Constitutional judgment 5-19-40

S U P R E M E C O U R T

CONSTITUTIONAL REVIEW CHAMBER

JUDGMENT

in the name of the Republic of Estonia

Case number	5?19?40
Date of judgment	17 December 2019
Composition of court	Chairman: Villu Kõve; members: Velmar Brett, Ants Kull, Viive Li
Case	Review of the constitutionality of § 64[1] clause 3[1]) of the Minister of No 72 of 30 November 2000 on “Internal prison rules”
Basis for proceedings	Tartu Administrative Court judgment of 12 June 2019 in administrat 3?17?2607 and Tartu Administrative Court judgment of 20 June 201 case No 3?18?56
Participants in the proceedings	Chancellor of Justice Minister of Justice Minister of Social Affairs Viru Prison Applicants DT, LS, NŠ, KM and AS

Hearing

Written procedure

OPERATIVE PART

1. To dismiss the applications by Tartu Administrative Court.

2. To replace the names of the applicants in the published court order with the initials DT, LS, NŠ, KM and AS.

FACTS AND COURSE OF PROCEEDINGS

1. By Regulation No 21 of 6 October 2016, the Minister of Justice amended, effective as of 1 October 2017, the provisions of Regulation No 72 of 30 November 2000 on "Internal prison rules" (hereinafter 'the IPR') concerning organisation of smoking and owning of tobacco products in prison. Section 8^2 of the IPR annulled the provisions regulating organisation of smoking and depositing of tobacco products for prisoners, except provisions regulating depositing of tobacco products of prisoners in an open prison or in the open prison department of a closed prison. By amending § 64^1 clause 3) of the IPR, prisoners were prohibited from owning lighting devices and by amending § 64^1 clause 3^1) of the IPR prisoners were prohibited from having smokable tobacco products and items with the help of which smokable tobacco products can be fabricated or smoked.

2. By directive No 1-1/55 of 24 April 2017, the director of Viru Prison supplemented the Rules of Procedure of Viru Prison (hereinafter 'the Rules of Procedure') with clause 2.3 according to which smoking in prison territory is prohibited. By this directive, he also introduced other amendments to the Rules of Procedure removing provisions on smoking from the Rules of Procedure.

3. Prisoners DT, LS, NŠ and KM from Viru Prison lodged actions with Tartu Administrative Court, seeking repeal of the prohibition on smoking and an order obliging the respondent to take steps to enable smoking. The applicants contended that they had been forcefully deprived of the right to smoke. The health of the applicants cannot be protected by compulsion and the restriction imposed does not serve the aim of imprisonment. Smoking can be organised reasonably, for example by creating non-smoking sections, placing smoking prisoners separately or creating smoking rooms. As regards prohibition of cigarettes, the IPR is unconstitutional.

4. By judgment of 12 June 2019 in administrative case No 3?17?2607, Tartu Administrative Court set aside

§ 64^1 clause 3^1) of the IPR and declared it unconstitutional. The Administrative Court also repealed clause 2.3 of the Rules of Procedure insofar as it prohibits smoking for prisoners in prison territory, and obliged the respondent to re-decide the issue of prisoners' smoking. Tartu Administrative Court referred its judgment to the Supreme Court with a view to initiating constitutional review court proceedings. This constitutional review case was assigned number 5?19?37.

5. Prisoner AS from Viru Prison lodged an action with Tartu Administrative Court, seeking repeal of the prohibition on smoking and an order obliging the respondent to take steps to enable smoking. The applicant contended that the provisions of the IPR entering into force on 1 October 2017 had created a situation where, on the one hand, smoking is not prohibited by legislation while, on the other hand, smoking is not possible without owning cigarettes. The fact that the applicant cannot smoke causes them suffering which cannot be considered an inconvenience inevitably inherent in imprisonment. Smoking for prisoners in prison can be enabled without unreasonable expense and without endangering the life of others. A prisoner cannot be forced to give up a harmful habit against their will.

6. By judgment of 20 June 2019 in administrative case No 3?18?56, Tartu Administrative Court set aside § 64^1 clause 3^1) of the IPR and declared it unconstitutional. The Administrative Court also repealed clause 2.3 of the Rules of Procedure insofar as it prohibits smoking for prisoners in prison territory, and obliged the respondent to re-decide the issue of prisoners' smoking. Tartu Administrative Court referred its judgment to the Supreme Court with a view to initiating constitutional review court proceedings. This constitutional review case was assigned number 5?19?40.

7. By order of 11 September 2019, the Supreme Court Constitutional Review Chamber joined the above constitutional review cases in unified proceedings and assigned to the case number 5?19?40.

JUDGMENTS OF TARTU ADMINISTRATIVE COURT

8. In the opinion of Tartu Administrative Court, from the effective provisions of the IPR, § 64^1 clause 3^1) of the IPR, which prohibits smokable tobacco products for prisoners, is relevant for adjudicating the administrative case. If a prisoner may not own or possess cigarettes in prison, they cannot smoke and the court cannot oblige the prison to enable smoking.

