THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA

DECISION

ON REFUSING TO CONSIDER THE PETITION OF THE SUPREME ADMINISTRATIVE COURT OF LITHUANIA REQUESTING AN INVESTIGATION INTO THE COMPLIANCE OF ARTICLE 22 OF THE REPUBLIC OF LITHUANIA'S LAW ON THE ENFORCEMENT OF PRETRIAL DETENTION WITH THE CONSTITUTION OF THE REPUBLIC OF LITHUANIA

9 May 2016, No. KT12-S5/2016

Vilnius

The Constitutional Court of the Republic of Lithuania, composed of the Justices of the Constitutional Court: Elvyra Baltutytė, Vytautas Greičius, Danutė Jočienė, Pranas Kuconis, Gediminas Mesonis, Vytas Milius, Egidijus Šileikis, Algirdas Taminskas, and Dainius Žalimas

The court reporter—Daiva Pitrėnaitė

The Constitutional Court of the Republic of Lithuania, in its procedural sitting, considered the petition (No. 1B-9/2016) of the Supreme Administrative Court of Lithuania, the petitioner.

The Constitutional Court

has established:

1. The Constitutional Court received the petition of the Supreme Administrative Court of Lithuania requesting "an investigation into the compliance of Article 22 of the Republic of Lithuania's Law on the Enforcement of Pretrial Detention (wording valid from 1 January 2013 until 1 September 2015), insofar as the said article provides neither for the right of detained persons to long-term visits nor for the procedure for implementing this right, with Paragraph 1 of Article 22, Paragraph 1 of Article 29, and Paragraph 1 of Article 38 of the Constitution of the Republic of Lithuania and with the constitutional principle of a state under the rule of law."

2. After suspending the consideration of an administrative case, the petitioner applied to the Constitutional Court regarding the compliance of the impugned legal regulation with the Constitution. In the said case, the Supreme Administrative Court of Lithuania was dealing with a dispute in connection, *inter alia,* with compensation for non-pecuniary damage relating to the denial of long-term conjugal visits to a concrete detained person on the basis of Article 22 of the Republic of Lithuania's Law on the Enforcement of Pretrial Detention (wording of 1 July 2008; hereinafter—also the Law on the Enforcement of Pretrial Detention).

3. The petition is substantiated by the following arguments.

3.1. Article 22 (its wording valid until 31 March 2016 and its wording of 23 June 2015 that came into force on 1 April 2016) of the Law on the Enforcement of Pretrial Detention does not provide for the right of detained persons to long-term conjugal visits, while this right, under Paragraph 1 (wordings of 27 June 2002 and 23 June 2015) of Article 94 of the Republic of Lithuania's Code on the Execution of Sentences, is granted to convicted persons who serve their prison sentences. Thus, upon establishing the right to long-term visits, certain groups of persons who are virtually in a similar situation, i.e. they are imprisoned and excluded from society, are treated differently: from the viewpoint of their right to private and family life, the right of such groups of persons to be visited by loved ones is equally important for them.

There are not any objective and compelling reasons why the right to long-term visits is not granted to detained persons who are not convicted yet and, on the basis of the principle of presumption of innocence, must be considered innocent given that Paragraph 1 of Article 20 the Law on the Enforcement of Pretrial Detention provides for the right of detained persons to enter into marriage under procedure laid down in the Civil Code of the Republic of Lithuania.

In view of the fact that the legislature has granted the right to convicted persons to long-term visits, the impugned legal regulation, whereby no such right is granted to detained persons, restricts the right of detained persons to private and family life and such a restriction cannot in all cases be justified (i.e. there may be situations where there is no actual and legal need to restrict the right to long-term visits, however, the legislature has not provided for the assessment of such situations in concrete cases). The aforesaid legal regulation can violate Paragraph 1 of Article 22, Paragraph 1 of Article 29, and Paragraph 1 of Article 38 of the Constitution as well as the constitutional principle of a state under the rule of law.

