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JUDGMENT OF THE SUPREME COURT EN BANC

No. of the case	3-3-1-29-04
Date of judgment	25 October 2004
Composition of court	Chairman Märt Rask and 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 Laffranque, Jaak Luik, Jüri Pöld, Harri Salmann, Tambet Tampuu and Peeter Vaher.
Court Case	Appeal of Helmut Pikmets against a procedural act of the Põhja Police Prefecture of 31 December 2003 and ruling of the traffic supervision department of the Põhja Police Prefecture of 15 January 2004.
Disputed judgment	Ruling of the Tallinn Circuit Court of 29 March 2004 in administrative matter no. 2-3/575/04.
Complainant and type of appeal	Appeal against a ruling filed by Helmut Pikmets
Date of hearing	22 September 2004
Persons participating in the hearing	Complainant Helmut Pikmets, representative of the Legal Chancellor, Deputy Chancellor of Justice-Adviser Aare Reenumägi and representative of the Minister of Justice Liina Lust

DECISION

1. To dismiss the special appeal of Helmut Pikmets and to uphold the ruling of the Tallinn Circuit Court.

FACTS AND COURSE OF PROCEEDING

1. On 31 December 2003 Sten Sabbo, a junior police inspector of the Lääne-Harju department of the Harju Police Prefecture prepared a misdemeanour report to H. Pikmets under § 74²² of the Traffic Act (hereinafter “the TA”) for exceeding the speed limit. Upon preparing the misdemeanour report the driving licence of H. Pikmets was confiscated and a temporary driving licence was issued to him. H. Pikmets filed an application for the return of his driving licence with the traffic supervision department of the Põhja Police Prefecture, which was dismissed by a ruling of 15 January 2004.

2. On 21 January 2004 H. Pikmets was punished for the referred violation under § 74²² of the TA by a fine. H. Pikmets contested this decision in the Tallinn City Court.

3. On 16 February H. Pikmets submitted an action with the Tallinn Administrative Court requesting a declaration of unlawfulness of the procedural act performed by S. Sabbo, a junior police inspector of the Harju Police Prefecture, by which the driving licence of the complainant was confiscated; requesting an annulment of the ruling of the traffic supervision department of the Põhja Police Prefecture by which the application of H. Pikmets for the return of his driving licence was dismissed; requesting that the court issue a precept to the traffic supervision department of the Põhja Police Prefecture to return the driving licence; requesting that the court declare § 58(3) of the Code of Misdemeanour Procedure (hereinafter “the CMP”) and § 41¹(1) and (2) of the TA unconstitutional and do not apply these.

4. By the ruling of 23 February 2004 the Tallinn Administrative Court rejected the action without a hearing. The court found that an appeal against the procedural act of confiscating a driving licence and the dismissal of an application in a misdemeanour proceeding may be filed with a county or city court. On 9 March 2004 H. Pikmets filed an appeal against the referred ruling with the Tallinn Circuit Court.

5. By its ruling of 29 March 2004 the Tallinn Circuit Court dismissed the appeal against the ruling. The circuit court was of the opinion that the police officer had confiscated the driving licence of H. Pikmets within the proceeding of a misdemeanour matter which commenced by preparing a misdemeanour report. Pursuant to § 74(1)14) of the CMP a decision of a body conducting extra-judicial proceedings shall set out how to proceed with the objects used as physical evidence and with other seized objects. In this matter a decision has been made in a misdemeanour proceeding on 21 January 2004, which sets out also a decision concerning the confiscated driving licence. It appears from the latter that upon entering into force of the decision in the misdemeanour matter the driving licence shall be forwarded to the Motor Vehicle Registration Centre for the suspension of the right to drive. Pursuant to the reasoning of the circuit court the complainant can contest the decision concerning the forwarding of the driving licence to the MVRC by a body conducting extra-judicial proceedings of a misdemeanour, by contesting the decision made in a misdemeanour proceeding in a county or city court. Upon adjudicating the matter the court can also review the constitutionality of § 41¹ of the TA and § 58(3) of the CMP.

