Case no 16/2016

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA
IN THE NAME OF THE REPUBLIC OF LITHUANIA

RULING
ON THE COMPLIANCE OF ITEM 5 OF PARAGRAPH 1 OF ARTICLE 43 OF THE REPUBLIC OF LITHUANIA'S LAW ON THE LEGAL STATUS OF ALIENS WITH THE CONSTITUTION OF THE REPUBLIC OF LITHUANIA

11 January 2019, no KT3-N1/2019

Vilnius

The Constitutional Court of the Republic of Lithuania, composed of the Justices of the Constitutional Court: Elvyra Baltutytė, Gintaras Goda, Vytautas Greičius, Danutė Jočienė, Gediminas Mesonis, Vytas Milius, Daiva Petrylaitė, Janina Stripeikienė, and Dainius Žalimas

The court reporter – Daiva Pitrėnaitė

Ričardas Piličiauskas, the chairperson of a panel of judges, acting as the representative of the Supreme Administrative Court of Lithuania *(Lietuvos vyriausiasis administracinis teismas)*, the petitioner

Valerijus Simulik, the Chair of the Seimas Committee on Human Rights, acting as the representative of the Seimas of the Republic of Lithuania, the party concerned

The Constitutional Court of the Republic of Lithuania, pursuant to Articles 102 and 105 of the Constitution of the Republic of Lithuania and Article 1 of the Law on the Constitutional Court of the Republic of Lithuania, at a hearing of the Constitutional Court, on 3 January 2019, considered, under oral procedure, constitutional justice case no 16/2016 subsequent to the petition (no 1B-22/2016) of the Supreme Administrative Court of Lithuania, the petitioner, requesting an investigation into whether Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Republic of Lithuania's Law on the Legal Status of Aliens, insofar as the said item does not stipulate that, in the event of family reunification, a temporary residence permit in the Republic of Lithuania may also be issued to a foreign national in cases where a marriage or registered partnership concluded by the foreign national in another state with a person – a citizen of the Republic of Lithuania – residing in the Republic of Lithuania is not recognised in the Republic of Lithuania due to the prohibition on

concluding a same-sex marriage or same-sex registered partnership, although the foreign national and the Lithuanian citizen have built up such a relationship whose content corresponds to the concept of the family, is in conflict with Paragraphs 1 and 4 of Article 22, Paragraph 1 of Article 29, and Paragraphs 1 and 2 of Article 38 of the Constitution of the Republic of Lithuania, as well as with the constitutional principle of a state under the rule of law.

The Constitutional Court

has established:

I

The arguments of the petitioner

1. The Supreme Administrative Court of Lithuania, the petitioner, was considering an administrative case subsequent to an appeal against a decision of the court of first instance that had rejected a complaint of the applicant in the said administrative case against the decision of the Migration Department under the Ministry of the Interior of the Republic of Lithuania to refuse to issue a temporary residence permit in the Republic of Lithuania (hereinafter referred to as a temporary residence permit). On 3 September 2015, the applicant in the administrative case, a citizen of the Republic of Belarus, concluded a marriage in the Kingdom of Denmark with a same-sex citizen of the Republic of Lithuania. Based on this fact of marriage, the said foreign national applied for a temporary residence permit for the purposes of family reunification with his spouse residing in the Republic of Lithuania, who is a citizen of the Republic of Lithuania. By its order, the Supreme Administrative Court of Lithuania suspended the consideration of the administrative case and applied to the Constitutional Court.

2. The petitioner doubts whether Item 5 of Paragraph 1 of Article 43 of the Law on the Legal Status of Aliens (hereinafter also referred to as the Law), insofar as the said item does not stipulate that, in the event of family reunification, a temporary residence permit may also be issued to a foreign national in cases where a marriage or registered partnership concluded by the foreign national in another state with a citizen of the Republic of Lithuania residing in the Republic of Lithuania is not recognised in the Republic of Lithuania due to the prohibition on concluding a same-sex marriage or same-sex registered partnership, although the foreign national and the Lithuanian citizen have built up such a relationship whose content corresponds to the concept of the family, is in conflict with Paragraphs 1 and 4 of Article 22, Article 29, and Paragraphs 1 and 2 of Article 38 of the Constitution, as well as with the constitutional principle of a state under the rule of law.

The petition is based on the following arguments.

2.1. Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law provides that a temporary residence permit may be issued to a foreign national in the event of family

reunification, *inter alia*, when the foreign national's spouse or the person with whom the foreign national has concluded a registered partnership resides in the Republic of Lithuania where the spouse or the person with whom a registered partnership has been concluded is a citizen of the Republic of Lithuania or a foreign national holding a residence permit in the Republic of Lithuania (hereinafter also referred to as a residence permit). The law does not provide that a temporary residence permit may also be issued in the event of family reunification where the purpose of the foreign national's living together with a citizen of the Republic of Lithuania is to create a family relationship, although, under national law, his/her marriage to the citizen of the Republic of Lithuania is not recognised because of the prohibition on marriage between persons of the same sex.

Such a legal regulation does not comply with the provisions of the official constitutional doctrine under which families other than those founded on the basis of marriage also enjoy protection under the Constitution; the constitutional concept of the family is based on mutual responsibility between family members, understanding, emotional affection, assistance and similar relationships, as well as on the voluntary determination to take on certain rights and responsibilities, i.e. on the content of relationships, whereas the form of expression of these relationships has no essential significance for the constitutional concept of the family. Therefore, the petitioner has doubts about the compliance of the impugned legal regulation with Paragraphs 1 and 2 of Article 38 of the Constitution.

2.2. The impugned legal regulation denies the right to family reunification of persons whose marriage is not recognised under national law because of the prohibition on marriage between persons of the same sex, although the purpose of their living together is to establish a family relationship. Such denial of the right to family reunification constitutes a restriction of the private life of those persons in the absence of any objective justification.

2.3. Under the legal regulation that is currently in force, persons of the same sex who have established a stable relationship do not have the opportunity to be considered a family under Item 5 of Paragraph 1 of Article 43 and Paragraph 26 of Article 2 of the Law, because they cannot marry or register a partnership. According to national law, a person is allowed to enter into marriage only with a person of the opposite sex (Paragraph 3 of Article 38 of the Constitution, Article 3.12 of the Civil Code of the Republic of Lithuania).

The petitioner has doubts as to whether between a person who has entered into a marriage or registered a partnership satisfying the legal requirements of the Republic of Lithuania and a person who has created a relationship that corresponds to the concept of the family, but whose foreign marriage in the Republic of Lithuania is not recognised because of the prohibition on marriage between persons of the same sex there are differences of such a nature and to such an extent so that their uneven treatment, in view of the prohibition on discriminating against persons on the basis of

their sexual orientation, could be objectively justified. Therefore, the impugned legal regulation is in conflict with Article 29 of the Constitution.

Moreover, the failure to consolidate in Item 5 of Paragraph 1 of Article 43 of the Law the right to family reunification of persons of the same sex is a disproportionate restriction of the right of these persons to the protection of family and private life; therefore, this provision is in conflict with Paragraphs 1 and 4 of Article 22 of the Constitution.

2.4. The principle of the equality of the rights of persons, which is enshrined in the Constitution, is inseparable from the constitutional principle of a state under the rule of law; consequently, a violation of the principle of the equality of the rights of persons also means a violation of the constitutional principle of a state under the rule of law.

2.5. The legal regulation under which, in the event of family reunification, a temporary residence permit may also be issued to a foreign national in cases where a marriage or registered partnership concluded by the foreign national in another state with a citizen of the Republic of Lithuania residing in the Republic of Lithuania is not recognised in the Republic of Lithuania due to the prohibition on concluding a same-sex marriage or same-sex registered partnership, although the foreign national and the Lithuanian citizen have built up such a relationship whose content corresponds to the concept of the family must be established namely in Item 5 of Paragraph 1 of Article 43 of the Law, since it is this paragraph that provides for cases where a foreign national may be granted a temporary residence permit in the event of family reunification when the foreign national has created a relationship whose content corresponds to the concept of the family with a citizen of the Republic of Lithuania residing in the Republic of Lithuania or with a foreign national holding a residence permit and residing in the Republic of Lithuania.

II

The arguments of the representative of the party concerned

3. In the course of the preparation of the case for the hearing of the Constitutional Court, written explanations were received from Valerijus Simulik, the Chair of the Seimas Committee on Human Rights, acting as the representative of the Seimas, the party concerned, in which it is maintained that the impugned legal regulation under which, in the event of family reunification, a temporary residence permit may not be issued to a foreign national who has concluded a marriage with a same-sex person who is a citizen of the Republic of Lithuania is not in conflict with the Constitution. The position of the representative of the party concerned is based on the following arguments.

The term “family members” that is consolidated in Item 26 of Article 2 of the Law means spouses, persons who have registered a partnership, and their children (or children of one of them) until they reach a certain age, as well as dependants who are relatives. According to the law of the

Republic of Lithuania, when deciding on the issue of a residence permit, the data on the family situation of the persons in the population register, into which the data are transferred from the existing civil status documents, are used. Item 78 of the Rules of Civil Registration, approved by the 19 May 2006 order (No IR-160) of the Minister of Justice of the Republic of Lithuania, contains the mandatory requirement to record in the civil registry books in the Republic of Lithuania a marriage certificate issued abroad.

The representative of the party concerned also substantiates his position by some provisions of the official constitutional doctrine formulated by the Constitutional Court in interpreting Paragraphs 1 and 4 of Article 22 and Article 38 of the Constitution, and by the statement that, under the Constitution, the state has the duty to establish by means of laws and other legal acts such a legal regulation that would ensure the protection of the family as a constitutional value, create the preconditions for the proper functioning of families, strengthen family relationships, and defend the rights and legitimate interests of family members, and also that the state has the duty to regulate, by means of laws and other legal acts, family relationships in such a way that no preconditions would be created for discrimination against certain participants in family relationships (as, for instance, against a man and a woman who live together without having registered their union as a marriage, their children/adopted children, single parents raising their child/adopted child, etc.).

III

The material received in the case

4. In the course of the preparation of the case for the hearing of the Constitutional Court, written opinions were received from: Paulius Griciūnas, a Vice Minister of Justice of the Republic of Lithuania; Deividas Kriaučiūnas, the Director General of the European Law Department under the Ministry of Justice of the Republic of Lithuania; Saulius Aviža, a lecturer at the Department of Private Law of the Faculty of Law of Vilnius University; Snieguolė Matulienė, a Vice Dean of the Faculty of Law of Mykolas Romeris University; Tomas Berkmanas, the Dean of the Faculty of Law of Vytautas Magnus University; and Jurgita Paužaitė-Kulvinskienė, the Director of the Law Institute of Lithuania; in addition, a letter on the provision of information was received from Evelina Gudzinskaitė, the Director of the Migration Department under the Ministry of the Interior of the Republic of Lithuania.

4.1. In the written opinion of Paulius Griciūnas, a Vice Minister of Justice, it is noted that the interpretation of the concepts of family members and spouses, as entrenched in the Law, only on the basis of the national law of the Republic of Lithuania would correspond neither to the purpose of this law nor to the obligations established in the Treaties of the European Union to take into account the principles and human rights entrenched in the Charter of Fundamental Rights of the European Union (hereinafter referred to as the Charter). In interpreting the impugned legal regulation within the

context of the Treaties of the European Union, the Charter, the Constitution, and the case law of the Court of Justice of the European Union (hereinafter referred to as the CJEU) and of the European Court of Human Rights (hereinafter referred to as the ECtHR), it appears that there is no gap in the legal regulation in Item 5 of Paragraph 1 of Article 43 of the Law and that the legal regulation enshrined in the said item makes it possible to exercise the right to family reunification for spouses of the same sex who have concluded a marriage in a foreign state, or for same-sex partners who have concluded a registered partnership in a foreign state.

4.2. In the written opinion of Deividas Kriaučiūnas, the Director General of the European Law Department under the Ministry of Justice of the Republic of Lithuania, it is stated that, under EU law, Member States are not obliged to allow or recognise same-sex partnerships or marriages, but, under EU legislation (including those relating to the free movement of persons, migration, and asylum), they must treat equally same-sex couples and couples of different sexes. In order to properly implement the legal regulation of the European Union, the possibility of issuing a temporary residence permit to a foreign national in the event of family reunification should also be established in Lithuanian law in cases where a person – a citizen of the Republic of Lithuania – who resides in the Republic of Lithuania and who, having exercised the right of free movement, has concluded in another state with that foreign national a marriage or a registered partnership that is not recognised in the Republic of Lithuania.

4.3. In the written opinion of Saulius Aviža, a lecturer at the Department of Private Law of the Faculty of Law of Vilnius University, it is noted that the impugned legal regulation should be interpreted in such a way that would not link the possibility of a foreign national who has concluded a marriage (or a registered partnership) with a citizen of the Republic of Lithuania to acquire the right to live in the Republic of Lithuania to the sex of his/her spouse. Such an interpretation of the impugned legal regulation would be in line with the international obligations undertaken by the Republic of Lithuania and would not contradict the Constitution.

4.4. In the written opinion of Snieguolė Matulienė, a Vice Dean of the Faculty of Law of Mykolas Romeris University, it is noted that the Law does not point out the sex of a foreign national – the spouse of a citizen of the Republic of Lithuania – in order to consider him/her a legitimate spouse so that he/she could obtain a temporary residence permit. Nor does the Law require that the marriage be recorded in order to obtain a temporary residence permit. Thus, in the context of family reunification, both spouses of different sexes and those of the same sex should be treated equally.

Under private international law, sometimes referred to as the law based on tolerance, even if same-sex marriages are not allowed under the legislation of a particular state, it should recognise such marriages concluded in a foreign state.

4.5. The written opinion of Tomas Berkmanas, the Dean of the Faculty of Law of Vytautas Magnus University, states that the Republic of Lithuania has the right to prescribe which persons may enter into marriage and obtain a residence permit. Only a recognised marriage or partnership can produce legal effects, so only when in the Republic of Lithuania it will be allowed to marry, or to conclude partnership contracts with, persons of the same sex will it be possible to grant a residence permit in the Republic of Lithuania to the same-sex spouse or partner of a citizen of the Republic of Lithuania.