9. Section 64^1 of the IPR lists items prohibited for prisoners in prison. Under clause 3^1) of the list, as of 1 October 2017 cigarettes are also prohibited for a prisoner. The legal nature of the list laid down in § 64^1 of the IPR is disputable, but since in prohibiting smokable tobacco products for prisoners both persons and prohibited items have been defined in general terms, this is a legislative act issued to regulate an undefined number of cases, i.e. a regulation.

10. A legal basis for the minister responsible for the area to establish a list of items prohibited for prisoners

is provided by § 15(3) of the Imprisonment Act. When establishing the above list, the minister must take into consideration the requirements under § 15(2) of the Imprisonment Act, according to which prisoners are prohibited from having substances and items which: 1) endanger the security of people; 2) are particularly suited to damaging property; 3) may endanger security or order in the prison; 4) do not comply with the aims of execution of imprisonment imposed as a punishment; 5) significantly impede compliance with hygiene requirements by the prison, or 6) require authorisation by a prison service officer under § 31(2) of the Imprisonment Act.

11. As a legal basis for prohibiting cigarettes, the explanatory memorandum to the IPR refers to § 15(2) clause 3) of the Imprisonment Act, i.e. the fact that cigarettes may endanger security or order in prison. Prohibition of cigarettes has also been linked to protection of health. Cigarettes as items cannot significantly endanger prison security. The argument that violating the rules on smoking is dangerous (smoking indoors, fire risk), is related to smoking as an activity which, however, is not regulated by the IPR. The only security risk related to cigarettes as items could be their use as a means of payment in illegal debt relationships, but prisoners may illegally hand over different items to each other. An adequate solution cannot prohibit all items for all prisoners.

12. The aim of protecting health cannot be considered compatible with grounds for prohibiting any of the substances or items laid down in § 15(2) of the Imprisonment Act. An interpretation according to which items the use of which may endanger a person’s life and health can be considered as endangering a person’s security, including cigarettes for the reason that smoking is dangerous for health, is arbitrary and distorts the meaning of § 15(2) clause 1) of the Imprisonment Act.

13. In the opinion of the Administrative Court, the real aim of the amendments to the IPR was to prohibit smoking in prison. For example, the explanatory memorandum to the Draft Regulation says that the regulation changes the procedure for smoking in prison with the aim of reducing the security risk involved in tobacco products and their use, to make the prison environment completely smoke-free and prohibit smoking on closed prison territory. It also follows from the explanatory memorandum that if smokable tobacco products are added to the list of items prohibited in prison, the regulatory framework allowing smoking by prisoners becomes void of substance and, after the entry into force of the amendments, prisoners may no longer smoke on closed prison territory.

14. Prohibition of smoking for prisoners must be laid down by law. Since no legal basis arises from law to prohibit smoking, by imposing the prohibition on smoking the Minister of Justice exceeded the powers conferred on him by law. The Minister has failed to take into account compliance of the restriction with the aims of execution of imprisonment, i.e. failed to comply with the requirements of § 4^1 clause 2) of the Imprisonment Act.

15. The amendment to the IPR by which cigarettes were included among prohibited items also contravenes the principle of legal clarity arising from § 13 of the Constitution. This creates a situation where cigarettes are prohibited for prisoners by the IPR, which is a regulation, i.e. a legislative act of general application, while smoking as such is prohibited by the prison Rules of Procedure, which by its legal nature is an administrative act (a general directive).

16. If the Minister wanted to regulate smoking as an activity by amendments to the IPR, this should have been done unequivocally. Instead, the Minister prohibited cigarettes for prisoners and annulled the provisions of the IPR which stipulated the possibility and conditions for smoking. Since 1 October 2017, the IPR contain no provisions regulating smoking as an activity, it is neither allowed nor prohibited. The whole explanatory memorandum to the amendments to the IPR speaks of smoking as an activity while the IPR themselves do not contain a single provision on this.

17. When viewed separately, the prohibition on owning cigarettes contained in the IPR, as well as the prohibition on smoking contained in the Rules of Procedure, could be understandable, but the connection between them, their effect and meaning remains unclear. Both rules are addressed to prisoners who, in general, have no comprehensive legal knowledge or experience. At the same time, by amendments to the legal regulatory framework they have been placed in a situation which does not create a good opinion of the manner of exercise of public authority. Prohibition on smoking has been laid down by an administrative act which can be contested in mandatory pre-trial proceedings and in the administrative court. Since owning cigarettes and smoking as an activity cannot be separated, it is ultimately incomprehensible for the addressees of the legal norm what act prohibited smoking and what the procedure is to contest it.

18. In conclusion, § 64^1 clause 3^1) of the IPR contravenes § 3(1), § 13 and § 94(2) of the Constitution.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

19. - 30. [not translated]

PROVISION DECLARED UNCONSTITUTIONAL

31. Review of the constitutionality of § 64^1 clause 3^1) of the Minister of Justice Regulation No 72 of 30 November 2000 on “Internal prison rules”.

