constitutional-judgment-5-22-10

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?22?10
Date of judgment	6 February 2023
Judicial panel	Chairman: Villu Kõve; members: Velmar Brett, Ants Kull Laffranque and Heiki Loot
Case	Review of the constitutionality of § 5(1) of Rae Rural Mu Government regulation No 4 of 20 February 2018 on “The admission of children to and exclusion from preschool chi institutions”
Basis for proceedings	Tallinn Administrative Court judgment of 4 October 2022 administrative case No 3?22?621
Hearing	Written procedure
Participants in the proceedings	Rae Rural Municipality Government X Y

Chancellor of Justice

Minister of Education and Research

Minister of Public Administration

Minister of Justice

OPERATIVE PART

1. To declareunconstitutional and invalid the part of the sentence “and a free place in the relevant age group of a childcare institution” in § 5(1) of Rae Rural Municipality Government regulation No 4 of 20 February 2018 on “The procedure for admission of children to and exclusion from preschool childcare institutions”.

2. To replace the applicants’ names and the child’s date of birth in the published judgment with alphabetical characters.

FACTS AND COURSE OF PROCEEDINGS

1. On 2 December 2019, X (applicant I) and Y (applicant II) (hereinafter together also called ‘the applicants’) applied for a kindergarten place for their second-born child /.../ in Rae rural municipality as of 26 May 2021. On the same day, in the system for the administration of Rae rural municipality education services, the applicants’ child was placed in the queue for a kindergarten place in Rae rural municipality. The applicants’ first child attends a kindergarten in Rae rural municipality.

2. On 25 May 2021, applicant I contacted Rae rural municipality (hereinafter ‘the respondent’) with a query about the kindergarten place. On the following day, the respondent explained that no kindergarten groups were formed in the applicants’ service district for the school year 2021/2022 for children born between 1 October 2019 and 30 September 2020. Since the number of families with small children was constantly growing and the municipality was unable to provide kindergarten places for parents at the time they requested, the respondent explained the possibility to apply for support for a toddler raised at home, childcare service support or support for a private childcare institution.

3. From 13 August 2021, the applicants’ second child started attending a private childcare facility. According to the contract entered into between the childcare facility, applicant II and Rae rural municipality, the parent had to pay a place fee of 80 euros a month for the service. The same amount of place fee was applicable in Rae rural municipality preschool childcare institutions under § 2 of Rae Rural Municipal CouncilRegulation No 42[1] of 17 September 2019 on “Establishing the rate of parental contribution in a preschool childcare institution in Rae rural municipality and the procedure for its payment” (hereinafter Regulation No 42). In the remaining part (386 euros), Rae rural municipality undertook the obligation to pay the place fee for childcare. Additionally, applicant I undertook to pay the child’s food expenses in childcare.

4. By letter of 8 December 2021, Rae rural municipality explained to applicant I that granting a discount from the kindergarten place fee is regulated by § 3(1) of Regulation No 42. If two or more children from a family attend a childcare institution in Rae rural municipality or a private childcare institution which has a contract with the municipality, the place fee for the second child is 50% of the fee rate. Since, according to the contract, the fee for the applicants’ second child was 80 euros, the discount was calculated from the fee for the applicants’ first child attending a kindergarten in Rae rural municipality. It was also explained that the law requires a parent to cover food expenses. However, the daily cost of food expenses is decided by the board of trustees of a childcare institution, so the amount does not depend on a local authority and the local authority is not required to compensate food expenses.

5. By letter of 11 January 2022 to applicant I, the respondent repeated its explanations and noted that the local authority is not required to compensate the difference in food expenses between a municipal kindergarten and childcare. It was also explained that a fee for hobby activities in childcare is not part of the place fee but constitutes a separate additional fee which a parent may pay if they so wish. Municipal kindergartens also have hobby groups operating for a charge which parents pay on a voluntary basis.

