



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Riga, July 7, 2004

JUDGMENT in the name of the Republic of Latvia

in case No. 2004-01-06

The Republic of Latvia Constitutional Court in the body of the Chairman of the Court session Aivars Endziņš, justices Romāns Apsītis, Aija Branta, Ilma Čepāne, Gunārs Kūtris, Juris Jelāgins and Andrejs Lepse under Article 85 of the Republic of Latvia Satversme (Constitution) as well as Articles 16 (Item 6), 17 (Item 9 of the first part), 19¹ and 28¹ on the basis of the claim by the Riga Ziemeļu (Northern) district court (judge Juris Stukāns) holding the proceedings in writing on June 15, 2004 at the Court session reviewed the case

”On the Compliance of Article 114² of the Administrative Violation Code with April 9, 1965 Convention on Facilitation of International Maritime Traffic”.

The establishing part

1. On September 11, 1997 the Saeima adopted the Law ”On the International Convention on Facilitation of International Maritime Traffic”, which took effect on September 24, 1997. By the above Law was confirmed the International Convention on Facilitation of International Maritime Traffic (hereinafter – the Convention), signed in London on April 9, 1965. In Latvia the Convention is effective as of March 21, 1998.

Standard 3.15 of the Convention establishes that ”Public authorities shall not impose any penalty upon ship-owners in the event that any control document in possession of a passenger is found by public authorities to be inadequate, or if, for that reason, the passenger is found to be inadmissible to the State”.

2. On October 14, 1998 the Latvian Administrative Violation Code (hereinafter – the AVC) was supplemented with Article 114². In its turn on June 19, 2003 the Saeima passed the Law "Amendments to the Latvian Administrative Violation Code" and Article 114² was expressed in the following wording:

"For carrying one or several persons from the foreign states to the Republic of Latvia, if the above persons do not have valid travel documents for crossing the state border of the Republic of Latvia and if it has been realized by the carrier of a maritime or air transport,-

the fine from one hundred to three hundred lats shall be imposed upon the physical entities and the fine from two hundred and fifty lats to five thousand lats shall be imposed upon the juridical entities.

For carrying one or several persons from the foreign states to the Republic of Latvia as the members of a passenger group, organized in accordance with the law, if the above persons do not have valid travel documents for crossing the state border of the Republic of Latvia and if it has been realized by the carrier of a motor transport,-

the fine from ten to two hundred and fifty lats shall be imposed upon the physical entities and the fine from fifty to two thousand lats shall be imposed upon juridical entities".

3. **The applicant of the claim** – the Riga Northern District Court on January 5, 2004 reviewed the complaint of the Stock Company "The Riga Sea Line" on the August 29, 2003 decision by the acting chief of the State Border Guards Riga Department Leonards Doniķis in administrative violation case No. 2932-03098 by which - on the basis of the first part of AVC Article 114² - the fine of 250 lats was imposed on the stock company "The Riga Sea Line". It was established in the above case that on August 29, 2003 the Stock Company "The Riga Sea Line" as the transporter with the ship owned by it "Baltic Christina" took to Latvia the citizen of the Kingdom of Sweden without valid travel documents (the expiry date of the passport was closer than three months).

The Riga Northern District Court (hereinafter – the applicant) decided to address the Constitutional Court with the request to initiate the case and assess the conformity of AVC Article 114² with the Convention.

It follows from the application and the documents attached to it that the applicant requests to assess the compliance of the first part of AVC Article 114² with Standard 3.15 of the Convention, besides, only in the part on maritime traffic (henceforth – the challenged norm).

The applicant holds that the challenged norm "is unconformable with Standard 3.15 of the Convention, as it envisages imposing penalty upon the carrier, if the control document of the passenger is acknowledged as invalid or if because of the above reason the passenger is denied entry in the state (he/she has not valid travelling documents for crossing the state border of the Republic of Latvia)".