“**§ 64^1. The list of prohibited items and substances**

The following is prohibited for a prisoner in prison:

[…]

3^1) smokable tobacco products and items from which and with the help of which smokable tobacco products can be fabricated or smoked;”

OPINION OF THE CHAMBER

32. The Administrative Court has filed an application with the Supreme Court seeking a declaration of the unconstitutionality of § 64^1 clause 3^1) of Minister of Justice Regulation No 72 of 30 November 2000 on "Internal prison rules" under which smokable tobacco products and items from which and with the help of which smokable tobacco products can be fabricated or smoked are prohibited for prisoners in prison. The Administrative Court finds that this rule has been issued by exceeding the scope of the underlying delegating rule, so that it contravenes § 3(1), § 13 and § 94(2) of the Constitution. The Administrative Court also finds that the combined effect of the contested rule and the provision on prohibition of smoking on prison territory laid down in the Rules of Procedure of Viru Prison (clause 2.3 of the Rules of Procedure) leads to a situation of lack of legal clarity which hampers prisoners in protecting their rights in extra-judicial administrative challenge proceedings and administrative court proceedings and thus contravenes § 13 of the Constitution.

33. The Chamber will first deal with the admissibility of the application (I), then with the compatibility of the contested provision with the scope of the delegating rule (II), the compatibility of instances of interference caused by the contested provision with the fundamental rights and freedoms of prisoners (III), and finally the possibility of prisoners to understand the substance of their duties and obtain effective legal protection to contest them (IV).

I

34. The Administrative Court has noted in its judgments that the nature of the list of prohibited items and substances set out in § 64^1 of the IPR is disputable, yet reached the conclusion that it is a legal rule the constitutionality of which can be checked in constitutional review court proceedings. The Chamber also finds that the IPR is a legislative act the constitutionality of whose provisions the Supreme Court is competent to assess in the frame of constitutional review (see also Supreme Court Constitutional Review Chamber judgment of 20 June 2014 in case No 3?4?1?9?14 [1]).

35. Under § 9(1) and § 14(2) of the Constitutional Review Court Procedure Act, in specific constitutional review proceedings the Supreme Court may only assess the constitutionality of a rule which is relevant for adjudicating the case. In line with long-standing Supreme Court case-law, a provision is relevant if in the event of its unconstitutionality the court should decide differently than if it were constitutional (for the first time in the Supreme Court *en banc* judgment of 28 October 2002 in case No 3?4?1?5?02, para. 15). The applicants have asked the Administrative Court to oblige the prison to take steps to enable smoking. According to the contested rule, a prisoner may not have tobacco products or items enabling to fabricate or smoke them. Thus, without setting aside the contested rule, prisoners may not be enabled to smoke in prison nor can their complaints be satisfied. However, even if the contested rule were to be set aside, the prisoners' complaints could not be satisfied nor could they be given the right to smoke in prison because, regardless of the possibility to possess tobacco products, smoking for prisoners as well as others on the territory of Viru Prison is also prohibited under clause 2.3 of the Rules of Procedure of Viru Prison which have been

established in an administrative act. However, taking into account that the Administrative Court in the case in the main proceedings repealed clause 2.3 of the Rules of Procedure insofar as it prohibits prisoners to smoke on prison territory, applying the contested rule is of decisive importance in terms of adjudicating the case. Thus, the contested provision is relevant.

II

36. Under § 3(1) (first sentence) of the Constitution, governmental authority is exercised solely pursuant to the Constitution and laws in conformity therewith. In line with the principle of general statutory reservation expressed in this provision, all significant decisions concerning issues related to fundamental rights must be made by the legislator. Delegating to the executive an issue within the competence of the legislator, and the executive authority's interference with fundamental rights, is only allowed on the basis of a delegating rule laid down by law and compatible with the Constitution. An expression of the general statutory reservation is also § 94(2) of the Constitution which confers on a Minister the right to issue regulations and administrative decrees on the basis and for the implementation of laws. Arising from the first sentence of § 3(1) of the Constitution, a regulation is contrary to the Constitution if it has been issued on the basis of an unconstitutional delegating rule, without a delegating rule, or is not compatible with the delegating rule (Supreme Court *en banc* judgment of 18 May 2010 in case No 3?1?1?116?09 [2], para. 24; Supreme Court Constitutional Review Chamber judgment of 18 May 2015 in case No 3?4?1?55?14 [3], paras 46–47). The principle of the general statutory reservation is further specified by the Administrative Procedure Act, under § 89(1) of which a regulation is lawful if it is in accordance with currently valid legislation, complies with the requirements for formal validity and is issued by the administrative authority specified in the provision delegating authority under the procedure prescribed by law. Under § 90(1) of the Administrative Procedure Act, a regulation may be issued only in the case of existence of a delegating rule contained in a law, and in accordance with the scope, spirit and aim of the delegating rule.

37. There is no dispute that the regulation by which the contested rule was established was adopted by an administrative authority mentioned in the delegating rule and through the procedure set out by law, and it complies with the requirements of form. Since the Administrative Court has expressed misgivings first and foremost about the conformity of the contested provision with the underlying delegating rule, the Chamber will next deal with its compatibility with the scope, spirit and aim of the delegating rule.

