

Case C-795/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

29 October 2019

Referring court:

Riigikohus (Estonia)

Date of the decision to refer:

24 October 2019

Applicant:

XX

Defendant:

Tartu Vangla

Other parties to the proceedings:

Justiitsminister

Tervise- ja tööminister

Õiguskantsler

Subject matter of the main proceedings

Constitutionality review in proceedings brought by XX contesting the decision adopted by the Governor of Tartu Vangla (Tartu Prison) on 28 June 2017 dismissing XX.

Subject matter and legal basis of the reference

Interpretation of EU law. The request for a preliminary ruling under Article 267(1)(b) and (3) TFEU concerns the interpretation of Article 2(2), read in combination with Article 4(1), of Directive 2000/78/EC.

Question referred

Should Article 2(2), read in combination with Article 4(1), of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, be interpreted as precluding provisions of national law which provide that impaired hearing below the prescribed standard constitutes an absolute impediment to work as a prison officer and that the use of corrective aids to assess compliance with the requirements is not permitted?

Provisions of EU law cited

Article 2 TEU

Charter of Fundamental Rights of the European Union, Article 21(2)

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), Article 2(1) and (2), Article 2(2)(a), Article 2(5), Article 3(1) and Article 4(1)

National law cited

Eesti Vabariigi põhiseadus (Constitution of the Republic of Estonia, ‘Constitution’), Paragraph 12(1) and Paragraph 29

Vangistusseadus (Estonian Code of Criminal Procedure, ‘Code’), Paragraph 146(1) and (4)

Põhiseaduslikkuse järelevalve kohtumenetluse seadus (Estonian Law on Constitutionality Review Proceedings, ‘Constitutionality Review Law’), Paragraph 14(2)

Väljateenitud aastate pensionide seadus (Estonian Law on Pension Entitlements, ‘Pension Entitlements Law’), Paragraph 2(2)

Vabariigi Valitsuse 22. jaanuari 2013. aasta määrus nr 12 “Vanglateenistuse ametniku tervisenõuded ja tervisekontrolli kord ning tervisetõendi sisu ja vormi nõuded” (Regulation No 12 of the Government of the Republic of Estonia of 22 January 2013 on health requirements for prison officers, medical checks and the form and content of health certificates), Paragraphs 3 to 5 and Annex 1

Brief summary of the facts and the procedure in the main proceedings

- 1 On 22 January 2013, the Estonian Government adopted Regulation No 12 on health requirements for prison officers, medical checks and the form and content of health certificates (Regulation No 12) pursuant to Paragraph 146(4) of the

Code. Paragraph 4 of Regulation No 12, which entered into force on 26 January 2013, lays down hearing requirements as one of the health requirements for prison officers. It states that the hearing of prison officers must be sufficiently acute to enable them to communicate by telephone and to hear alarms and public address communications (Regulation No 12, Paragraph 4(1)). In a medical check, hearing must not be impaired above 30 dB at a frequency of 500-2000 Hz and 40 dB at a frequency of 3000-4000 Hz in the ear with better hearing and 40 dB at a frequency of 500-2000 Hz and 60 dB at a frequency of 3000-4000 Hz in the ear with poorer hearing (Regulation No 12, Paragraph 4(2)). Annex 1 to Regulation No 12 contains a list of health problems that prevent prison officers from performing their functions (Regulation No 12, Paragraph 5(1)). Any absolute medical impediment prevents a person from being employed in the prison service and from training as a prison officer (Regulation No 12, Paragraph 5(2), first sentence). According to Annex 1, impaired hearing below the prescribed standard is an absolute impediment.

- 2 XX (or 'applicant') worked at Tartu Prison as an officer on the closed prison wing from 2 December 2002 and as an officer on the open prison wing from 1 June 2008. During a medical check in April 2017, his hearing in one ear was found to be impaired, measuring 55-75 dB at a frequency of 500-2000 Hz. If the applicant uses his hearing aid, his hearing complies with requirements. His hearing in the other ear complies with the requirements set out in Regulation No 12. By decision of 28 June 2017 ('contested decision'), the governor of Tartu Vangla (Tartu Prison) dismissed the applicant from the prison service.
- 3 By judgment of 14 December 2017, **Tartu Halduskohus** (Administrative Court, Tartu) dismissed the application lodged by XX which was seeking judgment to find the contested decision unlawful and to award damages. The Administrative Court held that it was fundamentally sensible to lay down health requirements that preclude work as a prison officer; that public policy and public security are fundamental social values, the protection of which justifies restricting other fundamental rights; and that the hearing requirement laid down in Paragraph 4(1) of Regulation No 12 is a necessary and well-founded measure that ensures that acting prison officers are able to perform the functions assigned to them with due regard for the working regulations of prisons.
- 4 By judgment of 11 April 2019, the **Tartu Ringkonnakohus** (Court of Appeal, Tartu) set the judgment of the Administrative Court aside and delivered a new judgment in the matter admitting the application, finding the contested decision unlawful and awarding the applicant damages of 60 months' pay. The Court of Appeal found Annex 1 to Regulation No 12 to be unconstitutional and disapplied that Annex in its judgment in the case inasmuch as impaired hearing below the prescribed standard constitutes an absolute impediment to work as a prison officer. The Court of Appeal held that that standard infringes the general principle of equal treatment enacted in Paragraph 12(1) of the Constitution and the principle of legitimate expectation enacted in the second sentence of Paragraph 11 of the Constitution.

