Constitutional judgment 3-3-1-38-00

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RULING
OF THE SUPREME COURT *EN BANC*
Of 22 December 2000

Review of appeals of the AS Brolex Grupp and the OÜ Dreiv Grupp and the Tax Board against a court ruling, relating to the review of legality of investigative activities in criminal proceedings.

The Supreme Court *en banc*,
chaired by Uno Lõhmus
and composed of justices Tõnu Anton, Jüri Ilvest, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull, Lea Laarmaa, Jaak Luik, Jaano Odar, Jüri Põld, Hele-Kai Remmel, Jüri Rätsep, Harri Salmann, Peeter Vaher and Triinu Vernik,
at its open session on 23 November 2000 reviewed the appeals of the AS Brolex Grupp and the OÜ Dreiv Grupp and the Tax Board against the ruling of the administrative chamber of Tallinn Circuit Court of 18 May 2000 in administrative matter no. II-3/206/2000.

The representative of the AS Brolex and the OÜ Dreiv Grupp sworn advocate Monika Mägi, the representative of the Tax Board sworn advocate Aivar Pilv and the representative of the Tallinn Police Prefecture sworn advocate Raivo Laus participated in the session as parties to the proceeding. The secretary of the Supreme Court *en banc* Piret Lehemets was present.

I. The Facts

1. On 02.07.1999 the preliminary investigator of the division of economic crimes of Tallinn Police Prefecture decided to conduct a search of the rooms of Diveci EAT OÜ in Tallinn, Jõe 3. According to the search order the preliminary investigator had grounds to believe that documents, notes, forms and other data and objects relevant to four pending criminal proceedings, which had been instituted on the grounds of elements of fraudulent conduct, may be located in these rooms. On the same day the prosecutor of the Tallinn Prosecutor's Office gave his consent to conduct the search.

2. The preliminary investigator started to conduct the reach of the rooms on 05.07.1999. In addition to the preliminary investigator who issued the search order other police officials and employees of the Tax Board, who allegedly were summoned as specialists to participate in the investigative activity, participated in the search. It appeared on the spot that the rooms located at Jõe 3 belong to the AS Divec, which was letting these out to the Diveci EAT OÜ and to the Alvin Law Office. The preliminary investigator prepared new search orders on the spot, in which he specified that the place of search was the rooms of the AS Divec, located at Jõe 3 and 5. It appears from the order that the prosecutor was informed of the search on

06.07.1999.

3. The search was conducted during the period of 05. - 07.07.1999. According to the submissions of the representatives of the AS Divec and the Diveci EAT OÜ the persons conducting the search took away more than 5000 documents of the company, several personal computers, seals, computer diskettes, metal drawers of a filing cabinet and other objects, large number of which have not been returned so far.

4. On 15.07.1999 the chairman of the management board of the AS Divec submitted a complaint against the search conducted by preliminary investigators and against taking away the property of the AS Divec with the Tallinn Prosecutor's Office. The AS Divec referred to the violation of the norms of criminal procedure and requested the review of legality of the activities of the persons who participated in the search and the initiation of a criminal proceeding for misuse of official position, and the return of the documents and objects of the public limited company. On 04.08.1999 the Tallinn Prosecutor's Office announced that no violations of law, which would serve as grounds for initiating a criminal or a disciplinary proceeding, were established concerning the activities of the police officials. On the same day the prosecutor prepared a ruling concerning the refusal to initiate a criminal proceeding, because he found that the activities of the police officials lacked the necessary elements of a criminal offence. The AS Divec together with the Diveci EAT ÜO submitted an appeal against this ruling with the Public Prosecutor's Office. The public prosecutor did not find essential violations of law in the activities of police officials, either. It is stated in the reply of 13.09.1999 that there were no grounds for revocation of the ruling refusing to initiate a criminal proceeding.

