Constitutional judgment 3-4-1-30-15

SUPREME COURT

CONSTITUTIONAL REVIEW CHAMBER

JUDGMENT

in the name of the Republic of Estonia

Case number	3-4-1-30-15
Date of judgment	15 January 2016
Composition of court	Chairman: Priit Pikamäe; members: Eerik Kergandberg, Hannes Kiris, Jaak Luik, Ivo Pilving
Case	Review of the constitutionality of § 141(1) of the Code of Criminal Procedure
Basis for proceedings	Tallinn City Council application of 29 October 2015
Hearing	Written procedure

OPERATIVE PART

To dismiss the application by Tallinn City Council.

FACTS AND COURSE OF PROCEEDINGS

1. On 22 September 2015, the Estonian Internal Security Service filed a suspicion of a criminal offence against Tallinn Mayor, Edgar Savisaar, for repeated acceptance of bribes, and suspicion of criminal offences against six other persons for arranging or giving the bribes.

2. On 23 September 2015, under § 141(1) of the Code of Criminal Procedure (CCrP) the State Prosecutor filed a motion with Harju County Court for suspension from office of E. Savisaar and Chairman of Tallinn City Council, Kalev Kallo, who was a suspect in his case, for the duration of pre-trial proceedings. On 25 September 2015, Harju County Court dismissed the motion for suspension from office of K. Kallo but on 30 September 2015 granted the motion for suspension from office of E. Savisaar. The order of Harju County Court entered into force immediately upon issue.

3. By order of 23 October 2015, Tallinn Court of Appeal upheld the Harju County Court order for suspension of E. Savisaar from the office of Mayor of Tallinn. E. Savisaar lodged an appeal against the Tallinn Court of Appeal order of 23 October 2015 with the Supreme Court Criminal Chamber. By order of 1 December 2015, under § 390(5) of the CCrP the Supreme Court Criminal Chamber denied E. Savisaar leave to appeal.

4. On 30 October 2015, the Supreme Court Constitutional Review Chamber received an application from Tallinn City Council to repeal § 141(1) of the CCrP on the grounds of its contravening the constitutional guarantees of local authorities.

APPLICATION BY THE CITY COUNCIL

5. In the opinion of Tallinn City Council, § 141(1) of the CCrP contravenes § 154(1) of the Constitution to the extent that it fails to provide for a restriction on suspension from office of a city or rural municipality mayor. Applying § 141(1) of the CCrP in respect of a mayor constitutes a clear interference with local authorities' right of self-organisation, as in such a case a municipal council cannot independently decide on the holding of office by a mayor whom it has elected. In the opinion of the applicant, in the event of so applying § 141(1) of the CCrP the constitutional guarantee of local authorities' right of self-organisation no longer stands.

6. An inseparable part of local authorities' right of self-organisation is election of a city or rural municipality mayor by a council formed on the basis of election results. Local authorities' right of self-organisation also includes the right of local authorities to determine their own internal administrative structures (Art 6 para. 1 of the European Charter of Local Self-Government). Suspension from office of the Tallinn Mayor endangers stable management of the city.

7. If an individual has received a record high number of votes in elections, particular care is required in considering whether their suspension from office is effective and necessary for attainment of the desired objective. Tallinn city is such a large local authority that an immunity procedure similar to that applicable for members of the national Government should be applied in respect of its leaders. No criminal procedural steps can be taken in respect of members of the Government and the Riigikogu without the consent of the Chancellor of Justice and the majority of members of the Riigikogu. At the level of local authorities, it is important that a representative of the people should be able to exercise their mandate as mayor, regardless of any interference arising from political rivalry, an ambiguous legal situation, or misinterpretation of the law. This is particularly so where according to internal documents of the prosecutor's office the suspicions filed against E. Savisaar are open to question.

8. In the opinion of the applicant, suspension from office as a coercive criminal procedural measure in respect of a mayor is not appropriate, necessary or narrowly proportionate for attaining the desired objective, and fails to impose any additional restrictions that would rule out influencing witnesses. Under the Penal Code, even in the case of non-suspension from office a suspect is prohibited from influencing witnesses.

OPINIONS OF PARTICIPANTS IN THE PROCEEDINGS

9. – 11. [Not translated].

CONTESTED PROVISION

12. Code of Criminal Procedure, § 141 “Suspension of suspect or accused from office”, subsection (1):

" A suspect or accused is suspended from office on the motion of a prosecutor's office and on the basis of an order of a preliminary investigation judge or on the basis of a court order if:

1) he or she may continue to commit criminal offences when remaining in office;

2) his or her remaining in office may prejudice criminal proceedings."

