Constitutional judgment 3-3-1-85-09

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-3-1-85-09
Date of judgment	22 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	Action of Oleg Osmjorkin for compensation for non-proprietary damage caused by a criminal proceeding
Contested judgment	The Tallinn Circuit Court judgment of 28 August 2009 in administrative case no. 3-06-1178
Basis of proceeding in the Supreme Court	Oleg Osmjorkin's appeal in cassation
Hearing	Written proceeding

DECISION	1. To satisfy Oleg Osmjorkin's appeal in cassation. 2. To annul the Tallinn Circuit Court judgment of 28 August 2009 in administrative case no. 3-06-1178 and the Tallinn Administrative Court judgment of 16 January 2009 in administrative case no. 3-06-1178 and to render a new judgment in the case. 3. To declare the State Liability Act to be in conflict with the Constitution in the part which does not prescribe compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings. 4. To satisfy Oleg Osmjorkin’s action and to order from the Republic of Estonia in favour of Oleg Osmjorkin 1,250 euros for compensation for non-proprietary damage caused by an unreasonably extended pre-trial criminal proceeding. 5. To return the security paid upon filing Oleg Osmjorkin’s appeal in cassation.

FACTS AND COURSE OF PROCEEDINGS

1. On 22 October 1994 in Tallinn approximately at 21.15, Igor Kristapovitš was murdered by a gunshot to the head. On the same day approximately at 22.23, the same weapon was used to fire from a moving car with no lights on at a police officer who had given an order to stop the car. The policeman suffered bodily injuries.

2. The Police Central Bureau of Investigation commenced on 23 October 1994 a criminal proceeding regarding both of those incidents – in the first case on the basis of § 100 of the Criminal Code (CC) (Murder), in the second case on the basis of § 15(2) – § 101 4) of the CC (Attempted Murder); the criminal cases were joined (criminal case no. 94010522).

3. On 9 December 1994, the Police Central Bureau of Investigation detained Oleg Osmjorkin as a suspect in commission of a criminal offence. Based on orders of the Police Central Bureau of Investigation’s preliminary investigator which were sanctioned by a Tallinn City Court judge, a preventive measure arrest was applied to Oleg Osmjorkin from 10 December 1994 to 31 March 1995. By an order of 31 March 1995 of the Police Central Bureau of Investigation’s preliminary investigator which was sanctioned by the deputy public prosecutor, the preventive measure arrest was replaced by a preventive measure signed undertaking not to leave place of residence.

4. By its order of 24 October 2005 the Central Criminal Police terminated the criminal proceeding in criminal case no. 94010522 due to expiry of the criminal offence. The order was sanctioned by a prosecutor of the Northern District Prosecutor’s Office. With the order the preventive measure signed undertaking not to leave place of residence applied to Oleg Osmjorkin was annulled. According to the order, Oleg Osmjorkin was to be paid compensation for the time kept under arrest.

5. Oleg Osmjorkin filed a petition with the Ministry of Finance requesting compensation in the amount of 69,776 kroons for damage caused by unjust deprivation of liberty.

6. According to the letter of the Ministry of Finance of 31 January 2006, the Ministry of Finance paid to Oleg Osmjorkin pursuant to § 5(1) of the Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act 11,760 kroons, minus income tax 2,822 kroons, for 112 days during which Oleg Osmjorkin was unjustly deprived of liberty.

7. On 14 June 2006, Oleg Osmjorkin filed with the Tallinn Administrative Court an action requesting compensation in the amount of 164,950 kroons for non-proprietary damage caused to him by a criminal proceeding.

8. According to the action, the complainant had no complaints regarding the period from 10 December 1994

to 31 March 1995 during which he was kept under arrest. The complainant has received compensation from the state for that period. The complainant was of the opinion that by release from arrest, the unjust suspicions of his commission of a criminal offence did not subside until termination of the criminal proceeding in 2005. By suspecting the complainant of commission of a criminal offence and by performing procedural acts after March 1995, the complainant was caused non-proprietary damage.

9. The complainant explained that the criminal investigation caused him suffering and emotional distress. The complainant had obtained the profession of a chef and had been employed as a chef, but after release from arrest he was unable to find work in his specialty or any other field. His name had become disreputable due to newspaper articles and reports broadcast on the radio and TV. He was treated as a criminal, although he had not committed a criminal offence. He was unable to protect himself because the criminal case had not been terminated.

10. The complainant found that the non-proprietary damage caused from 31 March 1995 to 24 October 2005 when the criminal case was terminated should be compensated. The complainant calculated the amount of compensation based on the provisions of the Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act.

11. In response to the Tallinn Administrative Court ruling of 24 August 2006 on refusal to proceed with the action, Oleg Osmjorkin explained that he became aware of the violation of his rights with the letter of the Ministry of Finance of 31 January 2006, which the complainant received on 8 March 2006, notifying that only the arrest will be compensated. Moral damage was caused to the complainant before and after 1 January 2002 by defamation because he was associated with the murder of Igor Kristapovitš. The complainant found that the criminal proceeding was not terminated in due course and was terminated on a wrong basis. The criminal proceeding was terminated in 2005 due to expiry, but that should have been done considerably earlier, in 1995, because the actions of the complainant did not comprise the necessary elements of a criminal offence. The complainant noted that he will consent to fair compensation at the discretion of the court. In specifications of 7 September 2006, the complainant explained that the order on termination of the criminal case was unlawful because he was suspected of a murder for ten years, although his innocence was known already in 1995.

12. By its ruling of 27 October 2006 the Tallinn Administrative Court accepted the action and declared the Republic of Estonia through the Ministry of Internal Affairs as the respondent.

13. As the authorised representative of the respondent, the Ministry of Internal Affairs, the Director General of the Police Board responded to the court that the Republic of Estonia cannot be considered as an administrative authority in the administrative court procedure. The respondent must be the same administrative authority against who a claim for compensation for damage could be filed in extra-judicial proceedings. In the assessment of the Director General of the Police Board, the appropriate respondent would be the Central Criminal Police. In the ruling of 22 November 2006 the Tallinn Administrative Court did not deem it right to change the respondent.

14. The Police Board as the authorised representative of the respondent submitted a written explanation on the facts of the action and the justification of the request. The respondent found that the conducted criminal proceeding cannot be deemed unlawful. The complainant has not shown that upon performance of procedural acts, his rights or procedural provisions had been violated. With the criminal proceeding, the fundamental rights and freedoms of the complainant have not been extraordinarily restricted which would be cause for claiming compensation for damage. The arguments of the complainant about defamation are not furnished with proof. There is no causal relation between arising of the alleged damage and the act causing the damage (police activity).

15. In the court session on 16 October 2007, Oleg Osmjorkin explained that after 31 March 1995 no procedural acts were performed in respect of him and he was not called out or had the obligation to go to the police. The complainant knew that he could not leave the country, but he was not aware of any other

obligations. Oleg Osmjorkin explained that regardless of the preventive measure, he had changed place of residence but he did not know that he had to inform the police thereof. The complainant did not know, until the termination of the criminal proceeding in 2005, about the course of the proceeding other than that the criminal case had not been terminated. The complainant found that out from a police commissar who he met on the market. The complainant found that he was caused damage by failure to terminate the criminal proceeding.

16. The Police Board found in a written statement that pursuant to § 31(2) of the State Liability Act (SLA), the term for filing actions has expired in respect of the alleged damage caused to the complainant before 1 January 2002, and the proceeding must be terminated. The respondent also found that for contesting the activity of an investigative body (unlawfulness of an order on termination of a criminal case, alleged non-timely termination of a criminal proceeding), the legislator has prescribed other procedure and so the procedure for filing actions against those acts has been provided in the 5th division of the Code of Criminal Procedure (a similar procedure was also provided in the Criminal Code applicable until 30 June 2004).

17. The Tallinn Administrative Court terminated the proceeding in respect of Oleg Osmjorkin's action by a ruling of 14 December 2007 on the basis of § 12(3) of the Code of Administrative Court Procedure (CACP). The court found that the complainant was aware of the causing of the alleged non-proprietary damage prior to 1 January 2002 when the State Liability Act entered into force, and thus, the action has not been filed within term.

18. The Tallinn Circuit Court by a ruling of 14 March 2008 dismissed Oleg Osmjorkin's appeal against the court ruling and refused to amend the ruling of the administrative court.

19. The Administrative Law Chamber of the Supreme Court by a ruling of 17 June 2008 in administrative case no. 3-3-1-28-08 satisfied Oleg Osmjorkin's appeal against the court ruling. The Supreme Court annulled the ruling of the Tallinn Administrative Court and of the Tallinn Circuit Court, deemed the appeal of Oleg Osmjorkin filed within term and referred the case to the Tallinn Administrative Court for continuing the proceeding.

20. The Administrative Law Chamber found that the infringement of the appellant's rights could have been caused by an extended criminal proceeding in respect of him which included application of a preventive measure and non-timely termination of the proceeding. The Chamber concurred with the appellant in the part that a legal opportunity to file a claim for compensation for damage could have occurred only after the proceeding was terminated because only then the amount of damage became evident. The basis for the termination of the proceeding in itself does not affect the right to file a claim for compensation for damage. Therefore, the Chamber applied § 31(3) of the SLA which precludes application of § 31(2) of the SLA in the case a person became aware of the creation of the right of claim after the entry into force of the Act.

21. The Tallinn Administrative Court by a ruling of 10 October 2008 accepted the action, and by a ruling of 30 October 2008 declared, on the basis of § 14(2)2) of the CACP, the Central Criminal Police as the respondent instead of the Ministry of Internal Affairs, and pursuant to § 14(3)2), involved the Prosecutor's Office in the proceeding as a body exercising supervision.

22. The Central Criminal Police concurred in a written response to the action with the opinions of the Police Board stated in the prior proceeding, and requested to dismiss the complaint.

23. The Public Prosecutor's Office found in a written opinion that none of the procedural acts performed in respect of the complainant were unlawful and that the complainant lacks cause for claiming damages. When the basis for the arrest ceased to exist, the person conducting the proceeding annulled, based on the needs of the criminal proceeding, the preventive measure or replaced it with a less restricting preventive measure depending on whether there was still cause for suspecting one or the other person. A person in respect of who a prohibition to leave place of residence has been applied lacks the right to claim damages. A criminal proceeding may restrict the rights of a suspect, but it cannot be said that any criminal proceeding which does

not result in conviction constitutes unlawful behaviour of the state. The state's mistake privilege principle is applicable in criminal proceedings. Moreover, the criminal proceeding in respect of Oleg Osmjorkin was not terminated due to the suspicion ceasing to exist, but due to expiry.

