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## Constitutional judgment 3-4-1-9-04

### JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

<b>No. of the case</b>	3-4-1-9-04
<b>Date of judgment</b>	21 June 2004
<b>Composition of court</b>	Chairman Tõnu Anton, and members, Lea Kivi, Ants Kull, Villu Kõve and Jüri Pöld.
<b>Court Case</b>	Petition of the Tallinn Administrative Court to review the constitutionality of § 12(4)1) and § 12(5) of the Aliens Act.
<b>Disputed judgment</b>	Judgment of the Tallinn Administrative Court of 1 March 2004, in administrative matter no. 3-657/2004.
<b>Type of proceeding</b>	Written proceeding

### DECISION

To declare § 12(4)1) and § 12(5) of the Aliens Act unconstitutional to the extent that they do not provide for a competent state authority's right of discretion upon refusal to issue a residence permit because of the submission of false information.

### FACTS AND COURSE OF PROCEEDING

1. Oleg Bakardžijev arrived in Estonia in 1989. By a decision of the Citizenship and Immigration Board O. Bakardžijev was issued a temporary residence permit for the term from 7 July 1995 until 7 July 2000. The residence permit was revoked on 10 February 1999, in relation to issuance of the Estonian passport. On 6 February 2002 the Citizenship and Migration Board revoked O. Bakardžijev's Estonian passport, because upon applying for the passport O. Bakardžijev had submitted false information.

During the years 1973 – 1988 O. B Bakardžijev had served as a professional member of the armed forces of Soviet Union. He was assigned to the reserve on 20 January 1988 in the rank of Commander.

O. Bakardžijev submitted application for a residence permit on 16 September 2002. By order no. 518 of 26 November 2003, on the basis of § 12(4)1) and 7) and § 12(5) and (6) of the Aliens Act, the Minister of Internal Affairs refused to issue him a residence permit because he had served as a professional member of the armed forces of a foreign state, had submitted false information upon applying for a residence permit and poses a threat to the national security of Estonia. O. Bakardžijev had denied his involvement with the armed forces of a foreign state in his application for a permanent residence permit in 1995, as well as in his

application for a residence permit in 2002.

2. On 5 December 2003 Oleg Bakardžijev filed an action with the Tallinn Administrative Court arguing that the Minister of Internal Affairs order no. 518 of was illegal and should be revoked for the following reasons:

a) when reviewing the application for a residence permit the Minister of Internal Affairs has not taken into consideration the complainant's family life in Estonia and the effect of refusal to satisfy the application on his family life. Pursuant to § 27 of the Constitution of the Republic of Estonia the family shall be protected by the state, and on the basis of § 9(1) of the Constitution the referred right extends to citizens of foreign states and stateless persons in Estonia;

b) compulsory execution of the precept to leave Estonia may lead to the interruption of the complainant's family relationships. Thus, the Minister of Internal Affairs must have had a very good reason for the infringement into family life. Submission of false information upon filling in a residence permit application form is not a serious offence. The complainant poses no actual threat to the state of Estonia.

3. By its judgment of 1 March 2004, in administrative matter no. 3-657/2004, the Tallinn Administrative Court satisfied the action of O. Bakardžijev, did not apply § 12(4)1) and § 12(5) of the Aliens Act, and declared the provisions unconstitutional.

### **OPINION OF THE ADMINISTRATIVE COURT AND PARTICIPANTS IN THE PROCEEDING**

4. The Tallinn Administrative Court found that § 12(4)1) and § 12(5) of the Aliens Act were disproportional to the extent that they did not allow the issuer or extender of a residence permit to choose legal consequences in regard of a person who has submitted false information when applying for a visa, residence or work permit or when applying for the extension of these. The issuer or extender of a residence permit has no possibility to weigh whether the restriction of rights and freedoms in a concrete case is necessary in a democratic society. The norms, enacted by the legislator, infringing on the fundamental right established in § 27(1) of the Constitution, are not in conformity to the principle of proportionality arising from § 11 of the Constitution. In the case of an infringement of family life the ascertainment of a threat to the national security for the purposes of § 12(6) of the Aliens Act is not sufficient, such a threat must be a serious one, outweigh the right of a person to family life, and must be proven and reviewable by the courts.

