Constitutional judgment 3-4-1-2-05

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

No. of the case	3-4-1-2-05
Date of judgment	27 June 2005
Composition of court	Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Julia, Jaak Luik, Jüri Põld, Harri Salmann, Tambet Tampuu and Peeter Vaher
Court Case	Review of constitutionality of subsections § 41^3(1), (4) and (8) of Traffic Act
Basis of proceeding	The Tallinn Circuit Court judgment of 11 April 2008 in administrative case no 3-06-2026
Hearing	Written proceeding
DECISION	**Not to declare subsections of § 41^3(1), (4) and (8) of Traffic Act unconstitutional and to dismiss the petitions of Tartu Administrative Court, Jõhvi Administrative Court and Tallinn Administrative Court**

FACTS AND COURSE OF PROCEEDING

1. Veiko Koobakene was punished under § 74^{22}(2) of Traffic Act (hereinafter “TA”) for the exceeding of a speed limit by 21 to 40 kilometres per hour by a fine on four occasions. After the decision made concerning the fourth misdemeanour had entered into force, the head of Võru office of the Estonian Motor Vehicle Registration Centre (hereinafter “MVRC”) suspended V. Koobakene’s right to drive for six month under § 41^3(4) of TA, by decision No 8430 of 3 September 2004. V. Koobakene filed an action against the decision of Võru office of MVRC with Tartu Administrative Court. The administrative court satisfied the action by its judgment of 22 December 2004, invalidated the decision of MVRC, and did not apply and declared

unconstitutional § 41^3(4) of TA.

2. Kaarel Toom was punished on 31 August 2004 under § 74^{19} of TA for driving a power-driven vehicle in a state of intoxication by a fine. After the decision made in the misdemeanour matter had entered into force, the leading specialist of Võru office of MVRC suspended K. Toom's right to drive for three months under § 41^3(1) of TA, by decision No 9116 of 18 September 2004. K. Toom filed an action against the decision with Tartu Administrative Court. The administrative court satisfied the action on 22 December 2004 by its judgment, invalidated the decision of MVRC, and did not apply and declared unconstitutional § 41^3(1) of TA.

3. Kalju Märtin was punished under § 74^{22}(2) of TA for the exceeding of a speed limit by 21 to 40 kilometres per hour by a fine on three occasions. After the decision made in the third misdemeanour matter entered into force, the head of Tartu Office of MVRC suspended K. Märtin's right to drive for six months under § 41^3(4) of TA, by decision No 7358 of 10 August 2004. K. Märtin filed an action against the decision with Tartu Administrative Court. The administrative court satisfied the action by its judgment of 28 December 2004, invalidated the decision of MVRC, and did not apply and declared unconstitutional § 41^3 (4) of TA.

4. Willem Niinelaid was punished under § 74^{19} of TA for driving a power-driven vehicle in a state of intoxication by a fine on 16 September 2004. After the decision made in the misdemeanour matter had entered into force, the head of Rakvere office of MVRC suspended W. Niinelaid's right to drive for three months under § 41^3(1) of TA, by decision No 10248 of 15 October 2004. W. Niinelaid filed an action against the decision with Jõhvi Administrative Court. The administrative court satisfied the action by its judgment of 28 December 2004, invalidated the decision of MVRC, and did not apply and declared unconstitutional § 41^3(3) of TA.

5. Ralf Burk was punished on 15 December 2004 by two separate decisions under § 74^{19} of TA by a fine for driving a power-driven vehicle in a state of intoxication. After the decision made in the misdemeanour matter had entered into force, the head of Jõhvi office of MVRC suspended R. Burk's right to drive for three months under § 41^3(1) of TA, by decisions No 10219 and No 10220 of 15 October 2004. R. Burk filed an action against the decision with Jõhvi Administrative Court. The administrative court satisfied the action by two different judgments of 30 December 2004, invalidated the decision of MVRC, and did not apply and declared unconstitutional § 41^3(1) of TA.

6. Toivo Aguraiuja was punished on 9 March 2004 under § 74^{31} of TA by a fine for failure to notify the police of a traffic accident. After the decision made in misdemeanour matter had entered into force, the head of Harju office of MVRC suspended T. Aguraiuja's right to drive for three months under § 41^3(1) of TA, by decision No 2746 of 1 April 2004. T. Aguraiuja filed an action against the decision with Tallinn Administrative court. The administrative court satisfied the action by its judgment of 8 February 2005, invalidated the decision of MVRC, and did not apply and declared unconstitutional § 41^3(1) of TA.

7. According to the punishment register data, Aimar Välba was punished under § 74^{22}(2) of TA for the exceeding of a speed limit by 21 to 40 kilometres per hour by a fine on four occasions. After the decision made in the fourth misdemeanour matter had entered into force, the head of Jõhvi office of MVRC suspended A. Välba's right to drive for twenty four months under § 41^3(8) of TA, by decision No 12671 of 14 December 2004. A. Välba filed an action against the decision with Jõhvi Administrative Court. The administrative court satisfied the action by its judgment of 10 February 2005, invalidated the decision of MVRC, and did not apply and declared unconstitutional § 41^3(8) of TA.

8. Tartu, Jõhvi and Tallinn Administrative Courts transferred their judgments to the Supreme Court. By its ruling of 8 March 2005 the Constitutional Review Chamber of the Supreme Court joined the petitions of the administrative courts concerning subsections § 41^3(1), (4) and (8) into one proceeding and by its ruling of 5 April 2005 transferred the matter to general assembly of the Supreme Court for hearing.

OPINIONS OF THE ADMINISTRATIVE COURTS AND PARTICIPANTS IN THE PROCEEDING

9. In its judgment of 22 December 2004, in administrative matter No 3-480/04, Tartu Administrative Court argued that the suspension of the right to drive, provided for in § 41^3(4) of TA, did not meet the requirement of equal treatment, because the regulation of the right to drive in § 41^3 of TA unjustifiably puts the citizens of foreign states into more favourable situation than Estonian citizens, as the right to drive of the former is not suspended by MVRC in the case of repeated violations. The court was of the opinion that unequal treatment consisted also in the fact that differently from the courts MVRC did not have the right of discretion, and that is why the commission of a misdemeanour results in a more severe consequence than the commission of a criminal offence.

The administrative court further argued that the suspension of the right to drive under § 41^3(1) of TA constituted a disproportionate restriction of V. Koobakene's freedom of enterprise, because the suspension of the right to drive as a punishment in the substantive sense was not in conformity with the aim of the restriction to remove a person who has repeatedly exceeded the speed limit from the traffic for some time. In addition, the suspension of the right to drive prevented V. Koobakene from fulfilling the duty to care for his family, arising from § 27 of the Constitution.

It appears from the judgment of the administrative court that V. Koobakene was the only shareholder and a member of the board of OÜ [private limited company] Northfors. The court is of the opinion that without the right to drive he will be unable to keep his company going. The income from the company is the main source of income for his family. Deprivation of work and income will result in grave economic consequences for his family. Besides, he needs the vehicle daily to take his children to the nursery-school situated 7 kilometres away. One of the children has a severe disability.

10. In its judgment of 22 December 2004, in administrative matter No 3-509/04, Tartu Administrative Court argued that § 41^3(1) of TA was not in conformity with the principle of equal treatment because the commission of a misdemeanour results in a more severe consequence than the commission of a criminal offence. Namely, MVRC, differently from the courts, has no right of discretion upon suspending the right to drive. Furthermore, the regulation of the right to drive in § 41^3 of TA unjustifiably puts the citizens of foreign states into more favourable situation than Estonian citizens, as the right to drive of the former is not suspended by MVRC in the case of repeated violations.

The court is of the opinion that the suspension of the right to drive disproportionately restricts K. Toom's freedom of movement and does not allow him to fulfil the obligation, arising from § 27 of the Constitution, to care for his needy family members. The applicant lives in the country near Võru city and he needs the vehicle once a week in order to be able to care for his mother, advanced in years, and his brother who has a physical disability.

11. In its judgment of 28 December 2004, in administrative matter No 3-461/04, Tartu Administrative Court pointed out that the suspension of the right to drive, provided for in § 41^3(4) of TA, did not meet the requirement of equal treatment, because MVRC, differently from the courts, has no right of discretion upon suspending the right to drive. Thus, the commission of a misdemeanour results in a more severe consequence than the commission of a criminal offence. The regulation of the suspension of the right to drive in § 41^3 of TA unjustifiably puts the citizens of foreign states into more favourable situation that Estonian citizens, as the right to drive of the former is not suspended by MVRC in the case of repeated violations. Furthermore, disproportionately with the offence committed by K. Märtin, § 41^3 of TA prejudices his rights and interest, because it does not allow for the right of discretion.

