Constitutional judgment 3-3-1-85-10

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-3-1-85-10
Date of judgment	31 May 2011
Composition of court	Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Priit Pikamäe, Ivo Pilving, Jüri Põld, Harri Salmann and Tambet Tampuu
Court Case	An action of OÜ Baltic Wind Energy for the annulment of the Government of the Republic regulation of 18 May 2007 no. 156 "Amendment of the Government of the Republic regulation of 27 July 2006 no. 176 "Placing limited-conservation areas under protection in Saare County"" in the part the immovables Roostiku, Nuka, Kadastiku, Kruusiaugu and Lagle were included in the Võilaiu limited-conservation area.
Basis of proceedings	The Administrative Law Chamber of the Supreme Court ruling of 19 January 2011 in matter no. 3-3-1-85-10.
Hearing	Written proceedings.

DECISION

1. To declare the part "a regulation of" of § 10 (1) of the Nature Conservation Act unconstitutional and invalid.
2. To satisfy the appeal in cassation of OÜ Baltic Wind Energy.
3. To annul the Tallinn Administrative Court judgment of 8 May 2009 and the Tallinn Circuit Court judgment of 21 May 2010 in administrative matter no. 3-08-166. To render a new judgment satisfying in part the action of OÜ Baltic Wind Energy and annulling the Government of the Republic regulation of 18 May 2007 no. 156 "Amendment of the Government of the Republic regulation of 27 July 2006 no. 176 "Placing limited-conservation areas under protection in Saare County"" in the part the immovables Roostiku, Nuka, Kadastiku and Kruusiaugu were included in the Võilaiu limited-conservation area. To dismiss the action in the part it requested the annulment of the inclusion of the immovable Lagle in the Võilaiu limited-conservation area.
4. To order the procedure expenses of EUR 3,500 from the Government of the Republic in favour of OÜ Baltic Wind Energy.
5. To refund to OÜ Baltic Wind Energy the security paid upon the filing of the appeal in cassation.

FACTS AND COURSE OF PROCEEDINGS

1. The Government of the Republic adopted on 27 July 2006 a regulation no. 176 "Placing limited-conservation areas under protection in Saare County" (the Regulation no. 176), § 1 (1) of which lists the limited-conservation areas to be placed under protection in Saare County.

2. On 18 May 2007 the Government of the Republic adopted a regulation no. 156 "Amendment of the Government of the Republic regulation of 27 July 2006 no. 176 "Placing limited-conservation areas under protection in Saare County"" (the Regulation no. 156). Clause 1 of the Regulation no. 156 complemented § 1 (1) of the Regulation no. 176 with clauses 28–69.

3. OÜ Baltic Wind Energy filed an action for the annulment of clause 1 of the Regulation no. 156 in the part the Võilaiu limited-conservation area placed under protection thereby (clause 66 added to clause 1 of § 1 of the Regulation no. 176) includes the immovables Roostiku, Nuka, Kadastiku, Kruusiaugu and Lagle belonging to the appellant. The appellant acquired the immovables from Väino Tammisaar by real right contracts concluded on 17 May 2007, and was entered in the land register as the owner on 23 May 2007.

[4.-6. Not translated.]

THE ADMINISTRATIVE LAW CHAMBER OF THE SUPREME COURT RULING

10. The Administrative Law Chamber of the Supreme Court found in its ruling of 19 January 2011 in matter no. 3-3-1-85-10 that although the Regulation no. 156 is legislation of general application by form and name, it is legislation of specific application in essence pursuant to the Code of Administrative Court Procedure and the case-law of the Administrative Law Chamber. By determining an area to be a limited-conservation area, the status in public law of the immovables included in it changes.

[Partly not translated.]

The Administrative Law Chamber is of the opinion that § 10 (1) of the Nature Conservation Act (NCA) may be in contradiction with the principle of legal clarity arising from § 13 (2) of the Constitution. According to the principle, legislation shall be sufficiently clear and understandable so that persons would have a reasonable possibility to anticipate the actions of the state and to adjust their own actions accordingly. The

terms and the procedure for challenging in court a decision of the executive power restricting the rights of persons shall be provided in the Act so clearly that every average observant person would be able to understand the main points without assistance and without examining any case-law. The Administrative Law Chamber found that the adjudication of the present matter requires adjudication of a matter which shall be adjudicated on the basis of the Constitutional Review Court Procedure Act (CRCPA) and therefore referred the matter, under § 70 (1^1) of the Code of Administrative Court Procedure (CACP), to be reviewed by the Supreme Court *en banc*.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDING
[11.-15. Not translated.]

CONTESTED PROVISION
16. § 10 (1) of the Nature Conservation Act:
"An area shall be placed under protection as a protected area or a limited-conservation area by a regulation of the Government of the Republic."

OPINION OF THE SUPREME COURT *EN BANC*
17. The Supreme Court *en banc* first forms an opinion on the constitutionality of § 10 (1) of the NCA (I) and then adjudicates the administrative matter (II).

