Constitutional judgment 3-3-1-101-06

JUDGMENT
OF THE GENERAL ASSEMBLY
OF THE SUPREME COURT

No. of the case	3-3-1-101-06
Date of judgment	3 January 2007
Composition of court	Chairman Märt Rask and members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Lea Laarmaa, Julia Laffranque, Jaak Luik, Priit Pikamäe, Jüri Põld, Harri Salmann and Tambet Tampuu.
Court Case	Action of Tatjana Gorjatšova for the annulment of the Government of the Republic order no 433 of 11 July 2005.
Disputed judgment	Judgment of Tallinn Circuit Court of 25 August 2006 in administrative matter no 3-05-641.
Ground for the proceeding in Supreme Court	Appeal in cassation of the Government of the Republic.
Type of proceeding	Written proceeding.

DECISION

1. To satisfy the appeal in cassation of the Government of the Republic.

2. To annul the Tallinn Circuit Court judgment of 25 August 2006 in administrative matter no 3-05-641 and to upheld the Tallinn Administrative Court judgment of 23 December 2005 in administrative matter no 3-1037/2005.

3. To refund the security.

FACTS AND COURSE OF PROCEEDING

1. Tatjana Gorjatšova is a person with unspecified citizenship, born in Estonia, who was employed as executive secretary and senior executive secretary in the National Security Committee of the ESSR (hereinafter "the SSC of ESSR") from 14 February 1978 until 8 May 1979, when she was released from employment on her own request. T. Gorjatšova submitted to the Citizenship and Migration Board an application for acquisition of Estonian citizenship by naturalisation as an adult, on the basis of §§ 6 and 33 of the Citizenship Act (hereinafter "the CA").

2. By its order no 433 of 11 July 2005, on the basis of § 21(1)5) of the CA, the Government of the Republic refused to grant citizenship to T. Gorjatšova, because the applicant for citizenship had been employed by a foreign security service.

3. T. Gorjatšova filed an action with the Tallinn Administrative Court for the annulment of the referred order of the Government of the Republic. The Tallinn Administrative Court dismissed T. Gorjatšova's action by its judgment of 23 December 2005 in administrative matter no 3 1037/2005.

The Administrative Court held that the action was unfounded because citizenship is a matter of honour and a privilege, not a right, and therefore the state has wide discretion upon determining its citizens. § 21(1)5) of the CA establishes a prohibition to grant citizenship, with no right of discretion, because bearing in mind the secrecy of the activities of the State Security Committee it is next to impossible for the Estonian state to check the actual activities of individual employees of the SSC of ESSR. That is why, differently from the procedure of granting residence permits, upon granting citizenship it is of no importance that the applicant has close connections with Estonia, is loyal to Estonia and has a family in Estonia. It is only important to ascertain whether the applicant for citizenship has been employed or is currently employed by foreign intelligence or security services. Pursuant to § 4(1) of the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia Act, being in service in security or intelligence organisation means employment as staff employee of a security or intelligence organisation. It appears from the entries in T. Gorjatšova's employment record book that she was employed by the SSC of ESSR on the basis of contract of employment entered into for an unspecified term. Pursuant to the labour Code in force at that time it was possible to conclude an employment contract for an unspecified term only with the aim of filling regular staff positions. Consequently, T. Gorjatšova was a staff employee of the SSC of ESSR, and § 21(1)5) of the CA was applied to her lawfully.

The person filing the action could not have a legitimate expectation to acquire citizenship, because the prohibition to grant citizenship to persons who have been employed by foreign security services has been in the Citizenship Act since the adoption thereof. The applicant has not brought any example to show that a person who is in a situation similar to hers was been treated more favourably than she. The violation of the principle of proportionality could be invoked only if the Government of the Republic had had discretion in this regard.

The Government of the Republic has ascertained the fact which serves as the basis for refusal to grant citizenship, and has taken a lawful decision.

4. T. Gorjatšova filed an appeal with the Tallinn Circuit Court, applying for the annulment of the judgment of the Tallinn Administrative Court and for the rendering of a new judgment.

The appellant argued that the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia Act and the Citizenship Act were Acts with different scope of application. The application of § 4(1) of the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia Act to the appellant was unjustified. A member of the technical staff must not be regarded a person referred to in § 21(1)5) of the CA, to whom Estonian citizenship shall not be granted or restored. The principle of proportionality requires that the state must not restrict the rights of persons or create for them burdensome consequences unless this is indispensable. The application of § 21(1)5) of the CA to the appellant is in conflict with Article 26 of the UN Covenant on Civil and Political Rights, which guarantees the equality of rights before the laws and the right to equal protection by the law, and establishes a general prohibition of discriminating provisions in the laws. The conflict with the Covenant arises from the fact that the granting of citizenship to persons has been prohibited without reason. § 21(1)5) of the CA should be applied only to those persons who voluntarily entered the military service in the SSC of ESSR, and the activities of whom were directed against the Estonian state.

5. On 25 August 2006 the Tallinn Circuit Court satisfied T. Gorjatšova's appeal, annulled the judgment of the administrative court and the contested order of the Government of the Republic, and issued a precept to the Government of the Republic to review the application of T. Gorjatšova.

