Constitutional judgment 3-3-1-69-09

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-3-1-69-09
Date of judgment	31 March 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 appeal of Vaike Õiglane for compensation for damage caused by unjust arrest
Contested judgment	The Tallinn Circuit Court judgment of 14 May 2009 in administrative case no. 3-07-1817
Basis of proceeding in the Supreme Court	Appeal in cassation of Vaike Õiglane
Hearing	Written proceedings

DECISION

1. To satisfy in part the appeal in cassation of Vaike Õiglane.

2. To annul the Tallinn Circuit Court judgment of 14 May 2009 in administrative case no. 3 07-1817 and the Tallinn Administrative Court judgment of 18 November 2008 in administrative case no. 3-07-1817 and to refer the case for a new hearing to the Tallinn Administrative Court.

3. To return the security paid upon filing the appeal in cassation of Vaike Õiglane.

FACTS AND COURSE OF PROCEEDINGS

1. On 3 November 2003 a proceeding was commenced in criminal case no. 03914100013 in which Vaike Õiglane was suspected of committing acts described in § 344 (1) (counterfeiting of documents, seals or blank document forms) and § 347 (1) (falsification of important identity documents) of the Penal Code.

2. Vaike Õiglane was detained as a suspect on 4 November 2003 and on 5 November 2003 a Tallinn City Court judge granted permission to apply in respect of her arrest until 13 November 2003 as a preventive measure. By a ruling of 13 November 2003 the Tallinn City Court judge extended until 3 January 2004 the preventive measure arrest applied in respect of Vaike Õiglane. The arrest was extended once more until 22 April 2004 when Vaike Õiglane was released from arrest and the preventive measure arrest was replaced by a preventive measure signed undertaking not to leave place of residence.

3. The criminal proceeding in respect of Vaike Õiglane was terminated by the Harju County Court judgment of 29 January 2007 in case no. 1-05-50, pursuant to which Vaike Õiglane was acquitted. According to paragraph 10 of the decision of the Harju County Court judgment, Vaike Õiglane was unjustly kept under arrest from 4 November 2003 to 22 April 2004 (i.e. 171 days) and she is entitled to compensation from the state.

4. On 25 July 2007, Vaike Õiglane filed a petition with the Ministry of Finance requesting determination of fair compensation by the state and payment thereof through the Ministry of Finance for loss of profit due to unjust deprivation of liberty and non-proprietary damage caused thereby. In her petition, Vaike Õiglane referred to § 1 (1) 1), § 2 (1) and § 4 (2) of the Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act (CDUDLA).

5. The Ministry of Finance responded to the petition of Vaike Õiglane with a letter no. 4 4/10236 of 15 August 2007 notifying that based on § 5(1) of the CDUDLA, Vaike Õiglane shall be paid 98,154 kroons. The Ministry withheld income tax of 21,594 kroons and transferred 76,560 kroons to the bank account of Vaike Õiglane.

6. Vaike Õiglane filed on 17 September 2007 a complaint against the Ministry of Finance administrative act no. 4-4/10236 of 15 August 2007. The complainant was of the opinion that the amount paid by the Ministry of Finance does not fully compensate for the non-proprietary damage and loss of profit caused by the unjust deprivation of liberty. This fact violates the complainant's subjective right to fair compensation for non-proprietary damage and loss of profit caused by unjust deprivation of liberty.

7. The complainant explained that due to the arrest, she suffered loss of profit under a patronage agreement concluded with the Law Office Kuklane & Partnerid. According to the agreement, the complainant was obligated to provide for the law office as a mandator services meeting the requirements of the law office which consisted of performing duties of a clerk of a sworn advocate under the supervision of a patron. Performance pay was agreed on for the provision of the services. Pursuant to the agreement, the complainant was entitled to 40% of the net profit of the mandator's approved annual report. The net profit fixed in the mandator's annual report of 2003 was 609,649 kroons and in 2004 it was 450,750 kroons. The complainant

was of the opinion that she was therefore entitled to 243,859 kroons and 6 cents for the year 2003 and 180,300 kroons for the year 2004, total of 424,159 kroons and 6 cents. The complainant was under arrest and unable to fulfil her contractual obligations.

[**8.—25.** Not translated.]

26. The full panel of the Administrative Law Chamber of the Supreme Court by a ruling of 15 March 2010 in case no. 3-3-1-69-09 referred the administrative case under § 70(1)2) of the Code of Administrative Court Procedure to be adjudicated by the Supreme Court *en banc*. In the opinion of the Administrative Law Chamber, the referral of the case to the Supreme Court *en banc* was important in terms of uniform application of the regulatory framework of compensation for damage caused by deprivation of liberty.

[**27.—33.** Not translated.]

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDING

[**34.—42.** Not translated.]

CONTESTED PROVISIONS

43. § 5 "Compensation" of the CDUDLA provides:

(1) Compensation in an amount of seven daily rates (days' wages) shall be paid to a person pursuant to the procedure provided for in § 4 of this Act for each twenty-four hour period during which the person was unjustly deprived of liberty.

