Constitutional judgment 5-20-10

S U P R E M E C O U R T

CONSTITUTIONAL REVIEW CHAMBER

JUDGMENT

in the name of the Republic of Estonia

Case number	5?20?10
Date of judgment	20 April 2021
Composition of court	Chairman: Villu Kõve; members: Velmar Brett, Nele Parrest, Ivo Volens
Case	Review of the constitutionality of § 100^{18} in combination with § (1) and § 100^{13} subsection (2) of the Aliens Act
Basis for proceedings	Order of Tartu Court of Appeal of 15 December 2020 in case No 3

Participants in the proceedings	Riigikogu
	Chancellor of Justice
	Minister of Justice
	Minister of the Interior
	Minister of Foreign Affairs
	Police and Border Guard Board
	Rostyslav Polishchuk
	Mykola Ishchenko
	Commercial association Loreta
	Hobulane OÜ
Type of hearing	Written procedure

OPERATIVE PART

1.To satisfy the application by Tartu Court of Appeal.

2. To declare unconstitutional and invalid § 100^{10}(1), § 100^{13}(2) and § 100^{18} of the Aliens Act insofar as they preclude filing an appeal with the administrative court for contesting premature termination of a period of stay.

FACTS AND COURSE OF PROCEEDINGS

1. Ukrainian citizens Rostyslav Polishchuk and Mykola Ishchenko [---] arrived in Estonia on 21 July 2020 for seasonal work. Covid-19 samples were taken from them and they were placed in isolation at the location of their respective employers. The results of test samples taken from the workers were negative. The Police and Border Guard Board (PBGB) in cooperation with the Health Board carried out a check at the location of the employers of applicants 1 and 2 on 30 July 2020. The PBGB ascertained that the workers, who were in quarantine, violated the requirements of isolation and were performing working duties. The results of Covid-19 repeat test samples taken from the workers were negative.

2. By notice drawn up on 7 August 2020, the PBGB prematurely terminated the period of stay of applicants 1 and 2 [...]. On 11 August 2020, applicants 1 and 2 applied to the PBGB, seeking to annul the notices. By decisions of 12 August 2020, the PBGB declined to satisfy the applications.

3.Applicants 1 and 2and seven more persons arriving from Ukraine to Estonia for seasonal work, in respect of whom the period of stay in Estonia was terminated prematurely, and their four employers, including the commercial association Loreta and the private limited company Hobulane OÜ (applicants 10 and 11), lodged an action with Tartu Administrative Court on 12 August 2020, seeking annulment of the PBGB notices of 7 August 2020. According to the action, the notices were unlawful. Persons whose stay in Estonia was terminated prematurely do not pose a risk to public health nor have they violated public order.

4. By order of 13 August 2020, Tartu Administrative Court returned the action [...] since the Administrative Court is not competent to adjudicate the dispute. The Administrative Court explained that the Aliens Act lays down a special procedure for contesting decisions contained in the PBGB notices of 7 August 2020. Under the Act, decisions on premature termination of the period of stay can only be contested by filing an application with the PBGB and subsequently filing an application with the Ministry of the Interior for a second review of the decision. Under § 100^{18} of the Aliens Act, no new appeal or action can be filed with the administrative court against the decision made on the basis of the application.

5.Applicants 1, 2, 10 and 11 lodged an appeal against the court order with Tartu Court of Appeal, seeking reversal of the Tartu Administrative Court order to the extent that their actions were returned. By order of 15 December 2020 in case No 3?20?1490, Tartu Court of Appeal satisfied the applicants' appeal, reversed the Administrative Court order and set aside and declared § 100^{18} of the Aliens Act in combination with § 100^{10} (1) and § 100^{13}(2) contrary to theConstitution of the Republic of Estonia insofar as they preclude filing an appeal with the administrative court for contesting premature termination of the period of stay.

ORDER OF TARTU COURT OF APPEAL

[…]

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

[…]

PROVISIONS DECLARED UNCONSTITUTIONAL

21. Section 100^{10}(1) of the Aliens Act stipulates as follows:

"(1) An alien may file an application against a decision made in the course of contesting a decision on refusal to issue a visa, annulment of a visa, revocation of a visa, refusal to extend the period of stay and premature termination of the period of stay for a second review of the decision on refusal to issue a visa, annulment of a visa, revocation of a visa, refusal to extend the period of stay and premature termination of the period of stay [...] within 30 days as of the date of notification of the decision made on the basis of the application specified in § 100^{1} of this Act."

