Constitutional judgment 3-3-1-77-03

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-3-1-77-03
Date of judgment	30 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, Julia Laffranque, Jaak Luik, Jüri Põld, Harri Salmann, Tambet Tampuu and Peeter Vaher.
Court Case	Action of Peeter Ludvig for the annulment of the Kuressaare Hospital Foundation expert's act no. 59 of 2 August 2003 determining the degree of intoxication and decision no. 1-10/449 of the Central Committee of Traffic Medicine of 1 September 2003.
Disputed judgment	Ruling of the administrative law chamber of the Tallinn Circuit Court of 2 October 2003 in administrative matter no. 2-3/768/2003.
Petitioner and type of action	Peeter Ludvig's appeal against the ruling.
Type of proceeding	Written proceeding

DECISION

To dismiss Peeter Ludvig's appeal against the ruling.

FACTS AND COURSE OF PROCEEDING

1. On 2 August 2003 a police officer of the Saare Police Prefecture took P. Ludvig to Kuressaare hospital for ascertainment of the state of intoxication. On the same day a doctor of the hospital prepared an expert's act no. 59 on the determination of the degree of intoxication, from which it appears that P. Ludvig had a medium degree of intoxication.

2. P. Ludvig submitted a challenge with the Central Committee of Traffic Medicine, by the decision of which of 1 September 2003 no. 1-10/449 P. Ludvig's challenge was dismissed and the decision of the doctor upheld.

3. On 12 September 2003 P. Ludvig filed an action with the Tallinn Administrative Court, requesting that the Kuressaare Hospital Foundation expert's act no. 59 of 2 August 2003 determining the degree of intoxication and decision no. 1-10/449 of the Central Committee of Traffic Medicine of 1 September 2003 be annulled.

4. By the ruling of 16 September 2003, in administrative matter no. 3-164/03, the Tallinn Administrative Court found that the action is not to be heard by an administrative court and returned the action to the complainant. The court argued that a doctor who gives an expert assessment and makes a decision is not a public authority but a person with specialist knowledge. The Central Committee of Traffic Medicine has the same role. The court argued that the referred act is an evidence in criminal proceedings, it can be contested and the suitability of it can be brought to question within a criminal matter.

5. On 19 September 2003 P. Ludvig filed an appeal against the ruling of the Tallinn Administrative Court with the Tallinn Circuit Court, in which he requested that the ruling of the Tallinn Administrative Court be annulled and the matter be referred back to the same court for a hearing.

6. By its ruling of 2 October 2003, in administrative matter no. 2-3/768/2003, the administrative law chamber of the Tallinn Circuit Court upheld the ruling of the Tallinn Administrative Court of 16 September 2003 and dismissed the appeal against the ruling filed by P. Ludvig.

The court argued that removal of a driver with the signs of intoxication from driving a vehicle, submitting a driver to medical examination for ascertaining the state of intoxication, and determination of degree of intoxication, are relationships in public law, more precisely, relationships under penal law. A legal relationship arises between the state and the health care institution ascertaining the state of intoxication, but there is no legal relationship between the person examined and the health care institution or a doctor ascertaining the state of intoxication. A doctor, in the capacity of a person having specialist knowledge, creates a documentary evidence by giving his or her opinion and by recording the opinion in an act on ascertaining the state of intoxication, and the evidence shall be assessed by body conducting extra-judicial proceedings or by a court in a proceeding of an offence. Administrative courts do not assess the evidence collected in a proceeding of an offence. The court did not consent to the argument of the complainant that the state of intoxication was ascertained outside a misdemeanour proceeding.

7. P. Ludvig, in his turn, filed an appeal against the ruling of the Tallinn Circuit Court with the Supreme Court, requesting that the rulings of the Tallinn Administrative Court and the Tallinn Circuit Court be annulled and the matter referred back for a new hearing.

8. By the ruling of the Administrative Law Chamber of the Supreme Court of 22 December 2003 the appeal against the ruling was referred to the Supreme Court *en banc* for a hearing, because the Chamber held that the regulatory framework for examination of persons for ascertaining the state of intoxication may have been in conflict with the Constitution.

