Constitutional judgment 3-2-1-40-15

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	3-2-1-40-15
Date of judgment	26 April 2016
Composition of court	Chairman: Priit Pikamäe; members: Tõnu Anton, Peeter Jerofejev, Henn Jõks, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Saale Laos, Viive Ligi, Jaak Luik, Jüri Põld, Paavo Randma, Malle Seppik and Tambet Tampuu
Contested judicial decision	Tartu Court of Appeal order of 28 November 2014 in civil case No 2-12-51758
Appellant and type of appeal	Appeal against order, filed by sworn advocate Veljo Viilol
Participants in the proceedings in the Supreme Court	Sworn advocate Veljo Viilol Riigikogu Chancellor of Justice Minister of Justice Estonian Bar Association
Hearing	8 December 2015, written procedure

OPERATIVE PART

1. To declare unconstitutional and repeal sentences 1–3 of § 21(3) of the State Legal Aid Act.

2. To declare unconstitutional and annul "The bases for calculation of the fee paid for provision of state legal aid, the procedure for payment, and the rates of fees, and the extent and procedure for compensation of expenses incurred in provision of state legal aid" (entered into force on 1 October 2014), approved by decision of 16 September 2014 and amended by decisions of 30 September 2014, 7 April 2014, 15 September 2015 and 12 January 2016 of the Board of the Estonian Bar Association.

3. To declare unconstitutional and annul the acts concerning the bases for calculation of the fee paid for provision of state legal aid, the procedure for payment, and the rates of fees, and the extent and procedure for compensation of expenses incurred in provision of state legal aid, approved by decisions of the Board of the Estonian Bar Association on the basis of § 21(3) of the State Legal Aid Act and in force from 1 January 2010 to 30 September 2014.

4. To postpone the entry into force of points 1?3 of the operative part by six months as of this judgment becoming final, except with regard to:

1) sentences 1–3 of § 21(3) of the State Legal Aid Act to the extent that they authorise the Estonian Bar Association to establish the provisions contained in subpoints 2–3 of point 4 of the operative part of this judgment;

2) the legal acts of the Estonian Bar Association mentioned in points 2 and 3 of the operative part of this judgment as regards clauses 51?54 of those acts;

3) Annex 1 to the legal acts of the Estonian Bar Association mentioned in points 2 and 3 of the operative part of this judgment, "Rates of fees for representatives in administrative court proceedings and administrative proceedings", as regards clauses 16?19, and Annex 2 „Rates of fees for representatives in proceedings for international protection and subsequent administrative court proceedings", as regards clauses 19?22.

5. To reverse the Tartu Court of Appeal order of 28 November 2014 in civil case No 2-12-51758 to the extent that the Court of Appeal dismissed the application by sworn advocate Veljo Viilol for compensation of travel expenses related to providing state legal aid. In the remaining part, the Court of Appeal order has become final.

6. With regard to the reversed part, to enter a new order granting in part the application by sworn advocate Veljo Viilol for compensation of travel expenses related to providing state legal aid, setting the amount of travel expenses to OÜ VELJO VIILOLI ADVOKAADIBÜROO [Veljo Viilol Law Firm] for legal aid provided by sworn advocate Veljo Viilol to Aune Pokk in civil case No 2-12-51758 as being 36 euros, including VAT.

7. To allow the appeal against the order in part.

8. To send the order to the Estonian Bar Association, OÜ VELJO VIILOLI ADVOKAADIBÜROO, and the Tax and Customs Board.

9. To refund to OÜ VELJO VIILOLI ADVOKAADIBÜROO the security paid on the appeal against the order.

FACTS AND COURSE OF PROCEEDINGS

1. By order of 10 June 2013, in civil case No 2-12-51758 being an action in which Jõhvi Rural Municipality (suing as Jõhvi Rural Municipality Government) claimed from Aune Pokk (defendant) payment of the principal debt of 830 euros and 85 cents, Viru County Court granted state legal aid to the defendant without the defendant's being obligated to compensate it. The defendant was represented by sworn advocate Veljo Viilol.

2. At the appeal stage, V. Viilol continued providing state legal aid to the defendant under § 17(1) and (3) of the State Legal Aid Act (SLAA). On 24 July 2014 and 14 November 2014, V. Viilol filed applications with Tartu Court of Appeal to determine the amount of the state legal aid fee and the extent of compensation of state legal aid expenses in the appeal proceedings.

3. According to the application of 24 July 2014, from 26 May to 10 June 2014 V. Viilol had provided state legal aid to the defendant in appeal proceedings; V. Viilol sought an award in the total amount of 805 euros and 68 cents (including VAT) for related fees and expenses.

4. According to the application filed by V. Viilol with the Court of Appeal on 14 November 2014, from 28 October to 11 November 2014 he had provided state legal aid to the defendant to the extent of 1.5 hours. V. Viilol sought from the Court of Appeal an award of 60 euros (without VAT) as a fee for the service provided. V. Viilol claimed remuneration in the amount of 20 euros for the time spent to reach the hearing at the Court of Appeal, and compensation of travel expenses in the amount of 118 euros and 20 cents (subject to additional VAT). According to the application of 14 November 2014, the remuneration and expenses of V. Viilol totalled 237 euros and 84 cents (including VAT).

5. Based on the applications of 24 July and 14 November 2014, V. Viilol sought an award of remuneration and expenses in the amount of 869 euros and 60 cents, subject to additional VAT of 173 euros and 92 cents (total 1043 euros and 52 cents).

6. By order of 24 November 2014, Tartu Court of Appeal approved a compromise reached between the parties at the court hearing and decided that expenses for state legal aid provided to the defendant would be borne by the state.

7. By order of 28 November 2014, the Court of Appeal granted in part the applications by V. Viilol to determine the amount of the state legal aid fee and the extent of compensation of expenses, and set them at the amount of 312 euros, including VAT.

8. Based on the application of 14 November 2014, the Court of Appeal deemed the compensable amount of the state legal aid fee for activities performed to be 60 euros. With regard to the application for compensation of expenses for travel to the Court of Appeal hearing of 11 November 2014, the Court of Appeal noted that the "The bases for calculation of the fee paid for provision of state legal aid, the procedure for payment, and the rates of fees, and the extent and procedure for compensation of expenses incurred in provision of state legal aid" (hereinafter 'the procedure for fees and expenses') approved by the Board of the Estonian Bar Association (hereinafter also called 'the Board of the Bar Association'), which entered into force on 1 November 2014, lays down in clause 51 that for providing state legal aid an advocate or the management of a law firm is compensated for travel and accommodation expenses, translation and interpretation expenses, and expenses related to presentation of evidence, only if these are supported by expense receipts (except if the court, investigative body, or prosecutor's office can electronically verify that the expenses were incurred). The Court of Appeal had no doubt that V. Viilol attended the hearing in Tartu Court of Appeal on 11 November 2014. There is also no question that the seat of OÜ V. Viiloli Advokaadibüroo is in Tallinn. Nevertheless, the Court of Appeal dismissed the application of 14 November 2014 by V. Viilol with regard to compensation of travel expenses because the advocate's travel expenses were not supported by expense receipts mentioned in clause 51 of the procedure for fees and expenses.

