Constitutional judgment 3-4-1-3-17

S U P R E M E C O U R T

CONSTITUTIONAL REVIEW CHAMBER

JUDGMENT

in the name of the Republic of Estonia

Case number	3-4-1-3-17
Date of judgment	18 May 2017
Composition of court	Chairman: Priit Pikamäe; members: Hannes Kiris, Indrek Koolmeister, Saale Laos, Tambet Tampuu
Case	Review of the constitutionality of § 5^1 of the Riigikogu Election Act
Basis for proceedings	Tallinn Court of Appeal judgment of 16 February 2017 in case No 3?15-584
Hearing	Written procedure

OPERATIVE PART

To dismiss the application by Tallinn Court of Appeal.

FACTS AND COURSE OF PROCEEDINGS

1. By a precept of 19 February 2015, the City Centre Police Station of the North Prefecture of the Police and Border Guard Board (PBGB) required Artur Talvik to stop violating the prohibition on political outdoor advertising laid down in § 5^1 of the Riigikogu Election Act (REA). According to the precept, on 18 February 2015, i.e. during the prohibition on political outdoor advertising, a Mitsubishi motor vehicle with registration plate 078 MHM at Rataskaevu 16 in Tallinn displayed the advertisement “talvik.ee” and a photograph/image of A. Talvik, who was a candidate for the Riigikogu, along with a sticker “Vali kass Artur!” [Elect Artur the Cat]. The advertising poster “talvik.ee” and the photograph of A. Talvik were visible in public space, thus

constituting outdoor advertising. The name Talvik and the person in the photograph could be unequivocally associated with the A. Talvik who was a candidate in the Riigikogu election. The fact that this constituted political outdoor advertising was also supported by the presence of the sticker “Vali kass Artur!” on the vehicle.

2. According to the precept, the advertisement with the text “talvik.ee” and the photograph/image of A. Talvik had to be removed from the vehicle on 19 February 2015 by 17:00 at the latest. The precept included a warning that a penalty payment or substitutive enforcement would be applied in the event of failure to comply with the precept or complying with it inadequately. A. Talvik complied with the precept.

3. On 10 March 2015, A. Talvik lodged an action with Tallinn Administrative Court for annulment of the PBGB precept of 19 February 2015 and asserted that § 5^1 of the REA, on which the precept was based, contravened § 32 and § 45 and § 60(2) of the Constitution. The prohibition on political outdoor advertising interfered disproportionately with the applicant’s right to property and the right to freedom of expression in combination with the right to stand as a candidate. Sections 32, 45 and 60(2) of the Constitution protected the applicant’s right to display his personal image and name on his property.

3.1. In 2015, the applicant stood as a candidate for the Riigikogu. Stickers on the vehicle informed voters about his candidacy. The applicant could not engage in widespread television, radio, internet and media campaigning, which was affordable for parliamentary political parties receiving support from the state budget.

3.2. The prohibition on political outdoor advertising is not a suitable means for attaining the goals sought by it. The measure at issue does not reduce the relative importance of money in election campaigning nor does it increase the role of political argumentation. It also fails to free public space of excessive outdoor advertising nor does it reduce improper influence on voters. Stickers with a candidate’s image and domain name displayed on a personal car cannot be considered excessive outdoor advertising. Ten years after adoption of the law, the prohibition on political outdoor advertising is no longer a suitable means to free public space of election advertising. The measure is also not necessary for attaining the goals sought by it nor is it proportional in the narrow sense as compared to the intensity of interference with the applicant’s rights.

4. The PBGB sought to have the action dismissed, asserting that the Supreme Court *en banc* in its judgment of 1 July 2010 in case No 3-4-1-33-09 had opened up the substance of § 5^1 of the REA and analysed its possible conflict with the Constitution. The Supreme Court *en banc* reached the conclusion that § 5^1 of the REA does not contravene the Constitution. Three justices wrote a dissenting opinion to the judgment, but these do not change the final opinion of the Supreme Court. The Supreme Court was of the opinion that the prohibition on political outdoor advertising was necessary for attaining the goals set by the legislator. According to the explanatory memorandum to the Riigikogu Election Act and the opinions expressed during the proceedings of the Draft Act, the goal of the provision in question is to reduce the role of money in achieving political power, to increase the role of substantive political argumentation, and to free public space of excessive outdoor advertising which may cause public resentment towards political advertising and politics as a whole. All these goals are driven by the duty of the state to establish conditions necessary for exercising the right to vote and the right to stand as a candidate in line with the principles of free, uniform, general, direct elections and secrecy of voting. However, the potential ineffectiveness of the prohibition on political outdoor advertising cannot be a basis for declaring it unconstitutional.

