Constitutional judgment 3-3-1-59-07

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-3-1-59-07
Date of judgment	14 April 2009
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, Villu Kõve, Lea Laarmaa, Jaak Luik, Priit Pikamäe, Jüri Põld, Harri Salmann and Tambet Tampuu.
Court Case	Action of Ardi Šuvalov for the annulment of the Minister of Justice directive no. 233-k of 26 June 2006.
Contested judgment	The Tallinn Administrative Court judgment of 24 November 2006 in administrative case no. 3-06-1451 and the Tallinn Circuit Court judgment of 30 April 2007 in administrative case no. 3-06-1451.
Basis of proceeding in the Supreme Court	Ardi Šuvalov’s appeal in cassation.
Hearing	Written proceeding.

DECISION	1. To declare the failure to pass such legislation that would allow to pay a salary or other equivalent compensation to a judge whose service relationship is suspended for the duration of a criminal proceeding to be in conflict with § 147(4) in conjunction with §§ 146 and 15 of the Constitution. 2. To satisfy the appeal in cassation of Ardi Šuvalov, and annul the judgments of the Tallinn Administrative Court of 24 November 2006 in administrative case no. 3-06-1451 and of the Tallinn Circuit Court of 30 April 2007 in administrative case no. 3-06-1451. 3. To render a new judgment satisfying the action of Ardi Šuvalov in part and requiring the Ministry of Justice to pay to Ardi Šuvalov 50% of his salary and additional remuneration for the period when Ardi Šuvalov's duties of judge were suspended because of a criminal proceeding. 4. To return the security.

FACTS AND COURSE OF PROCEEDING

1.On 6 June 2006, in case no. 3-5-0-8-06, the Supreme Court *en banc* made a proposal to the President of the Republic to grant consent for preparation of statement of charges against A. Šuvalov under § 294(2)2) and 4) of the Penal Code (hereinafter "the PC"). On 13 June 2006, by resolution no. 1031, the President of the Republic granted his consent for bringing criminal charges against A. Šuvalov.

2. On 26 June 2006 the Minister of Justice issued **directive no. 233-k** "Suspension of payment of salary to A. Šuvalov", in the following wording:

"On the basis of the President of the Republic resolution no. 1031 of 13 June 2006, and § 108(10) of the Public Service Act and § 49(1)9) of the Government of the Republic Act:

1. I suspend the salary of Ardi Šuvalov, judge of the Harju County Court, as of 13 June 2006 until the circumstances relating to criminal proceeding are ascertained.

2. The finances and assets management service of the Ministry of Justice is required to make appropriate amendments to the budget funds of the Harju County Court."

3. In his **action** filed with the administrative court A. Šuvalov applied for the repeal of the Minister of Justice directive no. 233-k, arguing as follows:

1) the contested directive contains errors of form and is unlawful in substance. The directive is not reasoned, lacks a reference to challenge, the time period for which the salary is suspended is unclear, and the directive was not duly served on the complainant;

2) the references in the directive to the President of the Republic resolution, § 108(10) of the Public Service Act (hereinafter "the PSA") and to § 49(1)9) of the Government of the Republic Act are irrelevant, because they do not relate to payment of salary;

3) the Minister of Justice has no competence to interfere with the service relationship of a judge. Pursuant to § 381(3) of the Code of Criminal Procedure (hereinafter "the CCrP") the performance of the official duties of a judge is suspended when President of the Republic grants consent for the preparation of a statement of charges. The President of the Republic has not issued a resolution referred to in § 381(3) of the CCrP. In his resolution the President of the Republic granted consent for bringing criminal charges against the complainant; consequently, the President has only granted consent for a judgment of conviction. The

President has no competence to grant consent for bringing criminal charges against a person;

4) the valid law does not contain the regulatory framework concerning the legal consequences of suspension of official duties of a judge. Neither the Courts Act (hereinafter "the CA") nor the Public Service Act provide for a possibility to suspend a salary of a judge holding a judicial office. The restricting principles of the Public Service Act are not applicable in regard to a judge whose performance of official duties is suspended, because a judge has a special status that is also related to numerous restrictions on holding other offices (§ 49 of the CA). The suspension of a judge's salary deprives the judge of his or her only possible source of income.

4. In the action filed with the administrative court A. Šuvalov also requested the application of provisional legal protection by requiring that the Ministry of Justice guarantee budgetary funds for the payment of ½ of A. Šuvalov's salary (judge's salary and additional remuneration for length of service).

By its ruling of 28 July 2006 the Tallinn Administrative Court dismissed the application for provisional legal protection.

A. Šuvalov filed an appeal against this ruling with the Tallinn Circuit Court, requesting that the court annul the ruling of the administrative court and require that the Ministry of Justice guarantee – by way of provisional legal protection – the budgetary funds for the payment of ½ of the former salary to A. Šuvalov for the duration of the criminal proceeding.

On 17 August 2006 the Tallinn Circuit Court requested A. Šuvalov to submit information and, if possible, evidence concerning his financial situation, as the application for provisional legal protection was essentially justified by the need to ensure the applicant's financial security. A. Šuvalov submitted to the circuit court his bank statement and the spouses' joint income tax return of the previous year.

By its ruling of 25 August 2006 the Tallinn Circuit Court dismissed the appeal against the ruling and upheld the ruling of the administrative court. The circuit court did not consider the financial situation of A. Šuvalov to be such as to justify the application of provisional legal protection.

5. The Minister of Justice did not accept the action and argued as follows:

1) there is no Act to regulate the general bases and consequences of suspension of service relationship of a judge, that is why – on the basis of § 8(2) of the CA and § 12(3)3) of the PSA – this issue is to be resolved on the basis of the Public Service Act, namely §§ 107(2) and 108(10) of the Act. The suspension of the performance of official duties of a judge on the basis of § 381(3) of the CCrP means release from the official duties until the entering into force of a court judgment, and this can be regarded equal to temporary release from service for the purposes of § 108(10) of the PSA;

2) the retention of official salary and additional remuneration must be provided by law. The PSA does not provide for the retention of official salary and additional remuneration when a service relationship is suspended on the basis of § 108(10) thereof. The authority of the complainant was suspended by a resolution of the President of the Republic. A directive of the Minister of Justice constitutes a document on the basis of which a bookkeeper can refrain from making disbursements of salary. The issue of suspension of judge's salary has not been placed within the competence of any other administrative agency, therefore the issue is within the competence of the Minister of Justice;

3) the complainants reference to the restriction on holding any other office is irrelevant. § 95(4) of the CA establishes that if the Disciplinary Chamber removes a judge from service during the hearing of a disciplinary matter, the Chamber may reduce the judge's salary for up to one half. A situation where salary may be reduced during the hearing of a disciplinary matter and not be suspended during a criminal proceeding can not be considered reasonable;

4) the directive was communicated to the complainant by e-mail. The absence of a reference to challenge is a

formal error, which does not affect the substantive lawfulness of the directive under § 57(2) of the Administrative Procedure Act.