24. The Tallinn Administrative Court by a judgment of 16 January 2008 in administrative case no. 3-06-1178 dismissed Oleg Osmjorkin's action. The court was of the opinion that the damage was not caused unlawfully, the violation of the complainant's rights and the causing of damage was not proved, and the complainant had also not taken advantage of remedies. The court found that even if the complainant's rights had been violated and the violation had been so intensive that non-proprietary damage caused thereby could only be compensated in money, the damages should be decreased to zero due to the complainant's own failure to act to prevent the said damage. The court also precluded the possibility to compensate lawfully caused damage.

25. First, the court stated that upon adjudication of the action, both the State Liability Act and the provisions applicable prior to entry into force of that Act and the general principles of compensation for damage shall be applied. The court said that pursuant to §§ 448 and 449 of the Civil Code and § 7(1) of the SLA, a prerequisite for compensation for damage is an unlawful act performed in public law relationships causing damage to a person, and a causal relation between the unlawful act and the damage.

26. The Administrative Court took the administrative court's limited control over criminal proceedings into account and established that Oleg Osmjorkin was not caused damage by an unlawful act or administrative act. Upon evaluation of unlawfulness, the court considered the following aspects: obligation to conduct criminal proceedings which gives a basis for the need to apply preventive measures provided by law to secure criminal proceedings; lack of circumstances eliminating the criminal proceeding; supervision conducted by the Prosecutor's Office over the lawfulness of the pre-trial criminal proceeding, and existence of the right to appeal.

27. About the duration of the criminal proceeding the court found that although the persons who committed the criminal offence could not be established in the course of the preliminary investigation, the Central Criminal Police had to follow the principle of mandatory criminal proceedings until a circumstance eliminating the criminal proceeding appeared. Therefore, the fact that the criminal proceeding was quite lengthy does not make the criminal proceeding unlawful. The court was of the opinion that persons must endure criminal proceedings in case of sufficient suspicion of a criminal offence even if they actually have not committed the criminal offence. In this case the lack of cause for a criminal proceeding has not been established, further investigation to find out the truth was precluded by expiry.

28. The Court formed an opinion that the complainant has not perceived in any way the preventive measure applied to him or the continuance of the criminal proceeding. Regardless of the violation of the preventive measure, a more restricting preventive measure has not been applied to the complainant. After 31 March 1995 no procedural act were performed in respect of the complainant. In the opinion of the court, the complainant's statements about damage to his reputation and his inability to find work were unsubstantiated.

29. Oleg Osmjorkin filed an appeal against the Tallinn Administrative Court judgment requesting annulment of the administrative court judgment and referral of the case to the administrative court for a new hearing.

30. The Central Criminal Police contested the appeal and maintained its prior opinions. The respondent requested dismissal of the appeal and refusal to amend the administrative court judgment.

31. The Tallinn Circuit Court by a judgment of 28 August 2009 in administrative case no. 3-06-1178 dismissed the appeal of Oleg Osmjorkin and refused to amend the Tallinn Administrative Court judgment of 16 January 2009. The circuit court concurred with the final conclusion of the administrative court and as a response to the appeal noted the following.

32. The circuit court concurred with the appellant in the part that a ten-year criminal proceeding cannot be

justified only by a person's obligation to endure an ongoing proceeding in respect of the person. Every state-organised proceeding must be conducted within reasonable time. A situation where no procedural acts are performed in respect of a person during ten years, but the proceeding in respect of the person is not terminated either, cannot be deemed reasonable. In this case, also a preventive measure – signed undertaking not to leave place of residence – was applied to the appellant during the entire criminal proceeding. Regardless of the fact that it was the least restricting preventive measure and that the appellant filed no complaints during the criminal proceeding, and due to the fact whether the appellant actually complied with the preventive measure, the circuit court has reasons to presume that application of the preventive measure may have become, at some point, unjustified and disproportionate.

33. The circuit court did not verify the lawfulness of the duration of the criminal proceeding or of the application of the preventive measure because the court found that the non-proprietary damage was not substantiated. The court found that an unlawful criminal proceeding may, in general, cause physical and emotional suffering to a person which the person must prove or substantiate to the court. The circuit court stated that emotional sufferings were caused to the appellant already by the commencement of a criminal proceeding in respect of him and by arrest, but no complaints about that have been filed. The circuit court conceded that knowledge of an ongoing criminal proceeding might have aroused fear, concern etc. in the appellant after 31 March 1995, but found that there is no indication that the affect of the continuance of the criminal proceeding would have been such which would have brought about the need for payment of financial compensation for it.

34. The circuit court was of the opinion that the appeal cannot be satisfied based on the appellant's statement that he did not murder Igor Kristapovitš and therefore the criminal proceeding was unpleasant. The said position does not concern the duration of the criminal proceeding, rather it questions the commencement of the criminal proceeding in respect of the appellant which is not the objective of the current dispute.

35. Oleg Osmjorkin filed an appeal in cassation against the Tallinn Circuit Court judgment of 28 August 2009. The appellant in cassation requested annulment of the Tallinn Circuit Court judgment and referral of the case to the same circuit court for a new hearing.

36. The appellant in cassation found that the conclusion of the courts stating that the lawfulness of the ten-year criminal proceeding and the application of the preventive measure do not need to be verified is erroneous. The law provides a ten-year limitation period for criminal offences, not for performance of procedural acts in criminal proceedings. The respondent and the involved person have claimed that a criminal proceeding was actually not conducted and no damage was caused. If a criminal proceeding was not conducted, the proceeding should have been terminated. The appellant was arrested without proof. The ten-year proceeding was unreasonably extended and should be regarded as an unjust repression.

37. The Police and the Border Guard Board requested to dismiss the appeal in cassation.

38. The Administrative Law Chamber of the Supreme Court found in a ruling of 21 June 2010 in case no. 3-3-1-85-09 that upon adjudication of the case, a suspicion has rose about the constitutionality of the provisions of compensation for damage caused by statements and acts in criminal proceedings or lack thereof (§§ 13, 15 and 25 of the Constitution), and referred the case for adjudication to the Supreme Court *en banc*.

39. The Chamber found that the right to claim for a criminal proceeding to be conducted within reasonable time is an independent right eligible for protection in court. Ascertainment of reasonable time of criminal proceedings requires separate assessment in every specific case. A criterion of such an assessment cannot be only the limitation period for criminal offences since it is not meant to define the duration of the proceeding. Expiry of criminal offences is an absolute obstruction of proceedings, in which case the proceedings are subject to termination. A situation where no procedural acts are performed in respect of a person during ten years cannot be deemed reasonable. Whether the criminal proceeding conducted in respect of Oleg Osmjorkin complies with the requirement of reasonable time of proceedings must be evaluated by

examining the acts of the specific criminal proceeding, and by evaluating the justification and lawfulness of the activity of the body conducting the proceedings. In the opinion of the Administrative Law Chamber, the administrative court and the circuit court had not explored the merits of the duration of the proceeding upon adjudication of Oleg Osmjorkin's appeal.

40. The Chamber also came to the conclusion that the applicable law does not govern how to establish in an administrative court procedure the unlawfulness of acts of criminal proceedings, including exceeding reasonable time of proceedings, which would be cause for adjudication of the claim for compensation for damage allegedly caused under the abovementioned circumstances.

41. The Administrative Law Chamber of the Supreme Court was of the opinion that unlawfully caused damage, including non-proprietary damage caused in the course of public authority's criminal proceeding, falls within the scope of protection of § 25 of the Constitution. However, there are no prerequisites for direct application of the provision. The Chamber found that § 9 of the SLA is not an appropriate provision in this case. Considering the encumbering nature of criminal proceedings, placing the burden of proof of occurrence of non-proprietary damage on the appellant is not justified in case of unlawfulness of criminal proceedings, including obviously exceeding reasonable time of proceedings.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDING

42. Pursuant to § 10(1) of the Constitutional Review Court Procedure Act (CRCPA), participants in a proceeding in a constitutional review court proceeding are: the body which passed or refused to pass the contested legislation of general application (clauses 1 and 2); in the proceedings commenced on the basis of a court judgment or court ruling, the participants in the proceedings of the case (clause 3); the Chancellor of Justice (clause 5); the Minister of Justice (clause 6); and a minister representing the Government of the Republic (clause 7). In the current constitutional review proceeding the participants are the Riigikogu, the appellant in the administrative court procedure Oleg Osmjorkin, the respondent the Police and Border Guard Board, and the involved person the Public Prosecutor's Office, the Chancellor of Justice, the Minister of Justice, and the Minister of Internal Affairs.

43. The Supreme Court *en banc* asked for the opinion of the participants in the proceeding about the constitutionality of the provisions of compensation for damage caused by statements and acts in criminal proceedings or lack thereof, and about the constitutionality of § 16(1) of the SLA.

The Constitutional Committee of the Riigikogu

44. The Constitutional Committee of the Riigikogu found that § 16(1) of the SLA is not in conflict with the Constitution. The Constitutional Committee was of the opinion that the order of the Prosecutor's Office should be regarded in the State Liability Act as an administrative act the way it has been done by the courts of first and second instance. The Constitutional Committee indicated that § 2(3) of the SLA was amended in 2004 by replacing the reference to the Administrative Procedure Act with the reference to the Code of Administrative Court Procedure concerning the terms "administrative act" and "measure". The objective of the amendment was to include in the State Liability Act all damage caused by public authority, and the term administrative act in the Code of Administrative Court Procedure has been provided more broadly than in the Administrative Procedure Act. The extensive scope of application of the State Liability Act excluding only compensation for damage in private law relationships, and the broad definition of a public authority in § 2(1) of the SLA has to be taken into account as well.

45. The Constitutional Committee found that administrative courts are competent to verify lawfulness of orders issued by prosecutors in criminal cases based on § 3(1) of the CACP and §§ 1, 2, 15(1) and 16(1) of the SLA, but only within the framework of the State Liability Act and the case.

The Police and Border Guard Board

46. The Police and Border Guard Board was of the opinion that § 16(1) of the SLA is not applicable in the

case because the appellant claims compensation for non-proprietary damage, and § 16 of the SLA governs only compensation for proprietary damage.

The Public Prosecutor's Office

47. The Chief Public Prosecutor found that the provisions of compensation for damage caused by statements and acts in criminal proceedings or lack thereof are not in compliance with §§ 13, 15 and 25 of the Constitution in the part which concerns ascertainment, outside the criminal procedure, of unlawfulness of statements and acts in criminal proceedings.

48. The Chief Public Prosecutor indicated that there are criminal procedure rules for assessment of lawfulness of statements and acts in criminal proceedings (e.g. §§ 228–232 of the CCP prescribing a procedure for Appeal Against Activities of Investigative Body or Prosecutor's Office by which the Prosecutor's Office or the preliminary investigation judge may declare the contested statement or act unlawful). If unlawfulness of statements or acts in criminal proceedings has been ascertained in the course of criminal proceedings, the damage caused thereby shall be compensated according to the general procedure for compensation for damage (§§ 17–18 of the SLA).

