Constitutional judgment 3-4-1-12-10

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-4-1-12-10
Date of judgment	7 June 2011
Composition of court	Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Priit Pikamäe, Jüri Põld, Harri Salmann and Tambet Tampuu
Court Case	Verification of the constitutionality of § 57(6) of the Health Insurance Act in the part it precludes the right to sickness benefit of persons who are at least 65 years of age for more than a total of 90 calendar days per calendar year
Basis of proceeding	The Tallinn Circuit Court judgment of 29 October 2010 in administrative case No. 3-09-2396
Hearing	Written proceeding
DECISION	**To declare the part "or insured persons who are at least 65 years of age" of § 57(6) of the Health Insurance Act unconstitutional and invalid.**

FACTS AND COURSE OF PROCEEDINGS

1. Heino Insler is a working old-age pensioner who is 67 years of age and who is an insured person for the purposes of § 5(2)1) of the Health Insurance Act (HIA). Therefore his employer is required to pay social tax for him. Further, H. Insler is also an insured person as an old-age pensioner based on § 5(4)3) of the HIA. He was temporarily incapacitated for work based on various certificates for sick leave during the periods from 1 until 25 January and from 17 February until 3 May 2009. On 19 July 2009 there was an accident at work, as a result of which H. Insler temporarily lost the capacity for work until 13 November 2009. 24 July was his 90th day compensated for on the basis of a certificate for sick leave in 2009. H. Insler submitted to the health

insurance fund the certificates for sick leave no. 00014222 and no. 00014309 specifying release from work respectively from 24 July until 22 August and from 23 August until 21 September 2009.

2. The Viru Department of the Estonian Health Insurance Fund by an order no. 1-14/1017998 of 7 September 2009 refused to grant and pay to H. Insler benefit for temporary incapacity for work for the period from 25 July until 22 August 2009. H. Insler filed a challenge against the order requesting to annul the order and to grant and pay the benefit for temporary incapacity for work. The Estonian Helath Insurance Fund dismissed the challenge by a decision of 28 September 2009.

The Viru Department of the Estonian Health Insurance Fund refused by an order no. 1-14/1033491 of 9 October 2009 to grant and pay to H. Insler the benefit for temporary incapacity for work on the basis of the certificate for incapacity for work no. 00014309.

3. H. Insler filed with the Tartu Administrative Court on 22 October 2009 an action for the annulment of the orders of the Viru Department of the Estonian Health Insurance Fund of 7 September and 9 October 2009 and for the grant of the benefit for temporary incapacity for work.

4. The Tartu Administrative Court satisfied the action by a judgment of 29 January 2010 and annulled the order no. 1-14/1017998 of 7 September 2009 and the order no. 1-14/1033491 of 9 October 2009 of the Viru Department of the Estonian Health Insurance Fund. According to the justifications of the judgment, the health insurance fund, upon refusing to grant the benefit for temporary incapacity for work, has not assessed the fact that the appellant is an old-age pensioner and not a person receiving pension for incapacity for work. The appellant is an insured person for the purposes of § 57(5) of the HIA. § 57(5) of the HIA is applicable to him, not § 57(6) of the HIA. The interpretation of § 57(6) by the health insurance fund that the 90th calendar day was 24 July 2009 and that the appellant is not granted and paid the benefit for temporary incapacity for work for the period from 24 July 2009 until 21 September 2009 cannot be deemed proportionate.

5. The Viru Department of the Estonian Health Insurance Fund filed an appeal against the administrative court judgment requesting annulment thereof and rendering of a new judgment in the matter dismissing the action of H. Insler.

6. H. Insler requested in his response the dismissal of the appeal.

7. The Tartu Circuit Court satisfied in part by a judgment of 29 October 2010 the appeal of the Viru Department of the Estonian Health Insurance Fund and annulled the Tartu Administrative Court judgment of 29 January 2010 due to incorrect application of substantive law. The circuit court satisfied the action of H. Insler filed with the Tartu Administrative Court and annulled the order no. 1-14/1017998 of 7 September 2009 and the order no. 1-14/1033491 of 9 October 2009 of the Viru Department of the Estonian Health Insurance Fund and obligated the respondent to review the appellant's requests for the grant and payment of sickness benefit on the basis of the certificates for incapacity for work no. 00014222 and no. 00014309.

