

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

EN BANC

JUDGMENT

in the name of the Republic of Estonia

Case number	5-18-5
Date of judgment	21 June 2019
Composition of court	Chairman: Villu Kõve; members: Velmar Brett, Peeter Jerofejev, Eerik Kergandberg, Hannes Kiris, Ants Kull, Saale Laos, Viive Ligi, Heiki Loot, Jaak Luik, Nele Parrest, Ivo Pilving, Jüri Pöld, Paavo Randma, Peeter Roosma, Malle Seppik and Tambet Tampuu
Case	Review of constitutionality of the Aliens Act and Minister of the Interior Regulation No 83 of 18 December 2015 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 forms for applying for a residence permit"
Basis for proceedings	Tallinn Court of Appeal judgments of 17 September 2018 in administrative cases No 3-16-1903 and No 3-17-51
Participants in the proceedings	Riigikogu
	K.
	M.
	Police and Border Guard Board
	Chancellor of Justice
	Minister of Justice
	Minister of the Interior
Hearing	Written procedure

OPERATIVE PART

1. To satisfy the applications by Tallinn Court of Appeal.

2. To declare unconstitutional and repeal the Aliens Act insofar as it precludes issuing a temporary residence permit to an alien for settling in Estonia with a registered same-sex partner who is an Estonian citizen.

3. To declare Minister of the Interior Regulation No 83 of 18 December 2015 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 forms for applying for a residence permit" unconstitutional insofar as it failed to lay down the list of information to be submitted in an application and the evidence to be attached to the application in a situation where the registered same-sex partner of an Estonian citizen applied for a temporary residence permit to settle in Estonia.

4. To declare unconstitutional and repeal 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" insofar as it fails to lay down the list of information to be submitted in an application and the evidence to be attached to the application in a situation where the registered same-sex partner of an Estonian citizen applies for a temporary residence permit to settle in Estonia.

FACTS AND COURSE OF PROCEEDINGS IN ADMINISTRATIVE CASE NO 3-16-1903

1. K. (hereinafter 'applicant I'), a citizen of the Democratic Socialist Republic of Sri Lanka, and L, an Estonian citizen of the same sex, entered into a registered partnership contract at a notary's office in Narva on 3 May 2016.

2. On 4 May 2016, applicant I applied to the Police and Border Guard Board (PBGB) for issue of a temporary residence permit to settle in Estonia with their registered partner.

3. By decision No 15.3-3.1/2505 of 9 September 2016, the PBGB refused to examine the application by applicant I as under § 118 cl. 1) of the Aliens Act, a temporary residence permit may be issued to an alien to settle with their spouse. The registered partnership contract attached to the application for residence permit by applicant I is not a document proving a contract of marriage.

4. Applicant I lodged an action with Tallinn Administrative Court seeking annulment of the PBGB decision of 9 September 2016 and an order obliging the PBGB to issue a temporary residence permit to applicant I. Additionally, applicant I sought an award of non-pecuniary damages from the Republic of Estonia in the amount of 10 000 euros or an amount determined by the court.
5. To comply with the Tallinn Court of Appeal order of 30 March 2017 for interim relief, on 4 April 2017 the PBGB exceptionally issued a temporary residence permit valid to 3 April 2018 to applicant I. The PBGB extended the residence permit of applicant I to 2 April 2019 and subsequently to 2 April 2020.
6. By judgment of 23 November 2017, Tallinn Administrative Court dismissed the action by applicant I.
7. Applicant I lodged an appeal with Tallinn Court of Appeal, seeking to reverse the Administrative Court judgment and to enter a new judgment granting their action.
8. By judgment of 17 September 2018, Tallinn Court of Appeal allowed the appeal by applicant I in part. The Court of Appeal reversed the Administrative Court judgment insofar as the Administrative Court had refused to grant the action by applicant I for annulment of the PBGB decision of 9 September 2016 and for imposing an obligation on the PBGB. With regard to the claim for non-pecuniary damages, the Court of Appeal dismissed the appeal and upheld the Administrative Court judgment. The Court of Appeal entered a new judgment, granting the action by applicant I in part, annulling the PBGB decision of 9 September 2016 and obliging the PBGB to re-examine the application for residence permit by applicant I.
9. The Court of Appeal declared the Aliens Act to be unconstitutional insofar as it fails to lay down a legal basis for issuing a temporary residence permit for the same-sex registered partner of an Estonian citizen to lead a family life in Estonia. The court also declared unconstitutional Minister of the Interior Regulation No 83 of 18 December 2015 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 forms for applying for a residence permit" insofar as it did not enable the registered same-sex partner of an Estonian citizen to submit a certificate of registration of a registered partnership instead of a document certifying a contract of marriage when applying for a temporary residence permit.
10. On 17 September 2018, Tallinn Court of Appeal referred its judgment to the Supreme Court for initiating constitutional review court proceedings. The application by Tallinn Court of Appeal was registered in the Supreme Court as case No 5-18-5.

