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JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

No. of the case 3-4-1-10-10

Date of judgment 14 December 2010

Composition of court Chairman Märt Rask, members Jüri Ilvest, Henn Jõks, Ott Järvesaar, Harri Salmann

Court Case Review of constitutionality of § 43(3)2) of the Weapons Act in conjunction with § 36(1)6) of the Weapons Act

Basis of proceedings Judgment of the Tartu Administrative Court of 5 October 2010 in administrative matter no. 3-10-1603

Hearing Written proceedings.

DECISION **To declare § 43(3)2) of the Weapons Act in conjunction with § 36(1)6) of the Weapons Act to be unconstitutional and invalid in the part in which it fails to allow, upon revocation of an acquisition permit or a weapons permit, to take into account the personality of the person punished pursuant to the criminal procedure and the offence committed thereby.**

FACTS AND COURSE OF PROCEEDINGS

1. On the basis of the judgment of the Supreme Court of 26 May 2010 no. 3-1-1-22-10, Villu Reiljan was, according to § 293(2)2) and 4) of the Penal Code, convicted of a criminal offence related to breach of the duty to maintain integrity, which involved demanding gratuities on a large-scale basis as an official. A prefect of the South Prefecture revoked the weapons permits issued to V. Reiljan by a decision of 26 May

2010. By the same decision, he was obliged to hand over the weapons permits, the weapons belonging to him (one pistol and three hunting guns) and ammunition to the Prefecture. V. Reiljan handed over the specified permits and items within the term set out in the decision.

2. V. Reiljan filed a complaint to the Tartu Administrative Court for the declaration of the decision of the South Prefecture of 26 May 2010 invalid.

3. The Tartu Administrative Court satisfied the complaint of V. Reiljan by the judgment of 5 October 2010 in the administrative matter no. 3-10-1603 and revoked the decision of the South Prefecture. The Court declared § 43(3)2) of the Weapons Act (WA) in conjunction with § 36(1)6) of the WA to be in conflict with the Constitution and did not apply the provisions in the part in which they fail to allow, upon revocation of a weapons permit, to take into account the personality of the person punished pursuant to the criminal procedure and the circumstances related to the offence attributed to the person. Thereby, the Administrative Court initiated constitutional review proceedings. The request was received by the Supreme Court on 7 October 2010.

JUDGMENT OF TARTU ADMINISTRATIVE COURT

4. In its judgment, the Tartu Administrative Court found that the contested provisions of the Weapons Act are contrary to the principle of proportionality specified in § 11 of the Constitution, as they do not allow those who implement the law to exercise the right of discretion.

5. Revocation of a weapons permit infringes the right to free self-realisation. Referring to paragraph 12 of the judgment of the Supreme Court no. 3-4-1-9-00 of 6 October 2000, the Administrative Court stressed that the Constitution does not refer to the right to acquire or possess weapons, but the right is covered by § 19(1) of the Constitution. Although hunting does not always presuppose carrying and using a weapon, still hunting with a weapon is one of the oldest ways of hunting and it is recognised by the state (on the basis of paragraph 13 of the judgment of the Supreme Court no. 3-4-1-7-01 of 11 October 2001 and paragraph 22 of the judgment of the Supreme Court no. 3-4-1-16-08 of 16 March 2009). Hunting is one of the ways of a person's free self-realisation. The Administrative Court also referred to paragraph 24 of the judgment of the Supreme Court no. 3-4-1-16-08 of 26 March 2009 according to which the ensuring of safety does not always presuppose the use of a weapon, but ensuring safety with a weapon constitutes a permissible way of protecting oneself and one's property. The Administrative Court took the position that it is possible to engage in hunting only when one holds a weapons permit and absence of a weapons permit precludes hunting with a weapon.

6. The Administrative Court agreed with the positions of the complainant that the established restriction in the form of revocation of the weapons permit is appropriate for achieving the objective (to prevent danger to the life or health of persons) and that the measure may be considered necessary.

7. The mandatory revocation of the weapons permit of V. Reiljan is immoderate. The life and health of persons are most important legal rights protected by the necessary elements of criminal offences but, in addition to these, the penal law also protects other legal rights that have minimum or no relation to persons' life and health. The Supreme Court held the same position also in paragraph 34 of the judgment no. 3-4-1-16-08. The fact of having been punished pursuant to the criminal procedure, in itself, does not mean that a person endangers the life and health of other persons as the specified fact does not indicate the circumstances relating to the criminal offence attributed to the person or the personal characteristics of the person who has been punished. There is no reasonable basis to believe that a person whom the state has trusted to own a weapon earlier would, in every case, become untrustworthy and dangerous to other persons' life and health only due to having been punished pursuant to the criminal procedure. It is possible that revocation of a weapons permit without taking into account the personality of the person punished pursuant to the criminal procedure and the circumstances relating to the criminal offence is justified if actual imprisonment has been imposed on the person. As the contested judgment deprives the complainant completely of the possibility to use a weapon for hunting and ensuring safety, this intensively infringes the complainant's right to free self-realisation provided for in § 19(1) of the Constitution. Therefore, the administrative authority whose

competence includes revocation of a weapons permit must have the right and possibility to consider the circumstances relating to the criminal offence and the personal characteristics of the person who has been punished. In the opinion of the court, the mandatory revocation of a weapons permit, arising only from the fact of having been punished pursuant to the criminal procedure, is not a moderate measure applied in order to protect the life and health of other persons.