4.6. The written opinion of Jurgita Paužaitė-Kulvinskienė, the Director of the Law Institute of Lithuania, notes that, in view of the requirements of the main institutions of the Council of Europe and of EU legislation regarding non-discrimination of persons on the grounds of their sexual orientation, and the duty of states, established in the case law of the ECtHR, to ensure the protection of family life for same-sex couples, it would be appropriate to consolidate in legislation the possibility for persons of the same sex to register partnerships. The implementation of this state duty, which is specified in the case law of the ECtHR, could lead to the recognition by the Republic of Lithuania of same-sex marriages concluded abroad as equivalent to registered partnerships. It is noted that such a model has been applicable in Italy since 2017.

4.7. In the letter from Evelina Gudzinskaitė, the Director of the Migration Department under the Ministry of the Interior, on the provision of information, it is stated that the arguments given in the order of the Supreme Administrative Court of Lithuania, by which it referred to the Constitutional Court, are well reasoned. At the same time, it is noted that a temporary residence permit is a document giving the right to reside in the Republic of Lithuania, but it does not automatically create civil rights and obligations.

IV

The persons who were present at the hearing of the Constitutional Court and the explanations provided by them

5. At the hearing of the Constitutional Court, Ričardas Piličiauskas, the chairperson of a panel of judges, acting as the representative of the Supreme Administrative Court of Lithuania, the petitioner, indicated that he supported the position set down in the petition and the arguments presented therein, as well as submitted additional explanations and answered the questions of the justices of the Constitutional Court.

The representative of the petitioner pointed out that, in the case pending before the Supreme Administrative Court of Lithuania, the procedural situation had not changed: the parties had not submitted any new statements or evidence, and the court had not adopted new procedural documents.

The representative of the petitioner supported the position that EU law was not applicable to the case pending before the Supreme Administrative Court of Lithuania, since the citizen of the

Republic of Lithuania who had married a same-sex citizen of the Republic of Belarus in the Kingdom of Denmark had not exercised the right to free movement of persons within the European Union. The issues raised in this case relate to fundamental, basic human rights. In its case law, the Supreme Administrative Court of Lithuania, when dealing with issues related to fundamental human rights, follows the Constitution first; therefore, in this case, the petitioner first of all detected the problem of the constitutionality of the impugned legal regulation.

According to the petitioner's representative, when interpreting the content of the impugned provision of Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law and deciding whether to apply EU law, the petitioner first took into account the principle of the supremacy of the Constitution.

6. Valerijus Simulik, the Chair of the Seimas Committee on Human Rights, acting as the representative of the Seimas, the party concerned, submitted additional explanations and answered the questions of the justices of the Constitutional Court.

The representative of the party concerned, presenting an opinion that was different from that given in his written explanations regarding the compliance of the impugned legal regulation with the Constitution, indicated that, in view of the context of EU law and the latest case law of the CJEU, the legal regulation according to which a foreign national who has married a citizen of the same sex of the Republic of Lithuania or a foreign national of the same sex holding a residence permit may be issued a temporary residence permit would not be in conflict with the Constitution, but such a legal regulation cannot change the concept of marriage enshrined in the Constitution. The constitutional concept of marriage may be changed only by amending the Constitution in a referendum or by voting on its amendment in the Seimas.

According to the representative of the party concerned, taking into account EU law, in the event of family reunification, a temporary residence permit should be issued to a foreign national regardless of whether he/she has concluded a marriage with a same-sex or an opposite-sex citizen of the Republic of Lithuania or with a same-sex or an opposite-sex foreign national holding a residence permit.

7. At the hearing of the Constitutional Court, the specialist Evelina Gudzinskaitė, the Director of the Migration Department under the Ministry of the Interior of the Republic of Lithuania, spoke and answered the questions of the justices of the Constitutional Court.

According to the specialist, the Law is a special law that regulates only migration issues and it does not regulate civil relationships. When implementing the Law, the Migration Department decides only on the issues of granting the right to reside in the Republic of Lithuania and, while resolving them, does not invoke the Civil Code. The issue of a temporary residence permit to the same-sex spouse of a citizen of the Republic of Lithuania would not mean that such marriage is

recognised in the Republic of Lithuania.

The specialist stated that there are three regimes of family reunification according to the Law: the first regime includes situations where a third-country national comes to join a family member who is another third-country national residing in the Republic of Lithuania (in this case, the relevant European Union Directive prohibiting discrimination based on sexual orientation applies); the second regime includes situations where a family member who is a third-country national comes to join a citizen of the European Union, who is also a citizen of the Republic of Lithuania and who has exercised the right to free movement of persons within the European Union (in this case, the relevant European Union Directive prohibiting discrimination based on sexual orientation also applies); and the third regime, which is applicable in the present case, includes situations where a family member comes to join a citizen of the Republic of Lithuania who has not exercised the right to free movement of persons within the European Union (in this case, no Directive of the European Union applies, however, the national law and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter referred to as the Convention) are applicable).

The specialist stated that the refusal to issue a temporary residence permit to the applicant in the case pending before the Supreme Administrative Court of Lithuania had been based on the public order (public policy) reservation, and account had been taken of the opinion of the public and of the fact that only persons of opposite sexes are considered spouses under the legislation of the Republic of Lithuania. At that time, there was no clearly formulated case law of the CJEU on the issue in question, either. Currently, taking into account the latest case law of the CJEU and the constitutional prohibition on discrimination against persons, the Migration Department would take a different decision – a temporary residence permit would be issued to a foreign national who has concluded a marriage in another country with a same-sex citizen of the Republic of Lithuania.

The Constitutional Court

holds that:

I

The impugned and related legal regulation

8. As mentioned above, the petitioner requests an investigation into the compliance of Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law with the Constitution, insofar as, according to the petitioner, the said item does not stipulate that, in the event of family reunification, a temporary residence permit may also be issued to a foreign national in cases where a marriage or registered partnership concluded by the foreign national in another state with a person – a citizen of the Republic of Lithuania – residing in the Republic of Lithuania is not recognised in the Republic of Lithuania due to the prohibition on concluding a same-sex marriage or same-sex

registered partnership, although the foreign national and the Lithuanian citizen have built up such a relationship whose content corresponds to the concept of the family.

9. On 29 April 2004, the Seimas adopted the Law on the Legal Status of Aliens, whose provision is impugned in this constitutional justice case. With the entry into force of this law, the Law on the Legal Status of Aliens that was adopted on 17 December 1998 expired.

9.1. The Law establishes the procedure of entry and departure, stay and residence, granting of asylum and temporary protection in the Republic of Lithuania, the procedure of integration and lodging of appeals against the decisions concerning the legal status of foreign nationals, and regulates other issues relating to the legal status of foreign nationals in the Republic of Lithuania (Paragraph 1 (wording of 1 December 2014) of Article 1).

In the context of the case at issue, it should be noted that the Law defines, *inter alia*, the notions of family members and of family reunification in the area of the legal relationships specified in Item 1 (wording of 9 December 2014) of Paragraph 1 of Article 1 of the Law. Thus, the Law is not meant for defining the concept of family members and regulating family reunification as far as the areas of legal relationships other than those referred to in Item 1 (wording of 9 December 2014) of Paragraph 1 of Article 1 of the Law are concerned.

9.2. Paragraph 2 of Article 1 of the Law provides that the provisions of this Law have been harmonised with the provisions of legal acts of the European Union specified in the Annex to this Law. The Law implements, *inter alia*, 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (hereinafter referred to as the Directive) (Item 14 of the Annex, titled “Legal Acts of the European Union Implemented by this Law”, to the Law).

Thus, the legal regulation impugned by the petitioner is to be interpreted also taking into account the provisions of the legal acts of the European Union, *inter alia*, the Directive, that are implemented by the Law.

10. In view of the aspect relevant in this case, it should be noted that the issue of a temporary residence permit to a foreign national in the case of family reunification is regulated in Article 43 of the Law, the provision of Paragraph 1 of which is impugned in this constitutional justice case.

Paragraph 1 of Article 43 of the Law has been amended and/or supplemented on more than one occasion.

10.1. Item 3 of Paragraph 1 of Article 43 of the Law (wording of 29 April 2004) prescribed: “A temporary residence permit may be issued to a foreign national in the event of family reunification

if […] 3) a foreign national's spouse resides in the Republic of Lithuania where the spouse is either a citizen of the Republic of Lithuania or a foreign national holding a residence permit."

Thus, under Item 3 of Paragraph 1 of Article 43 (wording of 29 April 2004) of the Law, a temporary residence permit could be issued to a foreign national in the event of family reunification if he/she was the spouse of a citizen of the Republic of Lithuania residing in the Republic of Lithuania or of a foreign national holding a permanent residence permit and residing in the Republic of Lithuania.

10.2. After the Seimas had adopted, on 28 November 2006, the Republic of Lithuania's Law Amending Articles 2, 6, 7, 8, 11, 17, 18, 21, 25, 26, 28, 33, 34, 35, 40, 43, 46, 50, 51, 53, 54, 55, 56, 64, 79, 88, 90, 93, 97, 99, 100, 101, 102, 104, 106, 113, 115, 127, 130, 131, 132, 136, 138, 140 of the Law on the Legal Status of Aliens, Supplementing the Law with Articles 49^1, 101^1, 140^1, Recognising Articles 30 and 105 of the Law as No Longer Valid, Amending the Title of Chapter X of the Law, and Amending and Supplementing the Annex to the Law, Article 43 of the Law was set out in its new wording, and Item 3 of Paragraph 1 of the said article became Item 5.

10.3. Paragraph 1 (Item 5 whereof is impugned in this constitutional justice case) of Article 43 (wording of 28 November 2006) of the Law prescribes:

"1. A temporary residence permit may be issued to a foreign national in the event of family reunification if:

1) the foreign national's parents or one of them, who are citizens of the Republic of Lithuania, reside in the Republic of Lithuania;

2) both or one of the parents of a minor foreign national, or a spouse of one of them, taking care of the minor foreign national, where such a spouse is a citizen of the Republic of Lithuania or holds a residence permit, reside/resides in the Republic of Lithuania;

3) the foreign national's child who is a citizen of the Republic of Lithuania resides in the Republic of Lithuania;

4) the foreign national's child who has been granted asylum in the Republic of Lithuania and has been issued a residence permit resides in the Republic of Lithuania;

5) the foreign national's spouse or the person with whom the foreign national has concluded a registered partnership resides in the Republic of Lithuania where the spouse or the person with whom a registered partnership has been concluded is a citizen of the Republic of Lithuania or a foreign national holding a residence permit;

6) the foreign national is a first-degree relative in the direct ascending line of a foreign national holding a residence permit;

7) the foreign national's parents who have incapacity for work due to the legal age of retirement or disability and hold a permanent residence permit reside in the Republic of Lithuania;

8) particularly difficult circumstances related to divorce or dissolution of a registered partnership or related to the death of a family member, which are regulated in accordance with the procedure laid down in Paragraph 5 of Article 51 of this Law, emerge. In this case, the application for the issue of a temporary residence permit must be lodged before the divorce or dissolution of the registered partnership or the day of the death of the family member, where the foreign national has not yet been granted a temporary residence permit for family reunification or not later than within six months after the divorce or dissolution of the registered partnership, or the day of the death of the family member, where the foreign national held a temporary residence permit issued for family reunification before the divorce or dissolution of the registered partnership or the day of the death of the family member. A temporary residence permit under this item may be issued for one year."

10.4. Thus, Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law lists the grounds for granting a temporary residence permit to a foreign national in the event of family reunification.

10.4.1. In this context, it should be noted that, under Paragraph 27 of Article 2 of the Law, "family reunification" means the entry into, and residence in, the Republic of Lithuania by family members of a foreign national who is not a citizen of the European Union but lawfully resides in the Republic of Lithuania in order to preserve the family unit, irrespective of whether the family relationship arose before or after the foreign national's entry. However, it is clear from the legal regulation laid down in Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law that, under Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, family reunification is understood in a broader sense, i.e. as the entry into, and residence in, the Republic of Lithuania of not only by a foreign national lawfully residing in the Republic of Lithuania, but also the entry into, and residence in, the Republic of Lithuania by family members of a citizen of the Republic of Lithuania who are foreign nationals for the purpose of preserving the family.

10.4.2. It should also be noted that Article 43 of the Law is in Section III, titled "Temporary Residence of Aliens in the Republic of Lithuania", of Chapter III of the Law, whose provisions, under Paragraph 2^1 of Article 1 (wording of 30 June 2012) of the Law do not apply to citizens of the Member States of the European Union and of the European Free Trade Association. Therefore, Paragraph 1 (Item 5 whereof is impugned by the petitioner) of Article 43 (wording of 28 November 2006) of the Law lays down the grounds for granting a temporary residence permit to a foreign national who is not a citizen of the European Union or of a Member State of the European Free Trade Association in the event of family reunification when he/she is a family member of a citizen of the Republic of Lithuania or of a foreign national lawfully residing in the Republic of Lithuania who is not a citizen of the European Union or of a Member State of the European Free Trade Association.

10.5. Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law establishes an exhaustive list of the grounds on which, in the event of family reunification within the meaning of Paragraph 1 of this article, a foreign national who is not a citizen of the European Union or of a Member State of the European Free Trade Association (hereinafter also referred to as "foreign national") may be issued a temporary residence permit; a situation where the spouse of such a foreign national or the person with whom the foreign national has concluded a registered partnership resides in the Republic of Lithuania where the spouse or the person with whom a registered partnership has been concluded is a citizen of the Republic of Lithuania or a foreign national holding a residence permit constitutes one of such grounds (Item 5).

10.6. Having compared, from the aspect relevant in this constitutional justice case, the legal regulation laid down in Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law with the legal regulation consolidated in Item 3 of Paragraph 1 of Article 43 (wording of 29 April 2004) of the Law, it should be noted that, according to Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, in the event of family reunification, a temporary residence permit may be issued to a foreign national not only in cases where he/she is the spouse of a citizen of the Republic of Lithuania residing in the Republic of Lithuania or of a foreign national holding a residence permit and residing in the Republic of Lithuania, but also in cases where he/she has concluded a registered partnership with a citizen of the Republic of Lithuania residing in the Republic of Lithuania or with a foreign national holding a residence permit and residing in the Republic of Lithuania.

11. The impugned Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law should be interpreted in the context of Paragraph 26 (wording of 9 December 2014) of Article 2 of the Law, which consolidates the notion of family members.