OPINIONS OF PARTICIPANTS IN THE PROCEEDING IN THE SUPREME COURT

9. The Chancellor of Justice argues that § 20(6) of the Traffic Act (hereinafter “the TrA”), the Procedure for Ascertaining a State of Intoxication and Determining a Degree of Intoxication and the Procedure for Contesting a Decision on the Determination of a Degree of Intoxication, approved by Regulation no. 120 of the Government of the Republic of 2 April 2002 (hereinafter “the Procedure”), and Directive no. 321 of the Minister of Social affairs of 2 October 2001 are not pertinent legal acts in this matter. In the case of unconstitutionality of these Acts the courts would not have to decide on the acceptance of P. Ludvig’s appeal against a ruling differently than in the case of constitutionality of the Acts. Upon hearing the appeal against the ruling filed by P. Ludvig the Administrative Law Chamber has, in its ruling, came to a material conclusion that P. Ludvig’s appeal against the ruling should be processed by an administrative court of first instance. When reaching the conclusion, i.e. by adjudicating the appeal on its merits, the Administrative Law Chamber had no doubts as to the constitutionality of any of the applicable Acts.

Upon hearing an appeal against the ruling the Supreme Court has no competence to form an opinion on issues of substantive law subject to adjudication. There are no procedural prerequisites for that, arising from § 52(1) of the Code of Administrative Court Procedure, such as a judgment of a circuit court in which a

substantive law norm has been applied incorrectly or a procedural norm has been violated to a material extent, or an appeal in cassation against such a judgment.

10. The Prime Minister, who submitted his opinion of behalf of the Government of the Republic, is of the opinion that the Regulation of the Government of the Republic of 2 April 2001 is not unconstitutional. The procedure approved by the Regulation but specifies the law and does not establish independent grounds for the restriction of persons' rights.

Taking a person to a health care institution or an administrative agency for ascertaining his or her state of intoxication is, in essence, a minor measure of administrative coercion, whereas the act on ascertaining a state of intoxication and a decision of the Central Committee of Traffic Medicine are expert's decisions for the purposes of § 39 of the Administrative Procedure Act (hereinafter "the APA"). The police officer who exercises state supervision is a public authority and performs administrative tasks, whereas a doctor is a person with specialist knowledge, who conducts expert analysis.

11. The Minister of Internal Affairs acting as Minister of Justice is of the opinion that medical examination of a person for ascertaining the state of intoxication is an administrative coercive measure, which falls under the protection of § 20 of the Constitution. Ascertaining a state of intoxication is a procedure important for the purposes of state supervision, and requires expert knowledge. Thus, it may be concluded, that the act on ascertainment of a state of intoxication is essentially an expert analysis for the purposes of § 39 of the APA. Administrative authorities are allowed to involve experts in administrative proceedings on their own initiative, and if necessary, on the basis of the right to organise their activities, to establish by a ruling a more specific procedure for involving forensic institutions, and, if necessary, also a special procedure for contesting the non-legal conclusions reached in an expert's decision.

12. The Minister of Social Affairs is of the opinion that the doubts of the Supreme Court that the pertinent provisions may be unconstitutional are justified. They are justified because proceeding from § 3 of the Constitution it is necessary to regulate the ascertainment of a state of intoxication by law. The first sentence of § 3(1) of the Constitution prohibits to leave issues, important from the constitutional point of view, to be decided by the executive. The fact that the ascertaining of a state of intoxication was delegated, by a Regulation of the Government of the Republic, to persons in private law, is also in conflict with § 3 of the Constitution, because the Traffic Act does not contain a norm delegating such authority.

The Minister of Social Affairs also argues that § 22 of the Procedure, which establishes the procedure for contesting, is in conflict with § 73 of the APA, and it is not allowed to set up the Central Committee of Traffic Medicine by a Directive of the Minister of Social Affairs. The Directive of the Minister of Social Affairs imposes an obligation on the Committee to review and make decisions concerning challenges related to driver's degree of intoxication, thus a Directive like this is not a decision on issues of self-organisation.