6. The Tallinn Administrative Court interpreted the complainant's request as an application that the court require the retention and payment of official salary or other equivalent compensation, and by its judgment of 24 November 2006 dismissed the action on the following grounds:

1) the basis of salary claim for public servants, including judges, is § 37(1) of the PSA, pursuant to which a public servant shall be entitled to receive a salary from the date of entry into the service until the date of release from the service. The Courts Act establishes only the salary rate of judges. A judge's right to a salary arises directly from law, from his or her appointment to office and commencement of performance of official duties, and for the exercise of the right no separate administrative legislation needs to be issued. The right to claim a salary terminates automatically with the release from office, and no separate administrative legislation needs to be prepared to terminate the payment of salary. Similarly, the right to a salary is suspended upon the suspension of a service relationship, and continues upon restoration of the service relationship. In administrative practice the so called salary directives are prepared in which the salary rate arising from law is fixed, but for the purposes of administrative law these are inert acts of which the creation, suspension or termination of judges' right does not depend. This means that a judge's right to a salary, the suspension and the termination of the right do not arise from a directive concerning salary, instead it arises upon commencement, suspension or termination of performance of official duties, and therefore the contested directive is not and can not serve as the basis for the suspension of the complainant's salary claim. The referred document is an act having but intra-administrative importance, and it is meant to distribute budgetary funds in accounting and has no binding effect on the complainant. If the service relationship of an complainant is not, in fact, suspended, he or she has the right to receive a salary irrespective of a directive to the contrary effect. That is why the complainant's claim is to be interpreted as a request that the court require the retention and payment of one half of his official salary or the payment of some other equivalent compensation;

2) the opinion of the complainant that the consent of the President of the Republic means that the President consents only to a judgment of conviction in regard to the complainant is erroneous. The President of the Republic has, on the basis of his competence arising from§ 153(1) of the Constitution, granted his consent for bringing criminal charges against the complainant, i.e. for the preparation of the statement of charges concerning him for the purposes of the Code of Criminal Procedure. The use of the wording which does not exactly correspond to the wording of § 381 of the CCrP but is still substantially constitutional constitutes an error of form which, in principle, can be corrected and does not result in the substantive unlawfulness and invalidity of the resolution;

3) under § 381(3) of the CCrP the consent of the President of the Republic for the preparation of a statement of charges with regard to an official shall suspend the performance of the official duties of the person concerned until entry into force of a court judgment. The suspension of the official duties of an official means the suspension of the service relationship of a judge with the state. Salary is paid for the performance of official duties, which means that there must be a legal ground for the payment of salary for the time a judge is not performing his or her official duties. None of the legal acts gives rise to the right of an official to receive a salary for the time when he or she is not performing official duties due to a pending criminal proceeding. § 107(2) of the Public Service Act establishes that during the suspended period of the service relationship, an official shall retain his or her salary together with additional remuneration or shall be paid other compensation in the cases and pursuant to procedure provided by law. The allegations of the complainant that § 107(2) of the PSA is only applicable on the grounds provided in § 108 of the PSA and that a directive or an order concerning suspension of the service relationship, required by § 111 of the same Act, have not been communicated to the complainant, are not relevant. The complainant's service relationship was suspended on the basis of § 108(10) of the PSA, i.e. in another case when an official is temporarily released from the performance of his or her functions pursuant to law. The performance of the complainant's official duties was suspended by a resolution of the President of the Republic, in conformity with § 381(3) of the CCrP, which constitutes a special regulatory framework in relation to § 111 of the PSA,

and on the basis of which – in addition to the resolution of the President of the Republic no additional formalisation by a directive or an order is necessary for the suspension of a service relationship;

4) indeed, various suspicions may fall to a judge's lot because of the conflicting situations characteristic of his or her work, but this does not justify the retention of salary for the duration of a criminal proceeding. Despite the suspension of a service relationship the judge's status is retained and pursuant to § 49 of the CA he or she shall not be employed other than in the office of judge, except for teaching or research; but even this fact does not constitute a ground for treating a judge differently from other public servants and for not applying § 107(2) of the PSA to him or her. Those officials to whom restrictions on holding office do not apply, too, probably have difficulties in finding other employment during a criminal proceeding;

5) the opinion of the complainant that for the duration of the criminal proceeding he should have been offered a possibility of performing other tasks outside the administration of justice is erroneous. Proceeding from §§ 2, 3, 6, 9, 37, 45, 56 of the CA all the official duties of a judge inevitably relate to administration of justice;

6) there is no ground for analogy with § 95(4) of the CA, because a disciplinary proceeding is commenced in other cases and on other conditions than the bringing of criminal charges against a judge. There is no reason to think that the legislator has, by accident, overlooked the fact that the Courts Act lacks a norm concerning criminal proceedings, similar to § 95(4) of the CA. Manifestly unfounded statements of charges are to be precluded by the requirement of the consent of the President and by the preceding proceedings in the Supreme Court *en banc*. This does not mean that a judge could be deemed guilty already during a criminal proceeding, but this does refute the complainant's argument that unfounded criminal charges are a bigger threat to judges than to other officials;

7) consequently, the non-retention of salary is the legislator's conscious choice which could be derogated by the court only if the norm were unconstitutional. The deprivation of a judge of his or her income for the duration of a criminal proceeding in conjunction with the principle of presumption of innocence (§ 22(1) of the Constitution) may be in conflict with the legislator's duty to provide for the guarantees for the independence of judges (§ 147(4) of the Constitution). At the same time the non-payment of salary is supported by the public interest to avoid the payment of salary during the time when a judge is not performing his or her official duties. The fact that a judge who is convicted of a criminal offence (a criminal offender) has received a judge's salary from the state (the tax-payer's money) for doing nothing during the criminal proceeding, which may last for years, would have an enormous negative response in the society; this would wound the people's sense of justice and degrade the reliability and authority of the law enforcement authorities. In this context the public interest counterbalances the infringement of § 147(4) of the Constitution;

8) on the basis of the aforesaid the complainant has no right to receive a salary. The Minister of Justice has not unlawfully interfered with the complainant's service relationship and has not violated his subjective rights. The complainant's right to claim a salary is restored only after a judgment of acquittal or a ruling terminating the criminal proceeding enters into force, and this right is not refuted by the ambiguous wording of the directive by which the complainant's salary was suspended "until the circumstances relating to criminal proceeding are ascertained".

7. A. Šuvalov filed an **appeal** against the judgment of the administrative court, applying for the annulment of the judgment due to wrong application of substantive law, and for rendering a new judgment satisfying the action. The appellant argued the following:

1) § 99 of the CA, exhaustively establishing the grounds for release of judges from office, does not provide for the possibility of temporary release of a judge from office. That is why it is not possible to temporarily suspend a judge's salary;

2) should the court of appeal find that a judge's authority can also be suspended on the basis of § 108(10) of

the PSA, the suspension of authority would still require a directive or an order of a competent person as established in § 111 of the PSA. In the case of absence of administrative legislation suspending a service relationship the suspension of official salary is unlawful, too;

3) should the court of appeal find that the non-retention of salary is based on law, the complainant requests that the relevant provision be not applied due to its unconstitutionality. Depriving a person with the status of a judge of an income is in conflict with the legislator's duty to provide for the guarantees for the independence of judges (§ 147(4) of the Constitution) in conjunction with the principle of presumption of innocence (§ 22(1) of the Constitution). Restrictions on holding office apply to the complainant, he as not been offered a possibility to perform duties outside the administration of justice and the "doing nothing" – referred to in the judgment – does not depend on the complainant.

