Constitutional judgement 3-4-1-29-13

EN BANC

JUDGMENT
in the name of the Republic of Estonia

Case number	3-4-1-29-13
Date of judgment	4 February 2014
Formation	Chairman: Priit Pikamäe; members: Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Ivo Pilving, Jüri Põld, Harri Salmann and Tambet Tampuu
Case	Review of the constitutionality of subsection 2 of § 125^1 of the Courts Act.
Basis for procedure	Judgment of Tallinn Circuit Court of 5 June 2013 in civil case no. 2-11-18297
Hearing	Written
OPERATIVE PART	**To declare subsection 2 of § 125^1 of the Courts Act and subsection 8 of § 174 of the Code of Civil Procedure to be in conflict with the Constitution and repeal them to the extent that these authorise judicial clerks to determine procedural expenses in civil proceedings.**

FACTS AND COURSE OF PROCEDURE

1. By an order of 8 August 2012 in civil case no. 2-11-18297, Harju County Court dismissed the claim of OÜ VANALINNA REISID (claimant) against Aleksandr Tetenkin (defendant) and ordered that the claimant bear the procedural expenses. The order entered into force on 29 August 2012.

2. On 28 September 2012, the defendant filed a request for the determination of the amount of the procedural expenses, to which the claimant filed its counter-arguments.

3. By an order of 3 April 2013, the County Court granted the defendant's request for the determination of procedural expenses in part. The decision was made by a judicial clerk.

4. The claimant lodged an appeal against the order of the County Court of 3 April 2013 in which it asked to annul the order of the County Court and to refer the case back to the County Court for a new hearing. The appellant did not agree to the order of the County Court as this was not made by a judge and the awarded procedural expenses are unreasonably high.

5. The County Court accepted the appeal, dismissed it and referred it to Tallinn Circuit Court for a hearing.

6. By an order of 5 June 2013, Tallinn Circuit Court refused to apply subsection 2 of § 125^1 of the Courts Act and declared it to be in conflict with the Constitution. The Circuit Court also annulled the order of Harju County Court of 3 April 2013 and referred the case to Harju County Court for a new hearing. The Circuit Court found that the case for the determination of procedural expenses was adjudicated and the substantial final decision was made by an official, not by a judge. Subsection 2 of § 125^1 of the Courts Act (CA) is a relevant provision as without that a judicial clerk cannot adjudicate a case for the determination of procedural expenses. The Courts Act is contrary to § 146 of the Constitution as justice can be administered exclusively by a judge. It follows from §§ 78, 146, 147 and 153 of the Constitution that justice can be administered exclusively by such a court that consists of judges, who are appointed to office for life, who are appointed by the President of the Republic, the grounds and procedure for release of whom from office are provided by law, who may be removed from office only by a judgment, against whom criminal charges may be brought during his or her term of office only on a proposal of the Supreme Court, and with the consent of the President and in respect of whom the legal status and special guarantees for independence are provided by law. A judicial clerk does not meet the aforesaid requirements. The Constitution guarantees to everybody that any binding judgments independent of their will and concerning the person's property or destiny may be made exclusively by a judge. Determination of procedural expenses must be considered the administration of justice as the decision is made in respect of a person, independent of their will and it is binding on them. Transfer of the administration of justice from judges to officials is not justified by the need to save state budget funds, the minimum rate of salary of judicial clerks provided for in law, the possibility of filing an appeal or the fact that formerly some functions have been transferred to officials in Estonia or in other countries.

7. The Constitutional Review Chamber placed the case for adjudication before the Court *en banc*.

OPINIONS OF PARTIES
8.–29. [Not translated.]

DISPUTED PROVISIONS
30. Subsection 2 of § 125^1 of the Courts Act (RT I 2002, 64, 390; RT I, 29.12.2012, 2):

31. "(2) A judicial clerk is also competent to take the steps and make decisions that an assistant judge or another court official is competent to take or make pursuant to the court procedure law."

32. Subsection 8 of § 174 of the Code of Civil Procedure (RT I 2005, 26, 197; RT I, 09.10.2013, 1):

33. "(8) An order on determining procedural expenses may also be made by an assistant judge."

