



JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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SEPARATE OPINION

of Jānis Neimanis,

Judge of the Constitutional Court,

in Case No. 2023-04-0106

“On Compliance of Para 58 of Transitional Provisions of Immigration Law and Section 5 of the law of 22 September 2022 “Amendments to Immigration Law”, insofar Para 8 of Section 24 (1) of the Immigration Law is deleted by it, with Article 1, the First Sentence of Article 91, Article 96 of the Constitution of the Republic of Latvia, as well as Article 4 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

Already in its initial wording, the Constitution of the Republic of Latvia included *expressis verbis* one of the most fundamental basic rights – the right to equality in front of the law and the court (*see Article 82 of the Constitution in the wording that was in effect until 5 November 1998, later Article 91 of the Constitution*). This was logical because Article 1 of the Constitution requires Latvia to be a democratic State, i.e. a State governed by fair treatment and fundamental rights.

Legal equality has been derived from the general principle of justice, which is a fundamental value of a democratic State, governed by the rule of law. On the one hand, it is a general legal principle *per se* but, on the other hand, it is the basis of fundamental

rights, alongside the principles of democracy and the rule of law. Historically, also the effectiveness of law and equality in freedom, as well as political and social rights have been demanded, based on the ideas of equality (*Pöschl M. § 14 – Gleichheitsrechte. In: Merten D., Papier H.-J. (Hrsg), Handbuch der Grundrechte in Deutschland und Europa. C.F. Müller, Band VII, 2014, S.519-590, Rn. 9, 13*). Likewise, the principle of equality comprises a person's right to objective and unbiased treatment (*id.*, *Rn. 15*). It follows from this that the equality principle included both comparable and incomparable rights: the right to equal or unequal treatment of others but also rights that exist *per se*, i.e., irrespective of the way other persons are treated. This kind of equality principle is linked to the principle of human dignity.

Compliance with the equality principle should be an indispensable element in testing the application of every fundamental right, even if this principle is not referred to separately. The tests should be expanded even more if the applicants in the legal proceedings before the Constitutional Court have pointed to an alleged violation of the principle. Under no circumstances a violation of the equality principle is a violation of secondary importance, the equality principle is on the constitutional level.

The principle of legal equality means that, in similar actual and legal circumstances, treatment should be similar, whereas, in different circumstances, the treatment should be differential.

The *Saeima* adopted a contested provision that envisaged reviewing the right to a permanent residence permit for those citizens of the Russian Federation, who had obtained the permanent residence permit on the basis of Para 8 of Section 24 (1) of Immigration Law, but did not review the right of those citizens of the Russian Federation, who had obtained exactly the same residence permits on the basis of Section 23¹ (1) of the law "On Entry and Residing of Foreigners and Stateless Persons in the Republic of Latvia" (hereafter – Law on Foreigners). Likewise, the *Saeima* did not envisage reviewing the right to a permanent residence permit with respect to citizens of other states, who had obtained

a permanent residence permit on the basis of Para 8 of Section 24 (1) of Immigration Law. Thus, the *Saeima* created a law-based differential treatment of the citizens of the Russian Federation, who had obtained a permanent residence permit on the basis of Para 8 of Section 24 (1) of Immigration Law, and those citizens of the Russian Federation, who had obtained a permanent residence permit on the basis of Section 23¹(1) of Law on Foreigners, as well as differential treatment of those citizens of the Russian Federation, who had obtained a permanent residence permit on the basis of Para 8 of Section 24 (1) of Immigration Law, and other foreigners, who had obtained a permanent residence permit on the basis of this provision. The Constitutional Court recognised this approach as being compatible with the first sentence of Article 91 of the Constitution.

I do not uphold the Constitutional Court's findings regarding the compliance of the contested provision with the first sentence of Article 91 of the Constitution.

I cannot subscribe to the statement made in Para 22.1. of the judgement that the citizens of the Russian Federation would be in different and incomparable circumstances with respect to other foreigners, who have obtained a permanent residence permit on the basis of Para 8 of Section 24 (1) of Immigration Law. This conclusion of the Court is based on the condition that the countries of citizenship of other foreigners are not neighbouring Latvia, have not launched warfare in their neighbouring countries and have not historically threatened Latvia's national security.

In my opinion, this argument is very simplistic, although partially correct. The current warfare in Ukraine is more complicated as it requires admitting honestly that the Republic of Belarus is also involved in it. Thus, the legislator's consistent actions would also be expected as regards legal aspects of immigration with respect to the citizens of this state if it has been substantiated at least by the aim of protecting national security. Whereas the aim of protecting the official language in the context of the foreigner's countries of citizenship is irrelevant since the State should demand basic proficiency in the official language from all recipients of permanent residence permits.

However, notwithstanding this, the Constitutional Court's position regarding the review of legal issues of immigration exactly with respect to the citizens of the Russian Federation, in the reasoning provided in the judgement, deviates from the premise advanced in Para 22.1. of the judgement.

