Constitutional judgment 5-19-45

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?45
Date of judgment	17 April 2020
Composition of court	Chairman: Villu Kõve; members: Hannes Kiris, Heiki Loot, Kaup Pilving
Case	Review of the constitutionality of § 18(1) clause 6) of the Local G Organisation Act
Basis for proceedings	Application of 20 December 2019 by the Chancellor of Justice
Participants in the proceedings	Chancellor of Justice Riigikogu Minister of Justice Minister of Public Administration Association of Estonian Cities and Municipalities
Hearing	Written procedure

OPERATIVE PART

1. To satisfy the application by the Chancellor of Justice.

2. To repeal part of the sentence containing the words "or working in an administrative agency of the same rural municipality, town or city on the basis of an employment contract" in § 18(1) clause 6) of the Local Government Organisation Act.

3. To postpone entry into force of the judgment by six months.

FACTS AND COURSE OF PROCEEDINGS

1. On 5 September 2019, the Chancellor of Justice made a proposal to the Riigikogu to bring § 18(1) clause 6) of the Local Government Organisation Act (LGOA) into conformity with the Constitution insofar as it stipulates premature termination of a municipal council member's mandate if the municipal council member works in an administrative agency of the same rural municipality, town or city on the basis of an employment contract.
2. At the session of 15 October 2019, the Riigikogu did not support the proposal of the Chancellor of Justice. 31 members of the Riigikogu voted in favour of the proposal and 37 against.

3. On 20 December 2019, the Chancellor submitted an application to the Supreme Court seeking repeal of § 18(1) clause 6) of the Local Government Organisation Act insofar as it contravenes the Constitution.

REASONING BY THE CHANCELLOR OF JUSTICE

4. The contested provision interferes seriously with the right to stand as a candidate for a municipal council, i.e. passive suffrage (in particular the requirement of uniformity guaranteed by the third sentence of § 156(1) of the Constitution), which is part of the principle of democracy (§ 10 Constitution), as well as the right to freely choose one's area of activity, profession, and position of employment. The position of a municipal council member is remunerated but does not enable a person to live from it and to maintain a family.

5. An administrative agency hires an employee for a position in which functions supporting the exercise of public power are performed which may be diverse in substance. The work done in an administrative agency may also differ in terms of its connection to performing public functions and the public interest; for an accountant and public procurement specialist the connection is closer while in many positions it is weak. A person performing supportive or advisory functions for a municipal council chair or deputy chair or a municipal council faction, rural municipality, town or city mayor, or rural municipal, town or city government member also works on the basis of an employment contract whereas under § 7(6) of the Civil Service Act that person's activity is not considered exercise of public authority. As at 31 December 2018, local government administrative agencies had 2555 employees working on the basis of an employment contract.

6. The contested part of § 18(1) clause 6) of the LGOA helps to prevent a conflict of interest and ensure separation of functions and responsibility.

7. In the event of a conflict between an official's duties and private interests, private interests may

inappropriately affect performance of official duties. Conflict of interest is not corruption but may lead to corruption, which damages a local authority's fair and lawful functioning in the interests of local residents. Prevention of corruption is an acceptable ground under the rule of law to circumscribe fundamental rights. A municipal council member may have an interest in preserving their position of employment in an administrative agency, obtaining a higher wage or better social guarantees, or they may also have an interest in having a position in an administrative agency created for them. A municipal council must resolve these issues by proceeding from the public interest.

8. If a municipal council member's interests intersect with the official interests of an employee of an administrative agency, it is necessary primarily to avoid concentration of power. Separation of functions and responsibility must ensure that too much power is not concentrated with one body and that a person does not simultaneously perform conflicting tasks. This is an organisational issue of a local authority (§ 160 Constitution).

9. An employee's work can only be technical; this is not substantive preparation or implementation of policy-making decisions (e.g. § 7(3) cl. 8) Civil Service Act). As a rule, the outcome of the work of an employee of an administrative agency reaches a municipal council for debate and decision-making through a rural municipal, town or city government. A municipal council exercises political control and, through the audit committee, accounting control over rural municipal, town or city government as an executive body. At the same time, distinguishing between the tasks of a municipal council and government is not intrinsic but proceeds from the criteria of significance and practicability. A municipal council in the frame of its margin of appreciation sets the conditions for performance of a task delegated to the government, administrative agency or its structural unit.

10. The contested provision is not constitutional because interference with fundamental rights arising from it is not necessary for achieving the aim (conflict with the principle of proportionality laid down in the second sentence of § 11 of the Constitution).

