Constitutional judgment 3-3-1-47-03

JUDGMENT
OF THE SUPREME COURT EN BANC

No. of the case	3-3-1-47-03
Date of judgment	10 December 2003
Composition of court	Chairman Uno Lõhmus and members Tõnu Anton, Jüri Ilvest, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Jaano Odar, Jüri Põld, Harri Salmann, Tambet Tampuu and Peeter Vaher.
Court Case	Viktor Fedtšenko's action applying for the annulment of decision no. 382 of the social benefits dispute committee of the Social Insurance Board and for requiring the committee to carry out a medical assessment.
Disputed judgment	Judgment of the Tallinn Circuit Court of 31 January 2003 in administrative matter no. 2-3/31/2003 and judgment of the Tallinn Administrative Court of 1 February 2002 in administrative matter no. 3-236/2002.
Basis of proceeding	Viktor Fedtšenko's appeal in cassation
Court hearing	Written proceeding

DECISION

1. To declare § 35(2)2) of the Citizenship Act invalid to the extent that it does not allow to exempt from compliance with the conditions provided for in § 6(3) and (4) of the Citizenship Act a person who is unable to comply with such requirements due to poor hearing.

2. To declare that § 35(4) of Citizenship Act (in the wording in force since 10 July 2000 until 9 November 2002) was unconstitutional to the extent that it required that in order to be exempted from compliance with the conditions provided for in § 6(3) and (4) of the Citizenship Act a person who was unable to comply with such conditions due to poor hearing had to be with a moderate disability and that the existence of the moderate disability had to be ascertained by a decision made on the basis of a medical assessment pursuant to the procedure established on the basis of the State Pension Insurance Act.

3. To allow V. Fedtšenko's appeal in cassation in part.

4. To annul the judgment of the Tallinn Administrative Court of 1 February 2002 in administrative matter no. 3-236/2002 and the judgment of the Tallinn Circuit Court of 31 January 2003 in administrative matter no. 2-3/31/2003 and to render a new judgment in the matter.

5. To annul decision no. 382 of the social benefits dispute committee of the Social Insurance Board of 11 July 2001.

6. To dismiss the action of V. Fedtšenko to the extent that he applied for requiring the committee to carry out a medical assessment.

7. To return the security.

FACTS AND COURSE OF PROCEEDING

1. On 31 August 2000 an ear, nose and throat specialist issued a consultative decision concerning Viktor Fedtšenko (born 1 January 1932) who does not have Estonian citizenship, in which he found that Viktor Fedtšenko's loss of hearing of one ear was 100% and loss of hearing of the other ear was 99% and that even a hearing aid would be of no help to the patient. The decision contained a request that the Disability Assessment Committee determine the degree of severity of the disability. The Tallinn Disability Assessment Joint Committee (hereinafter "the DAC") found in its decision that the extent of the functional impairment and the amount of personal assistance referred to in the doctor's request remain below the threshold necessary for the ascertainment of disability and the committee did not ascertain V. Fedtšenko's disability. Medical experts of medical assessment department of the Social Insurance Board found in the decision of 15 February 2001 concerning a further expert assessment that the DAC decision was correct. Pursuant to § 2(1)3) of the Social Benefits for Disabled Persons Act there is no reason for determining V. Fedtšenko's disability because he does not need personal assistance, guidance or supervision. By its decision no. 6 of 2 March 2001 the social benefits dispute committee of the Social Insurance Board found that the decision concerning further expert assessment was justified and found that there was no medical reason for ascertaining the severity of V. Fedtšenko's disability. V. Fedtšenko contested the social benefits dispute committee decision no. 6 of 2 March 2001 in an administrative court, and the administrative court terminated the proceeding because the dispute committee declared the referred decision invalid by clause 2 of its decision no. 382 of 11 July 2001.

Clause 1 of the same decision no. 328 of 11 July 2001 stated that V. Fedtšenko had no disability that would, for the purposes of § 35(2)2) of the Citizenship Act (hereinafter "the CiA"), serve as the basis for exempting him from compliance with the conditions provided for in § 6(3) and (4) of the same Act. According to the decision the social benefits dispute committee was of the opinion that the changes caused by illness do not cause for V. Fedtšenko the need for personal assistance.

2. In his action filed with the Tallinn Administrative Court V. Fedtšenko requested the annulment of decision no. 328 of the social benefits dispute committee of 11 July 2001, and that the court require the committee to conduct a medical assessment to ascertain whether he has a moderate hearing disability corresponding to § 35(2)2) of the CiA. The complainant has not requested for personal assistance, instead he requested that the severity of his disability be assessed for the purposes of § 35(2)2) of the CiA, that it be

assessed whether he, with his hearing impairment, was able to acquire the Estonian language and comply with the requirements set for the acquisition of citizenship.

3. By its judgment of 1 February 2002 in administrative matter no. 3-236/2002 the Tallinn Administrative Court dismissed V. Fedtšenko's action. By its judgment of 31 January 2003 in administrative matter no. 2-3/31/2003 the Tallinn Circuit Court dismissed V. Fedtšenko's appeal.

4. V. Fedtšenko filed an appeal in cassation, in which he requested that the judgments of the Tallinn Circuit Court and the Tallinn Administrative Court be annulled and the matter referred to a first instance court for a new hearing.

5. By its ruling of 13 June 2003 in administrative matter no. 3-3-1-47-03 the Administrative Law Chamber of the Supreme Court referred the appeal in cassation to the Supreme Court *en banc* for review, because the Chamber was of the opinion that subsections (2)2) and (4) of § 35 of the CiA in force since 10 July 2000 until 9 November 2002 may have been in conflict with §§ 11, 12 and 13 of the Constitution.

PERTINENT PROVISIONS

6. Since 10 July 2000 until 9 November 2002 subsections (2)2) and (4) of § 35 of the CiA were in force in the following wording (RT I 2000, 51, 323):

"§ 35. Special conditions for acquisition of Estonian citizenship

[…]

(2) The following persons are exempted from compliance with the conditions provided for in clauses 6 3) and 4) of this Act:

[…]

2) persons with a moderate disability who are unable to comply with such conditions due to a visual, hearing or speech impairment.