6. On 9 February 2022, applicant I applied to Rae rural municipality for replacement of the childcare service with a kindergarten place in the service district in accordance with § 10(1) of the Preschool Childcare Institutions Act (PCIA). Applicant I also requested compensation for damage caused by the municipality's failure to comply with the duty to provide a kindergarten place to the applicants' second child. In order to obtain a service in private childcare which would be equivalent to the service in a municipal kindergarten, the applicant had to incur additional expenses of 23 euros a month (total 115 euros) for music and mobility classes which the childcare place fee did not cover. However, in a municipal kindergarten music and mobility classes would have been covered by the kindergarten place fee (80 euros). Food expenses in childcare were also higher than they would have been in a municipal kindergarten, so the additional expense as at 31 January 2022 was 71 euros. Additionally, applicant I requested that the discount of 50% laid down by § 3(1) of Regulation No 42 should be calculated from the childcare place fee for the second child but not from the municipal kindergarten place fee for the first child.

7. By letter of 10 March 2022, the respondent explained that the duties laid down by § 10(1) of the PCIA are complied with by Rae rural municipality by following Rae Rural Municipalityregulation No 4[2] of 20 February 2018 on "The procedure for admission of children to and exclusion from preschool childcare institutions" (hereinafter Regulation No 4). Under the regulation, the basis for grant of a place in a childcare institution is the queue of place applications and the existence of a free place in the relevant age group in a childcare institution (§ 5(1) of Regulation No 4). Forming groups for a new school year begins on 1 April, and in the case of a free place and on the basis of the queue children are also admitted to a childcare institution in the middle of the school year. With regard to discount on place fees and compensation for damage incurred due to additional expenses, the respondent referred to its earlier letter.

8. On 14 March 2022, the applicants lodged a complaint with Tallinn Administrative Court. The applicants sought an order obliging the respondent to provide a place for the applicants' second child in a childcare institution within the service district. The applicants also sought annulment of the respondent's letter of 10 March 2022 concerning refusal to change the place fees, and an order obliging the municipality to change the place fees. Third, the applicants sought compensation from the respondent for pecuniary damage arising from the additional expenses for music and mobility classes and food expenses, as well as for the income tax refund forfeited on the childcare place fee for the applicants' second child.

9. The respondent objected to the complaint. Funding the childcare service is regulated by Rae Rural Municipal Councilregulation No 26[3] of 17 February 2015 on “The conditions and procedure for funding the childcare service from the budget of Rae rural municipality”. On this basis, the municipality enters into a tripartite contract with a parent and a childcare service provider, and the municipality pays for the service to the extent that it exceeds the place fee in a municipal kindergarten. The respondent did not refuse to grant a kindergarten place to the applicants’ child. A place could not be ensured immediately but would be provided on the basis of the queue of applications for places. It is not possible to ensure a kindergarten place that does not exist.

10. By judgment of 4 October 2022, Tallinn Administrative Court partially satisfied the complaint. The court terminated proceedings regarding the claim for an obligation to provide a kindergarten place for the child in the period from 25 May 2021 to 15 August 2022 since the respondent had offered a kindergarten place from 15 August 2022 but the applicant had waived it. The Administrative Court satisfied the claim in connection with the changing of place fees, annulled Rae rural municipality letter of 10 March 2022 in respect of refusal to change place fees, and obliged the respondent to change the place fees so that the amount payable for the applicants’ first child is 100% and for the second child 50% of the established place fee rate. The court partially satisfied the claim for compensation of damage and ordered the respondent to pay the applicants 536 euros and 90 cents: 161 euros and 40 cents for compensation of overpaid food expenses, 199 euros and 50 cents for compensation of additional expenses for music and mobility classes, and 176 euros for compensation of income tax refund forfeited. The Administrative Court declared unconstitutional and set aside § 5(1) of Regulation No 4.

REASONING OF THE JUDGMENT OF TALLINN ADMINISTRATIVE COURT

11. Section 5(1) of Regulation No 4 is contrary to § 3(1) and § 154(1) of the Constitution since it contravenes the law, and the norm cannot be interpreted in a constitutionally-compliant manner.

12. Under § 10(1) of the PCIA, a local authority is obliged to create an opportunity for a child to attend a childcare institution, which may be replaced with a childcare service only with parental consent. The respondent failed to comply with its duty under § 10(1) of the PCIA since it failed to offer the applicants a kindergarten place upon refusal of a place in childcare. The respondent essentially interpreted the second sentence of § 10(1) of the PCIA as a partial takeover of the funding obligation in the case of which a parent is responsible for finding a place, concluding a contract, and funding.

