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S U P R E M E C O U R T

EN BANC

JUDGMENT

in the name of the Republic of Estonia

Case number	3-3-1-35-15
Date of judgment	12 April 2016
Composition of court	Chairman: Priit Pikamäe; members: Peeter Jerofejev, Henn Jõks, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Saale Laos, Viive Ligi, Jaak Luik, Ivo Pilving, Jüri Pöld, Paavo Randma, Malle Seppik and Tambet Tampuu
Contested judicial decision	Order of Tallinn Court of Appeal of 27 February 2015 in administrative case No 3-14-50128
Appellant and type of appeal	Appeal by L. O. against order Appellant L. O., representative sworn advocate Kaido Ehasoo
Participants in the proceedings in the Supreme Court	Respondent Tax and Customs Board Riigikogu Chancellor of Justice
Hearing	Minister of Justice 2 February 2016, written procedure

OPERATIVE PART

- 1. To declare § 112(1) clause 1) of the Code of Administrative Court Procedure unconstitutional and repeal it as of the entry into force of this judgment insofar as it bars the court from deducting from a person's income any essential expenses not mentioned in that provision.**
- 2. To allow the appeal by L. O. and reverse the Tallinn Court of Appeal order of 27 February 2015 in administrative case No 3-14-50128.**
- 3. To remit the application by L. O. for procedural assistance to Tallinn Court of Appeal for a new hearing.**
- 4. To refund the security.**

FACTS AND COURSE OF PROCEEDINGS

1. By liability decision No 13-7/381-8 of 4 November 2013, the Tax and Customs Board (TCB) required L. O. to pay tax arrears owed by Lumar Invest OÜ in the amount of 18 737 euros and 28 cents.
2. L. O. filed an action with Tallinn Administrative Court for annulment of the liability decision of the TCB.
3. By judgment of 27 October 2014 in administrative case No 3-14-50128, Tallinn Administrative Court dismissed the action and left procedural expenses for the parties themselves to bear.
4. L. O. filed an appeal, seeking to reverse the Administrative Court judgment and to enter a new judgment allowing L.O.'s claim in the action and ordering the respondent to pay the appellant's procedural expenses.
5. On 11 December 2014, the appellant filed with Tallinn Court of Appeal an application for procedural assistance seeking to be exempted in full from payment of the state fee due to insufficient financial resources. In response to the Court of Appeal order by which the court refused to open proceedings on the action, on 29 December 2014 the appellant filed a correct application for procedural assistance, a notice concerning the appellant's personal financial situation as well as that of the appellant's family members, and a bank account statement for the period from 11 August to 11 December 2014.
6. By order of 27 February 2015 in administrative case No 3-14-50128, Tallinn Court of Appeal dismissed the appellant's application for procedural assistance and refused to open proceedings on the appeal, and ordered the appellant to pay the state fee in the amount of 562 euros and 11 cents. The Court of Appeal provided the following reasoning in its order:
 - 1) during the four months prior to filing the application, the appellant received wages, state and local authority benefits, and compensation for incapacity for work in the total amount of 2335 euros and 87 cents. Additionally, payments by four private individuals had been made to the appellant's account. The appellant's total income during the four months prior to filing the application was 3183 euros and 82 cents. At the moment of filing the application, the balance on the appellant's bank account was 42 euros and 21 cents. The appellant makes monthly repayments of 60 euros and 43 cents for a small loan. According to the application, the appellant is a co-owner of an apartment mortgaged in the sum of 144 093 euros and 90 cents. The appellant's minor child lives together with the appellant. The appellant has indicated their monthly housing expenses as being 200 euros. Additional to this is a loan repayment in the amount of 285 euros, which is however paid by the co-owner of the immovable. The appellant's monthly expenses on food are 300 euros, additional to which are expenses in the amount of 100 euros in relation to the child's compulsory school attendance, and other essential fixed costs in the amount of 50 euros;

2) according to the formula set out in § 112(1) cl. 1) of the Code of Administrative Court Procedure (CACP), the appellant's income for four months is 3183 euros and 82 cents, of which the average monthly income is 795 euros and 96 cents. From this, utilities in the amount of 200 euros and the sum of 150 euros for fulfilling the obligation to provide maintenance to the child can be deducted. Thus, the appellant's monthly income after deductions is 445 euros and 96 cents. The average income for two months is thus higher than the state fee of 562 euros and 11 cents. Even if the small loan were to be interpreted as a housing-related cost, the appellant's average income for two months is not below the sum of the state fee. Thus, providing procedural assistance is barred.

