



Mart Susi

*Dr. iuris, Head of International Summer University
of the University of Tartu*

The Estonian Judicial System in Search of an Effective Remedy against Unreasonable Length of Proceedings

1. Introduction

This article will review the question of whether the Estonian national judicial system offers a domestic judicial remedy for individuals complaining that judicial proceedings in which they are involved have taken unreasonable time. The right to have a judgment rendered within reasonable time on one's civil rights and obligations or on criminal charges is categorised as a fundamental right and as such protected under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the Convention').¹ Since Estonia is a member of the Council of Europe² and has ratified the Convention³, it has the obligation to abide by the latter and also be guided by the case law of the European Court of Human Rights (ECHR). Estonia belongs to the group of European countries for which the Convention has a status by which it is superior to general domestic laws but remains subordinate to the national constitution.⁴ Section 123 of the Estonian Constitution⁵ provides that if domestic laws are in conflict with any international treaties ratified by the Parliament (*Riigikogu*), then the provisions of the international treaty concerned shall prevail. The Constitution has a 'special' status since it is the only legal act in Estonia that has been adopted by a national referendum.

The Estonian Supreme Court has on numerous occasions declared that the provisions of the Convention are superior to domestic laws. For example, in a 6 January 2004 judgment of the General Assembly, the following

¹ Article 6 (1) of the Convention provides the respective fundamental right alongside with other procedural fair trial guarantees. See European Convention for the Protection of Human Rights and Fundamental Freedoms, 4.11.1950, ETS No. 5 (ECHR).

² Estonia acceded to the Council of Europe on 14 May 1993, shortly after the restoration of its independence.

³ The Estonian Parliament (*Riigikogu*) ratified the Convention on 13 March 1996 by adopting The Law on the Ratification of the Convention on the Protection of Human Rights and Fundamental Freedoms (supplemented by Protocols Nos. 2, 3, 5 and 8) and its Protocols Nos. 1, 4, 7, 8, 10 and 11. – RT II 1996, 11/12, 34.

⁴ J. Polakiewicz. The Status of the Convention in National Laws. – R. Blackburn, J. Polakiewicz (eds.). *Fundamental Rights in Europe. The European Convention on Human Rights and its Member States. 1950–2000.* Oxford University Press 2001, pp. 37–46.

⁵ Eesti Vabariigi põhiseadus (Republic of Estonia Constitution). Adopted in the national referendum on 28 June 1992. – RT 1992, 26, 349 (in Estonian). Available — also in English, at <http://www.just.ee/23295>.

was expressed: “The European Convention for the Protection of Human Rights and Fundamental Freedoms constitutes an international treaty, ratified by the *Riigikogu* (Parliament), which has priority over Estonian laws or other legislation.”⁶ Recently the Supreme Court has *expressis verbis* confirmed that the judgments and decisions of the ECHR are to be directly applied in Estonia in cases similar to those decided by the international court.⁷ The Supreme Court has not ruled on the question of which judgments have priority in the event of conflict of opinion — the decisions of the ECHR or its own judgments.⁸ The present article will touch upon this interesting question as well.

These brief introductory remarks are intended to demonstrate that there is no doubt that Estonia has an obligation to apply the Convention standards, and indeed the country has on numerous occasions expressed its willingness to do so. This commitment has been manifested both in theory and in practice — for example, through the law-making activity of the legislative branch of the Estonian state and through the application of laws by the Supreme Court.⁹ The author of this article has recently argued that explanatory reports accompanying amendments to existing laws or associated with the new proposed laws discussed in the Estonian Parliament often analyse the proposed Estonian legal norm in the context of the Convention as applied by the ECHR.¹⁰ The author has also demonstrated that in 2008 the General Assembly of the Supreme Court relied upon the ECHR case law in only one judgment out of 12¹¹, which is a considerable decrease from the proportion seen in the years up until 2005, in which era the General Assembly had relied upon ECHR case law in some capacity in 11 judgments out of 26.¹² In this way or another, it can be safely argued that both the Convention and the case law of the ECHR have found their way into the Estonian everyday legal discourse, at least at the Supreme Court level.

However, the question of whether the Estonian judicial system offers an effective remedy against unreasonable length of proceedings has become a ‘testing ground’ for the question of whether the Estonian legal system indeed is guided fully by the case law of the ECHR. This is so because until now the latter question had remained mainly theoretical. There have not been any ‘embarrassing’ judgments with respect to Estonia — that is, judgments raising serious questions about the quality of our judicial system as a whole or about certain aspects of it corresponding to the standards set by the ECHR.¹³ Whether this is so because of diligent work by the Estonian judiciary, unawareness of Estonia’s legal subjects about the protection possibilities offered by the ECHR machinery, or the impact of the Strasbourg ‘filter’ on the outcome of a case — in both the formal and informal meaning of the word — remains beyond the scope of this article.¹⁴

At the time of the writing of this article, there seems to be a different principal position taken by the ECHR and the Estonian Supreme Court as to the existence of such an effective national remedy. Both courts seem to stand firmly behind their position. It is therefore a unique possibility to follow how this conflict of courts will be resolved. It also allows one to ask whether reliance on the ECHR case law on the part of the Estonian

⁶ SCebd, 6.01.2004, 3-1-3-13-03, paragraph 31. Available — also in English, at <http://www.nc.ee>. For previous wording see “If Estonian laws or other legislation is in conflict with international treaties ratified by the *Riigikogu*, then [...] the provisions of the international treaty shall apply.” See CRCSD, 27.05.1998, 3-4-1-4-98, paragraph III.7. Available — also in English, at <http://www.nc.ee>.