38. The Minister of Justice has established the contested rule on the basis of § 15(3) of the Imprisonment Act, which reads as follows: "The minister responsible for the area shall establish by a regulation a list of the items prohibited for prisoners in closed or open prisons, the total weight of the items kept with them and in storage, and the procedure for storage of deposited items." The substance of the delegating rule is specified in § 15(2) of the Imprisonment Act, under which prisoners are prohibited from having substances and items which: 1) endanger the security of people; 2) are particularly suited to damaging property; 3) may endanger security or order in the prison; 4) do not comply with the aims of execution of imprisonment imposed as a punishment; 5) significantly impede compliance with hygiene requirements by the prison, or 6) require authorisation by a prison service officer under § 31(2) of the Imprisonment Act. The regulation is constitutional only if the underlying statutory delegating rule itself is compatible with the Constitution (Supreme Court Constitutional Review Chamber judgment of 18 May 2015 in case No 3?4?1?55?14 [3], paras 46–47). Neither the Administrative Court nor the participants in proceedings have called into question the constitutionality of the provisions of the Imprisonment Act underlying the issuing of the contested provision. Nor does the Chamber see the need to expand the review to the delegating rule but will only

assess the constitutionality of the provision contested by the Administrative Court.

39. In the explanatory memorandum to the Draft Regulation establishing the contested rule (Explanatory Memorandum to the Minister of Justice Regulation No 21 of 6 October 2016, available: http://eelnoud.valitsus.ee/ [4]), the Minister of Justice justified the prohibition of cigarettes in prison with the need to protect security and order in prison (§ 15(2) clause 3) Imprisonment Act). According to an assessment by the Minister of Justice, the concept of "security and order in prison" includes protection of the health of persons in prison, avoidance of fire risk in prison, prevention of illegal debt relationships between prisoners, as well as effective supervision over handling of tobacco products. Additionally, the Minister has found that establishment of the contested rule is also justified by the aim of ensuring the security of people arising from § 15(2) clause 1) of the Imprisonment Act.

40. Thus, the assessment of whether prohibition of tobacco products can be accommodated within the delegating rule depends first of all on defining the substance of the concepts "security and order in prison" and "the security of people" used in § 15(2) of the Imprisonment Act. In the opinion of the Chamber, when delimiting concepts, the nature of prison as a specific security environment should be taken into account and the fact that it should be possible to ensure security and order effectively and flexibly. Ensuring the security of persons in prison as well as security and order in prison is a precondition for achieving the aims of imprisonment (§ 6(1) Imprisonment Act) without which imprisonment would lose its purpose. In a combination of different circumstances, serious disturbance of security and order in prison could also be brought about by items and substances which pose no risk outside the prison.

41. In case-law to date, it has been noted that a prison has a wide margin of appreciation in assessing the danger of a substance or item and prohibiting it for a prisoner on the basis of the IPR. Prison is an establishment created for the execution of imprisonment and custody pending trial which must have the experience of detecting and preventing risks arising from the specificity of execution of imprisonment (e.g., Supreme Court Administrative Law Chamber judgment of 25 October 2012 in case No 3?3?1?28?12 [5], para. 14). In its jurisprudence, the Supreme Court Administrative Law Chamber has interpreted, inter alia, the following as constituting risks to prison security within the meaning of § 15(2) clause 3) of the Imprisonment Act: damage to prison property (Supreme Court Administrative Law Chamber judgment of 6 May 2015 in case No 3?3?1?88?14 [6], para. 12), hiding a prohibited item (Supreme Court Administrative Law Chamber judgment of 25 October 2012 in case No 3?3?1?27?12 [7], para. 19), or the risk of bringing a prohibited item into prison (Supreme Court Administrative Law Chamber judgment of 5 March 2009 in case No 3?3?1?102?08 [8], para. 19).

42. In the opinion of the Chamber, the Minister of Justice also has a considerable margin of appreciation in defining the substance of concepts laid down in § 15(2) of the Imprisonment Act. The Ministry of Justice together with prisons performs the functions of the prison service (§ 105^1 (1) and (2) Imprisonment Act). It may be presumed that the Minister of Justice, as Minister responsible for the area of execution of imprisonment, has at his disposal information as to the prohibition of what types of items or substances is justified in view of the actual security situation of prisons.

43. Regardless of the foregoing, the concepts of security and order in prison and security of persons cannot be defined so broadly as to allow the Minister to arbitrarily prohibit items and substances for prisoners. Prohibiting an item or a substance in prison must conform to the aim of execution of imprisonment and be

compatible with the principle of human dignity and may not cause a prisoner unjustified suffering or inconvenience (§ 4^1(1) and § 6(1) Imprisonment Act). Other requirements and restrictions arising from the Constitution, the Imprisonment Act and other legislation must also be taken into account.

44. It is not possible to agree with the opinion of the Administrative Court that prohibition of tobacco products in prison can only be justified by a risk arising from a tobacco product itself, and not the risk involved in using it. Such a distinction would be artificial and would also not conform to the practice to date in assessing the level of risk involved in items and substances. In the opinion of the Chamber, the majority of items and substances prohibited on the basis of § 64^1 of the IPR, such as weapons, tools, optical devices, alcohol and narcotic substances, have been prohibited in prison not because they are dangerous in themselves but because they pose a risk when used by prisoners. Therefore, it is also not possible to completely dissociate from each other the risks arising from tobacco products and from their use. Possession of tobacco products is a precondition for smoking, and by excluding ownership or possession of tobacco products, the harmful effects involved in smoking are also excluded. The fact that prisons by their administrative acts – rules of procedure of prisons – have established, based on the Tobacco Act, an additional prohibition on smoking for all persons on prison territory (not just prisoners), does not lead to the conclusion that the Minister of Justice might not also take into account considerations related to the dangers of smoking when prohibiting tobacco products for prisoners.

