Case Note

Estonia
Supreme Court on Reopening of Judicial Proceedings Following a Judgment of the European Court of Human Rights. Decisions of 6 January 2004, case No. 3-1-13-03 and 10 January 2004, case No. 3-3-2-1-04[1]

Taavi Annus*

Introduction

In the fourteen years since Estonia regained its independence in 1991, the Europeanisation of its legal, political and economic system has been rapid. Estonia became a member of the Council of Europe in May 1993 and has, thereafter, ratified most of its important international human rights conventions. Before becoming a member of the European Union in May 2004, a large-scale harmonisation of its laws with the EU standards has taken place. Two recent decisions by the Estonian Supreme Court, the subject of the present annotation, on the application of the European Convention of Human Rights (ECHR) and the execution of the decisions of the European Court of Human Rights illustrate the way in which European standards have become a part of the Estonian legal system.

Estonia adopted its new constitution in 1992.[2] A parliamentary system was introduced, with an indirectly elected symbolic president as the head of state. The Constitution contains a comprehensive list of directly applicable and justiciable

* Docent of Constitutional Law, Faculty of Law, University of Tartu.

[1] The important decisions of the constitutional chamber and the plenary of the Estonian Supreme Court are available in English at <www.nc.ee/english/const/judgments.html>.

[2] There are several general overviews of the Estonian constitutional system and the constitutional review procedure accessible for foreign audiences. Some recent titles include C. Taube, *Constitutionalism in Estonia, Latvia and Lithuania: A Study in Comparative Constitutional Law* (Uppsala, Iustus Förlag 2001) and W. Drechsler and T. Annus, 'Die Verfassungsentwicklung in Estland von 1992 bis 2001', *Jahrbuch des öffentlichen Rechts der Gegenwart*, Vol. 50 (Tübingen, J.C.B. Mohr (Paul Siebeck) 2002, p. 473-492. The most up-to-date source is the annual *Juridica International: Law Review of the University of Tartu*, published by the Faculty of Law of the University of Tartu. Each issue contains articles on the Estonian legal developments, including issues of constitutional law. The articles are available at <www.juridica.ee/international_en.php?submit_year=1&selected_year=default.>

European Constitutional Law Review, 1: 318–326, 2005
© 2005 T·M·C·Asser Press and Contributors
doi: 101017/S1574019605003184

https://doi.org/10.1017/S1574019605003184 Published online by Cambridge University Press

fundamental rights. According to the Constitution, international law plays a prominent role – treaties are directly applicable and superior to domestic legislation (Article 123(2)). There is no separate constitutional court; the Supreme Court fulfils constitutional review functions. The court has a separate chamber for constitutional review (besides administrative, civil, and criminal law chambers) that decides most cases. If there is a divergence of views within the constitutional review chamber, or if the issue of a constitutionality of the law deferred is raised by one of the other chambers of the court, the plenary of 19 judges decides.

The system from judicial review of legislative acts contains elements from both abstract and concrete review.[3] There are four major ways through which laws may be submitted to the Supreme Court for constitutional review. The President of the Republic may submit a law if he or she refuses to promulgate it and the parliament readopts it (this has happened approximately 10 times from 1993 until 2005). The Legal Chancellor, an institution specific to Estonia created by the 1992 constitution,[4] may also submit a law for review (these two being the pure abstract review mechanisms). Thirdly, any court may refuse to apply an unconstitutional law in a concrete case. The court has to submit the law to the Supreme Court, but only after making its own judgment in the concrete case. The proceedings are not suspended; the decision of the lower court may be quashed later in the appeals process after an unfavourable decision by the Supreme Court. This procedure is the only way in which individual citizens are able to initiate constitutional review procedures – there is no possibility of an individual constitutional complaint to the Supreme Court. Finally, since 2002 any local government has the power to ask the Supreme Court to invalidate any legislative act that infringes on the constitutional guarantees of local self-government.

The constitutional review chamber and the plenary of the Supreme Court have handed down a little over 100 decisions in the period of 1993-2004. In many of those, substantive fundamental rights of citizens have been protected. In those cases, more often than not, the case-law of the European Court of Human Rights has been referred to.[5] This may be one of the factors explaining why so few cases have been decided against Estonia – since the ratification of the ECHR until the end of 2004, the European Court of Human Rights has established only four

[3] The procedures are regulated in the Constitutional Review Court Procedure Act, available at <www.nc.ee/english/const/CONSTITUTIONAL%20REVIEW%20COURT%20PROCEDURE%20ACT.html>.

