Constitutional judgment 3-3-2-1-07

**JUDGMENT
OF THE GENERAL ASSEMBLY
OF THE SUPREME COURT**

No. of the case	3-3-2-1-07
Date of judgment	10 March 2008
Composition of court	Chairman Ants Kull and members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Lea Laarmaa, Julia Laffranque, Jaak Luik, Jüri Põld, Harri Salmann and Tambet Tampuu.
Court Case	Actions of Ivo Jurno, Meeri Konno, Pavel Žukovets, Vladimir Solovjov, Tõnu Eichler, Hele Mets, Vladimir Uik, Svetlana Gude, Jevgenia Nugis, Kiira Chagall, Asta Kortel, Janika Toompere, Lembit Nokkur, Valve Hääl and Rudolf Polman for declaration of illegality of CRCUEP decision no 4032 of 24 October 1994 and of the Tallinn City Government order no 244-k of 30 January 1995.
Disputed judgment	The Administrative Law Chamber of the Supreme Court ruling of 22 March in administrative case no 3-3-1-6-99 and the Tallinn Circuit Court judgment of 10 May 1999 in administrative case no II-3/148/99.
Appellant and type of action	Karin Elisabeth Adelheid Edenberg’s petition for review.
Type of proceeding	Written procedure.

DECISION	**1. To dismiss the petition for review of Karin Elisabeth Adelheid Edenberg.** **2. To order that Karin Elisabeth Adelheid Edenberg pay the procedural costs of Valve Hääl in the amount of 2832 kroons, of Ivo Jurno in the amount of 5664 kroons, of Ojari Ojamaa in the amount of 2832 kroons, and of Rudolf Polman in the amount of 2832 kroons.** **3. To transfer the security into the public revenues.**

FACTS AND COURSE OF PROCEEDING

1. By decision no 4032 of 24 October 1994 the Tallinn city committee for return of and compensation for unlawfully expropriated property (hereinafter "the CRCUEP") the buildings and the plot of land situated at Kaupmehe 10/Kentmanni 17 (former Kaupmehe 10), Tallinn, were declared the object of ownership reform. The city committee regarded it established that at the time of unlawful expropriation the property belonged to Max Edenberg. The referred decision declared Karin Trepp to be the entitled subject of ownership reform in regard to this property.

By the Tallinn City Government order no 244-k of 30 January 1995 the building at Kaupmehe 10/Kentmanni 17 was decided to return to K. Trepp.

2. The tenants of the apartments situated in the referred building – Ivo Jurno, Meeri Konno, Pavel Žukovets, Vladimir Solovjov, Tõnu Eichler, Hele Mets, Vladimir Uik, Svetlana Gude, Tatjana Muravjova, Kiira Chagall, Asta Kortel, Janika Toompere, Lembit Nokkur, Valve Hääl and Rudolf Polman – filed an action with the Tallinn Administrative Court for declaration of illegality of the Tallinn city CRCUEP decision no 4032 of 24 October 1994 and of the Tallinn City Government order no 244-k of 30 January 1995. The administrative court allowed Jevgenia Nugis to enter the proceeding instead of Tatjana Muravjova on the basis of the latter's application.

By its judgment of 17 June 1997 in administrative case no 3-13/97 the Tallinn Administrative Court declared the Tallinn city CRCUEP decision no 4032 of 24 October 1994 partly illegal, and the Tallinn City Government order no 244-k of 30 January 1995 illegal in its entirety. On 29 December 1997, by judgment in administrative case no 3/262/97, the Tallinn Circuit Court annulled the judgment of the Tallinn Administrative Court of 17 June 1997, and returned the matter to the same court for a new hearing in a different composition.

By its judgment of 6 August 1998, in administrative case no 3-275/98, the Tallinn Administrative Court dismissed the actions of the tenants of Kaupmehe 10. By its judgment of 17 November 1998 the administrative law chamber of the Tallinn Circuit Court dismissed the appeals of the tenants of the referred residential building, and upheld the judgment of the Tallinn Administrative Court of 6 August 1998.

3. I. Jurno, M. Konno, P. Žukovets, V. Solovjov, T. Eichler, H. Mets, V. Uik, S. Gude, J. Nugis, K. Chagall, A. Kortel,

J. Toompere, L. Nokkur, V. Hääl and R. Polman filed an appeal in cassation.

By its ruling of 22 March 1999, in administrative case no 3-3-1-6-99, the Administrative Law Chamber of the Supreme Court annulled the judgment of the administrative law chamber of the Tallinn Circuit Court of 17 November 1998 in administrative case no II-3/279/98, and referred the matter back to the circuit court for a new hearing in different composition. The Administrative Law Chamber of the Supreme Court reasoned its ruling as follows:

1) At the time of issue of the contested administrative legislation clause 5 of the resolution of the Supreme Council of 20 June 1991, entitled "On the implementation of the Principles of Ownership Reform Act", was in force. The provision established as follows: "The issues of return of or compensation for unlawfully

expropriated property to the entitled subjects of the ownership reform who left Estonia on the basis of agreements entered into with the German state shall be resolved pursuant to the procedure established by international agreements." There is no substantial difference between § 7(3) of the Principles of Ownership Reform Act (hereinafter "the PORA") and clause 5 of the Supreme Council's resolution of 20 June 1991;

2) It was established in the administrative case by the Tallinn Administrative Court judgment of 6 October 1998 that

M. Edenberg, the former owner of the residential building situated at Kaupmehe 10, Tallinn, left Estonia together with her family and went to Germany on the basis of the agreement entered into between the USSR and the German state on 10 January 1941. The circuit court agreed with the facts established by the administrative court. The circuit court made an error when arguing that the persons who had left Estonia on the basis of the agreement of 10 January 1941, were entitled, under the PORA, to claim the return of or compensation for that part of their unlawfully expropriated property which they had not declared and transferred under the referred agreement. If the property of a re-settler was unlawfully expropriated for the purposes of § 6 of the PORA, e.g. nationalised, then – according to § 7(3) of the PORA – the application of the person for return of or compensation for unlawfully expropriated property shall be resolved by an international agreement, and not on the basis of the Principles of Ownership Reform Act.