Under clause 51 of the procedure for fees and expenses, presentation of expense receipts to the court is mandatory, and no expenses are compensated in the case of failure to present them.

9. On 12 December 2014, V. Viilol filed an appeal with the Supreme Court, contesting the Tartu Court of Appeal order of 28 November 2014 with regard to the refusal to award travel expenses. V. Viilol seeks reversal of the Court of Appeal order to the contested extent and entry of a new order granting in part the application for compensation of travel expenses, awarding him 134 euros and 64 cents (including VAT). Alternatively, V. Viilol requests that the application for remuneration in the reversed part be remitted for re-examination to Tartu Court of Appeal.

10. V. Viilol noted in his appeal that the Court of Appeal had found as proven that V. Viilol had attended the hearing in Tartu on 11 November 2014 and that the seat of his law firm was in Tallinn, which necessitated travel to the hearing in Tartu. The court conceded that as a result of this V. Viilol had to incur expenses. Therefore, it is unfounded and controversial to refuse to grant the application for compensation of travel expenses on the ground that no expense receipts concerning use of a car had been presented.

11. Under clause 54 of the procedure for fees and expenses, justified travel expenses are compensated at the rate of 0.3 euros for each kilometre travelled. It is unclear from the judgment what kind of expense receipt the Court of Appeal has in mind that would be suitable as proof of use of a car. If the Court of Appeal is aware of what it should be, then under § 340^1(1) of the Code of Civil Procedure (CCivP) the court should first have issued an order to remedy the omission.

OPINION OF THE FULL PANEL OF THE SUPREME COURT CIVIL CHAMBER

12. By order of 20 May 2015, a three-member panel of the Supreme Court Civil Chamber decided that in the light of the Supreme Court *en banc* order of 26 June 2014 in case No 3-2-1-153-13 the issue of application of the procedure for fees and expenses established by the Board of the Bar Association on the basis of § 21(3) of the SLAA should be referred to the full panel of the Supreme Court Civil Chamber under § 18(2) of the CCivP in the interests of harmonisation and development of judicial practice.

13. By relying on the jurisprudence of the Supreme Court *en banc*, the full panel of the Supreme Court Civil Chamber by order of 14 October 2015 found that, under § 19(4) cl. 3) and § 690(1) (first sentence) of the CCivP and § 3(3) (second sentence) of the Constitutional Review Court Procedure Act (CRCPA), adjudication of the case should be referred to the Supreme Court *en banc*. When examining the case, the Chamber developed a doubt whether § 21(3) of the SLAA and the procedure for fees and expenses established by the Board of the Bar Association on that basis is formally constitutional.

14. In para. 73 of its order issued on 26 June 2014 in case No 3-2-1-153-13, the Supreme Court *en banc* noted that imposing a limit on compensation of expenses of a contractual representative interferes with the right to property of a participant in the proceedings (§ 32 Const.) and the right of recourse to the court (§ 15(1) Const.) and may also interfere with the right of appeal (§ 24(5) Const.). Under § 21(3) of the SLAA, the bases for calculation of fees payable for provision of state legal aid, the procedure for payment and rates of fees, and the extent of and procedure for compensation of expenses relating to provision of state legal aid will be established by the Board of the Bar Association for each budgetary year, taking into account the amount of funds allocated for this from the state budget and an estimate of the volume of state legal aid. In the order of 26 June 2014 in case No 3-2-1-153-13, the Supreme Court *en banc* held that compensation of the expenses of a contractual representative constitutes compensation for expenses incurred in court proceedings, so that in essence this falls within the scope of a statute governing court procedure (§ 104(2) cl. 14) Const.) (para. 74. of the order of the Court *en banc*). Issues falling within the scope of § 104(2) of the Constitution may only be regulated by statute and may not be delegated to the executive. Pursuant to § 104(2) cl. 14) of the Constitution, statutes regulating court procedure must be passed by a majority of the members of the Riigikogu. Thus, following from § 104(2) of the Constitution, compensation of expenses incurred in court proceedings must be regulated in a statute passed by a majority of the members of the Riigikogu.

15. The Chamber asks the Court *en banc* to answer, inter alia, the question whether the legislator can delegate to the executive the task of establishing the procedure for compensation of fees and expenses (including travel expenses) to a representative appointed to provide state legal aid or whether it can be delegated only under a statute. The Chamber also asks the Court *en banc* to assess whether, if the legislator may in principle delegate to the executive the task of establishing the procedure for fees and expenses, it can be considered constitutional if the right to establish such a legislative act is further delegated to a legal person in private or public law.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

16. – 21. [Not translated].

CONTESTED PROVISIONS

22. "The bases for calculation of the fee paid for provision of state legal aid, the procedure for payment, and the rates of fees, and the extent and procedure for compensation of expenses incurred in provision of state legal aid" (entered into force on 1 October 2014), approved by the decision of 16 September 2014 of the Estonian Bar Association, clauses 51?54:

„51. In connection with provision of state legal aid, an advocate or the management of a law firm shall be compensated travel and accommodation expenses, translation and interpretation expenses, and expenses related to presentation of evidence. Only expenses supported by expense receipts shall be compensated to an advocate or the management of a law firm, unless the court, investigative body, or prosecutor's office can electronically verify that the expenses were incurred.

52. On the basis of an application by an advocate who provided state legal aid, the court, investigative body or the prosecutor's office shall determine the compensable travel and accommodation expenses incurred by an advocate or the management of a law firm in connection with providing state legal aid if state legal aid was provided in a city or rural municipality outside the boundaries of the seat of the law firm or its department through which the advocate provides the legal service, or if international legal aid is provided abroad.

53. Travel and accommodation expenses shall be compensated in accordance with the conditions laid down in § 40(1) of the Civil Service Act and specificities set out in clause 52 of the procedure.

54. Expenses incurred for use of a private car or a car of the management of a law firm in connection with providing state legal aid in the cases set out in clause 52 shall be compensated on justified application of an advocate in the amount of 0.3 euros for each kilometre travelled. If expenses in relation to use of a car have been incurred in one or several cases, the compensation is divided by the number of recipients of state legal aid and, based on the result, an application to determine the amount of compensation of expenses shall be submitted separately for each recipient of state legal aid."

23. State Legal Aid Act, § 21 „State legal aid fee and state legal aid expenses", subsection (3), sentences 1?3:

„(3) The Board of the Bar Association will establish the rates of fees and the extent of compensation for expenses so that state legal aid would be ensured until the end of the budgetary year."

OPINION OF THE COURT *EN BANC*

24. First, the Court *en banc* will identify the applicable legal act and whether it is a legislative act of general application (I). Then the Court *en banc* will identify the relevant provisions and determine the extent of review of constitutionality in the instant case (II). After that the Court *en banc*will assess the constitutionality of the contested provision (III). Then the Court *en banc* will consider the need to also extend the review to earlier legislation in force on the basis of the contested delegation norm (IV). Finally,

the Court *en banc* will decide on the need to postpone the entry into force of the decision (V) and will resolve the appeal against the order (VI).