3.2. According to the petitioner, the constitutional right to private and family life, as well as the protection of the said right, must be interpreted in the light of the international obligations of the State of Lithuania that were assumed upon the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter—the Convention); the aforementioned right must also be interpreted taking account of the jurisprudence of the European Court of Human Rights (hereinafter—the ECtHR) that applies the provisions of the Convention in analysing the content of the right to private and family life, its interpretation and application upon deprivation of liberty, as this jurisprudence, as a source of the interpretation of law, is important for the interpretation of Lithuanian law.

The content of the rights provided for in Articles 22 and 38 of the Constitution is basically in line with the right to respect for private and family life as guaranteed by Article 8 of the Convention; in addition, the constitutional principle of the equality of all persons before the law is analogous to the prohibition of discrimination as consolidated in Article 14 of the Convention.

Article 8 of the Convention gives rise both to the duty to respect the right of everyone to family life and to the prohibition precluding the imposition of any restriction on using this right. Thus, any interference with family and private life, which is unjustified under the Convention, may be considered an encroachment on the right to respect for private and family life that is protected under the Convention, whereas legitimate restrictions must be proportionate to the aim sought, they must be laid down in a law and must be applied only when this is necessary in a democratic society where the state seeks to achieve the aims specified in the Convention. Where persons are granted the right to long-term visits, *inter alia*, the right to family life, to cultivate and foster close relations is implemented; the said right is equally important to all members of society regardless of their status and in this case it is not important whether a person is detained or convicted. Therefore, there is no ground for deciding not to provide for the right of detained persons to long-term visits and for treating this right differently with regard to detained and convicted persons.

The ECtHR jurisprudence, as regards the interpretation of Article 14 of the Convention that prohibits discrimination, i.e. a more favourable treatment of certain persons compared with other persons in the absence of an objective and reasonable justification, is also important for the interpretation of Article 29 of the Constitution. According to the ECtHR, Article 14 of the Convention is applicable in cases where the right to visits from loved ones is provided for with regard to both detained persons and convicted persons who serve their prison sentences (the ECtHR judgment of 13 December 2011 in the case of *Laduna v. Slovakia* (application No. 31827/02); the ECtHR judgment of 9 July 2013 in the case of *Varnas v. Lithuania* (application No. 42615/06)).

The doubts have arisen over the constitutionality of the impugned legal regulation in view of the fact that, in its judgment of 9 July 2013 in the case of *Varnas v. Lithuania* (application No. 42615/06), the ECtHR, emphasising that the legal acts of Lithuania restrict the visiting rights of persons remanded in custody to a greater extent than those of convicted persons placed in a correctional home and finding that the applicant (remand prisoner) had been restricted from receiving long-term conjugal visits in the absence of a reasonable and objective justification for the difference in treatment between remand prisoners and convicted persons, held that there had been a violation of Article 14 of the Convention in conjunction with Article 8.

3.3. Providing for the right of convicted persons to long-term visits and the procedure for the implementation of this right in Article 94 of the Code on the Execution of Sentences, while failing to consolidate any provisions regarding granting such a right or the possibility of implementing it in Article 22 of the Law on the Enforcement of Pretrial Detention, the legislature created a legislative omission, i.e. such a legal gap that is prohibited by the Constitution.

In Lithuania, detained persons do not have the right to long-term visits at all, regardless of the reasons for their detention, the place of custody, the related security considerations, their subsequent conduct, the length of detention, etc. There is no established procedure for assessing the possibility of allowing detained persons to receive long-term visits and there are no legal preconditions for assessing individual situations so that there might be an objective and justifiable reason to treat detained persons in a different manner compared with convicted persons for whom the Code on the Execution of Sentences provides such a possibility.