FACTS AND COURSE OF PROCEEDINGS IN ADMINISTRATIVE CASE NO 3-17-51

11. M. (hereinafter 'applicant II') a Ukrainian citizen and N., an Estonian citizen of the same sex, entered into a registered partnership in Germany on 12 January 2015.
12. The PBGB issued to applicant II a temporary residence permit valid from 28 August 2015 to 27 August 2016 for studying in Estonia, which was extended from 28 August 2016 to 27 August 2017. On 16 August 2017, the PBGB issued to applicant II a temporary residence permit for work in Estonia valid to 15 August 2019. On 17 August 2018, the PBGB issued to applicant II a temporary residence permit valid from 29 August 2018 to 29 August 2023 for permanently settling in Estonia.
13. On 25 August 2016, applicant II lodged an application with the PBGB to issue them a temporary residence permit under § 137(1) of the Aliens Act to settle with their registered partner in Estonia.
14. By decision No 15.3-3.2/5366-1 of 16 December 2016, the PBGB refused to issue a temporary residence permit to applicant II because applicant II did not meet the conditions for issue of a temporary residence permit. Under § 137(1) of the Aliens Act, a temporary residence permit may be issued to an alien to settle with their spouse who permanently resides in Estonia.
15. Applicant II lodged an action with Tallinn Administrative Court seeking annulment of the PBGB decision of 16 December 2016 and an order obliging the PBGB to issue them a temporary residence permit. Additionally, applicant II sought an award of non-pecuniary damages from the Republic of Estonia in the amount of 10 000 euros or an amount determined by the court.
16. By judgment of 21 July 2017, Tallinn Administrative Court dismissed the action. The court found that Directive 2004/38/EC of the European Parliament and of the Council was not applicable. The Directive applies in the exercise of freedom of movement by a European Union citizen, including where an Estonian citizen would like to return to Estonia (Member State of origin) after residing in another Member State with their registered partner. According to the judicial case file, applicant II lived in Ukraine with their cohabiting partner, who is an Estonian citizen, after which they came to Estonia, where they lived from 30 December 2014, i.e. already prior to entering into a registered partnership contract. Registration of a registered partnership in another Member State (Germany) does not provide a basis to apply the Directive in respect of the applicant.
17. Applicant II lodged an appeal, seeking to reverse the Administrative Court judgment and to enter a new judgment granting their action, annulling the PBGB decision of 16 December 2016, obliging the PBGB to issue a temporary residence permit to applicant II, and ordering an award of non-pecuniary damages. On account of the residence permit issued on 17 August 2018 (see para. 12 of the judgment), at the hearing in Tallinn Court of Appeal on 29 August 2018 the applicant amended their action, replacing the claim for annulment and the claim for imposing an obligation on the PBGB with a claim for declaration of unlawfulness of the PBGB decision of 16 December 2016.
18. By judgment of 17 September 2018, Tallinn Court of Appeal allowed the appeal by applicant II in part. The Court of Appeal upheld the Administrative Court judgment insofar as the Administrative Court had refused to grant the claim for non-pecuniary damages. In the remaining part, the Court of Appeal reversed the Administrative Court judgment and entered a new judgment concerning the reversed part, granting the action in part and declaring the PBGB decision of 16 December 2016 unlawful.
19. The Court of Appeal declared the Aliens Act to be unconstitutional insofar as it fails to lay down a legal basis to issue a temporary residence permit for the same-sex registered partner of an Estonian citizen to lead a family life in Estonia. The court also declared unconstitutional Minister of the Interior Regulation No 83 of 18 December 2015 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 forms for applying for a residence permit" insofar as it does not enable the registered same-sex partner of an Estonian citizen to submit a certificate of registration of a registered partnership instead of a document certifying a contract of marriage when applying for a temporary residence permit.
20. On 17 September 2018, Tallinn Court of Appeal referred its judgment to the Supreme Court for initiating constitutional review court proceedings. The application by Tallinn Court of Appeal was registered in the Supreme Court as case No 5-18-6.

