Constitutional judgment 3-4-1-1-97

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**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 11 June 1997**

Review of the petition of the Tallinn Administrative Court of 12 May 1997 to declare invalid § 41 of the Police Service Regulations, approved by the Government of the Republic Regulation no. 32 of 12 February 1991, because of conflict with § 29 of the Constitution.

The Constitutional Review Chamber sitting in a panel
presided over by the Chairman of the Chamber Rait Maruste
and composed of the members of the Chamber Tõnu Anton, Lea Kalm, Jaano Odar and Jüri Põld,
at its session of 11 June 1997,
with the Chancellor of Justice Eerik-Juhan Truuväli and the representative of the Government of the Republic Enno Loonurm appearing,
and in the presence of the secretary to the Chamber Piret Lehemets,

reviewed the petition of the Tallinn Administrative Court, dated 12 May 1997.

From the documents submitted to the Constitutional Review Chamber **it appears, that:**

The Tallinn Administrative Court, in its judgment of 9 May 1997 in administrative matter no. 3-424/97, did not apply § 41 of the Police Service Regulations, approved by the Government of the Republic Regulation no. 32 of 12 February 1991, because of the conflict thereof with § 29 of the Constitution.

It appears from the judgment of the Tallinn Administrative Court of 9 May 1997 that Einar Suimets had filed an action with the court against Directive no. 20 p of the Minister of Internal Affairs of 12 March 1997 imposing a disciplinary penalty, applying for declaration of unlawfulness of the Directive and annulment of the disciplinary penalty. The complainant argued that the Directive was illegal, because administrative legislation by which a penalty is imposed should be reasoned and should refer to a specific provision of an Act. The Directive does contain a reference to § 41(1)3) of the Police Service Regulations, but contains no reference to an Act. The Police Service Regulations, approved by the Government of the Republic Regulation no. 32 of 12 February 1991, are in conflict with § 29 of the Constitution, which - in the complainant’s opinion - provides that the conditions and procedure for service shall be regulated by an Act. Thus, the Police Service Regulations, approved by a Regulation of the government, and especially the part pertaining to disciplinary liability, are not in conformity with the Constitution.

The Tallinn Administrative Court found that a disciplinary penalty had been imposed on E. Suimets by Directive no. 20 p of the Minister of Internal Affairs on the basis of §§ 41(1)3) and 41(2)1) of the Police Service Regulations, approved by the Government of the Republic Regulation no. 32 of 12 February 1991. The court pointed out also that according to § 1 of the Police Service Regulations the regulations establish the procedure for employment in police service, conditions of service, service discipline and release from the service. The aspects of the career of police officers that are not regulated by these Regulations are regulated by the Public Service Act and other legislation pertaining to public service.

The administrative court considered that the complainants allegation that the Police Service Regulations were in conflict with § 29 of the Constitution was justified. The court was of the opinion that the conditions and procedure for service or employment, including disciplinary liability, are subject to regulation by an Act. Disciplinary liability of police officers can not be established by a regulation of the Government of the Republic on the basis of § 19 of the Police Act. That is why disciplinary action against E. Suimets should have been brought on the basis of relevant provisions of the Public Service Act.

The Constitutional Review Chamber of the Supreme Court, having given a fair hearing to the Chancellor of Justice - who is of the opinion that § 41 of the Police Service Regulations and § 29 of the Constitution are not in correlation, and that disciplinary liability should be established by an Act - and to the representative of the Government of the Republic, who is of the opinion that § 41 of the Police Service Regulations is not in conflict with § 29 of the Constitution, as the government approved the Police Service Regulations on the basis of § 19 of the Police Act, and having examined the materials submitted, **the Chamber found that:**

I. § 29 of the Constitution has six indents. The administrative court judgment does not specify with which of the indents the Police Service Regulations are in conflict. It follows from the reasoning of the judgment that the conflict is related to the first two sentences of the first indent of § 29 of the Constitution: “An Estonian citizen has the right to freely choose his or her sphere of activity, profession and place of work. Conditions and procedure for the exercise of this right may be provided by law.”

It follows from the text and spirit of § 29 of the Constitution that the requirement that disciplinary liability be established solely by an Act is not prescribed by § 29 (1) of the Constitution. The words “for the exercise of this right” of the second sentence of the first indent of § 29 mean the right to freely choose a sphere of activity, profession and place of work, and not public service in general, as E. Suimets argued in his action filed with the Tallinn Administrative Court. This provision does not regulate the already existing employment and service relationships. That is why § 41 of the Police Service Regulations, pertaining to disciplinary liability in this administrative matter, can not be regarded to be in conflict with § 29 (1) of the Constitution.

