

Court

Constitutional court

Decision date

07.12.2005

Reference number

G73/05

Collection number

17731

Principle

No violation of *Erwerbsausübungsfreiheit* through the ban of keeping or exhibiting of dogs and cats within the scope of commercial activity in pet shops with the purpose of sale within the animal protection act; no general prohibition of sale, mere restriction of selling arrangements; no violation of statutory creative leeway; presence of public interest of protecting life and well-being of the animals; species-appropriate keeping in pet shops and other commercial facilities not guaranteed

Verdict

The petition is denied.

Justification

Decision reasoning:

I. 1.1. With the present petition based on art. 140 B-VG the applicant company desires the repeal of §31 para. 5 of the federal act of animal protection (animal protection act – TSchG), BGB1. I NR. 118/2004 (hereafter: TSchG) as unconstitutional.

1.2. The applicant company's eligibility to file an application is based on the fact that as operator of a pet shop it is infringed in its right to keep dogs and cats for commercial activities of the pet shop and of other commercial establishments such as the purpose to sell or exhibit. Thus, the law has "adverse impact on their judicial sphere". Additionally, the applicant company

"no other reasonable way [...] at hand as it is only possible to receive a decision through an infringement of §31 para. 5 TSchG. With regards to §38 para. 3 TSchG a fine of €3.750,- up to €7.500,- for repeat offenses would be imposed on the applicant."

1.3. In the substance matter the applicant company brings forward that they are infringed in their constitutional right of commercial freedom with the contested provision in the TSchG.

According to provision §31 para. 5 TSchG in connection to the transitional provisions of §44 para. 8 TSchG it is solely permitted to keep dogs and cats in pet shops and other commercial establishments with the purpose to sell or exhibit that they have already held before 1st of January 2005 as long as the authority issued an approval according to provision §44 para. 8 TSchG.

After the cats and dogs that have been acquired before January 1st 2005 have been sold, the keeping for sale and exhibition of cats and dogs in pet shops or other commercial establishments is strictly forbidden.

An informative inquiry by the applicant company to the Federal Ministry of Health and Women also showed that the provision in question prohibits the sale of dogs and cats in pet shops and other commercial establishments from the specified date onwards.

Even though after §31 para. 5 TSchG only the keeping and exhibiting of cats and dogs is forbidden for the purpose of sale in pet shops and other commercial establishments this restriction results in an effective sale ban.

Regarding the implications of the contested norm the applicant company submits the following:

“Regarding this general animal protection requirements as well as internal requirements it is forbidden for the applicant to sell dogs and cats according provision §31 para. 5 TSchG. Due to the current provisions that comprise not only pet shops but also other commercial establishments, there is no possibility for pet shops to keep, exhibit and thus sell dogs and cats. The applicant can hereby only – if at all – act as an intermediary in sales of dogs and cats and is thereby infringed in his fundamental right of freedom of business. According the provision §31 para. 5 TSchG a stand-alone purchase for the purpose of resale is ruled out due to the lack of admissibility of keeping and exhibiting of the animals.”

1.4. Even though the applicant company acknowledges a public interest under §1 TSchG, it impugns the contested provision as an appropriate, necessary and adequate restriction of the constitutionally guaranteed right of freedom of business under the following reasoning:

“bb) Suitability of the restriction:

The prohibition of keeping and exhibiting of dogs and cats in the context of commercial activities under §31 para. 5 TSchG is not an appropriate measure to protect the animals life and well-being.

As described above, with provision §31 para. 5 TSchG the sale of dogs and cats is prevented altogether. This leads to a substantial increase on the black market where a big part of the dogs and cats come from dubious merchants who neither do not take heed of species-appropriate keeping and nor promote or enable the necessary contact between human and animal before the sale. The protection of the animals is thus in no way improved but rather considerably worsened.

It is incomprehensible for the applicant under what reasoning it is now prohibited for pet shops under official supervision to keep or exhibit dogs and cats in pet shops and other commercial establishments. Without any doubt, it is not only possible to ensure species-appropriate keeping firstly through the corresponding provisions in the TSchG which already exist but it is also possible to check it with inspections that are already carried out.

Furthermore, the applicant is not aware of any way in what (officially supervised) establishments dogs and cats could be held according to the legislature.

