Constitutional judgment 5-19-29

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

EN BANC

JUDGMENT

in the name of the Republic of Estonia

Case number	5?19?29
Date of judgment	15 March 2022
Composition of court	Chairman: Villu Kõve; members: Velmar Brett, Peeter Jerofejev, Ha Kull, Kai Kullerkupp, Julia Laffranque, Saale Laos, Viive Ligi, Heik Paal, Nele Parrest, Ivo Pilving, Paavo Randma, Kalev Saare, Juhan S Tampuu and Urmas Volens
Case	**Review of the constitutionality of Annex 1 to the Government of Regulation No 12 of 22 January 2013 on "The health requireme officer and the procedure for medical examination, and the subs formal requirements for a health certificate"**
Basis for proceedings	Judgment of Tartu Court of Appeal of 11 April 2019 in administrati 3?17?1569

Participants in the proceedings	Minister of Justice Minister of Health and Labour Chancellor of Justice Tartu Prison XX
Type of hearing	Written procedure

OPERATIVE PART

1. To declare unconstitutional and invalid §§ 4 and 5 and Annex 1 of the Government of the Republic Regulation No 12 of 22 January 2013 on "The health requirements for a prison officer and the procedure for medical examination, and the substantive and formal requirements for a health certificate" insofar as they, in combination, lay down that impaired hearing below the required threshold constitutes an absolute impediment for service as a prison officer and does not enable discretion with regard to the issue whether an officer, regardless of their impaired hearing below the required threshold, is able to perform their service duties, including after taking reasonable measures if necessary.

2. To order the Republic of Estonia to pay compensation for procedural expenses in the amount of 3000 euros in favour of XX.

3. To replace the applicant's name in the published judgment with an alphabetical character.

FACTS AND COURSE OF PROCEEDINGS

1. XX (hereinafter 'the applicant') worked as a guard at the imprisonment department at Tartu Prison from 2 December 2002 and as a guard in the supervisory department from 1 June 2008.

2. Under § 146(4) of the Imprisonment Act, on 22 January 2013 the Government of the Republic adopted Regulation No 12 on "The health requirements for a prison officer and the procedure for medical examination, and the substantive and formal requirements for a health certificate" (Regulation No 12). The Regulation entered into force on 26 January 2013 and § 4 of the Regulation laid down the hearing

requirements as a health requirement for a prison officer. On that basis, the hearing level of a prison officer must be sufficient in order to communicate by telephone and enable hearing alert sounds and radio communication messages (§ 4(1) of Regulation No 12). At the time of the medical examination, the hearing impairment of a prison officer may not exceed 30 dB at frequencies 500–2000 Hz and 40 dB at frequencies 3000–4000 Hz in the better-hearing ear, and 40 dB at frequencies 500–2000 Hz and 60 dB at frequencies 3000–4000 Hz in the worse-hearing ear (§ 4(2) of Regulation No 12). Annex 1 to Regulation No 12 laid down the list of health problems preventing performance of a prison officer's professional duties (§ 5(1) Regulation No 12), whereas the existence of an absolute medical impediment precludes a person's recruitment to the prison service or enrolment in training in the speciality of a prison officer (first sentence of § 5(2) of Regulation No 12). Under Annex 1, impaired hearing below the required norm constitutes an absolute impediment.

3. According to a health certificate issued on 4 April 2017, Qvalitas Medical Centre ascertained that the applicant's hearing in the right ear at frequencies 500–2000 Hz was in the range of 55–75 dB. The applicant's hearing in the left ear conformed to the requirements under Regulation No 12.

4. By directive of 28 June 2017, the director of Tartu Prison dismissed the applicant from service under § 95(1), § 15 clause 5 and § 104(1) of the Civil Service Act and § 5 of Regulation No 12 on account of the occurrence of circumstances precluding recruitment to the service – i.e. the prison officer's hearing in the right ear did not conform to the requirements laid down under Regulation No 12.

5. The applicant lodged an action with Tartu Administrative Court, seeking a declaration of unlawfulness of the director of Tartu Prison's directive of 28 June 2017 and an award of compensation to the applicant. In addition, the applicant sought an award of fair compensation at the court's discretion for damage caused by unequal treatment. In the applicant's opinion, Regulation No 12 contravenes the Constitution and the Equal Treatment Act, which was violated on account of discrimination on the ground of disability.

6. By judgment of 10 January 2018, Tartu Administrative Court dismissed the action.

7. By judgment of 11 April 2019, Tartu Court of Appeal overturned the Administrative Court judgment based on the applicant's appeal and entered a new judgment in the case, by which it satisfied the action, declared the director of Tartu Prison's directive of 28 June of 2017 unlawful and ordered Tartu Prison to pay compensation to the applicant in the amount of 60 monthly wages. The Court of Appeal declared unconstitutional and, in resolving the case, disapplied Annex 1 to Regulation No 12 insofar as impaired hearing below the required norm constitutes an absolute impediment for employment in the prison service. In the opinion of the Court of Appeal, the above norm contravenes the general fundamental right to equality arising from § 12(1) of the Constitution and the principle of legitimate expectations arising from the second sentence of § 11 of the Constitution.

8. Insofar as impaired hearing below the required norm constitutes an absolute impediment for employment as a prison officer, Annex 1 to Regulation No 12 is a relevant legal norm within the meaning of § 14(2) of the Constitutional Review Court Procedure Act.

9. The relevant fundamental right is the general fundamental right to equality laid down by § 12(1) of the Constitution. Hard-of-hearing people can most appropriately be compared to partially sighted people, whereas the common denominator is persons with an audiovisual impairment. The Regulation lays down requirements for both vision and hearing. The regulatory provisions in the case of impaired vision and hearing are somewhat similar although two important distinguishing features occur. First, the hearing requirements in § 4 do not include the possibility of derogation which would allow a hard-of-hearing person to use a hearing aid. Second, unlike § 3(1) clause 1, which regulates the requirements for vision, § 4(2) regulating the hearing requirements does not mention corrected hearing impairment but only impaired hearing. When assessing the regulatory provisions in combination, it should be concluded that unequal treatment is ultimately caused by Annex 1 to Regulation No 12 insofar as impaired hearing below the required norm constitutes an absolute impediment. If corrected visual acuity falls below the permissible threshold, an officer must acquire new glasses or contact lenses but they are not dismissed. However, the consequence of applying the norms laid down for hard-of-hearing people is that an officer is not enabled the use of a hearing aid but is dismissed. Consequently, the body issuing the regulation has treated partially sighted persons and hard-of-hearing persons differently to the extent that impaired hearing below the required norm is considered an absolute impediment, thus interfering with the general fundamental right to equality.

