Constitutional judgment 3-3-1-44-11

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-3-1-44-11
Date of judgment	3 July 2012
Composition of court	Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Ivo Pilving, Priit Pikamäe, Jüri Põld, Harri Salmann and Tambet Tampuu
Court Case	Action of Petr Dmitruk and Nadezhda Dmitruk against decision no. 15.3-04/158 ja 15.3-04/159 of the Police and Border Guard Board of 23 March 2010.
Basis of proceeding	Tallinn Circuit Court judgment of 10 February 2011 in administrative matter no. 3-10-1379.
Hearing	Written proceedings
DECISION	**1. To dismiss the Police and Border Guard Board's appeal in cassation.** **2. To declare that § 12^3(5) of the Aliens Act valid until 1 October 2010 in conjunction with § 12(9)4) thereto were in conflict with the Constitution in the part in which they stated the obligation to refuse to issue a temporary residence permit under § 12^3(1)3) without the right of discretion.** **3. To refuse to amend the decision of the Tallinn Circuit Court judgment of 10 February 2011 in administrative matter no. 3-10-1379. To amend the reasoning of judgment of the circuit court according to the reasoning of this judgment.** **4. To transfer the security into the public revenues.**

FACTS AND COURSE OF PROCEEDINGS
1.

Petr Dmitruk was born in 1956 in Russia and is a citizen of the Russian Federation. Nadezhda Dmitruk was born in 1948 in Russia. N. Dmitruk renounced Russian Federation's citizenship in 2000 and is currently stateless.

2. P. Dmitruk and N. Dmitruk got married in 1977 in Ukraine where in 1978 their daughter Anna Dmitruk was born. In 1978 P. Dmitruk and N. Dmitruk moved to Estonia where in 1980 their son Andrey Dmitruk was born.

3. P. Dmitruk served from 1974 to 1993 as a professional member of the armed forces of the Union of the Soviet Socialist Republics, from 16 March 1990 as a senior ensign. On 13 January 1994 P. Dmitruk was assigned to the reserve and on 15 May 1995 he retired.

4. In 1993 the Government of the Republic refused to issue P. Dmitruk and N. Dmitruk Estonian residence permits but in 1996 issued them temporary residence permits valid until 11 July 2001. In 1996 N. Dmitruk was also granted Estonian citizenship but she decided not to accept the certificate of citizenship.

5. In 1996, P. Dmitruk, as a former member of the armed forces, participated in the United States of America's aid programme 'New Construction'. The aid programme provided P. Dmitruk a place of residence in Novgorod, Russia. In addition, P. Dmitruk received 25,000 Estonian kroons of emigration support to emigrate his family of five from Estonia. By participating in the aid programme, P. Dmitruk committed to leaving Estonia and waived his right to settle in Estonia. P. Dmitruk and his family left Estonia in 1997.

6. In 1999, P. Dmitruk and N. Dmitruk and their family came back to Estonia on visas. Within the same year, P. Dmitruk and N. Dmitruk were issued Estonian passports. In 2000 their passports were declared invalid as P. Dmitruk and N. Dmitruk had submitted forged documents upon application for passports.

7. In 2003, P. Dmitruk and N. Dmitruk submitted applications for temporary residence permits to the Citizenship and Migration Board (CMB) under § 12(1)5) of the Aliens Act (international agreement). With its decision of 26 March 2004, CMB denied the applications for residence permits and issued P. Dmitruk and N. Dmitruk a precept to leave Estonia. The Tallinn Administrative Court annulled the CMB's decisions with its judgment of 30 June 2004 in administrative matter no. 3-1370/2004 and issued a precept to CMB to re-review the applications for residence permits and make new decisions. The Tallinn Circuit Court, with its judgment of 8 June 2005 in administrative matter no. 3-1370/2004, annulled the judgment of the Tallinn Administrative Court and rendered a new judgment dismissing the appeal of P. Dmitruk and N. Dmitruk. The Administrative Law Chamber of the Supreme Court refused to accept the appeal in cassation of P. Dmitruk and N. Dmitruk.

8. On 25 October 2005, CMB filed petitions to the Tartu Administrative Court to place P. Dmitruk and N. Dmitruk to the expulsion centre. On 8 November 2005, P. Dmitruk and N. Dmitruk filed a complaint to the Tartu Administrative Court requesting to suspend the expulsion procedures until the dispute in court is resolved. With its ruling of 9 November 2005 in administrative matter no. 3-05-1045, the Tartu Administrative Court satisfied the complaint of P. Dmitruk and N. Dmitruk and suspended the expulsion procedures until entry into force of a judgment in the administrative matter.

9. With its judgment of 16 April 2007 in administrative matter no. 3-05-1045, the Tartu Administrative Court dismissed the CMB's petition requesting P. Dmitruk and N. Dmitruk be placed in the expulsion centre. The Tartu Circuit Court allowed the appeal of CMB and annulled the judgment of the Tartu Administrative Court with its judgment of 11 September 2007 in administrative matter no. 3-05-1045. The Circuit Court rendered a new judgment in the matter allowing P. Dmitruk and N. Dmitruk be placed in the expulsion centre until their expulsion but for no longer than two months. With its judgment of 3 April 2008 in administrative matter no. 3-3-1-96-07, the Administrative Law Chamber of the Supreme Court allowed the appeal in cassation in part and annulled the judgment of the Tartu Administration Court of 16 April 2007 and the judgment of the Tartu Circuit Court of 11 September 2007 in administrative matter no. 3-05-1045.

10. P. Dmitruk and N. Dmitruk stay in Estonia with no legal basis, and the precepts to leave Estonia issued to them are valid. The adult children of P. Dmitruk and N. Dmitruk, Anna Dmitruk and Andrey Dmitruk, also live in Estonia. Anna Dmitruk is a citizen of Estonia, Andrey Dmitruk stays in Estonia on the basis of a temporary residence permit. N. Dmitruk's daughter Lidia Grigorieva, born in 1968, lives in the Russian Federation and is a citizen thereof.

11. On 15 October 2009, P. Dmitruk and N. Dmitruk submitted to CMB (as of 1 January 2010 Police and Border Guard Board (PBGB)) applications for temporary residence permit under § 12^3(1)3) of the Aliens Act in order to stay with an adult child permanently residing in Estonia. Under this provision a residence permit may be issued to a parent that needs care which it is not possible for him or her to receive in the country of his or her location or in another country and if his or her permanent legal income or the permanent legal income of his or her child who legally resides in Estonia ensures that the parent will be maintained in Estonia. A close relative for the purposes of settling with whom a residence permit is applied for must have a registered residence and an actual dwelling in Estonia and he or she shall bear all the costs related to the care and medical treatment of the alien (12^3(3) of the Aliens Act).