5. The Constitutional Committee of the Riigikogu admits that § 12(4)1) and § 12(5) of the Aliens Act may be disproportional to the extent that they do not allow the issuer or extender of a residence permit to consider whether the restriction of rights and freedoms in each concrete case is necessary in a democratic society.

Also, the Riigikogu requests that if the unconstitutionality of the disputed provision is ascertained, the entering into force of the judgment of the Supreme Court be postponed for one month, to enable the Riigikogu to amend the Act.

6. The Chancellor of Justice is of the opinion that § 12(4)1) and § 12(5) of the Aliens Act are unconstitutional to the extent that they exclude discretion upon deciding on the issuing of a residence permit, if a person has submitted false information upon applying for the residence permit.

A refusal to issue or extend a residence permit to an alien may constitute an infringement of family life. On the basis of the Constitution the family life is protected pursuant § 26 as well as pursuant § 27. The provisions of the Aliens Act which, in certain cases, exclude the possibility to issue or extend a residence permit, without allowing the implementers of the Act any discretion to take into consideration the circumstances of a concrete case, infringe upon the right of an alien to the inviolability of family life, because upon refusal to issue or extend a residence permit an alien loses the right to stay in Estonia and he or she has to leave Estonia.

The objective of refusal to issue a residence permit when a person has submitted false information is to exclude the stay in Estonia of such persons who can not be considered trustworthy. Pursuant to the

requirements imposed by the legislator the relationship of trust, which is the basis for issuing a residence permit, is interrupted when a person is either hiding something or is submitting false information. The referred provisions do not allow for any weighing in a concrete case, thus treating every case of submission of false information equally.

It is contrary to the principle of proportionality, arising from the second sentence of § 11 of the Constitution, that § 12(4)1) and § 12(5) of the Aliens Act exclude all discretion upon implementation of the Act.

**7.** The Minister of Internal Affairs is of the opinion that when applying § 12(4)1) of the Aliens Act it is important to ascertain the intent to submit false information. Pursuant to the established administrative practice the referred provision is only applied if an alien has submitted false information intentionally.

In his opinion the Minister of Internal Affairs pointed out that pursuant to § 12(6) of the Aliens Act the legislator has considered submission of false information as a threat to the national security of Estonia. If, upon processing an application for a residence permit, the intent of a person to submit false information has been ascertained, this amounts to a serious threat to security, and the refusal to issue a residence permit is justified and necessary.

**8.** § 12(4)1) and § 12(5) of the Aliens Act (RT I 1993, 44, 637 ... 2003, 4, 20) read as follows:

“§ 12. Bases for issue of residence permits

[...]

(4) A residence permit shall not be issued to or extended for an alien if:

1) he or she has submitted false information (including information concerning his or her earlier activities) upon application for a visa, residence permit or work permit or upon application for extension thereof;

[...]

(5) As an exception, temporary residence permits may be issued to aliens listed in clauses (4) 5)–8) and 14) of this section and such residence permits may be extended if the circumstances specified in clauses (4) 1)–4), 9)–13) or 15) of this section have not been ascertained with regard to such aliens.

[...]”

## **OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER**

**9.** By its judgment of 1 March 2004 the Tallinn Administrative Court did not apply § 12(4)1) and § 12(5) of the Aliens Act, and declared the provisions unconstitutional. The court held that the norms infringing upon the right to the inviolability of family and private life were not in conformity with the principle of proportionality, arising from § 11 of the Constitution, as they did not allow the issuer or extender of a residence permit to choose legal consequences in regard of a person who has submitted false information upon applying for a visa, a residence or work permit or when applying for the extension of these.