10. The aim of excluding hard-of-hearing people from being prison officers is that an officer should be able to perform their work safely and to the full extent without an aid. In addition to radio and telephone communication, an officer must be able to hear different sounds in prison, including whispered speech from a distance of several metres or through physical obstacles, be able to hear their colleagues and the above sounds in a situation where the hearing aid comes off during an assault or the battery suddenly runs out. For this reason, a prison officer’s natural hearing must be at a level which, without a hearing aid, guarantees their own safety and that of other officers in every situation in prison, as well as flawless communication. In addition, under § 109(4) of the Imprisonment Act a prison officer may be involved in ensuring public order by way of providing professional assistance. If necessary, a prison officer must be able to provide professional assistance to the police. For this reason, the hearing requirements for a prison officer in service must be the same as for a police officer in service. In terms of their state of health, every prison officer must be able to perform all the prison officer’s duties regardless of their current post or duties. Since the general fundamental right to equality is a fundamental right subject to a simple statutory limitation, these are legitimate considerations.

11. Different treatment of comparable groups has no reasonable and relevant justification. The fact that, in addition to radio and telephone communication, an officer must hear different sounds in prison, including whispered speech from a distance of several metres or through physical obstacles, can also be ensured by using a modern hearing aid. It is not comprehensible why a hard-of-hearing person is required to be able to hear their colleagues and sounds even in a situation where in the course of an assault or for some other reason their hearing aid comes off or the battery suddenly runs out, while a partially sighted person is not required to be able to still see everything in the event of breaking or removal of glasses. Glasses, which may be composed of metal and glass, may pose a greater danger than a hearing aid, which as a rule is miniature and mostly made of plastic. Metal or glass can be used to produce a thrusting or cutting weapon. A hard-of-hearing person with a hearing aid can do their work safely and to the full extent similarly to a partially sighted person’s ability to do their work safely and to the full extent with the help of glasses. Nor does a hearing aid prevent a prison officer from participating in performing other than their regular work duties. Modern hearing aids are either fitted inside the ear or so miniature that they also fit under a helmet. It is not precluded that the legislator or the body issuing a regulation based on delegated powers lays down a list of

hearing aids allowed in prison, while prohibiting all the others. However, excluding all hearing aids without distinction, and excluding hard-of-hearing people, unlike partially sighted people, from being employed in the prison service, is not proportional in the narrow sense.

12. The applicant's legitimate expectation has also been violated. The applicant started their service as a guard at Tartu Prison in 2002 when legislation did not impose restrictions on employment of hard-of-hearing people in the prison service. The applicant has pointed out that due to dismissal from service they lost the entitlement to a special superannuated pension under § 2 clause 2 of the Superannuated Pensions Act. At the time of lodging the action with the administrative court, the applicant was 56 years old and, according to the applicant, they would have become entitled to the pension at the age of 58. It is not ruled out that, over time, the state changes the rules applicable to civil servants. It is also not ruled out that in the event of non-compliance with the new rules a civil servant is forced to leave the civil service. When establishing such regulatory provisions, in the case of a person with long service their previous service record and the prospect of receiving a higher pension in connection with their service must be taken into account. If after years of impeccable service a person is dismissed for reasons beyond their control and they might no longer have enough time to achieve their retirement aims in another place, then the state can be found to have behaved perfidiously. Although by the time of dismissal the applicant had not fulfilled all the conditions for entitlement to a superannuated pension, in the event of continuing service they would nevertheless have acquired that entitlement in a few years. By the time of dismissal, the applicant had reached well over half of the required length of service.

13. The Supreme Court Constitutional Review Chamber by **order of 14 October 2019** decided to refer the following question to the EU Court of Justice for a preliminary ruling: "Should Article 2(2), read in combination with Article 4(1), of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, be interpreted as precluding provisions of national law which provide that impaired hearing below the prescribed standard constitutes an absolute impediment to work as a prison officer and that the use of corrective aids to assess compliance with the requirements is not permitted?"

14. The Chamber was of the opinion that it was not clear from the judgment of the Court of Appeal whether the court checked the compatibility of the contested norm with European Union (EU) law. In order to ensure the full effect of EU law, where necessary, national provisions in conflict with it must be disapplied and there is no need to await removal of the provisions through constitutional review procedure. Alongside the Constitution, the duty of public authorities to treat people with disabilities equally with other people in a similar situation and not to discriminate against them also arises from Article 21(1) of the EU Charter of Fundamental Rights and Article 1 in combination with Article 2(2)(a) and Article 3(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Directive 2000/78/EC). At the same time, under Article 4(1) of the directive, Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement; however, that derogation is only allowed if its objective is legitimate and the requirement is proportionate. Also under Article2(5) of the directive, the directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. Therefore, it is important to ascertain whether the restriction laid down by national legislation at issue in the main proceedings constitutes a proportionate requirement, i.e. whether the restriction is appropriate for attaining

the objective pursued and that it does not go beyond what is necessary to attain that objective (e.g. Court of Justice judgment C?416/13: *Vital Perez*, paras 43–45). In the opinion of the Chamber, neither the text of the directive nor CJEU case-law relating to interpretation of the directive enabled reaching definitive conclusions for the purposes of the instant case.

15. Should the CJEU reach the conclusion that the directive should be interpreted as precluding provisions of national law which provide that impaired hearing below the prescribed standard constitutes an absolute impediment to work as a prison officer and that the use of corrective aids to assess compliance with the requirements is not permitted, then the rules of Regulation No 12 at issue are contrary to EU law. In that case, the Chamber should decline to examine the application since the contested rules would not be relevant for adjudicating the administrative case within the meaning of § 9(1) and § 14(2) (first sentence) of the Constitutional Review Court Procedure Act. If the contested Regulation proves to be compatible with the directive, this does not necessarily warrant the conclusion that the same provisions are compatible with the Constitution (Supreme Court *en banc* judgment of 15 December 2015 in case No 3?2?1?71?14, para. 81), and the Chamber can resume checking their constitutionality.

16. The Chamber stayed the proceedings until entry into force of the Court of Justice judgment.

17. On **15 July 2021 in case C?795/19**, the **European Court of Justice** delivered a judgment, holding that Article 2(2)(a), Article 4(1) and Article 5 of Directive 2000/78/EC must be interpreted as precluding national legislation which imposes an absolute bar to the continued employment of a prison officer whose auditory acuity does not meet the minimum standards of sound perception prescribed by that legislation, without allowing it to be ascertained whether that officer is capable of fulfilling those duties, where appropriate after the adoption of reasonable accommodation measures for the purposes of Article 5 of that directive.

18. Regulation No 12 concerns a prison officer's conditions of recruitment and dismissal, for the purposes of Article 3(1)(a) and (c) of Directive 2000/78/EC, and therefore falls within the scope of that directive. Under Regulation No 12, in particular § 4 thereof and Annex 1 thereto, persons having a reduced level of auditory acuity which is below the prescribed minimum standards of sound perception cannot be recruited or continue in employment as prison officers. They are therefore treated less favourably than other persons are, have been or would be treated in a comparable situation, namely other workers employed as prison officers but whose level of auditory acuity meets those standards. It follows that Regulation No 12 establishes a difference of treatment of a hard-of-hearing person in comparison to a person with normal hearing, based directly on disability, within the meaning of Article 2(2)(a) of Directive 2000/78/EC.

