Constitutional judgment 3-4-1-2-04

RULING
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-2-04
Date of decision	1 April 2004
Composition of court	Chairman Uno Lõhmus, members Tõnu Anton, Ants Kull, Villu Kõve and Jüri Põld
Court case	Petition of the Harju County Court to review the conformity of the International Convention on Civil Liability for Oil Pollution Damage to the Estonian Constitution.
Basis of proceeding	Ruling of the Harju County Court of 9 December 2003
Date of court hearing	3 March 2004
Persons participating in the hearing	Representative of the Government of the Republic Eerik Siigur, representatives of the Chancellor of Justice Lauri Mälksoo and Mihkel Allik, representative of the Minister of Justice Anno. Aedma, representatives of the AS Termoil sworn advocates Raivo Laus and Madis Kiisa, representative of the Capri Marine Ltd sworn advocate Ene Soop, representatives of the International Oil Pollution Compensation Fund sworn advocates Indrek Teder and Kenno. Vilippus, representatives of the London Steam-Ship Owners' Mutual Insurance Company Ltd sworn advocates Toomas Taube and Hannes Vallikivi
Decision	**To refuse to hear the petition of the Harju County Court.**

FACTS AND COURSE OF PROCEEDING

1. On 17 September 2000, when unloading tanker vessel Alambra, owned by a foreign company the Capri Marine Ltd, a leakage of mazut was discovered, in connection of which, upon the order of the Muuga Harbour, the unloading of the tanker vessel was suspended and the tanker vessel was prohibited from leaving berth no. 7 of the Muuga Harbour. The tanker vessel was allowed to leave the berth on 28 September 2000. The AS Termoil loaded oil products on berth no. 7.

2. On 6 November 2003 the AS Termoil filed an action against the Capri Marine Ltd, claiming compensation for the loss of profit in the amount of 9 716 848 kroons. On 22 December the plaintiff also filed a claim against the London Steam-Ship Owners' Mutual Insurance Company Ltd (hereinafter "the London club"), the insures of the Capri Marine Ltd. On 8 November 2001, the court involved in the

proceedings from the plaintiff's side the International Oil Pollution Compensation Fund as a third person.

3. The plaintiff based his claim on the International Convention on Civil Liability for Oil Pollution Damage (hereinafter "the Convention").

4. By its ruling of 9 December 2003 the Harju County Court did not apply Article III(1) in conjunction with Article I (6) and (7) of the Convention, and declared these unconstitutional.

JUSTIFICATIONS OF THE COURT AND PARTICIPANTS IN THE PROCEEDING

Justifications of the Harju County Court

5. The Harju County Court found that when the facts presented by the parties are collected with the thoroughness enabling the court to deem the pre-trial proceedings to be completed, the court has achieved clarity as to the applicable law. After that the court must assess whether the applicable legislation is unconstitutional and, if necessary, initiate constitutional review proceedings under § 9(1) of the Constitutional Review Court Procedure Act (hereinafter "the CRCPA"). The court did not apply Article III(1) in conjunction with Article I (6) and (7) of the Convention and, referring to § 9(1) of the CRCPA and § 213(2)4) of the Code of Civil Procedure, initiated constitutional review proceedings.

The court found that at the time when the alleged damage was caused, i.e. in September 2000, the valid law recognised, among other things, loss of profit as damage. The extent of damage caused by marine pollution and the procedure for compensating for the damage is regulated by the Merchant Shipping Code (hereinafter "the MSC") as a special norm, which does not provide for compensation for the loss of profit. The court is of the opinion that the same relationships are also regulated by the Convention, which, in the interpretation of the court, treats loss of profit as a preventive measure. Thus, the court found that it was necessary to apply the Convention for adjudicating the plaintiff's claim.

6. The Government of the Republic decided to accede to the Convention by its decision no. 66, recorded into the minutes of the session of the Government of the Republic of 13 October 1992, and the Convention took effect in regard of the Republic of Estonia on 1 March 1993.

The Harju County Court found that according to § 121(2) of the Constitution, the Riigikogu should have taken the decision on acceding to the Convention. As the accession to the Convention was decided by the Government of the Republic, the decision is unconstitutional and should not be applied.

7. The court further argued that as the plaintiffs are foreign companies, the non-publication of the Convention in the Riigi Teataja [*State Gazette*] can not violate their rights.