13. Peeter Ludvig is of the opinion that the norm of § 20(6) of the TrA delegating authority is too general and does not allow the Government of the Republic to regulate several spheres necessary for the ascertaining of a state of intoxication. Furthermore, the Government of the Republic has exceeded its authority, as the concept of state of intoxication in the Procedure is not in conformity to the concept in § 20 of the TrA, and the Government of the Republic has appointed the persons, who have competence to ascertain a state of intoxication, by exceeding the limits of the norm delegating authority.

14. The Economic Affairs Committee of the Riigikogu, who replied on behalf of the Riigikogu, did not express its opinion, instead it delivered materials concerning the legislative proceeding of the Traffic Act in the Economic Affairs Committee.

CONTESTED LEGISLATION

15. The Traffic Act (RT I 2001, 3, 6), which entered into force on 1 February 2001.

"§ 20. Prohibition on driving vehicles

[…]

(6) The procedure for ascertaining a state of intoxication and determining a degree of intoxication and the procedure for contesting a decision on the determination of a degree of intoxication shall be established by the Government of the Republic.

[…]"

16. Procedure for Ascertaining a State of Intoxication and Determining a Degree of Intoxication and the Procedure for Contesting a Decision on the Determination of a Degree of Intoxication, approved by Regulation no. 120 of the Government of the Republic of 2 April 2001 (RT I 2001, 35, 196).

17. Directive no. 321 of the Minister of Social Affairs of 2 October 2001.

OPINION OF THE SUPREME COURT *EN BANC*

18. On the basis of § 70(11) of the Code of Administrative Court Procedure, the Administrative Law Chamber of the Supreme Court, by its ruling of 22 December 2003, transferred P. Ludvig's appeal against a ruling to the Supreme Court en banc for ascertaining whether § 20(6) of the TrA, the Procedure for Ascertaining a State of Intoxication and Determining a Degree of Intoxication and the Procedure for Contesting a Decision on the Determination of a Degree of Intoxication, approved by Regulation no. 120 of the Government of the Republic of 2 April 2001, and Directive no. 321 of the Minister of Social Affairs of 2 October 2001 are in conformity with the Constitution.

The ruling of the Administrative Law Chamber of the Supreme Court has been made within a proceeding of an appeal against a ruling, the object of which is the issue of competence of the courts: a dispute over whether an administrative court is competent to adjudicate the appeal of P. Ludvig.

The Supreme Court *en banc* is of the opinion that the issues of constitutionality can not be dealt with unless the issue of competence has been decided on, because otherwise there would be no possibility to say whether the legal norms the constitutionality of which is questioned, are pertinent or not.

19. In the ruling of 2 October 2003 the administrative law chamber of the Tallinn Circuit Court held that although the state of intoxication of P. Ludvig was ascertained within a relationship in public law, the procedure for ascertaining a state of intoxication can not be contested under § 3(1) of the Code of Administrative Court Procedure. The ruling of the circuit court refers to the fact that pursuant to § 3(2) of the Code of Administrative Court Procedure, adjudication of disputes in public law for which a different procedure is prescribed by law does not fall within the competence of administrative courts. The circuit court argued that the relationship in question falls within a proceeding of an offence. Ascertaining a state of intoxication can be treated as giving an opinion on the basis of specialist knowledge, and thus, as a procedure the result of which is an evidence that can be used in a proceeding of an offence.

The Supreme Court *en banc* considers it necessary to decide, first of all, whether the lawfulness of ascertaining the state of intoxication of P. Ludvig can be contested within an administrative proceeding or a proceeding of an offence.

20. In the action filed with the administrative court P. Ludvig requested that the expert's report on intoxication and the decision of the Central Committee of Traffic Medicine be annulled, and he argued that he had been sober on 2 August 2003 in Kuressaare. Thus, P. Ludvig wished the administrative court to assess the lawfulness of the ascertainment of his state of intoxication.