49. In the assessment of the Chief Public Prosecutor, the matter of lack of an appropriate procedure emerges only if ascertainment of unlawfulness of statements and acts in criminal proceedings by following the rules of criminal procedure is for some reason impossible (e.g. if court proceedings in a criminal case have been terminated and the judgment has entered into force). So far an action in such a situation has been filed with the administrative court. The Chief Public Prosecutor concurred with the Administrative Law Chamber that there is currently no possibility to assess in an administrative court procedure the lawfulness of statements and acts in criminal proceedings, including to give an assessment about exceeding a reasonable term of proceedings. Lack of an appropriate regulatory framework must be considered a violation of § 13 and 15 of the Constitution. The Chief Public Prosecutor stated that if to give such a competence to administrative courts by an expanding interpretation, it may in turn lead to violation of the principle of legal clarity because the ascertainment of unlawfulness of acts or statements in criminal proceedings would then be in the competence of the general and administrative courts at the same time.

Chancellor of Justice

50. The Chancellor of Justice found that according to law and the Constitution, administrative courts are competent to order damages caused in pre-trial criminal proceedings. Also, the State Liability Act is applicable and includes sufficient causes of a claim to order damages. Thus, the Chancellor of Justice was of the opinion that in the current case there is no relevant provision whose constitutionality should be assessed. Since there are sufficient provisions and they are applicable, there is no reason to assess the constitutionality of lack of provisions.

51. The Chancellor of Justice based his opinion on the fact that the Administrative Law Chamber questioned the constitutionality of lack of provisions, and found that therefore the issue is the relevance of such provisions, based on which a person receives something from the state. On that basis, the Chancellor of Justice assessed what are the possibilities for interpretation of the State Liability Act in conformity with the Constitution in order to ensure sufficient compensation for caused damage.

52. The Chancellor of Justice found that ordering damage caused by pre-trial criminal proceedings is within the competence of administrative courts on the basis of § 3 of the CACP. In addition to the explicitly provided disputes in the Code of Administrative Court Procedure, all those public disputes that are so to say left over from other courts are in the competence of administrative courts. The Chancellor of Justice was of the opinion that proceedings must follow substantive law, must enable its implementation in every case without exception. It arises from the general fundamental right provided in § 15(1) in conjunction with § 14 of the Constitution to receive effective legal protection and request a fair proceeding which is the foundation of the basic principle of the state based on the rule of law. § 3(1) of the CACP must be interpreted in the spirit of that principle. Whether the procedural act is unlawful for the purposes of § 25 of the Constitution and/or the State Liability Act, is a matter of substantive law, not of interpretation of § 3 of the CACP. The

Supreme Court has on several occasions admitted that in a situation where amending a judgment is not directly at issue and the legislator has not prescribed within a specific offence proceeding an option for judicial control over the infringement of the corresponding fundamental right, it is possible to apply administrative courts' competence for control.

53. The Chancellor of Justice found that it must be considered that an assessment of lawfulness of a legislation or of an act may not coincide on the primary and the secondary level due to different amount of information known to the assessor. Based on that, general and administrative courts may give different assessments on the one and the same legislation or act, without giving rise to a conflict. General courts assess the legislation or act *ex ante*, requiring assessment based on information known at the time the legislation was issued or the act was performed, whereas administrative courts assess the same *ex post*, knowing also the final assessment of the general courts on the guilt of the person. Also, it should be taken into account that the legislator has not enforced a different solution, for which reason the objective of § 3 of the CACP should not be restricted so that damage caused in criminal proceedings would not be covered by it. On the contrary, following the principle of interpretation in conformity with the Constitution, § 3 of the CACP should be interpreted broadly within § 15(1) and § 14 of the Constitution as the Supreme Court *en banc* has repeatedly done. Lack of effective judicial control would be worse than control in different courts.

54. The Chancellor of Justice was of the opinion that the State Liability Act applies to pre-trial criminal procedural acts and to orders issued in criminal proceedings in general. Although the State Liability Act has, above all, the damage caused in an administrative procedure for the purposes of the Code of Administrative Court in view, it is a general legislation, objective of which is to cover all cases of damage caused by a public authority. The Chancellor of Justice found that the State Liability Act is also applicable to events which occurred before 1 January 2002.

55. The Chancellor of Justice found that § 7 of the SLA which governs compensation for direct proprietary damage and loss of profit shall not be applied. § 15 of the SLA based on which compensation for damage can be claimed only if a judgment of conviction has entered into force in respect of the judge shall also not be applied. In the opinion of the Chancellor of Justice, § 16 of the SLA might be applicable in principle, but the problem is that the appellant claims compensation for non-proprietary damage but according to the wording of the provision, only proprietary damage shall be compensated.

56. The Chancellor of Justice formed an opinion that by interpreting in conformity with the Constitution, the damage caused to the appellant can be ordered on the basis of § 9(1) of the SLA if the necessary elements of the provision have been fulfilled in the specific case. The Chancellor of Justice concurred with the opinion of the Administrative Law Chamber of the Supreme Court that placing the burden of proof on the appellant would not be justified in this case. At the same time, exclusion of the applicability of § 9(1) of the SLA by this argument would give rise to an unsatisfactory situation. The appellant himself has not contested in due course the restrictions imposed on him during the criminal proceeding, but requests compensation for damage ex post facto. None of the causes for a claim non-cumbersome for a person provided in the State Liability Act in the competence of administrative courts are applicable because their objective is to compensate proprietary damage. For direct application of § 25 of the Constitution, lawfulness of restrictions imposed within criminal proceedings should be assessed ex post facto. Whereas for systematic reasons it is disputable whether administrative courts are competent for that purpose or should the assessment of lawfulness of criminal proceedings as such be in the competence of general courts. Starting the proceeding from the beginning in the general court would, however, extend even further an already extended proceeding because it should also be kept in mind that the appellant filed the complaint for compensation for damage with the administrative court on 14 June 2006, i.e. over four years ago.

57. The Chancellor of Justice found that § 9 of the SLA can be interpreted so that the burden of proof must be re-allocated. The Chancellor of Justice made a reference to the Administrative Law Chamber judgment of 22 March 2006 in case no. 3-3-1-2-06 regarding a dispute over the conformity of the conditions in the prison's punishment cell. The Administrative Law Chamber found in the judgment that the occurrence or lack of the circumstances presented in the complaint must be established by the court by following the

investigation principle and by considering the actual possibilities of the imprisoned person to collect and present evidence, i.e. by substituting the strict burden of proof of the appellant with the judicial investigation principle. The Chancellor of Justice made a proposal to interpret § 9 of the SLA in conformity with §§ 11 and 26 of the Constitution in conjunction. If the Supreme Court *en banc* deems the restrictions arising from the length of the proceeding disproportionate in respect of the appellant, the burden of proof should be re-allocated for the benefit of the person and to the detriment of the state, and the investigation principle should be applied. Otherwise there is no reason to seek cause of a claim. Upon interpretation, also the case-law of the European Court of Human Rights should be taken into account. In the light thereof, a ten-year prohibition to leave place of residence may prove to be disproportionate, which is why the person should be ordered fair compensation.

Minister of Justice

58. The Minister of Justice was of the opinion that § 16(1) of the SLA should be applied in conjunction with general principles of the law as they have been expressed, among others, in similar cases. That way uniform treatment, among others, of people shall be ensured. § 7 or 9 of the SLA shall not be applied.

59. The Minister of Justice found that § 16 of the SLA applies as precisely interpreted only to administrative acts and not to acts of legislative power or judicial power, and as precisely interpreted, a criminal proceeding is not an administrative act, but administration of justice or preparation thereof. The Minister of Justice referred to an opinion adopted in legal practice that if a person has suffered damage by application of a lawful measure in a criminal proceeding, and the person is not convicted, the caused damage can be viewed as damage caused by a criminal proceeding as an act of authority of the state, and compensation thereof is not prohibited. The fact that a special regulatory framework for compensation for such damage has not been imposed cannot preclude the state's liability before the person, and the general principles of the law have to be taken into account.

60. The Minister of Justice stated that damage caused by criminal proceedings is, in nature, lawful and is not covered by the definition of unlawfully caused damage mentioned in § 25 of the Constitution. The fact that a person might be suspected of an offence on the conditions protected by procedural guarantees, and the person might be subjected to restrictions in the proceeding is a risk of living in a state based on the rule of law, and equating damage caused to the person by these restrictions with unlawfully caused damage is not fair and its absolute compensation is not justified.

61. The Minister of Justice found that a person's general fundamental right to organisation and proceeding based on § 14 of the Constitution includes, among others, a subjective right to demand that proceedings organised by a public authority would have lasted a reasonable time. This right is also based on Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

62. At the same time, the Minister of Justice was of the opinion that there is no objective legal basis for arguing that the conducted criminal proceeding was unlawful or turned from lawful to unlawful during the proceeding. Based on the principle of legal certainty, it is lawful to presume that the conducted proceeding was lawful in the objective sense. The fact that during the criminal proceeding measures for securing the proceeding were applied to the appellant does not make the proceeding unlawful. The question whether application of measures infringing fundamental rights is proportionate can be verified by guarantees applicable in the law of criminal proceedings.

The Minister of Internal Affairs

63. The Minister of Internal Affairs was of the opinion that § 16(1) of the SLA governs only those cases where damage has been caused by issue of administrative acts or taking of administrative measures. The State Liability Act does not govern on which conditions it would be possible to claim compensation from the state if by performing lawful acts in criminal proceedings damage has been caused to a person. The right to compensation for damage as mentioned is not guaranteed by § 25 of the Constitution insofar as according to the said provision everyone has the right to compensation for only unlawfully caused moral and proprietary damage. In the assessment of the Minister of Internal Affairs, the right to compensation from the state, if by

performing lawful acts in criminal proceedings damage has been caused to a person, does not arise from any other fundamental right mentioned in the Constitution.

64. The Minister of Internal Affairs found that the State Liability Act does not govern separately compensation for damage caused by criminal proceedings. At the same time, if damage has been caused to a person unlawfully by criminal proceedings, the person has the right, pursuant to § 25 of the Constitution, to claim compensation for such damage. However, there is no regulatory framework specifying the Constitution which would provide how such a claim should be filed. The Minister of Internal Affairs found that development of such a regulatory framework should be considered.

OPINION OF THE SUPREME COURT *EN BANC*

65. The Administrative Law Chamber of the Supreme Court had, upon adjudication of Oleg Osmjorkin's appeal, a suspicion about the constitutionality of the provisions of compensation for damage caused by statements and acts in criminal proceedings or lack thereof. When finding that the adjudication of the administrative case requires adjudication of an issue to be heard under the Constitutional Review Court Procedure Act, the Administrative Chamber of the Supreme Court referred the case by a court ruling, on the basis of § 70(1^1) of the CACP, to be adjudicated by the Supreme Court *en banc*.

