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Constitutional judgment 3-4-1-18-10

RULING
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of case	3-4-1-18-10
Date of ruling	22 February 2011
Composition of court	Chairman Märt Rask, members Peeter Jerofejev, Ott Järvesaar, Lea Kivi, Harri Salmann
Court Case	A request of Oleg Ossinovski
Hearing	Written proceedings
DECISION	**To dismiss the request of Oleg Ossinovski.**

FACTS AND COURSE OF PROCEEDINGS

1. On 20 October 2010, Oleg Ossinovski filed with the Supreme Court an individual request for a constitutional review asking:

1) to declare § 366 7) of the Code of Criminal Procedure (CCP) to be in contradiction with §§ 15 and 14 of the Constitution in the part it does not provide as grounds for review the striking of an appeal filed with the European Court of Human Rights (ECHR) against a court judgment or ruling in the criminal matter subject to review out of the ECHR's list of cases on the basis of Article 37 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) because the appellant and the Government of Estonia have reached a friendly settlement for the purposes of Article 39 of the Convention;

2) to task the Riigikogu with providing in § 366 of the CCP as new grounds for review the striking of an appeal filed with the European Court of Human Rights (ECHR) against a court judgment or ruling in the criminal matter subject to review out of the ECHR's list of cases on the basis of Article 37 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) because the appellant and the Government of Estonia have reached a friendly settlement for the purposes of Article 39 of

the Convention;
3) to establish that not publishing officially every European Court of Justice judgment in Estonian is in contradiction with the first sentence of § 11, and with §§ 14 and 123 of the Constitution in conjunction;
4) if the Supreme Court does not establish the contradiction indicated in the previous paragraph, to establish that applying the European Court of Justice judgments not published in Estonian upon bringing charges and conviction in a criminal court is in contradiction with the Constitution;
5) to establish contradiction of the Competition Act with §§ 11 and 14 of the Constitution in the part the Competition Act does not provide an option to obtain from the Competition Authority a binding preliminary ruling for the verification of the compliance of a planned settlement with the Competition Act;
6) to establish that in the Estonian legal system a person lacks an efficient remedy for the verification of the constitutionality of a legal provision or his or her activity if the person lacks "his or her case" for the purposes of the first sentence of § 15 of the Constitution;
7) to commence a proceeding in the criminal matter no. 1-05-689 and refer the matter to be reviewed by the Criminal Chamber of the Supreme Court.

2. The request was received by the Supreme Court on 25 October 2010.

JUSTIFICATIONS OF THE PERSON WHO SUBMITTED THE REQUEST
3.—7. [Not translated.]

OPINION OF THE CHAMBER
8. O. Ossinovski has filed with the Supreme Court an individual request for a constitutional review concerning issues of penal law and criminal procedure related to his criminal matter no. 1-05-689.

9. The Constitutional Review Court Procedure Act (CRCPA) does not *expressis verbis* establish the possibility to file to the Supreme Court individual complaints. Nevertheless, on the basis of §§ 13, 14 and 15 of the Constitution and the practice of application of the European Convention for the Protection of Human Rights and Fundamental Freedoms, a person can, in exceptional cases, have direct recourse to the Supreme Court for the protection of his or her fundamental rights. This is possible only when the person has no other effective possibility to avail himself or herself of the right to judicial protection, guaranteed by § 15 of the Constitution, i.e. when the state has failed to fulfil the obligation to establish an appropriate procedure for the protection of fundamental rights, a procedure that is fair and guarantees effective protection of persons' rights. In keeping with the foregoing, when a person's right to judicial protection is guaranteed, his or her individual complaint is inadmissible. The complaint is inadmissible irrespective of whether the person has availed himself or herself of the possibility of judicial protection by the time of filing the individual complaint or not, or whether he or she has forfeited this possibility, i.e. has failed to avail himself or herself of the possibility in due time (see the Constitutional Review Chamber of the Supreme Court (CRCSC) ruling of 7 December 2009 in court case no. 3-4-1-22-09, paragraph 7 and the judicial practice referred to therein). Consequently, the Supreme Court is competent to hear an individual complaint only if the complainant does not have and has not had any effective possibilities to request judicial protection against violation of fundamental rights.

