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S U P R E M E C O U R T

CONSTITUTIONAL REVIEW CHAMBER

JUDGMENT

in the name of the Republic of Estonia

Case number	5-23-6
Date of judgment	22 June 2023
Judicial panel	Chairman: Villu Kõve; members: Hannes Kiris, Ants Kuusk, Nele Parrest
Case	Review of the constitutionality of the Aliens Act and Ministry of the Interior Regulation No 7 of 12 January 2017 on “The procedure for granting a temporary residence permit and its extension and applying for a resident’s residence permit and its restoration, and the rate of the fee for the processing of the application”
Basis for proceedings	Judgment of Tallinn Circuit Court of Appeal of 22 February 2023, No 3-21-2428

Participants in the proceedings

Riigikogu

Minister of the Interior

XX

Police and Border Guard Board

Chancellor of Justice

Minister of Justice

Manner of examination

Written procedure

OPERATIVE PART

- 1. To deny the application by Tallinn Circuit Court of Appeal for a declaration of unconstitutionality of the Aliens Act.**
- 2. To decline to examine the application by Tallinn Circuit Court of Appeal for review of the constitutionality of the Minister of the Interior Regulation No 7 of 12 January 2017 on “The procedure for applying for a temporary residence permit and its extension and applying for a long-term resident’s residence permit and its restoration, and the rates of legal income”.**
- 3. To replace the applicant’s name in the published judgment with alphabetical characters.**

FACTS AND COURSE OF PROCEEDINGS

1.XX (hereinafter ‘the applicant’) is a citizen of the Russian Federation, born in Kazakhstan and living in Moscow. The applicant’s parents who were citizens of the Russian Federation lived permanently in Estonia. The applicant’s father died in 2018.

2.The applicant's mother held a long-term resident's residence permit (§ 230 Aliens Act). In 2020, the Social Insurance Board established the applicant's mother as having a profound disability and she was bedridden, needing round-the-clock care. The applicant visited Estonia to care for the mother on the basis of a visa, at other times the mother was in a nursing hospital.

3.On 18 March 2021, the applicant applied to the Police and Border Guard Board (PBGB; hereinafter also 'the respondent') to obtain a temporary residence permit on the basis of a treaty (§ 118 Aliens Act). The applicant referred to the International Covenant on Economic, Social and Cultural Rights (ICESCR [1]) and the International Covenant on Civil and Political Rights (ICCPR [2]). The applicant wanted to settle in Estonia in order to care for their mother at her place of residence in Narva.

4.By decision of 18 August 2021, the respondent refused to grant the applicant a residence permit on the ground that the Aliens Act does not enable an adult child to apply for a temporary residence permit to settle in Estonia with a parent in need of care. The ICESCR and the ICCPR do not provide the right to obtain a temporary residence permit within the meaning of § 118 clause 7 and § 201 of the Aliens Act.

5.The respondent denied the applicant's challenge by a decision of 18 October 2021 concerning challenge. The treaty relied on when applying for a residence permit must be binding on foreigners and must give rise to the possibility of obtaining a residence permit. Neither the Constitution nor the Family Law Act give a foreigner the right to stay in a country of which they are not a citizen. The applicant has refused to take up employment in order to obtain a temporary residence permit on a different basis.

6.The applicant lodged a complaint with Tallinn Administrative Court, seeking annulment of the PBGB decision of 18 August 2021 and the decision of 18 October 2021 concerning challenge, and an order obliging the respondent to reconsider the applicant's application. When refusing to grant a temporary residence permit, the respondent has failed to take into account the applicant's exceptional circumstances. Since the Aliens Act fails to provide a basis for obtaining a residence permit to settle with a parent in need of care, reference must be made to the treaties mentioned in the application (Article 23 of the ICCPR and Article 10 of the ICESCR) and Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR [3]), which provide for individual rights. Account should also be taken of the Constitution and the Family Law Act, which lay down the protection of the family and the maintenance obligations. The respondent asked the complaint to be denied.

7.By judgment of 3 March 2022, Tallinn Administrative Court denied the complaint. A residence permit cannot be applied for on the basis of § 118 clause 7 of the Aliens Act by relying on the ICESCR, the ICCPR

or the ECHR.

8.The applicant lodged an appeal with Tallinn Circuit Court of Appeal, seeking reversal of paragraph 3 of the operative part of the judgment of Tallinn Administrative Court of 3 March 2022, by which the court denied their appeal. The applicant's mother died during the appeal proceedings in October 2022.

9.By judgment of 22 February 2023, Tallinn Circuit Court of Appeal upheld the applicant's appeal and overturned the Administrative Court judgment. The Circuit Court of Appeal issued a new judgment in the case, granting the complaint in part, annulling the respondent's decision of 18 August 2021 and the decision of 18 October 2021 concerning challenge. The Circuit Court of Appeal denied the appeal in respect of the claim for imposing an obligation.

10.The Circuit Court of Appeal declared unconstitutional and set aside the Aliens Act insofar as it does not enable an adult child who is a foreigner to be granted a temporary residence permit to settle with a parent in need of care residing in Estonia on the basis of a residence permit. The Circuit Court of Appeal also set aside, on the grounds of unconstitutionality, the Minister of the Interior Regulation No. 7 of 12 January 2017 on "The procedure for applying for a temporary residence permit and its extension and applying for a long-term resident's residence permit and its restoration, and the rates of legal income" (hereinafter 'the Regulation' [4]) insofar as it fails to lay down a list of information to be included in an application and the evidence to be attached to the application in a situation where an adult child who is a foreigner applies for a temporary residence permit to settle in Estonia with a parent in need of care residing in Estonia on the basis of a residence permit.

REASONING BY TALLINN CIRCUIT COURT OF APPEAL

11. Since the applicant's parent in need of care died during the appeal proceedings, it is not possible to satisfy the claim for imposing an obligation. The claims for annulment must be examined since the dispute in this regard has not been exhausted and the objective of the complaint is achievable. The court agreed with Tallinn Administrative Court and the respondent that the ICCPR, the ICESCR and the ECHR are not international treaties that would give a foreigner grounds to apply for a temporary residence permit in Estonia on the basis of § 118 clause 7 and § 201 of the Aliens Act, as they do not regulate grant of a residence permit.

