RIIGIKOHUS
Published on *The Estonian Supreme Court* (https://www.riigikohus.ee)

Constitutional judgment 3-4-1-2-01

3-4-1-2-01

**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
of 5 March 2001**

Review of the petition of the Tallinn Administrative Court for declaration of invalidity of § 12(5) and (6) of the Aliens Act.

The Constitutional Review Chamber,
presided over by Chairman Uno. Lõhmus
and composed of the members of the Chamber,
justices Tõnu Anton, Lea Kivi, Ants Kull and Jüri Põld,
at its open session of 25 January 2001,
with the representative of the *Riigikogu* Mart Nutt, the Minister of Justice Märt Rask and acting Chancellor of Justice Aare Reenumägi appearing
and in the presence of the secretary to the Chamber Piret Lehemets
reviewed the petition of the Tallinn Administrative Court of 8 November 2000.

I. FACTS AND COURSE OF PROCEEDINGS

1. On 27 July 2000 the Minister of Justice, acting as the Minister of Internal Affairs, by its directive no. 366, refused to issue a residence permit to J. Grigorjev. The basis for refusal was the fact that the person applying for residence permit had served as a professional member of the armed forces of a foreign state, being employed by the security service of a foreign state. In 1992 he had been assigned to the reserve in the rank of a Lieutenant Colonel, and neither his age, his rank nor other circumstances preclude his conscription into service in the security or armed forces of his country of nationality, which is considered as a threat to the security of the Estonian state under § 12(6) of the Aliens Act (hereinafter "the the AA"). J. Grigorjev falls within the category of persons to whom a residence permit shall not be issued or extended under § 12(4)10) of the the AA.

2. J. Grigorjev is a national of the Russian Federation, born in 1955, who arrived in Estonia in 1956. From 1982 to 1992 he worked in the National Security Committee of Estonian SSR. In 1992 he was assigned to the reserve in the rank of a Lieutenant Colonel. The residence permits of J. Grigorjev's spouse and of his two minor children are valid until 12 January 2002.

3. The representative of J. Grigorjev submitted a complaint to the Tallinn Administrative Court in which he requested that the Directive of the Minister be declared unlawful and invalid. One of the reasons specified in the complaint was that § 12(4)10) of the AA does not fulfil the requirements of the Constitution, because the

legislator has not taken into account the principle of proportionality in so far as the law does not allow those who apply the norm to choose legal consequences. The amendments to the Aliens Act which entered into force on 1 October 1999 exclude the possibility to issue residence permits to former members of security service or to extend formerly valid residence permits. Furthermore, the disputed Directive is in conflict with the principle of legitimate expectation and with § 10 of the Constitution. The second reason specified is the non-observance of the requirements of the legal instrument of 18 December 1991 on the termination of the activities of the National Security Committee of Estonian SSR. Thirdly, the complaint points at the fact that the Directive lacks reasoning and fourthly, that the Directive violates the complainant's right to family life.

4. By its judgment of 8 November 2000 the Tallinn Administrative Court satisfied the complaint of J. Grigorjev, declared the Directive invalid and did not apply § 12(5) and (6) of the AA as provisions in conflict with §§ 10 and 11 of the Constitution. The administrative court submitted a petition to the Supreme Court to declare § 12 (5) and (6) of the Aliens Act invalid.

II. The Law

Disputed provisions of the Aliens Act

5. The provisions disputed by the representative of J. Grigorjev and not applied by the Tallinn Administrative Court, in the wording in force as of 1 October 1999, are the following:

"§12 Bases for issue of residence permits
.....
(4) A residence permit shall not be issued to or extended for an alien if:
.....
10) he or she is or there is good reason to believe that he or she is employed by an intelligence or security service of a foreign state, or he or she has or there is good reason to believe that he or she has been employed by an intelligence or security service of a foreign state, and his or her age, rank or other circumstances do not preclude his or her conscription into service in the security forces or armed forces or other armed units of his or her country of nationality (RT I 1999, 27, 395);

(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 (RT I 1999, 27, 395).

(6) The circumstances listed in clauses (4) 1)–4), 6) and 8)–13) of this section shall be considered as a threat to the security of the Estonian state (RT I 1999, 71, 686)."