- 4. The Saeima** points out that the Convention does not forbid the Contracting Governments to amend the Standards and Recommendations of the Convention, as the second part of Article V of the Convention reads that nothing in the present Convention or its Annex shall be interpreted as precluding a Contracting Government from applying temporary measures considered by that Government to be necessary to preserve public morality, order and security. In its turn the first part of Article VIII of the Convention determines that any Contracting Government that finds it impracticable to comply with any Standard by bringing its own formalities, documentary requirements or procedures into full accord with it or which deems it necessary for special reasons to adopt formalities, documentary requirements or procedures differing from that Standard, shall so inform the Secretary General and notify him of the differences between its own practice and such standards. Taking the above into consideration, Article 3 of the Law "On the International Convention on Facilitation of International Maritime Traffic" establishes that the Ministry of Foreign Affairs is the institution responsible for informing the Secretary General of Inter-Governmental Maritime Consultative Organization (hereinafter – Secretary General of IMCO) about matters relating to approximation of formalities, documentary requirements and procedures but the Ministry of Transportation shall furnish the information on implementation of the above provisions.

The Saeima holds that in case if the provisions of Article 3 of the Law "On the International Convention on Facilitation of International Maritime Traffic" have not been observed there is still no need for declaring the challenged norm as null and void because not all the states are the Contracting States of the Convention. The Saeima points out that in conformity with Article 13 of the Law "On the Republic of Latvia International Agreements" the challenged norm should not be applied as regards the Contracting States of the Convention. In their turn as concerns the states, which are not the Contracting States of the Convention, the challenged norm shall be applied.

In addition the Saeima points out that the new Member States of the European Union (henceforth – the EU) from the day of accession shall observe the Council Directive 2001/51/EC of 28 June 2001 (hereinafter – the Directive). Article 4 of the Directive includes reference to Article

26 of the Convention under which the Agreement by the Governments of the Benelux States, the German Federative Republic and the Republic of France implement June 14, 1985 Schengen Convention on gradual withdrawal of control on the connecting borders (hereinafter – the Schengen Convention). In accordance with the provisions of these acts the carriers, who transport to the territory of the EU third country nationals, who are not citizens of the EU without the necessary documents, shall be applied penalties.

The Saeima holds that the challenged norm shall remain in effect.

5. **The Ministry of Foreign Affairs** holds that the challenged norm, if compared to Standard 3.15 of the Convention establishes a diverse regulation. However, in accordance with the provisions of Article 3 of the Law "On the International Convention on Facilitation of Maritime Traffic" execution of the liabilities incorporated in the Convention shall be coordinated by the Ministry of Transportation.
6. **The Ministry of Transportation** states that it has not furnished information on formalities, documentary requirements and procedures, which differ from the Standards in accordance with Article VIII of the Convention as is envisaged in Article 3 of the Law "On the International Convention on Facilitation of Maritime Traffic". Taking into consideration the fact that the above provisions have not been observed as well as taking into consideration the provisions of Article 13 of the Law "On the Republic of Latvia International Agreements" the Ministry of Transportation holds that the challenged norm is not completely conformable with the Convention.
7. **The Rector of the Riga Graduate School of Law, professor Norbert Reich** points out that up to May 1, 2004 the Directive was not binding on the Republic of Latvia. In its turn, after May 1, 2004 Latvia shall meet the commitments included in the Directive as the part of *acquis*.
8. **The lecturer of the Latvia University Faculty of Law Department of International and European Law Māris Lejnieks** holds that not touching upon the issue on the compatibility of the amount of the fine, included in the challenged norm, with the Directive, the adjustment of the challenged norm meets the requirements of the Directive but is at variance with the requirements concerning the travel documents of Standard 3.15 of the Convention.

M.Lejnieks points out that after joining the EU the provisions of the European Community are binding on it. Article 307 of the Agreement of Organization of the Consolidated European Community envisages that

the Agreement does not affect the international legal liabilities of the Member States, which they have undertaken with regard to one or several third countries. However, in compliance with the Judgment of the European Court of Justice in case *Commission v. Italy, case 10/61, [1962]ECR, p. 11* as concerns relations with other member States the legal acts of the European Community shall be applied. Besides, if the Member State establishes unconformity of its international liabilities with the legal norms of the European Community, it shall do everything to avert the unconformity.