13. A preschool childcare institution significantly differs from a childcare facility and the service provided there. The first case involves an educational institution operating on the basis of an education licence and hiring teachers, which enables receiving preschool education by observing the national curriculum and the costs of which can be deducted from taxable income. The childcare service is a social service aimed at supporting a person raising a child in coping or working or reducing the burden of care arising from a child's special need. Provision of this service does not involve a duty to observe the national curriculum, and to provide the service it is sufficient to have the profession of a childcarer or experience of working with children as well as suitable personal characteristics (to be assessed by the employer). The price of the service (including food expenses) is formed on the free market and a parent cannot deduct the costs of the service from income.

14. Under § 5(1) of Regulation No 4, grant of a kindergarten place depends on the queue of applications for a place in the particular service district and the existence of a free kindergarten place. Based on this provision, the respondent declined to provide a kindergarten place to the applicants, justifying the refusal with the argument that the turn of the applicants' child in the queue had not yet arrived as well as the fact that no free places were available. If the norm were not applicable, the municipality could not have relied on lack of progress in the queue or the absence of a place, and should have resolved the application on the basis of the PCIA. Section 15(4) of the PCIA empowers a local authority to establish the procedure for processing applications but not to impose additional or restrictive conditions on obtaining a kindergarten place. Even if the "queue requirement" were to be interpreted in a constitutionally-compliant manner, the grant of a kindergarten place is precluded by the fact that no free place is available. This condition contravenes § 10(1) of the PCIA.

15. Due to the unconstitutionality of § 5(1) of Regulation No 4, the respondent could not rely on it in refusing a kindergarten place, so that failure to offer a kindergarten place to the child from 26 May 2021 was unlawful. For this reason, the primary condition for compensation of damage under § 7(1) of the State Liability Act, i.e. the respondent's unlawful activity, was fulfilled.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

[…]

PROVISION DECLARED UNCONSTITUTIONAL

26. Section 5(1) of Rae Rural Municipality Government regulation No 4 of 20 February 2018 on "The procedure for admission of children to and exclusion from preschool childcare institutions" lays down as follows:

> "**§ 5. Filling places in childcare institutions and admission**
> (1) The basis for obtaining a place in a childcare institution is the queue of applications for a place within the service district and a free place in the relevant age group of a childcare institution."

OPINION OF THE CHAMBER

27. The case before the court involves a dispute as to whether a local authority may decline to ensure an opportunity for a child to attend a childcare institution if no free places are available in a childcare institution within the service district.

28. The Chamber will first assess the admissibility of constitutional review in the present case (I) and then the constitutionality of the contested provision (II).

I

29. When resolving a case based on an application by a court of first or second instance, the Supreme Court may invalidate or declare unconstitutional a legislative act or a provision thereof, as well as failure to issue a legislative act which was relevant to adjudicating the case (§ 9(1) and § 14(2) (first sentence) Constitutional Review Court Procedure Act). In line with 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 [4], para. 15).

30. Tallinn Administrative Court, which initiated the constitutional review, was adjudicating a complaint in which one of the claims included compensation for pecuniary damage caused by the respondent's allegedly unlawful action. Under § 7(1) of the State Liability Act, a person whose rights are violated by the unlawful actions of a public authority in a public law relationship may claim compensation for damage caused to the person if damage could not be prevented and cannot be eliminated by protection or restoration of rights in some other manner. In the opinion of the Administrative Court, all the preconditions for compensating damage were fulfilled and the claim had to be satisfied.

31. The applicants suffered the pecuniary damage at issue in the case as a result of their second child attending private childcare from 13 August 2021 instead of a municipal kindergarten. The damage consisted of costs that were higher in private childcare than they would have been in a municipal kindergarten, as well as of the loss of an income tax refund for the applicants. Although the applicants paid a place fee in childcare in the same amount as the place fee in a municipal kindergarten (the difference was reimbursed by the respondent), the childcare place fee did not include music and mobility classes, which were at the same time integrated into the day-to-day activities of the childcare facility. The municipal kindergarten place fee, on the other hand, also included music and mobility classes as part of the study programme. Also, food expenses in childcare were higher than they would have been in a municipal kindergarten. If the applicants' second child had attended a municipal kindergarten, the applicants could have deducted the place fee from their income subject to income tax, but they could not deduct the private childcare fee.