Justifications of the participants

6. The Tallinn Administrative Court points out that pursuant to §§ 1 and 10 of the Constitution Estonia is a democratic state recognising the principles of human dignity and of a state based on social justice, democracy and the rule of law. An Act which is in conflict with these principles is also in conflict with the Constitution. On 1 October 1999 the new wording of § 12 of the AA entered into force. Until then the former members of security forces had had the possibility to obtain a residence permit as an exception. J. Grigorjev had been issued a temporary residence permit five times. § 12(5) and (6) of the Aliens Act created a situation where he and other former members of security forces no longer had the possibility to obtain a residence permit as an exception. The court admits that the legislator has the right to make laws stricter and to impose additional restrictions, but the restrictions must be necessary in a democratic society and must not distort the nature of the rights and freedoms restricted. The intent of the legislator in making § 12 of the AA more restricting is unclear. Although almost ten years have passed since Estonia became independent and our state has become stronger, in order to guarantee national security a whole group of persons (persons specified in § 12(4)10) of the AA) has been declared dangerous to the society and the executive has been given no possibility to weigh actual circumstances.

The court found that § 12(4)10) of the AA, when read separately, was not in conflict with the Constitution. Subsections (5) and (6) of the same section are in conflict with the principles of legal certainty, legitimate expectation and proportionality, stipulated in §§ 10 and 11 of the Constitution.

The court came to the conclusion that the disputed Directive violates the right of the complainant to family life in Estonia. Interference with family life is possible under restrictions specified in § 26 of the Constitution and Article 8 of the European Convention on Human Rights (hereinafter "the ECHR"). The disputed Directive does not clarify how the complainant threatened the security of the Estonian state. The court is of the opinion that every so called integrated alien, among who both the complainant and his family members belong, has the right to private and family life in the Republic of Estonia.

7. Under § 120 of the Riigikogu Rules of Procedure Act the Constitutional Committee of the Riigikogu, on behalf of the Riigikogu, submitted observations concerning the petition of the administrative court. According to the explanations of the Constitutional Committee, the amendments to the Act were initiated by the Government of the Republic, who is of the opinion that it is not justified, upon deciding on issue of residence permits, to grant exceptions to those aliens who have submitted false data upon applying for a residence permit or who constitute a threat to Estonian constitutional order and national security. The Constitutional Committee is of the opinion that as under the wording of the Aliens Act in force before 1 October 1999 temporary residence permits were issued as an exception, then refusal to extend a residence permit does not amount to violation of the principle of legitimate expectation. A state is under no obligation to make exceptions to somebody until the end of his or her life. The Committee argues that if § 12 (5) and (6) of the AA were declared invalid it would deteriorate the situation of persons, because it would eliminate the possibility to make exceptions in regard to persons specified in § 12 (4). The Constitutional Committee and the representative of the Riigikogu who gave explanations at the Supreme Court hearing are of the opinion that § 12 (5) and (6) of the Aliens Act are not in conflict with the Constitution.

8. In his written opinion the Chancellor of Justice points out the dual nature of the disputed § 12(5) of the AA. One of the aims of this subsection is to allow for exceptions even if circumstances referred to in certain clauses of § 12(4) of the AA exclude the possibility. The part of § 12(5) of the Act, which excludes the possibility of exceptions, including in the cases specified in § 12(4)10), can be viewed as a restriction. If the provision were unconstitutional in its entirety, then issuance and extending of a residence permit as an exception in itself would be unconstitutional. Persons who under this provision have the possibility to obtain a residence permit or have it extended are deprived of this possibility. Thus, the conformity of § 12(5) to the Constitution can be reviewed in conjunction with § 12(4), which establishes the bases for refusal to issue or extend residence permits.

As for the allegations in the petition of the Tallinn Administrative Court that § 12(6) of the AA violates the principles of legitimate expectation and legal certainty, the Chancellor of Justice is of the opinion that the provision has no independent regulatory meaning. The legislator has found it necessary to state expressly in the provision that it considers the circumstances enumerated in § 12(4)10) of the AA to be a threat to the security of Estonian state and that is why, if certain facts are established, the issuance of residence permits to aliens is restricted. The basis for prohibition is established by § 12(4)10) of the Act and the prohibition to make exceptions by § 12(5). The fact that the legislator has evaluated the circumstances that constitute a threat to security is not necessarily in conflict with the principles of legitimate expectation and legal certainty. This in itself does not preclude the possibility to weigh, in regard of each alien, whether he or she as a person constitutes a threat to the security of the state. But § 12(6) in conjunction with § 12(5) and § 12(4)10) of the Act is in conflict with the referred principles, as it attaches a predetermined weighty meaning to certain circumstances, which further restricts the possibilities of those who implement the law to assess the dangerousness of a concrete person to the security of state and other circumstances. Consequently, § 12(6) in conjunction with § 12(4)10) and § 12(5) of the AA is not in conformity especially with the principle of proportionality, which means a conflict with § 11 of the Constitution.

