Constitutional judgment 3-3-2-1-04

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-3-2-1-04
Date of judgment	10 January 2004
Composition of court	Chairman Jaano Odar and members Tõnu Anton, Jüri Ilvest, Henn Jõks, Ott Järvesaar, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Jüri Põld, Harri Salmann, and Peeter Vaher.
Court Case	Action of the AS Giga applying for declaration of illegality of a measure of the Tartu City Government and a measure of the Tartu Police Prefecture.
Disputed judgment	Judgment of the Tartu Administrative Court of 13 September 1996 in administrative matter no. 3-28/96 and judgment of the Tartu Circuit Court of 22 November 1996 in administrative matter no. II-3-102/96.
Petitioner and type of action	Petition for review of the AS Giga
Type of proceeding	Written proceeding

DECISION

1. To satisfy the petition of the AS Giga partly.

2. To annul the judgment of the Tartu Circuit Court of 22 November 1996 in administrative matter no. II-3-102/96 to the extent that the circuit court terminated the proceeding of the action filed against the measures of the police prefecture.

3. To annul the judgment of the Tartu Administrative Court of 13 September 1996 in administrative matter no. 3-28/96 to the extent that it did not satisfy the action applying for declaration of illegality of the measures of the police prefecture.

4. To return the action against the measures taken by the Tartu Police Prefecture to the Tartu Administrative Court for a new hearing.

5. To return the security.

FACTS AND COURSE OF PROCEEDING

1. In 1996 the AS Giga filed an action with the Tartu Administrative court applying for declaration of illegality of the following:

1. A measure taken by the Tartu City Government by which the complainant's business activities were illegally inspected and audited and information about that published in the press;

1. A measure taken by the Tartu Police Prefecture - seizure and transfer into the use of the Tartu City Government of documents reflecting business activities of the AS Giga.

2. On the basis of § 20(1)2) of Code of Administrative Court Procedure (hereinafter "the CACP") the Tartu Administrative Court dismissed the action. The administrative court reasoned its judgment as follows:

1. It appears form the letter of the Tartu Police Prefecture of 17 November 1995 no. 3-14/4193 that the prefecture requested the assistance of the Tartu City Government finance department in organising the auditing in the course of investigation related to the use of foreign loan taken by the Tartu City Government energy department.

2. It appears from the materials of the file that the Tartu City Tax Board Office has inspected the accounting documents of the AS Giga. The activities of the Board are not related to the City Government. It was not proved at the court session that the Tartu City Government was involved in publishing data about business activities of the AS Giga in the press.

3. On the basis of § 4(1)1) of the CACP it is possible to file an action with an administrative court against measures of the police. Pursuant to § 3(2)3) of the CACP those actions and petitions that shall be resolved pursuant to the procedure established by the Code of Civil Procedure and the Code of Criminal Procedure do not fall within the competence of an administrative court. An administrative court is competent to check a police measure proceeding from the formal side thereof. An administrative court can not intervene into a criminal proceeding or supervise whether investigation authorities observe the law.

3. In its appeal the AS Giga requested that the judgment of the administrative court be annulled and a new judgment rendered, declaring the measures of the Tartu Police Prefecture and the Tartu City Government illegal.

4. The circuit court dismissed the appeal. The judgment of the administrative court was annulled to the extent that it did not satisfy the action of the AS Giga applying for the declaration of illegality of measures of the Tartu Police Prefecture. In that regard the proceeding of the matter was terminated on the basis of the reasoning that the hearing of the action was outside the competence of administrative courts. The judgment of the administrative court was upheld to the extent that it dismissed the action of the AS Giga applying for the declaration of illegality of measures of the Tartu City Government.

5. The AS Giga filed an appeal in cassation requesting that the judgment of the circuit court be annulled and a new judgment rendered, declaring measures of the Tartu Police Prefecture (seizure of documents reflecting business activities of the AS Giga on 15 November 1995 and 20 November 1995 and transfer of the data

into the use of the Tartu City Government) and of the Tartu City Government (inspection of the AS Giga business activities and publication of the results thereof) illegal. It was argued in the appeal in cassation that the Tartu Police Prefecture has violated § 33 of the Constitution, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention"), as well as the provisions of the Code of Criminal Procedure. It was also argued that the Tartu City Government has violated §§ 32 and 33 of the Constitution and Article 8 of the Convention. On 15 January 1997 the appeals selection committee of the Supreme Court did not grant the appeal in cassation the leave to appeal.

