THE SUPREME COURT
LEGAL INFORMATION DEPARTMENT

CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DECISIONS OF THE SUPREME COURT OF ESTONIA

Case-law analysis

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Contents

The merits of the law are usually expressed through disputes in court and case-law since it is the disputes in court where the pros and cons of actual problems, disputes and ambiguities of life and law are pointed out based on common sense and expertise. Thus, the best reflection of the law, including the Constitution is offered by the case-law.

Rait Maruste[1]

Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms[2] (hereinafter the Convention) entered into force with regard to Estonia on 16 April 1996. With its ratification the Convention was incorporated into the Estonian law and it became an integral part of the Estonian legal order. In the hierarchy of legal norms the Convention is between the Constitution and laws.[3]

As a Contracting Party, Estonia recognises also the jurisdiction of the European Court of Human Rights (ECHR) in the interpretation and application of the Convention. It immediately gave rise to a question *whether Estonian courts can or shall apply in their decisions the judgments of the European Court of Human Rights and of the Commission of Human Rights as precedence.*[4] If in respect of "can" the answer is yes, then in respect of "shall" the answer is not so simple. However, it is certain that *in the national application of the Convention the most important sources of interpretation next to the Convention itself are the judgments of the European Court of Human Rights (earlier also the decisions and reports of the European Commission of Human Rights).*[5]

In the recommendation Rec(2004)5 of the Committee of Ministers[6] the latter stressed that the Convention has become an integral part of the domestic legal order of all states parties and noted in this respect the important role played by national courts. The Committee of Ministers emphasised the significance of the principle of subsidiarity, noting that it is at national level that the most effective and direct protection of the rights and freedoms guaranteed in the Convention is ensured and that this requirement concerns all state authorities, in particular the courts, the administration and the legislature. The significance of being acquainted with the

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[1] R. Maruste. Põhiseaduse tõlgendamise meetodid. (Methods for interpretation of the Constitution.) Juridica 1996/II, p 78.

[2] The Convention for the Protection of Human Rights and Fundamental Freedoms is often referred to also as *the European Convention on Human Rights*.

[3] More on the relation of the Convention to the Constitution and the laws see e.g.: R. Maruste. EIÕK staatus Eesti õigussüsteemis. (The European Convention on Human Rights in the Estonian legal system.) Juridica 1996/IX, pp. 474–478; Final report of the expert committee on the Constitution of the Republic of Estonia. Chapter 2 of the Constitution "Fundamental Rights, Freedoms and Duties", paragraph 7. On the internet (in Estonian): http://www.just.ee/10731

[4] R. Maruste. EIÕK staatus Eesti õigussüsteemis. (The European Convention on Human Rights in the Estonian legal system.) Juridica 1996/IX, p 478. R. Maruste provided an answer to the question: "If the Convention is a part of the Estonian legal system, it should be concluded that also the case-law under the Convention is binding on us."

[5] H. Vallikivi. Euroopa inimõiguste konventsiooni kasutamine Riigikohtu praktikas. (Use of the European Convention on Human Rights in the practice of the Supreme Court.) Juridica 2001/VI, p 401.

[6] Recommendation Rec(2004)5 of the Committee of Ministers on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights. Adopted on 12 May 2004. On the internet: http://www.vm.ee/sites/default/files/CM_Rec_12052004_2.pdf

ECHR case-law and having regard to it has been stressed repeatedly at the Council of Europe level.

The most important recent documents include the Interlaken Declaration on the Future of the Court adopted at the High Level Conference of the Committee of Ministers on 19 February 2010. The said Declaration seeks to establish a roadmap for the reform process towards long-term effectiveness of the Convention system. According to the adopted action plan, the Conference calls upon the States Parties to commit themselves to taking into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system.[7]

The significance of knowing the European law (which also includes the ECHR case-law) has also been stressed by the Consultative Council of European Judges (CCJE).[8] In addressing the issue of application of the European law the CCJE has pointed out that the dialogue between national and European judicial institutions is necessary and has noted that for all national judges, the case law of the European Court of Human Rights and, where appropriate the Court of Justice of the European Communities serves as a reference in the process of developing a body of European law. The CCJE stresses that judges, in applying the law, should as far as possible interpret it in a manner which conforms to international standards even if set by "soft law".[9]

In the case-law of the Supreme Court the start of the application of the ECHR decisions may be deemed to be 20 December 1996 when the Constitutional Review Chamber of the Supreme Court referred in interpreting the definition of legality to the ECHR judgment of 1984 in the case of *Malone v. the United Kingdom*.[10] The Chamber added to its reasoning the interpretation of the definition of legality provided by the ECHR.

If to look for fundamental opinions on the binding effect of the Convention and the meaning of the ECHR case-law in the Supreme Court case-law after the entry into force of the Convention, it appears that the first references to the Convention and the ECHR case-law were made without further ado and without additional explanations. Although the ratification of the Convention was mentioned earlier,[11] the situation was elaborated by the Constitutional Review Chamber of the Supreme Court in its judgment of 11 June 1997 in case no. 3-4-1-1-

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[7] The Interlaken Declaration is available on internet: http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf See also the declaration and follow-up plan adopted at the Conference on the Future of the European Court of Human Rights held in Izmir on 26 – 27 April 2011. Also available on the website of the Ministry of Foreign Affairs: http://www.echr.coe.int/NR/rdonlyres/E1256FD2-DBE5-41E8-B715-4DF6D922C7B6/0/20110428_Declaration_Izmir_EN.pdf

[8] *Consultative Council of European Judges*, an advisory body of the Council of Europe composed of judges of the Member States.

[9] CCJE Opinion no 9 (2006) on the role of national judges in ensuring an effective application of international and European law, paragraphs 26 and 45. On the internet: http://www.riigikohus.ee/vfs/558/CCJE_2006_op9.pdf

[10] The Constitutional Review Chamber of the Supreme Court judgment of 20 December 1996 in court case no. 3-4-1-3-96 (review of the petition of the Administrative Law Chamber of the Supreme Court of 11 November 1996 to declare invalid clauses 2 and 3 and the appendix to the Government of the Republic Regulation no. 486 of 28 December 1994 entitled "Amendments to the Government of the Republic Regulation no. 408 of 21 December 1993 and to the organisation of import, wholesale and retail of vodka", as well as clause 5 of the "Instructions for the organisation of import and export, production and sale of alcohol, tobacco and tobacco products", approved by the Government of the Republic Regulation no. 4 of 7 January 1994, because of the conflict thereof with § 87 (6) of the Constitution).

[11] The Constitutional Review Chamber judgment of 8 November 1996 in case no. 3-4-1-2-96 (subdivision VI), the Administrative Law Chamber ruling of 6 June 1997 in administrative case no. 3-1-1-16-97 (paragraph 2).

97. Namely, the Constitutional Review Chamber deemed it necessary to point out that as of 16 April 1996 the European Convention on Human Rights is binding on Estonia and on the basis of § 123(2) of the Constitution, if laws of Estonia are in conflict with the Convention, the Convention as an international treaty ratified by the Riigikogu shall apply. Regarding the issue at hand the Chamber found that the main procedural guarantees provided for in Article 6 of the Convention are extended to disciplinary proceedings and added that such a conclusion arises also from the ECHR decision of 1976 in the case of Engel and others.

In the Supreme Court judgment of 20 September 2002 in criminal case no. 3-1-1-88-02 also the Criminal Chamber stressed the position of the Convention and the ECHR in the Estonian legal system, noting that based on § 3(2) and § 123(2) of the Constitution, the Convention for the Protection of Human Rights and Fundamental Freedoms and the opinions of the ECHR in interpretation thereof form an integral part of the Estonian legal system, having priority with regard to Estonian laws. The Chamber added that in certain cases the Convention can also provide assistance in furnishing the concept of the Estonian Constitution.

The Supreme Court *en banc* noted in its judgment of 6 January 2004 in criminal case no. 3-1-3-13-03 that the Convention for the Protection of Human Rights and Fundamental Freedoms constitutes an international treaty, ratified by the Riigikogu, which has priority over Estonian laws and other legislation. The Supreme Court *en banc* added that in keeping with the aforesaid, the European Convention for the Protection of Human Rights and Fundamental Freedoms constitutes an inseparable part of Estonian legal order and the guarantee of the rights and freedoms of the Convention is, under § 14 of the Constitution, also the duty of the judicial power. The Supreme Court has later repeatedly referred to paragraph 31 of the judgment, including in 2011.[12]

Subjects and structure of the analysis

The analysis aims to give an overview of the use of the ECHR case-law in the decisions of the Supreme Court.[13] The analysis focuses on the last three years' case-law of the Supreme Court, covering decisions made in criminal, administrative and civil cases from 2009 to 2011. Furthermore, it also includes all the constitutional review judgments, made after the entry into force of the Convention, which contain references to the ECHR case-law.[14] There is no time limit regarding the latter as it can be presumed that decisions made in constitutional review proceedings are of great importance in the interpretation and application of the Convention, thereby characterising also the Supreme Court's approach to the application of the Convention. The significance of these decisions is also expressed by the percentage of judgments declaring a contradiction with the Constitution – if to leave aside rulings of the Constitutional Review Chamber regarding dismissal of individual complaints (21 in total), then in 15 decisions out of the remaining 24 the Supreme Court has declared the legal regulatory framework in question to be in contradiction with the Constitution.

The analysis focuses on:
1) what is the general practice of referring to the ECHR decisions in the decisions of the Supreme Court like;

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[12] The Criminal Chamber of the Supreme Court ruling of 22 February 2011 in criminal case no. 3-1-1-110-10, paragraph 12; the Supreme Court *en banc* judgment of 22 March 2011 in case no. 3-3-1-85-09, paragraph 73; and the Constitutional Review Chamber judgment of 4 April 2011 in case no. 3-4-1-9-10, paragraph 54.

[13] The analysis does not offer an assessment of the quality of use of the ECHR case-law.

[14] It only covers final decisions made in a case. Rulings referring a case to be adjudicated by the Supreme Court *en banc* were not included in the material under analysis. The analysis does not cover decisions made on requests filed for reopening proceedings after a judgment by the ECHR.

2) what are the main areas and issues in which the Supreme Court has used the case-law of the ECHR; and
3) whether and to what extent the ECHR judgments made with regard to Estonia are referred to in decisions of the Supreme Court.

Based on these subjects the analysis has been divided into three chapters. The Annex to the analysis sets forth the decisions of the Supreme Court from 2009 to 2011 which include the most references to the ECHR case-law.

Statistic overview

According to the results of a search on the website of the Supreme Court, as at the end of 2011 the European Court of Human Rights[15] and/or the application practice of the Convention had been referred to in total of 173 decisions of the Supreme Court.[16] A decision of the European Commission of Human Rights[17] had been referred to on three occasions.[18]

The analysis includes 71 decisions in total. Decisions by the Chambers of the Supreme Court and the Supreme Court *en banc*:

2009–2011	Criminal Chamber	18
	Administrative Law Chamber	7
	Civil Chamber	1
	Constitutional Review Chamber	17
	Supreme Court *en banc*	4
1996–2008	Constitutional Review Chamber	17
	Supreme Court *en banc*	7

As it can be seen from the table, the most references to the ECHR case-law within the last three years have been made by the Criminal Chamber and the Constitutional Review Chamber. The Administrative Law Chamber is next on the list. The Civil Chamber referred to the ECHR case-law in one decision.