- 5 The Court of Appeal compared persons with impaired hearing with persons with impaired vision. It noted that vision requirements are laid down in Paragraph 3 of Regulation No 12 and that vision below the prescribed standard likewise constitutes an absolute impediment to work as a prison officer; that, according to Paragraph 3(2) of Regulation No 12, however, prison officers are entitled to wear contact lenses and glasses; that the hearing requirements are laid down in Paragraph 4 of Regulation No 12, which does not provide for the possibility of using a hearing aid in cases of impaired hearing; that there must be reasonable and appropriate grounds for different treatment; and that that criterion was currently not fulfilled. The Court of Appeal held that a list could be compiled of the hearing aids permitted in a prison; that, however, the exclusion of all hearing aids without distinction and the exclusion of persons with impaired hearing, but not of persons with impaired vision, from prison service was inappropriate.
- 6 The applicant's legitimate expectation had also been infringed. It recalled that the applicant had joined Tartu Vangla (Tartu Prison) as a security guard in 2002, when the law did not impose restrictions excluding persons with impaired hearing from prison service; that the applicant had contended that, as a result of his dismissal from the service, he had lost his right to the special vested pension under Paragraph 2(2) of the Pension Entitlements Law that he would have acquired over a number of years had he remained in the service.
- 7 The Court of Appeal found Annex 1 to Regulation No 12 to be unconstitutional inasmuch as impaired hearing below the prescribed standard constitutes an absolute impediment to work as a prison officer, disappplied that Annex and referred the case to the Riigikohus (Supreme Court) for review of the constitutionality of the provision.

Principal arguments of the parties in the main proceedings on the question of constitutionality

- 8 The **Õiguskantsler** (Ombudsman) is of the opinion that Paragraph 4 of Regulation No 12 and Annex 1 to that Regulation conflict with the freedom of occupation enacted in Paragraph 29 of the Constitution and with Paragraph 12(1) of the Constitution regulating the general principle of equal treatment and prohibiting discrimination; that the contradiction arises because there is no possibility of assessing if a prison officer's impaired hearing impedes the performance of his functions at work and whether the impaired hearing could be corrected by using a hearing aid; that the Court of Appeal should have reviewed Regulation No 12 for any potential conflict with Council Directive 2000/78, which was transposed into Estonian law under the Võrdse kohtlemise seadus (Estonian Law on Equal Treatment); and that it should have considered if the disability impeded the prison officer concerned in this particular case in the performance of his functions at work.

- 9 The **Justiitsminister** (Estonian Minister for Justice) is of the opinion that Annex 1 to Regulation No 12 is not unconstitutional; that the prison officer's normal hearing should be sufficient to guarantee his own and other officers' safety and unrestricted communication in all circumstances without a hearing aid; and that the same hearing requirements apply to prison officers and to police officers on duty.
- 10 The **Tervise- ja tööminister** (Estonian Minister for Health and Employment) holds that Regulation No 12 and Annex 1 thereto may give rise to unjustified unequal treatment between persons with impaired vision and persons with impaired hearing as, unlike impaired vision, impaired hearing cannot be corrected, and that it would be different if the rules governing the health requirements for prison officers provided for the possibility of testing the individual circumstances of each case of impaired hearing.
- 11 **Tartu Vangla** (Tartu Prison) concurs with the reasoning and opinion of the Minister for Justice.
- 12 The **applicant** contends that Paragraph 4 of Regulation No 12 and Annex 1 to that Regulation infringe freedom of occupation, the general principle of equal treatment and the ban on discrimination enacted in the Constitution.

