



JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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Judges of the Constitutional Court

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DISSENTING OPINION

Rīga, 31 October 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”

On 18 October 2024, the Constitutional Court delivered a judgment in 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” (hereinafter – the Judgment) whereby it was recognised that Section 185, Paragraph four of the Law on Administrative Liability conforms to the fourth sentence of Article 92 of the Constitution of the Republic of Latvia (hereinafter – the Constitution).

We cannot agree with the methodology applied by the Constitutional Court to assess the constitutionality of the contested norm, as well as with the conclusion that Section 185, Paragraph four of the Law on Administrative Liability conforms to the fourth sentence of Article 92 of the Constitution.

While arguing our opinion, we will use the abbreviations used in the Judgement.

1. In Paragraph 10 of the Judgment, the Constitutional Court concludes that the

right of any person to the assistance of counsel is the procedural guarantee included in the fourth sentence of Article 92 of the Constitution which ensures the exercise of the right of a person to a fair trial. Consequently, the Constitutional Court assessed the constitutionality of the contested norm by formulating and applying the methodology of verifying the fair trial guarantees. In particular, the court first examined whether there were objective and reasonable grounds for the fact that the defence counsel of a natural person to be held administratively liable has no right to sign a complaint in order to submit it to the court, and then verified whether the fact that the defence counsel of a natural person to be held administratively liable has no right to sign a complaint in order to submit it to the court in general ensures that the person had the legal assistance necessary to exercise his or her right to defence.

We cannot agree with the conclusion that the right of any person to the assistance of counsel should be regarded as the procedural guarantee included in the fourth sentence of Article 92 of the Constitution and not as the fundamental rights of the individual contained in this Article. We consider that the conformity of the contested norm with the Constitution had to be assessed by applying the methodology of assessing the constitutionality of the restriction on fundamental rights, i.e. by ascertaining whether the restriction on fundamental rights is established by law, whether it has a legitimate objective, and whether it is proportionate.

In Case No. 2023-42-01, the Constitutional Court essentially had to answer the following question: what is the scope of qualified legal assistance to which, in accordance with the fourth sentence of Article 92 of the Constitution, a person is entitled when exercising his or her right to defence in court in the prosecution proceedings, and also had to assess whether the legal regulation included in the contested norm, which does not provide for the right to the defence counsel of a natural person who is an adult to be held administratively liable to sign a complaint in order to submit it to the court, conforms to the right to the assistance of counsel included in the fourth sentence of Article 92 of the Constitution.

We agree with the conclusion reached in Paragraph 10 of the Judgment concerning the scope of the right to the assistance of counsel. In other words, in prosecution proceedings, such as administrative offence proceedings, legal assistance

in the conduct of the defence means not only the participation of the counsel in providing the defence, but also actually acting in the interests of the defendant. Such *de facto* action also includes signing a complaint in the interests of the defendant in order to submit it to the court.

Moreover, we consider that the right to the assistance of counsel to the abovementioned extent covers the fundamental rights of the individual deriving from Article 92 of the Constitution, and not the procedural guarantee to be ensured by establishing the procedures for hearing a case appropriate to the law. The right of a person to receive practical and efficient legal assistance through a defence counsel of his or her own choice results directly from the fourth sentence of Article 92 of the Constitution. Such right is not declaratory, and the content thereof can be specified in each individual situation by interpreting the fourth sentence of Article 92 of the Constitution in conjunction with other norms of the Constitution and international human rights norms.

The contested norm excludes one of the elements of legal assistance, i.e. signing a complaint in order to submit it to the court, from the scope of legal assistance available to a person. Preventing the defence counsel from signing a complaint in order to submit it to the court excludes the provision of legal assistance in a way that best suits the needs of the defendant. Hence, the legal assistance provided by the defence counsel no longer ensures that the rights and legal interests of the person are defended in the best and most appropriate way, i.e. these rights are no longer ensured in a practical and efficient manner.

