



JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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Judge of the Constitutional Court

Jānis Neimanis

DISSENTING OPINION

Rīga, 1 November 2024

Case No. 2023-42-01

“On conformity of Section 185, Paragraph four of the Law on Administrative Liability with the fourth sentence of Article 92 of the Constitution of the Republic of Latvia”

I cannot agree with the opinion of the Constitutional Court that Section 185, Paragraph four of the Law on Administrative Liability (hereinafter – the contested norm) conforms to the fourth sentence of Article 92 of the Constitution of the Republic of Latvia.

1. In the present case, the authority which issued the contested norm, i.e. the *Saeima*, acknowledged that the purpose of the contested norm was not at all to restrict the right of the defence counsel to sign the complaint of the person to be held administratively liable to the court.

On the contrary, the Constitutional Court concluded that the contested norm, however, restricted the right of the defence counsel of the person to be held administratively liable to sign a complaint in order to submit it to the court, which was reasonable, but it did restrict the right to receive legal assistance provided by the defence counsel.

It is difficult to see a logical link between these aspects.

2. The right to the assistance of counsel is personal liberty, which means the freedom to choose the defence counsel, to receive assistance from the defence counsel, and with the help of the special legal knowledge and skills of the defence counsel to use the remedies available to the person in the most effective way to protect his or her rights.

A person exercises the right to the assistance of counsel by instructing the defence counsel to act for and on behalf of the person. Since the person is acting within the scope of his or her liberty (private autonomy), he or she entrusts the defence counsel with the task by contract. The contract regulates the relationship between the defence counsel and the person internally. The defence counsel discloses the receipt of the assignment externally, for example, by means of a power of attorney (in Latvia also an order) which is presented to the relevant authorities when dealing with matters necessary for the fulfilment of the assignment.

The right to the assistance of counsel is both personal liberty protected by the respective fundamental rights and, on the other hand, a positive obligation of the state to ensure the right to the assistance of counsel under certain circumstances, for example, for persons whose freedom of choice is substantially restricted (e.g. a deprived person, a minor, or a person with a mental disability).

Of course, the right to the assistance of counsel also guarantees the right of a person to a fair trial and facilitates its full and effective exercise.

3. The right to the assistance of counsel includes the provision of legal assistance by defending and representing a person in court, in pre-trial investigations, before state, local government, or private institutions, by providing legal consultations, preparing legal documents, and performing other legal activities (*see, for example, the concept of an advocate in Section 3 of the Advocacy Law of the Republic of Latvia*).

Since the contested norm prevents the person to be held administratively liable from giving the respective assignment (or to include in the assignment of defence), i.e.

signing a complaint in order to submit it to the court, it restricts the right to the assistance of counsel, limiting the right of a person in this aspect.

The Constitutional Court had to consider the contested norm as restrictive of the respective fundamental rights, even if, in general, the right to the assistance of counsel promotes and guarantees the exercise of the right to a fair trial.

4. The right to the assistance of counsel is not absolute; it may be subject to certain limitations, insofar as they are prescribed by or on the basis of law, are necessary in a democratic society, and are proportionate.

The Constitutional Court recognised that the contested norm served the purpose of personal connection of the person to be held administratively liable with the administrative offence case, personal participation in such case, ensuring the functioning of a democratic state (*Paragraph 11.1 of the judgment*).

I agree that the legal status of the person to be held administratively liable is a special personal status and cannot be transferred to another person. This is also reflected in the text of the second sentence of Section 40, Paragraph two of the Law on Administrative Liability that the person to be held liable shall fulfil his or her obligations in person insofar as the administrative offence case requires personal fulfilment of obligations.

However, submission of a complaint against a decision of the institution is not a personal obligation. It is a right, not an obligation. Submission of a complaint against a decision of the institution is not the fulfilment of an obligation, but the exercise of a procedural right, i.e. a legal remedy. Such procedural right is only available to the person to be held administratively liable, but may be exercised by a defence counsel.

A defence counsel, acting on behalf of a person as his or her defence counsel is entitled both to replace him or her in exercising the procedural rights conferred on him or her and to exercise the rights directly conferred on the defence counsel himself or herself (if any). The right to appeal is a procedural right, the same as the right to make submissions on evidence (attachment, disclosure), to question witnesses, etc.

The existence of such right does not preclude the court from requiring the person to be held administratively liable to appear in person at an oral court hearing, if necessary.

Thus, if the person to be held administratively liable has decided that he or she will pursue a legal remedy (a complaint to the court), he or she may instruct a defence counsel to take further procedural steps, and it is neither objective nor reasonable for the legislator to prevent a defence counsel from signing the complaint directly.

As the situations of the applicants in the case, as well as court decisions in other administrative offence cases have shown, restricting the right to the assistance of counsel in signing a complaint has in the end only resulted in restricting the right of appeal to the person to be held administratively liable. As a result of the contested norm, the complaint signed by the defence counsel within the scope of the assignment given by the person was not accepted by the court, the procedural defect could not be remedied due to the limited time limit provided for by law, as a result of which the person was left without a legal remedy.

The contested norm does not have the purpose of ensuring the personal participation of the person to be held administratively liable; moreover, as the *Saeima* itself, as the authority which issued the contested norm, has indicated in the case, it did not intend to impose such restriction at all.

5. The Constitutional Court made a general conclusion that, notwithstanding the contested norm, in general the person to be held administratively liable was not prevented from receiving legal assistance provided by a defence counsel (*see Paragraph 11.2 of the judgment*).

I believe that such approach poses a risk to the protection of the right to the assistance of counsel. It allows the state to restrict certain manifestations of the right to the assistance of counsel without assessing the necessity and proportionality of a particular restriction in a democratic society, but instead by assessing whether the right to the assistance of counsel is generally preserved.

This raises further questions as to which rights that are part of the right to the assistance of counsel are its basic elements and the lack of which would already deny (in the opinion of the Constitutional Court – would not guarantee) the right to the assistance of counsel, and which – not yet.

Judge*

J. Neimanis

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