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## Constitutional judgment 5-17-42

S U P R E M E C O U R T  
CONSTITUTIONAL REVIEW CHAMBER  
**ORDER**

Case number	5-17-42
Date of judgment	10 April 2018
Composition of court	Chairman: Priit Pikamäe; members: Viive Ligi, Nele Parrest, Peeter Roosma and Malle Seppik
Case	Review of constitutionality of failure to issue implementing legislation for the Registered Partnership Act
Basis for proceedings	Tallinn Court of Appeal judgment of 20 November 2017 in case No 3-16-1191
Hearing	Written procedure

### OPERATIVE PART

**To decline to examine the application by Tallinn Court of Appeal.**

### FACTS AND COURSE OF PROCEEDINGS

1. On 13 June 2016, the applicant lodged an action with Tallinn Administrative Court, seeking to establish that failure to act by the governmental authority violated their rights and had caused them non-pecuniary damage. Alternatively, the applicant requested a declaration that it was unlawful to fail to regulate, recognise and protect the legal relations between same-sex persons. The applicant contended that the legislator had

failed to adopt sufficient legal measures to regulate the legal situation and legal property relations between same-sex persons. Due to insufficient legal regulation, their daily living arrangements were hampered and, in comparison to other parents, more complicated and inconvenient. Therefore, by its failure to act the governmental authority had violated the applicant's fundamental right to inviolability of private and family life (§ 26 Constitution), as well as the right not to be discriminated against (§ 12 Constitution). The applicant clarified the action on 30 June 2016, seeking a declaration that the applicant's rights had been violated as a result of failure to act by the governmental authority and an award of non-pecuniary damages in the amount of one euro. Alternatively, the applicant sought a declaration that failure to regulate, recognise and protect the legal relations between same-sex persons was unlawful.

**2.** By letter of 28 October 2016, Tallinn Administrative Court asked the applicant to clarify the action. In the opinion of the Administrative Court, the applicant's claim had been lodged under § 14 of the State Liability Act (SLA), which lays down the preconditions for compensation of damage caused by failure to issue a legislative act. The Administrative Court noted that according to the action the damage was inflicted by failure to adopt the implementing legislation for the Registered Partnership Act (RPA) but the applicant had failed to clearly indicate the circumstances constituting the preconditions for applying § 14 of the SLA. The Administrative Court asked the applicant to indicate how the activities and steps set out in the action were hampered with regard to the applicant themselves and not with regard to people in a similar situation to the applicant. The Administrative Court also asked the applicant to indicate clearly whether the action concerned infliction of damage more widely than merely with regard to the absence of implementing legislation for the Registered Partnership Act.

**3.** In their clarification filed on 11 November 2016, the applicant noted that since no accompanying implementing legislation had been adopted by the date set in § 26 of the RPA, by failing to issue a legislative act the state had violated its obligation in relation to the applicant. Failure to adopt the implementing legislation for the Registered Partnership Act exacerbates or renders it impossible for the applicant, subsequent to entering into a registered partnership contract, to exercise their rights without recourse to the court (e.g. filing a joint income tax return, entering family status in the population register, right of succession, possibility of joint ownership, entitlement to health insurance benefit and survivor's pension). On 2 January 2017, the applicant filed an application seeking an award of non-pecuniary damages in the amount of 10 000 euros or a just amount set by the court.

**4.** By judgment of 7 February 2017 in case No 3?16?1191, Tallinn Administrative Court allowed the action in part and ordered the respondent (the Ministry of Justice) to pay non-pecuniary damages in the amount of 1500 euros. The Administrative Court held that the preconditions set out in § 14(1) ("Damage caused by legislation of general application") of the SLA had been complied with.

**5.** The Administrative Court noted that the Registered Partnership Act regulates the legal relations between persons who have entered into a registered partnership contract (registered partners) and their legal relationships with third parties. The legislator had intended to regulate the relations with public authorities in the implementing legislation for the Registered Partnership Act. The Registered Partnership Act entered into force on 1 January 2016 but it cannot be foreseen whether and when the Riigikogu will adopt the pending Draft Implementing Act of the Registered Partnership Act (Draft Act 114 SE of the Riigikogu XIII composition). The situation persists despite § 26 of the RPA according to which implementing legislation should have been adopted together with entry into force of the Registered Partnership Act.

