Constitutional judgment 3-3-1-69-03

RULING
OF THE SUPREME COURT *EN BANC*

No. of the case	3-3-1-69-03
Date of judgment	28 April 2004
Composition of court	Chairman Uno Lõhmus, and members Tõnu Anton, Jüri Ilvest, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Jüri Põld, Harri Salmann, Tambet Tampuu and Peeter Vaher.
Court Case	Appeal of Ronald Tsoi for the annulment of punishment imposed by traffic supervision department of Tallinn Police Prefecture.
Disputed judgment	Ruling of administrative law chamber of Tallinn Circuit Court of 30 June 2003 in administrative matter No 2-3/617/03.
Basis of proceeding in the Supreme court	Ronald Tsoi's appeal against a ruling.
Type of proceeding	Written proceeding

DECISION

1. To allow the appeal against a ruling.

2. To annul the ruling of Tallinn Administrative court of 22 May 2003 in administrative matter No 3-1225/2003 and the ruling of Tallinn Circuit Court of 30 June 2003 in administrative matter No 2-3/617/03.

3. Return the matter to Tallinn Administrative Court for a hearing.

4. To return the security on cassation.

FACTS AND COURSE OF PROCEEDING

1. By the decision of traffic supervision department of Tallinn Police Prefecture of 20 June 2002 in administrative offence matter No 2310.03.037115 R. Tsoi was punished under § 103(1), and § 106(1) and (2) of Code of Administrative Offences by a fine of 3600 kroons and with the withdrawal of right to drive a power-driven vehicle for 24 months.

2. After the Penal Code entered into force, R. Tsoi addressed the Motor Vehicle Registration Centre with a

request that the driving licence be returned to him. By its letter No 1-6/02/16128 of 8 November 2002, the Motor Vehicle Registration Centre forwarded T. Tsoi's petition to the traffic supervision department of Tallinn Police Prefecture.

3. By a letter No 4-16-13/63063 the traffic supervision department of Tallinn Police Prefecture denied the petition of R. Tsoi. In the referred letter it was explained to R. Tsoi that the Code of Misdemeanour Procedure (hereinafter 'CMP'), valid since 1 September 2002, does not establish a possibility for the police to shorten the term of withdrawal of a special right, imposed as an administrative punishment, or to release an administrative offender from further serving of the punishment. According to the valid principle of procedural law the procedural laws in force at the time of performing a procedural act shall be applied.

4. On 13 January 2003 R. Tsoi filed an action with Tallinn City Court against the activities of Estonian Motor Vehicle Registration Centre. He argued on the basis of § 5(2) of Penal Code that a mitigating law should be applied to him. In relation to the entering into force of Penal Code in 1 September 2002 the offence, committed by the complainant, is qualified under § 7430 of Traffic Act. For this offence the Traffic Act provides for suspension of the right to drive for three months, not for withdrawal of the right to drive. R. Tsoi argued that the referred term of suspension had lapsed long ago and the driving licence has to be returned to him. He argued that irrespective of his repeated requests the Motor Vehicle Registration Centre has not returned his driving licence and requested that the Motor Vehicle Registration Centre be ordered to return his driving licence immediately and without having to pass a test.

5. By its ruling of 16 January 2003, in misdemeanour matter No 4.72/03, Tallinn City Court dismissed the action of R. Tsoi. According to the reasoning of the ruling, pursuant to § 5(4)2) of Penal Code Implementation Act (hereinafter 'PCIA'), a court shall decide on a release from punishment upon an official request of the agency that had imposed it. Thus, the punished person shall have to, first of all, address a petition to the traffic supervision department of Tallinn Police prefecture, and the latter shall decide on submitting a request for the release from punishment.

6. On 7 February 2003 R. Tsoi filed an appeal against the referred ruling with Tallinn Circuit Court. On the basis of § 192 of CMP the referred appeal was returned to Tallinn City Court who, by a ruling of 17 February 2003, dismissed it. Tallinn City Court held that pursuant to § 191(10) of CMP appeals can not be filed against a ruling on refusal to accept an appeal in appeal proceedings or a ruling on dismissal of an appeal. Furthermore, the court argued that the 10-day term for filing appeals had expired.