21. By order of 24 September 2018, the Supreme Court joined cases No 5-18-5 and 5-18-6 in unified proceedings, assigning the joined case number 5-18-5.

22. By order of 18 January 2019, the Supreme Court Constitutional Review Chamber referred case No 5-18-5 for adjudication to the Supreme Court *en banc*, relying on § 3(3) (first sentence) of the Constitutional Review Court Procedure Act.

REASONING OF THE TALLINN COURT OF APPEAL CONCERNING THE UNCONSTITUTIONALITY OF THE CONTESTED LEGISLATION

23. The Court of Appeal found that the Aliens Act violated the fundamental right to family and inviolability of family life protected under §§ 26 and 27 of the Constitution, as well as the fundamental right to equality under § 12 of the Constitution, as it precludes issue of a temporary residence permit to the applicants to settle with their registered partner.

24. The core of the fundamental right to family and inviolability of family life involves the right and opportunity of family members to be together with each other, including setting up a common home and living there together. For this, family members must be able to live together in one country. This right is matched by the state's obligation to establish a legal basis to obtain a residence permit so that family members could live together in the same country. Protection of family life from interference by the state is not made dependent on the sex of the family members or their sexual orientation. Although the state may interfere with an alien's family life, precluding their right to live together with a family member in Estonia, same-sex partners are also entitled to the protection of the state and restriction of their rights must not contravene the prohibition of discrimination and must be necessary in a democratic society.

25. Under the Registered Partnership Act (RPA) which entered into force on 1 January 2016, same-sex partners as well as partners of different sexes may enter into a registered partnership contract (§ 1(1) RPA) and a registered partnership registered in a foreign country is deemed to be valid in Estonia in accordance with the provisions of the Private International Law Act. Under § 118 cl. 1) of the Aliens Act, a temporary residence permit may be issued to an alien only to settle with a spouse.

26. The Court of Appeal did not consider it possible to interpret § 118 cl. 1) of the Aliens Act as including issue of a temporary residence permit to settle with a same-sex registered partner. The wording of the provision is clear and unambiguous, in particular considering § 1(1) of the Family Law Act, under which a marriage is contracted between a man and a woman. Also against an expansive interpretation is the Supreme Court Administrative Law Chamber opinion of 9 November 2009 in the judgment in case No 3-3-1-61-09, as well as non-amendment of the Aliens Act after the Registered Partnership Act entered into force on 1 January 2016. In the opinion of the Court of Appeal, this was a conscious choice by the legislator. Supplementing § 118 cl. 1) of the Aliens Act so as to allow issue of a temporary residence permit also to settle with a registered partner was foreseen in the Draft Implementing Act of the Registered Partnership Act (XIII Riigikogu 114 SE) before the Riigikogu but the Riigikogu did not support completion of the second reading of the Draft Act. Although on 5 April 2016 the Riigikogu supported a proposal by the Chancellor of Justice to bring § 118 of the Aliens Act into conformity with the Constitution, enabling issue of a residence permit in Estonia to same-sex cohabitants of Estonian citizens (see <http://stenogramm.id.rigikogu.ee/et/201604051000>), the parliament has not dealt with the relevant amendments.

27. The applicants and their cohabiting partners are of the same sex, so they cannot marry and comply with the precondition for issue of a residence permit set out in § 118 cl. 1) of the Aliens Act. As this legal impediment is not dependent on the applicants and their cohabiting partners, it treats the applicants and their cohabiting partners in issuing a temporary residence permit unjustifiably worse than persons of different sexes who have the possibility to get married. Since under the Constitution the family life of persons of the same sex and persons of different sexes is equally protected, no reasonable and relevant ground exists for such different treatment. Interference with fundamental rights is also not negated by the fact that the applicants may have an opportunity to apply for a temporary residence permit on some other grounds laid down in the Aliens Act. If the applicants wish to settle in Estonia for the purpose of leading a family life, they must be able to apply for a residence permit on that ground, especially since a residence permit obtained on another ground need not offer equivalent rights and protection to an applicant.