The Circuit Court held that taking into account the specificity of the work of the appellant there was no reason to consider that she was more dangerous than the persons who had not been employed by a security organisation of a state which had occupied Estonia. Danger to national security may arise only if the person has relevant training or practical experience, allowing him or her to work for a security organisation of another state in the future. Consequently, the unequal treatment of the appellant and other persons applying for citizenship by naturalisation is not justified by any of the legitimate aims. Such unequal treatment would be in conflict with § 12(1) of the Constitution, which requires that the legislator treat equal persons equally.

The circuit court argued that in conformity with the constitution-conforming interpretation § 21(1)5) of the CA should be interpreted to the effect that it does not preclude granting of citizenship to those persons who had been employed by security services of foreign states, but did not fulfil the functions specific to security organisations.

The circuit court held that the period during which T. Gorjatšova was employed in the SSC of ESSR, her former and subsequent places of employment, her area of specialisation, the lack of military rank and her age at the time she was employed in the SSC of ESSR, as well as her testimony given at the administrative court hearing indicate that she did not perform duties specific to security organisations, and that is why § 21(1)5) of the CA does not prohibit the granting of citizenship to her.

6. The Government of the Republic filed an appeal in cassation with the Supreme Court, applying for the annulment of the circuit court judgment and for the upholding of the administrative court judgment.

T. Gorjatšova requested that the appeal in cassation of the Government of the Republic be not satisfied and the judgment of the circuit court be upheld.

7. The Administrative Law Chamber of the Supreme Court found that § 21(1)5) of the CA prohibits in absolute terms, without the right of discretion and in a manner clearly excluding exemptions, to grant

Estonian citizenship to a person who has performed any remunerative work in an intelligence or security service. The Administrative Law Chamber had doubts whether § 21(1)5) of the CA was in conformity with the principle of equal treatment, and therefore the Chamber decided to refer the matter to the general assembly of the Supreme Court for hearing, so that the general assembly could form an opinion on the constitutionality of the provision.

The Administrative Law Chamber argued that upon adjudicating the matter the general assembly should answer the question whether it was in conformity with the principle of equal treatment that upon granting citizenship by naturalisation the employee, who had performed support functions in an intelligence or security service of a foreign country is treated differently from an employee, who had not been employed by an intelligence organisation of a foreign state.

In the ruling on transfer of the case to the general assembly the Administrative Law Chamber points out, inter alia, that it would not be right to be confined to finding a reasonable justification for the unequal treatment upon adjudicating the case, and that it should also be analysed whether the unequal treatment is a suitable and necessary measure, proportional in the narrow sense.

JUSTIFICATIONS OF THE PARTICIPANTS IN THE PROCEEDING

8. In its appeal in cassation the Government of the Republic applied for the annulment of the circuit court judgment and for the upholding of the administrative court judgment. The appellant in cassation argues the following:

1) Pursuant to § 2(2)6) of the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia Act, the USSR State Security Committee - KGB (Komitet Gosudarstvennoy Bezopasnosti) is a security and intelligence organisation for the purposes of this Act. The SSC of ESSR was subordinated to the USSR KGB. As the Citizenship Act does not enumerate the organisations which should be regarded as security or intelligence organisations, it is necessary to be guided by the list provided in the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia Act, and consequently the SSC of ESSR is a security organisation of a foreign state. Furthermore, the name of the organisation is an indication that its aims were related to security;

2) On the basis of directive no 33 of 16 February 1978, the personnel department of the SSC of ESSR has made an entry in the employment record book of T. Gorjatšova, that she was employed as an executive secretary since 14 February 1978; and on the basis of directive no 85 of 8 May 1979, that she was released from employment on her own request under § 35 of the Labour Code. On the basis of entries in the employment record book it has been unambiguously ascertained that T. Gorjatšova had been employed by a security organisation on the basis of an employment contract;

3) The concept of employment in a security service, for the purposes of § 21(1)5) of the CA, which entered into force on 1 April 1995, can be defined through the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia Act, which entered into force on 28 March 1995. The term “being employed by security services” can be determined through the analogous term used in the Act which had entered into force earlier;

4) Clauses 5) and 6) of § 21(1) of the Citizenship Act clearly differentiate employment and service. As § 21(1)5) establishes expressis verbis that the fact of having been employed by foreign services is a condition for refusal to grant Estonian citizenship, and it has been established that T. Gorjatšova meets this condition, the contested order of the Government of the Republic is lawful;

5) The purpose of the Citizenship Act is to preclude the granting of citizenship to a person who had

something to do with a foreign security organisation, irrespective of whether the person was employed on the basis of an employment contract or he or she was in active service. This is what the wording of § 21(1)5) of the CA “has been employed by foreign security services” refers to.

In its supplementary opinion submitted to the general assembly of the Supreme Court, the Government of the Republic argues that § 21(1)5) of the CA is not in conflict with the principle of equal treatment.

Pursuant to § 8 of the Constitution the conditions and procedures for the acquisition, loss and restoration of Estonian citizenship, including the grounds for refusal to grant citizenship, shall be provided by the Citizenship Act.