7. On 20 May 2003 R. Tsoi filed an action with Tallinn Administrative Court, contesting the refusal of the traffic supervision department of Tallinn Police Prefecture to release him from serving the punishment. According to the reasoning of the action the withdrawal of the right to drive is not provided for the referred offence after the entry into force of Penal Code, and also that pursuant to the valid Traffic Act the maximum degrees of punishment applicable for analogous offences have been mitigated. R. Tsoi requested that the court require that Tallinn Police Prefecture annul the punishment of withdrawal of the right to drive a power-driven vehicle, imposed on him.

8. By a ruling of 22 May 2003 Tallinn Administrative Court returned the action to R. Tsoi on the basis of § 11(4) and (8) of Code of Administrative Court Procedure holding that the action falls within the competence of county and city courts. Tallinn Administrative Court explained that pursuant to § 5(4)2) of PCIA release from punishment imposed for an administrative offence shall be decided, without summoning the participants in the proceedings, by a ruling of a judge of the county or city court of the location of the commission of the offence sitting alone, at the request of an official of the agency which imposed the punishment for the administrative offence. § 33(1) of PCIA establishes that a prosecutor or an official of the agency which imposed a punishment for an administrative offence or prepared an administrative offence report shall submit requests for release from punishment to a county or city court within four months after entry into force of the Penal Code.

9. On 16 June 2003 R. Tsoi filed an appeal against the ruling of the administrative court with Tallinn Circuit

Court. In his appeal against the ruling he argued that the dispute was within the competence of an administrative court, as he has contested the activities of the traffic supervision department of Tallinn Police Prefecture.

10. By a ruling of Tallinn Circuit Court of 30 June 2003 the contested ruling of Tallinn Administrative Court was upheld and R. Tsoi's appeal against the ruling was denied. The Circuit Court agreed with the administrative court that the appeal did not fall within the competence of administrative courts. The circuit court reasoned in its ruling as follows:

1) on the basis of different petitions of R. Tsoi it can be concluded that the claim of his action is the wish to be released from serving the punishment which was imposed on him under Code of Administrative Offences before the Penal Code was enacted;

2) it does not proceed from the Penal Code Implementation Act that the punishments for the commission of administrative offences, imposed before 1 September 2002, are subject to automatic annulment. The bases for release from a punishment are exhaustively provided for in the Act. It does not proceed from the Act that a person in regard of whom a decision official on punishing him or her by withdrawal of the right to drive had entered into force before 1 September 2002 should be released from the punishment only because the Act in force since 1 September 2002 no longer provides for the withdrawal of the right to drive as a type of punishment for a misdemeanour;

3) until 1 January 2003 a person against whom administrative action had been brought had no possibility to request that his or her release from punishment be decided, and that since the referred date it is possible to request for the release from punishment only if the grounds referred to in § 5(1) and (2) of PCIA exist. R. Tsoi does not belong to the referred circle of persons and thus, a competent official has the right not to refer a complaint to a county or city court;

4) as the law does not provide for a different procedure for contesting the denial to transfer a complaint, the denial can be contested in an administrative court pursuant to § 3 of Code of Administrative Court Procedure. If the complainant is of the opinion that the valid legislative regulation, pursuant to which a person punished under Code of Administrative Offences by the withdrawal of the right to drive is not released from the punishment in relation to penal law reform, is incorrect, the complainant can request for a review of constitutionality of the Penal Code Implementation Act;

5) the letter of Tallinn Police Prefecture of 10 December 2002 can not be regarded as a refusal to submit a request to a county or city court, because the letter was sent in reply to R. Tsoi's petition to the Motor Vehicle Registration Centre, and until 1 January 2003 a person could not apply for a decision on releasing him or her from punishment, and the referred letter does not contain a decision not to submit a request concerning R. Tsoi;

6) the complainant shall have to, first of all, submit himself to compulsory pre-trial proceedings provided for in the Penal Code Implementation Act, and after that observe the above referred procedure to contest the denial to release him from punishment.

11. R. Tsoi filed an appeal against the ruling of the circuit court with the Supreme Court, requesting that the rulings of the administrative court and the circuit court be annulled, and the police prefecture be required to bring its decision on administrative punishment into conformity the valid law, by changing the withdrawal of the right to drive for 24 months to the suspension of the right to drive for 3 months, which has already been served.