12. In its judgments of 28 and 30 December of 2004, in administrative matters No 3-249/2004, No 3-254/2004 and 3-255/2004, Jõhvi Administrative Court came to the conclusion that § 413 of TA violated the prohibition of double punishment and the right to organisation of procedure, and was in conflict with the principle of legal clarity. In addition, the provision was disproportionate due to the lack of the right of

discretion.

The violation of the principle of legal clarity consists in the fact that the regulation of Traffic Act is ambiguous as to the consequences accompanied by a punishment. Persons who have committed a traffic misdemeanour and persons who have committed a criminal offence are treated unequally, because upon suspending the right to drive in a misdemeanour matter MVRC has no right of discretion. This results in a fact that the commission of a misdemeanour will bring about a more severe consequence (each time the suspension of the right to drive) than the commission of a criminal offence.

13. In its judgment of 8 February 2005, in administrative matter No 3-1368/2004, Tallinn Administrative Court argued that § 41^3(1) of TA disproportionately restricted the T. Aguraiuja's – the applicant's – freedom of self-realisation and freedom to choose one's place of work, because by the suspension of the right to drive the desired aim – prevention of further violations, guarantee of road safety and security and the protection of life, health and property of others – is not achieved. The lack of the right of discretion does not enable to person conducting proceedings to prevent disproportionate restriction of persons' rights.

It appears from the judgment of Tallinn Administrative Court that T. Aguraiuja lives in Harju county, in a place 17 kilometres from Tallinn with insufficient public transport connection. At the material time of suspension of the right to drive and the submission of action against it T. Aguraiuja was employed as a fire and rescue worker of Harju county Rescue Service and his duty of employment was to drive an emergency vehicle. In the course of reorganisation of the work of the service T. Aguraiuja was offered a possibility to continue working as a driver of an emergency vehicle. Because of the suspension of the right to drive the applicant will lose his job, as his duties of employment are related to the right to drive, and thus he will not be able to guarantee an income for his family.

14. In its judgment of 10 February 2005, in administrative matter No 3-309/2004, Jõhvi Administrative Court was of the opinion that § 41^3(8) of TA violated the prohibition of double punishment as well as the right to organisation and procedure. Also, due to the lack of the right of discretion the provision is disproportionate.

15. Kalju Märtin is of the opinion that suspension of the right to drive, provided for in § 41^3(4) of TA, is a disproportionate measure, which violates the principle of equal treatment and prohibition of double punishment. The disproportionality of the measure lies in the fact that the authority issuing driving licences can not use discretion upon suspending the right to drive. It is also disproportionate that the right to drive of a person who has committed a misdemeanour is suspended each time, whereas – on the basis of the right of discretion – the right to drive of a person who has committed a criminal offence may not be suspended at all. It is also to be considered unequal treatment that the provision of the Traffic Act under discussion unjustifiably puts the citizens of foreign states in more favourable situation because the right to drive of these persons is not suspended in the case of repeated violations. *Ne bis in idem* rule is not applicable only to such cases where the law explicitly provides for a possibility to impose a principal punishment and a supplementary punishment on a person who has committed an offence. In regard to misdemeanours the Penal Code does not provide for such a possibility. Thus, this amounts to a violation of § 23(3) of Penal Code.

16. In his opinion submitted to the Supreme Court Kaarel Toom concurs with the opinion of Tartu Administrative Court that suspension of the right to drive under § 41^3(1) of TA prejudices the rights and interests of a person more than is justifiable by the aim of the applicable norm. K. Toom is also of the opinion that § 41^3(1) of TA is a provision violating the principle of equal treatment, because it unjustifiably puts the citizens of foreign states in more favourable situation as compared to Estonian citizens.

17. Aimar Välba is of the opinion that § 41^3(8) of TA is in conflict with §§ 11, 13(2), 14, 15(1) and 23(3) of the Constitution. Due to the lack of the right of discretion the provision is a disproportionate one. In the present form the Traffic Act does not allow to take into account the circumstances of a violation and treat equal persons equally in equal circumstances, furthermore, it does not guarantee a proper procedure.

18. Veiko Koobakene, Willem Niinelaid, Ralf Burk and Toivo Aguraiuja have not submitted their opinions to the Supreme Court.

19. The Legal Affairs Committee of the Riigikogu is of the opinion that the regulation of the suspension of the right to drive, established in the Traffic Act, is not unconstitutional. The Legal Affairs Committee points out that because of serious disputes concerning the legal content of the suspension of the right to drive and due to the big number of pertinent actions filed with the courts the Riigikogu intends to amend the regulation concerning the suspension of the right to drive. The draft initiated by the Legal Affairs Committee of the Riigikogu intends to transform the suspension of the right to drive, imposable for the commission of misdemeanours, into a supplementary punishment, whereas the imposition of this supplementary punishment will be within the competence of the courts.

20. Estonian Motor Vehicle Registration Centre is of the opinion that the lack of discretion when deciding on suspension of the right to drive a power-driven vehicle is justified in every way. The conferment of the right of discretion would mean unnecessary increase of the power of officials and the persons who have committed misdemeanours would be treated unequally. § 41^3 of TA protects the right to life, established in § 16 of the Constitution. Upon fulfilling the duty to protect, arising from the latter provision, the state has a wide margin of appreciation and the legislator may use measures of public law and administrative preventive measures to fulfil the duty.

The suspension of the right to drive does not prevent a person from engaging in enterprise. Both, the freedom of enterprise and the right to self-realisation can be exercised without the right to drive. Suspension of the right to drive constitutes a proportional restriction of rights, because is goes no further than is necessary for the achievement of the legitimate aim of the norm. § 41^3 of TA does not discriminate persons on grounds of nationality. Differentiation is based on in what country a document certifying the right to drive has been issued. Suspension of the right to drive does not amount to arbitrary exercise of state authority. On the basis of § 19(2) of the Constitution the state protects the rights and freedoms of others.

Neither have the principles of good administration been violated. The text of a decision made in a misdemeanour matter contains a reference explaining that upon entering into force of the decision the documents shall be forwarded to MVRC so that the latter could formalise the suspension of the right to drive. Thus, a person has been informed of the proceeding conducted concerning him or her. Pursuant to the judgment of the general assembly of the Supreme Court of 25 October 2004, in matter No 3-4-1-10-04, subsections (1), (4) and (8) of § 41^3 of TA are not in conflict with the prohibition of double punishment, arising from § 23(3) of the Constitution. The infringement of the freedom of movement, established by § 34 of the Constitution, is both proportional and necessary for the protection of the life, health and property of others.

21. The Chancellor of Justice is of the opinion that subsections (1), (4) and (8) of § 41^3 of TA disproportionately infringe upon the prohibition of double punishment, established in § 23(3) of the Constitution; the guarantee of the right of recourse to the courts, established in the first sentence of § 15(1) of the Constitution; the general right to organisation and procedure, established in § 14 of the Constitution, and the general right to equality, established in the first sentence of § 12(1) of the Constitution, and is thus in conflict with the Constitution.

The Chancellor of Justice is of the opinion that although, formally, the suspension of the right to drive is a non-punitive coercive measure, the suspension of the right to drive has substantially the characteristics of a punishment: penal substance, idea of retribution and repression. On the basis of the regulation in the Traffic Act one and the same misdemeanour shall result in the imposition of two sanctions. Thus, the suspension of the right to drive has the character of a supplementary punishment. As the suspension of the right to drive can be regarded as a punishment in the substantive sense, it violates the principle of *ne bis in idem* as well as the constitutional right of persons not to be punished twice for the same act. It does not appear from the necessary elements of a misdemeanour, included in §§ 74^5 and 74^{22} of TA, that in addition to a punishment

some supplementary sanctions shall be imposed on an offender. Thus, as regards the consequences of offences, the regulation of the Traffic Act is ambiguous and in conflict with the principle of legal clarity included in § 13(2) of the Constitution. § 41^3 of TA infringes upon § 23(3) of the Constitution disproportionately, because the provision for the suspension of the right to drive outside the norm defining necessary elements of a misdemeanour intensively infringes upon persons' procedural rights. Neither is the measure chosen by the legislator – providing separately for a punishment and for the suspension of the right to drive, which is a punishment in the substantive sense – proportional in the narrow sense for achieving the efficiency of the courts. The separation of the necessary elements of and punishment for a misdemeanour from the substantive punishment does not guarantee the general fundamental right to organisation and procedure, nor does it guarantee the right to a fair trial, because it essentially precludes the possibility of contesting the decisions on punishment. The fact that its is not possible, under subsections (1), (4) and (8) of § 41^3 of TA, to suspend the right to drive of those persons who have committed traffic misdemeanours in Estonia but to whom the diving licence has not been issued by MVRC, can not be reasonably justified. Thus, this amounts to a violation of the principle of equal treatment.