8. Further, the circuit court declared § 57(6) of the HIA unconstitutional and did not apply it in the part it precludes the right to sickness benefit of persons who are at least 65 years of age for more than a total of 90 calendar days per year.

9. Pursuant to § 25(10) of the Code of Administrative Court Procedure and § 4(3) and § 9(1) of the Constitutional Review Court Procedure Act (CRCPA), the Tartu Circuit Court forwarded the said judgment to the Supreme Court and thereby a constitutional review procedure was commenced. The Tartu Circuit Court judgment was received by the Supreme Court on 1 November 2010.

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15. The Constitutional Review Chamber of the Supreme Court referred the matter by a ruling of 7 March 2011 to be heard by the Supreme Court *en banc* because the five-member Constitutional Review Chamber encountered dissenting opinions of principled nature upon the interpretation of § 12(1) of the Constitution,

and taking account of the need to unify the case-law of the Constitutional Review Chamber of the Supreme Court upon the application of the fundamental right to equality.

16. The Constitutional Review Chamber found in the ruling that in order to adjudicate the current matter, it is necessary to interpret § 12(1) of the Constitution and find an answer to the questions for which purposes § 12(1) of the Constitution allows to treat persons differently, what is the mutual relationship between the first and second sentence of 12(1) of the Constitution , and whether "the other grounds" mentioned in the second sentence of § 12(1) of the Constitution, on the basis of which no one shall be discriminated against, can include also age. It must be decided whether upon verifying the constitutionality of unequal treatment, the Supreme Court shall, based on § 11 of the Constitution, assess the proportionality of the unequal treatment or whether there is a relevant and reasonable justification for the unequal treatment.

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PROVISION NOT APPLIED
20. § 57(6) of the Health Insurance Act (RT I 2002, 62, 377; RT I 2010, 22, 108) provides:

"(6) Insured persons receiving a pension for incapacity for work pursuant to the State Pension Insurance Act or insured persons who are at least 65 years of age have the right to receive sickness benefit in the event of an illness and injury for up to 60 consecutive calendar days for one illness but not for more than a total of 90 calendar days per calendar year."

OPINION OF THE SUPREME COURT *EN BANC*
21. First, the Supreme Court *en banc* assesses the constitutionality of § 57(6) of the HIA to the extent that it entitles insured persons who are at least 65 years of age to receive the sickness benefit in the event of an illness or injury for not more than a total of 90 calendar days per calendar year, by finding for that purpose the relevance of the provision (I), the interfered fundamental right (II), the comparable groups of persons (III) and the objectives of the interference (IV). Then the Supreme Court *en banc* assesses the proportionality of the provision (V). Second, the Supreme Court *en banc* assesses the constitutionality of § 57(6) of the HIA in the part to the extent that insured persons who are at least 65 years of age have the right are entitled to receive sickness benefit in the event of an illness or injury for up to 60 consecutive calendar days for one illness (VI).

I

22. The Tartu Circuit Court did not apply § 57(6) of the HIA, due to its unconstitutionality, in the part it precludes the right to sickness benefit of persons who are at least 65 years of age for more than a total of 90 calendar days per year.

23. The prerequisite for a concrete judicial review initiated by a court is the relevance of the provision submitted for verification (the first sentence of § 14(2) of the CRCPA). According to the case-law of the Supreme Court, a provision is relevant if in the event of its unconstitutionality the court would decide differently than in the event of its constitutionality (as of the Supreme Court *en banc* judgment of 28 October 2002 in case no. 3-4-1-5-02, point 15).

