

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

No. of the case	3-4-1-4-08
Date of decision	28 May 2008
Composition of court	Chairman Märt Rask, members Peeter Jerofejev, Hannes Kiris, Villu Kõve and Harri Salmann
Court Case	Review of constitutionality of § 2 (8) and (9) of the Minister of Justice Regulation no 71 of 18 December 2003 "Limits of remuneration of trustees and interim trustees in bankruptcy and the procedure for calculating the expenses subject to reimbursement".
Basis of proceeding	The Tallinn Circuit Court judgment of 10 March 2008 in civil case no 2 07 34515
Hearing	Written proceeding
Conclusion	To dismiss the petition of the Tallinn Circuit Court.

FACTS AND COURSE OF PROCEEDING

1. On 7 September 2007 the OÜ Primarius filed a debtor's bankruptcy petition with the Harju County Court. By its ruling of 18 October 2007 the Harju County Court commenced the bankruptcy proceedings and appointed an interim trustee in bankruptcy.
2. By its ruling of 13 December 2007 the Harju County Court terminated the bankruptcy proceedings of the OÜ Primarius by abatement, without declaring bankruptcy. The court decided that the debtor was to be liquidated and deleted from the commercial register and obliged the interim trustee in bankruptcy to do so. After the deletion of OÜ Primarius from the commercial register the court released the interim trustee in bankruptcy and determined the interim trustee's remuneration in the amount of 24 605 kroons plus 2315 kroons and 90 cents as reimbursement for necessary expenses. The court found that it had been established in the bankruptcy proceedings that a member of the management board had not filed the bankruptcy petition in due course and that the company and its management board were to pay the interim trustee's reimbursement solidarily. The court ordered the payment of the total of 26 920 kroons and 90 cents to the interim trustee by the OÜ Primarius and a member of its management board Eva Truuverk.
3. The debtor filed an appeal against the Harju County Court ruling. The OÜ Primarius argued that the ruling was unfair as regards the justifications on the basis of which the court established that the insolvency had been caused by a grave error in management and applied solidary liability of the member of the management board in reimbursing the expenses of the interim trustee in bankruptcy. The debtor argued that there was no legal basis for obligating a member of the management board to bear the costs of bankruptcy proceedings.
4. By its ruling of 23 January 2008 the county court accepted the appeal against the ruling. The court annulled the ruling of 13 December 2007 to the extent that the court had ordered the debtor and a member of its management board to pay the remuneration and reimburse the expenses of the interim trustee. By the same ruling the court ordered that the OÜ Primarius pay the interim trustee 20 220 kroons and 90 cents. The court also ordered the payment of 6700 kroons to the interim trustee out of state funds, from which the income tax was to be withheld and to which social tax was to be added. The court pointed out that in all other respects the appeal against the ruling was dismissed and the ruling of 13 December 2007 was upheld. Under § 663(5) of the Code of Civil Procedure (hereinafter "the CCP") the county court sent the appeal against the ruling to the circuit court.
5. The Tallinn Circuit Court was of the opinion that according to § 663 (4) and (5) of the CCP, as a result of hearing of an appeal against a ruling, the county court is entitled either to satisfy the appeal – while annulling its disputed ruling or refuse to satisfy the appeal and send it to the appellate court. As the provisions of the CCP do not allow a county court to partially annul its rulings and to selectively satisfy the claims of an appeal against a ruling, the circuit court annulled the ruling of the county court of 23 January 2008 to the extent that it ordered that the state and the OÜ Primarius pay the remuneration of the interim trustee in bankruptcy.

In regard to the disputed ruling of the county court of 13 December 2007 the circuit court held that it had to be annulled to the extent that it ordered that the debtor and Eva Truuverk – a member of the management board – pay solidarily 26 920 kroons to the interim trustee in bankruptcy. Eva Truuverk as a natural person has not been a participant in the court proceeding, no claims have been filed against her, and on the basis of this the satisfaction of claims against her is in conflict with the rules of procedural law (§§ 439 and 656(1)1) of the CCP). § 150(4) of the Bankruptcy Act (hereinafter "the BA"), according to which, in the event of abatement of bankruptcy proceedings, the court shall decide on the division of the costs of the bankruptcy proceedings according to the circumstances, does not justify the order that a person who is not a participant in the proceedings pay the costs of the bankruptcy proceedings. The court had been correct in determining the amount of remuneration of the interim trustee and of the expenses to be reimbursed, yet these can only be paid out of bankruptcy estate.

