Constitutional judgment 3-4-1-16-08

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-16-08
Date of judgment	26 March 2008
Composition of court	Chairman Märt Rask, members Peeter Jerofejev, Hannes Kiris, Indrek Koolmeister, Priit Pikamäe
Court Case	Review of constitutionality of § 43(1)2) of the Weapons Act.
Basis of proceeding	The Tallinn Administrative Court judgment of 11 November 2008 in administrative case no. 3-07-2302
Hearing	Written proceeding
Conclusion	**To declare § 43(1)2) of the Weapons Act unconstitutional and invalid to the extent that it does not allow the police prefecture, upon suspension of an acquisition permit or a weapons permit of a suspect or accused at trial, to take into consideration the personality of the suspect or accused at trial and the circumstances constituting the content of the charges.**

FACTS AND COURSE OF PROCEEDING

1. According to the judgment of the Tallinn Administrative Court the Põhja [North] Police Prefecture has issued 18 weapons permits and 4 weapons' acquisition permits (hereinafter "the acquisition permit") to Andres Sarri, on the basis of which he has the right to own ten firearms with a rifled barrel, five firearms with a smoothbore barrel, two revolvers and one pistol.

2. On 11 October 2007 the Security Police declared A. Sarri a suspect in criminal case no. 05913000055

under § 2998(1) of the Penal Code in giving and promising a bribe.

3. By the Põhja Police Prefecture decision no. 327 of 2 November 2007 the weapons permits and acquisition permits issued by the Põhja Police Prefecture to A. Sarri were suspended with reference to § 43(1)2) of the Weapons Act (hereinafter "the WA") until "elimination of the circumstances which were the basis for suspension", and the weapons and ammunition were deposited in the weapons storage of the Põhja Police Prefecture.

4. On 9 November 2007 A. Sarri filed an action with the Tallinn Administrative Court applying for the annulment of the Põhja Police Prefecture decision no. 327 of 2 November 2007, and for non-application of § 43(1)2) of the WA and for the declaration of unconstitutionality thereof.

5. On 20 November 2007 the court accepted the action and declared the Põhja Police Prefecture to be the respondent. On 13 November 2007 the Court dismissed A. Sarri's application for preliminary legal protection and the action. A Sarry filed an appeal against the court ruling; the Tallinn Circuit Court dismissed the appeal against the ruling by its ruling of 3 January 2008.

6. The public prosecutor terminated the criminal proceeding against A. Sarri on 14. March 2008.

7. The Põhja Police Prefecture restored the validity of A. Sarri's weapons permits by its decision no. 545 of 26 March 2008.

8. On 4 April 2008 A. Sarri replaced the request to annul the Põhja Police Prefecture decision no. 327 of 2 November 2007 with the request to have it declared unlawful.

9. By its judgment no. 3-07-2302 of 11 November 2008 the Tallinn Administrative Court satisfied the action of A. Sarri and declared the Põhja Police Prefecture decision no. 327 of 2 November 2007 on the suspension of a weapons permit unlawful. In addition, the Tallinn Administrative Court declared unconstitutional and did not apply § 43(1)2) of the WA to the extent that it does not allow for the discretion of a police prefecture in deciding on the suspension of a weapons permit, and by this the Court initiated a constitutional review proceeding in the Supreme Court.

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING

10. The Tallinn Administrative Court is of the opinion that by suspending the weapons permits and acquisition permits issued to A. Sarri the state authority had interfered with the right to free self-realisation established in § 19(2) of the Constitution. To decide whether an infringement is constitutional the executive must weigh different conflicting interests. The administrative court concludes that as § 43(1)2) of the WA does not allow, upon deciding on the suspension of a weapons permit or an acquisition permit, to take into account concrete circumstances or to weigh whether the application of the contested provision is proportional, the Court can not be convinced of the constitutionality of the interference into the right to free self-realisation established in § 19(1) of the Constitution.