5. On 09.08.1999 the AS Divec and the Diveci EAT OÜ submitted an action to the Tallinn Administrative Court in which they requested that the activities of the tax officials, consisting in seizure of objects and documents in possession of these companies, be declared illegal. The complainants claim that by the search and illegal seizure of documents the right to inviolability of property and possession, established by §§ 32 and 33 of the Constitution, have been violated.

6. On 05.10.1999 the AS Divec and the Diveci EAT OÜ submitted a second action to the Tallinn Administrative Court, requesting that the search and seizure conducted by the officials of the Tallinn Police Prefecture on 05. - 07.071999 be declared illegal because of the violation of §§ 32 and 33 of the Constitution and several sections of the CCP.

7. The Court joined the complaints to allow for a just and more expeditious hearing of the matter. At the court session of 03.04.2000 the representative of the AS Divec and the Diveci EAT OÜ submitted a copy of an entry in the commercial register, according to which, as of 24 January 2000, the new business name of the Diviteci EAT OÜ is the Dreiv Grupp. According to the entry in the commercial register of 22.06.2000 the new business name of the AS Divec is public limited company (AS) Brolex Grupp.

8. On 04.04.2000 a judge of the Tallinn Administrative Court issued the following ruling: to terminate the proceeding of the administrative matter for the reason that it was not within the competence of administrative courts.

9. The AS Divec and the Dreiv Grupp OÜ submitted an appeal against the ruling of the Tallinn Administrative Court. With its ruling of 18.05.2000 the Tallinn Circuit Court annulled the ruling of the administrative court to the extent that it concerned the complaint against the activities of tax officials and referred the matter back to the administrative court for hearing on the merits. The court upheld the part of the ruling that concerned the review of legality of the activities of police officials.

10. The AS Divec and the Dreiv Grupp OÜ as well as the Tax Board appealed against the ruling of the circuit court. The Administrative Chamber of the Supreme Court, having heard the appeals against the ruling, decided on 17.10.2000 to refer the appeals to the Supreme Court*en banc* for adjudication, because of the necessity of uniform application of law.

II. The law

Reasoning of courts

11. The administrative court found that the complainants have disputed the legality of pre-trial investigative activities - search and seizure (of objects and documents) regulated by chapter 14 of the Code of Criminal Procedure - and the legality of the activities of police officials and of the officials of the Tax Board who were summoned to participate in the investigative activities as specialists.

According to the reasoning of the ruling, the first paragraph of § 15 of the Constitution establishes the right of every person of recourse to the courts if his or her rights and freedoms are violated, but according to § 149(4) of the Constitution the procedure for realisation of the right (rules of court procedure) shall be established by law. Pursuant to § 3(2)1) of the Code of Administrative Court Procedure which was in force until 01.01.2000, adjudication of complaints which are to be adjudicated pursuant to the procedure provided in the Code of Criminal Court Procedure (hereinafter "the CCP") do not fall within the competence of administrative courts. In principle, § 3(2) of the valid Code of Administrative Court Procedure corresponds to that.

Pursuant to the Prosecutor's Office Act the Chief Public Prosecutor and prosecutors who are subordinated to the Chief Public Prosecutor exercise supervision over the legality of pre-trial proceeding of criminal matters (§ 22 (1) of the CCP). Thus, the supervision over the legality of a search and seizure conducted during pre-trial investigation is within the competence of the prosecutors. The procedure for appeal against the activities of a preliminary investigator or a prosecutor is established in chapter 19 of the CCP. A complaint against the activities of a preliminary investigator shall be submitted to a prosecutor. A complaint may be submitted against the decision of a prosecutor on the adjudication of a complaint or against the activities of a prosecutor during investigation with a higher-ranking prosecutor (§ 183(3) of the CCP). Only the AS Divec submitted a complaint against the search and seizure of property with the Tallinn Prosecutor's Office. The Diveci EAT OÜ was a co-complainant when the AS Divec disputed the decision of the Tallinn Prosecutor's Office. The Chief Public Prosecutor found that the search and seizure of documents and objects was not illegal. Neither this decision of the public prosecutor nor his activities during adjudication of the complaint were disputed by the complainants in courts, although adjudication of such a complaint would have fallen within the competence of administrative courts under §§ 3(1)1) and 4(1)1) of the Code of Administrative Court Procedure which was in force until 1 January 2000. Administrative courts have no competence to review a subsequent complaint against the activities of police officials who conducted the investigative activity and the activities of tax officials who were involved in the investigative activity, the legality of which has already been reviewed by competent officials pursuant to procedure established in the CCP.

