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Constitutional judgment 3-4-1-6-09

**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT**

No. of the case	3-4-1-6-09
Date of decision	17 July 2009
Composition of court	Chairman Märt Rask, members Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Hannes Kiris.
Court Case	Request of the Tallinn Circuit Court to declare § 56(18[1]) of the State Fees Act to the extent that is provides that a state fee of 200 kroons shall be paid upon filing of an appeal against a ruling rendered in an administrative matter, unconstitutional.
Basis of proceeding	The Tallinn Circuit Court ruling of 17 March 2009 in administrative matter no. 3-09-90
Date of hearing	Written procedure.
DECISION	**To dismiss the request of the Tallinn Circuit Court.**

FACTS AND COURSE OF PROCEEDING

1. According to the judgment of the Tallinn Circuit Court Urve Piirat had filed an action with the Tallinn Administrative Court on 14 January 2009, requesting that the court declare invalid the government of the Tallinn central district letter of 11 December 2008. By this letter the government of the central district notified of the privatisation by auction of legal shares of Faehlmanni 41, which is in common ownership. Also, U. Piirat applied, by way of provisional legal protection, for the prohibition of the auction of the residential building located at Faehlmanni 41, until the European Court of Human Rights renders its decision concerning Urve Piirat's application no. 45103/08.

2. By its ruling of 17 February 2009 the Tallinn Administrative Court accepted the action of U. Piirat, but did not satisfy the application for provisional legal protection.

3. U. Piirat filed an appeal against the ruling of the Tallinn Administrative Court with the Tallinn Circuit Court. The Tallinn Circuit Court dismissed the appeal against the ruling, but it found that § 56(18^1) of the State Fees Act (hereinafter "the SFA") was to be declared unconstitutional and not applied to the applicant, and thus initiated a constitutional review proceeding.

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING

4. The Tallinn Circuit Court found that upon filing the appeal against the ruling U. Piirat had failed to pay the state fee, and the court held that pursuant to § 56(18^1) of the SFA an appeal against a ruling can not be heard until the deficiencies thereof have been rectified. The Circuit Court must adhere to § 472 of the Code of Administrative Court Procedure (hereinafter "the CACP") and § 664(2) of the Code of Civil Procedure (hereinafter "the CCP") which in their conjunction do not allow to hear such an appeal against a ruling. On the basis of §§ 659, 637(1)3) and 638(2) of the CCP the appeal against the ruling should not be accepted and a term should be set to the appellant for rectification of the deficiencies of the appeal.

5. The Tallinn Circuit Court decided that § 56(18^1) of the SFA was not to be applied to the extent that it requires the payment of a state fee upon filing an appeal against a ruling. Pursuant to the second sentence of §§ 32(3) and 47^1(6) of the CACP an appeal against a ruling is exempt from state fees. Pursuant to § 104(2)14) of the Constitution court procedure Acts may be passed and amended only by a majority of the membership of the Riigikogu. § 56(18^1) was inserted to the State Fees Act by § 38(20) of the Act to Amend the Code of Civil Procedure and Related Acts, which was passed on 10 December 2008. The Act was indeed passed by a majority of the membership of the Riigikogu, yet the Act is not referred to in § 104(2) of the Constitution. The Constitutional Review Chamber of the Supreme Court has explained in part V of its judgment no. III-4/A-11/94 of 21 December 1994 that upon regulating the issues referred to in § 104(2) of the Constitution it is not sufficient if this is done by an Act passed by a majority of the membership of the Riigikogu; it is required that such a regulatory framework be included in a relevant Act enumerated in § 104(2) of the Constitution. It was explained in the Constitutional Review Chamber of the Supreme Court judgment no. 3-4-1-1-98 of 5 February 1998 that regulation by ordinary Acts of relationships that are to be regulated by constitutional laws is unconstitutional and the issues which fall within the sphere of regulation of constitutional laws can only be regulated through relevant constitutional laws.

The payment of a state fee upon filing an appeal against a ruling is regulated, although in general terms, by the Code of Administrative Court Procedure. The rates of the fees are provided by the State Fees Act. In a situation where, pursuant to the Code of Administrative Court Procedure, the payment of a state fee is an issue of court procedure for the purposes of § 104(2)14) of the Constitution, the issue can not be regulated by some other Act than the Code of Administrative Court Procedure.

As far as relevant, § 56(181) of the SFA is also in conflict with the principle of legal clarity, arising from § 10 of the Constitution, because the norms that are in conflict with each other have been created in the legal order. § 56(18^1) of the SFA and §§ 32(3) and 471(6) of the CACP can not be interpreted so that both norms would be meaningful at the same time.