7. The appellant filed an appeal against the order with the Supreme Court, seeking to reverse the Court of Appeal order as regards refusal to provide procedural assistance, and to enter a new ruling granting the application for procedural assistance and exempting the appellant from paying the state fee upon filing the appeal or, alternatively, remitting the case for a new hearing to the Court of Appeal. The reasoning provided in the appeal is as follows:

1) the court unjustifiably disregarded the appellant's essential monthly expenses on food. In addition to providing maintenance to a minor child, the appellant also has to provide maintenance to themselves. It is inconceivable that the appellant is considered to be capable of bearing the procedural expenses on account of their essential food requisites. This view is also supported by § 132(1) of the Code of Enforcement Procedure, under which income shall not be seized if it does not exceed the amount of minimum wages prescribed for one month. The appellant's monthly food expenses do not exceed this sum;

2) the court has unjustifiably disregarded the appellant's obligation to provide maintenance to their child to the extent required by law. In view of their limited income, the appellant reckoned 150 euros as the maintenance expense for their child, but according to § 101(1) of the Family Law Act the monthly support payment for one child may not be less than half of the minimum monthly wage established by the Government. In line with this, the appellant's maintenance obligation to the child is 195 euros.

ORDER OF THE SUPREME COURT ADMINISTRATIVE LAW CHAMBER

8. By order of 16 November 2015 in case No 3-3-1-35-15, the Supreme Court Administrative Law Chamber found that in view of adjudication of the case requiring determination of an issue to be dealt with under the Constitutional Review Court Procedure Act (CRCPA), in line with § 228(1) cl. 3) of the CACP and § 3(3) (second sentence) of the CRCPA the case should be referred for adjudication to the Supreme Court *en banc*. The Chamber expressed misgivings that restrictions on provision of procedural assistance imposed under § 112(1) cl. 1) of the CACP might disproportionately restrict the fundamental rights enshrined in §15 and § 24(5) of the Constitution. According to the first sentence of § 15 of the Constitution, everyone whose rights and freedoms have been violated has the right of recourse to the courts. Under § 24(5) of the Constitution, in accordance with the procedure provided by law, everyone is entitled to appeal a judgment rendered in his or her case to a higher court.

9. If, in accordance with § 112(1) cl. 1) of the CACP, all the income for four months prior to filing the application for procedural assistance is added up, including regular as well as one-off income, the appellant's income for four months was 3183 euros and 82 cents. The above provision enables deduction of housing expenses (200 euros a month) and the sum intended for discharging the maintenance obligation to the child (195 euros). Thus, the appellant's average monthly income for the two months calculated over four months is 801 euros and 91 cents ($(3183.82 - 4 \times (200 + 195)) \div 4 \times 2 = 801.91$).

10. The Code of Administrative Court Procedure does not enable including justified expenses on food, medication, and hygiene products among essential fixed expenses. If procedural expenses are not anticipated to amount to a sum exceeding twice the average monthly income for an applicant for procedural assistance, calculated in accordance with § 112(1) cl. 1) of the CACP, this provision bars granting procedural assistance to an applicant. The Chamber has misgivings concerning the constitutionality of a situation where a person

is forced to choose between having recourse to the court for protection of their rights and buying essential food, medication or hygiene products.

11. The Code of Administrative Court Procedure also contains no other provisions enabling provision of procedural assistance to an applicant whose procedural expenses do not exceed twice their average monthly income. Unlike the Code of Civil Procedure, § 181(3¹) of which enables payment of the state fee by instalments, the Code of Administrative Court Procedure does not provide for that opportunity. Additionally, under the CACP an applicant for procedural assistance cannot be exempted from the state fee to an extent exceeding their monthly regular income after deductions.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

12. – 17. [Not translated].

CONTESTED PROVISION

18. Code of Administrative Court Procedure, § 112 “Limitations concerning grants of procedural assistance to natural persons”, subsection (1) clause 1):

“(1) Procedural assistance is not granted to a natural person if:

1) the procedural expenses are not anticipated to amount to a sum exceeding twice an applicant’s average monthly income calculated on the basis of the average monthly income for the four preceding months, from which amount taxes, mandatory insurance premiums and any sums required to perform any maintenance obligations imposed by law, as well as the reasonable cost of accommodation and transport are deducted;

[...].”