12. With its decision no. 15.3-04/158 regarding P. Dmitruk and decision no. 15.3-04/159 regarding N. Dmitruk, PBGB refused to issue temporary residence permits. PBGB stated that the fact that P. Dmitruk and N. Dmitruk need help and care had been established. However, the issue of residence permits was precluded by § 12^3(5) of the Aliens Act which stated the obligation to refuse to issue a residence permit to an alien if he or she does not meet the conditions provided by law, if any other condition for the issue of a residence permit is not complied with, if the application for the residence permit is not justified or other circumstances exist which are the bases for refusal to issue a residence permit. PBGB was of the opinion that § 12(4)2) and 7) and § 12(9)4) of the Aliens Act regarding P. Dmitruk and § 12(4)2) and 14) and § 12(9)4) of the Aliens Act regarding N. Dmitruk precluded the issue of residence permits to them.

13. § 12(9)4) of the Aliens Act stated that issue of a residence permit shall be refused if a person has committed to leaving the Republic of Estonia, has received a residential space abroad within the framework of an international aid programme or has received support for leaving Estonia. Since P. Dmitruk received an apartment in Russia in 1997 by participating in an international aid programme and support for leaving Estonia and committed to leaving Estonia, PBGB refused to issue P. Dmitruk and N. Dmitruk residence permits under § 12(9)4) of the Aliens Act.

14. Secondly, upon refusing to issue P. Dmitruk and N. Dmitruk residence permits, PBGB referred to § 12(4)2) of the Aliens Act which stated that a residence permit shall not be issued to an alien if he or she does not observe the constitutional order and laws of Estonia. PBGM stated that they implemented the provision as P. Dmitruk and N. Dmitruk disregarded the precept to leave Estonia and lived in Estonia without a legal basis.

15. Furthermore, PBGB also referred to § 12(4)7) and 14) of the Aliens Act as bases for refusal. § 12(4)7) of the Aliens Act stated that a temporary residence permit shall not be issued to an alien, if he or she has served as a professional member of the armed forces of a foreign state or has been assigned to the reserve forces thereof or has retired therefrom. § 12(4)14) of the Aliens Act stated that a temporary residence permit shall not be issued to an alien, if he or she is the spouse or a minor child of a person specified in § 12(4)7 of the Aliens Act. However, § 12(5) of the Aliens Act provides an exception that enables to issue a residence permit to persons specified in § 12(4)7) and 14) of the Aliens Act.

16. With its decision of challenge of 10 May 2010, PBGB denied the challenge of P. Dmitruk and N. Dmitruk.

17. P. Dmitruk and N. Dmitruk filed an action to the Tallinn Administrative Court against the decision of 23 March 2010. The persons who filed the action were of the position that the decisions violate their right to inviolability of private and family life. It cannot be decided to refuse to issue residence permit under §

12(9)4) of the Aliens Act if the residence permit has been applied for under § 123(1)3) of the Aliens Act. After leaving Estonia in 1997, the medical status of appellants has deteriorated significantly, and there is a special dependant relationship between appellants and their adult children. The appellants did commit to leaving Estonia but never waived their right to receive care and support from their children, should it prove necessary. The irreversible damage to the health of the parties and the need for the care of their children could not be foreseen at the time of participation in the aid programme.

18. With its judgment of 5 October 2010 in administrative matter no. 3-10-1379, the Tallinn Administrative Court dismissed the action. The administrative court was of the opinion that § 12^3(1)3) of the Aliens Act is an imperative provision and § 12(9)4) of the Aliens Act precludes the issue of residence permit to the parties under § 12^3(1)3) of the Aliens Act. The administrative court stated that the right of a person, who participated in an aid programme, to apply for a residence permit cannot be precluded, should the circumstances change, but a residence permit may only be issued if the person has recovered the received sums to the Republic of Estonia.

19. The administrative court found that the requirement of not being able to receive care in the country of location or another country set forth in § 12^3(1)3) of the Aliens Act has not been met. The administrative court had no doubt that the children living in the same house with the parents help out with everyday errands and chores. However, the court did not deem proven that the same kind of help is not accessible to the parties in Russia where N. Dmitruk's adult daughter lives. The court believed there to be a sufficient healthcare and maintenance system in Russian Federation which provides the necessary help for pensioners.

20. Regarding the basis for refusal to issue a residence permit under § 12(4)2) of the Aliens Act, the administrative court pointed out that the parties to the proceeding had failed to observe the precept to leave Estonia since 2004 which proves that they do not observe the constitutional order and laws of Estonia.

21. P. Dmitruk and N. Dmitruk filed an appeal in which they requested the administrative court's judgment of 5 October 2010 to be annulled. The appellants pointed out that § 12 of the Aliens Act establishes general rules for issuing a temporary residence permit. § 12^1 to 12^4 of the Aliens Act are specific provisions which are interpreted in conjunction with the general rules only to the extent they are in conformity with the special provisions and the purposes thereof. Expulsion of the appellants and their separation from their children violates the appellants' as well as their children's right to inviolability of private and family life.

22. With its judgment of 10 February 2011 in administrative matter no. 3-10-1379, the Tallinn Circuit Court allowed the appeal and annulled the judgment of the administrative court. The circuit court rendered a new judgment in the administrative matter annulling the PBGB's decisions of 23 March 2010 and issued a precept to PBGB to re-review P. Dmitruk's and N. Dmitruk's applications for temporary residence permits. The circuit court ordered payment of procedure expenses in the sum of 575 euro and 20 cents in favour of P. Dmitruk and N. Dmitruk.

23. The circuit court found that in this case it should not be argued whether the appellants need constant help and care. Instead, it should be discussed how § 12^3(5) of the Aliens Act should be implemented and whether, upon refusal to issue residence permits, it was justified to refer to § 12(4)2), 7) and 14), § 12(9)4) of the Aliens Act and to argue that necessary care may also be received in Russia.

24. The circuit court interpreted § 12^3(5) of the Aliens Act in a manner in conformity with the Constitution and found it not to be an imperative provision which precludes the issue of residence permit should any of the circumstances mentioned in the provision exist. If it has been established that a person who applies for a residence permit under § 12^3(1)3) of the Aliens Act needs care and that it is not possible for him or her to receive such care in any other country, it should be possible to consider, regardless of the bases indicated in § 12^3(5) of the Aliens Act, the issue of residence permit for that person. The lack of the right of discretion may bring about a situation which is in conflict with the Constitution as it poses a threat to the life, health and human dignity of the applicant.

