

**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT**

No. of the case	3-4-1-20-07
Date of judgment	9 April 2008
Composition of court	Chairman Märt Rask, members Peeter Jerofejev, Villu Kõve, Priit Pikamäe and Harri Salmann.
Court Case	Petitions of the Harju County Court of 19 and 21 December 2007 to review the constitutionality of § 309(1) of the Code of Civil Procedure (CCP).
Participants in the proceeding and their representatives in the Supreme Court	Legal Affairs Committee and Constitutional Committee of the Riigikogu Plaintiffs: OÜ Aviso Kinnisvara (registry code 10521243), represented by advocate Indrek Lillo; Bestmarki Suurköökide Aktsiaselts (registry code 10043536), represented by advocate Madis Mahlapuu Defendants: Karin Poolak (personal identification code 46210210361); and OÜ Barons Hotels (registry code 11315095), represented by sworn advocate Tõnu Meidra Chancellor of Justice Allar Jõks
Hearing DECISION 	Written proceeding To declare the first sentence of § 390(1) and § 660(1) of the CCP unconstitutional and invalid to the extent that they do not permit an appeal against a ruling on dismissal of a petition for securing an action, by which the security paid is transferred into the public revenues.

FACTS AND COURSE OF PROCEEDING

1. By its ruling of 31 October 2007 the Harju County Court dismissed the petition for securing the action of OÜ Aviso Kinnisvara against Karin Poolak (applying, among other things, for the order that the defendant pay 3 228 432 kroons) and transferred the security for securing the action (100 000 kroons) into the public revenues.

The plaintiff filed an appeal against the ruling. By its ruling of 19 December 2007 in civil case no 2-07-44841/21 the Harju County Court did not apply § 390(1) of the Code of Civil Procedure (hereinafter "the CCP") to the extent that it does not permit to appeal against a ruling on securing an action, considering it unconstitutional; the court accepted the appeal against the ruling, forwarded its ruling to the Supreme Court for constitutional review, and stayed the proceeding of the appeal against the ruling until the adjudication of the constitutional review matter by the Supreme Court.

2. In addition, by its ruling of 6 November 2007, the Harju County Court dismissed the petition for securing the action of Bestmarki Suurköökide Aktsiaselts against OÜ Barons Hotels for ordering the payment of 1 096 675 kroons and 10 cents, and transferred the security for securing the action (55 000) into the public revenues.

The plaintiff filed an appeal against the ruling. By its ruling of 21 December 2007 in civil case no 2-07-46111/21, the Harju County Court did not apply § 390(1) of the CCP to the extent that it does not permit to appeal against a ruling on securing an action, considering it unconstitutional; the court accepted the appeal against the ruling, forwarded its ruling to the Supreme Court for constitutional review, and stayed the proceeding of the appeal against the ruling until the adjudication of the constitutional review matter by the Supreme Court.

3. The Supreme Court received the rulings, sent by the Harju County Court on the basis of § 9(1) of the Constitutional Review Court Procedure Act (hereinafter "the CRCPA") to initiate a constitutional review proceeding, on 31 December 2007.

By its ruling of 6 March 2008, on the basis of § 52 of the CRCPA, the Constitutional Review Chamber of the Supreme Court joined both petitions into one proceeding.

JUSTIFICATIONS OF THE COURT AND PARTICIPANTS IN THE PROCEEDING

4. In the referred rulings the Harju County Court argues that under §§ 660(1) and 390(1) of the CCP the submitted appeals against the rulings can not be heard. Neither do the provisions regulating the payment of security for securing actions allow the filing of appeals against rulings. The county court is of the opinion that the consequence resulting from the dismissal of a petition for securing an action affects the rights of the petitioner to the extent that to avoid court errors its must be protected by the right of appeal. That is why § 390(1) of the CCP, to the extent that it does not allow to file appeals against rulings on dismissal of petitions for securing actions, is not in conformity with §§ 15 and 24(5) of the Constitution.

5. Both plaintiffs and defendant OÜ Barons Hotels agree with the opinions of the county court. In addition, plaintiff OÜ Aviso Kinnisvara argues that § 390(1) of the CCP is also in conflict with § 12 of the Constitution, as in civil proceedings the rights of a person are less protected than in administrative court proceedings. Defendant Karin Poolak argues that § 390(1) of the CCP is in conformity with the Constitution.