4. By its judgment of 10 May 1999 in administrative case no II-3/148/99, the Tallinn Circuit Court declared the Tallinn city CRCUEP decision no 4032 of 24 October 1994 and the Tallinn City Government order no 244-k of 30 January 1995 illegal, and required that the city committee and the City Government review the matter and make a new decision. The circuit court was of the opinion that pursuant to clause 5 of the resolution of the Supreme Council of 20 June 1991, entitled "On the implementation of the Principles of Ownership Reform Act" and § 7(3) of the PORA, the persons who left Estonia on the basis of agreements entered into with the German state were not entitled, on the basis of the Principles of Ownership Reform Act, to apply for the compensation for or return of the property which was in their ownership and remained in Estonia upon resettlement. Neither can the successors of the referred persons have this right. As M. Edenberg left Estonia on the basis of an agreement entered into with the German state, K. Trepp can not be an entitled subject in regard to the property at Kaupmehe 10.

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING

5. On 12 December 2006 **Karin Elisabeth Adelheid Edenberg** (former Trepp) filed a **petition for review**, applying for the annulment of the Tallinn Circuit Court judgment of 10 May 1999 in administrative case no II-3/148/99 and the Administrative Law Chamber of the Supreme Court ruling of 22 March 1999 in administrative case no 3-3-1-6-99, and for the upholding of the Tallinn Administrative Court judgment of 6 August 1998 in administrative case no 3-275/98 and the Tallinn Circuit Court judgment of 17 November 1998 in administrative case no II-3/279/98, and for issuing a precept to the Tallinn City Government for the reversal of the annulled judgments. The petition for review sets out the following arguments:

1) Pursuant to § 702(2)7) of the Code of Civil Procedure (hereinafter "the CCiP"), the ground for review in this case is the judgment of the general assembly of the Supreme Court of 12 April 2006, by which § 7(3) of the PORA was declared invalid as of 12 October 2006, on the condition that an Act amending or repealing § 7(3) of the PORA has not entered into force by that date. In its judgment of 6 December 2006 the general assembly of the Supreme Court held that § 7(3) of the PORA was invalid as of 12 October 2006;

2) The circumstance, serving as the ground for review, became evident on 12 October 2006 when, proceeding from the general assembly of the Supreme Court judgment of 12 April 2006, § 7(3) of the PORA was declared invalid;

3) The main provision of law of the judgments revised was § 7(3) of the PORA. These judgments created a legal situation where K. E. A. Edenberg is not an entitled subject for the purposes of the Principles of Ownership Reform Act and in regard to return of property.

6. V. Hääl, I. Jurno, O. Ojamaa and R. Polman apply for the dismissal of the petition for review, because the petition was filed in violation of time limit; or for the denial of the petition, if the petition is reviewed. V. Hääl, I. Jurno, O. Ojamaa and R. Polman argue the following:

1) The petition for review has been filed in violation of the two months' time limit established in § 704(1) of the CCiP, as the Supreme Court declared § 7(3) of the PORA unconstitutional by its judgment of 28 October 2002. The CCiP, which was in force until 31 December 2005, did not refer to unconstitutionality of legislation of general application or a provision thereof as a ground for review. Furthermore, there are no transitional provisions on the time limits for filing petitions for review in a situation where a judgment is based on a provision which is declared unconstitutional before the entering into force of a new Act. If the Supreme Court should, nevertheless, find that § 702(2)7) of the CCiP is applicable, the petition for review must have been filed within two months as of the entering into force of the new Code, that is on 1 March 2006, the latest, i.e. in accordance with the opinion of the Supreme Court in administrative case no 3-3-1-66-04;

2) The unconstitutionality of § 7(3) of the PORA was established by the Supreme Court for the second time in the judgment of 12 April 2006. In regard to the declaration of invalidity the entering into force of the judgment was postponed until 12 October 2006. The rest of the judgment, including paragraph 26 where the unconstitutionality of the provision was established for the second time, entered into force already on 12 April 2006. The referred judgment was published in the Riigi Teataja [state gazette] on 19 May 2006. The petition for review should have been filed not later than on 19 July 2006. Proceeding from §§ 705 and 682(1) of the CCiP and §§ 76 and 77 of the Code of Administrative Court Procedure (hereinafter "the CACP") in their conjunction the Court should refuse to hear the petition for review, because it was filed after the expiry of the date provided by law;

3) Proceeding from § 5(2) of the CACP the ground for review established in § 702(2)7) of the CCiP is not applicable in administrative court proceedings. When adjudicating an action an administrative court must, on its own initiative, verify the constitutionality of the applicable norms to the full extent, and the judgment of an administrative court serves as an assurance that the applied provision was constitutional. Before 1 January 2006 the declaration of unconstitutionality of a norm was not established as a ground for filing petitions for review; that is why the appellants had a ground to expect that the Administrative Law Chamber of the Supreme Court ruling of 22 March 1999 and the Tallinn Circuit Court judgment of 10 May 1999 could not be revised;

4) If the Supreme Court considers § 702(2)7) of the CCiP applicable in the present case, the constitutionality of the retroactive application of the provision should be reviewed. The Supreme Court has emphasised earlier that judgments in constitutional review cases do not have retroactive force (case no 3-4-1-10-00);

5) As § 7(3) of the PORA was not unconstitutional at the time the judgments were rendered, there exists no ground for refusal, established in § 702(2)7) of the CCiP. The Supreme Court declared § 7(3) of the PORA unconstitutional because of the legal uncertainty, which had aggravated during the passing years, because it became evident only later that there was no intention to enter into the agreement referred to in the provision. Earlier, in another review case, the Supreme Court has regarded § 7(3) of the PORA constitutional, and so has the appeals selection committee in its ruling of 4 August 1999 in case no 3-7-2-4-205, on the refusal to accept the appeal in cassation of K. E. A. Edenberg (Trepp) against the Tallinn Circuit Court judgment of 10 May 1999. The satisfaction of the petition for review would add to legal ambiguity, as the residential building in regard to which the ownership reform was completed years ago would again be dragged into the reform;