12. The Aliens Act does not provide for a possibility to apply for a temporary residence permit for an adult child who wishes to settle in Estonia to care for their parent. At the same time, the Aliens Act lays down a possibility to obtain a temporary residence permit for a parent in need of care whose child lives permanently in Estonia and therefore there is a need to take their parent in need of care to live with the child under child's care. An adult child can also apply for a residence permit to settle with a parent residing in Estonia if the child is unable to cope independently due to health reasons or disability (§ 118 clause 2, § 150(1) clauses 2 and 3 Aliens Act).

13. The fundamental right to family arising from §§ 26 and 27 of the Constitution entitles a person to request positive action from the state, which would help the person to lead a full family life. The duty of the family to care for its members in need, laid down by § 27(5) of the Constitution, also extends to adult family members, depending on the circumstances. The fundamental right to family also extends to foreign citizens and stateless persons staying in Estonia (§ 9(1) Constitution) and their family members.

14. Since a foreigner cannot settle in Estonia without a residence permit, the absence of a basis for granting a temporary residence permit prevents an adult child and a mother in need of care from living together in Estonia and interferes with the fundamental right to family. The fact that the applicant might apply for a residence permit on another basis does not render the interference non-existent. The absence of a legal basis also interferes with the fundamental right to equality arising from § 12(1) of the Constitution, since a parent and an adult child in need of care can, under the Aliens Act, apply for a residence permit to settle with their child or parent permanently residing in Estonia, but not an adult child to settle with their parent in need of care.

15. Interference with the fundamental right to family and the fundamental right to equality resulting from the absence of a basis for granting a residence permit is unconstitutional, since it is not necessary for achieving the aim of the interference, i.e. to restrict the opening of a new migration channel and its possible misuse. For the same reasons, the Regulation is unconstitutional.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

16. The majority of the Constitutional Committee, which submitted an opinion on behalf of the **Riigikogu**, is of the opinion that the Aliens Act is in accordance with the Constitution.

17. The regulatory provisions on close relatives were added to the earlier Aliens Act (adopted in 1993) in 1999 (Act on amending and supplementing the Aliens Act (955 SE[5], Riigikogu VIII composition)). Section 12³, which at the time regulated the grant of a residence permit to settle with a close relative living in Estonia, was inserted into the Act by an amendment for which no reasoning was provided in the proceedings on the Draft Act.

18. In 2002, a possibility was introduced into the law for an adult child to obtain a temporary residence permit to settle with a parent permanently residing in Estonia if the child is unable to cope independently due to health or disability, and additional conditions were laid down for the person with whom the child wished to settle. The explanatory memorandum to the Draft Act stated that the aim was to avoid a situation where a foreigner who is granted a residence permit to settle with a child, grandchild or guardian residing in Estonia would become a burden on the Estonian social welfare system. The aim was to ensure the protection of fundamental rights and freedoms of individuals and to harmonise the family reunification part of the Aliens Act with European Union legislation in force at the time.

19. In accordance with Recital 9 and Article 4(1) of the EU Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Member States are required to grant family reunification to members of the nuclear family, that is to say the spouse and the minor children. The Member States' right of decision under the Directive does not include adult children applying for family reunification with a parent in need of care. According to the principles of international law, a State has the sovereign right to control the arrival and stay of foreigners in the country and, if necessary, to ensure their departure from the country through the application of coercion.

20. The sovereign right of a State to control immigration by preventing the entry of undesirable foreigners into the country is rooted in the aim of protecting national security and public order. This aim is related to the fifth paragraph of the preamble to the Constitution, according to which the state of Estonia ensures defence of internal and external peace. The state must ensure that immigration policy does not become a burden on the social assistance system. The logic of the regulatory framework is based on the principle that a person in need moves to the assistance provider, and this is because the assistance provider must ensure the maintenance and coping of the person in need. The close relative with whom a foreigner is to about settle has the obligations of a sponsor, i.e. they must guarantee the foreigner's accommodation and bear the costs of the foreigner's stay in and departure from Estonia. In a situation where the person in need themselves needs maintenance and care, it is impossible to demand the maintenance of a foreigner from the person in need.

21. Foreigners residing in Estonia are subject to the rights and obligations arising from the Estonian Constitution (including the obligation to care for family members in need). No subjective right to enter Estonia arises from § 27(5) of the Constitution for an adult child who is not in need of assistance and who is not staying in Estonia. It is questionable whether the obligation laid down by the Constitution should be extended to a foreigner residing abroad. When establishing the circle of close relatives, the legislator has found a balance between the fundamental right to family, national security and a functioning social assistance system. The purpose of the regulatory framework is, on the one hand, to enable a foreigner residing in Estonia to carry out the duty arising from § 27(5) of the Constitution to care for a family member in need and, on the other hand, not to promote immigration, but to restrict the opening of a so-called sprawling migration channel and the possible related misuse of residence permits.

22. Section 27(5) of the Constitution does not give rise to the right to settle in Estonia. In a situation where a family member in need of assistance does not live in Estonia, the right of the state to decide who should be granted the right to reside in the country must also be taken into account. For a parent in need, assistance and care are better guaranteed in the adult child's country of location, where the adult child has established themselves and where they presumably work. The adult child might not have a job in Estonia and, due to the lack of income of the assistance provider, maintenance and care of the parent is not guaranteed in Estonia. Section 27(5) of the Constitution does not prohibit the provision of assistance outside Estonia, especially in a situation where the provision of assistance outside Estonia is more efficient.

23. By extending the circle of close relatives to an adult child who is not in need of care, who in turn may have family members (e.g. a spouse, minor children and adult children in need of care) and thus become entitled to apply for a residence permit, immigration may become unpredictable. In addition, a parent in need of care may have several adult children, all of whom wish to apply for a residence permit on this basis. It is difficult for the legislator to set out cases where one adult child is entitled and the other is not entitled to receive a residence permit to settle with a parent in need of care in Estonia. In the event of a presumption that the absence of a legal basis in the Aliens Act constitutes interference with a fundamental right, this can be regarded a proportionate measure, since other measures are not capable of controlling immigration, which may become a burden on the social assistance system. Moreover, in the current security situation, the opening of new migration channels, which could become a threat to public order and national security, cannot be considered fit for purpose.

