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JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

No. of the case 3-4-1-14-07

Date of judgment 1 October 2007

Composition of court Märt Rask and members Hannes Kiris, Julia Laffranque, Priit Pikamäe and Jüri Pöld.

Court Case Petition of the Tallinn Administrative Court of 30 May 2007 to review the constitutionality of §§ 120, 130(1), 131(3) and 133(1) and (3) of the Public Service Act.

Hearing Written proceeding

DECISION **To declare § 120 of the PSA, § 130(1) of the PSA insofar as it concerns the advance notice of release from service due to age, § 131(3) insofar as it concerns compensation upon release from service due to age, and § 133(1) and (3) insofar as they concern restrictions on timing of release from service due to age, unconstitutional and invalid.**

FACTS AND COURSE OF PROCEEDING

1. Citizenship and Migration Board (hereinafter “CMB”) officials Elli Klein and Mare Linntamm were released from service due to age by directives no 233 p and 234 p of the director general of the CMB of 23 March 2007, under § 120(1) of the Public Service Act (hereinafter “PSA”).

2. E. Klein and M. Linntamm filed actions with the Tallinn Administrative Court, applying for the declaration of unlawfulness of their release from service, for the change of grounds for the release from service and for the ordering of payment of compensation related to release from service. The complainants requested, among other things, that § 120(1) of the PSA be declared to be in conflict with §§ 12 and 19 of the Constitution. The administrative court combined the actions into a joined proceeding.

3. By its judgment of 30 May 2007 in administrative matter no 3-07-598 the Tallinn Administrative Court satisfied the actions in part. The court declared the release from service of E. Klein and M. Linntamm unlawful, and under § 135(2) of the PSA ordered the payment of compensation to the complainants. Upon adjudicating the matter the Administrative Court did not apply § 120(1) of the PSA, and declared unconstitutional §§ 120, § 130(1) of the PSA insofar as it relates to advance notice of release from service due to age, § 131(3) to the extent that it relates to compensation upon release from service due to age, and § 133(1) and (3) insofar as these relate to restrictions on timing of release from service due to age (provisions related to § 120 of the PSA).

The administrative court transferred the judgment to the Supreme Court on 1 June 2007, thus initiating constitutional review court proceedings.

OPINION OF THE COURT AND PARTICIPANTS IN THE PROCEEDING

4. In its Judgment the Tallinn Administrative Court found that under § 120(1) of the PSA the officials in public service have been deprived of the protection against dismissal, so that elderly officials can be released solely due to their advanced age. The fact that a person can no longer work in the office congenial and suitable to the person solely because he or she has attained certain age, constitutes an intensive infringement of free self-realization, established in § 19(1) of the Constitution. The possibility to terminate service relationships with persons who have attained certain age solely due to their age does not serve the interest of democratic social order, and if the ground for terminating a service relationship established in § 120(1) of the PSA did not exist, the democratic society would not suffer any significant loss. § 12 of the Constitution gives rise to the prohibition to treat a person unequally in comparison to others solely due to age, if there is no reasonable and – in regard to the restriction on a person's right or freedom resulting from unequal treatment – proportional ground. § 120(1) of the PSA places the elderly, solely due to age, into an unequal situation in comparison to younger persons. In addition to the Constitution the equal treatment in employment and service relationships is required also by the provisions of the International Labour Organisation Convention (No 111) concerning Discrimination in respect of Employment and Occupation, adopted in Geneva on 25 June 1958 (entered into force in regard to the Republic of Estonia on 17 August 2006) and the provisions of the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

If an official who has attained more than 65 years of age is unable, due to his or her advanced age, to properly perform his or her duties, § 117 of the PSA (especially clauses 5) and 6) of subsection (1) of § 117) offers a ground for the release of such an official due to unsuitability for position.

A constitutional review proceeding should be commenced also in regard to the provisions of the Public Service Act, which are related to § 120(1) of the PSA.