24. A prerequisite for relevance is also the fact that the court which initiated the norm control has established every fact significant upon the adjudication of the matter and the essence of the legal provisions, i.e. has correctly interpreted the legal provisions. "Only a norm that has been applied in regard of a person and which actually regulates a disputed relationship or a situation can be regarded as relevant." (The Constitutional Review Chamber judgment of 1 July 2008 in case No. 3-4-1-6-08, point 33.)

25. H. Insler contested the orders of the health insurance fund by which he was refused the grant and payment of benefit for temporary incapacity for work for the period from 25 July until 21 September 2009. He submitted to the health insurance fund the certificates for sick leave no. 00014222 and no. 00014309 specifying release from work respectively from 24 July until 22 August and from 23 August until 21

September 2009. The Viru Department of the Estonian Health Insurance Fund issued on 7 September 2009 an order no. 1-14/1017998 refusing to grant and pay to H. Insler the benefit for temporary incapacity for work for the period from 25 July until 22 August 2009. By an order no. 1-14/1033491 of 9 October 2009 the Viru Department of the Estonian Health Insurance Fund refused the grant and payment of benefit for temporary incapacity for work for the period from 23 August until 21 September 2009. 24 July was H. Insler's 90th day to be compensated for in that calendar year on the basis of a certificate for sick leave.

26. The Supreme Court *en banc* finds that if § 57(6) of the HIA is in contradiction with the Constitution in the part it precludes the right to sickness benefit of persons who are at least 65 years of age for more than a total of 90 calendar days per year, § 57(5) of the HIA, pursuant to which an insured person has the right to receive sickness benefit for a total of 250 days per calendar year, should be applied upon granting sickness benefit to H. Insler. The matter under dispute should therefore be adjudicated differently than in case of the provision's constitutionality. Consequently, § 57(6) of the HIA is a relevant provision in the part insured persons who are at least 65 years of age have the right to receive sickness benefit in the event of an illness and injury for not more than a total of 90 calendar days per calendar year.

II

27. The Constitutional Review Chamber held that in order to adjudicate the matter, it is necessary to interpret § 12(1) of the Constitution and find answers to the questions as to what purpose § 12(1) of the Constitution allows people to be treated differently, what the mutual relationship between the first and second sentence of 12(1) of the Constitution is, and whether "the other grounds" mentioned in the second sentence of § 12(1) of the Constitution, on the basis of which no one shall be discriminated against, can include age.

28. The Supreme Court has attributed different content to the first and second sentence of § 12(1) of the Constitution. The Supreme Court prevailingly deems that the first sentence of § 12(1) of the Constitution contains the general fundamental right to equality and the second sentence contains prohibitions against discrimination, i.e. special fundamental rights to equality (see e.g. the Administrative Chamber judgment of 20 October 2008 in case no. 3-3-1-42-08, point 28; the Supreme Court *en banc* judgment of 20 November 2009 in case no. 3-3-1-41-09, points 21, 42, 51; however, see also the Supreme Court *en banc* judgment of 3 January 2008 in case no. 3-3-1-101-06, point 20).

29. The case-law of the Supreme Court has been diverse regarding the objectives of the restriction in the first sentence of § 12(1) of the Constitution. According to the latest view of the Supreme Court *en banc*, the general fundamental right to equality in the first sentence of § 12(1) of the Constitution is a fundamental right without a statutory reservation (the Supreme Court *en banc* judgment of 2 June 2008 in case No. 3-4-1-19-07, point 23). It does not appear from this judgment that the Supreme Court *en banc* would have justifiably changed the long-term approach to § 12(1) of the Constitution, stated in an earlier judgment of the Supreme Court *en banc* (the Supreme Court *en banc*judgment of 3 January 2008 in case No. 3-3-1-101-06, point 20), that the first sentence of § 12(1) of the Constitution constitutes a fundamental right resembling a fundamental right to liberty with a simple reservation by law.