22. The Minister of Justice is of the opinion that subsections (1), (4) and (8) of § 41^3 of TA are not in conflict with the Constitution. The Minister of Justice agrees with the opinion expressed in the judgment of the general assembly of the Supreme Court of 25 October 2004, in matter No 3-4-1-10-04, that subsections (1), (4) and (8) of § 41^3 of TA do not amount to a violation of the prohibition of double punishment, established in § 23(3) of the Constitution, and that the suspension of the right to drive forms an integral part of a misdemeanour procedure. Thus, the general principles of administrative procedure are not violated in regard to persons, because they are heard essentially in the same procedure.

The lack of the right of discretion can not serve as a ground for declaration of unconstitutionality of the regulation concerning the suspension of the right to drive. The Administrative Law Chamber of the Supreme Court has pointed out in its judgment of 17 March 2003, in matter No 3-3-1-11-03, that even a regulation not providing for the right of discretion can yield a proportional result upon application – that is if the legislator itself has considered proportionality upon establishing pertinent exceptions. In the present case the legislator has thoroughly weighed the relationship between and act and the consequences thereof.

The allegations of the persons that the suspension of the right to drive excessively restricts their possibilities to exercise their fundamental rights, are inappropriate. It is the road safety and the life, health and property of others, that deserve primary protection.

The suspension of the right to drive does not constitute a restriction on the freedom of movement, established in § 34 of the Constitution. The restriction on the manner of movement does not prevent a person from arriving to his or her destination. Proceeding from the regulation of the suspension of the right to drive, the holders of driving licences issued in a foreign country and the holders of driving licences issued by MVRC are not equal for the purposes of § 12 of the Constitution, because the misdemeanours committed in Estonia may refer to certain differences in the requirements serving as the basis for issuing driving licences. Unequal groups of persons do not have to be treated equally. Also, on the basis of § 41(2) of TA it is a police officer who is also entitled to suspend the right to drive. This ensures equal treatment of Estonian citizens and citizens of foreign states.

The infringement of the right of ownership with the aim of guaranteeing road safety is a proportional measure, because road safety is a legal right more strongly protected than the freedom to use one's property.

The suspension of the right to drive does not violate the freedom of a person to choose his or her place of employment if the possession of a driving licence is a necessary requirement for employment. The restriction has been imposed in a public interest, with the aim of preventing causing damage by poor-quality work. Proceeding from the judgment of the Constitutional Review Chamber of the Supreme Court of 11 June 1997, in matter No 3-4-1-1-97, the requirement to preserve existing place of employment is not protected under § 29 of the Constitution, if the person no longer meets the requirements serving as the basis for running as a candidate for the job.

Suspension of the right to drive is in conformity with the principle of free self-realisation, arising from § 19 of the Constitution, because subsection (2) of the same section establishes that everyone shall honour and consider the rights and freedoms of others, and shall observe the law, in exercising his or her rights and freedoms and in fulfilling his or her duties.

PERTINENT PROVISIONS

23. In the present matter Tartu, Jõhvi and Tallinn Administrative Courts have declared unconstitutional and have not applied subsections (1), (4) and (8) of § 41^3 of Traffic Act.

Subsections (1), (4) and (8) of § 41^3 of Traffic Act (RT I 2001, 3, 6 … 2003, 78, 522) establish the following:

"§ 41^3. Suspension of right to drive by agency which issued driving licence

(1) An agency which has issued a driving licence shall suspend the right to drive for three months if a decision on punishment has entered into force in respect of the person in a matter of a misdemeanour for violation of § 74^{19}, 74^{20}, 74^{21}, 74^{30} or 74^{31} of this Act.

[…]

(4) An agency which has issued a driving licence shall suspend the right to drive for six months if the person is punished for a third time for violation of § 74^5 or subsection 74^{22} (2) or (3) of this Act and a decision has entered into force concerning the matter and if information concerning the previous punishment for violation of sections specified in this subsection has not been expunged from the punishment register in accordance with the Punishment Register Act.

[…]

(8) In the event of violation of the requirements of the Traffic Act or legislation issued on the basis thereof for a fourth time or more, if suspension of the right to drive is prescribed for the violation and a decision has entered into force concerning the matter and if information concerning the previous punishments has not been expunged from the punishment register in accordance with the Punishment Register Act, the agency which issued the driving licence shall suspend the right to drive for twenty-four months.

[…]"

OPINION OF THE GENERAL ASSEMBLY OF THE SUPREME COURT

24. In order to adjudicate the present matter the general assembly shall first of all check whether the norms of the Traffic Act, declared to be unconstitutional by the administrative courts, are relevant (I). Secondly, the general assembly shall examine the allegations of Jõhvi Administrative Court and K. Märtin concerning the conflict of subsections (1), (4) and (8) of § 41^3 of Traffic Act with the prohibition of double punishment, arising from § 23(3) of the Constitution (II). Thirdly, the general assembly shall form an opinion concerning the compatibility of § 41^3 of TA with the principle of legal clarity (III). Thereafter the general assembly shall analyse whether the contested subsections of § 41^3 of TA guarantee the right to be heard to required extent (IV). Fifthly, the general assembly shall assess the conformity of subsections (1) and (4) of § 41^3 of TA to the principle of equal treatment (V). Thereafter, the general assembly shall analyse the proportionality of restrictions, established in subsections (1) and (4) of § 41^3 of TA, on freedom of movement, freedom to choose one's sphere of activity, profession and place of work, freedom of enterprise and freedom of self-realisation, and justifiability of restrictions on the exercise of the duty to care for one's family (VI). And finally, the general assembly shall form an opinion concerning the petitions of the administrative courts requesting that subsections (1), (4) and (8) of § 41^3 of TA be declared unconstitutional (VII).

I.

25. Tartu, Jõhvi and Tallinn Administrative Courts have initiated constitutional review proceedings to check whether subsections (1), (4) and (8) of § 41^3 of TA are in conformity with the Constitution.

Pursuant to § 14(2) of Constitutional Review Court Procedure Act, the provision the constitutionality of whish is to be assessed by the Supreme Court must be relevant. According to the established practice of the Supreme Court a norm is relevant if it is decisive for the outcome of the case (see judgment of the general assembly of the Supreme Court of 22 December 2000, in matter No 3-4-1-10-00 – RT III 2001, 1, 1, § 10). A provision is of a decisive importance when in the case of unconstitutionality of the provision a court should render a judgment different from that in the case of constitutionality of the provision (see judgment of the general assembly of the Supreme Court of 28 October 2002, in matter No 3-4-1-5-02 – RT III 2002, 28, 308, § 15).

26. The general assembly is convinced that the provisions of the Traffic Act at issue were of decisive importance for Tartu, Jõhvi and Tallinn Administrative Courts for the adjudication of the cases, because it was precisely on the basis of these provisions that the appellant's right to drive had been suspended. Thus, the norms are pertinent.

II.

27. Despite the fact that in its judgment of 25 October 2004, in matter No 3-4-1-10-04 (RT III 2004, 28, 297) the general assembly of the Supreme Court held that suspension of the right to drive under subsections (1), (4) and (8) of § 413 of TA was not in conflict with § 23(3) of the Constitution, Jõhvi Administrative Court found in its judgments of 28 December 2004 (matter No 3-249/2004), 30 December 2004 (matters 3-254/2004 and 3-255/2004) and 10 February 2005 (matter No 3-309/2004) that subsections (1) and (8) of § 41^3 of TA were in conflict with § 23(3) of the Constitution, and that W. Niinelaid, R. Burk and A. Välba have been punished twice, in different proceedings, for one and the same act. The administrative court was of the opinion that a misdemeanour proceeding and the proceeding for suspending the right to drive in MVRC constitute independent proceedings and these can not be regarded as one and the same proceeding. K. Märtin requested in his action filed with Tartu Administrative Court as well as in the opinion submitted that to the Supreme Court that § 41^3(4) of TA be declared to be in conflict with § 23(3) of the Constitution.