32. The childcare service was used by the applicants because the respondent did not provide the applicants' second child with a kindergarten place from 26 May 2021, which the applicants had applied for at the end of 2019. According to the applicants, refusal to grant a place in a kindergarten was unlawful. The applicant offered a kindergarten place to the applicants' second child from 15 August 2022, which the applicants waived. Consequently, the administrative case concerned pecuniary damage suffered between 13 August 2021 and 15 August 2022.

33. One of the preconditions for satisfying the claim for damages, which the Administrative Court had to assess, was therefore the question whether it was lawful not to grant the applicants' second child a place in kindergarten. The first sentence of § 10(1) of the PCIA obliges the local authority, at the request of the parents, to create an opportunity for a child between the ages of one and a half and seven years, whose place of residence is within the boundaries of the particular rural municipality or city and coincides with the place of residence of at least one of the parents, to attend a childcare institution in the service district. At the same time, for parents of a child between the ages of one and a half and seven years, this provision entitles them to obtain a place for their child in a childcare institution in the service district if they so wish. The obligation of the local authority also includes creation of sufficient places in childcare institutions so as to be able to fulfil the obligation towards parents.

34. The law does not specify the period within which – from the moment of expression of their wish by a parent – the municipality must fulfil the obligation arising from the first sentence of § 10(1) of the PCIA. As granting a place in a kindergarten constitutes administrative procedure, a place in a childcare institution must be granted within a reasonable time (Supreme Court Constitutional Review Chamber judgment of 19 March 2014 in case No3?4?1?63?13 [5], para. 33). In case-law, two months from the submission of an application has been considered reasonable (see e.g. Tallinn Circuit Court of Appeal judgment of 31 May 2018 in case No3?17?449

[6], para. 9). The same length of time was also laid down for resolving a parent's application in the Draft Preschool Education and Childcare Act, which was rejected in the proceedings of the Riigikogu (see579 SE [7], Riigikogu XIV composition; § 4(2) of the draft). The applicants filed an application in December 2019, immediately after the birth of the child, with the wish to obtain a place in kindergarten when the child reached the age of one and a half years on /.../ May 2021. Thus, by 26 May, 2021, the applicants had a statutory right to obtain a place in a kindergarten in the service district.

35. With parental consent, the second sentence of § 10(1) of the PCIA allows the local authority to substitute the place of a child aged one and a half to three years in a childcare institution with childcare service. This means that a local authority is relieved of the obligation laid down by the first sentence only if the parent voluntarily waives their right to a place in a kindergarten. The local authority must explain to the parent the voluntary nature of the waiver and the related legal consequences and must not give the impression that the local authority has the right to refuse to comply with the obligation laid down in the first sentence of § 10(1) of the PCIA.

36. Although the applicants used a childcare service from 15 August 2021, based on materials in the case file this cannot be regarded a voluntary waiver of their right to a kindergarten place within the meaning of the second sentence of § 10(1) of the PCIA. The applicants used the childcare service only because the respondent did not provide a place in a kindergarten for their second child. The materials in the case file also show that the applicants were not aware of the difference between a childcare institution and a childcare service, including the different content of the service and the different costs. The respondent also confirmed at the court hearing that, in the event of waiver to use the childcare service, the applicants would not have been able to obtain a kindergarten place for their second child. The respondent also conceded that the difference between a childcare service and a kindergarten place was not explained to the applicants. If the applicants had voluntarily waived a kindergarten place, failure to provide a kindergarten place would not have been unlawful and the Administrative Court would not have been able to satisfy the claim for damages.

37. The respondent failed to provide the applicants' second child with a place in a kindergarten at the time requested, on the ground that there were no vacancies in the child's age group in the applicants' service district (see para. 2 above), without reference to the legal basis. Later, in explaining failure to grant a place in a kindergarten, the respondent referred to § 5(1) of Regulation No 4, according to which the basis for obtaining a place in a childcare institution is the queue of applications for a place in the service district and a vacancy in the relevant age group of a childcare institution (see para. 7 above). During the court proceedings, the respondent was of the opinion that it had not refused to grant the applicants' second child a place in kindergarten or failed to fulfil its obligations under § 10(1) of the PCIA. It can be inferred from the respondent's explanations that grant of a place in kindergarten to the applicant's second child had simply been postponed until a vacancy arose and the queue reached the applicants' child (see para. 9 above).