5. E. Klein and M. Linntamm argue that § 120 of the PSA is in its entirety and the provisions related to § 120 of the PSA are in part in conflict with the prohibition of discrimination and general right to equality and the right to free self-realisation, established in §§ 12(1) and 19(1) of the Constitution, and the provisions should be declared, respectively, wholly or in part unconstitutional and invalid. The fact that the regulation of § 120(1) of the PSA is valid in Estonian legal order is in conflict with the obligation, assumed upon accession to the European Social Charter (Revised), to guarantee that no one's employment shall be terminated without a legal ground, whereas the grounds for release may be only the capacity or conduct of the employee or the operational requirements of the undertaking, establishment or service (Part II, Article 24 a). Guideline 5 of Council Decision of 22 July 2003 on guidelines for the employment policies of the Member States (2003/578/EC) establishes that Member States should eliminate incentives for early exit from the labour market, notably by reforming early retirement schemes and ensuring that it pays to remain active in the labour market; and encouraging employers to employ older workers. § 120(1) of the Public Service Act is not based on the health status or capacity for work of persons who are 65, it is based solely on the age. The unequal treatment of officials over 65 years of age in comparison to younger officials is

arbitrary, because it lacks a reasonable justification. Consequently, § 120(1) of the PSA and the provisions of the Public Service Act inseparably and individually related to the referred provision are in conflict with § 12(1) of the Constitution, and with the obligation arising from Article 1, Article 2(2)A and Article 3(1)C of the Council Directive 2000/78/EC, to eliminate direct discrimination of the elderly in relation to employment or dismissal.

6. The Citizenship and Migration Board is of the opinion that the provisions which were not applied by the administrative court in its judgment are not unconstitutional. § 120(1) of the Public Service Act does not violate the principle of equal treatment. Public and private sectors are subject to different legal regulation, and it is thus incorrect to compare release from service under the Public Service Act to release from employment under the Employment Contracts Act. Both, the Constitution and the European Union law allow exceptions from the principle of equal treatment in certain justified cases. Article 6 of the Council Directive 2000/78/EC establishes that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. Release from service due to age is not an imperative norm or a general rule, it is a possibility. The right to free self-realisation, established in § 19 of the Constitution, is not an unlimited fundamental right. In regard to certain positions the deprivation of high protection against dismissal due to age is justified.

7. The Constitutional Committee of the Riigikogu is of the opinion that the release of elderly public servants due to age, as established in the Public Service Act, is not in conflict with the Constitution. § 120 of the Public Service Act is not imperative by nature, and it leaves an employer the right of discretion to decide on the expedience of a concrete person's stay in the public service. This provision should not be interpreted as discriminating against elderly officials, instead it should be interpreted as giving them advantages, through allowing the persons to leave with dignity and receive compensation.

8. The Chancellor of Justice is of the opinion that in regard to protection against dismissals the officials under and over 65 years of age are differentiated. The persons who are 65 and over have significantly weaker protection against dismissal than those under 65, as § 120(1) of the PSA gives the right to release the former from office without a substantive justification, on the basis of a formal criterion – the age. This amounts to unequal treatment of groups of persons who are in an analogous situation. Thus, § 120(1) of the Public Service Act and the norms related to this provision infringe the general right to equality, established in the first sentence of § 12 of the Constitution, of persons who are 65 and over. The reduction of protection against dismissal in comparison to younger officials is not reasonable and is not appropriately justified. The unequal treatment of officials who are 65 and over can not be justified by the need to regulate the labour market, neither can it be justified by the state of health or by capability to accomplish what is required (see the regulation of these cases in §§ 117 and 119 of the PSA). The reduction of the protection against dismissal has intense negative consequences for an official's right to self-realisation and his or her economic circumstances. Council Directive 2000/78/EC prohibits, in Article 6, in employment matters the differences of treatment on grounds of age, establishing in the 14th recital of the preamble that the Directive shall be without prejudice to national provisions laying down retirement ages. As the case C 411/05: *Felix Palacios de la Villa v. Cortefiel Servicios SA* is pending in the European Court of Justice, it is not clear what the European Union law establishes in this regard (cf. ECJ judgment C 144/04: *Mangold v. Helm*). Yet, pursuant to the 28th recital the Council Directive 2000/78/EC lays down minimum requirements, and consequently the resolution of the referred case under the European Union law will probably not affect the constitutionality or unconstitutionality of § 120 of the PSA and related provisions, valid in Estonian national legal system.