24. The **Minister of the Interior**, who also delivered an opinion on behalf of the respondent, considers that the law and the Regulation preventing a child or grandchild from settling with a parent or grandparent residing in Estonia and in need of care are compatible with the Constitution.

25. The fundamental rights of individuals are interfered with in accordance with the Constitution in order to protect public order and the rights and freedoms of others. The aim of the state is to ensure the security of

Estonia and prevent a security threat to Estonia's sovereignty and constitutional order that may arise from foreign citizens. In this case, the aim of interference with a fundamental right is to restrict the opening of a new migration channel and its possible misuse. The potential threat posed by a foreigner cannot always be achieved by means which are less intrusive of fundamental rights. The specific threat to public order or internal security posed by an applicant for a residence permit must be assessed, but the statutory regulatory framework must also enable mitigation of risks in advance by defining the target groups who can and who cannot apply for a residence permit.

26. Grant of a temporary residence permit on the basis in dispute would bring to Estonia people full of vigour, the risk from whom can therefore be presumed greater for that reason alone. In the case of a temporary residence permit granted on the basis of § 118 clause 2 and § 150(1) clause 3 of the Aliens Act, the possible threat posed by a person is already non-existent, since in this situation those applying for a temporary residence permit to settle in Estonia are foreigners in need of care. When creating additional regulatory provisions for family migration, compelling reasons should be present for refusal to grant a residence permit, such as a specific threat to public order or security. However, it is not possible for the state to substantiate such a specific risk, since, as a general rule, information about a foreigner residing in a third country is limited to what is provided on the application form. The residence permit procedure differs from the visa procedure, where such compelling reasons do not have to be present for refusal. Thus, there are no other suitable means for achieving the aim nor can the same aim be achieved by another measure which is less intrusive of fundamental rights.

27. The aggression of the Russian Federation against Ukraine has changed the security situation, which clearly illustrates the need to avoid allowing new migration routes and that measures less restrictive of the fundamental rights of individuals do not sufficiently help to prevent a security risk. According to the Constitution of Russia, the protection of the fatherland is the duty of every citizen of the Russian Federation. According to public sources, the vast majority of the population of the Russian Federation supports the war and its expansion. The ruling regime of the Russian Federation may take advantage of its citizens to circumvent the sanctions imposed on the Russian Federation and/or commit other acts that would significantly damage Estonia's international reputation and economy. The state cannot find out the ideology of every person wishing to settle in Estonia, because it is not objectively verifiable whether what the person has expressed corresponds to their actual beliefs.

28. As for comparison of foreign carers and persons under care, the law treats them differently. This too is dictated by the need to ensure the protection of internal peace of the country and the preservation of the Estonian nation. As of 11 April 2023, more than 23 000 foreigners over the age of 75 were living in Estonia on the basis of a residence permit, of whom nearly 16 000 are citizens of the Russian Federation. It is not possible to estimate how many of such foreigners would need care now, in the near future or in the more distant future. If it were possible for an adult child to settle with a parent in need of care who is a citizen of another country living in Estonia, the possibility of third-country citizens in the same order of magnitude settling in Estonia must also be considered. Together with an adult child or grandchild, their family members must also be allowed to settle in Estonia, so that predictably the circle of potential foreigners wishing to settle in Estonia will be even larger. Although the legislator can lay down the conditions for granting a residence permit, presumably obtaining a temporary residence permit would be easy. In order to need care, no extraordinary circumstances have to exist with regard to a parent or grandparent living in Estonia, but the need may be due only to age. The circle of persons settling in Estonia on such a basis may be unpredictable

and a new migration channel may be a source of danger.

29. Considering the growing trend of immigration, the number of foreigners spending their old age in Estonia will increase in the future from countries where a family has significantly more members than is customary in Estonia. Therefore, with the opening of this migration channel, the number of foreigners wishing to settle in Estonia is expected to increase even more. This may ultimately have a significant impact on the composition of the Estonian population. Already now family migration is the main reason for settling in Estonia apart from receiving international protection. An adult child or grandchild who settles in Estonia with a parent or grandparent may become a burden on the Estonian social assistance system, because by constantly caring for a parent or grandparent they will not be able to work to support themselves and their family members. The family members accompanying them may further increase the burden on the social assistance system and on the ability of the Estonian state to ensure services to its citizens and residents. By grant of a residence permit, a foreign citizen obtains the legal benefits of an Estonian resident without having previously contributed to Estonian society or having the obligation to do so while living in Estonia (as is the case, for example, with a residence permit issued for employment). In addition, a foreign citizen will have the opportunity to obtain the benefits of an Estonian resident by misusing the conditions of migration without the obligation to give something back to Estonian society or contribute to Estonian society.

30. The **Chancellor of Justice** finds that the Aliens Act and the Regulation were relevant to resolving the administrative case and are contrary to § 11, § 26 and § 27(1) and (5) of the Constitution insofar as they fail to enable granting a residence permit to an adult foreigner wishing to settle in Estonia with a parent in need of care. The central question in resolving the annulment complaint is whether the Aliens Act and the ministerial regulation are compatible with the Constitution.

31. The Aliens Act does not provide a legal basis which would entitle an adult to apply for a residence permit to settle with their parent when the parent is in need of care. The absence of such a legal basis restricts the fundamental right to family of both the foreigner applying for a residence permit and the parent in need of care residing in Estonia. The fundamental right to family also extends, depending on the circumstances, to the relationship between parents and adult children, especially when family members are in need of care. This includes the right to personal care by a family member.

32. The Supreme Court has found that the restriction of the fundamental right to family arising from the Aliens Act is justified by the values expressed in the preamble to the Constitution, such as the protection of internal peace and the preservation of the Estonian nation. These goals can be achieved by the state if it has the right to decide whether and under what conditions to admit foreigners into the country. State control over population formation is generally a compelling goal. If applying for a residence permit is not directly related to fundamental rights, the state has a wide margin of discretion in allowing or excluding immigration. Fundamental rights would become meaningless if, by relying on the goal of population control, the state were free to determine the purposes for which it is possible to apply for a residence permit. In that case, a situation would develop in which the state could easily admit foreigners to the country, for example, for purposes of employment (including through registration of short-term employment, which is not subject to

the immigration quota), entrepreneurship, or educational mobility, but exclude applying for a residence permit if the residence permit is sought for the exercise of substantial fundamental rights and in humane circumstances.