9. The Minister of Justice, in his written opinion, agrees with the opinion of the Tallinn Administrative Court

that § 12(5) and (6) of the AA are not in conformity with the principle of legitimate interest proceeding from § 10 of the Constitution and with the principle of proportionality established by § 11 of the Constitution. At the same time he does not agree with the opinion that § 12 (5) and (6) are also in conflict with the principle of legal certainty.

At the court session the Minister of Justice held that it would not be reasonable hurriedly to declare § 12 (5) and (6) of the AA unconstitutional. When drafting his written opinion, the Minister had, by mistake, not taken into consideration the fact that the administrative court lacked competence not to apply § 12(5) and (6) of the AA and to submit a petition for constitutional review to the Supreme Court. The administrative court had found that the disputed administrative act was not reasoned and that is why the court annulled the act. There was no need for the court to apply § 12(5) and (6) of the AA and to file a petition to initiate a constitutional review proceeding specified in § 25(6) of the Code of Administrative Court Procedure.

Opinion of the Chamber

10. First of all, the Chamber points out that the views of the complainant and those of the administrative court as to which provision of the Aliens Act is in conflict with the Constitution and should not be applied, differ. The complainant holds that § 12(4)10) of the AA is the provision which is in conflict with the principle of legitimate expectation proceeding from § 10 of the Constitution and with the principle of proportionality of § 11. The Court, on the other hand, held that § 12(4)10) of the AA, when read separately, was not unconstitutional. § 12 (5) and (6) of the AA are in conflict with the principle of legal certainty, legitimate expectation and proportionality, arising from §§ 10 and 11 of the Constitution. These were the provisions that the Court did not apply.

11. A court can initiate constitutional review only if the disputed legislation is relevant to resolving a case. Proceeding from § 15(1) of the Constitution and § 5(1) of the Constitutional Review Court Procedure Act a court shall declare a legislation unconstitutional and shall not apply it if the court, upon adjudicating the case, comes to a conclusion that applicable law or other legislation is in conflict with the Constitution. The provision the constitutionality of which is reviewed by the court of constitutional review must be decisive for the outcome of the case (*judgment of the Supreme Court en banc of 22 December 2000, paragraph 10 -- RT III 2001, 1, 1*).

The Chamber is of the opinion that within the constitutional review proceeding it is necessary to review the constitutionality of § 12(5) and (6) of the AA, referred to in the petition of the administrative court, and of § 12(4)10) of the AA, referred to by the complainant. § 12(5) and (6) of the Aliens Act make exceptions to and interpret restrictions on the cases enumerated in § 12(4), upon the occurrence of which a residence permit shall not be issued or extended to an alien. That is why these provisions and § 12(4)10) of the AA are relevant to the resolution of the case.

12. Setting out to hear the petition of the administrative court the Chamber points out that pursuant to the principles of international law a state has the right to decide on the entry, stay and expulsion of aliens to, on and from its territory. The Constitution does not give an alien a fundamental right to reside and continue residing in Estonia. Yet, the Constitution guarantees the right of every Estonian, irrespective of his or her nationality, to settle in Estonia (§ 36(3)). Protocol no. 4 to the Convention on Human Rights and Fundamental Freedoms prohibits collective expulsion of aliens.

According to § 9 of the Constitution the rights, freedoms and duties of each and every person, as set out in the Constitution, shall be equal for Estonian citizens and for citizens of foreign states and stateless persons in Estonia. Proceeding from this, the refusal to extend a residence permit of an alien, which involves the obligation of an alien to leave the state, may interfere with some fundamental rights or freedoms, protected by the Constitution.

13. §§ 10 and 11 of the Constitution refer to rights and freedoms without a specific reference to any of them. These provisions contain fundamental principles for interpreting and applying fundamental rights, freedoms

and obligations, and that is why the scope of these covers all fundamental rights and freedoms. It proceeds from § 10 that interpreting the Constitution amounts to more than mere determination of the meaning of words. That is why for the application of the principles set out in these provisions it is necessary to establish the infringements of pertinent fundamental rights.

Both the complainant and the administrative court are of the opinion that the Directive of the Minister by which J. Grigorjev was denied a residence permit infringes upon the right of the complainant to family life.

14. There are two sections in the Constitution dealing with the protection of family life. The first sentence of § 26 establishes the inviolability of everyone's private and family life, the first indent of § 27 confirms that the family, being fundamental to the preservation and growth of the nation and as the basis of society shall be protected by the state. The wording of § 26 indicates the influence of Article 8 of the ECHR. The provision gives everyone the right to expect that state agencies, local governments and the officials thereof will not interfere with their family life, except to achieve the objectives specified by law. This right corresponds to the duty of the state not to interfere with family life. The first indent of § 27 deals with the external protection of family life and gives a person a right to positive state action assisting him or her in having genuine family life.