The exhaustive regulation of the rights of detained persons that is established in the Law on the Enforcement of Pretrial Detention should also be regarded as confirming the necessity arising from the constitutional imperatives of the clarity of a legal regulation to explicitly establish such significant aspects of the legal regulation as the opportunity of detained persons to receive long-term visits namely in Article 22 of the Law on the Enforcement of Pretrial Detention in which the provisions regarding the right of detained persons to receive visits are consolidated.

The Constitutional Court

holds that:

1. The petitioner requests an investigation into the compliance of Article 22 of the Law on the Enforcement of Pretrial Detention, insofar as the said article provides neither for the right of detained persons to long-term visits nor for the procedure for implementing this right, with Paragraph 1 of Article 22, Paragraph 1 of Article 29, and Paragraph 1 of Article 38 of the Constitution and with the constitutional principle of a state under the rule of law.

2. Article 22 “The Right of Detained Persons to Receive Visits” of the Law on the Enforcement of Pretrial Detention (wording of 1 July 2008) prescribed:

“1. The number of visits from relatives and other persons shall not be limited for detainees, however, the administration of a pretrial detention facility allows such visits only upon written consent either by the prosecutor who is either in charge of or conducts the investigation or the court with which the relevant case was filed. Such consent may be one-off or multiple. If the prosecutor who is either in charge of or conducts the investigation or the court with which the relevant case was filed does not give its consent to allowing a detainee to receive visits from relatives or other persons, the detainee and the administration of the relevant pretrial detention facility must be presented a reasoned decision.

2. A visit received by a detainee may not exceed two hours.

3. The detained persons specified in Items 1, 2, and 4 of Paragraph 2 of Article 12 of this Law who wish to receive a visit do not need the written consent of the prosecutor who is either in charge of or conducts the investigation or the court with which the relevant case was filed. These persons have the right to receive one visit.

4. The procedure for receiving visits is established by the Internal Regulations for Pretrial Detention Facilities."

Thus, the impugned Article 22 of the Law on the Enforcement of Pretrial Detention established the right of detained persons to receive visits for up to two hours.

In this context, it should be mentioned that, under Paragraph 1 of Article 94 of the Code on the Execution of Sentences, which was adopted on 27 June 2002, convicted persons serving their prison sentences were allowed to receive short-term and long-term (up to 48 hours) visits.

It should be noted that, if compared with the aforementioned provisions of the Code on the Execution of Sentences, the impugned Article 22 of the Law on the Enforcement of Pretrial Detention established the right for detained persons to receive only short-term visits, whereas no right to long-term visits was granted to them.

3. On 23 June 2015, the Seimas adopted the Republic of Lithuania's Law Amending Articles 2, 7, 8, 9, 10, 11, 12, 16, 22, 23, 24, 27, 28, 30, 32, 34, 37, 38, 41, 42, 44, and 48 of the Law on the Enforcement of Pretrial Detention (No. I-1175) (hereinafter—the Amending Law).

3.1. Paragraph 1 (valid as of 1 April 2016) of Article 9 of the Amending Law amended the impugned Article 22 of the Law on the Enforcement of Pretrial Detention: it changed the procedure for allowing short-term visits, however, no right to long-term visits was established for detained persons.

3.2. By Paragraph 2 of Article 9 of the Amending Law, Article 22 of the Law on the Enforcement of Pretrial Detention was set out in its new wording, providing, among other things, for the right of detainees to long-term visits (up to 24 hours) allowed not earlier than after two weeks from the day they were remanded in custody and not more than once a month (Paragraph 6). According to Paragraph 3 of Article 23 of the Amending Law, Paragraph 2 of Article 9 thereof will come into force on 1 January 2017.

3.3. It is clear from the explanatory note to the draft Amending Law that this law was adopted, *inter alia*, in order to enforce the ECtHR judgment of 9 July 2013 in the case of *Varnas v. Lithuania* (application No. 42615/06), which came into force on 9 December 2013. By the said judgment, the ECtHR recognised that the legal acts of Lithuania restrict remand prisoners' visiting rights in a general manner and to a greater extent than those of convicted persons placed in a correctional home, therefore, there was a violation of Article 14 "Prohibition of Discrimination" in conjunction with Article 8 "Right to Respect for Private and Family Life" of the Convention.