6. H. Pikmets filed an appeal against the ruling of the Tallinn Circuit Court of 29 March 2004 with the Supreme Court. In his appeal against the ruling he requests that the ruling of the Tallinn Circuit Court of 29 March 2004 and the ruling of the Tallinn Administrative Court of 23 February 2004 be annulled and the matter referred back to the Tallinn Administrative Court for a new hearing.

7. On the basis of § 70(1)2) of the Code of Administrative Court Procedure, by its ruling of 22 June 2004, the Administrative Law Chamber of the Supreme Court referred the matter to the Supreme Court *en banc* for a hearing. The Administrative Law Chamber was of the opinion that what has been provided in § 41¹ of the TA and in § 58(3) of the CMP in relation to confiscation of driving licences and issue of temporary driving licences is not sufficiently clear to guarantee uniform application of law, including for determining a competent court. The Administrative Law Chamber also argued that upon hearing the matter the Supreme Court *en banc* will be able to review whether the restriction established in § 41¹ of the TA is constitutional or amounts to a disproportional restriction of fundamental rights.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDING

8. The complainant is of the opinion that the dispute falls within the competence of an administrative court and he supports his view with the fact that in the present matter the body conducting extra-judicial proceedings has not issued a reasoned ruling which could be disputed in a misdemeanour proceeding. Even if contestation were possible, the CMP (§§ 76, 78, 79) does not guarantee an effective remedy. Furthermore, the complainant has not contested the fact that the respondent forwarded the driving licence to the MVRC, as this measure is taken after a decision in a misdemeanour proceeding has taken effect. The complainant contested the activity (a procedural act) of the respondent, consisting in replacing the driving licence with a temporary one. The person filing the appeal against the ruling argues that § 41¹ of the TA is unconstitutional. With the issue of a temporary driving licence a person loses the right to drive a power-

driven vehicle in a foreign state. This amounts to a restriction which infringes upon the principle of freedom of movement, established in § 34 of the Constitution. Such a restriction is not justified in any way and is not necessary in a democratic society. Furthermore, § 411 of the TA violates the principle of legal clarity, presumption of innocence and the fundamental right to equality.

9. The respondent – the traffic supervision department of the Põhja Police Prefecture – failed to submit to the Supreme Court its opinion concerning which court is competent to hear the appeal. The respondent is of the opinion that nothing related to issue of a temporary driving licence as established in § 41¹ of the TA violates the rights of a person to an extent amounting to an infringement of a fundamental right established in the Constitution. This is a measure necessary to guarantee legal order.

10. The Chancellor of Justice did not express his view on which is the competent court in this matter. The Chancellor of Justice is of the opinion that for adjudicating the dispute pending in the Supreme Court it is not possible to analyse the constitutionality of § 41¹ of the TA, because this is not a relevant legislation in this matter. When adjudicating an appeal against a ruling the Supreme Court is not competent to form an opinion on issues of substantive law to be adjudicated. There are no procedural prerequisites, proceeding from § 52(1) of the Code of Administrative Court Procedure (hereinafter “the CACP”), such as a judgment of a circuit court in which the circuit court has applied a provision of substantive law incorrectly or has materially violated a provision of court procedure, or an appeal in cassation filed against it. The Administrative Law Chamber of the Supreme Court referred the matter to the Supreme Court en banc for a hearing under § 70(1)2) of the CACP and not under § 70(1¹) of the CACP. If § 411 of the TA were unconstitutional, the Supreme Court would not have to render a decision on acceptance of the appeal of H. Pikmets differently than in the case of constitutionality of the provision.

11. The Riigikogu did not form an opinion concerning a competent court. The Legal Affairs Committee of the Riigikogu argues that the aim of § 41¹ of the TA is to guarantee smooth proceeding of traffic violations without delays, including the appearance of a person subject to proceedings before the body conducting proceedings.