6. On 4 July 1997 Tiit Veeber filed an application (no. 37571/97) against the Republic of Estonia to the European Commission of Human Rights under former Article 25 of the Convention. The applicant argued that by the search and seizure of documents in the premises of his company the police had violated the rights of the plaintiff, proceeding from Article 8 of the Convention. The applicant also argued that he could not contest the activities of the police in a court and thus Article 6 of the Convention had been violated. The applicant further argued that he had no effective remedy before national authorities against the search and seizure conducted by the police, as required by Article 13 of the Convention.

In its judgment of 7 November 2002 in *Veeber versus Estonia (no. 1)* the European Court of Human Rights found that the Republic of Estonia had violated Article 6(1) of the Convention as contrary to the requirements of the provision the hearing of the matter by a tribunal was not available to the applicant in an effective manner. The Court of Human Rights did not discuss the complaint filed on the basis of Article 8 on its merits. As the Court of Human Rights had ascertained the violation of Article 6(1), it did not consider it necessary to decide on the alleged violation of Article 13 of the Convention. The Court dismissed the applicant's claim of 500 000 Estonian kroons for satisfaction for distress caused by his fruitless efforts to gain legal protection of his rights. The Court of Human Rights agreed with the Estonian Government that the finding of a violation of the Convention in itself constituted an adequate just satisfaction for any non-pecuniary damage as alleged by the applicant.

7. On 15 January 2003 the AS Giga filed a petition for review with the Supreme Court, applying for the annulment of the judgment of the Tartu Administrative Court of 13 September 1996 and of the judgment of the Tartu Circuit Court of 22 November 1996, and for the transfer of the matter for a new hearing to the Tartu Administrative Court.

8. On 5 June 2003 the Administrative Law Chamber of the Supreme Court referred the matter to the Supreme Court *en banc* for hearing.

JUSTIFICATIONS OF THE PARTICIPANTS IN THE PROCEEDING IN THE SUPREME COURT

9. The representative of the AS Giga argues as follows:

1. §§ 14 and 15 of the Constitution require the legislator to establish a procedure that would guarantee every person the right of recourse to the courts if his or her rights and freedoms are violated. The referred procedure must sufficiently guarantee the real and effective protection of persons' rights. As neither § 75 nor § 81 of the CACP provide for a violation of a person's rights by wrong application of law by the courts as one of the grounds for a new hearing of a matter, the effective protection to the person is not guaranteed. Thus, the legislative power has failed to fulfil its positive obligation.

2. The finding of violation of Article 6 of the Convention by the European Court of Human Rights does not eliminate the violation of individual's rights. The judgment of the Human Rights Court does not eliminate the fact that because of wrong application of law the action of the AS Giga was not heard on the merits. The judgments made in the process of hearing the action of the AS Giga violate the fundamental rights of the AS Giga. The Court of Human Rights can not annul the judgments of domestic authorities, and that is why the actual elimination of the violation of a person's rights should take place on the domestic level. The Code of Administrative Court Procedure does not offer solutions to the problem. When the Human Rights Court establishes a violation of Article 6(1), it is possible to guarantee the fundamental right established in § 15(1)

of the Constitution only if the legislator ensures to the person, proceeding from § 14 of the Constitution, a possibility of a new court proceeding. If the judgment of the Court of Human Rights did not allow for the initiation of a new proceeding, the judgment violating a person's rights would remain in force.

3. The regulatory framework of the Code of Administrative Court Procedure that does not allow for a review of a judgment after the finding of a violation of a person's rights by the Court of Human Rights is not in conformity with § 15 of the Constitution in conjunction with § 14, because it does not ensure sufficient procedural guarantees for the elimination of violations of persons' rights.