Brief summary of the basis for the reference

- 13 The **Põhiseaduslikkuse järelevalve kolleegium** (Constitutionality Review Senate) found that it is common ground that the applicant worked as a prison officer for over 14 years and six months. According to the applicant's most recent job description, his official functions included supervising persons under electronic surveillance by the surveillance system and passing on information on those persons, monitoring surveillance and signal transmitters, responding to and passing on information on alarms and identifying breaches of regulations. At no point in his period of service to date has the applicant's performance of his functions given rise to criticism. Hearing requirements, including the ban on the use of hearing or other aids, were adopted after the applicant had been with the service for over ten years. During a medical check in 2017, it was found that the applicant's hearing in one ear did not meet the prescribed requirements. The applicant contends that his hearing has been impaired in that ear since he was a child. The Ministry of Justice has confirmed that hearing aids are not of themselves prohibited in prisons. The justification given by the Ministry of Justice and Tartu Vangla (Tartu Prison) for the requirements and restrictions adopted under Regulation No 12 is that, because of the need to guarantee security and public policy, no aid should be used in order to meet hearing requirements and that, as resources are limited, the applicant must be able to perform all the functions of a prison officer for which he is trained and to provide the police with any administrative assistance required. It contends that a prison officer's normal hearing should be sufficient to guarantee his own and other officers' safety and

unrestricted communication in all circumstances, even without any aid (e.g. if the hearing aid battery dies or the aid is lost in an attack).

- 14 The Court of Appeal initiated constitutionality review proceedings to verify the constitutionality of the provisions of Regulation No 12. It is not clear from the decision whether the court verified the compatibility of the contested regulation with EU law or national law transposing it. In order to ensure that EU law is fully effective, any national provision to the contrary must, if need be, be disapplied, and there is no need to wait for it to be set aside in constitutionality review proceedings (see, for example, judgment of 4 December 2018, *The Minister for Justice and Equality and Commissioner of the Garda Síochána*, C-378/17, EU:C:2018:979, paragraph 50).
- 15 The obligation of the public authorities to treat persons with a disability equally in comparable situations and not to discriminate against them follows from EU law as well as from the Constitution. According to Article 2 TEU, the European Union is based on the principle of equality. Article 21(1) of the Charter of Fundamental Rights of the European Union prohibits any discrimination based on disability. Article 1 of Directive 2000/78 states that the purpose of the Directive is to lay down a general framework for combating discrimination, including on the grounds of disability. According to Article 3(1) of the Directive, it applies to all persons, as regards both the public and private sectors, including public bodies, in relation, *inter alia*, to employment and working conditions, including dismissals (subparagraph (c)). According to Article 2(2)(a) of the Directive, direct discrimination is taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation. Although Article 4(1) of the Directive states that, notwithstanding Article 2(1) and (2) of the Directive, the Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds for discrimination referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, such exceptions may only be created provided that the objective is legitimate and the requirement is proportionate. According to Article 2(5) of the Directive, the Directive is without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. Recital 18 of the Directive clarifies that the Directive does not require the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services. Moreover, the Court of Justice of the European Union has ruled that the concern to ensure the operational capacity and proper functioning of those services is a legitimate objective of differentiated treatment of persons within the meaning of Article 4(1) of Directive 2000/78. However, it must be ascertained whether, in

laying down such a restriction, the national rule contested in the main proceedings laid down a requirement that is proportionate and whether this restriction is suitable for securing the attainment of the objective pursued, and does not go beyond what is necessary in order to attain it (see, for example, judgment of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraphs 43 to 45).

- 16 The Senate is of the opinion that its ruling on the constitutionality review case pending before it requires a preliminary ruling by the Court of Justice of the European Union as to whether Article 2(2), read in combination with Article 4(1), of Directive 2000/78, should be interpreted to mean that the Directive precludes provisions of national law which provide that impaired hearing below the prescribed standard constitutes an absolute impediment to work as a prison officer and that the use of corrective aids to assess compliance with the requirements is not permitted. In the opinion of the Senate, neither the wording of the Directive nor the current case-law of the Court of Justice of the European Union on the substance of Article 4(1) of Directive 2000/78 provide unequivocal guidance for the present case. Nor are any requests for a preliminary ruling on this question pending before the Court. Thus, this case does not concern an *acte clair* or an *acte éclairé*.
- 17 The Supreme Court is unable in this case to directly review the compatibility of a national provision of law with EU law in constitutionality review proceedings. The Constitutionality Review Law does not include any rules on orders for reference. However, nor are orders for reference precluded in constitutionality review proceedings. If, in interpreting the Directive, the Court of Justice of the European Union rules that it precludes provisions of national law which provide that impaired hearing below the prescribed standard constitutes an absolute impediment to work as a prison officer and that the use of corrective aids to assess compliance with the requirements is not permitted, the provisions of Regulation No 12 contested in this case and subject to constitutionality review are incompatible with EU law. In that case, the Court of Appeal should have disapplied those provisions in the administrative proceedings in keeping with the principle of the primacy of EU law and should not have initiated constitutionality review proceedings. Consequently, the Senate should have dismissed the application in accordance with Paragraph 9(1) and Paragraph 14(2) of the Constitutionality Review Law on the grounds that the contested provisions were irrelevant to the decision in the administrative proceedings. If it transpires that the contested regulation is compatible with the Directive, that does not of itself mean that these provisions are constitutional and the Senate can proceed with its constitutionality review.