For the above reasons the circuit court held that § 56(181) of the SFA should not be applied due to conflict with §§ 10 and 104(2)14) of the Constitution, and it should be declared unconstitutional to the extent that it provides for the obligation to pay a state fee of 200 kroons upon filing an appeal against a ruling of a court in an administrative matter.

6. U. Piirat is not of the opinion that § 56(18^1) of the SFA is in conflict with §§ 10 and 104(2)14) of the Constitution, and argues that the provision should not be applied because it is in conflict with the Code of Administrative Court Procedure as a supreme constitutional law.

7. The government of the Tallinn central district agrees with the opinion of the Tallinn Circuit Court that in a situation where the Code of Administrative Court Procedure regards the payment of a state fee as an issue of

court procedure this issue can not be regulated by some other Act.

8. The Constitutional Committee and the Legal Affairs Committee of the Riigikogu submitted their opinions on behalf of the Riigikogu. The Constitutional Committee is of the opinion that as pursuant to § 104 of the Constitution the Code of Administrative Court Procedure is a constitutional law, the Code has supremacy over the State Fees Act. Consequently, the Code of Administrative Court Procedure should be applied and the fact that the provision of the State Fees Act was passed by a majority of the membership of the Riigikogu is irrelevant. At the same time § 56(18^1) of the SFA is in conflict with § 10 of the Constitution, because the conflict thereof with the provisions of the Code of Administrative Court Procedure which provide for the exemption from state fees creates the lack of legal clarity that can not be overcome through interpreting.

The Legal Affairs Committee is of the opinion that § 56(1^{81}) of the SFA is not a constitutional provision, yet it is in conflict with the principle of legal clarity, which arises from §§ 10 and 13(2) of the Constitution, because conflicting norms have been created in the legal order. § 56(181) of the SFA and §§ 32(3) and 47^1 (6) of the CACP can not be interpreted so that both norms would be meaningful at the same time.

9. The Minister of Finance is of the opinion that § 56(18^1) of the SFA is not a relevant provision and the conflict between the provision and §§ 32(3) and 47^1(6) of the CACP can be resolved through interpreting. The State Fees Act only establishes the rates of state fees, it can not render the payment of a state fee mandatory. The obligation to pay a state fee can only arise from a specific Act.

10. The Chancellor of Justice is of the opinion that to the extent that § 56(18^1) of the SFA provides for the payment of a state fee upon filing an appeal against a ruling of a court in an administrative matter the provision is in conflict with the principle of legal clarity (§ 13(2) of the Constitution) and in substantive conflict with the general fundamental right to effective legal protection and fair trial (§ 15(1) and § 14 of the Constitution in their conjunction), because it is not reasonable. The Chancellor of Justice points out further that the Supreme Court practice concerning the implementation of § 104(2) of the Constitution requires specification.

§ 56(18^1) of the SFA infringes the general fundamental right to effective legal protection and fair trial. The Chancellor of Justice is of the opinion that the objective of the infringement is to preclude excess and vexatious appeals, which in turn refers to the economy of proceedings that serves as the aim for the establishment of state fees for actions and appeals. The economy of proceedings is, proceeding from Chapter XIII of the Constitution, a legal value of constitutional ranking.

The establishment of a state fee of 200 kroons upon filing an appeal against a ruling is a suitable and necessary measure to ensure the economy of proceedings, yet it might not be proportional in the narrow sense. The increase of state fees upon having recourse to the courts involves a serious threat to the accessibility of legal protection, and if doubts arise as to the proportionality of a state fee such doubts should be intensively analysed by way of constitutional review.

The bigger a state fee the more intensively it restricts the general fundamental right to effective legal protection and fair trial. If the amount of a state fee prevents a person, who is not eligible for the state procedural aid, from exercising his or her rights in the courts, the state fee is disproportional and, thus, unconstitutional. In the present case the state fee is 200 kroons which, when seen separately and bearing in mind the average salary in Estonia, is not a significant amount. On the other hand, the principle of economy of proceedings is also important, because an overloaded court system does not make it possible to ensure that persons get effective legal protection within a reasonable time. Each appeal against a ruling extends the proceedings and causes more work to the courts. Bearing in mind that each state fee payable in the court restricts the general fundamental right to effective legal protection and fair trial, which is of high value, each state fee must have a rational and superior justification. The state fee required upon filing an appeal against a ruling does not concern the principal action, instead it is a precondition upon the protection of auxiliary and secondary claims of the appellant. The legislator has provided for the state fee of 200 kroons for all appeals against rulings. In this concrete case the appeal was against the ruling on dismissal of the application for