11.1. According to Paragraph 26 (wording of 9 December 2014) of Article 2 of the Law, "family members" mean the spouse or the person with whom a registered partnership has been concluded, minor children/adopted children, including the minor children of the spouse or the person with whom a registered partnership has been concluded, on condition that they are not married and are dependent, as well as direct relatives in the ascending line who have been dependent for at least one year and are unable to use the support of other family members residing in a foreign state.

Thus, both the spouse and the person with whom a registered partnership has been concluded are considered to be family members under Paragraph 26 (wording of 9 December 2014) of Article 2 of the Law.

11.2. In the context of the constitutional justice case at issue, it should be noted that the impugned Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, Paragraph 26 (wording of 9 December 2014) of Article 2 of the Law, or any other provision of the

Law does not explicitly stipulate that a foreign national and his/her spouse or a person with whom a registered partnership has been concluded and who is a citizen of the Republic of Lithuania or a foreign national holding a residence permit must be persons of different sexes.

In the context of the constitutional justice case at issue, it should also be noted that the impugned Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, Paragraph 26 (wording of 9 December 2014) of Article 2 of the Law, or any other provision of the Law does not explicitly stipulate that a marriage or registered partnership of a foreign national with a citizen of the Republic of Lithuania or with a foreign national holding a residence permit must be recorded in the Civil Registry Office of the Republic of Lithuania.

12. In the constitutional justice case at issue, Paragraph 3 (wording of 26 June 2014) of Article 43 of the Law is also relevant, according to which, *inter alia*, in the case referred to in the impugned Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, a family member who is a foreign national may be issued a temporary residence permit if he/she complies with the conditions set out in Items 2–4 of Paragraph 1 of Article 26 (wording of 28 November 2006) of this Law (together with the exception specified in Paragraph 3 of this article) or if a person who is joined for the purpose of family reunification ensures, in accordance with the procedure laid down in legal acts, that the member of his/her family fulfils the said conditions.

12.1. It should be noted that Paragraph 1 of Article 26 (wording of 28 November 2006), titled "Conditions for Issue or Renewal of a Residence Permit", of the Law prescribes:

"A residence permit may be issued or renewed to a foreign national if the foreign national:

[…]

2) holds a valid document evidencing health insurance coverage when, in the cases established in laws of the Republic of Lithuania, he/she is not covered by compulsory health insurance or, in the cases and in accordance with the procedure laid down by the Government of the Republic of Lithuania, he/she holds a verified letter of commitment of a citizen of the Republic of Lithuania residing in the Republic of Lithuania or a foreign national residing in the Republic of Lithuania to cover the costs of the health care services provided to him/her during the period of his/her residence in the Republic of Lithuania;

3) has sufficient means of subsistence and/or receives regular income that is sufficient for his/her stay in the Republic of Lithuania;

4) possesses by the right of ownership suitable residential premises in the Republic of Lithuania in which he/she intends to declare his/her place of residence, provided that the residential area per each adult person who has declared the place of residence at it would not be less than seven square metres, or uses the said residential premises under a lease or loan for use contract, provided that the duration of the relevant contract is not shorter than the period of the validity of the temporary

residence permit and has been registered in accordance with the established procedure, or presents a letter of commitment of a natural or legal person, verified in accordance with the procedure laid down in legal acts, to provide him/her with suitable residential premises at which he/she will declare his/her place of residence and which will meet the requirements for residential area per person for the period of the validity of the temporary residence permit […]".

Paragraph 3 (wording of 9 December 2014) of Article 26 of the Law prescribes: "The conditions set out in Items 2–5 of Paragraph 1 of this Article shall not apply to a foreign national who has been granted temporary protection or asylum in the Republic of Lithuania or the family members of a foreign national who has been granted asylum in the Republic of Lithuania, who have, within three months after the granting of asylum in the Republic of Lithuania, applied for the issue of a residence permit by virtue of family reunification."

12.2. Interpreting the impugned provision of Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law in conjunction with Paragraph 3 of the same article, it should be noted that, under Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, a temporary residence permit may be issued to a foreign national in the event of family reunification if the foreign national (save the exception envisaged in Paragraph 3 (wording of 9 December 2014) of Article 26 the Law relating to granted asylum or temporary protection in the Republic of Lithuania) complies with the general conditions for the issue of a residence permit, as laid down in Items 2–4 of Paragraph 1 of Article 26 (wording of 28 November 2006) of the Law, where the said general conditions are linked with a valid health insurance, sufficient means of subsistence, and the possession of suitable residential premises, or if a person who is joined for the purpose of family reunification ensures, in accordance with the procedure established in legal acts, that his/her family member to whom a temporary residence permit is issued complies with the said conditions.

13. In the constitutional justice case at issue, the provisions of Paragraph 1 (wording of 29 April 2004 with subsequent amendments) of Article 35 of the Law are relevant. These provisions establish the grounds for refusing a foreign national to issue a residence permit, as, for example: the foreign national's residence in the Republic of Lithuania may represent a threat to national security, public policy, or public health (Item 1); the data that he/she has submitted in order to obtain the residence permit are not accurate or the submitted documents have been obtained fraudulently or are counterfeit, or there are serious grounds to believe that a marriage of convenience or a partnership of convenience has been concluded, or a fake adoption has been effected, or that the foreign national is a participant, manager, or member of a collegial management or supervisory body of a fictitious enterprise (Item 2 (wording of 26 June 2014); an alert has been issued for him/her in the Central Schengen Information System by another Schengen State for the purposes of refusing entry and there are no grounds for issuing a residence permit on humanitarian grounds or because of international

obligations or he/she has been entered on the national no-entry list (Item 3 (wording of 26 November 2015)); he/she does not possess sufficient means of subsistence and/or does not receive regular income to stay in the Republic of Lithuania (Item 5 (wording of 28 November 2006)); he/she does not possess suitable residential premises that meet the requirement of residential area per person (Item 6); he/she is not in possession of a valid document evidencing health insurance coverage (Item 7); there are serious grounds to believe that he has committed a crime against peace, a crime against humanity, or a war crime within the meaning defined in the laws of the Republic of Lithuania, international treaties, or other sources of international law or that he/she has incited or otherwise participated in committing such crimes (Item 8 (wording of 9 December 2014)), etc.

In this context, mention should be made of the provision of Paragraph 4 (wording of 26 June 2014) of Article 43 of the Law, which, *inter alia*, stipulates that "If a temporary residence permit is issued to a foreign national in compliance with Item 5 of Paragraph 1 of this Article, it must be evaluated in accordance with the procedure laid down by the Minister of the Interior if there are any serious grounds to believe that a marriage of convenience or registered partnership of convenience has been concluded".

When interpreting the impugned provision of Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law in conjunction with Paragraph 1 (wording of 26 November 2015) of Article 35 of the Law, it should be noted that, under Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, in the event of family reunification, a temporary residence permit may be refused to a foreign national on the general grounds for refusal to grant a foreign national a residence permit, which are established in Paragraph 1 (wording of 26 November 2015) of Article 35 of the Law, and which are related, *inter alia*, to a possible threat to national security, public order (public policy), or public health; the said permit may also be refused to a foreign national for non-compliance with the general conditions (save the exceptions provided for in the Law) for granting a temporary residence permit, as established in Items 2–4 of Paragraph 1 of Article 26 (wording of 28 November 2006) of the Law, or for the conclusion of a marriage of convenience or a registered partnership of convenience.

14. In the context of the constitutional justice case at issue, mention should also be made of the legal regulation related to the recording of civil status acts that are registered or approved in a foreign state, as consolidated in the Republic of Lithuania's Law on the Registration of Civil Status Acts.

14.1. Paragraph 1 of Article 2 of the said law provides that a civil status act is an officially registered action or event that determines a natural person's legal status and that causes, changes, or ends a natural person's rights and obligations. According to Article 3 of this law, the civil status acts (*inter alia*, marriage) specified in Items 1–8 of Article 2.18 of the Civil Code must be registered. It

should be mentioned that, under Paragraph 1 of Article 3.7 of the Civil Code, marriage is a voluntary agreement between a man and a woman to build up a family legal relationship where the said agreement is formalised in accordance with the procedure established by law, and, under Article 3.12 of the same code, marriage may be concluded only with a person of the opposite sex.

14.2. Under Article 7 of the Law on the Registration of Civil Status Acts, citizens of the Republic of Lithuania must inform the civil registry office about civil status acts registered or approved in foreign states; such acts are recorded in accordance with the procedure established in the Rules of the Registration of Civil Status Acts (Paragraph 1); the recording of civil status acts registered or approved in foreign states is refused by applying *mutatis mutandis* the provisions of Paragraph 4 of Article 3 of this law; according to these provisions, if the registration of a civil status act were not in line with the requirements established in this law or in the Rules of the Registration of Civil Status Acts or contradicted the public order (public policy) established in the Constitution and other laws, the registration of the civil status act would be refused.

14.3. In the context of the constitutional justice case at issue, it should be noted that both in the Rules of Civil Registration (Item 81), approved by the order (No 1R-160) of the Minister of Justice of 19 May 2006 on approving the Rules of Civil Registration, which were in force until 31 December 2016, and in the Rules of the Registration of Civil Status Acts (Item 98), approved by the order (No 1R-334) of the Minister of Justice of 28 December 2016 on approving the Rules of the Registration of Civil Status Acts as well as the Records of Civil Status Acts and Model Forms of Other Documents, which have been in force since 1 January 2017, there was/is the provision that civil registry offices only record marriages registered in foreign states without violation of the conditions for concluding a marriage established in Articles 3.12–3.17 of the Civil Code. Thus, the marriage of persons of the same sex concluded in a foreign country could not/cannot be recorded in a civil registry office in accordance with the procedure established by the Minister of Justice, since, as mentioned above, marriage is allowed only with a person of the opposite sex under Article 3.12 of the Civil Code.

14.4. Thus, according to the legal regulation laid down in the Law on the Registration of Civil Status Acts, citizens of the Republic of Lithuania must notify a civil registry office of civil status acts registered or approved in a foreign state, *inter alia*, the conclusion of a marriage, so that these acts would be recorded in a civil registry office and would produce legal consequences, i.e. the occurrence, change, or expiry of a person’s rights and duties; this law does not establish an obligation for citizens of the Republic of Lithuania to notify a civil registry office of a partnership registered in a foreign state. In the context of the constitutional justice case at issue, it should also be noted that the Law on the Registration of Civil Status Acts does not provide for an obligation of foreign nationals to notify

the Civil Registry Office of the Republic of Lithuania of civil status acts registered or approved in a foreign state, *inter alia*, of the conclusion of a marriage.

15. In this context, it should be noted that Chapter XV of Book Three of the Civil Code regulates non-marital living together. Article 3.229 of the Civil Code stipulates that the norms of this chapter establish property relationships between a man and a woman who, having registered their partnership in accordance with the procedure laid down in laws, have been living together (cohabiting), without having registered their union as a marriage, for at least one year with the aim of building up a family relationship.

According to the Law on the Approval, Entry into Force, and Implementation of the Civil Code of the Republic of Lithuania, the norms of Chapter XV of Book Three of the Civil Code concerning non-marital living together come into force from the moment of the entry into force of the law governing the procedure for the registration of partnership (Article 28). It should be noted that the law governing the procedure for the registration of partnership has not been adopted so far; therefore, Chapter XV, titled "Non-marital Living Together", of Book Three of the Civil Code has not come into force.

16. Summarising the impugned legal regulation, laid down in Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, and the related legal regulation relevant in connection with this constitutional justice case, it should be noted that:

– the item in question lays down one of the grounds for granting a temporary residence permit for reasons of family reunification (within the meaning of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law) to a foreign national who is not a citizen of an EU Member State or the European Free Trade Association – in cases where the spouse of such a foreign national or the person with whom the foreign national has concluded a registered partnership resides in the Republic of Lithuania where the spouse or the person with whom a registered partnership has been concluded is a citizen of the Republic of Lithuania or a foreign national (not a citizen of an EU Member State or the European Free Trade Association) holding a residence permit; a temporary residence permit is granted on the said grounds to a foreign national who is not a citizen of an EU Member State or the European Free Trade Association in order to allow the said foreign national, who has concluded a marriage or registered partnership with a citizen of the Republic of Lithuania or a foreign national (not a citizen of an EU Member State or the European Free Trade Association) holding a residence permit, to enter the Republic of Lithuania and reside there for the purposes of preserving the family;

– Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, Paragraph 26 (wording of 9 December 2014) of the Law, or any other provisions of the Law does not explicitly stipulate that a foreign national and his/her spouse or the person with whom the foreign

national has concluded a registered partnership and who is a citizen of the Republic of Lithuania or a foreign national holding a residence permit must be persons of opposite sexes;

– Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, Paragraph 26 (wording of 9 December 2014) of Article 2 of the Law, or any other provision of the Law does not explicitly stipulate that a marriage or registered partnership of a foreign national with a citizen of the Republic of Lithuania or with a foreign national holding a residence permit must be recorded in the Civil Registry Office of the Republic of Lithuania;

– under Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, a temporary residence permit may be issued to a foreign national in the event of family reunification if the foreign national (save the exception envisaged in Paragraph 3 (wording of 9 December 2014) of Article 26 the Law) complies with the general conditions for the issue of a residence permit, as laid down in Items 2–4 of Paragraph 1 of Article 26 (wording of 28 November 2006) of the Law, where the said general conditions are linked with a valid health insurance, sufficient means of subsistence, and the possession of suitable residential premises, or if a person who is joined for the purpose of family reunification ensures, in accordance with the procedure established in legal acts, that his/her family member to whom a temporary residence permit is issued complies with the said conditions; under Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, in the event of family reunification, a temporary residence permit may be refused to a foreign national on the general grounds (established in Paragraph 1 (wording of 26 November 2015) of Article 35 of the Law) for refusal to grant a foreign national a residence permit, such as those related, *inter alia*, to a possible threat to national security, public order (public policy), or public health, or non-compliance with the above-mentioned general conditions for granting a temporary residence permit, or the conclusion of a marriage of convenience or a registered partnership of convenience;

– the impugned legal regulation is to be interpreted taking into account the provisions of the legal acts of the European Union, *inter alia*, the Directive, that are implemented by the Law.