The administrative court admits that A. Sarri was a suspect of a criminal offence relating to breach of duty to maintain integrity, more specifically to giving or promising a bribe. Thus, the petitioner was suspected of a crime in the second degree, which is not related to weapons or danger to other persons or to the security of the society. The administrative court is of the opinion that in this case there is no information indicating that A. Sarri is a person who constitutes a danger to the society. The administrative court does not agree with the police prefecture that the suspension of a permit restricts the rights of the person to considerably lesser extent than the revocation of the permit. The administrative court is of the opinion that the effect of the suspension of a permit is, indeed, temporary, but the effect is still equal to that of revocation of the permit.

For the above reasons the administrative court argues that the restriction established in § 43(1)2) of the WA, requiring those who implement the Act to suspend the weapons permit or acquisition permit of a suspect or an accused at trial without taking into account the circumstances of a concrete case, including the personality

of the holder of the weapons permit or acquisition permit and the circumstances serving as basis for the suspicion or the charges (degree and nature of criminal offence, etc.) is not proportional to the aim of protecting the health and lives of other persons. The administrative court concludes that the suspension of the weapons permits and acquisition permits issued to A. Sarry was not proportional.

11. A. Sarri is of the opinion that § 43(1)2) of the WA as an imperative norm does not allow for the exercise of administrative discretion. This is in conflict with the principle of proportionality established in § 11 of the Constitution and the principle of effective procedure established in § 14 of the Constitution. A. Sarri points out that an imperative restriction always gives rise to the danger of ignoring not only the principle of proportionality but also the principle of sound administration.

A. Sarri is of the opinion that pursuant to the judicial practice of the Supreme Court a discretionary decision constitutes a rule without which an administrative agency might not make a proportional decision (see the Supreme Court en banc judgment of 11 October 2001 in case no. 3-4-1-7-01 – RT III 2001, 26, 280, paragraphs 22, 23 and 24; the Constitutional Review Chamber of the Supreme Court judgments of 28 April 2000 in case no. 3-4-1-6-00 – RT III 2000, 13, 140; of 3 May 2001 in case no. 3-2-1-6-01 – RT III 2001, 15, 154, and of 17 February 2003 in case no. 3-4-1-1-03 – RT III 2003, 5, 48).

A. Sarri argues that it is not the possibility of application of the restriction that is unconstitutional, but the lack of possibility to exercise discretion. The restriction established in § 43(1)2) of the WA in the interests of the protection of life and health of others may prove necessary primarily in regard to suspicions of violent crimes, including crimes that constitute a threat to physical security of persons. The Act provides for several constitutional restricting measures which depend on concrete person (such as criminal record, evasion of service in the Defence Forces, hunting without a hunting certificate). Declaring someone a suspect does not depend on the person, and it may prove objectively unjustified. It is not the guilt of a person that serves as a basis for suspension of a weapons permit or acquisition permit, instead it is the danger the person constitutes on the basis of the acts he or she has allegedly committed. In the light of § 22 of the Constitution, in the majority of cases the mere suspicion gives no ground to presuppose that a person constitutes a danger.

A. Sarri points out that the Supreme Court has held that the absolute prohibition to apply for a weapons permit is not proportional when the person has, in the past, committed an intentional criminal offence (see the Supreme Court en banc judgment of 11 October 2001 in case no. 3-4-1-7-01, paragraphs 22, 23, and 24 – RT III 2001, 26, 280).

12. The Põhja Police Prefecture is of the opinion that § 43(1)2) of the WA is not in conflict with the Constitution. The Weapons Act is a specific law that gives those persons who meet the requirements enumerated therein a special right to own and carry a weapon in restricted commerce. The Põhja Police Prefecture is of the opinion that, taking into account the security of community, the provision of law which requires a police prefecture, on the basis of circumstances arising from a criminal proceeding, to suspend the weapons permit of a suspected person is perfectly well-grounded and logical.