(2) The daily rates (days' wages) shall be calculated on the basis of the minimum monthly wage established by the Government of the Republic, valid on the date of entry into force of a decision (order) on release of a person. The daily rates (days' wages) shall be determined by dividing the minimum monthly wage by 30, without taking account of the fractional part.

[---]

(4) Loss of profit as a result of unjust deprivation of liberty and non-proprietary damage caused thereby are deemed to be compensated for to a person by payment of compensation provided for in subsection (1) of this section. The amount of compensation for direct proprietary damage is determined in accordance with the provisions of the State Liability Act.

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OPINION OF THE SUPREME COURT *EN BANC*

44. The full panel of the Administrative Law Chamber of the Supreme Court found in hearing the appeal in cassation of Vaike Õiglane that in terms of uniform application of the regulatory framework of compensation for damage caused by deprivation of liberty it is important to adjudicate the case in the Supreme Court *en banc*. Upon adjudication of the appeal in cassation, the Supreme Court *en banc* was not sure whether § 5 (1), (2) and (4) of the CDUDLA comply with the principles of equal treatment and compensation for damage provided in §§ 12 and 25 of the Constitution. In hearing the appeal in cassation, the Supreme Court *en banc* adjudicates the dispute in the administrative case and forms an opinion on the matter of constitutionality necessary for adjudication of the appeal.

45. The Supreme Court *en banc* first states what Vaike Õiglane requested (I). Then the Supreme Court *en banc* points out the provisions of the Constitution significant upon adjudication of the case (II). After that the Supreme Court *en banc* addresses the substantive law regulating compensation for damage caused by arrest (III) and forms an opinion on who is the appropriate respondent in the case (IV). Finally, the Supreme Court *en banc*

assesses whether causing and amount of damage has been proved in the case and forms an opinion on the Tallinn Circuit Court and the Tallinn Administrative Court judgments (V).

I

46. Vaike Õiglane was in the pre-trial criminal proceeding under arrest for 171 days and the court acquitted her. The Ministry of Finance informed Vaike Õiglane with a letter no. 4-4/10236 of 15 August 2007 that she will be paid compensation of 98,154 kroons, minus income tax of 21,594 kroons, for the days unjustly kept under arrest. The Ministry of Finance transferred 76,560 kroons to the bank account of Vaike Õiglane.

47. Vaike Õiglane filed a complaint with the Tallinn Administrative Court against the Ministry of Finance administrative act no. 4-4/10236 of 15 August 2007. The complaint noted the Republic of Estonia through the Ministry of Finance as the respondent. The complainant requested to oblige the Republic of Estonia to compensate through the Ministry of Finance the non-proprietary damage and loss of profit to the extent not compensated by the Ministry. The complainant was of the opinion that the compensation paid to her does not cover in full the non-proprietary damage and loss of profit caused by the unjust deprivation of liberty. In the appeal Vaike Õiglane waived the claim for compensation for non-proprietary damage and requested compensation for loss of profit in the amount of 424,159 kroons and 6 cents in the part which the Ministry of Finance failed to compensate. Vaike Õiglane requested to declare § 5 (1), (2) and (4) of the CDUDLA to be in conflict with §§ 11, 12, 20 and 25 of the Constitution and not to apply § 5 (1) and (4) of the CDUDLA.

48. In the assessment of the Supreme Court *en banc*, Vaike Õiglane filed a complaint mentioned in § 6 (3) 2) of the Code of Administrative Court Procedure (CACP) for compensation for damage caused in public law relationships. The complainant requested compensation for damage caused to her by arrest in the part which exceeds the amount paid by the Ministry of Finance. It is a public law dispute and there is no other procedure for reviewing claims for compensation for damage caused by criminal proceedings, and therefore the administrative court is competent to review the complaint.

49. The Supreme Court *en banc* finds that the complaint has not been filed for annulment or establishment of unlawfulness of the Ministry of Finance administrative act no. 4-4/10236 of 15 August 2007 (§ 6 (2) 1) and (3) 1) of the CACP). The title of the initial complaint stated that the complaint has been filed against that administrative act, but the complainant did not request annulment of the administrative act nor presented arguments about its unlawfulness in the complaint or its later supplements or in court sessions.

50. Vaike Õiglane requested additional compensation for damage caused by arrest and declaration of unconstitutionality of the provisions of the CDUDLA. The complainant did not argue that her arrest was unlawful, but found that damage caused by arrest to a person acquitted on criminal charges is unlawful and shall be compensated pursuant to § 25 of the Constitution.

II

51. Arrest is a preventive measure, i.e. one of the means of securing criminal proceedings, which constitutes deprivation of liberty on the basis of a court ruling from a person who is suspected or accused of committing a criminal offence if the person may abscond from the criminal proceeding or continue to commit criminal offences (§ 130 (1) and (2) of the CCP). The preventive measure arrest was similarly provided in the Code of Criminal Procedure which became invalid on 30 June 2004 (§ 73 (1) of the former CCP).