Decisions in which the Supreme Court *en banc* has referred to the ECHR case-law are by the type of the case as follows: four constitutional review cases, three criminal cases, three civil cases and one administrative case.[19]

Consequently, from 2009 to 2011 the Supreme Court referred to the ECHR case-law the most in criminal cases (in total of 21 decisions). During the same period, the ECHR case-law was

[15] Including under the name of *Strasbourg Court* and on two occasions only by the abbreviation ECHR.
[16] This number includes all decisions, irrespective of the person making the reference, i.e. the Supreme Court is not the person making the reference in every case.
[17] On 1 November 1998 the Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms entered into force replacing the existing European Commission and Court of Human Rights with a new permanent European Court of Human Rights. The European Commission of Human Rights ceased to exist in 1999.
[18] The Criminal Chamber referred for the first time to the European Commission of Human Rights decision of 18 December 1980 in the case of *Crotciani and Others v Italy* in its judgment of 15 October 1996 in case no. 3-1-1-109-96 and used the same reference again in a judgment of 17 June 1997 in case no. 3-1-1-70-97 and in a judgment of 21 October 2011 in case no. 3-1-1-74-11.
[19] During 2009–2011, two out of the four Supreme Court *en banc* decisions were made in administrative cases, one in a constitutional review case and one in a civil case. During the previous period, three decisions out of the seven were made in criminal cases, two in constitutional review cases and two in civil cases.

referred to in constitutional review cases in 19 decisions, the corresponding number of decisions in administrative cases was eight and in civil cases two.[20]

From the entry into force of the Convention up to the year 2008 the Supreme Court referred to the ECHR case-law in constitutional review proceedings in total of 24 decisions.

1. General observations on references to the ECHR judgments

Since the ECHR case-law has been actively used in the decisions of the Supreme Court, it can be stated that the Convention and its application practice have found a place in the case-law of the Supreme Court. The Supreme Court has applied the ECHR case-law in interpretation of both the Constitution and the laws. The Supreme Court has also resorted to the ECHR case-law in declaring several provisions of law to be in contradiction with the Constitution. The ECHR case-law is used in the Supreme Court decisions mostly as a reason of interpretation but also in bringing examples for illustrative purposes and by way of *obiter dictum*.

The ECHR decisions are mostly referred to by abstracts instead of quotes. If possible, the same position is confirmed by references to several ECHR decisions. It is also typical that if a decision of the ECHR is referred to, it will be referred to in the future as well. References are often reiterated from decision to decision also when the Supreme Court continues its earlier case-law and refers to its own opinions formed in previous decisions. There are several examples where an entire paragraph or section of an earlier decision has been quoted.

It is also typical of the case-law of the Supreme Court that if based on the ECHR case-law the Supreme Court has formed its opinion, then in the future no specific reference to the ECHR case-law is made, rather the opinion is complemented by a general reference to the earlier case-law of both the ECHR and the Supreme Court.

The ECHR case-law is extensive, covering court cases of countries with different legal systems and often addressing an issue relevant in the adjudicated case in another context. Thus, application of the ECHR case-law cannot be compared to the application of the law where there is a clearly specified amount of material. Also, it is not excluded that the ECHR case-law offers various interpretation possibilities. All these circumstances complicate the application of the ECHR opinions.

Here is a list of ECHR judgments which the Supreme Court has referred to the most:

Pélissier and Sassi v. France[21]	referred to in 8 decisions;
Kudła v. Poland[22]	6 decisions;
Konashevskaya and others v. Russia[23]	5 decisions;
Reinhardt and Slimane-Kaïd v. France[24]	4 decisions;

[20] The small percentage of civil cases can partly be justified by the fact that the obligation to guarantee fundamental rights is overwhelmingly associated with public authority. See also D.W. Belling. Põhiõiguste tähendus eraõigusele. (The implications of fundamental rights for private law.) Juridica 2004/I, pp. 3–10. For the meaning of fundamental rights in private relations and the *Drittwirkung* of basic rights in the case-law of the Supreme Court see Vitali Šipilov's master's thesis "The *Drittwirkung* of Basic Rights and the Horizontal Effect of the European Union Law" (winner of 2010 Research Contest of the Ministry of Justice). On the internet (in Estonian):
http://www.just.ee/orb.aw/class=file/action=preview/id=52954/%26%238222%3BP%F5hi%F5iguste+kolmikm%F5ju+ja+Euroopa+Liidu+%F5iguse+horisontaalne+kohaldatavus%26%238220%3B.pdf

[21] The ECHR judgment of 25 March 1999; the Supreme Court has used it in addressing reasonable time of proceedings and ensuring of right of protection.

[22] The ECHR judgment of 26 October 2000 – reasonable time of proceedings, right to effective legal remedy.

[23] The ECHR judgment of 3 June 2010 – reasonable time of proceedings.

[24] The ECHR judgment of 31 March 1998 – reasonable time of proceedings.

Kangasluoma v. Finland[25] 4 decisions;
Sunday Times v. the United Kingdom (No. 1)[26] 4 decisions.

In 2009, Mart Susi has noted that resorting to the Convention and the ECHR decisions in the Supreme Court decisions is noticeable but not decisive.[27] Based on the material explored in the course of the compilation of this analysis it can be said that certain questions have formed, addressing of which helps to embed the ECHR case-law in the decisions of the Supreme Court more and more. The following is a thematic overview of areas which the ECHR case-law has affected.

2. Thematic overview of the case-law of the Supreme Court

2.1. Reasonable time of proceedings

In the analysed decisions the ECHR case-law was used the most in addressing reasonable time of proceedings. A requirement for reasonable time of proceedings arises from the first sentence of Article 6(1) of the Convention which prescribes that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[28]

The Supreme Court has repeatedly dealt with claims regarding reasonable time of proceedings and has brought numerous examples from the case-law of the ECHR. The Supreme Court judgment of 18 June 2010 in criminal case no. **3-1-1-43-10** stands out due to the number of references to the ECHR case-law therein. The said judgment contains references to total of 20 ECHR judgments,[29] but also to the earlier case-law of the Supreme Court itself. This gives us a thorough approach to the reasonable time of proceedings which the Supreme Court has repeatedly quoted or referred to in its later decisions.[30]

The Criminal Chamber of the Supreme Court used in its judgment made in case no. 3-1-1-43-10 the case-law of the ECHR in addressing the following issues:
- in criminal proceedings, application of legal consequences related to expiry of reasonable time of proceedings (paragraph 20 of the judgment);
- determination of period of time considered upon assessment of the length of time of proceedings (paragraphs 25, 27 and 28);
- which are the criteria for assessment of the reasonableness of time of proceedings (paragraph 30) and whether in the case to be adjudicated the reasonable time of proceedings has expired or is about to expire based on these criteria. The Chamber referred to the ECHR case-law, assessing the complexity of the case (paragraph 33), the conduct of the accused and his or her councils in the criminal proceedings (paragraphs 35, 46, 47), the role the bodies

[25] The ECHR judgment of 20 January 2004 – reasonable time of proceedings.
[26] The ECHR judgment of 26 April 1979 – principle of legal clarity.
[27] Mart Susi. Eesti õigusruumi puutepunktidest Euroopa Inimõiguste Kohtuga. (Contacts of the Estonian legal space with the European Court of Human Rights.) The Journal of the Estonian Parliament no. 19, 2009. On the internet (in Estonian): http://www.riigikogu.ee/rito/index.php?id=13771
[28] Valid wording of the Convention which entered into force on 1 June 2010 (RT II 2010, 14, 54). The valid wording replaced the earlier translation of the Convention (RT II, 2000, 11, 57) and it includes amendments to the control system of the Convention established by Protocol No. 14 which entered into force on 1 June 2010.
[29] See the Annex to the analysis.
[30] For example, the Criminal Chamber of the Supreme Court judgment of 3 November 2010 in criminal case no. 3-1-1-84-10, judgment of 23 March 2011 in criminal case no 3-1-1-6-11, and judgment of 17 August 2011 in criminal case no. 3-1-1-57-11, also the Supreme Court *en banc* judgment of 22 March 2011 in administrative case no. 3-3-1-85-09 (paragraphs 79 and 84).

conducting the proceedings played in the length of the criminal proceedings (paragraph 52) and the importance of the case for the accused (paragraph 54).

In the Supreme Court ruling of 22 February 2011 in case no. **3-1-1-110-10** the Criminal Chamber explained **matters related to the reasonable time for keeping an accused under arrest**. By referring to the ECHR decisions the Chamber explained the purpose of the requirement for reasonable time of proceedings (paragraph 13) and drew attention to Article 5(3) of the Convention which prescribes an additional guarantee, independent of Article 6(1), for the prevention of exceeding the reasonable time for keeping an accused under arrest (paragraph 14). The Chamber also brought examples from the ECHR decisions where the ECHR has assessed the conformity of the length of proceedings with the requirements in Article 5(3) of the Convention (paragraph 16). In the case in question the accused had been under arrest for nearly six months after which the county court extended their arrest by more than thirteen months (the hearing of the criminal case was scheduled for October 2011). Considering that no procedural acts were performed during that time and the accused only waited for the court to hear their criminal case, the Chamber drew the county court's attention to the fact that such lengthy arrest may be in contradiction with the ECHR case-law.

The Supreme Court *en banc* judgment of 22 March 2011 in administrative case no. **3-3-1-85-09** addressed in the light of the ECHR case-law in addition to the main issues concerning reasonable time of proceedings (the merits, scope and assessment criteria of a claim concerning reasonable time of proceedings) also **the obligation to guarantee a national effective legal remedy** (paragraph 75). The Supreme Court noted that this obligation binds, above all, the legislator who is obligated to impose provisions which would ensure execution and protection of the fundamental rights with sufficient probability and to a sufficient extent. The second main issue in the adjudication of which the Supreme Court *en banc* used the ECHR case-law was compensation for non-proprietary damage caused by unreasonably extended criminal proceedings (paragraph 130). The Supreme Court *en banc* found that the protection of fundamental rights provided in, above all, §§ 14 and 15 and in § 25 of the Constitution[31] requires implementation of a specific regulation for compensation for damage caused in a criminal proceeding. In the case in question the Supreme Court gave an assessment on the constitutionality of the regulatory framework of compensation for damage provided for in the State Liability Act and declared the State Liability Act to be in contradiction with the Constitution in the part it does not prescribe compensation for non-proprietary damage caused by unreasonably extended pre-trial criminal proceedings. By weighing whether and in which amount damages should be awarded to the complainant the Supreme Court *en banc* found based on the ECHR case-law that the only possible compensation for the violation of the complainant's rights is award of a fair monetary compensation. Since no corresponding regulatory framework exists, the Supreme Court deemed it possible to award the compensation itself.