45. Prohibiting items and substances on considerations of security of persons and of the prison is, in principle, possible to protect others staying on prison territory as well as for the reason that these are dangerous for a prisoner's own life or health (e.g. enabling commission of self-injury or suicide). A person smoking endangers their own health as well as the health of those staying close to them. The Chamber has no doubt that the aim of protecting the security of people and of the prison also covers protection of the life and health of others from the harmful effects of tobacco products and smoking (precluding passive smoking). In the opinion of the Chamber, there is no reason to exclude risks arising from tobacco products from the scope of security of people and of the prison within the meaning of § 15(2) of the Imprisonment Act merely for the reason that the risk to human health involved in smoking is realised within a longer period and might not lead to serious health damage with the same likelihood in the case of everyone. Protecting the health of non-smoking prisoners from health damage caused by tobacco smoke is an undeniable duty of the prison service. By reference to the case-law of the European Court of Human Rights, the Supreme Court Administrative Law Chamber has emphasised that the prison has a duty to ensure that smoking in prison should be completely ruled out in rooms where other people are forced to stay against their will, if necessary separating smoking and non-smoking prisoners into different cells (Supreme Court Administrative Law Chamber order of 22 May 2014 in case No 3?3?1?30?14 [9], para. 10).

46. As for the aim of protecting the health of prisoners themselves, the Chamber agrees with the Chancellor of Justice that any risk to a prisoner's own health arising from a harmful habit or unhealthy lifestyle, as well as the aim of ridding a prisoner of nicotine addiction might not be covered by the aim of execution of imprisonment and justify prohibition of an item or substance to a prisoner. Owning and smoking tobacco products are not, of themselves, factors conducive to a person's criminal conduct. Neither a precondition for nor the aim of execution of imprisonment is to ensure that a prisoner would not be able to exercise any activity harmful for them, in particular if it is clear that they do it of their own will and knowingly. Protection of the health of a smoking prisoner and ridding them of their addiction cannot be considered as also covered by the aim of imprisonment merely because it may, to a certain extent, save the public funds spent on their future possible treatment. Prohibition of tobacco products or smoking also cannot be seen as a condition arising from the nature of imprisonment or inevitably inherent in its execution. Therefore, the scope of the delegating rule does not cover the aim of ridding a smoking prisoner of their nicotine addiction

or protecting their health from the risk or a harmful consequence which they inflict on themselves by using tobacco products.

47. The Minister of Justice has also justified the prohibition of tobacco products for prisoners by fire safety and the need to prevent illegal debt relationships in prison and to exercise more effective supervision over compliance with order in prison. It is obvious that the use of open fire inevitably involved in smoking in prison is dangerous to the life and health of prisoners as well as other persons staying in prison. There is also no doubt that open fire may damage prison property and otherwise disturb orderly activities in prison. The risk of fire is increased by the fact that prisoners may use self-made items to light a fire. The aim of ruling out use of tobacco products in prison as an illegal means of payment and thereby avoiding the spread of debt relationships between prisoners has been set with a view to separating a prisoner from the criminal environment and re-socialising them. These aims correspond to the aim of execution of imprisonment and are thus covered by ensuring security and order in prison within the meaning of § 15(2) clause 3) of the Imprisonment Act. Although simplifying supervision over compliance with order in prison or saving on the supervision resource may not be independent aims for interference with the rights of prisoners, in the opinion of the Chamber the aim of raising the effectiveness of supervision is covered by the need to effectively achieve the aim of preventing health risks, fire risk as well as illegal debt relationships in prison. The positions expressed by the Minister of Justice and the prison show that when prisoners had a limited opportunity to use tobacco products in prison, despite supervision it often happened that prisoners also had tobacco in their possession outside the area permitted for this. The complete prohibition of tobacco products for prisoners reduces the possibility that tobacco products reach the prison illegally and thus enables prevention of the above-mentioned risks to the security of people and prison presumably by using a smaller supervision resource.

48. In conclusion, the Chamber does not see a conflict of the contested provision with the substance, scope and aim of the delegating rule if tobacco products and their precursors are prohibited for prisoners in prison with the aim of protecting the life and health of other people, preventing fire risk in prison and preventing the use of tobacco products as illegal means of payment. In the opinion of the Chamber, such an interpretation of the delegating rule is also not precluded by the requirements and systematic relations arising from other legislation in force, first and foremost the Tobacco Act. Although the Tobacco Act is the main legislative act in the Estonian legal order laying down the requirements and restrictions for tobacco products, their handling and consumption (§ 1(1) Tobacco Act), this does not rule out regulating issues related to tobacco products in other laws or a legal act issued on the basis of a law. The fact that in the Tobacco Act the legislator has not explicitly established a prohibition of tobacco products or smoking in prison cannot lead to the conclusion that such a prohibition might not arise from the Imprisonment Act or a legal act issued on the basis of it within the scope of the delegating rule.