According to §31 para. 2 TSchG every business establishments that keeps animals for a commercial activity needs to have sufficient number of people with knowledge of species-appropriate keeping permanently working there. In addition, these people are obliged to advise customers about species-appropriate keeping, necessary vaccinations as well as a possible duty to obtain a permit. The compliance with this obligation needs to be able to be made credible to authorities. This standardization clearly ensures that not only the potential buyer of an animal is informed in detail about any obligations, but also that the species-appropriate keeping is ensured by persons with appropriate knowledge.

In summary, the provision §31 para. 5 TSchG is in no way a suitable means of pursuing the objective of animal welfare in the public interest.

cc) To the necessity:

The general prohibition of keeping and exhibiting dogs and cats in the context of commercial activities in pet shops and other commercial establishments is in no way the mildest or least effective means of achieving the objective of the TSchG.

The existing provisions of the TSchG are sufficient in any case to ensure the keeping of dogs and cats in pet shops and other commercial establishments in a species-appropriate and behavior-appropriate manner. In this regard, reference should be made to §12 para. 2 TSchG for instance, per which only people that are capable of complying with the provisions of this Federal Law and the regulations based thereon and, in particular, people who possess the necessary knowledge and abilities are capable of keeping animals. According to §13 para. 2 TSchG, an animal owner has to ensure that the space available, the freedom of movement, the soil conditions, the structural equipment of the accommodation and the holding devices, the climate, in particular the light and temperature, the care and nutrition as well as the possibility of social contact under consideration of the species, age and degree of development, adaptation and domestication of the animals are appropriate to their psychological and ethological needs. According to §13 para. 3 TSchG it is obligatory for animal keeping that do not disturb the bodily functions of the animals and their behavior as well as do not overstrain their adaptability. Caregivers must be available in sufficient numbers and have the necessary qualifications and the necessary knowledge and professional abilities according to § 14 TSchG. In addition, the freedom of movement of the animal within the meaning of §16 para. 1 TSchG may not be so restricted insofar that the animal is inflicted with pain, suffering or it suffers from serious anxiety.

This merely, and in no way, complete rendition of the relevant provisions of the TSchG already shows that with the existing statutory standardization species-appropriate and behavior-appropriate keeping of dogs and cats is ensured in pet shops and other commercial establishments. The applicant is not aware of the reasons on which a general prohibition of holding and exhibiting dogs and cats in pet shops would be justified if these legal requirements are complied with. In particular, it is not possible to identify the specific characteristics of a pet shop, which would make the contested prohibition necessary in the sense of animal welfare.

However, even if it was assumed that the existing provisions in the sense of animal welfare would not be sufficient to allow the keeping and exhibiting of dogs and cats in pet shops, special provisions would have needed to be introduced instead of the general prohibition.

Due to the regulation of §31 para. 5 TSchG, this disproportionately restricted the applicant's basic right.

dd) To the adequacy:

Ultimately, the fundamental prohibition of keeping and exhibiting dogs and cats, as defined in §31 para. 5 TSchG, and thereby the infringement of the applicant's fundamental-rights position is no relation to the justifying grounds. As stated above, the other provisions of the TSchG provide for species-appropriate and behavior-appropriate keeping of dogs and cats insofar that if these provisions are complied with, there would be – if at all – only a slight disadvantage for the protection of the animals. The basic prohibition laid down in §31 para. 5 of the TSchG is, therefore, a disproportionate infringement of the applicant's fundamental-rights position. In summary, §31 para. 8 TSchG directly infringes the fundamental right of the exercise of freedom of employment and does not in any event constitute proportionate, appropriate, necessary and adequate means of protecting the animals."

2.1. At the invitation of the Constitutional Court, the Federal Government has made a statement; as process requirements, the Federal Government as well as the applicant company assume by §31 para. 5 TSchG that "the applicant company is directly and currently affected in a legal position and that there is no other reasonable legal way to appeal in an administrative procedure or on the occasion of court proceedings The Constitutional Court".

2.2. In this case after a thorough interpretation of the legal situation, the Federal Government denies that the applicant company is infringed in its right to freedom of employment in its constitutional law and recommends that the Constitutional Court decides that "the contested provision is not repealed as unconstitutional".