8. § 43(3)2) of the WA in conjunction with § 36(1)6) of the WA, which is the basis for the decision made by the South Prefecture does not allow, upon revocation of a weapons permit issued in the name of a person punished pursuant to the criminal procedure, the right of discretion to those who implement the law without good reason. The Administrative Court found, stressing the principle of proportionality arising from § 11 of the Constitution, that the regulation which does not allow the right of discretion may have a proportionate result upon application only if the legislator has, upon establishment of the exception, considered the proportionality thereof. In the opinion of the Court, the legislator has not, upon wording the specified provisions of the Weapons Act, thought that persons punished pursuant to the criminal procedure must be distinguished from persons punished pursuant to the misdemeanour procedure and from persons declared to be suspects or the accused, and that persons punished pursuant to the criminal procedure must be allowed to hold an acquisition permit for weapons or a weapons permit in no case regardless of the offence committed or the personal characteristics of the person who has been punished.

OPINIONS OF PARTICIPANTS IN PROCEEDINGS

The Riigikogu

9. In the opinion of the Constitutional Committee of the Riigikogu, § 43(3)2) of the WA in conjunction with § 36(1)6) of the WA is in conflict with § 11 of the Constitution as it fails to allow, upon revocation of a weapons permit, to take into account the personality of the person punished pursuant to the criminal procedure and the circumstances related to the offence attributed to the person.

10. The regulation of the Weapons Act which is under dispute is immoderate. According to this, a prefecture must, regardless of a criminal offence, revoke the weapons permit of a person punished pursuant to the criminal procedure. These provisions of the Weapons Act restrict a person's right to free self-realisation. The objective of the restriction is to protect the rights and freedoms of other persons, as a person punished pursuant to the criminal procedure may, while holding a valid weapons permit, present, by definition, danger to the life and health of other persons. The restriction is very intensive as it deprives the person punished pursuant to the criminal procedure of the possibility to engage in hunting in any case and it does that regardless of the criminal offence the person has committed and without taking into account the person's personal characteristics. The Penal Code contains several necessary elements of criminal offences (e.g. criminal offences against intellectual property), which are not related to the life and health of persons and, in the case of the necessary elements of the criminal offences, the restriction on a person's free self-realisation is not necessarily moderate. The restriction on a person's free self-realisation might be moderate if the person were punished pursuant to the criminal procedure for a criminal offence against life or health.

11. By the judgment no. 3-4-1-16-08 of 26 March 2009, the Supreme Court declared § 43(1)2) of the WA partially invalid. The circumstances of the current case are similar to the circumstances referred to in the decision of the Supreme Court. The difference lies in the fact that, in one situation, the person is in the status of a suspect or an accused and, in the current situation, the person has already been convicted of a criminal offence by a court. Analogously with the previous situation, the restriction on a person's free self-realisation should also be moderate, i.e. upon establishment of the restriction, the type and degree of the criminal offence and the personality of the convicted offender should be taken into account.

12. The **Legal Affairs Committee of the Riigikogu** finds that § 43(3)2) of the WA is not in conflict with § 19 of the Constitution, but the different possibilities to interpret assessment of the moderation of the restriction may also lead to a different result.

13. § 43(3)2) and § 36(1)6) of the WA do not necessarily have to be considered together as the legal situations are different. § 36(1)6) of the WA must be considered in conjunction with § 36(2) of the WA. The

restriction on a person's right to freedom is not absolute because it is related to the serving of a punishment and deletion of data concerning the punishment within the prescribed term.

14. Revocation of an acquisition permit or a weapons permit of a person punished pursuant to the criminal procedure helps prevent danger to the life and health of persons which arises from the possible illegal use of firearms. Persons punished pursuant to the criminal procedure have shown disregard for the legal order and therefore there is an attempt to prevent situations where these persons acquire and possess firearms. A firearm is a source of greater danger and the acts of persons are not necessarily always lawful.

15. The repeal of an earlier version of § 43(1)2) of the WA in the part in which it did not allow a police authority to take into account the personality of the suspect or accused and the circumstances which form the content of the suspicion or accusation upon suspension of the validity of a weapons permit has a different legal regulation than § 43(3)2) of the WA. In the case of the last provision, the state has already given its assessment to the person and his or her act by punishing the person for the commission of a criminal offence pursuant to the criminal procedure.

16. The Legal Affairs Committee directs attention to § 43(3)¹) of the WA according to which a police authority may revoke an acquisition permit or a weapons permit if the holder of the permit is unfit to acquire or possess this category of a weapon due to the lifestyle or behaviour which jeopardises the safety of himself or herself or other persons.