I

18. First, the Supreme Court *en banc* addresses the request of the Chancellor of Justice to hear the matter by way of oral proceedings. The Supreme Court laid down that the participants shall submit their opinions by 25 February 2011. The Chancellor of Justice submitted to the Supreme Court his opinion, together with a request to hear the matter by way of oral proceedings, on 22 March. Since the written proceedings had already been commenced by that time, the Supreme Court *en banc* does not deem it possible to review the request.

19. In order for the Supreme Court to assess the constitutionality of a provision, it has to be relevant. A provision is relevant if in case of its constitutionality the court would decide differently than in case of its unconstitutionality.
§ 10 (1) of the NCA is a provision delegating authority which gives rise to the competence of the Government of the Republic to decide on placing limited-conservation areas under protection. The provision determines the form of the act – a regulation – issued upon making of the decision, and the procedure for the issue thereof. Also the contested Regulation no. 156 of the Government of the Republic has been imposed under § 10 (1) of the NCA. If § 10 (1) of the NCA is unconstitutional, the court shall decide differently than in case of its constitutionality. Consequently, the provision is relevant.

20. The act placing limited-conservation areas under protection is a decision determining the areas to be placed under protection and the objective of the protection. Therefore the restrictions provided for in Chapter 3 of the NCA are applied to the area placed under protection (to the immovables located in the limited-conservation area). The said restrictions limit the options of the owner of the immovable, by way of imposing protection on the immovable, to use his or her immovable. In addition to the general restrictions provided for in §§ 14 and 16 of the NCA, the restrictions and obligations arising from §§ 15, 32 and 33 of the NCA extend to the possessor of an immovable included in a limited-conservation area. Consequently, the basis for an infringement of a person's right to property is a decision on placing limited-conservation areas under protection. This conclusion is not overturned also by the fact that the possessor of an immovable included in a limited-conservation area is issued a protection obligation notice as a document issued for information pursuant to § 24 of the NCA, and a management plan is prepared on the basis of § 25 of the NCA for the purpose of organising protection of limited-conservation areas.

According to § 51 (1) of the Administrative Procedure Act (APA), an administrative act is an order,

resolution, precept, directive or other legal act which is issued by an administrative authority upon performance of administrative functions in order to regulate individual cases in public law relationships and which is directed at the creation, alteration or extinguishment of the rights and obligations of persons. Pursuant to § 51 (2) of the APA, a general order is an administrative act which is directed at persons determined on the basis of general characteristics or at changing the public law status of things. A regulation which is issued under § 10 (1) of the NCA and which has a direct effect, due to the establishment of a limited-conservation area, on the rights and obligations of the possessor of a specific immovable has the characteristics of an administrative act in the material sense. The Administrative Law Chamber found in its ruling of 7 May 2003 in matter no. 3 3 1 31 03, among other, that an act which does not only regulate the actions performed on an immovable, but the regulated actions are directly related to a specific immovable is a general order (paragraph 21).

21. In § 10 (1) of the NCA the legislator has explicitly prescribed that the act is to be issued as a regulation. It appears from the explanatory memorandum of the draft Act of the NCA (279 SE, X Riigikogu) that the legislator intended the act to be issued by a regulation. Although the type of the act has not been mentioned in the initial version of the draft Act, a draft of the regulation issued based on § 10 (1) of the NCA has been annexed thereto. Also the Ministry of the Environment refers in its opinion submitted to the Supreme Court that the legislator knowingly decided to regulate the placing limited-conservation areas under protection by a regulation, whereas taking account of the consequences resulting from the form of the act with respect to the procedure and challenge, i.e. the preclusion of the right to appeal among other.

22. Although the decision made on the basis of § 10 (1) of the NCA can be deemed an administrative act in the material sense, it cannot be denied that the said act resembles legislation of general application in terms of specificity. Not only the owners of the immovables are the persons concerned, though the infringement of their rights is significantly more intensive, but all persons who happen to be on the immovable. The regulation establishes the area to be protected and the objective of the protection. As a result of the establishment of a limited-conservation area by a regulation, the rights and obligations of an abstract group of persons change. In a limited-conservation area, every person is obligated to observe the restrictions provided by law, but also the rights of every person apply there (§ 15 (1) of the NCA). Consequently, a general regulatory framework arising from the law shall enter into force with respect to that area by imposing the act. Based on § 71 of the NCA, every person shall be liable in a misdemeanour procedure for the violation of the requirements for the use or protection of the protected natural objects. Therefore it is important that the decision on placing limited-conservation areas under protection would be published, i.e. every person could easily acquaint himself or herself with it.