[4] Besides the constitutional review function described here, the Legal Chancellor (sometimes also called the Chancellor of Justice) performs the functions of an ombudsman and acts as a mediator in discrimination complaints. For an overview, *see* <www.oiguskantsler.ee/index.php?lang=eng>.

[5] Generally, *see* H. Vallikivi, 'Status of International Law in the Estonian Legal System under the 1992 Constitution', VI *Juridica International* (2001), p. 227.

https://doi.org/10.1017/S1574019605003184 Published online by Cambridge University Press

violations.[6] The decisions of the Supreme Court on the issue of the execution of the decisions of the European Court of Human Rights were adopted in the beginning of 2004, after the first two judgments of the European Court against Estonia, in the cases of *Veeber* v. *Estonia no. 1* and *no. 2*.[7]

Veeber v. *Estonia no. 2*

The *Veeber* v. *Estonia no. 2* case, which I deal with first as it was decided first by the Supreme Court, arrived at the European Court of Human Rights in 1998 on complaint of a businessman who was convicted of several instances of tax fraud, the events occurring from 1993 until 1995. The law criminalising the behaviour took effect only in 1995. The Estonian courts had used a 'continuous offence' doctrine in justifying the punishment for the acts committed before 1995 under this law. Veeber received a total sentence of three and a half years in prison, suspended for two years. He was also obliged to pay the state over 800.000 Estonian *kroons*, based on the civil claim brought by the tax authorities. The European Court examined the legal situation during each of the years in which Veeber allegedly committed the crimes and established that during the years 1993-1994 the actions for which he was convicted had not yet been criminalised. The 'continuous offence' doctrine was rejected. Therefore, the European Court found a violation of Article 7(1) of the Convention ('No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed') and ordered a just satisfaction in the sum of 2000 EUR in respect of non-pecuniary damage. The European Court decision provided no further guidance as to what further measures should be taken by the Estonian authorities in order to remedy the violation of the fundamental right.

After the judgment, Veeber started to seek a review of his sentence in the Estonian courts. The Estonian Code of Criminal Court Appeal and Cassation Procedure[8] did not foresee any possibility for review of criminal convictions due to a violation of human rights ascertained by the European Court of Human Rights.

[6] Besides the cases dealt with here (*Veeber no. 1* and *2* and *Puhk* cases), there is also ECtHR 2 Dec. 2003, appl. No. 48129/99 *Treial* v. *Estonia* (excessive length of civil proceedings). In ECtHR 12 Sept. 2000, appl. No. 37043/97, *Slavgorodski* v. *Estonia*, the case was struck out of the list due to a friendly settlement between the applicant and the Estonian government.

[7] ECtHR 7 Nov. 2002, appl. No. 37571/97, *Veeber* v. *Estonia (no. 1)*, and ECtHR 21 Jan. 2003, appl. No. 45771/99, *Veeber* v. *Estonia (no. 2)*.

[8] Available at <www.legaltext.ee/text/en/X40006K6.htm>. This Code governed the appellate and cassation proceedings until 1 July 2004, when the new Code of Criminal Procedure took effect, *see* <www.legaltext.ee/text/en/X60027K3.htm>. The web page of the Estonian Legal Language Center, <www.legaltext.ee>, contains English translations of most laws adopted by the Estonian Parliament.

https://doi.org/10.1017/S1574019605003184 Published online by Cambridge University Press

However, Veeber directly applied to the Criminal Chamber of the Supreme Court, alleging that the courts have the duty to protect human rights despite the restrictions in the procedural laws. The Criminal Chamber, finding that a constitutional issue was involved, handed the case over to the Supreme Court plenary.

The plenary in its decision first ascertained that the procedural laws did not in fact explicitly allow for the reopening of domestic proceedings, even though Estonia is obliged to do so in certain cases.[9] Subsequently, the Court stated that 'the best fulfilment of [the duty to reopen proceedings] would require the amendment of procedural laws so that it would be unambiguous whether and in which cases and how the new hearing of a criminal matter should take place after a judgment of the European Court of Human Rights' (paragraph 31). However, the plenary argued that this 'does not give rise to the conclusion that the Supreme Court is not competent to hear the petition of T. Veeber's counsel' (paragraph 31). Thereafter, the Court came to its most important conclusion (paragraph 32):

> [I]n deciding on re-opening of proceedings it must be ascertained whether the re-opening of a proceeding would be a necessary and appropriate remedy of a violation of a Convention right or of a violation which has a causal link to the former, found by the European Court of Human Rights. In doing that it will be necessary to weigh whether the finding of a violation or award of just satisfaction by the Human Rights Court would be sufficient for the person. The […] re-opening of a proceeding would be justified only in the case of continuing and substantial violation and only if this will remedy the legal status of the person. The need to re-open a judicial proceeding must overweigh the peace of law and possible infringement of other persons' rights in the new hearing of the matter. Furthermore, a prerequisite for the revision of a judgment, which has entered into force, shall be that there are no other effective means to remedy the violation.

