

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

No. of the case	3-4-1-22-09
Date of decision	7 December 2009
Composition of court	Chairman Märt Rask, members Jüri Ilvest, Peeter Jerofejev, Henn Jõks and Indrek Koolmeister.
Court Case	Request of Raivo Paala to declare that the procedure for submitting appeals against the activities of investigative bodies and the prosecutor's office, provided by Division 5 of Chapter 8 of the Code of Criminal Procedure, does not guarantee effective protection; to establish that the lack of an effective remedy for appealing against the activities of investigative bodies and the prosecutor's office has resulted in the infringement of Raivo Paala's fundamental rights; to award fair compensation to Raivo Paala for the moral damage arising from the violation of fundamental rights.
Hearing	Written proceeding
CONCLUSION	To dismiss the request of Raivo Paala

FACTS AND COURSE OF PROCEEDING

1. On 25 September 2009 Raivo Paala submitted to the Supreme Court a request to:

1. establish, by way of individual constitutional review, that the procedure for submitting appeals against the activities of investigative bodies and the prosecutor's office, provided by Division 5 of Chapter 8 of the Code of Criminal Procedure, does not guarantee the effective legal protection meeting the requirements of Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention") and §§ 13 15 of the Constitution;
2. establish that the lack of an effective remedy for appealing against the activities of investigative bodies and the prosecutor's office has resulted in the infringement of Raivo Paala's fundamental rights in the proceeding of criminal matter no. 08930000325;
3. award a fair compensation to Raivo Paala for the moral damage arising from the violation of fundamental rights.

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING

2. According to the reasoning of the request R. Paala is a suspect in criminal matter no. 08930000325 concerning which a pre-trial criminal procedure is being conducted. On 7 January 2009, when R. Paala was hospitalised in Valga Hospital, 4 5 police officers in plain clothes were constantly present in the internal diseases' department of the hospital, demanding that the doctor give them the health file of R. Paala. Later, when analysing the events, R. Paala came to the conclusion that the investigative body had been observing him. This caused stress and health problems to R. Paala, because he had reasonable doubt that the police officers wanted to interfere with his treatment procedures. Irrespective of the fact that R. Paala had informed the preliminary investigator of his illness, the latter started to summon R. Paala at short notices. In order to submit to the preliminary investigator the medical certificate in the form required by law R. Paala, while being ill, had to travel to his attending physician in Tallinn and back – more than 500 kilometres all in all – which caused a serious health disorder to him.

3. On 12 February 2009 the preliminary investigator prepared an examination ruling in which he posed to an expert six questions concerning R. Paala's state of health. R. Paala is of the opinion that the conduct of this expert analysis was not necessary.

4. R. Paala is of the opinion that the valid law does not afford him an effective possibility to contest the activities of the investigative body of 7 January 2009 and the examination ruling of the preliminary investigator of 12 February. The procedure for appealing against the activities of investigative bodies and the prosecutor's office, provided by Division 5 of Chapter 8 of the Code of Criminal Procedure, pursuant to which an order or a procedural act of an investigative body or the prosecutor's office must first be contested in the prosecutor's office before it can be contested in court, does not meet the requirements of Article 13 of the Convention and §§ 13 15 of the Constitution. Furthermore, the effectiveness of such possibility of appeal is diminished by the fact that pursuant to § 228(5) of the Code of Criminal Procedure the filing of an appeal shall not suspend the execution of the contested order or performance of the procedural act. It is the preliminary investigation judge who, pursuant to § 231(4) of the Code of Criminal Procedure, may decide to suspend the execution of the contested order or procedural act. Consequently, the procedure provided by Division 5 of Chapter 8 of the Code of Criminal Procedure did not afford an effective remedy to R. Paala because by the time his appeal could have reached the preliminary investigation judge the procedural acts of 7 January 2009 in the Valga Hospital would have been completed and the examination ruling of 12 February 2009 executed.

Furthermore, the procedure provided by Division 5 of Chapter 8 of the Code of Criminal Procedure does not allow to award a fair compensation to the injured party. As the legal remedy is insufficient, R. Paala did not have recourse to the prosecutor's office in order to contest the procedural act of 7 January 2009 and the preliminary investigator's ruling of 12 February 2009. R. Paala is of the opinion that in the light of lack of relevant practice the possibility to file an appeal against the activities of investigative bodies directly with the preliminary investigation judge without filing an appeal with the prosecutor's office, can not be deemed an effective remedy. Nevertheless, if the Supreme Court, upon hearing his request, would instruct the preliminary investigation judges that the county courts may review appeals against the procedural acts and orders of investigative bodies without a prior appeal procedure in the prosecutor's office, R. Paala and other persons in an analogous situation would be able to avail themselves of this remedy.

