Constitutional judgment 3-3-1-41-09

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-3-1-41-09
Date of decision	20 November 2009
Composition of court	Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Indrek Koolmeister, Lea Kivi, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Priit Pikamäe, Jüri Põld, Harri Salmann and Tambet Tampuu.
Court Case	Action of Annela Külm applying for the declaration of unlawfulness of the Lõuna Police Prefecture directive no. 462p of 15 July 2008, and for the ordering of payment of compensation.
Contested judgment	The Tartu Administrative Court judgment of 14 November 2008 and the Tartu Circuit Court judgment of 5 March 2009 in administrative case no. 3-08-1604.
Appellant and type of appeal	Appeal in cassation of Annela Külm.
Hearing	Written proceeding.

DECISION

1. To declare unconstitutional and repeal § 49(3) and (4) of the Police Service Act to the extent that they provide that a woman born in 1948 shall be released from police service at younger age than a man born in the same year.

2. To allow the appeal in cassation of Annela Külm and to annul the judgment of the Tartu Administrative Court of 14 November 2008 and the judgment of the Tartu Circuit Court of 5 March 2009 in administrative case no. 3-08-1604.

3. To render a new judgment satisfying the action of Annela Külm. To declare the Lõuna Police Prefecture directive no. 462p of 15 July 2008 unlawful, and to order that the Lõuna Police Prefecture pay to Annela Külm her official six moths' salary.

4. To return the security.

FACTS AND COURSE OF PROCEEDING

1. Annela Külm (born 18 January 1948) was employed as senior police inspector (3rd official rank) of the Lõuna Police Prefecture. By clause 1 of the Lõuna Police Prefecture directive no. 462p of 15 July 2008 A. Külm was released from police service as of 19 July 2008 on the basis of § 49 of the Police Service Act (hereinafter "the PolSA") due to reaching of specified age limit.

In reply to the application of A. Külm of 19 June 2008 concerning her wish to continue her service in the police the national police commissioner advised her in his letter of 16 July 2008 that the composition of police officers in the Lõuna Police Prefecture exceeded the composition prescribed in the resources model by 24 positions. There were vacant positions in other police authorities, primarily in the Põhja and Ida Police Prefectures. The national police commissioner advised A. Külm to address the referred police prefectures.

2. A. Külm filed an action with the Tartu Administrative Court, applying for the declaration of illegality of the directive of 15 July 2008 and – as she waived reinstatement – for the ordering of payment of the compensation established in § 135(2) of the Public Service Act (hereinafter "the PSA").

In the action filed with the administrative court A. Külm argued that § 49 of the PolSA was in conflict with § 12 of the Constitution because it allowed, without a reasonable justification, to treat a person who has reached specified age limit in a discriminatory manner in comparison to a person who has not reached the specified age limit, and – depending on the arbitrariness of the employer ¬ also in comparison to another person who has reached the specified age limit. Proceeding from the Supreme Court judgment in case no. 3-4-1-14-07, § 49 of the PolSA should not have been applied due to the conflict thereof with § 12 of the Constitution.

On 3 November 2008 A. Külm submitted an additional opinion to the administrative court, where she argued the following:

1) In its reply of 16 July 2008 to the letter of A. Külm where she expressed her clear wish to continue to be in service, the Police Board does not consider the age of A. Külm as an impediment to her continuing to be in the police service, but argues that A. Külm must be released because there are too many officers in the Lõuna Police Prefecture, and proposes to A. Külm to enter into service in some other prefecture. Consequently, proceeding from the reply of 16 July 2008, A. Külm could continue to be in the police service irrespective of her age. Nevertheless, due to the desire to decrease the number of officers in the Lõuna Police Prefecture A. Külm was released from police service on the pretext of her age;

2) when arguing that A. Külm was to be released from service on the basis of § 7(2) of the State Pension Insurance Act (hereinafter “the SPIA”), this amounts to discrimination on grounds of sex and age: the women born in 1984 must retire from the police service at the age of 60 years and 6 months the latest, whereas § 7(1) of the same Act is applicable to men and they may continue to be in service until they attain the age of 63 years;

3) As A. Külm had expressed her wish to continue to be in service, she ought to have been treated equally with men and given a possibility to continue to be in service on the basis of § 7(1) of the SPIA. A. Külm has been discriminated on grounds of sex and age. There is no reason whatsoever why in the age group of 60.5 to 63 years a male officer should be preferred to a female officer of the same age group. The described unequal treatment is in conflict with § 12 of the Constitution and with the opinions set out in the Supreme Court judgment in case no. 3-4-1-14-07.

3. The Tartu Administrative Court dismissed the action. According to the reasoning of the judgment § 49 of the PolSA is not in conflict with the Constitution and does not discriminate the persons who have reached specified age limit because it treats equally the police officers who have attained the pensionable age established in § 7 of the SPIA. Neither can the fact that female and male police officers are released from service at different ages, upon attainment of pensionable age, be deemed a violation of the principle of equal treatment. The gradual implementation of equal treatment for men and women in matters of pensionable age is not in conflict with the European Union legislation on social insurance schemes (Directive 79/7/EEC; 2006/54/EC). The complainant is to be compared to her female colleagues who are in similar situation, and not to her male colleagues. The letter of the Police Board of 16 June 2008 is not administrative legislation creating legal consequences and the court shall disregard it.

4. In her appeal A. Külm applied for the annulment of the administrative court judgment and for rendering a new judgment, declaring the contested directive unlawful and ordering the payment of the compensation established in § 135(2) of the PSA to her.