8. The Minister of Justice requested that the appeal be dismissed. The minister argues that the opinion of the complainant that temporary suspension of a judge's service relationship is impossible, is erroneous. For example, the service relationship is suspended for the period of incapacity for work. Pursuant to § 381(3) of the CCrP the consent of the President of the Republic shall suspend the performance of the official duties of the judge until entry into force of a court judgment. Consequently, for that period the judge is released from the performance of his or her official duties, and the release from duties has the effect equivalent to temporary release from service duties for the purposes of § 108(10) of the PSA. The administrative court found correctly that § 381(3) of the CCrP is a special regulation in relation to § 111(1) of the PSA, that in addition to the resolution of the President of the Republic no additional formalisation by a directive or an order is necessary for the suspension of a service relationship, and that the contested directive does not serve as a ground for the suspension of the complainant's salary or his service relationship.

9. By its judgment of 30 April 2007 the **Tallinn Circuit Court** dismissed the appeal and upheld the judgment of the administrative court for the following reasons:

1) the arguments of the appeal constitute no ground for changing the judgment. The administrative court has correctly ascertained the facts relevant for the adjudication of the case and has not erred in the application of substantive law. The circuit court agrees with the judgment of the administrative court and does not reiterate the reasons thereof;

2) the administrative court has correctly established and duly reasoned why a judge's right to receive a salary and the suspension and termination of the right are not based on the Minister of Justice directive concerning the salary, but on the commencement, suspension or termination of performance of official duties. As the directive of the Minister of Justice, contested by the complainant, constitutes an intra-administrative legislation and has no binding effect on the complainant, it is irrelevant from the aspect of adjudication of the dispute whether and when it was communicated to the complainant. The complainant wishes that he would be continued to be paid a salary (or other equivalent compensation). On the basis of the objective of the action the court has correctly interpreted the submitted request as a request that the court require the retention of official salary or payment of some other equivalent compensation, and the court was justified to hold that the complainant lacked the right to receive a judge's salary during the time of a criminal proceeding against him;

3) § 99 of the CA, invoked by the appellant, is not a relevant provision, because this provision regulates the bases of and the procedure for release of judges from office. The complainant has not been released from the office of judge, instead his authority and service relationship have been suspended on the basis of § 381(3) of the CCrP and § 108(10) of the PSA. The opinion of the appellant that § 108(10) of the PSA is not applicable in this case and that for the purposes of § 381 of the CCrP the consequences of the President's consent are, in principle, of criminal law nature and do not suspend the authority of judge, is erroneous. The Courts Act does not provide the consequences of the consent granted for the preparation of a statement of charges on the authority and service relationship of judges, yet it establishes in § 8(2) that the Public Service Act applies to judges in the cases which have not been regulated by the Courts Act. § 108(10) of the PSA speaks of the suspension of a service relationship in the cases when an official is temporarily released from

the performance of his or her functions pursuant to law. Pursuant to § 55(1) of the CA judges of a court of the first instance and judges of a court of appeal shall be appointed by the President of the Republic on the proposal of the Supreme Court *en banc*. Pursuant to subsection (3) of the same section a judge of a court of the first instance or a judge of the court of appeal appointed to office by the President of the Republic shall be appointed to court service by the Supreme Court *en banc*. Consequently, a judge's authority commences upon appointment by the President of the Republic, and a judge's right to claim a salary arises upon his appointment to court service. § 3(3) of the CA establishes that criminal charges against a judge of a court of the first instance and a court of appeal may be brought during their term of office only on the proposal of the Supreme Court en banc with the consent of the President of the Republic. § 381(3) of the CCrP provides that a consent granted by a resolution of the President of the Republic suspends the performance of the official duties of the judge. This means that the consent of the President for the preparation of a statement of charges suspends the authority of a judge, and by the suspension of his or her authority for the duration of criminal proceedings the service relationship of the judge is suspended, too, on the basis of law. As the suspension of authority is followed by the suspension of a service relationship (official duties can only be performed by a judge with valid authority), this requires no additional formalisation by administrative legislation;

4) the administrative court has correctly pointed out that no legislation provides for the retention of a salary for a judge for the duration of a criminal proceeding, and that this does not constitute a legal gap, instead this is a conscious choice of the legislator. In response to the appellant's argument that due to the restrictions on holding office applicable to judges the deprivation of a person with the status of a judge of income is in conflict with the legislator's duty to establish the guarantees for the independence of judges in conjunction with the principle of presumption of innocence, the circuit court retains the view expressed in its judgment no. 2-3/97/04 of 30 January 2004 that as a judge is not performing official duties during the time when the performance of official duties is suspended, on the consent of the President of the Republic, until entry into force of a court judgment, and proceeding from the purpose of the establishment of the restrictions on office, a judge – like any other official – can have another employment which is not related to working in the court or in the administrative agencies of state or local governments. Consequently, a judge whose authority and service relationship have been suspended because of a criminal proceeding, can be employed also other than in teaching or research, and have an income.

10. A. Šuvalov filed an **appeal in cassation**, in which he applies for the repeal of the Minister of Justice directive no. 233-k of 26 June 2006, and for requiring the Ministry of Justice to pay him his salary for the period when the performance of his official duties was suspended.

11. By its ruling of 15 January 2008, on the basis of § 67(1) of the Code of Administrative Court Procedure (hereinafter "the CACP"), the Administrative Chamber of the Supreme Court referred the matter for hearing to the full panel of the Administrative Chamber.

By its ruling of 24 January 2008, on the basis of § 70(1)2) of the CACP, the Administrative Chamber referred the matter to the Supreme Court *en banc* for adjudication. § 70(1)2) of the CACP establishes that a matter shall be referred to the Supreme Court *en banc* for adjudication if it is essential for the uniform application of the law.

12. By its ruling of 20 April 2008 the Supreme Court *en banc* involved the Riigikogu, the Chancellor of Justice and the Minister of Justice in the constitutional review proceeding.

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING

13. The appellant in cassation argues the following:

1) the opinion of the courts that the service relationship of A. Šuvalov was suspended on the basis of § 108(10) of the PSA as of the resolution of the President of the Republic, and that proceeding from § 107 of the PSA the Minister of Justice has correctly suspended the salary payable to A. Šuvalov, is erroneous. A. Šuvalov is a judge, and the performance of duties of a judge is regulated by the Courts Act and the Code of

Criminal Procedure. Pursuant to § 381(1) of the CCrP the consent of the President of the Republic for the preparation of a statement of charges suspends the performance of the official duties of the judge until entry into force of a court judgment. The Public Service Act does not regulate the suspension of the performance of official duties due to a criminal proceeding. The courts have interpreted § 108(10) of the PSA broadly when they found that the service relationship of a judge subject to a criminal proceeding is suspended on the basis of the referred provision. The suspension of a service relationship on the basis of this provision requires the issue of a directive pursuant to § 111(1) of the PSA. As to A. Šuvalov's knowledge no directive concerning the suspension of his service relationship has been issued;

2) by incorrect application of §§ 108(10) and 107 of the PSA the Minister of Justice and the courts have come to an erroneous conclusion that there is no legal basis for the payment of salary to a judge during the time when the performance of his official duties is suspended. The applicable Code of Criminal Procedure and the Courts Act do not provide that the suspension of payment of official salary is concurrent with the suspension of the performance of official duties;

3) the opinion of the circuit court that during the time when the service relationship is suspended the judge, like any other official, may have other employment which is not related to working in the court or in an administrative agency of a state or local government, is erroneous. The temporary suspension of the performance of official duties on the basis of § 381(1) of the CCrP does not release a judge from the duty to observe the restrictions on holding office when being otherwise employed. The suspension of payment of salary to a judge subject to restrictions on holding office, whose performance of official duties is suspended, would equal to deprivation of the person of income, and this is in conflict with the legislator's duty to establish the guarantees for the independence of judges.