6. The Legal Affairs Committee of the Riigikogu admits that § 390(1) of the CCP may be in conflict with § 24(5) of the Constitution for the reasons pointed out by the county court. The non-existence of the right of appeal against dismissals of petitions for securing actions was justified by the consideration of procedural economy, but the regulation of securing actions needs to be amended.

The Constitutional Committee of the Riigikogu is of the opinion that the regulation in the Code of Civil Procedure, according to which a security is required with the petition for securing an action and an appeal can not be filed against a ruling on refusal to secure an action, is not in conformity with §§ 15(1) and 24(5) of the Constitution in their conjunction. The Constitutional Committee pointed out that if there was no requirement of security, the lack of the right of appeal against rulings on refusal to secure an action would not prevent the hearing of the main action and would not intensively infringe the rights and freedoms of the participants in a proceeding.

7. The Chancellor of Justice is of the opinion that the first sentence of § 390(1) of the CCP, to the extent it does not allow to appeal against a ruling on dismissal of a petition for securing an action, is in conflict with the general fundamental right to effective legal protection, established in the first sentence of § 15(1) of the Constitution, in conjunction with the right of appeal, established in § 24(5) of the Constitution. The non-permission of appeal against refusal to secure an action may endanger the execution of the judgment rendered as a result of court proceedings, and thus call into question the reasonableness of having recourse to the courts. The legitimate aim of the restriction on the right of appeal is to decrease the courts' work load and ensure the efficiency of the judicial system, thus guaranteeing also better protection of persons' rights. Also, the restriction on the right of appeal is a suitable and necessary measure for the achievement of this aim. Nevertheless, the aim of efficiency of the court system does counterbalance the intensity of the infringement of fundamental rights (general right to effective legal protection in conjunction with the right of appeal).

The Chancellor of Justice argues also that the first sentence of § 390(1) of the CCP to the extent that it does not allow to appeal against a ruling on dismissal of a petition for securing an action, on the basis of which the security for securing the action is transferred into the public revenues – is in conflict with the right to freely possess, use, and dispose of one's property, arising from the first sentence of § 32(2) of the Constitution, in conjunction with the right of appeal established in § 24(5) of the Constitution. The legitimate aim of the infringement is the efficient functioning of the court system, and the restriction of the right of appeal is a suitable and necessary measure for the achievement of this aim. Nevertheless, the aim of efficiency of the court system does counterbalance the intensity of the infringement of fundamental rights (free possession, use and disposal of property in conjunction with the right of appeal).

That is why the Chancellor of Justice is of the opinion that the Supreme Court should also examine the constitutionality of §§ 141 and 149 (2) and (5) of the CCP. He argues that §§ 141 and 149 (2) and (5) of the CCP, to the extent that they regulate the security for securing an action, are in conflict with § 32(2) of the Constitution in conjunction with § 24(5) of the Constitution.

8. The Minister of Justice is of the opinion that § 390(1) of the CCP is not in conflict with §§ 15 and 24(5) of the Constitution. The Minister of Justice argues that a ruling on refusal to secure an action does not fall into the sphere of protection of § 24(5) of the Constitution, because this is not a court ruling which renders the further conduct of proceedings impossible. Restriction of the right of appeal in a proceeding as an infringement of the right of recourse to the courts serves a legitimate aim, which consists in the guarantee of efficiency of the judicial system; also, the infringement is a proportional one. The different regulation in § 390(1) of the CCP and in § 12²(5) of the Code of Administrative Court Procedure is justified. The regulation not allowing appeals against rulings on dismissal of petitions for securing an action has been in force already since 1993. The Minister of Justice adds, with reference to the draft of the CCP Amendment Act, that in the future the petitioner will have no negative property consequences in relation to filing such a petition and the dismissal thereof.

RELEVANT PROVISIONS

9. The first sentence of § 390(1) of the Code of Civil Procedure reads as follows:

"A party may file an appeal against a ruling by which a county court or circuit court satisfies an application for securing an action, substitutes one measure for the securing of an action with another, or cancels the measures to secure an action."