52. Pursuant to § 20 (1) of the Constitution, everyone has the right to liberty and security of person. § 20 (2) of the Constitution allows deprivation of liberty for, among others, combating a criminal offence, bringing a person who is reasonably suspected of such an offence before a competent state authority, or to prevent his or her escape. Arrest is means of securing criminal proceedings which infringes personal freedom most seriously (the Supreme Court *en banc* judgment of 1 February 2008 in case no. 3-3-1-15-07, p 24).

53. § 11 of the Constitution allows restriction of fundamental rights provided in the Constitution only if the restriction is constitutional. Restrictions of fundamental rights shall be necessary in a democratic society and

they cannot distort the nature of the rights restricted. Based on § 11 of the Constitution, restrictions of fundamental rights shall be proportional to their objective which is pursued with the restriction. For ensuring in every single case the proportionality of intervention by arrest in the right to freedom provided in § 20 of the Constitution, procedural securities are provided in the Code of Criminal Proceeding. Disproportionate infringement of the personal freedom arising from § 20 of the Constitution is unconstitutional. If damage has been caused by unconstitutional arrest, the obligation to compensate for damage arises from § 25 of the Constitution.

54. 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. From § 25 of the Constitution arises also the right to claim compensation for damage caused by a public authority. The scope of protection of § 25 of the Constitution covers compensation for both direct proprietary damage and loss of profit, as well as non-proprietary damage.

55. The right to compensation arises from § 25 of the Constitution provided the damage has been caused unlawfully – some of the rights deriving from the law, the Constitution or an international agreement of the person suffering the damage have been violated. The objective of the fundamental right provided in § 25 of the Constitution is restoration of rights violated, for which reason the person unlawfully harmed must be placed by compensation for damage in a situation as near as possible to that in which he or she would have been if his or her rights had not been violated.

56. Arrest infringes, first of all, personal freedom, but also many other fundamental rights. In addition to personal freedom, arrest may also infringe the fundamental right of ownership provided in § 32 of the Constitution. 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. § 32 of the Constitution protects proprietary rights as ownership – things, money and monetarily appraisable rights and claims (the Supreme Court *en banc* judgment of 17 June 2004 in case no. 3 2 1 143 03, p 18).

57. Infringement of the fundamental right of ownership is any restriction of the legal status provided in § 32 of the Constitution and causing of proprietary loss to the owner. Although infringement of the fundamental right of ownership is not the objective of arrest, the latter may infringe the fundamental right of ownership of most of the arrested persons. Arrested persons cannot go to work, earn a living, fulfil their contractual obligations and it may cause them proprietary loss.

58. The fundamental right of ownership is not unlimited. Pursuant to the second and third sentences of § 32 (2) of the Constitution, restrictions of property shall be provided by law and property shall not be used contrary to the public interest. 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. 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.

59. Based on § 32 of the Constitution, infringements of the fundamental right of ownership shall be provided by law and property can only be expropriated in the public interest. Upon assessment of constitutionality of infringements of the fundamental right provided in § 32 of the Constitution, the proportionality principle arising from § 11 of the Constitution shall be taken into account. The legislator shall consider public interests which are the objective of the infringement and the infringement of the fundamental right of individuals in order to find a reasonable balance between them.

60. The Supreme Court *en banc* notes that individuals have an obligation to tolerate to a certain extent a criminal proceeding in respect of the individual and also accompanying infringements of fundamental rights. Criminal proceedings serve public interests. Criminal proceedings as a whole and single procedural acts, including arrest, are aimed at finding out the truth in criminal cases with the objective to punish the person

who committed the act. Pursuant to § 6 of the CCP, investigative bodies and Prosecutors' Offices are required to conduct criminal proceedings upon the appearance of facts referring to a criminal offence unless the circumstances which preclude criminal procedure or the grounds to terminate criminal proceedings exist.

61. Obligations put on individuals in public interests shall be divided equally between the individuals. According to the first sentence of § 12 (1) of the Constitution, everyone is equal before the law. A situation where one individual or a few of them should bear greater expenses in public interests than others who also use the means and resources created in public interests would be in conflict with the principle of equality. A need for payment of fair compensation to ensure the proportionality of an infringement of the fundamental right of ownership arises in situations where proprietary loss of one individual is disproportionately vast compared to that of others. Intervention of the state in the rights of individuals is accompanied by proprietary loss for individuals, which is excessive considering the equality of the toleration principle.

62. Upon arrest, the infringement of the arrested person's fundamental right of ownership which may accompany the arrest is not taken nor can it be fully taken into account. The regulatory framework of arrest in the Code of Criminal Procedure shall ensure, above all, the proportionality of the infringement of personal freedom. The objective of arrest is to deprive a person of liberty for securing the criminal proceeding and achieving its objectives. The infringement of the fundamental right of ownership is only accompanying the criminal proceeding. However, it can be presumed that upon providing the rules of arrest in the Code of Criminal Procedure, the legislator has, to a limited extent, also considered possible infringements of other fundamental rights. So the investigative bodies, Prosecutors' Offices and courts are obligated to deposit the unsupervised property of an arrested person and ensure that the minor children of an arrested person be supervised and the persons close to him or her who need assistance be cared for (§ 8 5) and 6) of the CCP). It is not excluded that arrest which took place in compliance with the rules of criminal procedure results for some people in a much larger damage compared to that of other arrested persons, putting on that person an unequally big obligation of toleration in public interests.