The Citizenship Act does not draw a line depending whether a person was employed in the intelligence or security organisation in a post where he or she performed support tasks or not, because a person has access to sensible information also when performing support tasks. As the majority of documents related to the State Security Committee of ESSR were taken out of Estonia and given over to the Russian Federation or destructed after the disintegration of the USSR, it is no longer possible to check ex post facto who and to what extent could access such information.

The principle of equal treatment requires that equal situations must be treated equally. In a situation where there is no possibility to check the exact duties of the person applying for citizenship during his or her employment in intelligence or security organisations, it can not be stated for sure that a person does not constitute a danger to the national security. That is why § 21(1)5) of the CA is applied equally to all persons who have been employed by foreign intelligence or security services.

Pursuant to international law each state has the right to decide who its citizens shall be. Neither the Constitution nor the international law establishes a subjective right to acquire citizenship by naturalisation to anyone, including stateless persons.

The scopes of application of clauses 3) and 5) of § 21(1) of the Citizenship Act do not overlap, because clause 3) includes persons who have acted against the Republic of Estonia security outside intelligence or security organisations and either alone or in a group.

9. T. Gorjatšova requests that the appeal in cassation be not satisfied and that the circuit court judgment be upheld, and she argues the following:

1) The Government of the Republic is wrong to proceed from the mere grammatical interpretation of § 21(1)5) of the CA. The application of § 21(1)5) of the CA upon adjudication of her application violates the principle of proportionality. The opinion of the Government of the Republic that close connections of T. Gorjatšova with Estonia, the fact that she is loyal to the state, that her husband is an Estonian citizen, etc., are of no relevance for the adjudication of the administrative matter, is wrong. The referred facts render it possible for the authorities to assess, upon the application of the law, whether and how dangerous a person is for the national security;

2) Regarding members of the technical staff as persons referred to in § 21(1)5) of the CA is in conflict with Article 26 of the UN Covenant on Civil and Political Rights, ratified by Estonia in 1991, which guarantees the equality before the laws and establishes a general prohibition of discriminating provisions in the laws. The will of the legislator was to preclude the acquisition of Estonian citizenship to persons who had been in active military service in the SSC of ESSR and whose activities were, thus, directed against the Estonian state and its security. T. Gorjatšova worked as an ordinary executive secretary on the basis of an employment contract;

3) The definition established in § 4(1) of the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia Act should be used only when applying the referred Act itself, because this provision clearly and unambiguously underlines that being in service in

security organisation is, for the purposes of the Act, is employment as staff employee of a security organisation. The Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia Act and the Citizenship Act have different scopes of application and their terminology need not necessarily be the same. This conclusion is supported by § 3(2) of the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia Act, which uses the term "stateless person", a term that is not used in other Estonian legislation.

In her supplementary opinion submitted to the general assembly of the Supreme Court T. Gorjatšova argues in addition to the aforesaid that § 21(1)5) of the CA is in conflict with the principle of proportionality, included in § 11 of the Constitution.

Pursuant to §§ 1 and 10 of the Constitution Estonia is a democratic state wherein the general principles of law recognised in the European legal space are valid. The Constitution and the laws which are in conformity therewith must guarantee the creation and preservation of a stable society. The aims of laws must be permanent and understandable.

The legitimate aim of the restriction established by the legislator is not clear. It is incomprehensible why the granting of citizenship to a person whose activities have never been directed against the Estonian state or its citizens, is precluded by law. The respondent doubts the necessity and proportionality in the narrow sense of § 21(1)5) of the CA.

10. The Constitutional Committee of the Riigikogu argues that § 21(1)5) of the CA is not in conflict with the Constitution.

The Constitutional Committee of the Riigikogu points out that pursuant to the Constitution a person has no subjective right to acquire citizenship by naturalisation. Under international law each state has a sovereign right to decide on the conditions for the acquisition of citizenship. The legislator is competent to form citizenship policy and regulate by Citizenship Act the conditions for the acquisition of citizenship by naturalisation.

The employees who have performed support functions in foreign intelligence or security services are not equal to the persons who have not been employed by foreign intelligence services. When assuming employment in a foreign intelligence or security service the person must have known where she was commencing work and what her duties would be.

§ 21(1)5) of the CA establishes an absolute prohibition to grant or restore Estonian citizenship to a person who has been employed by a foreign intelligence or security service, because the Republic of Estonia has no possibility to check the activities of the employees of an intelligence or security service of another state or what their work consists in. No exceptions to this prohibition could be established by law. In principle, a court, when interpreting the Act, can differentiate between approaches based either on organisation or service.

11. The Chancellor of Justice is of the opinion that § 21(1)5) of the CA is not in conflict with the Constitution.

The Chancellor of Justice argues that § 21(1)5) of the CA can not be interpreted to the effect that it permits to grant citizenship by naturalisation to persons who have been employed by an intelligence organisation of a state which has occupied Estonia, but who have not performed tasks specific for a security organisation.

It appears from the explanatory letter to the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia Act, that the technical and support staff of security organisations was not excluded from the scope of application of this Act, because there have been

cases when those who had been employed as support staff had actually and directly been engaged in the collection of intelligence or surveillance of persons. Furthermore, the state has no archival data about which persons actually performed the duties specific for intelligence or security services.