12. By a ruling of the Administrative Law Chamber of the Supreme Court the matter was transferred to the Supreme Court *en banc* for a hearing, because the Administrative Law Chamber found that the adjudication of the matter required adjudication of an issue, which is subject to review under Constitutional Review Court Procedure Act. On the basis of the judgment of the Supreme Court *en banc* of 17 March 2003 (No 3-1-3-10-

02, RT III 2003, 10, 95) the Administrative Law Chamber doubted whether § 5 of PCIA was in conformity with the Constitution.

JUSTIFICATIONS OF THE PARTICIPANTS IN THE PROCEEDING IN THE SUPREME COURT

13. The arguments of R. Tsoi's appeal against the ruling are the following:

1) the person who filed the appeal against the ruling requests that the punishment, imposed on him, be brought into conformity with the valid law, and is not requesting that his punishment be annulled, as Tallinn Circuit Court erroneously finds. There is no withdrawal of the driving licence under administrative procedure any more, the validity of the driving licence is only suspended. § 5(2) of Penal Code declares that : "An Act which precludes the punishability of an act, mitigates a punishment or otherwise alleviates the situation of a person shall have retroactive effect." The application of the valid law alleviates the person's situation;

2) R. Tsoi was punished for an administrative offence pursuant to administrative procedure and the decision on punishment is an administrative act, which is subject to annulment pursuant to Administrative Procedure Act. Thus, the hearing of the appeal is within the competence of administrative courts. The complainant has addressed the Motor Vehicle Registration Centre, who transferred his petition to the police for hearing. The traffic supervision department of Tallinn Police Prefecture referred to the fact that the petition could not be reviewed under the Code of Misdemeanour Procedure; Tallinn Administrative Court finds that the matter is not within its competence;

3) the persons who committed an administrative offence before the Penal Code entered into force are treated unequally before the law, in comparison to those persons who committed an offence after 1 September 2002. The rights of the person who filed the appeal against the ruling, established in §§ 12 and 13 of the Constitution, have been violated.

14. In his written opinion submitted in the Supreme Court proceedings R. Tsoi is of the opinion that § 5(2) of Penal Code should be applied to him. Procedure for the application of the provision is provided for in Administrative Procedure Code (hereinafter 'APC'). According to § 65(3) of APC a decision on punishment shall be repealed as of the moment when changes in the circumstances took place, that is as of 1 September 2002. There is also a possibility to annul a decision on punishment (§ 63 of APC). These procedures require no further legislative regulation. The police or the Motor Vehicle Registration Centre could be the competent authorities.

15. Tallinn Police Prefecture argues in its written opinion that there are no provisions in the Penal Code Implementation Act providing for the release of a person, who has committed an administrative offence, from serving the imposed punishment for the purposes of § 5(2) of Penal Code. § 5 of PCIA in itself is not in conflict with the Constitution. The legislator provided for the release from punishment of those persons the offences committed by who are no longer regarded as criminal offences or misdemeanours, and did not provide for the release from punishment of those persons the offences committed by who are regarded as punishable acts also under the new Act, if the new Act itself does not provide for pertinent type of punishment any longer.

16. The Legal Affairs Committee and the Constitutional Committee of the Riigikogu argue in their written opinion that the second sentence of § 23(2) of Constitution is not applicable to the punishments which have already been imposed.

17. The Chancellor of Justice argues in his written opinion that § 5 of PCIA is in conformity with the Constitution, on the basis of the following :

1) bearing in mind that the second sentence of § 23(2) of the Constitution has the character of a principle, which requires that the sphere of protection of the sentence be interpreted broadly, the provision is also applicable to administrative offences (misdemeanours). The legislator has, after the commission of an

offence, mitigated the punishment provided for the offence;

2) the persons who committed an administrative offence before the entering into force of Penal Code are treated differently from the persons who committed a similar offence later. Also, it may be that there is a different treatment of persons who committed an offence at one and the same time, but to whom a punishment was imposed at a different time, prior to or after the entering into force of Penal Code, respectively;

