

**JUDGMENT OF
THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 25 November 1998**

Review of the petition of the Chancellor of Justice to declare invalid § 15 (2), and subsections (1), (2)2), (3), and (4) of § 17 of the Police Service Act.

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 Kalm, Ants Kull and Jüri Pöld, at its open session of 11 November 1998, with the Chancellor of Justice Eerik-Juhan Truuväli and representative of the Riigikogu Tõnis Seesmaa appearing, and in the presence of the secretary to the Chamber Piret Lehemets reviewed the petition of the Chancellor of Justice of 18 September 1998.

From the documents submitted to the Constitutional Review Chamber **it appears, that:**

On 14 May 1998 the Riigikogu passed the Police Service Act, which was promulgated by the President of the Republic on 3 June 1998.

On 16 June 1998, on the basis of § 142(1) of the Constitution and § 15(1) of the Chancellor of Justice Activities Organisation Act, the Chancellor of Justice proposed to the Riigikogu that it bring §§ 15 and 17 of the Police Service Act into conformity with § 34 of the Constitution. On 17 June 1998 the Riigikogu did not support the proposal of the Chancellor of Justice, and did not amend the Police Service Act.

Pursuant to § 142(2) of the Constitution and § 17 of the Chancellor of Justice Activities Organisation Act, the Chancellor of Justice submitted a petition to the Supreme Court to declare § 15(2), and subsections (1), (2)2), (3), and (4) of § 17 of the Police Service Act invalid.

In the petition submitted to the Supreme Court the Chancellor of Justice argues that § 15(2) of the Police Service Act in conjunction with § 15(1) makes it possible to transfer a police officer, in the interests of service and without his or her consent, to another position of police officer even if this results in the change of a police officer's residence. This provision of the Police Service Act does not conform to everyone's right to choose his or her place of residence, established by § 34 of the Constitution. Pursuant to § 124(3) of the Constitution the right to choose place of residence may be restricted solely in respect to persons in the Defence Forces and alternative service in the special interests of the service. Thus, the transfer of a police officer, without his or her consent, to another position, which inevitably results in change of place of residence, is not in conformity with the Constitution, as a police officer can not decide on his or her residence. Upon transfer to some other location without the consent of a police officer the latter is forced compulsorily to change his or her residence. If a police officer refuses to change his or her place of residence upon transfer to another position, this may bring about his or her release from service under § 118 of the Public Service Act (§ 42(3) of the Police Service Act). Thus, by § 15(2) of the Police Service Act a police officer is, under the threat of a disciplinary punishment, denied the possibility to freely decide on his or her place of residence. This distorts the nature of the right to choice of residence, stipulated in § 34 of the Constitution. Such provision makes it possible to dismiss unwelcome police officers on a discretionary basis, which entails the loss of a number of benefits prescribed for public service. As § 15(2) of the Police Service Act is not in conformity with § 34 of the Constitution, subsections (1), (2)2), (3) and (4) of § 17 of the Act, which deal with guarantees of a police officer upon his or her transfer without his or her consent, can not be in conformity with the Constitution, either.

At the court session the Chancellor of Justice adhered to his petition.

The representative of the Riigikogu argued at the court session that the contested provisions of the Police Service Act were in conformity with the Constitution, and that the petition of the Chancellor of Justice should be dismissed.

In his written opinion submitted to the Constitutional Review Chamber the Minister of Justice is of the opinion that only § 17(3) of the Police Service Act is in conflict with the Constitution, and that the petition of the Chancellor of Justice should be satisfied in part, that is only this provision should be declared invalid.

Having examined the submitted materials and having given a fair hearing to the Chancellor of Justice and to the representative of the Riigikogu, **the Constitutional Review Chamber found:**

§ 15(1)1) of the Police Service Act, in addition to cases specified in the Public Service Act and in the interest of the service, allows for the transfer of a police officer to another position without the police officer's consent, within the same official rank in the same or another police authority. § 15(2) establishes: "Any transfer which results in the change of a police officer's residence shall be prohibited if the last transfer which resulted in the change of residence took place without the consent of the police officer less than five years ago."

The first sentence of § 17(1) of the Police Service Act establishes an obligation to notify the police officer of his or her transfer without his or her consent at least one month in advance; the second sentence establishes an obligation to give a notice concerning a transfer which results in the change of residence at least two months in advance. Subsections (2)2), (3), and (4) of the § 17 stipulate guarantees for police officers upon transfer which results in the change of residence.

II.

§ 15(2) of the Police Service Act in conjunction with § 15(1)1) provides for the possibility to transfer a police officer to another permanent position without his or her consent even if this results in the change of residence.

§ 15(2) of the Police Service Act speaks of "transfer which results in the change of a police officer's residence", the second sentence of § 17(1) speaks of "transfer related to change of residence", and § 17(3) of "transfer of a police officer which results in the change of his or her residence". It appears from these wordings that both the transfer and the change of residence in which it results are compulsory for a police officer.

This conclusion is further supported by §§ 28 and 29 of the Police Service Act. Pursuant to § 28(2) it is possible to require that a police officer work overtime up to 8 hours a day, whereas the duration of a shift together with overtime must not exceed 16 hours, and the duration of overtime within a calendar year must not exceed 300 hours. § 29(1) establishes that a police officer must be at the disposal of the leaders of the police authority and the dispatch service in agreed locations for the performance of urgent police tasks during his or her rest time. The duration of such on call time, pursuant to § 29(2), must not exceed 150 hours per month. Thus, in case of 40-hour working week the maximum duration of police officer's overtime is 7.5 weeks per calendar year and maximum duration of on call time is 3.75 weeks per calendar year. Such a regulation of the service presupposes that a police officer has to live near the place of service.