23. According to the general requirement, the form of an act shall comply with its material content, i.e. legislation of general application of the Government of the Republic are regulations and legislation of specific application are orders. Such a requirement of distinction of acts is based on, among other, § 87 6) of the Constitution and Division 6 of Chapter 1 of the Government of the Republic Act. Upon the issue of legal acts, making a strict distinction between a regulatory framework and an individual precept is complicated in some cases and may not correspond to the principle of economy of the regulatory framework. The regulatory framework of an act which prescribes the issue of such legislation of general application which gives direct rise to the infringement of the subjective rights and freedoms of persons is not necessarily unconstitutional. Whereas, decisive is the issue whether by imposing an infringement of the subjective rights of a certain person by legislation of general application the fundamental right to organisation and procedure arising from § 14 of the Constitution has been guaranteed to the person sufficiently, and also whether the person has been guaranteed the right arising from § 15 of the Constitution to contest in court the restrictions imposed on him or her.

24. The issue, formal legality and challenging of a regulation as legislation of general application and an administrative act differ because the nature of the acts and the needs for the protection of the rights of persons differ. Issue of a general order shall not be directed at an excessive restriction on persons' procedural rights and the right to appeal. It must be noted that the legislator may, in case of regulations, prescribe by special provisions additional procedural rules for the issue of acts or rules for challenging the issue; rules

which are generally typical of another type of act and necessary in a specific case in terms of protection of the rights of persons.

The issue of a regulation is not appropriate if a general order is significantly more specific than legislation of general application.

25. As the legislator has, by imposing § 10 (1) of the NCA, prescribed the placing limited-conservation areas under protection by a regulation, the provisions of the issue of a regulation provided for in the Administrative Procedure Act shall be applied to the issue of acts. Upon the issue of a regulation under § 10 (1) of the NCA, the procedure provided for in § 9 of the NCA shall be observed in addition to the rules in the Administrative Procedure Act for the issue of a regulation. Pursuant to the procedure, the authority competent to initiate the proceedings for placing under protection shall forward a notice to the owner of the immovable on the planned placing a natural object under protection, the proposal or draft decision for placing the natural object under protection, the place and time of public discussion or a proposal to decide the matter without a public discussion, and also on the term for filing objections and propositions (§ 9 (4) and (5) of the NCA). The initiator of the proceedings shall respond to the written proposals and objections filed in the course of the public display within two weeks after the end of the display (§ 9 (8) of the NCA). After the proceedings regarding proposals and objections and renewal of a draft decision for placing a natural object under protection, a public discussion shall be organised (§ 9 (9) of the NCA). If the main positions expressed by the decision on placing the natural object under protection change as the result of the public display or public discussion, a new notice shall be published and a new public display shall be organised (§ 9 (10) of the NCA).

26. According to § 56 (1) of the APA, written reasoning shall be provided for the issue of a written administrative act. The reasoning for the issue of an administrative act shall be included in the administrative act or in a document accessible by participants in proceedings and the administrative act shall contain a reference to the document. The reasoning for the issue of an administrative act shall set out the factual and legal basis for the issue (§ 56 (2) of the APA). The reasoning for the act restricting the rights of persons is significant so that they would understand why and on which legal basis the decision was made and whether it was made lawfully. Without knowing the reasoning for the issue of the act it is difficult for the person to argumentatively challenge the circumstances of the issue of the administrative act. The obligation to reason fulfils also the administrative authority's self-regulation objective – whether the right decision has been reached. Further, the reasoning enables the administrative court to efficiently verify administrative acts.

The procedure provided for in § 9 of the NCA resembles the open procedure provided for in Chapter 3 of the Administrative Procedure Act. However, the rights of an owner of an immovable upon the issue of the contested regulation are significantly less guaranteed than they would be in the proceedings for the issue of an administrative act under the Administrative Procedure Act. Upon the issue of a regulation, the administrative authority does not have the obligation to provide reasoning for the regulation or to attach a reference to challenge – these requirements are not obligatory according to § 89 (2) of the APA. Although pursuant to § 9 (8) of the NCA the administrative authority is obligated to respond to the proposals and objections of persons, the provision does not prescribe the obligation of substantive reasoning in case of dismissed proposals and objections. Neither the Nature Conservation Act nor the Administrative Procedure Act prescribe the reasoning for or delivery of a regulation issued on the basis of § 10 (1) of the NCA. Similarly there is no requirement to attach a reference to challenge to a regulation issued under § 10 (1) of the NCA and no special procedure for challenge has been provided.

Consequently, § 10 (1) of the NCA infringes the right to organisation and procedure arising from § 14 of the Constitution.

27. In order for an infringement to be lawful, it has to have a legitimate objective and the infringement has to be proportional with respect to the objective. Upon not providing reasoning for an act and not delivering it, the administrative procedure is probably quicker. A faster procedure can be deemed efficient. The efficiency of an administrative procedure is a legitimate objective.