Justifications of the participants in the proceeding

8. The AS Termoil is of the opinion that the Convention is of decisive importance for the adjudication of the matter. The decision of the Government of the Republic recorded in the minutes of its session is an act of incorporation, the review of constitutionality of which is not appropriate in this matter. Secondly, the plaintiff argues that the Convention is in force in Estonia, as § 30 of the MSC eliminates the conflict between the Convention and the provisions of the Merchant Shipping Code and gives supremacy to the Convention, and that is why acceding to the Convention did not require amendment of the existing law. Such a solution would also be in conformity with the principles of justice and legal certainty.

The plaintiff analysed the effect of failure to publish the Convention in the Riigi Teataja and came to the conclusion that although, pursuant to the principle of rule of law, only published laws have obligatory force, the requirement is valid primarily in the situations where a legal act imposes obligations on national subjects. A norm giving a right to a national subject need not be published to be directly applicable. Also, it must be taken into account that the defendants are engaged in operating and insuring of oil tankers and are constantly observing the provisions of the Convention for these purposes.

9. The defendants, including the Capri Marine Ltd, the London club and the third person - the International Oil Pollution Compensation Fund - are of the opinion that the court ruling is a correct and justified one, but they consider that the fact that the Convention has not been published in the Riigi Teataja is also important.

10. The Government of the Republic does not agree with the opinion of the Harju County Court and argues that the Convention did not extend liability as compared to § 291 of the MSC. The provisions of neither of the legal acts exclude the loss of profit from damage to be compensated for. As there was no need to amend national law in order to accede to the Convention, there was also no need for the Riigikogu to ratify the agreement. The Government of the Republic had acted within its competence and correctly in the legal sense.

The Government of the Republic also pointed out that pursuant to § 46 of the Vienna Convention on the Law of Treaties the Convention as an international agreement is binding on Estonia irrespective of the fact that upon acceding to it a provision concerning the competence to enter into agreements was violated, except in the cases when a violation was manifest and affected an essentially important norm of national law.

11. The Chancellor of Justice argued that § 9(1) of the CRCPA allows a court initiate constitutional review proceedings by a ruling. The same proceeds from clauses 3) and 9) of § 213(2) of the Code of Civil Procedure in conjunction with §§ 9(1) and 4(3) of the CRCPA.

The Chancellor of Justice is of the opinion that Regulation no. 66 of the Government of the Republic registered in the minutes of its session is in conflict with the Constitution and the Convention has been incorporated into the legal system of the Republic of Estonia unconstitutionally. At the same time the Chancellor of Justice is of the opinion that from the point of view of international law the Convention is binding on the Republic of Estonia and pursuant to the second sentence of § 3(1) of the Constitution the Convention as a set of generally recognised rules of international law shall be applied on the national level.

It is important that the Convention is not in material conflict with the Constitution and similar norms concerning compensating for damage are in force in Estonia as international common law. The Chancellor of Justice is of the opinion that possible full compensation for pollution damage – as prescribed by the Convention – is a generally recognised norm of international law.

12. The Minister of Justice is of the opinion that the petition of Harju County Court should be dismissed. Neither § 9(1) of the Constitutional Review Court Procedure Act nor other procedural laws provide for a court’s competence to make a ruling on declaring a legislation of general application or a provision thereof unconstitutional and not applying it in the matter. Rulings can be made in the cases provided for in procedural laws for the resolution of procedural matters. In the present matter the court has, in essence, made a preliminary judgment by making the ruling, which does not resolve a procedural issue and instead adjudicates a part of the dispute between the plaintiff and the defendant. A court can initiate a constitutional review proceeding only after having adjudicated the matter.

The Minister of Justice argued that accession to an international agreement by a decision of the Government of the Republic registered in the minutes of its session was problematic. The contested international agreement does not provide for liability broader than that provided by the Merchant Shipping Code and the Civil Code in their conjunction. That is why there was no need to ratify the Convention in the Riigikogu and the accession to the Convention was in conformity with the Constitution. As for the non-publication of the agreement, the Minister of Justice points out that proceeding from § 24(1) of the Vienna Convention on the Law of Treaties the publication of an international agreement is not a precondition of its entry into force and the agreement is valid irrespective of the publication thereof in the Riigi Teataja.