3) in the present case the guaranteeing of the efficiency of courts could be regarded as a justification of the restriction. In the Penal Code Implementation Act the legislator has provided for an exhaustive list of persons, in regard of whom it considers it justified to apply the second sentence of § 23(2) of the Constitution. The line drawn by the legislator is a measure suitable for achieving the objective of the infringement, as the measure helps to guarantee the efficiency of courts. The measure is a necessary one, as the review of all punishments, imposed earlier but still in force, would be a solution much less inefficient;

4) the right to drive a vehicle is not a fundamental right, but it may be related to the right to free self-realisation, the right to freely choose a profession or a sphere of activity, also to the right to free and purposeful use of one's property and to the freedom of movement. In case No 3-1-3-10-02, decided by the Supreme Court, the restriction of freedoms amounted to more intensive infringement of a fundamental right than in the case of withdrawal of the right to drive. Bearing in mind the problems with traffic culture in Estonia it can be presumed that the review of administrative punishments will predictably result in a bigger workload for the courts, taking into account that there are more persons whose right to drive has been withdrawn than persons serving a prison sentence the duration of which exceeds the maximum punishment provided for a similar criminal offence in the Penal Code;

5) the punishment was imposed on the complainant almost two months before the Penal Code entered into force. The fact that the imposition of a punishment on some other person was delayed, either by his or her fault or by the fault of the body conducting proceedings, constitutes no reason to state that the punishment, correctly imposed on the complainant, was unjust or violates the principle of equality.

18. In his written opinion the Minister of Justice argues the following:

1) the protection of the second sentence of § 23(2) of the Constitution does not extend to persons serving sentences pursuant to court judgments which have entered into force. The restriction of the right to free self-realisation is justified for the purposes of public interests. The prohibition to drive a vehicle was and is provided only for the most severe traffic misdemeanours;

2) currently, proceeding from § 41^3(1) of Traffic Act, an agency which has issued a driving licence shall automatically suspend the right to drive for three months. Code of Administrative Offences provided for very different terms of withdrawal of the right to drive for different administrative offences. Upon regulating the system, in the course of punitive law, a procedure was provided for in the Traffic Act, by which the duration of the suspension of the right to drive was made dependent, on the one hand, on the gravity of offence and, on the other hand, on whether the offence was repeated or not;

3) withdrawal of the right to drive is essentially a punishment less onerous than deprivation of liberty. If the decision on punishment in regard of the complainant is to be changed, it is the failure to issue legislation of general application that should be declared unconstitutional. The court should not search for the Acts in our legal order where the required norm should belong by its nature.

PERTINENT PROVISIONS

19. § 5(2) of **Penal Code** (RT I 2001, 61, 364) establishes the following:

"§ 5. Temporal applicability of penal law

[…]

(2) An Act which precludes the punishability of an act, mitigates a punishment or otherwise alleviates the situation of a person shall have retroactive effect.

[…]"

§ 5(1) of the **Penal Code Implementation Act** (RT I 2002, 56, 350) establishes the following:

"§ 5. Release from punishment imposed on natural person or legal person for administrative offence and expungement of data concerning punishment

(1) If a punishment for an administrative offence which, pursuant to the Penal Code or another Act providing for the necessary elements of a misdemeanour, is no longer punishable as a misdemeanour or criminal offence has been imposed on a natural or legal person, the person shall be released from punishment.

[…]"

On 20 June 2002 § 103(1) and § 106(1) and (2) of the **Code of Administrative Offences** were in force in the following wording (RT 1992, 29, 396; RT I 2001, 74, 453):

"§ 103. Ignoring stop signal for vehicle

(1) The intentional ignoring of a mandatory stop signal for a vehicle by a driver of a vehicle is punishable by a fine from 50 up to 200 fine units or by withdrawal of the right to drive from one up to three years, or by a fine from 30 up to 150 fine units and withdrawal of the right to drive from of six months up to two years, or by an administrative detention of up to 30 days.

[…]"

"§ 106. Other violations of traffic rules by a driver

(1) Other violations of traffic rules by a driver, with the exception of offences enumerated in §§ 92, 92^1, 92^2, 92^3, 92^4, 92^5, 92^6, 92^7, 94, 95, 951, 96, 98, 99, 101, 103, 103^1, 103^2 and 104 of this Code are punishable by a fine of up to 10 fine units.