5. The Tartu Circuit Court dismissed the appeal and upheld the administrative court judgment. The reasoning of the circuit court was the following:

1) § 49(3) of the PolSA in conjunction with § 7(2) of the SPIA give rise to the imperative prohibition to continue service relationship with the appellant. The appellant was born on 18 January 1948. Pursuant to § 7(2) of the SPIA she attained her pensionable age and the age limit for being employed as a police officer at the age of 60 years and 6 months, i.e. on 18 July 2008. That is why the action can not be satisfied on the ground that in its letter of 16 July 2008 the Police Board had considered it possible for the appellant to continue to be in service, although in the Põhja Police Prefecture instead of the Lõuna Police Prefecture. Even when an administrative agency has attempted, upon issuing administrative legislation, to use discretion not arising from law, the court can not annul the administrative legislation the issuance of which imperatively arises from the law;

2) the complainant argued that of § 49(3) of the PolSA was in conflict with the principle of equal treatment established in § 12 of the Constitution. In the action filed with the administrative court the complainant argued that she was being treated differently from those persons who have not reached the specified age limit. In the appeal she argues that men and women are treated differently by § 49(3) of the PolSA, because the final age limit for being employed in the police is made dependent upon the attainment of pensionable age, which is different for men and for women. The circuit court formed its on opinion on whether the case under discussion amounts to an infringement of the general right to equality (sub-paragraphs 3 to 5 below), and, thereafter, on whether the infringement is justified (sub-paragraphs 6 to 9 below).

3) different treatment on grounds of age amounts to an infringement of the general right to equality (the first sentence of § 12(1) of the Constitution). On the other hand, different treatment on grounds of sex amounts to an infringement of a specific prohibition to discriminate, established in the second sentence of § 12(1) of the

Constitution. The spheres of protection of general right to equality and of prohibition to discriminate are different, yet in both cases it is first necessary to ascertain the comparable groups of persons and thereafter to find out whether these groups of persons are treated differently;

4) the observation of the administrative court that in the case under discussion the Police Service Act treats equally all police officers who have attained pensionable age, is correct but irrelevant. The complainant does not argue that the police officers who have attained pensionable age are treated differently, instead she argues the unequal treatment of the police officers who have attained pensionable age in comparison to younger police officers, and also that men and women reach the final age limit at different ages. The circuit court is of the opinion that the two groups the police officers who have attained pensionable age and the police officers who have not yet attained that age – are not incomparable. The question whether different treatment of these groups on grounds of age is justified is a matter of justifying the infringement and not a matter precluding comparison and infringement. As § 49(3) of the PolSA allows younger police officers, unlike the police officers who have attained pensionable age, to continue their service relationship, § 49(3) of the PolSA prescribes for legal inequality. Consequently, in the case under discussion the general right to equality is infringed;

5) the circuit court does not agree with the opinion of the administrative court that the complainant is to be compared to her female colleagues who are in a situation similar to hers, and not to her male colleagues. The complainant has not alleged the different treatment of female colleagues who have attained pensionable age, instead she argues the different treatment of her as a woman in comparison to her male colleagues. The mere fact that men and women have different pensionable ages does not render the human groups of male and female police officers incomparable. The situation also amounts to an infringement of prohibition to discriminate on grounds of sex. The law treats differently male and female police officers who are about to reach the specified age limit. Different treatment consists in the fact that § 49(3) of the PolSA in conjunction with § 7(1) and (2) of the SPIA allows the former to continue to be in the police service until the age of 63, but not the latter, including the complainant. The different exceptional specified age limit creates legal inequality;

6) the infringement is justified by the nature of the functions of the police and the obligations of a police officer, which require greater mental and physical abilities from police officers. Discrimination on this basis is not arbitrary. After a police officer has reached the preliminary specified age limit (55 years of age), he or she belongs to a risk group, although in a concrete case he or she may still meet the professional requirements for police officers. It is general knowledge that people's health deteriorates with age and their physical strength and stress tolerance diminish. Good health, fitness and stress tolerance are, indisputably, essential in the police service (see also e.g. § 8(2) of the PolSA). Bearing in mind that the state can not keep creating new offices for new police officers in addition to those held by ageing police officers, it is understandable that § 49 of the PolSA attempts to vacate offices in police service to younger persons. The respondent and the administrative court point out correctly that the restrictions relating to age are alleviated by various additional guarantees provided to police officers. That is why the circuit court considers discrimination of grounds of age in the police service to be proportional and does not find any unlawful infringement of the fundamental right to equality;

7) the principle of gender equality, established in § 12(2) of the Constitution, is not subject to be restricted by law. Consequently, unequal treatment of men and women can only be justified by other fundamental rights or other constitutional values (cf. the Supreme Court *en banc*judgments of 19 April 2005 in case no. 3-4-1-1-05, paragraph 24; and of 17 March 2003 in case no. 3-1-3-10-02, paragraph 28). It was underlined in the European Human Rights Court judgment of 22 February 1994 in Burghartz v. Switzerland (paragraph 27) that there must exist "very weighty reasons" for difference of treatment on the ground of sex. In case of infringement of the prohibition to discriminate the legislator does not have as wide margin of appreciation as in case of infringement of the general fundamental right to equality. In case of infringement of prohibition to discriminate the judicial review must be more intense and can not be confined to the review of manifest arbitrariness;

8) first of all it has to be examined whether the different pensionable age serves as a justification for releasing women before men from the police service. In this context it is not necessary nor possible to review the constitutionality of § 7(2) of the SPIA or the conformity thereof with the European Union law. The contested infringement does not arise from § 7(2) of the SPIA, instead it arises from § 49(3) of the PolSA;

9) reliance on pensionable age in itself is a suitable measure for the achievement of the aim of § 49 of the PolSA, i.e. continual rejuvenation of the police staff. Nevertheless, the legislator did not inevitably have to make the specified age limit dependent on pensionable age. A procedure would also be possible under which the same specified age limit would apply to both female and male police officers. This could coincide with the pensionable age of either women or men or be established independently therefrom. At the same time reliance on pensionable age is reasonable and justified. This guarantees an optimal compromise between the two opposing interests – the interest of a police officer to continue to be in service and the interest of the state to recruit younger persons to the police service. Upon attainment of pensionable age the balance is significantly tipped in favour of the public interest, because a person is guaranteed subsistence in the form of old age pension. An equal age limit that both women and men would reach upon attaining pensionable age for men could not have protected the public interest as broadly as it is protected now. Public interest in the efficient functioning of the police constitutes a constitutional value of sufficient weight, capable of justifying different treatment of men and women to a restricted extent. That is why in the case under discussion the circuit could does not find an unlawful infringement of the prohibition to discriminate.