The Constitutional Court found that all those citizens of the Russian Federation who were former citizens or non-citizens of Latvia and had acquired a permanent residence permit on the basis of Para 8 of Section 24 (1) of Immigration Law or Section 23¹ (1) of Law on Foreigners were in similar and according to certain criteria comparable circumstances. However, in Paras 22.2.3. and 22.2.4. of the Court's judgement, the Court finds that:

1) as regards national security, it should be taken into consideration that the number of those citizens of the Russian Federation who have acquired a permanent residence permit on the basis of Para 8 of Section 24 (1) of Immigration Law is much higher compared to that of citizens of the Russian Federation who have acquired a permanent residence permit on the basis of Section 23¹ (1) of Law on Foreigners, and individual screening of citizens of the Russian Federation, residing in Latvia, should be conducted as soon as possible;

2) Section 23¹ (1) of Law on Foreigners and Para 8 of Section 24 (1) of Immigration Law had different purposes;

3) the legislator had been aware and had taken into account the fact that there were two groups of citizens of the Russian Federation, of which one was informed by a letter from the Office of the Citizenship and Migration Affairs that the new legal regulation did not apply to it, and deliberately chose to apply the contested provision only to the second group of citizens of the Russian Federation,

therefore, there are objective and reasonable grounds for the differential treatment of these two groups of citizens of the Russian Federation and it is not arbitrary.

Firstly, I do not subscribe to comparing the size of the two groups of citizens of the Russian Federation as an argument for justifying differential treatment. Although this mathematical fact, undeniably, is interesting, it does not substantiate, in any way, the differential

treatment. Nothing follows from it; it is an empty statement, which says nothing about the internal differences between the groups, which could substantiate the legitimacy of the differential treatment on its merits. The judgement does not allow establishing why the increase by five percent of the total number of persons to be screened would have caused threats to national security, by slowing down the procedure disproportionately. Likewise, it does not follow from the contested regulation that the State would have any intentions to review the legal aspects of immigration of one, the so-called “small group”, such legal regulation that would enter effect on a specific date or that would envisage later gradual review, as the legislator has done by the contested provision, has not been created. Hence, one of the groups is privileged, not only by establishing for it a longer period for adjusting to the new regulation but by not establishing such at all.

If this reasoning by the Court were to be examined in the context of the obligation to take the proficiency test in the official language, the opposite conclusions could be reached, i.e., first of all, the language proficiency of the smaller group should be checked to ensure that the persons included in it are loyal to the State and have adequate language proficiency. Looking at this from the perspectives of the challenges identified during the language tests, this, possibly, would have been a good idea.

Choosing the largest group at the beginning of the screening process enters in a logical contradiction with a conclusion made further in the judgement that such screening should be performed as soon as possible, whereas the need to assess the dangerousness of all citizens of the Russian Federation contradicts the separation of one group vis-à-vis the other one.

Secondly, I do not consent that purposes of Section 23¹ (1) of Law on Foreigners and Para 8 of Section 24 (1) of Immigration Law are different and it would have any significance in substantiating the differential treatment.

The arguments regarding how easily and in what procedure someone received permanent residence permits in the past, dating back 30 years, have no logical connection to the current threats to national security or the official language.

Thirdly, I do not uphold the Constitutional Court's argument that the differential treatment would be justified by the fact that the legislator had been aware and had taken into account the fact that there were two groups of citizens of the Russian Federation, of which one was informed by a letter from the Office of the Citizenship and Migration Affairs that the new legal regulation did not apply to it.

I think that the actions of an institution of executive power cannot restrict the legislator in adopting such provisions that comply with the equality principle. These actions were not binding upon the legislator. If, however, the legislator had developed the impression that such a letter had restricted it, it had been erroneous. Likewise, advancing and taking into account such an argument in the legal proceedings before the Constitutional Court is dangerous as it allows the legislator, in other comparable cases, to justify its differential treatment and, I would say – violation of the equality principle, by a letter of an institution.

Fourthly, in its judgement, the Constitutional Court refers extensively to the State's discretion in the area of immigration. Yes, one can agree that the State has the right to choose whether and how to regulate legal relationships with foreigners. However, the limits of discretion are always defined by the equality principle.

I discerned in the present case that the persons, who have obtained a permanent residence permit on the basis of Section 23¹(1) of Law on Foreigners, were placed in a more favourable situation than those, who had obtained a permanent residence permit of Para 8 of Section 24 (1) of Immigration Law, although these persons were in similar circumstances and the aims, referred to by the legislator, applied to them equally. Whereas fair and equal treatment requires such treatment of persons that has no place for unfounded privileges. Hence, a violation of the principle of legal equality occurs also when one group of persons is not ensured the same rights that are established for a group of persons in a comparable situation.

It is irrelevant whether the denial of these rights had been substantive or minor. The more intense the differential treatment is the more important its aim should be. If the differential treatment is of low intensity then the prohibition of arbitrary actions should be

applied. The differential treatment is intensive if the affected person cannot influence the criteria, on which the differential treatment is based, and the differential treatment affects the fundamental rights of this person. In the present case, the persons affected by the contested provision can no longer amend the legal provision, on which the permanent residence permit is based, or influence the size of the groups. Likewise, the review of permanent residence permits has been recognised as such that affects a person's fundamental rights, defined in Article 96 of the Constitution. Therefore, the lawfulness of the differential treatment could not have been examined solely in the context of arbitrariness.

I hold that the Constitutional Court had to recognised that the legislator had to view both groups of the citizens of the Russian Federal as being of equivalent (equal). Since the Constitutional Court cannot predict how the legislator would choose to eliminate this unequal treatment, the Court had to establish, objectively and unbiasedly, the differential treatment caused by the contested provision, which is the grounds for recognising the contested provision as being incompatible with the first sentence of Article 91 of the Constitution. Consequently, the legislator should have been given time to remedy the inconsistency.

Judge*

J. Neimanis

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