**6.** The Administrative Court explained that § 14 of the Constitution guarantees the fundamental right to organisation and procedure, and §§ 13 and 14 of the Constitution the fundamental right to legal clarity. Section 26 of the RPA in combination with §§ 13 and 14 of the Constitution give rise to the obligation of the state to eliminate lack of legal clarity regarding issues not regulated by the Registered Partnership Act. By relying on opportunities available under effective law and case-law and using techniques of interpretation, notaries have begun to conclude registered partnership contracts, administrative authorities have begun to resolve applications by individuals and courts have begun to adjudicate judicial disputes, but to date neither the courts nor the Chancellor of Justice have initiated constitutional review proceedings regarding the

absence of implementing legislation for the Registered Partnership Act. Nevertheless, a situation where an effective statute lays down adoption of implementing provisions and the Draft Implementing Act of the Registered Partnership Act has been pending in the Riigikogu for quite some time cannot be considered to represent legal clarity. The course of proceedings of the Draft Act until now does not allow for conclusions as to what kinds of provisions the legislator would eventually pass and whether and to what extent registered partners would be granted similar status to married persons and what legal rights they should have in relations with public authorities.

**7.** In the opinion of the Administrative Court, the applicant suffered non-pecuniary damage as a result of failure to adopt implementing legislation for the Registered Partnership Act, because the applicant's dignity was degraded and protection of their private life was not ensured, and a causal link exists between the legislator's failure to act and infliction of damage on the applicant. However, the applicant had not proved any instances where, due to the absence of implementing legislation for the Registered Partnership Act, government agencies had refused to grant the applicant's applications as a person having entered into a registered partnership contract, while many situations pointed out by the applicant can be resolved on the basis of effective law or are negligible. With regard to several situations, the solution depends on how an administrative authority interprets and applies effective law. However, in many instances no immediate and speedy solution might exist for protecting the rights of individuals who have entered into a registered partnership contract, and judicial disputes may be long, expensive and nerve-racking, while the final solution is not predictable. The applicant can protect their rights by invoking various legal remedies and under § 14 of the Constitution different branches of government have the duty to protect fundamental rights. Nevertheless, prolonged legislative uncertainty places one social group (couples who have entered into a registered partnership contract, among whom same-sex couples form a distinct group) in an uncertain situation, and interferes with their private life and may degrade their dignity. No certainty exists as to how a certain practical situation would be resolved and what method for interpreting effective law an official or authority dealing with the specific situation would choose. Recourse to a court or an administrative authority for protection of one's rights can be a reasonable solution only in isolated cases, but not on a regular basis. The above lack of legal clarity has lasted since 1 January 2016. For more than a year the legislator has not continued the proceedings of the Implementing Act of the Registered Partnership Act, and no clear will for this seems to exist either, even though the necessity for implementing legislation was clear already at the time of passing the Registered Partnership Act in October 2014. The legislator's margin of discretion concerning what and how to regulate has become more constrained since under the Act that has entered into force the legislator has incurred an obligation to adopt implementing legislation.

**8.** Both the respondent and the applicant lodged an appeal against the Administrative Court judgment. The respondent sought a decision reversing the Administrative Court judgment and either declining to examine or dismissing the action. The respondent contended that the Administrative Court had not established a violation of the subjective rights of the applicant or the unlawfulness of failure to issue a legislative act. The Administrative Court's observation that § 26 of the RPA in combination with §§ 13 and 14 of the Constitution give rise to the obligation to eliminate lack of legal clarity regarding issues not regulated by the Registered Partnership Act is not sufficient for this, nor is abstract analysis of the legal situation of same-sex couples. Since failure to adopt an Act may only be unlawful if this is contrary to a hierarchically superior legal act, i.e., the Constitution, the Administrative Court could not have established failure to issue a legislative act or compensated damage without having initiated constitutional review proceedings. The respondent was of the opinion that failure to adopt implementing legislation for the Registered Partnership Act was constitutional. Moreover, the Administrative Court failed to establish the significance of violation by a public authority or the applicant's belonging among a group of specially injured persons, while incurring non-pecuniary damage by the applicant and its causal link with the legislator's failure to act was wrongly established.

**9.** The applicant in their appeal sought to reverse the Administrative Court judgment to the extent that it dismissed the claim for damages exceeding 1500 euros, and to enter a new judgment awarding non-pecuniary damages in the amount of 10 000 euros.