I

25. When examining the appeal against the Court of Appeal order, the Civil Chamber developed misgivings whether § 21(3) of the SLAA and the procedure for fees and expenses established by the Board of the Bar Association on that basis is formally constitutional. It appears from the ruling of the Court of Appeal that, in the case it was adjudicating, the court considered "The bases for calculation of the fee paid for provision of state legal aid, the procedure for payment, and the rates of fees, and the extent and procedure for compensation of expenses incurred in provision of state legal aid" in force since 1 November 2014 as being the applicable legal act.

26. By relying on approval and amendment notations contained in the headers of legal acts regulating state legal aid fees and expenses published on the homepage of the Bar Association (http://www.riigioigusabi.ee [1]) and established on the basis of § 21(3) of the SLAA, as well as other materials and theory of legal acts, the Court *en banc* finds that the version applicable in the instant case is "The bases for calculation of the fee paid for provision of state legal aid, the procedure for payment, and the rates of fees, and the extent and procedure for compensation of expenses incurred in provision of state legal aid" approved by decision of 16 September 2014 of the Board of the Bar Association. Essentially, this act constitutes an act with the same name approved by decision of 15 December 2009 of the Board of the Bar Association and amended by decisions of 9 February 2010, 15 June 2010, 13 December 2011, 14 June 2012, 11 December 2012, 19 February 2013, 16 April 2013 and 18 June 2013, and losing validity on 1 January 2014, which the Board of the Bar Association by decision of 16 September 2014 established anew and which entered into force on 1 October 2014. On 1 November 2014, only the amendments introduced to this act by decision of 30 September 2014 of the Board of the Bar Association entered into force. Thus, the version relevant in the instant case is "The bases for calculation of the fee paid for provision of state legal aid, the procedure for payment, and the rates of fees, and the extent and procedure for compensation of expenses incurred in provision of state legal aid", approved by decision of 16 September 2014 of the Board of the Bar Association and entering into force on 1 October 2014.

27. Under § 3(3) (second sentence) of the CRCPA, the Supreme Court *en banc* adjudicates cases referred by a Chamber or Special Panel if the Chamber or Special Panel has reasonable doubts concerning the constitutionality of a legislative act relevant to adjudication of the case. From this provision in combination with § 2 cl. 1) of the CRCPA it follows, first of all, that a contested act by its legal nature must be a legislative act. If the contested act is essentially an administrative act, the Court *en banc* cannot check its constitutionality by way of constitutional review proceedings (see, *mutatis mutandis*, Supreme Court Constitutional Review Chamber order of 22 November 2010 in case No 3-4-1-6-10, para. 64). Thus, in order to decide on the possibility of initiating constitutional review court proceedings, the Court *en banc* must first ascertain whether the act at issue is a legislative act of general application or an administrative act. For reasons explained in paras 38 and 62 of the judgment, the Court *en banc* will provide its relevant assessment with regard to all the procedures for fees as a whole and expenses established on the basis of § 21(3) of the SLAA (on these procedures, see para. 61 of the judgment).

28. Under § 51(1) of the Administrative Procedure Act, an administrative act is an order, resolution, precept, directive or other legal act issued by an administrative authority concerning performance of administrative functions in order to regulate individual cases in public law relationships and directed at creating, altering or extinguishing the rights and obligations of persons. Under § 51(2) of the Administrative Procedure Act, a general order directed at persons determined on the basis of general characteristics is also an administrative act. Under § 88 of the Administrative Procedure Act, a regulation is a legal act issued by an administrative authority to regulate an unrestricted number of cases.

29. In the context of assessing the formal constitutionality of a legal act, the Court *en banc* has explained that the procedure for issuing a legislative act and an administrative act, their formal legality, and contestation are different because the nature of acts and needs for protecting the rights of individuals are different (Supreme Court *en banc* judgment of 31 May 2011 in case No 3-3-1-85-10, para. 24). In § 21(3) of the SLAA, the legislator has not mentioned whether the procedure for fees and expenses is legislation of specific or general application. The Court *en banc* finds that the procedure for fees and expenses corresponds to the characteristics of a regulation under § 88 of the Administrative Procedure Act.

30. By degree of specificity, the procedure for fees and expenses is close to a legislative act, a regulation. It establishes the bases for calculation of fees payable for provision of state legal aid, the procedure for payment and the rates of fees, and the extent of and procedure for compensation of expenses relating to provision of state legal aid. The procedure for fees and expenses imposes limits on remuneration for a representative appointed to provide state legal aid, as well as on compensation of their expenses, including travel expenses.

31. Through procedural codes, the procedure for fees and expenses concerns the rights and duties of an abstract range of persons. In addition to members of the Bar Association identifiable on the basis of general characteristics, it is also aimed at courts who have to rely on it when determining procedural expenses and imposing the duty of compensation on participants in the proceedings. The provisions of the procedure for fees and expenses also affect the rights of persons entitled to state legal aid as well as the rights of those ordered to pay state legal aid expenses. Thus, characteristically of a legislative act, the range of addressees of the procedure for fees and expenses is open. For this reason, it does not constitute a general order mentioned in § 51(2) of the Administrative Procedure Act.

32. On that basis, the Court *en banc* finds that the procedure for fees and expenses is a legislative act. The procedure being a legislative act within the meaning of § 2(1) of the CRCPA, the Supreme Court is competent to assess its constitutionality.

II

33. Pursuant to the first sentence of § 14(2) of the CRCPA, in constitutional review court proceedings the Supreme Court checks the constitutionality of a provision which is relevant for adjudicating the case. Therefore, it must first be ascertained to what extent this was the case with the procedure for fees and expenses in force during the contested period. Until not decided otherwise, the procedure for fees and expenses in the following part is understood to be the act applicable in the instant case.

34. There is no dispute in the case that sworn advocate V. Viilol provided state legal aid to the defendant in civil court proceedings within which he attended a hearing at Tartu Court of Appeal. It is also undisputed that the law firm of V. Viilol is located in Tallinn, so that he had to travel to the hearing at Tartu Court of Appeal. Nevertheless, the Court of Appeal refused to grant the application by V. Viilol for an award of travel expenses, as the advocate's travel expenses were not supported by expense receipts as set out in clause 51 of the procedure for fees and expenses. According to clause 51 of the procedure for fees and expenses, only expenses supported by expense receipts are to be compensated to an advocate or a law firm, unless the court, investigative body, or prosecutor's office can electronically verify that the expenses were incurred. Sworn advocate V. Viilol has not submitted expense receipts in support of his travel expenses, and the expenses claimed by the advocate cannot be verified electronically either.

35. Thus, clause 51 of the procedure for fees and expenses prevents compensation of travel expenses related to representation for the reason that they are not supported by requisite expense receipts. Determination of travel expenses, if incurring them is proven, is regulated by clauses 52?54 of the procedure for fees and expenses. As the fact whether and to what extent travel expenses have to be compensated depends on the constitutionality of clauses 51?54 of the procedure for fees and expenses, these provisions are relevant.

