en banc* is of the opinion that a state fee of 69,250 kroons or somewhat smaller may, *inter alia*, prevent the thoughtless filing of excessive and vexatious actions and cover the costs of administration of justice, and would probably be as effective as a state fee of 130,000 kroons. At the same time, a state fee of 69,250 kroons or somewhat smaller would burden persons

less. Application of § 11(3^1)5) of the CACP would guarantee that the court need not hear actions which obviously have no perspective.

32. Thus, the Supreme Court *en banc* declares, under § 15(1)5) of the CRCPA, that § 56(11) of the SFA and Annex 1 thereto (in the wording valid from 1 January 2009 until 31 December 2010) in their conjunction were in contradiction with the Constitution in the part in which they prescribed the obligation to pay a state fee of 130,000 kroons on a claim of 2,500,000 to 3,000,000 kroons upon filing an action for compensation for damage with the administrative court.
The Supreme Court *en banc* lacks the option to declare the norms in contradiction with the Constitution to be invalid because as of 1 January 2011 a new State Fees Act (RT I 2010, 21, 107) is in force, due to which the state fee rates valid up to 31 December 2010 have been declared invalid.

III

33. Since the Supreme Court *en banc* declared the state fee of 130,000 kroons to be paid upon filing an action for compensation for damage with the administrative court to be in contradiction with the Constitution and that norm shall not be applied, a state fee which the person who filed the action shall pay on the claim for damages shall be determined.

34. According to the State Fees Act in force up to 31 December 2008, L. Dovženko should have paid a state fee of 69,250 kroons on her action. Although a state fee in such an amount was no longer provided for in the State Fees Act at the time of the filing of the action, the Supreme Court *en banc* holds that the gap can, nonetheless, be filled with the said state fee rate. A state fee of 69,250 kroons guarantees in the administrative court in matters of compensation for damage both the objective of bearing the costs of administration of justice and the objective of procedural economy, and serves at the same time in matters of compensation for damage as a proportional measure for achieving those objectives. Consequently, the Supreme Court *en banc* determines the state fee which the person who filed the action shall pay to be 69,250 kroons (4,425 euros and 88 cents).

If the person who filed the action is unable to pay a state fee in such an amount, she has the right to file a request for exemption from the payment of the state fee (§ 91(1) of the CACP).

35. The Supreme Court *en banc* satisfies Ljudmilla Dovženko's appeal against a court ruling, annuls the Tallinn Circuit Court ruling of 29 December 2010 and the Tallinn Administrative Court ruling of 4 November 2010 in administrative matter no 3-09-2215 and refers the administrative matter to the Tallinn Administrative Court for decision on acceptance.

The security shall be returned (§ 90(2) of the CACP).

A dissenting opinion of the justice of the Supreme Court Tõnu Anton on the Supreme Court *en banc* judgment in administrative matter no. 3-3-1-22-11, which the justices of the Supreme Court Indrek Koolmeister and Ivo Pilving have concurred with

The majority of the Supreme Court *en banc* decided (paragraph 2 of the decision) that the person who filed the action shall pay a state fee of 4,425 euros and 88 cents (69,250 kroons), and deemed such a fee proportional (paragraph 34 of the judgment).

I find that a fee in such an amount is not proportional and the Supreme Court *en banc* has not justified the merits of the contrary position. I concur with the majority of the Supreme Court *en banc* that also a fee in the amount of 4,425 euros and 88 cents guarantees in matters of compensation for damage the bearing, by the participants, of the costs of administration of justice and facilitates the achievement of the objective of procedural economy. However, I do not concur with the majority of the Supreme Court *en banc* in respect of

the final conclusion – a fee in such an amount is an excessive restriction on the constitutional right of appeal, i.e. according to the verification of proportionality scheme, not a moderate measure for the achievement of the aforesaid measure.