21. Driving a power-driven vehicle in a state of intoxication is, depending on circumstances, punishable either as a misdemeanour under § 74^{19} of the TrA, or as a criminal offence provided for in § 424 of the Penal Code (hereinafter "the PC"). Pursuant to § 3(1) of the Code of Criminal Procedure the body

conducting proceedings shall initiate a criminal proceeding if there is sufficient information indicating at elements of criminal offence. Under § 2 of the Code of Misdemeanour Procedure the same principle applies also in misdemeanour proceedings.

22. There is a criminal proceeding pending, concerning the matter of P. Ludvig, under § 424 of the Penal Code, which provides for liability for driving in a state of intoxication. Within the proceeding the court must assess whether on 2 August 2003 in Kuressaare P. Ludvig had been intoxicated or not, and this requires also an assessment of whether evidence has been obtained lawfully. That is why the appeal of P. Ludvig does not fall within the competence of an administrative court and the appeal against the ruling shall be dismissed.

23. In the case of a violation of a fundamental right a person must have the right of a recourse to the courts for the protection of his or her rights. Pursuant to § 3(1) of the Code of Administrative Court Procedure an administrative court shall adjudicate an action filed under a public law dispute only if a different procedure has not been prescribed by law (*see also a ruling of the Supreme Court en banc of 22 December 2000, in case no. 3-3-1-38-00 – RT III 2001, 2, 14*). The Supreme Court en banc points out that, for example, such a different procedure has been prescribed in §§ 76-80 of the Code of Misdemeanour Procedure, and in §§ 228-232 of the Code of Criminal Procedure which shall enter into force on 1 July 2004.

24. Pursuant to the first sentence of § 14(2) of the Constitutional Review Court Procedure Act the Supreme Court shall, within constitutional review proceedings, review the constitutionality of only pertinent legislation of general application (*see judgment of Constitutional Review Chamber of the Supreme Court of 22 December 2000, in case no. 3-4-1-10-00 – RT III 2001, 1, 1, paragraph 10; judgment of Constitutional Review Chamber of the Supreme Court of 28 October 2002, in case no. 3-4-1-5-02 – RT III 2002, 28, 308, paragraph 15*).

25. When adjudicating the appeal against a ruling the Supreme Court *en banc* shall give an opinion on which court is competent to hear P. Ludvig's appeal. In a dispute about competence the decisive importance is to be attached to the norms that determine which court shall adjudicate a concrete dispute. The Supreme Court *en banc* is of the opinion that the state of intoxication of P. Ludvig was ascertained within a proceeding of an offence and that the procedure can be contested within the proceeding of an offence. Thus, the norms regulating the general procedure for contesting a decision on the determination of a state of intoxication are not pertinent, and the Supreme Court *en banc* has no ground to review the constitutionality of these provisions.

DISSENTING OPINION
of justices Tõnu Anton, Indrek Koolmeister, Ants Kull,
Julia Laffranque, Jaak Luik, Jüri Põld and Harri Salmann

We do not consent to the opinion of the majority of the Supreme Court *en banc* concerning the determination of a competent court (I), and on the pertinence of the norms the constitutionality of which was called into question by the Administrative Law Chamber of the Supreme Court (II).

It appears from the case that P. Ludvig had addressed the Tallinn Administrative Court with a request that the Kuressaare Hospital Foundation expert's act no. 59 of 2 August 2003 determining the degree of intoxication, and decision no. 1-10/449 of Central Committee of Traffic Medicine of 1 September 2003 be annulled.

The Supreme Court *en banc* found that the adjudication of the appeal was not within the competence of administrative courts, as there was a criminal proceeding pending, in which it had to be assessed whether evidence had been obtained lawfully.

I.

1. We argue that it does not appear from the judgment of the Supreme Court *en banc* on the basis of which facts the Supreme Court *en banc*found that the state of intoxication was ascertained within a proceeding of an offence. The fact that at the time of rendering the judgment of the Supreme Court *en banc* a criminal proceeding was pending, is irrelevant.