25. By previous court judgments it has been established that the circumstances mentioned in § 12(4)7 and § 12(9)4 of the Aliens Act exist. It has to be assessed whether the circumstances justify the refusal to issue residence permits also upon implementation of § 12^3(1)3) of the Aliens Act. The circuit court was of the position that § 12(9)14) of the Aliens Act played an important part in the refusal. The refusal was also based on § 12(4)7) (and 14)) but it was obvious that PBGB did not consider the appellants to be dangerous to the Republic of Estonia.

26. The circuit court found that § 12(9)4) of the Aliens Act may not be interpreted in a manner which precludes obtaining a residence permit for people who participated in an aid programme on any grounds. Also, it is not necessary that the received sums be recovered to Estonia beforehand because the Republic of Estonia has not incurred any costs due to the aid programme. The emigration support received from the Republic of Estonia has been recovered by the appellants. The obligation to transfer the place of residence in Russia before settling in Estonia would not be proportional as the residence permit to be issued is temporary, and the circumstances that form the basis of issue of residence permits, e.g. the need for care, may lapse which may obligate the person to leave Estonia.

27. The circuit court is of the opinion that § 12^3(1)3) of the Aliens Act states the need for physical care. It should be determined whether the care indicated in § 12^3(1)3) of the Aliens Act would be accessible in Russia. The case materials fail to point out why the appellants find N. Dmitruk's daughter living in Russia unable to take care of her mother and her husband. PBGB has not made an effort to establish that. However, the mere fact that N. Dmitruk's adult daughter lives in Russia is not sufficient to prove the accessibility of care in Russia.

28. The circuit court believes it to be unjustified to implement § 12(4)2) of the Aliens Act to the appellants which imperatively precluded the issue of a residence permit to an alien who does not observe the constitutional order and laws of Estonia. The court found that it was unclear why was not implemented § 12(10)4) of the Aliens Act which provides the right of discretion to decide to refuse from issuing a residence permit if the person has violated the conditions for aliens regarding stay in Estonia and departure from Estonia.

29. The circuit court was of the opinion that considering the circumstances it was not possible to decide whether the decisions made by PBGB were free of abuse of discretion. The decisions and judgments fail to consider the extent to which PBGB based its decisions on the imperativeness of § 12(4)2), 12(9)4) and § 12^3(5) of the Aliens Act. The existing evidence fail to convince that the appellants are not eligible for residence permits under § 12^3(1)3) of the Aliens Act.

30. In its appeal in cassation, PBGB requested the Tallinn Circuit Court's judgment of 10 February 2011 to be annulled and render a new judgment dismissing the appeal of P. Dmitruk and N. Dmitruk.

31. PBGB agreed to the position of the circuit court stating that instead of § 12(4)2) of the Aliens Act, § 12(10)4) of the Aliens Act should have been focused on. Upon review of applications for residence permits, § 12(9)4) of the Aliens Act, which imperatively precludes the issue of residence permits to P. Dmitruk and N. Dmitruk, was deemed to be important. In addition, it was not established that P. Dmitruk and N. Dmitruk have no possibility of receiving care and support outside of Estonia.

32. With its ruling of 16 February 2012 in administrative matter no. 3-2-1-44-11, the Administrative Law Chamber of the Supreme Court referred the matter to the Supreme Court *en banc*. The Administrative Law Chamber of the Supreme Court was of the opinion that § 12^3(5) of the Aliens Act in conjunction with § 12(9)4) may be in conflict with § 27(5) and § 11 of the Constitution in their conjunction in the part in which it precludes satisfaction of an application for residence permit submitted under § 12^3(1)3) of the Aliens Act.

33. The Chamber stood by the position established in its previous practice that § 12(9)4) of the Aliens Act provides no right of discretion regarding the issue of a residence permit and imperatively precludes the issue

of residence permit to persons indicated in the provision. The Chamber finds also to be imperative § 12^3(5) of the Aliens Act which requires an alien applying for a residence permit to meet the requirements set forth by law and is unequivocally in conjunction with § 12(9)4) of the Aliens Act. If an applicant meets the criteria set forth in § 12(9)4) of the Aliens Act, the application submitted under § 12^3(1)3) of the Aliens should be denied.

34. The Chamber established that when participating in the aid programme, P. Dmitruk and N. Dmitruk waived their right to live in Estonia, and that waiver is not in conflict with any public interest. Refusal to issue residence permits interferes with the fundamental right of inviolability of private and family life provided by § 26 of the Constitution but it does not violate it. However, it should be considered that P. Dmitruk and N. Dmitruk applied for temporary residence permits as needy parents of a child living in Estonia under § 12^3(1)3) of the Aliens Act. In this case, the refusal to issue a residence permit also interferes with the fundamental right provided by § 27 of the Constitution. § 27(5) of the Constitution obligates a family to care for its needy members, and the fundamental right to require care corresponds to that obligation. By participation in the aid programme, P. Dmitruk and N. Dmitruk did not waive their fundamental right provided by § 27(5) of the Constitution. The Chamber believes that one cannot waive that fundamental right.

35. The Chamber found § 12^3(1)3) of the Aliens Act to be a provision enabling children to care for their parents who permanently need help. Upon deciding whether to issue a residence permit under § 12^3(1)3) of the Aliens Act, the dependant relationship between parents and adult children caused by the neediness of parents should be considered. The Chamber is of the position that § 12^3(5) of the Aliens Act in conjunction with § 12(9)4) hinder caring for needy family members. The Chamber found no reasonable explanation or legitimate purpose for the need to always deny the application for residence permit submitted under § 12^3 (1)3) of the Aliens Act if the application is submitted by a person specified in § 12(9)4) of the Aliens Act. The imperativeness of § 12^3(5) of the Aliens Act may, in this case, bring about the violation of § 27(5) of the Constitution because due to the imperativeness of the provision, regardless of the need of a family member to receive care in Estonia, the issue of a residence permit should always be refused. The Chamber found a more lenient and proportional solution to be a possibility, upon deciding whether to issue a residence permit, to consider participation in an aid programme together with other circumstances with legal effect.

CONTESTED PROVISIONS

36. § 12(9)4) of the Aliens Act valid until 30 September 2010 provided the following:
‘§ 12. Bases for issue of temporary residence permits
[---]
(9) Issue of a residence permit shall be refused if:
[---]
(4) a person has committed to leaving the Republic of Estonia, has received a residential space abroad within the framework of an international aid programme or has received support for leaving Estonia.’

37. § 12^3(5) of the Aliens Act provided the following:
‘123. Issue of residence permits to settle with close relative residing in Estonia
[---]
(5) The issue of a residence permit to settle with a close relative who resides in Estonia shall be refused if the close relative who resides in Estonia or the alien who applies for the residence permit does not meet the conditions provided by law, if any other condition for the issue of a residence permit is not complied with, if the application for the residence permit is not justified or other circumstances exist which are the bases for refusal to issue a residence permit.’