11. As a rule, a conflict of interest can be prevented equally effectively, while interfering less with the rights of a municipal council member, by a municipal council member's obligation to refrain from preparing, deliberating and resolving legislation of specific application with regard to which a procedural restriction extends to the member under the Anti-corruption Act (§ 17(5) and (6) LGOA). The Anti-corruption Act prohibits an official from performing an act or making a decision if the decision is made or the act is performed with respect to the official or a person connected to them, or the official is aware of an economic interest of that official or a person connected to them, or the official is aware of a risk of corruption (§ 11(1) Anti-corruption Act); an exception is adoption of legislation of general application (including a local authority budget) and participation in its adoption or preparation (§ 11(3) cl. 1) Anti-Corruption Act). Prevention of a specific risk of corruption is more important than reduction of an abstract risk of corruption. Negative consequences of a conflict of interest can also be prevented by democratic and transparent decision-making processes and effective control.

12. An employee of an administrative agency does not act on a political decision-making level nor do they bear political responsibility before the municipal council, so that a municipal council member's obligation to refrain is also a sufficient means of ensuring separation of functions and responsibility. Additionally, the legislator can expand the ban on a municipal council member from belonging to the audit committee (§ 48(2^2) LGOA) to also include those municipal council members who are simultaneously employees of an administrative agency. In the cases laid down by § 7(6) of the Civil Service Act (CSA) (political advisers working on the basis of an employment contract), the aim could be achieved by suspension of the mandate, which would be less restrictive of a municipal council member's rights.

13. A conflict of interest may also occur if a municipal council member is a private entrepreneur (as a sole proprietorship, or among the owners of a company or a member of a company management or supervisory body). A conflict of interest is even more likely if a municipal council member is head of an agency administered by a local authority's administrative agency. However, in such cases the law does not stipulate

termination or suspension of a municipal council member's mandate. When a municipal council member who becomes a member of a rural municipal, town or city government is simultaneously an official (public authority is exercised in both positions), the council member's mandate is not terminated but suspended (§ 19(2) cl. 1), § 19(1^1) LGOA).

14. At the time when the Supreme Court in its judgment of 30 November 2010 No 3?4?1?17?10 assessed the constitutionality of § 18(1) clause 6) of the LGOA in respect of an official, exercise of public authority and activities supporting this were not distinguished in the civil service but were closely intertwined. The Civil Service Act also did not clearly distinguish between neutral officials and politically defined persons, and the Act also applied to people performing tasks of a political nature. Unlike rural municipal, town or city government members and officials, an employee does not exercise public authority.

15. Interference with fundamental rights resulting from § 18(1) clause 6) of the LGOA is not justified by the wish to avoid wrongly implementing the Civil Service Act in defining the tasks of an official and an employee (as was noted with regard to the contested provision in the list of amendments submitted for the second reading of the Draft Civil Service Act (193 SE, XII composition of the Riigikogu). Correct application of the law could be achieved with the help of clarity of law-making and effective supervision.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

16. - 38. [not translated]

CONTESTED PROVISION

39. Section 18(1) clause 6) of the Local Government Organisation Act (in the wording in force from 1 April 2013):

"**§ 18. Premature termination of the mandate of a municipal council member**

(1) The mandate of a municipal council member terminates prematurely:

[…]

6) due to appointment as an official of the same rural municipality, town or city local government or **employment in an administrative agency of the same rural municipality, town or city based on an employment contract**;

[RT I, 6 July 2012, 1[1] - entered into force 1 April 2013]

[...]".

OPINION OF THE CHAMBER

40. The application by the Chancellor of Justice for repeal of the second alternative in § 18(1) clause 6) of the LGOA has been submitted under § 6(1) clause 1) of the Constitutional Review Court Procedure Act, and the requirements laid down by § 17 and § 18(1) of the Chancellor of Justice Act have been complied with.

Thus, the application is admissible and the Chamber will examine it. The Chamber will first demonstrate how the contested provision interferes with fundamental rights (I) and then explain the aims of interference with fundamental rights (II). Finally, the Chamber will assess the constitutionality of the contested provision (III).

I

41. According to the first sentence of § 156(1) of the Constitution, the representative body of a local authority is its council which is elected in a free election for a term of four years. The third sentence of § 156(1) of the Constitution says that the elections are general, uniform and direct.