6) The satisfaction of the petition for review would compromise the legal certainty of the appellants in regard to the lawfulness of the acquisition of their apartments. All appellants, with the exception of O. Ojamaa, entered into the contracts of purchase and sale of their apartments for the privatisation thereof on 16 June 1999. The seven years of ownership of the apartments requires the dismissal of the petition for review

irrespective of other justifications set out in the response to the petition for review. In the situation where legal ambiguity was established a posterior there can be no reproaching that upon privatisation of apartments people trusted the judgments and administrative legislation which had entered into force. Legal certainty was created as a result of the activities of not only the city of Tallinn but also and mainly as a result of the activities of the courts, who repeatedly dismissed the applications and actions of the petitioner for review, filed with the aim of interfering with the privatisation of the apartments. By the Tallinn Administrative Court ruling of 3 February 2002 in administrative case no 3-38-02 the court accepted K. Trepp-Edenberg's discontinuance of action against the Tallinn city CRCUEP, by which her application for the return of the residential building and plot of land under discussion was denied under § 7(3) of the PORA. The Tallinn City Court judgment of 16 January 2001 in civil case no 273/25-996/00 and the Tallinn Circuit Court judgment of 18 April in civil case no II-2/558/01 dismissed the action of K. E. A. Edenberg (Trepp) for the establishment of nullity of the contract of purchase and sale of the apartment of Kaupmehe 10-1 for the privatisation thereof. On 9 May 2001, by its ruling, the appeals selection committee of the Supreme Court refused to accept the appeal in cassation in case no 3-7-2-5-249. The Tallinn Administrative Court judgment of 19 April 2001 in administrative case no 3-752/2001 and the Tallinn Circuit Court judgment of 24 October 2001 in administrative case no II-3/316/2001 dismissed the action of K. E. A. Edenberg (Trepp) against the Tallinn City Government order no 6753-k of 6 October 1999, determining the land necessary for servicing the structure at Kaupmehe 10 for the establishment of apartment ownership on the conditions set forth in the order. By the registration order of 24 April 2000 the assistant judge of the Tallinn City Court dismissed the objection of K. E. A. Edenberg (Trepp) to the joint registration application of the residents of Kaupmehe 10 for the opening of land register part and establishment of apartment ownership;

7) There exist, and may exist additional grounds precluding the return of the property. The residential building at Kaupmehe 10, Tallinn, is in its entirety in the ownership of other persons in good faith (§ 12(3)3) of the PORA), and therefore it is not possible to uphold the Tallinn Administrative Court judgment of 6 August 1998 in administrative case no 3-275/98 and the Tallinn Circuit Court judgment in administrative case no II-3/279/98. It is not excluded that the German state has paid compensation to M. Edenberg as a resettler, and according to § 17(5) of the PORA this deprives her of the possibility to claim the return of or compensation for the property. The valid ownership reform regulation is not meant to be applied in a situation where § 7(3) of the PORA is declared unconstitutional in 2006 (paragraph 30 of the judgment of the general assembly of the Supreme Court of 12 April 2006). It is not possible to start to return the apartments, privatised years ago pursuant to the principles in force since 1991. The changes to the building, including the investments made by the appellants, have to be taken into account;

8) The petition for review exceeds the limits of action and does not conform to § 26(1) of the CACP. The petitioner applies for the reversal of annulled judgments. According to § 19(7) of the CACP a court shall hear a matter to the extent requested in the action. A court can not issue the precept not requested by the appellant. The appellants have not submitted and do not intend to submit an application for the reversal of judgments. According to § 26(1) of the CACP, a precept can be issued to reverse only administrative legislation.

7. T. Eichler requests that the petition for review be not accepted due to the expiry of the term, or, if the petition is accepted, that it be dismissed, because the judgments of the Constitutional Review Chamber have *ex nunc* effect.

T. Eichler argues the following:

1) The term for filing petitions for review had expired by 12 December 2006, because pursuant to § 704(3) of the CCiP a petition for review cannot be filed if five years have passed from the entry into force of the court decision the review of which is requested. § 704(4) of the CCiP does not allow extending or restoring the term for filing of a petition for review;

2) The petitioner can not exercise her rights through a petition for review. The ruling of the Supreme Court and the judgment of the Tallinn Circuit Court the review of which is requested established a legal ground to

the tenants for the privatisation of the dwellings at Kaupmehe 10. Privatisation has been concluded and the apartment ownership of Kaupmehe 10 5 was registered in the name of T. Eichler on 24 April 2004. As T. Eichler's right arose from the law and was verified by a court, there can be no doubt that she acquired the apartment in good faith and that according to § 12(3)3) of the PORA the apartment is not subject to return;

3) The general assembly of the Supreme Court judgment of 6 December 2006, in which the Court held that proceeding from the judgment of 12 April 2006 of general assembly § 7(3) of the PORA was invalid as of 12 October 2006, does not have retroactive force in regard to privatisation of dwellings of the residential building at Kaupmehe 10. The Supreme Court has repeatedly (judgment in case no 3-4-1-5-00, paragraph 37; judgment in case no 3-4-1-10-00, paragraph 37; judgment in case no 3-4-1-8-02, paragraph 15) held that as the judgments of the Constitutional Review Chamber have *ex nunc* effect, the judgments do not give the right to apply for reversal to those persons who had not contested the administrative legislation or in regard to whose actions an administrative court judgment has entered into force.