36. The procedure for fees and expenses has been established by the Board of the Bar Association on the basis of a delegating norm in § 21(3) of the SLAA. In line with the jurisprudence of the Supreme Court, also relevant are those provisions that are closely linked to a contested provision and, if left in force, may cause lack of clarity in terms of legal reality (see Supreme Court Constitutional Review Chamber judgment of 26 November 2007 in case No 3-4-1-18-07, para.20). Clauses 51?54 of the procedure for fees and expenses are closely linked to the delegating norm on which their establishment is based. Therefore, § 21(3) of the SLAA is also relevant in the instant case to the extent that it authorises the Board of the Bar Association to establish the legal rules applicable in this case.

37. The Court *en banc* concedes that from the point of view of the court dispute it is adjudicating, only clauses 51?54 of the procedure for fees and expenses and the underlying delegating norm are relevant. At the same time, the Civil Chamber who referred the case to the Court *en banc* did not doubt the substantive constitutionality of the regulatory arrangements concerning compensating the travel expenses of state legal aid advocates in connection with representing their clients, but whether the procedure for fees and expenses established by the Board of the Bar Association and applicable in the instant case, as well as the underlying § 21(3) of the SLAA, are formally compatible with the Constitution. In other words, the Chamber doubts whether the Board of the Bar Association is a competent body to establish the procedure for fees and expenses.

38. The Court *en banc* shares the doubts expressed by the Chamber. If clauses 51?54 of the procedure for fees and expenses and the underlying delegating norm are formally incompatible with the Constitution, it is highly likely that other provisions established on the basis of § 21(3) of the SLAA, as well as the delegating norm itself to the relevant extent, are also formally incompatible with the Constitution. In other words, the Court *en banc* has doubts concerning the constitutionality of the delegating norm in § 21(3) of the SLAA and the procedure established on that basis to a wider extent than is relevant in the instant case, and does not find it justified to postpone verifying this doubt until an opportunity to resolve the issue within a potential future abstract constitutional review case or another specific constitutional review case arises. On that basis, and in line with the principle of effective protection of the legal order, the Court *en banc* will check the formal constitutionality of the whole delegating norm contained in § 21(3) of the SLAA and the procedure for fees and expenses established on that basis.

39. In the event of the unconstitutionality of a delegating norm, an act passed on the basis of that norm is also unconstitutional (See Supreme Court *en banc* order of 26 June in case No 3-2-1-153-13, para. 69). Therefore, the Court en banc will first check the constitutionality of the delegating norm contained in § 21(3) of the SLAA.

III

40. Pursuant to the first sentence of § 11 of the Constitution, rights and freedoms may only be restricted in accordance with the Constitution. In accordance with the requirement of formal constitutionality, a legislative act that restricts fundamental rights must comply with the requirements of competence, procedure, and form, as well as the principles of legal clarity and statutory reservation (Supreme Court *en banc* judgment of 1 July 2015 in case No 3-4-1-20-15, para. 44).

41. Thus, the first issue in adjudicating the present constitutional review case is whether the Board of the Bar Association as a management body of a legal person in public law is competent to issue legislative acts in line with the Constitution. This is an issue of the constitutional admissibility of delegating the function of creating norms. It depends on the answer to this question whether the legislator may authorise the Board of the Bar Association to establish the legal norms contained in the procedure for fees and expenses.

42. To answer this question, the Court *en banc* will first assess whether the issue of proof and compensation of travel expenses of advocates providing state legal aid, regulated in clauses 51?54 of the procedure for fees and expenses, is of the kind which pursuant to § 104(2) cl. 14) of the Constitution must be regulated in a

statute passed by a majority of the members of the Riigikogu. If the answer to this question is affirmative, the Constitution reserves establishing clauses 51?54 of the procedure for fees and expenses to a majority of the members of the Riigikogu, and delegating it to the Board of the Bar Association is inadmissible.

43. Under § 104(2) cl. 14) of the Constitution, statutes governing court procedure must be passed by a majority of the members of the Riigikogu. Previously, the Court *en banc* has expressed the opinion that imposing a limit on compensation of the expenses of a contractual representative, being an issue of compensation of expenses incurred in court proceedings, belongs, by nature, within the scope of § 104(2) cl. 14) of the Constitution, so that it must be regulated in a statute passed by a majority of the members of the Riigikogu (Supreme Court *en banc* order of 26 June 2014 in case No 3-2-1-153-13, paras 73?74).

44. The Court *en banc* emphasises that in the case cited the subject-matter of the dispute was imposing a limit on compensation of expenses of a contractual representative. In order to decide whether a limit on compensation of expenses of a contractual representative may be imposed by a body issuing a regulation, the Court *en banc* dealt with the principle of parliamentary reservation, as well as whether the matter is subject to regulation by a constitutional statute under § 104(2) cl. 14) of the Constitution. In brief, the Court *en banc* considered the issue of establishing a limit on compensation of the expenses of a contractual representative to be an essential issue which, in line with the principle of parliamentary reservation, must be regulated by the legislator who, in line with § 104(2) cl. 14) of the Constitution, must do so by a majority of votes of its members. The Court *en banc* also noted that § 104(2) of the Constitution, under which certain statutes may be passed and amended only by a majority of the members of the Riigikogu, is an expression of the principle of parliamentary reservation, i.e. essentiality (Supreme Court *en banc* order of 26 June 2014 in case No 3-2-1-153-13, para. 72).

45. The Court *en banc* finds that, unlike imposing a limit on compensating the expenses of a contractual representative, which, on account of its essentiality, must be decided by a majority of the members of the Riigikogu, proof and compensation of travel expenses of an advocate providing state legal aid, regulated in clauses 51?54 of the procedure for fees and expenses and having relevance in the instant case, is not an issue which should be regulated by a majority of the members of the Riigikogu. In other words, it does not by nature fall within the scope of § 104(2) cl. 14) of the Constitution. Such an opinion corresponds to the reason for the existence of a constitutional requirement for a qualified majority in passing constitutional statutes.

46. In concrete terms, constitutional statutes are statutes that regulate the most important issues from the point of view of the state’s constitutional order, being in a sense an extension of the Constitution. By establishing the requirement of a qualified majority for passing constitutional statutes, including statutes governing court procedure, the list set out in § 104(2) of the Constitution lays down derogations from § 73 of the Constitution, under which legislation in the Riigikogu is passed by a majority of votes cast, unless otherwise prescribed in the Constitution. When giving meaning to the derogation laid down in § 104(2) cl. 14) of the Constitution, it must not be interpreted so as to excessively restrict the compentence of the Riigikogu under § 73 to decide the passage of its legislation, as a rule, by a majority of votes cast. Unjustified extension of the scope of § 104(2) cl. 14) of the Constitution to any substantive rules of judicial procedure, and through this requiring a higher majority threshold for passing those norms, may lead to disregarding the provision in § 73 and thus also the will of the constitutional legislator. In the opinion of the Court *en banc*, proof and compensation of the travel expenses of advocates providing state legal aid is not among issues of utmost national importance from the point of view of the country’s constitutional order.

47. Certainly, the fact that the Constitution does not reserve regulation of the above issues for a majority of the membership of the Riigikogu does not mean that they could be regulated by any kind of body. As the dispute in the instant case involves first and foremost the issue whether they could be regulated by the Board of the Bar Association, the Court *en banc* will next focus on this.