OPINION OF THE COURT *EN BANC*

19. The Court *en banc* will first ascertain whether § 112(1) cl. 1) of the CACP is a relevant provision (I). Then the Court *en banc* will identify the fundamental rights interfered with (II). Further, the Court *en banc* will identify the legitimate aims of instances of interference and provide assessment with regard to the legitimate aim of the proportionality of instances of interference with fundamental rights (III). Finally, the Court *en banc* will resolve the appeal against the order (IV).

I

20. The court can initiate constitutional review court proceedings only if the contested legal act was relevant for adjudication of the case. Thus, the Court *en banc* must first verify whether contested § 112(1) cl. 1) of the CACP is a relevant provision.

21. Section 112(1) clause 1) of the CACP does not enable deduction of necessary expenses on food from the income of a participant in proceedings when deciding on a grant of procedural assistance. On account of this provision, it was found that the appellant’s income was sufficient to enable them to pay the state fee. The Code of Administrative Court Procedure also lacks any other provision under which the appellant could be granted the requested procedural assistance in the instant case (see also Supreme Court Administrative Law Chamber order of 16 November 2015 in case No 3-3-1-35-15, paras 11.3–12). At the same time, § 112(1) cl. 2) of the CACP, cited by the Minister of Justice, does not preclude granting procedural assistance to the appellant in the instant case – it does not appear from the materials of the case file that the appellant has property which can be sold without significant difficulty and against which the law allows claims for payment to be made. The apartment in which the appellant and their child reside does not belong among such property. Nor is providing procedural assistance to the appellant barred by the condition laid down in § 111(1) of the CACP that sufficient grounds should exist to believe that intended participation in the proceedings has good prospects. The appeal cannot be considered as having no prospect of success.

22. In the instant case, the application for procedural assistance by way of exemption in full from payment of the state fee was filed by a natural person whose twice the average monthly income (801 euros and 91 cents, calculated according to § 112(1) cl. 1) of the CACP, see para. 9 of the judgment) exceeded the amount of the state fee (562 euros and 11 cents). On that basis, the Court of Appeal in the process of reaching its judgment had to apply § 112(1) cl. 1). As the Court of Appeal had to refuse to grant the appellant's application for procedural assistance for that reason, § 112(1) cl. 1) of the CACP is of decisive importance in adjudicating the case. Thus, § 112(1) cl. 1) of the CACP must be considered a relevant provision.

23. The appellant considers § 112(1) cl. 1) of the CACP to be unconstitutional insofar as it bars the court from taking into account necessary food expenses when deciding on a grant of procedural assistance. The Court *en banc* believes that it would not be justified to delimit the scope of review of the constitutionality of § 112(1) cl. 1) of the CACP so narrowly. The Court *en banc* does not consider it reasonable to have a separate dispute with regard to every essential expense not mentioned in § 112(1) cl. 1) of the CACP in terms of whether that particular expense should be taken into account in assessing an applicant's income when deciding on a grant of procedural assistance. This would be contrary to the principle of effectiveness of constitutional review. It would also lead to lack of legal clarity with regard to the constitutionality of § 112(1) cl. 1) of the CACP insofar as it bars the court from deducting from income other essential expenses not mentioned in this provision (see Supreme Court *en banc* judgment of 12 April 2011 in case No 3-2-1-62?10, para. 33). The Court *en banc* finds that essential expenses not mentioned in § 112(1) cl. 1) of the CACP may include expenses on food, medication and hygiene products as set out in the order of 16 November 2015 of the Supreme Court Administrative Law Chamber, but also other expenses necessary to ensure human dignity.

II

24. The Administrative Law Chamber found that the limitation on provision of procedural assistance laid down in § 112(1) cl. 1) of the CACP may interfere with the fundamental rights enshrined in § 15 and § 24(5) of the Constitution (Supreme Court Administrative Law Chamber order of 16 November 2015 in case No 3-3-1-35-15, para. 11.1; see also the order of 12 March 2014 in case No 3-3-1-82-13, para. 12). The Court *en banc* affirms the opinions of the Administrative Law Chamber.

