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RULING OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

No. of the case 3-4-1-12-08

Date of judgment 30 December 2008

Composition of court Chairman Märt Rask, and members Eerik Kergandberg, Hannes Kiris, Indrek Koolmeister and Priit Pikamäe.

Court Case Request of Raivo Paala to declare that the Tartu County Court proceeding in criminal case no. 1-07-2186 has been unreasonably long and thus violates his right to a proceeding within a reasonable time; that the failure to issue legislation of general application regulating the hearing of appeals concerning unreasonably long proceedings and awarding of just compensation is in conflict with the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms; and to award just compensation for the moral damage caused by the violation of fundamental rights.

Hearing of the matter Written proceeding

DECISION To dismiss the request of R. Paala.

FACTS AND COURSE OF PROCEEDING

1. In the criminal case no. 1-07-2186 pending before the Tartu County Court Raivo Paala is charged with the criminal offence described in § 386(1) of the Penal Code (hereinafter “the PC”).

2. By its ruling of 9 January 2008 the Tartu County Court partly terminated the criminal proceeding concerning the act, set out in the statement of charges, committed in 1996, due to expiry of limitation period, without evaluating the substance of the charge. The Tartu County Court refused to hear the civil action concerning the charge. Also, the Tartu County Court refused to hear the request of R. Paala firstly to ascertain that the criminal proceeding has violated his right to a hearing within a reasonable time for the

purposes of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the Convention”); secondly, to ascertain alternatively that there is no effective remedy for the purposes of Article 13 of the Convention when the right to a proceeding within a reasonable time has been violated, and thirdly to award to R. Paala a compensation of one million kroons because the requirement of reasonable length of proceedings of Article 6(1) of the Convention continues to be violated.

3. The ruling of the county court was appealed against by both the prosecutor and the accused R. Paala. The prosecutor applied for the annulment of the ruling of 9 January 2008 to the extent that the court terminated the proceeding of the criminal offence committed in 1996 due to expiry of the limitation period. The accused R. Paala requested that the ruling be annulled in its entirety and that judgment of acquittal be rendered in regard to the criminal offence of 1996.

4. By its ruling of 12 February 2008 the Tartu Circuit Court annulled the ruling of the Tartu County Court of 9 January 2008 concerning partial termination of criminal proceeding due to expiry of limitation period on the basis of § 199(1)2) of the Code of Criminal Procedure (hereinafter “the CCP”), and concerning refusal to hear the civil action on the basis of § 274(1) of the CCP. The circuit court was of the opinion that the time of an intermittent offence can be ascertained on the basis of evidence examined by the court, and that it is possible to decide on the expiry on limitation period of an offence only after the examination of evidence. The county court had, without examining the evidence, prematurely availed itself of the possibility given by § 274(1) of the CCP to terminate criminal proceedings.

5. On 7 March 2008 R. Paala submitted a request to the Supreme Court to declare § 2 of the CCP partly unconstitutional and in conflict with the Convention. By its ruling of 3 March 2008 in matter no. 3-4-1-3-08 the Constitutional Review Chamber of the Supreme Court dismissed the request of R. Paala.

6. On 2 September 2008 R. Paala submitted a new request to the Supreme Court, applying for the following:

1) to ascertain that the proceeding in the Tartu County Court of criminal case no. 1-07-2186 has been unreasonably long and this is in conflict with § 14 of the Constitution and Article 6(1) of the Convention;

2) to ascertain that the absence of legislation of general application establishing civil and criminal procedures for the hearing of appeals against unreasonable time of proceedings and for awarding just compensation is in conflict with § 14 of the Constitution and Article 13 of the Convention;

3) to award just compensation for the moral damage caused by the violation of fundamental rights.