(2) The same act if it causes a traffic hazard is punishable by a fine from 10 up to 100 fine units, or by withdrawal of the right to drive from one up to 6 months."

§ 74^{30}(1) and § 74^{35} of **Traffic Act** (RT I 2001, 3, 6; 2002, 63, 387) are in force in the following wording:

"§ 74^{30}. Ignoring stop signal for vehicle

(1) The intentional ignoring of a mandatory stop signal for a vehicle by a driver of a vehicle is punishable by a fine of up to 200 fine units or by detention.

(2) A stop signal for a vehicle is mandatory if it is given pursuant to the established procedure by a police officer, a special constable or another person so authorised by law or other legislation issued pursuant to law."

OPINION OF THE SUPREME COURT EN BANC

I.

20. In order to adjudicate this appeal against a ruling the Supreme Court *en banc* shall have to ascertain whether the dispute initiated by R. Tsoi falls within the competence of administrative courts. The Supreme Court *en banc* interprets the appeal of R. Tsoi in accordance with the second sentence of § 19(7) of Code of Administrative Court Procedure and is of the opinion that the objective of the dispute is the question of whether Tallinn Police Prefecture had to release R. Tsoi from further serving the supplementary punishment (withdrawal of the right to drive a power-driven vehicle) imposed on him for an administrative offence before the Penal Code entered into force, ad to submit a request for release from punishment to a county or city court, or it was entitled to deny the petition.

The Supreme Court *en banc* is of the opinion that in essence, by the letter of 10 December 2002, No 4-16-13/63063, the traffic supervision department of Tallinn Police Prefecture refused to release R. Tsoi from punishment and to submit a request to a county or city court.

The participants in the proceeding do not dispute over the fact that as of 1 September 2002 withdrawal of the right to drive is no longer provided for as a supplementary punishment for the acts such as R. Tsoi was punished for. Estonian punitive law no longer recognises this type of punishment for misdemeanours. R. Tsoi is of the opinion that the legislator has provided for a less onerous punishment for the offence he had committed, and that the punishment should be applied to him retroactively.

21. § 5(1) of Penal Code Implementation Act establishes that if a punishment for an administrative offence which, pursuant to the Penal Code or another Act providing for the necessary elements of a misdemeanour, is no longer punishable as a misdemeanour or criminal offence has been imposed on a natural or legal person, the person shall be released from punishment. Pursuant to section (2) of the same section a natural person who at the time of commission of an administrative offence was less than 14 years of age shall be released from punishment. These are the only grounds, referred to in this Act, providing for the alleviation of the situation of a person serving a punishment imposed for an administrative offence.

22. § 5 of the Penal Code Implementation Act is a special provision specifying § 5(2) of Penal Code. That is why § 5(2) of Penal Code is not applicable to those persons whose punishment is mitigated or whose situation is otherwise alleviated in relation to entering into force of Penal Code on 1 September 2002. Thus, in the present case, R. Tsoi can not invoke § 5(2) of Penal Code.

23. As the legislator did not provide for the release from punishment imposed for acts which are qualified as offences as of 1 September 2002 of persons more than 14 years of age, irrespective of the fact that the new law alleviates the situation of the punished persons, the legislator did not establish a special procedure for the resolution of the situation, either. Among other things the body competent to release from a punishment has not been specifically regulated, either the procedure for submission of pertinent requests and procedure for contesting the decisions of the body. The resolution of such disputes is neither regulated by §§ 5, 11, 12 and 33 of PCIA, because these provisions pertain only to persons referred to in § 5(1) and (2) of PCIA.

In order to guarantee the broadest possible right of appeal, established in § 15(1) of the Constitution, § 3(1) 1) and § 3(2) of Code of Administrative Court Procedure establish that all disputes in public law for which a different procedure has not been provided pursuant to law shall fall within the competence of administrative courts. This dispute is a dispute in public law. Pursuant to laws regulating court procedure the dispute belongs within the competence of administrative courts. What needs to be clarified, is whether such a solution is constitutional in the present case.

24. The Supreme Court *en banc* is of the opinion that an administrative court could not be able to guarantee effective protection of the rights of R. Tsoi or other persons in a similar situation if § 5 of CPIA were unconstitutional because it does not provide for the release of such persons from punishment.

