

**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 22 June 2000**

Review of the petition of the Tallinn Administrative Court to review the constitutionality of the director general of National Housing Board directive no. 45 of 20 June 1995.

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 Kivi, Ants Kull and Jüri Põld, at its open session of 13 June 2000, with the representative of the Minister of Justice Enno Loonurm and the representatives of the Minister of Economic Affairs Eldur-Georg Ratnik and Diana Reiman appearing, and in the presence of the secretary to the Chamber Piret Lehemets reviewed the petition of the Tallinn Administrative Court of 11 May 2000.

I. FACTS AND COURSE OF PROCEEDINGS

1. On 20 June 1995 the director general of National Housing Board issued directive no. 45 "Approval of "Instructions for registration of buildings"". By the directive the "Instructions for registration of buildings" (hereinafter "the Instructions") were approved. The instructions were amended by the director general of National Housing Board directive no. 4 of 24 January 1996.

2. Juta Nõulik had repeatedly applied to the Tallinn buildings register for the issue of a statement certifying the ownership and legal status of the apartment situated in Tallinn, Vilde tee 58-31; she needed the certificate for carrying out a transaction with the apartment. The building register refused to issue the certificate, reasoning its decision with the prohibition against disposal of the apartment and with valid compromise in bankruptcy proceedings.

3. J. Nõulik submitted an action to the Tallinn Administrative Court against the activities of the buildings register and requested that a precept be issued to the Tallinn buildings register that it issue a statement certifying ownership of apartment situated in Tallinn, Vilde tee 58-31. In her action J. Nõulik resorted also to clauses 26 and 30 of the Instructions declaring that proceeding from these the buildings register is under an obligation to issue certificates to interested persons even if there are restrictions incumbent on the building.

4. The Tallinn Administrative Court, in its judgment of 5 May 2000, regarded the Instructions to be in conflict with the Constitution and therefore not applicable to the case. The Databases Act is to be applied to the buildings register. By the judgment of the court the director general of National Housing Board directive no. 45 "Approval of "Instructions for registration of buildings"" was declared unconstitutional.

5. On 11 May 2000 the Tallinn Administrative Court filed a petition with the Supreme Court to review the constitutionality of the directive.

II. LEGAL JUSTIFICATIONS

Justifications of the participants

6. According to the petition of Tallinn Administrative Court the director general of National Housing Board directive no. 45 of is in conflict with the Government of the Republic Act and, due to the fact, also with § 3(1) of the Constitution.

Proceeding from §§ 3(1) and 87(7) of the Constitution the Government may not issue legislation, which is in conflict with law and for the issuance of which it has no legal authority. The director general of National Housing Board directive no. 45 of 20 June 1995 is in conflict with the Government of the Republic Act, which was passed on 13 December 1995 and became effective as of 1 January 1996. According to § 70(1) of the Act an executive agency (a board) is a government agency provided by law which operates within the area of government of a ministry, has a directing function, exercises state supervision and enforcement powers of the state on the bases and to the extent prescribed by law.

According to § 74(1) of the Government of the Republic Act the director general of an executive agency (a board) or inspectorate has the right to issue directives concerning service-related issues pursuant to law, a regulation or order of the Government of the Republic, or a regulation or directive of the minister. A directive is an administrative legislation of specific application. Despite of the fact that the Instructions were enforced by a directive, i.e. by a legislation of specific application in the formal sense, it is in essence an act of general application.

7. The Chancellor of Justice is of the opinion that the director general of National Housing Board directive no. 45 of 20 June 1995 is a legislation of general application, for the issuance of which the director general of National Housing Board had no competence. Pursuant to §§ 87(6) and 94(2) of the Constitution legislation of general application may be issued by the Government of the Republic and by ministers, if the legislator has authorised them to do so.