10. § 660(1) of the Code of Civil Procedure reads as follows:

"A participant in a proceeding to whom a ruling of a county court pertains may file an appeal against the ruling with a circuit court only if filing of an appeal against the ruling is permitted by law or the ruling hinders the further conduct of proceedings."

OPINION OF THE CHAMBER

11. Having ascertained the relevant provision (I), the Chamber shall address the issue of the infringement of the right of appeal and the constitutionality thereof (II).

I.

12. According to the first sentence of § 14(2) of the Constitutional Review Court Procedure Act, the provision the constitutionality of which the Supreme Court evaluates by way of concrete norm control, must be relevant. A provision, applied in regard a person, which actually regulates the relationship or a situation under review, must be considered relevant (see judgment of the Constitutional Review Chamber of the Supreme Court of 2 November 2006, in case no 3-4-1-8-06 – RT III 2006, 40, 337, paragraph 17).

13. In the rulings of the Harju County Court of both 19 and 21 December 2007 the court did not apply § 390(1) of the CCP, due to the unconstitutionality thereof, "to the extent that it does not permit to appeal against a ruling on securing an action". The Chamber points out that that the conclusions of the county court rulings are not worded correctly. Under § 390(1) of the CCP it is possible to file an appeal against a ruling on securing of an action, i.e. against a ruling by which the court secured an action. Nevertheless, it appears from the statement of reasons of the county court rulings that the county court considered § 390(1) of the CCP unconstitutional to the extent that it does not allow to file an appeal against a ruling by which a petition for securing an action is dismissed. The Chamber can proceed from this.

14. The Chamber agrees with the county court that the Code of Civil Procedure does not allow filing an appeal against a ruling of a county court by which the court dismissed a petition for securing an action, i.e. refused to secure an action. This proceeds from § 660(1) of the CCP, according to which a participant in a proceeding to whom a ruling of a county court pertains may file an appeal against the ruling with a circuit court only if filing of an appeal against the ruling is permitted by law or the ruling hinders the further conduct of proceedings. The contesting of court rulings related to securing of an action is regulated by § 390(1) of the CCP, which – among the rulings which can be appealed – refers to the rulings by which a county court or circuit court satisfies an application for securing an action, substitutes one measure for the securing of an action with another, or cancels the measures to secure an action. This provision does not refer to a ruling by which the court dismisses a petition for securing an action, i.e. refuses to secure an action. Neither is the possibility of contesting such a ruling provided elsewhere in

the Code of Civil Procedure. The Chamber does not consider that a ruling on dismissal of a petition for securing an action is a ruling hindering the further conduct of proceedings, which could be appealed under § 660(1) of the CCP. The securing of an action during a proceeding is related to the so called main proceeding, and the adjudication of a petition for securing of an action does not hinder that proceeding. Consequently, § 660(1) of the CCP does not allow to contest a ruling on refusal to secure an action.

15. If there existed a right to file an appeal against refusal to secure an action, the Harju County Court should have adjudicated the civil cases under discussion differently – the county court should have accepted the submitted appeals against rulings under § 663(1) of the CCP, and under § 663(4) of the CCP the court should have either satisfied the appeals or referred these, under § 663(5) of the CCP, to a circuit court for adjudication.

As the contesting of rulings related to securing of an action is regulated by § 390(1) of the CCP, the referred provision is relevant. As the second sentence of § 390(1) establishes that a ruling of a circuit court concerning an appeal against a ruling of a county court is not subject to appeal to the Supreme Court, this is not a provision under discussion in this concrete case. In the present case it is the contesting of a county court ruling in a circuit court by way of appeal against a ruling, and not subsequent appeal to the Supreme Court, that is at issue. Consequently, the norm of decisive importance in this court case is the first sentence of § 390(1) of the CCP.

16. To guarantee legal certainty, also those norms have to be regarded relevant, which are closely related to a contested norm and which may create ambiguity as to the legal situation, if they remain in force (see judgment of the Constitutional Review Chamber of the Supreme Court of 13 February 2007 in case no 3-4-1-16-06 – RT III 2007, 6, 43, paragraph 18).

The Chamber is of the opinion that the first sentence of § 390(1) of the CCP is, by nature, related to § 660(1) of the CCP, which restricts the contesting of rulings of county courts, and the restriction on filing appeals against rulings on refusal to secure an action arises from the referred provisions in their conjunction.

