Constitutional judgment 3-4-1-24-04

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-24-04
Date of judgment	10 December 2004
Composition of court	Chairman Märt Rask and members Tõnu Anton, Eerik Kergandberg, Lea Kivi, Villu Kõve.
Court Case	Review of constitutionality of subsection (2) of § 413 of the Traffic Act.
Basis of proceedings	Judgment of the Tallinn Administrative Court of 1 September 2004 in matter no. 3-1763/2004.
Hearing	Written proceeding

DECISION

1. Not to declare subsection (2) of § 41^3 of the Traffic Act unconstitutional and to dismiss the petition of the Tallinn Administrative Court.

FACTS AND COURSE OF PROCEEDING

1. Igor Bernardov was punished by a fine on the basis of § 74^{22}(2) of the Traffic Act (hereinafter "the TA") for the exceeding of a speed limit by 21 to 40 kilometres per hour on two occasions: on 28 May 2003 and on 25 May 2004. After the decision of 25 May 2004 took effect the head of the Tallinn bureau of the Motor Vehicle Registration Centre (hereinafter "the MVRC"), by decision of 17 June 2004, suspended I. Bernardov's right to drive for one month under § 41^3(2) of the TA.

2. I. Bernardov filed an appeal against the decision with the Tallinn Administrative Court, requesting that it be annulled.

3. By its judgment of 1 September 2004 the Tallinn Administrative Court satisfied the action of I. Bernardov and annulled the decision of the head of the Tallinn bureau of the MVRC. The court did not apply § 41^3(2) of the TA, declared it unconstitutional, and referred the judgment to the Supreme Court.

OPINION OF THE ADMINISTRATIVE COURT AND THE PARTICIPANTS IN THE PROCEEDING

4. On the basis of the arguments presented in the judgment of the Administrative Law Chamber of the Supreme Court of 23 February 2004 in matter no. 3-3-1-1-04, the Tallinn Administrative Court argued that

suspension of the right to drive on the basis of § 41^3(2) of the TA constitutes a punishment in the material sense. That is why suspension of the right to drive on the basis of § 41^3(2) of the TA violates the fundamental right, established in § 23(3) of the Constitution, not to be punished twice for the same act. As the administrative court ascertained a conflict of § 41^3(2) of the TA with § 23(3) of the Constitution, it did not consider it necessary to analyse whether the pertinent provision was in conflict also with some other constitutional norm.

5. I. Bernardov points out that he is aware that by its judgment of 25 October 2004 in matter no. 3-4-1-10-04 the Supreme Court *en banc* did not declare unconstitutional subsections (1), (4) and (8) of § 41^3 of the TA, which are essentially analogous to § 41^3(2) of the TA. In the present matter the Tallinn Administrative Court argued that § 41^3(2) of the TA was in conflict with § 23(3) of the Constitution and for that reason did not analyse the possible conflict of the pertinent provision with other constitutional provisions referred to by the person who filed the action. Upon adjudicating this matter the Supreme Court should analyse the possible conflict of the pertinent provision with the Constitution in a broader and more abstract sense. I. Bernardov is of the opinion that taking a decision to suspend the right to drive without the right of discretion is in conflict with the principles of proportionality and equal treatment, and also with the right to free self-realisation.

6. The Estonian Motor Vehicle Registration Centre is of the opinion that § 41^3(2) of the TA is not unconstitutional, and repeated the arguments it had presented in constitutional review matter no. 3-4-1-10-04.

7. Legal Affairs Committee of the Riigikogu refers to its opinion in matter no. 3-4-1-10-04, pointing out that suspension of the right to drive can not be regarded as a punishment in the material sense, and that is why § 41^3(2) of the TA is not in conflict with the Constitution. At the same time the Legal Affairs Committee points out in its opinion that proceeding from the principle of legal peace the valid regulation of the Traffic Act requires adjustments through an amendment of the Act.

8. The Chancellor of Justice is of the opinion that § 41^3(2) of the TA disproportionally infringes the prohibition of punishing a person twice, established in § 23(3) of the Constitution, and also the guarantee of recourse to a court established in the first sentence of § 15 as well as the right to organisation and proceeding guaranteed by § 14, and is thus in conflict §§ 11, 13(2), 14, the first sentence of § 15(1) and with § 23(3) of the Constitution in their conjunction. Also, the Chancellor of Justice perseveres with the opinion submitted in matter no. 3-4-1-10-04.

9. The Minister of Justice is of the opinion that § 41^3(2) of the TA is not in conflict with § 10, § 12(1) and § 23(3) of the Constitution.