OPINIONS OF PARTICIPANTS
The Constitutional Committee of the Riigikogu
38. [Not translated.]

Representative of P. Dmitruk and N. Dmitruk
39.

[Not translated.]

The Police and Border Guard Board
40.–41. [Not translated.]

The Chancellor of Justice
42.–45. [Not translated.]

The Minister of Justice
46.–50. [Not translated.]

The Minister of the Interior
51. [Not translated.]

OPINION OF THE SUPREME COURT *EN BANC*
52. Husband and wife P. Dmitruk (a retired member of the armed forces of the former Union of Soviet Socialist Republics, a senior ensign, a citizen of the Russian Federation) and N. Dmitruk (a stateless person, a former citizen of the Russian Federation) applied for temporary residence permits under § 12^3(1)3) of the Aliens Act valid until 1 October 2010. § 12^3(1)3) of the Aliens Act set forth a possibility to issue a temporary residence permit to a parent or grandparent to settle with an adult child or grandchild staying in Estonia legally if the parent or grandparent needs care which is not possible for him or her to receive in the country of his or her location or in another country and if his or her permanent legal income or the permanent legal income of his or her child or grandchild who legally resides in Estonia ensures that the parent or grandparent will be maintained in Estonia. The close relative with whom the applicants wished to settle with (the sponsor) was their daughter living in Estonia.

53. PBGB refused to issue P. Dmitruk a residence permit under § 12(4)2) and 7), § 12(9)4) and 12^3(5) of the same Act. N. Dmitruk was refused to be issued a residence permit under § 12(4)2) and 14), § 12(9)4) and § 12^3(5) of the same act.

With its ruling of 16 February 2012, the Administrative Law Chamber of the Supreme Court referred the matter to the Supreme Court *en banc* because the Chamber doubted whether § 12(9)4) of the Aliens Act in conjunction with § 12^3(1)3) of the Aliens Act are in conformity with the Constitution.

54. At first, the Supreme Court *en banc* forms a position on whether the contested provisions preclude the right of discretion upon refusal to issue residence permits and is a relevant provision in terms of constitutional review (I). Having determined that the right of discretion is precluded, the Supreme Court *en banc* assesses whether the contested provisions are in conformity with the Constitution. The Supreme Court *en banc* discusses interference with fundamental rights (II), points out the purpose of the interference (III) and assesses the proportionality of the interference (IV). Thereafter, the Supreme Court forms an opinion on the allegations in the appeal in cassation and other issues relevant to the administrative matter (V). Then the Supreme Court declares the contested provisions to be in conflict with the Constitution and adjudicates the administrative matter (VI).

I

55. The Supreme Court verifies the conformity with the Constitution of only the relevant Act subject to implementation (§ 14(2) of the Constitutional Review Court Procedure Act). The contested provision shall be of critical importance in terms of adjudication of the matter. A provision is deemed to be of critical importance if, upon adjudication of the matter, the court is expected to decide differently if the Act is in conflict with the Constitution, as opposed to if it is not (see judgment of the Supreme Court *en banc* of 28 October 2002 in matter no. 3-4-1-5-02, paragraph 15).

56. Upon refusal to issue residence permits to P. Dmitruk and N. Dmitruk, PBGB, first and foremost, relied

on § 12(9)4) of the Aliens Act in conjunction with § 12^3(5) of the Aliens Act. Thus, the debate in the administrative matter revolves around the question whether § 12^3(1)3) of the Aliens Act in conjunction with § 12(9)4) of the Aliens Act preclude the issue of residence permits to P. Dmitruk and N. Dmitruk under § 12^3(1)3) of the Aliens Act without the right of discretion. The Tallinn Administrative Court is of the position that these provisions preclude the issue of a residence permit and provide no right of discretion. However, the Tallinn Circuit Court found that the provisions fail to preclude the issue of a residence permit. The Administrative Law Chamber of the Supreme Court believed that the provisions provide no right of discretion and doubted whether the provisions were in conformity with the Constitution.

57. In its previous case-law the Administrative Law Chamber has established repeatedly that should an applicant meet the criteria of § 12(9)4) of the Aliens Act, the application for a residence permit submitted under § 12^3(1)3) of the Aliens Act shall be denied (judgments of the Administrative Law Chamber of the Supreme Court of 17 March 2003 in administrative matter no. 3-3-1-11-03, paragraph 42; of 18 March 2003 in administrative matter no. 3-3-1-12-03, paragraph 13; of 17 April 2003 in administrative matter no. 3-3-1-17-03, paragraph 21). It may also be concluded from the judgments of the European Court of Human Rights (ECHR) that the court has considered § 12(9)4) of the Aliens Act an imperative provision (judgment of ECHR of 5 January 2006 on the admissibility of action, Mikolenko vs. Estonia; judgment of ECHR of 25 October 2005 on the admissibility of action, Nagula vs. Estonia).

58. The Supreme Court *en banc* agrees with the opinion the Administrative Law Chamber presented in the ruling of 16 February 2012 that § 12^3(5) or § 12(9)4) of the Aliens Act provide no right of discretion for an administrative authority. The wording of § 12(9)4) of the Aliens Act as well as the origin of the provision clearly indicate that it obligates to refuse to issue a residence permit to persons specified in the provision. One should take the same position when interpreting § 12^3(5) of the Aliens Act as the wording of that provision also contains no right of discretion. § 12^3(5) of the Aliens Act is a reference provision and thus essentially linked to the provisions it refers to. The extent of discretion may be set forth in the provisions which § 12^3(5) of the Aliens Act refers to. In this case, § 12^3(5) of the Aliens Act refers to the imperatively worded § 12(9)4) of the Aliens Act.

59. The Supreme Court *en banc* finds that § 12^3(5) of the Aliens Act in conjunction with § 12(9)4) of the Aliens Act is of critical importance upon adjudication of an administrative matter and the provisions are relevant in terms of constitutional review.

II

60. The first sentence of § 26 of the Constitution ensures everyone's right to the inviolability of private and family life. This provides everyone with the right to presume that state agencies, local governments and their officials refrain from interfering with one's family and private life, unless necessary for achieving the goals indicated in the Constitution. The obligation of the authority of the state to refrain from interfering with one's family and private life corresponds to that right (see, for example, the judgment of the Constitutional Review Chamber of the Supreme Court of 5 March 2001 in matter no. 3-4-1-2-01, paragraph 14).

61. Similarly to § 26 of the Constitution, the inviolability of family and private life have been ensured in Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). In the practice of ECHR, expulsion of long-term residents in terms of 'private life' and 'family life' has been repeatedly discussed (see Slivenko vs. Latvia, paragraph 94). ECHR has pointed out in several occasions that the Convention does not ensure aliens with the right to enter a country or live there. However, the expulsion of a person from the country where his or her close relatives live may constitute a violation of the right to family life (see, for example, Boultif vs. Switzerland, paragraph 39).