10. The Tartu City Government is of the opinion that the Code of Administrative Court Procedure is not in conflict with § 15 of the Constitution in conjunction with § 14. §§ 15, 24 and 148 of the Constitution in their conjunction regulate the appeal against judgments made in Estonian court system to a higher court. It does not proceed from the Constitution that a judgment of the Court of Human Rights should give rise to the right of appeal to a higher court.

11. Tartu Police prefect argues that:

1. The Constitution does not provide that the Court of Human Rights is a part of Estonian court system and does not refer to the legal force of the judgments of the Human Rights Court. A possibility to apply a judgment of the Court of Human Rights should proceed from the Constitution. In order to enforce the judgments of the Human Rights Court the Constitution and other Acts should be amended.

2. The Constitution does not declare that the international court system is inseparable from Estonian court system. There is no legal ground for enforcement of judgments of international courts. The Courts Act does not refer to international courts. The Code of Administrative Court Procedure is not in conflict with any of the referred Acts.

12. The Constitutional Committee of the Riigikogu is of the opinion that the Code of Administrative Court Procedure is in conflict with § 15 of the Constitution in conjunction with § 14, as it does not allow, on the basis of judgments of the Human Rights Court, to revise the judgments of Estonian courts. The problem can be solved only by amending the law.

13. The Chancellor of Justice argues the following:

1. The Code of Administrative Court Procedure does not establish a clear basis for hearing the petition of the AS Giga. Estonian state has acceded to the Convention and undertaken to guarantee the enforcement of the judgments of the Human Rights Court. Nevertheless, the domestic procedural law does not regulate the proceeding of the present matter clearly. This amounts to a genuine gap in law. To bridge the gap the law with a higher authority should be applied. In the given case the pertinent provisions and principles of law are those derived from the Constitution, the Convention and the Recommendations of the Council of Europe on the implementation of the Convention. On the basis of analysis of §§ 75 and 81 of the CACP, §§ 13, 14, 15 and 123 of the Constitution, Articles 13 and 46(1) of the Convention and Article 4(2) of the seventh additional protocol to the Convention, it can be argued that what we are dealing with is rather a gap of law and not an unconstitutionality. Neither the Constitution nor the Convention give rise to the obligation of a state to review pertinent judgments which have entered into force. Review of a judgment which has entered into force may not always be the best way to restore the violated rights. Perhaps the most effective means, especially in administrative and civil matters, would be if the state paid compensation. It is not possible to guess with certainty whether the Riigikogu, having failed to amend the procedural laws after the ratification of the Convention, considered it possible that a judgment of the Human Rights Court could be regarded as a basis for review for the purposes of § 75(2)1) of the CACP, or whether the Riigikogu has decided that on the basis of those judgments it will not be possible to review judgments which have entered into force.

2. The Supreme Court *en banc* has, on 17 March 2003 in case no. 3-1-3-10-02, rendered an important judgment concerning the possibility of review of and direct applicability of §§ 14 and 15 of the Constitution

to judgments which have entered into force. Then the Supreme Court *en banc* held that if the procedural laws do not guarantee sufficiently effective protection for a person if his or her fundamental rights and freedoms are violated, the Supreme Court is entitled to hear the person's action on the basis of § 15 of the Constitution. In a situation where the Supreme Court en banc has applied the Constitution and procedural laws in their conjunction and has reached a fair procedural decision through which the effective protection of fundamental rights is guaranteed, the declaration of unconstitutionality of procedural norms is not justified.

3. In the present case the gap of law can be bridged in two ways. Firstly, it is possible to interpret the grounds for review of § 75(2)1) of the CACP broadly. Another way for bridging the gap of law would be on the basis of § 15 of the Constitution in conjunction with § 14, and Articles 13 and 46(1) of the Convention. This solution would also be in conformity to the judgment of 17 March 2003 of the Supreme Court*en banc*, on the basis of which the Supreme Court may refuse to hear a person's action on its merits only if there are other effective ways available to the person for the judicial protection of his or her rights as established by § 15 of the Constitution. § 75(2)1) of the CACP in conjunction with § 15 of the Constitution, Articles 13 and 46(1) of the Convention and the practice of the Supreme Court in similar cases guarantees the review of judgments, which have entered into force, if the Supreme Court finds that other effective remedies have been exhausted.