[…]

(4) A person with a severe, profound or moderate disability specified in subsection (2) of this section, shall, instead of documents specified in clauses 12 (2) 7)–8) of this Act submit the decision made on the basis of a medical assessment pursuant to the procedure established on the basis of the State Pension Insurance Act (RT I 1998, 64/65, 1009; 2000, 36, 226) by which the severe, profound or moderate disability is ascertained, and a statement of the attending physician confirming inability to comply with the requirements provided for in clauses 6 3) and 4) of this section."

7. At present, § 35(2)2) is in force in the same wording. The wording of § 35(4) has been amended by now so that reference to the State Pension Insurance Act (hereinafter "the SPIA") has been replaced by reference to the Social Benefits for Disabled Persons Act. The wording of the rest of the provision has remained the same.

8. Since 1 January 2001 until 31 December 2001, § 2(1)1) of the Social Benefits for Disabled Persons Act (RT I 2001, 3 10) was in force in the following wording:

"§ 2 Definitions

(1) Disability is the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person. For the purposes of this Act, there are three degrees of severity of disabilities:

1) profound disability is the loss of or an abnormality in an anatomical, physiological or mental structure or

function of a person as a result of which the person needs constant personal assistance, guidance or supervision twenty-four hours a day;

2) severe disability is the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person as a result of which the person needs personal assistance, guidance or supervision in every twenty-four hour period;

3) moderate disability is the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person as a result of which the person needs regular personal assistance or guidance at least once a month."

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING

9. The Chancellor of Justice is of the opinion that although the reference to the State Pension Insurance Act in subsection (4) of § 35 of the CiA, in force since 10 July 2000 until 9 November 2002, was not correct, it did not constitute a real obstacle to understanding the severity of a disability and the regulation concerning ascertainment thereof. As the degrees of severity of a disability were actually ascertained pursuant to procedure established by legislation issued on the basis of the Social Benefits for Disabled Persons Act, the certain ambiguity of the contested provisions of the Citizenship Act is not sufficient to admit that the provisions are in conflict with the principle of legal clarity. The incorrect reference in the Act did not constitute an essential obstacle for people in understanding the rights and obligations extending to them as required by the principle of legal clarity.

The Chancellor of Justice is of the opinion that § 35(2)2) and § 35(4) of the CiA in the wording in force since 10 July 2000 until 9 November 2002 were in conflict with the prohibition of unequal treatment arising from § 12(1) of the Constitution in conjunction with the obligation to afford disabled persons special treatment established in § 28(4) of the Constitution.

Persons, whose disability was not sufficient for the ascertainment of degree of severity thereof under the Social Benefits for Disabled Persons Act, had to, for the acquisition of citizenship, pass an examination on the Estonian language the knowledge of the Constitution of the Republic of Estonia and of the Citizenship Act on an equal basis with persons without such disability. Thus, upon application for citizenship, unequal persons were treated equally. Pursuant to § 28(4) of the Constitution families with many children and persons with disabilities shall be under the special care of the state and local governments. § 28(4) in conjunction with the principle of equal treatment included in § 12(1) of the Constitution imposed a requirement on the state to treat persons with disabilities fairly - to consider persons with disabilities, upon legislating, in such a way as to enable them to share in the benefits offered by the state in accordance with their specific condition.

10. The dispute committee of the Social Insurance Board is of the opinion that subsections (2)2) and (4) of § 35 of the CiA have not violated the principle of legal clarity to a significant extent. But persons with hearing impairment who need personal assistance and persons with hearing impairment who do not need personal assistance are treated differently, because by way of assessing the need for personal assistance, guidance and supervision it is not possible to assess a person's ability to acquire the Estonian language.

11. The Constitutional Committee of the Riigikogu is of the opinion that although § 35(4) of the CiA in force since 10 July 2000 until 9 November 2002 contained an error of reference, it did not constitute an essential violation of the principle of legal clarity. Interconnecting the language learning ability with the need for personal assistance is not reasonable and infringes upon the principles of equality and proportionality established by the Constitution.

12. The Minister of Justice is of the opinion that the contested regulatory framework, which was in force since 10 July 2000 until 9 November 2000, was in conflict with § 12 of the Constitution (principle of equal treatment), § 14 in conjunction with § 11 (disproportional restriction of rights to organisation and

procedure), as well as with § 13(2) (principle of legal clarity) of the Constitution. It is argued in the opinion that § 35(4) of the CiA did not treat persons with hearing impairment equally, as those who needed assistance and the rest of persons with hearing impairment were treated differently. The objective of exempting persons from compliance with the requirement of knowledge of the Estonian language is to create possibilities for acquisition of citizenship to those persons who are not able to acquire the Estonian language, whereas the need for personal assistance is irrelevant. §§ 11 and 14 of the Constitution allow, in administrative proceedings, to impose on persons only such requirements that are necessary in a democratic society. All persons who, because of their health condition, are not able to acquire language skills, should have the right to acquire citizenship without passing a language examination. The erroneous reference of the earlier wording of § 35(4) of the CiA to the State Pension Insurance Act, which did not contain the referred regulation, was not in conformity with the principle of legal clarity and understandability of law.

OPINION OF THE SUPREME COURT EN BANC

13. The Supreme Court *en banc* shall firstly give its opinion on the pertinence of the contested legislation (I) and on the application thereof (II). Next, opinion shall be formed on the constitutionality of the contested provisions (III - IV) and the conclusions be given in the matter (V). Lastly, the Supreme Court en banc shall adjudicate V. Fedtšenko's appeal in cassation.

I.

14. In the administrative matter the courts have not ascertained what was the aim of V. Fedtšenko when he went to ear, nose and throat physician, who requested, in his consultative decision of 31 August 2000, that the DAC ascertain the degree of severity of V. Fedtšenko's disability. In his action filed with the administrative court V. Fedtšenko pointed out that he had explained, when filing an appeal against the DAC decision with the social benefits dispute committee, that he was not applying for the ascertainment of his invalidity but for a decision whether his hearing impairment met the provisions of § 35(2)2) of the CiA. He also stated in his action: "In assessing the need for personal assistance the DAC and social benefits dispute committee probably proceeded from whether the degree of severity of my disability was such as to make it impossible for me to cope materially and whether I needed a social benefit for disabled persons. Yet, I requested that the degree of severity of my disability be assessed for the purposes of § 35(2)2) of the CiA, that an assessment be given as to whether I, with my hearing impairment, am able to acquire the Estonian language and meet in that respect the requirements set for the acquisition of citizenship."