Under section 1.3.1 of the statement the Federal Government first explains the historical origins of the TSchG for public interests and pleads under commission report 509 p. 62 that the prohibition of keeping and exhibiting of dogs and cats for commercial activities in pet shops and other commercial establishments that offer animals which is found in §31 para. 5 TSchG is an appropriate measure for the avoidance of animal suffering and damages to animal health.

In the opinion of the Federal Government, a species-appropriate and behavior-appropriate keeping of dogs and cats can not be guaranteed in the exhibition in a pet store or a similar commercial establishment, regardless of the other requirements of the legislator in the TSchG for pet stores. From the view of the Federal Government it is "consequently only a prohibition of keeping and exhibiting of dogs and cats in pet shops [...] is appropriate to prevent animal suffering and severe psychological as well as physiological damages to animals". Furthermore, the Federal Government explains which technical considerations the legislator took to standardize the prohibition of keeping and exhibiting provisions.

2.3. In addition, the following is stated:

"In the Federal Government's opinion, it is not possible to achieve species-appropriate and behavior-appropriate keeping of dogs and cats in exhibitions in pet shops or other commercial establishments regardless of the existing animal keeping regulations such as §§12 ff. TSchG and Tierhaltungs-Gewerbeverordnung, BGBl. II Nr. 487/2004 as well as possible additional ones. Hence, only a prohibition of keeping and exhibiting dogs and cats in pet shops and other commercial establishments is an appropriate measure to prevent animal suffering and severe psychological as well as physiological damages to animals.

Provisions, especially in the form of requirements, about husbandry conditions such as cage- or box size, soil, quality, manipulable material, feeding, lighting, possibilities of retreat, run area, social contact, etc. as well as regular controls of the compliance with these are not able to improve the situation of the animals. Dogs as well as cats have high degrees of social and explorative needs. These cannot be fulfilled in an environment with limited premises such as pet shops. A species-appropriate as well as behavior-appropriate accommodation is not possible there. Both species are dependent on a high degree of social contact to conspecifics and humans. The transfer of young animals to pet shops goes hand in hand with the loss of the a familiar reference person as well as drastic changes in husbandry conditions. Especially in the very difficult and stressful times after the settlement from the mother which often coincides with the transfer to the pet shops, the puppies need particularly careful keeping and caring. Acclimatization to the keeping of the new and final reference person should be as fast as possible without a possible transitional period of several days to weeks with third parties. Additionally, as explained already there is a continual stress load on the animals that are kept in pet shops or other commercial establishments, which might significantly weaken the immune system of the young animals as they have only a limitedly durable immune system. As a result, this might lead to serious infectious diseases.

These facts can be illustrated on the example of dog puppies by the following: The period up to the 14th week of life is decisive for the development of the young dogs in which among other things characterization (Prägung?) happens which is 'a learning phenomenon in which animals are virtually irreversibly fixed on the objects of their social relations in a short and genetically determined period of time' (Celli, Konrad Lorenz, Begründer der Ethologie, 2001). If this period passes unused, the animal concerned will not be characterized which automatically leads to lifelong behavioral disorders. A condition that can be found quite often in dog puppies which are bought in pet shops. The characterization process is irreversible and therapy resistant. Ethological studies such as for instance at the institute of pet science at the Christian-Abrechts-University Kiel, have shown that errors and deficiencies in the characterization process of the puppies lead to irreparable behavioral disorders (cf. Feddersen-Petereson, Hundepsychologie, 2004). Isolated or dogs that have low stimulus when raised inevitably develop behavioral disorders due to the serious social experience deprivation. The characterization period is also the most important stage of life for living together with humans later on: In this stage, which is characterized with curiosity and the congenital capacity for learning, they are characterized by humans.

Starting around the 9th week of life the socializing phase starts for the puppies. 'The socializing phase is a process during which an individual adapts to the social expectations of the environment or is prompted to do that by espousing norms of the social environment and learns to act according to these norms' (Portmann, Das Tier als soziales Wesen, 1953). In this phase the puppy learns the rules of the social cohabitation together with conspecifics as well as humans. The socializing phase together with the characterization phase has the biggest

meaning for a conflict-free cohabitation of human and animal. The cornerstones for the whole further development of the dog as a social animal are laid down; the dog learns to integrate itself in the community life and develops the ability to subordinate and accept its position within the 'familypack'.