An administrative court is not authorised to change a decision on punishment made in an administrative offence proceeding. A decision on imposing a punishment for an administrative offence is not administrative

legislation for the purposes of § 4(1) of Code of Administrative Court Procedure or of § 51(1) of Administrative Procedure Act, because such a decision on imposing an administrative punishment is made upon exercising the function of jurisdiction of the state authority, and not upon performing administrative duties. Pursuant to general principles of law, it is the body who imposed the punishment (police prefecture) or – on the basis of analogy with § 5(4) of PCIA – a judge of county or city court sitting alone, who should be competent to release from punishment. An administrative court could not issue a precept to a police prefecture or a county or city court to release a person from a punishment, because the decision on changing an earlier administrative punishment is not administrative legislation, either. An Administrative court could only require that a police prefecture hear a person's petition or submit it to a court.

If § 5 of Penal Code Implementation Act were unconstitutional, the Act were unconstitutional also because it does not provide for an effective remedy for the protection of rights. The valid regulation of competence of administrative courts would not guarantee, in the present case, the right to effective remedy arising from §§ 132, 14 and 15 of the Constitution and from Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see ruling No 3-3-1-38-00 of the Supreme Court *en banc* of 22 December 2000, RT III 2001, 2, 14, §§ 15 and 19; judgment No 3-1-3-10-02 of 17 March 2003, RT III 2003, 10, 95, §§ 17 and 18), because the punishment may expire before it becomes clear whether a person is subject to release. An effective remedy could be the possibility of a person, serving a punishment, to directly petition a city or county court.

25. It appears from the aforesaid that the issue of whether this dispute belongs to the competence of administrative courts or of county or city courts, depends on the constitutionality of § 5 of PCIA. This is the issue the Supreme Court *en banc* shall address next.

II.

26. In its judgment of 17 March 2003, in case No 3-1-3-10-02, the Supreme Court *en banc* held that the second sentence of § 23(2) of the Constitution should be interpreted to mean that the protection of the provision also extends to the period of serving a sentence (§ 26 of the referred judgment). In the present case it is necessary to decide whether the sphere of protection of the provision also includes punishments imposed for administrative offences, including the withdrawal of the right to drive as a supplementary punishment.

The Supreme Court *en banc* can refer to no ground for excluding the supplementary punishment imposed on R. Tsoi from the sphere of protection of the second sentence of § 23(2) of the Constitution. The referred provision does not distinguish between types of punishment (administrative punishments, punishments for criminal offences, principal and supplementary punishments, etc.). When determining the sphere of protection of § 23(2) of the Constitution in its judgment of 17 March 2003 the Supreme Court *en banc* took into consideration the fundamental rights in question in the dispute – especially the restriction of liberty of person because of imprisonment – but it does not follow from this that the right to retroactive application of a mitigating law is valid only if the liberty of person is infringed at the same time. An intensive and prolonged infringement of some other fundamental right may be more onerous for a person than deprivation of liberty for a short time.

III.

27. In order to ascertain an infringement of the fundamental right established in the second sentence of § 23(2) of the Constitution it is necessary to clarify whether the valid punitive law would treat R. Tsoi, in relation to what he committed, more leniently that the earlier regulation. The Supreme Court *en banc* is of the opinion that this question is to be answered in the affirmative.

At the material time of commission of the offence it was possible to punish R. Tsoi by a fine from 50 up to 300 fine units or by withdrawal of the right to drive from one to three years, or by a fine from 30 up to 150

fine units with the withdrawal of the right to drive from 6 moths up to two years, or by an administrative detention of up to 30 days.

For the same offence § 74^{30} of Traffic Act provides for a fine of 200 fine units or a detention. Withdrawal of the right to drive as a supplementary punishment is no longer provided for. In comparison to the situation where both a principal and a supplementary punishment were imposed on a person under § 103(1) of Code of Administrative Offences, the maximum amount of fine imposable as the principal punishment has been increased from 150 fine units to 200 fine units, which is not of the same weight as the two-year prohibition to drive, which no longer exists.