66. Pursuant to § 14(3) of the CRCPA, the Supreme Court *en banc* shall adjudicate a matter, referred by a ruling by the Chamber of the Supreme Court or Special Panel pursuant to corresponding procedural law, in all relevant issues and the procedural law corresponding to the matter and the Constitutional Review Court Procedure Act apply concurrently. Upon hearing Oleg Osmjorkin's appeal, the Supreme Court *en banc* shall therefore adjudicate both the dispute in the administrative case and the issue of constitutionality necessary for the adjudication of the dispute.

67. Upon adjudication of the case, the Supreme Court *en banc* first ascertains what Oleg Osmjorkin requested in the action filed with the administrative court (I). After that the Supreme Court *en banc* points out the provisions of the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHRFF) significant upon adjudication of the case (II). Then the Supreme Court *en banc* establishes whether the criminal proceeding in respect of Oleg Osmjorkin exceeded reasonable time and whether damage was caused to Oleg Osmjorkin by an unreasonably extended proceeding (III). Next, the Supreme Court *en banc* ascertains the substantive law applicable upon compensation for damage (IV) and gives an assessment on the constitutionality of the regulatory framework for compensation for damage in the State Liability Act (V). Finally, the Supreme Court *en banc* adjudicates the issue of ordering damages to Oleg Osmjorkin (VI).

I

68. Oleg Osmjorkin filed an action with the Tallinn Administrative Court requesting compensation for non-proprietary damage caused by the state by an unlawful criminal proceeding. It appears from the action and its supplements and specifications that in the opinion of the complainant, the state caused him damage unlawfully by an extended criminal proceeding, during which preventive measure signed undertaking not to leave place of residence was also applied. In the complainant's opinion, the state failed to terminate the criminal proceeding in due course. The pre-trial criminal proceeding continued in respect of the complainant for ten years, although the bases for termination of the proceeding existed already in 1995. The complainant was of the opinion that damage was caused to him during the period of 31 March 1995 to 24 October 2005.

69. In the initial action Oleg Osmjorkin requested to order him compensation in the amount of 164,950 kroons for non-proprietary damage caused to him. On the proposal of the Tallinn Administrative Court the complainant withdrew the amount of the compensation for damage and requested fair compensation at the discretion of the court according to § 10(3^1) of the CACP.

70. Pursuant to § 3(1) of the CACP, administrative courts are competent to adjudicate disputes in public law (clause 1), grant permission to take administrative measures in the cases provided by law (clause 2) and adjudicate other matters which are placed within the competence of administrative courts by law (clause 3). According to § 3(2) of the CACP, adjudication of disputes in public law for which a different procedure is prescribed by law does not fall within the competence of administrative courts. Pursuant to § 6(3)2) of the CACP, a complaint may be filed with an administrative court for compensation for damage caused in public law relationships.

71. In the assessment of the Supreme Court *en banc*, Oleg Osmjorkin filed an action mentioned in § 6(3)2) of the CACP and the administrative court is competent to review such an action. The Supreme Court *en banc* is of the opinion that it is a dispute in public law and a different procedure is not prescribed for reviewing a claim for compensation for damage caused by criminal proceedings.

II

72. § 13 of the Constitution provides everyone with the protection of the state and of the law. Pursuant to § 14 of the Constitution, the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. § 15(1) of the Constitution prescribes that everyone whose rights and freedoms are violated has the right of recourse to the courts.

73. According to Article 13 of the ECHRFF, everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. The ECHRFF is an integral part of the Estonian legal order (the same opinion has been expressed by the Supreme Court *en banc* in judgment of 6 January 2004 in case no. 3-1-3-13-03).

74. The fundamental right to an effective remedy arises from § 14 of the Constitution. The fundamental right to an effective judicial proceeding arises from this provisions in conjunction with § 15 of the Constitution. A similar right has been guaranteed in Article 13 of the ECHRFF.

75. The fundamental rights arising from §§ 14 and 15 of the Constitution include the person's subjective right to demand effectiveness of the proceeding and the state's objective obligation to provide it. These are procedural fundamental rights, objective of which is to make way for execution of the person's substantive fundamental rights and to ensure effective protection of the fundamental rights. According to the practice of the European Court of Human Rights (ECHR), a Contracting Party to the ECHRFF, pursuant to Article 13, must ensure that national remedies would be effective both legally and in fact, and as a result of application of the remedy, a judgment about the action would be made and sufficient compensation would be awarded in case of a possible established violation (Kud?a v Poland, judgment of 26 October 2000, p 17). This obligation binds, above all, the legislator who is obligated to impose provisions which would ensure execution and protection of fundamental rights with sufficient probability and to sufficient extent.

76. Upon ensuring effective legal protection, the right to compensation for damage has a significant meaning. Pursuant to § 25 of the Constitution, everyone has the right to compensation for moral and material damage caused by the unlawful action of any person. The right to compensation arises from § 25 of the Constitution provided the damage has been caused unlawfully – some of the rights deriving from the law,

the Constitution or an international agreement of the person suffering the damage have been violated.

77. The fundamental right to an effective remedy provided in § 14 of the Constitution includes, among others, the right to demand that proceedings would be conducted within reasonable time. The first sentence of Article 6(1) of the ECHRFF states that in determination of any criminal charge against a person, everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law. In its practice, the ECHR has interpreted the first sentence of Article 6(1) of the ECHRFF as the person's right to adjudication of the case within reasonable time.

78. The reasonable time of proceedings is an undefined legal definition which the ECHR has furnished in its practice. The ECHR has not prescribed any specific time limits, but has based the assessment of reasonableness of the time of proceedings on the following criteria: complexity of the case, behaviour of the appellant, activity of the bodies conducting the proceeding, and the benefits at stake for the appellant (see, for example, the ECHR judgment of 25 March 1999 in cases Pélissier and Sassi v France, request no. 25444/94, paragraph 67; König v Germany, judgment of 28 June 1978, p 99 and 111; Kud?a v Poland, p 124; Konashevskaya and others v Russia, judgment of 3 June 2010, p 42).

79. The Supreme Court has repeatedly dealt with claims regarding reasonable time of proceedings, furnishing it based on the practice of the ECHR. In the Constitutional Review Chamber of the Supreme Court ruling of 30 December 2008 in case no. 3-4-1-12-08 it is emphasised that the court shall assess reasonableness of the time of proceedings, according to the practice of the ECHR, based on the character of the case, considering conditions provided in the practice of the ECHR, above all, the complexity of the case and the activity of the appellant and competent authorities. The Criminal Chamber of the Supreme Court has also noted that upon assessing exceeding of the reasonable time of proceedings, the court shall consider the degree of the criminal offence, the complexity and volume of the criminal case, and other specific circumstances as well, including the course of the proceeding so far (see the Criminal Chamber of the Supreme Court judgment of 27 February 2004 in case no. 3-1-1-3-04, p 19; judgment of 18 June 2010 in case no. 3-1-1-43-10, p 30). The ECHRFF and its application practice is a source of the criminal procedural law pursuant to § 2 2) of the Code of Criminal Procedure (CCP).

80. The fundamental right to a proceeding within reasonable time provided in § 14 of the Constitution obliges both the legislator and the executive power. In criminal procedural law, the state must establish sufficient legal mechanisms so it would be possible to complete criminal proceedings within reasonable time without harming the quality of the proceedings. The executive power, including the bodies conducting criminal proceedings, shall also be obligated to conduct the proceeding effectively and within reasonable time. The obligation of every body conducting criminal proceedings to take steps both in pre-trial proceedings and in court proceedings in order to settle the criminal case as quickly as possible arises from § 14 of the Constitution (see the Criminal Chamber of the Supreme Court judgment of 27 February 2004 in case no. 3-1-1-3-04, p 19).

III

81. Next, the Supreme Court *en banc* assesses the compliance of the pre-trial criminal proceeding conducted in respect of Oleg Osmjorkin with the requirement of reasonable time of proceedings provided in § 14 of the Constitution. The Supreme Court *en banc* forms an opinion whether the criminal proceeding exceeded reasonable time of proceedings and whether unlawful damage was caused to Oleg Osmjorkin thereby. The Supreme Court *en banc* does not assess lawfulness of single procedural acts, including application of the preventive measures arrest and prohibition to leave place of residence, performed in respect of Oleg Osmjorkin in the pre-trial proceeding.

82. The Police and Border Guard Board as the respondent and the Public Prosecutor’s Office involved as a body exercising supervision found that the criminal proceeding conducted in respect of Oleg Osmjorkin was lawful, and refrained from expressing an opinion about the compliance of the proceeding with the requirement of reasonable time of proceedings.

83. Based on the practice of the Supreme Court and the ECHR upon assessment of the reasonable time of proceedings, the beginning of the criminal proceeding in respect of the appellant shall be established, the complexity of the proceeding and the intensity of the performed procedural acts, the activity of the bodies conducting the proceeding to conduct the proceeding within reasonable time, and the appellant's own behaviour shall be assessed.

84. The Criminal Chamber of the Supreme Court has stated: "According to the practice of the European Court of Human Rights, that period in criminal cases which to consider, pursuant to Article 6(1) of the ECHRFF, upon assessment of reasonableness of time of proceedings starts as soon as the person has been “charged” (for the purposes of the Convention). Whereas, the ECHR has defined a criminal charge for the purposes of Article 6(1) of the ECHRFF as an official notification submitted by a competent authority to a person about a suspicion that the person has committed a criminal offence (see, for example, Reinhardt and Slimane-Ka?d v France, judgment of 31 March 1998, p 93, and Malkov v Estonia, judgment of 4 February 2010, p 56). Other measures or acts of authorities which indicate only indirectly the state's suspicion of a criminal offence committed by a person, but which might substantially affect the situation of the suspect are also considered as actuators of the time of proceedings (see, for example, Kangasluoma v Finland, judgment of 20 January 2004, p 26). The starting point of the period which is the basis for the assessment of the reasonableness of time of proceedings is, for instance, the date of arrest of the person or the time when the pre-trial proceeding was commenced in respect of the person, and although the person has not been arrested, he or she has officially become aware of the investigation or the investigation affects him or her (compare Reinhardt and Slimane-Ka?d v france, p 93 and Kangasluoma v Finland, p 26)" (the Criminal Chamber of the Supreme Court judgment of 18 June 2010 in case no. 3-1-1-43-10, p 25). The Supreme Court *en banc* concurs with that opinion.

85. Oleg Osmjorkin was detained as a suspect in criminal case no. 94010522 on 9 December 1994 at 17.00 and he was interrogated as a suspect on 10 December 1994. In the assessment of the Supreme Court *en banc*, the detention on 9 December 1994 shall be deemed the moment when a charge was brought against Oleg Osmjorkin for the purposes of Article 6(1) of the ECHRFF and a criminal proceeding was commenced in respect of him. Notwithstanding that Oleg Osmjorkin was not prosecuted as an accused under an order of the preliminary investigator until 19 December 1994. The definition of a criminal charge in the context of Article 6 of the ECHRFF may differ from definitions used in national criminal procedural law.