19. Article 4(1) and Article 2(5) of Directive 2000/78/EC allow a derogation from the principle of non-discrimination, and the objectives of such a restriction may include ensuring the operational capacity of the prison service and public security as well as public order in prison. By reason of the nature of a prison officer's duties and of the context in which they are carried out, the fact that his or her auditory acuity must satisfy minimum standards of sound perception laid down by national legislation may be regarded as a 'genuine and determining occupational requirement' within the meaning of Article 4(1) for the purposes of employment as a prison officer. Thus, different treatment of hearing and hard-of-hearing people under Regulation No 12 pursues a legitimate objective within the meaning of Directive 2000/78/EC.

20. However, the contested restriction is not a proportionate measure to justify different treatment. Different treatment of visually impaired and hard-of-hearing people in the use of corrective aids shows that the hearing requirements do not ensure attaining their objective consistently and systematically and go beyond what is necessary to attain the objectives pursued by them. Loss of glasses or contact lenses may endanger performance of a prison officer's professional duties similarly to loss of a hearing aid.

21. Regulation No 12 completely precludes exercising the duties of a prison officer who does not meet the hearing requirements, without the possibility of derogation depending on the department to which those officers are assigned or the position they hold; nor does it enable individual assessment of a prison officer's ability to perform the essential functions of that occupation notwithstanding any hearing impairment. The Regulation does not allow taking into account the fact that the prison service involves tasks which do not presume direct contact with prisoners and that use of a hearing aid may be easy and purposeful in practice. In the main proceedings, no criticism was expressed towards the officer, who had been in service for a long time (for more than 14 years).

22. Under Article 5 of the directive, employers are to take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment unless such measures would impose a disproportionate burden on the employer. The Regulation did not enable checking, before dismissal of a prison officer from service, whether such supportive measures could be applied in a particular case (e.g. use of a hearing aid or changing the officer's working duties or position). No information has been submitted to allow the conclusion that such measures would create a disproportionate burden.

23. The European Court of Justice noted: "Thus, by providing for minimum standards of sound perception, non-compliance with which constitutes an absolute medical impediment to the exercise of the duties of a prison officer, without allowing it to be ascertained whether that officer is capable of fulfilling his or her duties, where appropriate after the adoption of reasonable accommodation measures for the purposes of Article 5 of Directive 2000/78, Regulation No 12 appears to have imposed a requirement which goes beyond what is necessary to attain the objectives pursued by that regulation, which it is for the referring court to ascertain."

24. By order of 29 September 2021, relying on the first sentence of § 3(3) of the Constitutional Review Court Procedure Act, the **Supreme Court Constitutional Review Chamber** referred the case for adjudication to the Supreme Court *en banc*. The Chamber had fundamental disputes as to whether examination of the application for constitutional review should be declined since the contested norms are not relevant for resolving the administrative case or whether, regardless, the constitutionality of these norms should be checked. The Chamber referred to its earlier opinions expressed in para. 32 of the order of 26 June 2008 in case No 3?4?1?5?08 and para. 46 of the order of 24 October 2019 in case No 5?19?29/18. According to these opinions, in the event of a conflict with EU law, arising from the principle of primacy of EU law, the Court of Appeal should have disapplied the contested norm in the case before it and not initiated constitutional review court proceedings. On the other hand, the Chamber pointed out the position expressed in para. 40 of the Supreme Court Constitutional Review Chamber judgment of 20 April 2021 in case No 5?20?10/13 that the contested norms falling within the scope of EU law does not mean that review of their constitutionality by the Estonian courts would be precluded, provided that the level of protection provided for by the EU Charter of Fundamental Rights, as interpreted by the CJEU, and the primacy, unity and

effectiveness of European Union law are not thereby compromised.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

[…]

PROVISION DECLARED UNCONSTITUTIONAL

34. Annex 1 to the Government of the Republic Regulation No 12 of 22 January 2013 on "The health requirements for a prison officer and the procedure for medical examination, and the substantive and formal requirements for a health certificate"

The list of health problems preventing the performance of a prison officer's professional duties

Medical impediments:

A – absolute impediment;

[…]

Impaired hearing below the required norm	A

OPINION OF THE COURT*EN BANC*

35. The Constitutional Review Chamber referred the case for adjudication to the Court *en banc* because a fundamental difference of opinion arose regarding the issue whether examination of the application for constitutional review should be declined because the contested provision is not relevant for resolving the main case, or whether, regardless, the constitutionality of the contested provision should be checked. The

Court *en banc* will first form an opinion regarding the issue causing the difference of opinion (I), then identify the relevant norms (II), resolve the constitutional review case (III), and finally resolve the application for compensation of legal assistance expenses (IV).

I

36. The Supreme Court has repeatedly had to deal with the issue whether and to what extent constitutional review is possible for provisions connected with EU law.

37. In 2005, the Court *en banc* noted that constitutional review is not meant for checking the compatibility of national legislation with EU law. The legislator is competent to decide whether it wishes to regulate the procedure for invalidating Estonian law which is in conflict with EU law (judgment of 19 April 2005 in case No 3?4?1?1?05, paras 49–50).

38. Three years later, in 2008, the Constitutional Review Chamber noted, inter alia by reference to the Administrative Law Chamber order in case No 3?3?1?85?07, that in a situation where in the frame of a court case the compatibility – with both the Constitution and EU law – of an Estonian law provision related to EU law is contested simultaneously, the court adjudicating the case must first check the compatibility of Estonian law with EU law. If checking the compatibility of Estonian law with EU law – where necessary, by seeking a preliminary ruling from the EU Court of Justice – leads to the conclusion that Estonian law contravenes EU law and the conflict cannot be eliminated through consistent interpretation, then the court in the case before it must disapply the specific provision which is contrary to EU law and not initiate constitutional review proceedings. With a different checking procedure, the risk would arise that the Supreme Court checks the compatibility of EU law with the Constitution. In that case, possible conflicts of Estonian law with EU law would also not be discovered, thus failing to fulfil the obligation under the EU Treaty to ensure primacy of application of EU law (hereinafter the Court *en banc* will use the Estonian term ‘esimus’ for primacy, see e.g. CJEU judgment C?573/17: *Pop?awski*, para. 53) over national law and its full legal effect. However, the Chamber did not entirely rule out constitutional review in the case of provisions connected with EU law, admitting the possibility of doing so regarding the issue of formal constitutionality of a provision, as well as to the extent not regulated by EU law, or to the extent that it leaves discretion to Member States (Supreme Court Constitutional Review Chamber order of 26 June 2008 in case No 3?4?1?5?08, paras 31–32, 34–36, 43–44, see also the order of 24 October 2019 in case No 5?19?29/18, para. 46).