II

The legal regulation laid down in EU legislation and the jurisprudence of the Court of Justice of the European Union

17. As mentioned above, the legal regulation established in the impugned Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law is to be interpreted taking into account the provisions of the legal acts of the European Union, *inter alia*, the Directive, that are implemented by the Law.

18. In the context of the constitutional justice case at issue, the provisions of the Treaty on European Union, which lay down the fundamental values on which the European Union is founded, as well as its objectives, are relevant.

18.1. Article 2 of the Treaty on European Union, *inter alia*, provides that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities; these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.

18.2. Under Article 3(2) of the Treaty on European Union, the Union offers its citizens an area of freedom, security, and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration, and the prevention and combating of crime. Under Article 3(3) of the same Treaty, the European Union establishes an internal market.

18.3. The European Union pursues its objectives by appropriate means commensurate with the competences that are conferred upon it in the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the TFEU) (Article 3(6) of the Treaty on European Union).

18.4. The European Union respects the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government (Article 4(2) of the Treaty on European Union).

18.5. According to Article 6(1) of the Treaty on European Union, the European Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007; the Charter has the same legal value as the Treaty on European Union and the TFEU.

Furthermore, under Article 6(1) of the Treaty on European Union, fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, constitute general principles of the EU law.

19. It should be noted that, under Article 1(1) of the TFEU, this Treaty organises the functioning of the European Union and determines the areas of, delimitation of, and arrangements for exercising its competences.

Article 20(1) of the TFEU provides that citizenship of the European Union is hereby established; every person holding the nationality of a Member State is a citizen of the European Union; citizenship of the European Union is additional to and does not replace national citizenship. Paragraph 2(a) of the same article provides that one of the rights of EU citizens is to move and reside freely in the territory of the Member States.

Under Article 21(1) of the TFEU, every citizen of the European Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions

laid down in the Treaty on European Union and the TFEU and by the measures adopted to give them effect.

Article 26 of the TFEU provides that the European Union adopts measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaty on European Union and the TFEU (Paragraph 1); the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaty on European Union and the TFEU (Paragraph 2).

It should be noted that, under Article 4(2)(a) of the TFEU, internal market falls within shared competence of the European Union and the Member States.

20. Article 1, titled "Human dignity", of the Charter, provides that human dignity is inviolable; it must be respected and protected. Article 7, titled "Respect for private and family life", of the Charter, prescribes: "Everyone has the right to respect for his or her private and family life, home and communications." Article 9, titled "Right to marry and right to found a family", of the Charter, states: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." Under Paragraph 1 of Article 21, titled "Non-discrimination", of the Charter, any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation is prohibited.

In the context of this case, it should be noted that Article 45 of the Charter enshrines freedom of movement and residence of every citizen of the European Union in the European Union (Paragraph 1). Paragraph 2 of the same article provides that freedom of movement and residence may be granted to nationals of third countries legally resident in the territory of a Member State.

It should also be noted that Article 51(1) of the Charter provides that the provisions of this Charter are addressed to the institutions, bodies, offices, and agencies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law; they must therefore respect the rights, observe the principles, and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the European Union as conferred on it in the Treaty on European Union and the TFEU.

21. As mentioned above, under Article 21(1) of the TFEU, every citizen of the European Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty on European Union and the TFEU and by the measures adopted to give them effect.

The conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members are laid down in the Directive (Article 1(a)).

21.1. The Directive provides that citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect (Recital 1); EU citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence (Recital 3).

21.2. Recital 5 of the Directive provides that the right of all EU citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality; for the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

In this context, it should be noted that, under Article 2(2)(a) and (b) of the Directive, family members of an EU citizen are considered to include, *inter alia*, his/her spouse or partner with whom the EU citizen has concluded a registered partnership on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage, and in accordance with the conditions laid down in the relevant legal acts of the host Member State.

21.3. Recital 31 of the Directive states that this Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age, or sexual orientation.

21.4. As stated in the Directive, it applies to all EU citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in Article 2 who accompany or join them (Article 3(1)). It therefore applies only to EU citizens and their family members who have exercised their right to free movement and residence in another Member State of the European Union, and, if an EU citizen lives in his/her country of nationality, the Directive does not apply to him/her and his/her family members.

22. In the context of this constitutional justice case, the jurisprudence of the CJEU on the interpretation of the regulation of the civil status of individuals, as well as the interpretation of the

legislation (*inter alia*, the Directive) governing the right to move and reside freely within the territory of the Member States, is relevant.

22.1. The CJEU has held that, as EU law stands at present, legislation on the civil status of persons falls within the competence of the Member States (the CJEU, the judgment of 10 May 2011, *Römer*, C-147/08, paragraph 38) and that the Member States are free to provide or not provide for marriage for persons of the same sex, or an alternative form of legal recognition of their relationship, and, if they do so provide, to lay down the date from which such a marriage or alternative form is to have effect (the CJEU, the judgment of 24 November 2016, *Parris*, C-443/15, paragraph 59).

However, the jurisprudence of the CJEU recognises that the powers retained by the Member States must nevertheless be exercised consistently with EU law (the CJEU, the judgment of 14 February 1995, *Schumacker*, C-279/93, paragraph 21; the judgment of 2 October 2003, *Garcia Avello*, C-148/02, paragraph 25). In the exercise of the competence related to regulating marital status, the Member States must comply with EU law and, in particular, with the provisions relating to the principle of non-discrimination (the CJEU, the judgment of 1 April 2008, *Maruko*, C-267/06, paragraph 59; the judgment of 24 November 2016, *Parris*, Case C-443/15, paragraph 58), as well as with the provisions of the Treaty on European Union on the freedom of every EU citizen to move and reside in the territory of the Member States (the CJEU, the judgment of 2 October 2003, *Garcia Avello*, C-148/02, paragraph 25).

22.2. The CJEU has noted that the Directive aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on EU citizens by Article 21(1) of the TFEU and that the Directive aims in particular to strengthen that right (the CJEU, the judgment of 25 July 2008, *Metock and Others*, C-127/08, paragraphs 59 and 82; the judgment of 18 December 2014, *McCarthy and Others*, C-202/13, paragraph 31; the judgment of 14 November 2017, *Lounes*, C-165/16, paragraph 31).

22.3. In the context of the constitutional justice case at issue, the CJEU judgment of 5 June 2018 delivered in *Coman and Others* (C-673/16), which, *inter alia*, interpreted the provisions of Article 21(1) of the TFEU and of the Directive, is particularly relevant.

22.3.1. The Constitutional Court of Romania referred to the CJEU for a preliminary ruling by requesting an interpretation, *inter alia*, whether the term "spouse" used in Article 2(2)(a) of the Directive also includes the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State.

22.3.2. The CJEU emphasised that it follows from a literal, contextual, and teleological interpretation of the Directive that it governs only the conditions determining whether an EU citizen can enter and reside in Member States other than that of which he/she is a national and does not confer

a derived right of residence on third-country nationals who are family members of an EU citizen in the Member State of which that citizen is a national (paragraph 20). However, at the same time, the CJEU noted that, in that regard, it had previously acknowledged (as, for instance, in its judgment of 14 November 2017, *Lounes*, C-165/16, paragraph 46) that, in certain cases, third-country nationals, family members of an EU citizen, who were not eligible, on the basis of the Directive, for a derived right of residence in the Member State of which that citizen is a national, could, nevertheless, be accorded such a right on the basis of Article 21(1) of the TFEU (paragraph 23).

22.3.3. In its interpretation of Article 21(1) of the TFEU, which guarantees the right of EU citizens to move and reside freely within the territory of the Member States, and of the provisions of the Directive, the CJEU noted in this judgment that:

– the term "spouse" used in the Directive refers to a person joined to another person by the bonds of marriage; this term within the meaning of the Directive is gender-neutral and may therefore cover the same-sex spouse of the EU citizen concerned (paragraph 35);

– a Member State cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with an EU citizen of the same sex in another Member State in accordance with the law of that state (paragraph 36);

– to allow Member States the freedom to grant or refuse entry into and residence in their territory by a third-country national whose marriage to an EU citizen was concluded in a Member State in accordance with the law of that state, according to whether or not national law allows marriage by persons of the same sex, would have the effect that the freedom of movement of EU citizens who have already made use of that freedom would vary from one Member State to another, depending on whether such provisions of national law exist, and such a situation would be at odds with the case law of the CJEU, to the effect that, in the light of its context and objectives, the provisions of the Directive may not be interpreted restrictively and, at all events, must not be deprived of their effectiveness (paragraph 39);

– the refusal by the authorities of a Member State to recognise, for the sole purpose of granting a derived right of residence to a third-country national, the marriage of that national to an EU citizen of the same sex, concluded, during the period of their genuine residence in another Member State, in accordance with the law of that State, may interfere with the exercise of the right conferred on that citizen by Article 21(1) of the TFEU to move and reside freely in the territory of the Member States (paragraph 40);

– a restriction on the right to freedom of movement for persons, which is independent of the nationality of the persons concerned, may be justified if it is based on objective public-interest considerations and if it is proportionate to a legitimate objective pursued by national law; a measure

is proportionate if, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective (paragraph 41);

– it has been repeatedly held that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions; thus, it follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (paragraph 44);

– the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, which is defined by national law and falls within the competence of the Member States (paragraph 45);

– a Member State is not required to provide, in its national legal acts, for the institution of marriage between persons of the same sex; it is confined to the obligation to recognise such marriages, lawfully concluded in another Member State, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law; accordingly, such an obligation does not undermine the national identity or pose a threat to the public policy of the Member State concerned (paragraphs 45 and 46).

22.3.4. In the light of these considerations, the CJEU found in this judgment that, in a situation in which an EU citizen has made use of his/her freedom of movement by moving to and taking up genuine residence in a Member State other than that of which he/she is a national, and, whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he/she is joined by a marriage lawfully concluded in the host Member State, Article 21(1) of the TFEU must be interpreted as precluding the competent authorities of the Member State of which the EU citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex (paragraph 1 of the operative part).

22.3.5. It should be noted that, in the light of this judgment of the CJEU, the Constitutional Court of Romania stated in its ruling of 18 July 2018 that:

– the nature of a same-sex couple relationship, just as that of a heterosexual relationship, comes within the scope of the right to private life and to family life; thus, the protection of the right to private and family life, safeguarded by Article 7 of the Charter, Article 8 of the Convention, and Article 26 of the Constitution of Romania, applies to same-sex couples in stable relationships; enjoying the right to private and family life, same-sex couples in stable relationships have the right to express their personality within these relationships and to enjoy, in time and by the means prescribed by law, and by legal and judicial recognition of the appropriate rights and duties;

– the fact that the Romanian domestic law does not provide for/recognise marriages between persons of the same sex must not serve as a ground for refusing to grant the right of residence on the territory of Romania to a same-sex spouse, irrespective of whether he/she is a national of a Member State of the European Union and/or of a third country, if he/she was joined by the bonds of a marriage legally concluded on the territory of a Member State of the European Union with a Romanian citizen having his/her domicile or residence in Romania, or a citizen of a Member State of the European Union who has the right to reside in Romania; the provisions of Romanian legislation that preclude the recognition of marriages between persons of the same sex are not applicable if a citizen of a Member State of the European Union or of a third country, who is a person of the same sex, married to a citizen of Romania or another Member State of the European Union, pursuant to Article 21(1) of the TFEU and the Directive, requires the grant of a right to reside on the grounds of family reunion, for more than three months, on the territory of Romania;

– whenever an EU citizen in a Member State other than that of which they are a national resides in the latter Member State, pursuant to and in compliance with the conditions set out in the Directive, and family life was created or strengthened there, the effectiveness of the rights conferred upon the respective EU citizen by Article 21(1) of the TFEU requires that the latter's family life continued upon his/her return to the Member State of which he/she is a national, by granting a derived right of residence to the family member concerned, a national of a third country.

23. To sum up the EU legal regulation relevant in this constitutional justice case, it should be noted that, under this legal regulation:

– the EU is founded on fundamental values such as respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities (Article 2 of the Treaty on European Union);

– a legal regulation governing the conditions for concluding marriage and registered partnerships is a matter falling within the competence of the Member States; the Member States are not required to provide for same-sex marriages in national legislation (the CJEU, the judgment of 10 May 2011, *Römer*, C-147/08, paragraph 38; the judgment of 24 November 2016, *Parris*, C-443/15, paragraph 59);

– one of the rights of EU citizens is the right to move and reside freely within the territory of the Member States (Article 20(2)(a) and Article 21(1) of the TFEU, Article 45(1) of the Charter); the free movement of persons is one of the prerequisites for the functioning of the internal market (Article 26(1) and (2) of the TFEU);

– when ensuring the free movement of persons, the private and family life of EU citizens must be respected and regard must be paid to the prohibition on any discrimination, *inter alia*, based on sex or sexual orientation (Article 7 and Article 21(1) of the Charter);

– the right of an EU citizen to move and reside freely in the territory of the Member States is also granted to his/her family members, who are considered to include, *inter alia*, his/her spouse or partner with whom the EU citizen has concluded a registered partnership on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage, and in accordance with the conditions laid down in the relevant legal acts of the host Member State (Recital 5 and Article 2(2)(a) and (b) of the Directive);

– the term "spouse" used in the Directive refers to a person joined to another person by the bonds of marriage; this term within the meaning of the Directive is gender-neutral and may therefore cover the same-sex spouse of the EU citizen concerned (the CJEU, the judgment of 5 June 2018, *Coman and Others*, C-673/16, paragraph 35);

– the Member States must take account of a marriage or registered partnership (if the legislation of the host Member State treats registered partnerships as equivalent to marriage) lawfully concluded between same-sex persons in another Member State, to the extent necessary to ensure the exercise of the rights that these persons enjoy under EU law, *inter alia*, the right to move and reside freely in the territory of the Member States (Article 2(2)(a) and (b) of the Directive; the CJEU, the judgment of 5 June 2018, *Coman and Others*, C-673/16, paragraphs 36, 40, and 45);

– such an obligation does not undermine the national identity or pose a threat to the public policy of the Member State concerned; in the context of the restriction of the right to freedom of movement for persons, the concept of public policy as justification for a derogation from a fundamental freedom is interpreted strictly: public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (Article 4(2) of the Treaty on European Union; the CJEU, the judgment of 2 June 2016, *Bogendorff von Wolffersdorff*, C-438/14, paragraph 67; the judgment of 13 July 2017, *E*, C-193/16, paragraph 18; the judgment of 5 June 2018, *Coman and Others*, C-673/16, paragraphs 44 and 46);

– in the light of these considerations, a Member State cannot rely on the reservation of public policy, *inter alia*, on the grounds that the law of that Member State does not provide for marriage between persons of the same sex (registered partnership between persons of the same sex if the legislation of the Member State treats registered partnerships as equivalent to marriage), in refusing reunification to a family founded by an EU citizen (*inter alia*, a citizen of that Member State) having made use of his/her right to freedom of movement and a same-sex third-country national, who have lawfully concluded a marriage (or a registered partnership) in another Member State (Article 21(1) of the TFEU; Article 2(2)(b) of the Directive; the CJEU, the judgment of 5 June 2018, *Coman and Others*, C-673/16, paragraphs 23, 45, and 51).