8. The Tallinn City Government is of the opinion that in this case there are no grounds for review, established by the law, and that the petition for review was filed later than the due date. The City Government argues as follows:

1) According to § 702(2)7) of the CCiP one of the grounds for review is the declaration of unconstitutionality of legislation of general application by way of constitutional review proceedings. The general assembly of the Supreme Court declared § 7(3) of the PORA unconstitutional on 28 October 2002. The declaration of invalidity of § 7(3) of the PORA as of 12 April 2006 by the judgment of the general assembly of 12 April 2006 can not, according to § 702(2)7) of the CCiP, be a ground for review, because review is related to the declaration of unconstitutionality of an act;

2) In 2002 when the Supreme Court established the unconstitutionality of § 7(3) of the PORA, the law did not provide expressis verbis that declaration of unconstitutionality of legislation of general application constituted a ground for review. The appellant is of the opinion that the unconstitutionality of § 7(3) of the PORA was a fact which was not know to the Administrative Law Chamber of the Supreme Court or the circuit court in 1999, but which could have affected the rendering of judgments. § 75(2)1) of the CACP, valid in 2002, was the closest to the referred approach. Pursuant to § 76(3) of the CACP in force at that time, the time limit for filing petitions for review was three months from the date when the petitioner for review became aware or should have become aware of new facts. Thus, the petition for review should have been filed within three months after the communication of the judgment of 28 October 2002 of the general assembly of the Supreme Court, that is not later than on 28 January 2003;

3) The petition for review would not be timely even if § 702(2)7) of the CCiP established a new ground for review. The new wording of the Code of Civil Procedure entered into force on 1 January 2006. By that time § 7(3) of the PORA had been declared unconstitutional. Consequently, the term for filing petitions for review commenced as of the entering into force of the Code and the petition for review should have been filed, according to § 704(1) of the CCiP, not later than within two months after the entry into force of the Code, i.e. by 1 February 2006. According to § 704(3) of the CCiP, a petition for review cannot be filed if five years have passed from the entry into force of the court decision the review of which is requested. Six years have already passed from the rendering of the judgment;

4) According to § 58(2) of the Constitutional Review Court Procedure Act a judgment shall enter into force as of pronouncement thereof. That is why the Supreme Court judgments of 28 October 2002 and of 12 April 2006 have no retroactive force, and at the time of rendering the judgments § 7(3) of the PORA was constitutional. Pursuant to the general assembly judgment of 28 October 2002, § 7(3) of the PORA had not been in conflict with §§ 13 and 14 of the Constitution all the time. The provision became unconstitutional from the moment when the Supreme Court found that reasonable time for enacting appropriate legal regulation had expired. The Supreme Court has not established that § 7(3) of the PORA was unconstitutional in 1999;

5) Whether the petition for review is justified, must be evaluated in the context of lawfulness of the Tallinn city CRCUEP decision no 4032 of 24 October 1994 and the Tallinn City Government order no 244 k of 30 January 1995. Administrative legislation must conform to the law valid at the time of issuing the legislation and correspond to the factual situation. The unlawfulness of these legal acts was based on clause 5 of the resolution of the Supreme Council of 20 June 1991, entitled “On the implementation of the Principles of Ownership Reform Act”, which has never been declared unconstitutional.

9. During the court proceedings, on 10 April 2007, V. Hääl. I. Jurno, O. Ojamaa and R. Polman filed their additional written opinion to the Supreme Court, where they argue the following:

1) It is only the general assembly of the Supreme Court judgment of 28 October 2002 that made it clear that it was not allowed to privatise the property of the resettlers until the amendment of § 7(3) the PORA. When rendering legal opinion on the previous legal situation the general assembly stated clearly in paragraph 34 of the judgment that leaving open, in § 7(3) of the PORA, the possibility to return property on the basis of an international agreement leaves it unclear whether the prohibition to transfer property, established in § 18(1) of the PORA, is extended to the property unlawfully expropriated from persons who resettled and whether it is allowed to privatise the property. In the same paragraph the general assembly even pointed out the following: „If § 18 of the PORA allowed to transfer or encumber with a real right the property of persons who resettled in regard of which the application for return or compensation for has been dismissed, it is totally unclear whether it is possible to transfer or encumber with a real right the property which was unlawfully expropriated from the persons who resettled, but for the return of or compensation for the person has not submitted an application, considering the provisions of § 7(3) of the PORA.” On the basis of this judgment of the general assembly the appellants argue that at the time when privatisation contracts were concluded, no prohibition to privatise dwellings, complying with the principle of legal clarity, was to be deducted from the law;

2) A legally clear prohibition of privatisation could not arise from § 18(1) of the PORA, because the property which had been in the ownership of resettlers was not subject to return at that time under this Act or § 3(5)4) of the Privatisation of Dwellings Act, because the latter provided for a privatisation restriction only if the issue of return was not resolved;

3) There was no clarity whether a denial of application for return resolves the question of return temporarily or finally. In administrative procedure the denial of an application usually means a final decision on the merits, as compared to dismissal of an application or suspension of the hearing of an application;

4) The transaction of privatisation of apartments can not be void due to violation of a norm, if the prohibition to perform a transaction, arising from the norm, is not clear in the legal sense;
5) In its judgment of 28 October 2002 the Supreme Court also admitted that the situation, where it is not clear whether a dwelling is subject to privatisation, was not constitutional, and the Court found that such a situation hinders the creation of a home and organisation of family life. Consequently, the prohibition to privatise, that can be deducted from §§ 7(3) and 18(1) of the PORA and § 3(5)4) of the Privatisation of Dwellings Act retroactively, must have been unconstitutional, too;

6) The CRCUEP decision of 24 May 1999 was lawful at the time it was made and it can be amended only in conformity with the restrictions established in §§ 64 to 70 of the Administrative Procedure Act. The confidence of the appellants was increased by the discontinuance of the action against the committee’s decision, the refusal to satisfy the actions for annulment of privatisation contracts and objections against application for registration, and the non-acceptance of appeal in cassation of a third person. The confidence of the appellants in the remaining in force of the decisions on non-return of property should be regarded as having more weight than the right of a third person to return of property, because the consequences of non-recognition of the right to privatise many years later would be very grave for the appellants. The appellants have given up the possibility to acquire other dwellings at the time when the prices of construction and immovable property were much lower than now;

7) Even if the privatisation contracts were invalid and the appellants had not been conferred the right of ownership of the apartments, they would still have legitimate expectation that applications for privatisation are adjudicated on the basis of the law valid at the time of filing of these applications. There is no ground to think that § 7(3) of the PORA, in force at the time of filing of privatisation applications, would have resulted in the return of Kaupmehe 10, taking into account, inter alia, that compensation might have been paid to M. Edenberg when she resettled, and that the residential building was encumbered by a loan. The new legal situation, created after the declaration of invalidity of § 7(3) of the PORA, enabling to return property without an international agreement, is significantly more disadvantageous for the appellants, and it can not be applied without concrete implementation regulation established by law. At the same time, the implementation regulation would be in conflict with the principle of legal certainty, as the law had given the appellants the expectation that the apartments would be privatised if no international agreement concerning the property of resettles is concluded;

