

S U P R E M E C O U R T
CONSTITUTIONAL REVIEW CHAMBER
C O U R T O R D E R

Case number	5-20-11
Date of order	12 March 2021
Composition of court	Chairman: Villu Kõve; members: Velmar Brett, Hannes Kiris, Ants Kull and Heiki Loot
Case	Review of the constitutionality of failure to issue legal norms laying down the rights of a convicted offender in proceedings concerning a special report of a probation supervisor and collection of evidence on violation of the rules of supervision of conduct in the Code of Criminal Procedure
Basis for proceedings	Tartu County Court judgment of 11 December 2020 in case No 1-20-1090
Participants in the proceedings	Riigikogu Tartu Prison Andres Uibu Chancellor of Justice Minister of Justice
Type of hearing	Written procedure

OPERATIVE PART

To decline to examine the application.

FACTS AND COURSE OF PROCEEDINGS

1. On 27 February 2020, Tartu County Court convicted A. Uibu for repeatedly driving a motor vehicle in a state of intoxication [...] and sentenced him to 1 year and 1 month of imprisonment. Under § 74 of the Penal Code, the court ordered 1 month and 28 days of the sentence to be served immediately while not enforcing the remaining imprisonment of 11 months. The condition for not enforcing the sentence was compliance with the supervisory requirements and duties within a period of probation of 2 years and 2 months. Inter alia, A. Uibu had to refrain from consuming alcohol [...], submit information to a probation supervisor about his compliance with the duties [...] and, to the end of supervision of conduct, submit blood samples to ascertain excess consumption of alcohol while the test result was to remain within the agreed limit [...].

2. On 29 September 2020, a probation officer in Tartu Prison submitted a special report to Tartu County Court noting that the offender had consumed alcohol on 4, 5, 6, 7, 8, 9, 10 and 11 September 2020. Consumption of alcohol on 10 and 11 September was proved by reports of control with an indicator device. Consumption of alcohol was also proved by a reply to the laboratory blood analysis of 18 September 2020 revealing that the biomarker indicator denoting consumption of alcohol was higher than allowed and significantly higher in comparison to previous samples. A. Uibu acknowledged in a written explanation that he had consumed alcohol on 4-10 September 2020. The probation officer thought that imposing additional duties or extending the period of probation would be useless and proposed to the court to activate the remaining part of the sentence.

3. Tartu County Court found that the procedure laid down in the Code of Criminal Procedure (CCrP) does not enable adjudicating the special report on the merits. The court declared the Code of Criminal Procedure to contravene the Constitution insofar as it fails to regulate the rights of a convicted offender in the procedure for examining a special report and the procedure for collecting evidence about violation of the requirements of supervision of conduct. The court declined to examine the special report by the probation officer and referred the order to the Supreme Court on 16 December 2020.

REASONING IN THE ORDER OF TARTU COUNTY COURT

4. In the opinion of Tartu County Court, it could be deemed to have been ascertained by statutory procedure (i.e. with an indicator device) that the convicted offender had consumed alcohol on 10 and 11 September 2020. Therefore, he violated [...] the duty [not to consume alcohol]. It could also be deemed to have been ascertained that the convicted offender violated [...] the

duty to ensure that the blood test result indicating alcohol consumption should remain within the agreed limits. However, it was also necessary to assess alleged alcohol consumption on 4-9 September 2020. The reason was that the court is bound by the report submitted to it and also that [...] the consequence to be applied in respect of the person depends on the severity of the violation ascertained.

5. The only information about alleged alcohol consumption on 4-9 September 2020 was in the explanation written by the individual himself. In essence, this constitutes self-incriminating information by the individual. It is not clear from the Code of Criminal Procedure or the Probation Supervision Act whether and on what conditions this information may be admissible as evidence. It is also not clear whether in the course of probation supervision a convicted offender has the right to know that, based on an explanation given to a probation supervisor, their sentence may be activated and this may lead to deprivation of liberty. This gap prevents adjudicating the special report on the merits.

6. It is also not clear from the Code of Criminal Procedure whether and how additional evidence may be collected about the alleged violation. The rules of adversary procedure cannot be applied by analogy. No legal basis exists for applying the investigative principle. Again, this constitutes a gap that prevents adjudication of the case.