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING

7. R. Paala is of the opinion that his individual complaint is permissible and subject to hearing on the merits, because he has no other effective remedy for the protection of his rights. The Supreme Court is only entitled to refuse to hear a complaint of a person if the person can achieve the protection of his rights in some other efficient way (see the Constitutional Review Chamber of the Supreme Court ruling of 3 July 2008 in case no. 3-4-1-10-08 – RT III 2008, 33, 225; ruling of 3 April 2008 in case no. 3-4-1-3-08 – RT III 2008, 16, 104; ruling of 17 May 2007 in case no. 3-4-1-11-07 – RT III 2007, 21, 170; ruling of 4 April 2007 in case no. 3—4-1-8-07 – RT III 2007, 15, 114; ruling of 17 January 2007 in case no. 3-4-1-17-06 – RT III 2007, 3, 20; ruling of 9 May 2006 in case no. 3-4-1-4-06 – RT III 2006, 19, 174; ruling of 13 June 2005 in case no. 3-4-1-10-05, 23, 234; ruling of 23 March 2005 in case no. 3-4-1-6-05 – RT III 2005, 11, 104).

In regard to other effective remedies R. Paala points out that in its judgment of 8 November 2007 in *Saarekallas OÜ v. Estonia* the European Court of Human Rights ascertained that the Estonian legal system lacked an affective remedy, meeting the requirements of Article 13 of the Convention, enabling to hear the complaints of persons concerning the issue of whether the proceedings concerning the determination of civil rights and obligations or a criminal charge against these persons have been conducted within a reasonable time.

8. R. Paala is of the opinion that upon hearing criminal case no. 1-07-2186 the Tartu County Court has violated the requirement of proceedings within a reasonable time, arising from § 14 of the Constitution and Article 6(1) of the Convention. By 2 September 2008 the hearing of R. Paala's case had lasted more than nine years.

R. Paala argues that a person has the right to request that the violation of his or her fundamental rights be ascertained before the judgment in the matter has entered into force. In its judgment of 9 December 1991 in *Maylnek v. Austria* the European Court of Human Rights held that when the Convention has been violated a person's application can be regarded permissible even when a court judgment concerning the person has not yet entered into force. The European Court of Human Rights reached a similar conclusion in the *Treial v. Estonia* judgment of 2 December 2003.

According to the case-law of the European Court of Human Rights the reasonable time of proceedings depends on the complexity of the case, the conduct of the appellant and the competent authorities (*Mitev v. Bulgaria* judgment of 22 December 2004; *Jean-Claude Boddaert v. Belgium* judgment of 17 April 1991; *Akcakale v. Turkey* judgment of 25 May 2004, and *Sari v. Turkey and Denmark* judgment of 8 November 2001). R. Paala is of the opinion that his criminal case amounts to an ordinary court case, that his conduct has not dragged the criminal proceedings beyond a reasonable time and there are no circumstances in the conduct of competent authorities justifying the unreasonable length of the proceeding.

R. Paala points out that in the *Saarekallas OÜ v. Estonia* judgment of 8 November 2007 the European Court of Human Rights ascertained the violation of the requirement of reasonable time in the situation where the criminal proceedings had lasted for more than seven years.

9. Secondly, R. Paala argues that the lack of national procedure for the hearing of complains about unreasonable length of proceedings is in conflict with § 14 of the Constitution and with the provisions of Article 13 of the Convention. R. Paala is of the opinion that this conflict has been ascertained also in the referred *Saarekallas OÜ v. Estonia* judgment.

R. Paala is of the opinion that the Supreme Court can either establish such procedure through its judicial practice or require that the Riigikogu regulate the issue by legislation of general application. Irrespective of the lack of procedure R. Paala argues that the Supreme Court could, as an interim measure, adjudicate his complaint about the unreasonable length of proceedings.

10. Thirdly, R. Paala requests that the Supreme Court award him just compensation for the alleged violations of fundamental rights. R. Paala argues that the unreasonably long proceeding has deteriorated his and his family's quality of life and jeopardised planning the future. R. Paala considers one million croons to be just compensation. R. Paala admits that as the fact of ascertaining of violation of fundamental rights is just as important as the amount of compensation, he wishes that the Supreme Court award him just compensation in the amount at the discretion of the court.

11. The Constitutional Committee and the Legal Affairs Committee submitted written opinions on behalf of the Riigikogu. Both Committees were of the opinion that R. Paala's request was not permissible, because R. Paala has not exhausted national remedies before filing the individual complaint with the Supreme Court.

