Constitutional judgment 3-4-1-10-04

JUDGMENT
OF THE SUPREME COURT EN BANC

No. of the case	3-4-1-10-04
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 Põld, Harri Salmann, Tambet Tampuu and Peeter Vaher.
Court Case	Review of constitutionality of subsections (1), (4) and (8) of § 41^3 of the Traffic Act.
Basis of proceeding	Judgments of the Tallinn Administrative Court of 5 March 2004 in administrative matter no. 3-799/2004; of 19 May 2004 in administrative matter no. 3-1298/2004, and of 25 June 2004 in administrative matter no. 3-1473/2004.
Date of hearing	15 September 2004
Persons participating in the hearing	Petitioner Vahur Viigimäe; representatives of the Chancellor of Justice, Deputy Chancellor of Justice-Adviser Aare Reenumägi and acting adviser Arnika Kalbus; representative of the Minister of Justice Kristjan Siigur; representative of the Estonian Motor Vehicle Registration Centre Tiia-Liis Jürgenson

DECISION

1. Not to declare subsections (1), (4) and (8) of § 41^3 of the Traffic Act unconstitutional and to dismiss the petitions of the Tallinn Administrative Court.

FACTS AND COURSE OF PROCEEDING

1. Vahur Viigimäe was punished by a fine under § 74^{22}(2) of the Traffic Act (hereinafter "the TA") for the exceeding of a speed limit by 21 to 40 kilometres per hour on two occasions, i.e. on 21 October 2003 (by a second decision also under § 74^{35}(1) of the TA for violation of traffic requirements) and on 6 November 2003. After the entry into force of the decision of 6 November 2003, the head of the Tallinn bureau of Motor Vehicle Registration Centre (hereinafter "the MVRC"), by its decision no. 10693 of 5 December 2003, suspended V. Viigimäe's right to drive for six months under § 41^3(4) of the TA. V. Viigimäe filed an appeal against the decision with the Tallinn Administrative Court. By its judgment of 5 March 2004 the Tallinn Administrative Court satisfied the action, annulled the decision of the MVCR, did not apply § 41^3(4) of the TA and declared it unconstitutional.

2. Kristen Pugi was punished on 5 February 2004 under § 74^{19} of the TA by a fine for driving a power-driven vehicle in a state of intoxication. After the decision in misdemeanour matter took effect, the head of the Tallinn bureau of the MVCR, by its decision no. 1987 of 4 March 2004, suspended K. Pugi's right to drive for three months under § 41^3(1) of the TA. K. Pugi filed an appeal against the decision with the Tallinn Administrative Court. By its judgment of 19 May 2004 the Tallinn Administrative Court satisfied the action, annulled the decision of the MVCR, did not apply § 41^3(1) of the TA and declared it unconstitutional.

3. Eerik Kivivare has been punished under § 74^{22}(2) of the TA for the exceeding of a speed limit by 21 to 40 kilometres per hour on four occasions: on 29 March, 21 September and 9 October of 2003 and on 26 March 2004. After the entry into force of the latter decision, the head of the Tallinn bureau of the MVCR, by its decision no. 3032 of 13 April 2004, suspended E. Kivivare's right to drive for 24 months under § 41^3(8) of the TA. E. Kivivare filed an appeal against the decision with the Tallinn Administrative Court. By its judgment of 25 June 2004 the Tallinn Administrative Court satisfied the action, annulled the decision of the MVCR, did not apply § 41^3(8) of the TA and declared it unconstitutional.

4. The Tallinn Administrative Court referred all three judgments to the Supreme Court. By its ruling of 26 May 2004 the Constitutional Review Chamber of the Supreme Court joined the matters under § 41^3(1) and (4) of the TA into one proceeding, and by its ruling of 1 June 2004 referred the matter to the Supreme Court *en banc* for hearing. By its ruling of 30 June 2004 the Constitutional Review Chamber joined the matter concerning § 41^3(8) of the TA into the same proceeding with the former matters.

