Constitutional judgment 3-4-1-6-01

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**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER**

of 3 May 2001

Review of the petition of the Tallinn Administrative Court to declare § 140(1) of the Family Law Act invalid.

The Constitutional Review Chamber,
presided over by chairman Uno Lõhmus
and composed of the members of the Chamber,
justices Tõnu Anton, Lea Kivi, Ants Kull and Jüri Põld,
at its open session of 19 April 2001,
with the representative of the Riigikogu Vootele Hansen, the Chancellor of Justice Allar Jõks and the representative of the Minister of Justice Enno Loonurm appearing
and in the presence of the secretary to the Chamber Piret Lehemets
reviewed the petition of the Tallinn Administrative Court of 27 February 2001.

I. FACTS AND COURSE OF PROCEEDINGS

1. On 15 April 1999 the Minister of Internal Affairs, by his directive, dismissed to the request of Marika Arendi for changing her name. M. Arendi wished her new surname to be Arendi Elita von Wolsky. The directive of the Minister of Internal Affairs stated the following legal grounds for the refusal: § 140 (2) of the Family Law Act and § 11 of the Surnames Act established by the Decree of the Head of State on 22 October 1934.

2. M. Arendi filed a complaint with the Tallinn Administrative Court, requesting that the directive of the Minister of Internal Affairs be declared invalid. She found that the directive was not reasoned, as it only contained references to provisions of law. The directive was issued without taking into account the wish of M. Arendi to preserve the name of her family. According to M. Arendi she descends from the family the surname of which was Elita von Wolsky. The complainant also requested that § 11 of the Surnames Act be declared unconstitutional. The complainant found that the restriction established in this section that persons who are of Estonian origin or have an Estonian surname may not request a non-Estonian surname, discriminates on the basis of national origin against persons who are of Estonian origin and is thus in conflict with § 12 of the Constitution.

3. On 21 February 2001 the Tallinn Administrative Court, by its judgment, repealed the disputed directive of

the Minister of Internal Affairs. The court did not apply § 140(1) of the Family Law Act and declared it unconstitutional. On 27 February 2001 the administrative court filed a petition with the Supreme Court to review the constitutionality of § 140(1) of the Family Law Act.

II. THE LAW

Disputed provisions

4. § 140 of Family Law Act reads as follows:

"§ 140. Change of name

(1) The provisions of the Surnames Act (RT 1934, 91, 735) established by decree of the Head of State of the Republic of Estonia on 22 October 1934 apply upon a change of name, except Chapters 1 and 3 and § 8(1), § 10(1)3) and 4), and §§ 12, 13, and 14(2), and §§ 16 and 25(1).
(2) Until enactment of the Names Act, the Minister of Internal Affairs approves the change of name of a person. The name of a person permanently residing in Estonia who is not a citizen of another state is changed pursuant to the same procedure.

5. § 11 of the Surnames Act of 1934 reads as follows:

"§ 11.
A requested new surname may not be a surname of a well-known figure or of a generally known family or a surname which has been entered into the protection register of surnames (§ 16), nor a surname, which has derogatory or vulgar meaning, is ill-sounding or which is in too wide use, nor a non-Estonian surname, if the person requesting change of surname is of Estonian origin or has an Estonian name."

Justifications of the participants

6. It is argued in the judgment of the Tallinn Administrative Court that § 11 of the Surnames Act, applicable under § 140 (1) of the Family Law Act, discriminates against persons who are of Estonian origin. The provision establishes restrictions on a certain group of persons (persons who are of Estonian origin) on the ground of their ethnic origin. Imposition of such restrictions is in conflict with the spirit of § 12 of the Constitution.

Furthermore, the administrative court argues that §§ 19 and 24 of the Surnames Act are in conflict with the Constitution, too. The former is also discriminatory against persons who are of Estonian origin, the latter provides for the finality of a directive of the Minister of Internal Affairs, and is thus in conflict with § 15 of the Constitution, pursuant to which everyone whose rights and freedoms are violated has the right of recourse to the courts. The Constitution guarantees everyone the right of appeal. Pursuant to § 11 of the Constitution rights and freedoms may be restricted only in accordance with the Constitution. Restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted.

The Tallinn Administrative Court points out that the legal problem will not be solved by declaring the Surnames Act partly (§ 11) unconstitutional. It is expedient to request that § 140 (1) of the Family Law Act, under which the provisions of the Surnames Act are partially applicable, be declared unconstitutional.

7. The Riigikogu is of the opinion that the Surnames Act is not in conflict with §§ 11 and 12 of the Constitution. The Surnames Act does not discriminate against persons who are of Estonian origin. According to the preamble of the Constitution the state must guarantee the preservation of the Estonian nation and culture.