PERTINENT PROVISION

10. § 41^3(2) of Traffic Act (RT I 2001, 3, 6; 2004, 46, 329) reads as follows:

"(2) An agency which has issued a driving licence shall suspend the right to drive for one month if the person is punished for a second time for violation of § 74^5, subsection 74^{22} (2) or (3), § 74^{33} or subsection § 74^{35} (2) of this Act and a decision has entered into force concerning the matter and if information concerning the previous punishment for violation of sections specified in this subsection has not been expunged from the punishment register in accordance with the Punishment Register Act."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

11. By its judgment of 1 September 2004 the Tallinn Administrative Court declared § 41^3(2) of the TA to be in conflict with § 23(3) of the Constitution, on the basis of the arguments presented in the judgment of the Supreme Court *en banc* of 25 October 2004 in matter no. 3-4-1-10-04 (RT III 2004, 28, 297). In the referred matter the Supreme Court *en banc*, inter alia, expressed the opinion that drawing a line between subsections (1) to (8) of § 41^3 of the TA would be unreasonable, as the provisions form an integrated system (see paragraph 20 of the judgment). For the purposes of constitutional review the facts of the present case do not materially differ from the facts which served as the basis of the judgment of the Supreme Court *en banc* of

25 October 2004. In both cases the complainant disputed the suspension of the right to drive in an administrative court. In both cases an administrative court satisfied the action solely on the basis of alleged violation of § 23(3) of the Constitution and adhering to the judgment of the Administrative Law Chamber of the Supreme Court of 23 February 2004 in matter no. 3-3-1-1-04 (RT III 2004, 7, 73). Irrespective of the fact that the Legal Affairs Committee of the Riigikogu states that the adjustment of the principles of the Traffic Act through an amendment to the Acts is presently being discussed, neither the legal norms nor the implementation practice thereof have changed so far. That is why the Constitutional Review Chamber of the Supreme Court is of the opinion that because of the reasons presented in the judgment of the Supreme Court *en banc* of 25 October 2004, § 41^3(2) of the TA should not be declared unconstitutional and the petition of the Tallinn Administrative Court should not be satisfied.

12. In regard to the opinions of I. Bernardov and the Chancellor of Justice, that in addition to § 23(3) of the Constitution, § 41^3(2) of the TA may be in conflict with some other constitutional provisions, the Chamber points out the following. Pursuant to § 14(1) of the Constitutional Review Court Procedure Act the Supreme Court is not, when adjudicating a matter, bound by a petition or a court judgment or court ruling. Consequently, when assessing the constitutionality of a norm, the Supreme Court is not obliged the confine itself to only the constitutional norms referred to in a petition or court judgment which is the basis of a proceeding. The Supreme Court may and must assess the constitutionality of a contested norm on the basis of entirety of the norms and the spirit of the Constitution (see judgment of Supreme Court*en banc* of 22 December 2000 in matter no. 3-4-1-10-00 – RT III 2001, 1, 1, paragraph 19). Nevertheless, the aforesaid does not mean that a request, referred to in an opinion of a participant in the proceeding, to review the conformity of a pertinent provision to some other constitutional provision, not referred to in a petition or a court judgment or ruling, which is the basis of a proceeding, should be binding on the Supreme Court. It is up to the Supreme Court to decide to what extent it is necessary, in a concrete case, to deviate from the motivation of a petition, court judgment or court ruling.

When adjudicating a matter analogous to the present constitutional review case the Supreme Court *en banc* decided, in matter no. 3-4-1-10-04, not to deviate from the motivation of the administrative court, when analysing the provisions of the Traffic Act. That is the reason why in the present matter, which is analogous to the case adjudicated by the Supreme Court *en banc*, the Constitutional Review Chamber does not consider it possible to form an opinion on whether § 41^3(2) of the TA may be in conflict with some other constitutional norm, not referred to in the judgment of the Tallinn Administrative Court.

Dissenting opinion
of justice Tõnu Anton

1. I find that this judgment creates grounds to doubt the consistency of the Supreme Court in adhering to the principle of rule of law. Failure to give a clear and motivated opinion concerning the essential and pertinent arguments of I. Bernardov and the Chancellor of Justice can be regarded as a deviation from the requirements of a fair trial and as a violation of the fundamental rights of the complainant in the constitutional review proceedings.

2. The second sentence of § 15(1) of the Constitution, reading that “Everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional,” means also an obligation to adjudicate such a petition. A judge may not withdraw from the fulfilment of this obligation even if a foreseeable result of a constitutional review proceeding amounts to ignoring public opinion. I find that an opinion counter to this would be inappropriate in a state based on the rule of law.

3. Fulfilment of the obligation of constitutional review requires the examination of all essential arguments of the participants in a proceeding. Moreover, when adjudicating matter no. 3-4-1-10-00 the Supreme Court has pointed out: “The Supreme Court can and must assess the lawfulness of a contested norm proceeding from

the entirety of the norms and the spirit of the Constitution." In the present case the Chamber has ignored the arguments of I. Bernardov and of the Chancellor of Justice about the possible conflicts with other provisions of the Constitution. The Chamber confined itself to only § 23(3) of the Constitution.