25. The first sentence of § 15 of the Constitution stipulates that everyone whose rights and freedoms have been violated has the right of recourse to the courts. The aim of the fundamental right enshrined in the first sentence of § 15 of the Constitution is to ensure effective judicial protection without any gaps through appropriate court procedure (see also Supreme Court *en banc* order of 22 December 2000 in case No 3-3-1-38-00, para. 15; judgment of 16 May 2008 in case No 3-1-1-88-07, para. 41).

26. The right to receive procedural assistance forms part of the fundamental right to effective judicial protection. Therefore, limitations on provision of procedural assistance interfere with the right to effective judicial protection (see Supreme Court Constitutional Review Chamber judgment of 1 November 2011 in case No 3-4-1-19-11, para. 23). As noted by the Administrative Law Chamber, the limitation on procedural assistance laid down in § 112(1) cl. 1) of the CACP may cause a situation where a person is forced to choose between having recourse to the court for protection of their rights and buying essential food, medication or hygiene products (Supreme Court Administrative Law Chamber order of 16 November 2015 in case No 3-3-1-35-15, para. 11.2). In the opinion of the Court *en banc*, a situation where an individual must choose between incurring necessary expenses to ensure their human dignity and judicial protection of their rights testifies to the fact that the regulatory scheme for procedural assistance does not allow assisting all those whom it is intended to assist.

27. In the instant case, the appellant's right to appeal has been interfered with. Under § 24(5) of the Constitution, in accordance with the procedure provided by law, everyone is entitled to appeal a judgment rendered in their case to a higher court. The scope of protection of the right of appeal ensured under § 24(5) of the Constitution includes a situation where a court ruling concerning a person's rights and liberties exists

(Supreme Court *en banc* order of 21 April 2015 in case No 3-2-1-75?14, para. 60; order of 30 March 2011 in case No 3-3-1-50-10, para. 48). The appellant has contested the Tallinn Administrative Court judgment of 27 October 2014 by which the court upheld the liability decision issued in respect of the appellant by the Tax and Customs Board. However, the Court of Appeal refused to open proceedings on the appeal because it dismissed the appellant's application for procedural assistance for exemption from the state fee and required the appellant to pay the state fee in order for the court to adjudicate the appeal. The limitation on procedural assistance imposed under § 112(1) cl. 1) of the CACP precludes the appellant from exercising their right of appeal in this case.

28. On the basis of the foregoing, § 112(1) cl. 1) of the CACP interferes with the fundamental right to effective judicial protection enshrined in § 15(1) and the right of appeal enshrined in § 24(5) of the Constitution.

III

29. The Court *en banc* has no misgivings concerning the formal constitutionality of § 112(1) cl. 1) of the CACP. Next, the Court *en banc* will assess the substantive constitutionality of § 112(1) cl. 1) of the CACP. To do so, the Court *en banc* will first identify the legitimate aims for which the general right to effective judicial protection and the right of appeal are being limited.

30. The general right to effective judicial protection enshrined in the first sentence of § 15 of the Constitution is a fundamental right not subject to statutory reservation (Supreme Court *en banc* judgment of 16 May 2008 in case No 3-1-1-88-07, para. 43). Thus, this right may only be interfered with for protection of other fundamental rights or other constitutional-grade values.

31. However, the right of appeal enshrined in § 24(5) of the Constitution is a fundamental right subject to a simple statutory reservation (Supreme Court *en banc* judgment of 12 April 2011 in case No 3-2-1-62-10, para. 38). A simple statutory reservation means that a fundamental right may be restricted for any purpose that does not contravene the Constitution. It follows from this that the legislator may impose more extensive procedural limitations on the right of appeal than on the fundamental right to effective judicial protection.

32. Legitimate aims for limitation of the fundamental right to effective judicial protection and the right of appeal in administrative court proceedings may include, *inter alia*, procedural economy and the principle of partially bearing the costs of administration of justice (see, e.g., Supreme Court *en banc* judgment of 12 April 2011 in case No 3-2-1-62-10, para. 45; judgment of 22 November 2011 in case No 3-3-1-33-11, paras 26–26.3; judgment of 29 November 2011 in case No 3-3-1-22-11, paras 29.1–29.2). The Court *en banc* upholds its previous jurisprudence and also in the instant case considers the above principles to be legitimate aims for interference.