In other judgments pertaining to the reasonable time of proceedings the Supreme Court has referred to the ECHR case-law in the following matters: aim of the requirement for reasonable time of proceedings[32], determination of the period of time (above all the start thereof) considered upon assessment of the length of time of proceedings[33], criteria for assessing the

[31] § 14 of the Constitution provides for the right to organisation and proceedings, § 15 for the right to have recourse to the courts and § 25 for the right to compensation for damage.

[32] The Criminal Chamber judgment of 3 November 2010 in criminal case no. 3-1-1-84-10, paragraph 15; the Criminal Chamber judgment of 17 August 2011 in criminal case no. 3-1-1-57-11, paragraph 15.4.

[33] The Criminal Chamber judgment of 23 March 2011 in case no. 3-1-1-6-11, paragraph 17.1, and the Criminal Chamber judgment of 17 August 2011 in criminal case no. 3-1-1-57-11, paragraph 14.1. In both cases paragraph 25 of the judgment of the Criminal Chamber made in case no. 3-1-1-43-10 has been quoted (in full).

reasonableness of the time of proceedings[34] and consideration of a civil action filed in a criminal case in choosing the consequence of the violation of the requirement for reasonable time of proceedings[35].

The author of the analysis holds that with regard to the case-law of the Supreme Court concerning reasonable time of proceedings it can be said that resorting to the Convention and the ECHR case-law in addressing this issue in the decisions of the Supreme Court has been noticeable and also decisive in respect of judgments explored above.

It is noteworthy that the ECHR case-law has made its way to the Estonian laws through the case-law of the Supreme Court. Namely, on 1 September 2011 entered into force amendments to the Code of Criminal Procedure prescribing legal remedies by application of which the court hearing a criminal case can respond to the expiry of the reasonable time of proceedings.[36] Also the Supreme Court responded to the long-awaited developments in its judgment of 4 November 2011 in criminal case no. **3-1-1-81-11**, paragraphs 22–22.3 of which deserve special attention. Namely, in order to guide the jurisprudence, the Criminal Chamber deemed it necessary (outside the scope of the criminal case in question) to refer to the earlier case-law of the Supreme Court regarding the lack of legal remedies for ensuring reasonable time of proceedings and possible measures and the amendments to the Code of Criminal Procedure which entered into force on 1 September 2011 by which the relevant legal remedies were finally provided for in a law. In paragraph 22.3 of the judgment the Criminal Chamber noted the following: "*Consequently, as of 1 September 2011 the legislator has eliminated the earlier gap and prescribed legal remedies by application of which the court hearing a criminal case can respond to the expiry of the reasonable time of proceedings. Therefore, in determining the legal remedies applicable upon violation of the requirement for reasonable time of proceedings it is no longer necessary to follow decisions of the Supreme Court as a subsidiary source of criminal procedural law pursuant to clause 4 of section 2 of the Code of Criminal Procedure. It also means that as of 1 September 2011 expiry of reasonable time of proceedings does not constitute a basis for acquittal of the accused or for application of § 202 of the Code of Criminal Procedure because the legislator has prescribed different legal remedies for such a situation*."

As this concludes a very important phase in the work of the Supreme Court in the interpretation and development of law, it is worth looking back on the time when the opinions in the matter of reasonable time of proceedings were first formed. In the context of the case-law of the Criminal Chamber it has been noted that already a judgment of 27 February 2004 in case no 3-1-1-3-04 explained the relativity of reasonable time of proceedings (depending on the seriousness, complexity and extent of the criminal offence in question, but also on other specific circumstances, including the course of the proceedings so far, e.g. how many times the criminal case has already been returned for a new court hearing or for additional pre-trial proceedings); and also that the consequence of stating the expiry of reasonable time need not be automatically and always an acquittal. Depending on the circumstances a

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[34] The Criminal Chamber of the Supreme Court judgments of 7 June 2010 in criminal case no. 3-1-1-118-09, paragraph 7, and of 28 December 2009 in criminal case no. 3-1-1-100-09, paragraph 17; the Constitutional Review Chamber ruling of 30 December 2008 in case no. 3-4-1-12-08, paragraph 22.

[35] The Criminal Chamber judgment of 23 March 2011 in criminal case no. 3-1-1-6-11, paragraph 19.2.

[36] Act on the amendment of the Code of Criminal Procedure and in connection therewith amendment of other Acts (RT I, 23.02.2011, 1), see, above all, § 274^2 of the CCP (Termination of criminal proceedings in court session due to expiry of reasonable time of proceedings) and § $306(1)6)^1$ of the CCP pursuant to which in making of a court judgment the court shall adjudicate, inter alia, the issue whether the punishment should be lessened due to exceeding of reasonable time of proceedings. The Act in question also amended the Code of Civil Procedure, see § 333^1 (Request for expedition of court proceedings).

proportional consequence may also be, for instance, termination of proceedings in the criminal case for reasons of expediency or consideration of the said circumstance in imposition of a punishment.[37]

Decisions of the Supreme Court *en banc* and constitutional review decisions maintained the course set by the Criminal Chamber, tying it with the opinions of the ECHR. For example, in the Constitutional Review Chamber of the Supreme Court ruling of 30 December 2008 in case no. 3-4-1-12-08 it was emphasised that according to the case-law of the Human Rights Court the reasonableness of the length of proceedings is to be assessed by a court in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and the conduct of the competent authorities.

In conclusion it can be stated that there really is no doubt that the need to ensure reasonable time of proceedings and to establish an effective national legal remedy for protection against unreasonable time of proceedings has become clear to the legislative and judicial power precisely through the case-law of the ECHR.[38]

2.2. Admissibility of individual complaints

The right of recourse to the courts and the right to an effective legal remedy are of decisive importance in assessing the admissibility of individual complaints in constitutional review cases.

As at the end of 2011, the Supreme Court has adjudicated total of 22 cases of individual complaints. The first of which is from 2003 and the last five are from 2011. In all these decisions[39] the Supreme Court noted that pursuant to the Constitutional Review Court Procedure Act, the possibility to file an individual complaint directly with the Supreme Court is limited, and on the basis of §§ 13, 14 and 15 of the Constitution and the application practice of the European Convention for the Protection of Human Rights and Fundamental Freedoms[40] stressed that that the Supreme Court can refuse to hear a complaint only if the person has other effective ways of exercising the right to judicial protection, guaranteed by § 15 of the Constitution. On these grounds the Supreme Court has returned without review 21 individual complaints out of the said 22.

The only complaint the merits of which the Chamber reviewed was Sergei Brusilov's complaint. In a judgment of 17 March 2003 regarding that complaint in case no. **3-1-3-10-02** the Supreme Court interpreted on the basis of the ECHR case-law the individual's right of appeal for the protection of fundamental rights extensively.[41] Consequently, a precedent was

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[37] Elina Elkind, Erkki Hirsnik, Eerik Kergandberg, Lea Kivi, Mervi Kruusamäe, Margus Mõttus, Andres Parmas, Priit Pikamäe, Juhan Sarv, Jaan Sootak. Valikuliselt Riigikohtu kriminaalkolleegiumi praktikast õiguse tõlgendamisel ja edasiarendamisel. (A Selection of Decisions of the Criminal Chamber of the Supreme Court in the Interpretation and Development of Law.) Juridica 2009/VIII, p. 552 (note no 75).

[38] See Mart Susi. Kas Eestis on tõhus riigisisene õiguskaitsevahend kaebuste ebamõistliku menetlusaja vastu? (Does an effective national legal remedy for complaints concerning unreasonable time of proceedings exist in Estonia?) Yearbook of courts 2009, p. 51. On the internet (in Estonian): http://www.riigikohus.ee/vfs/998/Kohtute_aastaraamat_2009.pdf

[39] The Supreme Court *en banc* judgment of 17 March 2003 in case no 3-1-3-10-02; Constitutional Review Chamber rulings in cases no. 3-4-1-6-05, 3-4-1-4-06, 3-4-1-17-06, 3-4-1-8-07, 3-4-1-11-07, 3-4-1-1-08, 3-4-1-3-08, 3-4-1-13-08, 3-4-1-12-08, 3-4-1-19-08, 3-4-1-11-09, 3-4-1-26-09, 3-4-1-22-09, 3-4-1-3-10, 3-4-1-4-10, 3-4-1-14-10, 3-4-1-18-10, 3-4-1-15-10, 3-4-1-5-11, 3-4-1-20-11, 3-4-1-21-11.

[40] The reference to the application practice of the Convention is declarative; no specific decisions are referred to.

[41] About the significance of the judgment made in the Brusilov case, see additionally Madis Ernits. Põhiõigused kui väärtusotsustused Riigikohtu praktikas. - Riigikohtu lahendid Eesti õiguskorras: tähendus ja kriitika. Riigikohtu teadustööde konkursi kogumik. (Fundamental rights as value judgments in the case-law of the

set by the Supreme Court in 2003, extending an individual's right of appeal to cases when he or she has no other effective means for the protection of his or her rights.

The complaint of Sergei Brusilov raised the question of retroactive force of an Act providing for a less onerous punishment for a commission of an act. In making of the judgment the Supreme Court *en banc* weighed which possibilities S. Brusilov has to have recourse to the courts for the verification of an alleged violation. By assessing the possibilities provided for in the Penal Code Implementation Act and in the Code of Administrative Court Procedure, the Supreme Court *en banc* came to the conclusion that proceeding with complaints in the administrative court and in the county and city court would last so long that the solution regarding the violation of the complainant's rights would be achieved after S. Brusilov has served the entire sentence imposed on him. The Supreme Court *en banc* held that there is no effective remedy for S. Brusilov for the protection of his fundamental right. Taking into account this fact, the fundamental rights at stake and the duration of the sentence served, the Supreme Court *en banc* could find no justification to refuse to hear S. Brusilov's petition on merits. As a result of hearing the petition on merits the Supreme Court declared the Penal Code Implementation Act to be in contradiction with the second sentence of § 23(2) of the Constitution in conjunction with the first sentence of § 12(1) in the part the Act does not prescribe alleviation of the sentence of a person serving imprisonment imposed on the basis of the former Code of Criminal Procedure to the maximum imprisonment provided for in the relevant section of the Special Part of the Penal Code, and released S. Brusilov from serving the punishment.