4. In this context, it should be mentioned that, on 23 June 2015, the Seimas also adopted the Republic of Lithuania's Law Amending the Code on the Execution of Sentences by which, among other things, Paragraph 1 of Article 94 of the Code on the Execution of Sentences was amended. The Seimas stipulated in the said paragraph, *inter alia,* that convicted persons serving their prison sentences have the right to receive long-term visits (up to 24 hours). This provision came into force on 1 April 2016.

5. In its petition, the Supreme Administrative Court of Lithuania points out that, in order to deal with the dispute in the administrative case considered by it, Article 22 of the Law on the Enforcement of Pretrial Detention is of relevance, as the said article fails to provide either for the right of detained persons to long-term visits or for the procedure for implementing this right. In addition, the petitioner states that the doubts over the constitutionality of the impugned legal regulation arose also in view of the aforementioned judgment of the ECtHR in the case of *Varnas v. Lithuania*. The petitioner also maintains that, having ratified the Convention, the State of Lithuania assumed the relevant international obligations; as a source of the interpretation of law, the jurisprudence of the ECtHR that applies the provisions of the Convention is important for the interpretation of Lithuanian law.

Thus, it is clear from the petition that the unconstitutionality of the impugned legal regulation is argued not only on the basis of the provisions of both the Constitution and the official constitutional doctrine, but also on the basis of the provisions of the Convention and the ECtHR jurisprudence, including the aforesaid judgment of the ECtHR in the case of *Varnas v. Lithuania.*

6. It should be noted that, as it has been held by the Constitutional Court on more than one occasion:

– the application of a court to the Constitutional Court with a petition requesting an investigation into the compliance of a legal act with a higher-ranking legal act, *inter alia,* with the Constitution, and the investigation into that compliance are not an objective in itself; the purpose of the application (as a constitutional institute) of a court to the Constitutional Court is to ensure the administration of justice *(inter alia*, the Constitutional Court's decision of 13 November 2007 as well as its rulings of 29 June 2012 and 27 August 2013);

– under the Constitution and the Law on the Constitutional Court, a court may apply to the Constitutional Court with a petition requesting an investigation into whether not any law (part thereof) or other legal act (part thereof) is in conflict with the Constitution, but only such a law (part thereof) or other legal act (part thereof) that must be applied in the respective case considered by that court *(inter alia,* the Constitutional Court's decisions of 22 May 2007, 29 October 2009, and 29 August 2014).

7. In this context, the following provisions of the official constitutional doctrine should be mentioned:

– international treaties ratified by the Seimas acquire the force of a law; this doctrinal provision may not be interpreted as meaning that, purportedly, it is permitted for the Republic of Lithuania not to observe its international treaties where its laws or constitutional laws establish a different legal regulation if compared to that established in the international treaties; in the cases where a national legal act (obviously, with the exception of the Constitution itself) establishes such legal regulation that competes with the one established in an international treaty, the international treaty must be applied *(inter alia,* the Constitutional Court's rulings of 14 March 2006, 5 September 2012, and 18 March 2014);

– the norms of the Convention must be implemented in reality, while any violation of the rights and freedoms enshrined therein must not be interpreted as meaning that the laws allegedly provide for something else;

the Contracting States to the Convention must ensure within their domestic legal system the effective implementation of the norms of the Convention (the Constitutional Court's conclusion of 24 January 1995);

– the ECtHR was set up to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and protocols thereto (the Constitutional Court's ruling of 5 September 2012); as a source of the interpretation of law, the ECtHR jurisprudence is important for the interpretation of Lithuanian law *(inter alia,* the Constitutional Court's rulings of 8 May 2000 and 5 March 2015).