33. Following from Chapter XIII of the Constitution, procedural economy is a constitutional-grade legal value. In the case of state fees, procedural economy is reflected in the fact that the state directs people not to file frivolous and vexatious complaints the adjudication of which may lead to inability of the judicial system to offer effective judicial protection within a reasonable time (see Supreme Court *en banc* judgment of 12 April 2011 in case No 3-2-1-62-10, para. 45). As the legal frames for state fees and procedural assistance are inextricably linked to each other, procedural economy is expressed in the same way in the case of limitations on procedural assistance.

34. The aim of the contested limitation on procedural assistance is to enable the court to resolve an application for exemption from the state fee through a relatively simple procedure. Previously, prior to 2012, on the application of a person the court could issue an order to exempt the person either fully or partially from the state fee if the court found that the person was insolvent. In line with the jurisprudence of the Supreme Court Administrative Law Chamber prior to 2012, as a rule a person had to be fully or partially exempted from paying the state fee if they could not in actuality pay the state fee upon filing an action. In line with that jurisprudence, the court had to thoroughly investigate a person's ability to pay in order to

adjudicate an application for procedural assistance. This was burdensome on the court from the point of view of procedural economy.

35. The Court *en banc* has explained that the aim according to which a participant in proceedings only partially bears the costs of administration of justice in their case can be considered legitimate in administrative court proceedings. The principle of participation in bearing costs is limited in administrative court proceedings because, in addition to protection of the subjective rights of individuals, the functions of administrative courts include balancing executive governmental authority (Supreme Court *en banc* judgment of 29 November 2011 in case No 3-3-1-22-11, para. 29.2; judgment of 22 November 2011 in case No 3-3-1-33-11, para. 26.3). In a situation where governmental authority may interfere with a person's right in the public interest, the costs necessary to verify the legality of interference must also be borne mostly out of public funds.

36. Next, the Court *en banc* will verify the proportionality of interference with the general fundamental right to effective judicial protection and the right of appeal arising from the limitation on procedural assistance imposed by § 112(1) cl. 1) of the CACP, in terms of the aims of procedural economy and partial bearing of the costs of administration of justice.

37. The limitation on procedural assistance imposed in § 112(1) cl. 1) of the CACP is appropriate if it facilitates the aim of ensuring that no frivolous or vexatious complaints are brought to the court and that state budgetary funds are used economically. In terms of appropriateness, a measure is definitely disproportionate if in no instances does it facilitate attaining its aim. In the instant case, the contested limitation on procedural assistance does not amount to such a situation.

38. The measure laid down in § 112(1) cl. 1) of the CACP facilitates attaining the aim of procedural economy since at least in certain cases it directs individuals not to bring lightly to court complaints having no prospect of success. Such a limitation on procedural assistance based on a person's income allows prevention of the indiscriminate grant of procedural assistance to every person having recourse to the court. This, in turn, helps to prevent judicial adjudication of frivolous complaints. In this context, the preventive effect of the contested limitation on procedural assistance in terms of facilitating procedural economy should also be taken into account. Linking the conditions for grant of procedural assistance to the financial situation of an applicant and to the prospects of success of their complaint is also justified in the opinion of the European Court of Human Rights (see, e.g., *Steel and Morris v. the United Kingdom*, No 68416/01, 15 February 2005, para. 62). Based on the foregoing, the measures laid down in § 112(1) cl. 1) of the CACP also facilitate economical use of state budgetary funds in line with the public interest.

39. To achieve the aims of procedural economy and partial bearing of the costs of administration of justice, no other measure exists that would be less onerous on individuals while being at least equally effective as the limitation on procedural assistance laid down in § 112(1) cl. 1) of the CACP. Therefore, the limitation on procedural assistance imposed by the contested provision is a necessary measure for attaining the aims of procedural economy and partial bearing of the costs of administration of justice.

40. To decide on the narrow proportionality of a measure requires considering, on the one hand, the extent and intensity of interference with a fundamental right and, on the other hand, the importance of the aims. It should be taken into account that the more intense the interference with a fundamental right, the more solid the reasons justifying interference have to be (see, e.g., Supreme Court *en banc* judgment of 7 June 2011 in case No 3-4-1-12-10, para. 50).