OPINION OF THE CHAMBER

13. The Constitutional Review Chamber will first express an opinion on the admissibility of the application by Tallinn City Council (I). The Chamber will then assess whether applying § 141(1) of the CCrP in respect of a city or rural municipality mayor interferes with constitutional guarantees of local authorities, and in the case of a finding of interference will check its proportionality (II). Lastly, the Chamber will present its final conclusions (III).

14. Under § 7 of the Constitutional Review Court Procedure Act (CRCPA), a municipal council may submit an application to the Supreme Court to declare an Act which has been promulgated but has not yet entered into force or a regulation of the Government or of a minister which has not yet entered into force to be in conflict with the Constitution, or to repeal an Act, a regulation of the Government or of a minister, or a provision thereof, which has entered into force, if it contravenes the constitutional guarantees of local authorities. Thus, in the instant case, the Supreme Court’s competence includes not assessment of the constitutionality of suspension from office of the Tallinn mayor based on a court order but, instead, an abstract assessment of the constitutionality of § 141(1) of the CCrP, as contested by Tallinn City Council, as regards constitutional guarantees of local authorities.

15. Under § 7 of the CRCPA, the Supreme Court is competent to examine on the merits applications that meet two preconditions: first, the application should be lodged by a municipal council and, second, the application should assert that a legal act mentioned in § 7 of the CRCPA, or a provision of that act, contravenes the constitutional guarantees of local authorities. The Chamber will not assess the possibility of interference with the constitutional guarantees of local authorities as a precondition for admissibility of the application because establishing the impossibility of interference, i.e. its clear absence, would require opening up and explaining the scope of protection of the respective constitutional guarantee. This, however, constitutes a substantive assessment of the constitutionality of the contested legal act or its provision (Supreme Court *en banc* judgment of 16 March 2010 in case No 3-4-1-8-09, paras 44 and 48).

16. Tallinn City Council in its application asserts that § 141(1) of the CCrP contravenes the right of self-organisation of local authorities as stipulated under § 154(1) of the Constitution. Thus, the application is admissible as it has been lodged by a municipal council and it contests the conformity of a statutory provision with the constitutional guarantees of local authorities. On that basis, the application by Tallinn City Council must be examined on the merits.

II

17. The Chamber will first assess whether § 141(1) of the CCrP interferes with the constitutional guarantees of local authorities.

18. In the opinion of Tallinn City Council, applying § 141(1) of the CCrP in respect of a mayor constitutes a clear interference with the right of self-organisation of local authorities, as in that case a municipal council cannot independently decide on a local matter concerning the holding of office by a mayor whom it has elected. On that basis, first it is necessary to answer the question whether suspension of a mayor under § 141(1) of the CCrP interferes with a local matter within the meaning of § 154(1) of the Constitution.

19. Suspension from office of a city or rural municipality mayor touches upon the core of the right of self-organisation of local authorities. As a result, interference with a decision on the choice of city or rural municipality mayor occurs, a choice which under § 22(1) cl. 15) of the Local Government Organisation Act falls within the exclusive competence of a municipal council. Thus, suspension from office of a city or rural municipality mayor has a negative impact on the right of a local authority to independently decide on the holding of office by a mayor as a local matter.

20. As the position of city or rural municipality mayor is a political office and that person carries out the political will of the majority of the council while in office, their suspension from the office of city or rural municipality mayor also constitutes interference with political choices. Suspension of a city or rural municipality mayor may significantly hamper opportunities to carry out the programmatic positions of the political force that received the people's mandate (see Supreme Court Administrative Law Chamber judgment of 6 November 2003 in case No 3-3-1-72-03, para. 18).

21. A statute that sets a basis for performing an act interfering with the right of self-organisation also in itself interferes with that legal right. The exercise of any negative influence on the right of self-organisation of local authorities is sufficient to constitute an interference (see Supreme Court *en banc* judgment of 16 March 2010 in case No 3-4-1-8-09, para. 48). Thus, § 141(1) of the CCrP interferes with the right of self-organisation to the extent that it also enables suspension from office of the head of a local authority executive.

22. However, the Chamber finds that even though applying § 141(1) of the CCrP in respect of a city or rural municipality mayor interferes with the scope of protection of the right of self-organisation of local authorities, the interference is proportionate. In the instant case, the formal constitutionality of the restriction is not in doubt. The Code of Criminal Procedure is a constitutional Act (§ 104(2) cl. 14) Const.), which conforms to the requirements of competence, procedure, and form, as well as the principles of legal clarity and statutory reservation. Therefore, the Chamber will next clarify the substantive constitutionality of the interference, i.e. its appropriateness, necessity and narrow proportionality in terms of attaining the aim of restricting the right of self-organisation of local authorities (Supreme Court Constitutional Review Chamber judgment of 16 January 2007 in case No 3-4-1-9-06, para. 23; judgment of 8 June 2007 in case No 3-4-1-4-07, para. 19).

