JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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SEPARATE OPINION

of the Constitutional Court's Judge

Jautrīte Briede

in Riga on 24 July 2024

in Case No. 2022-45-01

"On Compliance of Section 9 (1^1), Sub-para 1 of Para 102 of Transitional Provisions of Education Law and of Sections 1, 5 and 6 of the Law of 29 September 2022 "Amendments to Education Law" with Article 1, the First Sentence of Article 112, and Article 114 of the Constitution of the Republic of Latvia".

On 10 July 2024, the Constitutional Court delivered its judgement in case No. 2022-45-01 "On Compliance of Section 9 (1^1), Sub-para 1 of Para 102 of Transitional Provisions of Education Law and of Sections 1, 5 and 6 of the Law of 29 September 2022 "Amendments to Education Law" with Article 1, the First Sentence of Article 112, and Article 114 of the Constitution of the Republic of Latvia" (hereafter – the Judgement), by which it decided to recognise Section 9 (1^1), Sub-para 1 of Para 102 of Transitional Provisions of Education Law and of Sections 1, 5 and 6 of the law of 29 September 2022 "Amendments to Education Law"(hereafter – the contested provisions) as being compatible with Article 1, the first sentence of Article 112 and Article 114 of the Constitution of the Republic of Latvia (hereafter – the Constitution).

1. I uphold the conclusion made in the Judgement that the contested provisions substantially comply with Article 1, the first sentence of Article 112 and Article 114 of the Constitution. However, due to reasons stated below I consider that, in this case, the Constitutional Court should not have reviewed the compatibility of the contested provisions with Article 114 of the Constitution.

2. Article 114 of the Constitution provides that persons belonging to ethnic minorities have the right to preserve and develop their language and their ethnic and cultural identity. As noted in the Judgement and the previous case law of the Constitutional Court, the content of the rights, included in Article 114 of the Constitution, should be revealed in conjunction with the documents of international law in the area of minority rights protection that are binding upon Latvia, in particular, the Framework Convention for the Protection of National Minorities (hereafter – the Convention).

However, the content of international law documents cannot be simply automatically regarded as the content of the Constitution or laws. When interpreting the Latvian legal provisions in compliance with recognised methods for interpreting legal provisions, the documents of international law should be taken into account in a well-considered way, always with adequate respect for the Latvian context.

The concept of a national minority is not defined in the Convention. The Explanatory Report to the Convention allows concluding that, while drafting the Convention, it was found that it was impossible to formulate a definition that could be supported by all members states of the Council of Europe (*see Explanatory Report to the Convention, Para 12*). This means that it can be interpreted broadly. For example, it does not differentiate strictly between the traditional national minorities and the so-called "new minorities", likewise, the connection between citizenship and a national minority has not been defined (*compare, European Centre for Minority Issues, Third Report, p. 3, available: ecmi.de*). A significant part of states, upon accessing to the Convention, have submitted declarations with respect to each State's definition of national minorities and in the meaning of its

national legal system, pointing out that national minorities are only ethnic groups that have traditionally resided on the territory of this State and are citizens of this State or have indicated specific ethnic groups, to which the States apply the Convention (*see annotation to the draft law "On the Framework Convention for the Protection of National Minorities"*). It is debated whether the area of application of the international treaties on minorities, which usually apply to historic, ancient minorities, can be applied also to the new groups of minorities that have formed as the result of migration. The positions on this matter are very diverse: some States strictly object to application of the rules on minorities to new minorities (e.g., Germany and Estonia); others have applied some rules also to new groups (e.g., the United Kingdom and Finland); whereas other States have not expressed their official position. The majority of international organisations that are involved in minority matters have adopted an open approach. It does not prohibit voluntary assimilation and does not prohibit the State Parties from introducing measures while implementing the general politics of integration (*see Medda-Windischer R. Old and New Minorities: Diversity Governance and Social Cohesion from the Perspective of Minority Rights. Acta Universitatis Sapientiae, European and Regional Studies, 2017, Vol. 11, Issue 1, p. 30*).

Also Latvia, in ratifying the Convention, has provided its own concept of a national minority. I.e., it is set out in Section 2 of the law "On the Framework Convention for the Protection of National Minorities" that "The Republic of Latvia declares that the term "national minorities", which is not defined in the Convention, for the purposes of the Convention means citizens of Latvia who are different from Latvians in culture, religion or language, who have traditionally lived in Latvia for generations, who consider themselves to belong to the Latvian State and society, and who wish to preserve and develop their culture, religion or language. [..]"

The preparatory materials for the law allow concluding that the legislator had not wished to grant, by the Convention, special minority rights to the so-called "new minorities", *inter alia*, to those persons who came here as the bearers of the occupational power during the period of Soviet occupation, to replace those

inhabitants of Latvia who had been annihilated by the Soviet regime, had been deported or had left Latvia as refugees.

There are logical considerations, based in its history, why Latvia chose such an approach. These considerations have been repeatedly highlighted in the Constitutional Court's judgements. One of these, also referred to in the Judgement, is the fact that, during the Soviet occupation, migrants in large numbers flooded into Latvia, among them were also former military personnel (*see Para 30.1. of the Judgement*). A large part of the newcomers had no wish whatsoever to integrate into the Latvian society. As the Constitutional Court recalls in its Judgement, the issue of communication in society was resolved by implementing general russification (*see Para 30.2. of the Judgement).* As the result of russification and assimilation, also the traditional non-Russian minorities had lost, to a large extent, their identity of an ethnic minority (*see ibid.*).