12. The Tallinn Circuit Court partially agreed with the reasoning of the ruling, sharing the opinion of the administrative court that the latter lacks competence to interfere with the preliminary investigation of a criminal matter and to exercise supervision over the observance of laws by preliminary investigation authorities. The Code of Criminal Procedure provides for a separate procedure for reviewing the legality of investigative activities. If the activities of a public prosecutor who reviews investigative activities violate the rights of a person, then the activities of the public prosecutor can be disputed in an administrative court.

The circuit court agreed with the arguments of the representatives of the AS Divec and the Dreiv Grupp OÜ that if the employees of the Tax Board fulfilled the tasks proceeding from the Taxation Act during the search, the review of legality of their activities would fall within the competence of administrative courts. The prosecutors who reviewed complaints have referred to the fact that some of the employees of the Tax Board were fulfilling an auditing function. The review of legality of the activities of persons fulfilling public law administrative tasks falls within the competence of administrative courts, unless some other procedure for the review of such activities is provided by law.

Justifications of the participants

13. In its appeal against the ruling of the circuit court the Tax Board contested the opinion that a complaint

against the activities of tax officials should be adjudicated on the merits by the Tallinn Administrative Court. The Tax Board does not agree with the circuit court opinion that some of the tax officials fulfilled auditing tasks in the rooms of the AS Divec. The representatives of the Tax Board could participate in the investigative activity in accordance with §§ 111^1(1) and 142(1) of the CCP only as specialists, summoned by the preliminary investigator to participate in the investigative activity. Tax officials could not fulfil auditing tasks also because other persons fulfilling tasks not related to an investigative activity may not be present at the time and in the place where the investigative activity is being conducted. Scrutiny of an investigative activity can not be considered adjudication of a public law dispute, which would fall within the competence of administrative courts. Such a view proceeds from the ruling of the Administrative Law Chamber of the Supreme Court of 3 November 1995 (III-3/1-32/95), which states that "administrative courts do not interfere with criminal procedure and do not exercise supervision over the observance of laws by the investigation authorities and preliminary investigation authorities. On the basis of the Code of Administrative Court Procedure administrative courts only review whether the activities of a public prosecutor upon adjudicating a complaint were legal". The complainants have not submitted a complaint against the activities of a prosecutor with the court.

14. The representatives of the AS Brolex Grupp and the OÜ Dreiv Grupp find that the conclusion of the Tallinn Circuit Court that a complaint against the activities of the officials of the Tallinn Police Prefecture during conducting the investigative activity does not fall within the competence of administrative courts, is erroneous. According to § 15(1) of the Constitution everyone whose rights and freedoms are violated has the right of recourse to the courts. Thus, a court has competence and also a duty to adjudicate any dispute, provided that recourse to the court was taken under the conditions and pursuant to procedure provided by law. The disputes arising from the exercise of public power should also be considered public law disputes for the purposes of §§ 3(1)1) and 4(1) and (2) of the old Code of Administrative Court Procedure and § 3(1)1) of the valid Code of Administrative Court Procedure. A policeman entering a dwelling or a possession of a person and taking away objects without the consent of the possessor constitutes exercise of public power. The view that the final review over the legality of the activities of a preliminary investigator is carried out by the prosecutor's office creates a situation where the review over the lawfulness of the activities of certain persons does not fall within the competence of courts, as established in § 15(1) of the Constitution and Article 6(1) of the European Convention of Human Rights and Fundamental Freedoms, but within the competence of the representatives of the executive power. After the pre-trial investigation, when it is possible to contest, alongside with the original administrative legislation or measure, also the decision of administration (in this case a prosecutor) concerning the adjudication of pre-trial procedure, the complainant has the right to challenge, *inter alia*, the original administrative legislation or measure.