42. Section 156 of the Constitution guarantees the subjective right to stand as a candidate in an election of a municipal council (passive suffrage) (see Supreme Court Constitutional Review Chamber judgment of 15 July 2002 in case No 3?4?1?7?02, para. 19; also Supreme Court *en banc* judgment of 19 April 2005 in case No 3?4?1?1?05, para. 15). In addition to the right to stand for election, passive suffrage also includes a person's right to hold a municipal council member's mandate (powers) in the case of being elected (see Supreme Court Administrative Law Chamber judgment of 27 June 2001 in case No 3?3?1?35?01, para. 2; most lately Supreme Court Constitutional Review Chamber order of 6 June 2018 in case No 5?18?3/2 [2], para. 19).

43. When regulating passive suffrage the legislator must take into account the principles mentioned in the third sentence of § 156(1) of the Constitution (*mutatis mutandis* Supreme Court *en banc* judgment of 1 July 2007 in case No 3?4?1?33?09, para. 30, see also Constitutional Review Chamber cited judgment in case No 3?4?1?7?02, para. 19). Arising from the principle of general elections, passive suffrage may not be restricted without justification. The principle of uniformity of elections in combination with the fundamental right to equality arising from § 12 of the Constitution requires equal treatment of candidates and persons who are elected (cf. Supreme Court *en banc* cited judgment in case No 3?4?1?1?05, paras 15–16).

44. Passive suffrage in municipal council elections is linked to the principle of democracy laid down by § 10 of the Constitution (see Constitutional Review Chamber cited judgment in case No 3?4?1?7?02, paras 19–20, and Court *en banc* judgment in case No 3?4?1?1?05, para. 30; also the Preamble and Article 3 of the European Charter of Local Self-Government).

45. Section 156(1) of the Constitution does not lay down a statutory reservation for restricting passive suffrage. Therefore, interference with this fundamental right is only allowed if necessary for protection of other fundamental rights or other constitutional values (see Supreme Court *en banc* cited judgment in case No 3?4?1?1?05, para. 24).

46. The second alternative in § 18(1) clause 6) of the LGOA stipulates termination of the mandate of a municipal council member if they work in the same local authority on the basis of an employment contract. This is a prohibition on compatibility of offices which interferes with passive suffrage of an elected person, more specifically their right to hold a municipal council member's mandate. A person working in an administrative agency on the basis of an employment contract has the right to stand as a candidate in municipal council elections (if they meet the conditions laid down by § 5 of the Municipal Council Election Act (MCEA)), but in the case of being elected they have to choose between exercising a municipal council member's mandate or working in an administrative agency.

47. After election day or the day of a repeat vote, the rural municipality, town or city electoral committee shall by resolution register the elected municipal council members (§ 68(1)–(2) MCEA), as well as alternate members on the list of alternate members (§ 69 MCEA). The election results are deemed to be declared and the mandate of a member of a council shall commence on the date following publication of the resolution on registration of municipal council members (§ 68(3) MCEA). A person registered as a municipal council member who holds an office incompatible with the office of a council member must notify the electoral committee within three days after the date of declaration of election results whether they wish to participate in the work of the municipal council or continue in their current office and decline the municipal council

member's mandate (§ 68(3^1) MCEA). If a person works in a local authority's administrative agency and does not give up their position, their mandate terminates in line with the second alternative under § 18(1) clause 6) of the LGOA. A municipal council member's mandate also terminates on that basis if during the election period they take up employment in an administrative agency of the same local authority.

48. A municipal council member's mandate terminates with the occurrence of a legal fact, i.e. no electoral committee resolution is needed for termination of the mandate (consistent case-law of the Supreme Court Constitutional Review Chamber since the judgment of 30 November 2017 in case No 3?4?1?17?10). When a municipal council member's mandate terminates, the electoral committee will by resolution appoint an alternate member to replace them. Since termination of a municipal council member's mandate is a precondition for appointment of an alternate member, the electoral committee in that resolution must ascertain the fact of termination of a municipal council member's mandate. Section 18(2) of the LGOA imposes an obligation on a council member to inform the city, town or rural municipality secretary of the circumstances causing termination of the mandate.

49. A municipal council member cannot avoid termination of the mandate (on the basis of the second alternative in § 18(1) clause 6) of the LGOA) by submitting an application for suspension of the mandate under § 19(2) clause 3) of the LGOA.