An example on using the ECHR case-law in dealing with admissibility of an individual complaint can be brought also from the recent case-law of the Supreme Court. In its ruling of 3 March 2011 in court case no. **3-4-1-15-10** the Constitutional Review Chamber explained based on the ECHR case-law that pursuant to the Convention it is not possible to file an *actio popularis* to the ECHR for the purpose of interpreting rights guaranteed by the Convention. The Convention does also not grant the right for persons to contest any provisions, measures or legislation of specific application merely because they feel that these provisions may violate the Convention; whereas, the resulting consequences are not directly related to them. According to the Chamber, these conclusions can also be applied with regard to the national system of legal remedies (paragraph 17).[42]

2.3. Too high state fees

Too high state fees constitute one of the most important subjects during the last few years in adjudication of which the Supreme Court has proceeded from the opinions of the ECHR. With a view to future developments of access to the courts and exercise of the right of appeal, a significant decision is the Supreme Court *en banc* judgment of 12 April 2011 in court case no. **3-2-1-62-10** (action of AS Wipestrex Grupp against the Republic of Estonia).[43] In that

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Supreme Court. – Decisions of the Supreme Court in the Estonian Legal Order: Meaning and Critique. Collection of the Research Contest of the Riigikogu.) Tartu, 2005. The same collection also contains a critical approach to the decision – see Laura Feldmanis, Tristan Ploom. Kas jõustunud kohtuotsus on JÕUSTUNUD kohtuotsus? Riigikohtu roll karistusõiguse reformi elluviimisel. (Is a judgment which has entered into force a judgment which has ENTERED INTO FORCE? The role of the Supreme Court in implementing the penal law reform.)

[42] At the same time the Constitutional Review Chamber noted that the ECHR has recognised that it is, however, open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risk being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation (see the ECHR judgment in case *Burden v. the United Kingdom*, paragraph 34).

[43] The Supreme Court has resorted to this judgment in its subsequent decisions regarding state fees, see e.g. the Supreme Court *en banc* judgment of 14 April 2011 in civil cases no. 3-2-1-60-10, the Constitutional Review

court case the Supreme Court verified **the constitutionality of the state fee rates and the constitutionality of failure to grant procedural assistance to a legal person in private law for the payment of a state fee on an appeal.** Upon weighing the moderation of the infringement of the right of appeal, the Supreme Court *en banc* took into account the case-law of the ECHR regarding access to the court, bringing examples of ECHR judgments (paragraph 48.4).[44] Proceeding from, inter alia, the case-law of the ECHR the Supreme Court found that § 56(1) and (19) and the last sentence of Annex 1 to the State Fees Act (in the wording applicable from 1 January 2009 to 31 December 2010) in their conjunction were unconstitutional to the extent they prescribed an obligation to pay in case of a civil matter with the value exceeding 10,000,000 kroons a state fee of 3% of the value of the civil matter but not more than 1,500,000 kroons.

In the judgment in question the Supreme Court has referred to the case-law of the ECHR additionally in connection with the objective of state fees (paragraph 44), with the opinion that very high state fees may prevent even legal persons in private law (including companies) from exercising the right of appeal (paragraph 57.3), and with issues of adjudication of requests of legal persons in private law for procedural assistance (paragraph 62.2). In addition to declaring the said provisions of the State Fees Act unconstitutional, the Supreme Court declared in the same judgment the first sentence of § 183(1) of the Code of Civil Procedure to be in contradiction with the Constitution and invalid to the extent it precludes grant of procedural assistance in a civil proceeding to an Estonian legal person in private law not meeting the criteria indicated in that provision for exemption in full or in part from payment of a state fee on an appeal.

Definitely worth mentioning is also paragraph 63 of the judgment in which the Supreme Court *en banc* additionally noted that *"this judgment may have an extensive effect. Therefore, in the assessment of the Supreme Court* en banc*, it is necessary to quickly analyse the regulatory framework for state fees as a whole. State fees have not been decreased in the current State Fees Act. On the contrary, as of 1 January 2011 the state fee maximum rate provided in the last sentence of Annex 1 to the SFA increased significantly, meaning that in case of a civil matter with the value exceeding 639,116.48 euros (10,000,000 kroons) the full rate of state fee is 3% of the value of the civil matter but not more than 131,955.82 euros (2,064,659 kroons and 93 cents). In order to prevent future disputes and normalise judicial procedural expenses, the legislator should, as soon as possible, generally and systematically lower the state fee rates."* At the time of the compilation of the analysis it has been possible to follow through the media the actions of the Supreme Court in the indicated direction and although the necessary amendments are still in the preparatory phase, it can be said that the opinions of the Supreme Court have already influenced the Estonian legislator's subsequent choices in the state fees policy.

The conformity with the Constitution of the provisions of the State Fees Act and the Code of Civil Procedure has been previously assessed in the same context by the Constitutional Review Chamber of the Supreme Court. By its judgment of 15 December 2009 in court case no. **3-4-1-25-09** the Chamber declared § 131(2) and (3) of the Code Civil Procedure (in the part § 131(3) provides for a reference to § 131(2)) and Annex 1 to the State Fees Act to be in contradiction with the Constitution and invalid to the extent they prescribe an obligation to pay 75,000 kroons on an action for declaration of a resolution of the general meeting of a

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Chamber judgment of 14 April 2011 in case no 3-4-1-1-11 and the Constitutional Review Chamber judgments of 1 November 2011 in cases no. 3-4-1-17-11 and 3-4-1-19-11.

[44] e.g. *Paykar Yev Haghtanak LTD v. Armenia*, 20.12.2007; *Kreuz v. Poland*, 19.06.2001; *Teltronic-Catv v. Poland*, 10.01.2006; *FC Mretebi v. Georgia*, 31.07.2007; *Weissman and others v. Romania*, 24.05.2006 (see paragraph 48.4 of the judgment).

building association null and void. The case-law of the ECHR has been referred to in paragraph 27 of the judgment, stating that the ECHR has on several occasions declared too high state fees as a violation of Article 6(1) of the Convention, and an example from amongst the ECHR decisions has also been included.[45]

On 29 November 2011 the Supreme Court *en banc* rendered in administrative case no. **3-3-1-22-11** another judgment concerning too high state fees. In discussing the objectives of the regulatory framework of state fees the Supreme Court *en banc* referred to the ECHR judgment in the *FC Mretebi v. Georgia* case, in which the ECHR has mentioned protection of the judicial system from burdensome appeals as an objective of state fees. Having regard to the objectives of state fees the Supreme Court *en banc* held that a state fee of 130,000 kroons is not a necessary measure for carrying out the principle of procedural economy or the objective of bearing the costs of administration of justice in part, and decided that § 56(11) of the State Fees Act in conjunction with Annex 1 thereto (in the wording valid from 1 January 2009 until 31 December 2010), which prescribed that upon filing an action with the administrative court for compensation for damage a state fee in the amount of 130,000 kroons was required to be paid on a claim in the amount of 2,500,000 to 3,000,000 kroons, were in contradiction with the Constitution.

2.4. Right of recourse to the courts and right to effective legal remedy in misdemeanour proceedings

The right of recourse to the courts and the right to effective legal remedy are issues which in two cases have led to declaration of unconstitutionality of provisions of the Code of Misdemeanour Procedure (CMP). The first case concerned the right of appeal of a person outside misdemeanour proceedings upon confiscation of his means of transport. In its judgment of 16 May 2008 in case no. **3-1-1-88-07** the Supreme Court *en banc* noted by resorting to one of its earlier decisions[46] and the case-law of the ECHR referred to therein that effective remedy must be guaranteed to everyone who claims that his rights and freedoms have been violated and in such a case he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (paragraph 41). Based on, inter alia, the case-law of the ECHR, the Supreme Court held that § 114(2) of the CMP infringes the right of a person to have a recourse to the courts if his rights and freedoms are violated, provided for in the first sentence of § 15(1) of the Constitution, and declared the said provision to be in conflict with the Constitution to the extent that it does not allow a person who is not a participant in the proceedings to file an appeal with the county court against a decision made under § 73(1) of the CMP by way of general procedure, by which a transport vehicle of the person not participating in the proceeding is confiscated.

In the second judgment the constitutionality of lack of an option to file an appeal against a court ruling was assessed. The Constitutional Review Chamber of the Supreme Court found in its judgment of 25 March 2004 in case no. **3-4-1-1-04** that clause 10 of section 191 of the CMP (in the wording in force from 1 September 2002 until 31 December 2003) was in conflict with the Constitution to the extent that it excluded the filing of an appeal against a ruling on refusal to accept or hear an appeal in the appeal proceedings in a county or city court. In that judgment the Chamber expressed also fundamental opinions which stress the importance of the Convention and its application practice. The Chamber pointed out that *"the*

[45] A reference is made to the ECHR judgment of 17 July 2007 in the case of *Mehmet and Suna Yigit v. Turkey*, in which the ECHR found that claiming a state fee four times the minimum wage from a person without an income is a violation of Article 6(1).

[46] The Supreme Court *en banc* ruling of 22 December 2000 in case no. 3-3-1-38-00 (so-called Divec case), see paragraph 19 of the ruling and the case-law referred to therein.

procedural rights of persons charged with a criminal offence are laid down in §§ 22 to 24 of the Constitution. These provisions contain the rights to effective legal protection, which are realised through a fair proceeding. But in addition to the Constitution national legislation must also take into consideration the principle of fair trial, established in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the ECHR"). The Chamber shares the opinion that the Constitution should be interpreted in a manner which guarantees the application of the Constitution in conformity with the Human Rights Convention and the application practice thereof. Otherwise effective national protection of a person's right would not be guaranteed." (paragraph 18).

The importance of the same judgment shall be emphasised also with a view to substantive law. Namely, the court explained the furnishing of the concept of "criminal offence" in the case-law of the ECHR (paragraph 19). Insofar as under the criteria established in the case-law of the ECHR some misdemeanours can be classified into the category of criminal offences, a person must be guaranteed in such cases all the procedural guarantees that a person charged with a criminal offence enjoys. By referring to the case-law of the European Court of Human Rights the Chamber noted that pursuant to the case-law of the European Court of Human Rights a person must have an opportunity to challenge any decision concerning his or her punishment, which will guarantee him or her the rights required by Article 6 of the ECHR (paragraph 20).

2.5. Giving of statements and use thereof in criminal proceedings

Giving of statements and use thereof as evidence is one of the most addressed subjects next to the requirement for reasonable time of proceedings adjudicated in the Supreme Court during the period in question. The opinions of the Criminal Chamber of the Supreme Court formed from 2009 to 2011 which are based on decisions of the ECHR are as follows.

In the Supreme Court judgment of 22 June 2011 in criminal case no. **3-1-1-48-11** the Criminal Chamber has used the case-law of the ECHR in addressing **the relation between the principle of direct examination of evidence and the guarantee of the right of defence**, noting that reservations from the principle of direct examination of evidence may be made only if the right of defence of the accused has been taken into account sufficiently at the same time (paragraph 17). As it is a subject addressed repeatedly in the case-law of the Criminal Chamber, the opinions of the ECHR have been referred to in this judgment also through earlier judgments of the Chamber.[47]

In the Supreme Court judgment of 14 April 2010 in criminal case no. **3-1-1-119-09** the Criminal Chamber has, in giving an assessment on **the possible violation of the right of defence of the accused and on the admissibility of statements of witnesses as evidence,** referred to the case-law of the ECHR in connection with the ECHR's opinion regarding the right to remain silent and the privilege of a person not to incriminate himself or herself. Based on, inter alia, the case-law of the ECHR, the Chamber held that pursuant to general procedural rules, a situation where an accused may be forced to give statements against his or her co-accused or risk criminal prosecution, as it is possible in case of a witness under §§ 318 and 320 of the Penal Code, is precluded.