8) The continuance of the judicial dispute which started in 1995, then died down and was again re-opened, is not a judicial proceeding conforming to Article 6(1) of the European Human Rights Convention;

9) If a third person has suffered damage because of the lack of legal clarity, the public authority must find another possibility to remedy the damage, and must not deprive the appellants of the apartments privatised in the conditions of legal ambiguity. The recovery of apartments would constitute for the appellants damage much bigger than that caused to the third person by refusal to return the apartments. The return of Kaupmehe 10 would be in conflict with § 2(2) of the PORA.

10. V. Hääl, I. Jurno, O. Ojamaa and R. Polman filed an application that the Court order, under §§ 92 and 95 of the CACP, that K. E. A. Edenberg pay the legal costs they have incurred. According to the invoices submitted to the Supreme Court the legal costs incurred by V. Hääl are 2832 kroons, those of I. Jurno are 5664 kroons, legal costs of O. Ojamaa are 2832 kroons and those of R. Polman are 2832 kroons.

OPINION OF THE GENERAL ASSEMBLY

11. The petitioner applies for the review of the Administrative Law Chamber of the Supreme Court ruling of 22 March 1999 in administrative case no 3-3-1-6-99 and of the Tallinn Circuit Court judgment of 10 May 1999 in administrative case no II-3/148/99. The petition for review was filed with the Supreme Court on 12 December 2006.

The petitioner is of the opinion that what constitutes the ground for review is the general assembly of the Supreme Court judgment of 12 April 2006, declaring § 7(3) of the PORA invalid as of 12 October 2006 on the condition that by that time no Act amending or repealing § 7(3) of the PORA has entered into force. According to the petition the fact serving as a ground for review became evident on 12 October 2006 when, proceeding from the general assembly of the Supreme Court judgment of 12 April 2006, § 7(3) of the PORA was declared invalid. The general assembly of the Supreme Court, too, held in its judgment of 6 December 2006, that § 7(3) of the PORA was invalid as of 12 October 2006. The judgments to be revised were mainly based on § 7(3) of the PORA and they created a legal situation which excludes K. E. A. Edenberg's possibility to be an entitled subject on the basis of the Principles of Ownership Reform Act and for the purposes of return of property to entitled persons.

12. The owners of the apartments at Kaupmehe 10, Tallinn, as well as the Tallinn City Government have called into question both the permissibility of the petition for review and whether the general assembly of the Supreme Court judgment of 12 April 2006, regarding its content, could serve as basis for review.

13. Next, the general assembly of the Supreme Court shall express its opinion on whether the ground for review, established in § 702(2)7) of the CCiP, is applicable in administrative court proceedings (I), whether this ground for review is applicable to the judgments rendered before the enactment of the referred ground for review (II), what could be the *ratione tempore* effect of a judgment rendered in a constitutional review

proceeding (III), whether the petition for review was filed during the term (IV), whether the hearing of the petition for review is prevented due to the fact that the administrative legislation declared invalid by the circuit court judgment had been issued not on the basis of § 7(3) of the PORA, but on the basis of clause 5 of the resolution of the Supreme Council of 20 June 1991, entitled “On the implementation of the Principles of Ownership Reform Act” (V), whether the judgment of 12 April 2006 constitutes a ground for review by its nature, that is proceeding from its essence (VI). In Part VII of the judgment the general assembly shall form an opinion on the request expressed in the petition for review and shall resolve the issue of procedure expenses. In Part VIII of the judgment the general assembly shall address the issue of how to proceed in a situation where § 7(3) of the PORA has lost its validity, yet the Riigikogu has failed to establish legal regulation for the emerged situation.

I.

14. The participants in the proceeding have called into question the possibility of application of the ground for review, established § 702(2)7) of the CCiP, in administrative court proceedings, and they argue that this is not in conformity with the specifications for administrative court procedure provided in § 5 of the CACP, and that an administrative court judgment must serve as a guarantee that the law applied is constitutional (see paragraph 6 3) above).

15. § 75(2) of the CACP establishes that the grounds for review established in civil procedure shall be the grounds for review of judgments rendered in administrative court procedure. Pursuant to § 702(2)7) of the CCiP, one of the grounds for review is the declaration by the Supreme Court, by way of constitutional review proceedings, of unconstitutionality of the legislation of general application or a provision thereof on which the court decision in the civil matter subject to review was based.

Thus, the legislator has clearly indicated that the ground for review established in § 702(2)7) of the CCiP is applicable in administrative court procedure. The specifications for the administrative court procedure, referred to in § 5 of the CACP, do not give rise to non-application of § 702(2)7) of the CCiP in administrative court procedure. There is nothing to justify that in private law relationships the judgments based on a provision which has been declared unconstitutional can be reviewed, yet it would not be possible in public law relationships. The general assembly points out that a judgment of the Supreme Court, rendered in general court proceedings, including administrative court proceedings, can not serve as a guarantee that the law applied will be considered constitutional also in the constitutional review court procedure. The ruling of the Administrative Law Chamber of the Supreme Court of 11 March 1999 in administrative case o 3-3-1-6-99 can not be such a guarantee, either.

II.

16. It needs to be analysed whether the ground for review, established in § 702(2)7) of the CCiP, is applicable to the judgments rendered before the entry into force of this Code, that is before 1 January 2006. Namely, the previous Code of Civil Procedure did not provide for the ground for review analogous to that established in § 702(2)7) of the new CCiP. In the response to the petition of review the constitutionality of application of § 702(2)7) of the CCiP to judgments rendered before 1 January 2006, i.e. before entry into force of the valid CCiP, has been called into question. This doubt is connected to the principles of legal certainty and proportionality (see paragraph 6 4) above).