8. The Chancellor of Justice is of the opinion that the administrative court has not established which legal norms were decisive for the adjudication of the case. As the directive of the Minister of Internal affairs was

not reasoned, there was no possibility to establish which norms the Minister applied when issuing his directive, i.e. which of the grounds enumerated in § 11 of the Surnames Act were decisive upon the issuance of the directive. The administrative court has initiated abstract norm control, and it is not empowered to do so under the law. That is why the petition of the court should be dismissed. Furthermore, the Chancellor of Justice observes that the Surnames Act in its entirety can not be unconstitutional only because the administrative court is of the opinion that § 11 of the Surnames Act is in conflict with the Constitution.

At the court session the Chancellor of Justice stated that as the Surnames Act prohibits both Estonians and aliens from taking a non-Estonian surname, this does not constitute discrimination. The restriction infringes the fundamental right established by § 19 of the Constitution, but the infringement is justified. The case may also give rise to the issue of infringement of § 27 of the Constitution.

9. The Minister of Justice is of the opinion that although the fact that the administrative legislation was not reasoned was a sufficient ground for repealing the legislation, the examination of the merits of the directive of the Minister of Internal Affairs by the administrative court was justified. Otherwise a consecutive administrative act would also have violated the rights of a complainant. At the same time the Minister of Justice argues that through § 140 (1) of the Family Law Act the administrative court has also reviewed the constitutionality of §§ 19 and 24 of the Surnames Act, which have not been given legal effect.

Assessing § 140(1) of the Family Law Act to the extent that it gives effect to § 11 of the Surnames Act, the Minister of Justice is of the opinion that on the one hand this amounts to the restriction of the principle of human dignity (§ 10 of the Constitution) and the protection of family life (§ 27(1) of the Constitution). On the other hand, the disputed restriction on the changing of surnames has been established for the protection of the Estonian nation and culture (preamble of the Constitution). In the given case the protection of family life prevails, because the requested surname was not a new one; allegedly, it had earlier belonged to the family. The Minister of Justice is of the opinion that § 140(1) of the Family Law Act should be declared invalid to the extent that it gives effect to § 11 of the Surnames Act in so far as it prohibits, without exception, to give a non-Estonian surname to applicants who are of Estonian origin.

The opinion of the Constitutional Review Chamber

I.

10. First of all the Chamber points out that a court can initiate constitutional review only if the disputed legislation is relevant for the adjudication of the case. Proceeding from § 15(1) of the Constitution and from § 5(1) of the Constitutional Review Court Procedure Act the court shall declare unconstitutional and shall not apply a legislation if it comes to the conclusion that the applicable law or other legislation is in conflict with the Constitution. The provision the constitutionality of which is reviewed by the court of constitutional review must be decisive for the adjudication of the case (see judgment of the Supreme Court *en banc* of 22 December 2000, paragraph 10 -- RT III 2001, 1, 1). Thus, the Chamber has to establish which of the provisions disputed by the Tallinn Administrative Court by way of constitutional review were relevant to the adjudication of the complaint of M. Arendi.

11. Change of name is dealt with in § 140 of the Family Law Act, which entered into force on 1 January 2001 (RT I 1994, 75, 1326). The legislator has decided that upon change of name certain sections of the Surnames Act, established by a Decree of the Head of State on 22 October 1934, shall be applied.

According to § 8(2) of the Surnames Act the following reasons exist for the change of surnames: 1) non-Estonian surname; 2) derogatory or vulgar meaning of a surname or ill-sounding surname; 3) desire to differentiate a surname from others if it is in too wide use; 4) desire to preserve a family name; 5) desire to use only one of the many variants of a family name; 6) other reasons considered adequate by the Minister of Internal Affairs.

§ 11 establishes that a new surname may not be a surname of a well-known figure or a surname of a

generally known family or a surname which has been entered into the register of surnames, or a surname which has a derogatory or vulgar meaning, is ill-sounding or in too wide use, or a non-Estonian surname if the person requesting the surname is of Estonian origin or has an Estonian surname.

12. In her request for the change of her surname, submitted to the Minister of Internal Affairs, Marika Arendi pointed out that she wished to restore the surname of her family - Elita von Wolsky. The Minister of Internal Affairs dismissed the request of M. Arendi to change her surname on the basis of § 11 of the Surnames Act. The Directive of the Minister of Internal affairs does not specify which circumstances enumerated in § 11 of the Surnames Act served as the basis for refusal to satisfy the application. It appears from the documents of the administrative matter that the reasons for the refusal to change the surname were the following: Marika Arendi was an Estonian and she had an Estonian surname, whereas the requested surname was non-Estonian. § 11 of the Surnames Act establishes, *inter alia*, that a non-Estonian name may not be a new surname if the person requesting the new name is of Estonian origin or has an Estonian surname.