38. Since a reasonable period had elapsed since the applicants' application was filed, by 26 May 2021 the respondent was under an obligation to grant the applicants' second child a place in kindergarten. Since the applicants did not voluntarily give up their place in the kindergarten, by failing to grant a kindergarten place the respondent violated the obligation arising from the first sentence of § 10(1) of the PCIA. The fact that, according to the respondent, performance of the obligation was simply postponed does not play a role in this regard. Postponing the grant of a kindergarten place (being in the queue for longer than a reasonable time for resolving the application) means refusal to grant it. In that regard, § 5(1) of Regulation No 4, on which the respondent*de facto* relies, must be seen as the legal basis for refusal.

39. Under § 5(1) of Regulation No 4, the basis for obtaining a place in a childcare institution is the queue of applications for a place within the service district and a free place in the relevant age group of a childcare institution. Thus, the grant of a kindergarten place depends on two conditions – a vacancy must exist in a childcare institution in the service district and the applicant's turn in the queue of applications for a place must have arrived.

40. In case No3?4?1?63?13 [5] in 2014, the Supreme Court assessed the constitutionality of an earlier regulation of Rae Rural Municipality Government regulating the same field. At issue was the constitutionality of § 4(2) of Regulation No 12 of 12 March 2013 of Rae Rural Municipality Government on "The procedure for admission of children to and exclusion from preschool childcare institutions", which made allocation of a place in a kindergarten dependent on the queue ("the allocation of a place in a kindergarten is based on the service districts and the general queue"). The Supreme Court considered § 4(2) of Regulation No 12 to be a procedural norm and treatment of an application for a kindergarten place on the basis of the order in which the applications are received as an appropriate way to organise applications for allocation of a kindergarten place. Assuming that a place in a kindergarten was guaranteed within a reasonable time on the basis of the queue, queueing did not limit a parent's right to obtain a place in a kindergarten, and the local authority fulfilled its obligation under § 10(1) of the PCIA, and the rule in the regulation did not contravene the law or the Constitution (see Supreme Court Constitutional Review Chamber judgment of 19 March 2014 in case No3?4?1?63?13 [5], paras 27–28 and 33–34).

41. In the opinion of the Chamber, the part of § 5(1) of Regulation No 4, which makes the grant of a place in a kindergarten dependent on the queue of applications for a place, must also be regarded as a procedural rule governing the processing of applications for a place and does not exempt the local authority from complying with the obligation laid down in the first sentence of § 10(1) of the PCIA. If applications in the queue cannot be satisfied due to a lack of places, the reason is not the queue but the lack of places. Processing of applications for a place on the basis of the queue cannot therefore justify refusal to grant a place in a kindergarten (including postponing the grant of a kindergarten place) to those parents who have acquired the statutory right to a place in a kindergarten.

42. However, the same conclusion cannot be reached with regard to the second condition, on which § 5(1) of Regulation No 4 makes the grant of a place in a kindergarten dependent, i.e. the part of the sentence "a free place in the relevant age group of a childcare institution". From the wording of the part of the sentence and the explanations given by the respondent during the court proceedings, it appears that its purpose is to exempt the municipality from the obligation laid down by the first sentence of § 10(1) of the PCIA. As noted above, the law imposes an obligation on the local authority to ensure the possibility to attend a childcare institution, which also includes the obligation to create a sufficient number of additional places in kindergartens in the event of insufficiency of available places. The condition "the existence of a free place" limits the statutory obligation for a local authority to create a sufficient number of places in a childcare institution, since it does not make the creation and grant of kindergarten places dependent on necessity but leaves it up to the local authority to decide whether, when, and how many places to create, i.e. to what extent to fulfil its obligation to parents.