The Põhja Police Prefecture points out that the legislator differentiates between the suspension and the revocation of weapons permits. § 43(3) of the WA established the grounds for revocation of weapons permits (including criminal record, evasion of service in the Defence Forces, hunting without a hunting certificate, etc.). Under § 43(1)2) a weapons permit is suspended, not revoked, when the holder of the permit is a suspect or an accused at trial. This means that simultaneously with the termination of a criminal proceeding the ground for the suspension of a weapons permit is eliminated and the weapons permit is restored. The police prefecture concludes from the aforesaid that the suspension of a weapons permit restricts the rights of a person to a much lesser extent than the revocation of the permit. The Põhja Police Prefecture is of the opinion that § 43(1)2) of the WA is in conformity with the principle of proportionality, because the public interests have more weight than the subjective rights of a suspect or an accused at trial.

13. The Constitutional Committee submitted its opinion on behalf of the Riigikogu. The Constitutional Committee is of the opinion that § 43(1)2) of the WA is not in conformity with §§ 11 and 19 of the

Constitution. The Constitutional Committee admits that the restriction established in § 43(1)2) of the WA, requiring a police prefecture to suspend in every case the weapons permit of a person who is a suspect in a criminal proceeding or an accused at trial, without taking into account the dangerousness of the act to society, the nature of the act and the personality of the suspect, may – in the case of less dangerous offences and depending on the personality of the suspect or the accused at trial – prove to be disproportional to the aim of protecting the life and health of others.

14. The Chancellor of Justice is of the opinion that § 43(1)2) of the WA, pursuant to which every time when a person is declared a suspect in a criminal proceeding or an accused at trial the weapons permit of the person must be suspended, is not in conformity with the principle of proportionality established in § 11 of the Constitution.

The Chancellor of Justice is of the opinion that § 43(1)2) of the WA infringes the freedom to freely hunt and to engage in hunting sports and the right to self-defence. The restriction has been imposed with the aim of protecting legal rights of high importance, such as the life and health of other persons. What needs to be evaluated is the probability of prejudicing the referred legal rights, and this depends on both the characteristics of a weapon, the purpose of using the weapon, as well as the personality of the person who uses the weapon.

The Chancellor of Justice argues that it is questionable whether the suspension of the weapons permit of the person who is declared a suspect in a criminal proceeding or accused at trial always facilitates the protection of the life and health of others. The probability of danger is bigger when the person suspected or the accused at trial is violent and dangerous to others. The Chancellor of Justice admits that the Penal Code includes several acts that are not related to violence. A. Sarri was suspected of giving a bribe, which constitutes a crime against the duty to maintain integrity.

The Chancellor of Justice is of the opinion that the weapons permit of a suspect in criminal proceedings or an accused at trial could be left in force when the suspicion or the charges relate to e.g. offences committed through negligence. The Chancellor of Justice argues that the legislator should enumerate the criminal offences in the case of which those who implement the Act could consider the possibility of not suspending a weapons permit or an acquisition permit.

15. The Minister of Justice is of the opinion that § 43(1)2) of the WA contains a disproportional restriction of the right to free self-realisation and is thus in conflict with §§ 11(1) and 19(1) of the Constitution in their conjunction.

The Minister of Justice is of the opinion that the aim of the suspension of a weapons permit, established in § 43(1)2) of the WA, is to prevent the danger to the life and health of persons and to ensure smooth criminal proceedings. The minister admits that the automatic suspension of a weapons permit in the case of a suspicion of commission of any criminal offence is not a reasonable restriction of the general right to freedom. Under § 43(1)2) of the WA an administrative authority has no discretion in deciding on the suspension of a weapons permit or an acquisition permit. The bringing of suspicions in a criminal proceeding always results in the suspension of a weapons permit or an acquisition permit. The minister concludes that the provision does not take into account the gravity of the possible criminal offence committed by the suspect or the accused at trial, nor the danger of the act to the general interests of the society.