The importance of the characterization and the socializing phase in connection to the hand-over date can be seen on the following diagram (from: Weidt, Der Hund, mit dem wir leben, 3. Auflage, 1996):

Graphics cannot be displayed!!!

Puppies are usually offered for sale in pet shops between their eight and tenth week of life which means under the before established remarks that they are in the for them deciding characterization and socializing phase. Since it is not possible to ensure species-appropriate animal keeping under conditions (socialization with other species, permanent disturbance caused by stress-triggering environmental stimuli such as noise, light, temperature, touch and lack of socialization on humans and lack of resting and retreating possibilities) that are present in pet shops even with compliance of animal protection requirements a prohibition under §31 para. 5 TSchG is needed.

Thereby the applicant's argument that a general prohibition of keeping and exhibiting dogs and cats in pet shops is not reasonable when complying with the regulations of the TSchG is incomprehensible.

Finally, the applicant also does not exclude the lack of suitability of the other existing provisions of the TSchG for the protection of animal welfare in the given context. After the applicant's appeal, 'even if it was assumed that the existing provisions in the sense of animal welfare would not be sufficient to allow the keeping and exhibiting of dogs and cats in pet shops', though 'special provisions would have needed to be introduced instead of the general prohibition' (p. 11, second last paragraph of the individual application). Hereby it is once more needed to register that the prohibition under §31 para. 5 TSchG is not a general keeping and exhibiting prohibition but only for the purpose keeping and exhibiting of animals for sale. Furthermore, the applicant does not state the type nor the content of appropriate 'special provisions'. In this connection it is once more needed to register that it is not possible to ensure species-appropriate and behavior-appropriate keeping of dogs and cats for exhibition in pet shops or other similar commercial establishments with additional provisions to the existing animal keeping provisions of §§12 ff. TSchG as well as the Tierhaltungs-Gewerbeverordnung, BGBl. II Nr. 487/2004. Rather it is the case that the legislature in pursuit of the objective of animal welfare in the public interest only remains to prohibit the keeping and exhibiting of animals.

Due to the lack of other appropriate measures it is consequently not possible to introduce milder (appropriate) measures to achieve the same goal. The prohibition under §31 para. 5 TSchG is thus necessary.

2.4. In conclusion, the Federal Government states that the prohibition under §31 para. 5 TSchG is proportionate when considering the gravity of the infringement and the weight of the justifying grounds.

II. To the legal situation:

With the constitutional provision of Article 1 of the Federal Law, that enacts the TSchG and changes the Federal Constitutional Law, the Gewerbeordnung 1994 and the Bundesministeriengesetz 1986, BGBl. I Nr. 118/2004, to art. 11 para. 1 of the Federal Constitutional Law, BGBl. Nr. 1/1930, the following point 8 is added:

Article 11. (1) Responsibility of the federal government is the legislation and provincial matter is the execution in the following matters:

1. to 7. [...]

"8. Animal protection, as long as it is not stated under other provisions that it is in the responsibility of the legislature, however, with the exception of hunting and fishing."

(2) to (9) [...]

The relevant provisions of the Federal Act on the Protection of Animals (Animal Protection Act - TSchG), BGBl. I Nr. 118/2004, (afterwards: TSchG) (the contested parts are highlighted):

"4. Principal part Penal and final provisions

Penal provisions

§38.

(1) and (2) [...]

(3) Any person who violates, except in the cases of para. 1 and 2, the provisions §§9, 11 to 32, 36 para. 2 or 39 or against administrative acts based on these provisions, commits an administrative offense and is fined by the authority with a fine of up to EUR 3 750
Repetition case up to EUR 7 500.

(4) to (7) [...]"

"Entry into force and transitional provisions

§44. (1) This Federal Act comes into force on January 1st, 2005, but not before the end of the day of its publication in the Federal Law Gazette.

(2) to (7) [...]

(8) Animals which have been legally kept under the existing provisions, but which are prohibited under this Federal Act, the authority may issue an authorization (§23) if this is more appropriate to the welfare of the animal.

(9) Applications for authorizations and notifications which are required under this Federal Act shall be submitted within one year after the date of entry into force as set out in

para. 1. If the application or the notification has been submitted in due time, the activity or the state to which the authorization or notification obligation relates to is legal up to a different official decision.