13. The Tallinn Administrative Court writes in its decision that "upon resolving this administrative matter the court shall not apply § 11 of Surnames Act established by the Decree of the Head of State on 22 October 1934, applicable under § 140 (1) of the Family Law Act which entered into force in 1995, and is in conflict with the Constitution of the Republic of Estonia", but the Court requests that the Supreme Court review § 140 (1) of the Family Law Act in its entirety. The administrative court justifies this request by the fact that "the legal problem will not be solved by declaring the Surnames Act partly (§ 11) unconstitutional and pursuant to the principle of expediency it is legally justified to request that § 140 (1) of the Family Law Act, which became effective as of 1 January 1995, under which the provisions of the Surnames Act established by the Decree of the Head of State of the Republic of Estonia on 22 October 1943 are partially applicable, be declared unconstitutional".

14. The Chamber points out that § 140 (1) of the Family Law Act does not contain rules for the change of names and thus can not infringe the fundamental rights of persons. Subsection (1) refers to the provisions of the Surnames Act, among which § 11 is relevant to the extent that it prohibits to give a new non-Estonian name if the person requesting the new surname is of Estonian origin or has an Estonian name. That is why, within this constitutional dispute, the Supreme Court can only review the constitutionality of this prohibiting norm.

The judgment of the administrative court also refers to §§ 19 and 24 of the Surnames Act as relevant to the case. These sections are under Chapters 1 and 3 of the Surnames Act, which have not been given legal effect by § 140(1) of the Family Law Act. Thus, these sections are not applicable.

II.

15. The review of constitutionality of § 11 of the Surnames Act requires that the fundamental right, infringed by the restriction established by the referred section, be established.

In the present case the right of a person to change his or her name has been restricted. A surname is an important element of a person's identity. It constitutes a link to a certain group of persons - family unit or family. Names are means for distinguishing people or for linking the bearers of a given name to a family. European Court of Human Rights has examined the issues related to change of names under Article 8 of the European Convention on Human Rights - the right to respect for private and family life (see Burgharz v Switzerland, judgment of 22 February 1994, § 24; Stjerna v Finland, judgment of 25 November 1994, § 37). The more extensive list of fundamental rights and freedoms in the Constitution makes it possible to place the freedom to change one's name, depending on circumstances, either under the scope of protection of § 26, which provides that everyone has the right to the inviolability of private and family life, of § 19, which stipulates that everyone has the right to free self-realisation, or of some other fundamental right. In the light of the argument that the complainant justified her request to change her surname by her desire to add to her surname the name of her family, the Chamber considers the refusal to change the name as an infringement of

the inviolability of the complainant's family and private life.

III.

16. The review of the constitutionality of this infringement should be commenced by answering the following question: is the disputed provision of the Surnames Act constitutional in the formal sense?

The law has to be published to be applicable (§ 3(2) of the Constitution). The Surnames Act has been published in the *Riigi Teataja* (Official Gazette) of 1934, but the provisions referred to in § 140(1) of the Family Law Act have not been re-published. Thus, the requirement that laws must be published is fulfilled. Publication of a law is only a prerequisite of the accessibility of law. In Sunday Times v United Kingdom judgment of 27 October 1978 the European Court of Human Rights defined the requirements a law must meet. One of the conditions is that the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. At the disposal of the Chamber there is no information concerning the accessibility of the *Riigi Teataja* of 1934. In the present case the Chamber contents itself with the knowledge that the Surnames Act was accessible for Marika Arendi.

IV.

17. An infringement of a fundamental right can be regarded constitutional only if the infringement serves a legitimate aim, "restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted (§ 11 of the Constitution). In other words, the freedom to change one's name may be restricted by law only if the restriction has been imposed taking into consideration the referred constitutional aim and the principle of proportionality. Restrictions must not affect a legally protected interest or right more than is justifiable by the legitimate aim of the norm. The means used must be proportional to the desired aim. The principle of proportionality must be observed not only by those who apply law but also by the legislator (see judgment of the Constitutional Review Chamber of 28 April 2000, paragraph 13 -- RT III 2000, 12, 125).