⁷ CRCSD, 30.12.2008, 3-4-1-12-08. Available — also in English, at <http://www.nc.ee>.

⁸ The text of the Convention does not provide a clear answer on this question, since the Member States have taken the obligation to be bound only by these ECHR judgments where they have been one party. See Convention Article 46.

⁹ For understandable reasons the question about the direct applicability of the ECHR case-law is limited to the question about this direct applicability by the Supreme Court. The author is not aware of any statistically reliable studies about the question how often and in what capacity lower domestic courts of a Council of Europe member state rely on the ECHR case-law. This has not been studied in Estonia either. For reflections about the positions of the domestic judiciary towards the need to apply directly international treaties or court judgments, see R. Clements. Bringing It All Back Home. “Rights” in English Law Before the Human Rights Act 1998. – *Human Rights Law Journal* 2000 (21), p. 134 ff.; S. Beaulac. National Application of International Law: The Statutory Interpretation Perspective. – *Canadian Yearbook of International Law* 2003 (XLI), pp. 225, 229; G. W. Anderson. Using Human Rights Law in Scottish Courts. – *European Law Review* 2000 (25), Human Rights Survey 2000, HR/3; I. Cameron. The Swedish Experience of the European Convention of Human Rights Since Incorporation. – *International and Comparative Law Quarterly* 1999 (48), p. 20.

¹⁰ M. Susi. Õigus tõhusale menetlusele enda kaitseks. Euroopa Inimõiguste Kohtu käsitluse ja Eesti õigusruumi näitel (Right to Effective Procedure in One’s Own Defence. On the Example of the Approach of the European Court of Human Rights and the Estonian Legal Space). – *Juridica* 2009/1, p. 4 (in Estonian).

¹¹ *Ibid.*, p. 3.

¹² K. Merusk, M. Susi. Ten Years Since Ratification — the European Convention on Human Rights and Its Impact on Estonia. – *German Yearbook of International Law* 2005 (48), pp. 350–353.

¹³ For an overview of the ECHR case-law towards Estonia see the Note above and also M. Susi. Recent Judgments and Decisions of the European Court of Human Rights towards Estonia. – *Juridica International* 2006 (11), pp. 93–101. In the latter article two main types of Convention violations were reported — of Article 6 (3) “d” due to the failure to provide opportunities for the accused and his counsel to question the witnesses in a public court hearing; and due to Estonia’s prison conditions. Both types do not constitute a structural problem, since the first is only a reflection of errors by an individual judge and the latter is a relic of the Soviet time prison facilities.

¹⁴ I. Ziemele has argued that Estonia’s relative ‘success’ in Strasbourg is attributable to the ‘compatibility’ exercise carried out by a group of experts prior to Estonia’s ratification of the Convention. See I. Ziemele. The Role of International Organizations in Strengthening Human Rights Performance in the Baltic Sea Region. – *German Yearbook on International Law* 2000 (43), p. 9.

Supreme Court has been only a matter of convenience or need^{*15} in a search for additional argumentation for its judgments, or whether the Supreme Court is indeed willing to change its understanding of certain aspects of law — by reversing or reviewing its previous position written into its judgments — in consequence of the directives stemming from judgments of international courts. Although the author of this article has not noted such change of Supreme Court positions in respect to the judgments of the ECHR^{*16}, the Supreme Court has declared its change of position due to developments in European Court of Justice (ECJ) jurisprudence. Specifically, the Supreme Court has ruled that, since the ECJ judgment of 11 December 2007 in case C-161/06, *Skoma-Lux*, prohibited imposing obligations on individuals stemming from the Union Law if the respective law had not been published in the Official Journal of the European Union^{*17}, the Supreme Court reversed its position that professionals in the corresponding field needed to abide by the EU rules irrespective of the official publication of these norms.^{*18}

The article begins by presenting a short overview of the position of the ECHR concerning an effective national remedy against unreasonable length of proceedings. Then, the article will review the judgments of the ECHR with respect to Estonia regarding complaints in this area — where the ECHR has established the absence of such an effective domestic remedy, counterbalanced by the findings of the Estonian Supreme Court, which suggest that such a domestic remedy is available. The article will conclude with contemplation of possible scenarios for resolving this conflict of courts.

2. The position of the European Court of Human Rights

The ECHR had until 2000 refused to review applications that claimed violation of the Convention's Article 6 (1) due to the unreasonable length of proceedings and simultaneously argued that the applicant did not have an effective remedy in the domestic judicial system to have this argument decided. According to the position of the ECHR until 2000, the Convention did not bestow upon an individual the right to turn to domestic authorities during the ongoing judicial proceedings with a request to establish the violation of fundamental rights in view of the unreasonable length of these proceedings. The 'victim' of the situation had to wait until the final court judgment in the proceedings concerned. The ECHR has explained its former position in one of the most important judgments of the new millennium — *Kudla v. Poland*^{*19} — by saying that in the situations concerned the court did not examine the violation of Article 13^{*20} of the Convention because it considered Article 6 (1) to be *lex specialis* toward Article 13 in respect of claims related to the unreasonable length of proceedings.^{*21}

The ECHR explained its change of position through two main arguments:

- 1) A complaint about the unreasonable length of proceedings under the Convention's Article 6 (1) does not incorporate the notion that the individual wishes this complaint to be reviewed by a 'domestic authority': "The question of whether the applicant in a given case did benefit from trial within a

¹⁵ It has been noted that the ECHR judgments are hardly ever cited in the Supreme Court judgments and there are usually only formal references to the cases and presentation of some relevant points. See Note 12, p. 351.