17. Liberation of the conditions for the acquisition of firearms affects further developments in the weapons policy and this needs to be analysed more thoroughly.

V. Reiljan

18. V. Reiljan finds that § 43(3)2) of the WA in conjunction with § 36(1)6) of the WA are in conflict with § 11 of the Constitution in the part in which these provisions do not allow, upon revocation of a weapons permit, to take into account the personality of the person punished pursuant to the criminal procedure and the circumstances related to the offence attributed to the person.

19. These provisions of the Weapons Act restrict the right to hunt with a weapon and to ensure the safety of oneself, persons close to one and one's property, which arise from § 19(1) of the Constitution. V. Reiljan has been a hunter for a long time. On the basis of § 38(1) of the Hunting Act (HA), it is possible to hunt using a weapon only when holding a weapons permit. Revocation of a weapons permit issued to V. Reiljan deprived him of the possibility to hunt with a weapon and thereby the authority of the state intensively restricts his right to free self-realisation. In addition, V. Reiljan finds that the said provisions of the Weapons Act restrict the right to ensure safety with a weapon. Here, V. Reiljan relies on § 28(1)3) of the WA according to which it is allowed to acquire a weapon in order to protect oneself and one's property. V. Reiljan acquired a pistol exactly for the specified purpose. Revocation of a weapons permit issued regarding the pistol deprived V. Reiljan of the possibility to ensure safety with a weapon and thus the authority of the state intensively restricts the right of V. Reiljan to free self-realisation.

20. The said provisions of the Weapons Act do not allow, upon revocation of a weapons permit, those who implement the law to exercise the right of discretion. The legitimate objective of the restrictions on possessing a weapon is, first of all, the need to prevent danger to the life and health of persons. The restriction on the right to free self-realisation contained in the relevant provisions of the Weapons Act can be in conformity with § 11 of the Constitution only if the restriction on the fundamental right can be justified with the need to prevent danger to the life and health of persons.

21. V. Reiljan holds the opinion that the measure is not moderate for the purpose of protecting the life and health of other persons. The fact of having been punished pursuant to the criminal procedure does, in itself, not mean that the person endangers the protected legal rights (i.e. the life and health of other persons) as this, in itself, does not indicate the circumstances related to the criminal offence attributed to the person or the personal characteristics of the person who has been punished. If the personality of the person punished

pursuant to the criminal procedure and the circumstances relating to the criminal offence committed thereby are taken into account, it may become evident that the person does not endanger the protected legal rights. In the opinion of V. Reiljan, it is obvious that the degree of danger posed by criminal offences to the life and health of persons is different. V. Reiljan agrees that refusal to issue and revocation of a weapons permit is proportionate in order to achieve the objective in the case of some criminal offences (e.g. upon conviction for a criminal offence against life or health or for another criminal offence for the commission of which a weapon was used). By its judgment no. 3-4-1-16-08, the Supreme Court declared § 43(1)2) of the WA partially invalid. Similarly with this judgment, the punishment of a person pursuant to the criminal procedure alone does not bring about the danger of misuse of a weapon and there is no reasonable basis to believe that a person whom the state has trusted to own a weapon earlier would become, in every case, untrustworthy and dangerous to other persons' life and health only due to having been punished pursuant to the criminal procedure. V. Reiljan notes that his conviction for the breach of the duty to maintain integrity does not indicate that he would pose any danger to the life or health of other persons.

The South Prefecture

22. The South Prefecture holds the opinion that the provisions of the Weapons Act under dispute are not in conflict with the Constitution.

23. With justification, the legislator has not considered it important to give a person conducting proceedings the right of discretion upon implementation of the provisions under dispute. In the opinion of the South Prefecture, the legislator has used discretion when wording the provision, which is confirmed by the difference of the wording of the provision as compared to the earlier version. In the opinion of the South Prefecture, the fact that a person has not been punished for an offence against life or health or related to the misuse of a weapon does not change the fact that the person has violated the established public order to a significant extent. Violation of the public order to the extent which brings about punishment pursuant to the criminal procedure makes, in every case, a person untrustworthy even if the state has earlier trusted him or her to acquire and own a firearm by the issue of an acquisition permit and a weapons permit. In the opinion of the South Prefecture, after a person has been punished pursuant to the criminal procedure (also for a criminal offence related to the breach of the duty to maintain integrity), the state cannot fully trust the person any more and presume that he or she fully and honestly fulfils the increased requirements related to the handling of weapons.

The Chancellor of Justice

24. According to the opinion of the Chancellor of Justice that § 43(3)2) of the WA in conjunction with § 36(1)6) of the WA is in conflict with § 19(1) of the Constitution in the part in which these provisions do not allow, upon revocation of a weapons permit, in no case to take into account the personality of the person punished pursuant to the criminal procedure and the circumstances related to the offence attributed to the person.