8. The Minister of Justice is of the opinion that the petition of the Tallinn Administrative Court is justified. Pursuant to § 86 of the Constitution the executive power is vested in the Government of the Republic, who shall, under § 87(6) of the Constitution, issue regulations and orders on the basis of and for the implementation of law. According to § 94(2) of the Constitution a minister shall manage issues within the area of government of the ministry, issuing regulations and directives on the basis of and for the implementation of law. Proceeding from §§ 36 and 37 of the Government of the Republic Act, which was passed on 20 October 1992 (invalid as of 1 January 1996) a director general of an executive agency (a board), analogously with a secretary general of a ministry, could issue directives for the management of operations of the agency and work of its staff. The contested directive is not confined to regulating the work and operations of the buildings register, instead it includes numerous rules of conduct, directed outward, the imposition of which is not within the competence of a general director.

9. The Minister of Economic Affairs is of the opinion that from the formal legal point of view the petition of the Tallinn Administrative Court is justified. As the internal operation of the Tallinn buildings register as well as of the buildings registers of all counties is organised observing the requirements of the Instructions, the activities of all buildings registers shall be suspended if the Instructions are declared unconstitutional. This may cause a temporary suspension of commerce in regard to buildings and premises that are immovables and in regard to those registered immovables of which a building is an essential part.

Opinion of the Constitutional Review Chamber

10. The Constitutional Review Chamber agrees with the Chancellor of Justice and the Minister of Justice and shares the opinion that directive no. 45 of director general of National Housing Board contains universally mandatory rules of conduct, which are applied to an unspecified number of persons in an abstract number of cases.

11. Pursuant to § 86 of the Constitution the executive power is vested in the Government of the Republic, who shall, pursuant to § 87(6) of the Constitution, issue regulations and orders on the basis of and for the implementation of law. § 94(2) of the Constitution stipulates that a minister shall manage issues within the area of government of the ministry and shall issue regulations and directives on the basis of and for the implementation of law.

Under § 35 of the Government of the Republic Act, which was in force at the time the contested directive was issued, it was allowed to set up executive agencies (boards) within the area of government of a minister, and pursuant to § 36 of the same Act these agencies were directed by the minister through directors. The Act did not give the directors of agencies the right to issue legislation of general application.

The Instructions were amended by the director general of National Housing Board directive no. 4 of 24 January 1996, when the Government of the Republic Act, which entered into force on 1 January 1996, was in force. According to § 74(1) of the Act the director general of an executive agency (a board) or inspectorate has the right to issue directives concerning service-related issues pursuant to law, a regulation or order of the Government of the Republic, or a regulation or directive of the minister.

Thus, the director general of National Housing Board did not have the right, either under the present or the previous Government of the Republic Act, to issue legislation of general application.

12. For the aforesaid reasons the director general of National Housing Board directive no. 45 of 20 June 1995 is in conflict with § 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.

13. § 52(1) of Databases Act, which became effective as of 19 April 1997 required that the statutes of state registers or databases which are approved prior to the entry into force of the Act shall be brought into compliance with the Act within two years after the entry into force of this Act.

The Statutes of the Estonian state buildings register were approved by the Government of the Republic Order no. 378-k of 20 December 1990. The Statutes were amended by the Government of the Republic Orders of 21 July 1998 and 14 March 2000.

The Statutes of the buildings register have not been brought into compliance with the Databases Act. Consequently, the Government of the Republic has failed to fulfil a duty imposed by the legislator.

§ 35 of the Databases Act prescribes what the statutes for maintenance of a state register must set out. Some of the issues which, pursuant to this provision, have to be regulated by the statutes for maintenance of a state register have, as of today, been regulated by the Statutes of the Estonian state buildings register

and some issues by the Instructions.

The Chamber is of the opinion that it is not reasonable to declare the Instructions invalid without giving the Government more time to bring the Statutes of state buildings register into compliance with the Databases Act. Discontinuance of regulatory framework established by the contested directive may paralyse commerce in buildings and parts thereof and violate the constitutional right of any person to freely dispose of his or her property.

On these considerations the Chamber is of the opinion that the director general of National Housing Board directive no. 45 is to be declared invalid as of 1 September 2000, if by that time the Statutes of the buildings register, issued under the Databases Act, have not entered into force.

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

To declare the director general of national Housing Board directive no. 45 of 20 June 1995 “Approval of “Instructions for registration of buildings”” invalid as of entering into force of the new Statutes of buildings register, but not later than as of 1 September 2000.

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

Uno Lõhmus

Chairman of the Constitutional Review Chamber