**BILL WATCH 12/2021**

**[3rd March 2021]**

**Standard Scale of Fines : Parliamentary Legal
Committee’s Adverse Report**

Yesterday in the National Assembly the Parliamentary Legal Committee [PLC] issued an adverse report on the Criminal Law (Codification and Reform) (Standard Scale of Fines) Notice, published in SI 25/2021.  The National Assembly resolved that the report should be adopted and the SI withdrawn.  The Minister of Justice, Legal and Parliamentary Affairs said he intended to withdraw the SI and ensure that a new one was enacted properly.

**The Committee’s Reasons**

In its report, which was unanimous, the PLC found the SI to be *ultra vires* and unconstitutional for much the same reasons as we outlined in Bill Watch 3/2021 of the 28th January *[*[*link*](http://www.veritaszim.net/node/4728)*]*.  These reasons were:

* The SI’s preamble did not state which Minister had published the SI.  This was important because the enabling Act, the Criminal Law Code, gave both the Minister of Justice and the Minister of Finance power to issue such SIs.
* Because the Minister of Justice is responsible for administering the Criminal Law Code, it was to be presumed that he published SI 25/2021. *[He probably did, in fact, since he assumed responsibility for withdrawing the SI after the Committee had announced its report.]*
* The Minister of Justice had not tabled a draft of the SI in Parliament before he published it, as required by section 280(6) of the Criminal Law Code.

Hence SI 25/2021 was ultra vires the enabling Act and therefore unconstitutional.

**Consequences of the Adverse Report**

**Invalidity of SI 25/2021**

Once the PLC has reported that a statutory instrument is *ultra vires* its enabling Act, and the National Assembly or the Senate has resolved that the SI is indeed *ultra vires* – as the Assembly has done in this case – the SI immediately ceases to have effect.  This is provided for in para 9(4) of the Fifth Schedule to the Constitution.

The result is that the old Standard Scale of Fines, which was published in SI 272 of 2020, is the operative scale of fines – assuming, of course, that it was properly enacted.  Hence the courts and the police must revert to that old standard scale when imposing fines including deposit or “spot” fines.

**Fines already imposed and paid**

It is quite clear that as soon as the National Assembly resolved to approve the PLC’s adverse report, SI 25/2021 ceased to have effect and fines can no longer be imposed on the basis of the scale set out in it.  The effect of the Assembly’s resolution, in other words, was to repeal the SI.

What is not clear is what effect the resolution has on fines that were imposed and paid before the resolution was passed.

The general rule is that if an SI is published illegally – because for example the proper procedure was not followed in enacting it – then it must be regarded as never having been published, as being invalid from the moment it was published in the Gazette.  If this general rule applies to SI 25/2021 then all fines that were imposed in accordance with the scale it lays down were imposed invalidly and will have to be refunded.

The general rule probably applies to SI 25/2021 even though para 9(4) of the Fifth Schedule to the Constitution states that when the National Assembly adopts an adverse report by the PLC and resolves that an SI is *ultra vires*, the SI “thereupon ceases to have effect”.  Although these words imply that an SI becomes invalid only from the moment when the Assembly passes the resolution, such an interpretation would lead to an absurdity.  It would mean that if the Assembly resolved to adopt a PLC report that an SI was *ultra vires* the SI would be repealed but would be deemed to have been valid up to the moment the resolution was passed, even though – as is the case with SI 25/2021 – it was never valid at all.

The answer probably is that para 9(4) was not intended to override the general rule.  If an SI is *ultra vires* it is invalid and always has been invalid, and the National Assembly’s resolution simply confirms its invalidity and compels the Government to withdraw it, i.e. to repeal it formally.  Once the resolution is passed the SI – SI 25/2021 in this case – ceases to have effect and there can be no argument about whether or not it should continue to be enforced.  But as to the SI’s validity or invalidity before the resolution was passed, para 9(4) does not affect the issue.  If anyone believes that the PLC and the National Assembly were wrong and that SI 25/2021 was really valid, and that fines imposed before the resolution were properly imposed in accordance with the SI, then they are free to go to court and put their case before a judge.  Until a judge rules otherwise, however, SI 25/2021 must be regarded as having been invalid from the beginning.

Unfortunately anyone who wants their fines refunded would probably have to apply to a court.

What is beyond doubt however is that SI 25/2021 is no longer in force.  The PLC is to be commended for its report, and the National Assembly for adopting it so promptly.

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