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Same-sex couples also have a right to the protection of family life

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In today's judgment, the Supreme Court explained the competence of the court in applying provisional legal protection during residence permit actions. The law does not prohibit the issuing of a residence permit to a person residing with their spouse for the duration of a court action, including when it concerns the marriage of a same-sex couple contracted in a foreign country.

Provisional legal protection is a temporary measure that is applied by the court in order to protect the rights of the appellant before the end of the litigation in a main case, i.e. for the duration of the court proceedings. In the present case, the matter concerned whether the Tallinn Circuit Court had applied the provisional legal protection correctly. The Circuit Court required the Police and Border Guard Board (PPA) to issue the appellant with a temporary residence permit so that she could reside with her spouse until the end of the ongoing court proceedings, and for the duration of the possible processing of her residence permit application. The marriage of the appellants was contracted in a foreign state, and both of the partners were female.

The Administrative Law Chamber of the Supreme Court firstly emphasised that the Constitution does not provide for the right of same-sex persons to be contracted in marriage in Estonia. However, the protection of family life, as well as the ban on discrimination laid down in the Constitution, does apply to same-sex couples. The text of the Constitution does not make the issue of the protection of family life from state intervention dependent upon the gender or the sexual orientation of the family members. Furthermore, the cohabitation of same-sex persons is not banned or punishable under Estonian law. The family life of both opposite-sex and same-sex couples is protected under the European Convention on Human Rights, and this has also been the conclusion of the European Court of Human Rights in residence permit cases. The state has the right to prohibit a foreign national from residing with a family member in Estonia, but only if there is a valid reason for such a prohibition.

According to the Code of Administrative Court Procedure, the court may implement provisional legal protection if the protection of a person's rights at a later date would not be effective. However, the action presented to the court may not be manifestly unjustified. The court may *inter alia* oblige the administrative authority to issue the permits in question on a temporary basis under the umbrella of the provisional legal protection. According to the Chamber, the issuing of a fixed-term residence permit to the appellant under the provisional legal protection, in order for the appellant to reside with her spouse, was a justified action. The prohibition on living in Estonia during the ongoing court proceedings would strongly interfere with family life; whereas, the temporary residence of the appellant in Estonia does not infringe on anyone's rights or on the public interest.

In addition, the application of provisional legal protection in this case does not result in a manifestly unlawful situation. Whereas the Family Law Act precludes the contracting of a same-sex marriage in Estonia, it does not preclude the recognition of such marriages that are contracted elsewhere in the world. It is required by law that a foreign marriage, which was performed in accordance with the laws of the married

couple's country of residence, must also be considered as valid in Estonia. Such a marriage may be considered invalid only if it manifestly violates the important principles of the laws of Estonia. According to the Chamber's initial estimation, it is legally debatable whether considering a same-sex marriage contracted abroad to be valid would be in breach of the important principles of the laws of Estonia. As Estonian law does not provide a clear or unequivocal solution to this issue, the court must present a final response during its settlement of the main action. At present, the Circuit Court has not yet settled the main action.

However, the Supreme Court did not agree with the duration of the legal protection that was determined by the Circuit Court, stating that the court may assign legal protection only for the duration of the court proceedings, and not for the duration of a possible new residence permit procedure. The duration of the provisional legal protection that was applied by the Circuit Court was longer than the duration of the court proceedings. Therefore, the Supreme Court revoked the Circuit Court decision in this regard, but did not change the decision in its other aspects.

DECISION 3-3-1-19-17 [1]

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