Section 100^{13}(2) of the Aliens Act stipulates as follows:

"(2) If a decision on refusal to issue a visa, annulment of a visa, revocation of a visa, refusal to extend the period of stay or premature termination of the period of stay has been made by the Police and Border Guard Board or the Estonian Internal Security Service, an application shall be filed with the Ministry of the Interior."

Section $100^{18}$of the Aliens Act stipulates as follows:

"**§ 100^{18}. Contestation of a decision made on the basis of an application**

A new appeal or action cannot be filed with the administrative court against a decision made on the basis of an application."

OPINION OF THE CHAMBER

22. The Chamber will first provide its interpretation of the substance of the norms declared contrary to the Constitution by the Court of Appeal and will assess their relevance (I), then will explain the connection of the contested norms with EU law (II), and finally will assess the constitutionality of the norms and resolve the application (III).

I

[…]

II

34. The Court of Appeal has found that the contested norms are not connected with EU law to the extent that would lead to setting them aside due to conflict with EU law, and considered a check of their constitutionality to be admissible.

35. Article 19(1) (second sentence) of the EU Treaty provides that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. Under Article 51(1) (first sentence) of the EU Charter of Fundamental Rights, the provisions of the Charter are addressed to the Member States only when they are implementing Union law. Article 47(1) of the EU Charter of Fundamental Rights provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.

36. Regulation 2018/1806 has been adopted under Article 77 of the Treaty on the Functioning of the EU, i.e. in the frame of border control, asylum and immigration policy within the shared competence of the EU and Member States. Arising from Article 4(1) of the Regulation, nationals of third countries listed in Annex II of the same Regulation shall be exempt from the visa requirement when crossing the external borders of the Member States for stays of no more than 90 days in any 180-day period. In Annex II to the Regulation, Ukraine is also mentioned as a country whose nationals are exempt from the requirement to be in possession of a visa when crossing the external borders of the Member States. In this respect, Regulation 2018/1806 is a directly applicable EU legal act under which an alien acquires a subjective right to visa-free entry into and stay in Estonia under the conditions set out in the Regulation and other EU legislation. Thus, ensuring the right of judicial appeal to an alien in the case of premature termination of a visa-free stay constitutes an issue of protection of a subjective right arising from EU law.

37. Regulation 2018/1806 does not contain provisions regulating contestation (including contestation in court) of administrative decisions concerning the right to a visa-free stay. Nor do any such provisions arise from other EU legal acts concerning border control and immigration.

38. As already stated, under Article 47(1) of the EU Charter of Fundamental Rights everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. This provision of the Charter is sufficiently clear, precise and unconditional so as also to give rise to direct legal effect in respect of the situation of contesting premature termination of a visa-free right of stay (cf. e.g. CJEU judgments in cases C?414/16: *Egenberger*, para. 78; C?556/17: *Torubarov*, para. 56). The Court of Justice of the EU has found that, in the absence of EU rules on a matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals in accordance with the principle of procedural autonomy. In this regard, the Member State must keep in mind that the principles of equivalence and effectiveness are observed: i.e. that those rules are not less favourable than those governing similar domestic situations and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (C?403/16: *Soufiane El Hassani*, paras 26–27).

39. It follows from the foregoing that the possibility of contesting interference with the right of visa-free stay as a right arising from EU law is an issue falling within the scope of EU law within the meaning of the EU Treaty and the EU Charter of Fundamental Rights. To resolve this, Member States have been afforded procedural autonomy on the precondition that the objectives and principles set by EU law are observed.

40. The contested norms falling within the scope of EU law does not mean that review of their constitutionality by the Estonian courts would be precluded. The Court of Justice of the EU has reached the opinion that where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the EU Charter of Fundamental Rights, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see C?399/11: *Melloni*, para. 60; C?617/10: *Åkerberg Fransson*, para. 29).

41. The Supreme Court *en banc* has also found that relation of an Estonian legal act to EU law cannot, of itself, prevent review of the constitutionality of a legal act within the meaning of § 152 of the Constitution. Within the limits determined by EU law, the national legislator is bound by the requirements under the Estonian Constitution, and the national courts are bound by the duty arising from § 152 of the Constitution to check the constitutionality of measures chosen for achieving an objective. In no circumstances does EU law prohibit states from ensuring domestic fundamental rights to the extent that realisation of those fundamental rights does not endanger the primacy or effectiveness of EU law (Supreme Court *en banc* judgment of 15 December 2015 in case No 3?2?1?71?14 [1], paras 81 and 83).