28. In its judgment of 25 October 2004 the general assembly recognised that in essence the suspension of the right to drive under subsections (1) – (8) of § 41^3 of TA constituted a punishment, nevertheless the general assembly explained in the same judgment as well as in another judgment rendered on the same date in matter No 3-3-1-29-04 (RT III 2004, 28, 298), that although in the formal sense a misdemeanour proceeding and the proceeding for suspension of the right to drive conducted by MVRC as an administrative procedure constitute independent proceedings, they can nevertheless be regarded as an integrated whole.

Namely, a big number of procedural acts relevant for the suspension of the right to drive (ascertaining of facts, hearing of persons) are performed within a misdemeanour proceeding. The authority which has issued the driver's licence does not check the facts of the traffic violation when suspending the right to drive, instead it proceeds from the decision made in a misdemeanour proceeding. Neither does the person suspending the right to drive have the right of discretion as to the duration of the suspension of the right to drive. That is why the formalisation of the suspension of the right to drive under subsections (1) – (8) of § 41^3 of TA by MVRC can be regarded as an inevitable consequence of the decision on punishment, made in a misdemeanour proceeding.

29. The treatment of a misdemeanour proceeding and the suspension of the right to drive as an integrated whole is also supported by the fact that the suspension of the right to drive can be considered as a punishment in the substantive sense precisely due to the fact that the administrative body, when suspending the right to drive, does not once again assess the danger that a person constitutes to road safety and that the

suspension of the right to drive depends on the violation and guilt ascertained in misdemeanour proceedings (see judgment of the general assembly of the Supreme Court in matter No 3-4-1-10-04 – RT 2004, 28, 297, § 19). The general assembly is of the opinion that there is no ground to change the above described opinion and that subsections (1), (4) and (8) of § 41^3 of TA are not in conflict with § 23(3) of the Constitution.

III.

30. Jõhvi Administrative Court argued that also the requirement of legal clarity, arising from § 13(2) of the Constitution, has been violated. Namely, it does not appear from § 74^{19} and § 74^{22}(2) of TA, establishing the acts deemed to be misdemeanours and sanctions for the acts, that there is a possibility of suspension of the right to drive. That is why the person who has committed a referred violation can not foresee the suspension of the right to drive and the person can not defend himself or herself.

31. The Supreme Court disagrees with this opinion. The principle of legal clarity arises from the requirement that a person must have a reasonable possibility to foresee the legal consequences in which his or her activity may result – a person must be able, on the basis of legal norms, to foresee the behaviour of public authority. The principle at issue means that legal norms must be sufficiently clear and understandable, but it does not necessarily require that all legal consequences of an act be assembled into one and the same norm.

The general assembly reiterates the opinion expressed in § 24 of its judgment in matter No 3-4-1-10-04, that a driver of a power-driven vehicle could very well foresee the consequences of his or her unlawful activities and defend himself or herself within a misdemeanour proceeding against these. According to § 28(3) of TA a prerequisite of obtaining the right to drive is that a driver must be familiar with the requirements of legislation concerning traffic, and the suspension of the right to drive is unambiguously and bindingly provided for in subsections (1) – (8) of § 41^3 of TA.

32. The general assembly adds that the regulation of a misdemeanour proceeding also guarantees that a person is informed of the fact that the decision on punishment made in a misdemeanour proceeding will result in the suspension of the right to drive. Namely, § 58(3) of Code of Misdemeanour Procedure (hereinafter “CMP”) establishes that in the case of violation of the requirements of law for which suspension of a special right is prescribed, the document certifying the special right shall be immediately taken away from the person subject to proceedings upon commencement of the misdemeanour proceedings and added to the materials concerning the misdemeanour matter. Pursuant to § 19(1)5) of CMP a person subject to proceedings has the right to know the purpose of the procedural acts. Taking away of the driving licence is provided for by the Code of Misdemeanour Procedure and thus constitutes a procedural act of misdemeanour procedure, which means that the person conducting extra-judicial proceedings must explain to a person the reasons of taking away the driving licence. Pursuant to § 108(7) of the Code of Misdemeanour Procedure a decision made in misdemeanour proceedings shall point out how to proceed with regard to seized objects. This requirement is applicable also in regard to driver’s licences taken away under § 58(3) of CMP.

IV.

33. On the basis of the petition of Jõhvi Administrative Court the general assembly shall examine also whether the constitutional right to fair and effective procedure of W. Niinelaid, R. Burk and A. Välba, which contains – among other things – the right to be heard before a judgment is rendered (see judgment of the Constitutional Review Chamber of the Supreme Court of 22 February 2001, in matter No 3-4-1-4-01 – RT III 2001, 6, 63), has been violated.

34. The general assembly points out that in this context, too, it is necessary to bear in mind when ascertaining the infringement of fundamental rights that MVRC bases its decision on suspension of the right to drive on the fact of violation and the guilt of the person. In the misdemeanour proceedings a person has the possibility to give testimony, submit evidence and requests (§ 5(2) and § 19(1)4) of CMP). Pursuant to §

69(6) of CMP a person has the right to file objections concerning the misdemeanour report. Thus, a person is heard in misdemeanour proceedings concerning the central issue from the point of view of suspension of the right to drive – whether a violation took place and whether the person is guilty of the violation. As MVRC does not ascertain the facts again there is no need for hearing the person again in MVRC.

35. In regard to the facts ascertainable in MVRC the general assembly considers it necessary to pint out the following. Those persons whose right to drive is suspended would no doubt wish to express their opinion first and foremost concerning the necessity and duration of the right to drive. Proceeding from the fact that in the cases prescribed by law the suspension of the right to drive is mandatory, i.e. MVRC has no right not to suspend the right to drive, and from the fact that the law unambiguously prescribes also for the term of the suspension, the opinion of a person can not affect the decision to be made and therefore hearing of a person concerning these issues is not justified. What has to be checked is whether the right of a person to be heard is guaranteed in relation to those issues in regard to which MVRC has to form an opinion when making a decision. Such issues are primarily the following facts: whether a person has a valid driving licence; whether a decision on punishment, made in misdemeanour proceedings concerning the person, serving as a ground for suspending the person's right to drive under § 41^3 of TA, has entered into force; whether there is a legal ground for suspending the right to drive; whether the earlier decisions on punishment concerning the person are still in force pursuant to punishment register; whether the person uses a vehicle due to disability; whether an earlier decision on suspending the person's right to drive has been enforced.

From among the referred facts it is the number of punishments in force that has to be checked within misdemeanour proceedings, because under § 56(1) of Penal Code this information characterising the person has to be taken into account upon imposing a punishment so as to evaluate the possibility to influence the offender not to commit offences in the future. Thus, during a misdemeanour proceeding, a person has a possibility to respond. Nevertheless, it has to be admitted that during the period between making a decision in a misdemeanour matter and suspending the right to drive relevant data may change. No other facts are ascertained in a misdemeanour proceeding, neither is a person guaranteed the possibility to express opinions concerning these.

36. Traffic Act, regulating the suspension of the right to drive, does not prevent MVRC to hear a person. Thus, after the decision on punishment, made in a misdemeanour proceeding, has entered into force, a person has the right to address MVRC with his or her opinions concerning the circumstances which, pursuant to law, exclude the suspension of the right to drive. Despite of this the right of a person to be heard is being infringed upon, because a person is not informed of whom and within which term he has to address. Furthermore, pursuant to § 41^3 (10) of TA the time-limit of conducting the proceeding of suspending the right to drive is extremely short, as the decision is to be formalised within three days as of the date when MVRC receives the decision on punishment, which has entered into force. Thus, the timely submission of requests and explanations concerning the facts excluding the suspension of the right to drive may be impeded, restricting the right to fair and effective procedure, arising from § 14 of the Constitution, and there is an infringement of § 14 of the Constitution.

37. Pursuant to § 11 of the Constitution rights and freedoms may be restricted only in accordance with the Constitution, and the restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted, that is – an infringement must be proportional.

The general assembly is of the opinion that the restriction is prompted by the legitimate aim to economise the resources spent on proceedings and to guarantee efficient proceeding of large number of similar matters (see *mutatis mutandis* the judgment of the Constitutional Review Chamber of the Supreme Court of 22 February 2001, in matter No 3-4-1-4-01 – RT III 2001, 6, 63). Statistics reveal that the number of serious traffic violations for which the suspension of the right to drive is prescribed is great. According to the MVRC data the right to drive was suspended on 13 295 occasions in 2004. It is obvious that hearing a person on all these occasions would be very resource-intensive. At the same time the facts necessary for formalising the suspension of the right to drive are, as a rule, correctly ascertainable without hearing a person (e.g. when ascertaining the existence of punishments in force it is the data of punishment register that

has to be taken as a basis), and it is in very rare instances that the non-hearing of a person results in a wrong decision. There is no other measure, less intensively infringing upon persons' rights, to achieve this aim. The infringement is proportional because, as a rule, the non-hearing of a person does not result in an incorrect decision. Besides, pursuant to § 41(10) of TA a person has a possibility to file a complaint against decision to suspend a person's right to drive with an official who is superior to the official who made the decision, or the decision may be contested in court, which also guarantees his or her right to be heard and gives a chance to express one's opinions, submit requests and defences. On the basis of the aforesaid the infringement of § 14 of the Constitution is not intensive and is outweighed by the public interest in effective proceeding of the matters of suspension of the right to drive.