12. The Minister of Justice did not form an opinion concerning a competent court. The Minister of Justice was of the opinion that § 41¹ of the TA was unconstitutional. The Minister of Justice argues that what is problematic is, first of all, the space-limitation of a temporary driving licence, pursuant to which a temporary driving licence is valid only in Estonia. This restriction may materially infringe upon the right to freely choose a sphere of activity, profession and place of work and the exercise of the right to engage in enterprise. The aim of confiscating a driving licence and issuing a temporary one is that in the case the right to drive is suspended later on the person will not be in possession of a document certifying his or her right to drive. Nevertheless, the enforcement of a decision of an administrative agency could be guaranteed by a penalty payment, which would be considerably less restrictive of the rights of persons than the replacement of a driving licence with a temporary driving licence. The Minister of Justice is of the opinion that issuing of a temporary licence may result in a violation of a fundamental right to equality. Neither is the restriction in conformity with the presumption of innocence.

CONTESTED LEGISLATION

13. The Traffic Act (RT I 2001, 3, 6; 2002, 92, 531; 105, 613; 110, 654; 655; 2003, 26, 156; 78, 522; 2004, 46, 329) provides for the following:

“§ 41¹. Issue of temporary driving licences

(1) Upon the commission of a misdemeanour for which suspension of the right to drive is prescribed pursuant to § 41³ of this 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.

(2) A temporary driving licence is only valid in Estonia for thirty days. An agency which conducts extra-

judicial proceedings concerning the misdemeanour shall extend the validity of the licence until the decision made in the matter of the misdemeanour enters into force. The standard format for temporary licences shall be established by the Minister of Internal Affairs.”

Code of Misdemeanour Procedure (RT I 2002, 50, 313; 110, 654; 2003, 26, 156; 83, 557; 88, 590; 593; 2004, 46, 329; 54, 387; 390; 56, 403) provides for the following:

“§ 58. Commencement of misdemeanour proceedings

[...]

(3) 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.”

OPINION OF THE SUPREME COURT EN BANC

I.

14. By its ruling of 22 June 2004, on the basis of § 70(1)2) of the CACP, the Administrative Law Chamber of the Supreme Court referred the appeal of H. Pikmets against a ruling to the Supreme Court *en banc*, for guaranteeing the uniform application of law.

15. As the ruling of the Administrative Law Chamber has been issued in a proceeding of an appeal against a ruling, the object of which is the problem of competence of court, the Supreme Court *en banc* shall have to decide whether the hearing of the appeal of H. Pikmets is within the competence of an administrative court or of county or city courts.

There is no doubt that a police officer confiscates a driving licence within a framework of a relationship in public law. Adjudication of public law issues is within the competence of administrative courts, except in the cases when another procedure has been provided by law (§ 3(2) of the CACP). The procedure for filing appeals against the activities of a body conducting extra-judicial proceedings in a misdemeanour proceeding until the decision is taken in a misdemeanour matter is regulated by §§ 76-80 of the CMP, proceeding from which the activities of a body conducting extra-judicial proceedings, i.e. a police officer, based on the Code of Misdemeanour Proceedings, can be contested in county or city courts.

16. The question of whether a driving licence is confiscated in an administrative proceeding or in a misdemeanour proceeding arises because the confiscation of a driving licence is simultaneously regulated by § 58(3) of the CMP and § 41¹ of the TA, i.e. by a norm of misdemeanour procedure and a norm of administrative procedure. Furthermore, the so called dual character of a police officer has to be taken into account – he is an official exercising traffic supervision and, at the same time, a body conducting extra-judicial proceedings of misdemeanour matters. In order to determine whether we deal with a procedural act of a misdemeanour proceeding or of an administrative proceeding it has to be found out first, which of the referred norms can be regarded as a norm authorising the confiscation of a driving licence.