17. The Chancellor of Justice is of the opinion that the Supreme Court should examine the constitutionality of §§ 141 and 149 (2) and (5) of the CCP, i.e. review the constitutionality of security for securing actions and the transfer thereof into the public revenues. The Chamber does not agree with this opinion. The issue of constitutionality of obligation to pay a security for securing an action and of transfer thereof to the public revenues if a petition for securing an action is dismissed, is an issue much wider than the question of the constitutionality of the lack of the right of appeal, posed by the county court, and is not directly connected to the latter. Although the county court rulings (in paragraphs 4 and in conclusions) refer also to § 140 (in fact, probably the court meant § 141) and to § 149(5) of the CCP, the county court has not called to question the constitutionality of the regulation of payment of security and transfer thereof into the public revenues. The county court has referred to the regulation of transfer of security into the public revenues only by way of justification of why it considered it necessary that there should be a possibility to file an appeal against a ruling on the refusal to secure an action. The possible unconstitutionality and invalidity of §§ 141 and 149 (2) and (5) of the CCP would not result in the possibility for the plaintiffs to file an appeal against the ruling on refusal to secure an action. Consequently, the referred provisions are not relevant in the pending proceeding.

II.

18. The first sentence of § 15(1) of the Constitution entitles everyone whose rights are violated to have recourse to the courts. This is a fundamental right, which must guarantee the gapless judicial protection of rights (see ruling of the general assembly of the Supreme Court of 22 December 2000 in case no 3-3-1-38-00, paragraph 15). The right to judicial protection, provided in §§ 13 to 15 of the Constitution, includes the right of a person to file an action to a court if his rights and freedoms are violated, as well as the obligation of the state to establish for the protection of rights appropriate court proceedings, which are fair and ensure effective protection of persons' rights (see e.g. judgment of the Constitutional Review Chamber of the Supreme Court of 14 April 2003 in case no 3-4-1-4-03 – RT III 2003, 13, 125, paragraph 16).

§ 24(5) of the Constitution gives everyone the right of appeal to a higher court against the judgment in his or her case pursuant to procedure provided by law. The Supreme Court has argued: "[a] judge, like any other human being, can make mistakes. The institute of right of appeal, established in § 24(5) of the Constitution, is based on the very assumption that it is necessary to guarantee the review of correctness of court judgments and rulings." (Judgment of the Constitutional Review Chamber of the Supreme Court of 25 March 2004 in case no 3-4-1-1-04 – RT III 2004, 9, 96, paragraph 21.)

On the basis of the obligation to give broad interpretation to norms establishing fundamental rights (upon delimiting the sphere of protection a broader approach should be preferred) and in order to ensure the protection of fundamental rights without gaps (judgment of the general assembly of the Supreme Court of 17 March 2003 in case no 3-1-3-10-02 – RT III 2003, 10, 95, paragraph 26), a court ruling on refusal to secure an action, as a judgment in the broader sense, must be considered to fall within the sphere of protection of § 24(5) of the Constitution.

19. The Chamber agrees with the Chancellor of Justice and the Minister of Justice that the aim of the restriction arising from the first sentence of § 390(1) and § 660(1) of the CCP is to decrease the courts' work load, thus guaranteeing the efficiency of the judicial system. The guarantee of efficiency of courts is a constitutional value, expressed in Chapter XIII of the Constitution, which can ensure the administration of justice within reasonable time and, consequently, fair trial and better protection of persons' rights. The procedural efficiency of courts is important for the functioning of the court system as a whole (from the aspect of general work load of courts) as well as for ensuring that each case is adjudicated within a reasonable time (the length of proceedings of cases, expressed in the right to a trial within a reasonable time of Article 6 of the European Convention of Human Rights). Thus, there exists a legitimate aim for restricting the right of appeal against a ruling on refusal to secure an action.

20. As it is probable that if there was the possibility of appeal against refusals to secure an action, appeals against the majority of rulings dismissing the petitions for securing actions would be filed, the measure is suitable for the achievement of the referred legitimate aim. It can be supposed that the legislator has exercised its right of discretion correctly and that the chosen measure is also necessary for the achievement of the referred aim, i.e. this is the softest measure possible for the achievement of the aim.

