

**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
of 8 February 2001**

Review of the petition of the Tallinn Administrative Court for review of constitutionality of clause 1 of the Government of the Republic Regulation no. 215 of 20 August 1996.

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 acting Chancellor of Justice Aare Reenumägi and the Minister of Justice Märt Rask appearing
and in the presence of the secretary to the Chamber Piret Lehemets
reviewed the petition of the Tallinn Administrative Court of 7 November 2000.

I FACTS AND COURSE OF PROCEEDINGS

1. By clause 1 of its Regulation no. 215 of 20 August 1996 "Establishment of the form of application for permission for transfer of immovable property ownership to aliens, foreign states and legal persons" the Government of the Republic approved the "form of application for permission for transfer of ownership of plots of land and possession of immovables to aliens" (hereinafter "the form of application").

2. Viktor Volkov requested from the Harju county governor a permission for transfer of a registered immovable located at Luise 34/Koidu 37, Tallinn, to him as an alien and tenant who, under § 12¹(10) of the Principles of Ownership Reform Act, had the right of pre-emption of this registered immovable. In his letter of 30 June 2000 the county governor refused to grant the permission, stating that pursuant to the form of application, the application for permission for transfer of ownership of plots of land or possession of immovables to aliens may be submitted to the county governor only by the transferor of the ownership or possession.

3. V. Volkov filed a complaint with Tallinn Administrative Court against the act performed by the Harju county governor and requested that a precept be issued to the Harju county governor to hear his application in accordance with the Restriction on Transfer of Immovable Property Ownership to Aliens, Foreign States and Legal Persons Act.

4. In its judgment of 30 October 2000 the Tallinn Administrative Court found that the form of application approved by the Government of the Republic Regulation of 20 August 1996 was in conflict with the Constitution and did not apply it. The administrative court issued a precept to the Harju county governor to decide on granting of permission to V. Volkov for transfer of the immovable property ownership in accordance with the conditions and terms provided for in § 7(1) to (4) of the Restrictions on Transfer of Immovable Property Ownership to Aliens, Foreign States and Legal Persons Act.

5. On 7 November Tallinn Administrative Court submitted a petition to the Supreme Court for the review the constitutionality of clause 1 of the Government of the Republic Regulation no. 215 of 20 August 1996.

II THE LAW

Justifications of participants

6. According to the petition of the Tallinn Administrative Court clause 1 of the Government of the Republic Regulation of 20 August 1996 is in conflict with § 87(6) of the Constitution because it has been issued exceeding the limits of competence. Pursuant to § 7(5) of the Restrictions on Transfer of Immovable Property Ownership to Aliens, Foreign States and Legal Persons Act the form of application for permission shall be established by the Government of the Republic. The Act does not specify the circle of persons who are entitled to apply for the county governor's permission. Neither has the legislator imposed an obligation on the Government of the Republic to determine the subjects entitled to submit applications for permission.

7. The Government of the Republic admits that the disputed provision is in conflict with § 87(6) of the Constitution as it was issued exceeding the limits of competence. The Restrictions on Transfer of Immovable Property Ownership to Aliens, Foreign States and Legal Persons Act does not specify the circle of persons who are entitled to apply for the county governor's permission. The legislator has not imposed an obligation on the Government of the Republic to determine the subjects entitled to submit applications for permission.

8. The Chancellor of Justice supports the opinion of the administrative court that the disputed provision was issued exceeding the limits of competence and is thus in conflict with § 87(6) of the Constitution. Pursuant to § 2(1) of the Restrictions on Transfer of Immovable Property Ownership to Aliens, Foreign States and Legal Persons Act an ownership of a plot of land may be transferred to an alien with the permission of the

county governor of the location of the plot of land. The wording of the title of the Act and of § 2(1) thereof imply that restrictions are applicable upon transfer of immovable property ownership. The Act does not establish the circle of persons who may submit applications to acquire the permission for transfer of an immovable to an alien. The restriction on the transfer of immovable property ownership must be viewed not only as a restriction of the right of disposal of the owner of the immovable but also as a restriction on the acquisition of immovables. By establishing the form of application for permission, which does not enable an alien who wishes to acquire a plot of land to apply for the permission for transfer of immovable property ownership, the Government of the Republic has restricted the rights of aliens with no legal basis.

In his written opinion the Chancellor of Justice argued that clause 1 of the Government of the Republic Regulation of 20 August 1996 should be declared invalid to the extent that it establishes a restriction that the person who applies for the permission must be the transferor of the ownership of a plot of land or of the immovable property ownership. At the session of the Constitutional Review Chamber the Chancellor of Justice adopted a position that the disputed provision should be declared invalid in its entirety, but before that the government should be given time to bring the form of application into conformity with the law.

9. The Minister of Justice agrees with the conclusion of the administrative court that the form of application, approved by the Government of the Republic Regulation of 20 August 1996 is not in conformity with the Constitution and the law. Under § 11 of the Constitution rights and freedoms may be restricted only in accordance with the Constitution. Pursuant to § 3(1) of the Constitution the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Under § 87(6) of the Constitution the Government of the Republic shall issue regulations only on the basis of and for the implementation of law. Proceeding from the referred provisions the act of exercising the powers of state must be referable to a provision of the Constitution or of a law which is in conformity therewith and must not exceed the limits provided by law. The law does not give rise to a possibility to restrict the right of aliens to submit the application.