43. Since the phrase “a free place in the relevant age group of a childcare institution” in § 5(1) of Regulation No 4 was the basis for refusal to grant the applicants’ second child a place in a kindergarten, the lawfulness of the respondent’s conduct and compensation for pecuniary damage suffered by the applicants depend on its validity. If this provision is constitutional and valid, then refusal to grant a place in a kindergarten was lawful and the Administrative Court would not be able to satisfy the claim for compensation for additional expenses incurred in using the childcare service. If the provision is unconstitutional and invalid, then refusal to grant a place in a kindergarten is unlawful and the additional expense incurred in using the childcare service can be regarded as unlawfully caused pecuniary damage within the meaning of § 7(1) of the State Liability Act.

44. In view of the hierarchy of norms, the provision that most closely governs the disputed legal relationship must be applied, which is why in implementation the relevant rules of the Regulation took priority over the rules of the law (see Supreme Court Constitutional Review Chamber judgment of 6 April 2021 in case No 5?20?12/9 [8], para. 50). The Administrative Court could not have disapplied the existing provision of the Regulation without declaring it unconstitutional. A court of first or second instance can disapply a valid legal norm only on the condition that it applies to the Supreme Court for constitutional review.

45. Thus, the part of the sentence “a free place in the relevant age group of a childcare institution” in § 5(1) of Regulation No 4 was a decisive provision for resolving the claim for damages in the administrative case, and the constitutionality of which the Supreme Court can assess in the current proceedings.

46. The Administrative Court also adjudicated a claim for imposing an obligation seeking to amend the discounts on place fees granted under Regulation No 42 (to calculate a 50% discount on the place fee for the second child attending private childcare, and not on the applicants’ first child attending a municipal kindergarten). This claim relates to the circumstances after 15 August 2022, i.e. after waiver of a place in kindergarten, so that satisfaction of this claim does not depend on the lawfulness of refusal to grant a place in a kindergarten or on the validity of the contested norm.

II

47. Next, the Chamber will examine the constitutionality of the contested norm – the part of the sentence “a free place in the relevant age group of a childcare institution” in § 5(1) of Regulation No 4.

48. At first, the Chamber notes that the issue in dispute in the instant case concerning provision of a place in a kindergarten relates to accessibility of preschool education. A kindergarten is a preschool childcare institution, the purpose of which is to provide care and preschool education for preschool-aged children (§ 1(1) PCIA). The fundamental right to education guaranteed by § 37(1) of the Constitution entitles everyone to education. This fundamental right also guarantees the right to preschool education, which is becoming increasingly important in today's society.

49. Section 37(2) of the Constitution mentions both the state and municipalities as guarantors of the fundamental right to education. Thus, provision of education can be considered as falling within the shared competence of the state and local authorities. In the case of a task falling within shared competence according to the Constitution, the principle of subsidiarity must be taken into account and a task should be performed by the level of government that can best cope with it in a particular situation (see Supreme Court Constitutional Review Chamber judgment of 6 December 2022 in case No 5?22?5/16 [9], para. 40 with further references).

50. Provision of preschool education is divided between the state and local authorities so that the general requirements for provision of education derive from national legislation, while local authorities are responsible for access to preschool education. Ensuring access to preschool education is therefore a local matter, i.e. a local government task within the meaning of § 154(1) of the Constitution. By laying down, in the first sentence of § 10(1) of the PCIA, the obligation to create an opportunity for children residing within the boundaries of a local authority to attend a preschool childcare institution, the legislator has made it compulsory for local authorities to ensure access to preschool education.

51. 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. Under § 154(1) of the Constitution, local matters shall be decided and organised independently by local authorities on the basis of laws. The principle of legality expressed in these provisions means that, in ensuring access to preschool education, a local authority may not contravene the provisions of a law.

52. As described above, the essence of the obligation laid down in the first sentence of § 10(1) of the PCIA is to create such a number of places in childcare institutions that it is possible, within a reasonable time from submission of an application, to allocate a place in a childcare institution in the service district to all children aged one and a half to seven years living within the boundaries of the local authority. This obligation, matched by the subjective right of parents and children, may be restricted by a local authority only if and to the extent that a law lays down the possibility to do so.

53. Section 15(1) of the PCIA empowers a municipal council to approve service districts for childcare institutions. Although designation of the service district plays a role in fulfilling the obligation to provide a place in a kindergarten, § 15(1) of PCIA does not give the right to limit the scope of the obligation set out in the first sentence of § 10(1) of the PCIA. Nor is such an empowerment given by § 15(3) of PCIA, which regulates, first of all, how to allocate kindergarten places between children in a service district (if possible, preference should be given to children whose siblings in the same family residing in the same place attend the same childcare institution). Secondly, this provision regulates a situation in which so many places are available in a childcare institution in a service district that they can also be given to children residing outside the service district. However, ensuring accessibility of preschool education in this way is possible only on the condition that a parent agrees to a place outside the service district.