39. In subsequent case-law, the Court *en banc* has expressed the position that the connection of Estonian legislation with EU law, or an opinion of any other institution on the compatibility of national law with EU law, cannot in itself preclude review of the constitutionality of the legislation within the meaning of § 152 of the Constitution. By no means does EU law prohibit member states from ensuring domestic fundamental rights to the extent that the exercise of the rights does not endanger the primacy, uniformity and effectiveness of EU law. Within the boundaries set by EU law, the national legislator is bound by the requirements arising from the Estonian Constitution, and the national courts by the duty under § 152 of the Constitution to check the constitutionality of the measure chosen for achieving the aim (see the judgment of 15 December 2015 in case No 3?2?1?71?14, paras 81 and 83). The above position of the Court *en banc* was also reiterated by the Constitutional Review Chamber in its judgment of 20 April 2021 in case No 5?20?10/13, paras 40–41.

40. In European legal space, significant developments have occurred in interpreting and applying the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as EU law, including the EU Charter of Fundamental Rights. With that in mind, the Court *en banc* deems it necessary to develop further the Supreme Court's previous positions regarding the issue of constitutional review of Estonian law provisions connected with EU law.

41. EU member states must ensure the full effect of EU law. Therefore, national law, including the Constitution, must be interpreted, to the greatest extent possible, in conformity with EU law (e.g. CJEU judgment in case C?573/17: *Pop?awski*, para. 55). However, consistent interpretation has certain limits and it may not lead to an interpretation of national law *contra legem* (e.g. C?261/20: *Thelen Technopark Berlin*, para. 28). If a provision of national law is contrary to a provision of EU law having direct effect, the national court must disapply the national provision, i.e. in the event of collision EU law enjoys primacy over national law (see also e.g. C?573/17: *Pop?awski*, para. 68). Under § 1 of the Constitution of the Republic of Estonia Amendment Act, Estonia may belong to the European Union, proceeding from the fundamental principles of the Constitution. Section 2 adds that, with regard to Estonia's membership in the European Union, the Constitution shall be applied taking into account the rights and obligations arising from the treaty of accession. Thus, the principle of primacy of EU law applies to the entirety of Estonian national law, including the Constitution (e.g. C?399/11: *Melloni*, para. 59; C?378/17: *An Garda Síochána*, para. 49; C?564/19: *IS*, para. 79; C?497/20: *Randstad Italia*, paras 52–53), but only insofar as this is not contrary to fundamental constitutional principles.

42. Article 4(3) of the Treaty on the European Union emphasises that following the principle of loyal cooperation, the EU and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the founding treaties. Under paragraph 2 of the same article, the EU must, inter alia, respect the national identities of the Member States inherent in their political and constitutional structures, and respect their essential State functions (see also para. 3 of the preamble to the EU Charter of Fundamental Rights).

43. Constitutional review is the duty of Estonian courts arising from § 15(2) and § 152 of the Constitution. In line with § 2 of the Constitution of the Republic of Estonia Amendment Act, this duty can yield to duties arising from EU law only insofar as this is necessary to implement EU law and prevent a collision (cf. Supreme Court Constitutional Review Chamber opinion of 11 May 2006 No 3?4?1?3?06, para.16). For this reason, the Court *en banc* maintains its opinion expressed in its judgment of 15 December 2015 in case No 3?2?1?71?14 that a mere connection of Estonian legislation with EU law cannot preclude review of the constitutionality of that legislation within the meaning of § 152 of the Constitution as long as the constitutional review proceedings or their result do not endanger the primacy, uniformity and effectiveness of EU law. This is also compatible with the case-law of the EU Court of Justice in situations where a member state's action is not fully regulated by EU law. Where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the EU Charter of Fundamental Rights, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court of Justice, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see C?399/11: *Melloni*, para. 60; C?617/10: *Åkerberg Fransson*, para. 29; C?516/17: *Spiegel Online*, para. 21).

44. Disapplying a rule of Estonian law on account of the primacy of EU law and on account of unconstitutionality are generally not mutually exclusive or contradictory. Constitutional review and the principle of primacy of EU law may lead to essentially the same result in the main proceedings – i.e. the relevant Estonian provision must be disapplied in the main proceedings. These proceedings may be mutually complementary with a view to effective and extensive protection of fundamental rights as much as possible.

45. In some cases, constitutional review court proceedings may ensure more effective protection of rights for persons under both EU law and Estonian law than simply disapplying a provision. Namely, having ascertained the unconstitutionality of a provision, the Supreme Court is empowered to invalidate the unconstitutional legislative act or provision (§ 152(2) Constitution, § 15(1) clause 2 Constitutional Review Court Procedure Act) and completely remove the effect of that provision from the legal order. However, in the event of a conflict of Estonian law with EU law, the court has no possibility to invalidate the Estonian legislative act or provision, and that provision must only be disapplied in a specific dispute. Nevertheless, disapplying a rule in administrative court proceedings also leads to the court's obligation to make a note to that effect in the operative part of the decision (§ 162(2) Code of Administrative Court Procedure). Although specific constitutional review proceedings primarily serve the rights and interests of the parties to the proceedings, it also has an objective arising from the public interest to ascertain and remove from the legal order any provisions which are contrary to the Constitution (Supreme Court *en banc* order of 9 April 2020 in case No 5?18?5/33, para. 11). The European Court of Justice has also found that the primacy and direct effect of the provisions of EU law do not release Member States from their obligation to remove from their domestic legal order any provisions incompatible with EU law, since the maintenance of such provisions gives rise to an ambiguous state of affairs and makes it more difficult to rely on EU law (e.g. C?104/86: *Commission v. Italy*, para.12; C?162/99: *Commission v. Italy*, para. 33).

46. The Court *en banc* maintains its previous position that, in order to disapply a national provision which is contrary to EU law, it is not in itself necessary to initiate constitutional review proceedings (Supreme Court *en banc* judgment of 19 April 2005 in case No 3?4?1?1?05, para. 49). The EU Court of Justice has repeatedly emphasised that national courts cannot be obliged to request or await the prior removal of a provision that is contrary to EU law by legislative or other constitutional means (e.g. C?378/17: *An Garda Síochána*, paras 35 and 50; C?564/19: *IS*, para. 80). On that basis, if the court hearing a matter finds that Estonian legislation is constitutional but contrary to a provision of EU law having direct effect then the Estonian law provision must be disapplied without initiating constitutional review proceedings (see e.g. Supreme Court Administrative Law Chamber judgment of 17 December 2020 in case No 3?16?2653/64, para. 4 of the operative part). Even the potential unconstitutionality of a provision does not preclude or restrict the right of the courts to assess the compatibility of national law with EU law and disapply any legislative act on account of its being contrary to EU law with direct effect. Regardless of the possible compatibility or incompatibility of the relevant provision with the Constitution, the Estonian court is entitled (the Supreme Court as the court of last instance, in certain cases, obliged) to seek a preliminary ruling from the EU Court of Justice to interpret relevant EU law, including in order to ascertain the compatibility of Estonian law with EU law on the basis of the preliminary ruling (see e.g. C?322/16: *Global Starnet*, paras 21–23; C?564/19: *IS*, para. 70). Also, nothing prevents an Estonian court from referring for a preliminary ruling to check the validity of a secondary EU law provision, including for the Court of Justice to assess whether secondary law is compatible with primary law, including the EU Charter of Fundamental Rights. Seeking a preliminary ruling on issues of interpretation of EU law and validity of secondary law may, arising from the principle of loyal cooperation, be particularly necessary in a situation where the court has misgivings about the compatibility of EU law with fundamental constitutional principles (see paras 41 and 42 above).