28. Minister of the Interior Regulation No 83 of 18 December 2015 is also unconstitutional insofar as it did not enable submission of a registered partnership contract or a certificate of registration of a registered partnership in a foreign country instead of a document certifying a contract of marriage.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

29. - 40. [not translated]

OPINION OF THE COURT *EN BANC*

41. Tallinn Court of Appeal found that the Aliens Act and Minister of the Interior Regulation No 83 of 18 December 2015 to be applied in the two administrative cases were in part unconstitutional. The Court *en banc* will first assess the admissibility of the Court of Appeal applications as regards the Aliens Act (I) and will then deal with the relevant fundamental rights (II), interference with fundamental rights arising from the Aliens Act (III), and its constitutionality (IV). After that, the Court *en banc* will express an opinion on the admissibility of the applications as regards the regulation of the Minister of the Interior, and will assess the constitutionality of the regulation (V). Finally, the Court *en banc* will resolve the applications by Tallinn Court of Appeal (VI).

I

42. Based on an application by a court of first or second instance, the Supreme Court will repeal or declare unconstitutional a legislative act or a provision thereof, as well as failure to issue a legislative act, which was relevant for adjudication of the case (§ 9(1) and § 14(2) (first sentence) Constitutional Review Court Procedure Act). In doing so, the Supreme Court does not adjudicate the legal dispute which will have to be adjudicated under the provisions of court procedure applicable in administrative, civil or criminal cases (§ 14(2) (second sentence) Constitutional Review Court Procedure Act).

43. Tallinn Court of Appeal initiated constitutional review proceedings while adjudicating administrative cases in which aliens contested refusal to issue them a temporary residence permit to settle in Estonia. The applications by Tallinn Court of Appeal are admissible if the Aliens Act was relevant for adjudication of the administrative cases insofar as the Court of Appeal questioned the constitutionality of the Act.

44. The Court of Appeal declared the Aliens Act to be unconstitutional insofar as the Act fails to lay down a legal basis to issue a temporary residence permit for the same-sex registered partner of an Estonian citizen to lead a family life in Estonia. To that extent the Aliens Act was relevant for adjudicating the administrative cases provided that the applicants had registered a

partnership with an Estonian citizen of the same sex.

45. Applicant I and their same-sex cohabiting partner who is an Estonian citizen entered into a registered partnership contract under the Registered Partnership Act in May 2016 in Estonia. Under § 1(1) of the Registered Partnership Act, a registered partnership contract may be entered into between two natural persons of whom at least one resides in Estonia. The Court *en banc* agrees with the opinion expressed by the Supreme Court Constitutional Review Chamber in para. 32 of the order in case No 5-17-42/9 that the Registered Partnership Act entered into force on 1 January 2016. No reason exists to doubt the validity of the registered partnership contract of applicant I, and, to the extent contested, the Aliens Act was relevant for adjudicating administrative case No 3-16-1903. Thus, the application by the Court of Appeal to check the constitutionality of the Aliens Act is admissible.

46. The Court *en banc* will decide on the application for constitutional review lodged by Tallinn Court of Appeal in administrative case No 3-17-51 after it has assessed the constitutionality of the contested regulatory provisions.

II

47. The fundamental right to family arises from the first sentence of § 26 of the Constitution, under which everyone is entitled to inviolability of their private and family life, and from § 27(1) of the Constitution establishing that the family, as being fundamental to the preservation and growth of the nation and constituting the foundation of society, enjoys the protection of the state. The fundamental right to family protects the right of family members to maintain family ties in their broadest sense, including the right to live together (Supreme Court Constitutional Review Chamber judgment of 4 April 2011 in case No 3-4-1-9-10, para. 43).

48. The fundamental right to family entitles everyone to assume 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 (Supreme Court Constitutional Review Chamber judgment of 5 March 2001 in case No 3-4-1-2-01, para. 14). The legislator must establish the necessary legal framework and appropriate procedures for exercise of the fundamental right to family (see Supreme Court Constitutional Review Chamber order of 10 April 2018 in case No 5-17-42/9, para. 36).

49. In the instant case, the issue is whether the fundamental right to family also protects the right of same-sex registered partners to lead a family life in Estonia.

50. Estonia has acceded to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, and interpretation of the Constitution must also take into account the Convention and its implementing practice in the European Court of Human Rights (ECtHR). The ECtHR has repeatedly found that family life protected under Article 8 of the Convention also includes cohabitation of same-sex people if it constitutes a stable *de facto* partnership (see ECtHR judgment of 24 June 2010 in the case of *Schalk and Kopf v. Austria*; judgment of 7 November 2013 in the case of *Vallianatos and Others v. Greece*; judgment of 21 July 2015 in the case of *Oliari and Others v. Italy*; judgment of 23 February 2016 in the case of *Pajić v. Croatia*; judgment of 30 June 2016 in the case of *Taddeucci and McCall v. Italy*; judgment of 14 December 2017 in the case of *Orlandi and Others v. Italy*).