OPINION OF COURT *EN BANC*

34. In the adjudication of the case, the Court *en banc* will first discuss the relevance of the disputed provision (I) and thereafter the Court *en banc* will review whether the relevant provisions are constitutional (II).

I

35. In the judicial constitutional review procedure, the Supreme Court reviews the constitutionality of such a provision which is relevant to the adjudication of a specific case (subsection 2 of § 14 of the Judicial Constitutional Review Procedure Act (JCRPA)). A relevant provision is one that is of decisive importance in the adjudication of a case, i.e. in the event of whose unconstitutionality and invalidity the court would have to decide otherwise than in the event of the constitutionality of the provision (the judgment of the Supreme Court *en banc* of 22 December 2000 in case no. 3-4-1-10-00, point 10; the judgment of 28 October 2002 in case no. 3-4-1-5-02, point 15).

36. Harju County Court dismissed the claim in civil case no. 2-11-18297 and ordered that the claimant bear the procedural expenses. Thereafter, the defendant filed a request with the County Court for the determination of the financial amount of the procedural expenses that the County Court granted by its order in part. In the County Court, the order was made by the judicial clerk.

37. In the operative part the Circuit Court refused to apply subsection 2 of § 125^1 of the CA and declared it to be in conflict with the Constitution.

38. Subsection 1 of § 125^1 of the CA provides that a judicial clerk is also competent to make the decisions that an assistant judge or another court official is competent to make pursuant to the court procedure law. According to subsection 8 of § 174 of the Code of Civil Procedure (CCP), an assistant judge may make an order on determining procedural expenses.

39. It follows from the aforementioned that the right of a judicial clerk to determine procedural expenses in civil case no. 2-11-18297 arose from subsection 2 of § 125^1 of the CA and subsection 8 of § 174 of the CCP. In the event of unconstitutionality and invalidity of the provisions, a judicial clerk would have no right to determine procedural expenses. If only subsection 2 of § 125^1 of the CA without subsection 8 of § 174 of the CCP were deemed to be a relevant provision, the review of constitutionality would also extend to other events where an order is made by a judicial clerk, but which is not disputed. As the present case of review of constitutionality started from the determination of procedural expenses by a judicial clerk, then only subsection 2 of § 125^1 and subsection 8 of § 174 of the CA, to the extent that the provisions place making an order on determining procedural expenses within the competence of a judicial clerk, are of decisive importance.

II

40. In civil proceedings procedural expenses are generally divided and determined at two levels (§§ 162-179 of the CCP). In the adjudication of the main case (in contentious or non-contentious proceedings) the division of procedural expenses between parties to the proceedings is decided by a judge. A party to the proceedings has the right to demand, after the court decision concerning the division of costs enters into force, that the court of first instance which adjudicated the case determine the procedural expenses in money (subsection 1 of § 174 of the CCP). A request for the determination of the amount to be compensated as procedural expenses is filed with the court, to which a list of procedural expenses (which sets out the composition of the costs in detail) and a confirmation that all the costs have been incurred in connection with the court proceedings are annexed (subsection 3 of § 174 of the CCP). In a county court, an order on determining procedural expenses may also be made by a judicial clerk (subsection 2 of § 125^1 of the CA and subsection 8 of § 174 of the CCP).

41. The defendant requested that the claimant be ordered to pay the costs of the representative in the amount of 2400 euros. The County Court granted the request in the amount of 1600 euros and the order on determining procedural expenses was made by the judicial clerk. The division of procedural expenses and the determination thereof in money interferes with the fundamental right of property of the parties to the proceedings (§ 32 of the Constitution) as this imposes a proprietary obligation on one party to the proceedings for the benefit of the other party to the proceedings or this is done in part or this is failed to be done. As the court dismissed the claim, then the expenses incurred by the defendant can be considered a loss that is compensated for in accordance with the procedure provided for in the Code of Civil Procedure (see also point 43.1 of this judgment).