¹⁶ In the recent years the Supreme Court has explained some key legal concepts through relying mainly on the ECHR jurisprudence. For example, the question about the scope of the right not to incriminate oneself is explained through citing one of the key ECHR judgments in this respect, *Saunders v. the United Kingdom*, judgment of 17 December 1996. – Reports 1996–VI.

¹⁷ ECJ judgment of 11 December 2007 in case C-161/06 *Skoma-Lux* paragraph 51: "Article 58 of the Act concerning the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, precludes the obligations contained in Community legislation which has not been published in the Official Journal of the European Union in the language of a new Member State, where that language is an official language of the European Union, from being imposed on individuals in that State, even though those persons could have learned of that legislation by other means."

¹⁸ ALCSCd, 13.10.2008, 3-3-1-36-08, paragraph 15 reversed the previous position, expressed in ALCSCd, 10.05.2006, 3-3-1-66-05, paragraph 12.

¹⁹ ECHR, *Kudla v. Poland*, judgment of 26 October 2000 (Grand Chamber). – Reports of Judgments and Decisions 2000–XI, p. 146.

²⁰ Article 13 of the Convention contains the following fundamental right: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in official capacity."

²¹ The ECHR also considers the right to have the reasons and legality of one's detention reviewed under Convention Article 5 (4) as *lex specialis* of Convention Article 13. See the following citation of a case, where the applicant argued that his Convention rights under Article 13 were violated: "[...] irrespective of the method chosen by Mr. Chahal to argue his complaint that he was denied the opportunity to have the lawfulness of his detention reviewed, the Court must first examine it in connection with Article 5 paragraph 4 (Articles 5–4)". See ECHR, *Chahal v. United Kingdom*, judgment of 15 November 1996. – Reports of Judgments and Decisions, 1996–V, p. 126.

reasonable time in the determination of civil rights and obligations or a criminal charge is a separate legal issue from that of whether there was available to the applicant under domestic law an effective remedy to ventilate a complaint on that ground.”²²

- 2) The number of applications to the ECHR concerning the unreasonable length of domestic proceedings might undermine the effectiveness of the Strasbourg system as a whole. The Court noted that “the important danger that exists for the rule of law within national legal orders when ‘excessive delays in the administration of justice occur’ in respect of which litigants have no domestic remedy”.²³

For the purposes of this article, it is necessary to note two aspects of this change in the ECHR’s position.

Firstly, the fact of the change itself in the Court’s position was clearly emphasised, with the note that “the Court now perceives the needs to examine the applicant’s complaint under Article 13 taken separately, notwithstanding its earlier finding of a violation of Article 6 (1) for failure to try him within a reasonable time”²⁴. From the time of this judgment, domestic legal systems had the obligation to provide a national judicial remedy for individuals’ claiming to be a ‘victim’ of unreasonably long proceedings.²⁵ It must be noted that the Estonian Supreme Court has not questioned this obligation. Rather, the problem may lie in determining whether national judicial systems actually provide this remedy.²⁶

Secondly, the ECHR changed its rigid requirement concerning the meaning of ‘effective remedy’ in relation to complaints about the unreasonable length of proceedings. The ‘standard’ meaning of the concept of effective remedy was already defined in 1983 and requires simultaneous existence of two remedies — the decision about the substance of the claim and the possibility of obtaining compensation for the violation. The Court has formulated this, regarding the individual who puts forward an ‘arguable claim’²⁷ of violation of his fundamental rights, as follows: “[H]e should have a remedy before a national authority in order to have his claim decided and, if appropriate, to obtain redress.”²⁸ This approach has remained unchanged to this day, with the clarification, dating back to the last millennium in its substance, that the redress offered for the violation does not necessarily need to be financial compensation. This formulation is the following: “However, article 13 (art. 13) does not go so far as to require any particular form of remedy. Contracting States are being afforded a margin of discretion in conforming to their obligation under this provision.”²⁹

The only type of violations for which the ECHR accepts a departure from this standard are violations related to the unreasonable length of proceedings. The ECHR presented this principle in the case of *Mifsud v. France* in the following formulation: “Article 13 therefore offers an alternative: a remedy is ‘effective’ if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred.”³⁰ The Court has not elaborated on this further in the decision, nor has it addressed in subsequent case-law the reasons for departing from the standard discussed in the previous paragraph. Neither has the Court explained whether this new position is applicable to other substantive

²² *Kudla v. Poland*, p. 147.

²³ *Ibid.*, p. 148.

²⁴ *Ibid.*, p. 149.

²⁵ It is quite unusual for the ECHR to change its position regarding a principal legal question abruptly. Usually the Court gives hints from judgment to judgment that it is ready to re-examine its previous position. See, for example, the gradual shift from denying that companies have morals to the understanding that companies can be victims of moral harm. See ECHR, *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, judgment of 19 December 1994, A 302; *Cominregsoll S.A. v. Portugal*, judgment of 6 April 2000. – Reports of Judgments and Decisions 2000–IV.

²⁶ The question of the parameters when the ECHR is likely to establish the violation of a reasonable time requirement is outside of the scope of this article. It is sufficient to note that there are no set time-limits from where the violation is likely to be established. The general position of the ECHR is repeated in almost standard formulation from judgment to judgment: “The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute.” ECHR, *Shchiglitsov v. Estonia*, judgment of 18 January 2007. For general analysis of the Court’s case law in this question, see also Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings adopted by the Venice Commission at its 69th Plenary Session (Venice, 15–16 December 2006) (CDL – AD (2006)) 036rev.