49. The Chamber found above (para. 46 of the judgment) that the scope of the delegating rule arising from § 15(2) and (3) of the Imprisonment Act does not cover the aim of protecting a prisoner from the health risk and health damage that they inflict on themselves by smoking. At the same time, all the aims underlying establishment of the contested provision must be assessed in the aggregate. Since the other aims mentioned by the Minister of Justice as grounds for prohibition of tobacco products are, in the light of the foregoing, compatible with the aim, substance and scope of the delegating rule, the body issuing the regulation has not exceeded the scope of the delegating rule in this case.

III

50. In the opinion of the Administrative Court as well as the other participants in proceedings, the prohibition on tobacco products arising from the contested provision of the IPR interferes with the fundamental rights and freedoms of prisoners. In line with Supreme Court case-law to date, imposing restrictions on fundamental rights by a regulation is not precluded if they are based on a precise and clear delegating rule conforming to the intensity of the restriction (see, e.g., Supreme Court *en banc* judgment of 3 December 2007 in case No 3?3?1?41?06 [10], para. 22; judgment of 16 March 2010 in case No 3?4?1?8?09 [11], para. 160). If a regulation gives rise to a restriction on the fundamental rights of an individual, to be convinced of the substantive constitutionality of the regulation it is not merely sufficient that it is compatible with the spirit, scope and aim of the delegating rule, but the regulation must also comply with the constitutional conditions for restricting the fundamental rights and freedoms of individuals.

51. The Chamber is of the opinion that the prohibition of tobacco products in prison interferes primarily with a prisoner's fundamental right to property under § 32 of the Constitution. Since the prohibition of tobacco products simultaneously precludes the possibility to smoke them or use them otherwise, the restriction also interferes with a prisoner's right to free self-realisation under § 19(1) of the Constitution. In the administrative court proceedings, the applicants argued that the prohibition of tobacco products and smoking also interferes with their right to treatment in line with human dignity arising from the first sentence of § 18 of the Constitution. Interference with this right of a prisoner presumes that suffering and inconvenience resulting from their detention conditions exceeds a certain level of severity (Supreme Court Constitutional Review Chamber judgment of 20 June 2014 in case No 3?4?1?9?14 [1], para. 36). The Chamber finds that the assessment of whether prohibition of tobacco products in prison also interferes with a prisoner's human dignity can be given in the frame of checking the intensity of interference with a prisoner's fundamental right to property and the right to free self-realisation (see paras 58–61) of the judgment.

52. Section 11 of the Constitution allows circumscribing fundamental rights only in accordance with the Constitution, setting the precondition that circumscription must be necessary in a democratic society and may not distort the nature of the rights and freedoms circumscribed. That is, interference with a fundamental right must have a (legitimate) aim complying with the Constitution and the interference must be proportionate to attaining the aim (appropriate, necessary and proportional in the narrow sense). Interference with a fundamental right is a measure appropriate for attaining the aim if it helps in some way to attain the aim. Interference is necessary if the aim cannot be attained by using a measure which is less restrictive of fundamental rights. To decide on the narrow proportionality of interference requires considering, on the one hand, the extent and intensity of interference with a fundamental right and, on the other hand, the importance of the aim (Supreme Court Constitutional Review Chamber judgment of 6 March 2002 in case No 3?4?1?1?02 [12], para. 15).

53. Both the fundamental right to property and the right to free self-realisation are fundamental rights subject to a simple statutory reservation which may be restricted for any purpose that does not contravene the Constitution (most lately the Supreme Court Constitutional Review Chamber judgment of 21 June 2019 in case No 5?19?28 [13]/10, para. 79). The Chamber found above that the aims of establishing the contested provision of the IPR are covered by ensuring the security of people and of the prison within the meaning of § 15(2) clauses 1) and 3) of the Imprisonment Act. The same aims are part of protecting the state's internal peace, public order and human health as more general constitutional goals, and there is no doubt that these are legitimate reasons for interference with the fundamental right to property and the right to free self-realisation within the meaning of the Constitution.

54. If tobacco products are completely prohibited for prisoners in prison, they have no opportunity to come into lawful contact with tobacco products. Even if presuming that the prison service cannot completely prevent prisoners from getting hold of tobacco products illegally, the prohibition makes access to tobacco products in any case more difficult for prisoners and thus facilitates attaining the aims of the restriction. From statistics presented in the opinion by the Minister of Justice it also appears that after the complete prohibition of tobacco products for prisoners in 2017, violation of smoking rules and the number of incidents of illegal handling of tobacco products in prison has significantly decreased. Thus, the measure is suitable for attaining the aims.

55. The Chancellor of Justice has found that the measure is not necessary in achieving the aim of protecting health because the risk to the life and health of other persons on prison territory has already been significantly reduced by the ban on smoking indoors in prison. In the opinion of the Chancellor of Justice, despite the prohibition tobacco products may still illegally reach the prison and since the prison service must tighten supervision to check compliance with the prohibition, use of the public resource might also not become more effective than previously.