The circuit court found that irrespective of the fact that regulation no 71 of the Minister of Justice of 18 December 2003 "Limits of remuneration of trustees and interim trustees in bankruptcy and the procedure for calculating the expenses subject to reimbursement" (hereinafter "the regulation of the Minister of Justice") provided for the possibility to partially pay the remuneration of a trustee in bankruptcy out of state funds, it is not applicable because § 2 (8) and (9) of the regulation of the Minister of Justice are in conflict with the Constitution. In the conclusion of its ruling of 10 March 2008 the circuit court declared § 2 (8) and (9) of the regulation of the Minister of Justice unconstitutional, did not apply these, and initiated a constitutional review proceeding.

JUSTIFICATIONS OF THE PARTICIPANTS IN THE PROCEEDING

6. The circuit court is of the opinion that the requirement of legality, arising from §§ 3(1) and 94(2) of the Constitution, means that legal acts issued by a minister should be in conformity with the laws. According to the reference therein the disputed regulation of the Minister of Justice was issued on the basis of §§ 23(2) and 65(5) of the BA. Thus, § 23(2) of the BA should contain a norm delegating authority, allowing the Minister of Justice to establish the prerequisites for the payment of remuneration to an interim trustee in bankruptcy out of state funds. The referred provision contains no such authority-delegating norm. § 23(2) of the BA does allow the Minister of Justice to establish the minimum and maximum amounts of remuneration of interim trustees and the procedure for calculation of the expenses subject to reimbursement, but it does not contain an authorisation to establish legislation of general application concerning out of whose funds the remuneration and expenses of an interim trustee in bankruptcy should be paid, or an authorisation to provide that under certain conditions the remuneration and expenses of an interim trustee in bankruptcy are to be paid out of state funds. The Minister of Justice has, without a legal basis, regulated the payment of remuneration and expenses of an interim trustee in bankruptcy out of state funds.

7. The Minister of Justice is of the opinion that § 2 (8) and (9) of the regulation of the Minister of Justice are in conformity with the Constitution. § 23(1) of the BA entitles an interim trustee in bankruptcy to receive remuneration for the work performed on court's orders. The law obligates to commence bankruptcy proceedings if the prerequisites for the commencement of the proceedings exist and to appoint an interim trustee in bankruptcy even if the debtor lacks finances for covering these expenses. Thus, when preparing the state budget, account has been taken of the costs on reimbursement of interim trustees in bankruptcy and this is reflected in the budget of the courts in the budget line for personnel expenditure and other management costs. In the State Budget Act the legislator has provided for the funds for the payment of remuneration and reimbursement of expenses to interim trustees in bankruptcy. The authority of the Minister of Justice to establish the minimum and maximum amounts of remuneration arises from § 23(2) of the BA.

8. The Chancellor of Justice is of the opinion that § 2 (8) and (9) of the regulation of the Minister of Justice are not relevant norms. The Chancellor of Justice argues that the appeal against a court ruling filed by the OÜ Primarius on 14 January 2008 was not permissible to the extent that is disputed the fact that Eva Truuvverk as a member of the management board was ordered to pay the expenses of the interim trustee in bankruptcy solidarily with the OÜ Primarius. The Harju County Court and the Tallinn Circuit Court had no basis for accepting this claim.

The Chancellor of Justice is of the opinion that the review of constitutionality would be permissible only if the OÜ Primarius had filed the appeal against the ruling with the Harju County Court for the protection of its rights or interests. The OÜ Primarius did not dispute the obligation to pay the remuneration and expenses of the interim trustee in bankruptcy, imposed on it by the disputed ruling of the county court of 13 December 2007. The objective of the appeal of the OÜ Primarius against the court ruling was to have the decision, which was favourable for it, changed into a more harmful one. §§ 3(1) and 423(2)2) of the CCP give rise to the court's discretion to refuse to hear an action if it becomes evident that the action has not been filed for protecting the plaintiff's right or interest protected by law, or with an aim subject to legal protection by the state, or if such objective cannot be achieved by the action. If the court accepts such an action and does not refuse to hear it, the court must dismiss it. Further, when accepting and deciding to hear the appeal against the ruling the Harju County Court ought to have taken into account § 2 of the CCP, which establishes that the purpose of civil procedure is to guarantee adjudication of civil matters by the court justly, within a reasonable period of time and at the minimum possible cost. The filing of an appeal against a court ruling and subsequent judicial proceedings is not the quickest and less costly solution either for the person or the judicial system – to achieve that the OÜ Primarius itself pays the whole amount of the remuneration of the interim trustee in bankruptcy, a relevant decision can be made pursuant to the general principle of freedom of contract.