14. In the opinion submitted to the Supreme Court *en banc* A. Šuvalov argues that for the duration of suspension of the performance of the official duties of a judge at least a partial salary should be guaranteed to the concerned person as well as the payment of social security contributions from that. This would guarantee that the lack of income during the suspension of the performance of official duties does not deprive the person of subsistence, health insurance, exercise of effective defence in a criminal matter and dignified continuation in the office of judge. A judgment, even in a criminal case against a judge, need not always be a judgment of conviction, it can also be one of acquittal. A situation, where there is no possibility to pay a judge a salary or other compensation for the period when his or her performance of official duties was suspended on the basis of § 381(3) of the CCrP, is not constitutional.

15. The Minister of Justice is of the opinion that the appeal in cassation is unfounded and argues the following:

1) the opinion that the performance of official duties of judge is regulated only by the Courts Act and the Code of Criminal Procedure, is erroneous. Pursuant to § 8(2) of the CA the Public Service Act applies to judges only in the cases not regulated by the Courts Act. The Courts Act does not restrict the cases when the Public Service Act is applicable and when it is not. As the Courts Act does not regulate the bases for suspension of service relationships the Public Service Act has to be deemed as the basis in these cases;

2) the suspension on the performance of official duties pursuant to § 381(3) of the CCrP constitutes, at the same time, the suspension of a service relationship on the basis of § 108(10) of the PSA. The performance of the official duties of a judge is suspended on the bases of a resolution of the President of the Republic and it is not necessary for the Minister of Justice to issue additional administrative legislation;

3) proceeding from § 107(2) of the PSA, during the suspended period of the service relationship, an official shall retain his or her salary or shall be paid other compensation in the cases and pursuant to procedure expressly provided by law. The Act does not prescribe that this shall be done when a service relationship is suspended on the basis of § 108(10) of the PSA. It has to be taken into account, though, that the grounds established in § 108(10) of the PSA may arise on the basis of different legal acts. Neither § 382 of the CCrP nor the Courts Act provide for the retention of salary if the performance of official duties of a judge is

suspended for the period of a criminal proceeding.

16. In the opinion submitted to the Supreme Court *en banc* the Minister of Justice argues that the Courts Act, the Public Service Act and the Code of Criminal Procedure are not in conflict with the Constitution to the extent that these do not allow to pay a salary or some other compensation to a judge for the period when the performance of his or her official duties is suspended on the basis of § 381(3) of the CCrP.

17. The Constitutional Committee of the Riigikogu is of the opinion that the Courts Act, the Public Service Act and the Code of Criminal Procedure are constitutional to the extent that they do not allow to pay a salary or some other compensation to a judge for the period when the performance of his or her official duties is suspended on the basis of § 381(3) of the CCrP.

18. The Chancellor of Justice is of the opinion that the regulatory framework which does not allow to pay a salary to a judge during the period when his or her service relationship is suspended on the basis of § 381(3) of the CCrP is not in conformity with the guarantee of independence of judges, established in § 147 of the Constitution, or with the right of every person to state assistance in the case of need, established in § 28(2) of the Constitution.

OPINION OF THE SUPREME COURT EN BANC

19. In part I of the judgment the Supreme Court *en banc* shall ascertain the object of the dispute. In part II the Supreme Court *en banc* shall analyse what constitutes a direct obstacle to the payment of salary or other equivalent compensation to A. Šuvalov. In part III the Supreme Court *en banc* shall examine whether a judge, whose performance of official duties is suspended on the basis of § 381 of the CCrP, can be employed other than in teaching or research. In part IV the Supreme Court *en banc* shall examine whether the direct obstacle to the payment of salary or other equivalent compensation to A. Šuvalov is constitutional. In part V the Supreme Court *en banc* shall adjudicate the appeal in cassation of A. Šuvalov.

I.

20. A. Šuvalov has not called into question the President of the Republic resolution no. 1031 of 13 June 2006 on granting the consent for binging criminal charges against him, or the lawfulness of the suspension of the performance of his official duties. The fact that A. Šuvalov has not contested the resolution of the President of the Republic does not prevent him from seeking judicial protection to his allegedly violated right.

21. A. Šuvalov applied for the repeal of the Minister of Justice directive no. 233-k of 26 June 2006 in the administrative court. Both the administrative court and the circuit court found that the directive of the Minister of Justice was but an intra-administrative legislation for the distribution of budgetary funds, and it had no binding effect on the complainant. The Supreme Court *en banc* agrees with this opinion of the courts.

22. The administrative court and the circuit court interpreted the complainant’s request as an application for requiring the retention and payment of official salary or some other equivalent compensation. A. Šuvalov has not contested this interpretation. It appears from the arguments of his action and the application of provisional legal protection that the purpose of the action was to achieve that he would continue to have means of subsistence, on the one hand. On the other hand, the complainant wanted judicial protection in a situation where his rights were violated by the suspension of a legal right – a salary – to which he was entitled by law. It appears also from the appeal, the appeal in cassation and the opinion submitted to the Supreme Court *en banc* that A. Šuvalov wants a salary from the Ministry of Justice in order to have means of subsistence during the suspension of the performance of his official duties.

Under these circumstances it would not be in conformity with the principle of effective legal protection if the judgment of the circuit court were annulled and the matter were referred back for a new hearing so that A. Šuvalov could decide whether he wished to amend the action filed with the administrative court in the form of an action for annulment of an act, and reword it as an action requiring performance. As one of the

objectives of the complainant was to acquire means of subsistence for the duration of suspension of the performance of his official duties, the Supreme Court *en banc*, too, considers it justified to interpret A. Šuvalov's claim as an application requiring the payment of salary or other equivalent compensation.

Indeed, the dispute in the courts has been over whether A. Šuvalov has the right to receive a salary or other equivalent compensation and whether the state is under an obligation to pay it.

II.

23. In the present dispute the ground for suspension of the performance of the official duties of a judge arises from § 381(3) of the CCrP, pursuant to which a resolution of the President of the Republic to grant consent for the preparation of a statement of charges with regard to a judge shall suspend the performance of the official duties of the judge until entry into force of a court judgment. The Code of Criminal Procedure does not regulate the obligation to pay salary or other compensation for the period of suspension of the performance of a judge's official duties during a criminal proceeding. Neither is there such regulation in the Courts Act, which is the specific Act regulating the service of judges.

24. The issues of service of judges are not regulated only in the Courts Act. Proceeding from § 8(2) of the CA and § 12(3)3) of the PSA the Public Service Act is applicable to the service issues of judges under the conditions referred to in these Acts. Pursuant to § 107(2) of the PSA, during the suspended period of the service relationship, an official shall retain his or her salary together with additional remuneration or shall be paid other compensation only in the cases and pursuant to procedure provided by law. It proceeds from § 107(2) of the PSA that upon suspension of a service relationship the non-payment of salary or other compensation is a rule to which exceptions are made in the cases provided by law. Neither the Courts Act, the Public Service Act, nor any other Act provide for a possibility to pay salary or other compensation to a judge in the case of removal from office for the period of criminal proceedings.

25. Consequently, the valid low does not allow to satisfy A. Šuvalov's action. On the basis of the aforesaid the Supreme Court *en banc* is of the opinion that the direct obstacle to payment of salary or other equivalent compensation to A. Šuvalov consists in the lack of relevant regulatory framework (failure to pass legislation) which would allow to pay salary or other compensation to a judge whose service relationship has been suspended for the period of criminal proceedings.