42. According to the Court *en banc*, the legal problem lies in whether it is admissible, pursuant to the first sentence of § 146 of the Constitution and § 147 of the Constitution, that in a county court an order on determining procedural expenses is made on the basis of the Code of Civil Procedure by a judicial clerk. To resolve the problem, first, an answer must be given to the question of whether on the basis of the applicable Code of Civil Procedure the determination of procedural expenses in a county court can be considered the administration of justice for the purposes of the first sentence of § 146 of the Constitution (point 43 of the judgment). Thereafter, it must be found out whether in the County Court procedural expenses were determined by a judge for the purposes of §§ 147, 150 and 153 of the Constitution (point 44 of the judgment).

43. The Court *en banc* is of the opinion that on the basis of the applicable Code of Civil Procedure the determination of procedural expenses in a county court can be considered the administration of justice for the purposes of the first sentence of § 146 of the Constitution for the following reasons.

43.1. Although the determination of procedural expenses in a county court on the basis of the Code of Civil Procedure is not the adjudication of the main case, as this has been adjudicated with a decision that has already entered into force, the determination of procedural expenses also has the same characteristics that conform to making a final decision in the case in one court instance. In essence, this is the adjudication of a claim for the compensation of damage in accordance with the procedure provided for in a special regulation (provisions for court proceedings). The latter is also confirmed by the case law of the Civil Chamber of the Supreme Court according to which the proceedings for the determination of procedural expenses is analogous with the proceedings for the compensation of damage as the proceedings for the determination of procedural expenses involve,

in principle, the awarding of the damage related to court proceedings (costs for legal assistance) in accordance with the procedure laid down in the Code of Civil Procedure (the order of the Civil Chamber of the Supreme Court of 14 October 2013 in case no. 3-2-1-107-13, point 15; order of 19 June 2013 in case no. 3-2-1-58-13, point 13; order of 9 November 2009 in case no. 3-2-1-112-09, point 18).

43.2. The European Court of Human Rights has noted that the proceedings of legal costs separate from the main case must be considered the continuation of the main case and therefore this means deciding on the civil rights and obligations of a person for the purposes of Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the judgment of the European Court of Human Rights of 5 September 2013 in case no. 9815/10: *Čepek v. the Czech Republic*, point 43).

43.3. In civil proceedings, the costs of the contractual representative are awarded only to a reasoned and necessary extent (subsection 1 of § 175 of the CCP). Under subsection 1 of § 175 of the CCP, the court must assess whether both the time spent on representation as well as the price of one work unit (i.e. the hourly fee) are reasoned and necessary (the order of the Civil Chamber of the Supreme Court of 13 November 2013 in case no. 3-2-1-115-13, point 25). It is also necessary to assess the complexity of the adjudicated civil case and the time spent on the proceedings. Expenses incurred on several contractual representatives are compensated if the costs arose due to the complexity of the case or were caused by the need to change representatives (subsection 3 of § 175 of the CCP). The Civil Chamber of the Supreme Court has noted about subsection 3 of § 175 of the CCP that in a decision to be made in the proceedings for the determination of procedural expenses the court is obliged to analyse and justify whether and why the specific civil case was so complex that it called for the need to use several representatives (the order of the Civil Chamber of the Supreme Court of 9 November 2009 in case no. 3-2-1-112-09, point 17). Thus, the determination of procedural expenses cannot be considered merely a technical and computational step, but the court has to substantively assess the request filed and take a position about whether the procedural expenses are reasoned and necessary.

43.4. Costs of a legal representative are compensated for with a decision made on the basis of the right of discretion, the judicial review of which in the appeal proceedings is limited. According to the consistent case law of the Civil Chamber of the Supreme Court, a decision on the determination of the amount of the costs of a legal representative is a discretionary decision, in which a court of higher instance can interfere only if the lower court has exceeded the limits of discretion (the order of the Civil Chamber of the Supreme Court of 18 May 2010 in civil case no. 3-2-1-43-10, point 19; the order of 26 October 2011 in civil case no. 3-2-1-88-11, point 11; the order of 15 February 2012 in case no. 3-2-1-161-11, point 8). If the court has a margin of discretion in deciding on the division of legal costs, it cannot be precluded that the arguments presented by a party to the proceedings may lead the court, either in full or in part, to a different solution (see the judgment of the European Court of Human Rights of 5 September 2013 in case no. 9815/10: *Čepek v. the Czech Republic*, point 58).