Consequently, we consider that the contested norm restricts the fundamental rights of the individual included in the fourth sentence of Article 92 of the Constitution, namely the right to the assistance of counsel, and does not derogate from the procedural guarantee of a fair trial. In addition, in order to establish whether the restriction on the fundamental rights of the individual was justified, the constitutionality of the regulation included in the contested norm had to be assessed by applying the methodology of assessing the constitutionality of the restriction on fundamental rights in the same way as it had been applied in previous cases related to representation and the right to the assistance of counsel (*see the judgment of the*

Constitutional Court of 27 June 2003 in Case No. 2003-04-01 and the judgment of the Constitutional Court of 6 November 2003 in Case No. 2003-10-01).

2. In Paragraph 11 of the Judgment, the Constitutional Court concludes that there are objective and reasonable grounds for the provision in the contested norm that the defence counsel of a natural person to be held administratively liable has no right to sign a complaint in order to submit it to the court. The majority of the judges of the Constitutional Court saw the essential public interest, i.e. objective and reasonable grounds for the contested norm, in the need to ensure the efficiency of the judicial proceedings and, consequently, proper functioning of a democratic state governed by the rule of law. In Paragraph 11 of the Judgment, the Constitutional Court concludes that in the interests of an efficient administrative offence procedure it is necessary that a natural person of legal age who is to be held liable participates in an administrative offence case in person, i.e. to explain the circumstances of the offence and to provide other information necessary for decision-making in the case, which is known only to the person himself or herself. The judgment emphasises the decisive importance of the handwritten signature of the person, pointing out that in a written procedure, which is how administrative offence proceedings are mostly examined by court, a person cannot otherwise be personally involved in the proceedings.

As recognised by the Constitutional Court, the decisive circumstance in any case in verifying the constitutionality of the contested norm is whether in a given situation a fair balance is achieved between public interests, on the one hand, and the interests of the respective person, on the other hand (*see Paragraph 11.2 of the judgment of the Constitutional Court of 20 October 2011 in Case No. 2010-72-01*). We consider that such a fair balance has not been achieved in the case of the contested norm, since no substantial public interest has been established, the protection of which was such as to prevent the defence counsel of a natural person of legal age who is to be held liable from exercising one of the elements of practical and efficient legal assistance, i.e. signing a complaint in order to submit it to the court. In other words, the restriction on the fundamental rights does not have a legitimate objective.

2.1. The principle of personal participation is provided for in Sections 40 and

54 of the Law on Administrative Liability, as well as emphasised in legal doctrine and case law. As stated in Paragraph 9 of the Judgment, it follows from the development materials of the contested norm that by including the principle of personal participation in the Law on Administrative Liability the legislator intended to establish such procedure for the examination of administrative offence cases that the circumstances relevant to the case and the subjective attitude of the person to be held liable towards them would be ascertained as accurately and efficiently as possible. Such regulation, which is linked to the implementation of the principle of personal participation with a view to ensuring prompt and efficient conduct of administrative offence proceedings, could in general be aimed at protecting important public interests. There is no doubt that personal participation of a person can contribute to the efficiency of the judicial process and is even necessary in certain cases.

However, it is not apparent what benefit the judicial system of a democratic state governed by the rule of law or other important public interests as a whole directly derive from the restriction on fundamental rights laid down in the contested norm. The court must in any event decide on the claim contained in the complaint in administrative proceedings. In the decision-making process, the court itself must, if necessary, examine the evidence presented in the case and request explanations from the person to be held liable. If the court considers that it is necessary to clarify the subjective opinion of the person to be held liable in order to examine the case objectively, it shall decide to examine the case in the oral procedure (*see Section 185, Paragraph one and Section 178 of the Law on Administrative Liability*). However, if the administrative offence case is examined in the written procedure, the court, when preparing it for examination, has the right to request the parties to the proceedings to answer in writing questions on the factual circumstances and legal substance of the administrative offence case, prescribing a reasonable time limit for the submission of explanations, testimonies, and evidence (*see Section 198 of the Law on Administrative Liability*). Thus, the law provides for several possibilities to ensure the personal participation of the person to be held liable in the examination of the administrative offence case and to ascertain his or her subjective opinion on the matters relevant to the case. However, signing a complaint in order to submit it to the court as such is not

an act in which the subjective opinion of the person is decisive.