86. Next, the Supreme Court *en banc* assesses the complexity of the criminal proceeding and its connection to the duration of the proceeding. It appears from the file of the criminal case that in connection with the murder (§ 100 of the CC) and the attempted murder (§ 15(2)–§ 101 4) of the CC) under investigation, a number of suspects and witnesses were heard, and various expert assessments were conducted. Direct personal sources of evidence in this criminal case could not be established. The pre-trial proceeding focused on several different and mutually exclusive investigation versions. The investigation was complicated by the fact that some of the suspects and accused were abroad and were declared fugitives. In the assessment of the Supreme Court *en banc*, the investigation within the criminal case no. 94010522 was more complicated than average.

87. Upon assessment of reasonableness of time of proceedings, it is important to consider the degree of the criminal offence, i.e. the legal right attacked by the criminal offence. Murder and attempted murder are an

attack against human life. Pursuant to § 16 of the Constitution, everyone has the right to life and that right shall be protected by law. Human life is one of the most valuable and the most protection-deserving and -requiring legal rights in the state based on the rule of law. In case of murder and attempted murder, the existence of public interest is presumed, and upon conducting criminal proceedings of such criminal offences, the principle of mandatory criminal proceedings applies without exception (§ 3 and § 93 of the Criminal Code (CC), § 6 of the CCP) and termination of the proceedings due to expediency considerations is not permitted.

88. It appears from the file of the criminal case that Oleg Osmjorkin himself has not caused any delays upon conducting the proceeding of the criminal case.

89. Oleg Osmjorkin was held in preliminary investigation imprisonment until 31 March 1995, total of 112 days. Suspected of committing acts provided in §§ 100 and 101 of the CC, he probably could have been punished with imprisonment in case of conviction. In the criminal proceeding, the appellant was repeatedly interrogated as an accused and his acquaintances and relatives as witnesses. From 31 March 1995 until the termination of the proceeding on 24 October 2005 the preventive measure signed undertaking not to leave place of residence was applied to Oleg Osmjorkin. The personal liberty (§ 20 of the Constitution), the right to freely choose his area of activity (§ 29 of the Constitution), the inviolability of private and family life (§ 26 of the Constitution), the right to freedom of movement and to choice of residence (§ 34 of the Constitution) and the right to leave the country (§ 35 of the Constitution) protected as fundamental rights were at stake for the appellant in the criminal proceeding. In case of extremely serious criminal offences, the state has an obligation to ascertain the criminal offender and the circumstances of the commission of the criminal offence by conducting criminal procedural acts with necessary thoroughness. On the other hand, the state is obliged to conduct proceedings as quickly as possible because infringements of the fundamental rights of the accused are important.

90. The criminal proceeding in respect of Oleg Osmjorkin lasted from 9 December 1994 until 24 October 2005, total of 10 years, 10 months and 15 days. It appears from the file of the criminal case that last procedural acts in respect of Oleg Osmjorkin were conducted on 31 March 1995. After that, the investigation focused on other versions and no evidence justifying or incriminating the appellant was collected. The criminal proceeding was suspended on 1 April 1995 and resumed on 18 December 1995. From the resumption of the criminal proceeding to its suspension once again on 23 January 1999, procedural acts were performed only in respect of other suspects and accused. From 23 January 1999 until 29 November 2004 the proceeding was suspended and until January 2000 only a few procedural acts which could not be postponed were performed. From 1 April until 18 September 1995 and after 23 January 1999 the criminal proceeding was essentially not conducted (the proceeding was suspended). The proceeding in respect of Oleg Osmjorkin shall be deemed to have been ongoing because the appellant was still in the status of an accused in the proceeding and a preventive measure was applied to him.

91. Taking into account the total duration of the criminal proceeding and the aforesaid considerations, the Supreme Court *en banc* finds that the pre-trial criminal proceeding in respect of Oleg Osmjorkin exceeded reasonable time of proceedings. The investigative body had an obligation to conduct the criminal proceeding but this obligation does not extend to conducting a proceeding against a specific accused if completion of the proceeding in respect of the person and prosecuting him is not possible within reasonable time. Upon expiry of the reasonable time, the body conducting the proceeding had the option to terminate the criminal proceeding in respect of Oleg Osmjorkin based on § 168(1)2) of the CCP and after 1 July 2004 depending on the factual circumstances based on § 199 or § 200^1 of the CCP. The Supreme Court *en banc* is of the opinion that by the end of the 1990s at the latest the body conducting the proceeding should have come to the understanding that the proceeding in respect of Oleg Osmjorkin cannot be completed within reasonable time.

92. Based on the aforesaid, the Supreme Court *en banc* is of the opinion that the pre-trial criminal proceeding in respect of Oleg Osmjorkin exceeded reasonable time of proceedings. The unreasonably extended pre-trial criminal proceeding was in conflict with the obligation arising from § 14 of the Constitution to ensure a proceeding within reasonable time.

93. The Supreme Court *en banc* finds that the unreasonably extended pre-trial criminal proceeding infringed Oleg Osmjorkin's fundamental right to a proceeding within reasonable time arising from § 14 of the Constitution, and caused him non-proprietary damage. The ECHR has expressed an opinion that if an unreasonably extended time of proceedings has been established, causing of non-proprietary damage to the accused shall be generally presumed, unless proven otherwise (see, for example, Scordino v Italy, judgment of 29 March 2006, appeal no. 36813/97). The Supreme Court *en banc* is of the opinion that the procedural status of the accused in the pre-trial criminal proceeding was inevitably accompanied by suffering and discomforts, and the non-proprietary damage caused thereby does not require separate evidence. At the same time with the infringement of the fundamental right provided in § 14 of the Constitution, the criminal proceeding also restricted other fundamental rights of the appellant, or at least the appellant as an accused in a criminal proceeding had to consider infringements of fundamental rights. The Supreme Court *en banc* shall take the existence and intensity of these infringements into account upon determination of the amount of compensation.

94. Next, the Supreme Court *en banc* assesses which national authority caused non-proprietary damage to Oleg Osmjorkin and should be the respondent in the present case. Pursuant to § 14(2)2) of the CACP, the respondent is the administrative authority against whose activities a complaint is filed. Oleg Osmjorkin noted in the complaint the Republic of Estonia through the Ministry of Internal Affairs as the respondent. The Tallinn Administrative Court declared the Central Criminal Police as the respondent in the case and involved the Prosecutor's Office as the body exercising supervision.

95. The Central Criminal Police was a structural unit of the Police Board conducting the criminal proceeding in respect of Oleg Osmjorkin. The Police Board was renamed the Police and Border Guard Board which was the respondent instead of the Central Criminal Police in the later stage of the administrative court procedure. In the assessment of the Supreme Court *en banc*, the Police and Border Guard Board is the appropriate respondent in the case.

96. The Supreme Court *en banc* finds that the Public Prosecutor’s Office should have been the respondent next to the Police and Border Guard Board. Pursuant to § 22(1) of the former CCP, the duty of prosecutors was judicial review of pre-trial criminal proceedings in criminal cases. The prosecutor's duties upon exercising supervision were provided in § 120 of the former CCP which was somewhat amended during the criminal proceeding. The Prosecutor's Office had extensive authority to ensure lawfulness of the proceeding, among others to annul or amend unlawful and unjustified orders of preliminary investigators and to terminate criminal proceedings. The Code of Criminal Procedure which entered into force on 1 July 2004 extended further the authority of the Prosecutor's Office upon ensuring lawfulness of pre-trial criminal proceedings. Pursuant to § 30(1) of the former CCP, a Prosecutor's Office shall direct pre-trial proceedings and ensure the legality and efficiency thereof.

97. In the assessment of the Supreme Court *en banc*, the Public Prosecutor’s Office cannot be declared a respondent in the present stage of the proceeding. The Supreme Court *en banc* notes that the Public Prosecutor’s Office was a participant in the proceeding as a body exercising supervision and had all the rights arising from § 15 of the CACP, among others an option to submit an opinion about circumstances presented in the action and in the appeal and appeal in cassation.

IV

98. Oleg Osmjorkin requested compensation for damage caused during the period from 31 March 1995 to 24 October 2005. The Supreme Court *en banc* found that the pre-trial criminal proceeding in respect of Oleg Osmjorkin exceeded reasonable time by the end of the 1990s at the latest.

99. As of 1 January 2002, the compensation for damage caused by a public authority is governed by the State Liability Act. § 31(1) of the SLA governing the implementation of the State Liability Act states that the provisions which were in force prior to the entry into force of the State Liability Act and general principles of compensation for damage apply upon the review of actions filed prior to the entry into force of the State Liability Act for the compensation for damage caused in public law relationships. The Supreme Court has found that it arises from § 31(1) of the SLA and from general principles of the law that in case the damage was caused prior to 1 January 2002, upon review of actions filed after 1 January 2002 the provisions which were in force prior to the entry into force of the State Liability Act and the general principles of compensation for damage shall be applied. Actions filed after 1 January 2002 but claiming compensation for damage caused prior to 1 January 2002 shall be reviewed in an administrative court (see the ad hoc panel between the Administrative Law and the Civil Chamber of the Supreme Court ruling of 4 March 2002 in case no. 3-3-4-1-02 and a ruling of 10 April 2002 in case no. 3-3-4-2-02).

100. It can be concluded from the above-mentioned that in case the damage has been partly caused prior to and partly after 1 January 2002 (entry into force of the State Liability Act), the causing of damage with respect to both periods shall be assessed separately and the substantive law applicable to each period shall be established. The Supreme Court *en banc* first addresses the substantive law applied to compensation for non-proprietary damage caused in public law relationships prior to 1 January 2002 and then the State Liability Act.

101. Prior to the entry into force of the State Liability Act, the Civil Code of the Estonian SSR and the general principles of compensation for damage had to be followed upon disputes over compensation for damage. In the assessment of the Supreme Court *en banc*, § 448 of the Civil Code shall be applied, and according to subsection 1 of that section, damage caused to the personality or property of a citizen and to an organisation had be compensated in full by the person who caused the damage. Pursuant to § 448(2) of the Civil Code, the person who caused the damage was released from compensating the damage if he or she proved that the damage was not caused through his or her fault.

102. According to § 222(2) of the Civil Code, only proprietary damage had to be compensated under the Civil Code. The basis for compensation for proprietary damage was governed by the General Principles of the Civil Code Act (GPCCA) which entered into force on 1 September 1994 and was repealed on 1 July 2002. Pursuant to the implementing provision § 172(2) of the General Principles of the Civil Code Act, moral damage caused to a person had be compensated for by the person who caused the damage. The person who caused the damage was released from the obligation to compensate for moral damage if he or she proved that he or she was not at fault for causing the damage. Subsection 3 of the same section provided that if personal rights were violated, a court decided on the basis of the circumstances whether moral damage was caused thereby. Therefore, based on § 172(3) of the GPCCA the court had to decide whether to compensate the moral damage in money. In determining the amount of the financial compensation the court had to, according to § 172(4), consider the extent and nature of the moral damage caused and the degree of fault of the person who caused the damage.