In the Supreme Court judgment of 18 November 2009 in criminal case no. **3-1-1-84-09** the Criminal Chamber addressed, in the light of the case-law of the ECHR, the issues whether **statements of a co-accused with regard to whom the criminal case has been separated or terminated may be disclosed as statements of a witness** and **whether statements of a**

[47] Earlier use of the case-law of the ECHR can be observed up to the Criminal Chamber judgment of 16 October 2002 in case no. 3-1-1-98-02.

witness heard pursuant to international legal assistance are admissible evidence in Estonian criminal proceedings. Regarding the latter issue the Chamber admitted that in respect of the statements in question the right of the accused to question the witnesses giving statements against them was infringed, and noted that admissibility of statements of such witnesses as evidence has not been excluded according to the earlier case-law of the ECHR and the Criminal Chamber of the Supreme Court, provided the conviction has not been based solely or to a decisive extent on these statements (paragraph 11.2).

In the Supreme Court judgment of 8 May 2009 in criminal case no. **3-1-1-37-09** the Criminal Chamber addressed the issue of admissibility as evidence of statements of a victim given in pre-trial proceedings and disclosed in the court hearing. The Chamber repeated its positions expressed in several earlier decisions based on the case-law of the ECHR, saying that "the right of an accused to present counterarguments to every evidence incriminating him or her is not an absolute right and Article 6(1) and (3)(d) of the Convention do not preclude in certain cases the use as evidence of statements given by a witness in pre-trial investigation or previous court hearing if the right of defence has been taken into account", and presented the ECHR's underlined opinion in the issue of the extent of having regard to such statements (paragraph 7).

The Supreme Court judgment of 25 February 2009 in criminal case no. **3-1-1-80-08** concerned the preference of statements given in court to statements given in pre-trial proceedings. The Criminal Chamber referred to the case-law of the ECHR declaratively and through its earlier decisions (paragraph 11).

The vast number of examples confirms that the Criminal Chamber resorts to the ECHR decisions to a great extent and consistently in order to guarantee fair proceedings.

2.6. Guarantee of right of defence in criminal proceedings

In the Supreme Court judgment of 4 November 2011 in criminal case no. **3-1-1-81-11** the Criminal Chamber did not agree with an argument arising from appeals in cassation that the county court had failed to guarantee the right of defence to the accused in the settlement proceedings because the court did not pay any attention to the allegedly negligent activity of the counsel appointed to the accused. Hereby the Chamber resorted to the opinion of the ECHR pursuant to which the state is liable for the activity of its institutions. However, a counsel who is an advocate cannot be deemed a national authority even he or she is a counsel appointed by the state. Having regard to the independence of an advocate from the state, his or her activity in a court case is by nature between him or her and the person being defended, and the state can be held liable for it only in certain exceptional cases.[48] The Chamber found that after assessing the facts of the case as a whole it cannot be stated that the failure of the state to interfere with the activity of the advocate left the accused without practical and effective legal assistance, and also there was nothing in the case which would have pointed to a credible possibility that the accused agreed to the settlement and stood by it because of inadequate legal counselling.

In the Supreme Court ruling of 2 August 2010 in criminal case no. **3-1-1-61-10** the Criminal Chamber drew attention to the opinion of the ECHR according to which the state shall guarantee to an accused such legal assistance which is practical and effective, not just theoretical and illusory. In the light of the case-law of the ECHR the Chamber emphasised that the right to choose a counsel is not merely the task of the accused but also the court is

[48] The Criminal Chamber referred to the ECHR judgment of 21 June 2011 in the case of *Mader v. Croatia*, more specifically to paragraphs 160 and 161 together with references to earlier case-law.

under an obligation to verify that the selected counsel actually performs his or her duties (paragraph 10.1).

In its judgment of 18 June 2010 in case no. **3-4-1-5-10** the Constitutional Review Chamber declared the regulations regarding summary proceedings to be in conflict with the Constitution in the part in which they fail to ensure the effective right of defence (including failure to allow to request, while a person's case is before the court, that a relevant provision be declared unconstitutional). In establishing the area of protection of the fundamental right, the Chamber compared § 24(5) of the Constitution to Article 2(1) of the Additional Protocol No. 7 to the Convention, both of which prescribe the right of appeal. The Chamber held that the material area of protection of the right of appeal provided for in § 24(5) of the Constitution is broader than the right arising from the Convention and, therefore, verified only whether the restriction conforms to the Estonian Constitution (paragraph 15).

The Chamber used the case-law of the ECHR in the judgment in question upon stressing the importance of ensuring the right of defence (paragraph 54). Namely, the ECHR has stressed the importance of the right of defence in criminal proceedings and has set out that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of fair trial. In the judgment referred to by the Chamber the ECHR pointed out that Article 6(3)c) of the Convention does not specify the manner in which the right must be ensured but it must be borne in mind that the right must be practical and effective, not theoretical or illusory.[49] Based on, inter alia, the opinions of the ECHR the Chamber found that different provisions in their conjunction do not ensure effective defence for the accused in summary proceedings. Arising therefrom, the Chamber does not declare any of the provisions unconstitutional individually. The Chamber held that the regulation can be amended or revised in many ways in order for the right of defence to be actually ensured, and added that the choice how to do it must remain with the legislator (paragraph 60).

2.7. Detention after service of sentence

In its judgment of 21 June 2011 in case no. **3-4-1-16-10** the Supreme Court *en banc* addressed the conformity of § 87^2 of the Penal Code (PC) with the Constitution. The Supreme Court *en banc* was of the opinion that the relevant provision is § 87^2 (2) of the PC.[50] The Supreme Court referred to the case-law of the ECHR in assessing the merits of detention after service of the sentence (paragraph 53) and in addressing the grounds for restriction of personal liberty (paragraph 79). The Supreme Court noted that the ECHR has repeatedly stated that only the restricted interpretation of the grounds for deprivation of liberty is in conformity with the objective of Article 5 of the Convention and with the concept of protecting everyone against arbitrary deprivation of liberty.

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[49] The ECHR judgment of 27 November 2008 in the case of *Salduz v. Turkey*.

[50] **§ 87^2. Detention after service of sentence**

(2) In addition to the punishment the court shall impose detention after service of the sentence if:

1) a person is convicted of an intentional criminal offence provided for in Division 1, 2, 6 and 7 of Chapter 9, Division 2 of Chapter 11 or Division 1 and 4 of Chapter 22 of this Code, or of an intentional criminal offence, elements of which constitute use of violence, provided for in another Chapter, and he or she is punished by at least two years' imprisonment without probation pursuant to § 73 or 74 of this Code;

2) a convicted offender has been previously punished on at least two occasions for acts specified in clause 1) of this subsection, and each time by at least one year's imprisonment, and

3) taking account of the convicted offender's personality, including his or her previous course of life and living conditions and circumstances of the commission of criminal offences, there is reason to believe that due to criminal tendency the person, when at large, will commit new criminal offences specified in clause 1) of this subsection.

In verifying whether detention after service of the sentence provided for in § 87^2(2) of the PC could be permitted on the basis of § 20(2)3) of the Constitution, the Supreme Court *en banc* noted that since upon providing for § 20(2)3) of the Constitution a provision with a similar content in the Convention – Article 5(1)c) – was followed, the Supreme Court *en banc* takes the Convention and its application practice into account upon interpreting the said provision of the Constitution. Proceeding from the opinions of the ECHR indicated in paragraphs 87 and 88 of the judgment[51] the Supreme Court *en banc* held that § 20(2)3) of the Constitution justifies only the detention or arrest of a person as an urgent reaction to the risk of commission of a specific criminal offence. § 20(2)3) of the Constitution does not provide grounds for deprivation of liberty for vague preventive or punitive purposes. Consequently, the part "to combat a criminal [---] offence" of § 20(2)3) of the Constitution does not justify deprivation of personal liberty in the form of detention after service of the sentence provided for in § 87^2(2) of the PC. In the assessment of the Supreme Court *en banc* a contrary interpretation would be a broad interpretation of § 20(2)3) of the Constitution and would contradict the concept of the provision.

In conclusion the Supreme Court *en banc* found that detention after service of the sentence provided for in § 87^2(2) of the PC is not justified by § 20(2)1) or 3) of the Constitution or by any other ground for deprivation of liberty provided for in § 20(2) of the Constitution. The Supreme Court *en banc* formed the opinion that there is no constitutional cause for detention after service of the sentence provided for in § 87^2(2) of the PC, and declared § 87^2(2) of the PC to be in contradiction with the Constitution and invalid.

Three dissenting opinions were attached to the judgment, one of which – the dissenting opinion of justices of the Supreme Court Villu Kõve, Peeter Jerofejev and Henn Jõks – is significant also with a view to the subject of the present analysis. Namely, the dissenting justices did not agree, inter alia, with the resolute opinion expressed in the judgment that the Constitution precludes the institute of detention after service of the sentence altogether in Estonia. For counterbalancing the case-law of the ECHR indicated in the judgment[52] they brought examples of ECHR decisions where the ECHR has clearly recognised the legitimacy of detention after service of the sentence[53], and noted the following: "*It is noteworthy that by justifying the inappropriateness of § 20(2)3) of the Constitution as the basis for detention after service of the sentence, the Supreme Court en banc has proceeded only from the ECHR's interpretation of Article 5(1)c) of the ECHRFF (see paragraphs 86–89 of the judgment). However, by justifying the inappropriateness of § 20(2)1) of the Constitution as the basis for detention, the Supreme Court en banc has said nothing about the case-law of the ECHR upon the application of Article 5(1)(a) of the ECHRFF. Consequently, the case-law of the ECHR upon the application of the ECHRFF has been used selectively, only in the part which coincides with the opinion of the majority of the Supreme Court en banc.*"

However, such a situation is not the first in the case-law of the Supreme Court – critique and suspicions regarding use of the case-law of the ECHR have been expressed in dissenting opinions before as well. In compiling the analysis it was noticed on two other occasions.[54]

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[51] Decisions referred to: ECHR judgment of 17 December 2009 in the case of *M. v. Germany*, paragraph 89 and the case-law referred to therein; the case-law of the ECHR as of the judgment of 1 July 1961 in the case of *Lawless v. Ireland*, paragraph 14.

[52] The Supreme Court *en banc* referred to the ECHR judgment of 17 December 2009 in the case of *M. v. Germany*, judgment of 29 March 2010 in the case of *Medvedyev and others v. France* and judgment of 1 July 1961 in the case of *Lawless v. Ireland.*

[53] The ECHR judgments of 9 June 2011 in cases of *Schmitz v. Germany* and *Mork v. Germany.*

[54] Rait Maruste has noted in his dissenting opinion on the Supreme Court *en banc* judgment of 9 April 1998 in criminal case no. 3-1-2-1-98 (petition for review in the case of E. Tammer): "*First of all, the decision of the*

2.8. Prohibition on being tried and punished twice

Article 4(1) of Protocol No. 7 to the Convention prescribes that no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. Prohibition on being tried and punished twice, also known as the *ne bis in idem* principle, has been provided for in § 23(3) of the Constitution.