The minister is of the opinion that it is not reasonable to argue that the suspicion of the commission of any criminal offence renders it automatically probable that the person may committee further offences. The suspicion that a weapon may be used to commit offences may be justified primarily in regard to a person who is suspected of or charged with an intentional criminal offence, a necessary element of which is the use of violence. The minister is of the opinion that the Weapons Act establishing this restriction should make it possible, in deciding on the suspension of a weapons permit or of an acquisition permit of a suspect or an accused at trial, to assess the degree and type of the criminal offence, and the personality of the suspect or

the accused at trial.

16. The Minister of Internal Affairs is of the opinion that § 43(1)2) of the WA is in conformity with the principles established in §§ 11, 19 and 22 of the Constitution.

The Minister of Internal Affairs is of the opinion that the right to procure or own a weapon is not a universal fundamental right, because the general right to freedom established in § 19 of the Constitution can be restricted for any reason which is not expressly prohibited by the Constitution. Pursuant to § 36 of the WA the legislator has established increased requirements to those persons who are allowed to use a weapon. These requirements are necessary for the prevention of danger to the life and health of people and for the state to make certain that an acquisition permit or a weapons permit is issued to a person who is reliable. The legislator has, among other things, excluded the possibility of issuing an acquisition permit or a weapons permit to a person who has a criminal record and who is a suspect in a criminal proceeding or an accused at trial. This shows that the legislator does not consider such persons to be reliable to the extent that the state could allow them to procure, own and use a weapon. The state can not allow a situation where a weapon is left in the use of a person in whose reliability the state has doubts, because such a person constitutes a potential danger to the life and health of other persons and himself or herself.

The Minister of Internal Affairs points out that the suspension of an acquisition permit or a weapons permit is a temporary measure, and it restricts the rights of a person to a lesser extent than the revocation of the permit. § 43(2) of the WA establishes that as soon as the suspicion or charges are eliminated, the suspension of the weapons permit is terminated.

RELEVANT PROVISION

17. § 43(1)2) of the Weapons Act (RT I 2001, 65, 377; 2008, 1, 6) reads as follows:

“43. Suspension and revocation of acquisition permit or weapons permit

(1) The police prefecture which issued an acquisition permit or a weapons permit shall suspend the permit:

[..]

2) if the holder of the permit is declared to be a suspect or an accused at trial on grounds arising from criminal proceedings;“.

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

18. First of all the Chamber shall form an opinion on the relevance of § 43(1)2) of the WA and shall ascertain the infringed fundamental right (I). Thereafter the Chamber shall assess the formal and substantial constitutionality of the provision (II). Finally, the Chamber shall adjudicate the petition of the Tallinn Administrative Court (III).

I.

19. According to § 14(2) of the Constitutional Review Court Procedure Act the provision the constitutionality of which is assessed by the Supreme Court must be relevant to the adjudication of the matter. Pursuant to the judicial practice of the Supreme Court a provision is relevant if it is of decisive importance for the adjudication of a case (see e.g. the Supreme Court en banc judgment of 22 December 2000 in case no. 3-4-1-10-00 – RT III 2001, 1, 1, paragraph 10). A provision is of decisive importance when in the case of unconstitutionality of the provision a court should render a judgment different from that in the case of constitutionality of the provision (see e.g. the Supreme Court en banc judgment of 28 October 2002 in case no. 3-4-1-5-02 – RT III 2002, 28, 308, paragraph 15).

As A. Sarri was suspected under § 298 of the Penal Code of promising and giving a bribe, i.e. he was, for the

purposes of § 43(1)2) of the WA, a suspect on grounds arising from criminal proceedings, the police prefecture had to suspend the weapons permits and acquisition permits of A. sari on the basis of this provision. The provision under discussion provides for no other legal consequences. If § 43(1)2) of the WA were constitutional, the Tallinn Administrative Court must have dismissed A. Sarri's action, i.e. the Court must have rendered a judgment different from that in the case of unconstitutionality of the provision. Consequently, § 43(1)2) of the WA was a provision of decisive importance for the adjudication of the case, i.e. it is a relevant provision.