8. It also needs to be mentioned that, under Paragraph 2 of Article 11 of the Republic of Lithuania's Law on International Treaties, if a ratified treaty of the Republic of Lithuania that has entered into force establishes norms other than those laid down in the laws or other legal acts of the Republic of Lithuania that are in force at the moment of the conclusion of the treaty or entered into force after the entry into force of the treaty, the provisions of the treaty of the Republic of Lithuania shall prevail.

9. It is clear from the arguments of the petitioner that, in its opinion, Article 22 of the impugned Law on the Enforcement of Pretrial Detention, insofar as the said article provides neither for the right of detained persons to long-term visits nor for the procedure for implementing this right, is not in line with the provisions of the Convention. Thus, the Supreme Administrative Court encountered a collision between the provisions of the law and those of the Convention in the aforesaid administrative case considered by it.

It should be noted that a collision between the provisions of a law and those of an international treaty is an issue of the application of law; such an issue must be decided by taking account of the aforementioned provisions of the official constitutional doctrine and those of the Law on International Treaties. Thus, although the relevant subject of public administration applied the provisions of the Law on the Enforcement of Pretrial Detention when it refused to grant long-term visits, however, the petitioner, before addressing the Constitutional Court, should have decided which legal regulation—the impugned one or the one laid down in the Convention—was applicable in the aforesaid administrative case, i.e., taking account of the aforementioned provisions of the official constitutional doctrine and those of the Law on International Treaties, the Supreme Administrative Court should have decided the issue of the application of law in the case of a collision between the law and the Convention.

10. It needs to be emphasised that, under the Constitution and the Law on the Constitutional Court, the Constitutional Court does not decide the questions concerning the application of legal acts: such questions are decided by the institution that has the powers to apply legal acts; the issues of the application of law that have not been solved by the legislature are a matter of judicial practice; petitions requesting the interpretation as to how the provisions of a law (or another legal act) must be applied do not fall under the jurisdiction of the Constitutional Court *(inter alia,* the Constitutional Court's decisions of 20 November 2006, 17 June 2014, and 15 January 2015).

11. Under Item 2 of Paragraph 1 of Article 69 of the Law on the Constitutional Court, the Constitutional Court, by its decision, refuses to consider petitions requesting an investigation into the compliance of a legal act

with the Constitution if the consideration of the petition does not fall under the jurisdiction of the Constitutional Court.

12. In view of what has been stated above, the conclusion should be drawn that there are grounds for refusing to consider the petition of the Supreme Administrative Court of Lithuania, the petitioner, requesting an investigation into the compliance of Article 22 of the Law on the Enforcement of Pretrial Detention, insofar as the said article provides neither for the right of detained persons to long-term visits nor for the procedure for implementing this right, with Paragraph 1 of Article 22, Paragraph 1 of Article 29, and Paragraph 1 of Article 38 of the Constitution and with the constitutional principle of a state under the rule of law.

Conforming to Paragraphs 3 and 4 of Article 22, Article 28, Item 2 of Paragraph 1 and Paragraph 2 of Article 69 of the Law on the Constitutional Court of the Republic of Lithuania, the Constitutional Court of the Republic of Lithuania adopts the following

decision:

To refuse to consider the petition (No. 1B-9/2016) of the Supreme Administrative Court of Lithuania, the petitioner, requesting an investigation into the compliance of Article 22 of the Republic of Lithuania's Law on the Enforcement of Pretrial Detention (wording of 1 July 2008), insofar as the said article provides neither for the right of detained persons to long-term visits nor for the procedure for implementing this right, with Paragraph 1 of Article 22, Paragraph 1 of Article 29, and Paragraph 1 of Article 38 of the Constitution of the Republic of Lithuania and with the constitutional principle of a state under the rule of law.

This decision of the Constitutional Court is final and not subject to appeal.

Justices of the Constitutional Court: Elvyra Baltutytė
Vytautas Greičius
Danutė Jočienė
Pranas Kuconis
Gediminas Mesonis
Vytas Milius
Egidijus Šileikis
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