Furthermore, the Minister of Justice pointed out that even if national law had provided for narrower liability in comparison with the Convention, it would not be correct to declare the Convention unconstitutional. Such a decision should be made only if it were in material conflict with the Constitution, but the courts have not ascertained that.

Opinion of the Constitutional Review Chamber

13. The Harju County Court initiated a constitutional review court proceeding without having deciding the matter on its merits. The Chamber considers it necessary to weight first whether the Constitutional Review Court Procedure Act (hereinafter "the CRCPA") allows to initiate proceedings in this manner.

14. § 9 of the Constitutional Review Court Procedure Act regulates initiation of constitutional review proceedings on the basis of a court judgment or ruling. § 9(1) of the Constitutional Review Court Procedure Act establishes that if a court of first or second instance, when adjudicating a matter, has decided not to apply any relevant legislation or international agreement, declaring it unconstitutional, it shall refer the pertinent judgment or ruling to the Supreme Court.

15. The Harju County Court is of the opinion that § 9(1) of the CRCPA allows a court to initiate a constitutional review court proceeding even before final resolution of the matter, if the court considers that pre-trial proceeding is completed and it is clear to the court which laws are applicable.

16. The Constitutional Review Chamber of the Supreme Court does not agree with this interpretation of the Harju County Court. In its earlier practice the Chamber has repeatedly underlined that when examining a petition of a court which has refused to apply an Act, the Chamber shall first check whether the provision declared unconstitutional by the court is relevant for the adjudication of the matter. Such a control is justified and necessary, because pursuant to § 14(2) of the CRCPA the Supreme Court is competent to declare unconstitutional and invalid only relevant provisions. When assessing relevance, it is important whether the provision, which was declared unconstitutional, was of decisive importance upon adjudicating the case. A provision is of decisive importance if, in the case of unconstitutionality of the provision, a court should make a judgment different from a judgment in the case of constitutionality of the provision (*see mutatis mutandis judgment of Constitutional Review Chamber of the Supreme Court of 2 December 2002, case no. 3-4-1-11-02 – RT III 2002, 35, 376, paragraphs 13-14; judgment of the Supreme Court en banc of 28 October 2002, case no. 3-4-1-5-02 – RT III 2002, 28, 308, paragraph 15*).

The Chamber has pointed out that in some instances the decision on relevance of a provision requires the assessment of whether the court who initiated concrete norm control has correctly interpreted the norm it has declared unconstitutional and the norms which define the conditions and extent of application of the provision declared unconstitutional. If the court which initiated constitutional review has declared a norm unconstitutional and has not applied it because of erroneous interpretation of the norm, a situation would arise where the court for constitutional review would have to review the constitutionality of a non-relevant norm. According to § 14(2) of the Constitutional Review Court Procedure Act the Supreme Court shall not, by way of constitutional review, adjudicate a legal dispute which is the subject of a case and shall not ascertain facts subject to ascertainment when hearing the initial case (*see judgment of Constitutional Review Chamber of the Supreme Court of 25 November 2003, case no. 3-4-1-9-03 – RT III 2003, 35, 368, paragraph 12*).

17. Proceeding from the aforesaid it is necessary for assessing the relevance of a provision that the court adjudicating the matter should have ascertained the circumstances essential for adjudication of the dispute as well as the applicable norm.

It appears from the materials of the case that the Harju County Court is conducting a proceeding of a civil law claim. Pursuant to § 228 of the Code of Civil Procedure it is upon making a judgment that a court shall evaluate the evidence and shall decide which Act or legislation established on the basis of an Act applies in the matter.

18. The Harju County Court has solved the issue of relevance of a legal norm by its ruling, without ascertaining the facts having importance in the matter, including to whom and by who damage was caused. Thus, when making the ruling, the court could not be convinced as to what is the applicable regulatory

framework of decisive importance to be applied in the dispute. That is why the Constitutional Review Chamber of the Supreme Court can not assess which legal norm was relevant for the adjudication of the dispute and whether the norm was constitutional.

19. The Chamber considers it necessary to point out that on the basis of § 213(2)4) of the Code of Civil Procedure a court shall suspend a proceeding for the time when the constitutional review matter is adjudicated in the proceedings of the Supreme Court if this may affect the validity of legislation of general application subject to application in the civil matter. The implementation of this provision pre-requires that a constitutional review proceeding in the Supreme Court has already started.