**10.** §§ 12(4)1) and 12(5) of the Aliens Act in their conjunction establish that a temporary residence permit shall not be issued to or extended for an alien who has submitted false information upon applying for a residence permit. The wording of § 12(4)1) and § 12(5) of the Aliens Act excludes the issuing of a residence permit in all cases of submission of false information. Thus, the disputed regulation provided for no right of discretion of a competent state agency upon making a decision on the issuing or extending a residence permit.

**11.** § 9(1) of the Aliens Act, in force at the material time of processing the application for a residence permit of O. Bakardžijev, established the grounds for an alien to stay in Estonia. Pursuant to § 9(1)1) one of the

bases for an alien to stay in Estonia is a residence permit.

Pursuant to § 3(2) of the Obligation to Leave and Prohibition on Entry Act (RT I 1998, 98/99, 1575 ... 2004, 28, 289) an alien is required to leave Estonia if his or her basis for stay expires and is not extended, and if he or she has no other basis for stay. Thus, a person is required to leave Estonia if his or her application for a residence permit is denied and he or she has no other basis for stay.

**12.** The obligation of a person to leave may infringe upon several fundamental rights and freedoms of the person. Depending on circumstances a refusal to issue a residence permit and obligation to leave may infringe upon the right to inviolability of family and private life, established in § 26 of the Constitution (see also judgment of the Administrative Law Chamber of the Supreme Court of 17 March 2003, in case no. 3-3-1-11-03 – RT III 2003, 8, 84).

**13.** The constitutional right to inviolability of family and private life obligates the authority of the state to refrain from interfering with family life. The field of the protection of the right includes, inter alia, a relationship of a child with his or her biological parents. Also, pursuant to the established practice of the European Court of Human Rights, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms includes at least the ties between near relatives (see judgment of 13 June 1979, in *Marckx versus Belgium*, paragraph 45).

Pursuant to § 9 of the Constitution the protection of family and private life extends to Estonian citizens as well as to citizens of foreign states and stateless persons staying in Estonia. The Supreme Court has found that a refusal to issue a residence permit to an alien amounted to an infringement of the inviolability of family life (see judgment of the Administrative Law Chamber of the Supreme Court of 18 May 2000, in case no. 3-3-1-11-00 – RT III 2000, 14, 149; judgment of 19 June 2000, in case no. 3-3-1-16-00 – RT III 2000, 18, 190).

**14.** The right to inviolability of family and private life is not an unlimited one. In paragraph 117 of its judgment of 9 October 2003 in *Slivenko versus Republic of Latvia* the European Court of Human Rights has pointed out that the public interest in the removal of active servicemen and their families from the territory will normally outweigh the individual's interest in staying, but even in such a case it is not to be excluded that the specific circumstances of a person's case might render the removal measures unjustified from the point of view of the Convention.

**15.** Pursuant to § 11 of the Constitution an infringement of a fundamental right must be necessary in a democratic society and must not distort the nature of the rights and freedoms restricted. The Supreme Court has found that an infringement of a fundamental right can be considered justified only if the principle of proportionality has been observed (see judgment of the Supreme Court en banc in case no. 3-4-1-7-01 – RT III 2001, 26, 280). Thus, the state must consider whether the measures taken, bearing in mind the desired aim, are proportional in the narrow sense.

**16.** The Administrative Law Chamber of the Supreme Court has pointed out in its judgment of 17 March 2003, in case no. 3-3-1-11-03 (paragraphs 41-43) that the principle of proportionality is related to the right of discretion. Pursuant to § 4 of the Administrative Procedure Act the right of discretion is an authorisation granted to an administrative authority by law to consider making a resolution or choose between different resolutions, and the right shall be exercised in accordance with the limits of authorisation, the purpose of discretion and the general principles of justice, taking into account relevant facts and considering legitimate interests.