33.Representatives of the executive have explained that the aim in this case is to prevent the opening of a new migration channel and possible abuses. According to the data of Statistics Estonia for 2022, 114 523 citizens of third countries (except the European Union) were living in Estonia, which is 8.6% of the population. There were also 66 583 people with undetermined citizenship living in Estonia, i.e. nearly 5% of the population. Many of the people who settled in Estonia during the Soviet occupation are now at a fairly advanced age. Third-country nationals account for around 10–16% of older people.

34.Elderly people are more likely to need personal assistance and care due to their health. Therefore, it is not excluded that if the Aliens Act were to lay down a basis for applying for a residence permit to settle with a parent in need of care, this could increase immigration to a certain extent. However, it can be considered likely that many of the descendants of elderly people already live in Estonia and may have acquired Estonian citizenship. Also, descendants living in a foreign country and having foreign citizenship are expected to have certain ties with the Estonian state if their parent lives in Estonia (e.g. they were born and raised in Estonia themselves, visited their parents on the basis of a visa, and the like).

35.The disputed restriction is unconstitutional because the requirement of proportionality has not been complied with. The Supreme Court has found that a situation where it is not possible at all to consider granting a residence permit to a group falling within the scope of protection of the fundamental right to family very intensively restricts fundamental rights. It is contrary to the requirement of narrow proportionality that the Aliens Act fails to provide a legal basis to apply for a residence permit to settle with a parent in need of care. The state can regulate by law the conditions for applying for a residence permit. This means that it is possible to determine through these conditions what should be taken into account when deciding whether to grant a residence permit to settle with a parent in need of care. It is also possible to assess the risk posed by each applicant for a residence permit and refuse to grant a residence permit to people who pose a threat to the public good. Of course, the decision must be taken in compliance with the rules governing discretion, and the principle of proportionality must be respected. Abuse of applying for a residence permit can be prevented by carrying out an appropriate procedure.

36.It is also incompatible with the Constitution for administrative authorities to recommend that a person apply for a visa or residence permit on another basis (e.g. for employment) in a case falling within the scope of protection of the fundamental right to family. The Supreme Court has repeatedly stated that the possibility to issue a residence permit to a person on other grounds does not provide sufficient certainty that the person will be able to lead a family life in Estonia. Applying for different residence permits is subject to different conditions that a person may not be able to meet. Similarly, the possibility of applying for a visa does not adequately guarantee fundamental rights.

37. In practice, the PBGB has issued residence permits, the basis for which is indicated as “treaty” if there is no other basis in law for granting a residence permit but in the opinion of the PBGB the grant of a residence permit is justified. However, this leads to a situation where the administrative authority assesses at its discretion in which cases the grant of a residence permit is justified, even though the law does not provide a clear-cut basis for granting a residence permit. In order to avoid this, it is extremely important that the court should declare the law unconstitutional insofar as it fails to provide the necessary basis.

38. Since there is no basis in the Aliens Act to enable applying for a residence permit to settle with a parent in need of care, the Regulation does not regulate what documents must be produced in such a case. Since the Regulation in question sets out in detail the procedure and requirements for applying for a residence permit and does not regulate the submission of data for applying for a residence permit to settle with a parent in need of care, the Regulation is unconstitutional in this regard.

39. The **Minister of Justice** is of the opinion that the Aliens Act contravenes §§ 11, 12, 26 and 27 of the Constitution, as it disproportionately restricts fundamental rights to the extent that it does not enable granting a temporary residence permit to an adult child who is a foreigner to settle with a parent in need of care residing in Estonia on the basis of a residence permit. For the same reason, the Regulation is unconstitutional to the extent that it fails to lay down a list of information to be included in an application and the evidence to be attached to the application in a situation where an adult child who is a foreigner applies for a temporary residence permit to settle in Estonia with a parent in need of care residing in Estonia on the basis of a residence permit. The Aliens Act and the Regulation are relevant to resolving the administrative case, since the resolution of the complaint depended on whether the absence of a legal basis in the law for granting a temporary residence permit is compatible with the Constitution or not.

40. According to § 27(5) of the Constitution, the family has a duty to care for its members in need. Such a duty corresponds to the right of a family member in need of assistance to receive care from another family member, which includes both the right of the family member to material assistance as well as the right to personal care from family members. A family within the meaning of § 26 of the Constitution generally includes the nuclear family, parents and their minor children, between whom there is a relationship of dependency. The duty of care laid down by § 27(5) of the Constitution also includes, depending on the circumstances, adult family members. Since a foreigner cannot settle in Estonia without a residence permit, the absence of a basis for granting a temporary residence permit prevents an adult child and their parent in need of care from living together in Estonia and exercising the right to care for the parent permanently residing in Estonia. The absence of a legal basis also interferes with the fundamental right to equality arising from § 12 of the Constitution.

41. According to explanations by the Ministry of the Interior and the respondent, the aim of interference is to restrict the opening of a new migration channel and its possible misuse. The absence of a legal basis in the

Aliens Act is an appropriate but not a necessary measure for achieving that aim, since the same aims can be achieved by means which are less intrusive of fundamental rights. In order to ensure the lawful use of the migration channel, it is possible to lay down rules in laws which enable assessing the specific risk posed by an applicant for a residence permit and refusing to grant a residence permit to a person in case of whom the relevant danger appears.

OPINION OF THE CHAMBER

42. Tallinn Circuit Court of Appeal declared unconstitutional and set aside the Aliens Act insofar as it does not enable granting a temporary residence permit to an adult child who is a foreigner to settle with their parent in need of care residing in Estonia on the basis of a residence permit; as well as the Regulation insofar as it fails to lay down procedural rules necessary for the grant of the residence permit. The Chamber will first assess the admissibility of constitutional review (I) and then the constitutionality of legislation (II–IV).

