

**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 6 October 2000**

Review of the petition of the Tartu Administrative Court to declare § 28(1)6) of the Weapons Act partly invalid.

The Constitutional Review Chamber sitting in a panel presided over by the Chairman of the Chamber Uno Lõhmus and composed of members of the Chamber, justices Tõnu Anton, Lea Kivi, Ants Kull and Jüri Põld, at its open session of 6 September 2000, with the acting Chancellor of Justice Aare Reenumägi and the Minister of Justice Märt Rask appearing, and in the presence of the secretary to the Chamber Piret Lehemets reviewed the petition of Tartu Administrative Court of 5 June 2000.

I. FACTS AND COURSE OF PROCEEDINGS

1. On 4 May 1995 the Tartu Police Prefecture issued a firearms licence to Andres Rebane until 4 May 1997. The weapons permit was extended until 4 May 1999. The weapons permit had been issued on the basis of the "Provisional rules on the production, sale, acquisition, storage and carrying of firearms and ammunition", approved by the Government of the Republic Regulation no. 256 of 27 August 1992 (hereinafter the "provisional rules"). Pursuant to clause 11(5) of the provisional rules persons who have been punished for an intentionally committed criminal offence and whose criminal record has not expired could not get a weapons permit. A.Rebane had been punished for intentionally committed criminal offences but his criminal record had expired by the date the weapons permit was issued.

2. On 4 April 1999 a senior police inspector revoked the weapons permit under the Weapons Act which entered into force on 1 January 1996, because A. Rebane had been punished pursuant to criminal procedure for an intentionally committed criminal offence. According to § 33(1)2) of the Weapons Act a weapons permit is to be revoked if the holder of the permit does not meet the requirements established by the Weapons Act. The requirements are prescribed by § 28(1)6) of the Weapons Act, pursuant to which a weapons permit is not issued to a person who has been punished pursuant to criminal procedure for an intentionally committed crime, irrespective of whether his criminal record has expired or been expunged. A. Rebane had been punished on 2 June 1978 and on 22 February 1982 for malicious hooliganism, illegal possession of a firearm, concealed theft, fraudulent conduct and falsification. The Weapons Act does not provide for exceptions for persons who had obtained a weapons permit under the provisional rules.

3. A. Rebane filed an action with the Tartu Administrative Court, applying for the declaration of illegality of the refusal of the Tartu Police Prefecture to annul the resolution to deprive him of the weapons permit and to issue him a new weapons permit be declared. He requested that the court order that the Tartu Police Prefecture issue him a weapons permit. A. Rebane requested that the words "irrespective of whether his criminal record has expired or been expunged" of § 28(1)6) of the Weapons Act be not applied due to their conflict with § 11 of the Constitution and that a constitutional review proceeding be initiated to declare the phrase invalid.

4. The Tartu Administrative Court did not apply § 28(1)6) of the Weapons Act due to its conflict with the Constitution and submitted a request to the Supreme Court that the court declare the phrase "irrespective of whether his crime (pro criminal record) has expired or been expunged" of § 28(1)6) of the Weapons Act invalid.

II. LEGAL REASONING

5. The provision of the Weapons Act, which the Tartu Administrative Court did not apply, reads as follows:

"§ 28. Circumstances precluding grant of acquisition permit or weapons permit to natural person

(1) An acquisition permit or a weapons permit shall not be granted to a natural person who:

.....
6) has been punished under criminal procedure for an intentionally committed criminal offence, irrespective of whether his or her criminal record has expired or been expunged".

Justifications of the participants

6. The administrative court pointed out that a person whose criminal record for an intentionally committed crime has expired and who was entitled to weapons permit under the provisional rules is not entitled to it after the entry into force of the Weapons Act. The court argued that under § 28(1)6) of the Weapons Act an earlier conviction may, for an unspecified term, restrict persons' rights and freedoms, which is in conflict

with the principle of legal certainty proceeding from § 10 of the Constitution. This principle involves respect for valid law, prohibition of retroactive legislation, and legitimate expectation. The provisional rules were more favourable to a holder of weapons permit than the Weapons Act. As a rule, it is prohibited to annul legislation and to adopt new legislation which significantly restricts persons' rights and freedoms. A criminal record may serve as a ground for restricting rights and freedoms of persons. But when a criminal record has expired or been expunged the person is considered not to have been punished pursuant to criminal procedure and the restriction of his rights on the ground of a criminal record is precluded.