7. In sum, the Code of Criminal Procedure contains two gaps which have created a situation of lack of legal clarity in ensuring the rights laid down by § 20 and § 22(3) of the Constitution. On that basis, the Code of Criminal Procedure contravenes the Constitution insofar as it fails to regulate the rights of a convicted offender in the procedure for examining a special report or the procedure for collecting evidence about violation of the requirements of supervision of conduct.

8. Due to the unconstitutional gaps, the court cannot express an opinion concerning alleged alcohol consumption occurring between 4-9 September 2020. Therefore, on the basis of the special report the court cannot issue a ruling on the merits as to which [statutory] measure to apply.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

[...]

OPINION OF THE CHAMBER

14. The core issue in the case is whether the procedure by which the court must decide how to adjudicate a special report by a probation officer on violation of the requirements and duties of supervision of conduct is regulated in such detail as required by the Constitution. More specifically, the County Court found that, even though the Constitution so requires, two important issues are unregulated on the statutory level. First, it is not laid down whether a convicted offender in these proceedings is entitled not to testify against themselves, whether and how they should be notified of this right and what are the consequences of failure to notify on the admissibility as evidence of explanations given by the convicted offender. Second, whether and how evidence may be collected about violation of the requirements and duties of supervision of conduct is unregulated.

[...]

18. The County Court has wrongly understood the legal norms and the case-law, including the provisions of the Constitution, on which the existence of the gap described by the County Court depends [...].

19. No gap exists in the legal order that would relate to an individual's right not to testify against themselves in proceedings of a probation officer's special report. Probation under § 74 of the Penal Code means granting an individual conditional liberty as an advantage for which the public authority expects the individual to comply with specific requirements and duties. Their more general aim is to achieve the individual's law-abiding behaviour (§ 1(1) Probation Supervision Act). The arrangement of probation presumes the individual's active participation in supervising and improving their behaviour in cooperation with a probation supervisor. As a supervisory requirement applicable to a probationer, § 75(1) clause 3) of the Penal Code also lays down the duty of cooperation, i.e. the duty to submit information to a probation supervisor about compliance with the duties. Inter alia, this means that at the request of the probation supervisor a convicted offender must provide explanations about their activity which may affect probation supervision. If a probation supervisor has reason to suspect that the individual is violating the supervisory requirements, if necessary the convicted offender must account for this, just as they must account for compliance with the duties, if necessary, even when the probation supervisor has no such suspicions (e.g. the duty to submit information about their means of subsistence). Explanations by the probationer are also presumed by § 31(2) of the Probation Supervision Act which regulates drawing up a special report by a probation officer. In conclusion, § 75(1) clause 3) of the Penal Code imposes a duty on a convicted offender subject to supervision of conduct to cooperate with a probation officer in the course of probation, including in complying with the duties imposed on the offender. Certainly, arising from § 22(3) of the Constitution the individual does not have to testify against themselves about possible new offences.

20. Additionally, § 22(3) of the Constitution does not give rise to the obligation within proceedings concerning a probation officer's special report to give the convicted offender the right not to testify against themselves. Section 22(3) of the Constitution is not applicable in these proceedings. Violation of supervisory requirements is not an offence for which the individual would be

convicted and a punishment imposed. The individual's conviction and punishing them with imprisonment has already been decided in earlier criminal proceedings. Activation of imprisonment in the situation where an individual has been left limited freedom only on the conditions imposed by the court is not comparable with previous conviction and a sentence of imprisonment (see also European Court of Human Rights decision of 7 September 1999 in the case of *Ganusauskas v. Lithuania*, No 47922/99, and the decision of 26 October 2004 in the case of *Brown v. the United Kingdom*, No 968/04, where it was found that the procedural rights under Article 6 of the Convention on Human Rights and Fundamental Freedoms are not applicable in comparable proceedings). Therefore, these are not proceedings where the right granted by § 22(3) of the Constitution could be relied on.