The executive needs the right of discretion to guarantee the implementation of the principle of proportionality. As a rule, a competent authority is under the obligation to assess whether the interests of a person and those of the public are balanced, i.e. if the restrictions of fundamental rights are proportional. In order to decide whether a decision to be taken is in conformity with the principle of proportionality, concrete circumstances have to be taken into account (see judgment of the Supreme Court en banc in case no. 3-4-1-7-

01 – RT III 2001, 26, 280, and judgments of the Constitutional Review Chamber of the Supreme Court in cases no. 3-4-1-6-2000 – RT III 2000, 13, 140; and no. 3-4-1-6-01 – RT III 2001, 15, 154; 3-4-1-1-03 – RT III 2003, 5, 48).

**17.** In several constitutional review matters the Supreme Court has dealt with the constitutionality of such regulations, established by law, which give the executive no discretion upon making decisions. The Supreme Court has, on several occasions, declared unconstitutional such laws which do not give the executive the right of discretion (judgments in cases no. 3-4-1-6-2000 – RT III 2000, 13, 140; no. 3-4-1-2-01 – RT III 2001, 7, 75; no. 3-4-1-6-01 – RT III 2001, 15, 154; no. 3-4-1-7-01 – RT III 2001, 26, 280; no. 3-4-1-1-03 – RT 2003, 5, 48).

In constitutional review case no. 3-4-1-2-01 (RT III 2001, 7, 75) the Chamber declared §§ 12(4)10) and 12(5) of the Aliens Act unconstitutional, because the referred provisions did not allow to take into consideration the behaviour of an alien who had stayed in Estonia for a long time, on the basis of which it can be decided whether he or she poses a threat to national security, the duration of permanent stay, the consequences of expulsion on his or her family members and the connections of the immigrant with his or her state of origin.

**18.** The aforesaid does not mean that the legislator was not entitled to foresee situations wherein the executive has no discretion. In paragraph 43 of its judgment of 17 March 2003, in case no. 3-3-1-11-03, the Administrative Law Chamber of the Supreme Court has pointed out that even a regulation which does not allow for discretion may, upon application, give a proportional result. That is, if the legislator itself has considered the proportionality of the exception upon establishing it. Naturally, the constitutionality of such exceptions can also be subjected to judicial review. The exceptions, just like the right of discretion, must be established by law. In the given case, neither the discretion nor the exception have been established in this manner.

**19.** In order to decide whether the restriction of the right to inviolability of family life is constitutional, an executive agency shall have to consider different opposite interests. Upon a refusal to issue a residence permit to an alien the following interests are opposing: on the one hand the interest of the person that his family and private life be not violated, and on the other hand the public interest to guarantee the national security of the state.

But if a norm does not allow a decision-maker to consider the peculiarities of a situation, we can not be sure that the infringement of family life is constitutional.

**20.** Similarly with the referred provisions, the assessment of the behaviour and the situation of an alien in order to make a right decision, is excluded also upon applying § 12(4)1) and § 12(5) of the Aliens Act. Neither is it possible to take into consideration the fact that the person's right to inviolability of family life is being infringed upon.

**21.** The lack of the right of discretion under § 12(4)1) and § 12(5) of the Aliens Act means that, irrespective of circumstances, any submission of false information will result in a denial of an application for a residence permit. The representatives of the executive have no possibility to consider whether the application of the contested provisions is proportional in a concrete case or not.

Even if we interpret the contested provisions the way the Minister of Internal Affairs explained, i.e. in conformity with the established practice that the referred provisions are applied only if an alien has submitted false information intentionally, the representatives of the executive have not been guaranteed a possibility to take into account the behaviour of the applicant, the peculiarities of his or her situation, or whether the false information had been submitted intentionally concerning issues important from the point of view of national security of the state.

**22.** On the basis of the aforesaid the Chamber is of the opinion that the regulation provided for in § 12(4)1)

and § 12(5) of the Aliens Act is unconstitutional to the extent that it does not provide for the right of discretion of a competent state agency upon refusal to issue a residence permit because of the submission of false information.

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