The serving of a more severe punishment in this situation constitutes an infringement of the fundamental right established in the second sentence of § 23(2) of the Constitution. It also results in different treatment of persons punished before and after 1 September 2002, and thus in the infringement of the fundamental right to equality (first sentence of § 12(1) of the Constitution).

IV.

28. The next issue which needs to be clarified is whether the infringements of fundamental rights provided for by the legislator in § 5 of PCIA are constitutional.

In its judgment of 17 March 2003 the Supreme Court *en banc* explained that the rights established in the first sentence of § 12(1) and the second sentence of § 23(2) of the Constitution are not absolute rights (§ 27 of the referred judgment). The Supreme Court *en banc* specified that only other fundamental rights or constitutional values could count as a legitimate justification of infringement of fundamental rights established without reservations.

Considering the legality of the infringement the Supreme Court *en banc* proceeded from the punishment imposed, whereas it checked whether it was necessary in a democratic society to restrict the right of a person, serving an imprisonment sentence, to a mitigating punishment (§ 30). In the present case, too, the Supreme Court *en banc* shall have to decide whether it is necessary in a democratic society that a person on whom a supplementary punishment – withdrawal of a special right – was imposed for an administrative offence, serve the full sentence after 1 September 2002, when the law no longer provides for such a supplementary punishment. In relation to infringement of the fundamental right to equality it is to be ascertained whether the more favourable treatment of persons on whom punishments are imposed later, is based on a reasonable ground.

29. The Supreme Court *en banc* shall review the proportionality of a restriction with the help of three characteristics – the suitability and necessity of the measure and the proportionality of it in the narrow sense (see § 30 of the referred judgment).

The constitutional values that could justify the restriction of the fundamental rights in question are the general sense of justice of the society, effective functioning of law enforcement system, legal force of decisions on punishment, legal certainty and peace of law.

30. In its judgment of 17 March 2003 the Supreme Court *en banc* held that the fact that the maximum punishment was decreased manifests the conviction of the legislator that the earlier punishment was unnecessarily severe (§§ 32 and 33). Unlike in the referred case, in the present case the legislator has considered it necessary to aggravate the principal punishment while abolishing the supplementary one. Also, § 41^{3}(1) of Traffic Act provides for the same offence for the suspension of the right to drive as an administrative coercive measure. Automatic release from a supplementary punishment would, in such a situation, result in an unjustifiably lenient treatment of persons who had been punished earlier.

31. Yet it would be practically impossible to find a just ground for decreasing a supplementary punishment. This would require a precise comparison of the extent to which supplementary punishments are mitigated

and principal punishments are aggravated, and of the gravity of measures of administrative coercion, for what there is no basis, and that is why the application of a mitigating law may mean a new hearing of an administrative offence matter. This would encumber the law enforcement bodies much more than release of persons serving imprisonment sentences after the maximum imprisonment, provided for in the new law, has been served.

Furthermore, a large-scale early restoration of the right to drive would give a wrong and misleading signal to the society from the point of view of legal policy, that in the new law the state has decided to be more lenient in regard to traffic violations than is actually the case. Traffic offences are an important social problem, and that is why the Supreme Court *en banc* is of the opinion that the precaution of the legislator in review of earlier punishments in case of traffic offences is justified.

Bearing in mind the objectives of fair punishment and effectiveness of law enforcement system, the Supreme Court *en banc* is of the opinion that in this context the continuous serving of a supplementary punishment is a suitable and necessary measure.

32. Alongside the aforesaid the legal force of a decision on punishment has to be pointed out as an independent value, which is necessary for guaranteeing the authority of administration of justice, legal certainty and peace of law. Each legal dispute must result in a final decision some time. It is first and foremost the principle of legal certainty that requires that a line be determined after which the issues which were the objects of disputes can no longer be raised.

33. Unlike in a situation where a more severe punishment consists in an imprisonment longer than the maximum imprisonment provided for in a later law, in the present situation the infringement is proportional in the narrow sense. The right to drive a vehicle is not a fundamental right of a person, although through the right to drive several other fundamental rights of a person can be realised. Primarily, this is one of the ways through which a person can realise the right to free self-realisation, established in § 19(1) of the Constitution.