Regarding Veeber, the Supreme Court first decided that the punishment for the crimes committed could not be mitigated – no prison sentence was actually served, the probation period had ended and the punishment had been expelled from the criminal register. Thus, the fact that Veeber was punished partly in violation of the ECHR would not be a sufficient cause in itself to reopen domestic proceedings. However, as the criminal proceedings also resulted in the obligation to pay the government money based on the civil claim brought by the tax authorities, negative consequences could still take place. As the civil law claim had not yet been enforced, the property rights of Veeber were still violated, and, as this violation was substantial and could not be remedied with other means, the criminal proceedings needed to be reopened. The Supreme Court partially acquitted Veeber

[9] Judgment of 6 Jan. 2004, case No. 3-1-3-13-03. Available at <www.nc.ee/english/const/2003/3-1-3-13-2003.htm>.

https://doi.org/10.1017/S1574019605003184 Published online by Cambridge University Press

(for the tax fraud committed in 1993 and 1994) and accordingly reduced his obligation to pay damages to the state caused by the tax fraud in this period.

Veeber v. *Estonia no. 1*

The *Veeber* v. *Estonia no. 1* case dealt with the company whose shares belonged to Mr. Veeber (AS Giga). The premises of AS Giga had been searched by the police authorities within a criminal investigation unrelated to the tax fraud charges subsequently brought against Veeber. Some of the seized documents, however, were used as evidence in those proceedings. The company submitted a claim to the administrative courts against the police, arguing that the search was conducted illegally. However, the courts, including the Supreme Court, refused to hear the case as they denied having competence to review police actions conducted as part of criminal proceedings. In the judicial stages of the criminal proceedings against Veeber, the lower courts admitted some irregularities during the search, but claimed that the irregularities were not serious enough to warrant the acquittal. The Supreme Court later confirmed the lower courts' decisions on appeal.

Thereafter, Veeber submitted a claim to the European Court of Human Rights, alleging that his company was deprived of effective access to a court contrary to the requirements of Article 6(1) of the ECHR. Even though the legal entity that was denied access to the administrative courts was AS Giga, the application was deemed admissible and the European Court decided in favour of Veeber.[10] AS Giga subsequently applied directly to the Supreme Court to overturn the decisions of the administrative courts that refused to hear his claims. Similarly to the *Veeber* v. *Estonia no. 2* case, the Code of Administrative Court Procedure[11] did not foresee a possibility for reopening domestic administrative court proceedings.

Although the European Court had not found a violation of the rights of AS Giga, the company, but of those of Veeber, who owned 100% of the shares of the company, the Supreme Court found the application of AS Giga admissible, referring to the fact that 'the European Court of Human Rights did not differentiate between the rights of T. Veeber and those of AS Giga'.[12] Neither was the fact that the case at hand was an administrative case and not a criminal case, as in *Veeber no. 1*, of major concern to the Supreme Court. The Court decided that the lack of judicial protection against the police activities also constituted a violation of Article 15[13] of the Estonian Constitution. The Supreme Court argued that 'when

[10] Neither the admissibility decision nor the judgment contains an analysis of the discrepancy between the applicants in the Estonian courts and the ECtHR.

[11] Available at <www.legaltext.ee/text/en/X30054K7.htm>.

[12] Judgment of 10 Jan. 2004, case No. 3-3-2-1-04, para. 22, available at <hwww.nc.ee/english/const/2004/3-3-2-1-2004.htm>.

[13] The first sentence of Art. 15 provides: 'Everyone whose rights and freedoms are violated has the right of recourse to the courts'.

https://doi.org/10.1017/S1574019605003184 Published online by Cambridge University Press

the legislator has not provided for an effective and gapless mechanism for the protection of fundamental rights, the judicial power must, proceeding from Article 15 of the Constitution, guarantee the protection of fundamental rights' (paragraph 27). The Supreme Court further ascertained that the reopening of proceedings and the review of the activities of the police would neither damage the rights of third persons nor the public interest (paragraph 29). Thus, the case was reopened and submitted to the Tartu Administrative Court for a hearing.

