

Decision no. 548 of 14 September 2021

regarding the exception of the unconstitutionality of the provisions of Article 58³ (4) first sentence of Law no. 360/2002 on the Statute of the Police Officer, in the wording prior to the amendment by the Emergency Government Ordinance no. 53/2018 amending and supplementing of Law no. 360/2002 on the Statute of the police officer

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Summary

I. As grounds for the exception of unconstitutionality, its author argued that Article 58³ (4) of Law no. 360/2002 on the Police Officer's Statute, according to which a police officer under investigation has the right to be assisted, upon request, by another police officer, chosen by him or designated by the trade union organization or by the National Police Corps, deprives the investigated officer from the qualified defense of a lawyer, with the consequence of the violation of the right to defense and the right to a fair trial, as this category is treated differently, compared to all other socio-professional categories to which the legislator acknowledged and guaranteed said constitutional rights.

II. Examining the exception of unconstitutionality, the Court found that the subject of the exception of unconstitutionality is represented by the provisions of Article 58³ (4) first sentence of Law no. 360/2002, in the wording prior to the amendment by Government Emergency Ordinance no. 53/2018, according to which the police officer under investigation has the right to be assisted, on request, by another police officer, chosen by him or designated by the trade union organization or the National Police Corps.

Analyzing the exception of unconstitutionality of the criticized legal provisions, the Court found that it is justified by reference to the provisions of Article 24 of the Constitution, for reasons similar to those held by Decision no. 653 of 17 October 2017, by which the Court upheld the exception of unconstitutionality of the provisions of Article 59 (7) of Law no. 360/2002, in the wording prior to the entry into force of Law no. 81/2015, according to which before the disciplinary councils a police officer has the right to be assisted by another police officer, chosen by him or designated by the National Police Corps.

On that occasion, the Court noted, in essence, that, by Decision no. 126 of 1 February 2011, it held that, regarding the scope of application of the provisions of Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights (ECtHR) ruled that disciplinary proceedings fall under Article 6 (1) regarding the right to a fair trial and to the resolution of the case within a reasonable time by an independent and impartial court. Thus, the guarantees of the right to a fair trial involve the right of the parties to be aware of all aspects of the litigation and presuppose compliance with the principle of adversariality. At the same time, the ECtHR ruled that Article 6 of the Convention applies to disciplinary procedures

carried out before professional bodies and in which the right to practice the profession is concerned. Thus, the ECtHR recalled its constant case-law according to which a disciplinary action in which the right to continue practicing a profession is at stake leads to challenges (disputes) regarding civil rights, within the meaning of Article 6 (1) of the Convention.

Also, by Decision no. 95 of 5 February 2008, the Constitutional Court ruled that the legal employment relationships must be carried out in a legal framework, in order to observe the rights and duties, as well as the legitimate interests of both parties. In this framework, the disciplinary investigation prior to the application of the sanction contributes to a large extent to the prevention of abusive, illegal or groundless measures ordered by the employer, taking advantage of its dominant position.

Referring to the rulings of the ECtHR on the case and analyzing all the disciplinary sanctions that can be applied to the police officer, the Constitutional Court found that the measures that can affect the right to practice the profession are the postponement of promotion to higher professional ranks or positions, for a period from 1 to 3 years, downgrading to at most the basic level of the professional rank held and dismissal from the police. But the fact that in front of the disciplinary councils the police officer only has the right to be assisted by another police officer, chosen by him or appointed by the National Police Corps, and not by an elected lawyer, determines the violation of the right to defense in the proceedings before a professional body. And, Article 24 (1) of the Constitution establishes that the right to defense is guaranteed in the absence of any circumstance, the fundamental rule invoked is also applicable outside the judicial sphere, therefore, including within the disciplinary procedure. Therefore, the right to defense contains many prerogatives, and one of them is, indisputably, the possibility of the person to benefit from legal counsel, under the conditions regulated by the legislation applicable to this form of legal activity.

As such, taking into account the aforementioned, the constitutional court found that in the matter of the disciplinary liability of police officers, contrary to the case-law developed by the ECtHR, the Romanian legislator did not adopt a regulation that would ensure the observance of the right to defense of the police officer under disciplinary investigation. Considering the aforementioned, the Court found that the criticized legal provisions, whereby which before the disciplinary councils the police officer under investigation has the right to be assisted only by another police officer, chosen by him or designated by the National Police Corps, violate the right to be assisted by a lawyer in the disciplinary procedure, as part of the right to defense, provided by Article 24 (1) of the Constitution.

Starting from these findings, the Court held that the reasons on which the previously mentioned decision was based are applicable *mutatis mutandis* also with regard to the resolution of this exception, since the provisions of Article 58³ (4) first sentence of Law no. 360/2002, in the wording prior to the amendment by Emergency Government Ordinance no. 53/2018 amending and supplementing Law no. 360/2002, according to which "a police officer under investigation has the right to be assisted, upon request, by another police officer, chosen by him or designated by the trade union organization or the Corps", violates the right of the police officer under disciplinary investigation to be assisted by a lawyer during the disciplinary procedure, as part of the right to defense, provided by Article 24 (1) of the Constitution.

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality and found that the provisions of Article 58³ (4) first sentence of Law no. 360/2002 on the Statute of the police officer, in the wording prior to the amendment by the Emergency Government Ordinance no. 53/2018 amending and supplementing Law no. 360/2002 on the Statute of the police officer, are unconstitutional.