47. In view of the foregoing, neither EU law, nor the Constitution nor procedural law give rise to the requirement that courts can check the constitutionality of national law connected with EU law only after they are convinced of its compatibility with EU law. Where a court has misgivings about the constitutionality of an Estonian law provision connected with EU law and falling within the scope of application of EU law, as well as about the compatibility of that provision with EU law, as a rule the court can weigh which of the two compatibility checks it will follow to resolve the case. In this regard, it is not ruled out that in resolving the case the court will disapply the Estonian provision on account of its conflict with directly applicable EU law, while simultaneously initiating constitutional review to check the constitutionality of the disapplied Estonian provision. Depending on the specific features of the case and of the provision, the compatibility of a provision with EU law or the Constitution may be more or less clear, and depending on the situation different proceedings may ensure effective legal protection and procedural economy to a greater or lesser extent. However, when making choices the court must take into account that it may not disapply an Estonian law provision on account of its substantive unconstitutionality if the duty to establish the provision arises unavoidably from EU law (nevertheless, see also paras 41 and 42 above). Similarly to the requirement of reasoning for any other positions and conclusions, the court must also give reasoning for initiating constitutional review regarding an Estonian provision connected with EU law, so that the choice of procedure and development of the court's inner conviction can be followed. The duty of reasoning helps, inter alia, to ensure that constitutional review does not compromise the primacy, uniformity and effectiveness of EU law.

48. No prohibition on initiating constitutional review proceedings regardless of the compatibility of an Estonian provision with EU law arises from a certain delay involved in constitutional review proceedings which may postpone the entry into force of the final decision in the matter. First, in view of procedural deadlines the possible delay is not particularly long (§ 13 Constitutional Review Court Procedure Act). Second, if necessary, its possible consequences can be alleviated by interim relief or by declaring a court decision immediately enforceable.

49. Nor is initiation of constitutional review proceedings precluded by the requirement of relevance of the provision that is going to be checked (§ 9(1) and § 14(2) Constitutional Review Court Procedure Act). In line with long-standing Supreme Court case-law, in the frame of specific constitutional review a provision is deemed relevant if it is of decisive importance for resolving the case, i.e. if in the event of its unconstitutionality the court should decide differently than if it were constitutional (e.g. Supreme Court *en banc* judgment of 28 October 2002 in case No 3?4?1?5?02, para. 15; judgment of 30 April 2013 in case No 3?1?1?5?13, para. 19). In the case of a provision connected with EU law, the above consideration means that the relevant provision must be of decisive importance for resolving the case, leaving aside the possibility to disapply the provision on account of incompatibility with EU law. In other words, the relevance of an Estonian national provision and thus also initiation of constitutional review proceedings in respect of that provision is not precluded by simultaneously disapplying the provision on account of its incompatibility with EU law. Since a check of a provision's compatibility with EU law does not have to temporally or procedurally precede a constitutionality check (see para. 47 above), then incompatibility with EU law does not render a provision irrelevant in terms of initiating constitutional review. However, when initiating constitutional review in respect of a provision connected with EU law, the prohibition arising from direct effect of EU law on compromising the primacy, uniformity and effectiveness of EU law must be taken into account.

50. By applying the above principles to the present case, the Court *en banc* is of the opinion that the possible incompatibility of Regulation No 12 with EU law does not preclude examination of the application for constitutional review submitted by the Court of Appeal. The Court *en banc* does not see how the constitutionality check on the contested provision might compromise the primacy, uniformity and effectiveness of EU law or otherwise compromise the level of protection ensured for persons under the EU Charter of Fundamental Rights or other EU legislation. The contested provision is not of the kind where an obligation for its establishment would arise from EU law. When replying to the Supreme Court's reference for a preliminary ruling, the EU Court of Justice found that the contested provision appears to have imposed a requirement which goes beyond what is necessary to attain the objectives pursued by it, and which may therefore be contrary to the requirements under Directive 2000/78/EC (CJEU judgment C?795/19: *Tartu Vangla*, para. 52). Thus, disapplying the contested provision and initiating constitutional review proceedings also serves the objective of ensuring the primacy and effectiveness of EU law.

II

51. Next, the Court *en banc* will identify the relevant provisions. The Court of Appeal declared unconstitutional and, in resolving the case, disapplied Annex 1 to Regulation No 12 insofar as impaired hearing below the required norm constitutes an absolute impediment to employment in the prison service.

52. There was no dispute in the administrative case over the fact that the applicant's hearing did not meet the requirements laid down for a prison officer's hearing by § 4(2) of Regulation No 12. The applicant sought a declaration of unlawfulness of the directive on their dismissal from service and compensation for damage caused by dismissal. Since the provision contested by the Court of Appeal precluded the applicant's employment in the prison service, in the event of the constitutionality and validity of the provision the court should have decided differently and dismissed the action. Thus the provision is relevant for resolving the case within the meaning of the first sentence of § 9(1) and § 14(2) of the Constitutional Review Court Procedure Act. The contested provision was not rendered irrelevant by its connection or possible incompatibility with EU law (see para. 50 above).

53. In addition to Annex 1 to Regulation No 12, the Court *en banc* also deems §§ 4 and 5 of Regulation No 12 to be relevant insofar as they do not enable discretion (neither margin of appreciation nor the right of assessment) with regard to the issue whether an officer, regardless of their impaired hearing below the required threshold, is able to perform their service duties, including after taking reasonable measures if necessary. As a result of the combined effect of the above provisions, when checking the hearing requirements imposed by Regulation No 12 it is not possible to use hearing aids, nor have any other mechanisms been prescribed to assess whether the health problem prevents an officer from performing professional duties imposed on them (cf. Supreme Court *en banc* judgment of 12 April 2016 in case No 3?3?1?35?15, para. 23; judgment of 25 January 2018 in case No 2?15?17249/49, para. 60 et seq.). Nor is carrying out constitutional review proceedings on §§ 4 and 5 of Regulation No 12 precluded by their connection with EU law, for the reasons mentioned in para. 50 of the present judgment.

54. In conclusion, the Court *en banc* deems §§ 4 and 5 and Annex 1 of Regulation No 12 to be relevant provisions insofar as they lay down that impaired hearing below the required threshold constitutes an absolute impediment for service as a prison officer and does not enable discretion with regard to the issue

whether, regardless of their impaired hearing below the required threshold, an officer is able to perform their service duties, including after taking reasonable measures if necessary.