28. In the assessment of the Supreme Court *en banc*, the special procedure provided for in § 9 of the NCA does not compensate for the deficiencies of the proceedings for the issue of regulations in terms of protection of the rights of individuals. Although an explanatory memorandum shall be annexed to regulations (§ 51 of "The rules of legislative technique of draft legislation of general application"), it need not include all objections and proposals submitted in the procedure for the issue of an act. The regulation does not refer to the explanatory memorandum, and the latter is also not a part of the regulation itself, but merely an annex to the draft regulation, and the explanatory memorandum may not be renewed based on the amendments made in the draft regulation shortly prior to the adoption thereof.

Furthermore, the explanatory memorandum reflects the opinions and considerations of the compilers of the draft regulation and they may not coincide with the actual motives of the administrative authority itself. Even if a person is aware of the existence of the explanatory memorandum and it reflects the reasoning to the same amount as the administrative act, it cannot be found as easily as legislation of general application, especially if the title of the regulation has been amended compared to the initial version of the draft regulation. Whereas, substantial restrictions are imposed on a person by the act (see paragraph 20 of this judgment). The regulation is not delivered to the owner of the immovable, but he or she shall be forwarded a protection obligation notice within six months as of the decision on the placing under protection. A protection obligation notice is a document issued for information, i.e. the arising of the rights and obligations of the person does not depend on the receipt of the protection obligation notice (§ 24 (1) and (3) of the NCA).

29. Everyone has the right, in all stages of the proceedings for the issue of an administrative act, to examine documents and files according to § 37 of the APA. In addition to the examination of documents in a public display corresponding to § 9 (7) of the NCA, a person can, in case of a regulation issued under § 10 (1) of the NCA, request additional information only by a request for an explanation on the basis of the Response to Memoranda and Requests for Explanations Act. Thus, even if a person can acquaint himself or herself with the reasoning for the regulation, he or she will probably learn of them so late that he or she cannot submit his or her objections to the administrative authority in due course.

30. Considering the aforementioned, § 10 (1) of the NCA restricts intensively the persons' right to organisation and procedure. There is no justification for such an extensive restriction, i.e. the restriction is disproportionate.
Based on the abovementioned, the Supreme Court *en banc* finds that the part "a regulation of" of § 10 (1) of the NCA is in contradiction with § 14 of the Constitution and needs to be declared invalid because pursuant thereto, the rules for the issue of a regulation provided in the Administrative Procedure Act which do not guarantee the persons' fundamental right to organisation and procedure shall be applied to the proceedings for the issue of an act.

31. Due to the declaration of invalidity of the part "by a regulation" of § 10 (1) of the NCA, the provisions concerning legislation of general application, including the rules for challenge, no longer apply to acts issued on the basis of the provision. Consequently, an act issued based on § 10 (1) of the NCA can be challenged in the administrative court as is provided by the Code of Administrative Court Procedure for acts regulating individual cases (§ 4 (1) of the CACP). Thus, as a result of declaring a part of the provision invalid, the right to appeal provided for in § 15 (1) of the Constitution is no longer restricted.

32. The Supreme Court *en banc* notes additionally that since the decisions on placing limited-conservation areas under protection are not regulations in the material sense, not § 93 (1) of the APA but § 61 (2) of the APA is applicable to them after the declaration of invalidity of the part "by a regulation" of § 10 (1) of the NCA.

II

33. Since in paragraph 31 of this judgment it was found that an action can be filed with the administrative

court against the contested act, the Supreme Court *en banc* is able to review the action. It was found in paragraph 30 of this judgment that the part “by a regulation” of § 10 (1) of the NCA is to be declared unconstitutional and invalid. Consequently, the rules for the issue of a regulation provided in the Administrative Procedure Act do not apply to the act, but based on the essence of the act the provisions for the issue of legislation of specific application shall be applied. Next, the Supreme Court *en banc* verifies the conformity of the contested act with these requirements.

34. The Minister of the Environment initiated on 9 July 2004 by a directive no. 643 the establishment of seventy-two limited-conservation areas in Saare County, including the Võilaiu limited-conservation area. The notice on the initiation of the establishment of the limited-conservation areas was made public in the official publication Ametlikud Teadaanded [*Official Notices*] on 11 August 2004. The notice on the initiation of the establishment of the limited-conservation areas in Saare County was made public on 12 August 2004 in the newspapers Meie Maa and Eesti Ekspress. The notice determined that the public display shall take place from 16 August until 12 September 2004.

V. Tammisaar, the previous owner of the immovables belonging to OÜ Baltic Wind Energy submitted on 17 August 2004 a written objection against the inclusion of his immovables in the limited-conservation area.

A notice on public discussions about the establishment of the limited-conservation areas in Saare County, among other the planned Võilaiu limited-conservation area, was published in the publication Ametlikud Teadaanded on 30 September 2004 and in the newspaper Meie Maa on 8 October 2004. The public discussion regarding the Võilaiu limited-conservation area took place on 24 November 2004 and V. Tammisaar also participated.