54. Section 15(4) of the PCIA empowers a rural municipality or city government to establish the procedure for admission to and exclusion from a childcare institution. Regulation No 4 has also been established on the basis of that provision.

55. The power laid down by § 15(4) of the PCIA has been interpreted by the Supreme Court as the right to establish procedural rules. “The procedure must be understood as to how applying for a place in a kindergarten takes place, how the applications are processed, and other technical issues concerning the allocation of a kindergarten place or exclusion from the kindergarten” (Supreme Court Constitutional Review Chamber judgment of 19 March 2014 in case No3?4?1?63?13 [5], para. 27). In that case, the Supreme Court also took the view that § 15(4) of the PCIA does not empower a rural municipality or city government to impose restrictions on the subjective right arising from the first sentence of § 10 (1) of the PCIA (para. 31 of the aforementioned judgment).

56. The part of the sentence “a free place in the relevant age group of a childcare institution” in § 5(1) of Regulation No 4 precludes the grant of a place in a kindergarten to parents who have a subjective statutory right to this. The provision thus restricts the right guaranteed by § 10(1) of the PCIA in a way for which no empowerment has been given by law. Therefore, the part of the sentence “a free place in the relevant age group of a childcare institution" in § 5(1) of Regulation No. 4 contravenes the law and the first sentence of § 3(1) and § 154(1) of the Constitution. Relying on § 15(1) clause 2 of the Constitutional Review Court Procedure Act, the Chamber declares the part of the sentence “and a free place in the relevant age group of a childcare institution” in § 5(1) of Regulation No 4 unconstitutional and invalid.

57. The Chamber further notes that, even though the obligation under the first sentence of § 10(1) of the PCIA is clear, a number of local authorities have problems in complying with it. According to a survey of local authorities conducted by the Ministry of Education and Research, a total of 2421 children in 33 local authorities (i.e. 42% of all local authorities and 56% of respondents) did not receive a place in a kindergarten or childcare by September 2020, although the parent had so requested (see the Preschool Education and Childcare Act (579 SE), page 108 of the explanatory memorandum on the initiation of the draft). At the

3?4?1?63?13 [5], already cited above, concerning an earlier regulation of Rae Rural Municipality Government, and the judgment of 19 March 2014 in case No 3?4?1?66?13 [10], concerning a similar regulation in Kiili rural municipality).

58. The Chamber emphasises that both the state as well as local authorities are responsible for accessibility of preschool education, both of which have the duty to find a systemic solution to the problem that does not deprive children of preschool education and families of the opportunity to combine work and family life. (cf. the decision of the Constitutional Review Chamber of the Supreme Court of 19 December 2019 in case No 5187/8, p. 121). No situation can be allowed to originate or persist in the country where accessibility of public services largely depends on the extent to which the local authority of a person's place of residence or location decides to perform the obligations imposed on it by law (cf. Supreme Court Constitutional Review Chamber judgment of 19 December 2019 in case No 5?18?7/8 [11], para. 121).

(signed digitally)

Links
[1] https://www.riigiteataja.ee/akt/426092019001
[2] https://www.riigiteataja.ee/akt/408012021002
[3] https://www.riigiteataja.ee/akt/429102020015
[4] https://www.riigikohus.ee/lahendid?asjaNr=3-4-1-5-
[5] https://www.riigikohus.ee/lahendid?asjaNr=3-4-1-63-13
[6] https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=250711199
[7] https://www.riigikogu.ee/tegevus/eelnoud/eelnou/fa9e8969-7a92-4870-934d-185c9f69ac43/Alushariduse%20ja%20lapsehoiu%20seadus
[8] https://www.riigikohus.ee/lahendid?asjaNr=5-20-12/9
[9] https://www.riigikohus.ee/et/lahendid?asjaNr=5-22-5/16
[10] https://www.riigikohus.ee/et/lahendid?asjaNr=3-4-1-66-13
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