III

The legal regulation laid down in the legal acts of the Council of Europe and the jurisprudence of the European Court of Human Rights

24. In the constitutional justice case at issue, the provisions entrenched in the acts of the Council of Europe are relevant, *inter alia*, those related to the protection of the right to private and family life and the right to marry, and the prohibition on discrimination, for instance, based on sex, sexual orientation, or gender identity.

24.1. On 29 April 2010, the Parliamentary Assembly of the Council of Europe adopted Resolution 1728(2010) on discrimination on the basis of sexual orientation and gender identity, which calls on Member States to ensure the legal recognition of same-sex partnerships if a partnership between different sexes is also available. This resolution calls, among other things, for measures to ensure that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if he/she were in a heterosexual relationship.

It should also be noted that the Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe to member states on measures to combat discrimination on grounds of sexual orientation or gender identity recommended that member states ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual, and transgender persons and to promote tolerance towards them. This Recommendation also notes that, where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.

24.2. Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 provides that everyone has the right to respect for, *inter alia*, his/her private and family life.

Article 12, titled “Right to marry”, of the Convention provides that men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 14, titled “Prohibition of discrimination”, of the Convention states that the enjoyment of the rights and freedoms set forth in this Convention is secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

25. The Constitutional Court has held on more than one occasion that the jurisprudence of the ECtHR is also important for the interpretation and application of Lithuanian law. Therefore, in this

constitutional justice case, it is necessary to take into account the principles, formulated in the jurisprudence of the ECtHR, of applying the above-mentioned provisions of the Convention, *inter alia*, Article 14 thereof, where this article is interpreted in conjunction with Article 8 or Article 12 of the Convention.

25.1. As noted by the ECtHR, although there have been major social changes in the institution of marriage since the adoption of the Convention, there is still no European consensus regarding same-sex marriage. Despite the fact that, among the States Parties to the Convention, there is an emerging European consensus towards the legal recognition of same-sex couples, this tendency has only developed rapidly over the past decade; therefore, the area in question must still be regarded as one where states must also enjoy a margin of appreciation that must extend to their decisions, including those established by law (the ECtHR, the judgment of 24 June 2010, *Schalk and Kopf v Austria*, no 30141/04, paragraphs 105 and 106; the judgment of 16 July 2014, *Hämäläinen v Finland* [GC], no 37359/09, paragraphs 74 and 75).

It should also be noted that, in its judgment of 14 December 2017, delivered in the case of *Orlandi and Others v Italy* (nos 26431/12, 26742/12, 44057/12, and 60088/12), the ECtHR underlined the clear tendency of states to recognise same-sex unions (paragraphs 112 and 204), but the states still have a wide margin of appreciation for the recognition of marriages of same-sex persons concluded in a foreign state; this remains an area where there is no consensus in Europe (paragraph 205).

25.2. The case law of the ECtHR shows that Article 8 of the Convention, which, as mentioned above, enshrines the right of a person to respect, *inter alia*, for his/her private and family life, cannot be interpreted as imposing an obligation on a State Party to the Convention to grant to same-sex couples the right to marry under national law (the judgment delivered in the case of *Hämäläinen v Finland*, paragraph 71; *mutatis mutandis Orlando v Italy*, paragraphs 204 and 205).

At the same time, it should be mentioned that Article 12 of the Convention, which, as mentioned above, entitles a man and a woman to marry and found a family, cannot be interpreted as imposing an obligation on Contracting States also to grant same-sex persons access to marriage (*inter alia*, *Schalk and Kopf v Austria*, paragraph 101).

Moreover, such an obligation on the part of states cannot derive from Article 14 of the Convention taken in conjunction with Article 8 thereof, which establish provisions of more general purpose and scope compared with the said Article 12 (*Schalk and Kopf v Austria*, paragraph 101).

Thus, States Parties to the Convention are free, under Article 12 of the Convention, as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to same-sex couples (*Schalk and Kopf v Austria*, paragraph 108; the judgment of 21 July 2015, *Oliari and Others v Italy*, nos 18766/11 and 36030/11, paragraphs 191–193).

In this context, it should also be mentioned that, under Article 14 of the Convention, the prohibition of discrimination also applies to discrimination based on the sexual orientation of a person. Just like different treatment based on sex, different treatment based on sexual orientation requires particularly convincing and weighty reasons by way of justification (the ECtHR, the judgment of 7 November 2013, *Vallianatos and Others v Greece* [GC], nos 29381/09 and 32684/09, paragraph 77), especially where such treatment relates to rights protected under Article 8 of the Convention. Differences based solely on considerations of sexual orientation are unacceptable under the Convention (the ECtHR, judgment of 22 January 2008, *E.B. v France* [GC], no 43546/02, paragraphs 93 and 96).

25.3. In this context, attention should be paid to the fact that the ECtHR has a broad interpretation of the notion of the family in its jurisprudence and has explicitly recognised that the term "family" in Article 8 of the Convention is not limited to marriage-based relationships, but may also include *de facto* family relationships where persons live together without marriage. There is, therefore, no reason to assert that a same-sex couple cannot enjoy "family life" for the purposes of Article 8 of the Convention, since the relationship of a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would (*Schalk and Kopf v Austria*, paragraph 94; *Vallianatos and Others v Greece*, paragraph 73).

Consequently, Article 8 of the Convention protects the right of couples of different sexes and same-sex couples living in a stable *de facto* partnership to the protection of their private and family life (*inter alia*, the ECtHR, the judgment of 30 June 2016, *Taddeucci and McCall v Italy*, no 51362/09, paragraph 58).

25.4. The ECtHR has also noted that the right to family life implies not only the duty of states to abstain from unlawful interference with family life, but also the positive obligations necessary to ensure effective protection of this right of a person (the ECtHR, the judgment of 13 June 1979, *Marckx v Belgium*, no 6833/74, paragraph 31).

In interpreting positive duties on the part of the state, in the context of Article 8 of the Convention, in its judgment of 21 July 2015, delivered in the case of *Oliari and Others v Italy*, the ECtHR noted that same-sex couples also have a vital interest in having a possibility of concluding a civil union or registered partnership, which would be the right way to legitimise their relationship and ensure its proper protection. In view of the very specific circumstances of the case, the ECtHR recognised that the repetitive failure of the Italian legislature to provide for any form of the legalisation of relationships of same-sex persons, despite the repetitive calls by the Italian Constitutional Court and the Court of Cassation to do so, overstepped the margin of its appreciation and left the applicants in a legal vacuum, thus violating its positive obligation under Article 8 of the

Convention to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions (paragraphs 184–187).

25.5. In its judgment of 21 July 2015, delivered in the case of *Oliari and Others v Italy*, the ECtHR considered the issue of the recognition of same-sex marriages concluded abroad, i.e. the registration of such marriages in Italy. The relevant application had been rejected on the basis of national law, since in Italy the right of persons of the same sex to marry is not provided for. The judgment also mentions the fact that, while enforcing the judgment delivered in the above-mentioned case of *Oliari v Italy*, the Italian legislature established the institution of civil unions in Italian law. The ECtHR held that states still have a broad discretion in assessing whether such unions may be recognised as marriages under national law; on the other hand, in the absence of any form of the legalisation of such unions (pending the adoption of new laws), the persons who make them are left in a legal vacuum and the state fails to take account of the social reality of the situation (*Orlandi and Others v Italy*, paragraph 205).

25.6. In the context of the constitutional justice case at issue, mention should be made of the case law of the ECtHR on discrimination against same-sex couples in issuing residence permits in relevant countries.

The ECtHR emphasises the margin of appreciation of states to regulate, in accordance with international law, the procedures for the entry into, exit from, and residence in their territories of foreign nationals. The Convention cannot be interpreted as giving the right to a foreign national to enter or reside in the territory of a particular state (the ECtHR, the judgment of 28 June 2011, *Nunez v Norway*, no 55597/09, paragraph 66). The duty imposed by Article 8 of the Convention cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by a family of the country of their common residence and to accept non-national partners for settlement in that country. Nevertheless, the decisions taken by states in the immigration sphere can in some cases amount to interference with the right to respect for private and family life secured by Article 8 of the Convention, in particular where the persons concerned possess strong personal or family ties in the host country that are liable to be seriously affected by the measure in question (*Taddeucci and McCall v Italy*, paragraph 56).

25.6.1. On 23 February 2016, the ECtHR delivered a judgment in the case of *Pajić v Croatia* (no 68453/13). The applicant, a citizen of Bosnia and Herzegovina, had been refused a residence permit in Croatia on the basis of family reunification with a same-sex partner living in Croatia. The national law did not provide for the possibility of family reunification where a couple consisted of two persons of the same sex, although a couple of different sexes had such a right in an analogous situation. The ECtHR noted that, although Article 8 of the Convention does not guarantee a person the right to receive a residence permit in a particular country, the state must implement its immigration

policy in a manner that does not violate the rights of foreign nationals, such as the right to respect for private and family life and the right not to be discriminated against.

25.6.2. The ECtHR accepts that the protection of the family in the traditional sense is, in principle, a weighty and legitimate reason that might justify a difference in treatment (*inter alia*, the ECtHR, the judgment of 24 July 2003, *Karner v Austria*, no 40016/98, paragraph 40; the judgment of 2 March 2010, *Kozak v Poland*, no 13102/02, paragraph 98; *Vallianatos and Others v Greece*, paragraph 83). However, the ECtHR is of the opinion that, in a particular area, namely when deciding whether to grant a residence permit for family reasons to a homosexual foreign partner, it cannot amount to a "particularly convincing and weighty" reason capable of justifying discrimination on grounds of sexual orientation (*Taddeucci and McCall v Italy*, paragraph 93).

26. To sum up the case law of the ECtHR relevant in this constitutional justice case, it should be noted that:

– under Article 14 of the Convention, the prohibition of discrimination also applies to discrimination based on the sexual orientation of a person; the different treatment of persons based on gender and sexual orientation requires particularly weighty and convincing reasons by way of justification, in particular where such different treatment concerns the rights falling within the scope of Article 8 of the Convention; differences based solely on considerations of sexual orientation are unacceptable under the Convention;

– under the Convention, the Contracting States enjoy a margin of appreciation as regards the regulation of the conditions and procedure for entry into the territory of the respective state and leaving its territory by foreign nationals and their residence there;

– the Convention does not impose any general obligation on the Contracting States to ensure in their domestic law that same-sex couples have access to marriage or partnership; the states exercise their margin of appreciation in this sphere; however, under Article 8 of the Convention, both the private and family life of same-sex couples must be protected in the same way as with respect to opposite-sex couples, since the position of same-sex couples living in a stable *de facto* relationship is equivalent to (the same as) that of opposite-sex couples in terms of family life;

– although Article 8 of the Convention does not guarantee a person or family the right to obtain a residence permit in a particular state, in regulating the granting of residence permits, the states must pay regard, *inter alia*, to Article 14 of the Convention as interpreted in conjunction with Article 8; accordingly, the states may not discriminate against persons, including same-sex couples, based solely on their sexual orientation or disproportionately limit their rights, *inter alia*, their right to the protection of private and family life, as guaranteed under the Convention; in this context, the aim of protecting the concept of the traditional family cannot be regarded as amounting to a convincing and weighty reason capable of justifying the different treatment of opposite-sex and same-

sex couples in matters of deciding whether to grant a spouse or partner a residence permit for family reasons.

IV

The provisions of the Constitution and the official constitutional doctrine

27. In the constitutional justice case at issue, the Constitutional Court investigates the compliance of Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, under which, in the event of family reunification, a temporary residence permit may be issued to a foreign national when the foreign national's spouse or the person with whom the foreign national has concluded a registered partnership resides in the Republic of Lithuania where the spouse or the person with whom a registered partnership has been concluded is a citizen of the Republic of Lithuania or a foreign national holding a residence permit, with Paragraphs 1 and 4 of Article 22, Paragraph 1 of Article 29, and Paragraphs 1 and 2 of Article 38 of the Constitution, as well as with the constitutional principle of a state under the rule of law.

As mentioned above, the Law implements the respective EU legislation.

28. In view of this fact, the constitutional provisions related to Lithuania's membership in the European Union are relevant in this constitutional justice case.

28.1. In its ruling of 24 January 2014, the Constitutional Court held that membership of the Republic of Lithuania in the European Union was constitutionally confirmed by means of the Constitutional Act on Membership of the Republic of Lithuania in the European Union; the preamble to this Constitutional Act makes it clear that the Seimas adopted it "expressing its conviction that the European Union respects human rights and fundamental freedoms and that Lithuanian membership in the European Union will contribute to the more efficient securing of human rights and freedoms", "noting that the European Union respects the national identity and constitutional traditions of its Member States", and "seeking to ensure the fully fledged participation of the Republic of Lithuania in the European integration, as well as the security of the Republic of Lithuania and welfare of its citizens".

28.2. The Constitutional Court has also noted that the Constitutional Act on Membership of the Republic of Lithuania in the European Union, *inter alia*, lays down the constitutional grounds of membership of the Republic of Lithuania in the European Union. If these constitutional grounds were not consolidated in the Constitution, the Republic of Lithuania would not be able to be a full member of the European Union: the Republic of Lithuania, as a Member State of the European Union, shares with or confers on the European Union the competences of its state institutions in the areas provided for in the founding Treaties of the European Union and to the extent it would, together with the other Member States of the European Union, jointly meet its membership commitments in those areas, as well as enjoy membership rights (Article 1); the norms of European Union law are a constituent part

of the legal system of the Republic of Lithuania; where it concerns the founding Treaties of the European Union, the norms of European Union law are applied directly, while in the event of the collision of legal norms, they have supremacy over the laws and other legal acts of the Republic of Lithuania (Article 2) (the Constitutional Court's rulings of 24 January 2014 and 11 July 2014, and its decision of 20 October 2017).