2. A proceeding of an offence is initiated if there are sufficient facts indicating at the existence of necessary elements to constitute an offence. In the present matter there is no information that the proceeding of an offence had been initiated before the medical ascertainment of a state of intoxication, or that the taking of a person to a hospital for ascertainment of a state of intoxication or that the ascertainment itself were the first procedural acts. What is important is the manner of the activities of a police officer upon taking a person for the ascertainment of a state of intoxication – the person was not apprehended pursuant to procedural norms, he was not informed of his rights in a criminal proceeding or in the procedural acts in the alleged proceeding of an offence, etc. In fact, the proceeding of an offence in regard of P. Ludvig was initiated only after the medical ascertainment of a state of intoxication, which gave the police officer sufficient information indicating at a commission of an offence.

3. A procedural acts in a proceeding of an offence in regard of a person is conducted when a person is informed of the procedural act, he or she has been informed of his or her rights, etc. Exceptions may be established to this rule (e.g. the Surveillance Act). The first procedural act as an act commencing a proceeding of an offence, must be recognised as such by a police official as well as by the person in regard of whom the referred procedural act is performed. In the present case this is not so.

4. Procedural acts of a proceeding of an offence must have a basis under procedural law. The judgment of the Supreme Court *en banc* does not deal with the legal basis of the ascertainment of a state of intoxication as the allegedly first procedural act. In this connection the following is to be pointed out:

1) procedural acts restrict fundamental rights of a person, whereas it is required that restrictions be established on the level of Acts passed by the Riigikogu. It does not proceed from the Code of Criminal Procedure that a preliminary investigator is entitled to perform procedural acts not established by the referred Code;

2) medical examination of a person for the ascertainment of his or her state of intoxication (ascertainment of a state of intoxication) as an alleged procedure of a proceeding of an offence is established neither by the Code of Criminal Procedure nor by the Code of Misdemeanour Procedure. Yet, the ascertainment of a state of intoxication is provided by the Traffic Act and by the Procedure for Ascertaining a State of Intoxication and Determining a Degree of Intoxication and the Procedure for Contesting a Decision on the Determination of a Degree of Intoxication (hereinafter “the Procedure”), approved by a Regulation of the Government of the Republic;

3) § 20^1 of the Traffic Act, which provides for the removal from driving a vehicle of a person with signs of intoxication and for sending the person for an examination in order for his or her state of intoxication to be ascertained, treats the referred procedures as coercive measures in an administrative proceeding.

5. Treatment of ascertainment of a state of intoxication as a procedural act of an administrative proceeding is supported by the following circumstances, inherent to administrative proceedings: if the signs of consumption of alcohol, narcotic drugs or psychotropic substances or intoxication are ascertained, a bill shall be submitted to the person for covering the expenses of the ascertainment of the state of intoxication (§ 9(6) of the Procedure); evasion by person of examination of state of intoxication to be ascertained is a misdemeanour (§ 74^{20} of the Traffic Act); both the person and the agency ordering for the ascertainment of a state of intoxication have a possibility to file a challenge against the medical decision of state of

intoxication within the challenge proceedings, and a special dispute settlement bodies (committees) have been set up for that.

6. According to the statistics of different countries up to 20% of medical examinations for the ascertainment of a state of intoxication yield a negative result, that is the person has not consumed alcohol or narcotic substances. If such an examination was carried out within a proceeding of an offence, the proceeding of the offence would be subject to termination by a ruling. In practice nothing of the kind happens.

7. The judgment of the Supreme Court *en banc* has, without a basis, extended the criminal procedural law regime to legal relationships, which remain outside criminal proceedings. Such an misleading approach results in a seeming possibility to regard several administrative procedures as parts of proceedings of offences. This pertains, first of all, to supervision proceedings (tax supervision, etc.). As in the course of supervision the elements of offences, resulting in institution of misdemeanour proceedings (or also criminal proceedings), are discovered, an erroneous conclusion can be drawn from the judgment of the Supreme Court *en banc*, that the referred supervisory operations (tax audits, sampling, expert assessments in administrative proceedings, etc.) constitute procedures of a proceeding of a pertinent offence, the lawfulness of which can be assessed only within the proceeding of the offence.