III.

26. The complainant has pointed out in this court case that the suspension of the payment of salary upon the suspension of the performance of official duties of a judge equals to deprivation of the person of income, which is in conflict with the legislator's duty to provide for the guarantees for the independence of judges. Nevertheless, the Tallinn Circuit Court held in its judgment of 30 April 2007 in administrative case no. 3-06-1451 that the judges' restrictions on holding office do not apply during the period of suspension of a judge's authority and service relationship due to a criminal proceeding, and therefore A. Šuvalov could ensure his income by being employed otherwise, not only in teaching or research.

27. § 49 of the Courts Act establishes the restrictions on holding office of judge. Subsection (1) of this section establishes the following: "Judges shall not be employed other than in the office of judge, except for teaching or research. A judge shall notify of his or her employment other than in the office to the chairman of the court. Employment other than in the office of judge shall not damage the performance of official duties of a judge or the independence of a judge upon administration of justice." Subsection (2) prohibits a judge from being a member of the Riigikogu, a member of a rural municipality or city council; a member of a political party; a founder, managing partner, member of the management board or supervisory board of a company; a director of a branch of a foreign company; a trustee in bankruptcy, member of a bankruptcy committee or compulsory administrator of immovable, or an arbitrator chosen by the parties to a dispute.

28. Consequently, the Courts Act expressly and unambiguously precludes any other employment of judges

except in teaching and research. § 49 of the CA is worded so that all the restrictions provided therein apply to a judge while he or she holds the office of judge, including while the performance of his or her duties is suspended. That is why the Supreme Court *en banc* does not agree with the opinion of the circuit court that A. Šuvalov could ensure his income by being employed elsewhere in addition to teaching and research.

IV.

29. As A. Šuvalov associated the necessity of ensuring means of subsistence with the issue of independence of judges, and as the direct cause of non-payment of salary or other equivalent compensation to A. Šuvalov is the non-existence of relevant regulatory framework, the Supreme Court *en banc* shall examine whether the lack of the regulatory framework that would allow to pay salary or other equivalent compensation to A. Šuvalov is in conformity with the constitutional principle of the independence of judges.

30. § 147(4) of the Constitution establishes that the legal status of judges and guarantees for their independence shall be provided by law. This is a provision which, on the one hand, requires the legislator to provide by law the guarantees for judges' independence, and on the other hand, precludes the possibility of establishing a regulatory framework concerning the independence of judges by the executive's legislation. This provision does not allow to make conclusions as to the extent of the guarantees of independence of judges so that it would be possible to evaluate the content of a regulatory framework or the constitutionality of the lack of such regulatory framework.

31. Upon ascertaining the extent of the guarantees for the independence of judges it is not only the Estonian legal order, especially the legislation ranking lower than the Constitution, that have to be taken into account. What is to be considered is also what other democratic states mean by the guarantees for the independence of judges.

32. Pursuant to generally recognised understanding in democratic states the independence of judges means, on the one hand, a privilege of each judge without which he or she would not be able to perform the role he or she is expected to perform and to act as an independent third person in solving social conflicts. The lack of independence would preclude the judge's possibility to be responsible for his or her activities. On the other hand, in addition to the aforesaid, the independence of judges in the democratic states has a significantly broader meaning. Namely, the independence of judges also serves the interest of all those people who apply for and count on the fairness of the administration of justice. This conclusion explicitly follows from Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the ECHR"), pursuant to which everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The content of Article 6(1) of the ECHR is included in §§ 15 and 146 of the Constitution. On the basis of the aforesaid it has to be concluded that the guarantees for the independence of judges have a narrower aspect – pertaining to each judge, and a broader aspect – guaranteeing the functioning of a democratic state.

33. § 3 of the Courts Act enumerates the main guarantees for independence of judges. Salary is not been referred to in this provision among the main guarantees for independence of judges. Neither is salary as a guarantee for independence of judges explicitly referred to in the European Convention for the Protection of Human Rights and Fundamental Freedoms, nor in the Constitution. Nevertheless, in Article 6.1 of the European Charter on the Statute for Judges, adopted at a multilateral meeting organised by the Council of Europe (available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/legal_professionals/judges/instruments_and_documents/charte%20Estonian.pdf [1]) it is considered to be universally recognised that remuneration is one of the guarantees for the independence of judges. The referred Article establishes the following: "Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality." In regard to the referred provision the following is pointed out in the Explanatory Memorandum to the Charter: "The Charter provides that the level of the remuneration to which

judges are entitled for performing their professional judicial duties must be set so as to shield them from pressures intended to influence their decisions or judicial conduct in general, impairing their independence and impartiality."

34. On the basis of the aforesaid the Supreme Court *en banc* holds that salary as a guarantee for the independence of judges is within the sphere of protection of §§ 15, 146 and 147(4) of the Constitution. Sufficient income guaranteed by the state to the judges while they hold the office of judge allows them to perform the role of judge as expected and, at the same time, constitutes a guarantee to participants in proceedings that their cases are heard by an independent and impartial tribunal. The Constitution does not allow for the conclusion that the guarantees for the independence of judges are not applicable to a judge during certain periods of time while he or she holds the office of judge, e.g. during the suspension of a service relationship. Also, for the duration of suspension of a service relationship under § 381(3) of the CCrP an income must be guaranteed to a judge in order to guarantee his or her independence as a judge after his or her authority is restored.

35. The Supreme Court *en banc* is of the opinion that proceeding from §§ 15, 146 and 147(4) of the Constitution a judge has a subjective right to claim salary or other compensation for the exercise of the guarantees for independence of judges. It is difficult to imagine a situation where potential participants in the proceedings could claim, as their subjective right, any of the guarantees for the independence of judges.

36. As salary constitutes one of the guarantees for independence of judges and § 49 of the CA establishes material restrictions on judges' other employment, it has to presumed that a judges whose service relationship is suspended on the basis of § 381(3) of the CCrP lacks the means of subsistence.

37. As A. Šuvalov is not paid a salary during the criminal proceeding and the law does not provide for any other compensation in such cases, the Supreme Court *en banc* is of the opinion – on the basis of the aforesaid – that the failure to pass legislation which would allow to pay a salary or other equivalent compensation to judges whose service relationships are suspended for the period of criminal proceedings is in conflict with § 147(4) of the Constitution in conjunction with §§ 146 and 15 of the Constitution.

V.

38. Next, an opinion is to be formed concerning the appeal in cassation. In his appeal in cassation A. Šuvalov applies for the repeal of the directive of the Minister of Justice, and for requirement that the Ministry of Justice pay him his salary for the period when the performance of his official duties was suspended. In his opinion submitted to the Supreme Court subsequent to the appeal in cassation A. Šuvalov writes about the necessity to ensure at least a part of the judge's salary. In the administrative court it was the suspension of payment of the salary that was contested. In the application of provisional legal protection, filed with the administrative court, A. Šuvalov applied for the court to require that the Ministry of Justice pay him, by way of provisional legal protection, one half of his former salary (judges' salary and additional remuneration). In the appeal A. Šuvalov referred to a salary.

39. Proceeding from §§ 75 and 76 of the CA a judge's remuneration consists of a judge's salary and additional remuneration.

40. The Supreme Court *en banc* is of the opinion that despite of the inconsistent use of terms A. Šuvalov wishes to be paid a judge's salary and additional remuneration for length of service, determined on the basis of §§ 75 and 76 of the CA, during the period of suspension of the performance of his official duties.