42. In the present case, the Chamber does not see that review of the constitutionality of limitations on the applicants' right of judicial appeal could endanger the primacy, unity and effectiveness of EU law, or otherwise compromise the level of protection of fundamental rights guaranteed by the EU Charter of Fundamental Rights. The EU legislator has clearly refrained from more detailed regulation of the issue in dispute. Estonian laws, including the contested norms, must be compatible both with EU law and the Constitution, and there is no reason not to assess their constitutionality merely because they may simultaneously contravene EU law. Inter alia, it is important that carrying out constitutional review court proceedings may ensure more effective protection of the rights and freedoms of persons arising from both EU and Estonian law, because, while assessing the constitutionality of a norm, the Supreme Court is authorised to invalidate an unconstitutional norm (§ 152(2) Constitution, § 15(1) clause 2 Constitutional Review Court Procedure Act) and completely remove the effect of that norm from the legal order. On the other hand, in the event of conflict of an Estonian-law norm with EU law the court has no possibility to invalidate that norm, and the norm should be set aside only in the specific dispute
(see e.g. Supreme Court*en banc* judgment of 19 April 2005 in case No3?4?1?1?05 [2], para. 49), making a note to that effect in the operative part of the judgment (§ 162(2) Code of Administrative Court Procedure).

43. In conclusion, review of the constitutionality of the contested norms is admissible regardless of the fact that they simultaneously fall within the scope of EU law.

III

44. Next, the Chamber will assess the constitutionality of the contested norms.

45. The first sentence of § 15(1) of the Constitution gives rise to everyone's right of recourse to the court if their rights and freedoms have been violated. This fundamental right forms part of the fundamental right to effective legal protection and fair administration of justice arising from the combined effect of § 15(1) and § 14 of the Constitution, which should guarantee effective protection of a person's rights without any gaps (Supreme Court Constitutional Review Chamber judgment of 17 December 2019 in case No 5?19?40/36, para. 63). An alien staying in Estonia also enjoys the right of recourse to an Estonian court (§ 9(1) Constitution), and once this right has arisen in connection with an alien's earlier stay in Estonia it does not end in the event of their departure from Estonia. The right of recourse to the court also enshrines a person's right to file an action with a court in the event of violation of their rights and freedoms, as well as the duty of the state to establish an appropriate judicial procedure for protecting fundamental rights which is fair and ensures effective protection of a person's rights (see e.g. Supreme Court *en banc* judgment of 16 May 2008 in case No 3?1?1?88?07, para. 41).

46. Any unfavourable influence on the right of recourse to the court constitutes interference with the substantive scope of protection of the fundamental right enshrined in § 15(1) of the Constitution. If a person enjoys a substantive right which may have been violated, but due to limitations laid down by procedural law that person cannot have recourse to the court, then undoubtedly the scope of protection of the fundamental right enshrined in § 15(1) of the Constitution has been interfered with (see also Supreme Court Constitutional Review Chamber judgment of 6 May 2016 in case No 3?4?1?31?15 [3], para. 36; order of 12 December 2017 No 5?17?10/10, para. 57).

47. The Minister of the Interior and the PBGB have asserted that no interference has occurred with the right of recourse to the court of the alien applicants because they have no judicially enforceable subjective right of entry to and stay in the territory of Estonia. The same argument has been put forward as justification for the absence of interference with the right of judicial appeal in the explanatory memorandum to the Draft Act mentioned above. The Chamber does not agree with this position.

48. As already concluded above (see para. 36 of the judgment), Article 4(1) of Regulation2018/1806 in combination with Annex II of the same Regulation are rules of EU law on the basis of which an alien has a subjective right of visa-free entry into and stay in Estonia on the conditions laid down by the Regulation and other EU legislation.

None of the participants in the proceedings have cast doubt on the fact that the alien applicants were Ukrainian citizens and the legal basis for their stay in Estonia arose from Regulation 2018/1806. Thus, the applicants had a subjective public right to stay in Estonia. Premature termination of the period of stay affects this unfavourably.

49. The aliens were staying in Estonia for the purpose of doing seasonal work, and premature termination of their period of stay also interfered with the freedom of enterprise of their employers laid down by § 31 of the Constitution.