In view of these and other arguments set out in Para 30 of the Judgement, I hold that it is invalid and unjust to grant the special minority rights to foreigners who had come to occupied Latvia contrary to international law as citizens of the Soviet Union and, thus, bearers of the occupational power and self-identifying with the Russian ethnicity. The minority rights should not be granted also to the descendants of these persons.

Therefore I cannot subscribe also to the conclusion made in the previous case law of the Constitutional Court that those migrants of the period of Soviet occupation who do not belong to the historic ethnic minorities should be deemed to be an emerging ethnic minority that would give the right to refer to Article 114 of the Constitution and protection provided by the Convention (*see Judgement by the Constitutional Court of 23 April 2019 in Case No. 2018-12-01, Para 22*). To compare, Turks in Germany, although, following immigration in the 1960s and 1970s, constitute the numerically largest part of non-German inhabitants in Germany, are not officially recognised as being a national minority (*see Community and Integration. National Minorities. Available : bmi.bund.de*).

As I already noted, the Convention can be interpreted broadly and, in applying Article 114 of the Constitution and adopting laws that pertain to minority

rights, the legislator has the right to develop its position on and assessment of the tragic period in Latvia' s history and the regulation on the consequences thereof at present. This is what the legislator has done, also by adopting the contested provisions, and this is also accepted by this Judgement of the Constitutional Court.

3. It follows from the application and the statements made by the Applicants' representative at the court hearing that the ethnicity of Applicant Dana Džibuti is Georgian, her father is a Georgian, a citizen of Latvia, whereas her mother is a Ukrainian, a citizen of Latvia. The ethnicity of Dominiks Džibuti has not been indicated, his father is a Georgian, a citizen of Latvia, whereas his mother is a Russian, a citizen of the Russian Federation. Both children are citizens of Latvia but their native language is said to be Russian. Likewise, the language of communication in the Applicants' family is said to be Russian. The Applicants' family has kinship ties with the Russian ethnicity and it self-identifies as belonging to the Russian language and culture. Therefore, the Applicants' representative holds that the Applicants belong to the Russian ethnic minority in Latvia.

I cannot uphold this opinion. Namely, general belonging to and identification with a large ethnicity, its language and culture, in the meaning of the Convention and Article 114 of the Constitution, cannot mean automatic belonging to the respective minority (ethnic minority) of Latvia, which has traditionally lived in Latvia for generations. These include Livonians, Roma and Russian Old Believers but not any citizen of Latvia whose native language or the language that is used in the family is Russian.

I subscribe to the point made in the application that the criterion "have traditionally lived in Latvia for generations" does not apply to each particular person in the meaning that the ancestors of the particular person have lived for generations in Latvia but applies to the respective national minority in general. However, this definition of a national minority, included in the law, requires a person's belonging exactly to a particular traditional national minority of Latvia. The purpose of the law is to grant the special minority rights only to the respective traditional minorities and not to foreigners who themselves or whose families have

come to Latvia comparatively recently, *inter alia*, during the years of Soviet occupation and associate themselves with the general language and culture of an ethnicity. These persons cannot refer to the minority rights, included in the Convention and Article 114 of the Constitution. To compare, special minority rights have been provided in Germany for the Danish minority, traditionally living in the north of Germany, close to the border with Denmark. However, not any Dane who has come to Germany, even if he becomes a citizen of Germany, is considered as belonging to the Danish minority.

Moreover, I am of the opinion that the Applicants' father is a Georgian, Dana Džibuti and her mother are Ukrainians, whereas the ethnicity of Dominiks Džibuti, although his mother is a Russian, has not been chosen. I subscribe to the statements, made at the court hearing by the summoned person *Dr. h. c., Assessor. jur., Dipl.-Pol.* Egils Levits, that in daily life, in particular, in ethnically mixed families, it is not essential to choose a particular ethnicity. However, in the meaning of the Convention, it is necessary to choose clear belonging to a national minority. It follows from the statements made by E. Levits at the court hearing that the Convention grants special rights to particular minorities but not to any person who lives in Latvia but does not belong to these minorities. Therefore he expressed doubts whether the Applicants, who are of Georgian and Ukrainian descent, in the meaning of Convention, may choose any identity to insist on a certain system of schools in a certain language. I uphold the position of Latvia's government that the Convention's safeguards cannot be applied, for instance, to ethnic Poles or Lithuanians who consider the Russian language as their first language. I do not believe that, for example, a person who self-identifies as a Pole would have the right, derived from the Convention, to demand the Russian language as the language of instruction in education (*se Latvia's Comment on the Fourt Opinion on Latvia by the Convention's Advisory Committee, p. 32. Available : mfa.gov.lv*). Accordingly, I also hold that the Applicants, who are of Georgian and Ukrainian descent, although Russian is the language that is used in their family and they generally associate themselves as belonging to the Russian culture, cannot refer to the protection by Article 13 of the Convention and Article 114 of the Constitution.

4. This separate opinion reflects the matter that was discussed during the court hearing, however, in my opinion, the Court has not provided an elaborate answer on it in its judgement. I believe that this issue required deeper analysis and the Court will have to do that in the future. Therefore I add my separate opinion to the Judgement. Otherwise I uphold this Judgement and conclusions made therein.

Judge of the Constitutional Court Jautrīte Briede

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