OPINIONS OF THE ADMINISTRATIVE COURT AND THE PARTICIPANTS IN THE PROCEEDING

5. In the judgments that serve as the basis for the proceeding the Tallinn Administrative Court argued that the suspension of the right to drive, provided for in subsections (1), (4) and (8) of § 41^3 of the TA, can be interpreted as actual punishment. In all three matters the administrative court referred to the pertinent view expressed in the judgment of the Administrative Law Chamber of the Supreme Court no. 3-3-1-1-4 of 23 February 2004. Similarly with the Administrative Law Chamber of the Supreme Court, the administrative court justifies that there is an extensive time period between the suspension of the right to drive and commission of a misdemeanour, during which a person is entitled to drive a vehicle. The suspension of the right to drive serves a repressive objective, characteristic of a punishment, which does not differ from the supplementary punishment, provided for in § 50 of the Penal Code for a traffic offence. There are other characteristics inherent to penal law, indicating at the punitive character of the suspension of the right to drive, namely: the extent of sanction depends on repeated commission and if the term for suspension of the right to drive for the previous misdemeanour has not expired, a new term shall be added to the unserved part of the previous term. The severity of sanction has also to be taken into account – pursuant to § 41^3 of the TA the right to drive may be suspended for 24 months. It has been argued in the judgments that the suspension of the right to drive violates the principle of*ne bis in idem* and the right not to be punished for the same act again, arising from the principle. That is why the contested provisions are in conflict with § 23(3) of the Constitution.

6. V. Viigimäe is of the opinion that the suspension of the right to drive a power-driven vehicle is of a

punitive character and is in conflict with the Penal Code, as the latter does not provide for supplementary punishments for misdemeanours. Thus, the repeated commission of a misdemeanour, provided for in the Traffic Act, is equal to a criminal offence. § 41^3(4) of the TA is in conflict with § 23 of the Constitution, because it violates the right not to be punished for the same act twice. A person who commits the traffic misdemeanour under discussion has no possibility to defend himself or herself or to explain the circumstances of the violation. Thus, the right of a person to be tried in his or her presence, arising from § 24 of the Constitution, is also violated.

7. K. Pugi and E. Kivivare have not submitted their opinions to the Supreme Court.

8. The Legal Affairs Committee of the Riigikogu is of the opinion that subsections (1), (4) and (8) of § 41^3 of the TA are not unconstitutional. Suspension of the right to drive is a non-punitive coercive measure. The Traffic Act contains this regulation because the legislator wanted to decrease the proportion of punitive sanctions in Estonian legal system. Suspension of the right to drive under the Traffic Act, in comparison to the deprivation of the right to drive under the Penal Code, results in different legal consequences. In the latter case the right to drive can be restricted for up to three years and the punishment decision is entered into the punishment register. Neither does the lack of the right of discretion render the provisions unconstitutional. A regulation not allowing for discretion is constitutional if it is proportional. Bearing in mind the traffic culture of Estonia the suspension of the right to drive is an expedient and suitable measure for inducing law-abiding behaviour. Also, the implementation of a coercive measure like this is necessary for the protection of life, property and health of others.

9. The Estonian Motor Vehicle Registration Centre (hereinafter “the MVRC”) is of the opinion that subsections (1), (4) and (8) of § 41^3 of the TA are in conformity with the Constitution. The MVRC is of the opinion that the right to drive a power-driven vehicle is a special right, upon the exercise of which the traffic rules must be obeyed. The right to drive can be interpreted and regarded equivalent to an activity licence issued by an administrative agency. It has been considered necessary to withdraw from traffic the drivers who have committed dangerous violations, in order to improve the traffic culture and increase road-safety. § 41^3 of the TA guarantees the realisation of the right to life and protection of health, included in §§ 16 and 28 of the Constitution. Failure to suspend the right to drive may result in grave consequences for the life, health and property of other persons. Suspension of the right to drive can not be interpreted as an actual punishment, because the right is not suspended by a decision on punishment but under administrative procedure by the agency which has issued the driving licence. Only that what is provided for as a punishment in a statute *expressis verbis* can be regarded as punishment. Suspension of the right to drive does not result in consequences inherent to a punishment. Thus, it amounts to a non-punitive coercive measure or administrative preventive measure. Suspension of the right to drive serves the two following aims: firstly, to withdraw from traffic for an extended period those persons who have committed most dangerous misdemeanours, and secondly, to place the persons who have committed most dangerous misdemeanours in a position where they are forced to reconsider their behaviour and to improve their behaviour in the future. The MVRC argues that the regulation concerning the suspension of the right to drive is not in conflict with §§ 11, 12, 14, 19, 31 or 34 of the Constitution, either.