The Minister of Justice finds that the disputed provision should be declared invalid as of some future date, in order to give the government time to bring the form of application into conformity with the law. The lack of the form may paralyse the civil commerce of immovables and violate the constitutional right of persons to freely dispose of their property.

Opinion of the Chamber

I.

10. Pursuant to § 9(1) 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. That is why § 32(2) of the Constitution, which guarantees everyone the right to freely possess, use, and dispose of his or her property, is extended also to citizens of foreign states and stateless persons. The Chamber is of the opinion that the term property of § 32(2) of the Constitution also includes the right of pre-emption of immovables. It proceeds from the court judgment that the county governor interfered with an alien's right, specified in § 32 of the Constitution, as he refused to grant a permission for the transfer of immovable property ownership.

11. According to § 32(3) of the Constitution classes of property which, in the public interest, may be acquired in Estonia only by Estonian citizens, some categories of legal persons, local governments, or Estonian state may be provided by law. Thus, § 32(3) of the Constitution enables the legislator to derogate, under certain conditions, from the provisions of § 32(2). In order to make a derogation the categories of persons to whom and classes of property to which the restrictions shall apply must be provided by law. Restrictions must be in the public interest. Restrictions on the transfer of immovable property ownership to aliens, foreign states and legal persons are established by the Restrictions on Transfer of Immovable Property Ownership to Aliens, Foreign States and Legal Persons Act. In certain locations the acquisition of a plot of land by an alien is prohibited (§ 2(3) of the Act). Generally, ownership of a plot of land may be transferred to an alien with the permission of the county governor of the location of the plot of land (§ 2(1) of the Act). It has been established by law that a permission shall be granted if the acquisition of immovable property possession or ownership is not contrary to the public interests of the state or the local government or the security of the state (§ 7(2) of the Act). Thus, the right of an alien to acquire certain property is restricted by law.

12. § 7(5) of the Restrictions on Transfer of Immovable Property Ownership to Aliens, Foreign States and Legal Persons Act stipulates that the Government of the Republic shall approve the form of application for permission for transfer of immovable property ownership to aliens, foreign states and legal persons. The Government of the Republic established the form on 20 August 1996 by its Regulation no. 215. The form of application for permission, approved by clause 1 of the referred Regulation, differently from the Act, restricts the circle of persons who are entitled to submit application for permission to transfer the ownership of a plot of land or possession of immovable property to an alien. Pursuant to the form it is only the transferor of the ownership or possession who may submit the application. An alien who, using his or her

right of pre-emption, wishes the transfer of ownership or of possession of immovables, can not submit the application. The wording of the form of application indicates that by its legal act the government has additionally restricted the right of aliens to acquire immovables. § 32(3) of the Constitution excludes the possibility to establish such a restriction by a governmental regulation. That is why clause 1 of the Government of the Republic Regulation no. 215 of 20 August 1996, by which the form was approved, is in conflict with § 32(3) of the Constitution, pursuant to which restrictions on ownership shall be provided by law.

II.

13. The disputed form of application is also in conflict with § 87(6) of the Constitution. 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. This norm means that issuing regulations is within the competence of the Government of the Republic. At the same time the Constitution sets limits on this competence: the government may issue regulations on the basis of and for the implementation of law, that is on the basis of a provision within the law delegating authority. Provision delegating authority indicates the purpose, content and extent of the authority within which the government is empowered to issue regulations. A regulation, which exceeds the purpose, content or extent of the authority delegated by a provision, is not in conformity with the Constitution.

14. The Restrictions on Transfer of Immovable Property Ownership to Aliens, Foreign States and Legal Persons Act establishes restrictions on the transfer of immovable property ownership to aliens, as well as the procedure pursuant to which it is possible to transfer immovable property ownership to the referred subjects. The Act does not specify the circle of persons who are entitled to submit applications for permission for transfer of immovable property ownership to aliens, foreign states or legal persons. § 7(5) of the Act provides that the Government of the Republic shall approve the form of application for permission for transfer of immovable property ownership to aliens, foreign states or legal persons. Thus, the government had the right to establish the form of the application by its regulation. The government had no right to additionally restrict the fundamental rights by the form of the application. The legislator could not have given the government such authority, because according to § 32(3) of the Constitution a restriction must be established by law. The government may, within the authority delegated to it, specify in its regulation the restrictions established by law, but it may not establish additional restrictions.

III.

15. The Constitutional Review Chamber does not agree with the opinion that the disputed provision of the Regulation of the Government of the Republic should be declared invalid as of some future date, to give the government time to bring the form of application into conformity with the law. The absence of the form of application does not prevent interested persons, on the basis of law, to submit to a county governor applications for permission for transfer of immovable property ownership to aliens.

Proceeding from section § 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 clause 1 of the Government of the Republic Regulation no. 215 of 20 August 1996 invalid.

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

Uno Lõhmus

Chairman of the Constitutional Review Chamber