62. § 27(5) of the Constitution states that the family is required to provide for its members who are in need. § 27(5) of the Constitution is a specific provision regarding § 26 of the Constitution which sets forth the inviolability of family life. The duty of the family to provide for its members who are in need corresponds to

the right of a needy family member to receive care from the family. The Supreme Court *en banc* is of the opinion that care in terms of § 27(5) of the Constitution includes the family member's right to receive material care as well as personal care from the family members.

63. The family in terms of § 26 of the Constitution is comprised of the nuclear family – parents and their minor children who are in a dependent relationship. ECHR has given a similar meaning to family life set forth in Article 1(1) of the Convention (see, for example, Slivenko vs. Latvia, paragraph 94). However, ECHR takes into account the protected area of Article 8 of the Convention pointing out the dependant relationship between adult children and parents (see, for example, judgment of ECHR of 15 June 2006 in Shevanova vs. Latvia, paragraph 67). The Supreme Court *en banc* is of the opinion that in certain circumstances the obligation stated in § 27(5) of the Constitution applies also to adult children.

64. According to § 9(1) of the Constitution, the rights, freedoms and duties of all persons and of everyone, as set out in the Constitution, apply equally to citizens of Estonia and to citizens of foreign states and stateless persons in Estonia. Thus, aliens staying in Estonia, regardless of whether they stay here legally, are also holders of the fundamental rights provided in § 26 and § 27(5) of the Constitution (see, for example, judgment of the Constitutional Review Chamber of the Supreme Court of 21 June 2004 in matter no. 3-4-1-9-04, paragraph 15).

65. P. Dmitruk and N. Dmitruk applied for residence permits in order to settle with their adult daughter. In the action filed with the administrative court, they stated that the refusal to issue them temporary residence permits violates their right of inviolability of family life. P. Dmitruk and N. Dmitruk have a family life in Estonia in terms of the first sentence of § 26 of the Constitution and Article 8(1) of the Convention. They have been married since 1977 and have lived in Estonia since 1978, except when residing in Russia from 1997 to 1999.

66. However, the Supreme Court *en banc* points out that when participating in the aid programme of the United States of America and agreeing to its terms and conditions, P. Dmitruk and N. Dmitruk unambiguously waived their right to live in Estonia, and that right was not in conflict with any public interest. ECHR has taken that position in several cases with similar facts. In the matter Nagula vs. Estonia, ECHR found that 'the appellant should be viewed as a person who has unambiguously waived any rights to stay in Estonia which he might have had according to Article 8. Also, considering the agreement between Estonia and Russia on taking the armed forces out of Estonia and the obligation assumed by the appellant, ECHR is of the opinion that the waiver is not in conflict with any public interest' (judgment of ECHR on the admissibility of action of 25 October 2005 in the matter of Nagula vs. Estonia; judgments of 5 January 2006 on the admissibility of action in the matter of Mikolenko vs. Estonia and Doroshenko vs. Estonia (application no. 10507/03)).

67. The Administrative Law Chamber of the Supreme Court has repeatedly found that the interference of the right to inviolability of family life arising from § 12(9)4) of the Aliens Act is proportional and in conjunction with the Constitution (see judgments of the Supreme Court of 17 March 2003 in administrative matters no. 3-3-1-10-03 and no. 3-3-1-11-03; judgment of the Supreme Court of 18 March 2003 in administrative matter no. 3-3-1-12-03; judgment of the Supreme Court of 11 April 2003 in administrative matter no. 3-3-1-17-03; and judgment of the Supreme Court of 20 May 2004 in administrative matter no. 3-3-1-44-03). Considering the established case-law of the Supreme Court in similar cases, the Supreme Court *en banc* deems unnecessary to verify the conformity of the interference of the first sentence of § 26 of the Constitution with the Constitution. However, the Supreme Court *en banc* is of the position that in this matter it is justified to verify the conformity of the contested provisions with § 27(5) of the Constitution.

68. The Supreme Court *en banc* is of the position that if a family is hindered by the state to care for their needy family members, it shall be deemed to be an interference with the fundamental right arising from § 27(5) of the Constitution.

69. § 27(5) of the Constitution provides no right to settle in Estonia. In a situation where a needy member of

the family does not live in Estonia, the state's right to decide whom it wishes to provide the right to live in Estonia must also be considered. However, upon reviewing an application for a residence permit, fundamental rights, including the one provided by § 27(5) of the Constitution, have to be taken into account. The refusal to issue a residence permit may not disproportionately interfere with fundamental rights. In order to decide whether the decision to be made is in conformity with the principle of proportionality, the specific circumstances have to be considered (judgment of the Constitutional Review Chamber of the Supreme Court of 21 June 2004 in matter no. 3-4-1-9-04, paragraph 16). The state's right to hinder settling in Estonia in order to perform the duty or exercise the right arising from § 27(5) of the Constitution depends on the circumstances of the case, especially on the need for help and the possibility of providing it outside of Estonia.

70. § 12^3(1)3) of the Aliens Act sets forth a possibility to issue a temporary residence permit to a parent or grandparent in order to settle with his or her adult child or grandchild who permanently resides in Estonia if the parent or grandparent needs care which it is not possible for him or her to receive in the country of his or her location or in another country and if the permanent legal income of his or her child or grandchild who legally resides in Estonia ensures that the parent or grandparent will be maintained in Estonia. The Supreme Court *en banc* is of the position that § 12^3(1)3) of the Aliens Act is a provision which enables one to realise the fundamental obligation or fundamental right set forth in § 27(5) of the Aliens Act. Thus, § 12^3(1)5) of the Aliens Act in conjunction with § 12(9)4) of the Aliens Act which preclude the issue of a residence permit under § 12^3(1)3) of the Aliens Act interfere with the fundamental right established by § 27(5) of the Constitution.

III

71. The first sentence of § 11 of the Constitution states that rights and freedoms may only be circumscribed in accordance with the Constitution. Such circumscription must be necessary in a democratic society and may not distort the nature of the rights and freedoms circumscribed. In order to assess the conformity of an interference with a fundamental right with the Constitution, at first the purpose which brings about the interference should be determined, and then it should be assessed whether the Constitution allows for an interference for such purpose (legitimacy of the purpose).

72. The fundamental right ensured by § 27(5) of the Constitution arises from the fundamental obligation set forth in this provision. The provision fails to point out the reasons which allow for restrictions of that fundamental right. Thus, it is a fundamental right with no legal reservations which may be interfered with in order to protect other fundamental rights or values provided in the Constitution (see, for example, judgment of the Supreme Court *en banc* of 2 June 2008 in matter no. 3-4-1-19-07, paragraph 23).