10. The Minister of Justice is of the opinion that subsections (1), (4) and (8) of § 41^3 of the TA do not violate the principle of *ne bis in idem*and are not unconstitutional. Suspension of the right to drive is a non-punitive coercive measure, because the consequences thereof are different from the deprivation of the right to drive, provided for in the Penal Code. The term of suspension of the right to drive under § 41^3 of the TA is shorter than the term for deprivation of the right to drive provided for in the Penal Code, and differently from the decision on the deprivation of the right to drive, the decision on the suspension of the right to drive is not entered into the punishment register. Neither can the suspension of the right to drive be regarded as a supplementary punishment for a misdemeanour, because pursuant to the Penal Code the supplementary punishments are provided only for criminal offences. The Minister of Justice points out that the suspension of a driving licence is of an administrative law character, which, in essence, resembles other activity licences and licences (e.g. weapons permit, trade licence, other activity licences). It is customary that the referred licences are suspended or withdrawn on the ground that the holder of the licence has violated the

requirements arising from legislation. The aim of these licences is to guarantee that only those persons engage in activities which, by essence, are dangerous to others, who have pertinent knowledge and skills or guarantees. It is natural that if the knowledge, skills or guarantees of a person are deficient, an administrative agency is entitled to temporarily suspend the licence. Suspension of the right to drive serves the same aim as the issue of the permission to drive, namely that the persons with necessary knowledge and skills and attitude participate in traffic as drivers of power-driven vehicles. The aim of temporary suspension of the right to drive is to force a person, in the future, to appropriately follow the requirements of legislation regulating traffic. The Minister of Justice also argues that a person's right of appeal is sufficiently guaranteed upon deciding on the suspension of his or her right to drive. Under § 19 of the Code of Misdemeanour Procedure a person can defend himself or herself already during a misdemeanour proceeding. The Minister of Justice also points out that the suspension of the right to drive has not been established as a punishment, and refers to the judgment of the Criminal Chamber of the Supreme Court of 4 March 2003 in matter no. 3-1-1-6-03.

11. The Chancellor of Justice is of the opinion that subsections (1), (4) and (8) of § 41^3 of the TA disproportionally infringe upon the prohibition of punishing a person twice, established in § 23(3) of the Constitution, and are thus in conflict with §§ 11, 13(2) and 23(3) of the Constitution in their conjunction. The Chancellor of Justice argues that although in the formal sense the suspension of the right to drive is a non-punitive coercive measure, in essence it has the characteristics of a punishment: penal content, idea of revenge and repression. Proceeding from the regulation of the Traffic Act, one and the same misdemeanour results in the application 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 interpreted as an actual punishment, it infringes upon the principle of *ne bis in idem* and the constitutional right of persons not to be punished again for the same act. It does not appear from the necessary elements of a misdemeanour referred to in §§ 74^5 and 74^{22}(2) and (3) of the TA that in addition to punishment for an offence supplementary sanctions shall be imposed. Thus, the regulation of the Traffic Act is unclear as to the consequences of an act, and is in conflict with the principle of legal clarity included in § 13(3) of the Constitution. § 413 of the TA disproportionally infringes upon § 23(3) of the Constitution, as provision for the suspension of the right to drive outside a norm establishing the necessary elements of a misdemeanour intensively infringes upon persons' procedural rights. Neither is the measure selected by the legislator – to provide separately for a punishment and for the suspension of the right to drive which is a punishment in the actual sense – a proportional measure for achieving the aim of efficiency of courts. The Chancellor of Justice argues that the Supreme Court should also decide on the constitutionality of subsections (2), (3), (5), (6) and (7) of § 41^3 of the TA.

PERTINENT PROVISIONS

12. Subsections (1), (4) and (8) of §413 of the Traffic Act (RT I 2001, 3, 6 … 2003, 78, 522) read as follows:

"§ 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 SUPREME COURT EN BANC

13. Pursuant to the first sentence of § 14(2) of the Constitutional Review Court Procedure Act (hereinafter "the CRCPA") the Supreme Court shall, in the constitutional review proceedings, review the constitutionality of only pertinent legislation of general application (*see judgments 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; and of 28 October 2002, in matter no. 3-4-1-5-02 – RT III 2002, 28, 308, paragraph 15*).

The Supreme Court *en banc* is of the opinion that subsections (1), (4) and (8) of § 41^3 of the TA are pertinent. These are the norms on the basis of which K. Pugi's, V. Viigimäe's and E. Kivivare's right to drive was suspended. Thus, the correctness of the judgments of the administrative courts who heard the appeals against the decisions on suspension of the right to drive depends on whether the norms under discussion are constitutional or not.