On the other hand, unlike the opinion of the Supreme Court *en banc* in its judgment of 2 June 2008 in case No. 3-4-1-19-07, the Constitutional Review Chamber has in its later judgment addressing § 12(1) of the Constitution repeated the approach to the objectives of the infringement of the first sentence stated in the previous Supreme Court *en banc* judgment in case No. 3-3-1-101-06 (the Constitutional Review Chamber judgment of 30 September 2008 in case No. 3-4-1-8-08, points 27, 32), pursuant to which the general fundamental right to liberty can be restricted for any reason which is in accordance with the Constitution. The same was also found by the Administrative Law Chamber in a later judgment of 20 November 2008 in case No. 3-3-1-42-08 (point 28).

30. The Supreme Court has addressed the second sentence of § 12(1) of the Constitution only once, from the aspect of discrimination on the grounds of sex (the Supreme Court *en banc* judgment of 20 November 2009

in case No. 3-3-1-41-09, points 21, 42, 51), thereby leaving unresolved the issue of the reservation by law of the prohibition against discrimination.

31. After analysing the case-law, the Supreme Court *en banc* is of the opinion that distinguishing between the grounds of discrimination in the first and second sentence of § 12(1) of the Constitution and the legitimate objectives of the infringement is not justified. § 12(1) of the Constitution includes a fundamental right to equality which is uniform with respect to all grounds of unequal treatment (compare with §§ 26, 31 and 34 of the Constitution). It guarantees a uniform approach to the fundamental right to equality. The fundamental right to equality in § 12(1) of the Constitution can be restricted for any reason which is in conformity with the Constitution. It constitutes a fundamental right with a simple reservation by law.

32. The list of prohibitions against discrimination of the fundamental right comprised in § 12(1) of the Constitution is not exhaustive and is therefore an example. That the list is an example is also indicated by the fact that the characteristics in the list are of different levels of importance. In addition to the characteristics irrespective of the people's intentions, the list in the second sentence also includes language, which can usually be learned, and religion and opinions which can be changed to some extent. If unequal treatment is based on the characteristics irrespective of the people's intentions (e.g. race, age, disability, genetic characteristics, and also native language), better reasons must generally be found as justification.

33. The Supreme Court *en banc* deems different treatment on the grounds of age an infringement of the fundamental right to equality contained in § 12(1) of the Constitution, i.e. different treatment on grounds not listed in the provision. The significance of the objective achieved by the infringement compared to age as the meaning of the fact can be taken into account upon weighing the proportionality (compare with the Constitutional Review Chamber judgment of 1 October 2007 in case No. 3-4-1-14-07, point 14). The importance of age as the fact prohibiting different treatment emerges from the fact that the European Union has acknowledged the prohibition against discrimination on the grounds of age as a general principle of EU law (see the direct prohibition against discrimination on the grounds of age stated in Article 21(1) of the Charter of Fundamental Rights of the European Union; also the European Court of Justice judgment of 22 November 2005 in case No. C-144/04 W. Mangold v R. Helm, point 75).

34. The case-law of the Supreme Court is not uniform upon choosing the scheme for identifying a violation of the fundamental right to equality. The Supreme Court has mostly held that in order to establish a violation of the fundamental right to equality arising from § 12(1) of the Constitution, it must be proven that the unequal treatment is arbitrary, i.e. there is no reasonable or relevant reason (most recently, the Supreme Court *en banc* clearly stated it in judgment of 3 January 2008 in case No. 3-3-1-101-06, point 20; the Administrative Law Chamber judgment of 20 October 2008 in case No. 3-3-1-42-08, point 28).

At the same time, the Supreme Court has also verified the proportionality with respect to the interference with the first sentence of § 12(1) of the Constitution (see e.g. the Supreme Court *en banc* judgment of 17 March 2003 in case No. 3-1-3-10-02, points 30, 34; the Supreme Court*en banc* judgment of 19 April 2005 in case No. 3-4-1-1-05, point 24; the Constitutional Review Chamber judgment of 31 January 2007 in case No.3-4-1-14-06, point 30). The Supreme Court has used the expression "reasonable and proportional" about a verification scheme once (the Administrative Law Chamber judgment of 22 February 2001 in case No. 3-4-1-4-01, point 16).