Having regard to the use of the case-law of the ECHR, the Supreme Court judgment of 18 January 2010 in criminal case no. **3-1-1-57-09** in which the Criminal Chamber gave its assessment on an **alleged violation of the *ne bis in idem* principle** should be pointed out. If upon addressing the issue of what constitutes being tried or punished twice for the purposes of § 23(3) of the Constitution and Article 4 of Protocol No. 7 to the Convention the Criminal Chamber had in its earlier case-law (see references in paragraph 17 of the judgment) resorted to the opinions of the ECHR in the *Franz Fischer v. Austria* case (29 May 2001), then now the Chamber decided that the ECHR by its judgment of 10 February 2009 in the *Sergey Zolotukhin v. Russia* case has revised its opinions with regard to the *ne bis in idem* principle. In that judgment the ECHR noted that the first section of Article 4 of Protocol No. 7 to the Convention shall be understood so that it prohibits repetition of proceedings with regard to a person if the proceedings concern the same or essentially the same facts. In order to verify a violation of the *ne bis in idem* principle, facts shall be compared first; whereas, it is irrelevant which parts of the charges are proven or rejected in the subsequent proceedings. Only in such a case a person is guaranteed protection not only against a new punishment but also against new proceedings. The Criminal Chamber of the Supreme Court held that such an interpretation corresponds to the wording of § 23(2) of the Constitution and formed an opinion that a violation of the prohibition on being tried twice shall be established by comparing the facts of the criminal offences which the person is being accused of.[55]

Also the Supreme Court *en banc* has, in interpreting § 23(3) of the Constitution, taken into account the application practice of the *ne bis in idem* principle provided for in Protocol No. 7 to the Convention. In its judgment of 14 November 2002 in criminal case no. **3-1-1-77-02** the Supreme Court *en banc* relied on the ECHR judgment of 30 July 1998 in the case of *Oliveira v. Switzerland*, in which the ECHR addressed the application of the *ne bis in idem* principle in the case of ideal competition.

2.9. Detention conditions, protection of human dignity, unlawful placement to punishment cell

The Supreme Court judgment of 15 March 2010 in administrative case no. 3-3-1-93-09 is noteworthy because in adjudication of the case the Supreme Court deemed it necessary, considering the case-law of the ECHR, to amend its earlier opinion. Namely, in administrative

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Criminal Chamber of the Supreme Court [Meaning here the Criminal Chamber of the Supreme Court judgment of 26 August 1997 in case no. 3-1-1-80-97 (case of E. Tammer).] *contains a directly erroneous and irrelevant reference to a decision of the European Court of Human Rights. The Chamber has inaccurately interpreted the opinion of the European Court of Human Rights by saying that recourse to the domestic court by a person insulted by a value judgment of a journalist for substantiating the value judgment constitutes a violation of the freedom of expression provided for in Article 10 of the Convention. It is not possible to understand such an opinion.*" R. Maruste noted in the dissenting opinion that in application of Article 10 of the Convention the European Court of Human Rights has developed a vast case-law which should give direct instructions also to the Estonian courts, and brought examples of the ECHR decisions as well. The second example is a competing opinion of Eerik Kergandberg to the Criminal Chamber of the Supreme Court judgment of 18 January 2010 in case no. 3-1-1-57-09, suspicions expressed in which concerned the Chamber's comprehension of the interpretation of the *ne bis in idem* principle in the case-law of the European Court of Human Rights.

[55] See also the competing opinion of E. Kergandberg attached to the judgment.

case no. 3-3-1-14-06 the Chamber had previously formed an opinion that keeping an imprisoned person in a punishment cell without a legal basis constitutes degradation of dignity within the meaning of § 9(1) of the State Liability Act (SLA)[56]. In paragraph 11 of the said judgment the Administrative Law Chamber noted that it deems necessary to amend its earlier opinion and gave the following justifications*: "The European Court of Human Rights has held that such sufferings of a person which exceeded the unavoidable level of sufferings accompanying detention can be deemed degradation of human dignity. In assessing the conditions of detention the cumulative effect of the detention conditions and the period of time during which a person was detained in specific conditions shall be taken into account (see Kochetkov v. Estonia, no. 41653/05, paragraphs 39 and 47; Dougoz v. Greece, no. 40907/98, paragraph 46; Kalashnikov v. Russia, no. 47095/99, paragraph 102; Kehayov v. Bulgaria, no. 41035/98, paragraph 64). The Chamber finds that the opinions of the European Court of Human Rights can be proceeded from in furnishing the concept of degradation of human dignity also within the meaning of § 9(1) of the SLA."* The Chamber formed the opinion that keeping a person unlawfully in a punishment cell does not in itself constitute degradation of human dignity and added that unlawful placement to a punishment cell may degrade human dignity if it results for the person in additional restrictions and sufferings which are not directly necessary for adherence to the detention regime.

The Administrative Law Chamber resorted to the amended opinion already in the same year in its judgment of 21 April in administrative case no. **3-3-1-14-10** and in its judgment of 16 June in administrative case no. **3-3-1-41-10**. The Administrative Law Chamber also used the reasoning of the said judgment and applied the opinions expressed therein on 20 September 2010 in adjudication of administrative case no. **3-3-1-3-10**. In its judgment in administrative case no. 3-3-1-41-10 the Supreme Court referred, in addition to the case-law of the ECHR addressed in administrative case no. 3-3-1-93-09, to the opinion of the ECHR pertaining to the issue of ascertainment of the level of sufferings. According to the decision referred to in the judgment, in ascertainment of the level of sufferings the physical and psychological effect on the person, the sex, age and state of health of the person shall be considered in addition to the duration of the treatment (paragraph 22). By referring to the ECHR judgments the Chamber also brought examples of situations which have been considered as degradation of dignity in the ECHR case-law (paragraph 23).

The case-law regarding the issue of conditions of detention and bearing of sufferings which degrade human dignity is also illustrated by the following case. Namely, one of the issues which the Administrative Law Chamber addressed in its judgment of 17 June 2010 in case no. **3-3-1-95-09** was whether using a toilet without a door degrades the human dignity of an imprisoned person. According to the appeal the imprisoned person was detained in a solitary cell which did not conform to the requirements set for a dwelling. The complaints included, inter alia, that the floor and walls of the cell were tiled, which is typical of a washroom, and the room had a toilet without a door. The Chamber noted that the ECHR has repeatedly held that using a toilet without a partition does not constitute in itself degradation of human dignity of the imprisoned person. The ECHR has considered the non-private nature of the toilet as an element of a set of facts on the basis of which the court has assessed whether the conditions of detention in a cell exceed the minimum level so that the situation would constitute treatment degrading human dignity of a person (paragraph 36). Considering that the imprisoned person was held in the cell alone, the Chamber found that this situation cannot be deemed degrading.

[56] On the basis of § 9(1) of the SLA, non-proprietary damage shall be compensated for upon wrongful degradation of dignity, damage to health, deprivation of liberty, violation of the inviolability of home or private life or the confidentiality of messages or defamation of honour or good name of the person.

2.10. Long-term visits received by imprisoned persons

With a view to the used ECHR case-law the Supreme Court judgment of 4 April 2011 in constitutional review case no. **3-4-1-9-10**, in which the Constitutional Review Chamber formed an opinion on a request of the Tallinn Circuit Court to declare § 94(1) of the Imprisonment Act (IA) to be in contradiction with the Constitution, is noteworthy. The circuit court held that § 94(1) of the IA which does not enable the receipt of long-term visits by persons in custody is in contradiction with the right to the inviolability of family and private life provided for in § 26 of the Constitution.

The Constitutional Review Chamber noted in its judgment that arrest means subjecting the entire way of life to the prison for a certain of period of time, and this restricts the exercise of several fundamental rights, including the right to the inviolability of family life. The Chamber also pointed out the opinion of the ECHR and referred to the ECHR judgments concerning infringement of the inviolability of private and family life and restrictions on the right to freedom. Pursuant to the ECHR case-law, any detention, including lawful detention in the light of Article 5 of the Convention, results in restrictions on family and private life. The ECHR has specifically found that by regulating the number, duration and supervision of the visits, the state infringes the persons' right to respect for private and family life provided in Article 8 of the Human Rights Convention (paragraph 44).

The Chamber also verified whether the Human Rights Convention requires enabling the receipt of long-term visits by persons in custody. The judgment includes a reference to the ECHR case-law pursuant to which, by applying Article 8 of the Convention, the European Court of Human Rights has found that it does not give rise to the right of prisoners (persons in custody and prisoners) to receive long-term visits. The ECHR has held that although many European countries enable the receipt of long-term visits, it does not mean that not enabling them in other countries would be contrary to Article 8 of the Convention (see paragraph 55 of the judgment). In deciding on the constitutionality of § 94(1) of the IA, the Chamber also referred to the case-law of other countries. After deliberating all the facts the Chamber came to the conclusion that the contested provision is not in contradiction with the right to the inviolability of family and private life provided for in § 26 of the Constitution.

2.11. Issue of residence permit

The right to respect for family and private life is one of the most addressed subjects also in court cases concerning refusal to issue a residence permit. In addressing the matters related to the issue of residence permits the Supreme Court has used the ECHR case-law in two constitutional review cases. Both of them concerned the constitutionality of the Aliens Act.

By its judgment of 21 June 2004 in constitutional review case no. **3-4-1-9-04** the Supreme Court declared § 12(4)1) and § 12(5) of the Aliens Act unconstitutional to the extent that they do not provide for a competent state authority's right of discretion upon refusal to issue a residence permit because of the submission of false information. In rendering the judgment the Constitutional Review Chamber considered the established practice of the European Court of Human Rights, pursuant to which Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms includes at least the ties between near relatives (paragraph 13) and the obligation arising from the practice of the European Court of Human Rights to weigh in deciding on the issue of a residence permit to an alien various contrasting interests and the specific circumstances of a person's case (paragraph 14).[57] The Chamber

[57] Hereby the Supreme Court referred to the ECHR judgment of 9 October 2003 in the case of *Slivenko v. Latvia* (more precisely to paragraph 117), in which the ECHR found that the public interest in the removal of active servicemen and their families from the territory will therefore normally outweigh the individual's interest in

pointed out that upon a refusal to issue a residence permit to an alien the following interests are opposing: on the one hand, the interest of the person that his family and private life be not violated, and on the other hand the public interest to guarantee the national security of the state. The Chamber held that if a norm does not allow a decision-maker to consider the peculiarities of a situation, we cannot be sure that the infringement of family life is constitutional.

