Constitutional judgment 3-3-2-1-16

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	3-3-2-1-16
Date of judgment	30 June 2017
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, Nele Parrest, Ivo Pilving, Jüri Põld, Paavo Randma, Peeter Roosma, Malle Seppik and Tambet Tampuu
Case	Action by Romeo Kalda to obtain access to the internet
Participants in the proceedings	Applicant Romeo Kalda Respondents Tartu Prison and Viru Prison Institutions involved for expression of opinion: the Ministry of Justice, the Riigikogu, the Chancellor of Justice
Contested judicial decisions	Tartu Administrative Court judgment of 17 July 2008 and Tartu Court of Appeal judgment of 31 October 2008 in case No 3-07-2639, and Supreme Court *en banc* judgment of 7 December 2009 in case No 3-3-1-5-09
Basis for proceedings	Motion by Romeo Kalda to reopen the case

Hearing

Written procedure

OPERATIVE PART

1. To allow the motion by Romeo Kalda to reopen the case in part.

2. To reverse the Supreme Court*en banc* judgment of 7 December 2009 in case No 3-3-1-5-09, and Tartu Administrative Court judgment of 17 July 2008 and Tartu Court of Appeal judgment of 31 October 2008 in case No 3-07-2639 insofar as they resolved the action concerning a request for access to the websites of the Riigikogu and the Chancellor of Justice. With regard to the websitewww.coe.ee [1], to dismiss the motion to reopen the case and to uphold the judgments.

3. To decline to examine the motion to reopen the case insofar as concerns constitutional review.

4. With regard to the reversed part, to remit the case for a new hearing to Tartu Administrative Court.

FACTS AND COURSE OF PROCEEDINGS

1. By judgment of 7 December 2009 in case No 3-3-1-5-09, the Supreme Court *en banc* dismissed an appeal in cassation by Romeo Kalda and allowed an appeal in cassation by Tartu Prison against Tartu Court of Appeal judgment of 31 October 2008 in case No 3-07-2639. The Court *en banc* reversed the Administrative Court judgment and the Court of Appeal judgment insofar as they declared denial of access to the website www.coe.ee [1] unlawful and obliged the prison to enable the applicant access to that website. Consequently, the action by R. Kalda, seeking a ruling to oblige the prison to ensure him access to internet websites www.coe.ee [1], www.oiguskantsler.ee [2] and www.riigikogu.ee [3] and to declare the prison's refusal to do so unlawful, was dismissed in its entirety. The Court *en banc* held that the restriction imposed by § 31^1 of the Imprisonment Act (IA), prohibiting prisoners from using the contested websites, was proportionate and constitutional.

2. The applicant lodged an individual application with the European Court of Human Rights (ECtHR) against case No 3-3-1-5-09.

3. By judgment of 19 January 2016, the ECtHR granted the application in case No 17429/10, finding a violation of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court dismissed the applicant's claim for non-pecuniary damages. In sum, the reasoning of the judgments was as follows:

a) the applicant requested access to publicly freely accessible information via a specific means – the internet. Article 10 of the ECHR cannot be interpreted as imposing an obligation on States to enable prisoners' access to the internet. However, since access to certain websites containing legal information is granted under Estonian law, prohibition of access to other websites that also contain legal information constitutes interference with the right to receive information in the instant case. A legal basis and a legitimate aim (protection of the rights of others and prevention of disorder and crime) existed for prohibiting access to the websites in question;

b) however, in the instant case the restriction was not necessary within the meaning of Article 10 para. 2 of the ECHR. The three websites in question predominantly contained legal information, including information related to fundamental rights and the rights of prisoners. Access to such websites increases public awareness and respect for human rights. This gives weight to the applicant's argument that the Estonian courts used

those websites for obtaining information and the applicant also needed access for protecting his rights. Making requests for information would not be equivalent to access because in order to make a request it is first necessary to know what kind of information a particular website contains;

c) one of the measures to ensure execution of the Court's judgments is translation of judgments into the language of the respondent State. Even though Estonian translations of judgments in respect of Estonia are now available to individuals through the online version of the *Riigi Teataja*, this was not so at the time of the judicial dispute at issue, so that the request for access to the website www.coe.ee [1] was justified. Council of Europe and other international instruments underline the importance of the internet and the fact that an increasing amount of information is only available online. This is also evidenced by the instant case, since in Estonia official publication of legislation takes place only online;

d) in the instant case, the prisons were already equipped with computers specially adapted for access to certain internet websites, and supervision was exercised over their use. The Supreme Court in its judgment only referred to general risks and costs resulting from allowing access to new websites. The Estonian courts and the Government have failed to convincingly demonstrate that the actual additional costs would have been noteworthy;

e) the finding of a violation in itself constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

4. In his motion to reopen the case the applicant seeks a reversal of the Supreme Court *en banc* judgment of 7 December 2009, as well as the judgments of the Administrative Court and the Court of Appeal in the instant case and to satisfy the complaint on the grounds set out in the judgment of the ECtHR.