28.3. The Constitutional Court has held that full participation by the Republic of Lithuania, as a Member State, in the EU is a constitutional imperative based on the expression of the sovereign will of the Nation; full membership by the Republic of Lithuania in the EU is a constitutional value (the Constitutional Court's ruling of 24 January 2014, its decision of 16 May 2016, and its ruling of 14 December 2018); the constitutional imperative of full participation by the Republic of Lithuania in the EU also implies the constitutional obligation of the Republic of Lithuania to properly implement the requirements of EU law (the Constitutional Court's decision of 20 December 2017 and its ruling of 14 December 2018); EU law is a source of the interpretation of the law of the Republic of Lithuania, *inter alia*, the Constitution, in those areas in which, under Article 1 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union, the Republic of Lithuania shares with or confers on the EU the competences of its state institutions (the Constitutional Court's decision of 20 December 2017). In view of this fact, in the context of the constitutional justice case at issue, it should be noted that the constitutional provisions related to the free movement of EU citizens, *inter alia*, citizens of the Republic of Lithuania, within the EU, *inter alia*, the Republic of Lithuania, should also be interpreted in the light of the respective EU legal provisions.

29. In this constitutional justice case, the constitutional provisions relating to the protection of human dignity are also relevant.

Under Paragraph 2 of Article 21 of the Constitution, human dignity is protected by law; Paragraph 3 of the same article establishes a prohibition, *inter alia*, on degrading human dignity.

When interpreting these constitutional provisions, the Constitutional Court has held that dignity is an inalienable characteristic of a human being as the greatest social value; every member of society has innate dignity (*inter alia*, the Constitutional Court's rulings of 29 December 2004 and 26 May 2015, as well as its conclusion of 19 December 2017); all people by nature are to be deemed equal in their dignity and rights (the Constitutional Court's conclusion of 19 December 2017). Human dignity should be regarded as a special constitutional value (the Constitutional Court's ruling of 9 December 1998 and its conclusion of 19 December 2017). Dignity is characteristic of every human being, irrespective of how he/she assesses himself/herself or other people assess him/her (the Constitutional Court's ruling of 29 December 2004 and its conclusion of 19 December 2017).

The Constitution establishes the duty of the state to ensure the protection and defence of human dignity (*inter alia*, the Constitutional Court's rulings of 8 May 2000 and 2 September 2009, as well as its conclusion of 19 December 2017). State institutions and officials have the duty to respect human dignity as a special value (the Constitutional Court's rulings of 29 December 2004 and 2 September 2009, as well as its decision of 20 April 2010). This means, among other things, that state institutions and officials may not treat an individual solely as a subject belonging to a particular social, economic, professional, or other category; in every case, an individual must be regarded as a free personality, whose human dignity should be respected (the Constitutional Court's ruling of 29 December 2004 and its conclusion of 19 December 2017).

The fact that the legislature, while regulating the relationships connected with the implementation of human rights and freedoms, must guarantee their proper protection constitutes one of the conditions for ensuring human dignity as a constitutional value; violations of the rights and freedoms of persons can also undermine their dignity (the Constitutional Court's rulings of 29 December 2004 and 2 September 2009, as well as its conclusion of 19 December 2017).

30. The petitioner impugns the compliance of Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law with, *inter alia*, Paragraphs 1 and 4 of Article 22 of the Constitution.

Article 22 of the Constitution provides that private life is inviolable (Paragraph 1); the law and courts protect everyone from arbitrary or unlawful interference with his/her private and family life, as well as from encroachment upon his/her honour and dignity (Paragraph 4).

30.1. The Constitutional Court has held that private life is the personal life of an individual: the way of life, marital status, living surroundings, relationships with other people, the views, convictions, or habits of an individual, his/her physical or psychological state, health, honour, dignity, etc. (the Constitutional Court's rulings of 19 September 2002 and 24 March 2003, as well as its conclusion of 19 December 2017). The inviolability of private life, which is enshrined in the Constitution, gives rise to the right of a person to privacy (the Constitutional Court's ruling of 19 September 2002), which includes private, family, and home life, the physical and psychological inviolability of a person, his/her honour and reputation, the secrecy of personal facts, the prohibition on publishing received or collected confidential information, etc. (*inter alia*, the Constitutional Court's rulings of 21 October 1999 and 23 October 2002, as well as its conclusion of 19 December 2017).

The provision of Paragraph 4 of Article 22 of the Constitution is one of the most important guarantees of the inviolability of an individual's private life: the private life of an individual is protected from unlawful interference of the state, other institutions, their officials, and other persons (the Constitutional Court's rulings of 19 September 2002, 29 December 2004, and 27 June 2016);

this provision consolidates one of the aspects of the family concept confirming the constitutional significance of the family as a protected and fostered constitutional value (the Constitutional Court's ruling of 28 September 2011).

If the private life of an individual is interfered with in an arbitrary and unlawful manner, then, at the same time, his/her honour and dignity are encroached upon (*inter alia*, the Constitutional Court's rulings of 29 December 2004 and 21 December 2006, as well as its conclusion of 19 December 2017); the protection of human dignity is inseparable from the protection of the private life of a person (the Constitutional Court's conclusion of 19 December 2017).

30.2. It should be noted that, according to the Constitution, a person's right to privacy is not absolute (the Constitutional Court's ruling of 29 December 2004). In the context of the constitutional justice case at issue, it should also be noted that the right to the protection of family life, which is guaranteed under Paragraph 4 of Article 22 of the Constitution, is not absolute, either.

As the Constitutional Court has repeatedly emphasised in its rulings, under the Constitution, it is allowed to limit the rights and freedoms of a person if the following conditions are followed: the limitations are established by means of a law; the limitations are necessary in a democratic society in order to protect the rights and freedoms of other persons, the values consolidated in the Constitution, as well as the constitutionally important objectives; regard is paid to the constitutional principle of proportionality (*inter alia*, the Constitutional Court's rulings of 26 January 2004, 21 June 2011, and 9 May 2014), according to which the rights and freedoms of a person may not be limited by means of a law more than necessary in order to reach the legitimate objectives that are important to society (the Constitutional Court's rulings of 7 July 2011, 14 April 2014, and 17 February 2016); the protection of common interests in a democratic state under the rule of law must not deny a specific human right or freedom as such (the Constitutional Court's rulings of 9 December 1998, 24 March 2003, and 26 February 2015).

In the context of the constitutional justice case at issue, it should be noted that the above-mentioned conditions for limiting the rights and freedoms of persons are also applicable in limiting, *inter alia*, the right of a person, as established in Article 22 of the Constitution, to the protection of private and family life. It needs to be emphasised that, providing by means of a law that the exercise of the right to private and family life is subject to certain limitations, which are necessary in a democratic society in order to reach the constitutionally important objectives, the legislature must also follow the constitutional principles of the equality of the rights of persons and proportionality; otherwise, human dignity, protected under Paragraphs 2 and 3 of Article 21 of the Constitution, would be violated, i.e. the preconditions would be created for degrading human dignity while denying the free personality of the person and his/her inherent equality with other people in terms of human dignity. In this context, it should be mentioned that only such a state that has respect for the dignity

of every human being can be considered to be truly democratic (the Constitutional Court's conclusion of 19 December 2017).

31. The petitioner impugns the compliance of Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law with, *inter alia*, Paragraph 1 of Article 29 of the Constitution.

31.1. Article 29 of the Constitution enshrines the principle of the equality of the rights of persons, which prohibits discrimination against anyone on the grounds of gender, race, nationality, language, origin, social status, belief, convictions, or views; the discrimination prohibited under Article 29 of the Constitution, when human rights are restricted on the grounds of gender, race, nationality, language, origin, social status, belief, convictions, or views, also degrades the dignity of a discriminated individual (the Constitutional Court's conclusion of 19 December 2017).

31.2. The Constitutional Court has held that discrimination is most often understood as a restriction of the rights of an individual based on gender, race, nationality, language, origin, social status, belief, convictions, views, or other characteristics (the Constitutional Court's ruling of 4 July 2003, 17 November 2003, and 3 December 2003). Paragraph 2 of Article 29 of the Constitution is a derivative of Paragraph 1 of the same article, as it does not allow the violations of the equality of the rights of persons – the general rule set out in Paragraph 1 of Article 29 of the Constitution: "All persons shall be equal before the law, courts, and other state institutions and officials" (the Constitutional Court's conclusion of 24 January 1995).

In view of this fact, the content of the constitutional principle of the equality of the rights of persons may be disclosed only by interpreting Paragraphs 1 and 2 of Article 29 of the Constitution in conjunction with one another. Therefore, Paragraph 2 of Article 29 of the Constitution may not be understood as consolidating an exhaustive list of the grounds of non-discrimination; otherwise, the preconditions would be created for denying the equality of all persons before the law, courts, and other state institutions, i.e. the very essence of the constitutional principle of the equality of the rights of persons, as guaranteed under Paragraph 1 of Article 29 of the Constitution.

In the context of the constitutional justice case at issue, it should be noted that one of the forms of discrimination prohibited under Article 29 of the Constitution is the restriction of the rights of a person on the grounds of his/her gender identity and/or sexual orientation; such a restriction should also be regarded as degrading human dignity.

31.3. As mentioned above, only such a state that has respect for the dignity of every human being can be considered to be truly democratic. It needs to be emphasised that, as noted by the Constitutional Court, the Constitution is an anti-majoritarian act, which protects an individual (the Constitutional Court's ruling of 19 August 2006).

In view of this fact, in the context of the constitutional justice case at issue, it should be noted that, in a democratic state under the rule of law, the attitudes or stereotypes prevailing in a certain

period of time among the majority of the members of society may not, based on the constitutionally important objectives, *inter alia*, ensuring public order (public policy), serve as constitutionally justifiable grounds for discriminating against persons solely on the basis of their gender identity and/or sexual orientation, *inter alia*, for limiting the right, as ensured under Paragraphs 1 and 4 of Article 22 of the Constitution, to the protection of private and family life, among other things, the protection of relationships with other family members.

31.4. The Constitutional Court has noted on more than one occasion that the constitutional principle of the equality of persons, which is consolidated in Article 29 of the Constitution, should be followed both in passing and applying laws.

32. The petitioner impugns the compliance of Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law with, *inter alia*, Paragraphs 1 and 2 of Article 38 of the Constitution.

32.1. Paragraphs 1 and 2 of Article 38 of the Constitution prescribe:

"The family shall be the basis of society and the State.

Family, motherhood, fatherhood, and childhood shall be under the protection and care of the State."

Paragraph 3 of Article 38 of the Constitution, which states that "Marriage shall be concluded upon the free mutual consent of man and woman", is also relevant in this constitutional justice case.

32.2. The Constitutional Court has held that Paragraphs 1 and 2 of Article 38 of the Constitution consolidate the constitutional principles of the most general nature; these provisions express the obligation of the state to establish such a legal regulation that would ensure that family, motherhood, fatherhood, and childhood, as constitutional values, would be fostered and protected in all ways possible (*inter alia*, the Constitutional Court's rulings of 28 September 2011, 27 February 2012, and 22 September 2015).

32.3. In its ruling of 28 September 2011, the Constitutional Court held that the constitutional concept of the family may not be derived solely from the institution of marriage, consolidated in Paragraph 3 of Article 38 of the Constitution; marriage is one of the grounds of the constitutional institution of the family for the creation of family relationships; however, this does not mean that the Constitution, *inter alia*, Paragraph 1 of Article 38 thereof, does not protect or defend families other than those founded on the basis of marriage; the constitutional concept of the family is based on mutual responsibility between family members, understanding, emotional affection, assistance, and similar bonds, as well as on the voluntary determination to take on certain rights and duties, i.e. the said concept is based on the content of relationships, whereas the form of expression of these relationships has no essential significance for the constitutional concept of the family; the duty, stemming from Paragraph 1 of Article 38 of the Constitution, for the state to establish, by means of

laws and other legal acts, a legal regulation that would ensure the protection of the family as a constitutional value implies the obligation of the state not only to establish such a legal regulation that, *inter alia*, would create the preconditions for the proper functioning of families, strengthen family relationships, and defend the rights and legitimate interests of family members, but also to regulate, by means of laws and other legal acts, family relationships in such a way that no preconditions would be created for discrimination against certain participants in family relationships (as, for instance, against a man and a woman who live together without having registered their union as a marriage, their children/adopted children, single parents raising their child/adopted child, etc.).

32.4. In this context, it should be noted that Paragraph 3 of Article 38 of the Constitution consolidates the constitutional concept of marriage concluded by free mutual consent of a man and a woman. It needs to be emphasised that a different concept of marriage may not be consolidated in the laws of the Republic of Lithuania unless Paragraph 3 of Article 38 of the Constitution is amended accordingly.

The Constitutional Court has noted that marriage is one of the grounds of the constitutional institution of family for the creation of family relationships; it is a historically established family model that has undoubtedly had an exceptional value in the life of society and ensures the viability of the Nation and the state, as well as their historical survival (the Constitutional Court's ruling of 28 September 2011).

32.5. In the context of the constitutional justice case at issue, it should be noted that, unlike the constitutional concept of marriage, the constitutional concept of the family, among other things, is neutral in terms of gender. Under Paragraphs 1 and 2 of Article 38 of the Constitution, interpreted in conjunction with the principle of the equality of persons and the prohibition of discrimination, as established in Article 29 of the Constitution, the Constitution protects and defends all families that meet the constitutional concept of the family, which is based on the contents of permanent or long-lasting relationships between family members, i.e. reciprocal understanding and responsibility, emotional affection, help and similar bonds, as well as on the voluntary determination to take on certain rights and duties.

On the other hand, this does not mean that the Constitution, *inter alia*, Paragraph 2 of Article 38 thereof, under which motherhood, fatherhood, and childhood are also under the protection and care of the state, precludes the establishment of a differentiated legal regulation of the family care and family support by the state where objective and constitutionally justified criteria are taken into account.

33. The petitioner impugns the compliance of Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law with, *inter alia*, the constitutional principle of a state under the rule of law.