Under § 31 (first sentence) of the Constitution, Estonian citizens are entitled to engage in enterprise and to form for-profit undertakings and organisations. The conditions and procedures for the exercise of this right may be provided by law (sentence 2). Freedom of enterprise includes activities taking place for the purpose of earning profit (see Supreme Court*en banc* judgment of 1 July 2015 in case No 3?4?1?20?15, para. 43). Inter alia, an undertaking exercises freedom of enterprise by entering into contracts to hire workers, thus using contractual relationships to shape the conditions which enable it to carry out its objectives while freedom of enterprise also protects an undertaking’s trust in contracts entered into in the frame of

entrepreneurship remaining in force (Supreme Court Constitutional Review Chamber judgment of 5 March 2015 in case No 3?4?1?49?14, para. 23; Supreme Court*en banc* judgment of 20 October 2020 in case No 5?20?3/43, para. 108). If the workers' period of stay is terminated prematurely, and thus unforeseeably for the employer, it is also impossible to continue fulfilling the agreements entered into for doing the work.

50. Thus, the scope of protection of the fundamental right of both the alien applicants and their employers arising from § 15(1) of the Constitution has been interfered with, so that the compatibility of this interference with the Constitution next needs to be checked.

51. The right of judicial appeal arising from § 15(1) of the Constitution is a fundamental right not subject to statutory reservation and only other fundamental rights or constitutional values can be taken into account as justification for its limitation, and interference must be proportionate for achieving its purpose, i.e. a measure which is appropriate, necessary and proportional in the narrow sense (see e.g. Supreme Court*en banc* judgment of 16 May 2008 in case No 3?1?1?88?07, para. 43).

52. The explanatory memorandum to the Draft Act justifies preclusion of the right of recourse to the court under § 100^{18} of the Aliens Act with the need to protect public order and national security and reduce the workload of the courts and the cost of judicial proceedings. It was found that in granting the right of recourse to the court an alien applicant must be ensured the possibility to be present at the hearing of their court case and thus stay in Estonia until the end of the judicial proceedings. In view of the consequences which may result from the arrival and stay in Estonia of an undesirable alien as well as the duration and cost of the judicial proceedings, it was found not to be appropriate or necessary to enable judicial proceedings for review of the lawfulness of carrying out visa proceedings.

53. Public order, national security and judicial procedural economy are constitutional values but, in principle, interference with a person's right of judicial appeal for the purpose of ensuring those values is not precluded. Although the alien applicants were not found to be infected with Covid-19, the dispute in the administrative case is about whether these aliens violated public order and prejudiced national security by breaching the isolation requirement imposed on them. Since breach of the isolation requirement also constitutes violation of public order, then public order and national security within the circumstances of this case cannot be seen as merely abstract values, in the guarantee of which premature termination of the period of stay and absence of the possibility for its judicial appeal would not be a contributing factor at all.

54. Preclusion of a judicial dispute over the lawfulness of premature termination of a period of stay of an alien who has violated public order may ensure their speedier departure from the country and is not a clearly inappropriate measure for guaranteeing public order and national security. Preclusion of the right of judicial appeal may undoubtedly also save financial resources for the state.

55. However, this is not a measure necessary for guaranteeing public order and national security because the same values can be protected by using other measures which are less restrictive of the applicants' rights.

56. Under § 24(2) of the Constitution, everyone may be present at the hearing of their case, but this fundamental right is not unlimited. Previously, the Supreme Court has analysed the opportunities ensured under current law to participants in proceedings, including an applicant, to participate in administrative court proceedings without direct attendance (see Supreme Court Constitutional Review Chamber judgment of 10 May 2016 in case No 3?4?1?31?15, paras 45–48). The court decided that in administrative court proceedings a person is ensured the possibility to file an action either in writing or in electronic format [...]. The court may also [---] hear the case in written procedure if the conditions set out in this provision have been fulfilled. Even if the case is heard at a court hearing, this does not mean the unavoidable necessity that a participant in proceedings should appear in the administrative court hearing the case. [...] [...] the court may organise a hearing as a procedural conference so that a participant in proceedings or their representative or adviser may be at a different location during the hearing and perform real-time procedural acts from that location, and questions to them can also be put in the same manner. Therefore, a participant in proceedings does not have to undertake a trip to the court's location but can communicate with the court by using means of information technology (see Supreme Court Constitutional Review Chamber judgment of 10 May 2016 in case No 3?4?1?31?15, para. 47). An alien applicant is also ensured the possibility to participate in judicial proceedings through a representative [...] or seek from the court, as interim relief, that compulsory enforcement of the precept to leave be suspended until the end of the judicial proceedings [...].