6. In her appeal in cassation A. Külm applies for the annulment of the judgments of the administrative court and the circuit court, and for rendering a new judgment declaring the contested directive unlawful and reinstating her to the service, and also for ordering of payment for the period of forced absence. Alternatively, should the Supreme Court consider her reinstatement impossible, the appellant in cassation applies for ordering the payment of the compensation established in § 135(2) of the PSA.

7. The Administrative Law Chamber of the Supreme Court was of the opinion that the adjudication of this appeal required the adjudication of a matter subject to be reviewed on the basis of the Constitutional Review Court Procedure Act, and referred the case under § 70(1^1) of the Code of Administrative Court Procedure to the Supreme Court *en banc* for hearing. The Chamber is of the opinion that it should be ascertained by way of constitutional review court procedure whether § 49(3) of the PolSA, to the extent that is treats differently women and men born in 1948, is in conformity with the second sentence of § 12(1) of the Constitution.

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING

8. The appellant in cassation argues the following:

1) in the appeal A. Külm explained that § 6(2)7) of the Gender Equality Act (hereinafter "the GEA") establishes that the activities of an employer shall also be deemed to be discriminating if the employer terminates an employment relationship or promotes the termination thereof due to reasons connected with gender. For the purposes of § 3(2) of the GEA "employee" also means a public servant within the meaning of the Public Service Act. The circuit court has failed to analyse the allegations of violation of the requirements of the Gender Equality Act;

2) service relationship with the appellant in cassation was terminated due to her gender. The circuit court admits this. There is no dispute about the fact that had A. Külm been a man she could have continued to be in service until she attained 63 years of age. As she is a women, she was released from service upon attainment of 60.5 years of age. Neither is there a dispute about the fact that A. Külm had informed the Police Board in good time that she wanted to continue to be in the police service;

3) it is common knowledge that there is no other analogous regulatory framework in Estonian legal order that would allow to release from employment or service representatives of other professions so that women

are released earlier than men. On the contrary, workers and employees are treated equally irrespective of their gender. For example, pursuant to § 48 of the Courts Act the maximum age of a judge is 67 years;

4) the circuit court has pointed out that the principle of gender equality, established in § 12(2) of the Constitution, is not subject to be restricted by law and that only other fundamental rights and constitutional values can justify unequal treatment. The circuit court refers to the Supreme Court judgments in case no. 3-4-1-1-05 and no. 3-1-3-10-02 as well as to the European Human Rights Court judgment of 22 February 1004 in Burghartz v. Switzerland;

5) the reasoning of the circuit court that it is in regard to police officers that the public interest in replacing the older members of the police staff is so weighty that it justifies the earlier release of female officers, is not justified or convincing. At the same time the circuit court had failed to explain why it was of the opinion that the police would be significantly less efficient if men and women were released at equal age. There is not and can not be such a justification, at least not to an extent that would allow exceptions upon application of § 12(1) of the Constitution. The explanatory letters to the Police Service Act and the State Pension Insurance Act do not show the clear will of the legislator to treat police officials upon release from service unequally on the ground of gender. Sooner, the legislator just did not foresee that application of these two Acts in their conjunction would create gender equality;

6) the opinion expressed in the judgment that § 49 of the PolSA was to be applied taking into account § 7(2) of the SPIA, is disputable. In a situation where A. Külm has expressed her wish to continue to be in service, she ought to have been given a possibility to remain in service on the basis of § 7(1) of the SPIA.

9. In her opinion submitted to the Supreme Court *en banc* A. Külm upheld her appeal in cassation.

10. The Lõuna Police Prefecture is of the opinion that the circuit court judgment is lawful and justified and that the appeal in cassation should be dismissed. In addition to what was expressed in response to the appeal the Lõuna Police Prefecture argues the following:

1) the judgment is not rendered unlawful by the fact that the circuit court did not analyse the allegations concerning the Gender Equality Act. The referred Act establishes the prohibition of unequal treatment on grounds of sex in cases when such treatment is based solely on unobjective gender-related grounds. The service relationship of A. Külm was not terminated because of her sex, instead it was terminated because § 49(4) of the PolSA establishes the release from service imperatively. As the Lõuna Police Prefecture is an authority of executive power, it has not right to decide on whether to apply a provision of an Act or not;

2) the Gender Equality Act can not change the fact that proceeding from § 11 of the Constitution rights and freedoms can be restricted under certain conditions;

3) the allegation of the appellant in cassation that the regulatory framework of the Police Service Act, pursuant to which women are released from service earlier than men, has no analogue in Estonian legal order, is exceptional and erroneous. Analogous regulatory framework exists in § 78(2) and (3) of the Boarder Guard Service Act and in § 112(1) and (21) of the Defence Forces Service Act;

4) as § 49 of the PolSA does not stipulate that pensionable age means the age established in § 7(1)1) of the SPIA, it is to be presumed that the legislator – upon referring to § 7 of the SPIA in § 49 of the PolSA – bore in mind that the logical structure of § 7 of the SPIA should be observed so that § 7(1) of the SPIA is a general provision and § 7(2) is a specific provision, applicable to those police officers who are within the sphere of application of subsection (2);

5) in her appeal in cassation A. Külm has amended her request. Pursuant to § 19(8) of the Code of Administrative Court Procedure a request set out in the action may be amended until the summations in an administrative court or expiry of the term for the submission of additional requests and evidence in written proceedings.