I

43. When resolving a case based on an application by a court of first or second instance, the Supreme Court may invalidate or declare unconstitutional a legislative act or a provision thereof, as well as failure to issue a legislative act which was relevant to adjudicating the case (§ 9(1) and § 14(2) (first sentence) Constitutional Review Court Procedure Act). In doing so, the Supreme Court does not resolve the legal dispute, which must be dealt with under the provisions of court procedure applicable in administrative, civil or criminal cases (§ 14(2) (second sentence) Constitutional Review Court Procedure Act).

44. In line with Supreme Court case-law, in the frame of specific constitutional review a provision is deemed relevant if it is of decisive importance for resolving the case, i.e. if in the event of its unconstitutionality the court should decide differently than if it were constitutional (e.g. Supreme Court *en banc* judgment of 28 October 2002 in case No 3-4-1-5-02 [6], para. 15). The failure to issue a legislative act must also be relevant, and the review of the constitutionality of this, in addition to specific requirements, is subject *mutatis mutandis* to the same principles as in the case of relevance of legal norms (Supreme Court Constitutional Review Chamber order of 30 November 2021 No 5-21-14/15 [7], para. 18).

45. The Circuit Court of Appeal initiated constitutional review proceedings while adjudicating a complaint in which the applicant sought annulment of the respondent's decision refusing to grant a residence permit and an order obliging the respondent to reconsider their application for a residence permit (a claim for annulment and a claim for imposing an obligation within the meaning of § 37(2) clauses 1 and 2 of the Code of Administrative Court Procedure). The applicant had applied for a temporary residence permit to settle with their parent, who was living in Estonia on the basis of a long-term resident's residence permit and was in need of care but who died during the court proceedings.

46. Although standing is generally checked as at the time of lodging the complaint, the Circuit Court of Appeal denied the complaint with regard to the claim for imposing an obligation because, due to the change in circumstances, the claim for imposing an obligation could no longer be satisfied (see e.g. Supreme Court Administrative Law Chamber order of 13 February 2023 No 3-21-1360 [8], para. 12.1). With regard to the claim for annulment, the Circuit Court of Appeal found that the dispute had not been exhausted and its objective was achievable, so it was not justified to decline to examine the complaint in that regard (§ 151(2) clause 1 and § 121(2) clause 2 of the Code of Administrative Court Procedure). The court explained that the legality of an administrative act is assessed as at the time when the administrative act was issued and that the applicant had not expressed willingness to withdraw the complaint. An unlawful administrative act infringing the applicant's rights could be annulled if the complaint were to be granted, notwithstanding the fact that the applicant's mother had died.

47. The Chamber agrees with the Circuit Court of Appeal that the Aliens Act lacks a legal basis for granting a temporary residence permit to an adult child who is a foreigner to settle in Estonia with a parent in need of care. There is no such legal basis, regardless of whether the parent residing in Estonia is an Estonian citizen or a foreigner residing here on the basis of a long-term resident's residence permit (permanent resident of Estonia within the meaning of § 5 of the Aliens Act) or a temporary residence permit. The failure to establish such a legal basis has been a conscious choice on the part of the legislator, which is also confirmed by the opinions of the participants in proceedings.

48. The law lays down the grounds and conditions for applying for a temporary residence permit in order to settle with a close relative (see § 118 clause 2 and §§ 150–161¹ Aliens Act), but the applicant did not meet those requirements. An adult child who is a foreigner can apply for a residence permit on this basis to settle with an Estonian citizen residing in Estonia or with a parent residing here on the basis of a residence permit only if the child is not able to cope independently due to health or disability (§ 150(1) clause 2 Aliens Act). Nor could a residence permit be issued to the applicant on the basis of a treaty (§ 118 clause 7 Aliens Act), as there is no treaty concluded either by Estonia or the European Union laying down an obligation to issue a residence permit in the circumstances specified in the complaint (§ 201 Aliens Act).

49. This is an issue belonging to the field of family reunification, which is partly harmonised by European Union law. EU Council Directive of 22 September 2003 on the right to family reunification (2003/86/EC [9]), which regulates the conditions of family migration of third-country nationals residing on the territory of a Member State, neither requires nor prohibits establishing the legal basis currently in dispute (see Article 4 and Article 3(5) of the Directive). Therefore, in the instant case, European Union law does not limit the admissibility of constitutional review (see Supreme Court *en banc* judgment of 15 March 2022 No 5-19-29/38 [10], paras 36–50).

50. Granting the applicant's claim for annulment depended on whether the absence of a legal basis in the Aliens Act for granting a temporary residence permit to an adult child who is a foreigner to settle in Estonia with a parent in need of care was constitutional or not. Thus, the absence of a legal basis was relevant to resolving the administrative case and review of its constitutionality is admissible.

51. The Chamber considers it justified to check the constitutionality of the absence of a legal basis more narrowly than the Circuit Court of Appeal – only insofar as concerns applying for a residence permit to settle in Estonia with a parent who is a foreigner residing in Estonia on the basis of a long-term resident's residence permit. Applying for a residence permit to settle with a parent who is an Estonian citizen or a parent residing in Estonia on the basis of a temporary residence permit is so different that assessment of the constitutionality of the absence of a legal basis may lead to a different result in these cases.

52. The Circuit Court of Appeal also declared the Regulation unconstitutional to the extent that it fails to lay down a list of information to be included in an application and the evidence to be attached to the application in a situation where an adult child who is a foreigner applies for a temporary residence permit to settle in Estonia with a parent in need of care residing in Estonia on the basis of a residence permit. The Chamber finds that the Regulation could have been relevant primarily to granting the claim for imposing an obligation, where it might have been necessary to submit information and evidence, but it could not have directly prevented the grant of the claim for annulment. Therefore, the Chamber declines to examine the application of the Circuit Court of Appeal as regards the Regulation.

II

53. The absence of a legal basis for granting a temporary residence permit to an adult child who is a foreigner to settle in Estonia with a parent in need of care residing in Estonia on the basis of a long-term resident's residence permit interferes with the fundamental right to family, as well as the general fundamental right to equality, of both a foreigner applying for the residence permit and a foreigner permanently residing in Estonia.