9. The Minister of Justice is of the opinion that the provisions of the Public Service Act, not applied by the administrative court, are in conformity with the principle of equal treatment, arising from § 12 of the Constitution, and with the right to free self-realisation, arising from § 19 of the Constitution. Release from service due to age is not an imperative norm or a general rule, it is a possibility. Due to the specific nature of public service the imposition of balanced restrictions, accompanied by additional benefits, in regard to public servants is justified. The age limit has a reasonable justification (e.g. need to guarantee the sustainable

development of an agency; the payment of three months' salary as compensation has been provided for, as well as old age pension). Officials of general public service and special service are comparable groups who must be treated equally upon providing for the possibility of release from service due to age, with the aim of guaranteeing sustainable performance of public duties. In special service the release from service upon the attainment of age limit is a general rule, in the general public service this is a possibility or, indeed, an exception. It is wrong to compare the group of persons working on the basis of employment contracts to the officials performing public duties under the Public Service Act, because these are different categories of persons, who are not treated unequally within their respective categories. If a person is unable, due to advanced age, perform functions properly, the release of the person due to age is easier in the moral sense than release due to unsuitability for position.

CONTESTED PROVISIONS

10. §§ 120, 130(1), 131(3), and 133(1) and (3) of the Public Service Act have been contested insofar as they provide as follows:

“§120. Release from service due to age

- (1) An official may be released from the service due to age when he or she attains sixty-five years of age.
- (2) An official shall be released pursuant to subsection (1) of this section as of the date specified in the document of release.”

“§ 130. Advance notice of release from service

- (1) An official shall be given at least one month's advance notice in writing of his or her release from the service due to [...] age.”

“§ 131. Compensation upon release from service

- [...]
- (3) Upon release from the service due to age [...], an official shall be paid his or her three months' salary as compensation.”

“§ 133. Restrictions on timing of release from service

- (1) An official shall not be released from the service due to [...] age [...] during the time the service relationship is suspended on any grounds provided for in clauses 108 2) 10) of this Act.
[...]
- (3) An official elected, pursuant to the procedure established by law or a regulation of the Government of the Republic, to an organisation representing public servants or as a representative of public servants may be released from the service due to [...], age, [...] at the time he or she acts as a representative and within one year thereafter only with the consent of the labour inspector of the location of the administrative agency.”

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

11. Pursuant to the first sentence of § 14(2) of the Constitutional Review Court Procedure Act the provision the constitutionality of which the Supreme Court reviews within concrete norm control, must be relevant. Norms can be regarded as relevant if they are of decisive importance for the adjudication of a case.

In the present case the officials of the CMB E. Klein and M. Linntamm were released from service due to age by directives no 233 p and 234 p of the director general of CMB under § 120(1) of the PSA. If § 120(1) of the PSA is unconstitutional, officials must not be released from service solely on the basis of age criterion, the release of E. Klein and M. Linntamm would be illegal and thus the court should render a different judgment. As § 120(1) regulates the relationship under dispute and is of decisive importance for the

resolution of the matter, it is a relevant norm.

12. With the aim of guaranteeing legal clarity, the provisions which are closely related to the contested norm and which may – when they remain in force – create ambiguity as to the legal reality, are to be regarded as relevant, too.

§ 120(1) of the Public Service Act provides that an official may be released from service due to age when he or she attains sixty-five years of age. Some other norms of the Public Service Act, which regulate the procedure of release from service due to age and the obligations of an agency towards an official released under § 120(1) of the PSA, and which jointly form a uniform regulation related to the release from service of officials who are 65 and over, are closely related to the referred provision. Thus, the second subsection of the same provision specifies the date of release, § 130(1) of the PSA regulates advance notice of release from service due to age, § 131(3) of the PSA regulates compensation for, and § 133(1) and (3) of the PSA regulate the timing of the release from service due to age. All of the referred provisions of the Public Service Act are relevant in the case under discussion with the aim of guaranteeing legal clarity.