II. The Government of the Republic Regulation no. 32 of 12 February 1991, by which the Police Service Regulations were approved, refers to the Police Act as the basis for issuing the regulation, without a reference to any specific provision thereof. § 19 of the Police Act authorises the Government of the Republic to establish the conditions and procedure for police service. The Chancellor of Justice and the representative of the Government of the Republic are of the opinion that establishing the conditions and procedure for police service also means determination of disciplinary offences and disciplinary penalties, i.e. the issues of disciplinary liability, which are dealt with in § 41(1) and (2) of the Police Service Regulations.

On the basis of § 5 of the Employees Disciplinary Punishments Act, §§ 1(2), 165(1) and 166 of the Public Service Act, and analogy with the establishment of administrative liability, one should conclude that disciplinary liability has to be prescribed by an Act. Determination of disciplinary offences, disciplinary penalties and disciplinary proceedings by legislation ranking lower than Acts is unlawful.

The Constitutional Review Chamber finds it necessary to point out that as of 16 April 1996 the European Convention on Human Rights is binding on Estonia. Pursuant to § 123(2) of the Constitution, if laws are in conflict with the Convention, the Convention as an international agreement ratified by the Riigikogu shall

apply. Disciplinary penalties affect rights and liberties. That is why the basic procedural guarantees of Article 6 of the Convention extend to disciplinary proceedings. The same conclusion can be drawn from the *Engel and others* case, decided by the European Human Rights Court in 1976.

III. According to § 12(3)4) of the Public Service Act, "the Public Service Act shall extend, insofar as not otherwise provided by the Constitution or specific Acts, to police officers". This provision took effect simultaneously with the Act, i.e. on 1 January 1996.

According to § 41 (1) 3) of the Police Service Regulations one of the disciplinary offences of a police officer is "an indecent act, i.e. a wrongful act which is in conflict with generally recognised moral standards or which discredits an officer or the police, regardless of whether the act is committed in or out of service". § 2(3) of the Employees Disciplinary Punishments Act also states that a disciplinary offence is an indecent act, which is in conflict with generally recognised moral standards or which discredits an employee or employer. The new wording of § 2(3) of the Employees Disciplinary Punishments Act, which took effect simultaneously with the Public Service Act, though, extends only to employees working on the basis of contract of employment, who have the duty to teach or educate the youth, or to the support staff of local government administrative agencies. A police officer is not among these. Thus, it is impossible to impose disciplinary liability on police officers on the basis of the Employees Disciplinary Punishments Act after the Public Service Act was enacted. According to § 5 of the Act, which took effect as of 1 September 1993, rules concerning some types of employees and employers may only be provided for by an Act. § 41 of the Police Service Regulations was amended and the presently valid wording of the provision was approved by the Government of the Republic with its Regulation no. 87 of 28 February 1995 and with Regulation no. 280 of 27 July 1995.

The Police Act does not contain provisions establishing disciplinary liability of police officers. The Government of the Republic may not establish disciplinary liability of police officers on the basis of § 19 of the Act, because disciplinary liability has to be prescribed by an Act.

It follows from the foregoing that the disciplinary liability of police officers is established neither by the Police Act nor by the Employees Disciplinary Punishments Act. Neither the Police Act nor the Employees Disciplinary Punishments Act can serve as the basis for § 41 of the Police Service Regulations, because disciplinary liability must be established by an Act. The Public Service Act is extended to police officers, and application of § 41 of the Police Service Regulations is in conflict with § 12(3)4) of the Public Service Act.

IV. § 84(3) of the Public Service Act states that a disciplinary offence is an indecent act, i.e. a wrongful act which is in conflict with generally recognised moral standards or which discredits an official or administrative agency, regardless of whether the act is committed in or out of service. Consequently, a disciplinary offence referred to in § 41(1)3) of the Police Service Regulations has the same characteristics as those stipulated for a disciplinary offence in § 84(3) of the Public Service Act.

The presently valid wording of §§ 41(1) and 41(2)1) of the Police Service Regulations was approved by clause 1 of the Government of the Republic Regulation no. 87 of 28 February 1995. The Public Service Act is extended to police officers on the basis of the Public Service Act Amendment Act, passed on 20 December 1995. The latter was published in the Riigi Teataja on 22 December 1995 and became effective simultaneously with the Public Service Act, i.e. on 1 January 1996. Thus, the approval of the presently valid wording of §§ 41(1) and 41(2)1) of the Police Service Regulations took place before the Public Service Act was extended to police officers. In the administrative matter of E. Suimets this means that application of § 41 of the Police Service Regulations constitutes an error of reference to the legal basis for the issuance of the administrative legislation. The correct reference would be a reference to §§ 84(3) and 85(1)1) of the Public Service Act. This error can not be rectified through a constitutional review court proceeding.

On the basis of the aforesaid and pursuant to § 19(1)1) of the Constitutional Review Court Procedure Act, **the Constitutional Review Chamber of the Supreme Court has decided:**

to dismiss the petition of the Tallinn Administrative Court of 12 May 1997.

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

Rait Maruste
Chairman of the Constitutional Review Chamber