The Committees argue that in the situation where his right to a proceeding within a reasonable time is violated R. Paala has the right of recourse to the administrative court. R. Paala can also have recourse to the administrative court for the compensation of the damage caused by the violation of the referred right. The Committees pointed out that the issue of compensating for the moral damage caused by a violation of fundamental rights arises when the violation of rights has been ascertained.

The Committees are of the opinion that the basis for this is to be found in § 4(2) of the Code of Administrative Court Procedure (hereinafter "the CACP") and § 25 of the Constitution. The CACP establishes that measures against which an action or protest may be filed with an administrative court are

activities, omissions or delays in public law relationships by agencies, officials or other persons who perform administrative functions in public law. Pursuant to § 25 of the Constitution everyone has the right to compensation for moral and material damage caused by the unlawful action of any person. § 15(1) of the State Liability Act (hereinafter “the SLA”) allows for the compensation for damage caused in the course of judicial proceedings if a judge committed a criminal offence in the course of these proceedings.

12. The Chancellor of Justice is of the opinion that R. Paala’s request is not permissible, because R. Paala can have recourse to the administrative court with the request to ascertain the unlawfulness of the unreasonable length of a criminal proceeding and to award just compensation for the moral damage caused by the violation of fundamental rights.

The Chancellor of Justice admits that the administrative court is competent to ascertain the unlawfulness of an activity or failure to act, constituting an element necessary for compensation for damage, and to award reasonable compensation for damage caused in public law relationships, including to award compensation for damage caused by the court.

The Chancellor of Justice based his opinion primarily on § 6(3)1) and 2) of the CACP, and §§ 1(1) and 17(1) of the SLA. § 6(3)1) of the CACP establishes that an administrative court is competent to establish the unlawfulness of an administrative act or measure. Under § 6(3)2) of the CACP an administrative court is competent to award compensation for damage caused in public law relationships. It proceeds from §§ 1(1) and 17(1) of the SLA that administrative courts have the competence to decide on the damage caused in public law relationships.

13. The Minister of Justice is of the opinion that R. Paala’s request is permissible, because pursuant to the Human Rights Court judgment in *Saarekallas OÜ v. Estonia* of 8 November 2007 there is no effective remedy in the Estonian legal order to guarantee the reasonable length of court proceedings for the purposes of the Convention.

The Minister of Justice is of the opinion that in regard to R. Paala the requirement that the length of a criminal proceeding be reasonable has not been violated. The Minister of Justice admits that the criminal proceeding of R. Paala’s case is long against the background of average length of criminal proceedings and the case-law of the Human Rights Court. There have been cases in the judicial practice of the Human Rights Court where in regard to judicial proceedings of comparable length the violation of the reasonable time requirement has not been found. The Minister of Justice admits that R. Paala’s court case is a complex one. The proceeding of the matter is rendered even more complex due to the fact that in order to ensure more effective protection of R. Paala’s rights the criminal proceedings of criminal offences of the same type have been joined. The Minister of Justice concludes that the duration of the proceeding is partly conditioned by the necessity of ensuring better protection to R. Paala’s rights.

The Minister of Justice is of the opinion that as the requirement of reasonable length of judicial proceedings has not been violated, there is no ground for compensation for damage. R. Paala’s request should be satisfied to the extent that he applies that the Supreme Court ascertain that the lack of legislation of general application establishing civil and criminal procedures for hearing complains against unreasonable length of proceedings and awarding just compensation is in conflict with § 14 of the Constitution and Article 13 of the Convention.

14. The Minister of Foreign Affairs is of the opinion that the request is not permissible, because the complainant has effective possibilities to avail himself of other legal remedies.

The Minister of Foreign Affairs admits that the Codes regulating court procedure do not contain a specific norm providing for the recourse to the courts and the filing of claims for the compensation of damage in a situation where the right to a proceeding within a reasonable time is violated. Nevertheless, this procedure exists in the form of general provisions. To ensure the right of appeal, established in § 15(1) of the Constitution, as extensively as possible § 3(1)1) and 2) of the CACP establishes that adjudication of disputes

in public law for which a different procedure is not prescribed by law falls within the competence of administrative courts.