Differently from § 58(3) of the CMC, § 41¹ of the TA does not refer to a person authorised to confiscate a driving licence. Thus, the authority of a police officer to confiscate a driving licence arises from § 58(3) of the CMC, which gives this authority to an official conducting the proceedings of a misdemeanour matter, who has to confiscate the driving licence immediately after the commencement of a proceeding of the misdemeanour matter. The confiscated driving licence shall be added to the materials concerning the misdemeanour matter. Pursuant to the ruling of the Tallinn Circuit Court it is established that the police officer confiscated the driving licence of H. Pikmets within a misdemeanour proceeding.

In addition, it has to be born in mind that a driving licence is forwarded to the agency which had issued the

licence on the basis of a decision on punishment made by a body conducting extra-judicial proceedings or a court. Pursuant to §§ 74(1)14) and 111(7) of the CMP a body conducting extra-judicial proceedings or a court shall set out in its decision how to proceed with the objects used as physical evidence and with other seized objects. The same applies if a body conducting extra-judicial proceedings or a court terminates the proceeding of a misdemeanour matter, - in this case a driving licence is returned to the person subject to proceedings on the basis of a ruling of a body conducting extra-judicial proceedings or a judgment of a court, without forwarding the driving licence to the agency which had issued it.

17. A driving licence is taken away on the basis of § 41³(1) – (8) of the TA to guarantee the suspension of the right to drive. The latter constitutes a measure of punitive nature applicable for the commission of one or several traffic misdemeanours established by law. A person's right to drive is suspended by agencies which issue driving licences, on the basis of a decision on punishment made in misdemeanour proceedings. Whereas, the circumstances of a violation and the guilt of a person are ascertained in a misdemeanour proceeding, and the agency which issued the driving licence proceeds, pursuant to § 41³(1) – (8) of the TA, from the fact of punishment only. As such, the suspension of the right to drive for a misdemeanour established by law, is an automatic consequence of a punishment. Although the suspension of the right to drive is in itself an administrative act, the proceeding for the issue thereof forms an integral whole with the misdemeanour proceeding (*see judgment of the Supreme Court en banc of 25 October 2004 in matter no. 3-4-1-10-04, paragraph 23*).

18. A big part of the proceeding necessary for the suspension of the right to drive (ascertaining of facts, hearing of person) takes place within a misdemeanour proceeding. For the purposes of economy of proceedings the solution chosen by the legislator, pursuant to which also the guaranteeing of suspension of the right to drive is made a duty of the body conducting extra-judicial proceedings, i.e. of the person who ascertains the circumstances of a violation, is justified.

19. Thus, before a decision is made concerning a misdemeanour matter, the confiscation of a driving licence by an official of the body conducting extra-judicial proceedings can be contested pursuant to the procedure prescribed in §§ 76 – 80 of the CMP. § 76(1) of the CMP establishes the following: “(1) Participants in the proceedings and persons not participating in the proceedings have the right to file appeals against the activities of a body conducting extra-judicial proceedings with the head of the body until the decision is made in the matter by the body.” Pursuant to subsections (1) and (2) of § 77 of the CMP the head of a body conducting extra-judicial proceedings shall adjudicate the appeals by way of a written proceeding within five days as of the receipt of the appeal, by a ruling. The head of a body conducting extra-judicial proceedings may deny the appeal, satisfy the appeal in full or in part and recognise that the rights of the person were violated if the violation can no longer be eliminated, or annul the contested ruling or suspend the contested procedural act in full or in part, thereby eliminating the violation of the right. Subsection (1) of § 78 of the CMP provides for the following: “If a person does not consent to a ruling made in the adjudication of an appeal pursuant to subsection 77 (2) of this Code, and the contested activities of the body conducting extra-judicial proceedings have violated the rights or freedoms of the person, the person has the right to file an appeal with the county or city court.” A county or city judge shall hear an appeal within five days after the receipt of the appeal. Pursuant to § 79(4) of the CMP a court which hears an appeal has the right to suspend the contested ruling or procedural act. In the adjudication of an appeal, a county or city court may eliminate the violation by annulling the ruling or suspending the procedural act, or recognise that the rights of a person were violated if the violation can no longer be eliminated. The Supreme Court *en banc* is of the opinion that proceeding from the short procedural terms and the competence of the head of the body conducting extra-judicial proceedings or of a court, the described procedure guarantees a speedy and sufficient protection of the rights of a person affected by a decision taken.