51. The ECtHR has often treated the issue of family life together with the right to equal treatment guaranteed under Article 14 of the Convention, as according to the Court's interpretation that Article also prohibits discrimination based on sexual orientation. The Court has found that same-sex couples are just as capable as different-sex couples to live in stable, committed relationships, consequently being in a relevantly similar situation to different-sex couples (see ECtHR judgment in the case of *Schalk and Kopf v. Austria*, paras 92–95 and 99). In the opinion of the Court, different treatment based on sexual orientation requires particularly serious reasons by way of justification and the state's margin of appreciation in such cases is narrow (see ECtHR judgment of 30 June 2016 in the case of *Taddeucci and McCall v. Italy*, para. 89; judgment of 23 February 2016 in the case of *Pajić v. Croatia*, para. 59).

52. In view of the above ECtHR jurisprudence, as well as the principles of human dignity (§ 10) and equal treatment (§ 12(1)) guaranteed under the Estonian Constitution, the Court *en banc* is of the opinion that the fundamental right to family guaranteed under the first sentence of § 26 and § 27(1) of the Constitution also protects the right of same-sex people to lead a family life in Estonia. The Court *en banc* agrees with the opinion expressed by the Supreme Court Administrative Law Chamber that “[T]he text of the Constitution does not make protection of family life from interference by the state dependent on the sex of the family members or their sexual orientation. Such restrictions cannot be found from the Constitution through interpretation either” (Supreme Court Administrative Law Chamber order of 27 June 2017 in case No 3-3-1-19-17, para. 16). That is, similarly to different-sex people, same-sex people living in a stable partnership may form a family within the meaning of the constitutional fundamental right to family, and the Constitution protects their family life from interference by the state authority.

53. The Court *en banc* notes that cohabitation of same-sex people is also legally regulated. Just like people of different sexes, same-sex people may also enter into a registered partnership contract under the Registered Partnership Act that entered into force on 1 January 2016 (§ 1(1) RPA). Under the rules of private international law in Estonia, a registered partnership between same-sex people registered in a foreign country can also be deemed to be valid in Estonia (§ 7(2) RPA). It is also important to take into account that even though under the Family Law Act only a woman and a man may contract a marriage (§ 1(1) FLA), a marriage contracted between same-sex people abroad is also deemed to be valid in Estonia if it was contracted in accordance with private international law rules (cf. Supreme Court Administrative Law Chamber order of 27 June 2017 in case No 3-3-1-19-17, para. 28). European Union law may also give rise to the right of temporary residence of a European Union citizen's family member (including a same-sex spouse, registered or *de facto* partner) in a Member State (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (see Article 2(2) points (a) and (b) and Article 3(2) point (b)); see also EU Court of Justice judgment of 5 June 2018 in the case of *Coman*, C-673/16, paras 34–35 and 51; as well as § 22 of the Citizen of the European Union Act).

III

54. Next, the Court *en banc* will deal with the issue of whether the Estonian legal order contains a basis to issue a temporary residence permit to the registered same-sex partner of an Estonian citizen, i.e. will ascertain interference with the fundamental right to family.

55. Under the Aliens Act, aliens can live in Estonia on the basis of a valid residence permit. The Aliens Act also lays down grounds for issuing a residence permit to an alien who wishes to settle in Estonia to lead a family life. To enable family migration, it is stipulated that an alien may apply for a temporary residence permit to settle with their spouse (§ 118 cl. 1) Aliens Act) or with a close relative (a child with a parent, a parent or grandparent with a child or grandchild, and a ward with a guardian) (§ 118 cl. 2) Aliens Act).

56. The Aliens Act enables applying for a residence permit to settle with one's spouse, thus only if the people concerned have contracted a marriage. When applying for a residence permit on that basis, in line with 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" the person must also submit a document certifying a contract of marriage (§ 9(1) cl. 3) of Regulation No 7). However, merely establishing the fact of a contract of marriage is not sufficient to issue a residence permit; a residence permit is issued if the additional conditions laid down by law have also been complied with (e.g. the requirements for family life set out in § 138 of the Aliens Act – close economic ties and a psychological dependence between the spouses, stability of the family, prohibition of a fictitious marriage).