20. Next, in order to adjudicate this constitutional review matter it is necessary to ascertain if § 43(1)2) of the WA infringes a fundamental right.

21. The weapons permits and acquisition permits of A. Sarri were suspended on the basis of § 43(1)2) of the WA in regard to ten firearms with a rifled barrel, five firearms with a smoothbore barrel, two revolvers and one pistol. In the action filed with the Tallinn Administrative Court A. Sarri argued that the suspension of the weapons permits deprived him of the possibility to engage in hunting. The Tallinn Administrative Court held that by the suspension of the weapons permits and acquisition permits issued to A. Sarri the state authority had interfered with the person's right to free self-realisation, established in § 19(1) of the Constitution.

22. The Supreme Court has held that the Constitution does not refer to the right to procure or own a weapon as every person's fundamental right, yet the right of a person to procure and own a weapon may be included in the right to free self-realisation, referred to in § 19(1) of the Constitution (the Constitutional Review Chamber of the Supreme Court judgment of 6 October 2000 in case no. 3-4-1-9-00 – RT III 2000, 21, 233, paragraph 12). The Supreme Court en banc has held that hunting is one of the ways of free self-realisation. In the same judgment the Supreme Court en banc pointed out 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 the Supreme Court en banc judgment of 11 October 2001 in case no. 3-4-1-7-01 – RT III 2001, 26, 280, paragraph 13).

23. Pursuant to § 38(1) of the Hunting Act (hereinafter "the HA"), 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 establishes that a weapons permit must be carried at a hunt when hunting with a hunting weapon. Consequently, hunting with a weapon is possible only when a person has a weapons permit.

§ 39(1)1) and 2) of the HA establish that the following firearms constitute permitted hunting equipment: 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. Proceeding 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 with an easily applicable safety catch, intended mainly for hunting.

The legislator has considered it necessary to discriminate, in § 29(3) of the WA, the firearms used for hunting from other revolvers and pistols the use of which for hunting is prohibited. Consequently, the right of A. Sarri to free self-realisation through hunting can only be infringed by the suspension of the weapons permits concerning smoothbore and rifled barrel guns.

24. Pursuant to § 28(1)1) and 4) of the WA a natural person may acquire, own or possess a weapon, in addition to hunting, also for ensuring safety i.e. protecting himself or herself and his or her property. Although the ensuring of safety, similarly with hunting, does not always presuppose the use of a weapon, ensuring safety with a weapon constitutes a permissible way of protecting oneself and one's property. Thus, the ensuring of safety with the aim of protecting oneself and one's property is within the sphere of protection of the general fundamental freedom established in § 19(1) of the Constitution. The Chamber admits that with the aim of ensuring safety A. Sarri has acquired revolvers and a pistol, but the use of firearms meant for hunting can not be precluded for the achievement of the same aim.

25. Consequently, the suspension of weapons permits deprived A. Sarri of the possibility to use a weapon for hunting and for the protection of himself and his property, and by this act the state authority infringed the petitioner's right to the fundamental freedom established in § 19(1) of the Constitution.

II.

26. The interference of the state authority in the petitioner's fundamental right established in § 19(1) of the Constitution does not necessarily amount to a violation of the right. A legal act infringing a fundamental right does not violate the fundamental right if the act is constitutional, i.e. in conformity with the Constitution in the formal and substantive senses (see the Constitutional Review Chamber of the Supreme Court judgment of 13 June 2005 in case no. 3-4-1-5-05 – RT III 2005, 23, 233, paragraph 7).

27. Formal constitutionality means that legislation of general application, restricting fundamental rights, must be in conformity with the requirements of competence, procedure and from, as well as with the principles of determinateness and 'subject to reservation by law' (the Constitutional Review Chamber of the Supreme Court judgment of 13 June 2005 in case no. 3-4-1-5-05 – RT III 2005, 23, 233, paragraph 8). The Chamber is of the opinion that the relevant regulatory framework meets the requirement of formal constitutionality.