In 2003 the general assembly of the Supreme Court underlined that upon establishing norms regulating the acquisition and loss of citizenship the legislator must take into account the rights and freedoms established in the Constitution, and that an important fundamental right which the legislator must consider when regulating citizenship is the fundamental right to equality and the prohibition of discrimination.

Although the European Court of Human Rights has repeatedly outlined that the issues related to granting of citizenship are not within the sphere of protection of the Convention for the Protection of Human Rights and Fundamental Freedoms or its additional protocols, the Court has found that arbitrary refusal to grant citizenship may, in exceptional circumstances, raise a question of possible violation of Article 8 of the Convention. The dispute over the refusal to grant citizenship to T. Gorjatšova contains no such exceptional circumstances, because the refusal to grant citizenship does not involve significant negative effect on the private and family life of the person.

The determination of conditions for granting of citizenship is, pursuant to international law, a manifestation of a state's sovereignty; hence it is problematic whether general right to equality is at all applicable in this context. At the utmost it is the procedure for granting citizenship that should conform to the general right of equality. As a person has no subjective right to acquire citizenship by naturalisation, the acquisition of this subjective right through the general fundamental right to equality is not justified.

It proceeds from the Constitution that there is a special bond of trust and loyalty between the Republic of Estonia and its citizens. This is the reasons why the Republic of Estonia is entitled to refuse to grant citizenship to a person in whose loyalty to the Republic of Estonia it can not be absolutely sure. The Republic of Estonia lacks a complete overview of the activities of foreign intelligence and security services and their employees, and it is impossible to get such an overview. Also, while working in the intelligence and security services, persons inevitably learn about the means and methods of performing duties specific for intelligence and security services and they meet those persons who actually perform these tasks. The latter may, later on, try to recruit those who have performed support functions in intelligence service to perform intelligence or security tasks, or to blackmail them. Therefore the person constitutes a threat to the national security of the Republic of Estonia, and the law differentiates the persons who performed support tasks when employed by foreign intelligence services from those persons who performed support functions outside foreign intelligence services. Consequently, the referred groups of persons are essentially different. This also constitutes a reasonable and appropriate justification for the unequal treatment of the groups.

12. The Minister of Justice is of the opinion that § 21(1)5) of the CA is not in conflict with the principle of equal treatment arising from § 12 of the Constitution.

The Minister of Justice does not agree with the opinion of the circuit court that there is no reason to consider T. Gorjatšova more dangerous than the persons who have not been employed by a foreign security organisation and to whom citizenship may be granted. The commencement of work in a foreign intelligence or security service, the selection of the person and his employment in the foreign intelligence or security organisation, is not equivalent to any other work in an ordinary enterprise or institution. The persons who had worked outside foreign intelligence or security services have no relation to foreign intelligence or security services, or the performance of the duties thereof. It is impossible to exclude the possibility that the person, while employed as an executive secretary, did not actually perform the principal functions of the intelligence or security service as additional tasks or in some other way.

Thus, the groups of persons suggested by the Administrative Law Chamber of the Supreme Court are different groups who do not have to be treated equally, and the unequal treatment of these persons does not violate the principle of equal treatment.

When comparing, upon application for citizenship, those persons the main function of whose office was not the performance of the essential duties of an agency, with those persons who performed such duties, it has to be regarded for the above reasons that the unequal treatment of these persons is in conformity with the principle of equal treatment.

If the Court should, nevertheless, find that the groups of persons are comparable, the unequal treatment of these groups is still justified. Citizenship constitutes a close and important bond between a state and its citizens, involving special reciprocal rights and obligations, including the possibility of a citizen, in whom the supreme power of state is vested, to direct the development and fate of the state. The persons who are or had been employed by foreign intelligence or security services constitute a threat to the national security of the Republic of Estonia, which – pursuant to the preamble and § 1 of the Constitution – is a constitutional value. Although it is clear, that the persons employed by such organisations have different duties, the Republic of Estonia has no actual possibility to establish what the person is or was doing in the organisation. Furthermore, the reliability of evidence may be suspicious, as only indirect evidence could be found. That is why the prohibition to grant citizenship is applicable to all persons who have been or currently are employed by foreign intelligence or security services.

CONTESTED PROVISION

13. § 21(1)5) of the Citizenship Act provides as follows:

“§ 21. Refusal to grant or refusal for resumption of Estonian citizenship

(1) Estonian citizenship shall not be granted to or resumed by a person who:

[...]

5) has been employed or is currently employed by foreign intelligence or security services;”

OPINION OF THE GENERAL ASSEMBLY

14. First, the general assembly of the Supreme Court shall decide whether this is a relevant norm, the review of constitutionality of which is permissible (I). Thereafter the general assembly shall analyse whether § 21(1)5) of the Citizenship Act is in conformity with the Constitution (II). Finally, the general assembly shall adjudicate the appeal in cassation of the Government of the Republic (III).

I.

15. The Administrative Law Chamber of the Supreme Court has initiated a constitutional review proceeding for controlling whether § 21(1)5) of the CA was constitutional. Pursuant to § 14(2) of the Constitutional Review Court Procedure Act a provision the constitutionality of which the Supreme Court assesses must be relevant. Pursuant to the established practice of the Supreme Court a provision is relevant if it is of decisive importance for the adjudication of the case.