5. By an order of 22 February 2017, the Supreme Court Administrative Chamber referred the case for adjudication to the Supreme Court *en banc*. The Chamber concluded that a basis to reopen existed (§ 240(2) cl. 8) Code of Administrative Court Procedure) concerning the matter of access to the websites of the Riigikogu and the Chancellor of Justice as resolved by judgment of the Court *en banc* in the frame of the applicant's appeal in cassation. Therefore, it is necessary to clarify whether, on account of the basis to reopen, the administrative case should be resolved differently than by the Court *en banc* in its judgment. However, the Administrative Chamber cannot reassess the position of the Court *en banc* concerning application of the law. The Chamber also found that in the event of a new adjudication of the case by the Court *en banc* the opinions expressed in the ECtHR judgment of 19 January 2016 may lead to reassessment of the opinion concerning the constitutionality of § 31^1 of the Imprisonment Act (IA). The Chamber had misgivings concerning the constitutionality of § 31^1 of the IA, and also referred the case to the Court *en banc* under § 228(1) cl. 3) of the Code of Administrative Court Procedure (CACP) and § 3(3) of the Constitutional Review Court Procedure Act.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

6.–10. [not translated]

CONTESTED PROVISION

11. Section 31^1 of the Imprisonment Act "Use of internet":

"Prisoners are prohibited to use the internet, except in the computers specially adapted for that purpose by the prison service which enable access under the supervision of the prison service to public legislation databases and the register of judicial decisions."

OPINION OF THE COURT*EN BANC*

12. The Court *en banc* will first resolve the issue whether and to what extent a basis to reopen the case exists (I). Then the Court *en banc* will ascertain whether the contested judicial decisions should be amended as a

result of reopening the case (II).

I

13. In addition to the judgments of the Administrative Court and the Court of Appeal, the applicant seeks to reopen the Supreme Court *en banc* judgment of 7 December 2009 insofar as the Court *en banc* resolved the administrative matter as well as insofar as the Court *en banc* assessed the constitutionality of § 31^1 of the IA.

14. Unlike the CACP and other codes of judicial procedure, the Constitutional Review Court Procedure Act does not enable reopening of a judgment delivered in a constitutional review matter. The Supreme Court Constitutional Review Chamber in paras 26–29 of its order of 7 November 2014 in case No 3-4-1-32-14 held that the current law does not allow reopening of judgments delivered in constitutional review proceedings that have become final. The Court *en banc* agrees with this opinion and holds that therefore the motion to reopen should not be entertained insofar as the Court *en banc* resolved the issue of constitutional review.

15. By judgment of 19 January 2016, the ECtHR resolved the applicant's individual complaint and found a violation of Art 10 of the ECHR. In an administrative case, court decisions that have become final may be reviewed anew based on a motion filed by a participant in the proceedings if an individual application lodged with the ECtHR against the judgment delivered in the administrative case to be reopened was satisfied on account of violation of the ECHR or of any protocol thereto, provided that the violation may have affected determination of the matter and cannot reasonably be remedied or the harm caused thereby cannot be compensated otherwise than by means of reopening (§ 240(2) cl. 8) CACP).

16. The Court *en banc* agrees with the opinion expressed in the order of 22 February 2017 of the Administrative Chamber that a basis to reopen exists in this case (§ 240(2) cl. 8) CACP) concerning judgments delivered in relation to granting access to the websites of the Riigikogu and the Chancellor of Justice. Violation of Art 10 of the ECHR may have affected determination of the matter and the violation cannot reasonably be remedied otherwise. The Court *en banc* notes the following in this respect.

17. Under Art 10 para. 1 of the ECHR, everyone has the right to freedom of expression, and this right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Under para. 2 of the same article, the exercise of these freedoms may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

18. The applicant was not granted access to websites as requested by him. Thus, the violation of the ECHR found by the ECtHR judgment of 19 January 2016 with regard to these websites is still ongoing. The ECtHR in its judgment found that the finding of a violation was in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. This does not mean that the violation of the Convention concerning the request for imposing an obligation, which constitutes the substance of the administrative matter, would have been eliminated in its entirety or that it need not be eliminated. Under Article 46 of the ECHR, Estonia has undertaken to abide by the final judgment of the Court in any case to which it is a party. The ECHR forms an inseparable part of the Estonian legal order (Supreme Court *en banc* judgment of 22 March 2011 in case No 3-3-1-85-09, para. 73).