28. Substantive conformity with the Constitution means that the legislation infringing a fundamental right has been enacted to achieve an aim permissible by the Constitution, and constitutes a proportional measure for the achievement of the aim.

The valid wording of § 43(1)2) of the WA entered into force on 24 July 2004. It does not appear from the explanatory letter to the amendment of the Weapons Act why this restriction was established on the validity of weapons permits and, thus, to the ownership of weapons, for the duration of criminal proceedings.

The Constitutional Committee of the Supreme Court has pointed out in its written opinion that the objective of the infringement established by the relevant provision is to prevent danger to the life and health of people. As the general fundamental right to freedom may be restricted for a reason which is not in conflict with the Constitution, this aim is a permissible one for the restriction of the general fundamental right to freedom. The Chamber shall assess the constitutionality of the infringement proceeding from this.

29. Although the legislator has established the restriction bearing in mind a legitimate aim, an infringement of a fundamental right can be considered justified only when the principle of proportionality is observed (see e.g. the Constitutional Review Chamber of the Supreme Court judgment of 5 March 2001 in case no. 3-4-1-2-01 – RT III 2001, 7, 75, paragraph 16).

Proportionality of an infringement means that the infringement must be suitable, necessary and reasonable for the achievement of an aim. A measure that fosters the achievement of a goal is suitable. For the purposes of suitability a measure, which in no way fosters the achievement of a goal, is indisputably disproportional. A measure is necessary if it is not possible to achieve a goal 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 reasonableness of a measure the extent and intensity of interference with a fundamental right on the one hand and the importance of the aim on the other hand have to be weighed (see the Constitutional Review Chamber of the Supreme Court judgment of 6. March 2002 in case no. 3-4-1-1-02 – RT III 2002, 8, 74, paragraph 15).

30. The imposed restriction is suitable for the achievement of the aim referred to in paragraph 28 above. A person suspected of a criminal offence or accused at trial may be dangerous and could use a weapon for continuing the commission of crimes or hindering criminal proceedings. This in turn may endanger the life and health of others. The suspension of a weapons permit or an acquisition permit means, under § 44 of the WA, that the person must surrender the permit and the weapon to a police prefecture, and thus he will not be able to use the weapon to cause danger to the life or health of others.

31. The restriction is necessary for the achievement of the aim. The Chamber is of the opinion that there is no equivalent alternative to the suspension of a weapons permit that would guarantee that a suspect or an accused does not pose a threat to the life and health of others.

32. Next, the Chamber shall assess whether the obligatory suspension of a weapons permit or an acquisition permit, when the holder of the permit is a suspect or an accused on grounds arising from criminal proceedings, is a reasonable measure for the protection of the life and health of others.

33. The restriction caused by the relevant provision is an intense one. The suspension of an acquisition permit and a weapons permit infringes the free self-realisation of every suspect or accused at trial in such way that he or she is totally deprived of the possibility to use a weapon for hunting or ensuring safety.

The Põhja Police Prefecture and the Minister of Internal Affairs point out that the legislator has, in the Weapons Act, provided for the suspension and the revocation of an acquisition permit and a weapons permit, as restrictions of different intensity. They are of the opinion that the suspension of a permit as a temporary measure restricts the rights of a person to a significantly lesser extent than the revocation of a permit. The Chamber does not agree with this view and concurs with the opinion of the Tallinn Administrative Court that indeed, the effect of suspension of a permit is a temporary one, yet equivalent to that of revocation of a permit. In either situation the person lacks the possibility of hunting and ensuring safety with a weapon during the duration of the restriction. Furthermore, the fact that the legislator could have established even more intensive restrictions does not mean that the established restriction of lesser intensity is a reasonable solution.

At the same time the relevant provision protects very weighty legal rights – the life and health of people.