On 7 March 2005 the Saaremaa Environmental Authority replied by way of a letter to the objection of V. Tammisaar against the inclusion of his immovables in the limited-conservation area (vol. 1 of the file, page 24). The Environmental Authority explained in the letter which nature values have been found on the immovables of the appellant, and notified that the immovables Roostiku, Nuka, Kadastiku and Kruusiaugu owned by the appellant are planned to be included in the limited-conservation area, but the immovable Lagle stays out of the boundaries of the limited-conservation area. The Environmental Authority also explained that the Natura 2000 will not set restrictions on the immovables for the establishment of a wind park if the environmental impact assessment favours it. On 14 March 2005 V. Tammisaar submitted again a letter to the environmental authority objecting to the inclusion of his immovables in the limited-conservation area.

On 27 July 2006 the Government of the Republic adopted a regulation no. 176 “Placing limited-conservation areas under protection in Saare County” which lists 27 limited-conservation areas to be placed under protection in Saare County, and their objectives of protection. On 18 May 2007 the Government of the Republic adopted a regulation no. 156 “Amendment of the Government of the Republic regulation of 27 July 2006 no. 176 "Placing limited-conservation areas under protection in Saare County"" by which under protection were placed another 41 limited-conservation areas, including Võilaiu which includes the immovables Roostiku, Nuka, Kadastiku and Kruusiaugu previously owned by V. Tammisaar and currently owned by OÜ Baltic Wind Energy who was entered in the land register on 23 May 2007.

35. OÜ Baltic Wind Energy is of the opinion that since by the Regulation no. 176 the Võilaiu limited-conservation area was not established and the first regulation was amended by the Regulation no. 156, a new proceeding corresponding to § 9 of the NCA should have been conducted. However, the administrative court and the circuit court found that the Regulation no. 176 did not contain a decision on the Võilaiu limited-conservation area – it was not decided to establish it or not to establish it. The first legal act concerning the Võilaiu limited-conservation area was the Regulation no. 156.

36. The Supreme Court concurs with the opinion of the courts. Although the Minister of the Environment initiated in July 2004 the placing 72 limited-conservation areas at once under protection in Saare County, placing every single limited-conservation area under protection shall be deemed as a proceeding for placing an individual natural object under protection for the purposes of the second chapter of the Nature

Conservation Act. The proceeding for the establishment of the Võilaiu limited-conservation area was initiated by the adoption of the Minister of the Environment directive of 9 July 2004 and was terminated by the adoption of the Government of the Republic regulation of 18 May 2007. The stages of the proceedings required by § 9 of the NCA – notifying the owners of the immovables, public display and discussion of the draft decision on the placing under protection – have been completed in the proceeding for placing the Võilaiu limited-conservation area under protection.

37. The title of the Government of the Republic Regulation no. 176 of 27 July 2006 may have mislead the owners of the immovables by creating an impression that it constitutes an exhaustive list of the limited-conservation areas to be placed under protection in Saare County. The courts have also not established that V. Tammisaar was notified of the continuance of the proceedings for placing the Võilaiu limited-conservation area under protection after the adoption of the Regulation no. 176. There was no communication between the administrative authority and the participant in the proceedings during the ten months between the adoption of the two regulations. According to the case-law of the Administrative Law Chamber, the principle of good administration requires, among other, that a person would be provided within a reasonable time with information about the course of the proceedings concerning him or her and about the administrative acts affecting the adjudication of the matter, and with any other relevant information (see e.g. judgment of 18 November 2004 in matter no. 3-3-1-33-04, paragraph 16; judgment of 5 March 2007 in matter no. 3-3-1-102-06, paragraph 21 etc.). Conducting proceedings unbeknownst to the participant therein and without communication with him or her cannot be deemed to be in conformity with the principle of good administration.

38. Conducting the proceedings in such a manner also violates the right to be heard of the owner of the immovables Roostiku, Nuka, Kadastiku and Kruusiaugu arising from § 40 (1) of the APA and § 9 of the NCA. However, V. Tammisaar, the owner of the immovable at the time, was able to submit his proposals and objections during the public display of the decision on the placing the limited-conservation area under protection from 16 August until 12 September 2004, and he also submitted an objection on 14 March 2005 (this objection was not responded to by the administrative authority, for which reason it is not possible to conclude whether the objection was taken into account in the making of the decision). From that time until the final adoption of the decision there was a period of two years, during which the factual circumstances could have changed.

39. Therefore, a new full open procedure was not necessary to be conducted upon the placing the Võilaiu limited-conservation area under protection by the adoption of the Regulation no. 156, but the owners of the immovables should have been informed of the continuance of the proceedings and they should have been given the possibility to state their opinions prior to the placing the limited-conservation area under protection in May 2007.