Towards the end of the 2004, the Supreme Court reopened proceedings in yet another case. The European Court of Human Rights had, in *Puhk* v. *Estonia*,[14] again found a violation of Article 7 of the ECHR for convicting Mr. Puhk for various instances of tax fraud that took place both before and after the relevant statute came into force. The Supreme Court, similarly to the *Veeber* v. *Estonia no. 2* case, reopened the proceedings and quashed the part of the conviction, which laid the basis of an accompanying civil claim.

Growing importance of decisions of the European Court of Human Rights in national legal orders

The Supreme Court decisions in the aforementioned cases did not cause much controversy in Estonia, demonstrating the willingness of the political actors to accept and implement the decisions of the European Court of Human Rights. All of the main parties to the Veeber cases (including the Minister of Justice, the Legal Chancellor, and the Prosecutor's office) agreed that in case of a violation of the ECHR established by the European Court of Human Rights, a possibility must exist to open domestic proceedings, at least in criminal cases. Moreover, the ability of the Supreme Court to reopen the proceedings itself without a statutory legal basis was not seriously contested. The reaction is quite different from the reaction of Spanish commentators and politicians after a substantively similar decision by the Spanish Constitutional Court of 16 December 1991, where some authors accused the Constitutional Court of overstepping its powers.[15] During the proceedings in the Estonian Supreme Court, the Ministry of Justice also indicated that 'in the nearest future the Ministry of Justice is going to submit a bill to the Government of the Republic which shall amend the procedural laws' (paragraph 22 of the *Veeber no. 2* case). The draft law was finally submitted to the Parliament in December 2004, foreseeing the possibility of reopening domestic proceedings

[14] ECtHR 10 Feb. 2004, appl. No. 55103/00, *Puhk* v. *Estonia*.

[15] C. Schutte, 'The Execution of European Court of Human Rights Judgments in Spain', in M.L. van Emmerik, P.H. van Kempen and T. Barkhuysen (eds.), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (Leiden: Martinus Nijhoff Publishers 1999) p. 147-166.

https://doi.org/10.1017/S1574019605003184 Published online by Cambridge University Press

as well as the right to claim damages for the violation of the ECHR.[16] The first reading of the bill took place in January 2005.

The Estonian judgments correspond not only with the trend of growing European influence in the Estonian legal system, but also with the trend in Europe to give increasing importance to the judgments of the European Court of Human Rights. Both the Council of Europe institutions as well as the individual High Contracting Parties have taken steps to ensure the effective implementation of the judgments of the European Court. For example, the Committee of Ministers of the Council of Europe adopted a corresponding recommendation in 2000, encouraging the Contracting Parties 'to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention'.[17] Both the Committee of Ministers and the Parliamentary Assembly have been closely following the execution of judgments and demand from individual countries the adoption of individual measures, including the reopening of proceedings and quashing of criminal sentences. The European Court of Human Rights itself has repeatedly reminded the parties of the obligation to take measures in order to put an end to the violations beyond the duty to pay the just satisfaction determined by the court.[18] If procedural rights have been violated, a retrial may be the most appropriate measure to redress the violation.[19] Also, several countries have recently adopted laws allowing for reopening of criminal proceedings after a judgment of the European Court, including Greece in 2000,[20] Turkey[21] and San Marino[22] in 2003, and the Czech Republic

[16] The draft law is available in Estonian through the Estonian Parliament website at <web.riigikogu.ee/ems/plsql/motions.show?assembly=10&id=545&t=E>.

[17] Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at the domestic level following judgments of the European Court of Human Rights.

[18] In ECtHR 8 April 2004, appl. No. 71503/01, *Assanidze* v. *Georgia*, the ECtHR found a violation by Georgia because a person acquitted by the court was not released from prison. The Court stated that 'having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Art. 5(1) and Art. 6(1) of the Convention, the Court considers that the respondent State must secure the applicant's release at the earliest possible date' (para. 203). Moreover, it called upon the parties to the ECHR to change their procedural laws in order to enable remedies beyond the payment of just satisfaction ordered by the ECtHR: '[I]t is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed' (para. 198).