V.

38. Next, the general assembly shall examine the arguments expressed in the judgments, which serve as the basis for this constitutional review case, concerning the possible conflict of the contested provisions of the Traffic Act with the principle of equality before the law, arising from the first sentence of § 12(1) of the Constitution.

39. So far the Supreme Court has held that the principle of equality before the law, arising from the first sentence of § 12(1) of the Constitution, generally requires that the laws treat equally all persons who are in a similar situation. This principle manifests the idea of material equality: those who are equal must be treated equally and those who are unequal must be treated unequally. Nevertheless, not every unequal treatment of those who are equal amounts to a violation of the right to equality. The prohibition to treat unequally those who are equal is violated if the unequal treatment of two persons, groups of persons or situations is arbitrary. Unequal treatment can be regarded to be arbitrary if there is no reasonable justification for that. Although the test of arbitrariness applies to the activities of the legislator, too, the latter has to be awarded a large margin of appreciation. If there is a reasonable and pertinent justification, the unequal treatment before the law is justified (see judgment of the Constitutional review Chamber of the Supreme Court of 3 April 2002, in matter No 3-4-1-2-02 – RT III 2002, 11, 108, § 17; judgment of the general assembly of the Supreme Court of 14 November 2002, in matter No 3-1-1-77-02 – RT III 2002, 32, 345, § 22, and of 17 March 2003, in matter No 3-1-3-10-02 – RT III 2003, 10, 95, § 36).

40. The general assembly points out that the issue of whether unequal treatment of two persons, two groups of persons or situations is justified or unjustified (i.e. arbitrary) can only arise if the groups who are treated differently are comparable, i.e. they are in an analogous situation from the aspect of concrete differentiation.

41. Tartu Administrative Court argues that subsections (1) and (4) of § 41^3 of TA are in conflict with the principle of equal treatment, because the provisions do not allow to suspend the right to drive of the citizens of foreign states – to whom the driving licences have been issued by competent authorities of respective states – who have committed traffic violations similar to those committed by Estonian citizens. The administrative court is of the opinion that the law does not guarantee equal treatment of all traffic offenders, by putting the citizens of foreign states in more favourable situation than Estonian citizens.

42. First of all the general assembly wants to specify that pursuant to subsections (1) and (4) of § 41^3 of TA the competence of MVRC to suspend a person's right to drive does not depend on the nationality of a person but on the state where driving licence was issued. At the same time it is true that the persons who have committed a traffic violation or the aggregate of violations referred to in subsections (1) and (4) of § 41^3 of TA, are treated differently on the ground of whether the driving licence was issued to the person by MVRC or by a competent authority of a foreign country. It is possible to suspend the right to drive of only the former. The general assembly is of the opinion that the persons, who have committed the misdemeanours referred to in subsections (1) and (4) of § 41^3 of TA, are in a comparable situation irrespective of the place of issue of their driving licences. Thus, it will be necessary to analyse whether there is a reasonable and pertinent justification for the different treatment of these persons upon the suspension of the right to drive.

43. The general assembly points out that on the basis of international law the possibility of suspending also the right to drive of a person to whom a driver's licence has been issued by a competent authority of a foreign country is not excluded. With the resolution of the Supreme Council of the Republic of Estonia of 23 March 1992 (RT 1992, 12, 194) the Republic of Estonia acceded to the Convention on Road Traffic (hereinafter "Convention"), adopted by the UN conference on road traffic in Vienna in 1968. Article 42(1) of the Convention confers upon Contracting Parties the competence to withdraw from a driver the right to use his domestic or international driver's document in their territories if he commits in their territories a breach of their regulations rendering him liable under their legislation's to the forfeiture of his license. At the same time the Convention provided for concrete conditions under which the right to use a driver's licence issued in a foreign country may be suspended. It proceeds from Article 42(1)(a) of the Convention, among other things, that the withdrawn driver's licence must be returned to the person upon his leaving the territory of the country the latest, even if the period of withdrawal has not expired by the date of his leaving the country.

44. § 58(3) of the Code of Misdemeanour Procedure establishes that in the case of violation of the requirements of law for which suspension of a special right is prescribed, the document certifying the special right shall be immediately taken away from the person subject to proceedings upon commencement of the misdemeanour proceedings and added to the materials concerning the misdemeanour matter. In addition, § 41^1(1) of Traffic Act establishes that upon the commission of a misdemeanour for which suspension of the right to drive is prescribed pursuant to § 41^3 of the same Act, the driving licence of the person shall be immediately withdrawn and a temporary driving licence shall be issued in place of the confiscated driving licence. This procedure is necessary for guaranteeing the suspension of the right to drive under subsections (1) – (8) of § 41^3 of TA (see judgment of the general assembly of the Supreme Court of 25 October 2004, in matter No 3-3-1-29-04 – RT III 2004, 28, 298, § 17).

45. If the Traffic Act provided for a possibility to suspend the right to drive of those persons whose driving licence has been issued in some foreign country the licences of those persons, too, would have to be taken away under § 58(3) of CMP and § 41^1(1) of TA. On the basis of Article 42(1)(a) of the Convention the Republic of Estonia would be obliged to return the withdrawn driving licence, irrespective of whether the term of withdrawal has expired, when the person who has obtained driving licence abroad leaves Estonian territory, the latest. The general assembly admits that for the performance of this duty the state should establish a system of returning the driving licences issued abroad. The system should guarantee, on the one hand, that the driving licences issued abroad are returned to their owners before they leave Estonia, but on the other hand, the system should exclude the possibility that the driving licence returned to a person who claims to be leaving Estonia or who leaves Estonia but for a short while would not be used in Estonia until the end of the expiry of the term of withdrawal of the licence.

On the basis of the aforesaid the general assembly argues that the aim of avoiding the costs of establishing and maintaining the system of returning foreign driving licences necessary for the observance of the Convention may well justify the different treatment of persons, who have committed the misdemeanours referred to in subsections (1) and (4) of § 41^3 of TA, upon the suspension of the right to drive, on the basis of issue of their driving licences.

46. In addition to the aforesaid the general assembly is of the opinion that the preferential treatment upon the suspension of the right to drive of persons holding driving licences issued abroad in comparison to persons who have obtained driving licences from MVRC is also justified by the fact that traffic norms of a country that has issued a driving licence may differ from pertinent norms valid in Estonia. In this context it has to be taken into account that the commission of a traffic violation does affect the right to drive of the person, holding a foreign driving licence, in Estonia. Namely, if a citizen of Estonia or a person who holds a residence permit in Estonia settles in Estonia, his or her driving licence issued in a foreign state shall be valid during twelve months as of the date on which the person settled in Estonia or on which the residence permit was issued to the person (the first sentence of § 27(4) of TA). If the holder of the driving licence has been punished in Estonia during the preceding year for repeated violation of the requirements of the Traffic

Act or a legal act issued on the basis thereof, or for a violation for which the prescribed punishment is suspension of the right to drive, a driving licence issued in a foreign state shall be replaced with an Estonian driving licence after the person has passed the theory test and driving test (§ 27(4) 1) – 2) of TA).

47. For the above reasons the general assembly is of the opinion that upon the suspension of the right to drive the unequal treatment of persons who have committed a traffic misdemeanour referred to in subsections (1) or (4) of § 41^3 of TA on the ground of the fact whether a driving licence has been issued by MVRC or a competent authority of a foreign state, does not violate the principle of equality before the law, established in the first sentence of § 12(1) of the Constitution.

48. Tartu Administrative court also argued that subsections (1) and (4) of § 41^3 of TA were disproportionate in comparison to § 50(1) of Penal Code. That is due to the fact that under § 41^3 of TA, upon suspension of the right to drive of persons who have committed traffic misdemeanours, the person conducting proceedings has no right of discretion, which it has under § 50(1) of Penal Code upon withdrawal of right to drive of persons who have committed traffic offences. The administrative court is of the opinion that there is no reasonable justification to "why a restriction applicable for a misdemeanour should be, in principle, more inevitable than a restriction applicable for a criminal offence".