11. In its opinion submitted to the Supreme Court *en banc* the Lõuna Police Prefecture upholds all its formerly expressed opinions. The police prefecture argues the following:

1) the procedure for releasing from the police service because of age has in principle been the same since 15 June 1998 when the Police Service Act entered into force. The maximum specified age limit of both male and female police officers depends on their pensionable age. The pensionable age and, therefore, the maximum age limit of police officers have been progressively increased on the basis of the same principles in regard to both men and women. The present situation where, with permission, female police officers can stay in the police service for a shorter period than male police officers, is caused by the fact that in regard to men the progressive increase of pensionable age up to 63 years was achieved earlier;

2) we have to consent to the circuit court reasoning concerning the conformity of § 49 of the PolSA with the second sentence of § 12(1) of the Constitution. The unequal treatment of men and women is justified by the public interest in the efficient functioning of the police.

12. The Police Board is of the opinion that the circuit court judgment is lawful and justified, and the Board upholds its opinion submitted to the administrative and circuit courts. The Police Board argues that there was no possibility or obligation to apply § 7(1) of the SPIA with regard to A. Külm. What is applicable is § 7(2) of the SPIA.

13. The Constitutional Committee of the Riigikogu is of the opinion that § 49(3) of the PolSA is in conflict with § 12 of the Constitution. § 49 of the PolSA clearly establishes for male and female police officers different age of release from the police service. Consequently, during the period of gradually making pensionable ages equal, they are treated differently: male police officers born in 1948 can carry on in their chosen profession for 2.5 years longer than female police officers. There is no weighty reason to justify such unequal treatment. The allegation of the Lõuna Police Prefecture and of the circuit court that earlier retirement of female police officers helps to open up the possibilities for recruiting younger police officers can not be deemed a justification. Neither can social guarantees be deemed a justification why it is compulsory for female police officers to retire at an earlier age. A female police officer ought to have an equal right to carry on in her chosen profession just as long as a male police officer.

14. The Legal Affairs Committee of the Riigikogu admits that the reference to § 7 of the SPIA in § 49(3) and (4) of the PolSA is a problematic one and may prove too general upon application. At the same time it is important to bear in mind the purpose of § 49 of the PolSA and to interpret this norm in conjunction with § 7 of the SPIA so that it would guarantee better protection to persons' rights and conformity with the second sentence of § 12(1) of the Constitution. The aim of § 49 of the PolSA is better understood in the light of the will of the legislator to specify an analogous regulatory framework by § 96 of the Police and Boarder Guard Act, adopted on 6 May 2009. The explanatory letter to the draft of the latter Act (343 SE) explains in regard to Chapter 5, Division 9 of the Act the following: "The Division establishes the differences of releasing from service as compared to the Public Service Act. Upon drafting service regulations the releasing before the attainment of general pensionable age as well as release pursuant to the procedure established in the Public Service Act were considered. The arguments are, on the one hand, the specifications of the service and more difficult conditions, and on the other hand, the principle of equal treatment – professional equality. [---] § 100(3) gives the director general of the Police and Boarder Guard Board the right to extend the time of service of a police officer by one year at a time until the attainment of the pensionable age established in § 7 of the SPIA, and in this case a police officer is released from service upon the attainment of general pensionable age. The time of service is extended by one year at a time, on the basis of a reasoned application of relevant police officer, and on the condition that his or her health condition and qualifications allow him or her to continue to remain in service." Although neither § 49 of the PolSA nor § 96 of the Police and Boarder Guard Act make a reference to § 7(1)1) of the SPIA, the will of the legislator still is to treat men and women equally, even upon extending their time of service by way of exception with the permission of the head of relevant authority. Although the reference to § 7 of the SPIA in § 49(3) and (4) is not the most well-turned one, the conflicts could be overcome through interpretation.

15. The Chancellor of Justice is of the opinion that § 49(3) of the PolSA is not a relevant norm. The Chancellor of Justice argues as follows:

1) to assess the relevance of a norm there has to be, first of all, a "personal case". To ascertain the existence of the latter it has to be assessed, in the first place, whether the administrative courts acted correctly when accepting the action of A. Külm. As a rule, a court must adjudicate a matter when the complainant argues the violation of his or her rights. The right of A. Külm to carry on in the police service longer than the age referred to in § 49(1) of the PolSA arose from the Lõuna Police Prefecture directive no. 1554p of 17 December 2004. A. Külm did not contest this directive or the conformity of § 49(3) of the PolSA to § 12(1)1) of the Constitution. A. Külm contested directive no. 462p of 15 July 2008, by which she was released from service, requesting that the directive be declared unlawful and that the court order the payment to her of the compensation established in § 135(2) of the PSA. Pursuant to § 11(1)3) of the Code of Administrative Court Procedure an administrative court which receives an action shall verify whether the action includes requests possible and appropriate for the achievement of the objective of the action and, if necessary, shall make a proposal to the person filing the action for the amendment of the action. As the actual content of the action consisted in the contestation of lawfulness of refusal to extend her continuing in the service, the directive of 15 July 2008 is not relevant. The end of the extended term of service was determined by the directive of 17 December 2004. Although the content of the directive of 15 July 2008 is release from service, it is not an independent and separate act on release from service, instead it is a logical sequel to formalise, pursuant to procedure established by law (§ 132 of the PSA), the expiry (not termination) of a concession granted by the directive of 17 December 2004. The annulment of the directive of 15 July 2008 would not contribute to the receipt of the compensation established in § 135(2) of the PSA. For more effective protection of the person's right the administrative court ought to have explained to A. Külm that what she had to contest was the refusal to issue advantageous to her administrative legislation (the reply letter of the Lõuna Police Prefecture of 15 July 2008 as administrative legislation);