54. The fundamental right to family, guaranteed under §§ 26 and 27 of the Constitution, gives everyone the right to expect that government agencies do not interfere with family life otherwise than to achieve the aims set out in the Constitution. In addition, individuals are entitled to positive steps by the state to help them lead a full family life. The legislator must establish the necessary legal framework and appropriate procedures for the exercise of the fundamental right to family (Supreme Court *en banc* judgment of 21 June 2019 No 5-18-5/17 [11], paras 47–48). A family within the meaning of the Constitution generally includes the nuclear family, parents and their minor children, but also adult children and parents between whom there is a relationship of dependency (Supreme Court *en banc* judgment of 3 July 2012 in case No 3-3-1-44-11 [12], para. 63).

55. The fundamental right to family protects the right of family members to maintain family ties in the broadest sense, including the right to live together in order to satisfy each other's emotional and social needs (Supreme Court Constitutional Review Chamber judgment of 4 April 2011 in case No 3-4-1-9-10 [13], para. 43). Family life also includes the right to care for each other, both in terms of provision of material assistance and personal care (Supreme Court *en banc* judgment of 3 July 2012 in case No 3-3-1-44-11 [12], para. 62). The latter is affirmed, inter alia, by § 27(5) of the Constitution, which imposes on family members the duty to care for its members in need.

56. The fundamental right to family also extends to foreign citizens and stateless persons staying in Estonia (§ 9(1) Constitution) as well as their family members. Although, unlike an Estonian citizen, a foreigner does not have the constitutional right to reside in Estonia (§ 36(1) Constitution), this right may arise for a foreigner from a residence permit issued on the basis of law (see also § 43 Aliens Act).

57. Since a foreigner cannot settle in Estonia without a residence permit, the absence of a basis for granting a temporary residence permit limits the possibility for family members to live together and care for each other. Therefore, a foreigner lawfully residing in Estonia may also be forced to leave Estonia, which, however, depending on the circumstances, may interfere with their right to the inviolability of private life (§ 26 Constitution) and the protection of health (§ 28(1) Constitution). It can be assumed that a foreigner residing in Estonia on the basis of a long-term resident's residence permit has lived here for a longer period and has developed ties (economic, cultural, social) with Estonia.

58. Although health reasons may preclude expulsion only in exceptional cases (see Supreme Court Administrative Law Chamber judgment of 15 February 2023 No 3-20-1115/147 [14], para. 33), the right to the protection of health may be affected both by departure from the country in itself (if travel is excessively burdensome for the person) and by the lack of necessary medical treatment facilities in the country to which the foreigner is departing. Ultimately, it must be taken into account that the person's human dignity should not be damaged, the guarantee of which is one of the fundamental principles of the Estonian Constitution (§ 10 Constitution).

59. Interference with the fundamental right to family is also not rendered non-existent if a foreigner wishing to settle in Estonia could apply for a residence permit on some other grounds not intended for family migration. Issuing a residence permit on other grounds does not ensure to a bearer of the fundamental right to family the certainty that they can lead a family life in Estonia, nor does it necessarily protect against arbitrary interference by the state with their family life (Supreme Court Constitutional Review Chamber judgment of 28 September 2021 No 5-21-4/13 [15], para. 39). The situation of foreigners is even more uncertain if it is only possible to stay in Estonia on the basis of a visa.

60. The general fundamental right to equality guaranteed by § 12(1) of the Constitution is interfered with if people in a similar situation are treated unequally. To ascertain unequal treatment, the point of departure of unequal treatment must be determined (*genus proximum*) and, on that basis, the comparable groups of persons set out (Supreme Court *en banc* judgment of 30 June 2016 in case No 3-3-1-86-15 [16], para. 47; judgment of 20 October 2020 No 5-20-3/43 [17], para. 93; judgment of 15 March 2022 No 5-19-29/38 [10], para. 70).

61. Families of foreigners where one family member lives in Estonia on the basis of a long-term resident's residence permit are treated differently depending on whether the person in need lives in Estonia or the person in need wishes to come to Estonia. A temporary residence permit can be applied for by a person in need of assistance: an adult child whose health or disability does not allow them to cope independently, to settle with a parent residing in Estonia (§ 150(1) clause 2 Aliens Act); as well as a parent in need of care, if care cannot be obtained in the parent's country of location or in another country, to settle with an adult child residing in Estonia (§ 150(1) clause 3 Aliens Act). If an adult child or parent in need of assistance (i.e. being unable to cope independently or in need of care) lives in Estonia, then a parent or adult child cannot apply for a temporary residence permit in order to settle with them. The law does lay down additional requirements that limit the granting of a temporary residence permit to a person in need of assistance – the sponsor must have a registered place of residence and an actual dwelling in Estonia (§ 151(1) Aliens Act); they must cover the applicant's maintenance and treatment costs (§ 152 Aliens Act); the sponsor who is an adult child must have permanent legal income that would ensure the applicant's subsistence in Estonia (§ 150(1) clause 3 Aliens Act) – but applying for a residence permit is not completely precluded, as is the case for settling with a family member in need of assistance living in Estonia.

62. Just like other fundamental rights guaranteed under the Constitution, the fundamental right to family and the fundamental right to equality are not absolute. Section 11 of the Constitution allows restricting fundamental rights only in accordance with the Constitution, setting the precondition that restriction must be necessary in a democratic society and may not distort the nature of the rights and freedoms restricted. That is, interference with a fundamental right must have a (legitimate) purpose compatible with the Constitution and the interference must be proportionate for attaining the purpose (appropriate, necessary and proportional in the narrow sense) (consistent case-law of the Supreme Court since the Constitutional Review Chamber judgment of 6 March 2002 in case No 3-4-1-1-02 [18], para. 15).