49. The general assembly points out that without a direct reference to the first sentence of § 12(1) of the Constitution the administrative court has essentially argued that the valid law puts persons who have committed traffic misdemeanours in a less favourable situation in comparison to persons who have been found guilty of traffic criminal offences (§§ 422-424 of Penal Code).

50. The general assembly disagrees with this view of Tartu Administrative Court and is of the opinion that persons who have committed traffic misdemeanours and persons who have committed traffic crimes are not groups comparable upon the suspension or the withdrawal of the right to drive (see § 40 of the judgment). The conviction of a person of a crime embodies a significant social condemnation, which is not comparable to the reproach upon applying a punishment for a misdemeanour. It is the stigmatisation arising from a conviction pursuant to criminal procedure, as well as extensive legal restrictions incidental to a punishment for a criminal offence (e.g. in relation to the freedom of choosing one's profession and place of work) that preclude the claim that upon suspending a person's right to drive for the commission of a misdemeanour the person's situation should in no respect be less favourable than that of a person who has committed a traffic criminal offence and whose driving licence is being withdraws as a supplementary punishment.

The general assembly further points out that the burdensomeness of the suspension of the right to drive as a punishment in the substantive sense should be assessed in conjunction with the gravity of sanction prescribed for a concrete traffic misdemeanour. The punishments prescribed for traffic misdemeanours are much more lenient than the sanctions provided for in §§ 422-424 of Penal Code. Also, the term of suspension of the right to drive provided for in subsections (1) and (4) of § 41^3 of TA is shorter than the term of withdrawal of the right to drive prescribed in § 50(1) of Penal Code. Taking into account the referred facts it can not be claimed that the lack of the right of discretion upon the suspension of the right to drive puts persons who have committed traffic misdemeanours in a situation less favourable than that of those persons who have committed traffic crimes. At the same time the general assembly shares the opinion that it is only in very exceptional circumstances that a court is entitled not to withdraw the right to drive of a person who has been convicted of a traffic criminal offence (see also judgment of Criminal Chamber of the Supreme Court of 12 February 2003, in matter No 3-3-3-10-03 – RT III 2003, 5, 53, § 7; and the ruling of 20 May 2003, in matter No 3-1-1-69-03 – RT III 2003, 20, 190, § 7).

51. For the above reasons the fact that differently from the deprivation of right to drive under § 50(1) of Penal Code, the person conducting proceedings has no right of discretion upon suspending the right to drive under subsections (1) and (4) of § 41^3 of TA, does not bring about the conflict of the latter provisions with the first sentence of § 12(1) of the Constitution.

52. In addition, Tartu Administrative Court has referred to the fact that under subsection (4) of § 41^3 of TA a

person's right to drive is suspended for six months if he is punished for the third time under subsection 74^{22} (2) or (3) of the same Act for exceeding of a speed limit. The right to drive shall not be suspended if by the third exceeding of a speed limit – in the row of violations still in force – the person causes a traffic accident. In the latter case the person is punished for the violation established in § 74^{17} of TA, which does not result in the suspension of the right to drive, if committed for the first time. The administrative court concluded from the above that § 41^{3}(4) of TA is not suitable for the achievement of the aim set, as those who exceed a speed limit are treated differently.

53. The general assembly points out that in the present case the administrative court has, in essence, raised the issue of conformity of § 41^{3}(4) of TA to the principle of equality before the law. The question is whether upon suspension of the right to drive § 41^{3}(4) of TA treats arbitrarily unequally persons, who earlier have twice committed a misdemeanour established in § 74^{22} (2) or (3) of TA, depending on whether the third traffic violation of the person consists in exceeding the speed limit by at least 21 kilometres per hour (§ 74^{22} (2) or (3) of TA) or in exceeding the speed limit by at least 21 kilometres per hour thereby causing proprietary damage or damage to the health of a person through negligence (§ 74^{17} of TA).

54. Admitting the general internal deficiency of § 41^{3} of TA, arising from the structure of the provision, the general assembly is still of the opinion that the groups of persons referred to in the above paragraph are not comparable. Upon assessing the burdensomeness of the suspension of the right to drive as a punishment in the substantive sense in conjunction with the gravity of sanction prescribed for a concrete traffic misdemeanour it is necessary to take into account that the sanction established by § 74^{17} of TA (a fine of up to 300 fine units or detention) is bigger than the sanctions prescribed in § 74^{22}(2) (a fine of up to 50 fine units) and in § 74^{22}(3) of TA (a fine of up to 200 fine units or detention). Consequently, it can not be claimed unambiguously that in conclusion the legislator has put a person, who has committed a misdemeanour established in § 74^{22}(2) or (3) of TA and whose right to drive is suspended for six months under § 41^{3}(4) of TA, in a situation worse than that of a person who causes proprietary damage or damage to the health of a person through negligence when exceeding the speed limit for the third time. Thus, the argument of Tartu Administrative court under discussion does not constitute a ground for declaring § 41^{3}(4) of TA to be in conflict with the first sentence of § 12(1) of the Constitution.

VI.

55. Tartu Administrative Court has formed an opinion that due to the fact that the person conducting proceedings lacks the right of discretion, the suspension of Kaarel Toom's right to drive under § 41^{3}(1) of TA for driving while intoxicated disproportionately infringes upon the person's freedom of movement and does not allow him to fulfil the duty to care for needy family members, arising from § 27(5) of the Constitution, and is therefore unconstitutional.

56. According to § 34 of the Constitution everyone who is legally in Estonia has the right to freedom of movement. The general assembly is of the opinion that the suspension of a person's right to drive restricts the person's possibilities of freedom of movement. Thus, there is an infringement of K. Toom's freedom of movement. As it has been pointed out above, the infringements into rights and freedoms must be in conformity with the requirement of proportionality, arising from § 11 of the Constitution. It has also to be born in mind that the freedom of movement established in § 34 of the Constitution is a fundamental right subject to qualified reservations by law. Thus, the freedom of movement may be restricted only in the cases enumerated in the second sentence of § 34 of the Constitution.

57. It proceeds from the earlier judgments of the general assembly that the suspension of the right to drive under § 41^{3} of TA is a punishment in the substantive sense (see judgment of the general assembly of the Supreme Court of 25 October 2004, in mater No 3-4-1-10-04 – RT III 2004, 28, 297, § 20; judgment of the general assembly of the Supreme Court of 25 October 2004, in matter No 3-3-1-29-04 – RT III 2004, 28, 298, § 17). A punishment constitutes a state-level condemnation of an offence and of the person who has committed the offence, and is manifested in the restriction of the rights and freedoms of the person. The

gravity of punishment is determined by the extent of guilt, and by the special and general needs of prevention. In other words, a punishment must be in correlation with the injustice of the act committed, it must affect the person to avoid further violations, and it has to protect the legal order. In this context the general assembly considers it necessary to underline that the legislator has a wide margin of appreciation upon determining punishments matching offences. Categories of punishment are based of the value judgments shared by the public, which the legislative power is competent to express. Also, this is how the legislator can develop national penal policy and affect illegal behaviour (see judgment of the Constitutional Review Chamber of the Supreme Court of 25 November 2003, in matter No 3-4-1-9-03 – RT III 2003, 35, 368). It proceeds from the above that the punishments established by Acts meet the requirement of proportionality, arising from § 11 of the Constitution, if a punishment is not manifestly excessive for the achievement of the aims referred to above.

58. The general assembly is of the opinion that in the present case the aim of the suspension of the right to drive, whish is a punishment in the substantive sense, is a legitimate one, as one of the aims of suspending the right to drive of a person who has been driving while intoxicated is to protect the life, health and property of others. Thus, the referred restriction on the freedom of movement has been imposed for the protection of the rights and freedoms of others.

59. Nowadays, prohibition to drive is a common type of punishment, and the general assembly is of the opinion that this is an effective punishment for traffic violations. At the same time, bearing in mind the nature of the offences, the punishment is not manifestly excessive.

The results of a survey conducted by the Commission in 1998 – 2002 (that is at the time when the changes to Traffic Act under discussion were prepared in Estonia) in the Member States of EU and associated countries, including Estonia, reveals that driving while intoxicated is, on estimate, the cause of a quarter of fatal traffic accidents (see the results of surveys conducted in the framework of SARTRE3 (Social Attitudes to Road Traffic Risk in Europe) – http://www.mnt.ee/atp/failid/SARTRE3.pdf [1]). The monitoring of traffic behaviour conducted in Estonia in 2003 shows that the inhabitants of Estonia consider drunken driving to be the biggest problem and they are of the opinion that the situation has deteriorated (in 2001 – 2003) (Monitoring of traffic behaviour 2003, IB Stratum, 2003 – http:// www.mnt.ee/atp/failid/seletuskiri%20LiMo%202003.pdf [2]).

