Constitutional judgment III-4/A-1/94

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JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 12 January 1994

Review of the petition of the Chancellor of Justice, submitted under § 142(2) of the Constitution, for the declaration of invalidity of subindent 4 of Part II of the Republic of Estonia Police Act Amendment Act under § Article 152(2) of the Constitution.

The Constitutional Review Chamber sitting in a panel
presided over by the Chairman of the Chamber, Chief Justice Rait Maruste
and composed of members of the Chamber, justices Tõnu Anton, Lea Kalm, Jaano Odar and Jüri Põld,
at its session of 5 January 1994,
with the Chancellor of Justice Eerik-Juhan Truuväli and the Minister of Justice Kaido Kama appearing, and in the presence of the Secretary to the Chamber Ene Kull,
reviewed the petition of the Chancellor of Justice no 84 of 7 October 1993.

The Chancellor of Justice submitted petition no. 84 to the Supreme Court on 7 October 1993. At its preliminary session on 5 November 1993 the Constitutional Review Chamber found that the documents submitted to the Chamber contained omissions and inaccuracies. On the basis of § 11(3) of the Constitutional Review Court Procedure Act the Chamber requested that the Chancellor of Justice supplement and specify the documents. On 12 November 1993 the Chancellor of Justice submitted to the Supreme Court the petition that met the requirements established by law.

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

The Police Act was passed on 20 September 1990. On 21 April 1993 the Riigikogu adopted the Republic of Estonia Police Act Amendment Act.

The Chancellor of Justice was of the opinion that subindent 4 of Part II of the Police Act Amendment Act was in conflict with the Constitution and, on 7 October 1993, on the basis of § 142(1) of the Constitution and § 15(1) of the Chancellor of Justice Activities Organisation Act, he proposed that the Riigikogu bring subindent 4 of Part II of the Police Act Amendment Act into conformity with the Constitution. On 14 September 1993 the Riigikogu considered the proposal of the Chancellor of Justice and decided to reject it.

On 7 October 1993, on the basis of § 142(2) of the Constitution and § 17 of the Chancellor of Justice Activities Organisation Act, the Chancellor of Justice submitted to the Supreme Court his petition no. 84. In this petition the Chancellor of Justice made a proposal to declare subindent 4 of Part II of the Police Act Amendment Act invalid on the basis of § 152(2) of the Constitution. The Chancellor of Justice was of the

opinion that subindent 4 of Part II of the Police Act Amendment Act was in conflict with §§ 11 and 3, 4, 13, 26, 33, 43, 59, 86 and 146 of the Constitution in their conjunction, for the following reasons:

"1. Subindent 4 of Part II of the Police Act Amendment Act provides that the security police officers are temporarily authorised, until an Act regulating operative surveillance is passed, to use special operative surveillance measures in performance of their duties only upon written consent of a Supreme Court justice appointed for that purpose by the Chief Justice of the Supreme Court.

§ 11 of the Constitution establishes that rights and freedoms may be restricted only in accordance with the Constitution.

The referred provision of the Police Act Amendment Act, however, leaves it up to discretion of the security police officers and a justice of the Supreme Court to decide:
1) what is to be deemed a special operative surveillance measure;
2) what are the cases and procedure for application of those special measures which have not been regulated by the law.

Thus, the principle laid down in § 11 of the Constitution, which is not subject to restriction even in the cases established in § 130 of the Constitution, has been ignored.

Allowing for the discretion of an official as a substitute for law creates a situation excluding the realisation of the principle established in § 13 of the Constitution, pursuant to which everyone has the right to be protected by law and the state. In the present case the referred Act only provides justifications for the activities of the referred officials without providing for the concrete cases and procedures for the protection of rights and freedoms upon such restriction.

On the basis of the foregoing it becomes apparent that the passing of the referred Act has caused temporarily intermittence of the effect of the Constitution.

2. The Riigikogu has not taken into account the restrictions of fundamental rights and freedoms accompanying the application of special surveillance measures, and has ignored the categorical requirement expressed in §§ 26, 33 and 43 of the Constitution that for the restriction of the rights established in those provisions exceptions may be made only in the cases and pursuant to procedure provided by law. The aforesaid gives rise to the obligation of the legislator to act accordingly (§ 14 of the Constitution). This means that the persons authorised to apply special surveillance measures, the circumstances of the use thereof, conditions, extent, supervision over the use of the special measures, and the responsibility of respective officials may be prescribed only by law. The fact that these constitutional requirements have been ignored renders the provisions of § 13(1)(12) of the Police Act declarative and non-enforceable.