The opinion of the Supreme Court *en banc*

15. The first sentence of § 15(1) of the Constitution gives everyone whose rights and freedoms are violated the right of recourse to the courts. This fundamental right must guarantee, without gaps, the judicial protection of rights. At the same time the first sentence of the first indent leaves open the question whether a person is entitled to seek the protection of only fundamental rights and freedoms or also in other cases when rights and freedoms stemming from other laws are violated. The second sentence of the same indent goes even further. Not only does it give everyone the possibility to have recourse to the courts for the protection of rights, it also gives the right to demand that any law, other legislation or procedure relevant to his or her pending case, be declared unconstitutional. Thus, the second sentence of the first indent of § 15 of the Constitution offers protection also against the activities of the legislator and of the authority who issued a legislation. A person is entitled to concrete norm control in the court which is hearing his or her matter. Only such norms or measures which violate a constitutional norm can be unconstitutional.

16. The administrative judge admitted the right established by § 15(1) of the Constitution, but was of the opinion that the procedure for the exercise of the right shall be established by law, according to § 149(4) of the Constitution. When making the decision that an administrative court has no competence to adjudicate complaints against the activities of police officials who conducted an investigative activity and tax officials who were summoned to participate in the investigative activity, the legality of which has already been

reviewed by competent officials pursuant to procedure provided in the CCP, the court did not explicitly state whether a person has the right of recourse to a county or a city court if he or she finds that his or her rights are violated by conducting a criminal procedure. It can still be concluded from the reasoning of the ruling that the court interpreted the first sentence of the first indent of § 15 of the Constitution restrictively: a person has the right of recourse to the courts if his or her rights and freedoms are violated, if the procedural laws provide for such a possibility.

17. In order to determine the extent of the judicial protection afforded to rights and freedoms by § 15(1) of the Constitution it has to be established, first of all, against the violation of which rights judicial protection was sought by the complainants. In the action filed on of 6 August 1999 against the activities of the tax officials the AS Divec and the Diveci EAT OÜ wrote that illegal seizure of things and documents in their possession violated the right of the companies, established in §§ 32 and 33 of the Constitution, to inviolability of property and possessions. In their action filed on 4 October 1999 they argued that the activities of police officials violated the right to inviolability of possessions, established by § 33 of the Constitution, because the search was not conducted pursuant to the procedure provided for in the CCP. Thus, the complainants sought judicial protection against the violation of fundamental rights and freedoms. According to § 9(2) of the Constitution the rights, freedoms and duties set out in the Constitution shall extend to legal persons in so far as this is in accordance with the general aims of legal persons and with the nature of such rights, freedoms and duties. The rights to inviolability of property and possessions are such fundamental rights, which are in accordance with the general aims of legal persons and with the nature of these rights, freedoms and duties.

18. The representative of the Tax Board assures that the norms of the CCP provide for adequate guarantees for the protection of rights and freedoms of persons and allow for the review of legality of investigative activities during pre-trial procedure through a prosecutor and public prosecutor, and during the judicial hearing through ordinary procedure in a criminal court. They argue that the review of legality of investigative activities related to the object of investigation outside the criminal procedure is unthinkable.

19. Weighing these objections the Supreme Court *en banc* considers it necessary to observe, firstly, that §§ 13, 14 and 15 of the Constitution and Article 13 of the European Convention of Human Rights and Fundamental Freedoms gives rise to the right to an effective remedy. The European Court of Human Rights has observed that according to Article 13 an effective remedy means a remedy which is as effective as possible (*Klass and others v. Germany*, judgment of 6 September 1978, Series A, no. 28, p 31 § 69). The Court has also said that if a person alleges that his or her convention rights have been violated, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see *Klass and others v. Germany, op. cit.*, § 64; *Kudla v. Poland*, judgment of 26 October 2000, § 157; *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000, § 96). It can not be a prerequisite for the application of Article 13 that the Convention be in fact violated. Effective remedy must be guaranteed to everyone who claims that his rights and freedoms under the Convention have been violated (see *Klass v. Germany*, § 64).