43.5. According to the Court *en banc*, Government of the Republic Regulation No. 137 of 4 September 2008, which has been adopted on the basis of subsection 4 of § 175 of the CCP and has established limits on claiming the costs of a legal representative from other parties to the proceedings, does not reduce the extensive margin of discretion of the court upon determining the

costs of a legal representative. Pursuant to subsection 1 of § 1 of Government of the Republic Regulation No. 137, limits in civil cases of a proprietary claim have been established according to the value of the civil case. Under subsection 1 of § 1, the limits range from 0 euros to 23 000 euros (in the event of the value of a civil case of up to 160 000 euros). If the value of a civil case is more than 160 000 euros, the costs award limit increases by 160 euros for each 3200 euros in accordance with subsection 2 of the same section. If the civil case involves a non-proprietary claim, only one limit has been established under section 2 of the Regulation from 0 euros to 12 800 euros. Government of the Republic Regulation No. 137 has established for awarding of procedural expenses wide ranges depending on the value of the claim, which make it more difficult for courts to render a judgment of discretion on whether the procedural expenses are necessary and reasoned and do not allow the parties to the proceedings to assess in full how expensive the civil proceedings are (the order of the Civil Chamber of the Supreme Court of 14 October 2013 in case no. 3-2-1-107-13, point 15).

43.6. In non-contentious proceedings it is not possible, according to the case law of the Civil Chamber of the Supreme Court (see the order of 19 June 2013 in case no. 3-2-1-58-13, point 14), to apply Government of the Republic Regulation No. 137 when determining the costs of a legal representative, but the award of costs of a representative must be decided only on the basis of the criterion provided for in subsection 1 of § 175 of the CCP of whether the costs of a legal representative are reasoned and necessary.

43.7. A decision made by a judicial clerk in a county court is, following the entry into force thereof, an enforcement title for the purposes of clause 1 of subsection 1 of § 2 of the Code of Enforcement Procedure. In principle, this is the final determination of procedural expenses in one court instance, i.e. in the county court. If a decision of the county court enters into force, this will create, amend and terminate the proprietary rights and obligations of parties to the proceedings.

43.8. If procedural expenses are determined by a judicial clerk and if the value of an appeal does not exceed 200 euros, the person who requested the determination of procedural expenses and is ordered to cover such expenses will have no right to file an appeal against an order on determining procedural expenses or an order whereby such order is supplemented (subsection 2 of § 178 of the CCP).

43.9. In light of the above, the Court *en banc* is of an opinion that the determination of procedural expenses in a county court is the administration of justice for the purposes of the first sentence of § 146 of the Constitution, since:
1) the determination of procedural expenses in a county court on the basis of the Code of Civil Procedure cannot be considered an activity preparing or organising the administration of justice or a technical and computational step. In essence, this is the adjudication of a claim for the compensation of damage for which a special procedure has been set out in the Code of Civil Procedure;
2) when determining procedural expenses, a county court must also assess whether the costs of a legal representative are reasoned and necessary (incl. the complexity of the adjudicated civil case and the time spent on the proceedings). The court has been provided with an extensive margin of discretion when determining the costs of a legal representative;
3) this is the adjudication of a dispute between two private persons in an independent and impartial institution, i.e. in court. In one court instance a substantial and final decision for the purposes of an

enforcement title is adopted on a disputed issue, which creates, amends and terminates the rights and obligations of parties to the proceedings;
4) no appeal can be lodged against an order made by a judicial clerk if the value of the appeal does not exceed 200 euros.