7. The Chancellor of Justice argues that the Regulation of the Government of the Republic of 27 August 1992, approving the provisional rules, had been issued without a legal basis and was therefore in conflict with section § 87(6) of the Constitution. The reasons set out by the Tartu Administrative Court as to the conflict of the phrase "irrespective of whether his criminal record has expired or been expunged" of § 28(1)6) of the Weapons Act with § 10 of the Constitution are not sufficiently justified. The legislator is justified, under § 11 of the Constitution, to establish restrictions, limitations or obligations by law. From the formal legal point the Weapons Act is in conformity with the Constitution. Proceeding from general safety, and assessing the necessity of the restrictions and the fact that established restrictions must not distort the nature of the restricted rights and freedoms, § 28(1)6) of the Weapons Act may be in conflict with § 11 of the Constitution.

8. According to the written opinion of the Minister of Justice § 28(1)6) of the Weapons Act is not in conflict with the principle of legal certainty and with § 10 of the Constitution. The Weapons Act has no retroactive force. A. Rebane was issued a weapons permit under the provisional rules on 4 May 1995, which remained in force until the expiration date of the permit, regardless of the entry into force of the new Weapons Act. The resolution to issue A. Rebane a weapons permit gave rise to his legitimate expectation that this administrative legislation will remain in force. Yet this expectation was not unlimited in time. The administrative act had been given for a specified term, as the weapons permit was issued until 4 May 1997. Thus, the holder of the weapons permit could not have a legitimate expectation that the provisional rules will be applicable to him even after the term specified in the weapons permit has expired.

9. At the session of the Constitutional Review Chamber the representative of the Chancellor of Justice adhered to the written opinion. He underlined that the restriction established by § 28(1)6) of the Weapons Act distorted the restricted rights and freedoms. The restriction is not proportional and is in conflict with § 11 of the Constitution. The Minister of Justice argued that the wording of the contested provision was not good and was in conflict with general principles of law. Such a provision creates legal uncertainty for persons who have served their punishment. The petition of the Tartu Administrative Court is justified and § 28(1)6) of the Weapons Act is in conflict with § 11 of the Constitution.

10. Before the adjudication of the petition of the Tartu Administrative Court by the Supreme Court the Tartu Circuit Court had annulled the judgment of the administrative court. The circuit court was of the opinion that revocation of the weapons permit of A. Rebane was not in conflict with the principle of legal certainty. The weapons permit had been issued under provisional rules. After the provisional rules were annulled and the Weapons Act entered into force A. Rebane could have no legitimate expectation that he would be able obtain a weapons permit in the future. The circuit court was of the opinion that § 28(1)6) of the Weapons Act, establishing that a punishment under criminal procedure for an intentional crime is a circumstance precluding issuance of weapons permit, irrespective of whether the criminal record has expired or been expunged, was not in conflict with the Constitution.

Opinion of the Chamber

11. The Weapons Act (RT I 1995, 62, 1056) determines the subjects of the right to ownership or possession of weapons and the rights of the subjects in acquiring and owning weapons. According to § 20(2) of the Weapons Act an Estonian citizen who has attained at least 21 years of age or has performed active military service, has the right to acquire and possess a civil weapon of limited commerce pursuant to procedure and conditions established by law. A natural person is allowed to acquire and own a civil weapon in restricted commerce for hunting; for sporting; for guaranteeing safety (protection of self and property); for pursuing a profession; for creating, maintaining or supplementing a collection of weapons and for other purposes not contradicting the law (§ 22).

12. The Constitution does not state that the right to acquire or own a weapon is a basic right of every person. Nevertheless, the person's right to acquire or own a weapon may fall under the right to free self-realisation, established in § 19 of the Constitution, or under some other basic right, for example the right to freely choose one's sphere of activity or profession.