As according to the principles of international law a state has the right to decide on the stay and expulsion of an alien, it is necessary to analyse whether the state has an obligation to guarantee an alien his or her family life in Estonia and whether the interference of a person's right to positive state action is justified. Although the Chamber admits that it is often difficult to draw a line between a positive and a negative obligation, it sets out to review the conformity of § 12(4)10), § 12(5) and (6) of the AA to the first indent of § 27 of the Constitution.

15. The right to positive state action assisting a person in having genuine family life is not an unlimited one. Some other legal value of equal weight may serve as a basis for restriction. Fundamental rights and freedoms of others and constitutional norms protecting the collective legal rights can be regarded as reasons for restrictions.

According to the Aliens Act security of the state is the value justifying imposition of restrictions on the right of aliens to reside in Estonia (§ 12(6)). On the basis of several constitutional norms, especially of the preamble, it can be concluded that pursuant to the letter and spirit of the Constitution security of the state is a value which can be recognised as a legitimate aim for restricting fundamental rights.

16. Although the legislator has imposed the restriction bearing in mind a legitimate aim, an infringement of a fundamental right can be regarded as justified only if the principle of proportionality has been observed. § 11 of the Constitution stipulates that restrictions on rights and freedoms must be necessary in a democratic society and must not distort the nature of the rights and freedoms restricted. Restrictions must not prejudice legally protected interests or rights more than is justifiable by the legitimate aim of the provision. The means must be proportional to the desired aim. The legislator, as well as those who apply law, must take the proportionality principle into consideration (*see judgment of the Constitutional Review Chamber of 28 April 2000, paragraph 13 -- RT III 2000, 12, 125*).

At the same time the Constitution empowers the courts to review the constitutionality of the legislation passed by the Riigikogu as the people's legitimate representation. Any court may declare unconstitutional any law, other legislation or procedure which violates the rights and freedoms provided by the Constitution or which is otherwise in conflict with the Constitution (§ 15(2) of the Constitution). The Supreme Court shall declare invalid any law or other legislation that is in conflict not only with the provisions but also with the spirit of the Constitution (§ 152(2) of the Constitution). The Supreme Court as a constitutional court does not have to assess the political will and expediency of a law, it has to assess the conformity of legislation to the provisions and spirit of the Constitution. At that the Court observes the tradition not to interfere with the sovereign activities of the legislator, except in the cases when restrictions on rights and freedoms established by law are not necessary in a democratic society or distort the nature of the rights and freedoms restricted.

Fundamental rights and freedoms would be non-justiciable programmatic slogans if the constitutional review court had no power to establish whether the activities of the legislator are in conformity with the provisions and spirit of the Constitution.

17. When resolving a conflict between a fundamental right and a collective legal right the Court observes the following principle: the more intensive the infringement of a fundamental right, the more conclusive should be the reasons justifying the infringement.

According to the Aliens Act one of the legitimate grounds for an alien to stay in Estonia is a residence permit. Refusal to extend a residence permit results in the disappearance of a legal ground for stay in Estonia. A person who has a family will be forced to leave Estonia, because otherwise he or she will be expelled from the country. This has to be considered an intensive infringement. On the other hand, the security of Estonian state as a collective legal right is a legal value of great weight.

18. The Chamber takes into account the consideration of the legislator that persons specified in § 12(4)10) of the AA may constitute a threat to the security of the Estonian state. In certain circumstances these persons may threaten the Estonian state from inside. They are familiar with Estonian circumstances and they may be conscripted into service in the security or armed forces of a foreign country. Infringement may also be justified by the fact that an alien could also live his family life in a country the citizen of which he or she is and to where he or she has the right to resettle.

The fact that the complainant arrived in Estonia in 1956, soon after his birth, and has resided here for about 45 years speaks for him. He is married and a father of two children. Leaving Estonia may tear his family apart from its habitual social environment.