17. The general assembly is of the opinion that in its judgment of 27 March 2007, in case no 3-2-2-1-07, the Civil Chamber of the Supreme Court has tacitly admitted the possibility of review of judgments rendered before 1 January 2006 on the ground established in § 702(2)7) of the CCiP. In the adjudication of the present case the Court can not confine itself to the statement of this fact, because the participants in the proceeding have submitted an argument to the contrary.

When reviewing the constitutionality of § 702(297) of the CCiP the general assembly weighs, on the one hand, the interest of the person who has lost a legal right through a judgment based on an unconstitutional

law, and on the other hand the interest of the person who acquired a legal right on the basis of the same judgment, and the general assembly argues that the interest of the persons who have unconstitutionally suffered overweigh the confidence of other persons in the remaining in force of the judgment. The terms for filing petitions for review, established in § 76(2) of the CACP and § 704 of the CCiP, are meant to protect legal certainty. The participants in the proceeding have submitted no arguments showing that the length of the terms is not constitutional. Neither does the general assembly consider it necessary to call the constitutionality of these terms into question in the present case. Legal certainty, protection of confidence and proportionality can be weighed in an administrative case, upon hearing a petition for review on its merits, and also upon the issue of new administrative legislation, but not in the course of deciding whether the filing of a petition for review is permissible prom the procedural point of view.

III.

18. In the response to the petition for review (see paragraphs 6 4) and 7 3) above) it is argued that in its earlier judgments the Supreme Court has emphasised that the judgments rendered in constitutional review cases have no retroactive force (judgments in cases no 3-4-1-5-00 (paragraph 37), 3-4-1-10-00 (paragraph 37), no 3-4-1-8-02 (paragraph 15)).

19. The general assembly of the Supreme Court is of the opinion that the impermissibility of filing of a petition for review can not be justified by the judgments of the general assembly and the Constitutional Review Chamber of the Supreme Court, in which it was found that the judgments rendered in constitutional review proceedings have no retroactive force. At the time when the general assembly and the Constitutional Review Chamber rendered the referred judgments it was not provided by law that a judgment rendered in constitutional review proceedings constituted a ground for review of judgments rendered in administrative court proceedings. By establishing the possibility for review of judgments in administrative court proceedings the legislator has clearly underlined that a judgment rendered in a constitutional review proceeding may have retroactive force. The review of a judgment would not be possible if the judgments in constitutional review proceedings had only *ex nunc* effect.

20. The general assembly of the Supreme Court is of the opinion that the enactment of the ground for review referred to in § 702(2)7) of the CCiP does not mean that all judgments rendered in constitutional review proceedings automatically have retroactive force. § 58(3) of the Constitutional Review Court Procedure Act allows rendering of such judgments in constitutional review proceedings that do not have *erga omnes* retroactive force. Neither does the establishment of the ground for review referred to in § 702(2)7) of the CCiP mean that if a petition for review is satisfied, total restitution of legal relationships in the case under review would always be necessary. If the administrative authority issues new administrative legislation after a petition for review is satisfied, taking into account the protection of confidence and other circumstances, the conclusion of the new administrative act may, but need not always differ from the conclusion of the contested administrative legislation. The elimination of the consequences of an unlawful administrative act need not necessarily consist in the reversal of the act. Compensation for damage is also a possibility.

IV.

21. In response to the petition for review it is argued that the time-limit for filing the petition had expired (see paragraphs 6 2), 7 1), and 8 2) and 3) above).

22. § 704(3) of the CCiP provides as follows: “A petition for review cannot be filed if five years have passed from the entry into force of the court decision the review of which is requested. A petition for review on the grounds that a party did not participate or was not represented in the proceeding or in the case referred to in § 702(2)8) of this Code cannot be filed if ten years have passed from the entry into force of the court decision.” The regulation in the CACP is different, § 67(2) of the Code providing the following: “The provision of § 704(3) of the Code of Civil Procedure are not applied to submission of petitions for review. A petition for review may be returned without a hearing if more than ten years have passed from the making of the decision the review of which is requested.”

Thus, the CACP establishes a longer term for submission of petitions for review on the grounds provided in § 702(2)7) of the CCiP than the latter Code. The judgments the review of which is requested were rendered in 1999. Consequently, in this case the petition for review has been submitted within the ten years' term provided in § 76(2) of the CACP.

23. There is a dispute over whether the petition for review was submitted within the two months' term established by the first sentence of § 704(1) of the CCiP. The first sentence of § 704(1) of the CCiP provides as follows: „A petition for review may be filed within two months after becoming aware of the grounds for review but not before the decision enters into force."

24. In relation to the case the review of which was requested the general assembly of the Supreme Court has rendered three judgments. By its judgment of 28 October 2002 in case no 3-4-1-5-02 the general assembly declared § 7(3) of the PORA unconstitutional, but did not declare it invalid. On 12 April 2006, in case no 3-3-1-63-05, the general assembly rendered the judgment declaring § 7(3) of the PORA invalid. The general assembly made provision for entry into force of this part of the judgment on 12 October 2006, on the condition that an Act amending or repealing § 7(3) of the Republic of Estonia Principles of Ownership Reform Act has not entered into force by that date. On 6 December 2006 the general assembly rendered the second judgment in case no 3-3-1-63-05, and stated in paragraph 4 of the statement of reasons that as no Act amending or repealing § 7(3) of the PORA had entered into force, the provision is invalid as of 12 October 2006, proceeding from the general assembly of the Supreme Court judgment of 12 April 2006.

25. The petitioner considers the general assembly of the Supreme Court judgment of 12 April 2006, by which § 7(3) of the PORA was declared invalid as of 12 October 2006, to be the ground for review. The petition for review was submitted on 12 December 2006. Thus, the petition for review was submitted within the two months' term provided in § 704(1) of the CCiP.

