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DECISION
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

of 27 May 1998

Review of the petition of Tallinn Administrative Court, dated 26 March 1998, seeking to declare the null and void regulation no. 414 of the Government of the Republic, dated 3 November 1994, for 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,
associate 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 Tallinn Administrative Court, dated 26 March 1998.

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

By its decision of 25 March 1998, upon adjudication of the complaint of Aleksandr Panov, Tallinn Administrative Court decided not to apply regulation No. 414 of the Government of the Republic, dated 3 November 1994, entitled "Partial amendment of regulation No. 268 of the Government of the Republic, dated 16 September 1992", and the court declared the legislation unconstitutional. The complaint of A. Panov was satisfied and the procedures of the Border Guard Administration in relation to A. Panov were declared totally illegal and the court collected the legal costs from the Border Guard Administration in favour of A. Panov.

Proceeding from section 5 of the Constitutional Review Court procedure Act, Tallinn Administrative Court filed a petition with the Supreme Court seeking that the court declare regulation No. 414 of the Government of the Republic, dated 3 November 1994, entitled "Partial amendment of regulation No. 268 of the Government of the Republic, dated 16 September 1992", invalid due to its conflict with the Constitution.

The court motivated its decision with the fact that pursuant 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 not allowed to carry out procedures, 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 paragraph of § 123 of the Constitution stipulates that if laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu, the provisions of the international treaty shall apply.

Section 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 pertinent rule in the laws delegation 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 decision 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 are 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." Pursuant to § 5(1) of Aliens Act, aliens staying in Estonia are guaranteed rights and freedoms equal to those of Estonian citizens unless the Constitution, Aliens Act, other Acts or international agreements of Estonia provide otherwise.

None of Estonian Acts provides for restrictions upon the choice of ship (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 associate the work of a seafarer on the basis of a document proving his identity, on a ship flying any flag, with his or her nationality.

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 an act ranking lower than law, regulated the conditions and procedure for the exercise of the right to choose place of work. Also, by an act 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 to the said regulation an alien seafarer, who already has been issued a seafarer's identity document, which meets the requirements of the Convention, 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 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 paragraph of the Constitution stipulates that if laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu, the provisions of the international treaty shall apply.

Proceeding from §§ 38 (3) and 48 of Documents Proving the Identity and Nationality of Estonian Citizens Act and considering that the disputed legislation has been issued without a legal ground, the Government of the Republic, by regulation No. 90 of 5 May 1998, annulled its regulation No. 268 of 16 September 1992, which regulated the approval of the code of Estonian seafarer's service record book and established rules for issuance of certificates of record of service on Estonian ships.

The court heard the opinion of the representative of the Government of the Republic to the effect that the petition was justified. Considering that the legislation had been issued without a legal ground, the Government of the Republic, by its regulation No.90. declared the disputed regulation invalid.

The Legal Chancellor, in his written opinion, supported the views of 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 there is no provision in a law delegating the Government of the Republic authority to issue its regulation No.268, dated 3 November 1992, entitled "Partial amendment of regulation No. 268 of the Government of the Republic, dated 16 September 1992", the said regulation is in conflict with § 87(6) of the Constitution. The Government of the Republic itself also referred to the lack of a legal ground and declared the disputed regulation invalid by its regulation No. 90 of 5 May 1998.

II Pursuant to § 38 of Documents Proving the Identity and Nationality of Estonian Citizens Act, a seafarer's service record 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 service record book the holder thereof can leave Estonia on a ship and arrive from a ship which is located abroad; also leave and arrive on a ship to the crew list of which he or she has been entered. A seafarer's service record book shall be issued to an Estonian citizen, who works or starts work or practical training on an Estonian or a foreign ship.

By regulation No. 414 of the Government of the Republic of 3 November 1993 the rules for issuing Estonian certificates of record of service on Estonian ships were approved. Section one 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 section 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 section 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 section 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, gives the holder thereof the right to leave Estonia visa-free, 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 Pursuant to § 5(1) of 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, Aliens Act, other Acts or international agreements of Estonia provide otherwise. Pursuant to the second paragraph 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 service record 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 service record 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 section 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 owner 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 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, is implicit and proceeds from the purpose of the Convention, namely to simplify the formalities related to seafarer's travel to or from ships.

As the said 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 treaties ratified by the Riigikogu, then, pursuant to second paragraph of § 123 of the Constitution, the provisions of the international treaty shall apply.

IV Pursuant 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 decision of the Administrative Court the regulation of the Government of the Republic is also in conflict with § 29 (1) of the Constitution. Pursuant to the 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 establishing a condition 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 decisions 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 Pursuant 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 checked in accordance with §§ 5(2) and 6(1)(3) of the Constitutional Review Court Procedure Act. As the Government of the Republic itself, on 5 May 1998, had declared the disputed 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 invalid regulation it is no longer possible to issue new seafarer's identity documents. The revocation of the regulation does not automatically invalidate the documents which had 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:

Not to satisfy the petition of Tallinn Administrative Court of 26 March 1998, as the Government of the Republic has already declared the disputed regulation invalid.

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

R. Maruste
Chairman of the Constitutional Review Chamber

Concurring opinion

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

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

The disputed 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, that is 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 decision 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 said 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 positive law with that of European Community.

European Community law and its principles have found expression in many legal acts. Thus, pursuant to section c of article 3 of the Treaties Establishing the European Communities, 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 said freedoms (2). Pursuant to section 2 of article 48 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 that Estonia has to be guided by in further legal regulation of movement of labour force, including seafarers.

Rait Maruste