(10) If the authorization or notification requirement or the prohibition of entry (para. 8) is provided by a regulation pursuant to this Federal Act, the above provisions shall apply with the provision that the entry into force of this ordinance takes precedence over the entry into force of this Federal Act.

(11) and (12) [...]"

III. The Constitutional Court has considered the following regarding the issue of the admissibility of the application:

1. According to art. 140 of the constitution, the Constitutional Court recognizes the unconstitutionality of laws also at the request of a person who claims to be directly infringed in his rights through this unconstitutionality, provided that the law has become effective for that person without a court decision or without issuing a notification. As the Constitutional Court elaborated in its jurisdiction starting with VfSlg. 8009/1977, the fundamental prerequisite for the legitimacy of an application is that the law directly interferes with the judicial sphere of the person concerned and that in the event of its unconstitutionality the law infringes it. In this connection, the Constitutional Court has to merely examine whether the effects brought about by the applicant are like the ones required as a prerequisite for the application by art. 140 para. 1, last sentence, of the constitution (cf. e.g. VfSlg. 11.730/1988, 15.863/2000, 16.088/2001, 16.120/2001).

2. The contested provision standardizes a prohibition to keep and exhibit dogs and cats for commercial activities in pet shops for the purpose of sale. This prohibition directly and currently infringes the applicant as an operator of a pet shop in her judicial sphere (cf. e.g. VfSlg. 11.853/1988 and VfSlg. 12.379/1990); furthermore in any case for animals which were not yet in their possession before January 1, 2005, there are and were no other reasonable means at the applicant's disposal to address the issue of the constitutionality of the provision to the Constitutional Court, especially as it would be not reasonable for a person subject to the provisions to provoke an administrative criminal prosecution and to argue with the unconstitutionality of the prohibition standard (cf. e.g. VfSlg 14.260 / 1995).

The application is thus admissible.

IV. To this matter:

1. According to §31 para. 1 TSchG an official authorization is needed to keep animals for commercial activities (§1 of the Gewerbeverordnung, BGB1. Nr. 194/1994). With the reference to §1 of GewO 1994 that is made in this provision, the Federal legislature has made clear that only those activities are to be covered, which are carried out independently on a regular basis and with profit intentions, and which are neither contrary to a legal prohibition nor excluded from the scope of the trade regulation pursuant to § 2 leg. Cit..

The legislator has specified this rule in §31 para. 5 TSchG, in which - ex lege - a prohibition has been intended, which states that cats and dogs can not be kept or exhibited in pet shops and other commercial establishments for the purpose of sale. According to this

prohibition, it is absolutely forbidden to keep these animals, namely dogs and cats, for the purpose of sale in the institutions mentioned therein (i.e. pet shops and, in particular, facilities such as DIY stores where animals are offered for sale in comparable exhibition situations) [cf. Binder, Das Österreichische Tierschutzgesetz, S. 126].

The justification for this prohibition can be found in the explanatory notes (cf. 509 BlgNR, XXII GP). According to these, it is "not possible to ensure species-appropriate and behavior-appropriate keeping of dogs and cats in pet shops and other similar commercial establishments that offer animals for sale. This is especially true for puppies and young animals. The animals are usually sold in an age where they are in a sensible development phase and where the environment has defining influences on their behavior. At the same time, due to the socialization with other litters and the exhibition circumstance dog and cat puppies suffer from stress load, which might not only have influences on the later development of an individual but also significantly weaken the immune system of the young animals as they have only a limitedly durable immune system which leads to serious infectious diseases and possibly death."

Nevertheless, the Constitutional Court assumes that the legislature does not standardize a general prohibition on the sale of animals under §31 para. 5 TSchG, but puts a ban on the holding and exhibiting of animals for the purpose of sale for commercial activities in pet shops and other commercial establishments in which animals are offered. As the report of the Constitutional Committee 509 BlgNR, XXII. GP shows, the contested provision of §31 para. 5 TSchG in question was inserted into the government bill only after a detailed professional and political debate, since the appropriate and behavioral attitude of dogs and cats in pet shops and other commercial establishments in which animals were offered can not be guaranteed otherwise from the legislator's point of view.

Finally, the following can be taken from the report:

"The keeping and exhibiting of dogs and cats in pet shops and other commercial establishments in which animals are held for the purpose of sale shall thus be forbidden. This prohibition of keeping and exhibiting should not be put on a level with a general prohibition of sale of dogs and cats. It is possible for the business people to find a suitable way of business."