41. As salary constitutes one of the guarantees for the independence of judges, and A. Šuvalov did not receive a salary and was not allowed to be employed in other than teaching and research, it is irrelevant from the point of view of adjudication his action whether A. Šuvalov in fact did have some sources of income during the period of suspension of the performance of his official duties or not. The Supreme Court *en banc* is of the opinion that A. Šuvalov is entitled to receive a salary or other equivalent compensation for the

whole period while the performance of his official duties was suspended.

42. As no such legal category as compensation equivalent to a salary exists in Estonian legal order, and the Supreme Court *en banc* does not consider it possible to construct such compensation instead of the legislator, it is necessary to require the Ministry of Justice to pay to A. Šuvalov the salary consisting of the salary of a judge of the first instance court and the additional remuneration established in §76 of the CA, to which A. Šuvalov is entitled.

43. Next, it is to be decided how much salary the Ministry of Justice is obliged to pay. The legislator has failed to regulate the payment of salary or other compensation to a judge for the period while he or she is removed from service for the duration of a criminal proceeding. The Supreme Court needs to exercise restraint when adjudicating the issues which the legislator has not regulated, especially the issue of a judge's salary. On the one hand, the judge's salary is a guarantee of his or her independence, on the other hand, the salary payable to a judge must be in elementary correlation to his or her actual work contribution. The Supreme Court *en banc* is of the opinion that there is no such elementary correlation in the case when a full salary is paid to a judge who has been removed from service for the period of a criminal proceeding and who, thus, does not work. With this in mind the Supreme Court *en banc* considers it justified to decrease the salary payable to a judge who is removed from service for the duration of a criminal proceeding.

44. In determining the amount of salary payable to a judge who is removed from service for the duration of a criminal proceeding the Court can, in the case under discussion, be guided first and foremost from the principle of reasonableness. An excessive reduction of salary can be regarded, *inter alia*, as an infringement bordering on the violation of the presumption of innocence. In this context the Court takes into account that pursuant to § 95(4) of the Courts Act the salary of a judge who is removed from service during the hearing of a disciplinary matter may be reduced by not more than a half. Reduction of salary by up to one half is not unreasonable.

45. On the basis of the aforesaid the Supreme Court *en banc* satisfies A. Šuvalov's appeal in cassation, annuls the judgments of the administrative court and the circuit court, and renders a new judgment by which it partly satisfies A. Šuvalov's action and requires the Ministry of Justice to pay to A. Šuvalov 50% of his salary and additional remuneration for the whole period during which the performance of A. Šuvalov's duties of judge were suspended because of a criminal proceeding.

Dissenting opinion of justice Jüri Põld
to the Supreme Court *en banc* judgment in administrative case no. 3-3-1-59-07,
joined by justices Ott Järvesaar and Lea Laarmaa

I do not consent to the decision or the reasoning of the judgment approved by the majority of the Supreme Court *en banc*. I consent neither to the annulment of the essentially correct decision of the administrative court and the circuit court, to the satisfaction of A. Šuvalov's action, nor to the declaration of unconstitutionality of the failure to pass legislation of general application allowing to pay a salary or other equivalent compensation to a judge whose service relationship is suspended for the period of criminal proceedings. I am of the opinion that in this case there was no legal possibility to declare the failure to pass such legislation of general application unconstitutional.

At the same time I argue that everyone, not only a judge, is entitled to receive means of subsistence from the state during the period when he or she is deprived of income because of a criminal proceeding. I find that what is unconstitutional is the failure to pass such legislation of general application that would allow a person, who is removed from employment or service for the duration of a criminal proceeding, claim that the state guarantee the means of subsistence.

I substantiate my opinion as follows.

I.

1. I am not calling to question the view that a salary constitutes a guarantee for the independence of judges. What I deeply doubt is the correctness of the reasoning that lead the majority of the Supreme Court *en banc* to the conclusion that a judge who is removed from office for the period of a criminal proceeding has a subjective right, derivable from Estonian Constitution, to claim by judicial process a salary as a guarantee of his or her independence.

2. In rendering the judgment the majority of the Supreme Court *en banc* proceeded from the fact that pursuant to generally recognised understanding in democratic states the independence of judges also means a privilege of each judge without which he or she would not be able to perform the role he or she is expected to perform and to act as an independent third person in solving social conflicts (the first sentence of paragraph 32 of the judgment). In the judgment the majority of the Supreme Court *en banc* refers to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the ECHR"), to §§ 15 and 146 of the Constitution, and to the European Charter on the Statute for Judges (hereinafter "the Charter"). In paragraph 35 of the judgment the Supreme Court *en banc*argues that proceeding from §§ 15, 146 and 147(4) of the Constitution a judge has a subjective right to claim a salary or other compensation for the exercise of the guarantees for independence of judges, and that it is difficult to imagine a situation where potential participants in the proceedings could claim, as their subjective right, any of the guarantees for the independence of judges.

3. I am of the opinion that the referred conclusions of the Supreme Court *en banc* can not be derived from Article 6(1) of the ECHR, §§ 15, 146 or 147(4) of the Constitution, or from the Charter. I find that the Supreme Court *en banc* has failed to discern between the law the existence of which they desire from the law that actually exists.

What is established in Article 6(1) of the ECHR and §§ 15 and 146 of the Constitution, which are analogous to the former in their content, is not a subjective right of a judge but a subjective right of a participant in a proceeding to have his or her case heard by an independent court. The Charter, too, when referring to Article 6(1) of the ECHR, proceeds from the understanding that the independence of judges and the guarantees thereof are related to the rights of the participants in the proceedings. Article 1.1. of the Charter sets out the purpose of national Statutes for judges as follows: "The statute for judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights." The Explanatory Memorandum to the Charter points out (in regard to Article 1.1) that the Charter is a means of guaranteeing that the individuals whose rights are to be protected by the courts and judges have the requisite safeguards on the effectiveness of such protection. Opinion no. 1(2001) of the Consultative Council of European Judges expressly states the following in paragraph 10, with reference to Article 6 of the ECHR: "Their [judges'] independence is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice."

Let me also point out that the commented editions of the Constitution of both 2002 and 2008 express the opinion that "it is a generally recognised understanding in modern democracies that independence is not a privilege of judges but a privilege of the people who come to the court to have their rights protected. This idea is expressly established in Article 6 of the ECHR." (see comment 11(2) to § 146; and comment 14(2) to § 146, respectively.)

4. The Charter proceeds from the understanding that a judge's right of appeal in the case of violations of his or her independence can not be derived from Article 6(1) of the ECHR. At the same time the Charter considers it necessary that national laws provide for the guarantees for the independence of judges in the interests of participants in the proceedings, and give the judges the right of appeal for the protection of their independence.

Article 1.4 of the Charter considers the following to be necessary: “The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority, with effective means available to it of remedying or proposing a remedy.”

In this content the Charter uses the word “right” to denote the guarantees for the independence of judges, but this word does not mean the subjective right currently protected by the action of a judge. The Charter bears in mind the national laws to be adopted in European states in the future, which should give the judges the relevant right (Article 1.2) in the interests of participants in the proceedings (Article 1.1). The independent authority referred to in Article 1.4 of the Charter does not mean a court of law, because the Charter uses the terms different from those used in Article 6(1) of the ECHR. Article 6(1) speaks of a tribunal established by law.