²⁷ Although the ECHR introduced the concept of an effective remedy already in 1978 in the judgment of *Klass et al. v. Germany*, judgment of 6 September 1978, application No. 5029/71, it subsequently changed its view that an effective remedy should be available to anyone who claims that his fundamental rights are violated. Subsequently the ECHR replaced this approach by saying that an effective remedy should be available to anyone who puts forward an “arguable claim” about the violation of his fundamental rights. Regarding the concept of an “arguable claim”, see M. Susi. The Right to an Effective Remedy — through the Dynamic Interpretation of the European Court of Human Rights. *Dissertationes Iuridicae Universitatis Tartuensis*. Tartu 2008, pp. 163–164.

²⁸ ECHR, *Silver v. the United Kingdom*, judgment of 25 March 1983, A61, p. 113 (a).

²⁹ ECHR, *Vilvarjah et al v. the United Kingdom*, judgment of 30 October 1991, A215, p. 122. It also needs to be noted that in the case-law of the last decade the ECHR sometimes uses the broader term “relief” instead of the formerly used term “redress”. See *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000, application No. 30985/96, paragraph 96.

³⁰ ECHR, *Mifsud v. France*, decision of 11 September 2002, application No. 57220/00, p. 17.

Convention violations. One way or another, the ECHR accepts a situation in which violation of the Convention due to the unreasonable length of proceedings continues and the affected person is only paid compensation. After the *Kudla v. Poland* judgment, the ECHR took upon itself the task of reviewing situations in several Member States related to meeting of the need to offer a separate domestic remedy for claims pertaining to unreasonable length of proceedings. The case law can be generalised to argue that three types of situations meet the Convention standards in respect of this new national remedy:

- 1) the adoption of a special law providing the remedy for complaints against the unreasonable length of proceedings;
- 2) amendments to the existing procedural laws;
- 3) directives of the supreme court of the country to lower courts for applying the already existing procedural laws.

The author will briefly present the possibilities these make available to the Member States by considering the example cases of Slovakia, Poland, and Portugal.

According to the interpretation of the ECHR, Slovakia did not meet the Convention's standards in this respect until 1 January 2002. On this date, change in the Slovakian Constitution took effect^{*31} that provided the possibility for both natural and legal persons to turn to the Constitutional Court with complaints about their fundamental rights' violation. Here, the Constitutional Court can award just redress if it establishes that a violation has occurred. Previously, Slovakia had lost several cases in the ECHR, where the national government argued that the existing State Liability Act provided the option for potential victims of this violation to seek damages for the delays in the administration of justice. The ECHR considered this option too vague and not to offer any realistic chances of success.^{*32}

This new situation was judged to meet the Convention's standards. In the judgment of *Andrašik v. Slovakia*, the ECHR found the remedy through the constitutional complaint to be "effective", since it gave authority to the Constitutional Court not only to establish the fact of the violation but also to oblige the domestic authorities in question to cease the violation and to award just compensation.^{*33} In the stage of presenting the parties' observations, the Slovakian government brought to the attention of the ECHR several judgments of the Constitutional Court applying Article 127, and therefore the ECHR had to conclude that "the remedy in question is effective not only in law, but also in practice"^{*34}.

After the *Kudla v. Poland* judgment, Poland passed the so-called 17 June 2004 Law, which regulates the procedure for complaints about the unreasonable length of proceedings.^{*35} The ECHR analysed this law in the case of *Charzyński v. Poland* and concluded that it "satisfies the 'effectiveness' test established in the *Kudla* judgment"^{*36}. It has to be mentioned here that the 17 June 2004 Law limits the amount of monetary compensation to a maximum of 10,000 Polish złotych.^{*37} The ECHR did not consider this problematic and indicated that the injured party always has the opportunity to seek additional damages under the amended Civil Code.^{*38} It must be indicated here that, although by the time of the decision in the case of *Charzyński v. Poland* no final judgments had been made in Poland applying this new law, the ECHR was satisfied with the existence of the legal possibility in theory.^{*39} This clearly signifies departure^{*40} from the well-established principle applied by the ECHR that for a remedy to be effective, the respective government also needs to demonstrate that the remedy is applied in practice by the national courts.^{*41}

³¹ Article 127 of the Slovakian Constitution, available at www.legislationonline.org.

³² ECHR, *J.K. v. Slovakia*, decision of 13 September 2001, application No. 38794/97 and *Havala v. Slovakia*, decision of 13 September 2001, application No. 47804/99.

³³ ECHR, *Andrašik v. Slovakia*, judgment of 22 October 2002, application No. 57984/00, p. 10.

³⁴ The Note above.

³⁵ Complaints for delays in the first instance court are reviewed by the district court and complaints for delays in the district court are reviewed by the Supreme Court.

³⁶ ECHR, *Charzyński v. Poland*, decision of 1 March 2005, application No. 15212/03, p. 39.

³⁷ Corresponds to approximately 2,150 euros.

³⁸ The Civil Code was also amended by the 17 June Law.

³⁹ Note 36 above.

⁴⁰ Similar acceptance of a situation where there are yet no domestic judgments, but the written law provides a remedy, is present in the following judgment: "[...] the new remedy at national level is open to the applicant and may address this problem since it not only provides for compensation to be awarded but also obliges the Constitutional Court to set a time-limit for deciding the case on the merits." ECHR, *Nogolica v. Croatia*, decision of 5 September 2002, application No. 77784/01, p. 6.