The Minister of Foreign Affairs is of the opinion that the obligation of the courts to adjudicate cases as quickly as possible, established in § 151 of the CCP, corresponds to the subjective public right of the accused at trial to request a speedy trial. If the referred obligation is violated, the person may have recourse to the administrative court for the protection of his or her rights and submit a claim for the compensation of damage caused by the violation of the right to a proceeding within a reasonable time.

The Minister of Foreign Affairs is of the opinion that the Human Rights Court judgment of 8 November 2007 in *Saarekallas OÜ v. Estoniados* not constitute a basis for satisfying R. Paala's request. The Minister of Foreign Affairs points out that in paragraph 66 of the *Saarekallas OÜ v. Estonia* judgment of 8 November 2007 the Human Rights Court concluded that there was no effective remedy in practice as well as in law, because the Government had not referred to any court cases where compensation had been awarded for damage related to unreasonably long court proceedings.

The Minister of Foreign Affairs argues that the guidelines of the Supreme Court to the complainant and the courts of lower instances are necessary for the guarantee of legal clarity that there is no conflict with § 14 of the Constitution and with Article 13 of the Convention in conjunction with Article 6(1) thereof.

15. According to the opinion of the Minister of Finance the request of R. Paala is not permissible. The Minister of Finance is of the opinion that under §§ 15 and 25 of the Constitution persons can file actions with administrative courts against unreasonably long court proceedings and to demand compensation. The valid law does not contain a provision prohibiting a person to have recourse to the courts and request the declaration of court proceedings unreasonably long and, if this is ascertained, to demand just compensation.

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

16. To hear the request of Raivo Paala the Constitutional Review Chamber of the Supreme Court shall first verify the permissibility thereof.

17. The Constitutional Review Court Procedure Act (hereinafter "the CRCPA") does not explicitly provide for the possibility to submit individual complaints for the review of constitutionality or legislation of general application (see the Constitutional Review Chamber of the Supreme Court ruling of 23 March 2005 in case no. 3-4-1-6-05 – RT III 2005, 11, 104, paragraph 4, and ruling of 4 April 2007 in case no. 3-4-1-8-07 – RT III 2007, 15, 114, paragraph 5).

18. The Supreme Court *en banc* has repeatedly stated, on the basis of §§ 13, 14 and 15 of the Constitution, that the Supreme Court can refuse to hear a person's complaint only if the person can exercise, in some other way, the right to judicial protection guaranteed by § 15 of the Constitution (see the Supreme Court *en banc* judgment of 17 March 2003 in case no. 3-1-3-10-02 – RT III 2003, 10, 95, paragraph 17; judgment of 6 January 2004 in case no. 3-1-1-13-03 – RT III 2004, 4, 36, paragraph 32; judgment of 6 January 2004 in case no. 3-3-2-1-04 – RT III 2004, 4, 37, paragraph 26).

19. The right to judicial protection, established in §§ 13, 14 and 15 of the Constitution, includes a person's right to file a complaint with a court if the person's rights and freedoms are violated, as well as the duty of the state to establish such an appropriate procedure for the protection of fundamental rights that would be fair and would guarantee effective protection of person's rights (see e.g. the Constitutional Review Chamber of the Supreme Court judgment of 14 April 2003 in case no. 3-4-1-4-03 – RT III 2003, 13, 125, paragraph 16).

20. On the basis of the aforesaid the Chamber shall analyse, for the hearing of R. Paala's request, whether the complainant can avail himself of some other effective possibility to exercise the right to judicial protection arising from § 15 of the Constitution.

21. The Chamber is of the opinion that R. Paala's right to a proceeding within a reasonable time is violated and that R. Paala is entitled to submit a relevant complaint within the proceeding pending before the Tartu County Court. The court is under the obligation to adjudicate such a complaint at any stage of a proceeding, not only when rendering a judgment. If necessary, the court must proceed from the Convention and the practice of application thereof, which – pursuant to § 2(2) of the CCP constitute a source of criminal procedural law. The Convention is an international agreement ratified by the Riigikogu, which – proceeding from § 123(2) of the Constitution has priority over Estonian laws or other legislation (see the Supreme Court en banc judgment of 6 January 2004 in case no. 3-1-3-13-03 – RT III 2004, 4, 36, paragraph 31).