8. Extending criminal procedural law regime to procedures of administrative proceedings unfoundedly prejudices the rights of persons, creating, among other things, obstacles to the exercise of the right of appeal. It remains unclear how could a person, subjected to ascertainment of a state of intoxication, file a complaint against the person who ascertained the state of intoxication (a doctor), or how he or she could challenge the decision of the Central Committee of Traffic Medicine within a criminal proceeding. Also, it remains unclear what are the prerequisites for a county or city court, within a criminal proceeding, to initiate the issue of constitutionality of an Act establishing the competence of a doctor or the Central Committee of Traffic Medicine.

9. The Supreme Court *en banc* argues in § 23 of the judgment that in the case of a violation of a right a person must have the right of a recourse to the courts. The Supreme Court *en banc* gives an erroneous interpretation to § 3(1) of the Code of Administrative Court Procedure, arguing that an administrative court shall adjudicate an action filed under a public law dispute only if a different procedure has not been prescribed by law. The regulation of § 3(1) and (2) of the Code of Administrative Court Procedure means the opposite. According to the Code of Administrative Court Procedure the administrative courts shall adjudicate all public law disputes, with the exception of those for the adjudication of which a different procedure has been prescribed by law.

The Supreme Court *en banc* points out that such a different procedure has been provided for in §§ 76-80 of the Code of Misdemeanour Procedure, and in §§ 228-232 of the Code of Criminal Procedure which shall enter into force on 1 July 2004. But in the present case we are not dealing with an offence, and thus the reference to the Code of Misdemeanour Procedure is irrelevant. The reference to the Code of Criminal Procedure, which has not yet entered into force, is irrelevant, too. What is more important, is that for the exercise of the referred challenge procedure the procedural act must have been performed within a proceeding of an offence and that it is possible to challenge a procedural measure or act of a body conducting extra-judicial proceedings or of an investigative body (preliminary investigator).

P. Ludvig can not, within a criminal court proceeding, achieve that the decision part of a judgment include an opinion on whether the ascertainment of his state of intoxication was lawful or not. P. Ludvig wishes that the opinion on the lawfulness of the ascertainment of his state of intoxication be exactly in the decision part of a court judgment.

10. It is important to emphasise in relation to a person’s right of defence that the opinions rendered on the lawfulness of an act or procedure in an administrative proceeding and in a criminal proceedings may differ. An act, which is proportional (suitable, necessary and proportional in the narrow sense) in a criminal proceeding, may not prove proportional in an administrative proceeding.

11. There is no ground to deny that information collected within an administrative proceeding may have the importance of evidence in a proceeding of an offence. The information, which was collected within an administrative proceeding, is evaluated within a proceeding of an offence on the basis of relevant procedural law. Nevertheless, the aforesaid does not mean that an administrative procedure should be terminated when a proceeding of an offence is initiated, and that a person loses a part or the whole right of appeal against the procedures of an administrative proceeding and of the right to file an action with an administrative court.

12. On the basis of the aforesaid we hold that the ascertainment of a state of intoxication constitutes an administrative proceeding and the procedures performed and acts issued within the referred proceedings are subject to contestation in an administrative court.

II.

13. The opinion of the Supreme Court *en banc* that the norms regulating the procedure for ascertaining the state of intoxication are not relevant for the determination of a competent court, is unjustified. Such norms are § 20(6) of the Traffic Act, the Procedure for Ascertaining a State of Intoxication and Determining a Degree of Intoxication and the Procedure for Contesting a Decision on the Determination of a Degree of Intoxication, approved by Regulation no. 120 of the Government of the Republic of 2 April 2002, and Directive no. 321 of the Minister of Social affairs of 2 October 2001, by which the Central Committee of Traffic Medicine was set up and the duties and rules of procedure of the Committee were established.