2) should the Court, nevertheless, find the existence of a "personal case", other criteria of relevance have to be considered. § 49(3) of the PolSA can be deemed a relevant provision for the purposes of the first sentence of § 14(2) of the Constitutional Review Court Procedure Act (hereinafter "the CRCPA") only on the condition that without the declaration of unconstitutionality of the provision bearing in mind the wording, content, spirit and purpose of § 7 of the SPIA – the continuation of A. Külm in the police service could not be extended until the pensionable age specified in § 7(1) of the SPIA (as it is in the case of male police officers who were born in the same year as she). It does not appear from the grammatical interpretation of § 49(3) of the PolSA and of § 7 of the SPIA whether the legislator bore in mind the age referred to in § 7(1)1) or in § 7(2) of the SPIA. It does not appear from § 7(2^1) of the SPIA or § 49(3) of the PolSA that the legislator wanted to establish imperatively that the advantageous right included in § 7(2) of the SPIA should be applied to women born in 1948 as a prohibition to continue to be in the police service. The legislator has not established, expressis verbis, that upon application of § 49(3) of the PolSA either only § 7(1)1) of the SPIA or – in regard to female officers § 7(2) of the SPIA should be implemented. The administrative court, the circuit court and the Administrative Law Chamber of the Supreme Court have failed to convincingly justify why they find that when applying § 49(3) of the PolSA to women § 7(2) of the SPIA should be taken as a basis. That is why, upon interpreting § 49(3) of the PolSA, both the general requirement of equal treatment included in the first sentence of § 12(1) of the Constitution, as well as the prohibition to discriminate on grounds of age included in the second sentence of the same provision, have to be taken into account. In case of apparent lack of legal clarity it is the obligation of both an administrative authority and the court to take into account the second sentence of § 12(1) of the Constitution. In case of systematic interpretation both § 49(3) of the PolSA and § 96(3) of the Police and Boarder Guard Act can be applied in a gender-neutral manner.

16. The Minister of Justice is of the opinion that § 49(3) of the PolSA is in conflict with § 12 of the Constitution to the extent that it treats differently women and men born in 1948. Pursuant to § 7 of the SPIA the pensionable age of men and women shall be different until 2016; that is why female and male police officers are treated differently in § 49(3) of the PolSA upon their release from the police service. Such

unequal treatment can not be justified with the need to vacate the positions of older police officers for younger persons, because the problem does not consist in the general age limit as such but in the fact that the age limits for men and women are different. It can not be argued that the physical abilities of women diminish quicker than those of men. Neither can the need to recruit younger police officers be justified at the expense of older female police officers. There is no reasonable justification why male and female police officers who were born in the same year should be treated unequally.

17. The Minister of Internal Affairs is of the opinion that § 49(3) of the PolSA refers to pensionable age in the meaning of § 7(1)1) of the SPIA, because this is the general pensionable age irrespective of gender. The legislator must have wanted to establish a procedure wherein the age referred to in § 7(1)1) of the SPIA would be deemed the pensionable age upon the attainment of which there is no possibility to continue to be in the police service.

REVELANT PROVISIONS

18. § 49 of the PolSA reads as follows:

"§ 49. Release from police service due to reaching of specified age limit

(1) Police officers belonging to official ranks 1 to 4 may be accepted for police service until they reach age limit of 55 years, police officers belonging to official ranks 5 to 10 until they reach the age of 60 years.

(2) A police officer shall be released from the police service on the first working day of the month following the month of attaining the specified age limit set out in (1) of this section.

(3) With the permission of the head of the Police Board or head of the Security Police Board, a police officer may be employed in the police service until he or she attains the pensionable age provided for in § 7 of the State Pension Insurance Act.

(4) A police officer specified in subsection (3) of this section shall be released from the police service when he or she attains the pensionable age provided for in § 7 of the State Pension Insurance Act.

[RT I 2006, 21, 162 – entered into force 1-06.2006]"

19. § 7 of the SPIA reads as follows:

„§ 7. Right to receive old-age pension

(1) The following persons have the right to receive an old-age pension:
1) persons who have attained 63 years of age and
2) persons whose pension qualifying period provided for in § 27 of this Act and earned in Estonia is 15 years.

(2) In order to gradually make the pensionable age of men and women equal, the right of women born between the years 1944 and 1952 to receive an old-age pension arises, before attaining the age provided for in clause (1) 1) of this section, at the ages provided as follows:

Year of birth Age
1944 58 years 6 months
1945 59 years
1946 59 years 6 months
1947 60 years
1948 60 years 6 months
1949 61 years
1950 61 years 6 months
1951 62 years

1952 62 years 6 months

(21) The age specified in clause (1) 1) of this section and subsection (2) of this section is deemed to be retirement age unless otherwise provided by another Act.

(3) Old-age pensions are granted for life.

[RT I 2006, 49, 370 – entered into force 20.11.2006]”

OPINION OF THE SUPREME COURT *EN BANC*

20. A. Külm was born on 18 January 1948. This court action commenced with A. Külm contesting in administrative court the Lõuna Police Prefecture directive of 15 July 2008, by which she was released from the police service from the position of senior police inspector (official rank 3) due to the attainment of the specified age limit. At the time of release A. Külm was 60 years and 6 months old.