5. R. Paala is of the opinion that as the described violations of fundamental rights have deeply affected the quality of his life and that of his family, a fair compensation at the discretion of the Supreme Court should be awarded to him.

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

6. R. Paala has filed an individual complaint with the Supreme Court, requesting the declaration of unconstitutionality of legislation of general application – the Code of Criminal Procedure, more specifically the procedure for appealing against investigative activities provided by Division 5 of Chapter 8 of the Code which allegedly caused the violation of his fundamental rights, and compensation for moral damage caused to R. Paala by the violation of his fundamental rights caused by the alleged unconstitutionality of the Code of Criminal Procedure.

7. The Constitutional Review Court Procedure Act does not *expressis verbis* establish the possibility to file to the Supreme Court individual complaints to verify the conformity of legislation of general application with the Constitution. Nevertheless, on the basis of §§ 13, 14 and 15 of the Constitution and the practice of application of the Convention, a person can, in exceptional cases, have direct recourse to the Supreme Court for the protection of his or her fundamental rights. This is possible only when the person has no other effective possibility to avail himself or herself of the right to judicial protection, guaranteed by § 15 of the Constitution, i.e. when the state has failed to fulfil the obligation to establish an appropriate procedure for the protection of fundamental rights, a procedure that is fair and guarantees effective protection of persons' rights. (See also the judgments of the Supreme Court *en banc* of 17 March 2003 in case no. 3-1-3-10-02 – RT III 2003, 10, 95, paragraph 17, and of 6 January 2004 in case no. 3-3-2-1-04 – RT III 2004, 4, 37, paragraphs 26 27; and the rulings of the Constitutional Review Chamber of the Supreme Court of 23 March 2005 in case no. 3-4-1-6-05 – RT III 2005, 11, 104, paragraph 4; of 9 May 2006 in case no. 3-4-1-4-06 – RT III 2006, 19, 174, paragraphs 8 9, and of 20 May 2009 in case no. 3-4-1-11-09 – RT III 2009, 27, 200, paragraphs 5 7).

In keeping with the foregoing the Chamber is of the opinion that when a person's right to judicial protection is guaranteed, his or her individual constitutional complaint is inadmissible irrespective of whether the person has availed himself or herself of the possibility of judicial protection by the time of filing the individual complaint or not, or whether he or she has forfeited this possibility, i.e. has failed to avail himself or herself of the possibility in due time.

8. Consequently, the Supreme Court is competent to hear R. Paala's request only if he does not have and did not have any effective possibilities to request judicial protection against the violation of fundamental rights caused by the alleged unconstitutionality of Division 5 of Chapter 8 of the Code of Criminal Procedure.

9. R. Paala is of the opinion that the procedure for appealing against the activities of investigative bodies has resulted in the violation of his fundamental rights, because the procedure did not allow him to appeal against the activities of the investigative body of 7 January 2009 and the examination ruling of 12 February 2009 as effectively and speedily as required by §§ 13 15 of the Constitution and Article 13 of the Convention. He argues that the ineffectiveness of the procedure for appealing against the activities of investigative bodies is first and foremost expressed in the restriction which establishes that the exhaustion of appeal procedure in the prosecutor's office is a prerequisite for contestation of the activities of an investigative body in court.

