

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT  
OF THE RUSSIAN FEDERATION

Judgment

of 6 April 2004 No. 7-II

in the case concerning the review of the constitutionality of the provision of Subsection 2, Article 87 of the Commercial Navigation Code of the Russian Federation and Decree of the Government of the Russian Federation No. 538 of 17 July 2001, “On Maritime Vessels Pilotage Activities of Private Organizations” in connection with complaints of the Russian Maritime Pilots’ Association, an international non-governmental organization, and the St. Petersburg Maritime Pilots’ Society, an autonomous non-commercial organization.

Moscow, 6 April 2004

The Constitutional Court of the Russian Federation composed of Presiding Judge A. Ya. Sliva and Judges N. S. Bondar, G. A. Gadzhiev, A. L. Kononov, L. O. Krasavchikova, Yu. D. Rudkin, V. G. Strekozov, B. S. Ebzeev, V. G. Yaroslavtsev,

in the attendance of representatives of the parties who submitted their constitutional complaints to the Constitutional Court of the Russian Federation, V. I. Egorkin, the President of the International Non-Governmental Organization “Russian Maritime Pilots’ Association” and maritime pilot commander of the Autonomous Non-Commercial Organization “St. Petersburg Maritime Pilots’ Society”, A. P. Sergeyev, PhD in Law, the attorneys I. A. Makarov and K. V. Ivanov; Permanent Representative of the State Duma to the Constitutional Court of the Russian Federation Ye. B. Mizulina, Plenipotentiary Representative of the Council of the Federation to the Constitutional Court of the Russian Federation Yu. A. Sharandin, Plenipotentiary Representative of the President of the Russian Federation to the Constitutional Court of the Russian Federation M. A. Mityukov, Plenipotentiary Representative of the Government of the Russian Federation to the Constitutional Court of the Russian Federation M. Yu. Barshchevsky,

pursuant to Section 4, Article 125 of the Constitution of the Russian Federation, Subsection 3, Section 1, 3 and 4, Article 3, Subsection 3, Section 2, Article 22, Articles 36, 74, 86, 96, 97 and 99 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”,

in an open hearing, examined the constitutionality of the provisions of Subsection 2, Article 87 of the Commercial Navigation Code of the Russian Federation and Decree of the

Government of the Russian Federation No. 538, “On Maritime Vessels Pilotage Activities of Private Organizations”, of 17 July 2001.

The reason for the consideration of the case is complaints of the International Non-Governmental Organization “Russian Maritime Pilots’ Association” and the Autonomous Non-Commercial Organization “St. Petersburg Maritime Pilots’ Society”. The ground for the consideration of the case is the discovered uncertainty of whether the provisions challenged by the applicants are in conformity with the Constitution of the Russian Federation.

Having heard the report of Judge-Rapporteur A. L. Kononov, statements by the parties, the expert opinion of G. G. Ivanov, PhD in Law, interventions by A. A. Leshchenko for the Ministry of Transport of the Russian Federation; and having considered written submissions and other materials, the Constitutional Court of the Russian Federation

e s t a b l i s h e d :

1. In October 2001, the International Non-Governmental Organization (INGO) “Russian Maritime Pilots’ Association” and the Autonomous Non-Commercial Organization (ANCO) “St. Petersburg Maritime Pilots’ Society” lodged a request with the Supreme Court of the Russian Federation to declare as unlawful Decree of the Government of the Russian Federation No. 538, “On Maritime Vessels Pilotage Activities of Private Organizations”. In their opinion this Decree unlawfully restricted the activities of private vessel pilotage organizations in favour of state pilotage services as it determined a list of sea ports where the activities of such non-governmental organizations were allowed. The request was dismissed by the decision of the Supreme Court of the Russian Federation on the following grounds: the Decree of the Government of the Russian Federation was adopted under Subsection 2, Article 87 of the Commercial Navigation Code of the Russian Federation, it was consistent with the legislation of the Russian Federation in force, and restrictions on activities of private pilotage services were necessary for the defense of the country and security of the state. The Cassation Section of the Supreme Court of the Russian Federation upheld the decision.

In their complaints to the Constitutional Court of the Russian Federation, the INGO “Russian Maritime Pilots’ Association” and the ANCO “St. Petersburg Maritime Pilots’ Society” challenge the constitutionality of Subsection 2, Article 87 of the Commercial Navigation Code of the Russian Federation. Pursuant to this provision, a maritime pilot is an employee of a maritime pilotage service of a state organization; private vessel pilotage organizations may be established in special circumstances determined by the Government of the Russian Federation; the Government of the Russian Federation determines the list of sea ports where activities of private vessel pilotage organizations are permitted.