60. In this respect the general assembly considers it necessary to point out that a measure can not be deemed disproportionate solely because of the lack of the right of discretion of the person conducting proceedings. In certain cases, after consideration, the legislator may come to a justified conclusion that the fundamental rights and freedoms of persons are guaranteed even when the person conducting proceedings has no right of discretion (judgment of the Administrative Law Chamber of the Supreme Court of 17 March 2003, in matter No 3-3-1-11-03 – RT III 2003, 8, 84, § 43; judgment of the general assembly of the Supreme Court of 11 October 2001, in matter No 3-4-1-7-01 – RT III 2001, 26, 280, § 24).

61. For the above reasons the general assembly of the Supreme Court is of the opinion that the suspension of Kaarel Toom's right to drive under § 41^3(1) of TA without the right of discretion does not amount to a disproportionate infringement of the freedom of movement.

62. Next, the general assembly shall analyse the conformity of § 41^3(1) of TA to § 27(5) of the Constitution. Tartu Administrative Court has ascertained that K. Toom lives in the country near Võru city and needs a vehicle once a week to care for his mother, who is advanced in years, and for his disabled brother, both living in Võru city. The administrative court argues that if K. Toom's right to drive is suspended he will not be able to fulfil the duty to care for his needy family members, arising from § 27(5) of the Constitution.

63. The general assembly points out that the duty to care for one's family, arising from § 27(5) of the Constitution, is important for guaranteeing the coping of needy persons, and that the state must not unjustifiably prevent a person from fulfilling the duty. Yet, this does not mean that the sate is not allowed to affect unfavourably the persons who are obliged to care for their needy family members.

It is first necessary to assess in each case whether the state interference – in the present case the suspension of the right to drive, without the right of discretion – makes it more difficult for a person to care for his or her needy family members. If the answer to this question is affirmative, it has to be ascertained whether such a restriction is justified by the need to guarantee a fundamental right or a fundamental value.

64. In the present matter the general assembly agreed with the opinion of Tartu Administrative Court that the suspension of the right to drive restricts K. Toom's possibilities to care for the needy members of his family. Yet, the general assembly does not find the restriction to be intensive, because K. Toom has not been deprived of the possibility of reaching the needy family members by means other than driving a power-driven vehicle.

The general assembly is also of the opinion that the existence of the right to drive can not serve as a prerequisite for caring for the needy members of one's family. The right to drive is a special right, allowing a person to realise his or her fundamental rights and duties more easily, and the lack of the right does not, as a rule, prevent a person from fulfilling the duty to care for his or her family.

65. Thus, the general assembly shall have to form an opinion on whether the suspension of the right to drive, without the right of discretion, serving the legitimate aims referred to in §§ 57 and 58 of the judgment, constitutes a justified restriction of the duty to care for one's family.

66. The general assembly is of the opinion that the need to protect the life, health and property of others, pursued by the suspension of the right to drive without the right of discretion, outweighs the right and duty of K. Toom to care for his needy family members in the manner chosen by him. Thus, the general assembly is of the opinion that the suspension, without the right of discretion, of the right to drive of K. Toom, who had been driving wile intoxicated, is justified and in conformity with the Constitution.

67. Next, the general assembly shall examine, on the basis of a request of Tallinn Administrative Court, whether the suspension, without the right of discretion, of the right to drive, under § 41^3(1) of TA, of Toivo Aguraiuja, for the failure to notify the police of a traffic accident, was in conformity with § 29(1) and § 19(1) of the Constitution.

Tallinn Administrative Court is of the opinion that the suspension of T. Aguraiuja's right to drive under § 41^3 (1) of TA in a situation where the person conducting the proceedings has no right of discretion in applying the provision, has resulted in a disproportionate infringement of his freedom to choose a profession and place of work and his freedom of self-realisation.

Tallinn Administrative Court has ascertained that T. Aguraiuja worked, at the material time of suspension of the right to drive and submission of action against this, as a fire and rescue worker of Harju county Rescue Service and his duty of employment was to drive an emergency vehicle. In the course of reorganisation of the work of the service T. Aguraiuja was offered a possibility to continue working as a driver of an emergency vehicle. The administrative court is of the opinion that the complainant will lose his job due to the suspension of his right to drive, because he will not be able to perform his duties of employment without having the right to drive.

68. According to § 29(1) of the Constitution an Estonian citizen has the right to freely choose his or her sphere of activity, profession and place of work. The Constitutional Review Chamber of the Supreme Court has earlier held that the subjective right to freely choose one's sphere of activity, profession and place of work does not cover the service relationship which has already been established or the termination thereof (see judgment of the Constitutional Review Chamber of the Supreme Court of 11 June 1997, in matter No 3-4-1-1-97 – RT I 1997, 50, 821; judgment of 6 October 1997, in matter No 3-4-1-2-97 – RT I 1997, 74, 1267; of 27 May 1998, in matter No 3-4-1-4-98 – RT I 1998, 49, 752).

69. The Administrative Law Chamber of the Supreme Court has held earlier that a recourse to the courts must be guaranteed to a person if the person's right to realise his or her constitutional right to freely choose

his sphere of activity, profession and place of work depends on the activities of administration (see judgment of the Administrative Law Chamber of the Supreme Court of 30 May 2000, in matter No 3-3-1-20-00 – RT III 2000, 15, 164, § 1). In the present case the possibility of T. Aguraiuja to be employed as a driver depends on the suspension of his right to drive. The general assembly is of the opinion that the situation amounts to an infringement of the freedom to choose a profession, established in § 29 of the Constitution.

70. Next, the general assembly shall examine whether the suspension, without the right of discretion, of the right to drive of T. Aguraiuja for three months, for failure to notify the police of a traffic accident, as a punishment in the substantive sense, is a proportional (i.e. not manifestly excessive) restriction – for the purposes of § 11 of the Constitution – of the freedom to choose one's profession, bearing in mind the achievement of the legitimate aims referred to in § 57 of this judgment.

Nowadays, prohibition to drive is common type of punishment, constituting an effective punishment for traffic violations. Neither is the punishment manifestly excessive, bearing in mind the nature of the offences. According to § 227 of Traffic Code the driver involved in a traffic accident shall immediately inform the police of the traffic accident if people were injured in the accident or if the drivers or driver involved in the accident and the person(s) who sustained damage disagree as to liability upon assessment of the reasons for the incident, or if the person(s) who sustained damage is (are) not known. Thus, the it is necessary to inform the police of a traffic accident so that it could ascertain the person liable for damaging the legal rights – health or property – of others. Hindrance of this constitutes a fundamental violation.

71. Tallinn Administrative Court has also raised the issue of proportionality of the infringement of T. Aguraiuja's freedom of self-realisation, without reference to which activities related to his self-realisation the suspension of the complainant's right to drive restricts. The general assembly has already expressed the opinion that driving a car can be regarded as one of such activities (see judgment of the general assembly of the Supreme Court of 28 April 2004, in matter No 3-3-1-69-03 – RT III 2004, 12, 143, § 33).

72. At the same time it has to be born in mind that on the basis of § 19(2) of the Constitution the right to free self-realisation, that is also the possibility to drive a car, can be restricted by the obligation of a person to respect and take into account the rights and freedoms of others and to observe the law.

The general assembly is of the opinion that in the present case, by the suspension of the right to drive as a punishment in the substantive sense, the legislator has restricted a person's right to free self-realisation precisely for the protection of the rights of others and of the legal order (see § 57 of the judgment).

73. For the reasons set out in § 70 of this judgment the general assembly is of the opinion that the suspension of the right to drive is not manifestly excessive infringement of T. Aguraiuja's freedom of self-realisation. Thus, the suspension of the right to drive for the failure to notify the police of a traffic accident is a proportional and constitutional restriction of the freedom of self-realisation.

74. Tartu Administrative Court is of the opinion that the suspension of Veiko Koobakene's right to drive for six months under § 41^3(4) of TA for exceeding a speed limit repeatedly constitutes – due to the fact that the person conducting proceedings has no right of discretion – a disproportionate infringement of freedom of enterprise and makes it more difficult for V. Koobakene to fulfil his duty to care for his family.