provisional legal protection. In the cases of provisional legal protections the situations may be urgent and a person may not have the required sum at the moment when he or she needs legal protection. What is also to be taken into account in regard to appeals against rulings is that such an appeal is submitted if a person is not satisfied with the activities of the court. Unlike in the case of ordinary appeals and appeals in cassation the object of an appeal against a rulings is a procedural decision. A procedural decision which is legally wrong constitutes a violation of fundamental rights by the judicial authority. When a state requires additional payments from an applicant for the contestation of the violations committed by the judicial system, this amounts to a disproportional procedural obstacle and violates the general fundamental right to effective legal protection and fair trial.

The obligation to pay a state fee upon filing an appeal against a court ruling made in an administrative matter is disproportional irrespective of the amount of the fee. Consequently, § 56(181) of the SFA is in substantive conflict with the Constitution to the extent that it establishes the obligation to pay a state fee upon filing an appeal against a court ruling rendered in an administrative matter.

RELEVANT PROVISION

11. Subsection (18^1) of § 56 "Review of statements of claim, petitions and appeals" of the State Fees Act reads as follows:

"Upon filing of an application for provisional legal protection as well as upon filing an appeal against a court ruling rendered in an administrative matter the state fee of 200 kroons shall be paid."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

12. First, the Chamber shall analyse the relevance of the provision which was not applied by the Tallinn Circuit Court, shall ascertain the relevant fundamental right (I) and thereafter shall analyse the formal (II) and substantive constitutionality thereof (III).

I.

13. Pursuant to § 14(2) of the Constitutional Review Court Procedure Act the provision the constitutionality of which is reviewed by the Supreme Court must be relevant to the adjudication of the principal dispute. Pursuant to the Supreme Court practice a provision is relevant when it is of decisive importance for the resolution of a case (see e.g. the Supreme Court *en banc* judgment of 22 December 2000 in case no. 3-4-1-10-00, paragraph 10). A provision is of a decisive importance when in the case of unconstitutionality of the provision a court should render a judgment different from that in the case of constitutionality of the provision (see e.g. the Supreme Court *en banc* judgment of 28 October 2002 in case no. 3-4-1-5-02, paragraph 15).

14. In the present case the problem is that § 56(18^1) of the SFA obligates the person submitting an appeal to pay a state fee of 200 kroons upon filing an appeal against a court ruling rendered in an administrative matter, whereas § 47^1(6) and the second sentence of § 32(3) of the CACP establish that an appeal against a ruling is exempt from state fees. § 84 of the CACP regulates the payment and refund of state fees as a general provision. The first sentence of § 84(2) of the CACP establishes that if the person filing an action fails to pay the state fee or the state fee paid by the person filing an action is less than the amount provided by law, the court shall set a term for the payment of the state fee or supplementary state fee and if the state fee is not paid by the due date, the hearing of the action is refused, unless otherwise provided by law.

Consequently, different norms give the results that are in conflict with each other. Whereas, at the first glance, the relationship between these norms seems unclear and it may prove difficult to decide which norms to apply and how these should be interpreted. The Chamber is of the opinion that § 56(18^1) of the SFA, which entered into force on 1 January 2009, constitutes *lex posterior* in regard to § 47^1(6) and the second sentence of § 32(3) of the CACP. Consequently, the rule that a later law (obligation to pay a state fee of 200 kroons) repeals an earlier law (exemption from state fees) is valid.

In the present case both provisions - § 56(18[1]) of the SFA as well as § 47[1](6) and the second sentence of § 32(3) of the CACP - regulate the same issue. Therefore, pursuant to the principle of *lex posterior derogate legi priori*, the later norm should be applied, that is § 56(18[1]) of the SFA (see the Constitutional Review Chamber of the Supreme Court judgment of 3 December 2007 in case no. 3-4-1-17-07, paragraph 22). If § 56(18[1]) of the SFA, requiring the payment of a state fee of 200 kroons upon filing an appeal against a court ruling in an administrative matter, were unconstitutional, the person filing an appeal against a ruling would not have to pay a state fee. If the norm were constitutional, the state fee should be paid upon filing an appeal against a ruling. Consequently, § 56(18[1]) of the SFA is a relevant norm.