21. Also as regards failure to regulate the procedure for collecting evidence as described by the County Court, this is not a gap but a broad margin of appreciation for the court granted by the Code of Criminal Procedure and recognised and interpreted through long-standing case-law of the courts. The rules for collecting evidence have not been left unregulated but, instead, the court as implementer of the law has been left the right for case-by-case decision-making when shaping the proceedings (cf. Supreme Court *en banc* judgment of 3 July 2012 in case No 3-1-1-18-12, para. 49, where the Court *en banc* emphasised that in deciding on activation of imprisonment under § 74(4) of the Penal Code the judge in charge of execution enjoys a broad margin of appreciation). Similarly to the choice of consequences under § 74(4) of the Penal Code, a broad margin of appreciation is also available in shaping the proceedings. Under § 74(4) of the Penal Code, a judge must first ascertain whether the preconditions exist for applying § 74(4) of the Penal Code. In addition to ascertaining the factual circumstances, a judge in charge of execution must choose the most appropriate legal consequence (judgment in case No 3-1-1-18-12, para. 49, cited above). Ascertaining the preconditions for application (i.e. ascertaining violation of the requirements) or the choice of an appropriate consequence (correct use of discretion) might also not be conceivable in every case without collecting evidence in judicial proceedings. Thus, if necessary, the court must also be able to collect evidence at its own discretion, yet while keeping in mind that the issue is rather in need of a quick resolution.

22. Certainly, the above does not mean complete and uncontrolled freedom. The Code of Criminal Procedure provides the general frame for proceedings [...], also from the aspect of general conditions for proof and collecting evidence [...]. The court is restricted by other provisions of the Constitution and the general procedural principles enshrined in them. Also in this context effective and fair proceedings mean that a person must be able to obtain a decision favourable for them in proceedings which guarantee the opportunity for participation, hearing and appeal along with opportunities to submit evidence in one's favour and to express an opinion about the evidence presented against oneself.

23. This margin of appreciation is also restricted by opinions acknowledged in case-law [...] according to which a court must assess whether a requirement was violated intentionally or through negligence and by what the person justifies their violation, as well as whether the reason given as justification is compelling or not; [...] in which an assertion was disregarded that according to the convicted offender's own explanation it is not allowed to deem violation of the ban on consuming alcohol as having been ascertained since the requirements of the Police and Border Guard Act have not been complied with). The decisions are subject to judicial review by way of appeal [...] which gives the opportunity to develop uniform case-law on debatable procedural issues.

24. In view of the foregoing, no gap exists in the procedure for collecting evidence whose constitutionality the Chamber could assess.

25. Moreover, § 20 of the Constitution does not give rise to an obligation to regulate collecting evidence in adjudicating a special report by a probation officer with similar thoroughness as in proceedings where a person is convicted of committing a criminal offence and is punished by imprisonment. Activating a sentence of imprisonment does not involve deciding anew on a person's conviction and punishment with deprivation of liberty but a decision on whether a person released from imprisonment on probation has violated the requirements and duties of supervision of conduct and if the person has violated them then whether to the extent that leads to activation of the sentence or another appropriate measure. In the case of activating a sentence of imprisonment, the basis for deprivation of a person's liberty within the meaning of § 20(2) of the Constitution is still the judgment of conviction issued previously on the grounds and according to procedure laid down by law (§ 20(2) clause 1) of the Constitution). Therefore, activating a sentence of imprisonment is not a new separate deprivation of liberty within the meaning of § 20 of the Constitution. Violation of supervisory requirements and duties by a person released on probation does not lead to a new deprivation of liberty but only to activating a sentence of imprisonment already imposed and, along with this, to the end of a conditional stay of the convicted person at liberty. Deciding on this is generally procedurally, legally as well as evidentially considerably less complicated than the preceding criminal proceedings, and, within the meaning of § 20(2) of the Constitution, the procedure laid down for this by law, including the procedure for collecting evidence, does not have to meet the same strict requirements as the preceding procedure for conviction and sentencing (cf. Supreme Court Criminal Chamber order of 11 March 2015 in case No 3-1-1-9-15, para. 31, European Court of Human Rights decisions in the cases of *Ganusauskas v. Lithuania* and *Brown v. the United Kingdom* cited above).

26. In conclusion, the legal order does not contain the gap described by the County Court the constitutionality of which the Supreme Court could assess. On that basis, the application is not admissible and its examination should be declined.