25. Upon assessment of moderation, in the case of importance of the objective of the restriction, the likelihood of damage to the protected legal rights (the life and health of other persons) must also be taken into account. The likelihood depends on the personality of the possible user of the weapon. It is not unequivocally identifiable whether always in the case when a person is punished pursuant to the criminal procedure, the revocation of his or her weapons permit contributes to the protection of other persons' life and health. The likelihood of the danger is greater when the person who committed the criminal offence has already been violent or dangerous in any other manner (e.g. has handled weapons unlawfully or has been connected with organised crime). The Supreme Court has found in paragraph 34 of its judgment no. 3-4-1-16-08 of 26 March 2009 that "the life and health of people are most important legal rights protected by necessary elements of criminal offences, but in addition to these the penal law also protects other legal rights that have minimum or no relation to persons' life and health." At the same time, the Supreme Court has noted in paragraph 24 of its judgment no. 3-4-1-7-01 of 11 October 2001 that "it may be justified never to issue a weapons permit to a person who has been punished for a dangerous intentional crime (e.g. terrorism, murder)." In the current case, it has not been ascertained that V. Reiljan committed the criminal offence by using a weapon or created danger to other persons' life or health.

The Minister of Justice

26. In the opinion of the Minister of Justice, the provisions of the Weapons Act under dispute are in conflict with the Constitution and the regulation contains a disproportionate restriction on free self-realisation.

27. The restriction is not moderate because these provisions of the Weapons Act do not take into account the personal characteristics of the person punished pursuant to the criminal procedure, the degree and nature of the criminal offence committed thereby and the seriousness of the criminal offence. The Act which prescribes the restriction should take these circumstances into account. It is impossible to state that punishment pursuant to the criminal procedure for any criminal offence automatically grants the basis to consider it likely that the person will perform subsequent unlawful acts by using a weapon. A concern that possession of a weapon constitutes a danger as regards performance of new unlawful acts with the use of a weapon may primarily be associated with intentionally committed criminal offences the necessary element of which is the use of violence. Upon assessment of moderation, it is important to compare the Weapons Act and § 51 of the Penal Code. According to the provision of the Penal Code, a court may deprive a convicted offender for up to five years of the right to possess weapons or ammunition if the person is convicted of a criminal offence relating to holding or use of weapons or ammunition. The possibility to impose a supplementary punishment has been provided for as the right of discretion of a court. Differently from the provisions of the Weapons Act, all criminal offences have not been specified.

The Minister of Internal Affairs

28. The Minister of Internal Affairs notes that the restriction established by law is proportionate to the objective being sought and the provisions of the Weapons Act under dispute are not in conflict with the Constitution.

29. Lack of the right of discretion alone does not mean a conflict with the Constitution. The legislator has considered each criminal offence of such degree of severity a deviation from the established rules that it gives a sufficient assessment to the personal characteristics of the person who committed the offence in order to decide that he or she is unfit to possess a firearm. There is no reason to believe that these decisions to establish restrictions have been made lightly and without considering constitutional values. The danger to the life and health of persons does not mean only an attack with a firearm against the life and health of a person but may also mean the falling of firearms into the hands of persons who have no right to possess weapons. It also includes danger arising from the careless handling and use of firearms. The degree of danger posed by criminal offences may be different and the persons who have committed the criminal offences therefore also have different personal characteristics and the degree of danger posed by these persons is also different, but they have one common characteristic – a criminal offence is an especially reprehensible act in the society and commission of such act indicates the person's attitude towards the legal order and/or disability to observe the established rules. A person who has been granted the right to possess and own firearms must be able to comply with the rules prescribed therefor.

30. As regards the moderation of the measure, the Minister of Internal Affairs finds that the effect of the restriction cannot be considered interference with such intensity that it would outweigh the objective to protect the life and health of persons from the intentional or careless misuse of firearms. The restriction on the owning of firearms does not allow the person to engage in areas related with firearms or use firearms to ensure his or her safety, but, at the same time, the right to use firearms is not a prerequisite for a wide range of ways of self-realisation.

31. In the opinion of the Minister of Internal Affairs, providing the right of discretion does not necessarily ensure the equal treatment of persons and the uniform application of the law. This would mean that a person may acquire a weapons permit even if the police has considered it unjustified in his or her case and the person has obtained the right through a court action by appealing on procedural errors. This increases the danger that weapons fall into the hands of persons who cannot ensure that their handling does not constitute a danger for the society. The Minister of Internal Affairs does not see the need to loosen the Estonian weapons policy and to consider the issue of weapons permits to criminal offenders. We must also consider

the effect of declaring the specified provisions of the Weapons Act to be in conflict with the Constitution on earlier decisions to refuse to issue weapons permits and to revoke weapons permits.