16. The Tallinn Circuit Court found that § 21(1)5) of the CA did not exclude the possibility of granting citizenship to those persons who had been employed by a foreign security service, but who did not perform duties specific for security organisations. According to the interpretation rendered by the Tallinn Circuit Court, § 21(1)5) of the CA is not a norm relevant for this constitutional review case and the constitutional review thereof would not be permissible.

The wording of § 21(1)5) of the CA does not allow for the interpretation rendered by the Tallinn Circuit Court. The Government of the Republic interpreted § 21(1)5) of the CA correctly, finding that it precludes the granting of citizenship to T. Gorjatšova by naturalisation.

On the basis of the aforesaid the general assembly is convinced that § 21(1)5) of the CA was of decisive importance for the Administrative Law Chamber in adjudicating the appeal in cassation of the Government

of the Republic. Consequently, this is a relevant norm the constitutionality of which the general assembly shall review.

II.

17. The Administrative Law Chamber of the Supreme Court requests that the general assembly review the conformity of § 21(1)5) of the CA with the principle of equal treatment arising from § 12 of the Constitution.

18. The general assembly continues to hold that as a rule the international law leaves the precise conditions for acquisition of citizenship to be decided by each state, and the citizenship policy, the formation of which is within the competence of the Riigikogu, determines the conditions for acquisition of citizenship by naturalisation. The Constitution does not provide for a subjective right to acquire citizenship by naturalisation as a fundamental right. But when enacting norms regulating the acquisition and loss of citizenship the legislator must take into account the fundamental rights and freedoms established in the Constitution. Important fundamental rights to be taken into consideration by the legislator upon regulation of citizenship are the fundamental right to equality and prohibition of discrimination (see judgment of the general assembly of the Supreme Court of 10 December 2003 in matter no 3 3 1 47 03, paragraph 23).

19. T. Gorjatšova has argued both in her appeal and her appeal in cassation that regarding members of the technical staff as persons referred to in § 21(1)5) of the CA is in conflict with Article 26 of the UN Covenant on Civil and Political Rights, ratified by Estonia in 1991, which guarantees the equality before the laws and establishes a general prohibition of discriminating provisions in the laws.

The general assembly considers it necessary to point out that to the extent referred to by T. Gorjatšova, Article 26 of the UN Covenant on Civil and Political Rights is covered by §§ 12 and 13 of the Constitution of the Republic of Estonia. Therefore, there is no need to examine separately whether § 21(1)5) of the CA is in conformity with Article 26 of the Covenant.

20. There is an infringement of the general right to equality, established in § 12(1) of the Constitution in the case of unequal treatment (see judgment of the Constitutional Review Chamber of the Supreme Court of 6 March 2002 in matter no 3 4 1 1 02 – RT III 2002, 8, 74, paragraph 13). § 12(1) of the Constitution must also be interpreted to mean equality before the law – the laws must, in substance, treat equally all persons who are in a similar situation. This principle manifests the idea of substantial equality: equals must be treated equally and unequals unequally. Yet, not each case of unequal treatment of equals amounts to a violation of the right to equality. The prohibition to treat equal persons unequally has been violated if two persons, groups of persons or situations are treated arbitrarily unequally. If there is a reasonable and appropriate cause, unequal treatment in legislation is justified (see judgment of the Constitutional Review Chamber of the Supreme Court of 3 April 2002 in matter no 3 4 1 2 02 – RT III 2002, 11, 108, paragraph 17).

21. Next, the general assembly shall analyse whether § 21(1)5) of the CA, applied in regard to T. Gorjatšova and establishing that Estonian citizenship shall not be granted or restored to a person who has been employed by foreign intelligence or security services, is in conformity with § 12(1) of the Constitution.

22. The Administrative Law Chamber was of the opinion that when adjudicating the matter the general assembly should answer the question whether it was in conformity with the principle of equal treatment that upon granting citizenship by naturalisation the persons who had performed support functions, not functions specific for intelligence or security organisations, while employed by foreign intelligence or security services are treated differently from the persons who had performed the same functions but had not been employed by a foreign intelligence organisation.

23. The issue of whether unequal treatment of two persons, groups of persons or situations was justified or unjustified (i.e. arbitrary), can arise only if the groups who are treated unequally are comparable, that is comparable from the aspect of concrete differentiation in analogous situations (see judgment of the general

assembly of the Supreme Court of 27 June 2005 in matter no 3 4 1 2 05, paragraph 40).

The general assembly argues that the persons who have performed support functions in intelligence and security services, and the persons who have performed support functions outside intelligence or security services, are not comparable. These groups of persons were not in analogous situations, because the persons performing support functions in an intelligence or security service were, perforce, in contact with the performance of the main functions of the organisation, and at least created – through their work the conditions for the performance of the main functions of the organisation. Furthermore, there is no possibility to establish for sure which functions were actually performed by the persons employed by a foreign security service, and to form comparable groups on the basis thereof.

24. As the general fundamental right to equality requires that persons who are in a similar situation must be treated equally, an infringement of the general fundamental right to equality consists in unequal (different) treatment of persons who are in a similar situation. In the present case the issue which have been raised is whether different treatment upon granting citizenship of persons who are in different situations is constitutional, and thus there is no infringement of the general fundamental right to equality.