This passage from V. Fedtšenko's action and the statements of case in the following court proceeding allow to come to the conclusion that the dispute in the administrative matter was induced by the fact that V. Fedtšenko wanted, because of his poor hearing, acquire Estonian citizenship without taking the language examination. The exemption from language examination upon acquisition of citizenship because of a moderate hearing impairment is regulated in § 35(2)2) and § 35(4) of the CiA. Thus, the referred provisions are pertinent for the adjudication of the administrative matter.

II.

15. Pursuant to the wording of § 35(4) of the CiA in force since 10 July 2000 until 9 November 2002 the severe, profound or moderate disability, exempting from language examination, had to be ascertained pursuant to the procedure established by the State Pension Insurance Act. Neither the referred Act nor legislation of general application issued on the basis thereof determined how to understand profound, severe or moderate disability, nor did they determine the procedure for the ascertainment of such degrees of severity of disabilities.

16. The State Pension Insurance Act did not give the definitions of a profound, severe or moderate disability, neither did it contain a provision authorising somebody to establish the procedure for ascertaining such

degrees of severity of disabilities. Several legal acts of general application had been issued on the basis of the State Pensions Insurance Act, but none of these regulated how to understand and ascertain a moderate disability.

"Procedure for the establishment of the time at which permanent incapacity for work arises and the reason for and duration of permanent incapacity for work by medical examination for incapacity for work", established by the Government of the Republic Regulation no. 94 of 27 March 2000, only regulated the establishment of permanent incapacity for work by the DAC or a medical expert. If the DAC or medical expert established that a person had a permanent incapacity for work, then pursuant to § 10(2)4) of the Procedure the extent of incapacity for work was expressed as a percentage. Also, during the time of issuing the contested administrative legislation, the extent of permanent incapacity for work was expressed, under § 11 (41)-(43) of the SPIA as a percentage of loss of capacity for work, whereas a loss of 100 per cent of the capacity for work corresponded to total incapacity for work, and a loss of 10–90 per cent of the capacity for work corresponded to partial incapacity for work. As the State Pension Insurance Act and the referred Procedure did not explain how to make congruent total and partial incapacity for work expressed as a percentage with profound, severe or moderate disability, it was not possible to use the State Pension Insurance Act or the Procedure issued on the basis thereof for ascertaining the disability referred to in § 35(4) of the CiA.

17. It was not possible to apply the State Pension Insurance Act or the Procedure issued on the basis thereof for determining the disability referred to in § 35(4) of the CiA, and therefore the DAC and the dispute committee applied legislation of general application which had not been established on the basis of the State Pension Insurance Act, but which contained the definitions of profound, severe and moderate disability and the procedure for ascertaining of degrees of severity of disabilities.

At the time when the dispute committee made the decision contested by V. Fedtšenko, there was in force the "Procedure for establishment of degree of severity of child's disability and the time at which disability arises and the procedure for establishment of degree of severity of disability and necessity of additional expenses of a person 16 years of age and older", established by the Minister of Social Affairs Regulation no. 32 of 7 March 2001 on the basis of the Social Benefits for Disabled Persons Act. The referred procedure employed the terms profound, severe and moderate disability, gave the definitions of degrees of severity of disability and also regulated the procedure for the establishment thereof.

On the level of law the degrees of severity of disabilities were established by the Social Benefits for Disabled Persons Act. The explanatory letter to the earlier version of the draft which had served as the basis for the contested regulation of the Citizenship Act also referred to the Social Benefits for Disabled Persons Act. Also, at the first reading of the draft (319 SE) on 2 May 2000 it was pointed out in the Riigikogu: "The necessity to declare subsections (2), (3) and (4) of § 34 of the Citizenship Act invalid also arises from the amendments to Acts regulating social benefits and social insurance. Such terms as "Category I disabled person" and "Category II disabled person" will be eliminated from the valid law. The Social Benefits for Disabled Persons Act passed on 27 January 1999 employs the terms "profound disability", "severe disability" and "moderate disability".

18. That is why the Supreme Court *en banc* concludes that despite the erroneous reference to the State Pension Insurance Act, it was the objective of the legislator to determine the degrees of severity of disability established in § 35(4) of the Citizenship Act through the degrees of severity of disability referred to in the Social Benefits for Disabled Persons Act. The same is supported by the fact that since 10 November 2002 the reference to the State Pension Insurance Act in § 35(4) of the CiA was replaced by reference to the Social Benefits for Disabled Persons Act. Among other things it was pointed out in the explanatory letter to the draft which served as the basis for this amendment that the reference in § 35(4) of the CiA to the State Pension Insurance Act was wrong because the degree of severity of disability can only be established pursuant to the procedure established on the basis of the Social Benefits for Disabled Persons Act.

19. Considering the aforesaid it is understandable why, in handling the request of V. Fedtšenko, both the

DAC and the dispute committee proceeded from the Social Benefits for Disabled Persons Act and the Procedure established on the basis thereof. As it was the intent of the legislator to determine the degrees of severity of disability referred to in subsections (2) and (4) of § 35 of the CiA through the degrees of severity of disability established by the Social Benefits for Disabled Persons Act, the Supreme Court *en banc* has to assess the constitutionality of subsections (2)2) and (4) of § 35 of the CiA and the Procedure established on the basis of the Social Benefits for Disabled Persons Act in their conjunction. The Supreme Court *en banc* shall not assess the constitutionality of the regulatory framework for establishing the degrees of severity of disabilities established in the Social Benefits for Disabled Persons Act.

20. Next, the Supreme Court *en banc* shall examine what type of regulatory frammework proceeded from the Social Benefits for Disabled Persons Act and the legislation issued on the basis thereof.