The average cost of administration of justice in the proceeding of one administrative matter in the court of first instance was according to the Ministry of Justice 10,749 kroons in 2009, i.e. 6.5 times less than the fee determined by the Supreme Court *en banc*. The Supreme Court *en banc* did express an opinion (paragraph 29.2 of the judgment) that in administrative matters the participants in the proceedings should bear the costs of administration of justice only in part by paying a fee, but failed to eliminate the obvious contradiction between such an opinion and the amount of the fee determined by the Supreme Court *en banc*. On the basis of the minimum wage and the average monthly wage I am convinced that also a fee many times smaller is efficient enough to prevent the thoughtless filing of unfounded appeals. In the case of so-called disputable actions (including the action filed in this matter), a fee in the amount determined by the Supreme Court *en banc* is an excessive impediment upon exercise of the constitutional right of appeal. In filing a disputable action, the person filing the action shall consider the possibility that the procedural expenses (including the fee) shall be borne both in the first and the second instance. In the case of a fee in the amount determined by the Supreme Court *en banc*, the nature of the right of appeal is distorted in terms of the second sentence of § 11 of the Constitution because in most cases, the filing of disputable actions must be waived due to inability to bear the procedural costs.

The situation is not sufficiently alleviated by the possibility to request for exemption from the payment of the fee in part or in full. The basis for exemption from the payment of the fee is not the excessive amount of the fee but the inability of the specific person filing an action to pay the fee. If most of the persons filing an action should be exempted from the payment of a fee in full or in part, the amount of the fee is not reasonable. It is unfounded to presume that most of the persons filing an action with a claim in an equal amount can bear the fee expenses alone in the court of first and second instance in the total amount of 8,850 euros (138,500 kroons).

The option of administrative courts to verify the lawfulness and constitutionality of the activity of the executive and legislative authority of the state should not significantly depend on whether or not the person filing an action is able to cover the costs of administration of justice by means of such a high fee. The actual possibility to commence disputes in administrative court proceedings, fair hearing and relevant court judgments are, in conclusion, an important guarantee of the preservation and development of a democratic state based on the rule of law.

In my opinion, the disproportion of the fee determined by the Supreme Court *en banc* is also expressed by the fact that in taxation matters, the maximum state fee is 958 euros and 67 cents (§ 57(16) of the SFA), and in the case of a claim for compensation for non-proprietary damage if the person filing an action leaves the amount of the compensation to be decided at the discretion of the court, the maximum state fee is 319 euros and 55 cents (§ 57(15) of the SFA).

Consequently, the state fee of 4,425 euros and 88 cents is 4.6 times higher than the maximum fee in taxation matters and 13.8 times higher than the fee in the case of a claim for compensation for non-proprietary damage if the person filing an action leaves the amount of the compensation to be decided at the discretion of the court.

A dissenting opinion of the justices of the Supreme Court Peeter Jerofejev and Tambet Tampuu on the Supreme Court *en banc*judgment in court case no. 3-3-1-22-11

We do not concur with the decision of the judgment of the Supreme Court *en banc*. We find that by assessing the conformity of § 56(11) of the State Fees Act (SFA) in conjunction with Annex 1 thereto (in the wording valid from 1 January 2009 until 31 December 2010) with § 15 of the Constitution in a situation

where the amount of the sate fee required from Ljudmilla Dovženko (the person who filed the action) did not prevent her from having recourse to the courts, the Supreme Court *en banc has* assessed the constitutionality of that provision in an abstract manner, departing from the limits of a concrete norm control.

The person who filed the action requested that she be exempted from the payment of the state fee in the amount of 130,000 kroons because she found that it is unconstitutional to require a state fee on an action for compensation for damage filed under § 14 of the State Liability Act. The person who filed the action challenged the administrative court ruling which refused to exempt her from the payment of the state fee. The circuit court did not amend the administrative court ruling and the Supreme Court did not grant a leave to appeal regarding the appeal against the circuit court ruling filed by the person who filed the action. Consequently, the person who filed the action has used the option to request exemption from the payment of a state fee and the courts have settled the matter conclusively. The circuit court held correctly that the statements of the person who filed the action about her economic inability to pay the state fee are no longer relevant. The Supreme Court *en banc* has also not established that the person who filed the action was, due to her economic situation, unable to pay the state fee.

We note that regardless of whether or not the economic situation of the person who filed the action allowed her to pay the required state fee, the Supreme Court *en banc* could have assessed whether § 56(11) of the SFA in conjunction with Annex 1 thereto (in the wording valid from 1 January 2009 until 31 December 2010) are in conformity with § 32 of the Constitution.