The referred Acts indicate at the administrative law nature of the ascertainment of a state of intoxication and provide for the competence of bodies upon ascertainment of a state of intoxication and upon challenging thereof. Determination of ascertainment of a state of intoxication as an administrative proceeding or a proceeding of an offence is possible only if the norms, constituting pertinent procedures, are analysed. The judgment of the Supreme Court *en banc* lacks such analysis. Perhaps this is why the Supreme Court *en banc* has reached a wrong conclusion upon determining the competent court.

14. In constitutional review proceedings the Supreme Court has considered legislation to be pertinent, if the provision of the legislation "[…] the constitutionality of which is reviewed by the court of constitutional review [is] decisive for the outcome of the case." (judgment of 22 December 2000, in case no. 3-4-1-10-00, RT III 2001, 1, 1). It proceeds from the judgment of the Supreme Court of 28 October 2002, in case no. 3-4-1-5-02 (RT III 2002, 28, 308), that 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.

Such a definition of a decisiveness of an Act is sufficient in the majority of cases, but this can not be regarded as the only and exhaustive definition. In the present case P. Ludvig's appeal against a ruling can be adjudicated only through determining the nature and content of the activities of the doctor and of the Central Committee of Traffic Medicine. The nature and content of the activities of the doctor and of the Central Committee of Traffic Medicine is provided for in the above referred legislation. When determining the competent court also several other Acts should be taken into consideration (the Code of Criminal Procedure, the Code of Misdemeanour Procedure, etc.). The provisions on the basis of which the court has to hear an appeal on its merits, on which the court has to build its reasoning, are indisputably pertinent for the adjudication of the matter.

The provisions of the Traffic Act, of Regulation no. 120 of the Government of the Republic of 2 April 2001, and of the Directive of the Minister of Social Affairs of 2 October 2001 are of decisive importance for the adjudication of P. Ludvig's case. If the referred norms are not applied, the court competent to hear P. Ludvig's appeal on its merits can not be determined. Unconstitutional norms shall not be applied. According to the first sentence of § 3(1) of the Constitution the powers of the state, including judicial power, shall be exercised pursuant to the Constitution and laws which are in conformity therewith. Thus, even when determining a competent court on the basis of an appeal against a ruling, the court can assess the

constitutionality of norms determining a pertinent procedure, especially when this amounts to assessment of legality.

15. In addition to the aforesaid it has to be pointed out that when a pertinence of a provision is interpreted restrictively, as referred above, a court can not assess, within a criminal proceeding, the constitutionality of norms regulating ascertainment of a state of intoxication either in the reasoning or the decision of its judgment. A court of general jurisdiction can ignore the decision on the determination of a state of intoxication and resort to other evidence. Thus, with the approach of the courts of general jurisdiction, a person looses the possibility to contest the constitutionality of the ascertainment of his or her state of intoxication.

CONCURRING OPINION
of justice Eerik Kergandberg

I consent to the conclusions and – in general – to the reasoning of the judgment of the Supreme Court *en banc* in case no. 3-3-1-77-03, yet I consider it necessary to add the following by way of a concurring opinion.

1. First of all I consider it necessary to emphasise that in Estonia, too, since 1 July 2000, as a result of the reform of the institute of initiation of a proceeding of an offence, we have a principle that a proceeding of an offence is commenced by the first procedural act, upon the existence of reason and grounds (§ 93(1) of the Code of Criminal Procedure and § 58(1) of the Code of Misdemeanour Procedure). The idea to be achieved by the referred reform was that if there is sufficient suspicion that an offence has been committed, it is not right to control the reasonableness of the suspicion outside the proceeding of the offence, instead the suspicion should be controlled, as fast as possible, in the form of proceeding of the offence, thus guaranteeing the person subject to proceedings all legal guarantees provided for the proceedings of offences. On the basis of the objectives of the referred reform the first procedural act for controlling the suspicion, if there is a sufficient suspicion that an offence has been committed, constitutes the objective beginning of the proceeding of the offence and the preliminary investigator is not competent to consider the proceeding of an offence to have started as of some other time than the first procedural act. Unlike during the period before 1 July 2000, a preparation of a pertinent ruling or any other procedural act is not required for the commencement of a criminal proceeding.