14. Pursuant to the prohibition of repeated punishment for the same act, established in § 23(3) of the Constitution, i.e. pursuant to the principle of *ne bis in idem*, no one shall be tried or punished again for an act of which he or she has been finally convicted or acquitted pursuant to law. The fundamental right arising from this prohibition guarantees the possibility for a person to know the consequences with the characteristics of state coercion that could be applied if his or her guilt is ascertained. Also, this fundamental right guarantees legal peace and excludes a possibility that after a decision on punishment of a person has been made the person is surprised by a wish to consider imposition of a supplementary punishment for the same act. In order to decide whether the suspension of the right to drive under subsections (1), (4) and (8) of § 41^3 of the TA amounts to a violation of this prohibition, it is necessary to check whether the suspension of the right to drive under these provisions falls within the sphere protected by § 23(3) of the Constitution. For this reason the following questions must be answered: is the right to drive suspended under subsections (1), (4) and (8) of § 41^3 of the TA for the same act for which a person was punished in a misdemeanour proceeding; does the suspension of the right to drive under the referred provisions amount to a punishment and, finally, does this amount to repeated punishment for the purposes of § 23(3) of the Constitution.

15. It is obvious that in a situation where the right to drive is suspended for one traffic violation for which a misdemeanour punishment is provided for, both sanctions are applied for the same act. This is the situation in the case of § 41^3(1) of the TA.

The Supreme Court *en banc* is of the opinion that under subsections (4) and (8) of § 41^3(1) of the TA the right to drive is suspended for the same act for which a person was already punished by the last decision on punishment which was the basis for the suspension of the right to drive. The provisions under discussion refer to necessary elements of a misdemeanour, requiring the existence of several previous decisions on punishment for a misdemeanour. Thus, the commission of one and the same traffic violation is a prerequisite of punishment in a misdemeanour proceeding and the suspension of the right to drive, whereas the disposition of the suspension of the right to drive adds the requirement of recurrent commission.

16. Next, the question whether the suspension of the right to drive under subsections (1), (4) and (8) of § 41^3 of the TA amounts to a punishment applicable for an offence, is to be answered.

There is no dispute over the fact that the acts for which the right to drive is suspended belong to offences – application of subsections (1), (4) and (8) of § 41^3 of the TA requires the existence of a valid decision on

punishment made in a misdemeanour proceeding (see also paragraph 15 above).

At the same time subsections (1), (4) and (8) of § 41^3 of the TA are not norms of special part of penal law in the formal sense. The general part of the Penal Code does not provide for supplementary punishments for misdemeanours, pursuant to § 3(4) of the Penal Code only a fine and a detention are the principal punishments. Also, it has to be taken into account that in the Traffic Act the legislator has provided for the suspension of the right to drive for traffic violations (chapter 8) and the necessary elements of a misdemeanour (chapter 14^1) in different chapters of the Act.

17. The issue of whether a certain coercive measure of the state is a punishment for the purposes of § 23(3) of the Constitution can not be resolved on the basis of the provisions of the Penal Code only. It needs to be checked whether a coercive measure of the state, which is not regarded as a punishment in the formal penal law, should still be regarded as one in the essence, that is in the actual sense. Guarantees of fundamental rights must be guaranteed also upon implementation of such coercive measures of the state, which have not been established as punishments in the formal penal law, but which can actually be regarded as those. Thus, in the case of suspension of the right to drive, it should be assessed whether this actually amounts to a punishment, i.e. if this amounts to a measure, applicable for an offence, which has the essence and objective of a punishment and is sufficiently severe to be considered equal to a criminal punishment in the formal sense.

18. In its essence a punishment means a restriction of a person's rights or freedoms. Nevertheless, not any restriction of rights and freedoms amounts to a punishment, even if the reason for the restriction is an offence. The difference between a punishment applicable for an offence and a non-punitive coercive measure lies in the following. Guilt of a person is an inevitable basis for a punishment, a punishment means a reproach manifested in the restriction. On the other hand, it is not the guilt of a person which is the basis for imposition of a non-punitive coercive measure, but the danger emanating from the person, indicated by the actions he or she has committed.

19. Pursuant to subsections (1), (4) and (8) of § 41^3 of the TA, the right to drive shall be suspended by an agency which has issued a driving licence, if a decision on punishment has entered into force in respect of the person in a matter of a misdemeanour. § 41^3(10) establishes: "Suspension of the right to drive shall be formalised by a decision of the agency which issued the licence within three days as of receipt of the decision on punishment which has entered into force. The decision shall contain the information specified in clauses 41 (4) 1)-3), 5) and 6) of this Act. A copy of the decision shall be sent to the person by post." Upon suspending the right to drive there is no proceeding in the MVRC on the merits, the role of the agency is confined to formalisation of the suspension of the right to drive. Thus, upon suspending the right to drive the administrative agency does not assess the danger to traffic a person constitutes. The only person who assesses the circumstances of a violation is the body conducting misdemeanour proceedings, who – upon hearing the offence matter – assesses only the guilt of the person; that is why the fact that a person is guilty of a commission of a traffic violation is to be considered the basis for suspending the right to drive. The same conclusion was reached by the European Court of Human Rights in its judgment of 23 September 1998 in *Malige v France*, where the Court held that a prohibition to drive, imposed by an administrative agency as a result of and in the context of a proceeding of an offence, should be regarded as "an automatic consequence of the conviction" of the person.