63. The Constitution allows restricting the fundamental right to family for purposes set out in the second sentence of § 26 of the Constitution, or to protect another fundamental right or a constitutional legal value (Supreme Court *en banc* judgment of 21 June 2019 No 5-18-5/17, para. 66). The general fundamental right to equality guaranteed under § 12(1) of the Constitution is subject to a simple statutory reservation, i.e. it can be restricted for any reason compatible with the Constitution (see Supreme Court *en banc* judgment of 7 June 2011 in case No 3-4-1-12-10 [19], para. 31). Therefore, the Chamber proceeds from the legitimate aims of restricting the fundamental right to family as a fundamental right with a higher standard of protection, thereby checking interference with the fundamental right to equality in conjunction with interference with the fundamental right to family (taking into account interference with the fundamental right to equality when checking the proportionality of interference with the fundamental right to family) (Supreme Court Constitutional Review Chamber judgment of 16 November 2021 No 5-21-10/18, para. 53; Supreme Court *en banc* judgment of 15 March 2022 No 5-19-29/38 [10], para. 72).

64. Next, the Chamber will assess the constitutionality of interference with fundamental rights by first identifying the aims of instances of interference.

III

65. In the administrative proceedings, the Ministry of the Interior explained that the disputed legal basis for granting a temporary residence permit is absent from the Aliens Act because the intention is to prevent the opening of a new migration channel and its misuse.

66. As the comparison made above showed, in the context of family migration, the law currently allows a temporary residence permit to be granted to a foreigner's family member in need of assistance in order to settle in Estonia. In order to settle with a close relative in Estonia, in addition to an adult child and a parent in need of assistance, a grandparent with a need for assistance can also apply for a residence permit in order

to settle in Estonia with a grandchild residing in Estonia on the basis of a long-term resident's residence permit (§ 150 subs. (1) clause 3, and subs. (2) Aliens Act). Minor children of a foreigner residing in Estonia can also apply for a residence permit (§ 150(1) clause 1 Aliens Act), as well as wards to settle with their guardian who is a foreigner residing in Estonia (§ 150(1) clause 4 Aliens Act).

67. Most of the possibilities to apply for a temporary residence permit to settle with a close relative were laid down in 1999 in the previous Aliens Act[20], in force until the end of 2009 (the Act on amending and supplementing the Aliens Act[21] (955 SE[5]; Riigikogu VIII composition). Only the possibility for an adult child in need of assistance to apply for a temporary residence permit was introduced to the Act later, in 2002 (the Act on amending the Aliens Act[22] (1028 SE[23]; Riigikogu IX composition). At the same time, the requirement was added to the Act that the sponsor must have a registered place of residence and an actual dwelling in Estonia and they must cover the applicant's maintenance and treatment costs. According to the explanatory memorandum to the Draft Act, the aim was that the foreigner would not become a burden on the Estonian social welfare system. It was also noted that the Draft Act brought the law into line with European Union legislation in force at the time (see pages 3 and 4 of the explanatory memorandum).

68. The legal bases laid down in the Aliens Act for granting a temporary residence permit for the purposes of family migration meet the requirements of the 2003 Directive (2003/86/EC[9]) on the right to family reunification, the overall purpose of which is to make family life of third-country nationals in a Member State possible and facilitate their integration (Recital 4). The Directive imposes obligations on the Member States, in particular, with regard to the spouse and minor children of the person residing in a Member State and seeking family reunification (Recital 9). In the case of relatives in the descending or ascending line of the applicant, the Directive leaves the decision on the possibility of reunification to the Member State (Recital 10).

69. Thus, the possibility of obtaining a temporary residence permit to settle in Estonia with a close relative (in this case, a parent) in need of care would indeed open a new immigration channel, which is not provided in the law to date. It is likely that this may increase family migration to Estonia, which will increase the share of foreigners among the Estonian population. In combination with other temporary residence permits issued for the purpose of family migration (spouse, minor children, adult children in need of assistance or parents and grandparents in need of assistance), family migration can increase significantly – more than merely on account of the persons currently in dispute (adult child to a parent in need of care). However, the potential additional immigration would be somewhat limited by the fact that a temporary residence permit can generally be revoked if the ground for granting the residence permit ceases to exist (§ 135(2) clause 2 and § 123 clause 1 Aliens Act). In the event of the recovery or death of the parent, the basis for granting a temporary residence permit to the adult child would presumably also cease to exist. By that time, however, the adult child may have developed such ties to Estonia that are protected as fundamental rights.

70. It can be inferred from the foregoing, as well as from the positions expressed by the Riigikogu and the Minister of the Interior in the instant case, that immigration in the disputed manner is excluded for two different aims: to avoid a threat to the national security and public order of Estonia and a burden on the

social system.

71.The aim of avoiding a threat to national security and public order is linked to the preamble to the Constitution, which requires, *inter alia*, that the Estonian state should ensure the protection of internal and external peace. These aims can be achieved by the state if it has the right to decide whether and under what conditions to admit foreigners into the country. This is a legitimate and compelling aim for interference with the fundamental right to family (Supreme Court *en banc* judgment of 21 June 2019 No 5-18-5/17 [24], para. 67).

72.According to the explanations by the Minister for the Interior, security and public order may be threatened by the fact that a number of foreigners full of vigour, whose level of danger is difficult to identify, could apply for a temporary residence permit. Although it is more or less complicated in each individual case, the potential threat to national security and public order in Estonia arising from a particular applicant is assessed in all administrative proceedings carried out under the Aliens Act (see § 13(1) and § 14(2)). Compared to rejection of visa applications, the statutory right of a foreigner to apply for a temporary residence permit would impose a greater obligation on the state to justify each and every refusal. It would also mean higher costs for procedure.

73.The aim of preventing an excessive burden on the Estonian social system by restricting immigration is also legitimate and compelling. Section 28(2) of the Constitution obliges the Estonian state to provide assistance primarily to Estonian citizens against various social risks, leaving the granting of state assistance to foreign citizens and stateless persons residing in Estonia for the legislator to decide. The right to the protection of health (§ 28(1) Constitution), on the other hand, is everyone's fundamental right, so that foreigners staying in Estonia may also request the performance of the state's obligation arising from it. The General Part of the Social Code Act, which regulates the organisation of social protection in Estonia, extends the rights and obligations laid down therein also to foreigners residing in Estonia on the basis of a long-term resident's residence permit, as well as foreigners residing in Estonia on the basis of a temporary residence permit (§ 3(1)). In the case of the legal basis in dispute, the possible burden on the Estonian social system could be limited by measures similar to those already in place for temporary residence permits granted for the purpose of family migration (see § 150(1) clauses 2–4, § 152 Aliens Act).