44. The principle of a state based on the rule of law is specified in the first sentence of subsection 1 of § 3 of the Constitution, according to which governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith. The supremacy of the Constitution arising therefrom requires that the entire activity of the public authority (incl. the administration of justice) must be constitutional. It is prohibited for the Legislature to come into conflict also with the rules on jurisdiction provided for in the Constitution.

44.1. The court as a constitutional institution is one of the exercisers of state authority besides the legislative and executive state authority (§ 4 of the Constitution). The court as an institution has been arranged into the following instances: 1) county and administrative courts, 2) circuit courts, and 3) the Supreme Court that hear cases as courts of first instance, courts of appeal and a court of cassation (§§ 148 and 149 of the Constitution, subsections 1 and 2 of § 9, subsections 1 and 2 of § 18, subsections 1 and 2 of § 22 and subsection 1 of § 25 of the CA). The function of a court is to administer justice (§ 146 of the Constitution). The Supreme Court has considered § 146 of the Constitution as the rule on jurisdiction that regulates which institution is competent to administer justice (the judgment of the Supreme Court *en banc* of 20 November 2012 in case no. 3-4-1-4-12, point 55; the judgment of 8 June 2009 in case no. 3-4-1-7-08, point 33).

44.2. The Court *en banc* is of an opinion that the first sentence of § 146 of the Constitution and § 147 of the Constitution also regulate who is entitled to administer justice in a court for the purposes of the first sentence of § 146 of the Constitution.

44.3. The court as an institution acts through the performers of its function, particularly through judges and court officers (subsection 1 of § 8 of the CA).

44.4. Sections 147, 150 and 153 of the Constitution provide, for the purposes of the Constitution, a special-type official, who is a judge and whose main function is to administer justice and, thus, as the court, exercise state authority. Only judges, for the purposes of §§ 147, 150 and 153, have been secured constitutional guarantees, such as the appointment to office for life, removal from office only by a judgment, the requirement that the grounds and procedure for release of judges from office as well as the legal status of judges and guarantees for their independence are to be provided by law (§ 147 of the Constitution), incl. special procedure for appointment to office (§ 150 of the Constitution) and bringing criminal charges against judges (§ 153 of the Constitution). The Constitution also provides additional restrictions for judges; for instance, judges may not hold any other elected or appointed office (subsection 3 of § 147 of the Constitution). The Constitution does not set out such guarantees or restrictions for any other officials working in the court system. The Legislature cannot change the constitutional guarantees and restrictions with any legal instrument of lower authority.

44.5. Presumably, a person who is a judge for the purposes of §§ 147, 150 and 153 of the

Constitution is in compliance with the requirements for the independence and impartiality that follow from § 15 of the Constitution. The guarantees and restrictions of judges as provided for in the Constitution are related to independence and impartiality of both the court as well as the judge. The independence of courts covers particularly the independence of judicial power as an institution from other branches of power. The guarantees of independence of a judge can be deemed to cover their work on the basis of merely the Constitution and laws, in line with his or her conscience and judgments, which also ensure the required impartiality in respect of parties to proceedings.

44.6. In light of the above, the Court *en banc* is of an opinion that in the court justice can be administered within the meaning of the first sentence of § 146 of the Constitution exclusively by a judge for the purposes of §§ 147, 150 and 153 of the Constitution, since a judge has been appointed to office and the guarantees and restrictions provided for in §§ 147 and 153 of the Constitution apply to them and, presumably, the judge complies with the requirements for independence and impartiality arising from § 15 of the Constitution.

45. The Court *en banc* notes that a judicial clerk is not a judge within the meaning of §§ 147, 150 or 153 of the Constitution as for the purposes of the Constitution they are not appointed to office for life, no judgment is required to remove them from office, the prohibition on holding any other elected or appointed office does not extend to them, they have not been appointed to office by the President of the Republic on the proposal of the Supreme Court and the guarantee according to which criminal charges may be brought against them only on the proposal of the Supreme Court and with the consent of the President does not extend to them.