13. The protected fundamental right in the case under discussion is the general right to equality, established in § 12(1) of the Constitution, the sphere of protection of which embraces all spheres of life and every person. There is an infringement of the general right to equality, established in § 12(1) of the Constitution, in the case of unequal treatment (see judgment of the Constitutional Review Chamber of the Supreme Court of 6 March 2002, in matter no 3-4-1-1-02 – RT III 2002, 8, 74, point 13). § 12(1) of the Constitution must also be interpreted to require equality in legislation – laws must, in substance, treat in the same way all the persons who are in a similar situation. This principle manifests the idea of substantial equality: equals must be treated equally and unequals unequally. But not every instance of unequal treatment of equals amounts to a violation of the right to equality. The prohibition to treat equals unequally is violated when a group of persons or a situation is treated unequally on an arbitrary basis. If there is a reasonable and appropriate ground, the unequal treatment by law is justified (see judgment of the Constitutional Review Chamber of the Supreme Court of 3 April 2002, in matter no 3-4-1-2-02 – RT III 2002, 11, 108, point 17).

14. The grounds for release from service, established in the Public Service Act, provide protection to officials against dismissal, by allowing – as a rule – to release an official from service for good substantial reasons related either to an employee or the agency (§ 117 – inadequate working skills, § 118 – breach of duties, § 115 – winding-up of administrative agency, § 116 – reorganization of administrative agency). Furthermore, the Public Service Act provides for the release from service of officials in order to guarantee the transparency of public service and the loyalty of public servants (§ 125 – prohibition on officials closely related by blood or marriage to hold positions of which one is directly subordinated to or controlled by the other, § 128 – release from positions requiring Estonian citizenship after loss of citizenship).

Pursuant to § 120(1) of the Public Service Act an administrative agency has a possibility to release from service an official who is 65 or over, without substantial justifications and solely on the basis of a formal criterion – the age. Thus, the Public Service Act differentiates between persons who are released from service due to attainment of 65 years of age, and persons who have not been released irrespective of attainment of 65 years of age. Namely, § 120(1) of the PSA leaves the release or non-release of these persons at the discretion of concrete administrative agencies. It is possible that in every-day administrative practice people over 65 are released with the reference to their age and without specifying substantive reasons, because the law does not require this. Also, the directives on the release from service of E. Klein and M. Linntamm referred only to release from service due to age, without specifying substantive reasons. Consequently, in the present case, groups of persons who are in an analogous situation are treated unequally. § 120(1) of the Public Service Act and the norms closely connected to this provision infringe the general right to equality of people of 65 years of age and over, established in § 12(1) of the Constitution.

15. There can be no reasonable justification to the regulation established in a general Act regulating public service, which allows to leave one official who has attained 65 years of age in the service and to release another from the service, justifying the release solely with age.

The reason for the unequal treatment of officials who have attained 65 years of age and have been released from service, and the officials of the same age who continue their service, is not to be found in the explanatory letter to the Public Service Act, which entered into force on 1 January 1996. Neither can the opinion of the Constitutional Committee of the Riigikogu and the Minister of Justice, that it is easier for an elderly person who is unable to properly perform his or her duties to cope with release from service due to age, instead of being released under § 117 of the PSA due to unsuitability for office, be accepted as a reasonable justification. To avoid arbitrary unequal treatment the motifs for release from service must be transparent and reflect the actual situation.

16. Consequently, the infringement of the general right to equality is not reasonably or appropriately justified and amounts to arbitrary unequal treatment, and that is why § 120(1) of the PSA and the related norms are in conflict with § 12(1) of the Constitution.

The Chamber hereby declares unconstitutional and invalid § 120 of the PSA, 130(1) of the PSA insofar as it concerns the advance notice of release from service due to age, § 131(3) insofar as it concerns compensation upon release from service due to age, and § 133(1) and (3) insofar as they concern restrictions on timing of release from service due to age.

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