Citizens and Aliens

During the reporting year, the issue of citizenship by birth of people having acquired Estonian citizenship under the Tartu Peace Treaty, and of their descendants, continued to be topical. The Chancellor of Justice dealt with the issue of the legal status of people who acquired Estonian citizenship on the basis of the Tartu Peace Treaty but did not return to Estonia in the 1920s. The Police and Border Guard Board had previously recognised the descendants of these people as citizens by birth but later changed its position.

Citizens

Optation means opting for citizenship (in particular in the event of transfer of territory from one country to another) and settling in the country considered as one's new homeland. In the context of Estonia, optants are primarily Estonians migrating from Estonia mostly to Russia at the end of the 19th and the beginning of the 20th century who, after Estonia's independence, acquired the opportunity to accept Estonian citizenship and come to live here. In 1920–1923, some 80 000 Estonians opted for Estonian citizenship but only 37 500 of them actually came to Estonia. For various reasons, more than half of them stayed in Russia and Georgia (Abkhazia). In many cases, the reason was that they could not return or were prevented from returning to Estonia.

The Director General of the Police and Border Guard Board (PBGB) affirmed to the Chancellor that those people who have already been identified as Estonian citizens by being descendants of the optants would also be treated as Estonian citizens by the PBGB in the future. That is, they are issued with the identity documents of an Estonian citizen regardless of whether their ancestor settled in Estonia or not. This ensures the protection of trust and legal certainty and takes account of the person's expectation that the current administrative act would remain in force. Since 2020, the PBGB has also informed the courts about its change of administrative practice.

The Estonian state still does not recognise as citizens any new applicants who have only now expressed the wish to obtain Estonian citizenship as a descendant of an optant and whose ancestor did not settle in Estonia. Interpretation of the conditions for acquiring citizenship under the Tartu Peace Treaty is a complicated legal issue. Historical sources indeed indicate

that in the 1920s and 1930s the Estonian state considered optants who had remained in Russia as being Estonian citizens. However, recent case-law proceeds from the interpretation that persons who did not settle in Estonia within a year after being accepted as citizens, or did not do so later, failed to complete the optation process and did not become Estonian citizens under Article IV of the Tartu Peace Treaty. The Supreme Court Administrative Law Chamber confirmed that interpretation by judgment delivered on 2 March 2018.

The Chancellor explained that the Estonian Constitution does not allow depriving someone of citizenship acquired by birth. This may not be done even if a person holds the citizenship of another country besides Estonian citizenship. Unfortunately, erroneous explanations have been given either by PBGB officials or the persons themselves have become confused when reading the provisions of the Citizenship Act (see, e.g. § 3(1) of the Act).

A petition received by the Chancellor revealed that often a difference of opinion has arisen between the PBGB and a person as to whether that person acquired citizenship by birth or by naturalisation. Often, the PBGB has made two decisions in one and the same administrative act: notifying the person that the PBGB deems them not to be a citizen by birth, and that the person is deemed to have lost their citizenship because they hold another citizenship. In that situation, a person is focused to prove their citizenship by birth and cannot make a conscious choice whether to give up the other country's citizenship. The Chancellor recommended that the PBGB should first resolve the issue of citizenship by birth and only then decide on depriving the person of citizenship. For example, a decision on the basis for acquiring citizenship can be drawn up as a preliminary administrative act.

Several petitions concerned renewal of documents of an Estonian citizen. For example, in the course of renewal of documents, the PBGB has announced that they have previously mistakenly identified the person as having citizenship by birth but in actuality the person does not hold Estonian citizenship. The Chancellor has previously said that once the state has already recognised someone as an Estonian citizen by birth, that decision cannot automatically become null and void. Recognition as a citizen amounts, in essence, to issuing an administrative act confirming that the person is an Estonian citizen. That decision has legal force until it is changed. However, when changing or annulling an administrative act, the principle of protection of trust must be observed (see the Chancellor's recommendation of 17 June 2019 to the Director General of the PBGB). Identification of citizenship status must take into account the principles of legitimate expectations and legal certainty.