21. The Administrative Law Chamber of the Supreme Court came to the conclusion that the action of A. Külm could not be satisfied on the basis of the Police Service Act. The Administrative Law Chamber referred the matter, on the basis of § 70(1^1) of the Code of Administrative Court Procedure, to the Supreme Court *en banc* for hearing because the Chamber had doubts as to the conformity of § 49(3) of the PolSA, to the extent that it treats differently men and women born in 1948, with the second sentence of § 12(1) of the Constitution.

I.

22. The Chancellor of Justice argues that as the actual content of the action of A. Külm consisted in the contestation of lawfulness of refusal to continue to be in service, the directive of 15 July 2008 is not relevant. The Annulment of the directive of 15 July 2008 would not contribute to the receipt of the compensation established in § 135(2) of the PSA. For more effective protection of the person’s right the administrative court ought to have explained to A. Külm that what she had to contest was the refusal to issue advantageous to her administrative legislation, i.e. the reply letter of the Lõuna Police Prefecture of 15 July 2008 as administrative legislation (see paragraph 15(1) of this judgment).

Consequently, the Supreme Court *en banc* has to examine whether the administrative court, the circuit court and the Administrative Law Chamber of the Supreme Court have adjudicated a correct case, whether it was possible for A. Külm to contest the Lõuna Police Prefecture directive of 15 July 2008.

23. The Supreme Court *en banc* does not agree with this opinion of the Chancellor of Justice. The Supreme Court *en banc* is of the opinion that A. Külm had no need to contest the Police Board reply letter of 16 July 2008 (in his opinion the Chancellor of Justice erroneously refers to the Lõuna Police Prefecture reply letter of 16 July 2008). By the time the Police Board letter was prepared the Lõuna Police Prefecture had already issued the directive on the release of A. Külm. Legal consequence was created by the Lõuna Police Prefecture directive of 15 July 2008 releasing A. Külm from service, not by the Police Board reply letter of 16 July 2008.

24. The Supreme Court *en banc* points out that the situation would not be different even if the Police Board reply letter as refusal to issue advantageous administrative legislation had been prepared earlier than the Lõuna Police Prefecture directive on release from service. The Public Service Act allows reinstatement or ordering of payment of the compensation referred to in § 135(2) of the Act only if the person contests the directive on release from service and the administrative court declares the latter unlawful.

25. For the above reasons the Supreme Court *en banc* is of the opinion that A. Külm has contested the correct administrative legislation.

II.

26. Consequently, the next question to be answered is whether there is a basis in the court case of A. Külm to commence a constitutional review proceeding.

There would be no basis for commencement of a constitutional review procedure concerning the court case of A. Külm if the directive by which A. Külm was released from service were not subject to judicial review due to lack or ambiguity of legal ground thereof. A constitutional review court proceeding should not be commenced also if, upon release of A. Külm from service, right of discretion had been violated, if it were possible to interpret the provision applied to A. Külm in a constitution-conforming manner, or if the outcome of the court case of A. Külm did not depend on the constitutionality of the applied provisions. In these cases the matter should be adjudicated as an administrative one.

27. A. Külm was released from service, due to the fact that she had reached the specified age limit, by clause 1 of the resolution of the Lõuna Police Prefecture directive of 15 July 2008, on the basis of § 49 of the PolSA. Clause 1 of the resolution of the directive does not refer to any subsections of § 49 of the PolSA. A reference to § 49(2) and (3) of the PolSA is made in the preamble of the directive.

28. Release from police service due to reaching of specified age limit is established in § 49 of the PolSA. Subsection (1) of the referred section permits the police officers belonging to official ranks 1 to 4 to continue to be in police service until the attainment of 55 years of age, and police officers belonging to official ranks 5 to 10 until the attainment of 60 years of age. Subsection (2) prescribes that a police officer shall be released from the police service on the first working day of the month following the month of attaining the specified age limit set out in (1) of this section. Subsection (3) establishes that a police officer may be employed in the police service until he or she attains the pensionable age provided for in § 7 of the State Pension Insurance Act with the permission of the head of the Police Board or head of the Security Police Board. Subsection (4) establishes that a police officer specified in subsection (3) of this section shall be released from the police service when he or she attains the pensionable age provided for in § 7 of the State Pension Insurance Act. Consequently, § 49(4) is the basis of release from service.

29. The Supreme Court *en banc* is of the opinion that the fact that clause 1 of the resolution of the directive does not refer to a specific subsection of § 49 of the PolSA does not serve as a basis for declaring the directive unlawful. Neither can the fact that the preamble of the directive refers to § 49(2) and (3) of the PolSA and fails to refer to subsection (4) which establishes the basis for release, serve as a basis for declaration of unlawfulness of the directive. The Supreme Court *en banc* is of the opinion that the directive is sufficiently clear to be subject to judicial review. The actual basis of release of A. Külm could have been and was § 49(4) of the PolSA.

30. The Supreme Court *en banc* is of the opinion that it unambiguously arises from § 49(3) and (4) of the PolSA that when a police officer has reached the pensionable age established in § 7 of the PSIA, he or she must be released from service. The law leaves no room for discretion upon deciding on the release of a police officer who has attained pensionable age.

31. Consequently, the issue to be resolved is whether the constitution-conforming interpretation of the applied provisions is possible. The main issue is which pensionable age was applicable upon the release of A. Külm, i.e. was the pensionable age established in § 7(1)1) of in § 7(2) of the SPIA to be taken as basis.