56. The Chamber concedes that, for protection of other people staying on prison territory from the harmful effect of tobacco smoke, more lenient measures than a complete prohibition on tobacco products could be considered. However, their effectiveness is difficult to assess. For example, it would be possible to separate smoking and non-smoking prisoners in different rooms, to create smoking rooms in prison (§ 30(3) Tobacco Act) or allow smoking only outdoors as was done in prison prior to the prohibition entering into force in 2017. However, in the opinion of the Chamber none of the measures enabling prisoners to possess and smoke tobacco products on prison territory in confined conditions ensures prevention of risks caused by the harmful effects of tobacco products to an extent that would be comparable to the effect resulting from a complete ban on tobacco products. The Chamber agrees with the Minister of Justice that even in the case of smoking in a confined area or a smoking room, the prison must ensure supervision over prisoners, and complete separation of non-smokers from smokers is not practically possible. The Chamber also has no reason to doubt the assessment of the Minister of Justice that allowing tobacco products to a limited extent in prison increases, in comparison to a complete prohibition of tobacco products, the possibility that prisoners also use tobacco products in an area where this is not allowed, and consequently the prison service should use an increased supervisory resource. Even if prohibition of tobacco products for prisoners does not ensure that no tobacco products at all reach prisoners illegally, nor does it relieve the prison service of the need to spend the supervision resource on searching for prohibited tobacco products, this does not mean that with more lenient measures the aims dealt with above (see Part II of the judgment) could be attained just as effectively.

57. The Chamber also sees no specific measure that would ensure prevention of the risk of fire from smoking in prison, or the risk of use of tobacco products as an illegal means of payment, clearly more effectively, while interfering less with the rights of prisoners, than a complete prohibition of tobacco products. The participants in the proceedings have also not indicated any such measures.

58. With regard to the narrow proportionality of the restriction, the Chamber finds that even though the possibility of owning and using tobacco products falls in itself within the scope of protection of the fundamental right to property and the right to free self-realisation, their prohibition does not amount to a

serious interference with the rights of prisoners that would deprive them of the basic necessities of life. The need to protect the health of others staying on prison territory, as well as prevention of illegal relationships between prisoners and prevention of fire risk and optimal use of the resource in prison are important aims which, in aggregate, outweigh interference with the above rights of prisoners.

59. Although the intensity of interference is increased by the fact that long-term use of tobacco products leads to nicotine addiction in a person, and giving up smoking results in withdrawal symptoms of different intensity and duration depending on the person, these pass within a few weeks and treatment is needed only in more serious cases of addiction (https://www.tubakainfo.ee/loobu-suitsetamisest/nikotiini-voorutusnahud/ [14]). Under § 52 of the Imprisonment Act, a doctor is required to constantly supervise the state of prisoners' health, treat them in prison to the extent possible and, if necessary, refer them to treatment at relevant providers of specialised medical care. Under § 8^2(1) of the IPR, when admitting a prisoner to prison it is ascertained whether a prisoner smokes and whether they wish to give up smoking. If a prisoner wishes to give up smoking, counselling in prison is ensured to them. Thus, the prison has a duty to ensure counselling to a prisoner who smokes and, in more serious cases of addiction, also withdrawal treatment. The Minister of Justice in his opinion has affirmed that if a prisoner gives up smoking they are ensured counselling, support and, if necessary, nicotine replacement treatment.

60. Neither the Administrative Court judgments nor the opinions submitted in the instant constitutional review case indicate any specific claims by DT, LS, NS and KM to indicate that the prison has failed to ensure them counselling or addiction treatment. According to the Administrative Court judgment, prisoner AS claims that they were not provided assistance to alleviate nicotine addiction. Viru Prison, however, is convinced that treatment possibilities for AS were ensured. Applicant AS has been in Viru Prison since 6 March 2014. Smoking in Viru Prison was already restricted before complete prohibition of tobacco products and smoking. According to the Rules of Procedure of Viru Prison, in the period from 16 May 2016 to 30 June 2017, prisoners could smoke up to three cigarettes a day, since 1 July 2017 two cigarettes and since 1 September 2017 one cigarette a day. Smoking in prison has been completely prohibited since 1 October 2017. In view of the gradual reduction of the number of cigarettes allowed for a prisoner and the small number of cigarettes allowed immediately before the complete ban on smoking, it is not plausible that the prisoner developed serious withdrawal symptoms only when the possibility of smoking disappeared completely. From the opinion submitted by prisoner AS in the instant constitutional review case it can also be concluded that a medical professional has assessed their health and found that they had no addiction disorder.

61. To sum up the foregoing, the Chamber finds that interference with the applicants' fundamental right to property and the right to free self-expression arising from the prohibition of tobacco products and smoking imposed by the contested provision is a proportionate measure to ensure the security of people and of the prison as well as order. The Chamber is of the opinion that the prohibition did not cause such intense suffering and inconvenience to the applicants as to be able to speak of interference with the right to be treated in line with human dignity arising from the first sentence of § 18 of the Constitution.

