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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 | 5-21-1 |
| Date of judgment | 12 April 2021 |
| Composition of court | Chairman: Villu Kõve; members: Velmar Brett, Hannes Kiris, Nel Urmas Volens |
| Case | Review of the constitutionality of dismissal of a police officer f being a suspect in criminal proceedings |
| Basis for proceedings | Tartu Administrative Court judgment of 12 January 2021 in case N |

Participants in the proceedings

Riigikogu

Kaupo Martihhin, representative attorney-at-law Tambet Laasik

Police and Border Guard Board

Chancellor of Justice

Minister of Justice

Minister of the Interior

Type of hearing

Written procedure

OPERATIVE PART

1. To declare unconstitutional and repeal § 95(1) and § 15 clause 5) of the Civil Service Act and § 40 clause 3) of the Police and Border Guard Act insofar as, in combination, they require the dismissal of a police officer from service if he or she is a suspect in criminal proceedings.

[...]

FACTS AND COURSE OF PROCEEDINGS

1. Kaupo Martihhin (the applicant in the administrative case) worked as head of the regional internal control service of the Police and Border Guard Board (PBGB, the respondent in the administrative case). On 3 December 2019, the Estonian Internal Security Service declared him a suspect on suspicion of appropriation of assets in the course of economic activity of a company, document falsification and use of falsified documents. Due to the suspicion, on 30 December 2019 the Director General of the PBGB dismissed K. Martihhin from service as of 2 January 2019 under § 95(1), § 15 clause 5) of the Civil Service Act (CSA) and § 40 clause 3) of the Police and Border Guard Act (PBGA).

2. K. Martihhin lodged an action with Tartu Administrative Court seeking a declaration of unlawfulness of the directive on his dismissal from service and an award of compensation in the amount of six month's average salary along with compensation for the lost opportunity to receive a superannuated pension.

3. Tartu Administrative Court in a judgment of 12 January 2021 declared the failure to issue a legal norm precluding a police officer's dismissal from service for the reason that they are a suspect or an accused in criminal proceedings to be contrary to § 12 of the Constitution. On that basis, the court found that the contested directive was unlawful and awarded compensation to the applicant.

REASONING BY TARTU ADMINISTRATIVE COURT

[... omitted from this summary]

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

[...]

CONTESTED PROVISIONS

17.Section 95(1) of the Civil Service Act stipulates as follows: “An official shall be dismissed from service if circumstances appear or arise which would preclude recruitment of the official pursuant to § 14(1) or (2) or § 15 of this Act.”

18. CSA § 15 “Persons who may not be employed in service” according to clause 5): “A person may not be employed in service: [...] 5) upon occurrence of another circumstance precluding recruitment laid down by law.”

19. PBGA § 40 “Persons not to be employed in police service”, clause 3) stipulates: “The following shall not be employed in service: [...] a person who is a suspect or accused in criminal proceedings.”

OPINION OF THE CHAMBER

20.The application by Tartu Administrative Court concerns the obligation to dismiss a police officer from service due to their status as a suspect or accused in criminal proceedings. The Chamber will first identify the relevant norm (I), then assess its constitutionality (II) and finally resolve the application to compensate costs of legal assistance (III).

I

[...]

22. In the opinion of the Chamber, constitutional adjudication of the administrative case and deciding it in favour of the applicant was precluded primarily by existing legal norms and not an unconstitutional failure to issue a legal norm as was found by the Administrative Court and the participants in the proceedings. The contested directive on the applicant's dismissal from service was lawful since § 95(1) of the CSA, § 15 clause 5) of the CSA and § 40 clause 3) of the PBGA, in combination, give rise to the obligation to dismiss a police officer from service if they are a suspect in criminal proceedings [...]. Unlawfulness of dismissal from service depends on whether the obligation is declared unconstitutional. If constitutional, the action should be dismissed while if unconstitutional the decision should be different, i.e. dismissal from service should be declared unlawful and the action granted.

23. The Administrative Court has expressed misgivings about the constitutionality of dismissal of a police officer from service both in the event of a suspicion as well as in the event of bringing charges. In specific constitutional review, a norm is relevant first of all to the extent of facts that were in dispute in the court case [...]. Since in the main case the applicant was dismissed from service due to suspicion, in the instant case the obligation to dismiss from service is relevant to the extent of the suspicion. No reason exists to include the aspect of charges in the subject-matter of review. In substance, suspicion and bringing charges are distinct [...] which may lead to a different conclusion regarding the constitutionality of regulatory provisions enabling dismissal from service.

24. In conclusion, in the instant case, for purposes of constitutional review proceedings § 95(1) of the CSA, § 15 clause 5) of the CSA and § 40 clause 3) of the PBGA are relevant insofar as, in combination, they lay down an obligation to dismiss a police officer from service if the officer is a suspect in criminal proceedings. With regard to that obligation, the application is admissible and the Chamber will examine it on the merits, i.e. will decide on the constitutionality or unconstitutionality of the relevant norm.

II

[...]

26. According to the first sentence of § 29(1) of the Constitution, Estonian citizens have the right to freely choose their area of activity, occupation and employment. The scope of protection of the fundamental right laid down in the first sentence of § 29(1) of the Constitution also covers service as a police officer. In this regard, from the aspect of the scope of protection of the fundamental right in question it is not important whether a person only wishes to take up service as a police officer or has already done so. The right to choose one's area of activity, occupation and employment also covers an existing employment or service relationship [...].