As the petition for review was submitted within the two months' term provided in § 704(1) of the CCiP, there is no need for the general assembly to analyse all the arguments to the effect that the referred term was exceeded. The general assembly only points out that the two months' term for submission of petitions for review, provided in the first sentence of § 702(1) of the CCiP, can not be calculated as of 12 April 2006 or as of the publication of the general assembly judgment of 12 April 2006 in the Riigi Teataja, because by the referred judgment the general assembly of the Supreme Court gave the legislator time until 12 October 2006 for enacting appropriate regulation. In paragraph 37 of the judgment of 28 October 2002 the general assembly admitted the possibility open to the legislator not to return the property which had been in the ownership of the resettlers. The general assembly holds that it would have been pointless to submit the petition for review and bear related costs in the ambiguous situation which lasted from 12 April until 12 October 2006, i.e. in the situation where it was not known what the legal situation might be subsequent to the activities of the legislator presumed in the general assembly judgment of 12 April 2006. It was possible to file the petition for review from the date when the consequences pointed out in the judgment of 12 April 2006 became evident, i.e. on 12 October 2006, when it became clear that § 7(3) of the PORA had become invalid.

V.

26. In the response to the petition for review (see paragraph 8 5) above) it is argued that the contested administrative acts were not issued on the basis of § 7(3) of the PORA, but on the basis of clause 5 of the resolution of the Supreme Council of 20 June 1991, entitled "On the implementation of the Principles of Ownership Reform Act".

27. The administrative acts, which were declared illegal by the circuit court judgment the review of which is requested, were, indeed, issued at the time when § 7(3) of the PORA was not yet in force, and instead clause 5 of the resolution of the Supreme Council of 20 June 1991, entitled "On the implementation of the Principles of Ownership Reform Act" was valid. The Administrative Law Chamber of the Supreme Court

has found that there is no substantial difference between § 7(3) of the PORA and clause 5 of the resolution of the Supreme Council of 20 June 1991, entitled “On the implementation of the Principles of Ownership Reform Act” (see judgment of 22 March 1999 in administrative case 3-3-1-6-99). In its judgments of 28 October 2002 and 12 April 2006, the general assembly of the Supreme Court, too, proceeded from the opinion that the substantive contents of § 7(3) of the PORA and clause 5 of the resolution of the Supreme Council of 20 June 1991, entitled “On the implementation of the Principles of Ownership Reform Act” are the same and there are only differences in the wording.

28. In the judgments referred to in the petition for review the Administrative Law Chamber of the Supreme Court and the circuit court have proceeded from both, § 7(3) of the PORA and clause 5 of the resolution of the Supreme Council of 20 June 1991, entitled “On the implementation of the Principles of Ownership Reform Act”. Consequently, the fact that the administrative acts, which were declared illegal by the circuit court judgment the review of which is requested, had been issued at the time when clause 5 of the resolution of the Supreme Council of 20 June 1991, entitled “On the implementation of the Principles of Ownership Reform Act”, and not § 7(3) of the PORA was in force, can not prevent the hearing of the petition for review.

VI.

29. It is necessary to answer the question whether the general assembly judgment of 12 April 2006, by its content, serves as a ground for review. In order to adjudicate this issue it should be recalled what § 7(3) of the PORA meant and which opinions in regard to § 7(3) of the PORA the general assembly of the Supreme Court has expressed in its earlier judgments.

30. § 7(3) of the PORA provided as follows: “Applications for return of or compensation for unlawfully expropriated property which was in the ownership of persons who left Estonia on the basis of agreements entered into with the German state and which was located in the Republic of Estonia are resolved by an international agreement.”

§ 7(3) of the PORA functioned in conjunction with § 18(1) of the PORA, which establishes the following: “Until a decision is made on return of unlawfully expropriated property which is an object of ownership reform (including resolution of an extra-judicial dispute or dispute in court), state agencies, local government agencies, other legal persons and natural persons who own or possess the property are prohibited from transferring such property or encumbering it with a real right unless otherwise provided by this Act. Transactions in violation of this prohibition are void. Such property may be transferred to the state or local governments, or to other persons with the notarised consent of the entitled subjects. Until a decision on return of unlawfully expropriated property is made, the current possessors of the property have the right to subject it to a commercial lease or grant possession of the property by any other method only without specifying the term, except if the entitled subject agrees to a relationship with a specified term. The provisions of § 12^1 of this Act do not apply to residential lease contracts without a term. Termination of contracts without a term is subject to three months’ advance notice.”

Thus, § 7(3) in conjunction with the first sentence of § 18(1) of the PORA established the prohibition to return, compensate for or transfer the property which was in the ownership of resettlers, including to privatise it to tenants. The referred prohibition can be described as a moratorium which, on the basis of § 7(3) of the PORA, was to remain in force until the entry into force of the agreement referred to in the provision or, proceeding from the general logic of law, until § 7(3) or the first sentence of § 18(1) of the PORA became invalid.

31. In relation to § 7(3) of the PORA the Supreme Court has rendered three judgments.

32. By the conclusion of the judgment of 28 October 2002 the general assembly declared § 7(3) of the PORA to be in conflict with §§ 13(2) and 14 of the Constitution in their conjunction. The provision referred to in the conclusion of the judgment was not declared invalid; the general assembly confined itself to declaration of unconstitutionality of the provision (see also paragraph 24 of the general assembly judgment

of 12 April 2006). In the last section of paragraph 37 of the statement of reasons of the judgment of 28 October 2002 the general assembly argued as follows: “The Supreme Court *en banc* admits that the declaration of unconstitutionality of § 7(3) of the PORA means the continuation of uncertain situation. To overcome this, the legislator must adopt appropriate legal regulation. Until the law is brought into conformity with the principle of legal clarity, the return of or compensation for the property which had belonged to persons who resettled can not be decided and the property can not be privatised.”

Thus, the general assembly left § 7(3) of the PORA as well as the moratorium arising from the referred provision and from § 18(1)1) of the PORA in force, as a result of which it was still not possible to return, compensate for or privatise the property which had been in the ownership of the resettlers.