M.Lejnieks holds that taking into consideration the fact that the Republic of Latvia has not informed the Secretary General of IMCO about different practice in applying Standard 3.15 of the Convention, then – as concerns the carriers, whose ships sail under the flags of the EU Member States – the requirements of the Directive shall be applied. As concerns carrier ships, which sail under the flags of the third countries, Standard 3.15 of the Convention shall be applied.

The concluding part

1. In accordance with the first part of Article 19¹ of the Constitutional Court Law, a court of general jurisdiction, when reviewing a case may submit a claim if it holds that the norm to be applied to the case does not comply with the legal norm of higher legal force. It is evident from the materials in case that in taking the decision only the first part of AVC Article 114² is of importance, as far as it concerns the carrier. Besides from the application and the documents attached to it follows that the applicant requests to assess the conformity of the challenged norm with Standard 3.15 of the Convention. The claim does not include the assessment of the amount of the sanction.

Thus the Constitutional Court in this Judgment will assess only the conformity of the following text of the first part of AVC Article 114²: ” ... for carrying one or several persons from the foreign state to the Republic of Latvia if the above persons do not have valid travel documents for crossing the State border of the Republic of Latvia and if it has been realized by the carrier of a maritime transport” with Standard 3.15 of the Convention.

2. The challenged norm envisages responsibility of the carrier for carrying one or several persons from the foreign states to the Republic of Latvia by maritime traffic, if the above persons do not have valid travel documents for crossing the State border of the Republic of Latvia. In its turn Standard 3.15 envisages that public authorities shall not impose any penalty upon ship-owners in the event that any control document in

possession of a passenger is found to be inadequate, or if, for that reason, the passenger is found to be inadmissible to the State.

To evaluate whether the challenged norm complies with the above norm of the Convention one has to ascertain:

- 1) whether Standard 3.15 of the Convention is the legal norm binding on Latvia;
- 2) whether the term "the carrier" used in the challenged norm and the term "the ship-owner", used in Standard 3.15 of the Convention refer to one and the same range of subjects;
- 3) whether the term "valid travel documents" in the challenged norm and "control documents" in the Standard 3.15 of the Convention mean the same documents.

- 3.1.** Article VI (part "a") of the Convention determines that "standards are those measures the uniform application of which [...] is necessary and practicable". Usage of the term "necessary" (*see page 55 of the materials in case*) indicates that the implementation of the Standard is mandatory. Thus the Standards, incorporated in the Annex to the Convention, have a mandatory and binding nature.

In its turn the second part of Article V of the Convention determines that "nothing in the present Convention or its Annex shall be interpreted as precluding a Contracting Government from applying temporary measures considered by that Government to be necessary to preserve public morality, order and security or to prevent the introduction or spread of diseases or pests affecting public health, animals or plants". From the norm one can deduce that application of the challenged norm has not been forbidden. However, Article VIII of the Convention establishes that "any Contracting Government that finds it impracticable to comply with any Standard by bringing its own formalities, documentary requirements or procedures into full accord or which deems it necessary for special reasons to adopt formalities, documentary requirements or procedures differing from that Standard, shall so inform the Secretary-General and notify him of the differences between its own practice and such Standard."

At the moment 94 Contracting States have acceded to the Convention. Some of them (e.g. Belgium, Denmark, Italy, Great Britain, Netherlands and Germany) have notified the Secretary General of IMCO about the differences between their practice and Standard 3.15 of the Convention. However – as shall be further pointed out - Latvia has not notified about different practice.