15. The contested provision invades the fundamental right to legal protection, arising from §§ 15(1) and 14 of the Constitution, which must guarantee judicial protection without gaps. The Supreme Court has pointed out the following: "The right to judicial protection established in §§ 13, 14 and 15 of the Constitution includes both the right of a person whose rights and freedoms are violated to file an action with a court as well as the duty of the state to provide for an appropriate judicial procedure for the protection of fundamental rights that is fair and guarantees effective protection to persons." (The Supreme Court *en banc* judgment of 16 May 2008 in case no. 3-1-1-8-8-07, paragraph 41.)

An infringement of a sphere of protection consists in unfavourable impact on the sphere. In this case the unfavourable impact consists in the fact that 56(18[1]) of the SFA establishes an obligation to pay a state fee of 200 kroons upon filing an appeal against a court ruling rendered in an administrative matter. This obligation affects unfavourably the general fundamental right to effective legal protection and, consequently, infringes the sphere of protection of the referred right.

An obligation to pay a state fee upon filing an appeal against a court ruling in an administrative matter, which infringes a fundamental right, must be in conformity with the Constitution both formally and substantively.

II.

16. Formal conformity with the Constitution means that a legislation of general application which restricts fundamental rights must comply with the constitutional requirements concerning competence, procedure and form, as well as the requirements of determinateness and 'subject to reservation by law' (the Constitutional Review Chamber of the Supreme Court judgment of 13 June 2005 in case no. 3-4-1-5-05, paragraph 8).

17. The Tallinn Circuit Court pointed out that pursuant to the second sentence of § 32(3) and § 47[1](6) of the CACP an appeal against a ruling is exempt from state fees, and that pursuant to § 104(2)14) of the Constitution court procedure Acts may be passed and amended only by a majority of the membership of the Riigikogu. § 56(18[1]) was inserted to the State Fees Act by § 38(20) of the Act to Amend the Code of Civil Procedure and Related Acts, which was passed on 10 December 2008. The Act was indeed passed by a majority of the membership of the Riigikogu, yet the Act is not referred to in § 104(2) of the Constitution. It has been established in the judicial practice of the Constitutional Review Chamber of the Supreme Court that upon regulating an issue referred to in § 104(2) of the Constitution it is not sufficient if this is done by an Act passed by a majority of the membership of the Riigikogu; it is required that such a regulatory framework be included in a relevant Act enumerated in § 104(2) of the Constitution. It was explained in the Constitutional Review Chamber of the Supreme Court judgment no. 3-4-1-1-98 of 5 February 1998 that regulation by ordinary Acts of relationships that are to be regulated by constitutional laws is unconstitutional and the issues which fall within the sphere of regulation of constitutional laws can only be regulated through relevant constitutional laws.

18. Consequently, it is to be ascertained, first, whether the procedural requirements for the passing of such an Act have been complied with.

The Chamber admits that the judicial practice of the Supreme Court concerning the issues discussed in

paragraph 6 above has not been uniform. The Chamber considers it justified to adhere to the later practice, i.e. that of the Supreme Court *en banc* (see the Constitutional Review Chamber of the Supreme Court judgment of 29 September 1999 in case no. 3-4-1-3-99, paragraph 16; the supreme Court *en banc*judgment of 8 June 2009 in case no. 3-4-1-7-09, paragraphs 29 and 30). It was pointed out in the latter judgment that procedural laws are constitutional laws referred to in § 104(2)14) of the Constitution, which may be passed and amended only by a majority of the membership of the Riigikogu. Nevertheless, when an issue concerning judicial procedure is regulated by an ordinary Act and at the final vote of the draft a majority of the membership of the Riigikogu voted in favour thereof, the procedural requirement arising from § 104(2)14) of the Constitution is fulfilled.

§ 56(18^1) was inserted to the State Fees Act by § 38(20) of the Act to Amend the Code of Civil Procedure and Related Acts, which was passed on 10 December 2008. This Act was passed by 59 votes in favour, i.e. by a majority of the membership of the Riigikogu.

19. In regard to legal clarity the Supreme Court has pointed out earlier that a person must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable (the Supreme Court *en banc* judgment of 28 October 2002 in case no. 3-4-1-5-02, paragraph 31). The required level of specificity or legal clarity of a norm is not the same in the case of all norms. The norms which enable to restrict person's rights and to impose obligations on persons must be more clear and precise (the Constitutional Review Chamber of the Supreme Court judgment of 20 March 2006 in case no. 3-4-1-33-05, paragraph 22). A drawback of technical character which can be overcome through interpretation does not amount to the lack of legal clarity (the Constitutional Review Chamber of the Supreme Court judgment of 22 February 2001 in case no. 3-4-1-4-01, paragraph 17).