The full text of the wording of § 2(1) of the Social Benefits for Disabled Persons Act in force at the time when the dispute committee of the Social Insurance Board made the decision of 11 July 2001, contested by V. Fedtšenko, is quoted in paragraph 8 of this judgment. § 5 of the "Procedure for establishment of degree of severity of child's disability and the time at which disability arises and the procedure for establishment of degree of severity of disability and necessity of additional expenses of a person 16 years of age and older", established by the Minister of Social Affairs Regulation no. 32 of 7 March 2001, which was in force at the same time, provided for the following:

"The following criteria shall be the basis for determination of the degree of severity of a disability:

1) in case of a profound disability a person needs constant personal assistance, guidance or supervision twenty-four hours a day;

2) in case of severe disability a person needs personal assistance, guidance or supervision in every twenty-four hour period;

3) in case of a moderate disability a person needs regular personal assistance or guidance at least once a month;

4) a person needs personal assistance or guidance if he or she does not cope independently with eating, hygiene, clothing, moving about or communicating or needs sign language interpreter for communicating;

5) a person needs supervision if he or she by act or omission, may constitute danger to the life, health or property of herself or himself or other persons;

6) the extent to which the need for personal assistance, guidance and supervision of a person requesting medical assessment is greater than the need for personal assistance conditioned by person's age is taken into consideration;

7) person's need for personal assistance, guidance and supervision despite the use of technical aids is taken into consideration."

21. It follows from the aforesaid that proceeding from § 35(2)2) and § 35(4)of the CiA in force since of 10 July 2000 until 9 November 2002 a person could be exempted from a language examination due to the fact that the person needed personal assistance or guidance at least once a month.

22. Next, the Supreme Court *en banc* shall assess the constitutionality of § 35(2)2) and § 35(4) of the CiA in force since 10 July 2000 until 9 November 2002.

23. Firstly, the Supreme Court *en banc* points out that, as a rule, international law leaves precise conditions for the acquisition of citizenship to be decided by each state. Conditions for acquisition of citizenship by naturalisation are established by citizenship policy, the formation of which is within the competence of the Riigikogu.

The Constitution does not provide that the right to acquire citizenship by way of naturalisation shall be a fundamental right. But in establishing norms regulating acquisition and loss of citizenship the legislator must take into consideration the fundamental rights and freedoms. The most important fundamental rights that the legislator has to consider in regulating citizenship are the fundamental right to equality and prohibition of discrimination.

24. The fundamental right to equality arises from the first sentence of § 12(1) of the Constitution, pursuant to which everyone is equal before the law. The observance of the provision requires that persons in an equal situation be treated equally and persons in an unequal situation be treated unequally. The referred provision also means the equality in legislation, which, as a rule, requires that laws, in essence, must treat similarly persons who are in similar situations. (Judgment of Constitutional Review Chamber of Supreme Court no. 3-4-1-2-02 of 3 April 2002 - RT III 2002, 11, 108).

25. To check whether there has been a violation of the fundamental right to equality it is necessary, first of all, to determine all important elements characterising the comparable persons. These are: poor hearing impeding language learning and necessity to learn the Estonian language for the acquisition of citizenship. Persons meeting these characteristics must be treated equally. Equal treatment requires that for the acquisition of citizenship equal conditions must be created for such persons, taking into consideration the poor hearing impeding language learning.

26. But subsections (2)2) and (4) of § 35 of the CiA, when exempting from language examination, do not proceed only from the fact that persons have poor hearing. The disputed regulatory framework makes the exemption from language examination dependent on whether a person has a moderate disability for the purposes of the Social Benefits for Disabled Persons Act or not. Thus, the persons who are in an equal situation due to poor hearing impeding language learning, are treated unequally, because persons with poor hearing and moderate disability have been guaranteed a possibility to acquire Estonian citizenship without passing a language examination, whereas persons without a moderate disability but with poor hearing have not guaranteed the possibility. Thus, subsections (2)2) and (4) of § 35 of the CiA infringe on the sphere of protection of the fundamental right to equality.

The infringement of the sphere of protection of the fundamental right to equality is further manifested in the fact that as the contested regulation does not allow to exempt from language examination those persons who do not need personal assistance, i.e. persons without a moderate disability, they would be forced, for the acquisition of citizenship, to learn the language on equal basis with persons with normal hearing. Thus, persons in unequal situations have been treated equally.

27. As the Supreme Court *en banc* has ascertained an infringement of the fundamental right to equality, it is necessary to ascertain next, whether this amounts to a violation of the referred fundamental right. It has to be ascertained whether there is a reasonable ground for the unequal treatment. If there is no reasonable ground for unequal treatment, this will amount to arbitrary unequal treatment, which is in conflict with the first sentence of § 12(1) of the Constitution.

28. The Supreme Court *en banc* is of the opinion that the aim of § 35(2)2) of the CiA is to exempt from language examination first of all those persons who, because of their poor health condition, more precisely because of visual, hearing or speech impairment are not able to learn the Estonian language. This is supported by § 35(4) of the CiA, pursuant to which one of the grounds for exemption from a language examination is a statement of the attending physician confirming "inability to comply with the requirements provided for in § 6(3) and (4) of this Act". But the aim of § 35(2)2) of the CiA is not confined to exempting from language examinations only those persons who are totally unable to learn languages. It is obvious that the number of persons who are totally unable to learn languages because of a visual, hearing or speech impairment is small compared to persons who, despite a visual, hearing or speech impairment are in principle able to learn the language, but with a lot of effort. That is why the Supreme Court *en banc* is of the opinion that giving a possibility to exempt from language examination those persons who are not totally

unable to learn languages because of a visual, hearing or speech impairment, but for whom language learning is significantly more time and effort consuming or expensive than for the people who are in normal health condition, could be considered to be one of the aims of § 35(2)2) of the CiA. The words "inability to comply with the requirements provided for in § 6(3) and (4) of this Act" provided for by § 35(4) of the CiA is to be interpreted as inability to comply with those requirements on equal conditions with the people who are in normal health condition.

29. As referred to above, the exemption from language examination upon acquisition of citizenship depends on whether a person has a disability for the purposes of the Social Benefits for Disabled Persons Act. A disability is ascertained on the basis of need for personal assistance or guidance.

