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## Constitutional judgment 3-4-1-4-05

### JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

<b>No. of the case</b>	3-4-1-4-05
<b>Date of decision</b>	4 April 2005
<b>Composition of court</b>	Chairman Märt Rask, members Tõnu Anton, Eerik Kergandberg, Villu Kõve, Jüri Pöld
<b>Court case</b>	Petition of the Tartu Administrative Court to review the constitutionality of § 21 <sup>1</sup> (11) of the Police Service Act
<b>Basis of proceeding</b>	Judgment of the Tartu Administrative Court of 30 December 2004 in administrative matter no. 3-243/2002
<b>Court hearing</b>	Written proceeding
<b>Decision</b>	<b>To dismiss the petition of the Tartu Administrative Court</b>

### FACTS AND COURSE OF PROCEEDING

1. Ain Valdmann, superintendent of the department of maintenance of law and order of the Jõgeva Police Prefecture, was intoxicated while in the service on 1 November 2001. A disciplinary investigation was commenced concerning him. On 17 January 2002 A. Valdmann was released from service on the basis of § 118 of the Public Service Act (hereinafter “the PSA”) for having committed an indecent act.

2. On 18 January 2002 A. Valdmann filed an application for pension for police officers with the Jõgeva division of the Tartu Pension Board (hereinafter “the Pension Board”). Having received no reply, he again submitted the same application to the Pension Board on 11 May 2002.

3. To ascertain whether in the present case there were any circumstances precluding the grant of pension, the Pension Board requested from the Jõgeva Police Prefecture a transcript of the directive on the release from the police service of A. Valdmann. Having ascertained that the indecent act serving as the basis of release from service consisted in intoxication while in the service, the Pension Board, on the basis of § 21<sup>1</sup>(11) of Police Service Act (hereinafter “the PoSA”), by its decision no. 779 of 22 May 2002, refused to grant A. Valdmann the pension for police officers.

4. A. Valdmann filed an action with the Tartu Administrative Court, applying for the annulment of the decision of the pension committee of the Pension Board because of the unconstitutionality of § 21<sup>1</sup>(11) of the PoSA, and for issue of a precept for the grant of the pension for police officers to him as of the date of

release from the service. At the same time A. Valdmann disputed his release from the service in the Tallinn Administrative Court, but withdrew his action on 16 April 2004, and the court terminated the proceeding.

5. On 30 December 2004 the Tartu Administrative Court satisfied the action of A. Valdmann by declaring § 21<sup>1</sup>(11) of the PoSA unconstitutional and not applying the provision upon adjudication of the matter. The court annulled the decision of the pension committee of the Pension Board and issued a precept to the Pension Board to calculate, grant and pay the pension for police officers to A. Valdmann as of the date when the right to this pension was created in regard of him.

6. The Tartu Administrative Court addressed the Supreme Court with the petition to review the constitutionality of § 21<sup>1</sup>(11) of the PoSA.

## **JUSTIFICATIONS OF THE COURT AND PARTICIPANTS IN THE PROCEEDING**

7. The Administrative Court held that § 21<sup>1</sup>(11) of the PoSA was in conflict with the requirement that restrictions of rights and freedoms be proportional, established in § 11 of the Constitution, as well as with the principle of equal treatment, arising from § 12 of the Constitution.

The court pointed out that if § 21<sup>1</sup>(11) of the PoSA was enacted with the aim of guaranteeing long-term impeccable service of police officers, the norm was not a suitable measure for achieving the aim. Thus, § 21<sup>1</sup>(11) of the PoSA disproportionately restricts the right of a person to receive the pension for police officers.

The administrative court held that the fact that certain cases of release from the service were not included in § 21<sup>1</sup>(11) of the PoSA was not in conformity with the principle of equal treatment. Thus a situation arises wherein, for example, a police officer released from the service for loss of confidence shall retain the right to receive the pension for police officers, while a police officer released for intoxication while in the service does not retain the right. The administrative court could not see a reasonable justification for the differential treatment of police officers released for disciplinary offences.

8. The Legal Affairs Committee and the Constitutional Committee of the Riigikogu are of the opinion that § 21<sup>1</sup>(11) of the PoSA is in conformity with the Constitution. The referred provision does not violate the principle of equal treatment and is a proportional ground for deprivation of a special pension.

The Constitutional Committee of the Riigikogu argued that the rights of a police officer who has committed a disciplinary offence were sufficiently protected in disciplinary proceedings, as the body conducting proceedings has the right of discretion and it has to substantiate the release from service. The Constitutional Committee admitted that what may prove unconstitutional is the release from service and deprivation of special pension of a police official who has served for a very long time, for a disciplinary offence committed at the end of employment time.