13. The Tartu Administrative Court did not find any relation between the right to acquire or own a weapon and free self-realisation or any of the fundamental rights. The court was of the opinion that in the case of A. Rebane the restriction established by § 28(1)6) of the Weapons Act is in conflict with the principles of legal certainty and legitimate expectation, proceeding from § 10 of the Constitution.

The Supreme Court does not agree with the opinion of the Tartu Administrative Court that § 28(1)6) of the Weapons Act is in conflict with § 10 of the Constitution.

14. A weapons permit issued under the provisional rules was valid until the end of the term of the permit. A person could have no legitimate expectation that his or her weapons permit will be extended after its expiry under the provisional rules that have been declared invalid. In regard to the provisional rules a person must bear in mind that the rules may change. Although it may have been more favourable for a person to obtain a weapons permit under the provisional rules, it is allowed to establish stricter requirements by law in general interests.

15. The Tartu Administrative Court made a proposal that the words “irrespective of whether the criminal record has expired or has been expunged” of § 28(1)6) of the Weapons Act be declared invalid. According to the rest of the text of the provision a weapons acquisition permit or a weapons permit shall not be issued to a natural person who has been punished under criminal procedure for an intentionally committed crime. The Chamber argues that the invalidation of the proposed words would not change the legal situation. The wording of § 28(1)6) of the Weapons Act shows the intent of the legislator to differentiate between the fact of punishment and a criminal record as a status involving unfavourable criminal law and other legal consequences for the pertinent person. Criminal record is temporary in nature and shall continue until it expires or is expunged. The fact of punishment, on the other hand, characterises a person and thus has a permanent significance.

16. The Constitutional Review Chamber considers it necessary to underline that the expiry and expunging of a criminal record used to be regulated by § 58 of the Criminal Code. This provision was declared invalid by the Punishment Register Act, passed on 19 November 1997. As several sections of the special part of the Criminal Code refer to a criminal record as a characteristic of a subcategory of a crime, the criminal record still has legal effects under criminal law. The Punishment Register Act does not specify which persons, punished under criminal procedure, have a criminal record. The Act does not establish that a person who has been entered into the Punishments Register has a criminal record. The purpose of the Punishment Register is to supply reliable information to state agencies concerning punishment data of persons for the performance of functions under the law or legislation issued in accordance of law, and giving information to persons about the data entered into the register concerning these persons (§ 2). The data entered into the register shall be expunged after the expiry of the term established in § 25(1) and (2) of the Act and shall be transferred to the archives. Thus, it can be said that the Act does not describe with sufficient precision the nature and meaning of a criminal record, and the relation between an entry in the punishment register and a criminal record is only presumable.

17. § 28(1)6) the Weapons Act establishes the legislator’s will never to issue a weapons permit to a person who has been punished for an intentionally committed crime, irrespective of whether the person has a criminal record or not. The establishment of this restriction can be explained by the fact that one of the purposes of the Act is to prevent threats to life and health of persons. A weapon as a device or thing can be used to harm a living object and that is why the acquisition of weapons is restricted and specific rules and requirements have been established for the acquisition, commerce and supervision thereof. These requirements have been provided for in general interests and the interests of an individual have been limited or restricted in the interest of other persons.

The Supreme Court is of the opinion that a restriction related to punishment under criminal procedure, which accompanies a person for his or her life, irrespective of the nature and gravity of the intentionally committed crime, may prove to be disproportional to the purpose of protecting the life and health of others. That is why the legislator must enable those who implement the law to take into account the personality of those who apply for a weapons permit and the circumstances of the committed crime. The Chamber is of the opinion that despite the imperative precept of the Weapons Act not to issue a weapons acquisition permit or a weapons permit to a person who has been punished for an intentionally committed crime, the court has to take into account all circumstances and weigh under § 11 of the Constitution whether the restriction is necessary in a democratic society and does not distort the nature of the rights and freedoms of persons.

Proceeding from § 19(1)1) of the Constitutional Review Court Procedure Act **the Constitutional Review Chamber of the Supreme Court has decided:**

To dismiss the petition of the Tartu Administrative Court of 5 June 2000.

The judgment is effective as of pronouncement, is final and is not subject to further appeal.

Uno Lõhmus

Chairman of the Constitutional Review Chamber