63. In many cases of restriction of the fundamental right of ownership it is possible to find balance between public and private interests. Yet, there might be situations where the state needs to restrict the fundamental right of ownership of individuals in public interests more than it would be proportional considering the interests of specific individuals. The Supreme Court *en banc* finds that if an infringement of the fundamental right of ownership is so intensive that it is not possible to find a reasonable balance between public and private interests, the obligation to pay compensation arises from § 32 of the Constitution. In case of payment of fair compensation, the infringement of the fundamental right of ownership is not disproportionate and the state does not violate fundamental rights of persons.

64. Based on the aforesaid, the Supreme Court *en banc* is of the opinion that from §§ 32 and 12 of the Constitution in conjunction arises the state's obligation to pay fair compensation upon infringement of the fundamental right of ownership by a lawful arrest in a pre-trial criminal proceeding in case the arrest infringes the individual's fundamental right of ownership more than is justified by the toleration obligation in public interests. In that case it is not possible to achieve fair balance between public interest and rights of individuals without payment of compensation. Upon lack of compensation or unfair compensation, the infringement of the fundamental rights arising from §§ 32 and 12 of the Constitution is disproportionate and the corresponding regulatory framework is in conflict with §§ 32, 12 and 11 of the Constitution in their conjunction. Unconstitutional is also failure to implement an Act regulating bases and procedure of payment of fair compensation.

65. Lack of fair compensation and 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. The Supreme Court *en banc*emphasises that in case of proprietary loss caused by a lawful arrest, it does not have to be compensated in full. In case of lack of compensation, the proprietary loss of a person is unlawful only to the extent to which it exceeds the toleration obligation. Fair compensation in that case is the difference between the actual proprietary loss and the toleration obligation. In a situation where a person has received compensation but not to a fair extent, the difference between the

paid compensation and the fair compensation has to be compensated for.

66. Such a conclusion of the Supreme Court *en banc* complies with an earlier opinion of the Supreme Court *en banc*, pursuant to which the fair price of an expropriated thing does not necessarily have to be equal to the usual value, i.e. the market price, of the thing. Although the fair price can generally be deemed the market price of the thing, a smaller compensation may also be constitutional if full compensation is not justified under the circumstances of the expropriation. To give an assessment on the fairness of compensation, the interests of individuals must be considered with regard to public interests (see the Supreme Court *en banc* judgment of 18 March 2005 in case no. 3 2 1 59 04, p 19).

67. To assess the proportionality of the infringement of the fundamental rights provided in §§ 32 and 12 of the Constitution and the need for payment of fair compensation, and also the amount of fair compensation, the infringement of the fundamental rights of individuals arising from §§ 32 and 12 of the Constitution and public interests, compliance with which resulted in the infringement, shall be considered. The Supreme Court *en banc* notes that upon considering fundamental rights infringed by a criminal proceeding, the importance of public interests is decreased also by the fact that the person suspected of commission of a criminal offence was acquitted as a result of the proceeding.

III

68. Next, the Supreme Court *en banc* assesses the substantive law applicable upon adjudication of the appeal of Vaike Õiglane. Compensation for damage caused by a public authority is regulated by the State Liability Act as a general law. Compensation for damage caused by unjust deprivation of liberty is regulated by the CDUDLA which is a specific law in respect of the State Liability Act.

69. Pursuant to § 1 (1) of the CDUDLA, the state is obligated to compensate for damage caused to persons by unjust deprivation of liberty. Cases which the CDUDLA deems as unjust deprivation of liberty and for which a compensation is prescribed have been listed in § 1 (1) 1)–7) of the CDUDLA. According to § 1 (1) 1) of the CDUDLA, deprivation of liberty is unjust in cases where persons who were held in custody with the permission of a court and criminal proceedings in whose matters were terminated at the stage of pre-trial investigation or in a preliminary hearing or persons with regard to whom a judgment of acquittal has entered into force. Vaike Õiglane requested compensation for loss of profit caused by her arrest in the criminal proceeding which was terminated by a judgment of acquittal. The Supreme Court *en banc*does not analyse all the cases of compensation for damage mentioned in § 1 (1) of the CDUDLA, but only compensation for damage related to unjust arrest which is covered by § 1 (1) 1) of the CDUDLA.

70. The Supreme Court *en banc* is of the opinion that damage caused by unjust arrest for the purposes of the CDUDLA may not be unlawful for the purposes of § 25 of the Constitution. Compensation for damage caused by unjust arrest under the CDUDLA does not require establishment of lawfulness or unlawfulness of the arrest. For the purposes of the CDUDLA, arrest is unjust and results in the right to compensation regardless whether the arrest complied with the provisions of criminal procedure or not (the Supreme Court *en banc* came to the same conclusion in paragraph 29 of its judgment of 1 February 2008 in case no. 3 3 1 15 07). At the same time, it is not excluded that arrest was unlawful and person suffered damage which should be compensated based on § 25 of the Constitution. The definition of damage caused by unjust deprivation of liberty in the CDUDLA is not identical to the definition of unlawfully caused damage in the Constitution and damage caused by unjust deprivation of liberty is not necessarily covered by the scope of protection of § 25 of the Constitution.