48. Under § 59 of the Constitution, in Estonia legislative authority is vested in the Riigikogu. However, this norm, as one of the expressions of the principle of democracy reflected in § 1 of the Constitution, does not require that universally mandatory norms of behaviour should only be established by the legislator directly

legitimised by the people. The Constitution also enables other state bodies to pass legislative acts. Thus, § 87 cl. 6) of the Constitution explicitly lays down the right of the Government of the Republic to issue regulations and directives on the basis of and for the implementation of statutes. Under § 94(2) of the Constitution, a minister also issues regulations on the basis of statutes; § 78 cl. 7) of the Constitution lays down the legislative powers of the President of the Republic.

49. In addition to the above bodies, norms may also be created by bodies not explicitly given that authority by the Constitution. For example, the Constitution does not lay down the right of municipal councils to pass legislation, but stipulates in § 154(1) that all local matters are determined and administered by local authorities, who discharge their duties autonomously in accordance with the law. This provision contains the principle of self-organisation, i.e. autonomy, of local authorities. Since autonomous administration of local matters would be difficult without the right to issue regulations, the concept of autonomy of local authorities includes the right to issue legislative acts as a necessary precondition for such autonomy. Autonomy is also explicitly mentioned in § 38(2) of the Constitution, under which universities and research institutions are autonomous within the limits prescribed by statute. Thus, the right of a person or body of persons not mentioned in the Constitution to create norms may derive from their constitutional status.

50. The Constitution does not mention the Estonian Bar Association or its autonomy. Under § 2(2) of the Bar Association Act, the Estonian Bar Association is a legal person in public law. Subsection (1) of the same section defines the Bar Association as "a self-governing professional association which organises the provision of legal services in private and public interests and protects the professional rights of advocates". Granting the Bar Association the status of a legal person in public law is justifiable by the fact that by providing state legal aid it exercises a public function.

51. The Court *en banc* finds that the norm-creating competence of state bodies not mentioned in the Constitution, including management bodies of legal persons in public law, cannot be ruled out. However, a serious reason must exist for partial delegation of the norm-creating function to a body not mentioned in the Constitution. Decentralisation may be considered as a general justification for delegation of public administration to legal persons in public law. A specific justification for partial delegation of the exercise of public authority to self-governing professional associations as a sub-group of legal persons is the understanding that due to their substantive competence in the relevant field they are best capable of exercising the public function concerned.

52. Thus, the question to be asked is whether the above justifications also suffice to justify (partial) transfer of a norm-creating function to a body not mentioned in the Constitution. In the opinion of the Court *en banc*, the answer to this question should be affirmative. It cannot be ruled out that under certain conditions partial delegation of norm-creation, limited to a specific field, to a body not mentioned in the Constitution, including the Board of the Bar Association, may be admissible within the meaning of the Constitution. Exercise of functions transferred to a legal person in public law may be accompanied by the right to decide autonomously, on the basis of a statute, issues falling within the particular competence, including issuing universally mandatory rules of behaviour.

53. The fact that the Constitution does not prohibit delegation of the norm-creating function to bodies not mentioned in the Constitution cannot lead to the conclusion that the legislator may delegate decisions on any kinds of issues to such a body. In line with the principle of parliamentary reservation or essentiality, that which under the Constitution is the obligation of the legislator cannot be further delegated to the executive (see the Supreme Court's consistent jurisprudence since the Constitutional Review Chamber judgment of 12 January 1994 in case No III-4/A-1/94). Just as the legislator may delegate to the executive only what the Constitution does not require the legislator itself to do, when delegating the norm-creating function the legislator may transfer to a body not mentioned in the Constitution only the competence to regulate those issues which the Constitution does not require the parliament itself or, for example, the Government to decide.

54. In order to decide whether, upon delegating establishment of the procedure for fees and expenses to the

Board of the Bar Association, the legislator authorised it to do more than allowed under the Constitution, it is necessary to consider whether the provisions laid down in the procedure constitute those essential issues which the Constitution does not enable the management body of the Bar Association to regulate. In other words, it should be asked whether, upon delegating establishment of the procedure for fees and expenses to the Bar Association, the legislator observed the principle of essentiality, which in the present context should be understood not as a parliamentary reservation but as a principle which reserves decisions on certain issues to a democratically more legitimised state body, i.e. either to the legislator itself or to the Government or a minister (hereinafter in the judgment provisionally termed 'reservation of direct governmental authority'). This principle derives from the first sentence of § 3(1) of the Constitution, under which governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith (cf. Supreme Court *en banc* judgment of 16 May 2008 in case No 3-1-1-86-07, para. 21).

55. As the present constitutional review case originates from a dispute over compensation of travel expenses, the Court *en banc* will start checking the formal constitutionality of the procedure for fees and expenses from clause 51 of the procedure. Under clause 51 of the procedure for fees and expenses, only compensable expenses supported by expense receipts are to be compensated to an advocate or a law firm, unless the court, investigative body, or prosecutor's office can electronically verify that the expenses were incurred. This provision, regulating the conditions under which the representation-related expenses of an advocate who provided state legal aid are compensated, interferes not only with the inviolability of property and professional freedom of advocates obliged to provide state legal aid but also with the right to judicial protection of persons entitled to state legal aid and with the inviolability of property of the opposing party. The reason is that what expenses incurred due to provision of state legal aid are compensable, and on what conditions, directly affects the legal positions of all the above parties, including in an unfavourable direction.

56. If an advocate is not compensated at all for travel expenses incurred in connection with representation, or they are compensated in a smaller amount than that actually incurred, as well as when proof of incurring them is unreasonably complicated, the advocate may be forced to bear those expenses on account of their personal property. On the other hand, regulatory arrangements that do not require advocates to provide documentary proof of expenses incurred may unfavourably affect persons entitled to state legal aid. The reason is that if resources allocated from the state budget are channelled to compensating unsupported expenses, this may lead to a situation where state legal aid fees funded from the same source evolve to the level where it might no longer be possible to speak of effective judicial protection of rights.

57. In the opinion of the Court *en banc*, deciding on restrictions of fundamental rights of persons to such an extent constitutes an essential issue that may not be regulated by the Bar Association. Therefore, the Court *en banc* holds that the underlying delegating norm for clause 51 of the procedure for fees and expenses contravenes the principle of reservation of direct governmental authority within the meaning explained above. For the same reasons, the delegating norm underlying the establishment of clauses 52?54 of the same procedure also contravenes the Constitution. Since in the case of a conflict of a delegating norm with the Constitution an act issued on that basis is also unconstitutional, clauses 51?54 of the procedure for fees and expenses are unconstitutional.

58. The Court *en banc* notes that if the delegating norm contained in § 21(3) of the SLAA and the provisions of the procedure for fees and expenses passed on that basis are formally unconstitutional as regards proof and compensation of expenses, due to violation of the principle of essentiality (within the meaning explained above), the delegating norm and the act passed on that basis are also unconstitutional to the extent that they regulate issues whose essentiality is equal to or more important than the issue of proof and compensation of expenses examined above.