20. The duration of the suspension of the right to drive, provided for in subsections (1) to (8) of § 41^3 of Traffic Act, ranges from one month (subsection 1) to 24 months (subsection 8). The Supreme Court en banc is of the opinion that a prohibition to drive for years is sufficiently encumbering allowing for the prohibition to be regarded as a punishment for the purposes of § 23(3) of the Constitution (under § 50(1) of the Penal Code up to three-years' prohibition to drive may be imposed for traffic offences). What is also to be taken into account is the fact that if the right to drive is suspended for longer than six months, a person must, pursuant to § 44(1) of the TA, for the restoration of the right to drive, pass the theory test; if a person's right to drive has been suspended or withdrawn for longer than twelve months, his or her right to drive shall be restored if he or she passes the theory test and the driving test. There is also a historical argument that can

not be ignored when resolving the issue under discussion. During the period preceding the penal law reform the suspension of the right to drive was a punishment, applicable for administrative offences, also in the formal sense.

Although the suspension of the right to drive for a short period is not in itself a measure as encumbering as to be regarded an actual punishment (*see judgment of Human Rights Court of 28 October 1999, in Escoubet v Belgium*) to which the guarantees provided for hearing offences should be extended, the Supreme Court en banc is of the opinion that drawing a line between subsections (1) to (8) of § 41^3 of the TA would be unreasonable, as the provisions form an integrated system.

21. Thus, the suspension of the right to drive under subsections (1), (4) and (8) of § 41^3 of the TA is a coercive measure of the state, upon the application of which the provisions of § 23(3) of the Constitution must be taken into account. Next, the Supreme Court *en banc* shall review whether the suspension of the right to drive, based on the decision on punishment made in a matter of a misdemeanour, amounts to a violation of the prohibition established in § 23(3) of the Constitution.

22. Proceeding from the wording of § 23(3) of the Constitution the imposition of several punishments, e.g. a principal and a supplementary punishment, is not prohibited in principle; what is prohibited, is to try the matter again and to punish again in an independent proceeding. This interpretation is supported by the fact that the principle of *ne bis in idem* constitutes, on the one hand, an impediment to proceedings, on the other hand it constitutes a subjective right of a person to presume that he or she will not be prosecuted for the same act again. Thus, the prohibition of repeated punishment is related to the principle of legal certainty, protecting a person from the arbitrariness of the state (see paragraph 14 of the judgment).

23. Thus, the prohibition established in § 23(3) of the Constitution would be violated if the suspension of the right to drive by the agency who issued the licence were preceded by trying the person for the same act again for the purposes of § 23(3) of the Constitution and the matter were heard on its merits for the second time. Neither of the referred takes place. Suspension of the right to drive as established in the valid law has the characteristics of both administrative and penal law. Although the right to drive is suspended by an administrative agency and in the formal sense this does not constitute a norm of penal law, this amounts to a punishment in the actual sense. What is important in this context is the fact that upon suspending the right to drive the circumstances of the violation are not ascertained independently, instead the decision of proceeding of a misdemeanour, which has entered into force, serves as a basis for the suspension and thus, the guilt of the person who committed the misdemeanour (see paragraph 19 of the judgment). That is why the suspension of the right to drive does not constitute a new trial of a person or a new proceeding of his or her offence, instead, the suspension is an inevitable consequence of a misdemeanour proceeding and forms an integral whole with it.

24. According to § 28(3) of the TA a prerequisite of obtaining the right to drive is that a driver must be familiar with the requirements of legislation concerning traffic. The Supreme Court *en banc* is of the opinion that proceeding from this it should not come as a surprise for a person who is punished for a traffic offence that the entering into force of a decision on his or her punishment is followed by the suspension of his or her right to drive, because the application of the measure has been provided for in subsections (1) to (8) of § 41^3 of the TA unambiguously and bindingly. Pursuant to what is provided for in the different subsections of this section it should not come as a surprise to a person when a decision on his or her punishment is made, for how long his or her right to drive shall be suspended when the decision on punishment enters into force. Thus, a person who has been punished for a misdemeanour can not consider that the fact that the entering into force of the decision on his or her punishment is automatically followed by the suspension of the right to drive, constitutes a violation of legal certainty. 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.

