

**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 9 February 2000**

Review of the petition of the Chancellor of Justice to declare in valid the Narva City Government Regulation no. 672 of 16 April 1999 "Approval of Rules for the Use of Transit Vehicles Area" and the Appendix thereto dated 21 April 1999, and Regulation no. 1215 "Amendments to the Rules of the Use of Transit Vehicles Area" and the Appendix thereto dated 2 June 1999.

The Constitutional Review Chamber sitting in a panel presided over by the Chairman of the Chamber Uno Lõhmus and composed of members of the Chamber, justices Tõnu Anton, Lea Kalm, Ants Kull and Jüri Pöld, at its open session of 26 January 2000, with the representative of the Chancellor of Justice Aare Reenumägi, the representative of the Minister of Justice Priit Kama and the representatives of the Narva City Government Pjotr Näkk, Uno Veering and Aldo Kaljurand appearing, and in the presence of the secretary to the Chamber Piret Lehemets reviewed petition no. 2 of the Chancellor of Justice of 17 November 1999.

I FACTS AND COURSE OF PROCEEDINGS

1. On 16 April 1999 Narva City Government issued Regulation no. 672 "Approval of Rules for the Use of Transit Vehicles Area", and on 4 June 1999 it amended the regulation by Regulation no. 1215 "Amendments to Rules for the Use of Transit Vehicles Area". These Regulations obligated every driver of a truck, an automobile or a buss to drive to the transit vehicles area and to observe the rules for the use of the area. The rules also provide for the procedure for and priority of exiting to the customs office.

2. On 21 September 1999 the Chancellor of Justice made a proposal to the Narva City Government to bring both Regulations and the Appendices thereto into conformity with the Constitution and laws. He argued that the Regulations of the City Government 1) were in conflict with law; 2) could not be verified as to their legal motivation; 3) have been issued without a reference to legal grounds; 4) were in conflict with valid laws; 5) have been issued exceeding competence.

3. The Chancellor of Justice gives the following explanation to why the enactment of the Narva City Government regulations is in conflict with law. Pursuant to § 14 of the Constitution the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. All local issues shall be resolved and managed by local governments, which shall operate independently pursuant to law (§ 154). § 7(1) of the Local Government Organisation Act (hereinafter "the LGOA") establishes that local councils and governments have the right to issue regulations as legislation of general application. Regulations have to be issued (i.e. discussed, made public and enacted) pursuant to the grounds and procedure provided in § 31(1) to (4) and (6), and 49(10) of the LGOA. Clause 2 of the Narva City Government Regulation no. 1215 "Amendment to Rules of the Use of Transit Vehicles Area" of 4 June 1999, amending Appendix to Regulation no. 672 of 16 April 1999 (pro 21 April 1999) states that the Regulation shall be effective as of its adoption. This is in conflict with the grounds and procedure established in § 31(4) of the LGOA. The Chancellor of Justice also points out that he has used *pro* in his reference because there is a difference between the endorsement dates of Regulation no. 672 of 16 April 1999 and the Appendix approved by the regulation: the number of the Regulation is the same whereas the dates are different.

4. In his proposal the Chancellor of Justice emphasises the importance of the need to make a precise reference to legal basis in a regulation. The requirement to refer to a specific provision of a specific law arises from the Riigi Teataja Act. Otherwise, like in the case of the discussed regulations of Narva City Government, the general constitutional requirement of legal reasoning of administrative acts is not fulfilled. According to the explanation of the Chancellor of Justice all legislative acts of specific and general application of rural municipality and city councils and governments are administrative acts. Both, the Constitutional Review Chamber and the Administrative Law Chamber of the Supreme Court have, in the reasoning parts of several judgments, interpreted the requirements set to administrative acts, which arise from the letter and spirit of the Constitution. The Chancellor of Justice refers to case no. 3-3-1-18-96 of the Administrative Law Chamber of the Supreme Court, the reasoning of which includes, *inter alia*, the following: "An order of a city government is an administrative act, which has to be subject to verification. For an administrative act to be verifiable, it has to be reasoned and contain a reference to the specific provision of law. If an administrative act lacks such legal basis, it is illegal."