20. Postponement of the review of legality of an investigative activity infringing into fundamental rights and freedoms of persons until the judicial hearing of a criminal matter can not be regarded an effective remedy, because the hearing may take place years after the investigative activity was conducted. The harm caused by the violation of fundamental rights and freedoms may essentially increase or redress may become impossible by that time. Furthermore, the court hearing a criminal case has no right to decide on compensating the damage caused by an investigative activity. It can not be excluded that a criminal matter never reaches a court, or that an investigative activity infringes the fundamental rights and freedoms of a person who is not a party to a proceeding and therefore can not seek judicial protection against the violation of his rights and freedoms.

21. As for the prosecutor, it can be observed that in Estonian legal order this official does not meet the characteristics of an independent and impartial tribunal, described in Article 6 of the European Convention on Human Rights, which is a prerequisite of effective protection of fundamental rights and freedoms.

According to § 1 of the Prosecutor's Office Act the Prosecutor's Office is a government agency within the area of government of the Minister of Justice with no authority to administer justice. Thus, the control by the prosecutor can not replace the judicial control of an infringement of fundamental rights and freedoms. Furthermore, upon establishing the violation of rights and freedoms a prosecutor has no competence to decide to pay compensation to the victim of the violation of rights.

22. The allegation that disputing an investigative activity or part of it outside the criminal procedure would be an obstacle to thorough, full and objective hearing of a criminal matter, can not be regarded convincing. On the contrary, the requirement that a criminal proceeding be thorough, full and objective is fully met only if persons' fundamental rights and freedoms are respected during a proceeding.

Infringement of some fundamental rights and freedoms is subjected to judicial control, either before or immediately after the infringement of a fundamental right. In some cases an infringement of a fundamental right must be authorised by a court. Thus, according to § 21of the Constitution a person may be held in custody for more than forty-eight hours only with the specific authorisation of a court. The confidentiality of messages sent or received by post, telegraph, telephone or other commonly used means may also be interfered only with court authorisation (§ 43 of the Constitution). The detention and seizure of correspondence from post and telegraph offices may be conducted only if a county or city court judge has issued a specific permission or ruling (§ 145(1) of the CCP). Exceptional surveillance activities permissible under the Surveillance Act (§ 12(2) 1) to 3)) may be conducted with the permission of court (§ 13). In other instances a person is entitled to request the review of legality of infringement of fundamental rights and freedoms. A person is entitled to file an appeal against a ruling on taking into custody (§ 771). § 18 (2) of the Surveillance Act gives everyone, whose rights and freedoms are violated by the activities of surveillance agency or an official of a surveillance agency, the right of recourse to the courts. That is why the Supreme Court *en banc* finds no justification why some fundamental rights and freedoms would not be afforded effective judicial remedy. Such a situation is not in conformity with § 15(1) of the Constitution.

23. The Supreme Court *en banc* is of the opinion that legal regulation to ensure protection of fundamental rights and freedoms infringed in criminal procedure has gaps. Thus, the judicial control over taking persons into custody in a criminal proceeding and over the detention and seizure of correspondence from post and telegraph offices has been given into the competence of courts of general jurisdiction (county or city court), but deciding on exceptional surveillance activities permissible under the Surveillance Act has been given into the competence of administrative courts. Administrative courts are also competent to adjudicate complaints against a surveillance agency or officials of a surveillance agency. Thus, the judicial review of fundamental rights and freedoms infringed by a criminal procedure is exercised in different courts and pursuant to different rules of procedure, which does not always guarantee effective remedies and may give rise to fears that review of legality of an investigative activity through administrative court procedure may impede ascertaining of truth in a criminal procedure. The lack of effective control would still be worse than review by different courts.