18. The second sentence of § 26 of the Constitution allows for the infringement of family life and private life in the cases and pursuant to procedure provided by law to protect health, morals, public order, or the rights and freedoms of others, to prevent a criminal offence, or to apprehend a criminal offender. The aim of the part of § 11 of the Surnames Act which prohibits to take a non-Estonian surname, if a person is Estonian or if he has an Estonian surname, is to safeguard Estonian identity, because the name of a person is an expression of national identity. The preamble of the Constitution underlines that the state shall guarantee the preservation of the Estonian nation and culture through the ages. The intent of the legislator upon imposing the restriction was to guarantee the preservation of Estonian nation and culture, and through this, the right of other persons to national identity, which - the Chamber argues can be regarded as an aim justifying the infringement.

19. Upon weighing whether the need to protect national identity outweighs the individual right to change one's name the Chamber points out fist of all that during the drafting of the Constitution national identity was of great importance in safeguarding the cohesion of the people. Today the protection of national identity should not exclude the change of names. Such a conclusion is supported by the comparative analysis of pertinent legislation of various European countries, carried out by the European Court of Human Rights when disposing of Stjerna v Finland case. In Belgium, Portugal and Turkey any reason may be invoked in support of a request for a change of name. In France, Germany, Luxembourg and Switzerland the reasons must be convincing ones. In some countries specific reasons are required: e.g. the current name gives rise to pronunciation and spelling difficulties (Austria) or causes legal or social difficulties (Austria, Greece) or is contrary to decency (the Netherlands, Spain) or is ridiculous (Austria, Italy, the Netherlands) or is otherwise contrary to the dignity of the person concerned (Spain) (see Stjerna v Finland, judgment of 25 November 1994, § 29).

Thoughtless change of names is prevented by the requirement of an adequate reason, established by § 8(2) of the Surnames Act. The Minister of Internal Affairs may refuse to change a name if the request for a change of name lacks the grounds referred to in § 8(2) or if the new name does not meet other conditions stipulated in § 11 of the same Act. According to § 8(2)4) of the Surnames Act the reason invoked by Marika Arendi to change her name - namely, to preserve her family name - is sufficient for a change of name, if proved.

20. On the basis of the foregoing the Chamber came to the conclusion that the part of § 11 of the Surnames Act which prohibits to give a non-Estonian surname to a person who is of Estonian origin or who has an Estonian surname is not proportional and constitutes a violation of the principle established by § 26 of the Constitution.

V.

21. The Supreme Court considers it necessary to point out that the title used in a name no longer has its original meaning related to class privileges.

The Elimination of Estates Act, adopted by the Constituent Assembly on 9 June 1920, established: "By the present Act, in the Republic of Estonia, all Acts and regulations which contain estate-related rights, privileges, obligations and restrictions of rights, i.e. estate-related discrimination, are repealed. Official use of any estate-related names, honorary ranks and titles is prohibited."

Because of the changed historical situation, today all titles indicating estate have to be considered as parts of name. The same was asserted in the expert opinion delivered in the administrative matter. § 26 of the Constitution, which is to guarantee the possibility to take the spouses surname upon marriage even if the name contains a former nobiliary title, induces the same conclusion. The right to take a name containing a title is protected by § 26 of the Constitution also when a person wishes to restore the former name of his or her family. Whether the reasons for a change of name are well-justified can be decided taking into consideration specific circumstances of the case.

VI.

22. The Constitutional Review Chamber considers it necessary to observe that the prohibition established by § 11 of the Surnames Act to take a non-Estonian surname discriminates against non-Estonians who have Estonian surnames.

§ 11 of the Surnames Act prohibits to take a non-Estonian name, if the person requesting the name has an Estonian surname. This prohibition applies only to a non-Estonian who has an Estonian surname. The unequal treatment becomes apparent when comparing a non-Estonian who has an Estonian surname to a non-Estonian who has a non-Estonian surname. A non-Estonian, who has a non-Estonian surname, can take a non-Estonian surname, whereas a non-Estonian who has an Estonian surname, can not take such a name. This amounts to arbitrary discrimination and violates the right to equality established by the first sentence of § 12 of the Constitution.

Proceeding from § 152(2) of the Constitution and § 19(1)2) of the Constitutional Review Court Procedure Act, **the Constitutional Review Chamber of the Supreme Court has decided:**

To declare § 11 of the Surnames Act (RT 1934, 91, 735) referred to in § 140 of the Family Law Act, to the extent that it provides that a requested new surname "may not be a non-Estonian surname if the person requesting the change of name is a person of Estonian origin or has an Estonian surname", invalid.

The judgment is effective as of pronouncement, is final and is not subject to further appeal.

Uno Lõhmus

Chairman of the Constitutional Review Chamber