46. Although an appeal can be lodged against an order on determining procedural expenses made by a judicial clerk under the conditions provided for in subsection 2 of § 178 of the CCP, the determination of procedural expenses in a county court on the basis of the Code of Civil Procedure must still be considered the administration of justice for the purposes of the first sentence of § 146 of the Constitution. Likewise, the possibility of lodging an appeal does not change a judicial clerk into a judge for the purposes of §§ 147, 150 and 153 of the Constitution and the determination of procedural expenses into a technical and computational step.

47. Following the above, the Court *en banc* is of an opinion that the disputed provision is, to the extent that it places making an order on determining procedural expenses in a county court on the basis of the Code of Civil Procedure within the competence of a judicial clerk, in conflict with the first sentence of § 146 of the Constitution and is to be repealed.

48. The Court *en banc* also considers it necessary to note the following. If the determination of procedural expenses consisted only in determining the amount of state fee or also the costs of a contractual representative, where the exact rates have been provided up to the required degree of detail so that it were a technical and computational step, the determination of procedural expenses may not be considered a function that can be performed exclusively by a judge. The administration of justice, incl. substantial adjudication of a claim for the compensation of damage would in such an event be limited to the division by the judge of procedural expenses between parties to the proceedings in the civil case.

49. The Court *en banc* would like to emphasise that the only issue dealt with in the present case is whether a judicial clerk is competent to perform the function of the determination of procedural expenses in civil proceedings in accordance with § 146 of the Constitution. With this judgment, the Court *en banc* does not provide an overall and comprehensive assessment of which specific functions in the court system can be considered the administration of justice for the purposes of § 146 of the Constitution and whether and under which conditions in court they may be placed within the competence of officials who are not judges. Likewise, in this case the Court *en banc* does not provide an assessment of the issue of whether and under which conditions the function of the administration of justice can also be transferred to an institution that is not a court.

Dissenting opinion of Justice Jüri Põld on the Supreme Court *en banc* judgment in case no. 3-4-1-29-13, Justices Eerik Kergandberg and Jaak Luik support the opinion

I understand the first sentence of § 146 of the Constitution differently from the majority of the Court *en banc*. I share the opinion set out in the commented edition of the Constitution of the Republic of Estonia: "The sentence 'Justice is administered exclusively by the courts' means that at the final stage a point of dispute is decided by a court."

I find that it follows from the first sentence of § 146 of the Constitution that if the function of the administration of justice has been granted to a court official who is not a judge, or to a person or a body that does not belong to the Estonian court system, the right to contest their decisions in an Estonian court must generally be ensured.

I think that in the interpretation of the first sentence of § 146 of the Constitution the following legal realities must be taken into account. The imposition of a penalty for misdemeanours has in many events been granted to a body conducting extra-judicial proceedings. Compulsory pre-litigation intra-authority appeal proceedings have been established for the settlement of many disputes without the passing of which it is not possible to have recourse to a court. Parties can agree that a dispute be settled in an arbitral tribunal, whose awards may be contested judicially in very limited cases, or in a court of a foreign state, whose judgments cannot be contested in an Estonian court at all. Taking into account the realities, in the interpretation of the first sentence of § 146 of the Constitution I would also follow Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms I think that the requirement of the first sentence of § 146 of the Constitution has been met if the legality of a decision of a court official who is not a judge has been subjected to the review of a judge with an appeal lodged in accordance with the procedure set out by the court procedure law. This is generally so in the event of procedural expenses determined by a judicial clerk, as under the conditions provided for in subsection 2 of § 178 of the Code of Civil Procedure an appeal can be filed against an order on the determination of procedural expenses or an order whereby such order is supplemented. From the point of view of constitutionality it may be problematic that this provision of the Code does not allow for the lodging of an appeal if the value of the appeal is 200 euros or less. However, the assessment of the constitutionality of subsection 2

of § 125[1] of the Courts Act does not depend on how the constitutionality of a restriction imposed on the right of appeal associated with the value of the appeal provided for in subsection 2 of § 178 of the Code is adjudicated.

Due to the aforesaid, I, unlike the majority of the Court *en banc*, am of an opinion that subsection 2 of § 125[1] of the Courts Act is not in conflict with the first sentence of § 146 of the Constitution.