10. Pursuant to the second sentence of § 15(1) of the Constitution everyone has the right, "while his or her case is before the court", to petition for any relevant law, other legislation or procedure to be declared unconstitutional. Pursuant to this a person can apply for the commencement of concrete norm control for the review of constitutionality of a provision regulating judicial procedure, including a restriction on the recourse to the court, within the judicial proceeding in the course of which the contested provision is applicable. If a person is of the opinion that a provision of court procedure unconstitutionally restricts his or her rights, e.g. the right to effective protection, the person can request the court not to apply the norm as unconstitutional one in the hearing of the concrete case. Pursuant to § 15(2) of the Constitution the courts shall observe the Constitution and shall declare unconstitutional any law, other legislation or procedure which violates the rights and freedoms provided by the Constitution or which is otherwise in conflict with the Constitution. § 152(1) of the Constitution establishes that in a court proceeding the court shall not apply any law or other legislation that is in conflict with the Constitution. Pursuant to these provisions the court must, either at the request of a person or on its own initiative, declare any procedural provision, the application of which would result in the violation of the person's fundamental rights, unconstitutional to the relevant extent. On the basis of such a decision a constitutional review proceeding in the Supreme Court is commenced (§ 152(2) of the Constitution; § 4(3) of the Constitutional Review Court Procedure Act). There have been several cases in the judicial practice where the courts, upon accepting a matter for proceeding or during the proceeding, have declared unconstitutional and have not applied procedural provisions that have restricted a person's right to effective remedy (see e.g. the judgments 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, and of 9 April 2008 in case no. 3-4-1-20-07 – RT III 2008, 16, 105, and the Supreme Court *en banc* judgment of 16 May 2008 in case no. 3-1-1-88-07 – RT III 2008, 24, 160). Furthermore, the Supreme Court has held that if a court is of the opinion that the legislator has failed to provide for a procedure for the protection of a fundamental right, the court can declare the lack of the procedure for the protection of an individual right unconstitutional and adjudicate the matter on the basis of the procedure that the legislator ought to have established – in the opinion of the court pursuant to the Constitution for such situations (see the Supreme Court *en banc* judgment of 2 June 2008 in case no. 3-4-1-19-07 – RT III 2008, 28, 183, paragraph 32). Consequently, within adjudication of a concrete case – including upon assessing the admissibility of a complaint – the courts have wide possibilities to review the constitutionality of relevant procedural provisions, to eliminate all unconstitutional procedural restrictions and to guarantee to persons an effective right to judicial protection.

11. The Chamber also points out that the right, established in the second sentence of § 15(1) of the Constitution, to petition for any relevant law, other legislation or procedure to be declared unconstitutional while a case is before the court, does not mean that a person must be guaranteed, in any case, an effective possibility to raise the issue of constitutionality of legislation of general application in the Supreme Court as the final instance. Pursuant to the provisions and spirit of §§ 15 and 152 of the Constitution each court must assess the constitutionality of applicable law upon adjudicating a matter whenever relevant doubts arise (see also the Supreme Court *en banc* judgment of 8 June 2009 in case no. 3-4-1-7-08 – RT III 2009, 30, 218, paragraph 21). Consequently, the right and obligation to review the constitutionality of norms applicable in a concrete case whenever relevant doubts arise extends to the courts of all instances, not only to the Supreme Court.

12. Consequently, a person who wishes to contest the activities of an investigative body arguing that the observance of a prerequisite for recourse to the courts established in Division 5 of Chapter 8 of the Code of Criminal Procedure would result in the violation of his or her fundamental rights, may request the judicial protection of his or her fundamental rights in the procedure for appeal against the activities of an investigative body from a preliminary investigation judge of a county court. For example, when a person is of the opinion that the prior exhaustion of appeal procedure in the prosecutor's office would violate his or her fundamental rights, the person can file an appeal against the activities of an investigative body directly with the preliminary investigation judge of a county court. At that the person can request the court to declare the restriction established in § 230(1) of the Code of Criminal Procedure which establishes that the exhaustion of the pre-trial procedure in the circuit prosecutor's office and the Public Prosecutor's Office is a prerequisite for the admissibility of an appeal to the court – unconstitutional to the

relevant extent and not to apply it. On the basis of § 15(2) and § 152(1) of the Constitution a preliminary investigation judge of a county court, upon deciding on the admissibility of an appeal against the activities of an investigative body, is competent also to assess the allegation of the complainant that the prerequisite of exhaustion of pre-trial procedure, established in § 230(1) of the Code of Criminal Procedure, is unconstitutional. If the court consents to this allegation, it accepts the appeal for adjudication and shall not apply the restriction established in § 230(1) of the Code of Criminal Procedure to the relevant extent, shall initiate a constitutional review proceeding and shall adjudicate the person's appeal against the activities of an investigative body on its merits irrespective of the fact that the appellant has not exhausted the appeal procedure in the circuit prosecutor's office and the Public Prosecutor's Office.

13. The Chamber is of the opinion that a sufficiently effective possibility, in the form described in the preceding paragraph, to apply for judicial protection against the violation of fundamental rights caused by possible unconstitutionality of Division 5 of Chapter 8 of the Code of Criminal Procedure is guaranteed to R. Paala. From the aspect of admissibility of R. Paala's request it is irrelevant whether he has availed himself of this possibility or not (see also paragraph 7 of this ruling).

14. On the basis of the foregoing reasons the Chamber is of the opinion that the adjudication of R. Paala's request is not within the competence of the Supreme Court. That is why, pursuant to § 11(2) of the Constitutional Review Court Procedure Act, the request of R. Paala is dismissed and returned to him.