IV

74.Interference with a fundamental right is a measure appropriate for attaining the aim if it helps to attain the aim. However, interference is necessary only if the aim cannot be attained by using a measure which is less restrictive of fundamental rights. To decide on the narrow proportionality of interference requires considering, on the one hand, the extent and intensity of interference with a fundamental right and, on the other hand, the importance of the aim (Supreme Court Constitutional Review Chamber judgment of 6 March

75. In the opinion of the Chamber, the absence of a legal basis for granting a temporary residence permit to an adult child in order to settle with a parent in need of care enables the aims to be achieved (i.e. is appropriate for attaining the aims). If a whole group of foreigners are not allowed into the country, this rules out applications for residence permits by persons who may pose a threat to national security and public order in Estonia. Also, in case of not being allowed into the country, foreigners do not acquire the right to expect the Estonian state to ensure their social protection. In this regard, above all, the wish to protect national security and public order should be seen as the aim of unequal treatment (see para. 61 above). This is because the legislator has already made concessions by allowing residence permits to be applied for by people in need of assistance whose arrival and residence in Estonia may mean an additional burden on the Estonian social system.

76. Although there are measures which would help to achieve one or another of the above-mentioned aims by interfering less with fundamental rights (see paras 72–73 above), they cannot be regarded as equally effective, so that the absence of the disputed legal basis cannot be regarded an unnecessary measure for attaining the aims pursued. In ensuring national security and public order, consideration could be given, first and foremost, to the possibility to assess the threat posed by each individual instead of excluding an entire group of persons. However, this would entail higher costs for the state and would not be as effective, since errors cannot be ruled out in assessing the danger posed by each person. It is also important that there is no one single measure that would enable both aims to be achieved equally effectively. For this reason, in the instant case, it is necessary to assess, above all, the narrow proportionality of interference with fundamental rights (see Supreme Court *en banc* judgment of 15 February 2023 No 3-18-477/73 [25], paras 78 and 79). The question of the narrow proportionality of interference largely comes down to how intense the interference with fundamental rights is in a particular case and how much weight is given to the aims of interference. The Chamber notes that the security environment in Estonia plays a role in assessing the weight of the aim of ensuring national security and public order, so that the assessment may differ in the case of foreigners from different countries.

77. The intensity of interference with fundamental rights resulting from the absence of a basis to grant a temporary residence permit depends on whether the parent in need of care is able to leave Estonia and live with the adult child in another country (the country of the child's residence or another country); as well as on the consequences that leaving Estonia would have for the parent (see paras 57–58 above on interference with the inviolability of private life and the right to the protection of health). If departure of a parent from Estonia is possible and does not entail serious consequences, then interference with fundamental rights is intense but may yet be narrowly proportional, since the protection of national security and public order and the social system in combination are sufficiently compelling aims to justify instances of interference with fundamental rights. The inclusion of the disputed legal basis in the law would lead to additional immigration, which, combined with other already existing legal bases for granting a temporary residence permit for family migration, might not leave national security and public order unaffected. The Chamber concedes, however, that it is not ruled out that the assessment of the constitutionality of the absence of the legal basis in dispute may be different in cases where the circumstances differ from the present case.

78. However, if the parent's health situation is such that leaving Estonia is impossible or a real risk exists that this would have serious consequences for the parent (the state of health deteriorates significantly, rapidly and irrevocably, leading to great suffering or a significant reduction in life expectancy), the interference with the fundamental right to family is extremely intense. This means that foreigners should renounce the right to live together or choose whether to risk the parent's health and cause them great suffering in order to live together. Such a situation may not ensure decent treatment, and the aims – to exclude threats to national security and public order and not burden the social system – may not be compelling enough to justify interference with fundamental rights. In such a situation, the intensity of interference with fundamental rights would be reduced and a constitutional outcome guaranteed by the possibility of granting an adult child a temporary residence permit exceptionally for 'humane' reasons, without unduly undermining the aforementioned aims.

79. In the opinion of the Chamber, the legal basis for this arises from § 210³ of the Aliens Act, which lays down the grant of a temporary residence permit to settle permanently in Estonia in the event of extraordinary circumstances. On the basis of this provision, a residence permit can be granted to an alien who is staying in Estonia and on whom the imposition of an obligation to leave Estonia would clearly be too burdensome and who lacks the opportunity to obtain a residence permit in Estonia on another basis. Although this provision contains a wide margin of discretion for the authority applying it, its constitutional interpretation should nevertheless lead to the conclusion that also too burdensome are situations where an adult child who is a foreigner lacks the opportunity to live together with a parent residing in Estonia on the basis of a long-term resident's residence permit and to care for the parent because the parent's health is such that leaving Estonia is impossible or a real risk exists that this would entail serious consequences for the parent. The legal basis laid down in § 210³ of the Aliens Act makes it possible to take account of the aims pursued by the legislator by not establishing the legal basis in dispute. Under § 210³ of the Aliens Act, a temporary residence permit can be issued to a foreigner who does not pose a threat to public order and national security, and it is issued for a limited period – for up to one year – and its validity can be extended for up to three years at a time (§ 210⁴ Aliens Act).

80. The Chamber additionally notes that, for a short stay in Estonia and to avoid situations that excessively interfere with fundamental rights, it is also possible to extend the period of temporary stay in Estonia (§ 46 Aliens Act); the expulsion of a foreigner (enforcement of the precept to leave) must also be suspended if the foreigner's temporary stay in Estonia is justified by humane considerations (e.g. health considerations) (§ 14(5) clause 4 Obligation to Leave and Prohibition on Entry Act).

81. Since the law contains grounds which, in the event of extraordinary circumstances, allow an adult child who is a foreigner to live or stay in Estonia in order to care for a parent in need of care residing here on the basis of a long-term residence permit, the Chamber is of the opinion that the absence of a legal basis for granting a temporary residence permit to an adult child to settle with a parent in need of care residing in Estonia on the basis of a long-term resident's residence permit is compatible with the Constitution. Based on the foregoing, the Chamber denies the application by Tallinn Circuit Court of Appeal for a declaration of unconstitutionality of the Aliens Act.

(signed digitally)

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