35. The Supreme Court *en banc* is of the opinion that there is no reasonable grounds for verifying the proportionality of the infringement of the fundamental right to equality comprised in § 12(1) of the Constitution otherwise than as the proportionality of the infringement of rights to liberty. The result of the verification of the arbitrariness, i.e. the relevant and reasonable justification, and the proportionality, i.e. the appropriateness, necessity and reasonableness to achieve the legitimate objective is the same in terms of constitutionality. Consequently, in the interests of uniform application of the verification scheme of the fundamental rights, a verification of proportionality corresponding to § 11 of the Constitution shall be conducted for the establishment of the violation of the right of H. Insler provided for in § 12(1) of the Constitution (see as of the Constitutional Review Chamber judgment of 6 March 2002 in case No. 3-4-1-1-

02, point 15).

III

36. It can only be an infringement of § 12(1) of the Constitution if persons who are in an analogous situation are treated unequally (the Supreme Court *en banc* judgment of 27 June 2005 in case No. 3-4-1-2-05, point 40). It is important to determine the basis for comparison in the specific case.

37. The contested § 57(6) of the HIA is a specific provision. A general provision is comprised in subsection 5 of the same section, pursuant to which an insured person has the right to receive sickness benefit for not more than a total of 250 calendar days per calendar year. Thus, generally an insured person has the right to receive sickness benefit for not more than a total of 250 calendar days, insured persons receiving a pension for incapacity for work pursuant to the State Pension Insurance Act or insured persons who are at least 65 years of age, however, have the right to receive sickness benefit for not more than a total of 90 calendar days per calendar year.

38. Unlike persons under the age of 65, H. Insler and other insured persons who are at least 65 years of age are paid sickness benefit maximally for not 250 days (a general provision in § 57(5) of the HIA) but only for 90 days (a special provision in § 57(6) of the HIA). In the event of an illness, income guaranteed for a shorter period places persons who are at least 65 years of age in an inferior situation than persons who are under the age of 65. Consequently, § 57(6) of the HIA infringes the fundamental right to equality.

39. Based on the aforementioned, the comparable groups are insured persons who are under the age of 65 and who are entitled to receive sickness benefit, and insured persons who are at least 65 years of age and who are entitled to receive sickness benefit. Whereas, a common characteristic of these groups is the fact that they are covered by health insurance and the receipt of sickness benefit in the event of an illness or injury, the difference is the age of at least 65 years or under it.

IV

40. § 57(6) of the HIA is formally in accordance with the Constitution. The provision was adopted in the Riigikogu by the required majority of votes and is clearly understandable. To verify the substantive constitutionality of a provision, the permitted objectives of the infringement, caused by the verified provision, of the scope of protection of § 12(1) of the Constitution must be identified and the proportionality of the restriction with respect to these objectives must be assessed. Based on the aforementioned (point 31), a legitimate objective of the infringement of the fundamental right to equality arising from § 12(1) of the Constitution is any reason which is not prohibited by the Constitution.

41. As it appears from the explanatory memorandum of the draft legislation of the Health Insurance Act, the objective of § 57(6) of the HIA is to maintain the state of health of insured persons. The objective of the protection of the health of the elderly is based on the comprehension that long periods of incapacity for work of a working elderly person refer to the fact that the person’s general state of health has deteriorated and working may deteriorate it even further.

Limiting working is facilitated, in the opinion of the compilers of the explanatory memorandum, by limiting the duration of the payment of benefit for temporary incapacity for work. The Supreme Court *en banc* is of the opinion that the wish to spare the health of the elderly is a legitimate objective of § 57(6) of the HIA.

42. The Supreme Court holds that upon imposing the restriction of a 90 day payment of sickness benefit on persons who are at least 65 years of age, one aim of the legislator has also been saving money, i.e. saving the health insurance funds to ensure efficient and rational use of the health insurance system’s funds, and the functioning and sustainability of the system. The Supreme Court *en banc* is of the opinion that saving the health insurance funds is the second legitimate objective of § 57(6) of the HIA.