By its judgment of 5 March 2001 in constitutional review case no. **3-4-1-2-01** the Supreme Court declared § 12(4)10) and § 12(5) of the Aliens Act unconstitutional and invalid to the extent that they do not give the possibility to make exceptions upon issuing or extending a residence permit to an alien who has been or in regard of whom there is good reason to believe that he or she has been employed in an intelligence or security service of a foreign state. The Supreme Court held that the Aliens Act is disproportional to the extent that it does not allow those who issue or extend a residence permit to choose legal consequences in regard to a person who has served or in regard of whom there is good reason to believe that he or she has served in the intelligence or security service of a foreign state. The court noted that the Act does not allow to take into consideration the behaviour of a long-term immigrant, on the basis of which his or her threat to the security of the state can be assessed, the duration of permanent residence, the consequences of expulsion to his or her family members or the relationships of the immigrant and his or her family members with the county of origin. However, these circumstances should be taken into account when deciding on the expulsion of a long-term immigrant under Recommendation Rec (2000) 15 of the Committee of Minister of the Council of Europe and pursuant to the case-law of the European Court of Human Rights (paragraph 20).

2.12. Collection and disclosure of information concerning wages

In connection with the application practice of Article 8 of the Convention it is appropriate to recall the Constitutional Review Chamber of the Supreme Court judgment of 24 December 2002 in case no. **3-4-1-0-02**, in which the court verified the constitutionality of the provision of § $8(3^1)$ of the Wages Act delegating authority and of the Minister of Finance Regulation no. 24 of 28 January 2002 "The procedure for and conditions of disclosure of information concerning the wages of officials" issued on the basis thereof.

The inviolability of family and private life is protected by § 26 of the Constitution. In addressing the scope of protection of that provision the Chamber noted that the right to respect for private and family life is also provided by Article 8 of the European Convention for the Protection of Fundamental Rights and Freedoms and looked for support in the ECHR case-law. By referring to specific decisions the Chamber noted that when analysing the scope of protection of private life the European Court of Human Rights has expressed the opinion that private life included, inter alia, person's activities of a professional or business nature[58] and the collection and storage of information concerning a person by the authorities[59]. Taking into account the interpretation practice of the Convention on Human Rights the Chamber is of the opinion that the scope of protection of § 26 of the Constitution also includes collection, storage and disclosure of such information relating to business and professional activities, which enable to obtain an overview of a person's property and economic interests, and thus, the collection and making available to the public of information concerning a person's wages,

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staying. However, even in respect of such persons it is not to be excluded that the specific circumstances of their case might render the removal measures unjustified. This judgment of the Supreme Court is one example where Estonia has had the opportunity and ability to use the experience of a neighbouring state with a similar historical background.

[58] The ECHR judgment of 16 December 1992 in the case of *Niemitz v. Germany.*

[59] The ECHR judgment of 4 May 2000 in the case of *Rotaru v. Romania.*

and obligation to disclose his or her property and proprietary obligations to state agencies infringes upon the right to inviolability of family life, protected by § 26 of the Constitution (paragraph 23). Continuing the deliberation from there the Chamber came to the conclusion that §§ 8(3^1) and 8(3^2) of the Wages Act are in conflict with the right to the inviolability of private life, established in § 26 of the Constitution, to the extent that they allow for the disclosure of information concerning the wages and remuneration of persons representing private interests in the companies, in which the state has a precluding interest. This judgment is one example where the Supreme Court has, based on the case-law of the ECHR, interpreted a provision of the Constitution in a broadening manner.

2.13. Other issues

In addition to the abovementioned, the Supreme Court has used the ECHR case-law in addressing the following issues: principle of legal clarity,[60] impossibility of review after reaching of a friendly settlement,[61] suspension of the right to drive,[62] changing of a person's name,[63] establishment of procedural provisions[64] and the principle of legality.[65] In addition to the aforesaid, the case-law of the ECHR has been resorted to in criminal cases also in addressing the issue of legality of arrest[66] and legality of expulsion from the state of an alien.[67] In administrative cases the Supreme Court has further addressed the issue of lawfulness of furnishing of the concept of torture and use of handcuffs[68] and the issue of protection of confidentiality of messages.[69]

The only decision (from 2009 to 2011) in which the Civil Chamber referred to the case-law of the ECHR concerned unauthorised use of a person's image.[70] The Supreme Court *en banc* has, in civil cases referred to it for assessment of constitutionality, referred to the case-law of the ECHR also in such issues as protection of the right of ownership upon expropriation (including the concept of a fair compensation)[71] and the freedom to bequeath.[72]

3. ECHR judgments made with regard to Estonia in the case-law of the Supreme Court

By the end of 2011 the European Court of Human Rights had made with regard to Estonia 25 judgments on the merits.[73] In the context of the case-law of the ECHR the following four

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[60] The Constitutional Review Chamber of the Supreme Court judgment of 31 March 2011 in case no. 3-4-1-19-10, paragraph 40; the Constitutional Review Chamber judgment of 15 December 2005 in case no. 3-4-1-16-05, paragraph 22; the Supreme Court *en banc* judgment of 28 October 2002 in case no. 3-4-1-5-02, paragraph 31.
[61] The Constitutional Review Chamber ruling of 22 February 2011 in case no. 3-4-1-18-10, paragraphs 14 and 16.
[62] The Supreme Court *en banc* judgment of 25 October 2004 in case no. 3-4-1-10-04, paragraphs 19–20.
[63] The Constitutional Review Chamber judgment of 03 May 2001 in case no. 3-4-1-6-01, paragraphs 15 and 19.
[64] The Constitutional Review Chamber judgment of 11 June 1997 in case no. 3-4-1-1-97, II.
[65] The Constitutional Review Chamber judgment of 20 December 1996 in case no. 3-4-1-3-96, I.
[66] The Criminal Chamber ruling of 8 December 2009 in case no. 3-1-1-108-09, paragraph 7.
[67] The Criminal Chamber ruling of 06 May 2009 in case no. 3-1-1-38-09, paragraph 8.
[68] The Administrative Law Chamber judgment of 13 November 2009 in case no. 3-3-1-63-09, paragraphs 21 and 22.
[69] The Administrative Law Chamber ruling of 20 October 2011 in case no. 3-3-1-43-11, paragraph 11.
[70] The Civil Chamber of the Supreme Court judgment of 13 January 2010 in case no. 3-2-1-152-09.
[71] The Supreme Court *en banc* judgment of 18 March 2005 in case no. 3-2-1-59-04.
[72] The Supreme Court *en banc* judgment of 22/02/2005 in case no. 3-2-1-73-04.
[73] Translations into Estonian of the ECHR judgments made with regard to Estonia are available on the website of the Ministry of Foreign Affairs at http://www.vm.ee/?q=node/9121#sisu
Overall information about Estonia as at July 2011 is available on the website of the ECHR at http://www.echr.coe.int/NR/rdonlyres/6298BE53-5700-4B31-BF32-4BDFDAF1224B/0/PCP_Estonia_en.pdf

judgments are considered to be of importance level 1[74]: judgment of 6 February 2001 in the case of *Tammer v. Estonia*,[75] judgment of 21 January 2003 in the case of *Veeber v. Estonia (no. 2)*[76], judgment of 11 July 2006 in the case of *Harkmann v. Estonia*[77] and judgment of 25 June 2009 in the case of *Liivik v. Estonia*[78].

According to the results of a search on the website of the Supreme Court, the latter has referred to judgments made with regard to Estonia in total of nine decisions.[79]

In the Supreme Court judgment of 18 June 2010 in criminal case no. 3-1-1-43-10 the Criminal Chamber referred, along with other judgments of the ECHR, to the ECHR judgment of 4 February 2010 in the case of ***Malkov v. Estonia***. The Criminal Chamber summarised the opinion of the ECHR expressed in the said judgment **in the issue of calculating the reasonable time of proceedings**, noting that: "For instance, in the case of *Malkov v. Estonia* the European Court of Human Rights found that the time of commencement of criminal proceedings with regard to the appellant cannot be deemed to be the date of commencement of criminal proceedings with regard to the criminal act nor the date when the appellant was (casually) questioned as a witness (because at that time the proceedings did not concern the appellant), but the date when the investigator prepared an order for prosecution of the appellant as an accused and the appellant was declared to be a fugitive (since at around that time the appellant was supposed to become aware that the authorities are looking for him)." (See paragraph 25.) Via quotation of paragraph 25 of the judgment made in criminal case no. 3-1-1-43-10, the reference to the judgment in the case of *Malkov v. Estonia* has made its way to the Supreme Court *en banc* judgment of 22 March 2011 in administrative case no. 3-3-1-85-09 (paragraph 85) and to the Criminal Chamber judgment of 23 March 2011 in case no. 3-1-1-6-11 (paragraph 17.1) and judgment of 17 August in case no. 3-1-1-57-11 (paragraph 14.1).

In the Constitutional Review Chamber of the Supreme Court ruling of 22 February 2011 in case no. 3-4-1-18-10 the Chamber used the judgments rendered with regard to Estonia **in clarifying the concept of reaching of a friendly settlement**. The Chamber quoted in brief the ECHR judgment of 7 October 2008 in the case of ***M.V. v. Estonia***, the ECHR judgment of 2 March 2010 in the case of ***Pervushin v. Estonia*** and the ECHR judgment of 5 October 2010 in the case of ***Nõgisto v. Estonia*** (see paragraph 16) in English, adding the translation into Estonian in parentheses.

In the remaining cases the Supreme Court has pointed out the opinion of the ECHR and added a reference to the judgment made with regard to Estonia. So has the Administrative Law Chamber noted in its judgment of 15 March 2010 in case no. 3-3-1-93-09 that the ECHR has held that **in assessing the conditions of detention,** the cumulative effect of the detention

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Statistics on Judgements by State http://www.echr.coe.int/NR/rdonlyres/E6B7605E-6D3C-4E85-A84D-6DD59C69F212/0/Graphique_violation_en.pdf

[74] Importance level 1. This indicates judgments which according to the ECHR contribute significantly in the development, clarification or amendment of the ECHR case-law either in general or in connection with a specific state. There are three levels of ECHR decisions. See more in the HUDOC, the search portal of the ECHR case-law athttp://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=80443184&skin=hudoc-en

[75] ECHR judgment: Article 10 of the Convention (freedom of expression) has not been violated.

[76] ECHR judgment: Article 7(1) of the Convention (punishment under the law) has been violated.

[77] ECHR judgment: Article 5(3) and (5) of the Convention (right to liberty and security) has been violated.

[78] ECHR judgment: Article 7 of the Convention (punishment under the law) has been violated.