III

55. Next, the Court *en banc* will assess the constitutionality of the relevant provisions. There are no misgivings about their conformity with the requirements of competence, procedure, form, and legal clarity.

56. The Court *en banc* will first check whether the contested provisions are compatible with the principle of legality arising from § 3(1) of the Constitution. Under § 3(1) (first sentence) of the Constitution, state power shall be exercised solely on the basis of the Constitution and laws in conformity therewith. A similar requirement for regulations of the Government of the Republic is imposed by § 87 clause 6 of the Constitution.

57. The principle of legality includes the principle of statutory reservation, according to which all significant decisions concerning issues related to fundamental rights must be made by the legislator, and delegating to the executive an issue within the competence of the legislator, as well as 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. Thus, 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, para. 24; order of 26 June 2014 in case No 3?2?1?153?13, para. 69; Supreme Court Constitutional Review Chamber judgment of 18 May 2015 in case No 3?4?1?55?14, paras 46–47; judgment of 17 December 2019 in case No 5?19?40/36, para. 36). 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.

58. However, the principle of legality is not exhausted by the principle of statutory reservation. The first sentence of § 3(1) of the Constitution gives rise to the requirement that, in addition to the delegating rule, a regulation must also be compatible with other laws and the Constitution (Supreme Court *en banc* judgment of 16 March 2010 in case No 3?4?1?8?09, para. 161; Supreme Court Constitutional Review Chamber of 14 October 2015 in case No 3?4?1?23?15, para. 111). Only in that case is a regulation constitutional in terms of substance. Section 89(1) of the Administrative Procedure Act lays down the compatibility of a regulation with effective law as a precondition for its lawfulness.

59. Regulation No 12 was issued on the basis of § 146(4) of the Imprisonment Act, under which the health requirements for prison officers and the procedure for medical examination and the substantive and formal requirements for health certificates shall be established by a regulation of the Government of the Republic. The Court *en banc* has no misgivings about the constitutionality of the delegating rule based on which the regulation was issued. Although the delegating rule has been worded generally, determination of its limits, meaning and purpose must also take into account other subsections of § 146 of the Imprisonment Act, in particular the purpose of the medical examination of a prison officer, i.e. detecting health problems caused by an officer's service, reducing and preventing health risks and establishing the absence of health problems

preventing performance of duties imposed on a prison officer (cf. Supreme Court *en banc* judgment of 17 May 2021 in case No 3?18?1432/103, para. 24). It should also be taken into account that the situation involves regulation by the executive of the issue of compliance by its civil servants with the requirements, which also occurs in other fields of the civil service on the basis of relatively generally worded delegating rules (cf. § 10 subs. (1) clause 1, subs. (2), § 14 subs. (3) and (4) Civil Service Act).

60. Under § 15 clause 5 and § 95(1) of the Civil Service Act, the circumstances whose appearance or occurrence precludes a person's employment in the prison service must be laid down by a law. The circumstances which preclude a person's recruitment to or continued employment in the prison service have been laid down in § 14(1), § 15 clauses 1–4 of the Civil Service Act and § 114(1) of the Imprisonment Act. None of the above provisions includes non-compliance with health requirements as a circumstance precluding a prison officer's recruitment to the service or continued employment in the service. Nor can such a basis be found in §§ 113 or 113^1 of the Imprisonment Act laying down the general requirements for a prison officer.

61. As already noted above, § 146(1) of the Imprisonment Act lays down, inter alia, that the purpose of a prison officer's medical examination is to establish the absence of health problems preventing performance of the duties imposed on a prison officer. The contested Regulation No 12 was established on the basis of § 146(4) of the Imprisonment Act, which empowers the Government of the Republic to also establish a prison officer's health requirements by a regulation. The requirement that the existence of an absolute medical impediment precludes a person's recruitment to the prison service or enrolment in training in the speciality of a prison officer has been laid down by the first sentence of § 5(2) of Regulation No 12. Despite some difficulties of interpretation, the fact that a person not meeting some of the health requirements is not suitable for service can be traced back to the legal basis since the purpose of a prison officer's medical examination laid down by § 146(1) of the Imprisonment Act is to establish, inter alia, the absence of health problems preventing performance of duties imposed on an officer. It is clear that in the case of some health problems a person cannot objectively perform a prison officer's duties. Thus, in establishing the circumstances precluding service, the body issuing the regulation has not contravened the delegating rule.

62. Based on the foregoing, the body issuing a regulation must ensure that, in addition to the delegating rule, the regulation is also in conformity with higher-ranking law (see para. 58 of the judgment). Inter alia, Regulation No 12 must also be in conformity with the Equal Treatment Act, which transposes the requirements arising from Directive 2000/78/EC into Estonian law. Interpretation of both the directive and the law adopted for its transposition must proceed from the interpretation given to the directive by the Court of Justice of the EU. In its judgment in case C?795/19, the Court of Justice reached the conclusion that Article 2(2)(a), Article 4(1) and Article 5 of that directive must be interpreted as precluding national legislation which imposes an absolute bar to the continued employment of a prison officer whose auditory acuity does not meet the minimum standards of sound perception prescribed by that legislation, without allowing it to be ascertained whether that officer is capable of fulfilling those duties, where appropriate after the adoption of reasonable accommodation measures for the purposes of Article 5 of that directive.

63. Similarly to Article 4(1) of the directive, § 10(1) of the Equal Treatment Act lays down that a difference of treatment on grounds of any characteristic specified in § 1(1) of the Act does not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such characteristic constitutes a genuine and determining occupational requirement, but only if the aim of the requirement is legitimate and the requirement is proportionate. Similarly to Article 5 of

the directive, § 11(2) of the Equal Treatment Act stipulates that employers must take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate expense on the employer.

64. An absolute health requirement, non-compliance with which results in ineligibility for an occupation, must be compatible with § 11(2) of the Equal Treatment Act. In other words, an absolute health requirement may only be imposed if reasonable measures to overcome shortcomings involved in non-compliance with the health requirement would lead to disproportionate expense for the employer. Since § 12(5) of Regulation No 12 completely precludes employment in the prison service of a person not complying with the hearing requirements, this provision may contravene the principle of legality arising from § 3(1) of the Constitution.

65. However, it should be added that the Court of Justice of the EU in its judgment in case C?795/19, para. 52, has noted that even though Regulation No 12 appears to have imposed a requirement which goes beyond what is necessary to attain the objectives pursued by that regulation, the necessity for this is for the referring court to ascertain. Since in the circumstances of the specific case the judgment of the CJEU does not enable the conclusion that the provisions of Regulation No 12 unavoidably contravene EU law, it is also not possible to conclude that they unavoidably contravene the Constitution merely because of the necessity to interpret the Equal Treatment Act in conformity with Directive 2000/78/EC.