V

43. According to the principle of proportionality arising from the second sentence of § 11 of the Constitution, restrictions on rights and obligations must be necessary in a democratic society. Conformity with the principle of proportionality is verified on three consecutive levels - first the appropriateness of the measures, then the necessity and, if necessary, also the proportionality in a narrower sense, i.e. the reasonableness.

44. Unequal treatment on the grounds of age is appropriate if it favours attainment of the purposes of health protection and saving on health insurance funds. In terms of appropriateness, a measure that in no case favours the achievement of the aim is indisputably disproportionate.

45. Upon weighing the appropriateness of the infringement by § 57(6) of the HIA, first it shall be assessed whether restricting the right of a person who is at least 65 years of age to receive the sickness benefit to 90 days instead of 250 days guarantees health protection and directs the elderly who are sick for longer towards quitting work.

46. The Supreme Court *en banc* is of the opinion that it can be presumed that a person stops working due to health considerations if they really feel that they can no longer cope with it, if their employment is terminated or they are released from service due to health, or if they have no wish to keep working. A person is persuaded to temporarily stop working and save his or her health if, above all, both compensation by sickness benefit for the lack of income accompanying temporary incapacity for work and the availability of health and medical rehabilitation services and medicinal products have been guaranteed. Restricting the payment of benefit for temporary incapacity for work in the event of an illness and injury to persons who are at least 65 years of age to 90 days favours, in fear of losing income in the case of a longer duration of illness or injury of a temporary nature, the continuance of work before complete recovery than saving health. A permanently ill person is inclined to stop working in the interests of health if, above all, his or her health has deteriorated and they wish to save it or if their employment or service relationship has been terminated, not if the duration of the payment of the benefit is restricted. If in the case of an illness an income replacing wages for a long period has not been ensured, this does not mean that a person would draw the conclusion that the amount of his or her future income does not depend on working. In general, a rational person does not waive the prospect of a larger future income because his or her current income has decreased. More likely the person considers the fact that when they are well again, they will continue working and receive wages again, i.e. their income will increase. In addition, it should be noted that a person loses sickness benefit for a longer period only during one calendar year. If they fall ill again the next year, they are once more entitled to receive benefit for a total of up to 90 calendar days.

47. Thus, the objective of health protection is not appropriate as an objective of the infringement of § 57(6) of the HIA because it does not support the achievement of the objective.

48. Restricting the payment of sickness benefit to persons who are at least 65 years of age to 90 calendar days is an appropriate measure for saving on health insurance funds. Health insurance funds can be saved by paying sickness benefits to entitled persons who are at least 65 years of age for a period that is shorter than the duration of their illness or by paying the benefit to entitled persons under the age of 65 years.

49. Restricting the duration of the payment of sickness benefit is necessary if the objective of saving on health insurance funds cannot be achieved by another measure that is less burdensome on persons but at least as effective. If proceeding from the specific expenses of payment of sickness benefits, then compared to the restricted period of 90 days for the payment of sickness benefit there are no other measures, in the opinion of the Supreme Court *en banc*, that are as effective and less burdensome on persons. Consequently, the infringement by § 57(6) of the HIA is necessary for the purposes of saving on health insurance funds.

50. In order to assess the reasonableness of the restriction of 90 days on the payment of sickness benefits to

persons who are at least 65 years of age, the extent and intensity of the interference with the fundamental right to equality on the grounds of age, on the one hand, and the importance of the objective of saving the health insurance funds, on the other hand, must be weighed up. Thereby the principle is that the more intensive the infringement of a fundamental right, the more conclusive the reasons justifying the infringement must be (Constitutional Review Chamber judgment of 5 March 2001 in case No. 3-4-1-2-01, point 17).