PROVISIONS WHICH HAVE BEEN DECLARED UNCONSTITUTIONAL IN TARTU ADMINISTRATIVE COURT

32. § 43(3)2) of the Weapons Act (RT I 2001, 65, 377; 2010, 43, 256) provides for the following:

"§ 43. Suspension and revocation of acquisition permit or weapons permit

[---]

(3) The police prefecture which issued an acquisition permit or a weapons permit shall revoke the permit if:

[---]

2) the holder of the permit no longer meets the requirements established by this Act or upon existence of circumstances specified in clauses 36 (1) 1)-7), 9) or 10) or in subsection 40 (1) of this Act;"

33. § 36(1)6) of the Weapons Act provides for the following:

"§ 36. Circumstances precluding grant of acquisition permit or weapons permit to natural person

(1) An acquisition permit or a weapons permit shall not be granted to a natural person who:

[---]

6) has been punished under criminal procedure;"

OPINION OF CHAMBER

34. First, the Chamber will find whether § 43(3)2) of the WA in conjunction with § 36(1)6) of the WA are relevant provisions (I) and whether they restrict the right to free self-realisation (II). Thereafter, the Chamber will assess whether these provisions of the Weapons Act are formally in conformity with the Constitution and disproportionately interfere with the right to free self-realisation (III). Finally, the Chamber will explain the consequences of entry into force of the judgment (IV).

I

35. According to § 14(2) of the Constitutional Review Court Procedure Act (CRCPA), a provision the constitutionality of which is assessed by the Supreme Court must be relevant upon resolution of the main dispute. According to the practice of the Supreme Court, the provision decisive for the outcome of the case is also relevant (see e.g. judgment of the Supreme Court *en banc* of 22 December 2000 in case no. 3-4-1-10-00, paragraph 10). A provision is of decisive importance when in the case of unconstitutionality of the regulation a court should render a judgment different from that in the case of constitutionality of the regulation (see e.g. judgment of the Supreme Court *en banc* of 28 October 2002 in case no. 3-4-1-5-02, paragraph 15).

36. By its judgment no. 3-1-1-22-10 of 26 May 2010, the Supreme Court declared that V. Reiljan is, according to § 293(2)2) and 4) of the Penal Code, guilty of commission of a criminal offence related to breach of the duty to maintain integrity, which involved demanding gratuities on a large-scale basis as an official. As an alternative, § 43(3)2) of the WA refers to § 36(1)6) of the same Act, which was the basis for revocation of the weapons permit of V. Reiljan in the South Prefecture. These provisions in their conjunction do not prescribe alternative legal consequences. If § 43(3)2) and § 36(1)6) of the WA were in conformity with the Constitution, the court should have dismissed the complaint, i.e. rendered a judgment different from that in the case of the unconstitutionality of the clauses. Thus, these provisions of the Weapons Act in their conjunction were, upon adjudication of the case, of decisive importance or relevant, as these regulations obliged the South Prefecture to revoke the weapons permit of V. Reiljan.

37. The Chamber notes that review of the present constitutional review matter is within the competence of the Supreme Court regardless of the fact that the relevant provisions are related to the EU law. Namely, § 43(3)2) of the WA in conjunction with § 36(1)6) of the WA has been established partially in order to transpose Council Directive 91/477/EC of 18 June 1991 on control of the acquisition and possession of

weapons, which is amended by Article 5 of Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008 (Directive 91/477).

Article 5 of Directive 91/477 states that Member States shall allow the acquisition and possession of firearms only by persons who satisfy the conditions listed in this provision. Inter alia, Article 5(b) provides for a condition that there must be a low probability that these persons pose a danger to themselves, to public order or to public safety, whereas previous conviction for an intentional violent criminal offence is deemed to indicate such danger. Article 5 of Directive 91/477 provides that Member States may withdraw authorization for possession of the firearm if any of the conditions for the issue of the authorization is no longer satisfied. Article 3 of Directive 91/477 provides that Member States may adopt in their legislation provisions which are more stringent than those provided for in this Directive, subject to the rights conferred on residents of the Member States by Article 12(2). Article 12(2) of Directive 91/477 does not concern the circumstances of the present court case.

38. As a rule, the Supreme Court is not competent to review the constitutionality of a provision of an Estonian act of general application relating to the EU law. Among other exceptions, the Supreme Court has this competence in a situation where the EU law gives the Member States the right of discretion upon the transposition and implementation of the EU law, in the exercise of which the Member States are bound by their Constitutions and the principles arising from the Constitutions. When the EU law sets an objective to the Member States, but leaves the measures for the achievement thereof to be decided by the Member States, the measures chosen must conform both to the EU law and the Estonian Constitution (see the ruling of the Constitutional Review Chamber of the Supreme Court of 26 June 2008 in case no. 3-4-1-5-08, paragraphs 30 and 36).

In the opinion of the Chamber, Directive 91/477 gives the Member States the right of discretion upon the transposition and implementation of the Directive, in the exercise of which the Republic of Estonia is bound by its Constitution and the principles arising from the Constitution. Revocation of a weapons permit or an acquisition permit must be in conformity with the EU law and comply with the Constitution of Estonia. Although Articles 5 and 3 of Directive 91/477 do not preclude the possibility to revoke a weapons permit of a person punished pursuant to the criminal procedure in the manner set out in the relevant provisions, the Chamber will explain below why this is not in conformity with the Constitution of Estonia.