**10.** On 23 November 2017, Tallinn Court of Appeal dismissed the applicant's appeal and allowed the appeal by the Ministry of Justice in part, reversing the judgment of Tallinn Administrative Court. The Court of Appeal entered a new judgment in the matter, declaring failure to adopt implementing legislation for the Registered Partnership Act unlawful and unconstitutional and referring the judgment to the Supreme Court to initiate constitutional review court proceedings.

**11.** The Court of Appeal held that the action had been filed for protection of the applicant's rights. Due to absence of implementing legislation for the Registered Partnership Act, the scope of rights and liberties of same-sex couples is unclear, which interferes with the applicant's rights. Interference is also not precluded by the fact that the applicant may protect their rights by invoking preventive remedies. No such obligation can be imposed on the applicant since it is not justified that in a situation where implementing legislation is absent the court must assess on a case-by-case basis whether a specific right should also be afforded to registered partners in addition to spouses.

**12.** In the opinion of the Court of Appeal, the Administrative Court had correctly established the preconditions for compensation of damage in accordance with § 14(1) of the SLA. It appears from § 26 of the RPA that implementing legislation should have been adopted and entered into force by 1 January 2016 at the latest. Thus, the legislator had assumed an obligation to pass implementing legislation, and failure to comply with the obligation is also not legitimised by the fact that the Registered Partnership Act was passed with a smaller majority of votes than would be necessary for passing implementing legislation. The legislator enjoys broad discretion in deciding to what extent the rights of same-sex couples should be recognised, but this does not mean the right to be inactive after passing the Registered Partnership Act.

**13.** The applicant belongs among a group of specially injured persons. While partners of different sexes can choose between entering into a registered partnership contract or contracting marriage, same-sex persons cannot contract marriage. They can enter into a registered partnership contract but, due to the absence of implementing legislation, in relations with public authorities they cannot exercise their rights, nor do they know what their rights and duties are.

**14.** The Court of Appeal was of the opinion that failure to issue a legislative act was unlawful primarily on account of a conflict with the Constitution, and the Administrative Court had correctly established that the legislator had violated §§ 13 and 14 of the Constitution, resulting in violation of the applicant's human dignity and inviolability of private life. A claim for damages arising under § 14(1) of the SLA cannot be allowed in the instant case without initiating constitutional review court proceedings, because unconstitutional failure to act by the Riigikogu in dealing with implementing legislation for the Registered Partnership Act is one of the preconditions for allowing a claim for damages. Under § 2 cl. 1) of the Constitutional Review Court Procedure Act, only the Supreme Court can check the constitutionality of failure to issue a legislative act.

**15.** In addition, the Court of Appeal held that even though the applicant had incurred non-pecuniary damage, in terms of compensation it is sufficient if, instead of awarding damages, the unlawfulness of the legislator's activity is established (§ 41(5) Code of Administrative Court Procedure). Above all, adoption of implementing legislation is necessary for protecting the rights of the applicant. The Riigikogu has not persecuted the applicant personally.

## **OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS**

**16.** The **Riigikogu Constitutional Committee** found that even though § 26 of the RPA does not constitute good law-making, failure to issue implementing legislation does not contravene the Constitution since absence of regulatory provisions does not hamper individuals from exercising their fundamental rights. The Riigikogu has not been inactive in preparing legislation implementing the Registered Partnership Act since the proceedings of Draft Act 114 SE "Implementing Act of the Registered Partnership Act" are currently pending in the parliament.

**17. The Riigikogu Legal Affairs Committee** was of the opinion that it was debatable whether the Registered Partnership Act had entered into force. Currently effective (including international) law does not give rise to an obligation to regulate the legal relations of same-sex couples, so that absence of implementing legislation for the Registered Partnership Act does not amount to an unconstitutional situation. The legislator cannot be obliged to adopt the Implementing Act for the Registered Partnership Act already because, due to amendment of constitutional Acts, this presumes approval by a majority of members of the Riigikogu; such an obligation would be contrary to democracy: each member of the Riigikogu is free in casting their vote.

**18.** Four members of the Riigikogu Legal Affairs Committee expressed a different opinion, and found that the Registered Partnership Act had entered into force and failure to issue implementing legislation violated §§ 13 and 14 of the Constitution, potentially human dignity (§ 10 Constitution) and inviolability of private life (§ 26 Constitution), so that the situation is unconstitutional.