4. A judgment, which has entered into force, can be reviewed by administrative court procedure if the European Court of Human Rights has established a violation of Article 6(1) of the Convention. In this respect the Code of Administrative Court Procedure is not in conflict with § 15 of the Constitution in conjunction with § 14.

The Chancellor of Justice considered it necessary to express his opinion also for the occasion should the Supreme Court establish that the valid law does not enable the review of judgments which have entered into force. In this context the Chancellor of Justice argues the following. In deciding on judgments which have entered into force two principles important for a state based on the rule of law always clash: right of recourse to the courts and legal peace, consisting in the final force of law of a judgment. In the point of contact of these two principles both theory of law and the valid law provide for two special procedures for review of judgments which have entered into force: revision and correction of court errors. The decision on whether and under what conditions to allow the revision of domestic judgments on the basis of judgments of the Human Rights Court should be taken by the legislator. If the state guarantees other effective remedies, review may not prove necessary or permissible. On the other hand, we can not ignore repeated recommendations of the Council of Europe, calling the states to establish domestic procedures for review of judgments on the basis of judgments of the Human Rights Court. The measures for the effective guarantee of persons' rights are left to be decided by each state. In exceptional circumstances the domestic review of a judgment may prove the most effective means for achieving a fair result, but this may not be the only one. Also, the review of judgments is the only possibility when the violation of Convention, established by the Human Rights Court, consisted in grave procedural errors or shortcomings of domestic judicial proceeding. In the case of the AS Giga we are dealing with the latter. It is the duty of the state to carefully consider and create possibilities for domestic enforcement of the judgments of the Human Rights Court. Neither the Constitution nor the Convention unambiguously provide for a state's obligation to review pertinent judgments which have entered into force. Nevertheless, it is probable that in the case of certain judgments of the Human Rights Court the review of a domestic judgment would be the only effective way to restore a person's rights. Although, applying the Constitution, the Convention and the Code of Administrative Court Procedure in their conjunction, the Supreme Court can even now resolve pertinent petitions, this is but a temporary solution.

14. The Minister of Justice is of the following opinion:

1. The first sentence of § 15 of the Constitution embraces the fundamental right which should guarantee judicial protection without gaps. At the same time the right of recourse to the courts is not an unlimited one. In the present case the fundamental right established in § 15 of the Constitution is restricted by the provisions of the Code of Administrative Court Procedure, which do not enable a person, after the Court of

Human Rights has established a violation of Article 6(1) of the Convention, to have a recourse to the courts for the review of a judgment which has entered into force.

2. On the basis of § 11 of the Constitution a question arises of whether the restriction of the fundamental right established in § 15 of the Constitution, which is expressed in the fact that the review of judgments which have entered into force is prohibited to the extent that excludes the review of a judgment after the Human Rights Court has found a violation of Article 6(1), is in conformity with the principle of proportionality provided for in § 11 of the Constitution.

3. The purpose of norms regulating and restricting the review of judgments which have entered into force is to secure legal certainty. The restriction established is suitable and necessary.

4. A judgment of the European Court of Human Rights establishing a violation of Article 6(1) of the Convention, is not a ground for review under the Code of Administrative Court Procedure. The lack of such a ground for review as a restriction of the fundamental right established in § 15 of the Constitution, damages the fundamental rights of persons more than is justified by the purpose of the restriction. The Code of Administrative Court Procedure, not allowing to review judgments after the Human Rights Court has established a violation of Article 6(1) of the Convention, is not in conformity with the principle of proportionality provided for in § 11 of the Constitution.

5. If the Court of Human Rights establishes a violation, finding that the complainant has not been guaranteed the right to a fair hearing by a court, and the review of the same complaint is, nevertheless, refused again, the judgment of the Human Rights Court will become useless and have no consequences for the complainant. The Convention does not specify how to enforce the judgments of the Human Rights Court finding violations of the Convention. We can not speak of enforcement of the judgment of the Human Rights Court without the review of the action of the AS Giga by way of administrative court procedure. § 123 of the Constitution gives rise to the priority of international agreements over domestic law. The obligatory force of the final judgments, established in Article 46(1) of the Convention, allows to conclude that the opinions expressed in the judgments are also obligatory for the member states. The Court of Human Rights found that T. Veeber as the sole shareholder of the AS Giga has the right to contest the measure of the Tartu Police Prefecture in an administrative court proceeding. The refusal to review the AS Giga's action will amount to a conflict with § 14 of the Constitution.