50. The Supreme Court has assessed § 18(1) clause 6) and § 19(2) clause 3) of the LGOA in a competitive situation where a municipal council member was appointed as an official of a local authority's administrative agency at a time when their mandate had been suspended under § 19(2) clause 3) of the LGOA (see Supreme Court Constitutional Review Chamber judgment of 27 November 2014 in case No 3?4?1?52?14). In the judgment cited, the Chamber found that a council member's mandate terminates under § 18(1) clause 6) (first alternative) of the LGOA also when their mandate has been suspended because a possibility to avoid termination of the mandate by preceding suspension of the mandate would not be compatible with the principle of incompatibility of offices of a local authority official and municipal council member, i.e. the aim set out in § 18(1) clause 6) of the LGOA (para. 25 of the judgment cited). However, if two prohibitions on incompatibility of offices can simultaneously apply to a person, one of which leads to suspension of the mandate and the other to its termination (competition between § 18(1) clause 6) and § 19(2) clause 1) of the LGOA) then the mandate is suspended and not terminated (see Supreme Court Constitutional Review Chamber judgment of 21 November 2002 in case No 3?4?1?18?02; see also the judgment of 30 November 2017 in case No 3?4?1?17?10 and the judgment of 20 March 2012 in case No 3?4?1?5?12). The Chamber finds that those opinions of the Supreme Court on application of the first alternative (a prohibition on being an official) under § 18(1) clause 6) of the LGOA can also be extended to application of the second alternative (a prohibition on working in an administrative agency on the basis of an employment contract) under that provision.

51. The Supreme Court has found that an official of a local authority administrative agency who has stood as a candidate in an election may be on the list of alternate members, i.e. they do not lose their place on the list of alternate members because of being an official. The ban on compatibility of offices laid down by § 18(1) clause 6) of the LGOA applies to a person only when they obtain the opportunity to start performing the tasks of a municipal council member. An opposite conclusion would disproportionately restrict passive suffrage (see Supreme Court Constitutional Review Chamber judgment of 19 July 2004 in case No 3?4?1?18?04, para. 12). The Chamber finds that this conclusion is also relevant in the case of an employee of an administrative agency. The electoral committee notifies a person on the list of alternate members about the right to become a municipal council member, after which the person must decide within three days whether they wish to participate in the work of the municipal council (§ 20(5^2) LGOA).

52. The contested provision also interferes with the fundamental right to freely choose one's area of activity, profession, and position of employment guaranteed under the first and second sentence of § 29(1) of the Constitution. This fundamental right also includes the right to continue in an employment or service relationship already existing (Supreme Court *en banc* judgment of 25 January 2007 in case No 3?1?1?92?06, para. 24). Arising from the second alternative in § 18(1) clause 6) of the LGOA, in order to exercise a municipal council member's mandate a person must give up working in a local authority administrative

agency and cannot take up employment in an administrative agency during exercise of the mandate. In Estonia, municipal council members are mostly not paid the kind of remuneration which would be sufficient to live on without other income or savings. In many cases, this means that a municipal council member must find another activity or employment to earn income.

53. According to the second sentence of § 29(1), the law may lay down the conditions and procedure for the exercise of this right. Thus, the right to freely choose one's area of activity, profession, and position of employment is a fundamental right subject to a simple statutory reservation which may be interfered with for any aim compatible with the Constitution (para. 26 of the Supreme Court *en banc* judgment cited in the previous paragraph).

54. The contested provision stipulates termination of a municipal council member's mandate only if the person works in an administrative agency on the basis of an employment contract. Nonetheless, a person cannot avoid interference with fundamental rights by entering into a different kind of a contract for provision of a service with an administrative agency (primarily a contract of mandate or contract for services, Chapters 35 and 36 of the Law of Obligations Act) the conclusion of which is not prohibited by the Local Government Organisation Act or the Civil Service Act. The Supreme Court has found that, when assessing the fact of termination of a municipal council member's mandate, the electoral committee is competent to assess a contract entered into between the council member and the administrative agency, taking into account the provisions of the General Part of the Civil Code Act, the Law of Obligations Act, and the Employment Contracts Act, as well as the relevant case-law of the Supreme Court Civil Chamber (see Supreme Court Constitutional Review Chamber judgment of 5 May 2014 in case No 3?4?1?15?14 [3], paras 33–36). Therefore, electoral committees have found a municipal council member's mandate to have terminated also in cases where a contract of mandate, which was interpreted as an employment contract, had been concluded with a council member. Since the second alternative under § 18(1) clause 6) of the LGOA does not contain any other criteria as a precondition for its application, ascertaining an employment relationship with an administrative agency is a legal fact which terminates a municipal council member's mandate.

55. Arising from § 11 of the Constitution, a rule restricting a fundamental right must be compatible with the Constitution both in form and substance (see Supreme Court Constitutional Review Chamber judgment of 13 June 2005 in case No 3?4?1?5?05 [4], para. 7). Interference with a fundamental right must have a legitimate aim for the attainment of which the interference must be proportionate, i.e. appropriate, necessary, and proportional in the narrow sense (as of Constitutional Review Chamber judgment of 6 October 1997 in case No 3?4?1?3?97 [5]; most lately the Supreme Court *en banc* judgment of 21 June 2019 in case No 5?18?5 [6]/17, para. 65).