According to the judgment of the administrative court V. Koobakene is the only shareholder and a member of the board of OÜ Northfors. The administrative court is of the opinion that without the right to drive he will be unable to keep his company going. The income from the company is the main source of income for his family. Deprivation of work and income will result in grave economic consequences for his family. Besides, he needs the vehicle daily to take his children to the nursery-school situated 7 kilometres away. One of the children has a severe disability.

75. The general assembly lacks sufficient overview of the circumstances for assessing whether the present case amounts to an infringement of the freedom of enterprise. Neither is it possible for the general assembly,

due to insufficient information, to decide on whether the deprivation of work and income will compromise V. Koobakene ‘s duty to care for his family.

76. The general assembly is of the opinion that the suspension of the right to drive, without the right of discretion, makes it more difficult for V. Koobakene to care for his child with severe disability. Thus, the situation amounts to a restriction of the possibilities to fulfil the duty to care for one’s family, arising from § 27(3) of the Constitution. Next, the general assembly shall analyse whether the restriction is justified, taking into account that a restriction may be justified by another fundamental right or a constitutional value.

77. The general assembly points out that in the case under discussion, too, the aim of the suspension of the right to drive is the need to protect the legal order and the life, health and property of others, referred to in §§ 57 and 58 of this judgment. These aims constitute weighty constitutional interests, which outweigh the restriction of V. Koobakene’s duty to care. That is why the restriction of V. Koobakene’s possibilities to fulfil his duty to care for his family by the suspension of his right to drive shall be deemed justified and constitutional.

VII.

78. For the above reasons the general assembly of the Supreme Court shall dismiss the petitions of Tartu, Tallinn and Jõhvi Administrative Courts in this constitutional review matter, and shall not declare subsections (1), (4) and (8) of § 41^3 of TA unconstitutional.

Dissenting opinion of justices Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Põld and Harri Salmann

1. The majority of the general assembly of the Supreme Court expressed the opinion that a driver of a power-driven vehicle could well foresee the consequences of his or her unlawful activities and could defend oneself against these in a misdemeanour proceeding (§§ 31-37 of the judgment). We can not concur with the referred opinion for the following reasons:

1) the issue of suspension of the right to drive does not and can not arise in a misdemeanour proceeding. A person does not give testimony in relation to possible suspension of the right to drive, neither is the existence of conditions necessary for the suspension of the right to drive subject of proof. The sole fact that a document certifying a special right is taken away upon a violation of those provisions of the Traffic Act for which the suspension of a special right is prescribed, can not give rise to the conclusion that a person’s right of defence is guaranteed.

As a rule, in the course of a misdemeanour proceeding a person is indeed informed of the possible suspension of the right to drive, but this does not equal to hearing of the person or – in a broader sense – to guaranteeing his or her right of defence in relation to the suspension of the right to drive as a punishment. From the aspect of guaranteeing the right of defence the otherwise correct argument that a driver must know traffic norms and the legal consequences of the violations thereof is irrelevant, too.

2) it is not determined in a misdemeanour proceeding whether and under which provision the right to drive will be suspended and the suspension of the right to drive is not considered. A decision concerning a misdemeanour proceeding contains a reference to what shall happen to the driving licence which was taken away – it shall be sent to MVRC for deciding on the suspension of the right to drive under § 41^3 of TA. The provision to be applied upon suspension of the right to drive is determined by MVRC. That is why a person does not even have a hypothetical possibility to exercise his or her right of defence in a misdemeanour proceeding prior to the proceeding in MVRC. The allegation in the judgment that in a misdemeanour

proceeding the number of punishments in force must be checked is not related to determining the qualification for the suspension of the right to drive by MVRC.

3) a person lacks a possibility to exercise the right of defence before MVRC. A person does not know when and to which address the documents concerning him are transferred, or who and when shall proceed the matter of suspension of the right to drive. The procedure arising from Traffic Act (including from § 41^3(10) of TA) precludes notification of persons even on MVRC-s initiative. The allegation that Traffic Act does not prohibit MVRC to hear a person is to some extent correct in the formal sense, but wrong in substance. It has to be born in mind even in the formal sense that hearing of a person would take place either by violating a term prescribed by § 41^3(1) of TA or the principles established in Administrative Procedure Act.

4) although the majority of the general assembly admit the infringement of § 14 of the Constitution, the judgment states that the infringement is not an intensive one and is outweighed by the public interest in effective proceeding of matters of suspension of the right to drive, and that the failure to hear a person does not, as a rule, result in an incorrect resolution (§ 37 of the judgment). It is clear that hearing a person at an oral hearing in a legal proceeding, as well as the guarantee of other subjective procedural rights requires administrative and judicial resources and can be resource-intensive. But this fact can not be a decisive justification for the preclusion of the right of defence upon applying a measure which amounts to a punishment for the purposes of § 23 of the Constitution. The general assembly did not take into account or consider other possibilities for guaranteeing the right to be heard, known to the general assembly. One of such possibilities is notification of a person of the commencement of a proceeding for the suspension of the right to drive and of the possibility to submit written defences. It would also be possible to prepare a notice of conditional suspension, which shall acquire the force of a decision if a person does not respond or request a hearing. The use of all such possibilities would guarantee a sufficient right to be heard in a comparatively economical manner. The making of a decision to suspend the right to drive immediately after a decision in a misdemeanour matter enters into force is not necessary, because usually there is a long period of time between the commission of a violation and the suspension of the right to drive, during which a person is using the right to drive. Neither can the right to be heard be precluded on a justification that as a rule a decision to suspend the right to drive is correct. Besides correct (legal) decisions on suspension of the right to drive there are also erroneous decisions, which could be avoided if the right to be heard were exercised. What is more important, is the fact that the right to be heard is a substantive right by nature. The opinion on the lawfulness of a proceeding can not depend on whether the failure to hear a person generally results in a correct decision or not. Hearing of a person contributes to the development of the conviction that the suspension of the right to drive is just in a concrete case.

We are of the opinion that application of a coercive measure, falling within the sphere protected by § 23 of the Constitution, without the guarantee of the right of defence, is unconstitutional.

2. The majority of the general assembly is of the opinion that the suspension of the right to drive is a punishment in the substantive sense primarily because of the fact that an administrative body, upon suspending the right to drive, does not additionally assess a person’s danger to traffic and that the suspension of the right to drive depends on the violation and guilt ascertained in a misdemeanour proceeding (see § 29 of the judgment). This opinion of the Court is wrong.

A coercive measure can be deemed a punishment in the substantive sense if it is applied in the aftermath of a violation, it has the nature and objectives of punishment and it is sufficiently grave to be comparable to a punishment in the formal sense. The fact that an administrative body has no right of discretion and that several facts serving as grounds for the imposition of a coercive measure have been ascertained in another proceeding, is not decisive for the purposes of determining the nature and category of a measure.

In this respect the approach of “integrated procedure” is incorrect, too. For example, the suspension of the right to drive under subsections (2) to (8) of § 41^3 of TA presupposes the existence of several decisions on punishment which have entered into force. MVRC has to ascertain whether a person has committed the traffic violations which meet the necessary elements of concrete acts serving as the ground for the

suspension of the right to drive, whether pertinent decisions on punishment have entered into force and whether the punishments are in force according to the data of punishment register. Thus, the necessary elements are generally not confined to the last violation. Bearing in mind the latter the opinion of the general assembly would lead to the only possible conclusion that all previous misdemeanour proceedings and the subsequent suspension of the right to drive constitute a single proceeding. This conclusion is not reasonable and it is erroneous in the legal sense. An integrated proceeding does not fit into the framework of the valid law. There is a large number of proceedings governed by administrative law, during which a coercive measure is imposed because a person has previously committed a misdemeanour and has been punished for that. Such administrative proceedings could hardly be deemed to be forming an integrated whole with a misdemeanour proceeding.

3. In the court cases examined by the general assembly and covered by the judgment the administrative courts have not sufficiently ascertained all facts necessary for deciding whether the application of the suspension of the right to drive is in conformity with the principle of proportionality. In practice, due to § 41^3 of TA in force and the valid regulation of the suspension of the right to drive, the suspension of the right to drive may prove to be a proportional measure only by chance.

The application, without the right of discretion, of a fixed coercive measure established by the legislator may be justified in the case of minor offences, but not in the case of punishments falling under the protection of § 23 of the Constitution. The reasoning of the general assembly that the misdemeanour punishment together with the suspension of the right to drive, applicable to a person who has committed a traffic violation is much more lenient than the principal and supplementary punishments applicable to a person who has committed a criminal offence, is not convincing, either.

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