41. The right to judicial protection and the right of appeal are important fundamental rights and under § 15(1) and § 24(5) of the Constitution these must be guaranteed to everyone, not only to those who are able to participate in bearing costs. The interference arising from § 112(1) cl. 1) of the CACP is intense and extensive. If granting procedural assistance is barred but a person in actuality lacks resources for payment of the required state fee, recourse to the court is not just complicated but the person has been completely deprived of this opportunity. As a result, the rights for the protection of which the person wishes to have

recourse to the court will be left unprotected too.

42. In order to prevent the state fee from smothering judicial protection, procedural assistance must preclude a situation where the rights of a person having recourse to the court with a complaint having prospects of success are deprived of judicial protection merely because of the person's financial situation.

43. Failure to take into account essential expenses creates a distorted picture of a person's financial situation when deciding on a grant of procedural assistance. A person who has no savings or easily disposable property, and all of whose income after deductions allowed under § 112(1) cl. 1) of the CACP must be spent on essential food, medication, clothes and hygiene products, in actuality lacks funds to cover procedural expenses, or in order to cover procedural expenses they should desist from satisfying their primary necessities as well as those of their dependants. Both consequences would be too severe to justify them by an interest in somewhat economising on state budgetary funds spent on the administration of justice.

44. Weighing procedural economy as an aim for interference should, first of all, take into account that § 112(1) cl. 1) of the CACP is not the only measure to discourage vexatious complaints and complaints having no prospect of success, because in the case of such complaints the court may also refuse to grant procedural assistance by relying on § 111(1) of the CACP. The legislator can also more clearly specify the grounds for returning such complaints without examination. Second, in terms of procedural economy, it should nonetheless be conceded that deduction of additional expenses in applying § 112(1) cl. 1) of the CACP would make decisions on procedural assistance more complicated for the courts. However, this additional burden could be partially contained by other measures (para. 47 *et seq.* below).

45. Third, assessment of narrow proportionality should take into account that the aim of participation in bearing costs is secondary in administrative court proceedings (para. 35 above), and thus of little weight. In any case, only part of the costs necessary for the work of administrative courts can be left for participants in proceedings to bear, so that the contested limitation on grant of procedural assistance only minimally safeguards the principle of participation in bearing costs. Since the interference is narrowly disproportionate in respect of the right of appeal, it is even more disproportionate in respect of the fundamental right of recourse to the court of first instance for protection of rights.

46. On the basis of the foregoing and relying on § 15(1) cl. 2) of the Constitutional Review Court Procedure Act, the Court *en banc* declares § 112(1) cl. 1) of the CACP unconstitutional and repeals it as of the entry into force of this judgment insofar as it bars the court from deducting from a person's income any essential expenses not mentioned in that provision.

47. As a rule, in constitutional review court proceedings legal norms are repealed retroactively, but the Supreme Court may limit the retroactive force of a judgment, *inter alia*, based on the principles of legal certainty arising from § 10 of the Constitution (see, e.g., Supreme Court *en banc* judgment of 10 March 2008 in case No 3-3-2-1-07, paras 19 and 20; Constitutional Review Chamber judgment of 17 April 2012 in case No 3-4-1-25-11, para. 55). In line with § 240(2) cl. 7) of the CACP, retroactive repeal of § 112(1) cl. 1) of the CACP would lead to reopening many earlier rulings on procedural assistance. When granting applications for reopening, those applications that were not examined due to refusal to grant procedural assistance should also be reviewed anew. The resulting additional workload for administrative courts might lead to administrative courts becoming unable to offer effective judicial protection within a reasonable time in other administrative cases. Considering the importance of the principle of *res judicata*, i.e. the force of law of a judicial ruling, adjudication of applications anew in such an amount would not be compatible with the principle of legal certainty. Therefore, the Court *en banc* repeals § 112(1) cl. 1) of the CACP in part as of the entry into force of this judgment. Insofar as the contested provision is repealed, it can no longer be applied in adjudicating pending applications for procedural assistance, or in adjudicating appeals against orders refusing to grant procedural assistance.

48. The Court *en banc* considers it necessary to explain the principles based on which essentiality of expenses should be temporarily assessed as of the moment of entry into force of this judgment until the time

when the legislator establishes new regulatory arrangements in place of the repealed limitation on procedural assistance.