5. By judgment of 11 April 2016, Tallinn Administrative Court dismissed the action.

5.1. The Court found that on 18 February 2015, i.e. during the prohibition on political outdoor advertising, a car owned by A. Talvik displayed stickers with his personal photographic image and the text “talvik.ee”. Since political outdoor advertising is prohibited during active campaigning under § 5^1 of the REA, the applicant was in violation of the prohibition on political outdoor advertising.

5.2. The court did not agree with the applicant's position that § 5^1 of the REA, on which the precept was based, contravened §§ 32, 45 and 60(2) of the Constitution. In this respect, the Administrative Court relied on the Supreme Court *en banc* judgment of 1 July 2010 in case No 3-4-1-33-09 and noted that the applicant had not indicated any circumstances that would give grounds to reach a different opinion than the Supreme Court in the instant case.

6. In his appeal of 11 May 2016, A. Talvik sought a reversal of the Administrative Court judgment of 11 April 2016, satisfaction of his action, and an order for payment by the respondent of the applicant's procedural expenses.

6.1. In the opinion of A. Talvik, the Administrative Court judgment was contrary to para. 71 of the cited Supreme Court judgment in which the Supreme Court did not rule out that the prohibition on outdoor advertising may turn out to be unconstitutional in the frame of specific constitutional review.

6.2. The Administrative Court judgment was also contrary to the Supreme Court Criminal Chamber judgment in case No 3-1-1-69-11. In that judgment the Court held that, insofar as the prohibition on political outdoor advertising extends to items in a candidate's personal possession, it interferes more than customarily with privacy and the core of freedom of expression and the fundamental right to property, and could therefore turn out to be unconstitutional. Even though guidelines given by the Supreme Court in other cases are not legally binding on the administrative court, simply to ignore interpretations of the law expressed in other cases without the court refuting them in substance is not justified.

7. The PBGB sought dismissal of the appeal and an order for the applicant to pay the procedural expenses.

7.1. The Supreme Court *en banc* has explained that prohibiting outdoor advertising during active campaigning does not rule out introducing one's views or programme via other channels. Thus, the applicant's right to property may be interfered with but the interference is proportional in the narrow sense and necessary to attain the goal intended by the legislator.

7.2. In the opinion of the PBGB, the prohibition on political outdoor advertising is appropriate, necessary and proportional in the narrow sense. The opinions expressed in the Supreme Court Criminal Chamber judgment of 14 October 2011 in case No 3-1-1-69-11 are not relevant. The applicant failed to notice that in that judgment the person subject to proceedings was charged with an offence committed in the course of a campaign for a local council election. The Supreme Court clearly distinguished that election from the election for the Riigikogu and for the European Parliament.

7.3. Personal possessions may include very large items, including means of transport. If outdoor advertising were allowed for items in personal possession, a candidate could hire, for example, a double-decker bus, cover it with advertising and park it in a busy area. In view of the fact that members of larger political parties also have more financial resources, allowing outdoor advertising on items in personal possession would not help smaller political parties but would, instead, present an opportunity for larger ones.

ORDER OF TALLINN COURT OF APPEAL

8. By judgment of 16 February 2017, Tallinn Court of Appeal reversed the Administrative Court judgment of 11 April 2016. The Court of Appeal held that § 5^1 of the REA was unconstitutional insofar as it prohibited political outdoor advertising on a car in personal use of a person running as a candidate on a political party list during active campaigning. On that basis, the court annulled the unlawful precept of the PBGB of 19 February 2015.