The Supreme Court *en banc* argues that from the point of view of language learning ability it is irrelevant whether a person needs personal assistance or guidance in daily life. A person with poor hearing can manage in daily life without personal assistance or guidance, yet he is unable to learn the language on an equal footing with a person with normal hearing. In certain cases a person with poor hearing impeding language learning can be exempted from language examination - that is if he or she needs personal assistance or guidance and his or her disability has been ascertained for the purposes of the Social Benefits for Disabled Persons Act. This means that the criterion for exemption from language examination - need for personal assistance or guidance - chosen by the legislator, is not reasonable. Making the exemption from language examination dependent on the need for personal assistance does not sufficiently take into consideration the actual language learning ability of persons with poor hearing. That is why the criterion chosen by the legislator can not realise the objective of § 35(2)2) of the CiA fully.

On the basis of the aforesaid there is no reasonable ground for differentiating persons with poor hearing upon exempting from language examination depending on whether they need personal assistance or not. Thus, the contested regulation of the Citizenship Act violates the fundamental right to equality, provided for in the first sentence of § 12(1) of the Constitution.

IV.

30. Next, the Supreme Court *en banc* considers it necessary to assess, whether § 35(4) of the CiA, in force since 10 July 2000 until 9 November 2002, was in conformity with the principle of legal clarity, arising from § 10 of the Constitution. It is necessary to give an opinion on legal clarity in order to clarify the referred principle and to clarify when a provision of legislation of general application is in conflict with the principle of legal clarity. The assessment is not precluded by the fact that the Supreme Court *en banc* has already (in part II) established what kind of procedure for ascertaining a disability the legislator actually bore in mind in the contested regulation of the Citizenship Act. The legislator affirmed its will by amendment of § 35(4) of the CiA, which entered into force on 10 November 2002 (see paragraph 18 of this judgment). Thus, the administrative bodies and V. Fedtšenko could not, in the pre-trial administrative procedure, proceed from this amendment.

31. The Supreme Court has held in its earlier judgments that a provision which obligated undertakings with natural monopoly or special or exclusive rights to adhere to the procedure provided for in the Public Procurement Act, whereas neither the Public Procurement Office nor the Competition Board had the competence to take measures in regard to undertakings provided for by the State Procurement Act, to be in conflict with the principle of legal clarity. The Supreme Court found that such a situation created uncertainty for undertakings as to how they should act, because it was impossible to fully observe the procedure for public procurement and because it was unclear what acts would be lawful (Judgment of the Constitutional Review Chamber of the Supreme Court of 5 October 2000 no. 3-4-1-8-2000 - RT III 2000, 21, 232).

32. As referred to above, § 35(4) of the CiA, valid since 10 July 2000 until 9 November 2002, established that a disability necessary for exemption from language examination shall be ascertained pursuant to procedure established on the basis of the State Pension Insurance Act. Above, the Supreme Court has also concluded that the reference was erroneous, as it was actually not possible to ascertain a severe, grave or

moderate disability on the basis of the State Pension Insurance Act or legislation issued on the basis thereof.

It is impossible to directly apply a reference provision containing an erroneous reference, because in order to fully understand the provision mere adherence to the reference is not enough. In order to understand the provision a person, first of all, has to realise that the reference it contains is erroneous. After that the persons should be able to find, from among the valid norms, the necessary legislation of general application, which could be applied alongside with the reference provision. Thus, it is much more difficult to understand and observe a regulation like this than to observe a reference provision with a correct reference. The Supreme Court *en banc* is of the opinion that the reference in and the rest of the wording of § 35(4) of the CiA, in force since 10 July 2000 until 9 November 2002, were not in conformity with each other and, thus, were not in conformity with the principle of legal clarity.

33. The Chancellor of Justice has argued in this case that although the reference in § 35(4) of the CiA was not correct, it did not constitute a real obstacle to understanding the regulation concerning degrees of severity of and procedure for ascertaining disabilities, and thus the want of clarity of the contested provisions is not sufficient for ascertaining the conflict thereof with the principle of legal clarity. The incorrect reference in the Act did not constitute an essential obstacle for the addressees in understanding the rights and obligations extended to them. The dispute committee of the Social Insurance Board and the Constitutional Committee of the Riigikogu, too, came to similar conclusions.

The Supreme Court *en banc* refers to the appeal filed with the Tallinn Circuit Court, included in the file of this matter, in which V. Fedtšenko did not agree with the opinion of the administrative court that no procedure for the ascertainment of a disability and the degree of severity thereof has been established on the basis of the State Pension Insurance Act. It was pointed out in the appeal that "Appellant is of the opposite opinion - such procedure does exist. § 11(5) of the SPIA establishes that the time at which permanent incapacity for work (on the basis on analogy - the time at which permanent inability to learn Estonian because of hearing impairment) arises and the reason for and duration of permanent incapacity for work shall be established by a medical examination for incapacity for work pursuant to established procedure." In the appeal V. Fedtšenko meant the "Procedure for the establishment of the time at which permanent incapacity for work arises and the reason for and duration of permanent incapacity for work by medical examination for incapacity for work", established by the Government of the Republic Regulation no. 94 of 27 March 2000.

Thus, the materials of the case show that the misleading reference in § 35(4) of the CiA has created confusion and misunderstanding. This supports the opinion that § 35(4) of the CiA was in conflict with the principle of legal clarity.

V.

34. On the basis of the second sentence of § 15 of the Constitution the constitutionality of provisions relevant to the adjudication of a matter can be reviewed within concrete norm control. Provisions relevant to adjudication of the administrative matter initiated by V. Fedtšenko are § 35(2)2) of the CiA in force at present and § 35(4) of the CiA valid since 10 July 2000 until 9 November 2002, to the extent these pertained to persons with a moderate hearing disability. That is why the Supreme Court *en banc* shall form an opinion on these provisions only to the extent that these pertain to persons with moderate hearing disability.