**19. The Chancellor of Justice** was of the opinion that the legislator could be reproached for lack of legal clarity resulting from the absence of implementing legislation for the Registered Partnership Act, as well as for possible errors of discretion; however, case-law has demonstrated that substantive law can be implemented in a constitutional manner despite the absence of clear procedure and organisational rules. Arising directly from § 14 of the Constitution and from constitutionally-compliant interpretation, implementers of law have a broad margin of discretion in terms of procedure and organisation. Only when a substantive contradiction or gap proves to be insurmountable in a specific case may it be claimed that the legal order lacks a necessary legal provision for preventing damage.

**20.** The Chancellor of Justice found that the Registered Partnership Act had entered into force but cast doubt on the admissibility of the application due to absence of violation of a subjective right of the applicant. The applicant has failed to indicate any instances where an administrative authority had issued an administrative act, taken a step, or failed to issue an administrative act or take a step in direct violation of the applicant's rights and which the applicant would have contested in the administrative court. Therefore, it is difficult to establish whether damage has a causal link to absence of a legislative act or an administrative authority's act or step, as well as whether damage was inflicted as a result of a material violation.

**21. The Minister of Justice** found that examining the application should be refused because failure to issue implementing legislation for the Registered Partnership Act has no relevance for adjudication of the case. The reason was that the condition for entry into force of the Registered Partnership Act is the existence of implementing legislation. The applicant enjoys no subjective right which the state could violate by failure to adopt implementing legislation, so that the applicant lacks standing.

**22. The applicant** was of the opinion that failure to adopt implementing legislation for the Registered Partnership Act was unconstitutional. The Registered Partnership Act is also unconstitutional insofar as it fails to grant to persons having entered into a registered partnership contract the same rights as those granted to married persons.

## **OPINION OF THE CHAMBER**

**23.** Tallinn Court of Appeal declared failure to issue implementing legislation for the Registered Partnership Act unconstitutional. The Chamber will first deal with general issues concerning review of the constitutionality of failure to issue a legislative act (I), then it will assess the admissibility of the application by the Court of Appeal (II).

### **I**

**24.** The Supreme Court as court of constitutional review (§ 1 Constitutional Review Court Procedure Act [CRCPA]) also adjudicates, under § 2 cl. 1) (second alternative) of the CRCPA, applications for checking the constitutionality of failure to issue a legislative act. Under § 15(1) cl. 2<sup>1</sup>) of the CRCPA, when adjudicating a case the Supreme Court may declare failure to issue a legislative act to be unconstitutional.

**25.** When checking the constitutionality of failure to issue a legislative act, the Supreme Court assesses whether an unconstitutional gap exists in the legal order. Since the legal order is not perfect and is in constant development, emergence of a regulatory gap in applying law is never ruled out. However, not every situation where the court establishes that no applicable rule exists for the instant case can lead to initiation of constitutional review proceedings. The basis for checking the constitutionality of failure to issue a legislative act within the meaning of § 2 cl. 1) of the CRCPA can occur first and foremost when a regulatory gap that has emerged cannot be overcome by applying interpretation techniques recognised in legal science and in case-law, and enactment of regulatory provisions is required of the legislator under the positive duty arising from the Constitution.

**26.** While the Supreme Court mostly assesses whether a legislative act or a provision thereof is compatible with the Constitution, and in case of incompatibility declares the act unconstitutional (§ 15(1) cl. 1) CRCPA) or repeals the provision (§ 15(1) cl. 2) CRCPA), in the event of establishing the unconstitutionality of failure to issue a legislative act the Supreme Court obliges the legislator to enact rules in a situation where the legislator has failed to comply with its constitutional duty. Already arising from the principle of separation of powers enshrined in § 4 of the Constitution, the competence of a court to request the parliament to enact certain rules can have only limited scope. In line with § 59 of the Constitution, legislative power is vested in the Riigikogu elected by the people in direct elections. By passing statutes, the parliament accomplishes political goals for the pursuit of which voters elected the members of parliament. Therefore, in the field of law-making the parliament has broad discretion as to whether and what legal relationships to regulate and how, while also keeping in mind the ideological views of the political forces represented in the composition of the particular parliament.