25. The Supreme Court *en banc* points out that there may be instances when an employee of an agency who has issued a driving licence exceeds the authority given to him or her by § 41^3 of the TA and acts in a

manner which can not be presumed upon making a decision on punishment. There is reason to conclude, on the basis of systematic interpretation of the Act, that it is precisely for such cases that the legislator has provided for a possibility, in subsection (10) of § 41^3 of the TA, to appeal against a decision on suspending the right to drive to a higher official or an administrative court.

26. Proceeding from the aforesaid the Supreme Court *en banc* is of the opinion that suspension of the right to drive under subsections (1), (4) and (8) of § 41^3 of the TA can not be regarded as punishing a person again, and does not violate the principle established in § 23(3) of the Constitution that punishing a person again for the same act is prohibited. That is why the petitions of the Tallinn Administrative Court shall be dismissed and subsections (1), (4) and (8) of § 41^3 of the TA not be declared unconstitutional.

DISSENTING OPINION
of justice Jüri Põld,
joined by justices Tõnu Anton,
Indrek Koolmeister, Julia Laffranque and Harri Salmann

1. The majority of the Supreme Court *en banc* confined itself to the review of conformity of the contested provisions of the Traffic Act only to those provisions of the Constitution that were referred to in the judgments of the Tallinn Administrative Court, which initiated the constitutional review court proceeding (§ 23(3) of the Constitution). In the reasoning of the judgment the majority of the Supreme Court *en banc* totally ignored the arguments of the complaints submitted to the first instance court and some opinions of the Chancellor of Justice. By this the Supreme Court *en banc* arbitrarily deviated from the established practice of the Supreme Court. The approach chosen by the Supreme Court *en banc* in this matter means not only an unjustified deviation from the established practice but also circumvention of solving a socially acute legal problem.

2. Suspension of the right to drive is a punishment determined in absolute terms, automatically following a misdemeanour – whereas the punishment is the same in case of all violations of the same type, irrespective of the circumstances of the violation and information characterising the person who committed the violation.

What constitutes a problem is whether a punishment imposed without the right of discretion (suspension of the right to drive) is always proportional and whether there are weighty lawful reasons why achievement of proportionality is not reasonable. What is also a problem is whether there is a reasonable basis for the fact that upon suspending the right to drive the persons who are manifestly in an unequal position are treated equally, and persons who are manifestly in an equal position, are treated unequally.

The majority of the Supreme Court *en banc* refrained from dealing with these problems. The judgment contains no indication as to why these problems were not discussed.

The result on the failure to solve the problems is continuous legal ambiguity as to the constitutionality of § 41^3 of the TA. The suspension of the right to drive will still being applied and appealed against. After the judgment of the Supreme Court *en banc* the initiation of a new constitutional review proceeding for the review of constitutionality of those provisions which were only dealt with in the light of § 23(3) of the Constitution in the present matter, is not excluded. Pursuant to § 22(2)4) of the Code of Administrative Court Procedure an administrative court may suspend proceedings during the time when the constitutional review matter is adjudicated in the proceedings of the Supreme Court, until entry into force of a judgment made in the matter, if this may affect the validity of legislation of general application subject to application in the administrative matter. The valid regulation of the Traffic Act is such that a person whose right to drive has been suspended can still continue driving his or her power-driven vehicle until the end of the court proceeding of his or her matter.

3. So far, in the established practice of constitutional review, upon determining the limits of adjudication of a

matter, the Supreme Court has not considered itself to be bound by only those provisions of law and the Constitution, which are referred to in the judgment of an institution that initiated court proceedings. The Court has repeatedly analysed not only the conflicts with the Constitution found by the courts who have initiated proceedings, but also the arguments of the persons who had addressed the courts (see e.g. judgment of the Supreme Court *en banc* of 11 October 2001 in case no. 3-4-1-7-01, paragraph 12; judgment of the Constitutional Review Chamber of 14 April 2003 in case no. 3-4-1-4-03, paragraphs 6, 14 and 22; judgment of the Constitutional Review Chamber of 5 March 2001 in case no. 3-4-1-2-01, paragraphs 10, 11, and 14).

The Supreme Court *en banc* went even further when solving case no. 3-4-1-10-2000. In this case the Supreme Court *en banc* pointed out the following: "The Supreme Court may and must review the lawfulness of disputed norms proceeding from the entirety of the norms and the spirit of the Constitution" (paragraph 19 of the judgment of the Supreme Court *en banc* of 22 December 2000).