32. The Chancellor of Justice is of the opinion that the administrative court, the circuit court and the Administrative Law Chamber of the Supreme Court have failed to convincingly justify why they hold that, as regards women, §7(2) of the SPIA had to be regarded as the basis upon application of § 49(3) the PolSA. The Chancellor of Justice argues that in case of apparent lack of legal clarity it is the obligation of both an administrative authority and the court to take into account the second sentence of § 12(1) of the Constitution and holds that in case of systematic interpretation § 49(3) of the PolSA and § 96(3) of the Police and Boarder Guard Act can be applied in a gender-neutral manner (see paragraph 15(2) of this judgment). The Legal Affairs Committee of the Riigikogu and the Minister of Internal Affairs, too, are of the opinion that §

49 of the PolSA can be interpreted in a constitution-conforming manner (see paragraphs 14 and 17 of this judgment).

33. The Supreme Court *en banc* is of the opinion that § 49 of the PolSA can not be interpreted in a constitution-conforming manner, for the following reasons.

34. § 7(1)1) of the SPIA establishes that persons who have attained 63 years of age have the right to receive an old-age pension. This pensionable age applied in 2008 and is still applicable in regard to men only. § 7(2) of the SPIA regulates the making of the pensionable age of women born between the years 1944 and 1952 equal to that of men. Until the pensionable ages progressively become equal a lower pensionable age is established in regard to women. The pensionable ages of women and men become equal in 2016.

§ 7(2^1) of the SPIA deems the retirement age to be the age specified in clause (1) 1) of this section and subsection (2) of this section, unless otherwise provided by another Act, consequently the valid pensionable age, which is different for men and women.

It appears unambiguously from § 7(1), (2) and (2^1) of the SPIA that in 2008 for women born in 1948 the retirement age was 60 years and 6 months, and for men born in 1948 the retirement age was 63 years.

35. The Supreme Court *en banc* is of the opinion that “retirement age” should mean the retirement age that is valid at given time. Just like it is not possible to apply the retirement age which is no longer valid, the retirement age which is not yet valid can not be applied, either. The valid law should be applied. It is not possible, through interpretation, to set aside the valid and clearly worded law and instead apply the law that is not yet valid or has already lost its validity. The opposite would only be possible if an Act contained a clearly worded provision delegating relevant authority. § 49 of the PolSA does not contain a provision to the effect that the age established in § 7(1)1) of the SPIA is born in mind in regard to both men and women. Consequently, in 2008 it was impossible to apply in regard to women the retirement age that will be applicable to women only as of 2016.

36. As at the time of release of A. Külm the pensionable ages of men and women were (and still are) different, men and women had to and have to be released from police service at different ages under the valid law. In regard to men the basis must be § 7(1)1) and in regard to women § 7(2) of the SPIA.

37. Consequently, under the valid law, A. Külm, born on 18 January 1948, was to be released from police service as of 19 July 2008.

38. This conclusion can not be undermined by the argument submitted by A. Külm in her appeal in cassation that the circuit court had failed to analyse her allegations regarding violation of the Gender Equality Act. In her appeal A. Külm has argued that upon her release the Gender Equality Act had been violated.

Indeed, the circuit court has ignored these allegations of the appeal. Nevertheless, the Supreme Court *en banc* is of the opinion that this does not bring about the annulment of the circuit court judgment or the necessity for the Supreme Court to analyse whether the Gender Equality Act had been violated upon the release of A. Külm. It is not possible, on the basis of the Gender Equality Act – ordinary law to declare that the release from police service on the basis of the imperative provisions of the Police Service Act was unlawful. The Lõuna Police Prefecture had to observe the valid imperative Police Service Act.

39. On the basis of the aforesaid the Supreme Court *en banc* is of the opinion that the valid law does not allow to satisfy the action of A. Külm.

40. The satisfaction of the action of A. Külm directly depends on whether § 49(3) and (4) of the PolSA are constitutional or unconstitutional. The legal advantage that A. Külm would gain if § 49(3) and (4) were repealed due to unconstitutionality would consist in the satisfaction of her action, in the declaration of unlawfulness of her release from service and in the payment to her of the compensation of six months’ salary established in § 135(2) of the PSA (see paragraph 54 of this judgment). Consequently, § 49(3) and (4) of the

PolSA are provisions relevant to the case of A. Külm for the purposes of § 3(3) of the CRCPA. That is why, next, the issue of constitutionality of the provisions applied in the court case of A. Külm is to be adjudicated.

III.

41. § 49(3) and (4) of the PolSA in conjunction with § 7(2) of the SPIA were applied with regard to A. Külm.

42. In the first and second instance courts A. Külm has alleged two different discriminations: on grounds of age and sex. In her appeal in cassation A. Külm has only contested the conclusion of the circuit court that the principle of gender equality had not been violated. The Supreme Court *en banc* shall proceed from the assumption that A. Külm agrees with the circuit court conclusion that there is no age discrimination in this case, and shall control whether the Act which regulates the release of A. Külm is in conformity with the prohibition to discriminate on grounds of sex.

43. The contested situation is the following: due to the prohibition to continue to work, established in § 49(3) of the PolSA, a female police officer born in 1948 was to be released from police service pursuant to § 49(4) of the PolSA in 2008, whereas a male police officer born in 1948 was not to be released. At the same time both of them had to be released from police service upon attainment of retirement age, which is different for women and men under § 7(1)1) and (2) of the SPIA.

The creation of such a situation is related to the fact that § 7(2) of the SPIA provides for gradual making of pensionable ages of men and women equal so that by 2016 men and women would be treated equally with regard to retirement age.

44. The Supreme Court *en banc* has no reason to doubt the constitutionality of gradually making the pensionable ages of women and men equal. That is why the Supreme Court *en banc* does not consider § 7(2) of the SPIA to be a relevant provision for the purposes of § 9(1) of the CRCPA.