The Legal Affairs Committee of the Riigikogu pointed out that upon enacting the provision the Riigikogu proceeded from the consideration that police service requires special commitment and increased discipline, as it is on the basis of the police activities that the society evaluates the activities of the state upon guaranteeing law and order. The Riigikogu made the restrictions on the right to pension for police officers dependent on the commission of certain disciplinary offences, which are more difficult for the society to accept and which are more severe, bearing in mind the specific features of police service. The Legal Affairs Committee pointed out the fact that a former police officer who has lost the right to receive the pension for police officers still retains the right to state old-age pension and, in certain cases, also to superannuated pension.

9. The Chancellor of Justice is of the opinion that § 21<sup>1</sup>(11) of the PoSA is in conflict with the first sentence of § 12(1) in conjunction with § 11 of the Constitution.

The Chancellor of Justice argues that persons released from the service for an indecent act, consisting in intoxication while in the service, and persons released from the service for an indecent act consisting in

something else, are treated differently without a reasonable justification. This differentiation is not in conformity with the principle of equal treatment. Neither is the different treatment of the referred groups of persons proportional with the pursued aim.

**10.** The Minister of Justice argues that the disputed provision is not unconstitutional.

The Minister of Justice is of the opinion that more severe requirements must be imposed on a police officer as a holder of increased responsibility, which must be balanced with sufficient social guarantees. The Minister of Justice argues that it has to be born in mind that the possibility of deprivation of the special pension can be considered only in the cases of most severe disciplinary offences. The Minister of Justice does not think that the solution according to which special pension is granted, on the same grounds, to police officers whose service has been excellent and to those who have been released for intentionally committed criminal or disciplinary offences, would be in conformity with the principle of equal treatment.

**11.** The Minister of Internal Affairs is of the opinion that § 21<sup>1</sup>(11) of the PoSA is in conflict with the constitution and should be declared invalid.

The Minister of Internal Affairs argues that the provision violates the principle of equal treatment and that the deprivation of the right to special pension is not proportional to the gravity of violations of the duties of service. The Minister of Justice is of the opinion that making the deprivation of the right to special pension conditional on release from the service for a disciplinary misconduct constitutes double punishment, unacceptable in a society based on the rule of law.

**12.** A. Valdmann is of the opinion that § 21<sup>1</sup>(11) of the PoSA illicitly infringes into the fundamental rights established in §§ 11, 12(1) and 23(3) of the Constitution, and therefore the referred norm should be declared unconstitutional.

The right of other officials who have increased responsibility to receive special pension has not been restricted similarly with § 21<sup>1</sup>(11) of the PoSA. Thus, police officials are treated unequally in comparison with other officials. Deprivation of the right to special pension constitutes punishing a person twice for the same offence, i.e. punishing again for the same act, prohibited by § 23(3) of the Constitution.

**13.** The Pension Board is of the opinion that § 21<sup>1</sup>(11) of the PoSA is constitutional.

Imposition of a restriction on the right to receive special pension discriminates against the majority of police officials and is necessary for guaranteeing the interests of the state upon protecting law and order.

## **DISPUTED PROVISION**

**14.** The Tartu Administrative Court declared unconstitutional and did not apply § 21<sup>1</sup>(11) of the PoSA.

§ 21<sup>1</sup>(11) of Police Service Act (RT I 1998, 50, 753 ... RT I 2004, 54, 390) reads as follows:

“(11) The right to receive a pension for police officers pursuant to this section does not apply to a police officer who has been released from service due to the wrongful non-performance or unsatisfactory performance of duties, including intoxication while in the service.”

Subsection (1) of § 21<sup>1</sup> Police Service Act reads as follows: “(1) A police officer whose length of police service is at least 20 years has the right to receive a pension for police officers when he or she attains 50 years of age in the amount of 50% of the of the police officer's last salary or of the most favourable salary corresponding to his or her position earned by police officer during the last five years of the police officer's service, provided that he or her she served in the position for at least twelve consecutive months.”

Subsection (2) of the same section establishes the following: “(2) A police officer who is released from service due to age, state of health or lay-offs in the staff and who by the date of his or her release from

service has attained 55 years of age and who has completed at least twenty five years of pensionable service or whose accumulation period is at least twenty five years, twelve years and six months of which the person served on the position of a police officer, has the right to receive a pension for police officers in the amount of 30% of the police officer's last salary or of the most favourable salary corresponding to his or her position earned by police officer during the last five years of the police officer's service, provided that he or her she served in the position for at least twelve consecutive months.”