The Constitutional Court has noted that, under the Constitution, *inter alia*, the constitutional principle of a state under the rule of law, the Seimas, as the institution of legislative power, when exercising its constitutional powers and regulating family relationships by means of legal acts, must pay regard to the requirements stemming from the Constitution, *inter alia*, those of the equality of the rights of persons, as well as respect for human dignity and private life; under the Constitution, *inter alia*, the constitutional principle of a state under the rule of law, in the course of regulating family relationships by means of laws and other legal acts, the duty arises for the Seimas, as the institution of legislative power, to take account of the specific character of these relationships, *inter alia*, the particularities of the subjects of these relationships, as the said particularities objectively determine the necessity to define these subjects in the context of those concrete relationships the participants of which they appear to be (the Constitutional Court's ruling of 28 September 2011).

34. It should be noted that Article 32 of the Constitution is relevant to the legal regulation of the migration of citizens of the Republic of Lithuania and other persons. This article prescribes:

"Citizens may move and choose their place of residence in Lithuania freely and may leave Lithuania freely.

These rights may not be restricted otherwise than by law when this is necessary for the protection of the security of the State or the health of people, or for the administration of justice.

Citizens may not be prohibited from returning to Lithuania.

Everyone who is Lithuanian may settle in Lithuania."

34.1. Thus, Paragraph 1 of Article 32 of the Constitution consolidates the right of every citizen of the Republic of Lithuania to move freely, *inter alia*, to choose his/her place of residence in Lithuania or to leave Lithuania; Paragraph 3 of this article consolidates the right of a citizen to return to Lithuania; and Paragraph 4 enshrines the right of everyone who is Lithuanian to settle in Lithuania.

34.2. As noted by the Constitutional Court, freedom of movement guaranteed to a citizen is a significant element of the constitutional status of a member of a civil community; the provisions of Article 32 of the Constitution mean that it is only a citizen himself/herself who has the right to decide in which place of the territory of the Republic of Lithuania to stay, when to leave this place and move to another place, to freely decide as to which permanent or temporary place of residence to choose, and to decide whether to stay in or leave Lithuania, as well as the right to choose himself/herself the time of departure (the Constitutional Court's rulings of 29 December 2004 and 6 February 2015).

The rights and freedoms entrenched in Paragraph 1 of Article 32 of the Constitution are guaranteed both for citizens of the Republic of Lithuania and for other persons who legally reside in Lithuania in cases where their legal status does not imply a different implementation of these rights and freedoms (the Constitutional Court's ruling of 29 December 2004).

34.3. Freedom of movement, the right to choose the place of residence in Lithuania, as well as the right to leave Lithuania freely, which are consolidated in Article 32 of the Constitution, are not absolute ones. Under Paragraph 2 of Article 32 of the Constitution, they may be subject to restrictions; however, this may be done only by law and only when this is necessary for the protection of national security or public health; they may also be subject to restrictions when this is necessary for the administration of justice (the Constitutional Court's ruling of 29 December 2004).

34.4. It should be noted that the phrase "Citizens may not be prohibited from returning to Lithuania" of Paragraph 3 of Article 32 of the Constitution makes it clear that the right of a citizen of the Republic of Lithuania to return to, and reside in, Lithuania is absolute. As held by the Constitutional Court in its conclusion of 24 January 1995, the presence of a citizen in his/her country is always lawful. Meanwhile, the conditions for the lawfulness of the entry into, departure from, and presence in the country by foreign nationals or stateless persons are prescribed in the domestic law (the Constitutional Court's conclusion of 24 January 1995).

34.5. As mentioned above, Paragraph 4 of Article 32 of the Constitution consolidates the right of everyone who is Lithuanian to settle in Lithuania. In view of the fact that Paragraph 4 of Article 32 of the Constitution consolidates the right of every citizen of the Republic of Lithuania to return to, and reside in, Lithuania, it should be held that Paragraph 4 enshrines the right of everyone who is Lithuanian, but who is not a citizen of the Republic of Lithuania, to settle in Lithuania.

In its ruling of 13 November 2006, when interpreting Paragraph 4 of Article 32 of the Constitution, the Constitutional Court noted that all Lithuanians who reside abroad, wherever their permanent residence, have the right to come back to Lithuania, their ethnical homeland, at any time. In the same ruling, the Constitutional Court also emphasised that, under the Constitution, it is not allowed to establish any such legal regulation that would cut off Lithuanians living abroad from the Lithuanian nation; Lithuanians who reside abroad may not be deprived of the possibility of participating in the life of the Lithuanian nation if they request so; Lithuanians residing abroad are an inseparable part of the Lithuanian nation.

However, it should be noted that the phrase "Everyone who is Lithuanian may settle in Lithuania" of Paragraph 4 of Article 32 of the Constitution differs from the phrase of Paragraph 3 of the same article "Citizens may not be prohibited from returning to Lithuania", which, as mentioned above, implies the absolute right of a citizen of the Republic of Lithuania to return to Lithuania and reside there. In this regard, it should be held that that the provision of Paragraph 4 of Article 32 of the Constitution implies the right of every Lithuanian who is not a citizen of the Republic of Lithuania to enter Lithuania and settle there; however, this right is not absolute and may be restricted for reasons of national or public security, public order (public policy), the protection of public health, or for similar constitutionally important objectives. At the same time, this means that Paragraph 4 of

Article 32 of the Constitution is a constitutional basis for establishing by law a legal regulation whereby Lithuanians who are not citizens of the Republic of Lithuania would have the right to come to Lithuania and settle there under different (easier) conditions compared with other foreign nationals or stateless persons.

34.6. It should be noted that the provisions of Article 32 of the Constitution, *inter alia*, Paragraph 1, which establishes the right of each citizen of the Republic of Lithuania move freely, Paragraph 3, which provides for the absolute right of a citizen of the Republic of Lithuania to return to Lithuania and reside there, and Paragraph 4, which consolidates the right of everyone who is Lithuanian to settle in Lithuania, should be interpreted in conjunction with the provisions of Paragraphs 1 and 4 of Article 22 of the Constitution, which, as mentioned before, consolidate the right of a person to privacy, *inter alia*, the right to the protection of private and family life, also in conjunction with Article 29 of the Constitution, which, as mentioned before, lays down the principle of the equality of persons and the prohibition of discrimination, as well as with the provisions of Paragraphs 1 and 2 of Article 38 of the Constitution, under which, as mentioned before, the Constitution protects and defends all families that meet the constitutional concept of the family, which is based on the contents of permanent or long-lasting relationships between family members.

Having regard to the above, it should be held that, under the Constitution, by means of the legal regulation related to freedom of movement of the citizens of the Republic of Lithuania and entry into the Republic of Lithuania for residence purposes by Lithuanians who are not citizens of the Republic of Lithuania, the legislature must create the favourable conditions for the non-national family members of a citizen of the Republic of Lithuania or of a non-national Lithuanian entering Lithuania for residence purposes to enter Lithuania and reside there together with the respective citizen of the Republic of Lithuania or non-national Lithuanian entering Lithuania for residence purposes.

At the same time, it should be emphasised that, under the Constitution, the right of non-national family members of a citizen of the Republic of Lithuania and of a non-national Lithuanian to enter Lithuania and reside there together with the respective citizen of the Republic of Lithuania or non-national Lithuanian entering Lithuania for residence purposes is not absolute. This right may be subject to restrictions where necessary in a democratic society for reasons of national or public security, public order (public policy), the protection of human health, or for similar constitutionally important objectives; it should be noted that such a legal regulation that would limit this right in the absence of a constitutionally important objective would create the preconditions for violation of the freedom of movement of a citizen of the Republic of Lithuania, enshrined in Article 32 of the Constitution, *inter alia*, the right of a citizen of the Republic of Lithuania to return to Lithuania and reside there, which is enshrined in Paragraph 3 of this article, as well as the right of everyone who is

Lithuanian to settle in Lithuania, which is consolidated in Paragraph 4 of Article 32 of the Constitution.

35. Summarising the constitutional regulation from the aspect relevant in the case at issue, it should be noted that, under the Constitution, *inter alia*, the constitutional principle of a state under the rule of law, the legal regulation governing family reunification in the context of the free movement of persons within the EU and migration must be based on the principle of respect for human dignity and the private and family life of a person, as well as the principle of the equality of the rights of persons. Establishing this legal regulation, under the Constitution, *inter alia*, the constitutional principle of a state under the rule of law, the legislature must also pay regard to the specificity of the relationships in question, *inter alia*, the specificity of the free movement of persons within the European Union and migration, *inter alia*, to the fact that the family of a citizen of the Republic of Lithuania, of a citizen of any other EU Member State, or of a third-country national lawfully residing in Lithuania, whose family members wish to enter Lithuania and reside there for reasons of family reunification, may have been founded not only in the Republic of Lithuania, but also under the law of another EU Member State or under that of a third country, which may also allow marriages or registered partnerships, *inter alia*, between two persons of the same sex.

35.1. In view of the aspect relevant in the constitutional justice case at issue, it should also be noted that, under the Constitution, *inter alia*, the above-mentioned provisions of Paragraphs 2 and 3 of Article 21, Paragraphs 1 and 4 of Article 22, Article 29, and Paragraphs 1 and 2 of Article 38 thereof and the constitutional principle of a state under the rule of law, the legislature must lay down such a legal regulation related to the free movement of persons within the EU and migration that would provide for the right to reunification for a family founded by two same-sex persons in another state through a legally concluded marriage or registered partnership, i.e. the right of a foreign national to enter Lithuania and reside there together with his/her family member – a citizen of the Republic of Lithuania or a foreign national lawfully residing in Lithuania, with whom a marriage or registered partnership has lawfully been concluded in another state. With respect to a foreign national who is a family member of a citizen of the Republic of Lithuania or a family member of a non-national Lithuanian entering Lithuania for residence, with whom the foreign national has lawfully concluded a marriage or registered partnership in another state, the said duty of the legislature also arises from the provisions of Article 32 of the Constitution.

It should also be noted that the duty of the State of Lithuania to consolidate the said right for a family created on the basis of a marriage or registered partnership lawfully concluded by two persons of the same sex in another European Union country, i.e. the right of a citizen of a country other than EU Member State to enter Lithuania and reside there together with a citizen of the EU, *inter alia*, a citizen of the Republic of Lithuania, with whom a marriage or registered partnership has

lawfully been concluded in another EU Member State, also arises from the constitutional imperative of full participation by the Republic of Lithuania in the EU and Article 1 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union. As mentioned above, the constitutional provisions related to the free movement of EU citizens, *inter alia*, citizens of the Republic of Lithuania, within the EU, *inter alia*, the Republic of Lithuania, should also be interpreted in the light of the respective EU legal provisions.

35.2. In view of the aspect relevant in the constitutional justice case at issue, it should be emphasised that, under the Constitution, the exercise of the right to reunification by a family founded by two persons, *inter alia*, same-sex persons, through a lawfully concluded marriage or registered partnership is not absolute. The right of a foreign national to enter Lithuania and reside there together with his/her family member – a citizen of the Republic of Lithuania or a foreign national lawfully residing in Lithuania, with whom a marriage or registered partnership has lawfully been concluded in another state, under the Constitution, may be limited by means of a law where necessary in a democratic society for reasons of national or public security, public order (public policy), the protection of public health, or similar constitutionally important objectives; at the same time, regard must be paid to the constitutional principles of the equality of the rights of persons and proportionality.

It should be emphasised that the said limitations must be necessary in order to reach the constitutionally important objectives, in particular in a democratic society, where respect should be given to the human dignity of everyone without discriminating, *inter alia*, on the grounds of gender identity and/or sexual orientation. As mentioned before, in a democratic state under the rule of law, the attitudes or stereotypes prevailing in a certain period of time among the majority of the members of society may not, based on the constitutionally important objectives, *inter alia*, ensuring public order (public policy), serve as constitutionally justifiable grounds for discriminating against persons solely on the basis of their gender identity and/or sexual orientation. In other words, the constitutionally important objectives may not serve as justification for a limitation on exercising the right to reunification by a family founded by two persons, *inter alia*, same-sex persons, in another state through a lawfully concluded marriage or registered partnership if such a limitation is incompatible with Article 29 of the Constitution, under which, as mentioned before, one of the forms of prohibited discrimination is the restriction of the rights of a person on the grounds of his/her gender identity and/or sexual orientation, or with Paragraphs 2 and 3 of Article 21 of the Constitution, which protect human dignity and prohibit its degrading.

Taking account of this, it should be held that, although the objective to protect the constitutional concept of marriage, as concluded upon the free mutual consent of a man and a woman, as well as the historically established model of the family, which is based on this concept, may be

considered constitutionally important, under the Constitution, such an objective may not serve as justification for a legal regulation whereby, solely on the grounds of gender identity and/or sexual orientation, a foreign national would not be allowed to enter Lithuania and reside there together with his/her family member – a citizen of the Republic of Lithuania or a foreign national lawfully residing in Lithuania, with whom a marriage or registered partnership has lawfully been concluded in another state, i.e. such a legal regulation whereby a foreign national would be allowed to enter Lithuania and reside there exclusively in cases where he/she has lawfully concluded a marriage or registered partnership in another state with an opposite-sex citizen of the Republic of Lithuania or an opposite-sex foreign national lawfully residing in Lithuania.

35.3. In this context, it should be noted that the above-mentioned duty stemming from the Constitution for the legislature to lay down such a legal regulation related to the free movement of persons within the EU and migration that would provide for the right to reunification for a family founded in another state by two same-sex persons through a legally concluded marriage or registered partnership may not be interpreted as changing the concept of marriage consolidated in Paragraph 3 of Article 38 of the Constitution.

V

The assessment of the constitutionality of Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law on the Legal Status of Aliens

36. The Supreme Administrative Court of Lithuania, the petitioner, requests an investigation into whether Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, insofar as the said item, according to the petitioner, does not stipulate that, in the event of family reunification, a temporary residence permit may also be issued to a foreign national in cases where a marriage or registered partnership concluded by the foreign national in another state with a citizen of the Republic of Lithuania residing in the Republic of Lithuania is not recognised in the Republic of Lithuania due to the prohibition on concluding a same-sex marriage or same-sex registered partnership, although the foreign national and the Lithuanian citizen have built up such a relationship whose content corresponds to the concept of the family, is in conflict with Paragraphs 1 and 4 of Article 22, Paragraph 1 of Article 29, and Paragraphs 1 and 2 of Article 38 of the Constitution, as well as with the constitutional principle of a state under the rule of law.