35. § 35(2)2) of the CiA is still in force without amendments and thus the provision will have to be declared invalid to the extent that it is in conflict with the Constitution. The Supreme Court *en banc* considers it impossible to declare the provision invalid in its entirety, because then it would no longer be possible, upon acquisition of citizenship, to exempt from language examination those persons with poor hearing whose moderate hearing disability has been ascertained for the purposes of the Social Benefits for Disabled Persons Act. That is why the provision is to be declared invalid to the extent that it does not allow to exempt from compliance with the conditions provided for in § 6(3) and (4) of the CiA those persons who are unable to

comply with such conditions due to hearing impairment.

The wording of § 35(4) of the CiA, which was in force since 10 July 2000 until 9 November 2002, was in conflict with the Constitution to the extent that it required that to be exempted from compliance with the conditions provided for in clauses 6 3) and 4) of the CiA, a person who was unable to comply with the conditions due to hearing impairment had to have a moderate disability, and that the moderate disability had to be ascertained on the basis of a medical assessment pursuant to the procedure established on the basis of the State Pension Insurance Act.

36. As the wording of § 35(4) of the CiA, valid at present, is irrelevant for the adjudication of the present case, the Supreme Court *en banc*shall not form an opinion on the constitutionality of the provision.

VI.

37. By this judgment the Supreme Court *en banc* declares § 35(2)2) of the CiA partly invalid and § 35(4) of the CiA in the wording in force since 10 July 2000 until 9 November 2002 partly unconstitutional. Administrative legislation based on unconstitutional regulatory framework is unconstitutional, too. The procedure of ascertaining V. Fedtšenko's disability was initiated to solve the issue of whether he could be exempted from the language examination required for the acquisition of citizenship. Thus, decision no. 382 of the dispute committee of the Social Insurance Board of 11 July 2001, contested by V. Fedtšenko, was also based on the contested regulatory framework of the Citizenship Act. That is why the referred decision is to be annulled and V. Fedtšenko's complaint satisfied in this respect.

38. In his action filed with the administrative court V. Fedtšenko requested that a medical examination be carried out to ascertain whether he has a disability complying with § 35(2)2) of the CiA, allowing him to apply for citizenship without having to pass a language examination.

Irrespective of the fact that the Supreme Court *en banc* declares § 35(2)2) of the CiA partly invalid and § 35(4) partly unconstitutional, the Supreme Court *en banc* can not require the executive to solve the issue of V. Fedtšenko's language learning ability. At present there is no regulatory framework giving a body of the executive relevant authority and establishing a procedure for assessing a person's language learning ability. As there is no such regulation, the Supreme Court can not require the executive to assess V. Fedtšenko's language learning ability. If the court did that it would unlawfully interfere with the activities of the executive.

39. The situation would be solved when the legislator establishes a procedure that would enable to exempt persons with hearing impairment from language examination upon acquisition of citizenship on the basis of whether the hearing disability prevents them from learning the language or not. The Supreme Court *en banc* points out that the Citizenship Act is a constitutional Act, and issues that essentially are to be regulated by such an Act can not be regulated by an ordinary one.

40. The judgments of the Tallinn Administrative Court and the Tallinn Circuit Court concerning this administrative matter shall be invalidated. The Supreme Court renders a new judgment by which it invalidates the decision no. 382 of the dispute committee of the Social Insurance Board of 11 July 2001, but dismisses V. Fedtšenko's action as to the request that the court require a medical examination be carried out.

DISSENTING OPINION

of justice Uno Lõhmus

I consent to the opinion of the majority of the Supreme Court *en banc* that subsections (2)2) and (4) of § 35 of the CiA are in conflict with § 12 of the Constitution, but I do not consent to the opinion of the majority of

the Supreme Court manifested in clauses 1 and 2 of the decision of the judgment. I am of the opinion that the Supreme Court judgment is incomplete, difficult to understand and formalistic. The following shall explain my opinion.

1. It appears from the materials of the court file that stateless Viktor Fedtšenko (born 1932) went to ear, nose and throat doctor in August 2000. The visit to the doctor was induced by his wish to apply for Estonian citizenship without passing the language examination.

V. Fedtšenko has a substantial hearing disability. The doctor ascertained that the patient's loss of hearing of one ear was 100% and loss of hearing of the other ear was 99% and that even a hearing aid would be of no help to him. The doctor who ascertained the hearing impairment sent V. Fedtšenko to the Disability Assessment Committee for ascertainment of the degree of severity of his disability. The committee decided that V. Fedtšenko did not have a profound, severe or moderate disability for the purposes of the Social Benefits for Disabled Persons Act, because he did not need regular personal assistance or guidance outside his place of residence at least once a week. The Social Benefits Dispute Committee, having reviewed the assessment committee's decision on the basis of V Fedtšenko's complaint, found that the complainant did not have a disability on the basis of which he could be exempted from compliance with the language proficiency requirement under § 35(1)2) of the CiA.

2. Conditions for acquisition of Estonian citizenship by naturalisation are provided for by § 6 of the Citizenship Act. An alien who wishes to acquire Estonian citizenship by naturalisation shall, among other things, have general knowledge of basic Estonian needed in everyday life, have knowledge of the Constitution of the Republic of Estonia and the Citizenship Act. The Act also provides for special conditions for acquisition of citizenship. The special conditions established in § 35 serve the purpose of simplifying the acquisition of citizenship for those persons who, due to anatomical, physiological or mental disability are unable to comply with all the conditions enumerated in § 6 of the Act. Subsections (2) and (4) of § 25 of the Citizenship Act pertain to those persons whose disability prevents them from learning the Estonian language and acquiring the knowledge of the Constitution and the Citizenship Act.

Exemption from compliance with the requirement of knowledge of language and the Constitution is made dependent upon the degree of severity and the nature of disability. Persons with severe and profound disabilities are exempted form compliance with these requirements if they are unable to comply with the requirements for health reasons (§ 35(2)1) of the CiA). A person with a moderate disability, who has a visual, hearing or speech impairment rendering it impossible for him to comply with the requirements, is also exempted from the compliance with the requirements (§ 35(2)2) of the CiA). § 35(4) of the Citizenship Act specified how a disability exempting from the requirement of knowledge of language and the Constitution shall be ascertained. The degree of severity of a disability shall be ascertained by medical assessment committee, whereas the attending physician shall confirm that the disability makes the acquisition of the language and the knowledge of the Constitution impossible.