[19] There are several cases condemning the use of the special security court by Turkey. Starting with the judgment in the case of *Gençel* v. *Turkey*, the ECtHR has constantly claimed that, in principle, the most appropriate form of redress would be a speedy retrial by an independent and impartial court. *See* judgment of 23 Oct. 2003, appl. No. 53431/99, para. 27. The court applied this argument for other violations of Art. 6 in *Somogyi* v. *Italy*, ECtHR 18 May 2004, appl. No. 67972/01, para. 86.

[20] Law 2865/2000.

https://doi.org/10.1017/S1574019605003184 Published online by Cambridge University Press

in early 2004.[23] Most states now allow for the reopening of domestic proceedings after a decision by the European Court.[24]

A recent decision by the *Bundesverfassungsgericht*, [the German Constitutional Court], also exemplifies the growing significance of the European Court of Human Rights. In *Görgülü* v. *Germany*, the European Court established a violation of Article 8 by the German courts in not granting a father access and custody rights to his child.[25] In further domestic proceedings over the custody and visitation rights, the Naumburg Higher Regional Court dismissed those findings as not binding on the German judiciary. The Constitutional Court rejected this claim, arguing that it 'is not acceptable under constitutional law [to assume] that a judgment of the European Court of Human Rights binds only the Federal Republic of Germany as a subject of public international law, but does not bind German courts'.[26] As the Higher Regional Court had not taken the decision of the European Court of Human Rights sufficiently into account, it had violated the duty to respect the statute and the law. Although the Regional Court was not bound to enforce the European Court decision *per se*, and it even had to balance it against conflicting constitutional rights, including the rights of the foster family, it did have to take the judgment of the European Court into account and, if necessary, it did have to justify why it did not follow that decision. At the same time, it is obvious from the decision that a proceeding cannot be reopened without a statutory basis, i.e., on the basis of the European Court of Human Rights decision only; the *Bundesverfassungsgericht* makes it clear that courts have to follow existing procedural laws when considering to reopen a case.[27] Nevertheless, the impor-

[21] *See*, e.g., the Committee of Ministers of the Council of Europe Final Resolution ResDH (2004)86 concerning the judgment of the European Court of Human Rights of 17 July 2001 in the case of *Sadak, Zana, Dicle and Doðan* v. *Turkey*.

[22] Appendix 3 to the 871st Meeting of the Ministers' Deputies, Committee of Ministers of the Council of Europe (Strasbourg, 10 and 11 Feb. 2004 – DH), CM/Del/Dec(2004)871. Available at <wcd.coe.int/ViewDoc.jsp?id=748601&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>.

[23] Deutsch – Tschechische Juristenvereinigung e.V., *Info-Blatt Nr. 11*, Aug. 2004, p. 1, available at <dtjvcnsp.org/Info_dt_11.pdf>.

[24] Generally, *see* E. Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights* (Strasbourg: Council of Europe Publishing 2002) p. 16; J. Polakiewicz, 'The Execution of Judgments of the European Court of Human Rights', in R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (New York: OUP 2001, p. 55-76).

[25] ECtHR 26 Feb. 2004, appl. No. 74969/01.

[26] Bundesverfassungsgericht, Case 2 BvR 1481/04, decision of 14 Oct. 2004 (C. II. 2), para. 67. Available (both in German and in English) at <www.bundesverfassungsgericht.de>.

[27] Thus, in civil and administrative cases the reopening of domestic proceedings in Germany is probably not possible after a decision by the ECtHR. In this case, the Higher Regional Court did not have to reopen the proceedings but considered the case based on ordinary procedural rules on an ordinary appeal.

https://doi.org/10.1017/S1574019605003184 Published online by Cambridge University Press

tance of the ECHR and of the decisions of the European Court in the German legal order was made abundantly clear.[28]

The Estonian cases discussed in this annotation show the potential of the European Court of Human Rights to become an overarching human rights court. As more and more domestic courts are directly bound by its decisions and become even obliged to reopen their proceedings, the European Court of Human Rights starts to look more and more like a court of further appellate instance. Whether those developments are only positive or also contain dangers is yet to be determined. However, it is certain that the analysis of domestic constitutional review procedures necessarily obtains a new dimension. Such an analysis can no longer neglect the decisions of the European Court of Human Rights but must view them as an integral part of the system of protecting domestic fundamental rights.

[28] In the next issue of *EuConst,* there will be a case note on the decision of the Bundesverfassungsgericht.

https://doi.org/10.1017/S1574019605003184 Published online by Cambridge University Press