

Judgment of 19th October 2004, [K 1/04](#)
**DISMISSAL OF A CUSTOMS OFFICER BY REASON
OF SUSPICION OF AN OFFENCE**

Type of proceedings: Abstract review Initiator: Commissioner for Citizens' Rights	Composition of Tribunal: 5-judge panel	Dissenting opinions: 0
--	--	----------------------------------

Legal provisions under review	Basis of review
Dismissal of a customs officer indicted for having intentionally committed an offence capable of public prosecution (i.e. an offence prosecuted <i>ex officio</i>), or subjected to temporary detention [Customs Code and Customs Service Amendment Act 2003: Article 2 points 1 and 2]	Rule of law Principle of equality Presumption of innocence [Constitution: Articles 2, 32 and 42(3)]

This case concerned an application of the Commissioner for Citizens' Rights, challenging a provision of the Customs Code and Customs Service Amendment Act 2003. The reviewed provision entered into force in August 2003 as one of the elements in the battle against corruption. In Article 25(1) of the amended Act, concerning the conditions for the compulsory dismissal of a customs officer, the legislator added two further reasons for dismissal, where such an officer was indicted for having intentionally committed an offence capable of public prosecution (an offence prosecuted *ex officio*, i.e. it is capable of prosecution, even in the absence of a complaint from the injured person), or has been subjected to temporary detention. It should be noted that, whereas filing an indictment initiates court proceedings, temporary detention may, as a preventative measure, be ordered by the court prior to filing an indictment. The latter measure is applied in cases justified either by the apprehension that the accused may take flight, go into hiding, obstruct the proceedings (e.g. by inducing someone to provide a false testimony) or commit certain specified offences, or by the possibility of a severe penalty being imposed upon the suspect (cf. Article 258 of the Criminal Procedure Code).

In the applicant's view, the challenged provision fails, above all, to conform to the presumption of innocence principle, as expressed in Article 42(3) of the Constitution. This principle requires that a person shall be presumed innocent until the court finally pronounces judgment determining their guilt. On the basis of the challenged provision, however, a customs officer is punished by dismissal prior to pronouncement of the court's judgment. The challenged "penalty" occurs on the basis of a decision of an organ of public administration, without observing appropriate procedural guarantees or providing the concerned person with social protection. The applicant considered it insufficient that the Customs Service Act allowed a dismissed officer to be reinstated in the event of an acquittal or discontinuation of criminal proceedings against them.

The Commissioner for Citizens' Rights also alleged that the challenged provision failed to conform to the constitutional principle of equality (Article 32). The legislator treats customs officers more stringently than officers of other similar State services, such as the Internal Security Agency, Foreign Intel-

ligence Agency, Police or Frontier Guard. In analogous situations, statutes regulating these services merely envisage the suspension of an officer from their duties and a decrease in their remuneration.

RULING

The challenged regulation conforms to Article 32 and is not inconsistent with Article 42(3), read in conjunction with Article 2, of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. The performance of public service may not be treated solely as a privilege but should rather be conceived in terms of a service, mission and prudent care for the common good. Particular demands and responsibility may be placed upon the fulfilment of functions having a public-legal nature. Accordingly, the legislator has an appropriately broad discretion as regards interference with the legal position of persons fulfilling such functions.
2. The fundamental role of the presumption of innocence principle, as expressed in Article 42(3) of the Constitution, is to provide the accused with specific guarantees during the course of criminal proceedings. This principle, located within the catalogue of constitutional rights and freedoms, also concerns repressive procedures other than criminal proceedings. Nevertheless, it does not apply in respect of assessing statutory procedures aimed at creating various safeguards against infringements of the law.
3. For the aforementioned reasons, Article 42(3) of the Constitution, read in conjunction with the principle of the rule of law (Article 2), does not constitute an adequate basis on which to review the challenged provision, envisaging the dismissal of a customs officer who has been temporarily detained or indicted for having intentionally committed an offence capable of public prosecution.
4. From the principle of equality, as expressed in Article 32(1) of the Constitution, stems the requirement to treat entities within a specified class (category) identically. All entities characterised to an equal degree by a certain significant (relevant) feature should be treated equally and subject to the same measures. When reviewing the conformity of a particular provision with the principle of equality, it is crucial to determine this significant feature and the grounds for selecting the relevant criterion for differentiation.
5. The challenged provision concerning customs officers is more burdensome than regulations concerning officers of other public services, known as the “uniformed services”. This, however, does not amount to an infringement of the constitutional principle of equality. It is permissible to treat all of these services as a relatively homogeneous category when they are compared with other “non-uniformed” categories of public officers and professional groups. Nevertheless, it may not be overlooked that the term “uniformed services” is a composite category, encompassing professional groups with varying goals, tasks, competences, privileges and modes of service. Mere membership of this composite category is insufficient to lead to the *a priori* conclusions that the legal position of each individual profession therein should be shaped by the

legislator in an identical manner. There are many aspects to the tasks of the Customs Service: they constitute the fulfilment of goals traditionally attributed to, on the one hand, investigative services and, on the other hand, fiscal services. The successful fulfilment of the Customs Service's tasks is of considerable significance for the State budget. The nature and scale of risks accompanying fulfilment of this service, in particular the corruption pressure exerted upon customs officers and the frequency of contact with the criminal environment, are also common knowledge. Accordingly, the demands placed upon customs officers must be appropriately high, in order to strengthen their authority. The fact that these demands are often more stringent than in respect of other services does not signify that the latter may not be increased if this becomes necessary.

6. Although the Constitutional Tribunal finds no grounds to rule that the challenged provisions fail to conform to the Constitution, to the extent submitted by the applicant, the necessity remains for the legislator to adopt a comprehensive, rational and constitutionally-compliant solution to the problem regarding the effect of an *ex post* finding that a customs officer was wrongfully dismissed – in consequence of an acquittal, discontinuation of criminal proceedings or the quashing of a procedural decision concerning temporary detention.

Provisions of the Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 32. 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

Art. 42. [...] 3. Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court.