59. Undoubtedly, establishing the rates of fees for provision of state legal aid is just such an issue. Even though the Board of the Bar Association establishes these rates under a delegating norm, "taking into account the amount of funds allocated for this from the state budget and an estimate of the volume of state legal aid", this cannot lead to the conclusion that the rates of fees are thereby sufficiently specified. As the delegating norm additionally authorises the Bar Association to establish the procedure for compensating the

expenses of advocates, and in doing so does not establish a rule on how the state's budgetary resources should be used for the exercise of these essentially different functions, the Bar Association has an extensive margin of appreciation under the delegating norm in distributing state budget resources in a situation where the decision concerns, on the one hand, effectiveness of the right to judicial protection of those in need of state legal aid and, on the other hand, restrictions on the professional freedom of advocates. The discretion of the Board of the Bar Association in distributing state legal aid resources is limited, for example, by § 30(3) of the SLAA, under which "the Bar Association ensures that funds earmarked for provision of state legal aid are kept separately from the other assets of the Bar Association", but even this guarantee along with the ceiling indirectly imposed on the rates of fees through the volume of state budgetary allocations fails to satisfy the constitutional requirement according to which essential issues must be decided by direct governmental authority (within the meaning afforded to this above, i.e. either the legislator itself or the national Government or a minister).

60. The Court *en banc* does not rule out that the delegating norms contained in § 21(3) of the SLAA and the provisions of the procedure for fees and expenses passed on that basis may include some which are constitutional. However, the Court *en banc* does not find it possible to carry out a total check of the procedure for fees and expenses within the instant case. As the Court *en banc* estimates the proportion of such potentially constitutional provisions among the delegating norms contained in § 21(3) of the SLAA and the procedure for fees and expenses as a whole not to be particularly sizeable, and in view of the need to prevent excessively binding the legislator as regards the issue of how to shape the regulatory scheme for state legal aid fees and expenses in the future, the Court *en banc* repeals sentences 1?3 of § 21(3) of the SLAA and the procedure for fees and expenses passed on that basis in their entirety on the grounds of conflict with the principle of direct governmental authority arising from the first sentence of § 3(1) of the Constitution, within the meaning afforded to that principle above.

IV

61. The Court *en banc* calls attention to the fact that, in addition to the procedure for fees and expenses that entered into force on 1 October 2014, dealt with above, since adoption of the delegating norm in § 21(3) of the SLAA the Board of the Bar Association has also established other similar acts relying on that basis concerning the bases for calculation of the fee paid for provision of state legal aid, the procedure for payment and the rates of fees, and the extent and procedure for compensating expenses incurred in provision of state legal aid. By relying on approval and amendment notations contained in the headers of legal acts regulating state legal aid fees and expenses published on the homepage of the Bar Association and established on the basis of § 21(3) of the SLAA, as well as theory of legal acts, the Court *en banc* believes it can be concluded that since the entry into force of the contested delegating norm on 1 January 2010 until the entry into force on 1 October 2014 of the procedure relevant in the instant case, at least three legally distinct acts passed by the Board of the Bar Association based on § 21(3) of the SLAA have been in force. These acts are the following.

61.1. "The bases for calculation of the fee paid for provision of state legal aid, the procedure for payment, and the rates of fees, and the extent and procedure for compensation of expenses incurred in provision of state legal aid" (hereinafter also 'procedure No 1'), approved by decision of 15 December 2009 and amended by decisions of 9 February 2010, 15 June 2010, 13 December 2011, 14 June 2012, 11 December 2012, 19 February 2013, 16 April 2013 and 18 June 2013 of the Board of the Estonian Bar Association. This procedure entered into force on 1 January 2010 and ceased to be valid due to the entry into force of the new procedure on 1 January 2014.

61.2. "The bases for calculation of the fee paid for provision of state legal aid, the procedure for payment, and the rates of fees, and the extent and procedure for compensation of expenses incurred in provision of state legal aid" (hereinafter also 'procedure No 2'), approved by decision of 26 November 2013 and amended by decisions of 25 February 2014 and 5 August 2014 of the Board of the Estonian Bar Association; the procedure entered into force on 1 January 2014 and ceased to be valid on 1 September 2014. To be precise, by directive of 11 August 2014 No 72 the Minister of Justice annulled procedure No 2 under § 4 of

the Bar Association Act as of 1 September 2014 and obliged the Board of the Bar Association to establish an amended procedure at the latest on 1 September 2014. Under § 4(1) of the Bar Association Act, when exercising supervision over the organisation of state legal aid and use of funds allocated for state legal aid, the minister responsible for the area shall annul, partly or in full, a legal act adopted by a body of the Bar Association which is contrary to a statute or regulation.

61.3. "The temporary bases for calculation of the fee paid for provision of state legal aid, the temporary procedure for payment, and the temporary rates of fees, and the temporary extent and temporary procedure for compensation of expenses incurred in provision of state legal aid" (hereinafter also 'the temporary procedure') approved by decision of 15 August 2014 of the Board of the Bar Association, which constitutes an unamended version of the procedure annulled by the Minister of Justice directive No 72. The temporary procedure entered into effect on 1 September 2014. By directive No 77 of 1 September 2014 the Minister of Justice annulled the temporary procedure as of 10 September 2014 and obliged the Board of the Bar Association to establish an amended procedure at the latest on 10 September 2014. The temporary procedure ceased to be valid on 10 September 2014. On 4 September 2014, the Bar Association filed an action with the administrative court against the Minister of Justice directives No 72 and 77; at the time of the present judgment the proceedings are pending in the court of appeal.

61.4. With regard to the period from 10 to 30 September 2014, the Court *en banc* notes that even though during that period no legislative act of the Board of the Bar Association regulated the bases for calculation of the fee paid for provision of state legal aid, the procedure for payment and the rates of fees, and the extent and procedure for compensation of expenses incurred in provision of state legal aid, to fill the legal gap procedure No 1 should be applied, if necessary, by analogy in respect of activities carried out during that period.

62. As noted above (see para. 39 of the judgment), in the event of the unconstitutionality of a delegating norm, an act passed on the basis of that norm is also unconstitutional. Therefore, and out of necessity to avoid potential disputes similar to the one adjudicated in the instant case concerning the constitutionality of (invalid) procedures established on the basis of a formally unconstitutional delegating norm, the Court *en banc* also declares unconstitutional all the other procedures listed in para. 61 of the judgment and established on the basis of the delegating norm in § 21(3) of the SLAA.

V

63. Section 58(3) of the Constitutional Review Court Procedure Act (CRCPA) enables the Supreme Court to postpone by up to six months the entry into force of a judgment by which it declares unconstitutional and repeals an act or a provision of an act. The Court *en banc* finds that if the present judgment were to enter into force in its entirety upon pronouncement (as laid down in § 58(2) of the CRCPA), it would no longer be possible to determine the fees and expenses of state legal aid, and absence of the relevant procedure would lead to lack of clarity in paying the fees and compensating expenses of appointed state legal aid representatives. Absence of a procedure for fees and expenses could also lead to a situation where fees of representatives would be claimed on the basis of market prices paid to contractual representatives, which are presumably considerably higher than prices set in the procedures approved by decisions of the Board of the Bar Association. This, in turn, would mean that funds allocated from the state budget for payment of state legal aid would very quickly be exhausted.