39. The Chamber considers it necessary to add that the Administrative Court which resolved the main dispute should have verified the connection of § 43(3)2) and § 36(1)6) of the WA with the EU law and the compliance of these provisions with the Directive specified in the previous paragraph (see the ruling referred to above in case no. 3-4-1-5-08, paragraphs 31 and 42). Taking account of the freedom of decision given to a Member State by the Directive, it is obvious that the relevant provisions are not in conflict with the Directive. Therefore, it is not reasonable for the Supreme Court to refuse review of the request of the Administrative Court only for the reason that the Court which resolved the main dispute did not verify the connection of the provisions with the EU law or their compliance with Directive 91/477.

II

40. The Supreme Court has consistently taken the position that the Constitution does not state that the right to acquire or own a weapon is a fundamental right of every person, but a person's right to acquire and own a weapon may fall under the right to free self-realisation specified in § 19(1) of the Constitution or the general fundamental right to freedom (see judgment of the Constitutional Review Chamber of the Supreme Court of 6 October 2000 in case no. 3-4-1-9-00, paragraph 12, judgment of the Constitutional Review Chamber of the Supreme Court of 11 October 2001 in case no. 3-4-1-7-01, paragraph 13, judgment of the Constitutional Review Chamber of the Supreme Court of 26 March 2009 in case no. 3-4-1-16-08, paragraph 22). The Supreme Court *en banc* has found that hunting is also a way of a person's free self-realisation. In the same decision the Supreme Court has found that although hunting does not always presuppose carrying and using a weapon, still hunting with a weapon is one of the oldest ways of hunting and it is recognised by the state (see judgment of the Supreme Court *en banc* of 11 October 2001 in case no. 3-4-1-7-01, paragraph 13).

41. It is possible to hunt with a weapon only if one holds a weapons permit. § 38(1) of the HA provides that if the hunting method requires the use of a hunting weapon, a hunting permit for such hunting method shall not be issued to a person who does not hold a weapons permit. § 38(2) of the HA provides that a weapons permit need be carried at a hunt when hunting with a hunting weapon.

42. Hunting is permitted only with certain weapons specified by law. § 39(1)1) and 2) of the HA provide that a list of permitted hunting equipment includes firearms with a smoothbore barrel or rifled barrel or combination rifle-shotguns, except fully automatic firearms, and semi-automatic firearms with a magazine capable of holding up to two cartridges. Arising from the first sentence of § 29(3) of the WA, a hunting gun is a gun with a smoothbore or rifled barrel or a combination gun intended mainly for hunting, which has safety catches which can be easily switched.

43. In § 29(3) of the WA, the legislator has considered it necessary to differentiate guns used as hunting weapons from revolvers and pistols the use of which for hunting is prohibited. The right to free self-realisation of V. Reiljan according to which he has the right to hunt with a weapon, can only be restricted by the revocation of a weapons permit for three hunting guns. Revocation of a weapons permit for a pistol cannot restrict the right to hunt with a weapon which is included in the right to free self-realisation.

44. Ensuring of safety, similarly with hunting, does not always presuppose the use of a weapon, but the ensuring of safety with the aim of protecting oneself and one's property is a permissible way of free self-realisation within the sphere of protection of the right to free self-realisation established in § 19(1) of the Constitution (see judgment of the Constitutional Review Chamber of the Supreme Court of 26 March 2009 in case no. 3-4-1-16-08, clause 24). Arising from § 28(1)4) of the WA, a natural person may acquire, own or possess a weapon for ensuring safety, i.e. for protecting himself or herself and his or her property. V. Reiljan has acquired a pistol in order to ensure safety. Use of hunting guns in order to ensure safety is also not prohibited. Therefore, the right of V. Reiljan to free self-realisation according to which he has the right to ensure safety with a weapon, can be restricted by the revocation of the weapons permit for a pistol and the weapons permit for three hunting guns.

45. After the revocation of the weapons permits on the basis of the relevant provisions, V. Reiljan had to hand over the weapons to a police prefecture and he no longer had the legal freedom to go hunting with a weapon and ensure safety with a weapon. Therefore, these provisions restrict the right of V. Reiljan to free self-realisation which is provided for in § 19(1) of the Constitution.

III

46. Interference of the state authority with the complainant's right provided for in § 19(1) of the Constitution does not, in itself, constitute violation of the right. Legislation restricting fundamental rights does not violate fundamental rights if it is constitutional, i.e. in conformity with the Constitution both formally and in the substantial sense (judgment of the Constitutional Review Chamber of the Supreme Court of 13 June 2005 in case no. 3-4-1-5-05, paragraph 7).

47. Formal constitutionality means that legislation of general application, restricting fundamental rights, must be in conformity with the requirements of competence, procedure and form, as well as with the principles of determinateness and 'subject to reservation by law' (judgment of the Constitutional Review Chamber of the Supreme Court of 13 June 2005 in case no. 3-4-1-5-05, paragraph 8). In the opinion of the Chamber, the relevant regulation complies with the requirements of formal constitutionality.