57. The Court *en banc* agrees with the assessment of the Court of Appeal that it is not justified to interpret the definition of marriage in the Aliens Act expansively and include in it a registered partnership of same-sex people. Although legal concepts may have different scope in different legal acts, the legislator's clear wish to distinguish between the institutions of marriage and registered partnership speaks against such an interpretation. Such an aim by the legislator may be deduced both from adoption of the Registered Partnership Act as *lex specialis* in a situation where family life (including marriage) is regulated by the Family Law Act; as well as from the Draft Implementing Act of the Registered Partnership Act after the Registered Partnership Act was adopted (Draft Implementing Act of the Registered Partnership Act; XIII Riigikogu 114 SE), which disappeared from the Riigikogu proceedings. The Draft Implementing Act of the Registered Partnership Act also envisaged supplementing the Aliens Act (§ 80 of the Draft Implementing Act). The substance of the amendment was to add after the word "spouse" the words "or a registered partner" in the relevant grammatical form in the relevant provisions of the Aliens Act.

58. In the opinion of the Court *en banc*, the mere fact that the legislator has not amended the Aliens Act after adoption of the Registered Partnership Act does not enable the conclusion that the legislator believes that the provisions on marriage in the Aliens Act also apply to registered partnership. Rather, it implies the legislator's wish to exclude the possibility to issue a temporary residence permit for the purpose of family migration to the registered same-sex partner of an Estonian citizen. Although the legislator may choose in which Act to regulate issues concerning the rights of aliens, residence of aliens in Estonia is regulated primarily by the Aliens Act (except distinctions related to European Union law) which also lays down exhaustively the grounds for issuing a temporary residence permit.

59. In view of the foregoing, the Court *en banc* finds that the Aliens Act does not provide for grounds to issue a temporary residence permit to an alien wishing to settle in Estonia with a same-sex registered partner who is an Estonian citizen. Since an alien cannot settle in Estonia without a residence permit, the Aliens Act, insofar as it does not provide for the above grounds, interferes with the fundamental right to family of both an alien applying for a residence permit as well as their registered partner who is an Estonian citizen. Under § 36(1) of the Constitution, Estonian citizens have a subjective right to live in Estonia. If, in the absence of a residence permit, same-sex registered partners cannot live together in Estonia, the Estonian citizen may be forced to leave Estonia (see Supreme Court Administrative Law Chamber judgment of 18 May 2000 in case No 3-3-1-11-00, para. 6).

60. Interference with the fundamental right to family is also not negated by the fact that the registered same-sex partner of an Estonian citizen is not prohibited from applying for a temporary residence permit on some other grounds not intended for family migration. Legal grounds for stay in Estonia, which are not aimed at enabling family migration, may involve unfavourable restrictions for a bearer of fundamental rights (e.g. a visa is very limited in time) or be dependent on circumstances not related to leading a family life (e.g. a residence permit for study or work), and which a residence permit applicant might not satisfy. Also, in the case of grounds intended for family migration, issue or extension of a residence permit cannot be refused for the reason that the immigration quota is full (§ 115 cls 2) and 3) Aliens Act) or that the stay of an alien in Estonia may endanger morality or the rights or interests of others (§ 141, § 145(1), § 147(1), § 153, § 157(1), § 159(1) Aliens Act). Issuing a residence permit on other grounds does not ensure a bearer of the fundamental right to family sufficient certainty that they can lead a family life in Estonia, and need not protect against arbitrary interference by the state with their family life.

61. Apart from the fundamental right to family, the Aliens Act, in the relevant part, also interferes with the fundamental right to equality (§ 12(1) Constitution). Although same-sex people cannot contract a marriage in Estonia, on certain conditions a marriage contracted by same-sex people abroad is also deemed to be valid in Estonia (see para. 53 of the judgment). Therefore, based on the provisions of the Aliens Act regulating issue of a residence permit to settle with a spouse in Estonia, it is also possible to issue a temporary residence permit to the same-sex spouse of an Estonian citizen.

62. The Aliens Act does not enable issue of a temporary residence permit to an alien who has entered into a registered partnership with a same-sex Estonian citizen. Issuing a residence permit also does not depend on whether the partnership was registered in Estonia (registered partnership contract under § 1(1) of the Registered Partnership Act) or abroad (based on similar regulations in other countries) and the partnership is deemed to be valid in Estonia.