In the opinion of the applicants, these provisions unreasonably restrict the activities of private vessel pilotage organizations, discriminate against them on the ground that they are not in the property of the state, they are aimed at monopolizing state pilotage services, derogate the freedom of entrepreneurial and other economic activities and the right of maritime pilots to freely use their labour capabilities, to choose the type of activity and profession, i.e. contradict Articles 8, 34, 37 and 55 of the Constitution of the Russian Federation.

The constitutionality of Decree of the Government of the Russian Federation No. 538, “On Maritime Vessels Pilotage Activities of Private Organizations” of 17 July 2001 is challenged in the complaints on the same grounds. This Decree was adopted by the Government of the Russian Federation under the powers vested in the Government by the Commercial Navigation Code of the Russian Federation, i.e. a federal law, and this Decree is in normative unity with the Code. Accordingly, pursuant to the legal opinion expressed by the Constitutional Court of the Russian Federation in the Judgment of 27 January 2004 in the case concerning the review of the constitutionality of certain provisions of Subsection 2, Section 1, Article 27, Sections 1, 2 and 4, Article 251, Sections 2 and 3, Article 253 of the Civil Procedure Code of the Russian Federation, to this extent the application is considered admissible.

Thus the subject matter for consideration in the present case is the provisions of Subsection 2, Article 87 of the Commercial Navigation Code of the Russian Federation taken in normative unity with Decree of the Government of the Russian Federation No. 538, “On Maritime Vessels Pilotage Activities of Private Organizations” of 17 July 2001 to the extent that they regulate the activities of private vessel pilotage organizations, *inter alia* by permitting their activities only in certain predetermined sea ports.

2. The Constitution of the Russian Federation establishes the principle of freedom of economic activity as one of the fundamentals of the constitutional order of the Russian Federation (Section 1, Article 8). It also provides for a possibility to carry out different types of economic activities, in particular, in Article 34 pursuant to which everyone shall have the right to freely use of his abilities and property for entrepreneurial and other economic activities not prohibited by law.

This constitutional provision is normatively specified by the Commercial Navigation Code of the Russian Federation, which regulates commercial navigation relations, including property relations, on the basis of the principle of equality, autonomy of will and property autonomy of their participants (Article 1). Maritime vessel pilotage activities are among these regulated relations (Article 2).

Pursuant to the Commercial Navigation Code of the Russian Federation, maritime vessel pilotage is aimed at ensuring safety of navigation, prevention of vessels accidents, and protection

of the marine environment; it is exercised by maritime pilots who shall meet the requirements of regulations on maritime pilots adopted by the federal executive body responsible for transport regulation in coordination with the federal executive body responsible for the defense of the country and the federal executive body responsible for fishery (Articles 86 and 87). The right to perform maritime pilotage activities is confirmed by a maritime pilot certificate, issued by the sea port captain certifying the right to vessel maritime pilotage in certain waters. It implies verification of compliance with state requirements concerning the pilot's professional qualification, training, age, health, educational level, etc. Maritime pilots provide the ship-master with necessary information and advice in areas of compulsory and non-compulsory pilotage of vessels, i.e. they render non-material services, and the ship-owner in his turn pays a pilotage fee in amounts determined under the procedure provided by the legislation of the Russian Federation (Article 106).

Maritime pilots exercise pilotage either as employees of a pilotage service in a state organization or as employees of private vessel maritime pilotage organizations thereby exercising their constitutional right to economic activities not prohibited by law. These private organizations may be established in different forms of incorporation under the civil legislation.

Thus, maritime pilotage is a socially necessary function aimed at achieving socially beneficial goals. Irrespective of affiliation with a state pilotage service or private vessel maritime pilotage organization the pilots perform a number of public law duties in respect of circumstances and accidents endangering navigation and the environment. Particularly they are obliged to inform the sea port captain on changes in the navigation channels, vessel accidents and the ship master's violation of navigation rules and environmental safety requirements (Article 92 of the Commercial Navigation Code of the Russian Federation).

Since the basis of these activities is the public interest, the state permitting private organizations to perform maritime vessel pilotage has to create conditions for due performance of these functions, which implies the necessity to grant them a respective status and determine a procedure for compensation of damage caused by improper maritime pilotage.