Moreover, a natural person of legal age who is to be held liable for an administrative offence becomes personally involved in the proceedings from the moment he or she authorises the provider of legal assistance of his or her choice to defend his or her rights and legitimate interests before the court. In an administrative offence case, the defence counsel shall provide legal assistance on the basis of the authorisation of the person, enjoying the confidence of that person and agreeing with him or her on a defence strategy. Hence, there are no reasonable grounds for believing that a defence counsel could act outside the limits of the will expressed by the person. The obligation imposed on a natural person of legal age who is to be held liable to sign the complaint himself or herself in order to submit it to the court must be regarded as a formal obstacle preventing the person from using the provider of legal assistance of his or her choice. This means that the defendant is unable to receive legal assistance in the way that best suits his or her needs. Hence, the legal assistance provided by the defence counsel no longer ensures that the rights and legal interests of the person are defended in the best and most appropriate way, i.e. these rights are no longer ensured in a practical and efficient manner.

2.2. The principle of personal participation is also included in other prosecution proceedings, i.e. criminal proceedings. The first sentence of Section 86, Paragraph two of the Criminal Procedure Law, similar to the second sentence of Section 53, Paragraph two of the Law on Administrative Liability, stipulates the following: “A counsel shall not replace a defendant, but shall act in his or her interests”. However, Section 86, Paragraph two of the Criminal Procedure Law specifies the limits of the principle of personal participation, exhaustively specifying the procedural actions in which a person must participate himself or herself. Such actions include the expression of attitude towards the suspicions or prosecution, the provision of testimony, the selection of simpler proceedings, and the last word. Signing a complaint for submission to the court in criminal proceedings is not regarded as an action that cannot be performed by a defence counsel on behalf of the defendant.

Thus, it follows that personal participation in criminal proceedings is linked to

the objective need to ascertain the subjective opinion of the person. Only the person himself or herself can repent, admit guilt, or testify about the circumstances of the offence. However, the choice of simpler proceedings, e.g. a prosecutor's penal order or termination of criminal case by conditional release of the person from criminal liability, essentially means that the person agrees not to examine his or her case before court. All cases of fulfilment of the obligation of personal participation referred to in Section 86, Paragraph two of the Criminal Procedure Law have in common that personal participation is necessary because the efficient examination of the case objectively depends on it or the scope of the procedural rights of a person is substantially altered depending on it.

We believe that the objectives of the principle of personal participation are similar in administrative offence proceedings. This is indicated both by the provisions 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, and by the arguments expressed in the debate on the principle of personal participation in the *Saeima*.

Criminal offences are characterised by a significantly higher public danger than administrative offences. If the personal involvement of a person in submission of a complaint contributes to the efficiency of the proceedings, then it would be even more necessary in criminal proceedings than in administrative proceedings, but the legislator has not decided on such involvement. Thus, it is impossible to identify any reasonable grounds for including a more restrictive regulation of the fundamental rights of the individual in the Law on Administrative Liability which provides for liability for less dangerous violations of legal norms. In particular, it is not apparent what important public interests are protected in administrative offence proceedings and in what way, restricting the fundamental rights of the individual, namely the right to the assistance of counsel, more than in criminal proceedings.

2.3. In view of the above, we consider that the objective and reasonable grounds of the contested norm indicated in the Judgment are only alleged. The restriction on the fundamental rights of the individual contained in the contested norm

may have arisen due to the unconsidered exclusion from the Law on Administrative Liability of the right of the defence counsel to sign the complaint to be submitted to the court. Such restriction cannot be considered as something necessary to protect an essential public interest. It is also of no small significance that the authority which issued the contested norm, i.e. the *Saeima*, does not specify any legitimate objective of the restriction on fundamental rights included in the contested norm.

Consequently, there are no values of constitutional rank which would have required the exclusion of the legal assistance element, i.e. signing a complaint for submission to court, from the scope of legal assistance guaranteed to a person. In a democratic state governed by the rule of law, it is not permissible to restrict the right of a person to the assistance of counsel without any legitimate objective. Consequently, the contested norm fails to conform to the fourth sentence of Article 92 of the Constitution.

Judge of the Constitutional Court

Irēna Kucina

Judge of the Constitutional Court

Anita Rodiņa