73. The refusal to issue a residence permit under § 12^3(1)3) of the Aliens Act interferes with the fundamental right arising from § 27(5) of the Constitution. The legal basis for refusal to issue a residence permit is § 12^3(1)5) of the Aliens Act which provides no substantive reason for refusal but instead refers to § 12(9)4) of the Aliens Act. Therefore, the substantive reason for refusal to issue a residence permit arises from § 12(9)4) of the Aliens Act.

74. Pursuant to § 12(9)4) of the Aliens Act, issue and extension of a residence permit shall be refused if a person has committed to leaving the Republic of Estonia, has received a residential space abroad within the framework of an international aid programme or has received support for leaving Estonia.

75. § 12(9)4) was added in the Act so that persons who participated in the aid programme of the United States of America abided by the voluntarily assumed obligation to leave Estonia and, from then on, come to Estonia only on a visa. The Administrative Law Chamber of the Supreme Court has noted the following: 'As of 1993 when the Aliens Act entered into force, the legislator has expressed its unambiguous intention that the persons that served as professional members of the armed forces of the former USSR and their spouses are generally not issued residence permits, thereby wishing such individuals to leave Estonia. In the interest of the Republic of Estonia, international aid programmes have been carried out which funded obtaining

residential spaces for professional members of armed forces of the former USSR enabling them to leave Estonia. The purpose of § 12(9)4) of the Aliens Act is thus not just to sanction the abidance by the obligation to leave Estonia but also the wish of the Republic of Estonia to make sure that the purpose of granting money in the framework of international aid programmes to take professional members of armed forces of the former USSR out of Estonia would be achieved.' (judgment of the Administrative Law Chamber of the Supreme Court of 17 March 2003 in administrative matter no. 3-3-1-10-11, paragraph 45). The Administrative Law Chamber of the Supreme Court has repeatedly pointed out that the purpose of § 12(9)4) of the Aliens Act is legitimate in terms of interference of the inviolability of family life (judgment of 17 March 2003 in administrative matter no. 3-3-1-10-03, paragraph 46; judgment of 18 March 2003 in administrative matter no. 3-3-1-12-03, paragraph 12; judgment of 17 April 2003 in administrative matter no. 3-3-1-17-03, paragraph 16; judgment of 20 May 2003 in administrative matter no. 3-3-1-44-03, paragraph 10).

76. The situation of professional members of armed forces of the former USSR and their expulsion from Estonia were also mentioned in the agreements concluded between Estonia and Russia in July of 1994. However, on individual basis, the laws of Estonia or the aforementioned agreements did not preclude issuing a residence permit to former professional members of armed forces of the USSR. ECHR has also pointed out that the purpose of the aid programme and thus § 12(9)4) 'was to facilitate the leaving of Russian forces, among others, from Estonia. Different sides of the process were intertwined; providing the appellant with an apartment was in direct relation to the obligation of the Russian Federation to take its armed forces out of Estonia, as stated in the agreement, and to the obligations of the appellants to leave the country' (Nagula vs. Estonia). ECHR has considered the wish to protect the national security of a state a legitimate interference with Article 8(1) of the Convention (Slivenko vs. Latvia, paragraph 111).

77. The Supreme Court *en banc* is of the position that one of the purposes of the restriction set forth in § 12(9)4) of the Aliens Act is to ensure abidance by the voluntarily assumed obligations and to thereby protect the national security of Estonia. The national security is a legitimate purpose for interference with the fundamental right provided by § 27(5) of the Constitution.

IV

78. Pursuant to § 11 of the Constitution, an interference with the Constitution is constitutional if the interference and its purpose are proportional. Therefore, it shall be assessed whether the refusal to issue a residence permit under § 12^3(5) of the Aliens Act in conjunction with § 12(9)4) of the Aliens Act is a proportionate, or, in other words, a necessary and an appropriate measure to protect the national security in the circumstances indicated in § 12^3(1)3) of the Aliens Act.

79. The Supreme Court *en banc* admits that the refusal to issue a residence permit in circumstances presented in § 12(9)4) of the Aliens Act helps protect the national security of Estonia and is an appropriate measure to achieve the purpose. The aid programme mentioned in § 12(9)4) of the Aliens Act was addressed to former professional members of the armed forces of a foreign state which, as believed by the Republic of Estonia, posed a threat to the national security. The purpose of § 12(9)4) of the Aliens Act was to ensure that the persons who left Estonia in the framework of this aid programme would not be able to return to Estonia on the basis of a residence permit.

80. The Supreme Court *en banc* is of the position that the refusal to issue a residence permit to a person who needs the care of his or her close relatives under § 12(9)4) of the Aliens Act is a necessary measure to achieve the purpose because the purpose cannot be achieved that well in a manner that brings about a lesser interference of a fundamental right. The Constitutional Review Chamber of the Supreme Court has stated that making a decision by way of exercising discretion is more costly compared to refusal and it brings about the risk of making mistakes (see judgment of the Constitutional Review Chamber of the Supreme Court of 21 March 2012 in matter no. 3-4-1-1-12, paragraph 41). The Supreme Court *en banc* points out that exercising discretion and assessment of the circumstances of a specific case upon issuing a residence permit

may require more resources from the state than refusal to issue a residence permit under an imperative provision. Also, in terms of achieving the purpose of preventing a threat to security, it is more effective to implement a refusal compared to discretion as it brings about fewer mistakes in decision-making.

81. The Supreme Court *en banc* is of the opinion that the obligation to refuse to issue a temporary residence permit pursuant to § 12^3(1)3) of the Aliens Act to a needy family member arising from § 12(9)4) of the Aliens Act in conjunction with § 12^3(5) of the Aliens Act without the possibility to exercise discretion is not an appropriate measure to achieve the purpose.

82. § 12(9)4) of the Aliens Act in conjunction with § 12^3(5) of the Aliens Act notably interfere with the fundamental right provided in § 27(5) of the Constitution. The purpose of § 12(9)4) of the Aliens Act in conjunction with § 12^3(5) of the Aliens Act is to protect the national security of Estonia which is an important value in conformity with the Constitution. The lack of discretion in the procedure of issuing residence permits helps to save resources and prevent mistakes which are prone to come along when exercising discretion. The Supreme Court *en banc* is of the opinion that in this case threat to the national security does not outweigh the interference with the fundamental right provided in § 27(5) of the Constitution arising from the refusal to issue a residence permit without the right of discretion.