3. By giving the Security Police a vague and indefinite right "to apply special operative surveillance measures for the performance of their duties" the Riigikogu has considered the cases required by the Constitution to be equivalent to the general jurisdiction of the Security Police (§ 10(4) of the Police Act), whereas by giving a Supreme Court justice the authority to decide upon the permission of the use of special measures, however, the Riigikogu has restricted itself to only one element of the procedure required by the Constitution. Thus, a legal situation has been created where the provisions set forth in subindent 4 of Part II of the referred Act result in the following:
1) with respect to cases of application - the establishment of rules which define neither the content of unlawful act or omission nor the sanctions (subindent 4 of Part II of the Police Act Amendment Act and § 10(4) of the Police Act in their conjunction);
2) with respect to the procedure - the establishment of a procedure concurrent with pre-trial investigation in criminal procedure which, after the amendment of the Police Act, is in conflict even with the provisions of the same Act (§§ 3, 10(3,4,5), 12(1)(4,5), 13(1)(12), 21(1,2) of the referred Act and subindent 4 of Part II in their conjunction).

4. The Constitution does not entitle the Riigikogu to delegate to the Security Police officers or to the members of the Supreme Court the right to decide on the cases and procedure for the restriction of rights, the determination of which is required by the Constitution and subject to regulation only by the law. This is in conflict with §§ 44, 59, 86 and 146 of the Constitution. The activities of the Riigikogu, the President of the Republic, the Government of the Republic and the courts are organised on the principle of separate and balanced powers. The legislative power is vested in the Riigikogu, the executive power is vested in the Government of the Republic. Corresponding ministries shall be established, pursuant to law, for the administration of the areas of government (§ 94(1) of the Constitution). The police is an agency of the executive power within the area of administration of the Ministry of Internal Affairs (§ 2(1) of the Police Act). The courts administer justice in accordance with the Constitution and the laws, but they do not regulate - with the force equal to that of law - the cases and procedure for restricting everyone's rights."

Having examined the submitted documents and having given a fair hearing to the Chancellor of Justice and having listened to the Minister of Justice, **the Constitutional Review Chamber found the following**:

Subindent 4 of Part II of the Police Act Amendment Act does not specify what exactly is meant by special surveillance measures. In criminal law the term "special operative surveillance measures" or "operative surveillance measures" is used to mean technical equipment and procedures that enable, with the aim of gathering information, to interfere with the exercise of a person's rights and freedoms covertly, that is without the person being aware of it.

According to the principle of legality, which is a generally recognised principle of (international) law and is established in § 3 of the Constitution of the Republic of Estonia, fundamental rights and freedoms may be restricted solely on the basis of law. The procedure for restricting rights and freedoms, determined by law and made public, allows for freedom of choice, and guarantees the possibility of avoiding abuses of power. The lack of thorough regulation by laws and covert nature of the measures deprive a person of the right to informational self-determination, the right to choose his or her behaviour and the right to defend himself or herself.

The law, while enabling the officers of the Security Police to apply special operative surveillance measures, creates the possibility for restricting the rights and freedoms enumerated in the Constitution, including the inviolability of private and family life and home and the right to confidentiality of messages sent or received by commonly used means, established in §§ 26, 33 and 43 of the Constitution.

The possibilities to restrict the referred rights and freedoms are prescribed both by the Constitution and the legislation of international law. §§ 26 and 33 of the Constitution permit the restriction of the right to inviolability of private and family life and home to protect health, morals, public order or the rights and freedoms of others, to prevent a criminal offence, or to apprehend a criminal offender. § 33 of the Constitution permits to restrict the right to inviolability of home also in order to ascertain the truth in a criminal proceeding. According to § 43 of the Constitution the right to confidentiality of messages exchanged by commonly used means may be restricted only in order to prevent a criminal offence, or to ascertain the truth in a criminal proceeding. According to the Constitution such restrictions may be imposed only in the cases and pursuant to procedure provided by law. According to Article 8 of the European Convention on Human Rights everyone has the right of respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with these rights, except in accordance with the law and as necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The special operative surveillance measures are dealt with in two Acts, i.e. the Police Act and the Police Act Amendment Act.

§ 13(1)12) of the Police Act entitles the police to apply operative surveillance measures, to use technical equipment and other means to combat, ascertain or detect criminal offences, without violating the

constitutional rights of persons. According to subindent 4 of Part II of the Police Act Amendment Act the security police officers are temporarily authorised, until an Act regulating operative surveillance is passed, to use special operative surveillance measures in performance of their duties only upon written consent of a Supreme Court justice appointed for that purpose by the Chief Justice of the Supreme Court.