If the judges’ right of appeal for the protection of their own subjective rights or the subjective rights of participants in the proceedings already existed on the bases of Article 6(1) of the ECHR, there would be no need to wish to restrict the existing right by the Charter through seeking the possibility of recourse to some other independent authority instead of the courts.

5. This must not give rise to the conclusion as if I were of the opinion that currently a judge has no subjective right to claim his or her salary by judicial process. I think that it is necessary to discern between the following legal categories: salary as an element of service relationships and salary as a guarantee for the independence of judges established in the interests of participants in proceedings. A judge, like any other official, has the subjective right to a salary as an element of a service relationship. A judges has the right to claim the salary to which he or she is entitled by law and to claim that it be paid to him or her pursuant to the procedure provided by law.

6. What I can not consent to is the fact that the majority of the Supreme Court *en banc* derived, with the help of Article 6 of the Charter, the obligation to pay a salary to a judge for the period when the performance of his or her official duties is suspended during a criminal proceeding. Article 6.1 of the Charter does not pertain to such cases when a judge is removed from office for the duration of a criminal proceeding. This must have been clear also to the majority of the Supreme Court *en banc*, because the last sentence of paragraph 33 of the judgment quotes the Explanatory Memorandum to the Charter. It appears from the quote that this Article of the Charter speaks only of payment of remuneration for the performance of professional duties.

The social guarantees of judges are dealt with in Article 6.3 of the Charter. This Article considers it necessary for the judges to have guarantees against ordinary risks and enumerates these risks as follows: illness, maternity, invalidity, old age and death. Article 6.3 does not make mention of a case when a judge is removed from office for the duration of a criminal proceeding, either.

Consequently, I am of the opinion that the Charter can not be invoked to justify the payment of a salary to a judge who is removed from office for the duration of a criminal proceeding.

II.

7. I would have adjudicated the matter proceeding from A. Šuvalov’s argument that he lacks the means of subsistence due to the suspension of his service relationship, i.e. he is in need and wishes that means of subsistence be ensured to him.

8. I argue that a situation where a person who is removed from employment or service for the duration of a criminal proceeding finds himself or herself in need is within the sphere of protection of § 28(2) of the Constitution. § 28(2) of the Constitution reads as follows: “An Estonian citizen has the right to state assistance in the case of old age, inability to work, loss of a provider, or need. The categories and extent of assistance, and the conditions and procedure for the receipt of assistance shall be provided by law. Citizens

of foreign states and stateless persons who are in Estonia have this right equally with Estonian citizens, unless otherwise provided by law."

9. To achieve the declaration of unconstitutionality of the failure to pass such legislation of general application, which would allow a person whose employment or service relationship is suspended for the duration of a criminal proceeding to claim from the state a compensation that would ensure subsistence, it would be necessary to ascertain that the person is indeed in need. The burden of proof lies with the person who alleges to be in need.

10. A. Šuvalov has not submitted such evidence to the court which would allow to conclude that he is in need. In the action filed with the administrative court A. Šuvalov claimed a salary, and by way of provisional legal protection the payment of half of the salary without submitting any proof concerning his economic situation. The administrative court dismissed the application of provisional legal protection. The circuit court required A. Šuvalov to submit evidence concerning his economic situation for the adjudication of the application of provisional legal protection. On the basis of the evidence submitted by A. Šuvalov the circuit court did not consider the economic situation of A. Šuvalov to be such as to necessitate the application of provisional legal protection. Later on A. Šuvalov has not submitted evidence concerning his economic status to the court.

That is why I would have dismissed A. Šuvalov's appeal in cassation and would have upheld the judgments of the administrative court and the circuit court by which no salary was required to be paid to A. Šuvalov.

11. In a situation like this and within concrete norm control the court could not have formed an opinion on the constitutionality of the lack of legal regulation.

On the abstract level I find that every person who has been removed, by the state, from employment or service for the duration of a criminal proceeding and who is in need as a result of this has the right to claim – on the basis of § 28(2) of the Constitution – state assistance irrespective of his or her post or citizenship, and what is unconstitutional is the failure to pass legislation of general application to establish that the state shall ensure the means of subsistence to such persons who are in need.

I am of the opinion that, upon assessing the economic situation of a person who is in need as a result of such state activity, § 27(5) of the Constitution which establishes that "[t]he family has a duty to care for its needy members," must not be taken in to account, at least not as a general rule. It would be disproportional to put an obligation on the family to support a person who is in need as a result of the activities of the state. Nevertheless, I dare not exclude the possibility of exceptions, at least not when analysing this on an abstract level. In some cases the intensity of infringement of ownership rights of a family member may prove to be insignificant. At the same time it may prove incompatible with human dignity to demand means of subsistence from family members or persons who have the maintenance obligation under the Family Law Act during a criminal proceeding. The duration of judicial process may render the claiming of the means of subsistence by way of judicial procedure completely ineffective.

Dissenting opinion of justice Tambet Tampuu
to the Supreme Court *en banc* judgment in case no. 3-3-1-59-07

1. I am of the opinion that A. Šuvalov's action should be satisfied partly, without declaring the legislative omission (failure to pass legislation of general application) unconstitutional. The appeal in cassation should be satisfied in part.

In this case the Supreme Court *en banc* has adjudicated an issue, which is not regulated by the legislator, without any reference to a provision of the Constitutional Review Court Procedure Act (CRCPA) or of any other Act (see paragraph 43 of the judgment). I am of the opinion that in the case of declaration of

unconstitutionality of the legislator's failure to act, proceeding from the principle of separate powers established in § 4 of the Constitution, neither the Constitutional Review Chamber nor the Supreme Court *en banc* have the competence to establish a regulatory framework instead of the legislator. At the same time, despite of the Supreme Court *en banc* judgment, it is not clear what exactly is the valid law relevant to the adjudication of A. Šuvalov's action. Therefore it still remains disputable whether and under which Act the Minister of Justice is allowed to reduce the salary of a judge in a case similar to that of A. Šuvalov's case.

Pursuant to the former judicial practice in administrative matters, the person who has suffered damage has the right to claim damages from the legislator if the legislator's failure to pass legislation of general application is declared unconstitutional (see the Administrative Chamber of the Supreme Court judgment of 2 March 2005 in case no. 3-3-1-92-04, paragraph 14).

2. According to § 8(2) of the CA the Public Service Act (PSA) applies to judges only in cases which are not provided for in the Courts Act. Under § 12(3)3) of the PSA the Act shall extend to judges insofar as not otherwise provided by the Constitution or other Acts. Under § 107(2) of the PSA, during the suspended period of the service relationship, an official shall retain his or her salary together with additional remuneration or shall be paid other compensation only in the cases and pursuant to procedure provided by law. None of the Acts provides for payment of a salary or other compensation to a judge during the period when the service relationship of the judge is suspended on the basis of § 108(10) of the PSA and § 381(3) of the CCrP. To my estimate this constitutes a legal gap, which can and should be bridged through analogy (see paragraphs 3 and 4 of this opinion). The use of analogy does not presuppose the declaration of unconstitutionality of the legislative omission, and does not mean the establishment of legal regulation instead of the legislative gap. Thus, the courts and the Supreme Court *en banc* could have satisfied A. Šuvalov's action without having declared the legislative omission unconstitutional.