49. It does not follow from this judgment that the court should consider as justified any expenses on food, clothes, and the like. The Court *en banc* repeals § 112(1) cl. 1) of the CACP only with regard to the impossibility of deducting essential expenses. With regard to expenses not mentioned in § 112(1) cl. 1) of the CACP in force to date, presumably as a rule they are essential for each person to the extent of approximately half the minimum monthly wage, i.e. currently to the extent of 200 euros. At the time of filing the application in 2015, the minimum wage was 390 euros (see § 1(2) of the Government regulation of 28 November 2013 No 166). According to Statistics Estonia, in 2014 the cost of the minimum monthly food basket of a household with one member was 91 euros and 96 cents, and presumably it remained within the same range in 2015. Additional to this are other essential monthly expenses, for example, on medication, hygiene and clothes, as well as potential unforeseen one-off expenses. It appears from the above that the subsistence minimum of 90 euros in 2015 (§ 2(8) cl. 1) of the 2015 State Budget Act) does not cover these essential expenses, not even the full cost of the minimum monthly food basket (see also Supreme Court Constitutional Review Chamber judgment of 21 January 2004 in case No 3-4-1-67-13, para. 51). However, these essential personal expenses are presumably covered by half the minimum wage (i.e. 195 euros in 2015). This serves as a reference point that does not preclude the justifiability of such expenses either in a somewhat smaller or a somewhat higher amount.

50. If a person's essential monthly expenses exceed half the minimum wage, justification for these expenses must be given in order to be deductible.

51. Expenses on food, clothes, and the like are not essential if satisfying a person's relevant needs is sufficiently ensured in some other way, e.g. through meals provided to a prisoner in prison. However, in view of the need, for example, to buy hygiene products and occasionally incur unforeseen one-off expenditure, even in the case of prisoners, it may be presumed that in addition to deductions recognised to date, monthly expenses in the amount of approximately 5% of the minimum wage (thus 20 euros in 2015) are essential and assessing them more specifically upon granting procedural assistance is unnecessary. A prisoner's need for expenses on hygiene products should be presumed, since a hygiene package at the expense of the prison is normally issued only on condition that during the three months prior to receiving a hygiene package the freely disposable funds on a prisoner's account were on average less than 9 euros and 59 cents (clause 11.3.3 of the internal rules of Tartu Prison and Viru Prison, clause 11.3.1 of internal rules of Tallinn Prison).

52. When preparing the new regulatory arrangements, the legislator can also consider other solutions that ensure a Constitution-compliant result in the light of the above.

IV

53. In the application for procedural assistance filed with the Court of Appeal, the appellant sought full exemption from payment of the state fee of 562 euros and 11 cents. The appellant's income for the four months preceding the filing of the application was 3183 euros and 82 cents (Supreme Court Administrative Law Chamber order of 16 November 2015 in case No 3-3-1-35-15, para. 9). In the application for procedural assistance, the appellant set out housing expenses in the amount of 200 euros and expenditure on food in the amount of 300 euros. Additionally, the appellant seeks deduction of 195 euros for fulfilling statutory maintenance obligation (§ 101(1) Family Law Act).

54. In the opinion of the Court *en banc*, the appellant's expenses on their own food and other primary necessities should be considered as essential in the amount of 200 euros a month. The legislator has already also included housing expenses and the sum intended for fulfilling a statutory maintenance obligation among essential expenses. Thus, the appellant's average monthly income for the two months calculated over four months, along with justified deductions, is about 400 euros $((3183.82 - 4 \times (195 + 200 + 200)) \div 4 \times 2 = 401$ euros and 91 cents).

55. Thus, granting procedural assistance to the appellant is not precluded. However, § 116(2) of the CACP additionally prescribes assessment of an applicant's financial situation in line with § 186 of the Code of Civil Procedure. This was not done by the Court of Appeal in the instant case as it limited itself to examination with regard to § 112(1) cl. 1) of the CACP when resolving the application. On that basis, the appeal against the order must be allowed, the Tallinn Court of Appeal order of 27 February 2015 reversed, and the application for procedural assistance remitted to the Court of Appeal for a new hearing.