71. § 5 of the CDUDLA provides the bases for determination of the amount of compensation for damage caused by unjust deprivation of liberty. Pursuant to § 5 (1) of the CDUDLA, compensation in an amount of seven daily rates (days' wages) shall be paid to a person pursuant to the procedure provided for in the CDUDLA for each twenty-four hour period during which the person was unjustly deprived of liberty. According to subsection 2 of the same section, the daily rates (days' wages) shall be calculated on the basis of the minimum monthly wage established by the Government of the Republic, valid on the date of entry

into force of a decision (order) on release of a person. The daily rates (days' wages) shall be determined by dividing the minimum monthly wage by 30, without taking account of the fractional part. Based on § 5 (4) of the CDUDLA, loss of profit due to unjust deprivation of liberty and non-proprietary damage caused thereby shall be deemed compensated for by payment of compensation provided in § 5 (1) of the CDUDLA. The amount of compensation for direct proprietary damage is determined in accordance with the provisions of the State Liability Act.

72. The first sentence of § 5 (4) of the CDUDLA prescribes compensation for both loss of profit and non-proprietary damage. At the same time, the law does not specify to what extent the compensation mentioned in the first sentence of § 5 (4) of the CDUDLA is for loss of profit and to what extent for non-proprietary damage. The Supreme Court *en banc* finds that in such a situation it can be presumed that the compensation is divided equally between the two (the Administrative Law Chamber of the Supreme Court formed the same opinion in paragraph 15 of its judgment of 17 December 2009 in case no. 3-3-1-72-08). The Ministry of Finance paid to Vaike Õiglane 98,154 kroons minus income tax for compensation for loss of profit and non-proprietary damage caused by unjust arrest. Based on the aforesaid, the Supreme Court *en banc* is of the opinion that it is justified to divide the said amount in two and deem that Vaike Õiglane was paid 49,077 kroons for compensation for loss of profit.

73. The first alternative of the first sentence of § 5 (4) of the CDUDLA which states "Loss of profit as a result of unjust deprivation of liberty [---] is deemed to be compensated for to a person by payment of compensation [---]" excludes additional compensation for loss of profit due to unjust arrest under any other Act. In case the first alternative of the first sentence of § 5 (4) of the CDUDLA should not be applied due to unconstitutionality, it would be possible to request additional compensation for loss of profit under any other Act if such regulatory framework exists. Next, the Supreme Court *en banc* forms an opinion on whether additional compensation for loss of profit due to unjust arrest would, in principle, be possible to be requested under the State Liability Act.

74. First, the Supreme Court *en banc* assesses whether the specific provision of compensation for damage of the State Liability Act – § 15 "Damage caused in course of administration of damage" – should be applied. Based on § 73 (2) of the former CCP, a preventive measure arrest was applied in respect of Vaike Õiglane in the pre-trial criminal proceeding with the permission of a Tallinn City Court judge. Pursuant to § 15 (1) of the SLA, a person may claim compensation for damage caused in the course of judicial proceedings, including damage caused by a court decision, only if a judge committed a criminal offence in the course of the judicial proceedings. § 15 (1) of the SLA provides a cause of a claim for compensation for damage, on the one hand, and restricts the right to compensation for damage, on the other hand. Damage is compensated only if a judge has committed a criminal offence; compensation for other damage caused in the course of judicial proceedings is excluded. The Supreme Court *en banc* is of the opinion that upon settlement of the dispute, § 15 (1) of the SLA should not be applied because this provision regulates only compensation for damage caused in judicial proceedings, and not compensation for damage caused in pre-trial criminal proceedings.

75. Upon compensation for damage caused to Vaike Õiglane by unjust arrest (loss of profit), the general provisions of compensation for damage of the State Liability Act (Division 1 "General provisions" of Chapter 3 "Compensation for damage") should not be applied. The cause of a claim for compensation for proprietary damage caused in public law relationships is provided in § 7 (1) of the SLA. Pursuant to § 7 (1) of the SLA, compensation for damage may be claimed by a person whose rights are violated by the unlawful activities of a public authority in a public law relationship. Therefore, the prerequisite for compensation for damage under § 7 (1) of the SLA is unlawfulness of the causing of the damage.

76. In the present case the appellant has not argued that she was caused damage by unlawful arrest. On the contrary, in the opinion submitted to the Supreme Court *en banc* the representative of the appellant stressed that there is no dispute over the lawfulness of the criminal proceeding. In such a situation the Supreme Court *en banc* deems it possible to presume that the damage was caused to Vaike Õiglane lawfully and it cannot be compensated for under § 7 of the SLA.

77. § 16 "Damage caused by lawful administrative act or measure" of the SLA also cannot be applied upon the adjudication of the appeal. 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. Damage caused by a lawful arrest in a pre-trial criminal proceeding cannot be compensated for based on that provision because it is not an administrative act or an administrative measure.