10. The requests described in sub-paragraphs 1 and 2 of paragraph 1 of this judgment concern § 366 "Grounds for review" of the Code of Criminal Procedure. The person who submitted the request is of the opinion that it is unconstitutional that the referred section lacks specific grounds for review. Thus, the request contests a provision regulating court procedure.

11. The Supreme Court has previously stated that a person can apply for the commencement of concrete norm control for the review of constitutionality of a provision regulating judicial procedure, including a restriction on the recourse to the court, within the judicial proceeding in the course of which the contested provision is applicable. Namely, pursuant to the second sentence of § 15 (1) of the Constitution, a person has the right, "while his or her case is before the court", to petition for any relevant law, other legislation or procedure to be declared unconstitutional. If a person is of the opinion that a provision of court procedure unconstitutionally restricts his or her rights, e.g. the right to effective protection, the person can request the

court not to apply the norm as unconstitutional one in the hearing of the concrete case. Pursuant to § 15 (2) of the Constitution the courts shall observe the Constitution and shall declare unconstitutional any law, other legislation or procedure which violates the rights and freedoms provided by the Constitution or which is otherwise in conflict with the Constitution. § 152 (1) of the Constitution establishes that in a court proceeding the court shall not apply any law or other legislation that is in conflict with the Constitution. Pursuant to these provisions the court must, either at the request of a person or on its own initiative, declare any procedural provision, the application of which would result in the violation of the person's fundamental rights, unconstitutional to the relevant extent. On the basis of such a decision a constitutional review proceeding in the Supreme Court is commenced (§ 152 (2) of the Constitution; § 4 (3) of the CRCPA).

12. There have been several cases in the case-law of the Supreme Court where the courts, upon accepting a matter for proceeding or during the proceeding, have declared unconstitutional and have not applied procedural provisions that have restricted a person's right to effective remedy (see e.g. the judgments of the CRCSC of 25 March 2004 in matter no. 3-4-1-1-04, and of 9 April 2008 in matter no. 3-4-1-20-07, and the Supreme Court *en banc* (SCEB) judgment of 16 May 2008 in matter no. 3-1-1-88-07). Furthermore, the Supreme Court has held that if a court is of the opinion that the legislator has failed to provide for a procedure for the protection of a fundamental right, the court can declare the lack of the procedure for the protection of an individual right unconstitutional and adjudicate the matter on the basis of the procedure that the legislator ought to have established – in the opinion of the court pursuant to the Constitution for such situations (see the SCEB judgment of 2 June 2008 in matter no. 3-4-1-19-07, paragraph 32). Consequently, within adjudication of a concrete case – including upon assessing the admissibility of a complaint – the courts have wide possibilities to review the constitutionality of relevant procedural provisions, to eliminate all unconstitutional procedural restrictions and to guarantee to persons an effective right to judicial protection.

13. Since O. Ossinovski has not filed the requests concerning § 366 of the CCP within the proceeding in the course of which the provision is applicable, he requests, in essence, an abstract norm control. The Supreme Court is not competent to adjudicate such requests (see also the CRCSC ruling of 10 June 2010 in matter no. 3-4-1-3-10). The requests shall therefore be dismissed on the basis of § 11 (2) of the CRCPA.

14. However, the Chamber deems it necessary to note that neither the Constitution nor the Convention include a fundamental right requiring that a judgment which has entered into force could be reviewed based on a friendly settlement reached in compliance with the Convention. A different conclusion cannot be made also on the basis of the ECHR decision Hakimi v Belgium referred to by O. Ossinovski.