Nevertheless, the suspension of the right to drive infringes the rights of a person more leniently than deprivation of liberty for the same duration. In the present case there are no such fundamental rights at stake that would force the arguments for remaining in force of a punishment to retreat. The Supreme Court *en banc* agrees with the opinion of the Chancellor of Justice that proceeding from the principle of legal certainty the review of decisions is not justified.

34. Thus, the regulation of § 5(2) of PCIA, pursuant to which withdrawal of the right to drive as a supplementary punishment has to be fully served even after 1 September 2002, if the act itself is still punishable as an offence, is constitutional.

V.

35. On the basis of the aforesaid there was no need for the legislator to provide for a special procedure in the Penal Code Implementation Act for the resolution of this dispute and other analogous disputes, and that is why the adjudication of the appeal of R. Tsoi falls within the competence of administrative courts. An administrative court shall have to ascertain whether the police prefecture reacted lawfully to the petition of R. Tsoi by not referring the petition to a county or city court. This is an issue the Supreme Court *en banc* can not adjudicate, because this would exceed the scope of the appeal against a ruling.

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

1. I consent to the opinion of the majority of the Supreme Court *en banc* that the valid punitive law would treat R. Tsoi for the act committed by him more leniently than the previous regulation. I also consent to the conclusion of the Supreme Court *en banc* that the continuing serving of the imposed punishment constitutes an infringement of the fundamental right established in the second sentence of § 23(2) of the Constitution, and results in the different treatment of persons punished before and after 1 September 2002, thus in the infringement of the fundamental right established in the first sentence of § 12(1) of the Constitution (§ 27 of the judgment).

I do not consent to the reasoning as a result of which the Supreme Court *en banc* concluded that the examined regulation was constitutional.

2. First of all, I can not consent to the view expressed in § 29 of the judgment that one of the constitutional values that could justify the restriction of fundamental rights is the general sense of justice of the society. I find that the general sense of justice of the society is something that is hard to gauge and probably too changing to justify the constitutionality of an infringement of fundamental rights.

3. The Supreme Court *en banc* found that the continuing service of the supplementary punishment is a necessary measure because application of a mitigating law may mean a review of an administrative offence matter, which would burden the law enforcement bodies too much.

In order to justify the avoidance of overburdening the law enforcement authorities, it should be clear, at least approximately, how may persons are currently serving the supplementary punishment of withdrawal of the right to drive. The materials of the present case do not include data about the number of such persons on 1 September 2002, when the withdrawal of the right to drive as a supplementary punishment was abolished.

I am of the opinion that continuing service of the supplementary punishment is not a measure necessary for avoiding the overburdening of law enforcement bodies. A measure is necessary if the objective can not be achieved by some other measure, less cumbersome on a person, but at least as effective as the former one (see § 30 of the judgment of the Supreme Court *en banc* of 17 March 2003, in case No 3-1-3-10-02). There was a measure, more lenient for a person, to avoid the overburdening of law enforcement bodies. The more lenient measure could have consisted in the replacement of withdrawal of the right to drive, imposed on a person under the previous law as a supplementary punishment, by the suspension of the right to drive for three months, as provided for in the new law, if the unserved part of the supplementary punishment exceeded three months. The more lenient measure could have been implemented in the form resembling amnesty, by establishing the technical rules for releasing from punishment the application of which does not overburden the bodies who had imposed supplementary punishments.

4. § 103(1) of Code of Administrative Offences, repealed as of 1 September 2002, provided for the withdrawal of the right to drive from six moths up to two years and § 106(2) for the withdrawal of the right to drive from 1 months up to 6 months. As of 1 September 2002, for analogous acts the right to drive may be suspended for 3 months under the Traffic Act. On 20 June 2002 a punishment was imposed on R. Tsoi by which his right to drive was withdrawn for 24 months. Thus, R. Tsoi was punished about two months before the date when the withdrawal of the right to drive as a supplementary punishment lost its validity. I think that withdrawal of the right to drive for two years is an intensive infringement of the right to free self-realisation established in § 19(1) of the Constitution. The persons who were deprived of the right to drive for two years before 1 September 2002 are treated differently in comparison to persons whose right to drive was suspended for three months after the referred date. I do not think the Supreme Court *en banc* has succeeded in justifying the conformity of this different treatment with the fist sentence of § 12(1) of the Constitution.