64. In order to prevent lack of clarity with regard to determining fees and expenses during the period required by a competent body to establish a regulatory scheme conforming to the requirements of the Constitution, the Court *en banc* considers it justified to postpone entry into force of the judgment with regard to all the procedures for fees and expenses dealt with above as well as the relevant part of their underlying delegating norm, except as regards clauses 51–54 of the procedures for fees and expenses and the relevant part of their underlying delegating norm, and as regards those clauses in the annexes to procedures for fees and expenses that contain provisions identical to those established in clauses 51–54 of the procedure for fees and expenses relevant in the instant case.

65. To be precise, the Board of the Bar Association has decided to regulate the bases for calculation of fees payable for provision of state legal aid, the procedure for payment and the rates of fees, and the extent of and procedure for compensation of expenses relating to provision of state legal aid in administrative and administrative court proceedings, and proceedings for international protection and subsequent administrative court proceedings, in annexes to the procedures for fees and expenses. Thus, by decision of 5 August 2014 the Board of the Bar Association amended procedure No 2, supplementing it with Annex 1 “Rates of fees for representatives in administrative court proceedings and administrative proceedings”, and by decision of 15 September 2015 amended the procedure for fees and expenses in force until the entry into force of the present judgment, supplementing it with Annex 2 “Rates of fees for representatives in proceedings for international protection and subsequent administrative court proceedings”. Clauses 16?19 of Annex 1 and clauses 19?22 of Annex 2, respectively, deal with the subject-matter regulated in clauses 51–54 of the procedure for fees and expenses in force until the entry into force of the present judgment. The Court *en banc* considers the legal norms contained in the above annexes to be an inseparable part of the procedure for fees and expenses, dealing with them separately within the present judgment only for practical reasons, first and foremost reasons arising from the legislative drafting choices made by the Board of the Bar Association, and to ensure better legal clarity.

66. The Court *en banc* postpones the entry into force of the present judgment to the extent explained in para. 64 of the judgment by six months under § 58(3) of the CRCPA.

67. The Court *en banc* does not find it necessary to postpone the entry into force of the judgment with regard to any of clauses 51–54 of the procedure for fees and expenses established on the basis of § 21(3) of the SLAA or any of the annexed clauses 16?19 (Annex 1) and 19?22 (Annex 2), or with regard to the relevant extent of their underlying delegating norm. Therefore, until the establishment of a regulatory scheme conforming to the requirements of the Constitution, the expenses that would have been compensable under those clauses will have to be determined on the basis of the SLAA, if necessary by applying analogy (with regard to travel expenses, see Part VI of the judgment).

68. The Court *en banc* also draws the attention of the legislator to § 22(6) of the SLAA, under which the amount of the state legal aid fee and the extent of compensation of state legal aid expenses will be determined on the basis of the procedure for fees and expenses specified in § 21(3) of this Act “which was in force at the time of performing the actions that served as the basis for payment of the corresponding fee or compensation of expenses, unless otherwise established by the Board of the Bar Association”. Since § 22(6) of the SLAA can no longer be applied after the Supreme Court judgment has become final in its entirety, the legislator must also resolve the issue of what norms should apply in determining procedural expenses in state legal aid cases pending at that moment.

VI

69. On the basis of the foregoing, the Court *en banc* holds that under § 701(3) of the Code of Civil Procedure the appeal against the order must be allowed in part and the judgment of the Court of Appeal reversed to the extent that the Court of Appeal dismissed the application by sworn advocate T. Viilol for compensation of travel expenses. With regard to the reversed part, a new order must be entered granting in part the application for compensation of travel expenses and setting the amount of travel expenses to OÜ V. Viiloli Advokaadibüroo incurred in connection with provision of state legal aid by sworn advocate Veljo Viilol in the civil case as being 36 euros, including VAT.

70. As the Court *en banc* declares unconstitutional and repeals § 21(3) of the SLAA and declares unconstitutional and annuls the procedures for fees and expenses established on that basis by the Board of the Bar Association, and in part postpones the entry into force of the judgment, except with regard to clauses 51–54 of the procedures for fees and expenses, these clauses cannot be applied in resolving the instant case. Instead, first and foremost the State Legal Aid Act should be used as a basis, if necessary by applying analogy or other ways of filling a legal gap for resolving the case.

71. Under § 22(1) cl. 4) of the SLAA, in order to determine the amount of the state legal aid fee and the extent of compensation for state legal aid expenses, an advocate will submit to the court, prosecutor's office or investigative body who decided on the grant of state legal aid, an application that must set out, inter alia, the grounds for the time spent, the actions performed and the necessity for and justification of expenses incurred. Under § 22(2) of the SLAA, the documents certifying the expenses incurred by the advocate or the management of the law firm will be annexed to the application, unless the court, investigative body, or prosecutor's office can electronically verify that the expenses were incurred. Under § 22(7) (first sentence) of the SLAA, the court, prosecutor's office or investigative body that decided on the grant of state legal aid will verify whether the application submitted by an advocate is correct and justified and determine on the basis of the advocate's application, inter alia, the necessary compensable expenses incurred in providing state legal aid. Under § 22(7) (third sentence) of the SLAA, in order to determine the above information, the court may request additional clarification or documents from the advocate.

72. It follows from § 22(2) and (7) of the SLAA that, if possible, documents proving that travel expenses were incurred must be submitted for compensation of state legal aid expenses, but no basis has been provided for refusal to compensate expenses in the event of failure to submit documents. The court may also request additional clarification or documents. Thus, if no expense receipts can be submitted to prove a circumstance, the circumstance may also be proven in some other procedurally admissible way. In the opinion of the Court *en banc*, there is no reason in the instant case to doubt the circumstance apparent in the application submitted by the applicant that he used a car to travel to the hearing at the Court of Appeal.

73. On account of finding the use of a car in the civil case proven, next the rate for compensation of travel expenses incurred must be found. Since clauses 52 and 54 of the procedure for fees and expenses that was declared unconstitutional and annulled cannot be applied, the Court *en banc*resolves the issue of compensating travel expenses by analogy.

74. The Court *en banc* finds it justified in determining the amount of compensation for use of a car to proceed from § 5 of Government regulation of 14 July 2006 No 164 ("The procedure for keeping records on the use of a private car for performing service- or work-related or official functions and duties, and the procedure for payment of compensation", which was also in force at the time of the hearing at the Court of Appeal on 11 November 2014), setting the maximum limit of up to 0.3 euros for each kilometre travelled, which is paid to a person if a private car was used for performing service- or work-related or official functions or duties. Since under § 21(2) of the SLAA, state legal aid expenses are necessary costs incurred by an advocate or the management of a law firm due to provision of state legal aid by an advocate, by analogy travel expenses incurred by the management of a law firm are also compensable.

75. By applying § 5 of the above Government regulation of 14 July 2006 by analogy, the Court *en banc* finds that the amount of compensable travel expenses in the instant case is 30 euros, subject to additional VAT of 6 euros. This expense corresponds to the actual presumed cost incurred by using an average car on the Tallinn-Tartu-Tallinn (372 km) route in November 2014.