78. § 16 (2) 4) of the SLA does not preclude compensation for loss of profit exceeding the amount paid under the CDUDLA. According to that provision, the compensation mentioned in § 16 (1) of the SLA cannot be claimed to the extent which payment for compensation is regulated by other Acts. § 16 (2) 4) of the SLA does not preclude compensation for damage under § 16 (1) of the SLA to the extent which exceeds compensation in any other Act.

79. Based on the aforesaid, the Supreme Court *en banc* finds that on the basis of § 1 (1) 1) of the CDUDLA, the loss of profit of Vaike Õiglane due to unjust arrest had to be compensated for to the extent provided in § 5 of the CDUDLA. Vaike Õiglane has received compensation to that extent and it is not a dispute in the case. However, compensation for loss of profit to the extent exceeding the amount prescribed in the CDUDLA is precluded by the first alternative of the first sentence of § 5 (4) of the CDUDLA. Compensation for loss of profit caused lawfully by unjust arrest is also not provided in the State Liability Act or any other Act.

IV

80. Next, the Supreme Court *en banc* assesses who is the appropriate respondent in the case. Pursuant to § 14(2)2) of the CACP, the respondent is the administrative authority against whose activities a complaint is filed. Vaike Õiglane noted in the complaint the Republic of Estonia through the Ministry of Finance as the respondent. The Tallinn Administrative Court declared the Ministry of Finance as the respondent in the case. The Supreme Court *en banc* declared by its ruling of 15 June 2010 the Ministry of Justice as a second respondent in the case.

81. Vaike Õiglane requested compensation for loss of profit caused by arrest with the permission of the court. Pursuant to § 17 (1) of the SLA, in order for compensation for damage to be granted, an application may be submitted to the administrative authority which caused the damage or an action may be filed with an administrative court. Applications for compensation for damage caused by courts shall be submitted to the Minister of Justice. The CDUDLA provides a different regulatory framework. Applications for compensation for damage caused by unjust deprivation of liberty shall be submitted to the Ministry of Finance (§ 4 (2) of the CDUDLA). The Ministry of Finance shall verify the authenticity of the documents submitted in order to receive compensation and shall pay compensation to an applicant or decide to deny the application (§ 4 (3) and (4) of the CDUDLA). Pursuant to § 4 (6) of the CDUDLA, a person may file an action with an administrative court for the order of payment of compensation if an application for compensation is denied or is not reviewed.

82. The Ministry of Finance does not decide on its own the compensation for damage caused by unjust deprivation of liberty. The court which renders a judgment of acquittal shall also decide whether damage caused by unjust deprivation of liberty shall be compensated to a person or not (§ 2 (1) and (2) of the CDUDLA, § 190 (3) of the CCP). The Ministry only verifies the authenticity of the documents submitted in order to receive compensation. Upon compensation for damage the Ministry shall follow the circumstances established by the court in the judgment which is the basis for compensation for the damage (the Supreme Court *en banc* formed the same opinion in paragraph 35 of its judgment of 1 February 2008 in case no. 3-3-1-15-07).

83. The Supreme Court *en banc* is of the opinion that the Ministry of Finance is not the appropriate respondent in the case. The Ministry of Finance has not caused damage to Vaike Õiglane and the Ministry of

Finance lacked the independent competence to decide on compensation for loss of profit caused by unjust arrest. Pursuant to the second sentence of § 17 (1) of the SLA, the appropriate respondent in the case is the Ministry of Justice because the appellant is requesting compensation for damage caused by a court.

V

84. The Supreme Court *en banc* found hereinabove that from §§ 32 and 12 of the Constitution in conjunction arises the state's obligation to compensate for loss of profit caused by a lawful arrest in order to ensure the proportionality of the infringement of the fundamental rights. The regulatory framework which precludes payment of compensation to a fair extent and the lack of a regulatory framework providing the bases and procedure for fair compensation are in conflict with §§ 32, 12 and 11 of the Constitution in their conjunction.

85. The Supreme Court *en banc* also found that the first alternative of the first sentence of § 5 (4) of the CDUDLA precludes compensation for loss of profit to the extent exceeding that prescribed in the CDUDLA. Additional compensation for loss of profit caused lawfully by unjust arrest is also not enabled by the State Liability Act or any other Act.

86. On the basis of § 5 of the CDUDLA, all persons who have been unjustly deprived of liberty shall be paid an equal amount for compensation for non-proprietary damage and loss of profit. In order to receive compensation, the actual damage or its extent need not be proven. The regulatory framework of the CDUDLA is based on the presumption that restriction of the right to freedom provided in § 20 of the Constitution inevitably causes non-proprietary damage and loss of profit. The Supreme Court has also found that unjust deprivation of liberty is inevitably accompanied by suffering and discomfort and the moral damage caused thereby need not be proven separately (see the Civil Chamber of the Supreme Court judgment of 12 March 1998 in case no. 3-2-1-32-98) and the non-proprietary damage resulting from arrest as an intensive infringement of fundamental rights shall be presumed (the Supreme Court *en banc* judgment of 1 February 2008 in case no. 3-3-1-15-07, p 27). The Supreme Court *en banc* admits that loss of profit of an arrested person can also be presumed. Upon determination of compensation for damage under § 5 of the CDUDLA, the actual damage caused to a person or to which extent compensation for damage would be fair is not assessed.