48. Substantial conformity with the Constitution means that a provision of law which infringes a fundamental right has been established in order to achieve an objective permitted by the Constitution and is proportionate for achieving the objective.

49. The right to free self-realisation may be restricted by law or pursuant to law for the reason which is not in conflict with the Constitution. The Supreme Court has found previously that the legitimate objective of

suspension of a weapons permit may be the protection of the life and health of persons (judgment of the Constitutional Review Chamber of the Supreme Court of 26 March 2009 in case no. 3-4-1-16-08, paragraph 33). Restrictions on the possession of weapons may be established also arising from the need to ensure national security and public order, and there may exist other circumstances justifying these restrictions (judgment of the Supreme Court *en banc* of 25 February 2004 in case no. 3-3-1-60-03, paragraph 21). The Chamber takes the position that revocation of a weapons permit of a person punished pursuant to the criminal procedure is also permitted in order to protect the life and health of persons and the national security and public order. The specified objectives are not in conflict with the Constitution. Revocation of a weapons permit may also be justified by other circumstances.

50. Although the legislator has imposed the restriction bearing in mind a legitimate objective, an infringement of a fundamental right can be regarded as formally legitimate only if the principle of proportionality arising from § 11 of the Constitution has been observed (see e.g. judgment of the Constitutional Review Chamber of the Supreme Court of 5 March 2001 in case no. 3-4-1-2-01, paragraph 16).

51. Observing the principle of proportionality means that an infringement is appropriate, necessary and moderate for achieving the objective. A measure that fosters the achievement of an objective is appropriate. For the purposes of appropriateness, a measure, which in no way fosters the achievement of an objective, is indisputably disproportionate. A measure is necessary if it is not possible to achieve an objective by some other measure which is less burdensome on a person but which is at least as effective as the former. In order to determine the moderation of a measure, the extent and intensity of interference with a fundamental right on the one hand and the importance of the objective on the other hand have to be weighed (see e.g. judgment of the Constitutional Review Chamber of the Supreme Court of 6 March 2002 in case no. 3-4-1-1-02, paragraph 15).

52. Revocation of a weapons permit of a person who has been convicted for a criminal offence is a suitable measure because it can help achieve protection of the life and health of other persons and ensuring of national security and public order. If a person has committed an offence punished pursuant to the criminal procedure, then he or she may be dangerous and could use a weapon for the commission of new criminal offences. This, in turn, may constitute a danger to the life and health of persons, national security and public order. According to § 44 of the WA, revocation of an acquisition permit or a weapons permit means that the person is required to hand over the weapons permit or acquisition permit and the weapon to a police authority and, therefore, he or she cannot pose a danger to the specified legal rights by using the weapon.

53. The restriction must also be necessary to achieve the objective. In the opinion of the Chamber, suspension of a weapons permit has no other equivalent alternative which would ensure that a person who has committed a criminal offence would not endanger the life and health of other persons, national security and public order with a weapon. As a more lenient measure than revocation of a weapons permit or an acquisition permit, the Chamber also considered the suspension of a permit until the deletion of information concerning the punishment of the person punished for a criminal offence pursuant to the Punishment Register Act. The Chamber still finds that suspension of a weapons permit or an acquisition permit is not as effective for achieving the objectives as revocation of a permit. Upon suspension of a permit, the permit should be automatically returned after the deletion of the data concerning the punishment. In the case of a person who has been punished pursuant to the criminal procedure earlier, it is necessary to verify again after the deletion of the data concerning the punishment whether the person is fit to handle a weapon.

54. The Chamber finds that revocation of a weapons permit of a person who has been punished for a criminal offence is not moderate.

55. Restrictions must not prejudice the interests or rights, protected by law, to greater extent than justifiable by the legitimate objective of the regulation (see judgment of the Constitutional Review Chamber of the Supreme Court of 17 March 1999 in case no. 3-4-1-1-99, paragraph 13). In order to decide on the moderation, the extent and intensity of the restriction on the free self-realisation on the one hand and the

objective to protect the life and health of other persons, national security and public order on the other hand have to be weighed.

56. The restriction caused by the aforementioned relevant regulations is very intensive. Revocation of an acquisition permit and a weapons permit restricts the free self-realisation of each person punished for a criminal offence in the manner which completely deprives the person of the possibility to use a weapon for hunting and for ensuring safety until the possible receipt of a new permit. Receipt of a new permit after the deletion of data concerning the punishment of a person from the punishment register presumes application for the permit which involves expenditure of time and money for the person.

57. Differently from a suspect or an accused, an assessment has already been given to an offence committed by a person punished pursuant to the criminal procedure and to his or her personality. The Chamber agrees with the South Prefecture that a person who has committed a criminal offence has violated the established public order to a significant extent. The Chamber also agrees with the Minister of Internal Affairs that a criminal offence is an especially reprehensible act in the society and commission of such act indicates the person's attitude towards the legal order or disability to observe the established rules. A conviction of a court has entered into force in order to confirm it.