20. In addition to the confiscation of his driving licence the complainant has also contested the issuing of a temporary driving licence, which is not regulated by § 58(3) of the CMP. Yet, the issuing of a temporary driving licence is inseparably connected to confiscation of a driving licence. If a driving licence were not confiscated from a person there would be no need to issue a temporary driving licence. Both, the confiscation of driving licence and the issuing of a temporary driving licence, serve one and the same

procedural aim. Pursuant to the Constitution everyone has the right to an affective remedy, which requires that appeals be heard by way of procedure as simple and speedy as possible. A possibility to contest the issuing of a temporary driving licence separately by way of administrative court procedure would be unjustified, that is why the confiscation of a driving licence and issuing of a temporary driving licence shall be contested together in a county or a city court.

II.

21. Pursuant to the first sentence of § 14(2) of the Constitutional Review Court Procedure Act the Supreme Court shall, within the constitutional review proceedings, check the constitutionality of only relevant legislation of general application. The norms which are of decisive importance for the adjudication of a matter are relevant (*see judgment of the Supreme Court en banc of 22 December 2000 in matter no. 3-4-1-10-00 – RT III 2001, 1, 1, paragraph 10*). An Act is of a decisive importance when in the case of unconstitutionality of the Act a court should render a judgment different from that in the case of constitutionality of the Act (*see judgment of the Supreme Court en banc of 28 October 2002 in matter no. 3-4-1-5-02 – RT III 2002, 28, 308, paragraph 15*).

22. The Supreme Court *en banc* is of the opinion that the competence of a court does not depend on whether a norm providing for the confiscation of a driving licence is constitutional or not, that is why § 41¹ of the TA is not a relevant norm (*see judgment of the Supreme Court en banc of 30 April 2004 in matter no. 3-3-1-77-03 – RT III 2004, 13, 159, paragraph 25*). The issue of whether the confiscation of a driving licence violates the fundamental rights of a person could be adjudicated only when an appeal is heard on its merits.

DISSENTING OPINION

of justice Indrek Koolmeister

joined by justices Tõnu Anton, Julia Laffranque,
Jüri Pöld and Harri Salmann

The majority of the Supreme Court *en banc* has found that confiscation of a driving licence and issuing of a temporary driving licence constitutes a procedural act of a misdemeanour proceeding. I can not consent to this conclusion for the following reasons:

1. It proceeds from § 41¹(1) and (2) of the TA and § 58(3) of the CMP in their conjunction that an official of the body conducting extra-judicial proceedings may confiscate the driving licence from a person in regard of whom a misdemeanour proceeding has been commenced in a matter which, pursuant to § 41³ of the TA, may result in the suspension of the right to drive. It can be concluded from § 41¹ of the TA that in that case the temporary driving licence is issued to a person also by the official of the body conducting extra-judicial proceedings, although the Code of Misdemeanour Procedure does not contain such an authority of the body conducting extra-judicial proceedings.

I am of the opinion that the performance of one or another duty by an official of the body conducting extra-judicial proceedings is not sufficient for determining under which procedure a procedural act has to be performed. The fact whether an act, by its nature, belongs to administrative or misdemeanour proceedings does not so much depend on the status of an official performing it (a police official as an official of a body conducting extra-judicial proceedings or as a person exercising traffic supervision), but first and foremost on the aims of which proceeding a procedural act serves. Confiscation of a driving licence and issuing of a temporary driving licence could be a procedural act of a misdemeanour proceeding if it served the aims of a misdemeanour proceeding. The majority of the Supreme Court *en banc* has not shown which aims of the misdemeanour proceeding the act of confiscation of a driving licence and issuing of a temporary driving licence serves.