8.1. The Supreme Court *en banc* in case No 3-4-1-33-09 held that the prohibition on political outdoor advertising laid down in § 5^1 of the REA interferes with the right to vote in connection with the election of a representative body, the right to stand as a candidate in combination with freedom of expression, as well as freedom of enterprise, the fundamental right to property, and freedom of activity by political parties. In

addition, the Court *en banc* held that the Constitution does not rule out restricting those fundamental rights and freedoms for the following purposes:

1) reducing the role of money in gaining political power and ensuring the equality of political parties, individual candidates and election coalitions by reducing election campaign costs;

2) increasing the role of political argumentation;

3) freeing public space of excessive outdoor advertising which may cause public resentment towards political advertising and politics as a whole;

4) reducing improper influence on voters by means of influence used in outdoor advertising.

8.2. The Court *en banc* found that the prohibition on political outdoor advertising is appropriate, necessary and proportional in the narrow sense for attaining the above goals. However, the Court *en banc* noted that even though in abstract constitutional review proceedings the prohibition proved to be constitutional, this does not rule out specific constitutional review.

8.3. The Supreme Court Criminal Chamber in its judgment in case No 3-1-1-69-11 held that based on the circumstances of a specific case the prohibition on political outdoor advertising may prove to be unconstitutional in certain aspects. The Chamber had misgivings as to whether the prohibition on political outdoor advertising laid down in § 6^1 of the Municipal Council Election Act is also constitutional as a means for attaining the goals indicated by the Court *en banc* to the extent that it deprives a person standing as a candidate in local elections of the right to advertise their candidacy on items in their personal possession, including a car or also, for example, clothes worn by the candidate.

8.4. By relying on the position expressed in the judgment of the Supreme Court Criminal Chamber cited above, the Court of Appeal held that § 5^1 of the REA was unconstitutional insofar as it prohibited political outdoor advertising on a car in the personal use of a person standing as a candidate on a political party list during active campaigning because such a prohibition does not contribute to attaining the goals indicated in the Supreme Court *en banc* judgment of 1 July 2010.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

9.-13. [not translated]

PROVISION DECLARED UNCONSTITUTIONAL

14. Riigikogu Election Act, § 5^1 “Prohibition on political outdoor advertising”:

“Advertising of independent candidates, political parties or persons who stand as candidates in the list of a political party, or their logo or other distinctive mark or programme on a building, civil engineering works, inner or outer side of public transport vehicles or taxis, and other political outdoor advertising is prohibited during the active campaigning.

[RT I 2005, 37, 281 - entered into force 10 July 2005]“

OPINION OF THE CHAMBER

15. The prohibition on political outdoor advertising derives from § 5^1 of the REA. The Supreme Court *en banc* concluded in its judgment of 1 July 2010 in case No 3-4-1-33-09 that even though in abstract constitutional review proceedings the prohibition on political outdoor advertising is constitutional, this does not rule out specific constitutional review.

16. In constitutional review proceedings the Supreme Court, based on § 14(2) of the Constitutional Review

Court Procedure Act, first assesses whether a rule is relevant, i.e. whether the court actually had to apply rules that were declared unconstitutional.

17. The Minister of Justice asserts that § 5^1 of the REA is not relevant because the court could not switch over from an annulment action to a declaratory action (see para. 10.1). The Chamber does not agree with this position. The action lodged by A. Talvik with Tallinn Administrative Court shows that he sought annulment of the precept and a check of the constitutionality of the underlying legal provision. Even if concluding that the administrative court should have formally amended the subject-matter of the proceedings and explained to the applicant the avenues of complaint available to him, in the course of adjudicating the subsequent declaratory action the court should also have adjudicated the applicant's application to assess the constitutionality of § 5^1 of the REA. Thus, the opinion by the Minister of Justice does not bar the admissibility of constitutional review.

18. In line with § 14(2) of the Constitutional Review Court Procedure Act, in certain cases a decision on the relevance of a provision also requires assessment of whether the court that initiated specific constitutional review had correctly interpreted the legal provision that was declared unconstitutional, as well as provisions prescribing the conditions for and extent of applying the provision that was declared unconstitutional (see, e.g., Supreme Court Constitutional Review Chamber judgment of 18 May 2015 in case No 3-4-1-14-15, para. 34). In the instant case, in order to decide on the relevance of § 5^1 of the REA, it is necessary to assess whether the name of A. Talvik and the domain name constitute political outdoor advertising within the meaning of the Riigikogu Election Act. For this, it is necessary to interpret the concept of political outdoor advertising in the Riigikogu Election Act in combination with the Advertising Act (AdA).