In law-making, most questions were caused by an amendment of the Citizenship Act by which a new ground for children to apply for citizenship under a simplified procedure was laid down (Draft Act 58 SE). The majority of children in the target group cannot realistically obtain Estonian citizenship before reaching the age of majority because they have Russian citizenship from which minors are not released. In comparison: under other grounds laid down in the Citizenship Act, children can obtain Estonian citizenship even when they have the citizenship of another country. They must renounce the citizenship of the other country at the latest upon reaching 21 years of age if they wish to maintain their Estonian citizenship. The issue of compliance with the principle of equal treatment arose since the distinction does not apply to this target group. The Chancellor noted that in proceedings of the Draft Act it is the task of the Riigikogu to ascertain all the relevant circumstances and to assess whether the restrictions resulting from the Draft Act are justified. However, the adopted law did not resolve the problem of the majority of the target group of the regulatory provisions.

Another remaining unresolved problem is that the Government delays with making decisions on citizenship applications where an application concerns exceptionally granting citizenship to a convicted person. The Chancellor's Office has explained that in such a situation the person should protect their rights in court.

Identity documents and digital identity

Several petitions sent to the Chancellor concerned applying for identity documents. By now, at least a partial solution has been found to the problem where for a long time the PBGB did not issue new identity documents to a person where a dispute was pending with the person on the circumstances of their acquisition of Estonian citizenship. In that situation, the PBGB had started issuing to those persons documents with a shorter period of validity.

The Chancellor drew the attention of the PBGB to the fact that, in today's society, identity documents are indispensable and problems related to them must be resolved swiftly and in line with the principles of good administration. The ID card is the only mandatory identity document which enables using the state's e-services. Nowadays, digital ID is indispensable for many essential procedures and activities. The state itself also directs people to increasingly use electronic channels. Alternative means (such as Mobile-ID or Smart-ID) are not accessible to everyone, and using alternative means might also not be possible because of disability. Moreover, a person is not obliged to obtain other means enabling electronic identification.

People complained about problems arising in replacing a non-functioning ID card. There have been cases where an ID card chip becomes locked for technical reasons. In that case, the PBGB replaces the card for free. However, an expert analysis of the ID card must be carried out before it can be replaced by way of guarantee. For this, the ID card must be handed over to the PBGB and the person cannot use the card as an identity document either. It may take up to a month to replace a card by way of guarantee, although as a rule it is replaced much faster. Nevertheless, in the meantime a person may encounter various problems due to lack of an identity document.

The Chancellor asked the PBGB to find a solution to replace dysfunctional ID cards as quickly as possible. The PBGB promised to inform people that in practice they would receive a new ID card by way of guarantee within a week or two. The PBGB also promised to consider the possibility of returning the original ID card to the holder as soon as the initial expert analysis was completed and until such time as a new card was made available. The Chancellor could not agree with the PBGB's position that a person cannot apply for compensation of the state fee if they apply for a new ID card before the results of the expert analysis become available.

The Chancellor was also contacted about a case where the ID card of a petitioner's next of kin could continue to be used even after death. This situation is unlawful. The PBGB is liable for possible damage under the State Liability Act. However, the PBGB affirmed that it had taken steps to avoid repetition of that error. The Information System Authority also initiated proceedings to investigate the case. The result of the proceedings is not yet available.

Several petitions concerned the form of dealings with the authorities. In some cases, the problem was the requirement of mandatory electronic procedures, while in other cases the problem was, conversely, the absence of electronic procedures. The situation was

exacerbated by the fact that during the emergency situation it was not possible to make a physical visit to many authorities because they were either closed to the public, some people had to stay in isolation, the borders were closed, or the person wanted to avoid public places due to the risk of the virus.