**27.** While adjudicating a case within specific constitutional review (based on a judgment or order of a court of first or second instance, or an order of a Chamber or Special Panel of the Supreme Court), failure to issue a legislative act should have relevance for adjudicating the instant case (§ 14(2) (first sentence) and subsection (3), § 3(3) (second sentence), § 23(1), § 30(1), § 35(1), and § 45(1) CRCPA).

**28.** Arising from § 152(1) of the Constitution, a court has the right and duty to set aside a statute or other legislation only when adjudicating a specific case. This means that a court may have recourse to the Supreme Court for initiating specific constitutional review proceedings with regard to a provision of a legislative act which is relevant for adjudicating the case, i.e. is of decisive importance. A court that applies to the Supreme Court must be convinced that precisely that provision needs to be applied in adjudicating the dispute and that any other solution is ruled out. The Supreme Court cannot analyse the constitutionality of legal provisions applied incidentally or unjustifiably in respect of an applicant (Supreme Court Constitutional Review Chamber order of 3 July 2008 in case No 3?4?1?9?08 [1], para. 15). This means, on the one hand, that the court that initiated constitutional review should have sufficiently established the facts necessary for applying the contested provision (see Supreme Court Constitutional Review Chamber judgment of 31 December 2014 in case No 3?4?1?50?14 [2], para. 30). On the other hand, the court must have correctly interpreted the effective legal rules, including ruling out the possibility of a constitutionally-compliant interpretation of the contested provision. The reason is that the Supreme Court has no basis to repeal a provision on grounds of unconstitutionality if the provision can be interpreted in a constitutionally-compliant manner (see Supreme Court judgment of 22 February 2005 in case No 3?2?1?73?04 [3], para. 36).

**29.** Even though in the event of constitutional review of failure to issue a legislative act no legislative act or provision exists of which the constitutionality can be assessed, the above principles also extend *mutatis mutandis* to those proceedings. Within specific constitutional review proceedings, under § 15(1) cl. 2<sup>1</sup>) of the CRCPA, the Supreme Court can declare failure to issue a legislative act unconstitutional only if failure to issue a legislative act, i.e. the unconstitutional gap, was relevant for adjudicating the instant case. First and foremost, this also means that a court contesting the constitutionality of failure to issue a legislative act cannot go beyond the object of the proceedings in the instant case, since this would be contrary to the nature of specific constitutional review. The court must first establish the practical facts necessary for adjudicating the dispute, thereafter indicating that subsuming them under the current legal rules would not be possible

even by interpreting those rules.

**30.** In view of the foregoing, a court initiating constitutional review of failure to issue a legislative act must provide reasoning as to what the positive duty arising from the Constitution was and how the legislator violated it by failing to enact the regulatory provisions. It should also be indicated whether and how establishing that violation was necessary for adjudicating the instant case. Thus, the court's decision must show that the Constitution requires regulation of the practical circumstances that constitute the object of the case. The court that initiates the proceedings must also indicate the specific unconstitutional gap and cannot limit itself to a general instruction addressed to the legislator to enact a certain legislative act. Unless otherwise provided by the Constitution, the legislator's broad margin of discretion includes not only the substance of the legal provisions to be enacted but also broad freedom in terms of issues of legislative form, including what provisions to include in a specific legal act and how to title them.?

## II

**31.** The Administrative Court was of the opinion that the Registered Partnership Act had entered into force and § 26 of the RPA in combination with §§ 13 and 14 of the Constitution give rise to the obligation of the state to eliminate lack of legal clarity regarding issues not regulated by the RPA. In the opinion of the Administrative Court, failure to fulfil this obligation also violates the applicant's right to protection of private life and human dignity, causing them non-pecuniary damage. Even though absence of implementing legislation for the Registered Partnership Act also concerns individuals of different sexes who have entered into a registered partnership contract, they have the choice between a registered partnership contract or contracting marriage, so that the rights of these individuals are better protected. The Court of Appeal was of the opinion that the Administrative Court had correctly established that by failure to issue implementing legislation the legislator had violated §§ 13 and 14 of the Constitution, resulting in violation of the applicant's human dignity (§ 10 Constitution) and inviolability of private life (§ 26 Constitution). The Court of Appeal noted that failure to issue a legislative act contravenes first and foremost the Constitution, declared failure to issue implementing legislation for the Registered Partnership Act unconstitutional, and referred the judgment to the Supreme Court for initiating constitutional review proceedings.

