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Home > Constitutional judgment 3-4-1-4-98

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**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 27 May 1998**

Review of the petition of the Tallinn Administrative Court of 26 March 1998 to declare invalid the Government of the Republic Regulation no. 414 of 3 November 1994 on partial amendment of its Regulation no. 268 of 16 September 1992.

The Constitutional Review Chamber sitting in a panel presided over by the Chairman of the Chamber Rait Maruste and composed of members of the Chamber, justices Tõnu Anton, Lea Kalm, Jaano Odar and Jüri Pöld, at its open session of 13 May 1998, with the representative of the Government of the Republic Neeme Mozolev appearing, and in the presence of the secretary to the Chamber Piret Lehemets reviewed the petition of the Tallinn Administrative Court of 26 March 1998.

From the documents submitted to the Constitutional Review Chamber **it appears, that:**

By its judgment of 25 March 1998, when hearing the action of Aleksandr Panov, the Tallinn Administrative Court decided not to apply the Government of the Republic Regulation no. 414 of 3 November 1994 entitled “Partial amendment of the Government of the Republic Regulation no. 268 of 16 September 1992”, and the court declared the legislation unconstitutional. The action of A. Panov was satisfied and the acts of the Border Guard Administration performed in relation to A. Panov were declared totally illegal and the court ordered the payment of A. Panov’s legal costs by the Border Guard Administration.

Proceeding from § 5 of the Constitutional Review Court Procedure Act the Tallinn Administrative Court submitted a petition to the Supreme Court to declare the Government of the Republic Regulation no. 414 of 3 November 1994 entitled “Partial amendment of the Government of the Republic Regulation no. 268 of 16 September 1992”, invalid due to conflict with the Constitution.

The court justified its decision with the fact that according to § 87(6) of the Constitution the Government of the Republic shall issue regulations and orders on the basis of and for the implementation of laws. This means that the Government of the Republic is prohibited to perform acts which are in conflict with the laws. The same conclusion proceeds also from § 3(1) of the Constitution, pursuant to which the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Generally

recognised principles and rules of international law are an inseparable part of the Estonian legal system. The second indent of § 123 of the Constitution stipulates that if laws or other legislation of Estonia are in conflict with international agreements ratified by the Riigikogu, the provisions of the international agreement shall apply.

§ 5 of the Government of the Republic Act of 20 October 1992 provided that the Government of the Republic shall issue regulations on the basis of and for the implementation of law. The Government of the Republic Act of 13 December 1995 also stipulates that a regulation shall refer to the provision of law which is the basis for its issuance. Nevertheless, the Government of the Republic has issued its Regulation no. 414 of 3 November 1994 without a legal basis, as there is no relevant rule in the laws delegating the authority to issue this Regulation. Under § 87 6) of the Constitution the executive is - as a rule - allowed to issue only *intra legem* regulations, thus the Government of the Republic, when issuing this Regulation, has exceeded its powers and consequently the Regulation itself is unconstitutional.

It is stated in the judgment of the administrative court that the Regulation of the Government of the Republic and the rules for issuance of certificates of record of service on Estonian ships approved by the Regulation were also in conflict with § 29(1) of the Constitution, pursuant to which “an Estonian citizen has the right to freely choose his or her sphere of activity, profession and place of work. Conditions and procedure for the exercise of this right may be provided by law. Citizens of foreign states and stateless persons who are in Estonia have this right equally with Estonian citizens, unless otherwise provided by law.” According to § 5(1) of the Aliens Act aliens staying in Estonia are guaranteed rights and freedoms equal to those of Estonian citizens unless the Constitution, this Act, other Acts or international agreements of Estonia provide otherwise.

None of Estonian Acts provides for restrictions upon the choice of ship (i.e. place of work) for alien seafarers. Also, Convention no. 108 of the International Labour Organisation (hereinafter Convention no. 108), ratified by the Republic of Estonia on 23 October 1996, does not set nationality requirements for a seafarer to work - on the basis of a document proving his identity - on a ship flying any flag.