OPINION OF THE SUPPREME COURT EN BANC

I.

15. The actions of the AS Giga, filed in 1996, were not heard by Estonian administrative courts to the extent that these relate to the legality of the activities of the Tartu Police Prefecture, i.e. the allegations that the police prefecture had violated § 33 of the Constitution and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention"), also the provisions of the Code of Criminal Procedure. In that respect the circuit court terminated the proceeding of the administrative matter on the ground that the hearing of the action was not within the competence of administrative courts. The action of the AS Giga was dismissed to the extent that it applied for the declaration of illegality of the activities of the Tartu City Government. The appeals selection committee of the Supreme Court did not, on 15 January 1997, grant the leave to appeal to the appeal in cassation of the AS Giga.

16. On 4 July 1997 T. Veeber filed an application (no. 37571/97) against the Republic of Estonia to the European Commission of Human Rights under former Article 25 of the Convention. The applicant argued that he could not contest the activities of the police in the courts and thus Article 6 of the Convention had been violated.

17. In its judgment *Veeber versus Estonia (no. 1)* of 7 November 2002 the European Court of Human Rights

held that the Republic of Estonia had violated Article 6(1) of the Convention as contrary to the requirements of the provision the hearing of the matter by a tribunal was not available to the applicant in an effective manner.

The Supreme Court *en banc* points out that the practice of the Supreme Court since the end of 2000 has affirmed that hearing complaints filed against the activities of the police is within the competence of administrative courts and such actions should be heard on the merits (*ruling of the Supreme Court en banc of 22 December 2000 in case no. 3-3-1-38-00 - RT III 2001, 2, 14*). Pursuant to §§ 230 and 231 of the Code of Criminal Procedure that will enter into force on 1 July 2004 the appeals contesting the activities of an investigative body in violation of the rights of a person shall be reviewed by the preliminary investigation judge of a county or city court.

18. In the petition for review submitted to the Supreme Court the AS Giga applies for the annulment of the judgments of 1996 of the Tartu Administrative Court and the Tartu Circuit Court concerning the company and for referring the matter to the Tartu Administrative Court for a new hearing. The petition for review is based on the opinion, expressed in the judgment of the European Court of Human Rights of 7 November 2002 *Veeber versus Estonia (no. 1),* that the Republic of Estonia violated Article 6(1) of the Convention as contrary to the requirements of the provision the hearing of the matter by a tribunal was not available to the applicant in an effective manner (paragraphs 74 and 75 of the judgment).

19. The referred judgment of the European Court of Human Rights concerned the contestation of the measures of the Tartu Police Prefecture in Estonian administrative courts. The judgment did not deal with the examination of the measures of the Tartu City Government in Estonian administrative courts.

20. Thus, we are in a situation where the appeal of the AS Giga against the activities of the police prefecture has not been reviewed by an administrative court and, as for contesting the activities of the police prefecture, the AS Giga has not actually been able to exercise the right of appeal, guaranteed by Article 6(1) of the Convention as well as by § 15 of the Constitution, in Estonian administrative courts.

II.

21. The AS Giga argues in the petition for review, submitted to the Supreme Court, that the referred judgment of the Human Rights Court constitutes a new fact for the purposes of § 75(2)1) of the CACP.

22. First of all the Supreme Court *en banc* shall decide whether the petition for review, submitted by the AS Giga, is admissible in the situation where it was the AS Giga who had recourse to the administrative court for the protection of its rights, it was T. Veeber who had recourse to the European Court of Human Rights, and it was the AS Giga who submitted the petition for review to the Supreme Court subsequent to the *Veeber versus Estonia (no. 1)* judgment of the European Court of Human Rights.