22. According to the case-law of the Human Rights Court the reasonableness of the length of proceedings is to be assessed by a court in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and the conduct of the competent authorities (see e.g. *Pélissier and Sassi v. France* judgment of 25 March 1999, application no. 25444/94, paragraph 67). The Supreme Court, too, has pointed out that upon assessing whether a reasonable time has been exceeded a court must take into account the gravity of criminal offence, the complexity and volume of the criminal case, as well as other concrete circumstances, including the course of proceedings (see the Criminal Chamber of the Supreme Court judgment of 27 February 2004 in case no. 3-1-1-3-04 – RT III 2004, 8, 86, paragraph 19).

23. If the court comes to the conclusion that R. Paala's right to a proceeding within a reasonable time is violated, the court can – in the light of all circumstances and on the basis of Article 6(1) of the Convention – terminate criminal proceedings for reasons of expediency, render a judgment of acquittal or take the fact that reasonable time was exceeded into account upon imposition of punishment.

As regards the referred possibilities the Criminal Chamber of the Supreme Court has pointed out that the expiry of reasonable length of a criminal proceeding need not necessarily and always bring about the acquittal of a person. Depending on the circumstances a proportional result of the expiry of reasonable time of criminal proceedings may be e.g. the termination of criminal proceedings for reasons of expediency or taking the referred fact into account upon imposition of punishment (see the Criminal Chamber of the Supreme Court judgment of 27 February 2004 in case no. 3-1-1-3-04 – RT III 2004, 8, 86, paragraph 22). In regard to taking into account the unreasonable length of proceedings upon imposition of punishments the Criminal Chamber has pointed out that on the basis of Article 6(1) of the Convention and pursuant to § 61 of the Penal Code the courts have the right to impose a less onerous punishment than the minimum term or rate provided by law (see the criminal Chamber of the Supreme Court judgment of 7 November 2008 in case no. 3-1-1-28-08 – not yet published in RT III, paragraph 17).

24. As regards R. Paala's request to declare the failure to issue legislation of general application unconstitutional the Chamber argues that if the failure to pass a piece of legislation of general application violates, in the opinion of the complainant, his subjective rights, the person has the right to file a relevant application with the Tartu County Court during the hearing of his criminal case. This right is given to R. Paala by the second sentence of § 15(1) of the Constitution, pursuant to which everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional. Under the second subindent of § 15 of the Constitution the Tartu County Court is obliged to observe the Constitution and declare unconstitutional any law, other legislation or procedure which violates the rights and freedoms provided by the Constitution or which is otherwise in conflict with the Constitution. § 152(1) of the Constitution provides that in a court proceeding, the court shall not apply any law or other legislation that is in conflict with the Constitution. On the basis of a judgment to this effect a constitutional review proceeding is commenced in the Supreme Court (§ 152 (2), § 4(3) of the CRCPA). Should the court conducting criminal proceedings refuse to satisfy such an application, the initiation of a constitutional review proceedings may be applied for in the appeal procedure and, finally, in cassation proceedings.

25. In the examination of R. Paala's request for compensation for the damage caused by the violation of

fundamental rights the Chamber agrees with the opinion expressed in the written opinions of the participants in the proceeding that R. Paala can demand compensation for damage in an administrative court on the bases and pursuant to the procedure established in the State Liability Act.

26. Bearing in mind what has been stated in paragraphs 20 to 25 above and the fact that the criminal proceedings concerning R. Paala are still pending before the Tartu County Court, the Constitutional Review Chamber of the Supreme Court concludes that the requests of R. Paala are not permissible and the Supreme Court lacks a ground to hear these on the merits.

27. For the above reasons and on the basis of § 11(2) of the CRCPA the Constitutional Review Chamber dismisses the request of R. Paala.

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