40. According to § 56 (1) of the APA, written reasoning shall be provided for the issue of a written administrative act. The reasoning for the issue of an administrative act shall be included in the administrative act or in a document accessible by participants in proceedings and the administrative act shall contain a reference to the document. The reasoning for the issue of an administrative act shall set out the factual and legal basis for the issue (§ 56 (2) of the APA). The reasoning for the issue of an administrative act issued on the basis of the right of discretion shall set out the considerations from which the administrative authority has proceeded upon the issue of the administrative act (§ 56 (3) of the APA).

The contested act notes as the legal basis for the issue thereof § 10 (1) of the NCA, pursuant to which an area shall be placed under protection as a protected area or a limited-conservation area by a regulation of the Government of the Republic. It constitutes a provision which determines who makes the decision. The legal provision which would be the substantive basis for the placing the limited-conservation area, listed in the act, under protection does not appear from the act. Such a provision could be, above all, § 7 of the NCA, according to which a natural object which is under risk, is rare or typical, has scientific, historic, cultural or esthetical value or which is subject to protection under an international agreement is deemed to have the prerequisites for placing the natural object under protection. It should have been noted which alternative

indicated in § 7 of the NCA gave rise to the placing the limited-conservation areas under protection in this case, together with explanations about the factual circumstances. Consequently, the legal reasoning for the contested act is insufficient and does not enable the court to verify the lawfulness of the merits.

41. Next the regulation lists the limited-conservation areas to be placed under protection. Every limited-conservation area is complemented by the habitat types and species which are the objective of the protection and which correspond to the lists in the Annexes to the Habitats and the Birds Directive. Clause 66 which is the object of the legal dispute lists the objectives of the protection of the Võilaiu limited-conservation area. At the end of the judgment it has been noted that the Annexes thereto have been disclosed in the electronic Riigi Teataja (the State Gazette). The Annexes constitute maps of the limited-conservation areas (including Võilaiu) that indicate which immovables are within the boundaries of each limited-conservation area. The Administrative Law Chamber found in its judgment of 15 October 2009 in administrative matter no. 3-3-1-57-09 that a list of the species of birds for whose protection the limited-conservation area is established cannot be deemed sufficient reasoning upon the placing the limited-conservation area under protection if there is no reasoning for the boundaries of the limited-conservation area, no references to the evidence that the said species of birds live in the area to be placed under protection, and no considerations which are the basis for the issue of the administrative act (paragraph 12). Also the Regulation no. 156 which is contested in the current matter presents merely a list of every habitat type and species of birds protected in the Võilaiu limited-conservation area. There is no reference to other documents (e.g. expert assessments, maps indicating the location of nature values etc.) which could explain the reasoning for the boundaries of the limited-conservation area, no clarifications on where exactly the nature values are located in the limited-conservation area, no arguments for the chosen type of protection, and no other reasoning. Thus, in addition to the insufficiency of the legal basis, also the factual basis of the administrative act has not been duly pointed out.

42. The contested regulation lacks the considerations which have been proceeded from upon the establishment of the limited-conservation area. The Supreme Court does not concur with the opinion of the circuit court pursuant to which the insufficient indication of the considerations is not an essential error in this case because the establishment of the limited-conservation area constitutes a type of protection which enables the achievement of the objectives of the Habitats Directive and at the same time is the least restricting on the rights of the owner of the immovable. According to § 69 of the NCA, in Estonia, the Natura 2000 network of the European Union shall consist of areas hosting birds of which Estonia has informed the Commission pursuant to the Birds Directive, and areas which, the Commission, pursuant to the Habitats Directive, considers to be of common European importance. The Commission included by a decision no. 2009/94/EC of 12 December 2008 the immovables of the appellant in the Väike Strait protected area which is of common European importance. Consequently, the immovables of the appellant were not at the time of the inclusion in the limited-conservation area on 18 May 2007 a part of the Natura 2000 network. The Government of the Republic included the immovables of the appellant “in the list of the areas in the Natura 2000 network to be presented to the Commission” by an order no. 148 of 23 April 2009. This order has been challenged in the administrative court by the appellant. When the challenged regulation was adopted, the immovables of the appellant had no connection with the Natura 2000 network to be established under the Habitats Directive. The decision on the establishment of the limited-conservation area was the first which imposed permanent nature protection related restrictions on the immovables of the appellant, and upon making of which the Government of the Republic had extensive discretion.

When the decision was adopted, the state did not have the obligation arising from Article 4 (4) of the Habitats Directive to designate the area as a special area. Based on the aforementioned, the argument which was mentioned in the explanatory memorandum of the Regulation no. 156 as a reason for the placing under protection and which stated that the limited-conservation areas to be placed under protection by the regulation are, due to their nature values, included in the Natura 2000 network is not true. Whereas it must be noted that the reasoning in the explanatory memorandum, even if relevant, could not be considered as reasoning for the Regulation no. 156 pursuant to § 56 (1) of the APA because there is no reference to that document in the Regulation and the participants in the proceedings have not been informed about the

document together with the Regulation.