The Supreme Court en banc is of the opinion that the petition of the AS Giga is admissible. The European Court of Human Rights proceeded from the fact that all shares of the AS Giga belong to T. Veeber (clause 9 of Veeber versus Estonia (no. 1) judgment). For the above reasons the European Court of Human Rights did not differentiate between the rights of T. Veeber and those of the AS Giga.

23. The Supreme Court *en banc* is of the opinion that the next issues to be solved are whether the Supreme Court is competent to hear the AS Giga's petition and whether the administrative court proceeding should be re-opened.

24. Pursuant to § 49 of the Code of Administrative Court Procedure the Supreme Court shall hear administrative matters on the basis of appeals in cassation, petitions for review and petitions for the correction of court errors. The legislator has failed to regulate in the Code of Administrative Court Procedure the issue of the domestic effect of judgments of the European Court of Human Rights.

The AS Giga has exhausted the possibilities of appeal in cassation, as the appeals selection committee of the Supreme Court did not, on 15 January 1997, grant the leave to appeal to the AS Giga's appeal in cassation. The grounds for review in administrative court procedure are established in § 75 of the CACP. The Supreme Court *en banc* is of the opinion that in regard to the AS Giga the ground for review (§ 75(2)1) of the CACP) referred to in the petition for review, or the grounds established in clauses 2), 3) and 4) of § 75(2) of the CACP, do not exist. Neither is there a ground for petition for correction of court errors, established in § 81 of the CACP. Thus, in the valid administrative court procedural law there is no ground for hearing the petition of the AS Giga.

25. The European Court of Human Rights held the following in *Veeber versus Estonia (no. 1)* judgment.

In addition to the action of the AS Giga proceeded by administrative courts there was also a criminal case against T. Veeber pending before the courts of general jurisdiction. In the criminal case the legality of seizure of the AS Giga's documents by the police prefecture was analysed. The Criminal Chamber of the Supreme Court found in its judgment in criminal case no. 3-3-3-50-98 (*judgment of the Criminal Chamber of the Supreme Court of 8 April 1998 - RT III, 1998, 15, 167*) that in effecting the seizure of documents the valid norms of criminal procedure were not strictly followed, but found that such infringement was not substantial for the purposes of § 39(4) Code of Criminal Court Appeal and Cassation Procedure: the violation did not hinder the thorough, complete and objective examination of the case, or prevent the rendering of a lawful and substantiated judgment.

The European Court of Human Rights dealt with the assessment that the courts of general jurisdiction gave to the seizure of documents in paragraph 72 of its judgment *Veeber versus Estonia (no. 1)*. The European Court of Human Rights observed that following the seizure of documents the police initiated criminal proceedings against the applicant on charges relating to tax evasion. During the subsequent trial the applicant contested the lawfulness of the seizure of documents and argued that this had adversely affected his defence rights. The European Court of Human Rights found that it was true that the criminal courts had had the opportunity to, and indeed had, assessed the lawfulness of the police measures and their impact on the fairness of the criminal proceedings. However, this assessment was only relevant to the determination of the criminal charge against the applicant. The criminal courts could not quash the impugned police acts or grant appropriate relief. They accordingly lacked the powers required under Article 6(1).

The European Court of Human Rights considered the finding of a violation of Article 6(1) of the Convention an adequate satisfaction for the non-pecuniary damage alleged by the applicant. The claim for 500 000 Estonian kroons for distress caused by the fruitless efforts to gain judicial protection for rights was not satisfied. Also, the claim for damage amounting to 4 286 000 kroons was rejected. This was the amount of damage the applicant alleged his company sustained as a result of the seizure of documents. The Court considered there was no causal connection established between the damage alleged and the violation found.

26. The Supreme Court *en banc* has admitted the possibility of criminal proceedings in the Supreme Court even when the procedural law provides no ground for that (*judgment of the Supreme Court en banc of 17 March 2003 in case no. 3-1-3-10-02 - RT III 2003, 10, 95*). On the basis of § 15 of the Constitution the Supreme Court may refuse to hear a person's petition only if some other effective ways are available to the person for the exercise of the right to judicial protection provided for in the same section (*mutatis mutandis* paragraph 17 of the referred judgment).