3. In the former judicial practice of the Supreme Court a legislative gap the existence of which requires the use of analogy of law has been considered to be a situation where the norms of an Act are not sufficient for the adjudication of a case and do not meet the requirement that a certain sphere be exhaustively regulated (see the Administrative Chamber of the Supreme Court judgment of 8 March 2008 in case no. 3-3-1-38-08, paragraph 16). Upon choosing an analogous regulatory framework it is necessary to consider the interest of all the interested persons as well as the expediency of the consequences that would follow the application of one or another regulatory framework (see the Administrative Chamber of the Supreme Court judgment of 2 March 2005 in case no. 3-3-1-45-03, paragraph 14).

Upon resolution of an issue not regulated by the legislator the Supreme Court *en banc* has taken into account § 95(4) of the CA (see paragraph 44 of the judgment). I argue that this provision should have been used on the basis of analogy (it follows from the Supreme Court*en banc* judgment that analogy was not used). The first sentence of § 95(4) of the CA establishes that if the Disciplinary Chamber removes a judge from service during the hearing of a disciplinary matter, the Chamber may reduce the judge's salary for such period. The second sentence of § 95(4) of the CA establishes that in the referred case the judge's salary shall be reduced by not more than a half.

It does not appear from the Supreme Court *en banc* judgment, which Act the Minister of Justice violated and on the basis of which provision the Court required the Ministry of Justice to pay to A. Šuvalov 50% of his salary and additional remuneration for the whole period while the performance of his official duties was suspended due to the criminal proceeding. I am of the opinion that the Minister of Justice – an official organising the payment of salary to the first and second instance judges – should have applied § 95(4) of the CA on the basis of analogy, and should have made a discretionary decision for the purposes of § 4 of the Administrative Procedure Act.

4. I justify the application of § 95(4) of the CA by way of analogy by the necessity to preclude the violation of A. Šuvalov's fundamental rights.

The failure to pay salary to A. Šuvalov infringes the fundamental right – arising from the presumption of

innocence established in § 22(1) of the Constitution - not to be presumed guilty of a criminal offence until a conviction by a court against him enters into force. This fundamental right protects a person, *inter alia*, against imposition of proprietary restrictions, resulting from conviction in a criminal case, before a judgment of conviction has entered into force. In the present case the proprietary rights of A. Šuvalov were restricted with a directive of the Minister of Justice - he was deprived of a judge's salary – before a judgment of conviction in the criminal case, which would serve as the basis for releasing him from the office of judge under § 101 of the CA, had entered into force. Furthermore, by suspending A. Šuvalov's salary his fundamental right to inviolability of property was infringed for the purposes of the first sentence of § 32(1) of the Constitution.

The infringements of A. Šuvalov's fundamental rights a rising from § 22(1) and the first sentence of § 32(1) of the Constitution serve a legitimate aim proceeding from a general interest – to restrict the expenditure of the state (payment of salary) to a judge who is temporarily removed from office due to a criminal proceeding and who, in the case of conviction, shall be deemed to be removed from the office of judge as of the entering into force of a conviction by a court for a criminal offence (§ 101 of the CA). Total deprivation of a judge of salary for the period of suspension of his or her service relationship on the basis of § 108(10) of the PSA and § 381(3) of the CCrP would constitute an unsuitable measure for the achievement of the referred legitimate aim. This measure would be in conflict with the principle of independence of the courts, established in the second sentence of § 146 of the Constitution, and with the fourth subindent of § 147 of the Constitution, pursuant to which the law shall provide guarantees for the independence of judges. I consent to the opinion that the judge's salary is one of the guarantees for the independence of judges (see paragraphs 30 36 of the judgment). Neither would this measure be proportional. The disproportion appears, *inter alia*, on the basis of the restrictions on holding other offices, established in § 49(1) of the CA. These restrictions apply to a judge also while his or her service relationship is suspended (see paragraphs 26 28 of the judgment).

5. The courts have interpreted A. Šuvalov's action as an application requiring a performance. They have ignored A. Šuvalov's request to repeal directive no. 233-k of the Minister of Justice of 26 June 2006, although he has not withdrawn this request. In the appeal in cassation A. Šuvalov has again requested the repeal of the referred directive.

I do not consent to the opinion expressed in paragraph 21 of the Supreme Court *en banc* judgment that the contested directive of the Minister of Justice is an intra-administrative legislation. This directive constitutes an implementing provision of the restriction of A. Šuvalov's rights (without this directive he would have continued to receive judge's salary). A. Šuvalov was the extra-administrative addressee of this directive. In the present case the directive, which completely suspended the payment of salary to A. Šuvalov before he was released from the office of judge, shall remain in force. The judgment of the Supreme Court *en banc* does not require the Minister of Justice to repeal this directive.

Having deemed the contested directive of the Minister of Justice an intra-administrative legislation, the administrative court should have, pursuant to § 11(4) of the Code of Administrative Court Procedure, returned to A. Šuvalov the part of his action in which he contested the directive. Pursuant to the referred provision, an action or protest the adjudication of which does not fall within the competence of administrative courts shall be returned by an administrative court ruling which indicates, if possible, the court to which the person has recourse.

Dissenting opinion of justice Lea Kivi
to the Supreme Court *en banc* judgment of 14 April 2009
in case no. 3-3-1-59-07

1. While agreeing with the Supreme Court *en banc* decision to declare the failure to pass such legislation of general application, which would allow to pay a salary or other equivalent compensation to a judge whose

service relationship is suspended for the period of a criminal proceeding, to be in conflict with § 147(4) of the Constitution in conjunction with §§ 146 and 15 of the Constitution, I have a dissenting opinion concerning clause 3 of the decision of the judgment. I do not consent to the opinion of the Supreme Court *en banc* by which the action of A. Šuvalov was satisfied partly and the Ministry of Justice was required to pay to A. Šuvalov 50% of his salary and additional remuneration for the period when his duties of judge were suspended because of a criminal proceeding. I substantiate my dissenting opinion as follows.

2. When the Supreme Court declares unconstitutional a legislative omission which consists in the lack of necessary regulatory framework, the Supreme Court *en banc* can not assume the role of the legislator and choose instead of the parliament – between possible solutions or prepare relevant legal regulations. The legislator has a wide margin of appreciation upon deciding to what extent and under which conditions a salary or compensation must be paid to a judge who is removed from service for the duration of a criminal proceeding, and that is why reasonable time should be afforded to the Riigikogu for the resolution of these issues. This principle was expressed in the Supreme Court *en banc*judgment of 12 April 2006 in case no. 3-3-1-63-05, and the principle should have been followed up upon adjudication of this case, i.e. the Supreme Court en banc should have rendered a partial judgment on the basis of § 58(3) of the CRCPA, and should have continued to adjudicate A. Šuvalov's appeal in cassation after the Riigikogu had enacted relevant legal regulation.

3. When the Supreme Court *en banc* itself adjudicated the appeal in cassation of A. Šuvalov and required that the Ministry of Justice pay to A. Šuvalov 50% of his salary and additional remuneration for the whole period when A. Šuvalov's duties of judge were suspended due to a criminal proceeding, it did so by applying – on the basis of analogy § 95(4) of the Courts Act. Consequently, the Supreme Court *en banc* did find the necessary legislative framework and satisfied A. Šuvalov's appeal in cassation. I am of the opinion that such a decision is in conflict with the preceding finding of the Supreme Court *en banc* (clause 1 of the decision) that relevant regulatory framework does not exist and that this is unconstitutional.

Links
[1] http://www.coe.int/t/e/legal_affairs/legal_co-operation/legal_professionals/judges/instruments_and_documents/charte%20Estonian.pdf