2. Although the legislator has not considered it necessary to determine the concept of a procedural act, it is justified to state, proceeding from the nature of a proceeding of an offence, that in a proceeding of an offence a procedural act is any proactive measure the objective of which is to obtain evidence which can be used in a proceeding of an offence; by which fundamental rights are restricted for the objectives of proceeding of an offence; the content of which is to use the possibility, provided by law, to require that another subject of a proceeding of an offence perform a certain procedural act; the content of which is the realisation of the right to appeal if a person does not consent to a procedural act or the results and course of proceedings as a whole, or in the framework of which the body conducting proceedings and determining the course of the proceedings reaches a decision.

3. Bearing in mind that pursuant to § 1(3) of the Code of Criminal Procedure and § 2 of the Code of Misdemeanour Procedure also other Acts, beside the referred Codes, may serve as sources of law of proceeding of offences, there is no ground to assert that the Code of Criminal Procedure and the Code of Misdemeanour Procedure contain an exhaustive list of procedural acts allowed in proceedings of offences. For the purposes of legislative economy it could be justified to regulate in the so called other laws first and foremost such procedural acts which are multifunctional or which may have importance in other spheres in addition to proceedings of offences, for example in administrative proceedings. Removal of a person from driving a vehicle if there is sufficient reason to believe that he or she is in a state of intoxication, sending the person to a health care institution and the medical examination in order for his or her state of intoxication to

be ascertained – i.e. the procedures conducted on the basis of § 20(5) and (6) and § 20^1(2) of the Traffic Act and in conformity with the Procedure for Ascertaining a State of Intoxication and Determining a Degree of Intoxication and the Procedure for Contesting a Decision on the Determination of a Degree of Intoxication, approved by Regulation no. 120 of the Government of the Republic of 2 April 2002 (hereinafter "the Procedure"), and Directive no. 321 of the Minister of Social affairs of 2 October 2001 – are also to be considered such multifunctional procedures which, depending on concrete circumstances, may be procedural acts in a proceeding of an offence.

4. The sufficiency of information for suspecting that a driver is in a state of intoxication is a category of judgment. It is important to emphasise in this context that the sufficiency of information need not and can not always mean that the state of intoxication is determined. This is true especially in the cases when the body conducting proceedings is of the opinion that there is sufficient information to suppose that a driver is in the state of intoxication and thus, that there is a ground from commending a proceeding of an offence, but the driver requests, on the basis of § 4(2) of the Procedure, that he or she be taken to a health care institution in order for his or her state of intoxication to be ascertained.

5. In the case of the event which took place in Kuressaare on 2 August 2003 the body conducting proceedings acted on the basis of the following facts: the police had been informed that a Volkswagen with a licence plate 81 ZAF was driving around in Kuressaare and the driver of the car was intoxicated; when the car was stopped, there was an open bottle of vodka in it; the driver and the passenger in the vehicle were dressed in long white smock-overalls; the movements of the driver were unsteady, he was staggering and he smelled of alcohol; it appeared that the driver – Peeter Ludvig – had been punished on 30 July 2003 under § 74^{19} of Traffic Act for driving a power-driven vehicle in a state of intoxication. I am of the opinion that on the basis of this primary information the body conducting proceedings was competent and under obligation to remove Peeter Ludvig from driving a vehicle and to commence the proceeding of an offence by this. Thus, the ascertainment of the state of intoxication of P. Ludvig took place within the proceeding of an offence and the procedure can not be contested under § 3(1) of the Code of Administrative Court Procedure in an administrative court as an administrative procedure.

6. At the same time I hold that proceeding from the ruling of the Supreme Court *en banc* of 22 December 2000, in case no. 3-3-1-38-00, P. Ludvig is entitled, until the presently valid Code of Criminal Procedure loses its validity, to contest any procedural acts conducted in regard of him within a proceeding of an offence in an administrative court. Beginning with 1 July 2004, i.e. as of entering into force of the new Code of Criminal Procedure, the law provides for the competence of courts of general jurisdiction to adjudicate complaints against the procedures conducted by preliminary investigators.