This judgment rendered in a criminal matter does not automatically give rise to the right to re-opening of a proceeding in an administrative matter after the European Court of Human Rights has found a violation of Article 6(1) of the Convention, which consisted in the failure of Estonian administrative courts to hear an action.

27. The violation of Article 6(1) of the Convention, found by the European Court of Human Rights, constitutes a violation of § 15 of the Constitution, too. The Supreme Court *en banc* is of the opinion that a

situation, where an action alleging a violation of fundamental rights filed with an administrative court was not heard on the merits, constitutes a continued and material violation in itself. Pursuant to § 14 of the Constitution the guarantee of rights and freedoms is the duty of the judicial power, too. The Supreme Court en banc considers that when the legislator has not provided for an effective and gapless mechanism for the protection of fundamental rights, the judicial power must, proceeding from § 15 of the Constitution, guarantee the protection of fundamental rights.

28. We are in a situation where, contrary to § 15 of the Constitution, the action of the AS Giga against the activities of the police prefecture has not been heard by Estonian courts, and the AS Giga has not been able to exercise its right of appeal against the alleged violation of its rights. The AS Giga has argued in the court proceeding that as a result of seizure of documents the economic activities of his company are impeded and the damage resulting therefrom is being ascertained. The AS Giga argues that the annulment of court judgments would be the only way to eliminate the violation of rights.

29. It does not appear from the materials of the case that the review of the action against the activities of the police prefecture would in any way damage the legal certainty of the status of third persons. Neither does it appear that there is such public interest in remaining in force of the binding court judgment that would prevail over the interest of the AS Giga in the proceeding of its action. The Supreme Court *en banc*considers it important to give the AS Giga a possibility for having the matter heard on its merits.

30. For the referred reasons the Supreme Court *en banc* is of the opinion that the administrative court proceeding of the AS Giga's action should be re-opened to the extent that the circuit court had terminated the proceeding of the administrative matter, i.e. in regard to the complaint against the activities of the Tartu Police Prefecture. The judgment of the European Court of Human Rights constitutes no reason for re-opening the proceeding of action against the activities of the Tartu City Government.

Dissenting opinion of justice Jüri Põld, joined by justice Jaak Luik

I consent to the majority of the Supreme Court *en banc* in that the action of the AS Giga against the activities of police authorities must be proceeded by Estonian administrative courts, because that part of the action filed with the administrative court in which the AS Giga alleged the violation of its fundamental rights has not been heard on its merits by a court. I agree that finding of a violation of Article 6(1) of the Convention by the European Court of Human Rights should, in certain cases, serve as a possibility for re-opening administrative court proceedings.

At the same time I am of the opinion that the situation where the Code of Administrative Court Procedure does not provide for a possibility of re-opening a judicial proceeding after the European Court of Human Rights has found a violation of Article 6(1) of the Convention, consisting in the fact that a person has not actually had a chance to exercise his or her right of appeal in an Estonian administrative court, is unconstitutional. I argue that the re-opening of an administrative court proceeding need not be worded as an absolute right of a person. But the legislator should provide for the conditions for re-opening an administrative court proceeding in the Code of Administrative Court Procedure. As the state has not established a procedure to regulate the re-opening of administrative court proceedings after the finding of a referred violation of Article 6(1) of the Convention by the European Court of Human Rights, the state has - in my opinion - violated § 15 of the Constitution in conjunction with § 14, and the Code of Administrative Court Procedure is unconstitutional to the referred extent. That is why I argue that the Code of Administrative Court Procedure should have been declared unconstitutional to the extent that the Code does not provide for a possibility of reopening administrative court proceedings in the referred case. I am of the opinion that the present case is in many ways analogous to criminal case no. 3-1-3-10-02, referred to in paragraph 26 of this judgment, in the judgment of which the Supreme Court *en banc* declared the Penal Code Implementation Act unconstitutional to the extent that the Act did not provide for a possibility to mitigate the punishment of a person serving imprisonment, imposed under the Criminal Code, up to the

maximum rate of imprisonment established by a corresponding section of the Special Part of Penal Code.