At the same time both state pilotage services and private maritime vessel pilotage organizations are subject to state control and supervision, particularly over compliance with the safety requirements. Accordingly, under Subsection 2, Article 88 of the Russian Federation Commercial Navigation Code, respective federal executive bodies may decide to terminate the activities of a private maritime vessel pilotage organization if it does not meet the requirements concerning the equipment and the number and qualification of employees.

Thus the legislation in force provides for equal requirements with regard to activities of state pilotage services and private vessels pilotage organizations.

3. The constitutional principles of a rule of law state, equality and fairness predetermine the requirement (imposed on the legislator) of certainty, clarity and lucidity of a legal norm, its coherence with the system of legal regulation in force.

Within the meaning of Articles 4 (Section 2) and 15 (Section 1) of the Constitution of the Russian Federation establishing the principle of the rule of law taken in systemic unity with Article 115 (Section 1) and the Federal Constitutional Law “On the Government of the Russian Federation” (Articles 2 and 3), the Government of the Russian Federation exercises its rule-making powers on the basis of and under the Constitution of the Russian Federation, federal laws, normative decrees of the President of the Russian Federation. The principles of certainty and coherence of legal regulation extend, *inter alia*, over the norms of delegation of powers from the federal legislator to the Government of the Russian Federation.

Any other approach would mean that the legislator may delegate an indeterminate scope of powers to the Government of the Russian Federation, and the Government may exercise them arbitrarily. This would violate the principle of separation of the legislative, executive and judicial powers (Article 10 of the Constitution of the Russian Federation) which implies that in legal regulation the legislative function of the Federal Assembly is separated from the law-enforcement function of the Government of the Russian Federation.

Consequently, the provisions of Subsection 2, Article 87 of the Commercial Navigation Code of the Russian Federation in their normative unity with the Decree of the Government of the Russian Federation “On Maritime Vessels Pilotage Activities of Private Organizations” shall be subject to assessment of certainty of the provisions on delegation of powers to the Government of the Russian Federation.

3.1. The provision of Subsection 2 (1), Article 87 of the Commercial Navigation Code of the Russian Federation, providing that the maritime pilot is an employee of a pilotage service of a state organization is an imperative rule. Within the literal meaning of the norm a person who is not an employee of a pilotage service of a state organization may not be considered a maritime pilot.

At the same time Subsections 2 (2) and 2 (3), Article 87, and Article 88 of the Commercial Navigation Code of the Russian Federation do not merely recognize the possibility to establish private vessel pilotage organizations, but also regulate state supervision over their activities. Consequently, the pilotage activities may not be associated only with a state organization and the Government of the Russian Federation relies on this approach in its Decree “On Maritime Vessels Pilotage Activities of Private Organizations”. The Supreme Court of the Russian Federation relied on the same approach in its Decision of 1 August 2001 on recognizing as invalid the Regulation on State Maritime Pilots of 26 April 1973 prescribing performance of

maritime pilotage only by state maritime pilots from the date of the entry into force of the Commercial Navigation Code of the Russian Federation.

The system of legal regulation in force and the provision of Subsection 2, Article 87 of the Commercial Navigation Code of the Russian Federation, within the meaning they acquired in the law-enforcement practice permit maritime pilotage by pilots of private vessel pilotage organizations. Hence the provision of Subsection 2 (1), Article 87 of the Code, may not be recognized as clear and certain and thereby it contradicts Articles 19 and 34 (Section 1) of the Constitution of the Russian Federation.

3.2. Pursuant to the provision of Subsection 2 (2), Article 87 of the Commercial Navigation Code of the Russian Federation, “private vessel pilotage organizations may be established under special circumstances determined by the Government of the Russian Federation and the requirements prescribed by this Code and other legal acts of the Russian Federation”, which may mean that the lack of regulatory determination of these special circumstances is an insurmountable obstacle to establishing these organizations. The reference to other legal acts of the Russian Federation does not resolve this uncertainty as neither the Commercial Navigation Code of the Russian Federation nor any other legal acts provide for special circumstances of establishing private vessel pilotage organizations or even do not mention them.

Pursuant to Federal Law “On Non-Commercial Organizations” of 12 January 1996, the specificity of the legal status of these organizations is prescribed by federal laws (Subsection 3, Article 6). As for commercial organizations, a similar requirement is found in the Civil Code of the Russian Federation (Articles 87, 107 and 113) and Federal Law “On Joint Stock Companies” of 26 December 1995 (Article 1). However the Commercial Navigation Code of the Russian Federation does not define any specificity of establishing, the legal status or activities of private vessel pilotage organizations. In Chapter VI, it provides for uniform requirements concerning maritime pilots (irrespective of affiliation with a state pilotage service or private vessel pilotage organization), their duties, relations with ship captains, responsibility for improper pilotage, the amount and procedure for collection of pilotage fees, etc. Imposition of certain “public law duties” on maritime pilots is not predetermined by the governmental or private status of pilotage activities and equally applies to all pilots without any exception.