87. The Supreme Court *en banc* notes that the first alternative of the first sentence of § 5 (4) of the CDUDLA which precludes compensation for loss of profit to the extent exceeding that prescribed in the CDUDLA may be in conflict with §§ 32, 12 and 11 of the Constitution in their conjunction. The said provision may be unconstitutional because it precludes compensation for loss of profit in a specific case to a fair extent. Unconstitutional may also be the lack of a regulatory framework which would provide the bases and procedure for compensation for loss of profit caused by unjust arrest to a fair extent.

88. Based on the aforesaid, in order to adjudicate the case it is necessary to form an opinion on whether the amount paid to Vaike Õiglane for compensation for loss of profit due to unjust arrest (38,280 kroons) was fair. The Supreme Court *en banc* is of the opinion that the fairness of compensation in a specific case can be assessed only in a situation where the causing and the amount of damage have been established. Therefore, it shall be established whether Vaike Õiglane suffered loss of profit due to unjust arrest and how big was her loss of profit.

89. According to the arguments in the complaint, Vaike Õiglane suffered loss of profit under a patronage agreement concluded on 6 January 2003 between her and the Law Office Kuklane & Partnerid. At the request of the Tallinn Administrative Court the law office presented to the court a copy of the agreement. The patronage agreement constituted an authorisation agreement, pursuant to which Vaike Õiglane (the mandatary) was obligated to provide legal services under the orders and supervision of the law office (the mandator). The law office was to pay performance pay to Vaike Õiglane for fulfilment of the obligations provided in the agreement. According to the agreement, the performance pay amounted to 40% of the net profit in the law office's approved annual report. The pay was to be paid at the latest within the month following the approval of the annual report, minus taxes. The law office was to compensate to Vaike Õiglane

reasonable expenses accompanying the provision of services.

90. Vaike Õiglane explained in the complaint that since she was under arrest from 4 November 2003, she was no longer able to fulfil her obligations arising from the patronage agreement. In the court session on 22 May 2008 the representative of Vaike Õiglane argued that Vaike Õiglane has not received pay for her work in the law office. The complainant was supposed to receive pay at the end of the year but because she was arrested, the law office refused to pay the performance pay. The net profit fixed in the mandator's annual report of 2003 was 609,649 kroons and in 2004 it was 450,750 kroons. The complainant was of the opinion that she therefore suffered loss in the amount of 243,859 kroons and 6 cents for the year 2003 and 180,300 kroons for the year 2004, total of 424,159 kroons and 6 cents. Olev Kuklase, a member of the management board of the law office explained in his letter of 6 June 2008 to the Tallinn Administrative Court that the law office has not paid to Vaike Õiglane, not even for the work already performed.

91. The Supreme Court *en banc* finds that it has not been proven whether and to what extent Vaike Õiglane suffered loss of profit under the patronage agreement. As it appears from the case materials, Vaike Õiglane worked under the patronage agreement from 6 January 2003 until her arrest on 4 November 2003 but allegedly did not receive pay for the work performed during that time. The explanations of the representative of Vaike Õiglane in the court session on 22 May 2008 about the income of Vaike Õiglane during that period are not clear. In the court proceeding, only written explanations have been requested from the representative of the Law Office Kuklane & Partnerid. The Supreme Court *en banc* is of the opinion that regarding the causing and amount of the damage additional evidence needs to be collected. Pursuant to § 64 (2) of the CACP, a judgment of the Supreme Court shall be based on the facts established by the judgment of a lower court. On that basis the Supreme Court does not establish the facts which are the basis for the complaint.

92. Based on the aforesaid, the Supreme Court *en banc* satisfies the appeal in cassation in part. On the basis of § 72 (1) 5) of the CACP, the Supreme Court *en banc* annuls the Tallinn Circuit Court judgment of 14 May 2009 in administrative case no. 3-07-1817 and the Tallinn Administrative Court judgment of 18 November 2008 in administrative case no. 3-07-1817 and refers the case to the Tallinn Administrative Court for a new hearing.

93. Since the damage to Vaike Õiglane and the amount thereof have not been established, the Supreme Court *en banc* cannot assess the constitutionality of the first alternative of the first sentence of § 5 (4) of the CDUDLA in a concrete norm control proceeding. In a constitutional review proceeding the Supreme Court *en banc* can only assess the constitutionality of a relevant provision. The first alternative of the first sentence of § 5 (4) of the CDUDLA is a relevant provision upon adjudication of the case only if the compensation paid to Vaike Õiglane did not compensate to a fair extent for loss of profit caused to her. Based on that, the Supreme Court *en banc* dismisses the request in the appeal in cassation for declaration of unconstitutionality of the provisions of the CDUDLA.