[79] Since the results of a keyword search included only two judgments which were made during an earlier period (2008) considering the criteria for the material, then by way of derogation all results of the keyword search have been considered (as at the end of 2011). The analysis does not cover decisions made on requests filed for reopening proceedings after a judgment by the ECHR.

conditions and the period of time during which a person was detained in specific conditions shall be taken into account. References to four judgments of the ECHR have been included, among others to the ECHR judgment of 2 July 2009 in the case of ***Kochetkov v. Estonia*** (paragraph 11). The same opinion of the ECHR and references to judgments have been used by the Administrative Law Chamber in its judgment of 17 June 2010 in case no. 3-3-1-41-10 (paragraph 22). The first references to judgments rendered with regard to Estonia can be found in decisions of the Criminal Chamber made a few years earlier. In its judgment of 28 January 2008 in criminal case no. 3-1-1-60-07 the Criminal Chamber deliberated the issue of **qualifying an on-going criminal offence** in a situation where a person is charged with an on-going criminal offence, parts of which are regulated by different wordings of the Penal Code. The Chamber noted that the fact that a later part of an on-going offence corresponds to elements of a criminal offence valid at the time of commission thereof does not automatically mean that parts of an offence regulated by the previous wording of the Penal Code can be deemed a criminal offence, and found that such an opinion can be deduced from the ECHR judgment of 21 January 2003 in the case of ***Veeber v. Estonia no. 2*** (paragraph 18). The Criminal Chamber has referred to judgments rendered with regard to Estonia also in addressing the issue of **legality of holding a person in custody**. In its ruling of 3 March 2008 in criminal case no. 3-1-1-80-07 the Chamber noted that the application practice of Article 5 of the Convention has repeatedly stressed the need to make sure in every single criminal case that persons are held in custody only then and as long as it really is unavoidably necessary for securing criminal proceedings, and illustrated it by the ECHR judgments of 2005 in the cases of ***Sulaoja v. Estonia*** and ***Pihlak v. Estonia*** (paragraph 13).

It follows that in its decisions the Supreme Court has referred to the ECHR judgments rendered with regard to Estonia more than on a few single occasions. It is important that the ECHR judgments made with regard to Estonia are not suppressed – they are considered in subsequent case-law and the opinions expressed therein are taken into account.

Summary

The main issues in adjudication of which the Supreme Court has, **in constitutional review cases,** referred to the ECHR case-law are admissibility of individual complaints, the right of appeal and too high state fees. Consequently, the main fundamental rights addressed have been the right of recourse to the courts and the right to an effective legal remedy. The opinions of the ECHR have been proceeded from also in assessing the constitutionality of detention after service of the sentence and in addressing the issues of collection and disclosure of information concerning wages and enabling imprisoned persons to receive long-term visits. The rights of aliens have been addressed in connection with the issue of a residence permit. The ECHR case-law has been used also in furnishing the principles of legal clarity and legality.

In criminal cases the Supreme Court has, in the light of the ECHR case-law, analysed reasonable time of proceedings, giving of statements and use thereof as evidence, the *ne bis in idem* principle, and also guarantee of the right of defence.

In administrative cases the main area affected by the ECHR case-law is the imprisonment law. The most frequently addressed specific problems are conditions of detention, degradation of human dignity and unlawful placement to a punishment cell.

In civil cases there has been even less contact with the ECHR case-law. As stated, the Civil Chamber has referred to the ECHR case-law during the period in question only in one decision. However, it can be pointed out that precisely in a civil case referred to the Supreme

Court *en banc* for the assessment of constitutionality the Supreme Court rendered a judgment, having extensive effect, concerning state fee rates and the constitutionality of failure to grant procedural assistance to a legal person in private law. The Supreme Court *en banc* has, in civil cases referred to it for assessment of constitutionality, referred to the case-law of the ECHR also in such issues as protection of the right of ownership upon expropriation (including the concept of a fair compensation) and the freedom to bequeath.

Based on the analysed material it can be said that the ECHR judgments have made their way to the case-law of the Supreme Court. In judgments rendered in constitutional review cases the case-law of the ECHR has been of great importance. The Convention is often applied namely in adjudication of disputes relevant from the aspect of legal order. The application practice of the Convention has helped to see the deficiencies in the domestic legal regulation and to point them out more clearly.

On the one hand, use of the ECHR case-law has become a natural part of the case-law of the Supreme Court, but on the other hand, application of the opinions of the ECHR may be complicated and lead to different interpretations. The latter is illustrated also by a dissenting opinion attached to the Supreme Court *en banc* judgment in which additional references were made to the case-law of the ECHR, taking account of which may have enabled a more flexible interpretation of the Constitution. However, it must be conceded that the time for becoming acquainted with the ECHR case-law has not been very long.

By assessing the efforts of the Supreme Court in the interpretation and development of the law in conformity with the Convention and the ECHR case-law, it is appropriate to conclude the analysis with the words setting a continually important objective for Estonia: "*In conclusion, it should not be forgotten that the Strasbourg control mechanism plays a subsidiary role and that the rights included in the Convention should be included in the legislation of every Contracting State so that a person whose human rights have been violated could seek protection, above all, from the judicial system of his or her own state*."[80] With a view to the planned changes to reduce the workload of the ECHR[81] , these words written down 17 years ago seem timeless.

[80] Tanel Kerikmäe. Muudatusi Euroopa inimõiguste kaitse süsteemis. (Changes in European Protective System of Human Rights.) Juridica 1994/IX, p. 224.

[81] See the Interlaken Declaration (19.02.2010) and the Izmir Declaration (27.04.2011), available in Estonian on the website of the Ministry of Foreign Affairs at http://www.vm.ee/sites/default/files/Interlakeni_deklaratsioon%20_EST.pdf; http://www.vm.ee/sites/default/files/Izmir%20deklaratsioon%20_est_.pdf

Annex

The Supreme Court decisions (from 2009 to 2011) which include the most references to the case-law of the ECHR

Criminal cases

the Criminal Chamber judgment of 18 June 2010 in case no. 3-1-1-43-10 – references to 20 decisions

Kudła v. Poland, ECHR judgment of 26 October 2000
Reinhardt and Slimane-Kaïd v. France, ECHR judgment of 31 March 1998
Malkov v. Estonia, ECHR judgment of 4 February 2010
Kangasluoma v. Finland, ECHR judgment of 20 January 2004
T.K. and S.E. v. Finland, ECHR judgment of 31 May 2005
Coeme and others v. Belgium, ECHR judgment of 22 June 2000
Šubinski v. Slovenia, ECHR judgment of 18 January 2007
Hozee v. the Netherlands, ECHR judgment of 22 May 1998
König v. Germany, ECHR judgment of 28 June 1978
Konashevskaya and others v. Russia, ECHR judgment of 3 June 2010
Estima Jorge v. Portugal, ECHR judgment of 21 April 1998
Golovkin v. Russia, ECHR judgment of 3 April 2008
Allenet de Ribemont v. France, ECHR judgment of 10 February 1995
Eckle v. Germany, ECHR judgment of 15 July 1982
Georgiadis v. Cyprus, ECHR judgment of 14 May 2002
Martin v. Romania, ECHR judgment of 10 March 2009
Stojic v. Croatia, ECHR judgment of 1 June 2006
Lavents v. Latvia, ECHR judgment of 28 November 2002
Neumeister v. Austria, ECHR judgment of 27 June 1968
Pishchalnikov v. Russia, ECHR judgment of 24 September 2009

the Criminal Chamber judgment of 22 February 2011 in case no. 3-1-1-110-10 – references to 8 decisions

Stögmüller v. Austria, ECHR judgment of 10 November 1969
Konashevskaya and others v. Russia, ECHR judgment of 3 June 2010
W. v. Switzerland, ECHR judgment of 26 January 1993
Scott v. Spain, ECHR judgment of 18 December 1996
Kudła v. Poland, ECHR judgment of 26 October 2000
Pishchalnikov v. Russia, ECHR judgment of 24 September 2009
Shishkov v. Bulgaria, ECHR judgment of 9 January 2003
Belchev v. Bulgaria, ECHR judgment of 8 April 2004

Administrative cases

the Supreme Court *en banc* judgment of 22 March 2011 in case no. 3-3-1-85-09 – references to 9 decisions

Kudła v. Poland, ECHR judgment of 26 October 2000
Pélissier and Sassi v. France, ECHR judgment of 25 March 1999
König v. Germany, ECHR judgment of 28 June 1978
Konashevskaya and others v. Russia, ECHR judgment of 3 June 2010
Scordino v. Italy, ECHR judgment of 29 March 2006

Ommer v. Germany, ECHR judgment of 13 November 2008
Reinhardt and Slimane-Kaïd v. France, ECHR judgment of 31 March 1998
Malkov v. Estonia, ECHR judgment of 4 February 2010
Kangasluoma v. Finland, ECHR judgment of 20 January 2004

the Administrative Law Chamber judgment of 17 June 2010 in case no. 3-3-1-41-10 – references to 12 decisions
Kochetkov v. Estonia, ECHR judgment of 2 July 2009
Dougoz v. Greece, ECHR judgment of 6 March 2001
Kalashnikov v. Russia, ECHR judgment of 15 July 2002
Kehayov v. Bulgaria, ECHR judgment of 18 January 2005
Ireland v. the United Kingdom, ECHR judgment of 18 January 1978
Messina v. Italy (no 2), ECHR judgment of 28 September 2000
Price v. the United Kingdom, ECHR judgment of 10 July 2001
Ilhan v. Turkey, ECHR judgment of 27 June 2000
Nevmerzhitsky v. Ukraine, ECHR judgment of 5 April 2005
Korobov and others v. Russia, ECHR judgment of 27 March 2008
Valasinas v. Lithuania, ECHR judgment of 24 July 2001
I.I v. Bulgaria, ECHR judgment of 9 June 2005

Civil cases

the Supreme Court *en banc* judgment of 12 April 2011 in case no. 3-2-1-62-10 – references to 5 decisions
Paykar Yev Haghtanak LTD v. Armenia, ECHR judgment of 20 December 2007
Kreuz v. Poland, ECHR judgment of 19 June 2001
Teltronic-Catv v. Poland, ECHR judgment of 10 January 2006
FC Mretebi v. Georgia, ECHR judgment of 31 July 2007
Weissman and others v. Romania, ECHR judgment of 24 May 2006

Constitutional review cases

the Supreme Court *en banc* judgment of 21 June 2011 in case no. 3-4-1-16-10 – references to 3 decisions
M. v. Germany, ECHR judgment of 17 December 2009
Medvedyev and others v. France, ECHR judgment of 29 March 2010
Lawless v. Ireland, ECHR judgment of 1 July 1961

The dissenting opinion of the justices of the Supreme Court Villu Kõve, Peeter Jerofejev and Henn Jõks on the Supreme Court *en banc* judgment no 3-4-1-16-10 includes references also to the following ECHR decisions:
Schmitz v. Germany, ECHR judgment of 9 June 2011
Mork v. Germany, ECHR judgment of 9 June 2011

the Constitutional Review Chamber judgment of 4 April 2011 in case no. 3-4-1-9-10 – references to 6 decisions
Messina v. Italy (no 2), ECHR judgment of 28 September 2000
Moiseyev v. Russia, ECHR judgment of 9 October 2008
Ciorap v. Moldova, ECHR judgment of 19 June 2007
Aliev v. Ukraine, ECHR judgment of 29 April 2003
Dickson v. the United Kingdom, ECHR judgment of 4 December 2007
Fox, Campbell and Hartley v. the United Kingdom, ECHR judgment of 30 August 1990