- 3.2.** Article 3 of the Law " On the International Convention on Facilitation of International Maritime Traffic" envisages that the Ministry of

Foreign Affairs if the institution responsible for informing the Secretary General about the approximation of recommendable practice with the documentary requirements or procedures and formalities in accordance with the provisions of Article VIII of the Convention; but the Ministry of Transportation shall furnish the needed information on the implementation of the above provisions. However, neither the Ministry of Foreign Affairs nor the Ministry of Transportation has furnished such information to the Secretary General of IMCO (*see pp. 102-106 of the materials in case*).

The Saeima in its written reply points out that, when passing the Law into which the challenged norm was incorporated, it had been of the opinion that the Ministry of Foreign Affairs and the Ministry of Transportation shall undertake the necessary measures to ensure implementation of the international liabilities of the Republic of Latvia, i.e., it will accomplish the task of informing the Secretary General as is envisaged in the Convention.

The State is entitled to adopt exceptions from the international agreement only if the international agreement envisages such a possibility. In conformity with Article VIII the Member State experiences such a right. The Saeima in its written reply points out that the Ministry of Foreign Affairs should have furnished information to meet the requirements of Article VIII of the Convention. However, the materials in case testify that the Saeima, when passing the challenged norm, has not evaluated it as an exception. From the Saeima written reply and the documents attached to it follows that the Draft Law, into which the challenged norm is incorporated, was elaborated by the Ministry of Transportation with an aim of meeting the requirements of the 9th. Annex to the Convention on International Civil Aviation so as to establish the responsibility of the air companies for bringing to Latvia passengers, who do not have the necessary documents for immigration. Alongside with it the responsibility of sea-carriers was envisaged in the Draft Law (AVC 114² Article) so as to avert carrying such passengers to Latvia over the sea.

Thus, during the process of adoption of the Law (the June 19, 2003 Law "Amendments to the Latvian Administrative Violation Code"), the Saeima has not assessed the conformity of the challenged norm with the Convention.

When discharging international commitments the State acts as an undivided subject of legal laws and it is not important what – the Parliament, the Government or a Ministry – has not honoured the duty, assigned by an international treaties. Important are the consequences – non-fulfillment of the commitments. Every state has

the right to create such a structure of State power, which it wants, but specifics of inner distribution of power may not serve as the reason for not carrying out international liabilities [*see e.g. ILC Articles on Responsibility of States for Internationally Wrongful Acts 2001, Article 2 (b)(Commentaries 5,6), Articles 4 (Commentaries 5,6); see <http://www.un.org/law/ilc/reports/2001/english/chp4.pdf>*].

4. The Administrative Violation Code does not present the interpretation of the term "the carrier". The above term shall be interpreted as read together with the definitions given in other normative acts. In compliance with the Maritime Code "the carrier" is a person with whom or in whose name the shipment (transport) agreement has been concluded and in accordance with which he or the actual carrier (the ship-owner, charterer or operator, who realizes the shipment or its part) realizes the shipment.

In its turn in the Annex to the Convention "the ship-owner" is defined in the following way –one who owns or operates a ship. Thus Standard 3.15 refers to any person, under whose possession the ship is and who actually operates it (even if he is not the owner of the ship).

Thus the term "the carrier" in the challenged norm and the term "the ship-owner" in Standard 3.15 of the Convention refer to one and the same range of subjects.

5. The "control documents", mentioned in the Convention, include both - the documents confirming the identity of the person, also the passport, and other documents, which the state demands or may demand the newcomers (immigrants) to present , for example – the forms of the International Certificate of Vaccination, which are mentioned in Standard 3.7. of the Convention.

Interpreting the challenged norm by reading it in conjunction with Item 4 of the Cabinet of Ministers July 10, 2001 Regulations No.310 "Procedures by which Persons Cross the State Border of the Republic of Latvia" the term "valid travel document" is applied to the passport or other travel document, in case of necessity also the valid travel visa, however, it is not applied to other documents, which are not connected with travelling.

Thus the term "valid travel documents" in the challenged norm and the term "control documents" in Standard 3.15 of the Convention basically refer to the same documents.