45. Neither does the Supreme Court *en banc* consider it necessary to analyse or doubt the constitutionality of establishment for police officers of an age limit for holding office. The constitutionality of the establishment of age limit is not an object of this dispute. The Supreme Court *en banc* points out that the age limit of some categories of state officials may be necessary and constitutional, if sufficient social guarantees are provided by law.

46. § 49(4) of the PolSA on the basis of which A. Külm was released from police service is applicable only in conjunction with § 49(3) of the PolSA. The inseparable conjunction of these provisions is manifest, as § 49(4) of the PolSA refers to subsection (3) of the same section.

47. Observing the Supreme Court judicial practice in constitutional review matters the Supreme Court *en banc* shall only review the constitutionality of § 49(3) and (4) of the PolSA to the extent that they treat differently women and men born in 1948.

48. The circuit court held that § 49(3) of the PolSA was not discriminatory on grounds of sex. The circuit court is of the opinion that it is reasonable and justified to take the retirement age as a basis. This guarantees an optimal compromise between two opposing interest – the interest of a police officer to continue to be in service and the interest of the state to recruit younger persons into police service. Upon attainment of pensionable age the balance is significantly tipped in favour of the public interest, because a person is guaranteed subsistence in the form of old age pension. An equal age limit that both women and men would reach upon attaining pensionable age for men could not have protected the public interest as broadly as it is protected now. Public interest in the efficient functioning of the police constitutes a constitutional value of sufficient weight, capable of justifying different treatment of men and women to a restricted extent (see paragraph 5(9) of this judgment). The appellant in cassation does not agree with the circuit court (see paragraphs 8(5) and 9 of this judgment).

The reasoning and justifications of the circuit court are not capable of convincing the Supreme Court *en banc*

, either.

49. The Supreme Court *en banc* can not understand how proceeding from different pensionable age of men and women can guarantee an optimal compromise between two opposing interests, namely the interest of a police officer to continue to be in service and the interest of the state to recruit younger persons into police service, and how the equal age limit for men and women could not have protected the public interest to the same extent. Namely, as the retirement ages of men and women are gradually being made equal, it is impossible to comprehend why – for the achievement of the aim pointed out by the circuit court – it was justified in 2008 to release from police service the women who had attained the age of 60 years and 6 months, at the same time allowing men who had attained 60 years and 6 months of age to continue to be in service until the age of 63 years, and why in 2016 it will be justified to release men and women from police service at equal age, i.e. at the age of 63 years.

50. The Supreme Court *en banc* is of the opinion that in the situation where retirement ages of women and men are different and a women reaches the retirement age, the balance can not be significantly tipped in favour of the public interest at the cost of women with the justification that subsistence is guaranteed to women in the form of old age pension. The mere justification that a police officer's occupational pension has been established cannot serve as a ground for interfering in the women's freedom to choose an area of activity and deprive them – differently from men – of the possibility to earn a bigger income through a freely chosen work than would be guaranteed by pension. In fact, the difference of the age limits for women and men for continuing to be in police service often results in the granting of different amounts of police officer's occupational pension to women and men. Namely, pursuant to § 21^1(1) of the PolSA, a police officer whose length of police service is at least 20 years has the right to receive a pension for police officers in the amount of 50% of the of the police officer's salary. Pursuant to subsection (3) of the same section, the amount of pension for police officers shall be increased for each year by which the length of the police service of the police officer exceeds this length of service in the amount equivalent to 2.5% of salary, and the maximum amount of occupational salary of such police officers is 75% of the corresponding salary.

51. The Supreme Court *en banc* can not see a reasonable ground for releasing a female police officer from police service earlier than a male police officer, and that is why the Court is of the opinion that § 49(3) and (4) of the PolSA are unconstitutional to the extent that they treat differently women and men born in 1948, i.e. they provide that a woman born in 1948 shall be released from police service at a younger age than a man born in the same year.

IV.

52. On the basis of the aforesaid the Supreme Court *en banc* declares unconstitutional and repeals § 49(3) and (4) of the PolSA to the extent that they provide that a woman born in 1948 shall be released from police service at a younger age than a man born in the same year.

53. The Supreme Court *en banc* satisfies the appeal in cassation of A. Külm and annuls the judgments of the circuit court and the administrative court.

54. On the basis of § 72(1)4) of the Code of Administrative Court Procedure the Supreme Court *en banc* renders a new judgment.

In the action filed with the administrative court A. Külm applied for the declaration of unlawfulness of the Lõuna Police Prefecture directive of 15 July 2008, and for the ordering of payment to her of the compensation established in § 135(2) of the PSA, as she waived reinstatement. The same claim was submitted in the appeal. In her appeal in cassation A. Külm is requesting the annulment of the administrative court and circuit court judgments and rendering of a new judgment on unlawfulness of the contested directive and reinstating her into service, and she is also requesting the ordering of payment for the forced absence from work. Alternatively, should the Supreme Court consider reinstatement not possible, the appellant in cassation is requesting the ordering of payment of the compensation established in § 135(2) of

the PSA.

§ 19(8) of the Code of Administrative Court Procedure establishes the following: "A person filing an action or protest may amend a request set out in the action or protest until the summations in an administrative court or expiry of the term for the submission of additional requests and evidence in written proceedings if the rest of the participants in the proceeding consent to the amendments or if the court deems the amendments purposeful." Consequently, it is not possible, at the level of cassation, to replace the claim to receive the compensation established in § 135(2) of the PSA with the request to be reinstated into service.

As such an amendment of the appeal is not possible, the Supreme Court *en banc* declares the contested directive of the Lõuna Police Prefecture unlawful and requires that the Lõuna Police Prefecture pay to A. Külm, on the basis of § 135(2) of the PSA, her six months' salary.

Source URL: https://www.riigikohus.ee/en/constitutional-judgment-3-3-1-41-09#comment-0