56. The second alternative under § 18(1) clause 6) of the LGOA is valid as of 1 April 2013 when a provision in the Civil Service Act on amendment of the Local Government Organisation Act entered into force (§ 143 cl. 3) Civil Service Act). Prior to this (from 1 January 2002), § 18(1) clause 6) of the LGOA was in force in a wording stipulating termination of a municipal council member's mandate only in the event of their appointment as an official of an administrative agency of the same local authority (currently the first alternative under § 18(1) clause 6) of the LGOA). The Chamber has no reason to doubt that formal rules were complied with on adoption, proclamation and publication of § 143 clause 3) of the Civil Service Act.

II

57. Next, the Chamber will deal with the aims of the contested rule.

58. The original text of the Draft Civil Service Act (193 SE, XII composition of the Riigikogu) did not envisage amending § 18(1) clause 6) of the LGOA. The proposal to insert in the Draft Civil Service Act a provision (§ 143 clause3)) on amending § 18(1) clause 6) of the LGOA was made for the second reading of the Draft Act (see the text of the Draft Act and the list of amendments submitted for the second reading, proposal No 133, page 34).

59. In the list of amendments, the need to amend § 18(1) clause 6) of the LGOA is explained as follows: "If employment contracts are concluded with some officials in the future, an issue arises whether in that case they have the right to also be in parallel a municipal council member. Upon the entry into force of the Act, other employees of the city's administrative agencies (information specialists, public procurement organisers, etc.) with whom employment contracts have been concluded could also serve as city council members. In order to avoid a conflict of interest, it would clearly be necessary that officials and employees of an administrative agency of the same rural municipality, town or city cannot serve as members of the municipal council. The concept and status of an official under the current Civil Service Act was clearly delimited; the Draft Civil Service Act enables local authorities to define the concept and status of an official and an employee differently, so that in different rural municipalities, towns and cities a situation may arise where a person doing the same work is an official in one municipality and cannot serve as a municipal council member while in another municipality that person is an employee who can also serve as a municipal council member. In fact, the main aim of the amendment is to rule out such different interpretations."

60. Thus, amending § 18(1) clause 6) of the LGOA was related to introducing general changes in the organisation of the civil service, first and foremost as concerns changing the definition of an official. In comparison to the previous Civil Service Act (CSA) (hereinafter the previous CSA), the current Civil Service Act did not change the definition of civil service, which is still understood as working as an official or an employee in a state or local government administrative agency (§ 5 CSA). The definition of an administrative agency also remained the same – it is an agency whose function is to exercise public authority (§ 6(1) CSA).

61. The Civil Service Act previously in force divided civil servants into officials and support staff, of whom the latter worked on the basis of an employment contract and did technical work. That law did not stipulate substantive criteria for defining an official but defined an official in formal terms – an official is a person who has been appointed to the position of an official within the composition of a given administrative agency. At the same time, designating the titles of local authority officials was within the competence of the Government of the Republic (§ 11(2) of the previous CSA). Although determining the structure and composition of a local authority administrative agency has always been within the competence of a municipal council (§ 22(1) cl. 36) LGOA), the Government of the Republic determined to what position in the structure of an administrative agency an official had to be appointed (see Government Regulation No 50 of 20 February 1996 on "Establishing the titles of positions of local government officials" which lost validity on 1 April 2013).

62. The current Civil Service Act defines an official by using a substantive criterion – an official is appointed to a position where public authority is exercised (§ 7(1) and (2) CSA). Exercise of public authority is defined in § 7(3) of the CSA. Inter alia, this includes directing an agency (clause 1), exercising administrative supervision, as well as conducting an internal audit (clause 2), carrying out offence-related proceedings (clause 5), substantive preparation or implementation of policy-making decisions within the competence of the municipal council, rural municipal, town or city government, and an administrative agency (clause 8) (leaving hereby aside instances of exercise of public authority only characteristic of state agencies). This definition leaves the implementer a margin for interpretation since the terms used are to a large extent undefined. The definition is also open by nature – inter alia, exercise of public authority is considered to include activities which, in the interests of strengthening and developing public authority, cannot be assigned to the competence of a person who is only in a relationship governed by private law with the authority (clause 9).