⁴¹ As a rule, the ECHR defines the concept of an 'effective remedy' partly through the ability of the respondent government to present court judgments where the remedy has been applied. For example, the Court has noted: "[...] the Government did not establish the existence of any domestic decision that had set a precedent in the matter. It has therefore not been shown that such a remedy would have been effective". See ECHR, *Rotaru v. Romania*, judgment of 4 May 2000. – Reports of Judgments and Decisions 2000–V, p. 70.

Still the country may not need to change any laws, but only modify the case law of its courts. This is evident in the example case of Portugal. The Government of Portugal used to submit an argument in cases of the type considered here that Portugal has a law, dating back to 1967⁴², that regulates the state's non-contractual liability. The ECHR considered this legal provision to be "theoretical" and indicated: "The Government has not cited a single precedent to show that such an action had real prospects of success, although the legal provision in question had been in force for more than twenty years."⁴³ In the judgment of *Paulino Thomas v. Portugal*, the ECHR changed its view and accepted the national government's argument that the domestic remedies for complaints against unreasonable length of proceedings are effective. This was because the government had referred to a judgment of the Supreme Court from 1998 whereby the possibility was accepted of the state being responsible for the violation of the reasonable time limit under the Convention's Article 6 (1). The Portuguese government likewise presented several court judgments wherein the litigants were awarded monetary compensation for violation of the reasonable time requirement. On this basis, the ECHR established that an effective domestic remedy in Portugal against complaints of unreasonable time did exist.⁴⁴ This was achieved merely through the Supreme Court directives.

3. The cases from Estonia related to violation of the reasonable time requirement and absence of effective remedy

The ECHR has directed five substantive judgments toward Estonia regarding complaints of unreasonable length of proceedings. In the case of *Treial v. Estonia*, the ECHR established that there was violation of the Convention's Article 6 (1).⁴⁵ In this application, no claim of absence of a domestic remedy for decision on the complaint in the Estonian national legal system was raised; consequently, the Court could not rule on this issue. Similarly, in the case of *Mõtsnik v. Estonia*, no complaint under the Convention's Article 13 was raised — here the ECHR did not establish existence of a violation of Article 6 (1) either.⁴⁶ In the case of *Shchiglitsov v. Estonia*, violation of the Convention's Article 6 (1) was established on account of the duration of marital property division: five years and 10 months.⁴⁷ As in the previous two cases, no argument under Article 13 was raised.

On 8 November 2007, the ECHR issued a judgment wherein it established violation of both Article 6 (1), due to unreasonable length of proceedings, and of Article 13, due to the absence of an effective remedy for having this claim decided domestically. In the case of *Saarekallas OÜ v. Estonia*, it was established that the litigant had spent seven years and two months in the Estonian courts.⁴⁸ For the purposes of this article, it is important to note what the arguments of the Estonian government were in defence of the availability of an effective domestic remedy for decision of such a case. The Estonian government made reference to the provisions of the Code of Administrative Court Procedure — according to which the administrative courts were empowered to adjudicate disputes under public law — and the Constitution. Furthermore, it quoted the case law of the Supreme Court, according to which administrative courts were authorised to examine whether public authorities performed their actions within reasonable time. The Supreme Court had found that the administrative courts were authorised to award compensation to individuals for actions — including delay — of public authorities even in cases where no specific legal provisions existed to that effect. The government concluded that a person could file a complaint with an administrative court against delays in judicial proceedings and against inaction of a court and also claim compensation for damage caused thereby. The government concluded that even if the Court were to find that none of the above-mentioned remedies individually constituted sufficient and effective remedy, the aggregate of remedies nevertheless ensured effective legal protection to the individuals in respect of the length of proceedings. The government contended that there had been sufficient remedies available to the applicant company, which, however, did not make any attempts to make use of them.⁴⁹

The applicant company pointed out that no example cases had been provided wherein the remedies referred to by the government would have been used and in which they would have been effective. Furthermore, no

⁴² Portuguese Law No. 48051.

⁴³ ECHR, *Gama da Costa v. Portugal*, decision of 5 March 1990, application No. 12659/87. – Decisions and Reports 65, p. 136.

⁴⁴ ECHR, *Paulino Thomas v. Portugal*, decision of 27 March 2003. – Reports of Judgments and Decisions 2003–VIII.

⁴⁵ ECHR, *Treial v. Estonia*, judgment of 2 December 2003, application No. 48129/99.

⁴⁶ ECHR, *Mõtsnik v. Estonia*, judgment of 29 April 2003, application No. 50533/99.

⁴⁷ ECHR, *Shchiglitsov v. Estonia*, judgment of 18 January 2007, application No. 35062/03.

⁴⁸ ECHR, *Saarekallas OÜ v. Estonia*, judgment of 8 January 2007, application No. 11548/04.

⁴⁹ Above, pp. 59–61.

examples had been given of situations in which compensation would have been paid for excessive length of court proceedings.^{*50}

The ECHR noted that the provisions of the Civil Code and the Constitution, referred to by the government, were of a general nature and did not include reference to a specific remedy for complaints against the unreasonable length of proceedings. The decisive argument was as follows: “The applicant company pointed out that no examples had been provided where the remedies referred to by the Government would have been used and where they would have been effective. Furthermore, no examples had been given where compensation would have been paid for the excessive length of court proceedings.”^{*51} The Court did not comment on the arguments of the government regarding the aggregate effect of remedies and that the administrative courts were empowered to review complaints against the delays in general county courts.

The author of this article is of the opinion that at least until the end of 2007 there was no effective remedy available in the Estonian judicial system for having a claim against unreasonable length of proceedings decided. The ECHR may have hinted to the Supreme Court that it could create this effective remedy by directing the practice of the lower-level courts. This is because the Court commented positively on the practice of the Supreme Court when interpreting the provisions of the Constitution broadly.