IV

62. The Administrative Court has also found that the contested provision does not conform to the principle of legal clarity laid down by § 13 of the Constitution. In the opinion of the Administrative Court, violation of

the principle of legal clarity arises from the combined effect of § 64^1 clause 3^1) of the IPR and clause 2.3. of the Rules of Procedure of Viru Prison which prohibits smoking for all persons on the territory of Viru Prison. Although, when viewed separately, the prohibition on owning cigarettes contained in the IPR, as well as the prohibition on smoking contained in the prison Rules of Procedure, are understandable, in the opinion of the court the connection between them, their effect and meaning remains unclear for prisoners. Therefore, in the opinion of the Administrative Court, they cannot understand by what legal act smoking in prison is prohibited and which legal act they have to contest to obtain the opportunity to smoke.

63. In the opinion of the Chamber, with reference to the principle of legal clarity the Administrative Court essentially contests the compatibility of the contested provision with the fundamental right to effective legal protection and fair administration of justice ensured by the combined effect of § 14 and § 15(1) of the Constitution (e.g., Supreme Court Constitutional Review Chamber judgment of 17 July 2009 in case No 3?4?1?6?09 [15], paras 15, 20 and 22). If a person does not understand the combined effect of different legal acts to be contested through different procedures, i.e. the effect resulting in restrictions of their subjective rights, then effective protection of their rights neither in administrative proceedings nor in the possible subsequent court proceedings might be ensured.

64. Undoubtedly, understanding the regulatory provisions laying down a person's rights and duties, and thus also the protection of their rights, is easier the smaller the number of legal acts regulating an issue and the simpler the connections between different acts or their rules. It was concluded above (para. 44 of the judgment) that if tobacco products are prohibited for prisoners, the inevitable consequence is also a prohibition on smoking, so that these prohibitions cannot be essentially separated from each other. Nevertheless, the Chamber does not find that the legal solution chosen would be as unclear or complicated in terms of legislative drafting that it would not enable a prisoner to understand the substance of their duties or to contest them in extra-judicial administrative challenge proceedings or administrative court proceedings. As the Administrative Court also concluded, the prohibition of both tobacco products and smoking in prison are in themselves understandable for prisoners.

65. When assessing the effectiveness of obtaining legal protection, the established case-law and the statutory duty of administrative courts to ascertain an applicant's actual will should also be taken into account. Section 120(1) clause 3) of the Code of Administrative Court Procedure stipulates that the court in which the action was brought verifies whether the claims and applications in the action are well suited and necessary for achieving the aim of the action and, where necessary, suggests that the applicant amend the action. Under § 2(4) of the Code of Administrative Court Procedure, the court interprets and deals with declarations of participants in the proceedings according to the actual intention of the participant who made the declaration. Under § 2(5) of the Code of Administrative Court Procedure, at every stage of the proceedings, the court must provide sufficient explanation to participants in the proceedings to ensure that no declaration or evidentiary item necessary to protect a participant's interests remains unrecognised because of the participant's lack of experience in legal matters. The Supreme Court Administrative Law Chamber in its case-law has also repeatedly explained the procedure and applicable remedies for contesting the regulatory framework precluding smoking in prison (e.g. Supreme Court Administrative Law Chamber order of 25 October 2017 in case No 3?17?749 [16]/24; order of 7 June 2018 in case No 3?17?2610 [17]/32; order of 28 June 2019 in case No 3?18?253 [18]/46).

66. Based on actions by prisoners, administrative courts have repeatedly assessed the lawfulness of the prohibition on tobacco products arising from the IPR and of the prohibition on smoking on prison territory

arising both from the rules of procedure of prisons, including the constitutionality of instances of interference with the applicants' fundamental rights. The case-law to date thus shows that prisoners have had an opportunity to effectively protect their rights in judicial proceedings.

67. In view of the foregoing, relying on § 15(1) clause 6) of the Constitutional Review Court Procedure Act, the Chamber dismisses the applications by Tartu Administrative Court.

Villu Kõve, Velmar Brett, Ants Kull, Viive Ligi, Paavo Randma

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Links
[1] https://rikos.rik.ee/?asjaNr=3-4-1-9-14
[2] https://rikos.rik.ee/?asjaNr=3-1-1-116-09
[3] https://www.riigikohus.ee/et/lahendid?asjaNr=3-4-1-55-14
[4] http://eelnoud.valitsus.ee/
[5] https://www.riigikohus.ee/et/lahendid?asjaNr=3-3-1-28-12
[6] https://rikos.rik.ee/?asjaNr=3-3-1-88-14
[7] https://www.riigikohus.ee/et/lahendid?asjaNr=3-3-1-27-12
[8] https://www.riigikohus.ee/et/lahendid?asjaNr=3-3-1-102-08
[9] https://rikos.rik.ee/?asjaNr=3-3-1-30-14
[10] https://www.riigikohus.ee/et/lahendid?asjaNr=3-3-1-41-06
[11] https://www.riigikohus.ee/et/lahendid?asjaNr=3-4-1-8-09
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[16] https://www.riigikohus.ee/et/lahendid?asjaNr=3-17-749/24
[17] https://www.riigikohus.ee/et/lahendid?asjaNr=3-17-2610/32
[18] https://www.riigikohus.ee/et/lahendid?asjaNr=3-18-253/46