25. It does not appear on the basis of the established facts that T. Gorjatšova had been treated unequally (differently) in comparison to some other group of persons in a similar situation, when she was refused the citizenship. Consequently, § 21(1)5) of the CA, which served as the basis for refusal to grant citizenship to T. Gorjatšova, is not in conflict with the principle of equality before the law arising from § 12(1) of the Constitution.

26. T. Gorjatšova has argued both in her appeal and in the appeal in cassation that the fact that her person and her personal situation were not taken into consideration upon deciding on the grant of citizenship is in conflict with the principle of proportionality.

27. § 11 of the Constitution refers to rights and freedoms, without specifying any of these. This article is a central norm embracing all fundamental rights, containing fundamental principles of interpretation and application of fundamental rights, freedoms and obligations. § 11 of the Constitution permits to restrict rights and freedoms on three conditions only. Firstly, rights and freedoms may be restricted only in accordance with the Constitution; secondly, the restrictions must be necessary in a democratic society, and thirdly, the restrictions must not distort the nature of the rights and freedoms restricted. (See judgment of the general assembly of the Supreme Court judgment of 11 October 2001 in matter no 3 4 1 7 01, paragraph 12).

The principle of proportionality derives from the second sentence of § 11 of the Constitution, pursuant to which the restrictions of rights and freedoms must be necessary in a democratic society. The courts examine the conformity with the principle of proportionality on three successive levels – first the suitability, next the necessity and, if necessary, also the proportionality of the measure in the narrower sense or the reasonableness. If a measure is manifestly unsuitable, there is no need to review the necessity and reasonableness of the measure in the narrower sense. If a measure is suitable but is not necessary, there is no need to review the reasonableness thereof. A measure that fosters the achievement of a goal is suitable. For the purposes of suitability a measure, which in no way fosters the achievement of a goal, is indisputably disproportionate. The requirement of suitability is meant to protect a person against unnecessary interference of public power. A measure is necessary if it is not possible to achieve a goal by some other measure which is less burdensome on a person but which is at least as effective as the former. In order to determine the reasonableness of a measure the extent and intensity of interference with a fundamental right on the one hand and the importance of the aim on the other hand have to be weighed (see the judgment of the Constitutional Review Chamber of the Supreme Court of 6 March 2002 in matter no 3 4 1 1 02, paragraph 15: the judgment of the general assembly of the Supreme Court of 17 March 2003 in matter no 3 1 3 10 02, paragraph 30).

28. T. Gorjatšova has not specified which of her fundamental rights, besides the general fundamental right to equality, is infringed by § 21(1)5) of the CA. As by nature § 21(1)5) of the CA is a norm of substantive law,

there can be no infringement of the right to procedure and organisation. The general assembly is of the opinion that besides the general fundamental right to equality § 21(1)5) of the CA infringes no other fundamental right. Therefore the Supreme Court does not find it possible to analyse T. Gorjatšova's allegations of the violation of the principle of proportionality.

III.

29. Next, the general assembly shall adjudicate the appeal in cassation of the Government of the Republic.

30. In its appeal in cassation the Government of the Republic applies for the annulment of the judgment of the Tallinn Circuit Court, annulling the Government of the Republic order no 433 of 11 July 2005, and for the upholding of the Tallinn Administrative Court judgment. The appellant in cassation is of the opinion that the objective of § 21(1)5) of the CA is to preclude the granting of citizenship to a person who had been in contact with a foreign security organisation, irrespective of whether the person worked in the intelligence or security organisation under an employment contract or was in its service.

31. In this case there is no dispute about the fact that from 14 February 1978 until 8 May 1979 T. Gorjatšova had been employed by the SSC of ESSR as an executive secretary and senior executive secretary.

32. The general assembly is of the opinion that § 21(1)5) of the CA can not be interpreted the way it was interpreted by the Tallinn Circuit Court. § 21(1)5) of the Citizenship Act prohibits, in absolute terms, excluding exceptions and discretion, to grant Estonian citizenship to a person who has been a salaried worker of an intelligence or security service.

To motivate its judgment the circuit court has made a reference to the opinion of the general assembly of the Supreme Court that in the case of different possibilities of interpretation the Constitution-conforming interpretation should be preferred to others that are not in conformity with the Constitution, and on the basis of this opinion the circuit court has found that § 21(1)5) of the CA can be interpreted to the effect that not all persons who currently work or have worked in a foreign security service fall under the regulation of this norm.

The general assembly is of the opinion that this opinion of the circuit court is not justified and that the circuit court has exceeded the limits of interpretation. This is not a case of different possibilities of interpretation of the contested norm, which would constitute a general ground to raise the question of Constitution-conforming interpretation. The different possibilities of interpretation of a norm must arise from the norm itself; in the adjudication of this case it is not possible to derive or conclude from the norm itself different possibilities of interpretation, because the term "employment" includes all paid employment, be it on the basis of employment or service contract.

33. As in this case the unconstitutionality of § 21(1)5) of the AC has not become evident, and the general assembly has come to hold that the provision can not be interpreted in a restrictive manner to exclude the application thereof to T. Gorjatšova, the case must be adjudicated on the basis of this very norm. Consequently, the Tallinn Circuit court has applied § 21(1)5) of the CA in regard to T. Gorjatšova in a wrong manner, and has erroneously annulled the contested order of the Government of the Republic.