4. The view (paragraph 12 of the judgment) that the allegations of the participants of a proceeding concerning other possible conflicts are not binding on the Supreme Court is erroneous and results in the violation of the rights of a complainant. Naturally, the referred allegations are not binding on the Supreme Court in the sense that the Supreme Court should agree with these. Yet, in the present case, the possibility to ignore such allegations has been born in mind. This approach is not in conformity with the principle of fair trial. The fact that the referred principles have not been clearly stated in the Constitutional Review Court Procedure Act, is irrelevant. After all, it is also irrelevant that it is possible to interpret the Constitutional Review Court Procedure Act in such a manner that it would result in a conflict with the principle of fair trial and, as such, would justify the choices of the Chamber. Procedural norms should be interpreted in conformity with principles.

5. Some of the principles of fair trial are reflected in procedural codes, some in the Constitution. For example, § 330(6) of the Code of Civil Procedure establishes that in its judgment a circuit court must respond to the reasons of an appeal. In constitutional review proceedings the same principle should be worded as an obligation of the court to respond to the allegations of participants in the proceeding regarding other possible conflicts with the Constitution.

6. § 24(2) of the Constitution refers to the right of everyone to be tried in his or her presence. This is not a mere subjective right, this is a principle. This does not primarily mean a possibility to participate in a court hearing, instead this means active participation – a right to be heard and an obligation of the court to take the submitted petitions and views into account or to motivate the refusal. That is why I am of the opinion that the Chamber has ignored this principle and this obligation by ignoring the allegations of a participant in the proceedings. The reference to an earlier judgment of the Supreme Court *en banc* in matter no. 3-4-1-10-04 is but an apparent justification. The referred judgment has also failed to give reasons why the court did not respond to the allegations of the participants in the proceeding.

7. It appears from § 139(1) of the Constitution that the most important duty of the Chancellor of Justice is constitutional review. The failure to pay attention to the arguments presented in the opinion of the Chancellor of Justice is not in conformity with the competence of this constitutional institution, with the requirement that the state authorities must act in conformity, or with the principles of the judicial constitutional review.

8. The approach chosen by the Chamber is not reasonable, either. It is possible in the appellate and cassation procedure to petition for a new constitutional review, referring to other possible conflicts. The issue of constitutionality of suspension of the right to drive may arise in other analogous cases. This may lead to the assessment of the conflicts which had not been dealt with previously, if the courts so require. It is clear that such repeated review of constitutionality is in conflict with the principle of economy of court proceedings. Differing court judgments (suspension of the right to drive is/ is not constitutional) confuse the general public and create uncertainty in application of law. I am of the opinion that in principle it is not possible to suspend the complainant's right to drive while a case is pending before a court, and the lawfulness of the implementation of this punishment is questionable when several years have passed after the decision to punish was taken.

9. It still remains unclear, even within the concrete norm control exercised in the present matter, whether the regulation of the right to drive established in Acts is constitutional or not. So far the Supreme Court has only held that the regulation is not in conflict with § 23(3) of the Constitution. The Supreme Court has failed to assess other possible conflicts, although the participants in the proceedings have requested it to do so.

10. I am of the opinion that the presently valid regulation of the suspension of the right to drive is, in the abstract sense, in conflict with the Constitution as regards the proportionality of punishment and the general

right to equality and because of the lack of due procedure. The latter is essential in the present case, too – in exercising concrete norm control.

11. A person who has violated road traffic rules can not submit objections to the suspension of the right to drive or to the duration thereof. In substance, there is no proceeding upon suspension of the right to drive. The result established in § 41^3(2) of the Traffic Act arises fatally after the punishment imposed in misdemeanour proceedings enters into force. Even if only a small fine is imposed on a person for the violation of road traffic rules, the suspension of the right on the basis of § 41^3(2) of Traffic Act will automatically follow. When imposing a fine there is no discussion of the suspension of the right to drive. Neither has the person conducting extra-judicial proceedings a right to decide on the necessity or duration of the suspension of the right to drive. I find that a proceeding of this kind is in conflict with the Constitution.

12. Consequently, I. Bernardov's justification of the action filed with the Tallinn Administrative Court, that his rights had been violated upon suspending his right to drive because the proceeding of the suspension of the right to drive did not constitute a due procedure, was correct. Nevertheless, in its judgment the Tallinn Administrative Court found that as the suspension of the right to drive was in conflict with § 23(3) of the Constitution, there was no need to analyse other possible conflicts with the Constitution. As a result of the judgment of the Constitutional Review Chamber the valid judgment of the Tallinn Administrative Court, annulling the decision on the suspension of the right to drive, is now un reasoned in essence. The only justification – the allegation that the suspension of the right to drive is in conflict with § 23(3) with the Constitution – was declared erroneous by the Supreme Court. As the court judgment annulling the decision on the suspension of the right to drive is in force, I. Bernardov has no direct interest in having a judgment, favourable to him, changed and in submitting an appeal. If, for some reasons, for example, because of uncertainty, the MVRC will not submit an appeal, either, a court judgment manifestly lacking reasoning will remain in force.