21. To decide on the reasonableness of a measure the extent and intensity of interference with a fundamental right on the one hand and the importance of the aim on the other hand have to be weighed. The more intense is the infringement of a fundamental right, the weightier must be the reasons to justify it.

22. A ruling on the dismissal of a petition for securing an action includes a decision to transfer, under the second sentence of § 149(5) of the CCP, the security paid by the petitioner into the public revenues. According to § 141(1) of the CCP a security for securing the action of 5 per cent of the value of the usual value of that which is claimed shall be paid which shall however not be lower than 500 kroons and not higher than 100 000 kroons. Consequently, a ruling by which a court refuses to secure an action results in a substantial property consequence for a person – the person forfeits the paid security. In the present case the securities in the civil cases was 55 000 and 100 000 kroons, which the plaintiffs forfeited due to the fact that the court refused to secure the actions.

23. The possibility to contest a ruling on dismissal of petition for securing an action did not exist either in the Code of Civil Procedure which entered into force on 15 September 1993, or in the new Code of Civil Procedure in force from 1 September 1998 to 31 December 2005. As of 1 January 2006 an amendment of the regulation of securing of actions was included in the form of security for securing an action. It is stated in the explanatory letter to the draft of the valid Code of Civil Procedure that the draft aimed at improving the institute of securing an action, restricting at the same time the filing of petitions for securing actions. The requirement of security on petitions for securing an action was meant to help to decrease the number of unfounded petitions. In their written opinions presented to the Supreme Court the Minister of Justice and the Legal Affairs Committee of the Riigikogu admit the same aims for the enactment of this regulation.

24. As it is not possible to contest a ruling on refusal to secure an action, a person is deprived of the right to contest the transfer of paid security into the public revenues. According to the valid regulation, regardless of the content of the court judgment terminating the proceedings, compensation of the security transferred into the public revenues can not be demanded from the opposing party, either (second sentence of 149(5) of the CCP).

Although, in the case a petition is dismissed, the securing of an action can be applied for repeatedly, whereas each time security for securing an action has to be paid, and there is no possibility of appeal, i.e. control, and therefore this does not amount to an effective remedy. Furthermore, in the case of deciding on securing of an action the terms are short and therefore the possibility of making mistakes is bigger.

25. A security payable for securing an action can be regarded as an equivalent of a state fee for the purposes of § 113 of the Constitution. As it is not possible to contest a ruling on refusal to secure an action, a person is deprived of the right to contest the transfer of the paid security into the public revenue as a payment of a fee under § 113 of the Constitution.

26. The Chamber is of the opinion that a person should be allowed to appeal against a ruling by which, on the basis of § 24(5) of the CCP, an action is not secured and the paid security is transferred into the public revenues, so that it would be possible – through the control of the grounds for refusal to secure an action – to review the legality of transfer of security for securing an action into the public revenues. The aim of ensuring the efficiency of the judicial system does not justify the deprivation of persons of the possibility to contest rulings by which an action is not secured and, thus, the security is transferred into the public revenues, because this can not be subsequently reviewed in any other proceeding, either.

That is why the restriction, arising from the first sentence of § 390(1) and § 660(1) of the CCP, which does not permit the right of appeal in regard to a court ruling on the basis of which a security is transferred into the public revenues, is not reasonable and disproportionately infringes the right of appeal, established in § 24(5) of the Constitution. The referred provisions of the Code of Civil Procedure have to be declared unconstitutional and invalid to the extent that they do not permit an appeal against a ruling on dismissal of a petition for securing an action, by which the security paid is transferred into the public revenues.

27. On the basis of the aforesaid, in the case of failure to secure an action, the persons who have petitioned for securing of an action and have paid the security, may file an appeal against the ruling, similarly with other cases referred to in the first sentence of § 390(1) of the CCP. And similarly with the other cases referred to in the first sentence of § 390(1) of the CCP, the restriction arising from the second sentence of § 390(1) of the CCP applies in regard to regulations on refusal to secure an action by which the paid security is transferred into the public revenues, i.e. a ruling of a circuit court concerning an appeal against a ruling of a county court is not subject to appeal to the Supreme Court.