34. For the reasons described above the general assembly hereby satisfies the appeal in cassation of the Government of the Republic and annuls the Tallinn Circuit Court judgment of 25 August 2006 in administrative matter no 3-05-641 due to erroneous application of a substantive law provision. The general assembly upholds the Tallinn Administrative Court judgment of 23 December 2005 in administrative matter no 3-1037/2005, by which the action of T. Gorjatšova was dismissed and the Government of the Republic order no 433 of 11 July 2005, based on § 21(1)5) of the CA, on the refusal to grant citizenship to T. Gorjatšova by naturalisation was upheld.

DISSENTING OPINION of justice Jüri Põld
to the judgment of the general assembly of the Supreme Court no 3-3-1-101-06,
joined by justices Tõnu Anton, Jüri Ilvest, Indrek Koolmeister, Julia Laffranque and Harri Salmann

1. In the case adjudicated by the general assembly the object of concrete norm control was not § 21(1)5) of the CA to the extent that it concerns a person who is employed by a foreign security service or a person who had earlier been employed by a foreign security service, performing the basic functions of the referred service. § 21(1)5) of the CA was the object of concrete norm control only to the extent that it concerns a person who had performed support tasks in the SSC of ESSR. The dissenting opinion shall concern only the referred group of persons and does not extend to those persons who at the time of submission of application for citizenship are employed by a foreign security service irrespective of their office, or who have earlier been employed by a referred service, performing the main functions of the service.

2. I agree with the opinion of the majority of the general assembly that § 21(1)5) of the CA excludes any discretion upon hearing the applications for the acquisition of Estonian citizenship submitted by persons who have been employed by a foreign intelligence or security service. According to this provision the grant of citizenship must be refused when it has been ascertained that a person has worked in a foreign intelligence or security service, no matter when and no matter in what office.

What I can not agree with is the reasoning followed by the majority of the general assembly to reach the conclusion that § 21(1)5) of the CA is not in conflict with the general right to equality and does not infringe the right to organisation and procedure. I hold that the general assembly avoided addressing the substance of the matter. As regards the general right to equality, the general assembly avoided proceeding from the facts ascertained by the circuit court. The general assembly discharged itself from the duty to analyse whether the right to organisation and procedure was restricted constitutionally by the finding that the referred fundamental right had not been infringed at all.

3. Another substantial issue was whether § 21(1)5) of the CA was constitutional to the extent on the basis of which the Government of the Republic automatically dismissed T. Gorjatšova's application, without exercising discretion, with the justification that from 14 February 1978 until 8 May 1979 T. Gorjatšova had been employed as an executive secretary and senior executive secretary of the SSC of ESSR.

4. I argue that on a more general level the problem under discussion boils down to whether a person may be regarded as an object of the state power, the decisions concerning whom are made on the basis of collective characteristics, without evaluating a concrete person. I admit that as regards certain decisions the regulation not allowing for the right of discretion may be constitutional. The constitutionality of a regulation prohibiting discretion can be recognised, by way of exception, also when the characteristic preventing the exercise of discretion accompanies a person throughout his or her life. Yet, to justify the lack of discretion the legislator must have a special reason. When the lack of discretion has not been duly justified and the lawful reasons for the lack of discretion are not obvious, this amounts to regarding a person as an object of the state power, which is in conflict with the principle of human dignity.

5. The substantial issue, in the present case the constitutionality of § 21(1)5) of the CA from the aspect of equal treatment, can be adjudicated within concrete norm control on the basis of ascertained facts. A judgment of the Supreme Court must be based on the facts ascertained by lower court instances and/or on the facts ascertained by the Supreme Court itself on the basis of § 50(2) of the Constitutional Review Court Procedure Act, and/or on a fact which the court deems to be a matter of common knowledge pursuant to § 231 of the Code of Civil Procedure.

6. The majority of the general assembly has circumvented the main issue without even trying to ascertain the object of § 21(1)5) of the CA, and has "resolved" the case by the abstract reasoning in the second section of paragraph 23, without having collected the evidence itself and yet ignoring what had been ascertained by the circuit court.

7. The second section of paragraph 23 of the general assembly's judgment reads as follows: "The general assembly argues that the persons who have performed support functions in intelligence and security services, and the persons who have performed support functions outside intelligence or security services, are not comparable. These groups of persons were not in analogous situations, because the persons performing support functions in an intelligence or security service were, perforce, in contact with the performance of the main functions of the organisation, and at least created – through their work the conditions for the performance of the main functions of the organisation. Furthermore, there is no possibility to establish for sure which functions were actually performed by the persons employed by a foreign security service, and to form comparable groups on the basis thereof."

7.1. I do not consider it right that in the constitutional review proceeding the lawfulness of a negative consequence, accompanying a person throughout his or her life, is substantiated solely by the statement that persons belonging to a certain group "were, perforce, in contact with the performance of the main functions of the organisation, and at least created – through their work the conditions for the performance of the main functions of the organisation". It is known from the recent history of Estonia that automatic negative consequences, imposable by the state without discretion, were justified by the fact that a person had performed something connected to a crime after the commission thereof. I am of the opinion that to justify the negative consequences applicable to a person the activities of the person must be ascertained.