The Estonian Supreme Court had an opportunity to abide by the findings of the ECHR in its decree of 30 December 2008. The case was brought to the Supreme Court as an individual constitutional complaint by ‘R.P.’, who argued that criminal proceedings (including the pre-trial investigation) directed toward him had lasted more than 12 years. At the time of submission of the application to the Supreme Court Constitutional Review Chamber, the trial was still pending in the court of first instance. R.P. asked the Supreme Court to establish violation of the reasonable time requirement, or as an alternative the absence of an effective remedy within the meaning of the Convention’s Article 13.

The possibility of submitting an individual constitutional review claim to the Estonian Supreme Court is limited. The Constitutional Review Court Procedure Act does not allow an individual to bring a constitutional complaint to the Supreme Court directly. The Constitution provides the right for anyone to ask that a legal norm be declared unconstitutional or not applied, but only in the context of one’s legal dispute.^{*52} However, the Supreme Court has taken a ‘broad’ approach to this limitation. It has reviewed an individual constitutional complaint on 11 occasions and only in one instance issued a substantive judgment.^{*53} In the latter case, the Supreme Court introduced a position according to which the Court “verifies which judicial remedies are available to the litigant for the control of the alleged violation of his fundamental rights”^{*54} In ten cases out of eleven, the Supreme Court has taken the position that proceedings in the administrative or county court provide sufficient effective remedy for the person’s claim concerning violation of fundamental rights.^{*55} It is debatable whether only one judgment decided on the merits through individual constitutional review proceedings satisfies the requirement of an effective remedy or whether instead this should be viewed as theoretical and illusory^{*56} protection of the fundamental rights.

The Supreme Court applies here the so-called gapless court protection doctrine of fundamental rights, which in the view of the Supreme Court is provided by § 15 of the Estonian Constitution.^{*57} In other words, even if the capacity of the administrative or another court to decide a case does not specifically derive from the text of the procedural law, the court is still empowered to discuss the case and issue a judgment on account of the authority granted to it by the Constitution.

Thus the Supreme Court faced a dilemma when deciding on the case brought forward by R.P. It could have decided it on the merits, which would have meant a second judgment on the merits made in an individual constitutional complaint case. This, in turn, would have meant that the Supreme Court could face a mounting number of applications arguing the same type of violation. Or the Supreme Court could have decided that there indeed is no effective remedy available, which could have meant an equivalent situation with complaints

⁵⁰ Above, p. 62.

⁵¹ Above, p. 66.

⁵² The second sentence of § 15 of the Estonian Constitution provides the following right: “Everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional.”

⁵³ SCebd, 17.03.2003, 3-1-3-10-02. Available — also in English, at <http://www.nc.ee>.

⁵⁴ CRCSd, 17.01.2007, 3-4-1-17-06, paragraphs 4–5. Available — also in English, at <http://www.nc.ee>.

⁵⁵ CRCSd, 3-4-1-12-08, 3-4-1-13-08, 3-4-1-10-08, 3-4-1-3-08, 3-4-1-11-07, 3-4-1-8-07, 3-4-1-17-06, 3-4-1-4-06, 3-4-1-10-05 and 3-4-1-6-05.

⁵⁶ At the same time the approach of the Supreme Court is not in violation of the requirements of the Convention or of the ECHR, since the ECHR does not consider the absence of individual constitutional review proceedings to be a Convention violation. Should the Supreme Court, through its subsequent case-law, introduce a practice through which an individual has a reasonable expectation as to the existence of this right in practice, then the issue of Convention violation may emerge, if the individual does not achieve a complaint review by the Supreme Court in its capacity as a constitutional court.

⁵⁷ CRCSd, 9.04.2008, 3-4-1-20-07, paragraph 18.

mounting. Instead, the Supreme Court applied the ‘gapless court protection’ doctrine.^{*58} It indicated that in its view the reasonable time limit was violated in R.P.’s case, but it did not establish this violation in the formal judgment. While the Supreme Court did not give leave for the application it explained, that county courts discussing criminal cases had to decide on this claim concerning reasonableness of time. The county courts need to decide the claim immediately after it is presented in the course of the proceedings and not wait until the stage of the substantive judgment in the case. Since the criminal courts do not have the authority to decide on appropriate monetary compensation, the Supreme Court provided guidance stating that such claims need to be decided separately in administrative courts under the provisions of the State Liability Act.

As for the remedies, the Supreme Court indicated three possible actions that the county court could take. These are:

- 1) termination of the criminal court proceedings;
- 2) acquittal;
- 3) taking into account the fact of the violation of fundamental rights at the time of sentencing.

The author of this article is of the opinion that the latter option — using the fact of the violation as a mitigating argument in the sentencing — does not meet the criteria for effective remedy. This is because an effective remedy needs to take immediate effect. By contrast, when the criminal court establishes violation of the reasonable time requirement during the proceedings, then it is not known how long the proceedings still may take. In general, during the proceedings it is not known whether the court will find the accused guilty. If it does not, then the person would remain without a remedy for the reasonable time violation.

At first sight, neither the termination of proceedings nor summary acquittal seems to correspond to the meaning of effective remedy either.^{*59} However, on deeper contemplation, this possibility cannot be excluded. According to the position of the ECHR and with application of the principle of subsidiarity, the Member States are in a better position than the international Court to decide which exact type of redress is most suitable for a particular violation.^{*60} Monetary compensation is only one possible type of compensation, and the latter may also constitute actions by the state authority or courts that are intended to remedy the situation.