5. The Chancellor of Justice is of the opinion that an administrative act must not only contain a specific reference to its legal basis, but it also has to be legally reasoned. The fulfilment of the requirement to give reasons has also proved difficult for the Narva City Government. In the preamble to its Regulation no. 672 "Approval of Rules for the Use of Transit Vehicles Area" of 16 April 1999 (*pro* 21 April 1999), instead of referring to legal basis the city government has referred to information from V. Mizui, a member of the management board of AS TRANSSERVIS-N. After the text of clause 2 the Regulation states the following: "Basis: § 298(2) of the Commercial Code." The regulation of the Narva City Government of 4 June 1999, amending the referred Regulation, contains neither reference to its legal basis nor legal reasoning. Local governments have the right and obligation to act pursuant to Constitution and laws. Substituting legal basis with the information from a managing board of a profit-making company constitutes, according to the Chancellor of Justice, an unprecedented legal nihilism in Estonian legal practice, so does the reference to § 298(2) of the Commercial Code, which regulates the rights and duties of a general meeting of a public limited company. The Narva City Government is a local government body (§ 4(2) of the LGOA), not a general meeting, a management board or supervisory board of a public limited company. This approach and both Regulations are illegal for the above-discussed reasons.

6. The object of regulation of both Regulations is the procedure for crossing state borders, including paying for crossing the border pursuant to the requirements stipulated in these Regulations, as well as declaring the goods to be carried out of the country. That is why the Chancellor of Justice argues that these are not local issues; on the contrary, these are national issues. § 6(3) of the LGOA stipulates that in addition to the functions provided for in subsections (1) and (2) of this section, local governments resolve and organise local issues: 1) which are assigned to them by other Acts; 2) which are not assigned by law to other persons for resolution and organisation.

The Narva City Government has started resolving the procedure for crossing the state border, which - in regard to border regime, customs policy and customs organisation - is assigned by law to other persons for decisions and organisation, thus acting contrary to the State Borders Act and the Customs Act.

7. The Chancellor of Justice also argues that payment for crossing the border pursuant to requirements provided for by the Regulations does not constitute a service charge, instead it constitutes a local tax of specific purpose. In this context the Chancellor of Justice refers to judgment of the Constitutional Review Chamber concerning case no. 3-4-1-11-98 of 22 December 1998. Local taxes, the procedure and requirements for imposition of local taxes are established by the Local Taxes Act. The local tax, a tax for specific purpose, imposed by the Narva City Government, has not been imposed on the basis of any law; moreover, it was imposed exceeding competence, as local taxes fall within exclusive competence of a council.

8. It appears from the letter no. 1-11/842 of the Narva City Government that despite the assurance to accept the Chancellor of Justice's proposal for deliberation, the accession to the proposal is tied to a condition: to postpone the satisfying of the proposal with the aim of finding a better complex solution and to obtain approval of pertinent ministries. The Chancellor of Justice is of the opinion that despite the referred motifs this constitutes an *expressis verbis* rejection of the proposal.

9. On 17 November 1999 the Chancellor of Justice submitted a petition to the Supreme Court to declare invalid the Narva City Government Regulation no. 672 of 16 April 1999 "Approval of Rules for the Use of Transit Vehicles Area" and the Appendix thereto dated 21 April 1999, and Regulation no. 1215 "Amendments to the Rules of the Use of Transit Vehicles Area" and the Appendix thereto dated 2 June 1999, due to their conflict with the Constitution and the law. The petition has the same content as the Chancellor of Justice's proposal to the Narva City Government.

10. On 6 January 2000 the Chancellor of Justice submitted specifications to his petition to the Supreme Court. The Chancellor of Justice is seeking that the referred Regulations of the Narva City Government be declared invalid due to their conflict with §§ 14 and 154(2) of the Constitution, § 6(3)(2) of the LGOA in conjunction with § 3(2)(3) of the same Act, § 298(2) of the Commercial Code, § 8(1)(1) and 2) and § 8(3) of the State Borders Act, § 2(1) and (2) of the Customs Act, § 22(2) of the LGOA (§ 22(1)(2) as amended - RT I 1999, 75, 705) in conjunction with § 30(1)(3) of the same Act, and with §§ 4(2) and 5(1) to (9) of the Local Taxes Act.

11. On 24 January 2000 the Narva City Government issued Regulation no. 203, by which it reworded the preamble to its regulation no. 672 of 16 April 1999 "Amendments to Rules of the Use of Transit Vehicles Area". According to the new wording the Regulation is issued to organise the traffic of transit transport on the territory of Narva city, and as a legal basis for the Regulation a reference is made to § 6(1)(3) of the Local Government Organisation Act and to §§ 2(2), 26(2) and (3), 261 (2), (3) and (4) of the Traffic Act. On the same day the Narva City Government issued another Regulation. By Regulation no. 204 clauses 6.5 and 6.6, which gave the right to pass through with priority to persons having a voucher of the Narva travel agency Reiviis and to persons who are in hurry and agree to pay higher service charges for expedited crossing of the boarder, were left out of the rules of the use of transit vehicles area.