24. Search of a dwelling, possession or place of work and seizure of documents are acts of public law, which infringe fundamental rights and freedoms of persons. According to § 3(1)1) of the valid Code of Administrative Court Procedure adjudication of disputes in public law are within the competence of administrative courts. According to the special clause in § 3(2) of the same Act adjudication of disputes in public law for which a different procedure is prescribed by law does not fall within the competence of administrative courts. As the CCP prescribes that appeal against the referred measures may be filed only with a prosecutor, then judicial review over such measures falls within the jurisdiction of administrative courts, pursuant to the general clause of § 3(1) of the valid Code of Administrative Court Procedure; that is why the administrative court should not have refused to hear the actions on the merits. Any person whose fundamental rights and freedoms are violated by a procedural act is entitled to file a complaint with a prosecutor or an administrative court. The Supreme Court *en banc* considers it necessary to observe that the duty of an administrative court is not to check the necessity and expediency of an investigative activity or which of the collected facts can be used as evidence upon deciding a criminal matter. The task of an administrative court is to review whether person's fundamental rights and freedoms were violated by a

procedural act.

25. Bearing in mind the above considerations the Supreme Court *en banc* is of the opinion that the actions of the AS Brolex Grupp and the Dreiv Grupp OÜ against both the preliminary investigators of the Tallinn Police Prefecture and the officials of the Tax Board fall within the jurisdiction of the Tallinn Administrative Court and the actions have to be adjudicated on the merits, if they meet the requirements established by law.

Proceeding from § 72(1)5) and § 90(2) of the valid Code of Administrative Court Procedure **the Supreme Court *en banc* has ruled:**

1. To annul the ruling of the Tallinn Administrative Court of 4 April 2000 in administrative matter no. 3-526/2000 and the ruling of the Tallinn Circuit Court of 18 May 2000 in administrative matter no. II-3/206/2000 and refer the actions of the AS Brolex Grupp and the OÜ Dreiv Grupp to the Tallinn Administrative Court for hearing.

2. To satisfy the appeal of AS Brolex Grupp and OÜ Dreiv Grupp, to dismiss the appeal of the Tax Board.

3. To return the security 700 (seven hundred) kroons to the AS Brolex Grupp and the security of 700 (seven hundred) kroons to the OÜ Dreiv Grupp.

4. The security of 700 (seven hundred) kroons of the Tax Board to be transferred into the public revenues.

The ruling becomes effective on 22 December 2000 as of pronouncement.

Dissenting opinion of justice Eerik Kergandberg to
Ruling of the Supreme Court en banc of 22 December 2000, no. 3-3-1-38-00

(Translated extracts)

"Differently from the basic concept of the judgment of the Supreme Court en banc I am of the opinion that what is provided for in § 15(1)1) of the Constitution does not always and in every situation mean a direct and immediate right to have recourse to the courts. Secondly, I find that the main issue of the judgment of the Supreme Court en banc – whether the provisions of Chapter 19 of the Code of Criminal Procedure guarantee the realisation of the fundamental right established in § 15(1) of the Constitution – is purely a question of criminal procedure […]." (p 1);

"From the aspect of classical trichotomy of powers, the comparatively great importance of pre-trial procedure in criminal proceedings does not mean that criminal proceedings constitute a part of the executive power in a state, including Estonian state." (p 3);

"During pre-trial investigation the court does not have to establish, in the first place, whether fundamental rights were restricted, instead the court has to establish whether the concrete extent to which fundamental rights were restricted in a concrete procedural situation (i.e. taking into account the gravity of offence, the trends of penal policy of the state, investigation practice of the specific category of criminal offences, the dangerousness of the presumable criminal offender, the volume of collected evidentiary information, and other factors arising from the materials of criminal matter) can be deemed necessary in a democratic society and not distorting the nature of the restricted fundamental right. The adjudication of the issue of restriction of fundamental rights requires daily involvement in the investigation of criminal offence matters – i.e. something that an administrative court lacks." (p 7)