83. The Supreme Court has found that even a regulation which enables no exercising of discretion may result in a proportional solution. That applies in cases where the legislator itself has considered the proportionality of an exception upon enactment thereof (e.g. judgment of the Administrative Law Chamber of the Supreme Court of 17 March 2003 in administrative matter no. 3-3-1-10-03, paragraph 43; see also judgment of the Constitutional Review Chamber of the Supreme Court of 21 June 2004 in matter no. 3-4-1-9-04, paragraph 18). The Constitutional Review Chamber of the Supreme Court has twice declared provisions of the Aliens Act, which provided the competent agency with no right of discretion and prevented them from considering the fundamental rights of an applicant upon reviewing residence permits, to be in conflict with the Constitution (judgment of the Constitutional Review Chamber of the Supreme Court of 5 March 2001 in matter no. 3-4-1-2-01; and judgment of the Constitutional Review Chamber of the Supreme Court of 21 June 2004 in matter no. 3-4-1-9-04.

84. The Supreme Court *en banc* is of the position that § 12(9)4) of the Aliens Act in conjunction with § 12^3(5) of the Aliens Act, valid until 1 October 2010, were in conflict with § 11 and 27(5) of the Constitution in the part in which they stated the obligation to refuse to issue a temporary residence permit under § 12^3(1)3) without the right of discretion.

V

85. The Supreme Court *en banc* is of the position that § 12^3(5) of the Aliens Act in conjunction with § 12(9)4) of the Aliens Act is in conflict with the Constitution. The decision of the Police and Border Guard Board to refuse to issue residence permits to P. Dmitruk and N. Dmitruk was thus based on a provision in conflict with the Constitution and shall be annulled. In addition to the above, the Supreme Court *en banc* considers it to be necessary to discuss other relevant aspects of this administrative matter.

86. In § 12^3(1)3) of the Aliens Act, the issue of a residence permit to a parent who wishes to settle with his or her adult child is connected to the fact that the parent has no possibility to receive care in his or her country of location or any other country. The provision refers to a foreign country even in the case where the applicant lives in Estonia. P. Dmitruk and N. Dmitruk live in Estonia.

87. § 12^3(1)3) of the Aliens Act fails to specify what care in a foreign state means. The appellant claims that the obligation of an adult child to maintain his or her needy parent is not limited to mere provision of help in Estonia. The appellant believes that one can hire a nurse to perform his or her obligation to maintain in a foreign country and apply for social services and benefits from the foreign state.

88. The Supreme Court *en banc* agrees to the appellant. § 12^3(1)3) of the Aliens Act can be interpreted so that care includes sending money by adult children to their parents who live abroad to hire a nurse, and care and maintenance provided by a foreign state.

However, one cannot satisfy with an abstract recognition that care may be provided in various ways. It should be assessed whether it is possible for the daughter of N. Dmitruk to send money for care, hire a nurse in a foreign state, apply for social services or maintenance from the foreign state and what would be the foreseeable result of such measures compared to the care their mutual children would provide in Estonia. The respondent has not done that.

89. In order to resolve this matter, it is important to the Supreme Court *en banc* whether it is possible for the Police and Border Guard Board to presume that P. Dmitruk and N. Dmitruk can receive the necessary care from the Russian Federation and that N. Dmitruk's daughter who lives in the Russian Federation takes care of P. Dmitruk and N. Dmitruk there. It is also important whether, upon application for residence permits, P. Dmitruk and N. Dmitruk have submitted the evidence required pursuant to the applicable law.

90. In its decision of refusing to issue P. Dmitruk, a citizen of Russia, a residence permit, the Police and Border Guard Board states that there is no doubt that the healthcare and social welfare system of the Russian Federation provides sufficient care for the health of its citizens. In the decision of refusing to issue a residence permit to N. Dmitruk who is a stateless person, the Police and Border Guard Board states that there is no doubt that the healthcare and social welfare system of the Russian Federation provides sufficient care for the health of everyone in their jurisdiction. In the appeal in cassation the Police and Border Guard Board indicates that N. Dmitruk's daughter who is obligated to maintain her parent lives in the Russian Federation and is able to provide the necessary care and support if they should need it.

91. The Supreme Court *en banc* considers these allegations of the appellant presumable and unsubstantiated. The Police and Border Guard Board may not, upon deciding on the issue of a residence permit, draw on the presumption that P. Dmitruk and N. Dmitruk may receive the care they need in their everyday life from the state of Russia or its welfare system, or to assume that the N. Dmitruk's daughter who lives in Russia is obligated to take care of P. Dmitruk who is not her father. An abstract provision setting forth the right to receive care and the corresponding obligation may be found in a law of a foreign country. However, each provision of each law is an integral part of its implementation practice established by the respective foreign country.

92. P. Dmitruk and N. Dmitruk have submitted all required documents upon application for their residence permits. § 16(1)4) of Regulation no. 364 of the Government of the Republic of 26 November 2002 "Procedure for Application, Issue, Extension and Annulment of Temporary Residence Permit and Work Permit and Procedure for Registration of an Alien's Absence from Estonia" resolves the burden of proof by requiring applicants to submit a confirmation that they have no possibility of receiving care in their country of location.

93. The representative of P. Dmitruk and N. Dmitruk have submitted the respective confirmation in a cover letter of 9 September 2009 to the application for residence permit (page 86 of the court file), and no more proof regarding the possibility of care in a foreign state upon application for a residence permit have been required from P. Dmitruk and N. Dmitruk. Also, the Police and Border Guard Board has not proven the P. Dmitruk's and N. Dmitruk's confirmation that they have no possibility of receiving the necessary care in the Russian Federation to be false.

94. The Police and Border Guard Board did not refuse to issue P. Dmitruk and N. Dmitruk residence permits not just pursuant to § 12^3(5) of the Aliens Act. Upon refusal to issue residence permits, other bases for refusal provided in the same Act were referred to. P. Dmitruk's residence permit application was refused based on § 12(4)2) and 7) and § 12(9)4) of the Aliens Act. Upon refusal to issue a residence permit to N. Dmitruk, in addition to § 12^3(5) of the Aliens Act, § 12(4)2) and 14) and § 12(9)4) of the Aliens Act were

referred to.

95. § 12(4)7) of the Aliens Act which was implemented in regard to P. Dmitruk provides that a residence permit shall not be issued to or extended for an alien, if he or she has served as a professional member of the armed forces of a foreign state or has been assigned to the reserve forces thereof or has retired therefrom. § 12(4)14) of the Aliens Act which was implemented in regard to N. Dmitruk states that a residence permit shall not be issued to or extended for an alien, if he or she is the spouse or a minor child of a person specified in clauses 6), 7), 10), 11) or 12) of this subsection. There was a reason to apply § 12(4)7) and 14) to P. Dmitruk and N. Dmitruk respectively.