63. The Court *en banc* finds that aliens who have contracted a marriage with a same-sex Estonian citizen or registered their partnership in another legal form are in a similar situation on account of their essential characteristics in terms of applying for a residence permit. In both cases, these persons wish to have a residence permit to settle in Estonia with their family member who is an Estonian citizen, relying on the fundamental right to family. However, the Aliens Act treats these persons in a similar situation differently as it enables issue of a residence permit to the same-sex spouse of an Estonian citizen while excluding issue of a residence permit to a registered partner. The opportunity of same-sex people to contract a marriage is limited in many countries (including in Estonia), so as to constitute a legal impediment independent of the people themselves in the exercise of their fundamental rights (cf. Supreme Court Administrative Law Chamber judgment of 9 November 2009 in case No 3-3-1-61-09, para. 33).

IV

64. Next, the Court *en banc* will assess the constitutionality of interference with fundamental rights. Just like other fundamental rights guaranteed under the Constitution, the fundamental right to family is not unlimited.

65. Section 11 of the Constitution allows circumscribing fundamental rights only in accordance with the Constitution, setting the precondition that circumscription must be necessary in a democratic society and may not distort the nature of the rights and freedoms circumscribed. That is, interference with a fundamental right must have a (legitimate) aim complying with the

Constitution and the interference must be proportionate for attaining the aim (appropriate, necessary and proportional in the narrow sense). Interference with a fundamental right is a measure appropriate for attaining the aim if it helps in some way 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 (see Supreme Court Constitutional Review Chamber judgment of 6 March 2002 in case No 3-4-1-1-02, para. 15).

66. Since the fundamental right to family is guaranteed by the first sentence of § 26 and § 27(1) of the Constitution, the Constitution allows circumscribing that right for aims set out in the second sentence of § 26 of the Constitution, or to protect another fundamental right or a constitutional legal value.

67. The Court *en banc* finds that interference with the fundamental right to family arising from the Aliens Act is justified by the values expressed in the preamble to the Constitution. Inter alia, the preamble to the Constitution requires that the Estonian state must ensure protection of internal peace and preservation of the Estonian people. These goals can be attained when it has the right to decide on whether and on what conditions to allow aliens into the country (cf. Supreme Court Administrative Law Chamber judgment of 18 May 2000 in case No 3-3-1-11-00, para. 3; Supreme Court Administrative Law Chamber order of 27 June 2017 in case No 3-3-1-19-17, para. 16).

68. The ECtHR also recognises a wide margin of appreciation of the States Parties to the Convention in matters concerning entry of aliens into a country and their stay there, and it has repeatedly held that the Convention does not guarantee the right of an alien to enter or to reside in a particular country (judgment of 30 June 2016 in the case of *Taddeucci and McCall v. Italy*, para. 55 with references therein). However, when using that margin of appreciation the States must take account of the need to protect people's private and family life. The State's margin of appreciation becomes particularly narrow where a difference in treatment is based on sex or sexual orientation (judgment of 23 February 2016 in the case of *Pajić v. Croatia*, paras 58–60).

69. In the opinion of the Court *en banc*, the disputed interference with the fundamental right to family arising from the Aliens Act is indeed a measure which is appropriate to attain the goals set out in the preamble to the Constitution, but it is not necessary. The regulation under the Aliens Act as a whole, as well as the restrictions on fundamental rights set out therein, enable the state to control entry of aliens into Estonia and their stay in Estonia, thereby promoting the constitutional goals mentioned above. However, those goals can be attained by measures which are less restrictive of fundamental rights.

70. To ensure internal peace and preservation of the people, the law could provide rules enabling assessment of the specific threat posed by a particular residence permit applicant and refusal to issue a residence permit to an individual in case of whom such a threat is found (such logic is also enshrined in § 124 of the Aliens Act, laying down grounds for refusal to issue a temporary residence permit based on considerations of ensuring public order and national security and protection of public health). This enables preventing excessive interference with fundamental rights, and this is also the overall logic of the provisions regulating residence permits in the Aliens Act. The Aliens Act completely precludes issuing a temporary residence permit to settle with a registered same-sex partner, thus very intensively restricting the fundamental right to family of a group of persons based on general characteristics, i.e. without allowing to link refusal to issue a residence permit to circumstances related to a particular person.

71. On that basis, the Court *en banc* finds that, insofar as the Aliens Act precludes issuing a residence permit to the registered same-sex partner of an Estonian citizen to settle in Estonia, it disproportionately restricts the fundamental right to family of an alien applying for a residence permit and of the Estonian citizen, and therefore contravenes § 26, § 27(1) and § 11 of the Constitution. Relying on § 15(1) cl. 2) of the Constitutional Review Court Procedure Act, the Chamber declares unconstitutional and repeals the Aliens Act insofar as it precludes issuing a temporary residence permit to an alien to settle in Estonia with a same-sex registered partner who is an Estonian citizen. Until an appropriate legal basis is laid down, when examining applications for a temporary residence permit the executive authorities can proceed from the provisions of the Aliens Act on issuing a temporary residence permit to settle with a spouse.