33. Paragraph 2 of the conclusion of the general assembly judgment of 12 April 2006 reads as follows: “To declare § 7(3) of the Republic of Estonia Principles of Ownership Reform Act invalid. This part of the resolution shall enter in force on 12 October 2006 on the condition that an Act amending or invalidating § 7(3) of Republic of Estonia Principles of Ownership Reform Act has not entered into force.” In paragraph 27 of the statement of reasons of the judgment the general assembly underlined that the declaration of unconstitutionality of § 7(3) of the PORA for the second time, without the declaration of invalidity of the provision, would not contribute to the solution of the situation. In order to put an end to the unconstitutional situation which has lasted for years § 7(3) of PORA shall have to be declared invalid. The declaration of invalidity of the provision would terminate the legal ambiguity for the resettlers as well as the lessees of the unlawfully expropriated residential buildings that had belonged to the former. The consequence of the declaration of invalidity of § 7(3) of PORA would be that the applications for the return of or compensation for the unlawfully expropriated property which was in the ownership of persons who resettled to Germany on the basis of an agreement entered into with the German state in 1941, as well as the applications of the lessees of the unlawfully expropriated buildings, which had been in the ownership of the resettlers, shall have to be processed.

Thus, by this judgment, too, the general assembly left § 7(3) of the PORA in force.

34. In paragraph 4 of the statement of reasons of the judgment of 6 December 2006 the general assembly argued as follows: “Pursuant to the judgment of the general assembly of the Supreme Court of 12 April 2006, § 7(3) of PORA is to be considered invalid as of 12 October 2006, because an Act amending or annulling § 7(3) of PORA has not entered into force.” In paragraph 5 of the same judgment the general assembly concluded the following: „The general assembly is of the opinion that the consequence of the invalidity of § 7(3) of PORA is that the unlawfully expropriated property which was in the ownership of persons who resettled to Germany on the basis of an agreement entered into with the German state is to be returned, compensation for or privatised to the lessees pursuant to the general principles and the general procedure established by the Republic of Estonia Principles of Ownership Reform Act.”

35. The general assembly is of the opinion that it proceeds from the referred three judgments of the general assembly of the Supreme Court in their conjunction that the prohibition to return, compensate for or privatise the property which was in the possession of those who resettled to Germany, was in force until 12 October 2006, when paragraph 2 of the conclusions of the general assembly of the Supreme Court judgment of 12 April 2006 entered into force. Thus, in this case there is no ground for review.

VII.

36. Consequently, the petition for review shall be dismissed.

37. V. Hääl, I. Jurno, O. Ojamaa and R. Polman have filed an application that the court order, under §§ 92 and 95 of the CACP, that K. E. A. Edenberg pay the legal costs they have incurred. According to the invoices submitted to the Supreme Court the legal costs incurred by V. Hääl are 2832 kroons, those of I. Jurno are 5664 kroons, legal costs of O. Ojamaa are 2832 kroons and those of R. Polman are 2832 kroons.

38. The general assembly is of the opinion that review takes place after the end of ordinary court proceedings and is not a part of ordinary judicial proceedings. As the ordinary court proceedings have finished and the CACP does not establish a special regulation for the division of procedure costs of review procedure, what has been provided in regard to parties must be applied to the petitioner for review. Pursuant to § 92(1) of the CACP, legal costs shall be borne by the party against whom the judgment is made.

39. On the basis of the aforesaid the court orders that K. E. A. Edenberg pay the legal costs of V Hääl in the amount of 2832 kroons, of I. Jurno in the amount of 5664 kroons, of O. Ojamaa in the amount of 2832 kroons and of R. Polman in the amount of 2832 kroons.

VIII.

40. By now a situation has evolved where § 7(3) of the PORA has become invalid, yet the legislator has failed to enact legal regulation on how to proceed with the applications submitted in regard to property which was in the possession of persons who resettled to Germany, or the regulation that would enable or preclude the submission of new applications.

41. The general assembly is of the opinion that the right of persons to organisation and procedure, arising from §§ 13 and 14 of the Constitution, has to be guaranteed and the uncertainty of persons who have submitted applications in regard to what will happen to the applications submitted in regard to property which was in the possession of persons who resettled to Germany, has to be terminated. These applications will have to be heard. The applications submitted in regard to the referred property will have to be heard by the committees for return of and compensation for unlawfully expropriated property and by rural municipality or city governments irrespective of whether these applications have earlier been dismissed or denied on the basis of § 7(3) of the PORA. The general assembly points out that in its judgment of 31 January 2007, in case no 3-4-1-14-06, the Constitutional Review Chamber of the Supreme Court found that there was no reasonable justification to why the Act on the repeal of § 7(3) of the Republic of Estonia Principles of Ownership Act, which the President of the Republic refused to proclaim, treats differently the persons whose applications were denied, in comparison to persons whose applications were dismissed (paragraphs 29 and 30). In this judgment the Chamber established unequal treatment by the regulation of the Act, which was not proclaimed, to the extent that the regulation provided for the hearing of the dismissed applications, but did not require that administrative authorities also hear the applications that had been denied on the basis of § 7(3) of the PORA.

42. The general assembly is of the opinion that the applications in regard to which administrative decisions were made, which were declared illegal or annulled by administrative court judgments on the basis of § 7(3) of the PORA, must be heard, too. The referred judgments, although formally still valid, can not preclude the hearing of the applications, because the judgments had been rendered in regard to administrative acts violating the prohibition established in § 7(3) of the PORA, with the aim of guaranteeing the preservation of the situation which would enable to make administrative decisions on the basis of the international agreement referred to in § 7(3) of the PORA, or, if the agreement is not concluded, administrative decisions on the basis of the law.

43. As § 7(3) of the PORA, enacted as a prohibiting norm, has become invalid, the hearing of the applications filed on the basis of this provision must not be regarded as renewal of administrative proceedings, but as the initiation of administrative proceedings required by law.

44. The general assembly can not exclude that some persons have been expecting the conclusion of the international agreement referred to in § 7(3) of the PORA, and have not submitted applications in regard to the property which was in the ownership of persons who resettled to Germany. If such an application is submitted, it has to be weighed in each case whether the application was submitted within reasonable term, i.e. it has to be found out why during more than one year as of 12 October 2006 the application was not submitted. The same has to be done when an application, which was returned without hearing on the basis of

§ 7(3) of the PORA, is re-submitted.