**32.** The Chamber agrees with the Administrative Court that the Registered Partnership Act has entered into force. Under § 108 of the Constitution, an Act enters into force on the tenth day following its publication in the *Riigi Teataja* unless a different term has been laid down in the Act itself. Section 26 of the RPA lays down that the Act enters into force on 1 January 2016 together with implementing legislation. In the opinion of the Chamber, § 26 of the RPA laid down a term for entry into force of the Registered Partnership Act without making the Act's entry into force dependent on implementing legislation. That conclusion is supported by grammatical interpretation of § 26 of the RPA, as well as by comparison with previous legislative practice. Linguistically, the wording of § 26 of the RPA does not contain any suspensive conditions for entry into force of the Act, laying down a simultaneous date of entry into force both for the Registered Partnership Act and for the implementing legislation to be enacted in the future. However, failure to adopt implementing legislation does not affect the date of entry into force of the Registered Partnership Act itself. This approach is also supported by a comparative argument. In the case of Acts whose entry into force the parliament has made dependent on enactment of implementing legislation, the legislator has explicitly expressed that aim in the Act's implementing provisions. Thus, for example, § 451 of the Penal Code laid down that the Penal Code would be enacted by a separate Act (see also § 170 of the General Part of the Civil Code Act, according to which the Act enters into force at the time laid down in the implementing Act; § 84(1) of the Law Enforcement Act, according to which the time of entry into force and the procedure for application of the Act is to be established by a separate Act; as well as § 63 of the General Part of the Environmental Code Act, according to which the Act would enter into force at a time and in accordance with the procedure laid down in the General Part of the Environmental Code Act Implementation Act). No such link between the entry into force of the Registered Partnership Act and implementing legislation is expressed in § 26 of the RPA. Rather, in § 26 of the RPA the legislator declares its intention to adopt implementing legislation. On that basis, the Registered Partnership Act entered into force on 1 January 2016.

**33.** First of all, it may be concluded from the judgments of the Administrative Court and the Court of Appeal that the Supreme Court should check whether the legislator has fulfilled the obligation under § 26 of the RPA to adopt implementing legislation for the Registered Partnership Act. This is indicated in the reasoning contained in the judgments of the courts, and in particular the operative part of the judgment of the Court of Appeal which specifically identifies failure to adopt implementing legislation as a violation of the obligation by the legislator.

**34.** The Chamber is of the opinion that § 26 of the RPA cannot give rise to the legislator's obligation to regulate the rights and duties of same-sex individuals who have entered into a registered partnership contract. The reason is that the legislator's obligation to adopt a legislative act can only arise from the Constitution. The legislator's obligation to enact legal rules cannot arise from § 26 of the RPA in combination with §§ 13 and 14 of the Constitution. The fundamental right to procedure and organisation (§ 14 Constitution) as a procedural fundamental right, as well as the requirement of legal clarity (§ 13(2) Constitution), can primarily ensure the realisation of substantive rights.

**35.** On the other hand, both the Administrative Court and the Court of Appeal found that lack of clarity resulting from failure to adopt implementing legislation for the Registered Partnership Act violated the applicant's right to inviolability of private life and human dignity. Thus, the Court of Appeal judgment can be understood as inferring that the Supreme Court should check whether the legislator has established sufficient regulatory provisions for protecting the applicant's private life and human dignity.

**36.** The Supreme Court Administrative Law Chamber has noted that, in line with the case-law of the European Court of Human Rights, cohabitation of same-sex individuals living in a stable *de facto* partnership falls within the scope of protection of family life (Supreme Court Administrative Law Chamber judgment of 27 June 2017 in case No 3?3?1?19?17 [4], para. 17). The first sentence of § 26 of the Estonian Constitution grants everyone the right to inviolability of private and family life. Section 26 of the Constitution, in combination with the general fundamental right to procedure and organisation enshrined in § 14 of the Constitution, gives rise to the right that the state should enact sufficient legal regulation to enable guaranteeing the inviolability of private life. Similarly, § 27(1) of the Constitution also guarantees the right that the legislator should establish the necessary legal framework and appropriate procedures for protecting the right to family life. These provisions of the Constitution entitle the bearer of a fundamental right to expect positive steps by the state, matched by the duty of the addressee of fundamental rights (primarily the legislator) to act, including laying down the constitutionally required organisation and procedure. While assessing whether the state has complied with its duty, first it is necessary to determine the constitutionally required level of procedure and organisation that would ensure the right to private and family life. However, to establish violation of a fundamental right, it should be assessed whether existing legal regulation ensures the required level or whether some practical circumstances have been unconstitutionally left unregulated. In doing so, it should be taken into account that the legislator has a broad margin of manoeuvre to decide how the constitutionally required level should be reached.