58. Falling of weapons into the hands of such persons who are not able or do not wish to handle the weapons in compliance with law cause a potential danger to the life and health of other persons, national security and public order. At the same time, the Chamber agrees with the position of the Tartu Administrative Court that the fact that a person has been punished pursuant to the criminal procedure, in itself, is not a good reason to absolutely preclude the right of discretion in respect of these persons whom the state has trusted to own a weapon before. Conviction for a criminal offence does not mean that a person is thereafter always dangerous when using a weapon. Therefore, revocation of a weapons permit is not justified without taking into account the personality of the person who committed the criminal offence and the circumstances relating to the criminal offence.

59. The Chamber finds that the regulation of the Weapons Act precluding the right of discretion does not take into account the possibility that every person punished pursuant to the criminal procedure does not necessarily attack the protected legal rights with a weapon. In the opinion of the Chamber, the likelihood that the protected legal rights are attacked with a weapon cannot be that significant in the case of any criminal offence and any person that the weapons permit of the person has to be revoked without discretion.

60. The Supreme Court has found earlier that the legislator must enable those who implement the law to take into account the personality of those who apply for a weapons permit and the circumstances of the committed criminal offence (judgment of the Constitutional Review Chamber of the Supreme Court of 6 October 2000 in case no. 3-4-1-9-00, paragraph 17). The Chamber finds that, upon revocation of a weapons permit, the personality of the person punished pursuant to the criminal procedure and the circumstances relating to the criminal offence committed thereby must be taken into account. The Chamber also wishes to stress that revocation of the weapons permits of persons punished for the commission of some intentionally committed criminal offences (e.g. terrorism, criminal offences against persons or criminal offences for the commission of which a weapon was used) without allowing the right of discretion may be considered justified.

61. In the court case which was the basis for the constitutional review proceedings, the Tartu Administrative Court found that, upon taking into account the personality of the person punished pursuant to the criminal procedure and the circumstances relating to the criminal offence, revocation of the weapons permit in order to protect the life and health of other persons was not a proportionate measure. In this criminal case, the person was convicted of a criminal offence related to the breach of the duty to maintain integrity. It was not a criminal offence against a person. Upon commission of the offence, the person did not use a weapon.

62. Taking account of the aforementioned, the Chamber finds that revocation of an acquisition permit or a weapons permit of a person who has been punished pursuant to the criminal procedure by preclusion of the

right of discretion is not a moderate measure in order to protect the life and health of other persons, national security and public order as the measure does not allow to take into account the fact that the person who has been punished pursuant to the criminal procedure does not necessarily violate the legal rights protected by revocation of the permit.

63. On the basis of the aforementioned, the Chamber declares § 43(3)2) of the WA in conjunction with § 36(1)6) of the WA to be in conflict with § 19(1) of the Constitution and invalid in the part in which it fails to allow to take into account the personality of the person punished pursuant to the criminal procedure and the offence committed thereby upon revocation of an acquisition permit or a weapons permit.

64. The Chamber adds that, on the one hand, protection of the life and health of persons, public order or national security and, on the other hand, protection of the general fundamental right to freedom of persons punished pursuant to the criminal procedure, can be ensured the best if those who apply the Weapons Act have the possibility to take into account the personality of the person punished pursuant to the criminal procedure, the circumstances related to the committed criminal offence and other significant circumstances and legitimate interests upon revocation of a weapons permit or an acquisition permit. The area of discretion prescribed upon restriction of the general fundamental right to freedom prevents the person from becoming the object of state authority and helps ensure human dignity.

65. The Chamber notes that the above said does not mean that the legislator should not establish such regulations where the issuer of an acquisition permit or a weapons permit has no right of discretion. A legal instrument which does not allow the right of discretion may also conform to the Constitution. After consideration, the legislator may come to a justified conclusion that the fundamental rights and freedoms of persons are guaranteed even when the person conducting proceedings has no right of discretion (see judgment of the Supreme Court *en banc* of 27 June 2005 in case no. 3-4-1-2-05, paragraph 60). When exercising the right of discretion, the legislator may define in the Weapons Act the circumstances upon occurrence of which a weapons permit or an acquisition permit of a person punished pursuant to the criminal procedure is subject to mandatory revocation.

IV

66. Entry into force of this judgment does not bring about a situation where the decisions of police authorities on the revocation of the acquisition permits and weapons permits of persons punished pursuant to the criminal procedure become automatically invalid. A person who has been punished pursuant to the criminal procedure and whose weapons permit has been revoked has the possibility to apply for the repeal of the administrative act on the basis of the provisions of the Administrative Procedure Act regarding the repeal of administrative acts and resumption of proceedings.

67. The Chamber explains that revocation of a weapons permit or an acquisition permit of a person punished pursuant to the criminal procedure by a police authority must, until the legislator has not amended the regulation of the Weapons Act, be based on this judgment and § 43(3¹) of the WA according to which a permit may be revoked if the holder of the permit is unfit to acquire or own this category of a weapon due to his or her lifestyle or behaviour which jeopardises the safety of himself or herself or other persons.

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