The Chamber is of the opinion that when applying the principle of *lex posterior derogat legi priori*, discussed in paragraph 14 above, it is possible at least with appropriate advice – to come to the conclusion that what is applicable is § 56(18^1) of the SFA, the content of which is unambiguous. Consequently, this provision does not lack legal clarity.

III.

20. As the fundamental right to effective legal protection, arising from the first sentence of § 15(1) of the Constitution, is a fundamental right not subject to reservations by law, only other fundamental rights or constitutional values can justify the restriction thereof. Nevertheless, the right of appeal, established in § 15 of the Constitution, is not an absolute one. The legislator has the right, within the constitutional frames, to establish the limits of this right, taking into account other constitutional values (the Constitutional Review Chamber of the Supreme Court rulings of 9 May 2006 in case no. 3-4-1-4-06, paragraph 12; and of 3 April 2008 in case no. 3-4-1-3-08, paragraph 5).

The substantive constitutionality of the infringement of the general fundamental right to effective legal protection and fair trial depends, firstly, on whether the aim of the infringement is a legitimate one and, secondly, on whether the infringement committed for the achievement of the legitimate aim is a proportional one. As § 15(1) of the Constitution is a fundamental right not subject to reservation by law, it is legitimate to restrict the right only to guarantee some other fundamental right or legal value of constitutional ranking.

At the second reading of the draft the presenter on behalf of the Legal Affairs Committee justified the general increase of state fees among other things with the necessity to prevent vexatious actions. The prevention of excess and vexatious actions indicates at economy of proceedings, which is the general aim of establishing state fees on actions and protests. The economy of proceedings is, proceeding from Chapter XIII of the Constitution, a legal value of constitutional ranking (the Supreme Court *en banc* judgment of 17 March 2003 in case no. 3-1-3-10-02, paragraph 9).

21. Next, it is to be ascertained whether the establishment of a state fee of 200 kroons upon filing an appeal

against a ruling is proportional with the aim of procedural economy. The principle of proportionality arises from the second sentence of § 11 of the Constitution, pursuant to which the restrictions on rights and freedoms must be necessary in a democratic society. The compliance with the principle of proportionality is reviewed by the courts on three consecutive levels – fist the suitability of a measure, then the necessity of the measure and, if necessary, also the proportionality of the measure in the narrower sense, i.e. the reasonableness thereof. If a measure is manifestly unsuitable, it is needless to review the necessity and reasonableness thereof. A measure that fosters the achievement of a goal is suitable. For the purposes of suitability a measure, which in no way fosters the achievement of a goal, is indisputably disproportional. The requirement of suitability is meant to protect a person against unnecessary interference of public power. A measure is necessary if it is not possible to achieve a goal by some other measure which is less burdensome on a person but which is at least as effective as the former. In order to determine the reasonableness of a measure the extent and intensity of interference with a fundamental right on the one hand and the importance of the aim on the other hand have to be weighed. The more intensive the infringement of a fundamental right, the weightier the reasons justifying it must be (see in this regard the Constitutional Review Chamber of the Supreme Court judgment of 6 March 2002 in case no. 3-4-1-1-02, paragraph 15).

22. The establishment of a state fee of 200 kroons upon filing of an appeal against a ruling is a suitable and necessary measure to ensure procedural economy. The Chamber agrees with the opinion of the Chancellor of Justice that the increase of state fees upon having recourse to the courts involves a serious threat to the accessibility of legal protection, and if doubts arise as to the proportionality of a state fee such doubts should be intensively analysed by way of constitutional review.

The bigger a state fee the more intensively it restricts the general fundamental right to effective legal protection and fair trial. If the amount of a state fee prevents a person, who is not eligible for the state procedural aid, from exercising his or her rights in the courts, the state fee is disproportional and, thus, unconstitutional. In the present case the state fee is 200 kroons which, when seen separately, is not an excessively big amount.

On the other hand, the principle of economy of proceedings is important, too. The hearing of appeals which are unfounded, vexatious, etc., may bring about a situation where the court system will not be able to ensure that persons get effective legal protection within a reasonable time. The handling time of court cases is extended and the workload of the courts increases unnecessarily.

23. The Chamber points out that within concrete norm control the constitutionality of a norm can be reviewed on the basis of the facts of the case. The Chamber admits that in certain cases the requirement to pay a state fee of 200 kroons upon filing an appeal against a ruling might not be reasonable, yet the ruling of the Tallinn Circuit Court which initiated this constitutional review proceeding sets out no such facts.

24. On the basis of the aforesaid the Chamber is of the opinion that taking into account the facts of the case § 56(181) of the SFA is not unconstitutional and the request of the Tallinn Circuit Court is to be dismissed.