27. Under the effect of the provisions in question, the applicant was dismissed from service due to an obligation arising from law while no opportunity to reinstate the person to service has been provided for the occasion where the circumstance for their dismissal from service disappears. This constitutes interference with the fundamental right enshrined in § 29(1) of the Constitution.

28. Under § 11 of the Constitution, rights and freedoms may be restricted only in accordance with the Constitution and the restrictions must be necessary in a democratic society and may not distort the essence of the rights and freedoms restricted.

29. According to the second sentence of § 29(1), the law may lay down the conditions and procedure for the exercise of the right to choose one's area of activity, occupation and employment. Thus, the freedom to choose one's area of activity, occupation and employment is a fundamental right subject to a simple statutory reservation whose restriction may be justified by any aim compatible with the system of values arising from the Constitution [...].

30. In the opinion of the Chamber, the statutory obligation to dismiss a police officer from service due to being a suspect in criminal proceedings is justifiable by the aim to ensure the authority and credibility of the police as an organisation preventing violations and carrying out proceedings in respect of them. The situation where a police officer also continues their usual work after they have become a suspect in criminal proceedings may diminish the authority and credibility of the police as an organisation in protecting public order.

31. However, in the opinion of the Chamber, dismissal from police service for this purpose cannot be considered necessary. Suspicion of a criminal offence only means a likelihood that the person is either the principal offender or an accomplice. The status of a suspect is given to a person in order to ensure their rights as a suspect and status as a person subject to proceedings, inter alia so as to be able to carry out procedural steps either to affirm or dispel the suspicion of a criminal offence. At the same time, suspicion may be due to a malicious or erroneous complaint and may disappear even as a result of a brief investigation. Proceedings may also result in acquittal. However, dismissal from service is final, involving various potentially unfavourable consequences for a police officer, including the possible loss of a police officer's pension.

32. In view of the possibly temporary nature of suspicion, the same purpose could be achieved by several measures which interfere less with freedom of occupation. This is also demonstrated by norms applicable to

other civil servants as well as by the opinions of the participants in the proceedings, including the plan referred to by the Minister of the Interior to amend the existing norms (see para. 6 above). For example, conceivable options are suspension of the service relationship, including with partial or full remuneration, and transfer to another post. It is also possible to stipulate that even though a police officer has to be dismissed from service, subsequent disappearance of the suspicion or acquittal means the person has to be reinstated. It is also possible to stipulate a margin of appreciation for responding to a suspicion or lay down discretion for choice of measures. Additionally, existing criminal procedural solutions can be supplemented (see para. 38 below). Certainly, combinations of different measures are also possible. When choosing among different solutions, the legislator may also proceed from the view that in the police service it is justified to impose higher requirements than in the civil service in general.

33. Proceeding from the distribution of work between different branches of power (§§ 59, 146 and 152 Constitution) stipulated by the system of separation and balance of powers (§ 4 Constitution), the Supreme Court does not prescribe to the legislator in detail what kind of solution to use. Yet, it is generally certain that by introducing measures different from the current ones it would be simultaneously possible to interfere less with service relationships of police officers as well as ensure the authority and credibility of the police as an organisation preventing violations and carrying out proceedings in respect of them.

34. The obligation to dismiss a police officer from service when they are a suspect in criminal proceedings is thus not necessary within the meaning of § 11 of the Constitution and violates the right under § 29(1) of the Constitution to freely choose one's area of activity, occupation and employment. The provisions laying down this obligation are to the relevant extent contrary to § 29(1) of the Constitution.

35. In view of the established conflict with § 29(1) of the Constitution, in the opinion of the Chamber it is not necessary to deal with the possible conflict of the provisions laying down the contested obligation with the fundamental right to equality (§ 12(1) Constitution) or with the presumption of innocence (§ 22(1) Constitution).

36. The applicant has also asserted that he has been discriminated against in violation of § 12(1) of the Constitution in comparison with police officers who were not dismissed from service due to suspicion. He has also essentially asserted that, in view of the wording possibly used by the authorities, in violation of § 22(1) of the Constitution he has been treated as guilty of a criminal offence in the specific case even before a judgment of conviction has entered into force in respect of him. These assertions cannot be dealt with in specific constitutional review proceedings where conformity of a legal norm with the norms of the Constitution as higher-ranking norms is being assessed but it is not being assessed whether a person's constitutional rights have been violated by a specific act or measure while applying certain norms (§ 14(2) Constitutional Review Court Procedure Act). If necessary, the court must deal with those while adjudicating the main case.

37. Based on the foregoing and relying on § 15(1) clause 2) of the Constitutional Review Court Procedure Act, the Chamber declares unconstitutional and repeals § 95(1) of the CSA, § 15 clause 5) of the CSA and § 40 clause 3) of the PBGA insofar as, in combination, they lay down an obligation to dismiss a police officer from service if the officer is a suspect in criminal proceedings.

38. The legal basis for dismissal of a police officer from service because they are a suspect in criminal proceedings thus ceases to exist. Until new norms are established, no police officer may be dismissed from service on that basis. Under § 141 of the Code of Criminal Procedure, police officers who are suspects can still be suspended from service for the duration of criminal proceedings. In addition, under the same circumstances it is possible to initiate disciplinary proceedings for the duration of which a police officer can be removed from service under § 78 of the CSA. These measures are sufficient in a transition situation where the old norms are no longer valid and new ones have not yet entered into force.

III

[...]

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