57. On that basis, the Chamber finds that an alien applicant is ensured an adequate possibility to participate in administrative court proceedings even without the need to permanently stay in Estonia during the judicial proceedings. If existing possibilities for participation in judicial proceedings by distance communication or through a representative are not sufficient, the legislator must consider expanding them but not entirely preclude the right of recourse to the court.

58. Complete preclusion of the right of recourse to the court constitutes serious interference with a person's rights and requires extremely compelling reasons. Although economy of judicial proceedings is a strong value (see Supreme Court Constitutional Review Chamber judgment of 10 May 2016 in case No 3?4?1?31?15, para. 52), such serious interference with the applicants' right of judicial appeal (i.e. complete preclusion of the right of judicial appeal) cannot be justified merely by the need to save the state's financial resources.

59. For these reasons, limitation of the fundamental right under § 15(1) of the Constitution resulting from the contested norms is disproportionate for achieving its objectives and contravenes the Constitution. As already noted above, this position does not compromise the primacy, unity or effectiveness of EU law. On the contrary, the Chamber finds that the need to interpret and implement the Constitution in conformity with EU law (see e.g. Supreme Court opinion of 11 May 2006 on interpretation of § 111 of the Constitution (3?4?1?3?06), paras 15–16) actually affirms the correctness of the above conclusion.

60. The Court of Justice of the EU has found that Article 32(3) of the EU Visa Code, read in the light of Article 47 of the EU Charter of Fundamental Rights, must be interpreted as meaning that it requires Member States to provide for an appeal procedure against decisions refusing visas, the procedural rules for which are to be established by each Member State by exercising its procedural autonomy in accordance with the principles of equivalence and effectiveness. In this regard, the requirements of equivalence and effectiveness mean the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law (see para. 38 of the present judgment and the CJEU judgment in case C?403/16: *Soufiane El Hassani*, paras 26–30 and 42 and the CJEU case-law cited therein).

61. Although the EU Visa Code does not regulate contesting premature termination of a visa-free right of stay, aliens staying in Estonia on the basis of the visa-free right of stay are in an essentially similar legal situation to persons staying in Estonia on the basis of a visa when exercising their subjective right arising from EU law. Since the scope of protection of § 15(1) of the Constitution also includes rights arising from EU law, in the event of termination of the right of visa-free stay an effective possibility of judicial appeal against the premature termination of the period of stay must be ensured.

62. In addition, the Constitution, including the right arising from § 15(1) of the Constitution, must be interpreted so as to ensure its compatibility with the ECHR and its implementing practice (Supreme Court Constitutional Review Chamber judgment of 25 March 2004 in case No 3?4?1?1?04 [4], para. 18). It follows from Article 1(1) of Protocol No 7 to the ECHR that an alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed to submit reasons against his expulsion, to have his case reviewed, and to be represented for these purposes before the competent authority or a person or persons designated by that authority. Although the text of the Protocol does not explicitly mention the right of recourse to the court, the ECtHR has found that, in these proceedings, a government minister is not an independent and impartial body whose review of an administrative decision would ensure that an alien enjoys the legal guarantees required by the ECHR (ECtHR judgment of 12 July 2011 in the case of *Baltaji v. Bulgaria*, No 12919/04, para. 58). In the opinion of the Chamber, it may be concluded from this that under the ECHR an alien must be ensured the possibility of recourse to the court or legal guarantees comparable to judicial proceedings for contesting their expulsion. Alongside the situation of contesting a decision on a person's expulsion, this conclusion should also be expanded to include contesting a decision on termination of the legal basis for their stay in Estonia, including premature termination of the period of stay.

63. Having regard to all the foregoing considerations, the Chamber satisfies [...] the application by Tartu Court of Appeal and declares unconstitutional and invalid § 100^{10}(1), § 100^{13}(2) and § 100^{18} of the Aliens Act insofar as they preclude filing an appeal with the administrative court for contesting premature termination of the period of stay. The conclusions reached in the present specific constitutional review cannot be automatically extended to assessing the constitutionality of limitations on individuals' right of recourse to the court in a different legal or factual situation, including in other types of judicial proceedings.

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