The Constitutional Court agrees with the Federal Government that the contested provision is just a restriction of certain selling arrangements but not a general prohibition of sale.

2.1. It is to agree with the applicant company and the Federal Government that the prohibition of the exhibition of dogs and cats for the purpose of sale in pet shops and other comparable commercial facilities is an interference with the freedom of business.

2.2. According to the established jurisprudence of the Constitutional Court to the constitutionally guaranteed right to freedom of business under art. 6 of the StGG, statutory provisions restricting the freedom of business, based on the reservation of rights attached to this basic right, are only permissible when they are in the public interest, appropriate to achieve their goal, adequate and objectively justifiable.

Statutory regulations restricting professional practice must therefore be examined for their conformity with the constitutionally guaranteed freedom of business. This means that (professional) exercise rules must be proportionate in the context of an overall balance between the gravity of the intervention and the weight of the justifying grounds. However, the legislature has a bigger legal scope for regulations regarding the freedom of business than in regulations which restrict access to a profession (the acquisition) because by such regulations governing the exercise of employment, the interference with the constitutionally protected court is less severe than by rules which hinder access to the profession (cf. e.g. VfSlg. 13.704/1994 and the cited Vorjudikatur; also VfSlg. 16.024/2000 and 16.734/2002).

2.3. The Constitutional Court can not find that the legislature had exceeded its margin of discretion by providing for a prohibition on holding and exhibiting dogs and cats for commercial purposes in pet shops and other commercial establishments where animals are offered for sale for the following reasons:

2.3.1. The existence of a public interest in the protection of life and the welfare of animals from the special responsibility of humans for the animal as a fellow creature was not questioned by the applicant company itself.

2.3.2. However, the applicant company has the opinion - summarized to the essentials - that the ban standardized in §31 para. 5 of the TSchG, even in the case of a public interest, is not suitable for the protection of dogs and cats since by this regulation the "black market" would have a significant boom; in addition, it would not at all possible to see in which institutions dogs and cats may still be kept.

The Constitutional Court does not share these concerns of the applicant company.

2.3.3. As the Federal Government correctly and extensively pointed out, the prohibition pursuant to §31 para. 5 TSchG does not include the commercial keeping of dogs and cats for breeding, but merely prohibits the keeping and exhibiting of these animals for the purpose of sale in a pet shop or similar commercial establishments (cf. also IV/1). The assertion that the scope of §31 para. 5 TSchG is unclear is therefore void.

If one starts from this normative content of § 31 Abs5 TSchG, especially in the case of a general consideration it can not be disregarded that - apart from the keeping of dogs and cats in pet shops themselves - other forms of business (such as using pictures, catalogues, videos, internet, etc.), be it for mediation or direct sale purposes, are not covered by the prohibition of §31 Abs5 TSchG.

The view of the Federal Government can not be contest insofar that the regulation is not a proportionate interference with the freedom of business when taking into consideration the significant interest in the protection of life and welfare of the animals, and the fact that operators of pet shops have numerous other ways of business with dogs and cats as well as animals which are not subject to the prohibition under §31 para. 5 TSchG; additionally another important aspect is that "especially with regard to the socialization of young animals in premises" in pet shops and other commercial establishments it is not possible to ensure species-appropriate animal keeping which is obviously a legitimate concern of the government (cf. Binder, Das Österreichische Tierschutzgesetz, Kommentar zu §31 Abs5 TSchG, S. 126).

Even if the concerns of the applicant company were correct in the sense that the legislature regulates with a prohibition of the exhibition of cats and dogs in pet shops only a partial aspect of the animal welfare of animals offered for sale in pet shops it is thereby not shown that this measure would be unsuitable or not objective in the light of §1 TSchG.

2.3.4. As a result, the Constitutional Court therefore takes the view that the legislature has not exceeded its constitutional scope not least in view of the fact that it is a mere exercise regulation and not a restriction of access to the exercise of a profession.

2.3.5. The application to repeal §31 para. 5 TSchG as unconstitutional was thereby dismissed.

V. According to the first sentence of §19 para. 4 VfGG, this decision could be passed without oral hearing in a non-public session.