3. The Citizenship Act does not explain what is to be understood by severe, profound and moderate disabilities and what characteristics shall be used as a basis for ascertaining the degree of severity of a disability. Pursuant to the regulation in § 35(4) of the Citizenship Act, in force since 10 July 2000 until 9 November 2002, the degree of severity of a disability was to be ascertained pursuant to the procedure established on the basis of the State Pension Insurance Act; pursuant to the later wording of the subsection the degree of severity of a disability is ascertained pursuant to the procedure established on the basis of the Social Benefits for Disabled Persons Act. The State Pension Insurance Act did not describe the characteristics and the procedure for ascertainment of degrees of severity of disabilities. The Supreme Court *en banc*concluded that the legislator, in fact, wanted to determine the degrees of severity of disabilities with the help of the Social Benefits for Disabled Persons Act. Reference to the State Pension Insurance Act had been erroneous (see paragraph 18 of the judgment).

The Supreme Court *en banc* is justified to argue that § 35(4) of the Citizenship Act has always been given the same meaning, namely that the disability exempting from the requirement of language proficiency and

knowledge of the Constitution was - at the time when the social benefits dispute committee reviewed the decision of medical assessment committee concerning V. Fedtšenko (2 March 2001) - and is at present ascertained based on the terms used in the Social Benefits for Disabled Persons Act. It is because of this very opinion that I can not agree with the conclusion expressed in paragraph 36 of the judgment, which clearly influenced the wording of the second clause of the decision, namely that the valid wording of § 35(4) of the CiA is irrelevant and that is why the Supreme Court *en banc* shall not form an opinion on the constitutionality thereof. I understand but do not share the fear of the majority of the Supreme Court *en banc* to evaluate a norm which is valid today in a wording different from the wording in force at the time when the administrative legislation was issued. In practice, the contested subsection had always been interpreted to mean one and the same, and the amendment to the Act corrected only an erroneous reference to an Act, that is why formalistic self-restraint is not justified. The Supreme Court shall fulfil its constitutional function of a watchdog of the Constitution only when its judgments effectively guarantee the constitutionality of the legal order.

4. The Supreme Court *en banc* correctly points out that, as a rule, international law gives a state freedom to decide who shall be the citizens thereof. Today the international law does not prescribe to the states the criteria for acquisition and loss of citizenship, although the freedom of states to regulate the issue of citizenship may be restricted by an international agreement or custom. Neither does the Constitution recognise the right to acquisition of citizenship by way of naturalisation as a fundamental right. Despite of the freedom to determine the citizenship policy the legislator has the obligation to consider, in formulating norms regulating acquisition and loss of citizenship, the fundamental rights and freedoms provided for in the Constitution. The Supreme Court *en banc* found that subsections (2)2) and (4) of § 35 of the CiA infringe upon the fundamental right of equality. I agree with the conclusion that the provisions violate the fundamental right to equality, established in the first sentence of the first indent of § 12 of the Constitution, although the violation could have been argued to amount to discrimination.

5. I do not consent to the present wording of clauses 1 and 2 of the decision. I am of the opinion that the referred provisions of the Citizenship Act should be assessed together. The purpose of § 35 of Citizenship Act - to make it easier to acquire citizenship for those persons who, due to anatomical, physiological or mental disability are unable to comply with the conditions enumerated in § 6 of the same Act - is in conformity with the requirement to treat unequally those persons who are in an unequal situation. An unsuitable method has been chosen to achieve the objective. The Act differentiates between degrees of severity of disabilities and requires that these be ascertained by norms of another Act. The right to equality is guaranteed if a person who is unable to acquire the language and the knowledge of the Constitution due to his or her disability, is exempted from the requirement of knowledge of the language and the Constitution. Thus, the nature of disability ought to be an essential criterion. I am of the opinion that the line of reasoning of the Supreme Court *en banc* that "persons with poor hearing and moderate disability have been guaranteed a possibility to acquire Estonian citizenship without passing a language examination, whereas persons without a moderate disability but with poor hearing have not guaranteed the possibility", (see paragraph 26) is imprecise.

Confining our analysis only to persons with a hearing disability, the law treats differently those disabled persons whose disability does not prevent them to acquire the language and knowledge of the Constitution. Those persons whose disability does not amount to a moderate disability, can not count on alleviation of the requirements set for the acquisition of citizenship, although the disability makes the acquiring of the knowledge of the language and the Constitution impossible.

6. The ascertainment of a degree of severity of a disability serves a totally different purpose in the Social Benefits for Disabled Persons Act. This is a purpose that can not be identified with the purpose of the Citizenship Act. The Social Benefits for Disabled Persons Act states that the purpose of this Act is to support the ability of disabled persons to cope independently, social integration and equal opportunities through partial compensation for the additional expenses caused by the disability (§ 1(2)). It is not the definition of disability, defined through medical criteria - the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person - that causes problems but the criteria for

ascertaining the degree of severity which, bearing in mind the purpose of the Act, are to a large extent of social character (need of personal assistance, guidance and supervision; additional expenses caused by the disability, etc.). According to the Social Benefits for Disabled Persons Act the amount of social benefit (e.g. disabled child allowance, disabled adult allowance, caregiver's allowance) depends on the degree of severity of disability. Bearing in mind the purpose of the Citizenship Act it is important to ascertain the disability that prevents a person from learning the language and acquiring knowledge of the Constitution. It is highly probable that it will not be possible to exempt a mute person from a language examination, because he or she does not need regular personal assistance or guidance outside his or her place of residence at least once a week, although he or she is unable, due to the disability, to converse and narrate in Estonian, as required by § 8(2) of the CiA.

7. The arbitrary treatment of disabled persons upon acquisition of citizenship by way of naturalisation is concealed in the wording of subsections (2) and (4) of § 35 of the Citizenship Act. Besides, the subsections can only be applied jointly, because subsection (4) provides for how the degree of severity of a disability referred to in subsection (2) is to be ascertained. This is one more reason why declaring one subsection partially invalid and another one partially unconstitutional is an incomplete solution, which - furthermore - may raise the issue of legal clarity of the provisions after the judgment of the Supreme Court *en banc* has entered into force.