63. Under the current Act, all servants not exercising public authority but only doing work which supports the exercise of public authority are deemed to be employees of an administrative agency with whom an employment contract is concluded (§ 7(4) CSA). The definition of an employee is also open since, in addition to the activities mentioned in § 7(5) of the CSA (accounting, human resource work, records management, activities of procurement specialists, activities of administrative personnel, activities of information technologists), an employee may also do other work in support of the exercise of public authority. A derogation from this conceptual list is offered by § 7(6) of the CSA under which it is not

deemed to constitute exercise of public authority and an employment contract is concluded with a person if that person performs support or advisory functions with a chair or vice-chair of the municipal council or faction, a rural municipality, town or city mayor, or a member of the rural municipal, town or city government until the expiry of the term of office of the person specified or termination of the activities of the faction (i.e. political advisers and assistants).

64. Thus, the current Act does not draw a clear line between officials and employees of an administrative agency, but leaves a broader opportunity, in comparison to the previous situation, for a municipal council to define a position within an agency's structure either as a position of an official or an employee.

65. From the proceedings of the Draft Civil Service Act it can be concluded that the aim of establishing the second alternative in § 18(1) clause 6) of the LGOA was primarily imposition of a ban on compatibility of offices for persons who were officials under the previous Civil Service Act. In the case of those persons, this was not a new restriction because, arising from the ban for officials on compatibility of offices laid down by the first alternative under § 18(1) of the LGOA, they were also previously (in their status as officials) prohibited from exercising the mandate of a municipal council member. Thus, the legislator wished that, despite amendment of the Civil Service Act, a ban would remain on those persons from simultaneously holding the mandate of a municipal council member since a possibility of conflict of interest was still seen (similarly to officials).

66. However, in addition to employees who were previously officials, the second alternative under § 18(1) clause 6) of the LGOA also applies to employees who were previously support staff. As before 1 April 2013 the ban on compatibility of offices only applied to officials (first alternative under § 18(1) clause 6) LGOA), prior to this a member of the support staff of a local authority administrative agency could simultaneously serve as a municipal council member. The proceedings of the Draft Civil Service Act do not indicate clear reasons why it was considered necessary to also prohibit previous support staff from participating in the work of a municipal council and whether, in the case of those persons, the risk of a conflict of interest was seen similarly to previous officials.

67. In the instant case, the participants in the proceedings (including the Chancellor of Justice) have pointed out that the aims of the contested provision are separation of the functions and responsibility of local government and avoidance of conflict of interest (leading to the risk of corruption). In this regard, the participants in the proceedings do not distinguish between previous officials and support staff among the addressees of the second alternative under § 18(1) clause 6) of the LGOA, thus considering the above aims to justify interference with the fundamental rights of both groups of persons. Nevertheless, when giving reasons for the unconstitutionality of interference with fundamental rights, the Chancellor of Justice often gives an example of previous support staff, while the other participants in proceedings, when asserting the constitutionality of the provision, rather rely on the need to maintain the ban in respect of previous officials.

68. The Supreme Court, in a case concerning a ban on compatibility of offices laid down for officials by the first alternative under § 18(1) clause 6) of the LGOA, considered the aim of the provision to be to strengthen separation of functions and responsibility of local authority bodies against risks which may arise from combining an office and the mandate (see Supreme Court Constitutional Review Chamber judgment of 30 November 2010 in case No 3?4?1?17?10 [7], para. 27). The Supreme Court later also considered the same aim to be the reason for a ban on compatibility of offices laid down by the second alternative under § 18(1) clause 6) of the LGOA, also interpreting in this light avoidance of conflict of interest which had been set as the aim during the proceedings of the Draft Act (Supreme Court Constitutional Review Chamber judgment of 27 November 2014 in case No 3?4?1?53?14 [8], para. 31; see also Constitutional Review Chamber order of 6 June 2018 in case No 5?18?3 [2]/2, paras 22–23).

69. As to local government bodies, the Constitution only stipulates the democratically elected representative body – the municipal council (first sentence of § 156(1) Constitution) – leaving the rest of the organisational structure of local government for the legislator to decide (§ 160 Constitution). Local government must be organised so that local authorities would be capable of determining and administering local matters (§ 154(1) Constitution). Functioning of the municipal council as a democratically legitimised representative body must be guaranteed, and through this also realisation of the will of local voters (the principle of

democracy guaranteed under § 10 of the Constitution).

70. By law, the legislator has laid down the organisation of local government so that a local authority also has a separate executive body – a rural municipal, town or city government (§ 4 LGOA) – in addition to the representative body. Both administrative authorities are bodies within the meaning of § 8(1) of the Administrative Procedure Act.