4. I consider the practice accepted in earlier judgments justified and expedient.

If the Supreme Court confined itself only to justifications of the court which initiated proceedings, and if the Court – when not agreeing with these – ignored the arguments submitted during the preceding proceeding in the court or the Supreme Court, the judicial disputes over the constitutionality of a regulation would not be finished. It would be highly probable that the constitutional dispute would continue on the appellate level on the basis of those arguments of a petition that were not dealt with in the court of first instance or in the Supreme Court. It is also established in the judicial practice that a court of first or second instance is competent to initiate a constitutional review court proceeding even if the complainant does not see any unconstitutionality of applicable regulation. In such a situation it can not be excluded that a circuit court initiates a new constitutional review court proceeding concerning the same matter. This is exactly what the approach chosen by the majority of the Supreme Court en banc in this matter may result in.

Also, court procedure codes, which establish that in the case of constitutional review court proceedings the term for submitting appeals and appeals in cassation commences as of rendering a judgment in the constitutional review court proceeding, directly guide the Supreme Court to review a matter more broadly than meant by the court which initiated proceedings, by the person who had recourse to the court or by the participants in the proceeding in the Supreme Court.

5. The established constitutional review practice of the Supreme Court is not only rational but also in line with § 14 of the Constitution, which establishes that the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. By this the Constitution imposes on courts, including the Supreme Court, the function of objective legal protection. I am of the opinion that this is exactly the provision on which the established practice has been based on, and it is the exercise of the objective legal protection that the quoted judgment of 22 December 2000 refers to.

6. I contend that in the present case the materials at the disposal of the Supreme Court *en banc* required much broader approach than the one opted for by the majority of the Supreme Court *en banc*.

7. It appears from the description of the facts in the judgment of the Tallinn Administrative Court of 5 March 2004 in administrative matter no. 3-799/2004, that V. Viigimäe argued that the right to drive was necessary for him for performing official duties and for helping his mother who lived 70 km away from Tallinn, that before the contested decision was made he had been given no possibility to defend himself, and that the applicable norm did not allow for discretion. In his action filed with the administrative court he also argued that at the material time of commission of the misdemeanour only two weeks remained until the expiration of his previous punishments, and that the violation had not been deliberate.

It appears from the description of the facts in the judgment of the Tallinn Administrative Court of 25 June 2004 in administrative matter no. 3-1473/2004 that E. Kivivare argued not only that § 23(3) of the Constitution had been violated but also that the restriction of the right to drive a power-driven vehicle must be proportional. He also argued that § 12 of the Constitution had been violated, as § 413 of the Traffic Act

discriminates against Estonian citizens, namely – the right to drive of only those persons, who obtained the right from the Motor Vehicle Registration Centre, can be suspended. The administrative court file, appended to the constitutional review case, contains a complaint of R. Kivivare, in which he also argues that the performance of his official duties requires constant exercise of the right to drive, the employer can not hire him a driver. He will lose his job when the decision of the suspension of the right to drive is enforced. E. Kivivare has appended a reference from his employer to the complaint.

8. In the judgments rendered in the matters of E. Kivivare and V. Viigimäe the administrative court directly pointed out that as the court ascertained that § 41^3(8) of the Traffic Act was in conflict with § 23(3) of the Constitution, the court did not consider it necessary to analyse the rest of the arguments of the parties, or whether the pertinent provision was in conflict with some other provision of the Constitution.

Thus, even when reading only the reasoning of the judgments of the administrative court, it should have been obvious to the Supreme Court*en banc* that if the Supreme Court does not deal with the arguments not assessed by the administrative court, there is a high probability that the dispute will continue in appellate court proceedings and finding a solution to the problem will be postponed. I find that the social consequences of such a course of events are encumbering both on the society and the legal order.

9. Naturally, the Supreme Court *en banc* could not have decided on whether the suspension of the right to drive for the term unambiguously provided for by law was proportional in regard of the referred three persons. This is something an administrative court can check. Pursuant to § 14(2) of the Constitutional Review Court Procedure Act the Supreme Court can not adjudicate a legal dispute which is subject to adjudication pursuant to court procedure provisions applicable in administrative, civil, criminal or administrative offence matters. The Supreme Court adjudicates, has adjudicated and should adjudicate constitutional issues arising on the basis of concrete cases from the courts of first two instances on a much more abstract level than the courts of first two instances can and may do.

Upon ascertainment of unconstitutionality of § 41^3 of the Traffic Act within constitutional review court proceedings the Supreme Court could declare that the unconstitutionality of the regulation shall not automatically result in the restoration of the right to drive, instead it shall result in the obligation of the Motor Vehicle Registration Centre to give a person a fair hearing and to decide to impose a fair punishment on him or her.