8. I am of the opinion that the Supreme Court *en banc* ought to have declared subsections (2) and (4) of § 35 of the Citizenship Act unconstitutional to the extent that these provisions do not make it possible to exempt from complying with the requirements enumerated in clauses 3) and 4) of § 6 of Citizenship Act those persons who are unable to comply with the conditions due to a disability.

9. Another possibility would be to declare the provisions partly invalid. The Constitution authorises the Supreme Court, differently from other courts, to declare an Act or a part thereof invalid. An Act which has already lost its validity by the time the court renders a judgment can not be declared invalid. In such cases the Supreme Court confines itself to declaration of unconstitutionality of such an Act. The problem of choice arises because the text or part of the text of the contested subsections can not be declared invalid, as this would also deprive persons with moderate, severe and grave disabilities of the possibility to apply for citizenship pursuant to simplified procedure. Thus, a question arises: is a court competent to declare invalid a provision or a text of an Act, which expresses the norm in words? If an Act or a structural element thereof (section, subsection, clause) is declared invalid, a norm will disappear together with the text. For example, the Constitutional Review Chamber wrote the following in its judgment of 3 April 2002 in case no. 3-4-1-2-02: "To declare § 40(3) of the Criminal Code partly invalid, omitting the words "unserved part of"." In another judgment (of the Constitutional Review Chamber of the Supreme Court of 17 February 2003 in matter no. 3-4-1-1-03) the court declared invalid one sentence of a legal instrument to the extent that it established an obligation that if the results of an auction are not approved it is always necessary to organise a new auction. In the present case, too, the majority of the Supreme Court *en banc* did not declare invalid a norm but a part of a clause of one subsection. There are instances when a provision can not be declared invalid, because it would amount to a political decision a court has no competence to make (see judgment of the Supreme Court *en banc* of 28 October 2002 in matter no. 3-4-1-5-02). I venture to argue that in the cases when a norm is unconstitutional, whereas the provision expressing the norm is not unconstitutional in its entirety, the provision containing the norm should be declared unconstitutional.

10. Irrespective of whether the provisions of the Citizenship Act are declared partly invalid or unconstitutional, bringing subsections (2) and (4) of § 35 of the CiA into conformity with the Constitution requires the intervention of the legislator. The legislator must determine who shall ascertain a disability and decide whether the disability prevents the learning of the language and the Constitution to the extent required for the acquisition of citizenship.

CONCURRING OPINION
of justice Jüri Põld

I consent to the majority of the Supreme Court *en banc* concerning the decision and most of the reasoning of the judgment. I do not consent to the opinion of the majority of the Supreme Court *en banc* that the reviewed regulation is unconstitutional because of lack of legal clarity (paragraphs 30 33 of the judgment). I admit certain ambiguity of the regulation, but I argue that this did not prevent the proceeding of V. Fedtšenko's case. Also, the Supreme Court *en banc* was competent to review the constitutionality of the regulation by assessing the conformity thereof with the principle of equal treatment. The ambiguity of the reviewed regulation can be surmounted through interpretation. That is why I do not think that the regulation lacks legal clarity or is unconstitutional due to lack of legal clarity.

CONCURRING OPINION
of justices
Jüri Ilvest, Henn Jõks, Lea Kivi,
Villu Kõve, Lea Laarmaa and Tambet Tampuu

1. We do not consent to the reasoning of part IV of the judgment.

We are of the opinion that the wording of § 35(4) of the CiA, in force since 10 July 2000 until 9 November 2002, was misleading and was not unambiguous, but was still understandable and applicable through interpretation. Also, the actions of V. Fedtšenko prove that he understood correctly that pursuant to § 35(4) of the CiA he had to apply for the ascertainment of a moderate disability by medical assessment carried out pursuant to the procedure provided for on the basis of the Social Benefits for Disabled Persons Act. Also, the DAC and the social benefits dispute committee, in resolving V. Fedtšenko's complaint, proceeded from the Social Benefits for Disabled Persons Act and the procedure established on the basis thereof (see paragraph 19 of the judgment). These bodies, as well as the Tallinn Administrative Court hearing the action of V. Fedtšenko, proceeded from the Social Benefits for Disabled Persons Act even before § 35(4) of the CiA was amended (see paragraph 30 of the judgment). Consequently, § 35(4) of the CiA was sufficiently understandable for the appellant in cassation and for those who had applied the Act earlier.

That is why we argue that § 35(4) of the CiA was not ambiguous enough to be declared unconstitutional because of violation of § 10 of the Constitution.

2. Furthermore, the judgment is inconsistent. Namely, in part II the court has interpreted § 35(4) of the CiA and found that the purpose of the provision was, irrespective of the erroneous reference, understandable and the requirements arising therefrom were clear (see paragraphs 18 21 of the judgment). In part III of the judgment it was argued, on the basis of part II, that subsections (2)2) and (4) of § 35 of the CiA were in conflict with the first sentence of § 12(1) of the Constitution. Nevertheless, in part IV of the judgment the court concluded that the regulation by the legislator was not sufficiently clear and was therefore in conflict with the principle of legal clarity established in § 10 of the Constitution. We argue that a provision can not be unconstitutional because of ambiguity and, at the same time, understandable enough to be in conflict with the first sentence of § 12(1) of the Constitution. On the basis of § 12 of the Constitution it is possible to review only such norms that serve as a basis for an understandable (if necessary, with the help of various interpretation methods and analogy) regulation. If a norm is not sufficiently understandable, it can not be reviewed in its essence and the substantial constitutionality thereof can not be assessed.

DISSENTING OPINION
of justices Lea Kivi and Tambet Tampuu

We agree with the views expressed in sections 7 to 10 of the dissenting opinion of justice Uno Lõhmus and we are of the opinion that clause 1 of the decision of the Supreme Court *en banc* judgment will not solve the problems related to acquisition of citizenship either for the appellant in cassation or for other persons who, due to anatomical, physiological or mental disability are unable to acquire the Estonian language to the extent required.