It still remains open to debate whether these remedies referred to by the Estonian Supreme Court meet the requirements of foreseeability and universality. For example, an individual may not agree to termination of the criminal proceedings, since he is interested in his reputation being cleared via a direct court judgment. It also seems disproportionate to discontinue proceedings in cases involving crimes against life or other serious offences. Therefore, the author of this article is of the opinion that in its 30 December 2008 decree the Supreme Court preferred to rely on the ‘gapless court protection’ doctrine rather than acknowledge that there are indeed gaps in the Estonian judicial system. The latter would have meant admission that there is no effective remedy against claims of unreasonable length of proceedings. The Supreme Court directed the county courts — at least in criminal matters — to apply the ‘gapless court protection’ doctrine while there are not very suitable remedies in the ‘arsenal’ of the county courts. The county courts cannot award monetary compensation in relation to criminal matters to the accused, nor are the remedies of termination or acquittal the most suitable ways of compensating the person concerned for the unreasonable length of proceedings.

Shortly after the 30 December 2008 Supreme Court decree, the ECHR published yet another judgment directed toward Estonia, establishing violation of the Convention’s Article 13 — the judgment in the case of *Missenjoy v. Estonia*.^{*61} Since the arguments of the government were submitted before the 30 December 2008 Supreme Court decree, it is safe to argue that the government could not have been aware, at the time of submitting its arguments, of the Supreme Court’s position. In this case, a litigant who had allegedly taken out a loan from one of Estonia’s commercial banks (*AS Eesti Maapank*) failed to pay the sums back and the bank lodged a claim against him on 19 October 1999. After years of inactivity, the parties finally reached a settlement, which was approved by the Viru County Court (*maakohus*) on 29 May 2006. The government advanced arguments similar to those applied in the *Saarekallas OÜ v. Estonia* case. It further stated that the injured party could have initiated disciplinary proceedings against the judge and also asked for jurisdiction to be transferred to another court.^{*62}

If one compares the arguments in the two cases — *Saarekallas OÜ v. Estonia* and *Missenjoy v. Estonia* — decided on the merits regarding the violation of Article 13 of the Convention, it appears that the arguments

⁵⁸ It is worth considering whether the ‘gapless court protection’ doctrine is a procedural question — in principle, for every type of claim there is a suitable domestic court, and the Supreme Court decided an individual constitutional complaint only when due to some exceptional circumstances the particular claim cannot be brought before the court which usually decides respective types of cases. In the other words, the Supreme Court could stand as the guardian of the right of access to court within the meaning of Convention Article 6 (1).

⁵⁹ The ECHR has issued several judgments where the absence of an effective remedy is established due to the lack of the ability of the national court to order compensation for the reasonable time requirement violation. See for example *Sürmeli v. Germany*, judgment of 8 June 2006, application No. 75529/01.

⁶⁰ ECHR, *Liakopoukou v. Greece*, judgment of 24 May 2006, application No. 20627/04, pp. 19–25.

⁶¹ ECHR, *Missenjoy v. Estonia*, judgment of 29 January 2009, application No. 43276/06.

⁶² The Note above.

of the government are not entirely consistent. While in the *Saarekallas* case the government admitted that the litigant could not appeal against the decisions to adjourn the hearings^{*63}, in the *Missenjoy* case the government stated that the applicant could have appealed even in the absence of a separate written court ruling whereby the hearing was adjourned.^{*64} In the *Saarekallas* case, there was no reference to the possibility of requesting disciplinary proceedings.^{*65}

Although the ECHR referred to the government's arguments in the *Missenjoy* case only in part, stating that they mainly followed arguments similar to those in the *Saarekallas* case^{*66}, it seems that the cornerstone of the government's position is that the applicants could have filed a complaint with an administrative court against delays in judicial proceedings and against inaction of a court and also claim compensation for damage caused thereby.^{*67} The ECHR has responded to this argument by stating that the provisions of the Code of Administrative Court Procedure were general in nature and, secondly, that the government had failed to produce any court precedents where the litigant's case was decided by an administrative court and compensation was awarded.^{*68}

One needs to distinguish between the position of the government and that of the Supreme Court on the question referred to above. The arguments in proceedings at ECHR level are prepared by the government of the Member State concerned, and the government is not obliged to argue its case via the legal doctrine of the national courts. Furthermore, in the two cases discussed above, the government made minimal reference to the case law of the Supreme Court, probably for the simple reason that such case law was not available. So these were the arguments of the government that the ECHR had to evaluate and analyse. The government's belief in the existence of an effective remedy through administrative court proceedings is supported also by the information it provided about the measures for complying with the judgment in the case of *Treial v. Estonia*. The following statement is included in the information: "Anyone may file a complaint before the administrative courts against delays in judicial proceedings or inaction by the courts. In doing so, he may rely on the relevant provisions of the Constitution or of the Convention as well as on the provisions of the Code of Administrative Procedure and the case law of the Supreme Court. It is possible during such proceedings to demand compensation for damage caused by such delays/inaction, and the administrative courts have competence to order payment of compensation."^{*69} Following the logic of the ECHR, one can only conclude that this remedy is **theoretical and illusory** and that until there emerges case law to support this argument it will not be a **practical and effective** remedy.^{*70} Since the ECHR has even considered the provisions of the Code of Administrative Court Procedure to be of too general a nature to satisfy the Convention's standards, the current position of the ECHR on the remedies suggested by the government needs to be read as stating that there is no such effective remedy in Estonia at any level — not in theory and not in practice.