23. The purpose of coercive measures is to assure the conduct of criminal proceedings. Assuring judicial proceedings is a legitimate aim of interfering with the right of self-organisation of local authorities.

24. The measure is clearly appropriate as it facilitates achieving the aims of criminal proceedings in a situation where, in the opinion of an independent court, by continuing to hold their office a city or rural municipality mayor may destroy evidence or influence witnesses. Furthermore, no alternative measure to the contested regulatory arrangement exists which would be less restrictive of the fundamental rights of an individual. If the court has reached the conclusion that by staying in office a city or rural municipality mayor could continue committing criminal offences or prejudice criminal proceedings, it is necessary in the public interest to suspend that person from office. For that reason, suspension from office is also a necessary measure.

25. Interference with the right of self-organisation of local authorities is also narrowly proportionate. As a criminal procedural coercive measure, suspension from office can be applied in respect of a specific city or rural municipality mayor who is a suspect or accused. This means that even after suspension from office of a city or rural municipality mayor a local authority is still empowered to exercise independent organisational authority in appointing a replacement for them. Of no lesser importance is the fact that in the event of suspension from office an incumbent city or rural municipality mayor who is subject to criminal proceedings is not removed from office but their powers in that position are merely suspended until the grounds for applying the criminal procedural measure cease to exist. Thus, a city or rural municipality mayor who has been suspended from office is still the bearer of that office even though they lack the power to exercise their

competence as mayor while suspended from office under § 141(1) of the CCrP. The intensity of interference with the right of self-organisation is also alleviated by the fact § 141^2(1) of the CCrP allows the possibility to apply for judicial review of the continued justification for suspension from office every four months as of the date of suspension from office. Thus, interference with the right of self-organisation of local authorities resulting from suspension from office of a city or rural municipality mayor is of limited scope and intensity.

26. In the opinion of Tallinn City Council, the intensity of interference with the right of self-organisation of local authorities is aggravated by the fact that no special arrangements similar to the immunity procedure laid down in Chapter 14 of the CCrP, applicable inter alia in respect of members of the national Government, exist in respect of mayors, in particular in respect of the mayor of Tallinn. In the opinion of Tallinn City Council, it would inevitably be necessary to apply an immunity procedure in respect of the mayor of Tallinn under which criminal procedural steps in respect of the mayor could only be taken with the consent of the Chancellor of Justice and the majority of the membership of the Riigikogu.

27. The Chamber finds that the purpose of the immunity procedure laid down in Chapter 14 of the CCrP is to guarantee the independence of the most important institutions of the state and protection of the parliamentary minority with a view to protecting democracy based on the rule of law. Inter alia, following from the principle of separation of powers enshrined in § 4 of the Constitution, such institutions must check and balance the country's executive, including those conducting criminal proceedings. For this, they also need to be protected from the possible exercise of pressure in the form of politically biased criminal proceedings by the executive. Local authorities do not perform the functions of checking and balancing governmental authority.

28. Extending the applicability of the immunity procedure to city and rural municipality mayors would essentially amount to creating entities alongside the state which are independent of the state. Such entities would rather be similar to subjects of a federation. Thus, this kind of solution would not conform to the principle of a unitary state enshrined in § 2 of the Constitution (see also Supreme Court Constitutional Review Chamber judgment of 9 June 2009 in case No 3-4-1-2-09, para. 33). Therefore, the Chamber does not agree with the opinion of Tallinn City Council that absence of the immunity procedure intensifies interference with the right of self-organisation of local authorities.

29. Suspension from office of a city or rural municipality mayor is decided by an independent court and the ruling is appealable both to the Court of Appeal and the Supreme Court. Following from the principles of a democratic state governed by rule of law and the unitary state, the legal framework of judicial proceedings in respect of city and rural municipality mayors should apply uniformly. The conduct of criminal proceedings cannot depend on the discretion of a local authority in granting authorisation for suspension from office of a city or rural municipality mayor. Even though local authorities do exist in the interests of decentralising public authority and circumscribing and balancing state authority, in line with the Constitution they are not meant to be "states within a state" (Supreme Court Constitutional Review Chamber judgment of 9 June 2009 in case No3-4-1-2-09, para. 33).

III

30. Based on the foregoing, under the circumstances set out in the application by Tallinn City Council the interference with the right of self-organisation of local authorities is proportionate. The Chamber upholds the considerations established in the Supreme Court jurisprudence to date and holds that the Tallinn City Council application to declare § 141(1) of the CCrP unconstitutional on the grounds of alleged contravention of the right of self-organisation of local authorities is unfounded.

31. For the above reasons and in line with § 15(1) cl. 6) of the CRCPA, the Supreme Court dismisses the application by Tallinn City Council.