103. § 172(1) of the GPCCA referred to the provisions of protection of personal rights in §§ 23–26 of the GPCCA. Pursuant to § 23(1) of the GPCCA, a person had the right to compensation for moral and proprietary damage caused by defamation by a court proceeding. According to § 24(1) of the GPCCA, a

person had the right to termination of a violation of the inviolability of his or her private life and to demand compensation for moral and proprietary damage caused thereby. § 25 of the GPCCA governed the protection of a person's name in case of unauthorised use of the name. Pursuant to § 26 of the GPCCA, in the cases provided by law, a person may also demand termination of the violation of his or her personal rights not specified in §§ 23–26 of the GPCCA and compensation for moral and proprietary damage caused thereby.

104. The Administrative Law Chamber of the Supreme Court has found that "although based on § 26 of the GPCCA, protection of personal rights, including compensation for moral damage, is possible, above all, in case of defamation or violation of private life or unauthorised use of name, it cannot be concluded that there was no legal basis for compensation for moral damage caused in performance of public duties in case of violation of other personal rights before entry into force of the State Liability Act. The General Principles of the Civil Code Act provides the general principles of civil law applicable in family, succession, obligations and property relationships. Compared to the General Principles of the Civil Code Act, significantly broader bases for compensation for moral damage caused in performance of public duties have been provided in the State Liability Act. An opinion of principle that due to the nature of public law relationships, the bases for compensation for damage upon causing of damage by performance of public duties and in civil law relationships shall be distinguished also arises from § 7(4) of the State Liability Act. Therefore, § 26 of the GPCCA cannot be interpreted as restricting upon compensation for moral damage caused in public law relationships. The basis shall be § 25 of the Constitution and not the general principles of compensation for non-proprietary damage" (the Administrative Law Chamber of the Supreme Court judgment of 3 June 2002 in case no. 3-3-1-27-02, p 13).

105. The General Principles of the Civil Code Act did not provide bases for compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings. A basis for compensation for such damage did not arise from any other Act either. The Supreme Court *en banc* is of the opinion that non-proprietary damage caused by unreasonably extended criminal proceedings prior to 1 January 2002 shall be compensated under § 25 of the Constitution.

106. Next, the Supreme Court *en banc* addresses the issue of the State Liability Act. First, the Supreme Court *en banc* assesses the scope of application of the State Liability Act to establish whether it also covers compensation for damage caused in criminal proceedings. The Administrative Law Chamber of the Supreme Court has found that the State Liability Act is applicable to all cases of compensation for damage caused by a public authority in public law relationships where a more specific special regulatory framework is lacking (the Administrative Law Chamber of the Supreme Court judgment of 20 November 2008 in case no. 3-3-1-47-08).

107. Pursuant to § 1(1) of the SLA, the State Liability Act provides the bases of and procedure for the protection and restoration of rights violated upon the exercise of powers of public authority and performance of other public duties and compensation for damage caused. The scope of application of the State Liability Act is specified by § 1(2) of the Act which excludes the restoration of rights and compensation for damage in private law relationships. According to § 2(1) of the SLA, a public authority for the purposes of the State Liability Act is the state, a local government, another legal person in public law or another person performing public duties on a public law basis outside of relationships of subordination. The Supreme Court *en banc* states that the investigative body conducting pre-trial criminal proceedings and the Prosecutor’s Office are national authorities and pre-trial criminal proceedings are exercise of public authority in public law relationships.

108. According to § 2(3) of the SLA, the terms “administrative act” and “measure” are used within the meaning of the Code of Administrative Court Procedure. Pursuant to the first sentence of § 4(1) of the CACP, administrative acts against which an action or protest may be filed with an administrative court are

the orders, directives, resolutions, precepts or other legislation which regulate individual cases in public law relationships, issued by agencies, officials or other persons who perform administrative functions in public law. According to § 4(2) of the CACP, measures against which an action or protest may be filed with an administrative court are activities, omissions or delays in public law relationships by agencies, officials or other persons who perform administrative functions in public law.

109. Compensation for damage caused in pre-trial criminal proceedings is regulated in part by the Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act (CDCSPUDLA). Pursuant to § 1(1) of the Act, the following persons shall be compensated for damage caused by deprivation of liberty: 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 (clause 1), and persons who were detained on suspicion of a criminal offence or released when the suspicion ceased to exist (clause 2). Therefore, the CDCSPUDLA regulates in criminal proceedings compensation for damage caused only by deprivation of liberty. It must be taken into account that according to § 5(4) of the CDCSPUDLA, loss of profit as a result of unjust deprivation of liberty and non-proprietary damage caused thereby are compensated for to a person under § 5 of the CDCSPUDLA; the amount of compensation for direct proprietary damage is determined in accordance with the provisions of the State Liability Act.

110. The Supreme Court *en banc* is of the opinion that the State Liability Act is a general act regulating the liability of public authority, and its scope of application includes compensation for damage caused by public authority to the extent that it is not regulated by specific law. A specific regulatory framework for compensation for damage caused by pre-trial criminal proceedings is provided only in respect of damage caused by unjust arrest, in other regards compensation for damage caused by pre-trial criminal proceedings is covered by the scope of application of the State Liability Act.

111. Next, the Supreme Court *en banc* assesses whether the State Liability Act provides bases for compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings. The causes of a claim for compensation for damage are provided in §§ 7 and 9 of the State Liability Act (Division 1 “General provisions” of Chapter 3 “Compensation for damage”) which are general provisions of compensation for damage, and in §§ 14, 15 and 16 regulating special cases of liability (Division 2 “Special cases of liability” of the same chapter). First, the Supreme Court *en banc* forms an opinion whether § 15 of the SLA regulating compensation for damage caused upon administration of justice should be applied. § 14 of the SLA regulating compensation for damage caused by legislation of general application and § 16 of the SLA regulating compensation for damage caused by a lawful administrative act or measure are irrelevant to the settlement of the dispute.

112. 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 shall 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.

113. Next, the Supreme Court *en banc* assesses whether the general provisions of compensation for damage of the State Liability Act can be applied to compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings.

114. The general cause of a claim for compensation for damage caused unlawfully in public law relationships is provided in § 7(1) and (2) of the SLA. Pursuant to § 7(1) of the SLA, a person whose rights are violated by the unlawful activities of a public authority in a public law relationship may claim compensation for damage caused to the person if damage could not be prevented and cannot be eliminated by the protection or restoration of rights in the manner provided for in §§ 3, 4 and 6 of the SLA. According to § 7(2) of the SLA, compensation for damage caused by a failure to act may be claimed only if an administrative act is not issued in due course or a measure is not taken in due course and the rights of a person are violated thereby. § 7(3) of the SLA states that on the basis of subsections 1 and 2 of the same section, only compensation for proprietary damage can be claimed. Upon compensation for non-proprietary damage, § 9(1) of the SLA shall be applied in addition to § 7(1) and (2). Based on § 7(1) of the SLA, a prerequisite for claiming compensation for both proprietary and non-proprietary damage is exercise of the claims, i.e. primary remedies provided in §§ 3, 4 and 6 of the SLA, objective of which is prevention and decrease of damage.

115. The Supreme Court *en banc* finds that upon compensation for damage caused in pre-trial criminal proceedings, the obligation provided in § 7(1) of the SLA to exercise primary remedies cannot be applied. Primary remedies which shall be exercised according to § 7(1) of the SLA are a claim for annulment of administrative act (§ 3 of the SLA), a claim for termination of ongoing measure (§ 4 of the SLA) and a claim for issue of administrative act or taking of measure (§ 6 of the SLA). Claims provided in §§ 3, 4 and 6 of the SLA can be filed only in administrative activity, filing thereof in pre-trial criminal proceedings is impossible. The Supreme Court *en banc* refrains from forming an opinion here whether criminal procedural law includes remedies equivalent to the primary remedies provided in §§ 3, 4 and 6 of the SLA. The Supreme Court *en banc* is of the opinion that an obligation to exercise criminal procedural remedies even if equivalent remedies exist cannot arise from § 7(1) of the SLA.

116. Failing to fulfil the obligation provided in § 7(1) of the SLA may exclude compensation for damage or restrict compensation for damage significantly. The obligation to exercise primary remedies restricts the person's fundamental right arising from § 25 of the Constitution to claim compensation for damage. Such a restriction of a fundamental right must be clearly provided by law. Without a legal basis the court cannot extend to pre-trial criminal proceedings an obligation provided for avoiding and decreasing damage in administrative activities and restricting a fundamental right. In addition, a situation where a person is able to comprehend which criminal procedural remedies are sufficient for fulfilling the obligation provided in § 7(1) of the SLA only by being well acquainted with case-law is in conflict with the principle of legal clarity. In the assessment of the Supreme Court, upon compensation for damage caused by pre-trial criminal proceedings, the person's behaviour upon occurrence of the damage and his or her activities for preventing or decreasing the damage can and must be considered. Such a basis for restricting liability is also provided in § 13(1)4) of the SLA, according to which upon determining the amount of compensation, restrictions arising from the part the injured party had in causing the damage which are provided for in private law shall be taken into account.

117. The Supreme Court *en banc* finds that non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings cannot be compensated under § 9(1) of the SLA. Pursuant to § 9(1) of the SLA, a natural person may claim financial compensation for non-proprietary damage upon wrongful degradation of dignity, damage to health, deprivation of liberty, violation of the inviolability of home or private life or the confidentiality of messages or defamation of honour or good name of the person. On the basis of the § 9(1) of the SLA, non-proprietary damage shall be financially compensated for only if legal rights which are exhaustively provided in the said provision are violated. Non-proprietary damage caused by violations of other legal rights cannot be compensated based on § 9(1) of the SLA.

118. Based on the aforesaid, the Supreme Court *en banc* is of the opinion that the State Liability Act lacks the bases for compensation for non-proprietary damage caused by unreasonably extended criminal proceedings – such damage cannot be compensated under the general nor the specific provisions of the State

Liability Act. Lack of causes of a claim in the State Liability Act means, in the assessment of the Supreme Court *en banc*, that compensation for damage caused by unreasonably extended pre-trial criminal proceedings is excluded and the appeal of Oleg Osmjorkin should be dismissed. The Supreme Court *en banc* assesses hereunder whether the regulatory framework of the State Liability Act excluding compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings is in conformity with the Constitution.