II. LEGAL REASONING

Justifications of parties

12. At the court session the representative of the Chancellor of Justice stood by the petition - to declare the contested Regulations of the Narva City Government invalid - and the reasoning thereof. The Chancellor of Justice considers the basic issue to be that the procedure for crossing state border and declaring goods to be carried out, as well as customs policy and customs organisation are national issues, and the Narva City Government has no competence to decide on these issues. The service charge, which is collected for the use of parking area, is substantially a local tax of specific purpose, and a local government is not entitled to impose such taxes.

13. The representatives of the Narva City Government argued both in their written reply and during the dispute at court session that the opinion of the Chancellor of Justice was erroneous. They assure that the contested Regulations do not regulate crossing of state border or entering the customs control. The Regulation regulates traffic organisation in Narva city before crossing the state border. This is a local issue, which a local government is competent to resolve. The representatives of the city government also argue that viewing the service charge as a local tax of specific purpose is erroneous, as a service charge is not a financial obligation without direct compensation. AS Transservis-N, the administrator of the transit vehicles area receives charges for services provided and costs incurred.

14. The Minister of Justice, in his written opinion, and his representative at the court session argued that Chancellor of Justice's petition was justified. It is not within the competence of a local government to regulate the procedure for persons and means of transport to cross state border, because law assigns this task to the competence of an agency authorised by the Government of the Republic. The service charge is substantially a tax, for the imposition of which the Narva City Government had no legal basis. The Minister of Justice also states that giving priority to certain persons for crossing the state border is in conflict with the principle of equal treatment enshrined in § 12 of the Constitution.

Opinion of the Constitutional Review Chamber

15. In order to resolve this constitutional review case it is necessary to answer the question whether the contested Regulations of the Narva City Government regulate national or local issues. The Chancellor of Justice and the Minister of Justice are of the opinion that the Regulations regulate crossing the state border, which is a national issue, whereas the Narva City Government claims that arrangement of transit traffic on the territory of the city is a local issue, which a local government is competent to regulate.

16. § 154 of the Constitution entitles local governments to decide and regulate all local issues without a special authorisation by law.

"§ 154. All local issues shall be resolved and managed by local governments, which shall operate independently pursuant to law."

In this context, a constitutional requirement is that an issue must inherently be a local, not a national issue. Thus, a local government may, without pertinent authorisation norm, decide on every issue, which is not a national issue. If a local government could not decide local issues without a norm delegating relevant authority, it would not be able to decide and resolve all such issues. This springs from the fact that it is impossible to foresee all local issues (see *mutatis mutandis* part II of the judgment of the Constitutional Review Chamber of the Supreme Court of 22 December 1998 RT I, 1998, 113/114, 1887).

17. The words "which shall operate independently pursuant to law" of the first sentence of § 154 of the Constitution nevertheless set certain limits on local governments in deciding and resolving local issues, including in the field of issuing regulations. The notion "pursuant to law" constitutes the requirement of legality. Pursuant to this requirement a local government must resolve issues in accordance with law. If a local government's legislation of general application, by which local issues are resolved, is in conflict with law, the legislation shall be illegal despite the fact that it resolves local, not national issues (see *mutatis mutandis* part II of the judgment of the Constitutional Review Chamber of the Supreme Court of 22 December 1998 - RT I, 1998, 113/114, 1887). Such interpretation is in conformity with Article 4(2) of the European Charter of Local Self-Governments, which establishes the freedom of local authorities, within the limits of the law, to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority.

18. The Local Government Organisation Act places within the competence of local governments, inter alia, the provision of public services and amenities and maintenance of city streets (§ 6(1)). The Traffic Act establishes that the local governments direct activities relating to traffic safety and are responsible for the ensuring of road user safety in counties and cities (§ 2(2)). Pursuant to the same Act the owner or possessor of a road shall ensure traffic control and proper placement and maintenance of traffic control devices (§ 26(3)). Parking shall be regulated by the owner or possessor of a road by means of traffic signs, road markings and other traffic control devices (§ 26(3)), who may charge a fee for parking (§ 26(4)).