34. Nevertheless, it may appear, when taking into account the personality of the suspect or accused at trial and the content of the suspicion or charges, that the person does not pose a threat to the legal rights protected.

Pursuant to the principle of universality in the criminal procedural law the criminal proceedings are conducted uniformly irrespective of the category of criminal offence committed or the personality of the suspected or accused person. Consequently, the commencement and conduct of criminal proceedings do not take into account the nature of the criminal offence or the personality of the suspect or the accused at trial.

A weapon as a device is meant, among other things, for hitting, damaging or killing a living object. This creates the necessity to prevent through suspension of a weapons permit or an acquisition permit the danger to the life and health of people primarily in the case of commission of a criminal offence with the elements of crime against life or health, also in the case of such crimes which were committed with the use of a weapon. At the same time the Penal Code includes many such necessary elements of criminal offences that are not meant to protect the legal right to life and health or that do not presuppose the use of a weapon. 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.

35. The Chamber does not agree with the opinion of the Minister of Internal Affairs that the mere fact that a person is attributed the status of a suspect or an accused in the proceedings is accompanied by the danger that the person may abuse a weapon. The Chamber is of the opinion that the prevention of danger to the life and health of others is first and foremost guaranteed by the restrictions applicable to the issue of weapons permits and acquisition permits. There is no ground to believe that a person whom the state has trusted to acquire and own a weapon by issuing to him or her a weapons permit or an acquisition permit would always become untrustworthy and pose a danger to the life and health of others merely because a criminal proceeding has been commenced against him or her.

36. In the judicial proceedings which serve as the basis for this constitutional review case the Tallinn Administrative Court found that taking into account the concrete personality and the suspicion the

suspension of the permits was not a proportional measure for the protection of the life and health of others. In that case the person was suspected of a criminal offence related to the violation of the duty to maintain integrity. This was not a criminal proceeding the object of which was a crime against life or health. Neither does it appear from the judgment of the Tallinn Administrative Court that a weapon had been used for the commission of the act.

37. Taking into account the aforesaid the Chamber is of the opinion that the obligatory suspension of an acquisition permit and a weapons permit when the holder of the permit is declared to be a suspect or an accused at trial on grounds arising from criminal proceedings is not a reasonable measure for the protection of the life and health of others, because it does not allow to take into account the personality of the suspect or the accused at trial and the circumstances serving as the ground for the suspicion or the charges.

III.

38. Proceeding from the aforesaid the Chamber declares § 43(1)2) of the WA unconstitutional and invalid to the extent that it does not allow a police prefecture, upon suspending an acquisition permit or a weapons permit of a suspect or an accused at trial, to take into account the personality of the suspect or the accused at trial or the circumstances that constitute the content of the suspicion or the accusation.

39. The Chamber adds further that the best way to guarantee the protection of the life and health of people on the one hand, and the protection of the general fundamental freedom of a suspect or an accused at trial on the other hand, would be if those who apply the law could take into account, upon suspending a weapons permit or an acquisition permit, the circumstances serving as the ground for the suspicion or the charge, the personality of the suspect or the accused at trial, and other possible essential circumstances and legitimate interest. The discretion afforded upon restricting the general fundamental right to a freedom would prevent a person being turned into an object of state authority and would facilitate to guarantee human dignity.

This does not mean that the legislator must not provide for situations where a police prefecture lacks discretion. Even such legislation that does not allow discretion may yield a proportional result upon application. In certain cases, after consideration, the legislator itself may come to a justified conclusion that the fundamental rights and freedoms of persons can be guaranteed even when those who conduct proceedings lack discretion (see the Supreme Court en banc judgment of 27 June 2005 in case no. 3-4-1-2-05 – RT III 2005, 24, 248, paragraph 60). Thus, the legislator can, exercising its margin of appreciation, without giving police prefectures the right of discretion, delimit in the Weapons Act the circumstances upon the existence of which it is mandatory to suspend a weapons permit or an acquisition permit.