19. Under § 1(3) of the Advertising Act, the AdA also applies in respect of advertising regulated in other Acts insofar as no specifications are contained in the other Acts. A specific provision of this kind within the meaning of the Advertising Act is also § 5^1 of the AdA dealing with political outdoor advertising. The Riigikogu Election Act does not define what constitutes advertising or political advertising within the meaning of that Act, nor does it contain any other distinctions with regard to that type of advertising. The REA only gives rise to a prohibition on political outdoor advertising during active campaigning. Thus, when giving substance to the concept of political outdoor advertising contained in § 5^1 of the REA, the definition of advertising laid down in the AdA should serve as guidance. In the opinion of the Chamber, in order to assess the conformity of information with the identifying characteristics of political outdoor advertising, it should first be decided whether the case involves advertising within the meaning of the Advertising Act at all. Information which does not constitute advertising cannot be seen as political outdoor advertising either.

20. Under § 2(1) cl. 3) of the AdA, advertising means information which is made public in any generally perceived form for a charge or without charge for the purpose of increasing the provision of services or the sale of goods, promoting an event or directing the conduct of a person in public interests. The concept of "outdoor advertising" is defined in § 2(1) cl. 8) of the AdA as advertising located in a public place or advertising which can be observed from a public place.

21. Section 2(2) of the AdA excludes certain information from the definition of advertising. The purpose of that provision is to exclude from the scope of the Advertising Act information which may at first sight seem to be advertising but which is nevertheless not deemed to be advertising. For example, under § 2(2) cl. 4) of the AdA, marking a vehicle used in the business or professional activities of a person with their name, contact details, trade mark, domain name and area of activity is not deemed to be advertising. It is important to keep in mind that the PBGB issued a precept to A. Talvik with an instruction to remove only the domain name "talvik.ee" and the photograph/image of A. Talvik from the car in his possession, as these specifically enabled association of the domain name and the family name contained in it with the person of A. Talvik. However, under § 2(2) cl. 4) of the AdA the information displayed on the vehicle used by A. Talvik and indicated in the precept of the PBGB does not constitute advertising if the vehicle was used in the person's business or professional activity. Therefore, next it is necessary to answer the question whether standing as a candidate in an election could also be interpreted as the candidate's business and professional activity within the meaning of § 2(2) cl. 4) of the AdA.

22. The Chamber agrees with the Minister of Justice that even though standing as a candidate in an election is not a candidate's business or professional activity within the meaning of the Acts regulating economic and professional activity, it is nonetheless one of the main tools for a candidate's political activity (e.g. standing as a candidate, political awareness-raising, communicating with voters and regional organisations or a political party). Therefore, in the opinion of the Chamber, political activities by a political party or a candidate on its list and by an independent candidate should also be interpreted as business or professional activity within the meaning of § 2(2) cl. 4) of the AdA. Thus, systematic interpretation of § 2(2) cl. 4) of the AdA and § 5^1 of the REA excludes marking a vehicle used in a politician's professional activity with their name, contact details, trade mark, domain name and area of activity from the prohibition on political outdoor advertising.

23. On the basis of the foregoing, by interpreting § 5^1 of the REA and § 2(2) cl. 4) of the AdA in combination, the Chamber concludes that the prohibition on political outdoor advertising did not extend to the vehicle used by A. Talvik, and § 5^1 of the REA did not prohibit marking that vehicle with the information indicated in the PBGB precept. On the basis of the foregoing, § 5^1 of the REA is not a relevant provision in the instant case.

24. Since the Supreme Court can only decide ? within constitutional review court proceedings in the frame of specific constitutional review ? on the constitutionality of a provision which needs to be applied for adjudicating the case, the Supreme Court is unable to resolve the application by Tallinn Court of Appeal. Under § 15(1) cl. 6) of the Constitutional Review Court Procedure Act, the application by Tallinn Court of Appeal must be dismissed.