15. The objective of the friendly settlement between the person who filed the application with the ECHR and the state is final resolution of the case. Pursuant to Article 37 (1) b) of the Convention, an application shall be struck out if the matter has been resolved. According to Article 39 (3), if a friendly settlement is effected, the case shall be struck out of the case list by means of a decision. Consequently, striking a case based on a friendly settlement means final resolution of the case. Pursuant to Article 39 (4), the execution of the decision confirming the friendly settlement shall be supervised by the Committee of Ministers. The process is similar to the regular supervision over the execution of a judgment of the ECHR.

16. The idea of a friendly settlement is that after the final resolution of the case, the applicant would not have any further claims against the state in respect of the case. It has also been expressed in the judgments of the ECHR which confirm friendly settlements (see e.g. the judgment of the ECHR of 7 October 2008 in case M.V. v Estonia: "The Government and the applicant declare that this payment will constitute the final resolution of the case and the applicant waives any further claims against Estonia in respect of the facts giving rise to this application."; the judgment of the ECHR of 2 March 2010 in case Pervushin v Estonia; the judgment of the ECHR of 5 October 2010 in case Nõgisto v Estonia: "The payment will constitute the final resolution of the case."). If the applicant agrees to the settlement, he or she agrees that the violation is compensated for by the execution of the settlement. The exact nature of the violation may, however, be officially and publicly unidentified.

17. Estonia is represented by the Government upon reaching friendly settlements in the ECHR. The Government cannot promise in a friendly settlement that the applicant shall have grounds for filing a petition for review or that his or her petition for review will be heard in the Supreme Court. The Government lacks the competence to assume such an obligation for the court system. If the applicant reaches a friendly settlement with the Government, he or she agrees that his or her case will not be reviewed again in Estonia. The objective of a friendly settlement, both nationally and on the ECHR level, is saving time and money. Re-commencing the proceeding would be contrary to the objective.

18. It must be added that according to Article 37 of the Convention, the ECHR shall continue the examination of the application if respect for human rights as defined in the Convention so requires. It means that if the ECHR finds that the promises in the settlement are sufficient for the resolution of the case, the ECHR does therefore not find that the state should do anything in addition (including hear the case again) for ensuring the fundamental rights.

19. The requests described in sub-paragraphs 3–6 of paragraph 1 of this judgment concern, in the opinion of the Chamber, the criminal proceedings conducted against O. Ossinovski. In these proceedings the Harju County Court judgment in criminal matter no. 1-05-689 entered into force on 21 May 2008 when the Supreme Court refused to accept the appeal in cassation filed against the Tallinn Circuit Court judgment of 11 March 2008. In these proceedings O. Ossinovski had the right to claim the establishment of unconstitutionality based on the claims presented also in the current request. With respect to the admissibility of the request it is not important whether O. Ossinovski actually exercised that right (see paragraph 9 above).

20. The requests in sub-paragraphs 3–6 of paragraph 1 are essentially appeals against the county court and the circuit judgment and the Supreme Court ruling on the refusal to accept the appeal in cassation. According to the consistent case-law of the Supreme Court, the right of everyone, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional provided for in the second sentence of § 15 (1) of the Constitution does not mean that a person shall have the right in every case to raise the issue of the constitutionality of the applicable legislation of general application in the Supreme Court. Pursuant to the wording and meaning of §§ 15 and 152 of the Constitution, every court must upon adjudication of a matter assess the constitutionality of the applicable law if there are suspicions about it (see also the SCEB judgment of 8 June 2009 in matter no. 3-4-1-7-08, paragraph 21). Consequently, the right and obligation to assess in case of suspicion the constitutionality of legal provisions applied in a specific court case extends to the courts of every instance, not only to the Supreme Court.

21. The request in sub-paragraph 7 of paragraph 1 requires the satisfaction of the previous requests. Since these requests were dismissed, there are also no grounds to review this request.

22. The Chamber is of the opinion that O. Ossinovski is or was ensured as described in the previous paragraphs the sufficient possibility to request for judicial protection against violation of fundamental rights. For the said reasons the Chamber finds that the Supreme Court is not competent to review the request of O. Ossinovski. Pursuant to § 11 (2) of the CRCPA, the request is to be dismissed and returned to the person who submitted it.

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