By making it compulsory for an alien to have a certificate of record of service on Estonian ships in order to be able to work on a ship flying Estonian flag, the Government of the Republic has, by legislation ranking lower than law, regulated the conditions and procedure for the exercise of the right to choose one's place of work. Also, by legislation ranking lower than law the Government has restricted the right of aliens under § 29(1) of the Constitution; namely if an Estonian citizen can - on the basis of a seafarer's service record, issued in accordance with ILO Convention no. 108 - work on a ship flying any flag, then pursuant the referred Regulation an alien seafarer - to whom a seafarer's identity document meeting the requirements of the Convention has been issued in some other country - has to apply for a certificate of record of service on Estonian ships, to be able to work on a ship flying Estonian flag. This violates the generally recognised principles of equal treatment and legitimate expectation and is in conflict with Article 1 of the Convention. This fact, too, indicates that Regulation no. 414 is in conflict with the Constitution, as § 3 thereof provides that generally recognised principles and rules of international law are an inseparable part of Estonian legal system. The second indent of § 123 of the Constitution stipulates that if laws or other legislation of Estonia are in conflict with international agreements ratified by the Riigikogu, the provisions of the international agreement shall apply.

Proceeding from §§ 38(3) and 48 of Identity Documents Act and considering that the legislation had been issued without a legal basis, the Government of the Republic, by Regulation no. 90 of 5 May 1998, annulled its Regulation no. 268 of 16 September 1992 concerning the approval of the regulations of Estonian seafarer's discharge book and the rules for issuance of certificates of record of service on Estonian ships.

The court heard the representative of the Government of the Republic who was of the opinion that the petition was justified. Considering that the legislation had been issued without a legal basis, the Government of the Republic, by its Regulation no. 90 of 5 May 1998, had declared the contested Regulation invalid.

The Chancellor of Justice, in his written opinion, supported the views of the Tallinn Administrative Court.

Having examined the materials submitted and having given a fair hearing to the representative of the Government of the Republic, **the Constitutional Review Chamber has found that:**

I.

Pursuant to § 87(6) of the Constitution the Government of the Republic shall issue regulations on the basis of and for the implementation of law. Also, the Government of the Republic Act, valid as of 1992, stipulated that the Government of the Republic shall issue regulations on the basis of and for the implementation of law. As the law contains no provision delegating the Government of the Republic the right to issue Regulation no. 268 of 3 November 1992 entitled “Partial amendment of the Government of the Republic Regulation no. 268 of 16 September 1992”, the referred Regulation is in conflict with § 87(6) of the Constitution. The Government of the Republic itself also referred to the lack of a legal basis and declared the contested Regulation invalid by its Regulation no. 90 of 5 May 1998.

II.

Pursuant to § 38 of the Estonian Citizens Identity and Citizenship Documents Act, a seafarer’s discharge book is an employment document proving the identity of a professional seafarer. On the basis of this document it is possible to cross state borders and stay in foreign countries visa-free, pursuant to Convention no. 108. On the basis of a seafarer’s discharge book the holder thereof can leave Estonia on a ship and arrive from a ship which is located abroad; also to leave and arrive on a ship to the crew list of which he or she has been entered. A seafarer’s discharge book shall be issued to an Estonian citizen, who works or starts work or practical training on an Estonian or a foreign ship.

By the Government of the Republic Regulation no. 414 of 3 November 1993 the rules for issuing Estonian certificates of record of service on Estonian ships were approved. Clause 1 of the rules refers to the fact that a certificate of record of service on Estonian ships shall be issued in accordance with Convention no. 108. Pursuant to clause 3 a certificate of record of service on Estonian ships shall be issued to a citizen of another state or to a stateless person who works, starts work or practical training on a ship flying Estonian flag. Pursuant to clause 4 the certificate of record of service on Estonian ships is an employment document proving identity of a seafarer, on the basis of which the holder of the certificate may leave Estonia and arrive in Estonia, if he or she has been entered in the crew list of a ship flying Estonian flag. Pursuant to clause 5 of the rules the certificate of record of service on Estonian ships together with an entry into a crew list of an Estonian ship, give the holder thereof the right to visa-free leave from Estonia if he or she is travelling to his or her place of work on a ship located abroad but flying Estonian flag, and to arrive in Estonia after termination of service on a ship located abroad but flying Estonian flag.