For example, several of the state e-services did not function with the Smart ID (e.g. suspension of activities as a sole proprietor in the commercial register) and, at the same time, no paper documents could be submitted either. Submission of documents in electronic format is generally practicable and simplifies procedures, but in line with the principle of freedom of form (§ 5 Administrative Procedure Act) this should not be the only possibility to manage affairs. Also those without the possibility for electronic dealings must be able to obtain services from the state. The Centre of Registers and Information Systems explained that work on development of possibilities for using the Smart-ID (including digital signing) was under way but the development would still take some time.

People complained to the Chancellor that the PBGB did not enable using the photograph available in the database when applying for identity documents during the emergency situation. The Chancellor found that the PBGB had acted lawfully. She suggested that the Riigikogu should consider possibilities how to issue documents electronically to as many people as possible during an emergency situation (see the chapter “Rule of law in an emergency situation”).

Measures put in place to prevent the spread of the virus also frustrated those wishing to submit an application for marriage. The law requires that an application for marriage must be submitted personally in a vital statistics office, its validity cannot be extended, and a new application for marriage must also be submitted personally by the parties. The only exception is remote authentication by a notary, but since one of the prospective spouses lived abroad and did not have Estonian identity documents it was also not possible to use this procedure. So it happened that because of restrictions during the emergency situation some people were deprived of the possibility to marry when they wished. The Chancellor found, however, that such restrictive rules were compatible with the Constitution.

The Chancellor was asked to investigate whether the fact that the authorities (PBGB and embassies) issue personal identity documents to children upon an application by only one parent could facilitate child abduction. A document for a person under 15 years old or an adult with restricted active legal capacity is issued to a legal representative of the document

user. The laws do not require that parents should jointly apply for documents for their child. Thus, an authority issuing a document proceeds from the assumption that the parent applying for the document has the consent of the other parent. However, if necessary, it should be verified whether there is any indication that documents are being applied for without the other parent's consent or that issue of documents may prejudice the interests of the child.

The Chancellor also received a letter about an incident where a PBGB official had prohibited a person from departing Estonia together with relatives who were minors because the adult was not in possession of the parent's written consent. The PBGB admitted that the official had been mistaken since legislation does not require possession of a parent's written consent to cross the border. If the parent's consent needs to be ascertained, an official must use other possibilities for this.

Aliens

A major gap in legislation was found in that laws did not lay down compensation for unfounded deprivation of liberty where a person's detention was authorised by a court but a higher court later overturned the previous decision. Under the State Liability Act, compensation for damage may only be claimed if a judge committed a criminal offence in the course of judicial proceedings. This problem has so far concerned applicants for international protection but may also concern people detained on other grounds; special regulation is in place only for offence proceedings.

According to the Chancellor's assessment, it is incompatible with the Constitution and the European Convention on Human Rights that the laws fail to regulate compensation for damage for unfounded deprivation of liberty outside proceedings for an offence. So far, the court has resolved this on a case-by-case basis, by identifying the respondent and deciding on the amount of compensation. This, however, does not substitute for the duty to regulate the grounds and procedure for compensation of damage by law. The Ministry of Justice informed the Chancellor that plans had been made to amend the State Liability Act to resolve the problem, but no relevant Draft Act has yet been initiated.

An Estonian citizen and their foreign spouse found themselves in a difficult situation after having married in Estonia and wishing to apply for an Estonian residence permit. The spouse's country of citizenship did not recognise a marriage contracted abroad, so that it was

not possible to replace the identity documents there. Therefore, the person's surname entered in the passport differed from the name taken upon marriage. The PBGB officials explained to the spouse that in that situation a residence permit in Estonia could not be applied for. However, after submission of objections the application for a residence permit was accepted for processing.

The Chancellor had to deal with a case where the PBGB did not suspend expulsion proceedings for the period when the person submitted a repeat application for international protection and their expulsion was prohibited under the law until the relevant court decision. The PBGB explained that if a valid precept to leave the country exists in respect of an individual and they obtain a legal basis for temporary stay in Estonia, the PBGB suspends enforcement of the precept until the ground for legal stay in Estonia ceases to exist. The PBGB said that it would change its practice and, in the future, an administrative act would be drawn up on suspension of enforcement of a precept to leave the country, which would also be introduced to an applicant for international protection.