10. Within the context of the present regulation of the Traffic Act a person who has violated traffic rules has no possibility to submit arguments against the suspension of the right to drive or against the duration thereof. The Supreme Court *en banc* has correctly found that there is no hearing of a matter on its merits in the Motor Vehicle Registration Centre upon suspending the right to drive, the role of the agency is confined only to formalising the suspension of the right to drive (paragraph 19 of the judgment). The consequence provided for in § 41^3 of the Traffic Act is a fatal one, appearing after the punishment imposed in a misdemeanour proceeding enters into force. By way of exception, the suspension of the right to drive may not be imposed in regard of a person who uses a power-driven vehicle because of disability, except when he or she was driving in a state of intoxication. The reality is that even if a small fine has been imposed on a person for certain violations of traffic rules, his or her right to drive will automatically be suspended for three months under § 41^3(1) of the Traffic Act, for six months under § 413(4) and for twenty four months under § 41^3(8) of the Traffic Act. When a fine is imposed there is no discussion of the suspension of the right to drive. Neither has the body conducting extra-judicial proceedings a right to decide on the necessity or duration of suspension of the right to drive. That is why I can not agree with the opinion of the majority of the Supreme Court *en banc* that within a misdemeanour proceeding a driver of a power-driven vehicle has a possibility to defend himself or herself against the consequences concurring his or her unlawful activities (the last sentence of paragraph 24 of the judgment).

DISSENTING OPINION
of justice Henn Jõks

I agree with paragraphs 1, 3, 4, 5, 6, 7 and 8 of the dissenting opinion of justice Jüri Põld.

DISSENTING OPINION
of justice Indrek Koolmeister

Although I have joined the dissenting opinion of justice Jüri Põld, I consider it necessary to present this dissenting opinion concerning the issues not dealt with in the dissenting opinion of J. Põld.

The Supreme Court *en banc* has found that proceeding from the wording of § 23(3) of the Constitution the imposition of several punishments, e.g. principal and supplementary punishments, is not forbidden in principle, but that it is prohibited to try the matter again and to punish again in an independent proceeding.

The majority of the Supreme Court *en banc* is of the opinion that the suspension of the right to drive under § 413 of the TA does not constitute trying a person for the same act again or proceeding his or her offence again, that instead it constitutes inevitable consequence proceeding from and making up an integral whole with a misdemeanour proceeding. That is why, in the opinion of the Supreme Court *en banc*, there is no violation of the prohibition established in § 23(3) of the Constitution in the present case. I can not consent to the latter opinion for the following reasons:

1. there are no arguments in the judgment justifying that the suspension of the right to drive is not an independent proceeding. § 41 of the TA and § 41^3(10) of the TA contain procedural provisions. The provisions of the Administrative Procedure Act are applicable to this proceeding. Upon suspending the right to drive an administrative agency takes a decision and the decision can be contested by filing a challenge to a higher official or in a court;

2. the facts that pursuant to the Traffic Act there is, as a rule, no discretion upon suspending the right to drive, and that the Traffic Act does not clearly provide for a duty of an administrative agency conducting proceedings in a matter to guarantee the right of a person to be heard and that in the practice the administrative agency confines itself to formalising decisions, can not be regarded as elements manifesting the non-existence of a proceeding;

3. the allegation that from the procedural point of view the suspension of the right to drive forms an integral whole with the misdemeanour proceeding, is misleading. In a misdemeanour matter a proceeding is terminated by a decision on punishment or when a ruling concerning the termination of the proceeding enters into force. The proceeding for suspension of the right to drive commences after the decision made in a misdemeanour matter has entered into force, that is after the conclusion of the proceeding of a misdemeanour matter. When a proceeding has been concluded, it can not go on. The Motor Vehicle Registration Centre is not entitled to conduct misdemeanour proceedings. The fact that two proceedings, misdemeanour proceedings and proceedings for suspending the right to drive, are interrelated and one succeeds another, does not constitute a ground for regarding these as a singe proceeding;

4. the arguments concerning why the violation of the prohibition established in § 23(3) of the Constitution is excluded when the guilt of a person is not assessed upon deciding on suspension of the right to drive, are not convincing. The fact that the guilt of a person has been ascertained by one decision on punishment does not give rise to a conclusion that on the basis of that decision on punishment it is possible, in another proceeding, to lawfully impose a new punishment on a person who has committed an offence;

5. upon ascertaining a possible violation of the prohibition established in § 23(3) of the Constitution it is also irrelevant that proceeding from the law a person must be aware that another punishment shall be imposed on

him. The principle established in § 23(3) of the Constitution also applies to such cases where a person is aware that he will be punished for one and the same violation twice.