III.

According to § 5(1) of the Aliens Act, passed on 8 July 1993, aliens staying in Estonia are guaranteed rights and freedoms equal to those of Estonian citizens unless the Constitution, this Act, other Acts or international agreements of Estonia provide otherwise. Pursuant to the second section of the same section aliens are guaranteed the rights and freedoms arising from the generally recognised rules of international law and international custom. According to § 3 of Aliens Act, for the purposes of this Act, an alien is a person who is a citizen of a foreign country or a stateless person.

On the basis of a seafarer’s discharge book an Estonian citizen who works or starts work or practical training on an Estonian or a foreign ship, has the right to leave Estonia on a ship and return from a ship located abroad, also to leave and arrive on a ship to the crew list of which he or she has been entered, irrespective of the fact which flag the ship is flying. On the basis of a seafarer’s discharge book it is possible, under Convention no. 108, to cross state borders and stay in foreign countries visa-free.

The Government of the Republic approved the rules for issuance of Estonian certificate of record of service on Estonian ships by its Regulation no. 414 of 3 November 1993. Pursuant to clause 4 of the rules “a certificate of record of service on Estonian ships is an employment document of a seafarer proving his or her identity, on the basis of which the holder of the certificate of record of service on Estonian ships may leave Estonia and arrive in Estonia, if he or she has been entered in the crew list of a ship flying Estonian flag.” Thus, the Regulation requires that a seafarer, who has a certificate of record of service on Estonian ships and who wishes to leave Estonia, must in addition be entered in the crew list of a ship flying Estonian flag.

The unequal treatment of aliens and Estonian citizens is not in conformity with § 5 of the Aliens Act, pursuant to which aliens staying in Estonia are guaranteed equal rights with Estonian citizens, and is not in conformity with Article 5 of Convention no. 108, pursuant to which any seafarer who holds a valid seafarer’s identity document issued by the competent authority of a territory for which this Convention is in force, shall be readmitted to that territory, irrespective of whether he or she has been or has not been entered in the crew list of a ship flying Estonian flag.

Pursuant to Article 6 of the Convention each member state shall permit the entry into a territory for which this Convention is in force of a seafarer holding a valid seafarer’s identity document, when entry is requested for temporary shore leave while ship is in port.

The Convention does not regulate the issues of leaving the territory of a state. This right, especially if related to going on board of one’s ship, is self-evident and proceeds from the purpose of the Convention, namely to simplify the formalities related to seafarer’s travel to or from ships.

As the referred Regulation of the Government of the Republic is in conflict with Convention no. 108, the implementation of the Regulation is in conflict with § 123 of the Constitution. If Estonian laws or other legislation are in conflict with international agreements ratified by the Riigikogu, then, pursuant to second indent of § 123 of the Constitution, the provisions of the international agreement shall apply.

IV.

According to § 12 of the Constitution everyone is equal before the law. The principle of equality before the law must also be applied to seafarers, referred to in the Convention. Pursuant to Article 1 of Convention no. 108 it was decided to unify seafarers’ national identity documents, so that every seafarer could freely and without any restrictions work on a ship of a country, member to the convention, other than a ship of war, if the ship is registered in a territory for which the convention is in force. Under this principle it is unjustified and contrary to the spirit of the Convention to issue to seafarers identity documents on nationality grounds, pursuant to which an Estonian citizen can, on the basis of a seafarer’s service record book, enjoy wider rights upon arrival in Estonia and leave from Estonia than an alien who has been issued a certificate of record of service on Estonian ships.