43. Based on the aforementioned, both procedural requirements and requirements for formal validity have been violated upon making of the decision on the establishment of the Võilaiu limited-conservation area. Pursuant to § 58 (1) of the APA, repeal of an administrative act cannot be demanded solely for the reason that procedural requirements are violated upon issue of the administrative act or the administrative act does not comply with the requirements for formal validity if the violations cannot affect the resolution of the matter. The same principle can be applied upon adjudication in court of a claim for repeal of an administrative act. Thus, upon deciding on the satisfaction of an action for repeal it shall be verified whether the established errors in procedure (undue involvement and hearing of the owner of the immovables) and in formalities (failing to justify the act) could have affected the essence of the decision on placing the Võilaiu limited-conservation area under protection, and whether the administrative act can be verified regardless of these errors.

44. The Administrative Law Chamber has generally deemed the failing to duly justify an administrative act as grounds for repealing the act, for which reason the lawfulness of the merits of the act cannot be verified in court (see e.g. the judgment of 22 May 2002 in administrative matter no. 3-3-1-14-00, paragraph 5; the judgment of 17 October 2007 in administrative matter no. 3-3-1-39-07, paragraph 13; the judgment of 15 January 2009 in administrative matter no. 3-3-1-87-08, paragraph 19; the judgment of 17 September 2008 in administrative matter no.3-3-1-39-08, paragraph 10). It appears from the materials collected in the matter that V. Tammisaar, the previous owner of the immovables was informed, in the proceeding for the establishment of the limited-conservation area, that significant habitats (limestone regions covered with thin soil and stunted vegetation) pursuant to the Habitats Directive have been found on his immovables (a letter of 7 March 2005 of the Saaremaa Environment Authority). Although making the said information available to the appellant compensates somewhat for the shortcomings of the reasoning for the contested act, this document also does not clarify for the owner of the immovable on which legal basis and considerations his immovables were included in the limited-conservation area.

The Administrative Law Chamber has found that in exceptional situations where the administrative authority should in any case re-issue an administrative act of the same content, repeal of the act due to the shortcomings of its reasoning may not be justified based on the principle of procedural economy (the judgment of 5 November 2008 in administrative matter no. 3-3-1-49-08, paragraph 11; the judgment of 15 October 2009 in administrative matter no. 3-3-1-57-09, paragraph 13). The Supreme Court is of the opinion that in this case there is no such exceptional situation. Since an administrative act shall comply with the legislation in force at the moment of its issue (§ 54 of the APA) and with the factual situation, the court can, within a claim for repeal, assess the administrative act only as at the time of its issue (see also the Administrative Law Chamber judgment of 21 February 2011 in matter no. 3-3-1-80-10, paragraph 23). Consequently, upon deciding on the satisfaction or dismissal of the action, the Supreme Court cannot take account of the fact that the Commission included in December 2008 the immovables of the appellant in the Väike Strait protected area which is of common European importance.

Also the violation of procedural requirements shall be deemed important in this case because it cannot be excluded that upon due involvement and hearing of the participants in the proceedings, the Government of the Republic could have reached a different final decision.

45. Based on the aforementioned, the contested act shall be repealed due to the violation of procedural requirements and the requirement to reason. Both the administrative court and the circuit court judgment in this matter shall be annulled. The action of OÜ Baltic Wind Energy shall be satisfied in part – the appellant has requested the repeal of the Regulation no. 156 in the part it included his immovables Roostiku, Nuka, Kadastiku, Kruusiaugu and Lagle in the Võilaiu limited-conservation area. The courts have established that the immovable Lagle was not included in the Võilaiu limited-conservation area by the contested regulation (see the third section of paragraph 13 of the circuit court judgment). Thus, the action of OÜ Baltic Wind Energy shall be dismissed in that part. The Supreme Court satisfies the action proportionally to the extent of four-fifths.

46. Since the Supreme Court renders a new judgment in the matter, it also has to decide on the division of procedural expenses pursuant to § 93 (4) of the CACPA. According to § 92 (1) of the CACPA, the procedural expenses shall be borne by the party against whom the court decides. Upon satisfaction in part of an action, the procedural expenses shall be divided proportionally to the satisfaction of the action.

In the administrative court OÜ Baltic Wind Energy requested the ordering of the costs for legal assistance from the respondent to the extent of 84,370 kroons (vol. I of the file, page 195; 5,392 euros and 23 cents in the valid currency). In the session in the administrative court the representative of the respondent found that the costs for legal assistance are unreasonably high considering the minimum complexity of the proceedings. In the appeal OÜ Baltic Wind Energy has requested ordering of the procedural expenses from the respondent, but has failed to submit to the court in the appeal proceedings a list of the expenses. From the case file it appears only the payment of a state fee of 250 kroons (vol. I of the file, pages 253 and 259). OÜ Baltic Wind Energy has not submitted a list of the expenses also in the cassation proceedings.