9. Ene Ahas, the interim trustee in bankruptcy of the OÜ Primarius, too, is of the opinion that § 2 (8) and (9) of the regulation of the Minister of Justice are not relevant. The appeal of the OÜ Primarius against a court ruling, filed on 14 January 2008, was not permissible, there was no legal ground for hearing the appeal and the court ought to have refused to hear it.

THE LEGISLATION NOT APPLIED

10. § 2 (8) and (9) of the Minister of Justice Regulation no 71 of 18 December 2003 "Limits of remuneration of trustees in bankruptcy and interim trustees in bankruptcy and the procedure for calculating the expenses subject to reimbursement" provide as follows:

"§ 2. Bases for calculation of remuneration of interim trustees

[...]

(8) Upon termination of the bankruptcy proceedings, commenced on the basis of a petition of the debtor, by abatement without declaring bankruptcy the court may order the payment of interim trustee's remuneration and expenses subject to reimbursement from the state funds as follows: the interim trustee's remuneration and expenses subject to reimbursement, or only the interim trustee's remuneration or only the expenses subject to reimbursement, but not more than 6700 kroons in total (including the taxes provided for under laws, except the social tax).

(9) The court shall not order the payment of interim trustee's remuneration or the expenses subject to reimbursement from the state funds if the debtor, a creditor or a third person pays into courts the amount ordered by the court for covering the remuneration and expenses of the interim trustee subject to reimbursement."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

11. According to § 9(1) of the Constitutional Review Court Procedure Act (hereinafter "the CRCPA"), when a court of first or second instance has refused to apply legislation of general application or an international agreement in a court proceeding and has declared it unconstitutional, or when a court of first or second instance has declared the failure to enact legislation of general application unconstitutional, the court shall forward its respective judgment or ruling to the Supreme Court. The competence of the courts to control the compliance of Acts and other legislation with the Constitution arises from §§ 15(2) and 152(1) of the Constitution, pursuant to which 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.

12. The Tallinn Circuit Court initiated the constitutional review proceeding because it was of the opinion that § 2 (8) and (9) of the regulation of the Minister of Justice, allowing to pay the remuneration of the interim trustee partly out of state funds, was not in conformity with the Constitution. The court argued that § 23(2) of the BA did not contain an authority-delegating norm that

would allow the Minister of Justice to establish the prerequisites for the payment of remuneration of an interim trustee in bankruptcy out of state funds, and therefore the Minister of Justice has, without a legal basis, regulated the payment of interim trustees' remuneration and the reimbursement of the trustees costs out of state funds.

13. The extent of the competence of the courts to review the constitutionality of legislation of general application is established in § 15(1) of the Constitution, which sets limits to the permissibility of petitions filed by the courts. § 15(1) of the Constitution establishes every person's right of recourse to the courts: everyone whose rights and freedoms are violated has the right of recourse to the courts, and everyone has the right, while his or her case is before the courts, to petition for any relevant law, other legislation or procedure to be declared unconstitutional. Thus, the second sentence of the provision specifies that there must be a "case" and that a law, other legislation or procedure must be "relevant". Concrete norm control originates in a concrete case – as a rule in an administrative, civil, criminal or misdemeanour case for the protection of a person's rights and freedoms – and in the process of hearing the case doubts must have arisen as to the constitutionality of relevant, i.e. applicable legislation.

Next, the Chamber shall analyse whether the Tallinn Circuit Court has remained within the limits of competence prescribed by the Constitution, when initiating the constitutional review of § 2 (8) and (9) of the regulation of the Minister of Justice. The Chamber shall verify the permissibility of the court's petition.

14. A dispute over the order of payment of interim trustee's remuneration was before the Tallinn Circuit Court. For the court to have competence to exercise the review of constitutionality of § 2 (8) and (9) of the regulation of the Minister of Justice the referred provisions should restrict the rights and freedoms of the participants in the proceeding – the debtor or the interim trustee in bankruptcy. It does not appear from the file of the court case that any of the participants of the proceeding has argued that § 2 (8) and (9) of the regulation violate their rights or freedoms. It appears from the ruling of the circuit court that the objective of the court's petition was not to protect the rights and freedoms of the participants in the proceeding, instead its objective was the declaration of unconstitutionality of the norm, which gave rise to the obligation of the state to reimburse an interim trustee's remuneration and expenses in the case of abatement of bankruptcy proceedings. Thus, the objective of the court was to protect the interests of the state.