Ironically, the ECHR thus far has been unable to evaluate the position of the Estonian Supreme Court regarding the existence or absence of an effective national remedy against unreasonable length of proceedings. In this respect, it cannot be argued that there is open conflict of opinion between the ECHR and the Supreme Court in this matter — the former being of the opinion that there is no such effective remedy available and the latter directing the lower courts to apply this remedy immediately in their proceedings once the relevant claim by the litigant or accused has been made. The 'testing' of the national remedy suggested by the Supreme Court will be done sooner or later by the ECHR.

If the Supreme Court wishes to follow the Portuguese model and create this remedy through the lower courts' case law, it is inevitable that this remedy will meet the Convention's standards as required by the ECHR. Soon the government will be required to be able to produce for the ECHR lower-court judgments implementing the directives of the Supreme Court regarding immediate review of complaints about unreasonable length of proceedings. Then the ECHR may have to decide whether the rather unique remedy suggested by the Estonian Supreme Court — termination of criminal proceedings or acquittal — can be regarded as an appropriate form of redress. If it is, then the concept of 'gapless court protection' by the Estonian courts finds a strong

⁶³ *Saarekallas OÜ v. Estonia*, pp. 56–57.

⁶⁴ *Missenjoy v. Estonia*, p. 36.

⁶⁵ This argument was used in the *Missenjoy* case to which the ECHR responded that there was no causal link established how the disciplinary proceedings could have expedited the proceedings in the main court case.

⁶⁶ *Missenjoy v. Estonia*, p. 36.

⁶⁷ *Saarekallas v. Estonia*, p. 60.

⁶⁸ The Note above, p. 66 and *Missenjoy v. Estonia*, pp. 49 and 51.

⁶⁹ Appendix to Resolution CM/ResDH (2007) 152, available online at HUDOC.

⁷⁰ The statement that an effective remedy is *practical and effective* and not *theoretical and illusory* is perhaps one of the most well-known statements of the ECHR. See for exact formulations: "The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness [...]." See *Akdivar et al. v. Turkey*, judgment of 16 September 1996. – Reports of Judgments and Decisions 1996–IV, p. 66 and "[...] the right of access to court must not only be entrenched in law as a principle but also secured with sufficient certainty in practice". See *Angel Angelov v. Bulgaria*, judgment of 15 February 2007, application No. 51343/99, p. 39.

supportive argument and perhaps can be regarded as a contribution of Estonian legal thought to European jurisprudence.

As for the potential ‘victim’ of excessive length of proceedings and the legal profession, it is not clear which path to follow in this ‘conflict’ of courts. From one side, the applicant is not supposed to rely on the remedy that in his view is not effective. The belief in the non-effectiveness or even unavailability of a national remedy has been confirmed by the ECHR, so the argument that the potential applicant has not exhausted the domestic remedies would probably not hold water in proceedings with the ECHR. On the other hand, should the remedy suggested by the Supreme Court prove effective, the applicant would lose much time in the ECHR proceedings and in the end may be advised to turn back to the domestic remedy. Therefore, the current situation may be regarded as a ‘window of opportunity’ for only those who may wish to use the ‘conflict of courts’ to their procedural advantage. For purposes of legal certainty, it is advisable that Estonia fulfil its obligations under the Convention soon — whether through the legislative initiative of the Parliament, via the developing case law of the lower courts, or through a combination of these two measures.

4. Conclusions

This article has provided a brief overview of the case law of the ECHR in relation to the Convention’s Article 13 standards in cases arguing the violation of fundamental rights due to unreasonable length of proceedings in civil or criminal matters. The ECHR has, beginning with its judgment in the case *Kudla v. Poland*⁷¹, required that there be a national remedy under domestic law for having the associated claim decided and, if appropriate, adequate redress made. The ECHR accepts three venues whereby Member States can meet their obligations: the adoption of a special law to deal with the relevant claims, amendment of the existing procedural laws, and directives by the country’s highest court to the lower-level courts on how to guarantee the respective domestic remedy.

The ECHR is of the opinion that there is no such domestic remedy available in Estonia. In the cases of *Saarekallas OÜ v. Estonia*⁷² and *Missenjov v. Estonia*⁷³, the Estonian government advanced the argument that the administrative courts are empowered to decide claims against delays in court proceedings and also award compensation, if the violation is established. The ECHR has rejected these claims by stating that the provisions of the Code of Administrative Court Procedure are of too general a nature to satisfy the Convention’s standards. The ECHR has also stated that the government has not produced a single court judgment wherein the administrative court has rendered judgment concerning the associated claim. This leads the author to conclude that in the view of the ECHR the respective national remedy does not exist in Estonia — neither in theory nor in practice.

The Estonian Supreme Court’s Constitutional Review Chamber has in its decree of 30 December 2008 directed the lower-level criminal courts to decide any claims about unreasonable length of proceedings immediately after it is presented to the court. The Supreme Court has proposed three possible remedies: termination of the proceedings, acquittal, and taking the fact of the violation into account during sentencing. The author of this article has shown above why the last of these does not meet the conditions for being an effective remedy. As for the other two, although their suitability as an effective remedy cannot be excluded, they cannot at the same time meet the requirements of universality and foreseeability. The ECHR has not yet analysed this approach to effective remedy proposed by the Supreme Court, which differs substantially from what has been offered in the arguments of the government. If the ECHR approves of this position, then the ‘gapless court protection’ doctrine advanced by the Estonian Supreme Court is given great impetus.

⁷¹ Note 19 above.

⁷² Note 48 above.

⁷³ Note 61 above.