V

119. The Supreme Court *en banc* finds that the regulatory framework of the State Liability Act excluding compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings restricts the fundamental right to compensation for damage provided in § 25 of the Constitution. Compensation for non-proprietary and proprietary damage caused unlawfully by a public authority is included in the scope of protection of the fundamental right provided in § 25 of the Constitution. The regulatory framework of the State Liability Act also restricts the right to effective judicial proceeding arising from §§ 14 and 15 of the Constitution in conjunction. There is no proceeding which would enable a person whose rights have been violated by an unreasonably extended pre-trial criminal proceeding to have recourse to the courts with a claim for compensation for damage. The regulatory framework of the State Liability Act which excludes compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings also restricts the fundamental right, arising from § 14 of the Constitution, to a proceeding within reasonable time, violation of which resulted in the right to compensation for damage.

120. § 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.

121. Bases of substantive law for compensation for damage caused by a public authority and therefore for exercising the fundamental right arising from § 25 of the Constitution are provided in the State Liability Act. By providing the bases and procedure for compensation for damage, the State Liability Act restricts, at the same time, the exercise of the fundamental right. According to the explanatory memorandum of the draft legislation of the State Liability Act, the objective of the draft legislation was to provide a basis for compensation for damage caused to a person by a public authority in a manner which would restore the person’s rights but which would not be too burdensome to public resources. Decrease of public authority’s expenses and thereby protection of the state’s financial interests can therefore be deemed one of the objectives of the restrictions of compensation for damage arising from the State Liability Act. The Supreme Court *en banc* finds that the same objective can also be considered the objective of exclusion of compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings. In the assessment of the Supreme Court *en banc*, protection of the state’s financial interests is a legitimate objective in itself for restriction of fundamental rights.

122. However, the Supreme Court *en banc* finds that the restriction of fundamental rights provided in §§ 25 and 14 and 15 of the Constitution is not proportionate. The regulatory framework of the State Liability Act excluding compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings restricts very intensely the fundamental right arising from § 25 of the Constitution to claim compensation for damage. The regulatory framework of the State Liability Act not only provides the conditions restricting compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings, but excludes the compensation for damage completely. Upon assessment of the intensity of the restriction, the fact that in pre-trial criminal proceedings several fundamental rights of the person, which may be substantial and their infringement intensive, are infringed at the same time must also be taken into account.

123. The Supreme Court *en banc* is of the opinion that the need to protect the state’s financial interest does

not outweigh the exclusion of the compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings as a whole and without the option of consideration.

124. Pursuant to the aforesaid, the Supreme Court *en banc* finds that the regulatory framework of the State Liability Act restricts disproportionately the fundamental rights provided in §§ 25, 14 and 15 of the Constitution in the part which does not prescribe the option to compensate non-proprietary damage caused in pre-trial criminal proceedings by exceeding reasonable time of proceedings. Based on § 15(1)21) of the CRCPA, the Supreme Court *en banc* declares the State Liability Act in conflict with §§ 11, 14, 15 and 25 of the Constitution in the part which does not prescribe the possibility to compensate non-proprietary damage caused in pre-trial criminal proceedings by exceeding reasonable time of proceedings.

125. The non-proprietary damage caused to Oleg Osmjorkin after 1 January 2002 by an unreasonably extended pre-trial criminal proceeding shall be compensated on the basis of § 25 of the Constitution.

126. In addition to the aforesaid, the Supreme Court *en banc* deems it necessary to stress the following. The State Liability Act does not regulate only compensation for damage; prevention and decrease of damage also have an important meaning in the State Liability Act. It was emphasised in the explanatory memorandum of the draft legislation of the State Liability Act that by the draft legislation the focus of the state liability law was wished to shift from financial compensation for damage to prevention of damage. The provisions of prevention and decrease of damage are closely related to the provisions of compensation for damage in the State Liability Act, forming a uniform structure of the regulatory framework of the public authority's liability in administrative activity. The Supreme Court *en banc* found hereinabove that the requirements for prevention and decrease of damage are not applicable upon compensation for damage caused in pre-trial criminal proceedings. Upon compensation for such damage under the State Liability Act, the latter could be applied only in part without necessary elements of the whole structure.

127. A prerequisite for compensation for damage under §§ 7 and 9 of the SLA is establishment of unlawfulness of a measure or an administrative act. Upon reviewing a claim for compensation for damage caused by an unlawful administrative act or administrative measure, the administrative court establishes first the unlawfulness of the act or measure, and then orders damages. The State Liability Act does not provide whether, how and to what extent the administrative court should assess the lawfulness of acts and decisions in pre-trial criminal proceedings. The vagueness in this matter might hinder the exercise of the fundamental right arising from § 25 of the Constitution and infringe the right, arising from §§ 14 and 15 of the Constitution, to effective judicial proceedings for the protection of rights. The regulatory framework of the State Liability Act may not correspond in respect of compensation for damage caused by pre-trial criminal proceedings to the requirement of legal clarity arising from § 13 of the Constitution.

128. The Supreme Court *en banc* notes that criminal proceedings are so specific exercise of the state’s authority that it is regulated separately from other exercise of public authority – administrative activity. The lawfulness of acts and decisions in criminal proceedings is generally verified, according to rules of criminal procedure and within criminal procedure, by general courts. It should also be noted that in criminal proceedings, pre-trial proceedings are in general followed by court proceedings, within which an assessment on acts and decisions, among others, in pre-trial proceedings is also given. Deciding compensation for damage caused in criminal proceedings based on current principles in the State Liability Act can result in subjection of decisions of general courts to the control of administrative courts. Considering the integrity and structure of the court system, it would, however, be an unreasonable solution and would probably not facilitate ensuring of legal protection which is effective and without shortcomings. The Supreme Court *en banc* finds that the protection of fundamental rights provided in, above all, §§ 14 and 15 and in § 25 of the Constitution requires implementation of a specific regulatory framework for compensation for damage caused in criminal proceedings.

VI

129. Based on the above-mentioned, the Supreme Court *en banc* annuls the Tallinn Circuit Court judgment of 28 August 2009 in administrative case no. 3-06-1178 and the Tallinn Administrative Court judgment of 16 January 2009 in administrative case no. 3-06-1178 and renders a new judgment on the basis of § 72(1)4) of the CACP.

130. Netx, the Supreme Court *en banc* considers whether and in which amount shall damages be awarded to Oleg Osmjorkin. The ECHR bases its judgments regarding unreasonable duration of criminal proceedings on the fact that non-proprietary damage can mostly be compensated by decrease of penalty, declaring penalty served in part, release from penalty or termination of the criminal proceeding. On the other hand, in cases where proceedings have been terminated or the person has been acquitted only after the end of reasonable time of proceedings and on other considerations than due to expiry of the reasonable time of proceedings (e.g. due to insufficient guilt or inability to provide evidence), the only fair measure upon compensation for non-proprietary damage caused to a person is fair financial compensation (see, for example, Ommer v Germany, judgment of 13 November 2008, action no. 10597/03, p 75). The criminal proceeding in respect of Oleg Osmjorkin was terminated on 24 October 2005 due to expiry of the criminal offence and therefore it is not possible to compensate non-proprietary damage by means of penal power. The only possible compensation for violation of Oleg Osmjorkin's rights is currently award of fair financial compensation.

131. The Supreme Court *en banc* bases its award of compensation for damage caused to Oleg Osmjorkin on § 25 of the Constitution and takes the general principles of compensation for damage into account upon determining the amount of the compensation. Based on that, the Supreme Court *en banc* assesses first the degree of violation of Oleg Osmjorkin's rights and then his part in causing of the damage.

132. The Supreme Court *en banc* found that the pre-trial criminal proceeding restricted Oleg Osmjorkin's fundamental right to a proceeding within reasonable time arising from § 14 of the Constitution. In the pre-trial criminal proceeding which exceeded reasonable time, in addition to the fundamental right arising from § 14 of the Constitution, other fundamental rights of the appellant were also infringed. The Supreme Court *en banc* shall take the infringement of these fundamental rights also into account upon determining the amount of compensation. According to the appellant, associating him with murder defamed him. His name had become disreputable due to newspaper articles and reports broadcast on the radio and TV. The appellant had obtained the profession of a chef and had been employed as a chef, but after release from arrest the appellant was unable to find work in his specialty or any other field. The appellant knew that he could not leave the country. According to the appellant, he was treated as a criminal, although he had not committed a criminal offence, and he was unable to protect himself because the criminal case had not been terminated. The appellant explained that the criminal proceeding caused him emotional distress which was expressed by feelings of humiliation and hurt, fear and concern.

133. The Supreme Court *en banc* finds that the preventive measure – signed undertaking not to leave place of residence – applied in the criminal proceeding infringed the appellant's rights arising from the Constitution to move freely and choose a place of residence (§ 34 of the Constitution) and the right to leave the country (§ 35 of the Constitution). The preventive measure signed undertaking not to leave place of residence (§ 69 of the CCP) means that a written obligation not to leave his permanent or temporary place of residence without the permission of the preliminary investigator, the prosecutor or the court was put on the suspect or the accused. The suspect or the accused was cautioned that in case of violation of the obligation, a more restricting preventive measure may be applied. § 128 of the CCP prescribes a preventive measure prohibition on departure from residence which is essentially the same (the obligation of a suspect or accused not to leave his or her residence for more than twenty-four hours without the permission of the body conducting the proceedings). The preventive measure signed undertaking not to leave place of residence is a preventive measure which restricts a person's rights less than, for example, arrest or exclusion from office.

134. The Supreme Court *en banc* finds that for proving infringement of § 35 of the Constitution, the

appellant is not required to prove whether he wanted to leave the country at all. The fact that, as it appears from the files of the case, the appellant actually changed his place of residence during the criminal proceeding and failed to inform the body conducting the proceedings thereof but it did not result in application of a more restricting preventive measure, does not undo the infringement of § 34 of the Constitution. These circumstances decrease the intensity of the infringement of the fundamental rights.

135. Although the appellant has not presented any specific arguments or proof about information spread about him or reports published in the media, the Supreme Court *en banc* finds that the criminal proceeding infringed the appellant's right to honour and good name arising from § 17 of the Constitution. The fact that a person is an accused in a criminal proceeding infringes his or her right to honour and good name because it is likely that such information will reach a larger number of people. In this case the likelihood was all the more greater since his family members and acquaintances were asked questions about the appellant. Refuting information which is spreading unofficially and restoring one's good name would be difficult even in a situation where there is an official confirmation about lack of grounds for associating the person with a criminal offence. The appellant lacked the possibility to protect his good name until the termination of the criminal proceeding.

136. In the assessment of the Supreme Court *en banc*, the suspicion of commission of a criminal offence and infringement of honour and good name arising from that, also the restriction on free movement, could have resulted in infringement of the appellant's right to freely choose his area of activity (§ 29 of the Constitution). The appellant has substantiated that infringement in general with difficulties finding specialised work, but no specific statements have been made. The Supreme Court *en banc* deems possible the infringement of little intensity of the fundamental right provided in § 29 of the Constitution.

137. Further, the Supreme Court *en banc* is of the opinion that the criminal proceeding infringed the appellant's right to inviolability of private life (§ 26 of the Constitution) because being in the status of an accused in a criminal proceeding meant possible surveillance of the appellant's private life. At the same time, no investigative acts were performed in respect of the appellant after March 1995 and therefore the infringement of his private life was not intensive.