15. The primary and main function of fundamental rights is to guarantee that everyone is protected from the activities of the state § 14 of the Constitution gives rise to the duty of the legislative, executive and judicial powers and of local governments to guarantee the rights and freedoms of persons, and under § 13 of the Constitution everyone has the right to the protection of the state and of the law. The law shall protect everyone from the arbitrary exercise of state authority. The referred provisions of the Constitution clearly indicate that the state is the addressee of fundamental rights and freedoms and it has the duty to act and exercise its powers solely pursuant to the Constitution. The Constitutional Review Chamber is of the opinion that in the present case the initiation of a constitutional review proceeding for the protection of the interests of the state is not in conformity with the right to the protection of the courts – arising from § 15(1) of the Constitution and with the objective of concrete norm control. The objective of concrete norm control is first and foremost to serve the interests of participants in a proceeding. Should the state find that the payment of remuneration to an interim trustee within the limits established in this legal act is not justified, the Minister of Justice as well as the Riigikogu themselves could amend the legislation which allegedly undermines the interest of the state. Furthermore, under § 139 of the Constitution the Chancellor of Justice has the competence to exercise supervision over the legislation of general application issued by the executive and to initiate a norm control of the regulation of the minister, if he is of the opinion that § 2 (8) and (9) of the regulation have been enacted exceeding the authority delegated by the law.

16. §§ 15(2) and 152(1) of the Constitution entitle every court to declare unconstitutional any relevant law, other legislation or procedure, and the courts have this obligation even when the participants in a proceeding do not raise this claim during the hearing of their case. Nevertheless, upon declaration of unconstitutionality of an applicable legal act the courts are still bound by the guarantee of protection of persons' rights and obligations, arising from §§ 15(1) and 14 of the Constitution. In the case under dispute what could be reviewed first of all is whether the relevant legal act, which restricts the rights of an interim trustee or a debtor, is in conformity with the Constitution. A petition to that effect has not been submitted to the Supreme Court.

17. According to § 23(1) of the BA an interim trustee has the right to receive remuneration in the amount determined by the court for the performance of his or her duties and demand reimbursement of the necessary expenses incurred in the performance of his or her duties. The provisions which were declared unconstitutional by the court allow to order the payment of an interim trustee's remuneration and necessary expenses out of state funds in the case of abatement of bankruptcy proceedings without declaration of bankruptcy. The bankruptcy proceedings of OÜ Primarius were terminated by the ruling of the Harju County Court of 13 December 2007 by abatement without declaration of bankruptcy, because the debtor's assets were insufficient for covering the costs of the bankruptcy proceedings and it was impossible to recover or reclaim the assets. According to the interim trustee's report the assets of the debtor amounted to 70 kroons and 58 cents. If the provisions which the circuit court did not apply were to be declared unconstitutional and invalid, the court would have no possibility to ensure the remuneration to an interim trustee if the debtor lacks the assets for covering the costs of the bankruptcy proceedings. The Chamber is of the opinion that the court did not act as a guarantor of rights and freedoms, as required by §§ 15(1) and 14 of the Constitution.

18. Within concrete norm control it is verified whether an act of general application violates the rights and freedoms of a person. The courts do not have the competence to initiate concrete norm control if the legislation does not violate the rights and freedoms of the participants in the proceedings. That is why the petition of the Tallinn Circuit Court is not permissible and is to be dismissed under § 11(2) of the CRCPA. By declaring unconstitutional an act of general application, favourable to a debtor as well as to an interim trustee in bankruptcy, the circuit court exceeded the competence provided for in § 15(1) of the Constitution and § 9(1) of the CRCPA. The norms which the court did not apply do not violate the rights and freedoms of the participants in the proceedings.

19. As the Chamber held that the petition of the circuit court was to be dismissed for the above reasons, the Chamber does not consider it necessary to render an opinion concerning the allegations of the Chancellor of Justice and the interim trustee Ene Ahas that § 2 (8) and (9) of the regulation of the Minister of Justice are not relevant.