According to the judgment of the administrative court the Regulation of the Government of the Republic is also in conflict with § 29(1) of the Constitution. Pursuant to this provision an Estonian citizen has the right to freely choose his or her sphere of activity, profession and place of work. Conditions and procedure for the exercise of this right may be provided by law. Citizens of foreign states and stateless persons who are in Estonia have this right equally with Estonian citizens, unless otherwise provided by law. The law provides no restrictions to alien seafarers as to their choice of ship (i.e. place of work). By setting a requirement that an alien working on a ship flying Estonian national flag must have a certificate of record of service on Estonian ships, the Government has, by an act ranking lower than law, regulated the conditions and procedure for choosing a place of work for aliens, thus restricting their right to choose place of work. The subjective right to freely choose sphere of activity, profession and place of work, established by § 29 of the Constitution, does not cover already existing employment relations. This is the view the Constitutional Review Chamber of the Supreme Court expressed in its judgments of 11 June 1997 and 6 October 1997. A. Panov already had a post on a foreign ship. That is why determination of conflict of the disputed Regulation

with § 29 of the Constitution is irrelevant.

V.

According to § 152 of the Constitution the ground for the Supreme Court to declare a law or other legislation unconstitutional is a conflict thereof with the Constitution, which has to be reviewed pursuant to §§ 5(2) and 6(1)(3) of the Constitutional Review Court Procedure Act. As the Government of the Republic itself, on 5 May 1998, declared the contested Regulation invalid, the Supreme Court can not declare it invalid again. The Constitutional Review Chamber confines itself to stating that the Regulation was unconstitutional.

On the basis of the invalid Regulation it is no longer possible to issue new seafarer's identity documents. The invalidation of the Regulation in itself does not invalidate the documents which have already been issued.

On the basis of the aforesaid and proceeding from §§ 15(2) and 152(2) of the Constitution, and from § 19(1)(1) of the Constitutional Review Court Procedure Act, **the Constitutional Review Chamber has decided:**

To dismiss the petition of the Tallinn Administrative Court of 26 March 1998, as the Government of the Republic has already declared the contested Regulation invalid.

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

R. Maruste

Chairman of the Constitutional Review Chamber

CONCURRING OPINION

of justice Rait Maruste

to the judgment of the Constitutional Review Chamber of 27 May 1998

I agree with the main views expressed in the judgment, but I consider it necessary, by way of *obiter dictum*, to point out the following:

The contested legislation, inter alia, regulated the legal basis of employment relations of individuals in the private sector, differentiating between aliens, stateless persons and Estonian citizens, giving advantages to Estonian citizens. The advantage consisted in the fact that seafarers who are Estonian citizens could sail all ships, whereas stateless persons and aliens could only work on ships flying the Estonian flag. Thus, the Regulation in principle allowed for different treatment of European Union and Estonian seafarers, giving advantages to Estonian seafarers and imposing restrictions on European Union seafarers as aliens. This is not right for two reasons:

1) Article 1 of the ILO Convention states that the Convention applies to every **seafarer, i.e. also to stateless and alien seafarers**. Through § 123 of the Constitution this ILO Convention and its principles are legally binding on Estonia.

2) The Republic of Estonia has made a political decision to become a member of the European Union. **On 1 August 1995 the Riigikogu passed a resolution to ratify the Association Agreement between the European Union and its Member States and the Republic of Estonia (Europe Agreement)**, which was signed on 12 June 1995 in Luxembourg (RT II 1995, 22-27, 120). The ratification became effective as of 1 February 1998. With the referred Agreement Estonia undertook a political, including legal-political, obligation to harmonise domestic law with EU law and its principles. Pursuant to Article 68 of the Agreement Estonia has an obligation to approximate its valid and future legislation with that of European Community.

European Community law and its principles have found expression in many legal acts. Thus, pursuant to Article 3(c) of the EC Treaty one of the basic objectives of establishing the EC is free movement of goods, services, persons and capital. Pursuant to the Treaty member states have to eliminate all obstacles restricting the implementation of the referred freedoms. According to **Article 48(2) of the EC Treaty such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.**

One of the general principles of European law is the principle of equal treatment. It is allowed to impose restrictions on free movement of persons but only if it is triggered by “real and serious threat to state’s policy”.

These are the legal-political landmarks which Estonia has to be guided by in further legal regulation of movement of labour, including seafarers.

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