71. The municipal council's task is to decide on the most important local issues, which by law have been clearly stipulated as falling within the exclusive competence of a municipal council (§ 22(1) LGOA). The municipal council forms the rural municipal, town or city government – approves the number of members and structure of rural municipality, town or city government, elects the rural municipality, town or city mayor, approves or appoints to office members of the government as well as releases them from office (§ 22(1) clauses 15), 16) and 17) LGOA).

72. The task of the government is to prepare matters to be discussed in the municipal council and implement council resolutions (§ 30 LGOA). While a municipal council bears general political accountability to voters through periodic elections, the municipal council, and through it the voters, have political control over the government, which can operate only if the council trusts it (an expression of no confidence is regulated in § 46, § 22(1) clause 18) of the LGOA). Municipal council members have the right to obtain documents and other information from the government, as well as to submit written questions (§ 26 LGOA). The European Charter of Local Self-Government requires that an executive body should be accountable to the representative body (see the second sentence of Article 3 para. 2). This requirement also arises from the principle of democracy to which the functioning of a municipal council is linked (§ 156(1) (first sentence) and § 10 of the Constitution).

73. A rural municipality, town or city government fulfils its tasks primarily through the administrative agencies of a local authority which have been established for the exercise of public authority. For provision of services, a local authority may also establish agencies under the administration of its administrative agencies, and additionally a local authority may found a company or a foundation or participate in a company, foundation or non-profit association, as well as to cooperate with other local authorities and form joint administrative agencies or joint agencies for this purpose.

74. Under the Civil Service Act, a local authority's administrative agencies include an office of a rural municipal council; a rural municipality, town or city office; a rural municipality, town or city government as an agency (together with its structural units); a rural municipality, town or city government office; a joint administrative agency of a rural municipality, town or city (§ 6(3) CSA). A municipal council decides what administrative agencies to form and what the structure of the agencies will be (§ 22(1) clauses 34) and 36) LGOA). Thus, within the limits of law and in matters not regulated by law a local authority enjoys a broad right of self-organisation. Not all local authorities need to have all the agencies mentioned in § 6(3) of the Civil Service Act (for instance, most local authorities do not have a separate municipal council office or agencies). As a rule, a local authority's administrative agencies are under the subordination of a rural municipality, town or city government as an executive body, so that servants of an administrative agency are part of the executive organisation subordinated to the government. Under § 66^1(1) of the LGOA, the government exercises supervisory control over an administrative agency and its officials.

75. Since under the law the tasks of a municipal council and government are, in principle, separated, a conflict may arise between the interests of the mandate and of the office if a person simultaneously exercises a mandate as a municipal council member and performs duties of office subordinated to the government. The Supreme Court has found that "[t]he conflict of interest as a situation where a civil servant simultaneously performs tasks which are contradictory by nature and pursues conflicting aims may cause lapses in performance of their official duties and may create preconditions for corruption" (see Supreme Court Constitutional Review Chamber judgment of 2 November 1994 in case No III-4/A-6/94 [9], para. 2).

76. A conflict between the interests of a municipal council member's mandate and those of the office may endanger the functioning of a municipal council. This may inhibit a municipal council member in exercising control over the government and an administrative organisation subordinated to it. A council member's simultaneous employment in subordination of the government may also affect their decision-making in the municipal council. In addition to the risk to the work of the municipal council, a negative effect on the work of the government and the administrative organisation subordinate to it is also not ruled out.

77. Thus, the main aim of the prohibition on compatibility of offices laid down in the second alternative under § 18(1) clause 6) of the LGOA is to prevent the risk to the functioning of the municipal council arising from a conflict of interest between the mandate and the office. The functioning of a local authority's representative body is a constitutional value since it contributes to democratic decision-making regarding local matters (§ 154(1) and § 10 Constitution). On that basis, the Chamber is of the opinion that this aim is legitimate to restrict the right of passive suffrage (guaranteed without statutory reservation) as well as the right to freely choose one's area of activity, profession, and position of employment (guaranteed subject to a simple statutory reservation; see paras 45 and 53 of the judgment above).

78. The Chamber agrees with the participants in the proceedings that, in addition to avoiding the risks described above, the aim of the contested provision can also be considered to be to avoid the risk of corruption which may arise in the case of a conflict between the public interest and a person's private interests.