III.

Putting a person into a situation where he or she has the obligation to change the place of residence, and to choose a new place of residence in only a certain region, restricts the right to choice of residence established by § 34 of the Constitution. The transfer of a police officer, without his or her consent, to another police authority, which results in the change of the place of residence, restricts in all cases of transfer the right to freely choose residence, stipulated in § 34 of the Constitution.

It would be possible to require that a police officer settle in some other region if the possibility to restrict the police officer's right to freely choose his or her residence proceeded from the Constitution.

The first sentence of § 34 of the Constitution establishes the right to freedom of movement and to choice of residence. The second sentence of the same norm makes it possible to restrict the right to freedom of movement in the cases and pursuant to procedure provided by law to protect the rights and freedoms of others, in the interests of national defence, in the case of a natural disaster or a catastrophe, to prevent the spread of an infectious disease, to protect the natural environment, to prevent the leaving of a minor or a person of unsound mind without supervision, or to ensure the administration of a criminal proceedings. Thus, under § 34 of the Constitution, it is only possible to restrict the right to freedom of movement, and not the right to choice of residence.

The possibility to restrict the right to freedom of choice of residence is, *expressis verbis*, established solely by Chapter X of the Constitution, which deals with the national defence.

Pursuant to § 130 of the Constitution, during a state of emergency or a state of war, the right to freedom of choice of residence may be restricted under conditions and pursuant to procedure prescribed by law. The restriction of the police officer's right to freedom of choice of residence imposed by § 15(2) of the Police Service Act (in conjunction with § 15(1)1)) does not relate to a state of emergency or a state of war.

It proceeds from § 124(3) of the Constitution that it is possible to restrict the right to freedom of choice of residence in the interests of the special nature of the service, in regard to persons in the Defence Forces and alternative service. For the purposes of the Armed Forces Service Act a police officer is not a member of the Defence Forces nor a member of the alternative service. Thus, it is not possible to restrict the police officers' right to freedom of choice of residence on the basis of this Constitutional provision, either.

The Constitution provides for very exceptional possibilities to restrict the right to freedom of choice of residence. It can be concluded on the basis of the exceptional nature of the restrictions that the Constitution does not provide for no other possibilities to restrict the right to freedom of choice of residence than those established by §§ 124(3) and 130.

For the above reasons § 15(2) of the Police Service Act is in conflict with § 34 of the Constitution.

The Constitutional Review Chamber considers it necessary to underline that the transition provided for in § 15(2) of the Police Service Act may also prejudice police officers' and their family members' right to family life.

IV.

The Chancellor of Justice is seeking that § 17(1) of the Police Service Act be declared invalid in its entirety. The first sentence of the provision, though, does not extend to such cases when a police officer is required to fulfil an order of transfer resulting in change of residence. It is only the second sentence of the provision that extends to such cases. Thus, it is impossible to satisfy the request of the Chancellor of Justice to declare subsection (1) of § 17 of the Police Service Act invalid in its entirety.

The second sentence of subsection (1) of § 17, subsections (2)2), (3) and (4) of § 17 of the Police Service Act establish guarantees for police officers upon transfer which results in change of residence. As § 15(2) of the Police Service Act, opening up the possibility to require that a police officer fulfil orders relating to transfer which result in change of residence, is unconstitutional, the other aforementioned provisions are unconstitutional, too. To declare invalid only § 15(2) of the Police Service Act would mean that the possibility to require that a police officer fulfil an order of transfer resulting in change of residence would remain open.

Consequently, the second sentence of subsection (1) of § 17, and subsections (2)2), (3) and (4) of § 17 of the Police Service Act are unconstitutional, too.

V.

The Chamber is of the opinion that the view expressed in the written opinion of the Minister of Justice that to satisfy the petition of the Chancellor of Justice would mean that there would still be a possibility, under § 15(1) of the Police Service Act, to transfer a police officer to another police authority, which results in the change of residence, without his or her consent, and that the limits of the possibility to transfer would be extended if the petition was satisfied, is incorrect.

If § 15(2), the second sentence of § 17(1), subsections (2)2), (3) and (4) of § 17 of the Police Service Act were declared invalid, it would be impossible, under § 15(1) of the same Act, to transfer a police officer to another police authority without his or her consent, if the transfer resulted in the change of residence. If certain provisions of an Act have been declared invalid by way of judicial constitutional review proceedings, the other provisions of the Act must be interpreted pursuant to the judgment of the Supreme Court.

It is possible, under § 15(1) of the Police service Act, to transfer a police officer to another police authority without his or her consent only if the police officer is not forced to change his or her place of residence.

Proceeding from § 152 of the Constitution and § 19(1)2) of the Constitutional Review Court Procedure Act, **the Constitutional Review Chamber of the Supreme Court has decided:**

To partially satisfy the petition of the Chancellor of Justice of 18 September 1998, and to declare § 15(2), the second sentence of § 17(1), and subsections (2)2), (3) and (4) of § 17 of the Police Service Act invalid.

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

U. Lõhmus

Chairman of the Constitutional Review Chamber