The law does not regulate how the right established in § 13(1)12) of the Police Act may be exercised by other branches of the police; the provisions of § 13(1)12) can be deemed a general norm which can be extended to all branches of the police. This means that in addition to Security Police the field police, traffic police and the criminal police and the police engaged in preliminary investigations are all entitled to apply operative surveillance measures. The Supreme Court has no competence to decide on the constitutionality of the lack of the procedure for the exercise of the right given by § 13(1)12 of the Police Act, because under § 4(3) of the Constitutional Review Court Procedure Act the Supreme Court is authorised to determine the constitutionality of legislation only to the extent determined in the petition.

The Police Act Amendment Act established the condition that a permission for the use of special operative surveillance measures may be issued on the consent of a member of the Supreme Court. This arises from § 43 of the Constitution, according to which everyone has the right to confidentiality of messages sent or received by him or her by post, telegraph, telephone or other commonly used means, and exceptions may be made by court authorisation to prevent a criminal offence, or to ascertain the truth in a criminal proceeding, in the cases and pursuant to procedure provided by law. To ask for the permission of court is a constitutional requirement and a permission may only be issued to prevent a criminal offence or to ascertain the truth in a criminal proceeding.

The law establishes the possibility to employ special operative surveillance measures, and the general grounds for the restriction of fundamental rights and freedoms. Subindent 4 of Part II of the Police Act Amendment Act enumerates the subjects entitled to apply these measures, namely all the officers of the Security Police. § 10(4) of the Police Act establishes the general aims for the achievement of which the officers of the Security Police are justified to use the special operative measures, i.e. the protection of the constitutional order of the Republic of Estonia, territorial integrity and state secrets, for the purposes of counter-intelligence, to fight terrorism and corruption. Some procedural elements of application of special operative surveillance measures have also been fixed. These are requirement of a written consent (“written consent”) and the consent of a member of the Supreme Court (“justice appointed by the Chief Justice of the Supreme Court”). The aforesaid is to be applied provisionally (“until an Act regulating operative surveillance is passed”).

On the basis of the aforesaid the Court admits the existence of partial legislative regulation for the use of special operative surveillance measures by the officers of the Security Police, and that an Act, once adopted, is to be the basis of the activities of those who have the duty to implement it, until the Act is amended or repealed pursuant to relevant procedure.

Nevertheless, the Court is of the opinion that the valid normative framework for the implementation of special operative surveillance measures is insufficient from the aspect of universal protection of fundamental rights and freedoms, and hides in itself the danger of arbitrariness, distortions and unconstitutional restrictions of the exercise of fundamental rights and freedoms.

It has not been provided what exactly is to be understood under these special operative surveillance measures. Different terms are used in the Acts - § 13(1)12) of the Police Act speaks of “operative surveillance measures’, subindent 4 of Part II of the Police Act Amendment Act speaks of “special operative surveillance measures”. The inconsistent terminology and the lack of legal definition render the content of the term unclear and do not make it possible to review the legality of the activities of officials.

Subindent 4 of Part II the Police Act Amendment Act makes it possible to allow for the use of special operative surveillance measures in the cases that are much wider in scope than allowed by §§ 26, 33 and 43 of the Constitution. The circle of subjects entitled to apply special operative measures, the cases, conditions,

procedures, guarantees, control and supervision, and responsibility pertaining to the use of special measures have not been specified. These omissions render the prohibition of violation of constitutional rights and freedoms, established in § 13(1)12) of the Police Act, declarative and essentially unreviewable. Thus, upon passing subindent 4 of Part II of the Police Act Amendment Act, the Riigikogu has ignored § 3 of the Constitution, according to which the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith, and has violated § 14, which obliges the executive to guarantee the rights and freedoms of every person.

The Riigikogu has exceeded the limits of its competence by leaving the referred important individual issues to be decided by the officers of the Security Police and a member of the Supreme Court. According to §§ 11, 26, 33 and 43 of the Constitution rights and freedoms may be restricted only in accordance with the Constitution and in the cases and pursuant to procedure provided by law. The Riigikogu itself ought to have established the concrete cases and a detailed procedure for the use of special operative surveillance measures, as well as possible restrictions of rights related to the use of such measures, instead of delegating all this to the officers of the Security Police and a justice of the Supreme Court. What the legislator is justified or obliged to do under the Constitution can not be delegated to the executive, not even temporarily and under the condition of court supervision. Thus, subindent 4 of Part II of the Police Act Amendment Act is also in conflict with § 13(2) of the Constitution, as insufficient regulation upon establishing restrictions on fundamental rights and freedoms does not protect everyone from the arbitrary treatment of state power.

Pursuant to § 152(2) of the Constitution and § 19(1)2) of the Constitutional Review Court Procedure Act the Constitutional Review Chamber has decided:

to satisfy petition no. 84 of the Chancellor of Justice of 7 October 1993, and to declare subindent 4 of Part II of the Police Act Amendment Act invalid as of the entering into force of this judgment.

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

Rait Maruste
Chief Justice of the Supreme Court