19. To comply with a judgment of the ECtHR, a Member State must take individual and, where necessary, also general measures in its domestic legal order to put an end to the violation that was found and to redress the effects. To achieve this, the applicant should as far as possible be put in a situation where they would have been if no violation of the Convention had occurred (ECtHR judgment of 18 September 2012 in case No 12214/07: *Egmez v. Cyprus*, para. 48 with case-law cited therein). In the event of failure to grant the

motion to reopen, the judgments dismissing the complaint for obtaining access would remain in force. This would provide a basis for the prison to deny the applicant's possible repeated request for access to the same websites. Thus, reopening the administrative matter is necessary to eliminate the violation.

20. Unlike the websites of the Riigikogu and the Chancellor of Justice, no basis exists to reopen the matter with regard to the website www.coe.ee [1]. That website no longer exists and the essential information previously published on that website (translations and summaries of ECtHR judgments) is now available in the electronic *Riigi Teataja*. With regard to that website, the motion to reopen is dismissed.

II

21. The existence of grounds to reopen does not necessarily mean that the complaint lodged with the Administrative Court for obtaining access to the websites should be satisfied.

22. Even though in this matter the ECtHR found a violation of Art 10 of the ECHR, it did not express the opinion that access to the contested websites had to be granted to prisoners in any case. The Court noted that while the security and economic considerations cited by the Estonian authorities may be considered as relevant, the domestic courts undertook no detailed analysis as to the security risks allegedly emerging from access to the three additional websites in question. The ECtHR found that the reasoning provided in the judgments of the Estonian courts as well as the Government's arguments concerning the complexity and costs of supervising use of the internet were not sufficiently specific to justify the proportionality of denial of access. The Supreme Court and the Government have failed to convincingly demonstrate that granting access to the three websites in question would have caused any noteworthy additional costs.

23. The Supreme Court *en banc* shares the opinion of the Ministry of Justice and the respondents that the security risks and resources required in relation to expanding prisoners' access to the internet, as noted in the Court *en banc* judgment of 2009, continue to be relevant. Even the use of computers adjusted by the prison service might not completely avoid all risks. However, a mere abstract reference to possible threats and to the complexity and cost of supervision does not give grounds to dismiss the motion to reopen.

24. Arising from the opinions contained in the ECtHR judgment of 19 January 2016, the process of a new review of the case should involve ascertaining what specific security risks the state would have to incur by granting prisoners access to the websites of the Riigikogu and the Chancellor of Justice, and the amount of resources required to mitigate those risks. Evidence to this effect must be provided by the state (§ 27(1) cl. 6) CACP). Based on this evidence, whether the restriction under § 31^1 of the IA is proportionate and necessary in a democratic society should be assessed anew. As these facts, which are essential in terms of resolving the administrative case, are not yet clear, the Court *en banc* cannot enter a new judgment in the matter itself. If the authorities participating in the proceedings fail to provide sufficient evidence, resolution of the case should proceed from Art 46 para. 1 of the ECHR and from what was established in the ECtHR judgment of 19 January 2016, according to which the restriction on access violates the applicant's rights under Art 10 of the ECHR.

25. The Court *en banc* underlines that even though the motion to reopen will not be entertained with regard to the dispute concerning constitutional review, and the Court *en banc* judgment of 7 December 2009 will not be amended, this does not prevent the Court from reassessing the constitutionality of § 31^1 of the IA in the present case. A statute that was declared constitutional in an earlier court decision may turn out to be unconstitutional in the light of new factual or legal circumstances.

26. In line with § 245(2) of the CACP, based on a well-founded motion to reopen a case the Supreme Court reverses a court decision that is reopened and remits the matter for a new hearing to the lower court which made the decision.

27. On that basis, the Supreme Court allows the motion by R. Kalda to reopen the case in part and reverses

the Supreme Court *en banc* judgment of 7 December 2009 and Tartu Administrative Court judgment of 17 July 2008 and Tartu Court of Appeal judgment of 31 October 2008 as regards the websites of the Riigikogu and the Chancellor of Justice. With regard to the reversed part, the case is remitted for a new hearing to Tartu Administrative Court.

Links
[1] http://www.coe.ee
[2] http://www.oiguskantsler.ee
[3] http://www.riigikogu.ee