79. The Supreme Court has found that "[i]t is possible to speak of an abstract risk of corruption in a situation where in respect of a person a characteristic or a relationship can be observed which, based on general experience, may arouse a wish in the person to rely, either in their activities as a whole or in making a specific decision, on a criterion which does not entirely proceed from the legitimate interests of the person's employer or mandator" (Supreme Court judgment of 25 January 2007 in case No 3?1?1?92?06 [10], para. 33). Simultaneous exercise of a municipal council member's mandate and performance of official duties in subordination of the government can be considered a relationship causing such an abstract risk of corruption. That is, a council member may develop a wish to make decisions in the municipal council not based on the public interest but on their own personal interest (e.g. to preserve their place of employment in an administrative agency).

80. Corruption damages the honest and lawful functioning of public authority (see para. 28 of the Court *en banc* judgment cited in the previous paragraph; also the Constitutional Review Chamber judgment of 27 March 2012 in case No 3?4?1?1?12, para. 44). Thus, avoiding the risk of corruption also contributes to the functioning of a democratically elected representative body, realisation of the will of voters and the principle of democracy. Therefore, the aim of avoiding the risk of corruption is also a legitimate reason for interference with fundamental rights.

III

81. Next, the Chamber will assess whether interference with fundamental rights is proportionate for achieving the above aims.

82. In the opinion of the Chamber, the prohibition on compatibility of offices arising from the contested provision is an appropriate measure for achieving both of the above aims (sees paras 77–80 of the judgment).

83. Although an employee of an administrative agency does not exercise public authority, a conflict of interest may arise between a municipal council member's mandate and the interests of the place of employment which may damage the functioning of the representative body. In this regard, it should be noted that the contested prohibition on compatibility of offices applies to a large number of employees whose duties may be very different. The second alternative under § 18(1) clause 6) of the LGOA includes both employees who, prior to amendment of the Civil Service Act in 2013, were officials, as well as those who were support staff (technical workers). Depending on the substance of duties, a conflict between the interests of the mandate and of the place of employment, and the resulting negative impact on the functioning of the municipal council, may be of a varying degree. Since a conflict between public and private interests may arise regardless of the nature of official duties, the contested prohibition is an appropriate measure for

avoiding the risk of corruption in the case of all the addressees of the rule.
84. The Chamber finds that the second alternative under § 18(1) clause 6) of the LGOA is not a necessary measure for achieving the aims sought. That is, the above aims can be achieved just as effectively by suspension of a council member's mandate, which interferes with passive suffrage less seriously.

85. In the case of suspension of the mandate, a council member is temporarily relieved of performing the council member's duties but the mandate would be restored after the grounds for its suspension cease to exist (§ 19(1), § 20^1 LGOA). If a municipal council member's mandate is suspended for the period of employment in an administrative agency, even though the person would not be able exercise the council member's mandate yet the interference with passive suffrage would be smaller – that person would not have to decide within three days after election whether to give up the mandate or continue the employment relationship. Also, during the election period, the person could temporarily suspend the mandate in order to work in a local authority administrative agency.

86. The Chamber notes that a possibility to suspend a council member's mandate for the period of employment in an administrative agency would not endanger the stability of work of the municipal council more than the currently applicable rules. Under § 19(2) clause 3) of the LGOA, even now a municipal council member can suspend their mandate based on an application, without indicating the reason for suspension. To ensure the stability of the work of a municipal council, on the basis of an application the mandate cannot be suspended for less than three months but periodic extension of suspension by submitting a new application is not precluded. Also in the case of suspension of the mandate for the purpose of employment in an administrative agency, the legislator could establish restrictive conditions (e.g. a minimum period).

87. Since the contested provision is not necessary for achieving the aims, it is unconstitutional, and the Chamber will not assess the narrow proportionality of interference with fundamental rights.

88. On the basis of the foregoing and relying on § 15(1) clause 2) of the Constitutional Review Court Procedure Act, the Chamber repeals the second alternative – the part of the sentence "or working in an administrative agency of the same rural municipality, town or city on the basis of an employment contract" – under § 18(1) clause 6) of the LGOA. Relying on § 58(3) of the Constitutional Review Court Procedure Act, the Chamber postpones entry into force of the judgment by six months, so as to give the legislator time to enact the necessary provisions. The Chamber draws the legislator's attention to the fact that regulation should take into account the principle of equal treatment of local authority employees. A conflict between the interests of the mandate and of the place of employment as well as public and private interests may arise not only for employees of a local government administrative agency but also for employees of an agency administered by a local authority's administrative agency.

Villu Kõve, Hannes Kiris, Heiki Loot, Kaupo Paal, Ivo Pilving

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[2] https://www.riigikohus.ee/lahendid?asjaNr=5-18-3/2
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