6. The challenged norm envisages responsibility for the activities for which Standard 3.15 of the Convention prohibits the states to set out

responsibility, with an exception of cases, when the state under the procedure, determined by the Convention, has notified about a different practice. As Latvia has not notified about such a practice, the Latvian national norm is at variance with the international norm.

On April 6, 1993 the Supreme Council of the Republic of Latvia by the Decision "On Accession to the May 23, 1969 Vienna Convention on the Law of International Treaties" ratified the May 23, 1969 Vienna Convention on Treaties (hereinafter – the Vienna Convention). This Convention establishes that the Contracting States of the Convention shall recognize the increasing role of this international legal source in the advancement of peaceable co-operation among the states, regardless of constitutional or public system differences. Article 26 of the Vienna Convention determines that "every valid treaty is binding on its members and shall be decently discharged". Thus every Member State of an international treaty shall observe fairness and appreciation, following from the treaties and other international legal sources. The State may not contrast its national law with the international liabilities (law).

Article 68 of the Republic of Latvia Satversme (henceforth – the Satversme) *inter alia* envisages that all international agreements which settle matters that may be decided by the legislative process shall require ratification by the Saeima. The Constitutional Assembly, when including the above norm in the Satversme has not conceded that the State of Latvia could avoid fulfilling its international commitments. The demand to require ratification of the international agreements by the Saeima was incorporated in the Satversme with the aim of precluding such international liabilities, which shall regulate issues under the procedure of legislature without the assent of the Saeima. Thus it can be seen that the Constitutional Assembly has been guided by the presumption that international liabilities "settle" issues and they shall be fulfilled.

The Law "The Procedure by which Laws and Other Acts, Adopted by the Saeima, State President and the Cabinet are Promulgated, Published, Take Effect and Being Valid" does not specially stipulate the place of the international agreements in the hierarchy of Latvian normative acts. However, one has to take into consideration that this Law was passed after the Law "On the Republic of Latvia International Agreements" had taken effect. Article 13 of the Law "On the Republic of Latvia International Agreements" determines that in case "if international agreement affirmed by the Saeima provides for other provisions than those in the Republic of Latvia legislative acts, provisions of the international agreement shall be applied". Article 16, Item 6 of the Constitutional Court Law also envisages that the Constitutional Court shall review cases regarding compliance of the national legal norms of

Latvia with the international agreements entered into by Latvia, which are not contrary to the Constitution.

Thus from the above laws and international liabilities, undertaken by the Republic of Latvia when ratifying the Vienna Convention, follows that in each particular case, if there arises a discrepancy between the international legal norms, ratified by the Saeima, and the national legal norms of Latvia the international legal norms shall be applied. Besides, the international liabilities, undertaken by Latvia on the basis of international agreements, confirmed by the Saeima, are binding also on the Saeima itself. It may not adopt legal acts, which are at variance with the above liabilities.

The Administrative Procedure Law (hereinafter – APL) *inter alia* determines the application of external normative acts, general legal principles and international legal norms as well as the hierarchy of the legal force of the external normative acts in the administrative process. The third part of Section 15 of this Law establishes that "the legal norms of international law regardless of their source shall be applied in accordance with their place in the hierarchy of legal force of external regulatory enactments".

The person applying legal norms, also the court, when establishing discrepancy between the international legal norm and the national legal norm of Latvia, shall apply the international legal norm.

7. After joining the European Union the Republic of Latvia has to honour the liabilities, following from the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the German Federative Republic, the Republic of Greece, the Kingdom of Spain, the Republic of France, Ireland, the Republic of Italy, the Great Duchy of Luxemburg, the Kingdom of Netherlands, the Republic of Austria, the Republic of Portugal, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (the member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Republic of Slovakia on the accession to the European Union. In accordance with the above act the Council Directive 2001/51/EC is also binding on Latvia. Taking into consideration Article 4 of the Directive Member States shall take the necessary measures to ensure that the penalties applicable to carriers under the provisions of Article 26(2) and (3) of the Schengen Convention are dissuasive, effective and proportionate.