76. The Court *en banc* also calls attention to the fact that establishing a new procedure for compensation of expenses incurred in provision of state legal aid should proceed from the premise that only costs actually incurred are compensable. For example, clause 54 of the procedure that has been declared unconstitutional and annulled enabled compensation of costs that were presumably several times higher than actual travel costs.

77. As the appeal against the order is allowed in part, in line with § 149(4) of the Code of Civil Procedure the security paid on the appeal must be refunded.

Dissenting opinion of Supreme Court Justice Jüri Põld to Supreme Court *en banc* judgment of 26 April 2016 in case No 3-2-1-40-15, joined by Supreme Court Justice Lea Kivi

1. I think that sentences 1 to 3 of § 21(3) of the State Legal Aid Act, as well as the acts of the Board of the Estonian Bar Association mentioned in the operative part of the judgment of the Court *en banc*, were not relevant in the instant case within the meaning of § 3(3) of the Constitutional Review Court Procedure Act, and their constitutionality did not need to be assessed nor should have been assessed in adjudicating the appeal against the order.

2. The dispute before the Supreme Court originated when Tartu Court of Appeal dismissed the application by sworn advocate V. Viilol for compensation of travel expenses. The Court of Appeal had no doubt that sworn advocate V. Viilol attended the hearing in Tartu Court of Appeal and that the seat of his law firm was in Tallinn. The Court of Appeal dismissed the application because the advocate's travel expenses were not supported by expense receipts mentioned in clause 51 of the procedure for fees and expenses approved by the Board of the Bar Association. The Court of Appeal found that under clause 51 of the procedure for fees and expenses presentation of expense receipts is mandatory, and no expenses are compensated in the case of failure to present them. The Court *en banc* also proceeded from the fact that the sworn advocate failed to present documents mentioned in the procedure for fees and expenses concerning his travel expenses.

3. I think that the Court *en banc* failed to pay sufficient attention to the fact that presentation of expense receipts is required not only under the procedure for fees and expenses but also under the State Legal Aid Act. Section 22 of the Act refers to an application that an advocate will submit in order to determine the amount of state legal aid expenses and compensation of those expenses. Subsection (2) of the same section stipulates: "The documents certifying the expenses incurred by the advocate or the management of the law firm will be annexed to the application, unless the court, investigative body, or prosecutor's office can electronically verify that the expenses were incurred."

4. The conclusion that in certain cases travel expenses can also be compensated without presentation of expense receipts is also barred by the last sentence of § 22(7) of the State Legal Aid Act, which stipulates: "In order to determine the information provided in this subsection, the court may request additional clarification or documents from the advocate". I believe that the words "request additional clarification or documents from the advocate" further emphasise that expense receipts are necessary and, in addition to expense receipts which the advocate must annex to the application under § 22(2), the court may request further additional documents if necessary.

5. Sworn advocate V. Viilol failed to present to the Court of Appeal any expense receipts concerning travel expenses. The Court of Appeal could also not verify electronically that the expenses were incurred, because no relevant databases exist.

6. However, it was not the procedure for fees and expenses that prevented compensating travel expenses to the sworn advocate. Compensation of travel expenses was directly prevented by statute. Even in the absence of the procedure the application should have been dismissed on the ground of absence of the documents required by § 22(2) of the State Legal Aid Act. Thus, the possibility to grant the application did not depend in the least on the existence or absence of a procedure for fees and expenses. The Court of Appeal and the Court *en banc* had absolutely no need for recourse to the procedure when adjudicating the application.

7. I think that in a situation where no expense receipts had been presented at all, the Court of Appeal should have set aside the procedure for fees and expenses when adjudicating the advocate's application and should, instead, have relied on § 22(2) of the Act and dismissed the application on the ground of absence of expense receipts. The Court *en banc*, however, should have upheld the operative part of the judgment of the Court of Appeal but should have amended the reasoning of the Court of Appeal. The Court *en banc* should have

justified refusal to dismiss the application for compensation of travel expenses by the fact that the clearly stipulated condition for compensation of travel expenses under § 22(2) of the State Legal Aid Act – presentation of expense receipts (i.e. documentary evidence required by statute) – had not been complied with. In a situation where no documents had been presented to prove that the expenses were incurred, the legal basis for dismissing the application should have been § 22(7) of the State Legal Aid Act, as this refers to compensation of expenses incurred by an advocate.

8. Since adjudicating the application by the sworn advocate did not depend in the least on the existence or absence of a procedure for fees and expenses, neither the procedure itself nor the delegating norm provided under the State Legal Aid Act for establishing it were relevant in the instant case.

9. Even though I hold the opinion that the procedure for fees and expenses is not relevant in the instant case, I concur with the majority of the Court *en banc* that it constituted a legislative act of general application – a regulation in the substantive sense – and that the Board of the Bar Association was not competent to establish that act.

However, I do not agree with the opinion expressed in para. 51 of the judgment that the norm-creating competence of state bodies not mentioned in the Constitution, including management bodies of legal persons in public law, cannot be ruled out. I believe that the right to issue a regulation in the substantive sense may only derive from the Constitution. The Constitution clearly confers this right on the national Government (§ 87 cl. 6)) and government ministers (§94(2)). I believe that autonomous universities and research institutions (§ 38(2)), the Bank of Estonia (§ 111), and local authorities (§ 154) also have the right to issue regulations, even though the Constitution does not mention their right to issue regulations. I believe that they hold the right to issue regulations because without issuing regulations they would not be able to exercise the functions arising from the Constitution.

Dissenting opinion of Supreme Court Justices Saale Laos and Viive Ligi to Supreme Court *en banc* judgment of 26 April 2016 delivered in civil case No 3-2-1-40-15

We agree with the position expressed in the opinion of the Chancellor of Justice and the Ministry of Justice that the procedure for fees and expenses established on the basis of § 21(3) of the State Legal Aid Act (SLAA) is a general order within the meaning of § 51(2) of the Administrative Procedure Act.

The only addressees of the order are the advocates who must comply with it when submitting applications for remuneration to be paid for provision of state legal aid and expenses incurred. In other words, the procedure for fees and expenses only interferes with the professional freedom and inviolability of property of advocates, and not with the rights of recipients of state legal aid or participants in proceedings who will have to bear the fee and expenses of state legal aid. The reason is that in determining the amount of state legal aid expenses and ordering an obligated person to pay them the body conducting the proceedings relies on the SLAA (e.g., § 22(7), § 23 and § 25(1)) and the relevant procedural statute. Nor does § 22(6) of the SLAA bind the body conducting the proceedings to the procedure for fees and expenses, but only lays down a temporal rule that an advocate must observe when seeking payment of remuneration for provision of services and compensation of expenses. It can also be taken into account that under § 21(3) of the SLAA the procedure for fees and expenses is established for each budgetary year.

On that basis, we find that the procedure for fees and expenses is substantively an administrative act, the constitutionality of which the Court *en banc* should not have checked within constitutional review proceedings.

We also share the views expressed in paras 3–7 of the dissenting opinion by J. Põld.

Links
[1] http://www.riigioigusabi.ee