19. The Narva City Government has tried to justify its Regulations with the referred provisions. The representatives of the city government state that Narva is a border city, the location of Estonian-Russian border checkpoint. Vehicles are constantly queueing in the streets of the city centre. The fact that vehicles were parking for hours had impairing effect on the social and ecological condition of the city and on the provision of public services and amenities, and constituted danger to traffic. Repeated references to governmental agencies have gone unnoticed.

20. Everything related to state borders and border regime belongs to the sphere of national issues. The State Borders Act establishes that border regime shall determine, *inter alia*, the procedure for persons and means of transport to cross the state border; for goods to be carried across state border; for persons and means of transport to enter, be at and exit border checkpoints and for goods to be brought to, be at and be removed from border checkpoints (§ 8(1) 1), 2) and 5)). The Act includes a norm delegating authority to the Government of the Republic or to an agency authorised by the government to establish rights, duties and restrictions arising from border regime, if these have not been established by the law or an international agreement (§ 8(3)). On the basis of the authorisation by the Act, on 17 September 1997, the Government of the Republic issued regulation no. 176, by which it approved the Border Regime Rules (RT I 1997, 69, 1126; 1998, 41/42, 629). According to § 66(1) of the Government of the Republic Act the guarantee of the border regime is within the area of government of the Ministry of Internal Affairs. The Border Guard Act obliges the Border Guard to guarantee the border regime (§ 2(1)5)). The Customs Act states that functions of customs authorities shall include, *inter alia*, monitoring of the lawfulness of the carriage of goods into and out of the customs territory (§ 2(1)1)).

21. Next it is necessary to ascertain whether the Narva City Government, when exercising its power to issue regulations, has acted within the competence established by the Local Government Organisation Act and the Traffic Act and has not acted in conflict with the provisions of the State Borders Act.

On 21 April 1999 the Narva City Council approved "The procedure of Traffic of Automobile Transport Crossing Estonian-Russian Border" (KO 1999, 6, 83) by its Regulation no. 98/46. The Regulation of the city council requires the drivers of all vehicles heading for Russia to drive to the parking area for transit vehicles, located in Narva at 4a Rahu street, where the vehicles are entered into the queue for crossing the border (clause 2). Such organisation of traffic heading for border checkpoint is within the competence of local governments. The Chancellor of Justice has not disputed this Regulation of the council.

"The Rules of the use of Transit vehicles Area", approved by the Narva City Government Regulation of no. 672 of 16 April 1999, and all subsequent amendments thereto contain several additional rules. The Rules provide for priorities to certain persons to enter customs and border checkpoints, give the right to employees of a legal person in private law to organise the entering of customs and border checkpoints, whereas they have the right to send vehicles back if the one hour limit of the passage permit has expired. These rules, which apparently regulate traffic in town, are extended to the sphere, which is defined by the notion of border regime. Everything related to border regime is a national issue, the regulation of which is given into the competence of the Government of the Republic or an agency authorised by the government by a norm of the State Borders Act delegating relevant authority (§ 8(3)). Although the representatives of the city government assured that the rules were enacted upon a mutual agreement between the city government and the local Border Guard, such an agreement has no legal basis.

Therefore, the Constitutional Review Chamber is of the opinion that the contested Regulations of the Narva City Government are in conflict with §§ 3(1) and 154(1) of the Constitution in their conjunction, and with § 8(1)1), 2) and 5) of the State Borders Act. The fact that the Government of the Republic or an agency authorised by the government has allegedly failed to act is not a sufficient justification for a local government to regulate national issues.

22. The Chancellor of Justice and the Minister of Justice also argue that the service charge, imposed by the city government for the use of transit vehicles area is by nature a local tax, for the imposition of which the Narva City Government had no legal basis. The representatives of the Narva City Government argue that the service charge is not a financial obligation without direct compensation and thus does not meet the characteristics of a tax, stipulated in the Taxation Act.

Considering the conclusions set out in paragraph 21 of this judgment the Constitutional Review Chamber does not find it necessary to examine this issue.

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

To satisfy the petition of the Chancellor of Justice and to declare the Narva City Council Regulation no. 672 of 16 April 1999 "Approval of Rules for the use of Transit Vehicles Area" and the Appendix thereto dated 21 April 1999, and Regulation no. 1215 "Amendments to the Rules of the Use of Transit Vehicles Area" and the Appendix thereto dated 2 June 1999, invalid.

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

U. Löhmus
Chairman of the Constitutional Review Chamber