Thus the federal legislator determined no criteria and benchmarks to determine the specificity of private vessel pilotage organizations. He left it to the discretion of the Government of the Russian Federation and thus did not preclude a possibility for arbitrary interpretation of their scope and content, and consequently restrictions on the rights and freedoms by an act of the

Government of the Russian Federation. This approach does not comply with Articles 19, 34 (Section 1) and 55 (Section 3) of the Constitution of the Russian Federation.

3.3. Pursuant to Subsection 2 (3), Article 87 of the Commercial Navigation Code of the Russian Federation, the Government of the Russian Federation determines the list of sea ports where activities of private vessels pilotage organizations are permitted, so activities of non-governmental organizations are not permitted in unlisted sea ports.

Consequently, this norm is also uncertain and unreasonable delegation to the Government of the Russian Federation of the powers to restrict maritime pilotage activities in certain ports. Neither this norm nor any other provision of the Commercial Navigation Code of the Russian Federation establish the aims and grounds for determining a list of sea ports where activities of private vessel pilotage organizations are permitted (or not permitted). The Decree of the Government of the Russian Federation “On Maritime Vessels Pilotage Activities of Private Organizations” also fails to provide any grounds for listing certain ports as those where activities of private vessels pilotage organizations are permitted.

Thus the provisions mentioned above do not meet the constitutional requirements of certainty and lucidity of legal norms and do not conform to Articles 19, 34 (Section 1) and 55 (Section 3) of the Constitution of the Russian Federation.

4. The Constitutional Court of the Russian Federation has repeatedly stated in its decisions that the uncertainty of a legal norm may not ensure its uniform interpretation, allows for abuse of powers by executive authorities, creates conflicting law-enforcement practice, weakens the guarantees of protection of the constitutional rights and freedoms, may lead to arbitrariness and therefore to violation of the principles of equality and rule of law. Violation of the requirement of certainty of a legal norm, which causes its arbitrary interpretations in the law-enforcement practice, is in itself sufficient to recognize this norm non-conforming to the Constitution of the Russian Federation (Judgments of 25 April 1995 in the case concerning the review of the constitutionality of Sections 1 and 2, Article 54 of the Housing Code of the RSFSR, of 5 July 2001 in the case concerning the review of the constitutionality of Decree of the State Duma of the Federal Assembly of the Russian Federation No. 492-III GD of 28 June 2000, “On Amendments to the Decree of the State Duma of the Federal Assembly of the Russian Federation ‘On the Announcement of an Amnesty in Connection with the 55<sup>th</sup> Anniversary of the Victory in the Great Patriotic War of 1941–1945’”, etc.).

Since the provisions of Subsection 2, Article 87 of the Commercial Navigation Code of the Russian Federation, in their normative unity with the Decree of the Government of the Russian Federation “On Maritime Vessels Pilotage Activities of Private Organizations” create lack of legal certainty in the system of legal regulation in force and cause their arbitrary

interpretation in the law-enforcement practice, they contradict Articles 19, 34 (Section 1) and 55 (Section 3) of the Constitution of the Russian Federation.

Concluding from the above and pursuant to Sections 1 and 2, Article 71, Articles 72, 74, 75, 79 and 100 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the Constitutional Court of the Russian Federation

h e l d :

1. To recognize the provisions of Subsection 2, Article 87 of the Commercial Navigation Code of the Russian Federation in their normative unity with Decree of the Government of the Russian Federation No. 538 of 17 July 2001, “On Maritime Vessels Pilotage Activities of Private Organizations” as non-conforming to the Constitution of the Russian Federation and its Articles 19, 34 (Section 1) and 55 (Section 3).

Pursuant to Article 80 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the federal legislator has to regulate the activities of private vessels pilotage organizations in consideration of the present Judgment.

2. This Judgment shall be final and shall not be subject to any appeal, it shall come into force immediately upon pronouncement, shall be directly applicable and shall not require confirmation by other authorities and state officials.

3. Pursuant to Article 78 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” this Judgment shall be published in the Collection of Laws of the Russian Federation and *Rossiyskaya Gazeta*. The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

Constitutional Court  
of the Russian Federation

No. 7-II