A petition received by the Chancellor revealed that often an individual is not notified of imposition of a ban on their entering Estonia. Under the Obligation to Leave and Prohibition on Entry Act, the Ministry of the Interior is not required to deliver to the affected person a decision on imposition of a ban on entry, but the decision is deemed to be communicated to that person after it has been published on the website of the Ministry of the Interior (§ 33^2(1) of the Act). General principles of administrative procedure must also be observed when imposing a ban on entry. General principles of law require that a person must be notified if an administrative authority has made an individual decision restricting their rights. The Supreme Court has acknowledged that if a ban on entry is not notified to an alien then, depending on circumstances, this may disproportionately restrict the alien's rights, in particular if the person is staying in Estonia and considering the consequences of imposing a ban on entry (Supreme Court Administrative Law Chamber judgment of 23 September 2019, No 3-16-2088, para. 15).

When the borders were closed due to the emergency situation, problems with aliens staying in Estonia or wishing to return here also became more frequent. These issues have been covered in the chapter "Rule of law in an emergency situation".

Name issues

The Chancellor's assistance was sought by an alien who had married an Estonian citizen but could not replace her documents abroad since that country did not recognise this marriage. The petitioner wished to take back her maiden name: the same as entered in her foreign passport. However, the Estonian Names Act does not enable this. The Chancellor found that, under the Constitution, a foreign citizen is entitled to take back their name used prior to marriage if that name is also entered in their identity document issued by the foreign country. The Ministry of the Interior also conceded that the restriction was not justified and made the necessary amendment to the new Draft Names Act. This, however, did not resolve the problem of the specific individual.

The name issue has also arisen in resolving filiation disputes where the court annuls the record on the child's father. In practice, this means that, together with amendment of the record on the child's father, the child's surname also changes in the register. The Ministry of the Interior considered this a good solution because, unless the court resolves the child's name issue together with resolving the filiation case, when changing the name later the child must pay a large state fee. It is astonishing, however, that this way an adult's surname in the register is also changed without their knowledge and against their will.

The Chancellor's Office is of the opinion that a name is an essential part of a person's identity and this may not be changed automatically. Under the law, changing a name in a filiation case is based on the relevant court judgment. An administrative authority should not change a person's name without their own consent or the consent of their legal representative, unless the court has made a decision concerning the name. The Ministry of the Interior asked the courts that in the frame of a filiation case the name issue should also always be resolved.

Implementing the Registered Partnership Act

People are still concerned that the Registered Partnership Act is in force without the necessary implementing legislation. Therefore, some notaries refuse to conclude registered partnership contracts with foreign citizens whose data have not been entered in the population register.

The Chamber of Notaries has explained that due to the absence of implementing legislation it is not possible to verify whether the necessary preconditions for entering into a registered partnership contract are fulfilled. However, recently Harju County Court found that even in the case of entering into a registered partnership contract with a foreign citizen the fulfilment

of these preconditions can be verified (see Harju County Court order of 8 June 2020 No 2-20-5958).

The Registered Partnership Act does not lay down a limitation on the citizenship of people entering into a registered partnership contract. Under the law, at least one of the partners must reside in Estonia. Entering into a registered partnership contract is the only possibility for same-sex partners to legally register their family life. This is necessary, inter alia, to apply for a residence permit entitling the applicant to settle with their partner.

Implementation of the Registered Partnership Act also arose during proceedings of the Draft Foreign Service Act (45 SE). Members of the Riigikogu asked the Chancellor whether it was compatible with the Constitution if the law lays down social guarantees (allowance for spouse and covering expenses) for the spouse of an official in the foreign service but not their *de facto* partner.

The Chancellor explained that the Constitution does not require that an unregistered partner accompanying a diplomat in the foreign service should be given the same social guarantees as laid down for a diplomat's spouse. However, social guarantees stipulated for family members of diplomats must extend to their registered partners. The President of the Republic refused to promulgate the said Act because it failed to take into account the rights of registered partners.