138. The Supreme Court *en banc* admits that the infringements of Oleg Osmjorkin's rights in the pre-trial criminal proceeding were severally not severe. At the same time, it must be taken into account that the pre-trial criminal proceeding meant infringement of several fundamental rights in conjunction and the rights were infringed for a very long time.

139. Next, the Supreme Court *en banc* assesses Oleg Osmjorkin’s part in causing of the damage. The Supreme Court *en banc* explores whether and which remedies were at the disposal of Oleg Osmjorkin for the protection of his rights and how would exercising them have prevented or decreased the causing of the damage.

140. Pursuant to § 182(1) of the former CCP, it was possible to submit a complaint against the activities of an investigator or a preliminary investigator to a prosecutor either directly or through the investigator or the preliminary investigator against whose activities the complaint was submitted. According to § 183(3) of the former CCP, it was possible to submit a complaint against the decision of a prosecutor on the adjudication of a complaint or against the activities of a prosecutor during investigation with a higher-ranking prosecutor. An appeal to the courts was not possible under the former Code of Criminal Procedure. § 228 of the Code of Criminal Procedure which entered into force on 1 July 2004 prescribes a procedure for appeal regarding investigative acts. In the procedure for appeal regarding investigative acts, before a statement of charges is prepared, a participant in a proceeding has the right to file an appeal with the Prosecutor's Office against a procedural act or order of the investigative body if he or she finds that violation of the procedural requirements in the performance of the procedural act or preparation of the order has resulted in the violation

of his or her rights (§ 228(1) of the CCP). Pursuant to § 230(1) of the CCP, if the activities of an investigative body or Prosecutor's Office in violation of the rights of a person are contested and the person does not agree with the order prepared by the Public Prosecutor's Office who reviewed the appeal, the person has the right to file an appeal with the preliminary investigation judge of the county court in whose territorial jurisdiction the contested order was prepared or the contested procedural act was performed. Thus, during the validity of the former Code of Criminal Procedure, but definitely after the entry into force of the new Code of Criminal Procedure, remedies which could have decreased the violation of Oleg Osmjorkin's rights were at his disposal. The Supreme Court*en banc* admits that due to lack of the possibility to appeal to the courts, the appeal options provided in the former Code of Criminal Procedure cannot be deemed especially effective.

141. As it appears from the criminal file, Oleg Osmjorkin did not file during the proceeding any appeals regarding the unreasonable duration of the proceeding with the Prosecutor's Office or the court. At the same time, the law did not provide the requirement of reasonable time, let alone determined the concept of reasonable time of proceedings. The right to a proceeding within reasonable time arising from the Constitution and the practice of the ECHRFF and the ECHR has been applied in Estonia only in case-law.

142. In the opinion of the Supreme Court *en banc*, it is difficult for a person without legal knowledge to protect his or her rights in such a situation. The ability of Oleg Osmjorkin to comprehend the violation of his rights and to protect his rights is indirectly characterised by the fact that, as it appears from the criminal file, Oleg Osmjorkin was under arrest from 9 February until 23 March 1995 without a court sanction. The appellant did not file any appeals against such an intensive infringement of the right to freedom or against an obvious violation of procedural rules. Based on the above-mentioned, the Supreme Court *en banc* finds that Oleg Osmjorkin should have comprehended the violation of his rights by an unreasonably extended pre-trial criminal proceeding and should have used general options for appeal prescribed in criminal procedure, but using these options could not have been reasonably expected of him. Failing to use the options for appeal is therefore not a basis for decrease of compensation in this case.

143. Based on the above-mentioned considerations, the Supreme Court *en banc* finds that a fair compensation to Oleg Osmjorkin for non-proprietary damage caused by an unreasonably extended pre-trial criminal proceeding is 1,250 euros. To order that the Republic of Estonia pay the damages.

A dissenting opinion of the justices of the Supreme Court Jüri Ilvest and Tambet Tampuu on the judgment of the Supreme Court *en banc* in case no. 3-3-1-85-09, paragraphs 1–3 of which the justice of the Supreme Court Henn Jõks has concurred with and paragraphs 1 and 2 the justices of the Supreme Court Jaak Luik and Priit Pikamäe have concurred with.

1. We find that paragraph 3 of the decision of the judgment of the Supreme Court *en banc* is not in compliance with paragraph 124 of the judgment of the Supreme Court *en banc*, pursuant to which the Supreme Court *en banc* applied § 15(1) 2^1) of the Constitutional Review Court Procedure Act (CRCPA). According to that provision, the Supreme Court has the right to declare, pursuant to the constitutional review court procedure, the refusal to issue an instrument of legislation of general application to be in conflict with the Constitution. It would have complied with the wording of § 15(1)2^1) of the CRCPA if the Supreme Court *en banc* would have declared in paragraph 3 of the decision of its judgment the refusal to issue an instrument of legislation of general application enabling compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings to be in conflict with the Constitution. For comparison – in judgment of 14 April 2009 in case no. 3-3-1-59-07 the Supreme Court *en banc* has followed the wording of § 15(1)2^1) of the CRCPA upon declaring unconstitutional the legislator's failure to act.

2. Paragraph 3 of the decision of the judgment of the Supreme Court *en banc* may give a false impression that regulating the option and conditions of compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings only in the State Liability Act is constitutional.

Such a false comprehension is deepened by the ambivalence of the justifications of the judgment of the Supreme Court *en banc* in the part in which the latter explains the coverage of compensation for damage caused by pre-trial criminal proceedings by the scope of application of the State Liability Act. In paragraph 110 of the judgment, the Supreme Court *en banc* finds that in the part in which there is no special regulatory framework prescribed in any other Act for compensation for damage caused by pre-trial criminal proceedings, the compensation of such damage shall be considered as a part of the scope of application of the State Liability Act. Then, after analysing the provisions of the applicable State Liability Act (paragraphs 106–117 of the judgment), the Supreme Court *en banc* comes to the unambiguous conclusion that the State Liability Act does not prescribe bases for compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings, and that the State Liability Act does not include the corresponding bases for claims (p 118 of the judgment). The judgment of the Supreme Court *en banc* lacks justifications about on which basis the Supreme Court *en banc* finds that compensation for damage caused by pre-trial criminal proceedings is covered by the scope of application of the State Liability Act. In our opinion, something for which an Act does not include a regulatory framework cannot, formal logically alone, belong to the scope of application of that Act.

From the fact that the state must compensate to a person the damage which state officials have caused unlawfully upon conducting pre-trial criminal proceedings it can only be concluded that the obligation to compensate for damage caused by criminal proceedings is a part of the state's liability. We concur with the first sentence of paragraph 124 of the judgment of the Supreme Court *en banc*, pursuant to which the regulatory framework of the State Liability Act restricts disproportionately the fundamental rights provided in §§ 25, 14 and 15 of the Constitution in the part which does not prescribe the option to compensate non-proprietary damage caused in pre-trial criminal proceedings by exceeding reasonable time of proceedings. However, it does not automatically result from such unconstitutionality that the regulatory framework of such liability only in the State Liability Act would be constitutional.

3. According to p 117 of the judgment of the Supreme Court *en banc*, compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings is not possible due to restrictions provided in § 9(1) of the State Liability Act (SLA). P 118 of the judgment of the Supreme Court *en banc* states that the lack of cause of a claim for compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings in the State Liability Act excludes the satisfaction of the appeal of O. Osmjorkin. Paragraphs 119–128 of the judgment of the Supreme Court *en banc* justify the unconstitutionality of the restrictions of compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings arising from the State Liability Act. It can be concluded from these justifications that p 3 of the decision of the judgment of the Supreme Court *en banc* meant the unconstitutionality of the restrictions arising from the State Liability Act. Therefore it would have been correct to apply § 15(1)2) of the CRCPA and declare in paragraph 3 of the decision of the judgment § 9(1) of the SLA unconstitutional and invalid in the part in which it excludes compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings.

4. Paragraph 3 of the decision of the judgment of the Supreme Court *en banc* in conjunction with § 15(1)2^{1}) of the CRCPA leaves unanswered the question whether as of the publication of the judgment of the Supreme Court *en banc*, the administrative courts are competent to hear actions which claim compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings. In our opinion, the Supreme Court lacks, in case it declares the legislator's failure to act unconstitutional according to § 15(1)2^{1}) of the CRCPA, the competence to implement with its judgment legislation of general application which is unconstitutionally lacking. It is therefore disputable whether p 3 of the decision of the judgment of the Supreme Court *en banc* eliminates the unconstitutional situation and implements the lacking regulatory framework. In case of declaration of invalidity of § 9(1) of the SLA in the above-mentioned part (see p 3 of this dissenting opinion), it would have been clear that the unconstitutional situation has been eliminated and that in the future other persons can file similar claims against the state as was filed by O. Osmjorkin.

The Supreme Court *en banc* has found in p 29 of its judgment of 21 May 2008 in constitutional review case

no. 341307 that § 9(1) and § 15(1)2[1]) of the CRCPA are connected to § 14(1) of the SLA, and therefore are meant to function only with a claim for compensation for damage caused by failure to issue legislation of general application. The Administrative Law Chamber of the Supreme Court has earlier expressed a similar opinion in p 14 of its judgment of 6 March 2003 in administrative case no. 3312303. Based on the justifications of the two indicated judgments, O. Osmjorkin would have the right to claim compensation for non-proprietary damage regarding the legislator's failure to act, not compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings.

5. We do not concur with p 4 of the decision of the judgment of the Supreme Court *en banc*, or with paragraphs 81–93 and 129–143 of the same judgment, and we find that the judgments of the lower courts should have been annulled and the case should have been referred to the Tallinn Administrative Court for a new hearing.

In the present case, the Supreme Court *en banc* has evaluated evidence for adjudication of the administrative case and has established necessary circumstances for giving a legal assessment on reasonableness of time of pre-trial criminal proceedings and for determining the amount of damages to be ordered to O. Osmjorkin. In our opinion, the Supreme Court *en banc* lacked the clear competence for such a procedural activity. According to § 64(2) of the Code of Administrative Court Procedure, a judgment of the Supreme Court shall be based on the facts established by the judgment of a lower court and the Supreme Court shall not establish facts which constitute the cause of an appeal. § 49 of the CRCPA prescribes submission of evidence only in matters regarding constitutional review. Giving a legal assessment on the state's failure to act and establishment of the amount of damages are issues of application of substantive law.

Upon a new hearing of the matter, the Administrative Court could have involved an appropriate respondent in the proceeding (see p 94–97 of the judgment of the Supreme Court *en banc*) and ascertained, before adjudicating the merits of the case, the respondent's opinions on the reasonableness of time of pre-trial criminal proceedings and the amount of damages.