## **OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER**

**15.** The Tartu Administrative Court has initiated constitutional review proceedings to review the constitutionality of § 21<sup>1</sup>(11) of the PoSA. According to the practice of the Supreme Court it is necessary that the provision the constitutionality of which the Supreme Court assesses be relevant. A norm is relevant if it is of decisive importance for the adjudication of the case (*see judgment of the Supreme Court en banc of 22 December 2000 in matter no. 3-4-1-10-00 – RT III 2001, 1, 1, paragraph 10*). A provision is of a 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 judgment of the Supreme Court en banc of 28 October 2002 in matter no. 3-4-1-5-02 – RT III 2002, 28, 308, paragraph 15*).

**16.** The Constitutional Review Chamber is of the opinion that upon deciding on the relevance in the present case it shall be first necessary to form an opinion on whether only release on the ground referred to in § 84(1) of the PSA is regarded as a ground for release from service, referred to in § 21<sup>1</sup>(11) of the PoSA, or whether the consequence established in § 21<sup>1</sup>(11) of the PoSA is also applicable to persons who are released from service for an indecent act stipulated in § 84(3) of the PSA.

§ 21<sup>1</sup>(11) of the PoSA establishes that the right to receive a pension for police officers pursuant to this section does not apply to a police officer who has been released from service due to the wrongful non-performance or unsatisfactory performance of duties, including intoxication while in the service.

Release from service of police officers is subject to general regulation of the Public Service Act. Pursuant to § 118(1) of the PSA an official may be released from service for a disciplinary offence established in § 84 of the same Act. Pursuant to § 84 of the PSA disciplinary offences are the wrongful non-performance or unsatisfactory performance of duties, including intoxication while in the service (§ 84(1) of the PSA); the wrongful causing of damage to the property of an administrative agency or the wrongful causing of danger of such damage (§ 84(2) of the PSA) and an indecent act, i.e. a wrongful act which is in conflict with generally recognised moral standards or ethic standards set for officials, or which discredits an official or administrative agency, regardless of whether the act is committed in or out of service (§ 84(3) of the PSA).

**17.** The Chamber points out that the wording of § 21<sup>1</sup>(11) of the PoSA concerning the grounds for release from service is almost identical with the wording of § 84(1) of the PSA. This indicates clearly that the legislator has regarded release from service of a police officer who has committed a disciplinary offence referred to in § 84(1) of the PSA as a ground for deprivation of the right to receive the pension for police officers. Whether or not other disciplinary offences are subject to this norm can not be assessed solely on the basis of the wording of the norm.

The evolution of the provision supports this view. Koit Pikaro, member of the Riigikogu, made the proposal to add § 21<sup>1</sup>(11) to the Police Service Act during the preparation period for the second reading of the draft of the Police Service Act and the Police Act Amendment Act, which the President of the Republic had refused to proclaim. During the legislative proceedings in the Riigikogu Vootele Hansen, the person reporting on the draft, pointed out: “The second amendment submitted by Koit Pikaro would deprive those police officers, who have been released from service for the wrongful non-performance or unsatisfactory performance of duties, including intoxication while in the service, of the right to pension for police officers. These are disciplinary offences. [...] The Legal Affairs Committee disregarded the proposal because the list of disciplinary punishments enabling to release an official from service, is longer. [...] Koit Pikaro’s proposal does not cover those cases, and in order not to render such a consequence to a disciplinary offence the

Committee disregarded the proposal; the proposal does not include all possible grounds of release for disciplinary reasons” (Shorthand notes of the sitting of 11 October 2001 of the plenary session of the VI session of the IX Riigikogu).

On the basis of the aforesaid the Chamber argues that § 21<sup>1</sup>(11) of the PoSA is not applicable in regard to police officers released from service for the commission of an indecent act.

**18.** A. Valdmann was released from service on the basis of § 118 of the PSA for the commission of the indecent act referred to in § 84(3) of the same Act. Proceeding from the above conclusion the legislator has not bound a legal consequence (non-creation of the right to receive the pension for police officers established in § 21<sup>1</sup>(11) of the PoSA) to an act qualified under § 84(3) of the PSA. The Chamber is of the opinion that upon deciding on the grant of pension the Pension Board must proceed from the qualification of the act referred to in the directive on the release from service, and that it can not re-qualify the disciplinary offence upon granting pension. The Pension Board would not have this right even if the evidence at its possession allowed to conclude that another administrative authority has wrongly qualified a disciplinary offence which served as the basis for release from service.

**19.** On the basis of the aforesaid the Chamber is of the opinion that § 21<sup>1</sup>(11) of the PoSA is not applicable to A. Valdmann in this court case. Decision on A. Valdmann’s right to receive the pension for police officers does not depend on the opinion on the constitutionality of this provision. Thus, § 21<sup>1</sup>(11) of the PoSA is not a provision of decisive importance for the adjudication of this matter, and the Chamber does not consider it necessary to review the constitutionality of the provision. The Chamber shall dismiss the petition of the Tartu Administrative Court.

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