56. Under § 107(4) (first sentence) of the CACP, the security is to be refunded.

Dissenting opinion of Supreme Court Justices Villu Kõve, Malle Seppik and Tambet Tampuu to the Supreme Court *en banc* judgment of 12 April 2016 in case No 3-3-1-35-15

We do not agree with the opinion of the majority of the Court *en banc* that § 112(1) cl. 1) of the Code of Administrative Court Procedure (CACP) contravenes the Constitution. We believe that this provision can be applied in a Constitution-compliant manner, so that no need exists to declare the provision unconstitutional.

Section 112(1) clause 1) of the CACP lays down the extent of procedural expenses that an appellant should be able to bear without state assistance in view of the appellant's income. This constitutes a proportion between the anticipated procedural expenses and a certain part of an appellant's income. The substance of the provision is to lay down that if an appellant's procedural expenses do not exceed even twice their average income, from which deductions set out in the same provision have been made, the participant in proceedings should be able to bear those costs without state assistance. In itself, the state may establish a threshold for procedural expenses, which a participant in proceedings should be able to meet in view of their income, and no procedural assistance would be granted to an appellant in the case of expenses being below the threshold.

The Court *en banc* has narrowly interpreted procedural expenses within the meaning of § 112(1) cl. 1) of the CACP, considering only the state fee to be paid on appeal as the appellant's procedural expense. In other words, only the procedural expense related to one procedural step has been taken into account. The provision itself enables a much wider interpretation. It refers to procedural expenses not anticipated to amount to a sum exceeding the part of an applicant's income calculated according to the rules contained in the provision. Use of the **plural form** (procedural expenses) indicates that expenses to be incurred in proceedings in general were intended, not just a single expense resulting from a single procedural step. The same follows from the fact that **anticipated** procedural expenses were intended. If the provision had been intended to relate to an individual procedural expense incurred in relation to a single procedural step (such as only the state fee to be paid on appeal in the instant case), it would not be possible to speak of anticipated procedural expenses, since the amount of the state fee to be paid on appeal is known in the same way as the amount of the appellant's income that needs to be taken into account in line with the legal norm at issue. In that case, nothing should be anticipated.

If § 112(1) cl. 1) of the CACP were to be interpreted as having been intended to relate to all the anticipated procedural expenses, then in the instant case, in addition to the state fee, at least the expense that the appellant will presumably have to pay for legal assistance should be taken into account. The state fee (562 euros and 11 cents), along with the anticipated costs of legal assistance (which can be anticipated to amount to more than 239 euros and 80 cents), would presumably exceed the amount of 801 euros and 91 cents, which is twice the appellant's monthly income as calculated in line with the rules under § 112(1) cl. 1) of the CACP, and granting procedural assistance to the appellant under this provision would not be precluded. Further, pursuant to § 116(2) of the CACP, the justifiability of granting procedural assistance should then be verified in line with § 186 of the Code of Civil Procedure.

Regardless of the above, in our opinion other provisions of the CACP do not preclude the right of the court to offer an opportunity to a participant in proceedings, for whom the grant of procedural assistance is barred under § 112(1) cl. 1) of the CACP, to pay the state fee by instalments even though the CACP does not contain a provision analogous to § 181(3¹) of the Code of Civil Procedure. Thus, when no state fee on the appeal has been paid, a reasonable time limit for an appellant must be given to remedy it (§ 187(3) cl. 3) and subs. (4) (first sentence) CACP). In deciding on the length of a reasonable time limit, the court may consider, *inter alia*, circumstances related to the appellant's financial situation. The law does not prevent setting a time limit for payment of the state fee so that the fee can be paid by instalments within deadlines set by the court. The court may extend the time limit set by itself, including at the request of the participant in proceedings as well as on its own initiative (§ 69(1) CACP). The court may return an appeal if the appellant fails to comply with the requirement of the court by the deadline (§ 187(4) (second sentence) CACP). However, the court has no such opportunity if the court's order for payment of the fee by deadline (payment by instalments) is complied with. In that case, we cannot talk of the consequences of failure to perform a procedural step in due time within the meaning of § 70 of the CACP. The fact that the CACP contains no provision regulating the moment of opening proceedings on an appeal in such a case does not prevent opening of proceedings and starting to adjudicate an appeal after the appellant has begun complying with the court's order to pay the state fee by instalments. Similar judicial practice is applied in civil cases even though the Code of Civil Procedure does not separately regulate the moment of opening proceedings in respect of an appeal in a situation where the state fee on the appeal is paid by instalments.

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