Article 26 (part two) of the Schengen Convention determines that Member States shall impose penalties on those carriers, transporting persons, who are not the citizens of the EU (*aliens*) without the necessary documents from the third countries to the territory of the EU.

In its turn, it follows from the challenged norm that the norm refers to transportation of any person. Thus, there is variance between the national legal norm (the challenged norm) and the norm of the Directive as well as the norm of the international agreement (Standard 3.15 of the Convention).

Article 307 of the Foundation Agreement of the Consolidated European Community regulates the above cases, establishing that European laws do not affect former agreements, but the Member States shall try to eliminate these unconformities. However, at the time while the Member State has not carried out any activities (denouncement, expression of pretexts) the international agreement shall be applied (*see the case C-158/91 Criminal proceedings against Jean-Claude Levy*). APL also envisages that the legal norms of the European Union (Community) shall be applied in accordance with their place in the hierarchy of legal force of the normative acts. When applying the legal norms of the European Union (Community) the institution and the court shall take into consideration the judicature of the European Court of Justice.

Taking into consideration the European Court of Justice Judgment in the case *Commission v. Italy, Case 10/61, [1962] ECR, p.11*) as concerns relations with other Member States, the EU (Community) norms shall be applied, i.e., legal acts of the European Community shall be applied. Besides, if the Member State establishes unconformity of its international legal liabilities with the legal norms of the European Community, it shall undertake the necessary measures to eliminate the unconformity.

As concerns the ships sailing under the flag of the EU Member State, the provisions of the Directive (the AVC norm) shall be applied. As the Republic of Latvia has not informed the Secretary General of IMCO about different practice in application of Standard 3.15 of the Convention, then, as concerns carrier ships sailing under the flag of the third countries – the Contracting States of the Convention - Standard 3.15 shall be applied.

At the same time, taking into consideration provisions of Article 307 of the Foundation Agreement of the Consolidated European Community, which establishes the duty of the State to attain the conformity of formerly concluded international agreements with the European Law, Latvia shall undertake the relevant and necessary measures.

8. Thus from the time of adoption of the challenged norm till May 1, 2004 the challenged norm in the part on setting out responsibility to those carriers of the States, which are the Contracting States of the Convention, was at variance with Standard 3.15 of the Convention.

In its turn in the period after May 1, 2004 if the State of Latvia does not inform about the different practice using the procedure set out in the Convention, the challenged norm in the part on determination of responsibility to the carriers of the States, which are Contracting States of the Convention, but are EU States, is at variance with Standard 3.15 of the Convention.

On the basis of Articles 30 – 32 of the Constitutional Court Law the Constitutional Court

hereby rules:

1. To declare the following text of Article 114² (the first part) of the Latvian Administrative Violation Code: ”for carrying one or several persons from the foreign states to the Republic of Latvia if the above persons do not have valid travel documents for crossing the Republic of Latvia border and if it has been realized by the carrier of maritime transport” from the moment of its adoption till May 1, 2004 as **unconformable** with Standard 3.15 of the International Convention on Facilitation of Maritime Traffic, signed in London on April 9, 1965 and **null and void** as concerns the carriers of those states, which are the Contracting States of the above Convention.
2. To declare the following text of the first part of Article 114² of the Latvian Administrative Violation Code: ” for carrying one or several persons from the foreign states to the Republic of Latvia if the above persons do not have valid travel documents for crossing the Republic of Latvia border and if it has been realized by the carrier of maritime transport” from May 1, 2004 as **unconformable** with Standard 3.15 of the International Convention on Facilitation of Maritime Traffic, signed in London on April 9, 1965 and **null and void** as regards the carriers of those states, which are Contracting States of the above Convention but are not EU Member States.

The Judgment is final and allowing of no appeal.

The Judgment takes effect as of the day of its publishing.

The Chairman of the Court session

A.Endziņš