19. Under the wording of the Aliens Act in force until 1 October 1999 a residence permit was not issued to an alien if he or she had been or was employed by an intelligence or security service of a foreign state (§ 12(4)7)). § 12(5) of the Act allowed, under the procedure provided for by the Government of the Republic, to make exceptions, which are not allowed under the new wording of the Act. The explanatory letter to the Aliens Act Amendments Act gives a laconic justification to the amendments: "It is not expedient, upon issuing residence permits, to make exceptions to an alien who [...] constitutes a threat to the constitutional order of the Republic of Estonia and the security of the state, etc." Deciding on the basis of the shorthand notes of the Riigikogu the amendments to § 12 of the AA did not enjoy serious attention of the speakers. The representative of the Riigikogu explained in court that when establishing the earlier wording of the Act the legislator proceeded from the principle that exceptions shall be made for good reasons, but in practice an exception turned into something more general than the legislator had intended when passing the Act. Thus, it may be concluded that the legislator intended to improve legal clarity by passing amendments to the Aliens Act which entered into force on 1 October 1999, but doing so it deprived the representatives of the executive of the possibility of exercising discretion.

20. On the basis of the explanations given during the legislative amendment proceeding one could only agree with the opinion of the administrative court that it was not the growing danger to the security of the state due to the activities of persons who had served in intelligence or security service of a foreign state that served as the justification for making the restrictions more severe, but the loss of control over the number and causes of exceptions.

That is why the Chamber is of the opinion that the Aliens Act is disproportional to the extent that it does not allow those who issue or extend a residence permit to choose legal consequences in regard to a person who has served or in regard of whom there is good reason to believe that he or she has served in the intelligence or security service of a foreign state. Those who issue or extend residence permits have no possibility to weigh whether the restriction of rights and freedoms in a concrete case is necessary in a democratic society. For that reason the activities of those who apply law are outside the scope of § 11 of the Constitution (*see also judgment of the Constitutional Review Chamber of 28 April 2000, paragraph 10 -- RT III 2000, 12, 125*

). The Act does not allow to take into consideration the behaviour of a long-term immigrant, on the basis of which his or her threat to the security of the state can be assessed, the duration of permanent residence, the consequences of expulsion to his or her family members or the relationships of the immigrant and his or her family members with the county of origin. These circumstances should be taken into account when deciding on the expulsion of a long-term immigrant under Recommendation Rec (2000) 15 of the Committee of Minister of the Council of Europe and pursuant to the case-law of the European Court of Human Rights. Although the Recommendation recognises the right of a state to expel a long-term immigrant from the state if he or she constitutes a threat to the security of the state or public security, the recommendation refers to the necessity to consider the principle of proportionality.

21. The Chamber is of the opinion that invalidation of § 12(5) and (6) of the AA would not result in changes for the complainant, because even if these clauses were invalid the Act would prescribe for refusal to extend the residence permit of the complainant. Those who apply the Act could weigh different constitutional values if § 12(4)10) was not imperative or if § 12(5) enabled to make exceptions in regard to persons referred to in § 12(4)10). That is why the court argues that § 12(4)10) and § 12(5) of the AA are unconstitutional to the extent that they do not allow to make exceptions upon issuing or extending a residence permit to an alien who has served or in regard of whom there is a justified reason to believe that he or she has served in the intelligence or security service of a foreign country. The norms established by the legislator which infringe upon the fundamental rights established by § 27(1) of the Constitution are not in conformity with the principle of proportionality enshrined in § 11 of the Constitution.

22. When adjudicating the complaint the administrative court came to the conclusion that as the complainant had previously obtained the residence permit five times, and as he has a family, a job and property in Estonia, his legitimate expectation that his residence permit will be extended in the future unless new circumstances are ascertained concerning him, was justified. The deprivation of the possibility to make exception violates the constitutional principle of legitimate expectation.

The Chamber agrees with the opinion of the Riigikogu that the amendments to the Aliens Act are not in conflict with the legitimate expectation to obtain a residence permit. An alien who obtains a temporary residence permit is aware that his or her right to stay in the country is limited by the term specified in the residence permit. Estonian legal order has never given the aliens who were associate workers of the former National Security Committee of Estonian SSR any reason for legitimate expectation to have a right to stay in Estonia. Nevertheless, the complainant has the right to legitimate expectation that the executive shall consider the issue of a residence permit to him.

Proceeding from § 152(2) of the Constitution and from § 19(1)2) of the Constitutional Review Court Procedure Act **the Constitutional Review Chamber has decided:**

To declare § 12(4)10) and § 12(5) of the Aliens Act unconstitutional and invalid to the extent that they do not give the possibility to make exceptions upon issuing or extending a residence permit to an alien who has been or in regard of whom there is good reason to believe that he or she has been employed in an intelligence or security service of a foreign state.

The judgment is effective as of pronouncement, is final and is not subject to further appeal.

U. Lõhmus
Chairman of the Constitutional Review Chamber

Source URL: https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-2-01#comment-0