Thus, the procedural expenses of OÜ Baltic Wind Energy amount to 84,620 kroons (84,370 kroons + 250 kroons) (5,408 euros 20 cents). Four-fifths of the amount equals 67,696 kroons (4,926 euros 56 cents). The Supreme Court concurs with the respondent that considering the volume of the court case, the ordering of the costs for legal assistance borne by OÜ Baltic Wind Energy in the first instance to the requested extent is not justified, for which reason the Supreme Court orders from the respondent in favour of OÜ Baltic Wind Energy 3,500 euros (54,763 kroons 10 cents) (§ 93 (5) of the CACPA).

The security paid upon the filing of the appeal in cassation shall be refunded on the basis of § 90 (2) of the CACPA.

A dissenting opinion of the justice of the Supreme Court Tõnu Anton on the Supreme Court *en banc* judgment in matter no. 3-3-1-85-10

1. In explaining the significant justifications in the judgment the majority of the Supreme Court *en banc* should have reached more extensive clarity and unambiguity.

2. According to the majority of the Supreme Court *en banc*, the Government of the Republic should have issued under § 10 (1) of the NCA an act which is a regulation only in form (see paragraph 19 etc. of the judgment).

The part “a regulation of” of § 10 (1) of the NCA is declared unconstitutional and invalid in paragraph 1 of the decision of the judgment. It is not certain whether unconstitutional is only the application of the form of a regulation or the error in the determination of the type of the act. I find that the error was made upon determining the type of the act which, however, was not assessed in the constitutional review by the Supreme Court *en banc*.

I am of the opinion that the decision on placing the limited-conservation area under protection is legislation of specific application, more precisely a general order. It is not correct to comprehend § 10 (1) of the NCA so that the Government of the Republic should have issued such a general order in the form of a regulation.

3. Although the judgment uses ambivalent criteria with respect to the regulation as a type of act indicated in § 10 (1) of the NCA – the regulation has the characteristics of an administrative act in the material sense (paragraph 20), the regulation can be deemed an administrative act in the material sense, but it resembles legislation of general application in terms of specificity (paragraph 22), the regulation would not be appropriate if a general order is significantly more specific than legislation of general application (paragraph 24) –, I find that the Supreme Court *en banc* finally formed an opinion that „it is not a regulation in the material sense“ (paragraph 32). Such a conclusion does not, however, refute the suspicion that in essence the Supreme Court *en banc* has established a basis for distinguishing a third type of act (which is neither

legislation of general nor specific application).

In paragraph 24 the Supreme Court *en banc* notes that "the legislator may, in case of regulations, prescribe by special provisions additional procedural rules for the issue of acts or rules for challenging the issue; rules which are generally typical of another type of act and necessary in a specific case in terms of protection of the rights of persons." In paragraph 23 the Supreme Court *en banc* explains: "Upon issue of legal acts, making a strict distinction between a regulatory framework and an individual precept is complicated in some cases and may not correspond to the principle of economy of the regulatory framework. The regulatory framework of an act which prescribes the issue of such legislation of general application which gives direct rise to the infringement of the subjective rights and freedoms of persons is not necessarily unconstitutional. Whereas, decisive is the issue whether by imposing an infringement of the subjective rights of a certain person by legislation of general application the fundamental right to organisation and procedure arising from § 14 of the Constitution has been guaranteed to the person sufficiently, and also whether the person has been guaranteed the right arising from § 15 of the Constitution to contest in court the restrictions imposed on him or her."

Such an approach would lead to the conclusion that the legislator's failure to act upon establishing procedural rules for the protection of the rights of persons is unconstitutional, not the legislator's authority to issue a regulation in form.

4. I concur that distinguishing between legislation of general and specific application is complicated in some cases but in my opinion that does not justify the disregard for the requirements of the Constitution and for a specifying so-called constitutional act – the Government of the Republic Act.

Pursuant to § 87 of the Constitution, the Government of the Republic shall issue regulations and orders on the basis of and for the implementation of law. According to § 27 (1) of the Government of the Republic Act, the Government of the Republic regulations are legislation of general application, and on the basis of § 30 (1), the Government of the Republic orders are legislation of specific application.

5. I find that § 10 (1) of the NCA is in contradiction with § 87 6) of the Constitution which distinguishes legislation of general and specific application. It constitutes an error of the legislator upon determining the type of the act.

6. Upon assessing the lawfulness of the contested regulation (a general order), the majority of the Supreme Court *en banc* has verified within the administrative court procedure "whether the established errors in procedure (undue involvement and hearing of the owner of the immovables) and in formalities (failing to justify the act) could have affected the essence of the decision on placing the Võilaiu limited-conservation area under protection, and whether the administrative act can be verified regardless of these errors" (see paragraph 43 of the judgment). The Supreme Court *en banc* neglected the error in both the form and the type of the act.