66. In its previous case-law, the Supreme Court has emphasised that a legal act which does not enable exercise of discretion may be constitutional. As a result of contemplation, the legislator or a body issuing a regulation may reach the justified conclusion that fundamental rights and freedoms of persons are ensured even without the body conducting the proceedings being able to exercise discretion. By exercising its margin of appreciation, a body laying down a norm may delimit the circumstances in the case of which an administrative act must be issued (see Supreme Court Constitutional Review Chamber judgment of 18 June 2019 in case No 5?19?26/13, para. 53 and the case-law cited therein).

67. Since the instant case involves specific constitutional review, it should be assessed whether, in the circumstances of the main proceedings, applying the relevant provisions led to an essentially constitutional result. For this, the Court *en banc* will identify the fundamental rights that were interfered with and assess the constitutionality of instances of interference.

68. The applicant’s involuntary dismissal from the prison service interfered with their right as an Estonian citizen under § 29(1) of the Constitution to freely choose one’s area of activity, occupation and employment. This right also protects continuation of an existing employment or service relationship (see Supreme Court *en banc* judgment of 27 June 2005 in case No 3?4?1?2?05, paras 67–69; judgment of 25 January 2007 in case No 3?1?1?92?06, para. 24; Supreme Court Constitutional Review Chamber judgment of 12 April 2021 in case No 5?21?1/10, para. 26).

69. The Court of Appeal has found that dismissal of the applicant from the prison service violated the fundamental right to equality laid down by § 12(1) of the Constitution (see para. 20 of the Court of Appeal judgment). The Court *en banc* will next check whether, in addition to the fundamental right under § 29(1) of

the Constitution, this fundamental right enjoyed by the applicant was also interfered with.

70. The general fundamental right to equality laid down by § 12(1) of the Constitution is interfered with if people in a similar situation are treated unequally. To ascertain unequal treatment, the point of departure of unequal treatment must be determined (*genus proximum*) and, on that basis, comparable groups of persons set out (see e.g. Supreme Court *en banc* judgment of 30 June 2016 in case No 3?3?1?86?15, para. 47; judgment of 20 October 2020 in case No 5?20?3/43, para. 93).

71. The Court of Appeal found that hard-of-hearing people could most appropriately be compared with visually impaired persons, and the *genus proximum* of both groups is a person with an audiovisual impairment (see para. 21 of the Court of Appeal judgment). The Court of Justice in its judgment in case C?795/19, para. 29, found the comparable groups to be prison officers having a reduced level of auditory acuity which is below the prescribed minimum standards of sound perception and prison officers whose level of auditory acuity meets those standards. The Court *en banc* finds, similarly to the Court of Justice, that in the present case it is necessary to compare people whose level of auditory acuity meets the prescribed threshold and persons whose level of auditory acuity falls below the established threshold (hard-of-hearing people). Since it follows from the provisions of the Civil Service Act in combination with the Imprisonment Act and the relevant provisions of Regulation No 12 that the applicant as a hard-of-hearing person had to be dismissed from the prison service while a person with normal hearing could continue in the prison service, then the relevant provisions of Regulation No 12 interfered with the applicant's general fundamental right to equality.

72. In line with the second sentence of § 29(1) of the Constitution, 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. In the case of the existence of a legitimate aim, it is necessary to check the proportionality of such a restriction, i.e. its appropriateness, necessity and narrow proportionality in relation to its aim (Supreme Court *en banc* judgment of 25 January 2007 in case No 3?1?1?92?06, paras 26–30; Supreme Court Constitutional Review Chamber judgment of 12 April 2021 in case No 5?21?1/10, paras 27–32). The general fundamental right to equality is also a fundamental right subject to a simple statutory reservation, interference with which is contrary to the Constitution if no reasonable and relevant ground exists for unequal treatment. In order to assess the constitutionality of interference, the aim of unequal treatment and the severity of the unequal situation caused has to be weighed (see Supreme Court *en banc* judgment of 30 June 2016 in case No 3?3?1?86?15, para. 53; judgment of 20 October 2020 in case No 5?20?3/43, para. 94). In view of the foregoing, the constitutionality of interference with both fundamental rights can be assessed by checking the existence of a constitutionally compliant aim for interference and the proportionality of interference in relation to that aim (cf. Supreme Court Constitutional Review Chamber judgment of 16 November 2021 No 5?21?10/18, para. 53).

73. The Court of Appeal has found (para. 23 of the judgment of the Court of Appeal) that restricting the general fundamental right to equality is justified by the aim of ensuring a prison officer's ability to do their work safely and to the full extent, engage in radio and telephone communication, hear different sounds in prison, including in a situation where use of a hearing aid is impeded or proves impossible. In addition, under § 109(4) of the Imprisonment Act every prison officer may be used for providing professional assistance in ensuring public order and, therefore, the hearing requirements for a prison officer cannot differ from the requirements imposed on a police officer. The Court of Justice in its judgment in case C?795/19,

paras 37–39, also found that the applicant's different treatment was justified by the aim of preserving the safety of persons in prison and public order by ensuring that prison officers are physically capable of performing all the tasks required of them, including providing professional assistance to the police. In the opinion of the Court *en banc*, all the above aims come down to ensuring prison security and public order. The need to protect prison security and public order may constitute a legitimate aim for restricting a fundamental right arising from both § 12(1) as well as § 29(1) of the Constitution.

74. In line with the second sentence of § 11 of the Constitution, even in the case of existence of a legitimate aim, the applicant's fundamental rights may only be restricted if the restriction is necessary is a democratic society and does not distort the essence of the rights and freedoms restricted.

75. There was no dispute in the administrative case over the fact that the applicant had been in the prison service for 14 years and 4 months and the respondent had never reproached the applicant for any non-compliance in performing their service duties (para. 21 of the Administrative Court judgment and para. 25 of the Court of Appeal judgment). According to the applicant's unrefuted assertion raised in the judicial proceedings, their hearing already became impaired in childhood and the impairment has remained on the same level in adulthood (para. 10.1 of the Administrative Court judgment and para 8 of the Court of Appeal judgment). The applicant's duties according to the job description did not presume frequent direct contact with prisoners (para. 24 of the Administrative Court judgment). During their entire service, the applicant worked in the position of a guard and the materials in the administrative case do not enable the conclusion that their service duties had significantly changed over that time or that they were not changed due to the applicant's health (see also para. 7 of the Administrative Court judgment and para. 12 of the Court of Appeal judgment).

76. It follows from the facts ascertained in the administrative court proceedings that throughout the applicant's entire long-standing service their hearing had been at the level or close to the level established at the hearing check on 4 April 2017 but despite this the applicant had been able to properly perform all the service duties imposed on them. Therefore, the applicant's dismissal from service was not a necessary measure to ensure safe and full performance of their duties and thus also prison security.