Proceeding from § 41¹ of the TA the aim of confiscating a driving licence is to guarantee the enforcement of

the decision to suspend the right to drive, taken on the basis of § 41³ of the TA. But, the suspension of the right to drive does not take place within a misdemeanour proceeding, instead it is possible by a decision of the Motor Vehicle Registration Centre after the decision on punishment made in a misdemeanour proceeding has taken effect, i.e. after the misdemeanour proceeding. By admitting the possibility of performing, in a proceeding under penal law, procedural acts which do not serve the adjudication of a misdemeanour matter, the majority of the Supreme Court *en banc* ignores one of the essential basic procedural requirements, pursuant to which the procedural acts of a proceeding under penal law must be necessary for the resolution of the matter.

2. In case no. 3-4-1-10-04 the majority of the Supreme Court *en banc* has found that the suspension of the right to drive under § 413 of the TA is an inevitable consequence of a misdemeanour proceeding and therefore forms an integral whole with the misdemeanour proceeding.

I am of the opinion that on the basis of temporal succession or a causal link it can not be concluded that confiscation of a driving licence and issuing of a temporary driving licence belong to a proceeding within which a concrete misdemeanour matter is resolved. The legal consequences of punishing a person for an offence can manifest in various spheres of life. Such legal consequences may also be of administrative law character. So far, neither law nor practice has considered deciding on such consequences to be a proceeding of an offence. Although the suspension of the right to drive under § 41³ of the TA is of punitive character, this coercive measure is not applied in a misdemeanour proceeding. For the application of the referred coercive measure the Traffic Act has established a separate procedure under administrative law (§§ 41, 41³ (10) of the TA). In regard to those aspects of procedural law which have not been established in the referred provisions, the provisions of the Administrative Procedure Act shall be applied in accordance with § 1(2) of the TA. Thus, the confiscation of a driving licence does not serve the aims of a misdemeanour proceeding.

3. The opinion of the majority of the Supreme Court *en banc* is not in conformity with the reasoning of the above referred judgment (no. 3-4-1-10-04), either. In that judgment the majority of the Supreme Court *en banc* considered it possible to treat the procedure for suspending the right to drive, conducted by an administrative agency who has not been given the authority to conduct misdemeanour proceedings, as a misdemeanour proceeding or a part thereof, whereas the application of a punitive administrative sanction, provided for in § 41³ of the TA and pertinent procedure have been provided for in the Traffic Act and not in the Code of Misdemeanour Procedure. Yet, in the present matter, upon deciding on the category of proceedings, the status of the body conducting proceedings and the Act containing a relevant norm authorising this, have been considered to be of decisive importance. Deciding on the belonging of an act to a category of proceedings on the basis of arbitrarily chosen formal characteristics has resulted in manifest discrepancy of judgments.

4. The Supreme Court *en banc* has failed to deal with the question of whether the confiscation of a driving licence and issuing of a temporary driving licence violates the rights of a person. The majority of the Supreme Court *en banc* has stated that the issue of constitutionality of the confiscation of a driving licence and issuing of a temporary driving licence could only be adjudicated upon hearing an appeal on its merits.

Because of such an opinion H. Pikmets is deprived of the possibility of judicial protection. If the confiscation of a driving licence and issuing of a temporary driving licence were a procedural act of a misdemeanour proceeding, it could be contested in a county or city court on the bases of and pursuant to the procedure prescribed for in § 78 of the CMP. Submission of such an appeal is possible only until the extra-judicial body conducting proceedings makes a decision in a misdemeanour matter during the term prescribed in § 78(2) of the CMP.