**37.** In the opinion of the Chamber, the Court of Appeal has failed to give reasons as to what unconstitutional gap exists in the regulatory framework of the private or family life of same-sex individuals living in a registered partnership, i.e. failure to regulate what practical circumstances is unconstitutional. As the Chamber already noted above, an observation that implementing legislation for the Registered Partnership Act has not been adopted is not sufficient to establish an unconstitutional gap. Failure to enact sufficient regulatory provisions may be unconstitutional but this does not mean that the only way to eliminate conflict would be adoption of the Draft Implementing Act of the Registered Partnership Act pending in the Riigikogu or of the implementing legislation vaguely mentioned in § 26 of the RPA. The Administrative Court has nonetheless noted that relationships with public authorities of individuals having entered into a registered partnership contract are unregulated. The Administrative Court has also concluded that due to insufficient legal regulation the applicant's daily living arrangements are hampered and rendered more complicated and inconvenient in comparison to other parents, due to lack of regulation the data arising from the registered partnership contract cannot be entered in the population register, so that the applicant lacks



social guarantees, including the right to parental leave, survivor's pension, death allowance, to file a joint income tax return, and in the event of adoption the parent's right of custody cannot be entered in the register. However, the courts have failed to assess whether shortcomings in legal regulation could be overcome by constitutionally-compliant interpretation, nor have they given reasons to indicate that existing regulation remains below the constitutionally required level.

**38.** It should be kept in mind that since 1 January 2016 the Registered Partnership Act, which regulates the procedure for entering into a registered partnership contract for same-sex or different-sex couples, the general legal consequences of the contract and termination of the contract form part of the Estonian legal order and should be applied in combination with other currently effective legislation. In the event of contradictions between the Registered Partnership Act and other legislation, overcoming them should proceed from relevant forms and principles of interpretation, such as *ex posteriori derogat priori*. In view of the foregoing, before initiating constitutional review court proceedings the courts adjudicating the instant case should have assessed, inter alia, whether data of a registered partnership contract can be entered in the population register by applying the provisions of the Registered Partnership Act, the Vital Statistics Registration Act and the Population Register Act in combination in a manner that guarantees a constitutional result.

**39.** Under § 14(1) of the State Liability Act, damage caused by failure to issue a legislative act is compensated if the damage was caused by a significant violation of obligations of a public authority, the legal provision forming the basis for the violated obligation is directly applicable, and the person belongs in a group of specially injured persons due to the legislative act or due to failure to issue the legislative act. Thus, the precondition for allowing a claim for damages includes establishing which provision gives rise to the obligation to adopt a legislative act and what the substance of the obligation is. Additionally, the Chamber notes that under § 44(1) of the Code of Administrative Court Procedure a person may have recourse to an administrative court only for protection of their rights, and under § 14(1) of the State Liability Act a precondition for compensating damage is also that the court should establish a violation of the applicant's subjective right. The obligation that the legislator has significantly violated by failure to issue a legislative act under § 14(1) of the State Liability Act must also be matched by a person's subjective right (cf. *mutatis mutandis* the Supreme Court Administrative Law Chamber judgment of 31 October 2013 in case No 3737178412 [5], para. 13: "[...] the legal provision violated by a legislative act or by failure to issue it [must] be aimed, at least among other things, at protecting the applicant's subjective rights").

**40.** Since neither the Administrative Court nor the Court of Appeal have explained what regulatory gap it is that cannot be overcome by interpretation and that hinders adjudication of the instant case, and what obligation under the Constitution the legislator is violating thereby, the Chamber is unable to assess whether failure to issue a legislative act was relevant for adjudicating the case. On that basis, the Chamber is of the opinion that the application by Tallinn Court of Appeal is inadmissible and, relying on § 11(2) of the CRCPA, will decline to examine it.

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