96. § 12(4)7) and 14) of the Aliens Act have been worded not to allow the right of discretion. § 12(5) of the Aliens Act, however, provides the right of discretion upon implementation of § 12(4)7) and 14) of the Aliens Act. The provision of the right of discretion also means that an administrative agency has the obligation to exercise it. Therefore, the refusal to issue residence permits under § 12(4)7) and 14) of the Aliens Act cannot be justified by merely the fact that the alien has served as a professional member of the armed forces of a foreign country, assigned to the reserve forces thereof or has retired therefrom, or by a fact that the person is a spouse of such person.

97. The Supreme Court *en banc* points out that the Constitutional Review Chamber of the Supreme Court in its judgment of 5 March 2001 in matter no. 3-4-1-2-01 has declared § 12(4)10) and § 12(5) of the Aliens Act to be in conflict with the Constitution in the part in which they do not allow an exception for issuing or extension of a residence permit to an alien who has been, or regarding whom there is reason to believe that he or she has been, a member of the intelligence or security service of a foreign country. With a judgment of 9 June 2004, in matter no. 3-4-1-9-04, the Constitutional Review Chamber of the Supreme Court declared § 12(4)1) and § 12(5) of the Aliens Act to be in conflict with the Constitution in the part in which it provides a competent state authority with no right of discretion upon refusal to issue a residence permit. In that matter, a person who had submitted false data upon application for an Estonian passport and a residence permit had been refused a residence permit.

In these cases the Chamber did not consider the facts that the person used to be a member of the security service of a foreign state and that he or she has submitted false data upon application for an Estonian passport to be sufficient reasons. In these cases, the Constitutional Review Chamber of the Supreme Court has deemed to be important to consider the interests of both parties – the interest of the alien to keep the state from interfering with his or her family and private life, and, on the other hand, the public interest to ensure the national security. This principle should also be applied in this case. The Supreme Court *en banc* is of the position that the threat to the national security caused by a person who has been assigned to the reserve forces may change in time.

98. § 12(4)2) of the Aliens Act sets forth that a residence permit shall not be issued to or extended for an alien, if he or she does not observe the constitutional order and laws of Estonia. In conjunction with § 12(5) of the Aliens Act, it provides no right of discretion upon making a decision on an application for a residence permit.

99. § 12(4)2) of the Aliens Act was applied to P. Dmitruk and N. Dmitruk because the precept to leave Estonia issued to them in 2004 is still in force and unobserved and as of the year 2000 they are staying in Estonia illegally, continuously failing to observe the laws of Estonia.

100. The circuit court was of the position that in that case it was not justified to implement § 12(4)2) of the Aliens Act. Instead, § 12(10)4) of the Aliens Act should have been applied which states that issue of a residence permit to or extension of a residence permit of an alien may be refused if the alien has violated the conditions for aliens regarding entry into Estonia, stay in Estonia, departure from Estonia, employment in Estonia or crossing the state border.

101. The Supreme Court *en banc* agrees with the circuit court. In this case, § 12(10)4) of the Aliens Act,

which is a specific provision to § 12(4)2) of the Aliens Act, shall be implemented.

VI

102. The Supreme Court *en banc* declares § 12^3(5) of the Aliens Act valid until 1 October 2010 in conjunction with § 12(9)4) thereto to be in conflict with the Constitution in the part in which they stated the obligation to refuse to issue a temporary residence permit under § 12^3(1)3) without the right of discretion.

103. § 12^3(5) of the Aliens Act in conjunction with § 12(9)4) of the Aliens Act which was the basis for refusal to issue P. Dmitruk and N. Dmitruk residence permits were in conflict with the Constitution, and § 12(4)2) of the Aliens Act was not applicable to P. Dmitruk and N. Dmitruk. Therefore, decisions of the Police and Border Guard Board of 23 March 2004 on refusal to issue residence permits to P. Dmitruk and N. Dmitruk should be annulled. With its judgment of 10 February 2011, the Tallinn Circuit Court annulled the contested decisions of the Police and Border Guard Board.

However, the circuit court was wrong about the fact that upon implementation of § 12^3(5) of the Aliens Act an administrative authority has the right of discretion. Furthermore, the Supreme Court *en banc* also disagrees with the circuit court in the fact that the indications of the Police and Border Guard Board on the maintenance obligations of the children living in Estonia are irrelevant. The Supreme Court *en banc* is of the opinion that this does not cause the judgment of the circuit court to be annulled. The Supreme Court *en banc* decides that the decision of the circuit court's judgment shall remain in force but the reasoning of the judgment of the circuit court shall be amended pursuant to the reasoning of the Supreme Court *en banc*'s judgment.

104. The Supreme Court *en banc* dismisses the Police and Border Guard Board's appeal in cassation.

A dissenting opinion of justices of the Supreme Court Tõnu Anton, Indrek Koolmeister, Ivo Pilving, Jüri Põld ja Harri Salmann on the judgment of the Supreme Court *en banc* in administrative matter

no. 3-3-1-44-11

1. We agree to the decision and most of the reasoning of the judgment. However, we cannot agree to subsection 1 of section 88 of the statement of reasons which states the following: 'The Supreme Court *en banc* agrees to the appellant. § 12^3(1)3) of the Aliens Act can be interpreted so that care includes sending money by adult children to their parents who live abroad to hire a nurse, and care and maintenance provided by a foreign state.'

2. We are of the position that the opinions presented in the cited section have not been substantiated.

3. We are for the opinion and the respective reasoning set forth in ruling of the Administrative Law Chamber of the Supreme Court of 16 February 2012 which referred this matter to the Supreme Court *en banc*. The opinion and the reasoning of the Administrative Law Chamber of the Supreme Court were stated in paragraph 22 of the ruling as follows:
'§ 12^3(1)3) of the Aliens Act regulates the care provided by children in Estonia, not monetary maintenance of a parent who resides in a foreign country. However, § 12^3(1)3) of the Aliens Act fails to specify the exact meaning of care unavailable in the country of location or in another state. An answer cannot be found in the materials of the Parliament of Estonia, the Riigikogu, regarding the procedure of the Draft Act to Amend and Supplement the Aliens Act passed on 17 February 1999.

The Chamber is of the opinion that the care in a foreign country set forth in § 12^3(1)3) of the Aliens Act is meant to be similar to the care for the receiving of which a residence permit under § 12^3(1)3) of the Aliens Act is applied for. The Chamber is convinced of this interpretation because Article 4(2)2) of Directive

2003/86/EC on the right to family reunification mentions persons who are unable to enjoy proper family support in their country of origin. This Directive is also referred to in section 11 of Part III of the Explanatory Memorandum of the Aliens Act currently in force, the § 150(1)3) of which is similar to the previous § 12^3(1)3). The Explanatory Memorandum states that the Act shall be brought into complete conformity with the Directive. Part V of the Explanatory Memorandum also states that the draft is in conformity with the law of the European Union.'