V

72. Tallinn Court of Appeal found that Minister of the Interior Regulation No 83 of 18 December 2015 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 forms for applying for a residence permit", which at the time of submission and rejection of residence permit applications by applicant I and applicant II regulated which documents had to be submitted when applying for a temporary residence permit, was also unconstitutional.

73. Unlike the generally applicable rules in administrative procedure for ascertaining circumstances essential for resolving a case and for collecting evidence (§§ 6 and 38 of the Administrative Procedure Act), the Minister of the Interior by Regulation No 83 of 18 December 2015 laid down a separate list of evidence and information to be attached to a residence permit application for each ground of issue of a temporary residence permit set out in § 118 of the Aliens Act. Since the Aliens Act did not provide a legal basis for issuing a residence permit to a same-sex registered partner, Regulation No 83 of 18 December 2015 also did not regulate the issue of what information and evidence should be submitted in that case. Thus, the Court of Appeal was correct in finding that Minister of the Interior Regulation No 83 of 18 December 2015 was relevant for adjudicating the administrative cases. In the opinion of the Court *en banc*, the Regulation was relevant insofar as it failed 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 the registered same-sex partner of an Estonian citizen is applying for a temporary residence permit to settle in Estonia.

74. Above (see para. 71 of the judgment) the Court *en banc* declared unconstitutional and repealed the Aliens Act on account of its conflict with the fundamental right to family insofar as it precludes issuing a temporary residence permit to the registered same-sex partner of an Estonian citizen to settle in Estonia. Therefore, Minister of the Interior Regulation No 83 of 18 December 2015 was also unconstitutional in the relevant part on account of a conflict with the fundamental right to family for the same reasons as the Aliens Act. Relying on § 15(1) cl. 5) of the Constitutional Review Court Procedure Act, the Court *en banc* declares that Minister of the Interior Regulation No 83 of 18 December 2015 was unconstitutional insofar as it failed 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 the registered same-sex partner of an Estonian citizen was applying for a temporary residence permit to settle in Estonia.

75. Minister of the Interior Regulation No 83 of 18 December 2015 became invalid on 16 January 2017 since on the following day 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" entered into force. The provisions under Minister of the Interior Regulation No 7 of 12 January 2017 are similar to the provisions in Minister of the Interior Regulation No 83 of 18 December 2015. Relying on § 15(1) cl. 2) of the Constitutional Review Court

Procedure Act, the Court *en banc* also declares unconstitutional and repeals Minister of the Interior Regulation No 7 of 12 January 2017 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 the registered same-sex partner of an Estonian citizen is applying for a temporary residence permit to settle in Estonia.

VI

76. The Court *en banc* satisfies the applications filed by Tallinn Court of Appeal in case No 3-16-1903 to declare the Aliens Act and Minister of the Interior Regulation No 83 of 18 December 2015 unconstitutional to the extent contested.

77. In administrative case No 3-17-51, the provisions of the Aliens Act, which the Court *en banc* declared unconstitutional (in para. 71 of the judgment), were relevant if the registered partnership of applicant II with an Estonian citizen that had been registered in Germany had to be deemed valid in Estonia for resolving the residence permit application. In that case, the present judgment also extends to applicant II.

78. In the opinion of the Tallinn Court of Appeal, in administrative case No 3-17-51 the partnership of applicant II registered in Germany had to be deemed valid. Relying on § 14(2) (second sentence) of the Constitutional Review Court Procedure Act, the Court *en banc* in the present constitutional review case will not assess whether the Court of Appeal was justified in deeming the registered partnership of applicant II to be valid in Estonia. If the respondent in the administrative case believes that the Court of Appeal incorrectly assessed the validity of the registered partnership of applicant II, they may lodge an appeal in cassation with the Supreme Court against the Court of Appeal judgment.

79. Based on the foregoing, the Court *en banc* also satisfies the applications filed by Tallinn Court of Appeal in case No 3-17-51 to declare the Aliens Act and Minister of the Interior Regulation No 83 of 18 December 2015 unconstitutional to the extent contested.

80. The judgment of the Court *en banc* will have to be published without data that would enable unequivocal identification of the applicants and their partners.

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