7.2. I find that the opinion that that there is no way at all to establish for sure which functions a person actually performed while working in a foreign security service, is remote from life and can not possibly be valid in regard to all employees of the security organisations of the USSR, which were active in Estonia for decades. In any case, the opinion of the majority of the general assembly can not be deemed to be a matter of common knowledge for the purposes of § 231 of the Code of Civil Procedure. I can not consider it true that it is not at all possible to establish the functions of the support personnel of the security organisations of the totalitarian regime that operated in Estonia. As regards the impossibility to ascertain the tasks that had to be performed, the established administrative practice proves that the actual functions of even the regular officers of the SSC of ESSR have been ascertained. For example, it has been possible to establish in the Government of the Republic order no 420-k of 12 May 1998, that from 1980 to 1989 a person, having the rank of Major, had been employed in the department II of the SSC of ESSR as an intelligence agent in the field of foreign tourists. His functions consisted in gathering information about and finding out the contacts of foreign tourists visiting Estonia (RTL 1998, 169/170, 645).

8. In paragraph 25 of the judgment the majority of the general assebly is of the following opinion: „It does not appear on the basis of the established facts that T. Gorjatšova had been treated unequally (differently) in comparison to some other group of persons in a similar situation, when she was refused the citizenship. Consequently, § 21(1)5) of the CA, which served as the basis for refusal to grant citizenship to T. Gorjatšova, is not in conflict with the principle of equality before the law arising from § 12(1) of the Constitution."

8.1. The referred facts established by the circuit court in regard to T. Gorjatšova remain a mystery to me while reading the reasoning of the judgment of the general assembly.

8.2. In order to understand where the problem lies in the present case it is necessary to adequately present the reasoning of and the facts ascertained by the circuit court. In paragraph 8 of its judgment the circuit court has found the following:

"The duration of employment, the qualifications of the person, her office and the lack of position of military rank can indicate that the person's testimony about her work-related activities in a security service of a state which has occupied Estonia is credible. In the present case the appellant was employed as an executive secretary and senior executive secretary of the SSC of ESSR, before that she had worked as a controller in the Pöögelmann electrical engineering plant, as a mounter in the "Punane RET" plant, later on as a technician in a motor depot, as a salesperson in the AS Bertal and as a technician in the OÜ E-Rigonda. The

appellant was employed in the SSC of ESSR for less than one year and three months. According to the testimony of the appellant she was involved only in formal matters, receiving, sorting, registering and distributing correspondence.

The Circuit Court is of the opinion that bearing in mind the specificity of this work there is no reason to regard the appellant as more dangerous in comparison to other persons who have not been employed by a security organisation of a state which has occupied Estonia. There can be a threat to the security of the state only if a person has relevant training or practical experience, enabling him or her to work for a security organisation of another state in the future."

8.3. In my opinion the general assembly has completely ignored that the circuit court has ascertained that bearing in mind the specificity of T. Gorjatšova's work there is no reason to regard her as more dangerous in comparison to other persons who have not been employed by a security organisation of a state which has occupied Estonia. I am convinced that the majority of the general assembly did not wish to proceed from the facts ascertained by the circuit court in regard to T. Gorjatšova. The general assembly has totally ignored these facts and has failed to point out in the reasoning of the judgment whether the circuit court has violated the procedural law when ascertaining these facts. The circuit court judgment was annulled because of wrong application of a norm of substantive law (paragraph 34 of the general assembly's judgment).

8.4. I argue that on the basis of the facts ascertained by the circuit court it would have been possible for the general assembly to form comparable groups. When the groups pointed out in the ruling of the Administrative Law Chamber of the Supreme Court and in the judgment of the Tallinn Circuit Court were not considered to be comparable, it would have been possible to differentiate some other comparable groups. It is inconceivable that a certain group is so peculiar that it can be compared to no one.

9. The majority of the general assembly hold that as § 21(1)5) of the CA is by nature a norm of substantive law there can be no infringement of the right to organisation and procedure (paragraph 28 of the judgment).

I can not agree with this view. Namely, the possibility and extent of discretion in administrative procedure are clearly defined not by procedural law but by the substantive law. In the present case the situation is exactly that § 21(1)5) of the CA, as a norm of substantive law, determines the limits of administrative procedure, excluding the substantive hearing of matters in administrative procedure. That is why I am of the opinion that the infringement of the right to organisation and procedure should have been recognised in the general assembly's judgment, and after the recognition of the existence of the infringement the general assembly ought to have analysed whether the regulation which does not allow to exercise discretion when deciding on the grant of citizenship was a constitutional interference into the right to organisation and procedure. The general assembly freed itself from the analysis of the problem by finding that there was no infringement of the right to organisation and procedure. I hold that consenting to the opinion of the majority of the general assembly would mean, in essence, consenting to the opinion that the right to organisation and procedure is also guaranteed by such system of substantive norms that reduces decision-making to a succession of mechanical operations.

Jüri Põld, Tõnu Anton, Jüri Ilvest, Indrek Koolmeister, Julia Laffranque and Harri Salmann

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