94. The court adjudicating the administrative case shall establish whether Vaike Õiglane suffered loss of profit due to unjust arrest and if so, then to what extent. Then the court shall assess whether the compensation paid to Vaike Õiglane was fair. If the administrative court finds that the fair compensation to Vaike Õiglane should have been higher than the compensation paid to her under the CDUDLA, the first alternative of the first sentence of § 5 (4) of the CDUDLA should not be applied pursuant to § 9 (1) of the CRCPA, the provision should be declared unconstitutional and the judgment should be referred to the Supreme Court for a constitutional review proceeding. In case of lack of bases and procedure for payment of fair compensation, the damage should be compensated to a fair extent on the basis of § 25 of the Constitution.

A dissenting opinion of the justices of the Supreme Court Jüri Ilvest, Henn Jõks and Tambet Tampuu on the Supreme Court *en banc*judgment in case no. 3-3-1-69-09, paragraph 1 of which the justice of the Supreme Court Jaak Luik has concurred with.

1. We do not concur with the final conclusions presented in p. 94 of the Supreme Court *en banc* judgment or with the instructions given to the Tallinn Administrative Court, pursuant to which the latter shall establish in a new hearing whether the compensation paid to Vaike Õiglane under § 5 (4) of the Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act (CDUDLA) is fair and if not, then declare the first alternative of the first sentence of § 5 (4) of the CDUDLA unconstitutional and not apply it, order fair damages from the state to V. Õiglane under § 25 of the Constitution if there are no bases or procedure for payment of fair compensation and refer the judgment to the Supreme Court for a constitutional review proceeding.

Upon adjudication of the appeal in cassation of V. Õiglane, the Supreme Court *en banc* initiated on 15 June 2010 under the second sentence of § 3 (3) of the Constitutional Review Court Procedure Act (CRCPA) a constitutional review court procedure in the matter whether § 5 (1), (2) and (4) of the CDUDLA are constitutional, and involved in the proceeding the participants in constitutional review court procedure (see p. 33 of the judgment). We find that the Supreme Court should complete the constitutional review court procedure initiated by itself by rendering one of the judgments in § 15 (1) of the CRCPA. The law does not provide a possibility for the Supreme Court to refer a constitutional review case initiated by itself for a hearing to a lower court.

2. As it appears from p. 93 of the judgment, the Supreme Court *en banc* did not deem the first alternative of the first sentence of § 5 (4) of the CDUDLA relevant (the first sentence of § 14 (2) of the CRCPA) since the damage and its extent have not been established. We do not concur.

According to the case-law of the Supreme Court, relevant is a provision that is of decisive importance in adjudication of the case, i.e. it affects the outcome of the case (see the Supreme Court *en banc* judgment of 22 December 2000 in case no. 3-4-1-10-00, p.10). A provision is of decisive importance if in case of its unconstitutionality the court would decide differently than in case of its constitutionality (see the Supreme Court *en banc* judgment of 28 October 2002 in constitutional review case no. 3-4-1-5-02, p. 15). Considering the above-mentioned case-law, the first alternative of the first sentence of § 5 (4) of the CDUDLA is a relevant provision because whether the judgments of the lower courts should be refused to be amended or should be annulled depends on that provision. Damage and its extent are important facts for application of substantive law because the adjudication of the merits of the complaint of V. Õiglane for compensation for damage depends on them.

The relevance of the first alternative of the first sentence of § 5(4) of the CDUDLA appears, in our opinion, also from the fact that V. Õiglane was unjustly deprived of liberty and because of that provision she lacks the right to claim fair compensation in the administrative court. If in order to declare that provision unconstitutional, additional facts should have been established in the opinion of the Supreme Court *en banc*, the latter could have requested V. Õiglane to substantiate these facts. §§ 49 and 50 of the CRCPA prescribe submission of evidence in matters regarding constitutional review. The Supreme Court *en banc* is competent to establish facts and assess evidence in these matters (see the Supreme Court *en banc* judgment of 22 March 2011 in administrative case no. 3-3-1-85-09, p. 81-93).

3. It can be concluded from p. 84 and 87 of the judgment that the first alternative of the first sentence of § 5 (4) of the CDUDLA is in conflict with §§ 32, 12 and 11 of the Constitution in their conjunction. The Supreme Court *en banc* also found that § 25 of the Constitution should be applied for compensation for damage if necessary (see p. 65 and 94 of the judgment). Considering the relevance of the first alternative of the first sentence of § 5 (4) of the CDUDLA (see p. 2 of this dissenting opinion), we find that the Supreme Court *en banc* should have declared that provision unconstitutional and invalid to the extent it restricts the amount of compensation paid by the state to a person for damage caused by unjust deprivation of liberty.

4. It does not appear from the judgment on which legal basis the Supreme Court *en banc* annulled the judgments of the lower courts and referred the case to the Tallinn Administrative Court for a new hearing (see p. 92 of the judgment).

If the Supreme Court *en banc* would have declared the first alternative of the first sentence of § 5 (4) of the CDUDLA unconstitutional and invalid (see p. 3 of this dissenting opinion), the annulment of the judgments of the lower courts and the referral of the case to the administrative court for a new hearing would have been based on incorrect application of a provision of substantive law (see § 54 (1) 6) and § 72 (1) 5) of the Code of Administrative Court Procedure).