77. The materials in the administrative case do not indicate the applicant's health condition as being an impediment during their service to using them in ensuring public order under § 109(4) of the Imprisonment Act. Moreover, under Annex 1 to the Government of the Republic Regulation No 114 of 19 December 2019 on "The health requirements for a police officer and the procedure for medical examination, and the substantive and formal requirements for a health certificate", the requirements imposed for a police officer's hearing have been relaxed in comparison to the previous requirements. For example, a police officer doing indoor work is allowed to use a hearing aid at a periodic health examination. If the occupational health doctor performing the health examination allows, if working conditions required by the occupational health doctor are ensured, and if according to assessment by the police officer's immediate superior the police officer has not experienced impediments in performing their service duties, then the police officer is allowed to continue performing service duties even if during the periodic health examination they were found to have a medical impediment to performing that work (§ 3(3) of Regulation No 114). Thus, in line with the hearing requirements applicable to a police officer, the existence of a hearing impairment comparable to the applicant would not result in a police officer's unavoidable dismissal from the police service. In the light of the foregoing, the applicant's dismissal from service was also not necessary in order to ensure the involvement of a person employed in the same position to protecting public order.

78. Even if it had been proved in the administrative case that the applicant's hearing impairment prevented them from properly performing their service duties, it could not have resulted in their unavoidable dismissal from service. Instead of dismissal from service, the state has the duty to ensure to the applicant that appropriate measures necessary in the specific case are taken in order to enable them to continue their service. However, the precondition is that such measures should not have imposed a disproportionate burden on the employer. Under § 28(4) of the Constitution, people with disabilities are under the special care of the state and local authorities, which also includes the above-mentioned duty for the state, i.e. the duty to create a legal regulatory framework enabling application of relevant measures. In the opinion of the Court *en banc*, this duty for the state also arose from Directive 2000/78/EC and the provisions of the Equal Treatment Act laid down for its transposition (see paras 62–64 of the judgment above) as well as from international law binding on Estonia. Specifically, Article 5(3) of the Convention on the Rights of Persons with Disabilities obliges States Parties to take all appropriate steps to ensure that reasonable accommodation is provided in order to promote equality and eliminate discrimination. Article 27(1)(a) and (i) of the Convention stipulate that States Parties recognise the right of persons with disabilities to work, on an equal basis with others, prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, and ensure that reasonable accommodation is provided to persons with disabilities in the workplace.

79. As noted, the absence of the right of discretion for an administrative authority in issuing an administrative act need not in itself result in unconstitutionality of the regulatory provisions if the relevant contemplation was undertaken by the legislator or the body issuing the regulation (see para. 66 of the judgment above). However, when assessing the circumstances of the specific case, the Court *en banc* does not see any reason that should already have completely precluded on the level of the relevant provisions the possibility for the prison to consider, instead of the applicant's dismissal, applying other measures to enable their participation in service (i.e. to support continuation of their service) within the meaning of § 11(2) of the Equal Treatment Act.

80. The Court *en banc* concedes that in the administrative case the courts failed to fully ascertain whether use of a hearing aid would have ensured the applicant's complete compliance with the hearing requirements for a prison officer. However, the materials in the court case do not indicate any circumstances to conclude that use of a hearing aid while performing service duties could not, in principle, have ensured the applicant's compliance with the hearing requirements or that its use was impossible for some other reason.

81. Nor is it ruled out, in the opinion of the Court *en banc*, that the applicant's continued service could have been possible – apart from the possibility to use a hearing aid, or instead of this – by applying other appropriate measures (e.g. if the prison could have been able to consider introducing other changes in the applicant's service duties, a reduction in the number of service duties presuming direct contact with prisoners, or the like). As noted, when applying other measures, the resulting expense for the respondent must also be be assessed.

82. In view of the foregoing, the Court *en banc* is of the opinion that the relevant provisions are disproportionate and contrary to § 11 (second sentence), § 12(1), § 28(4) and § 29(1) of the Constitution for the reason that they entirely precluded the margin of appreciation for the prison for applying reasonable measures to enable the applicant's continuation in service. By relying on § 15(1) clause 2 of the

Constitutional Review Court Procedure Act, the Court *en banc* declares unconstitutional and invalid §§ 4 and 5 and Annex 1 of Regulation No 12 insofar as they lay down that impaired hearing below the required threshold constitutes an absolute impediment for service as a prison officer and does not enable discretion with regard to the issue whether an officer, regardless of their impaired hearing below the required threshold, is able to perform their service duties, including after taking reasonable measures if necessary.

83. The Court *en banc* emphasises that the opinion expressed in the present case cannot lead to the conclusion that in the prison service the law is not allowed to lay down dismissal of an officer from service on account of non-compliance with certain health requirements without a margin of appreciation being granted to the prison. Legal provisions may also stipulate specific reasonable measures without imposing on the prison the duty to assess and weigh the proportionality of each health requirement on a case-by-case basis. When establishing such a procedure both the legislator and the body issuing a regulation must keep in mind the provisions of the Constitution, the obligations assumed by Estonia by acceding to the Convention on the Rights of Persons with Disabilities, and EU law and the case-law of the Court of Justice of the EU interpreting it.

IV

84. Arising from § 63(1) of the Constitutional Review Court Procedure Act, the necessary and justified legal expenses of a participant in specific constitutional review proceedings mentioned in § 10(1) of the Act shall be compensated (see Supreme Court *en banc* order of 9 April 2020 No 5?18?5/33, para. 16).

85. The applicant filed a timely (see para. 17 of the order mentioned in the paragraph above) application for compensation of the expense of legal assistance incurred in connection with examination of the constitutional review case, including the legal assistance expense related to submission of an opinion to the Court of Justice (a total of 23 hours and 54 minutes, hourly rate 120 euros), which together with VAT amounts to 3441.6 euros. The applicant also seeks compensation of the cost of postal services in connection with examination of the case in the amount of 7.90 euros. In total, the applicant seeks compensation of expenses in the amount of 3449.5 euros.

86. The Court *en banc* finds that, proceeding from analogy with § 103(2) of the Code of Administrative Court Procedure, a participant in proceedings mentioned in § 10(1) of the Constitutional Review Court Procedure Act must be compensated the necessary and justified expenses related to seeking a preliminary ruling from the Court of Justice. However, compensation of the full amount of legal assistance expenses sought is not justified, e.g. according to the information presented, drawing up the application for determination of procedural expenses required one hour, which is clearly excessive. Expenses in the amount of 3000 euros can be considered necessary and justified. This sum should be left for the Republic of Estonia to bear.

87. The applicant’s name in the published judgment is to be replaced with an alphabetical character.

Villu Kõve, Velmar Brett, Peeter Jerofejev, Hannes Kiris, Ants Kull, Kai Kullerkupp, Julia Laffranque, Saale Laos, Viive Ligi, Heiki Loot, Kaupo Paal, Nele Parrest, Ivo Pilving, Paavo Randma, Kalev Saare, Juhan Sarv, Tambet Tampuu, Urmas Volens

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