37. It has been mentioned that the impugned Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law provides that a temporary residence permit may be issued to a foreign national in the event of family reunification, when the foreign national's spouse or the person with whom the foreign national has concluded a registered partnership resides in the Republic of Lithuania where the spouse or the person with whom a registered partnership has been concluded is a citizen of the Republic of Lithuania or a foreign national holding a residence permit.

38. In the opinion of the petitioner, the impugned provision does not stipulate that a foreign national may also be issued a temporary residence permit in cases where a citizen of the Republic of Lithuania residing in the Republic of Lithuania or a foreign national holding a residence permit and residing in the Republic of Lithuania with whom the foreign national applying for a temporary residence permit has concluded a marriage in another state in accordance with the procedure established in legal acts is of the same sex. According to the petitioner, such a legal regulation is in conflict with Paragraphs 1 and 4 of Article 22, Article 29, and Paragraphs 1 and 2 of Article 38 of the Constitution, as well as with the constitutional principle of a state under the rule of law.

39. It has been mentioned that:

– under the Constitution, *inter alia*, the constitutional principle of a state under the rule of law, the legal regulation governing family reunification in the context of the free movement of persons within the EU and migration must be based on the principle of respect for human dignity and the private and family life of a person, as well as the principle of the equality of the rights of persons;

– under the Constitution, *inter alia*, the provisions of Paragraphs 2 and 3 of Article 21, Paragraphs 1 and 4 of Article 22, Article 29, and Paragraphs 1 and 2 of Article 38 thereof and the constitutional principle of a state under the rule of law, the legislature must lay down such a legal regulation related to the free movement of persons within the EU and migration that would provide for the right to reunification for a family founded by two same-sex persons in another state through a legally concluded marriage or registered partnership, i.e. the right of a foreign national to enter Lithuania and reside there together with his/her family member – a citizen of the Republic of Lithuania or a foreign national lawfully residing in Lithuania, with whom a marriage or registered partnership has lawfully been concluded in another state; with respect to a foreign national who is a family member of a citizen of the Republic of Lithuania or a family member of a non-national Lithuanian entering Lithuania for residence, with whom the foreign national has lawfully concluded a marriage or registered partnership in another state, the said duty of the legislature also arises from the provisions of Article 32 of the Constitution;

– the duty of the State of Lithuania to consolidate the said right for a family created on the basis of a marriage or registered partnership lawfully concluded by two persons of the same sex in another European Union country, i.e. the right of a citizen of a country other than an EU Member State to enter Lithuania and reside there together with a citizen of the EU, *inter alia*, a citizen of the Republic of Lithuania, with whom a marriage or registered partnership has lawfully been concluded in another EU Member State, also arises from the constitutional imperative of full participation by the Republic of Lithuania in the EU and Article 1 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union;

– under the Constitution, the exercise of the right to reunification by a family founded by two persons, *inter alia*, same-sex persons, through a lawfully concluded marriage or registered partnership is not absolute; the right of a foreign national to enter Lithuania and reside there together with his/her family member – a citizen of the Republic of Lithuania or a foreign national lawfully residing in Lithuania, with whom a marriage or registered partnership has lawfully been concluded in another state, under the Constitution, may be limited by means of a law where necessary in a democratic society for reasons of national or public security, public order (public policy), the protection of public health, or similar constitutionally important objectives; at the same time, regard must be paid to the constitutional principles of the equality of the rights of persons and proportionality; the constitutionally important objectives may not serve as justification for a limitation on exercising the right to reunification by a family founded by two persons, *inter alia*, same-sex persons, in another state through a lawfully concluded marriage or registered partnership if such a limitation is incompatible with Article 29 of the Constitution, under which one of the forms of prohibited discrimination is the restriction of the rights of a person on the grounds of his/her gender identity and/or sexual orientation, or with Paragraphs 2 and 3 of Article 21 of the Constitution, which protect human dignity and prohibit its degrading;

– although the objective to protect the constitutional concept of marriage, as concluded upon the free mutual consent of a man and a woman, as well as the historically established model of the family, which is based on this concept, may be considered constitutionally important, under the Constitution, such an objective may not serve as justification for a legal regulation whereby, solely on the grounds of gender identity and/or sexual orientation, a foreign national would not be allowed to enter Lithuania and reside there together with his/her family member – a citizen of the Republic of Lithuania or a foreign national lawfully residing in Lithuania, with whom a marriage or registered partnership has lawfully been concluded in another state, i.e. such a legal regulation whereby a foreign national would be allowed to enter Lithuania and reside there exclusively in cases where he/she has lawfully concluded a marriage or registered partnership in another state with an opposite-sex citizen of the Republic of Lithuania or an opposite-sex foreign national lawfully residing in Lithuania.

40. It has also been mentioned that the constitutional provisions related to the free movement of EU citizens, *inter alia*, citizens of the Republic of Lithuania, within the EU, *inter alia*, the Republic of Lithuania, should also be interpreted in the light of the respective EU legal provisions. In this context, it should be noted that, as mentioned above, under EU law, a Member State cannot rely on the reservation of public policy, *inter alia*, on the grounds that the law of that Member State does not provide for marriage between persons of the same sex (registered partnership between persons of the same sex if the legislation of the Member State treats registered partnerships as equivalent to marriage), in refusing reunification to a family founded by an EU citizen (*inter alia*, a citizen of that

Member State) having made use of his/her right to freedom of movement and a same-sex third-country national, who have lawfully concluded a marriage (or a registered partnership) in another Member State.

41. As mentioned above, the Law establishes the procedure of entry and departure, stay and residence, granting of asylum and temporary protection in the Republic of Lithuania, the procedure of integration and lodging of appeals against the decisions concerning the legal status of foreign nationals, and regulates other issues relating to the legal status of foreign nationals in the Republic of Lithuania (Paragraph 1 (wording of 1 December 2014) of Article 1); the Law defines, *inter alia*, the notions of family members and of family reunification in the area of the legal relationships specified in Paragraph 1 (wording of 9 December 2014) of Article 1 of the Law; the Law is not meant for defining the concept of family members and regulating family reunification as far as the areas of legal relationships other than those referred to in Paragraph 1 (wording of 9 December 2014) of Article 1 of the Law are concerned.

It has also been mentioned that, according to the impugned Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law and the related legal regulation established in the Law:

– the item in question lays down one of the grounds for granting a temporary residence permit for reasons of family reunification (within the meaning of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law) to a foreign national who is not a citizen of an EU Member State or the European Free Trade Association – in cases where the spouse of such a foreign national or the person with whom the foreign national has concluded a registered partnership resides in the Republic of Lithuania where the spouse or the person with whom a registered partnership has been concluded is a citizen of the Republic of Lithuania or a foreign national (not a citizen of an EU Member State or the European Free Trade Association) holding a residence permit; a temporary residence permit is granted on the said grounds to a foreign national who is not a citizen of an EU Member State or the European Free Trade Association in order to allow the said foreign national, who has concluded a marriage or registered partnership with a citizen of the Republic of Lithuania or a foreign national (not a citizen of an EU Member State or the European Free Trade Association) holding a residence permit, to enter the Republic of Lithuania and reside there for the purposes of preserving the family;

– Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, Paragraph 26 (wording of 9 December 2014) of the Law, or any other provisions of the Law does not explicitly stipulate that a foreign national and his/her spouse or a person with whom a registered partnership has been concluded and who is a citizen of the Republic of Lithuania or a foreign national holding a residence permit must be persons of opposite sexes;

– Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, Paragraph 26 (wording of 9 December 2014) of Article 2 of the Law, or any other provision of the

Law does not explicitly stipulate that a marriage or registered partnership of a foreign national with a citizen of the Republic of Lithuania or with a foreign national holding a residence permit must be recorded in the Civil Registry Office of the Republic of Lithuania;

– under Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, a temporary residence permit may be issued to a foreign national in the event of family reunification if the foreign national (save the exception envisaged in Paragraph 3 (wording of 9 December 2014) of Article 26 the Law) complies with the general conditions for the issue of a residence permit, as laid down in Items 2–4 of Paragraph 1 of Article 26 (wording of 28 November 2006) of the Law, where the said general conditions are linked with a valid health insurance, sufficient means of subsistence, and the possession of suitable residential premises, or if a person who is joined for the purpose of family reunification ensures, in accordance with the procedure established in legal acts, that his/her family member to whom a temporary residence permit is issued complies with the said conditions; under Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, in the event of family reunification, a temporary residence permit may be refused to a foreign national on the general grounds (established in Paragraph 1 (wording of 26 November 2015) of Article 35 of the Law) for refusal to grant a foreign national a residence permit, such as those related, *inter alia*, to a possible threat to national security, public order (public policy), or public health, or non-compliance with the above-mentioned general conditions for granting a temporary residence permit, or the conclusion of a marriage of convenience or a registered partnership of convenience.

41.1. Thus, the Law is aimed, *inter alia*, to regulate matters in relation to the free movement of persons within the EU and migration; the impugned Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law regulates family reunification as one of the matters related to the free movement of persons within the EU and migration. It should be noted that the Law, *inter alia*, the impugned Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, does not regulate the legal relationships that are regulated under other laws, such as, for instance, the Civil Code or the Law on the Registration of Civil Status Acts.

Consequently, there are no grounds for asserting that the impugned Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law is to be interpreted in the light of the legal regulation laid down in the Civil Code or the Law on the Registration of Civil Status Acts, i.e. there are no grounds for asserting that, under Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, in the event of family reunification within the meaning of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, a temporary residence permit may be refused to a foreign national who is not a citizen of an EU Member State or the European Free Trade Association in cases where the same-sex spouse of such a foreign national or the same-sex person with whom the foreign national has concluded a registered partnership resides in the Republic of Lithuania where the spouse

or the person with whom a registered partnership has been concluded is a citizen of the Republic of Lithuania or a foreign national (not a citizen of an EU Member State or the European Free Trade Association) holding a residence permit.

41.2. In this context, it should also be mentioned that the impugned legal regulation, consolidated in Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, is to be interpreted in the light of the provisions of the EU legislation, *inter alia*, the Directive, implemented by the Law; under the said provisions, as mentioned above, a Member State cannot rely on the reservation of public policy, *inter alia*, on the grounds that the law of that Member State does not provide for marriage between persons of the same sex (registered partnership between persons of the same sex if the legislation of the Member State treats registered partnerships as equivalent to marriage), in refusing reunification to a family founded by an EU citizen (*inter alia*, a citizen of that Member State) having made use of his/her right to freedom of movement and a same-sex third-country national, who have lawfully concluded a marriage (or a registered partnership) in another Member State.

41.3. Thus, contrary to what is claimed by the petitioner, under the impugned Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, in the event of family reunification within the meaning of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, a temporary residence permit may be issued to a foreign national who is not a citizen of a Member State of the European Union or the European Free Trade Association not exclusively in cases where an opposite-sex family member of such a foreign national resides in the Republic of Lithuania, i.e. a person with whom a marriage or registered partnership has lawfully been concluded in another state and who is a citizen of the Republic of Lithuania or a foreign national (not a citizen of a Member State of the European Union or the European Free Trade Association) holding a residence permit, but also in cases where a same-sex family member of such a foreign national resides in the Republic of Lithuania, i.e. a person with whom a marriage or registered partnership has lawfully been concluded in another state and who is a citizen of the Republic of Lithuania or a foreign national (not a citizen of a Member State of the European Union or the European Free Trade Association) holding a residence permit.

In this context, it should be noted that, under the impugned Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, in the event of family reunification within the meaning of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law, a temporary residence permit in Lithuania may be refused to a foreign national who is not a citizen of a Member State of the European Union or the European Free Trade Association in cases where an opposite-sex or same-sex family member of such a foreign national resides in the Republic of Lithuania, i.e. a person with whom a marriage or registered partnership has lawfully been concluded in another state and who is a

citizen of the Republic of Lithuania or a foreign national (not a citizen of a Member State of the European Union or the European Free Trade Association) holding a residence permit, on the general grounds (laid down in Paragraph 1 (wording of 26 November 2015) of Article 35 of the Law) for refusal to grant a foreign national a residence permit in Lithuania, where such grounds are related, *inter alia*, to a possible threat to national security, public order (public policy), or public health, or non-compliance with the general conditions (established in Items 2–4 of Paragraph 1 of Article 26 (wording of 28 November 2006) of the Law) for granting a temporary residence permit, or the conclusion of a marriage of convenience or a registered partnership of convenience. However, a refusal to issue such a permit may not be based solely on the gender identity and/or sexual orientation of a foreign national.

41.4. It has been stated in this ruling that only if the legal regulation consolidated in Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law is interpreted in the way indicated above, it is to be assessed as not violating the requirements arising from Paragraphs 2 and 3 of Article 21, Paragraphs 1 and 4 of Article 22, Articles 29 and 32, and Paragraphs 1 and 2 of Article 38 of the Constitution, Article 1 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union, as well as from the constitutional principle of a state under the rule of law and the constitutional imperative of full participation by the Republic of Lithuania in the EU.

42. In the light of the foregoing arguments, the conclusion should be drawn that Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006) of the Law is not in conflict with Paragraphs 1 and 4 of Article 22, Paragraph 1 of Article 29, and Paragraphs 1 and 2 of Article 38 of the Constitution, as well as the constitutional principle of a state under the rule of law.

Conforming to Articles 102 and 105 of the Constitution of the Republic of Lithuania and Articles 1, 53, 54, 55, and 56 of the Law on the Constitutional Court of the Republic of Lithuania, the Constitutional Court of the Republic of Lithuania gives the following

ruling:

To recognise that Item 5 of Paragraph 1 of Article 43 (wording of 28 November 2006; Official Gazette *Valstybės žinios*, 2006, No 137-5199) of the Republic of Lithuania's Law on the Legal Status of Aliens is not in conflict the Constitution of the Republic of Lithuania.

This ruling of the Constitutional Court is final and not subject to appeal.

Justices of the Constitutional Court: Elvyra Baltutytė

Gintaras Goda

Vytautas Greičius

Danutė Jočienė

Gediminas Mesonis

Vytas Milius

Daiva Petrylaitė

Janina Stripeikienė

Dainius Žalimas