51. § 57(5) of the HIA provides that every person who is under the age of 65, e.g. also 64 years of age, is entitled to the sickness benefit for a total of up to 250 days per one calendar year, meanwhile a person who is at least 65 years of age is compensated for the loss of income due to an illness or injury for a period that is nearly 2.5 times shorter, i.e. for a total of up to 90 days per one calendar year. The Supreme Court *en banc* finds that the age limit of 65 years prescribed in § 57(6) of the HIA is not justified. The statistics presented by the Minister of Social Affairs indicates that with age the risk of chronic illnesses that require long-term treatment increases, and the risk is considerably greater in the age group starting from the age of 66 years than in younger age groups. It is generally known that older people are on the average sicker than younger persons and need more medical care. At the same time the age limit of 65 years arising from statistics is due to such groups created by statisticians, and not due to the comprehension that persons' state of health would automatically and substantially deteriorate upon reaching the age of 65. The statistics would probably be quite similar if upon creating the age groups, one group consisted of persons who are e.g. either 63 or 67 years of age and older.

52. Regardless of age, the state of health of persons is very different – depending on lifestyles, genes, environment and other, a person may be much sicker or healthier than others of the same age. There are a considerable number of people who are significantly older than 65 years of age and who have perfect health and whose capacity for work equals that of younger people. However, like younger people they can also fall ill for a longer period of time, but still temporarily, due to an injury or illness without a permanent decrease in their capacity for work. Since it cannot be stated with certainty that precisely 65 years of age is the limit starting from which the state of health of a person deteriorates so that a long-term illness constitutes a permanent decrease in capacity for work, restricting the duration of the payment of sickness benefit on the grounds of age constitutes an serious interference with the fundamental right to equality of persons who are 65 years of age and older.

53. In addition to that pointed out in point 39 of the judgment, the difference between most persons who are below the age of 65 and who are at least 65 years of age and who are entitled to receive sickness benefits is that the latter have the right to receive an old-age pension pursuant to § 7 of the State Pension Insurance Act (SPIA). The Estonian Health Insurance Fund, the Chancellor of Justice, the Minister of Justice and the Minister of Social Affairs are of the opinion that the objective of the payment of both the pension and the benefit for temporary incapacity for work is replacement of lost income. The payment of two different benefits for the same purposes may constitute non-economical use of public resources. The Supreme Court *en banc* does not concur with such an opinion.

54. Under § 2 of the SPIA, a state pension is a monthly financial social insurance benefit in the case of old age, incapacity for work or loss of a provider which is based on the principle of solidarity and which is paid from the funds allocated for the expenditure of state pension insurance in the state budget. As it appears from § 2 of the HIA, health insurance is a system for covering health care expenses incurred to finance the disease prevention and treatment of and purchase of medicinal products and medical devices for insured persons and to pay benefits for temporary incapacity for work and other benefits, and this mandatory insurance is based on the solidarity of and limited cost-sharing by insured persons and on the principle that services are provided according to the needs of insured persons, that treatment is equally available in all regions and that health insurance funds are used for their intended purpose.

55. Consequently, the state old-age pension is a financial benefit in the case of old age. However, the sickness benefit is financial compensation paid by the health insurance fund to an insured person on the basis of a certificate for incapacity for work in cases where the person does not receive income subject to

individually registered social tax due to temporary release from his or her duties or economic or professional activity (§ 50(1) and (3) of the HIA). The objective of the benefit for temporary incapacity for work is to ensure income during the time the person is unable, due to temporary incapacity for work, to continue the work necessary for the receipt of their usual income. On the other hand, the state old-age pension is a state benefit in the case of old age for persons who have contributed their labours and whose wages have been subject to taxes for, in general, at least 15 years (see also § 30(1) of the SPIA), including the state pension insurance subjected to individually registered social tax which the amount of the old-age pension depends on (§ 11(1), § 12(2) of the SPIA). The receipt of a state old-age pension does not depend on the person's state of health or his or her ability to otherwise earn a living.

56. The Supreme Court *en banc* notes in addition that not every person who is 65 years of age or older receives a state old-age pension; however, some persons who are under the age of 65 receive an old-age pension. The latter may receive, for instance, an old-age pension under favourable conditions starting from the age of 53 years and 6 months (§ 7(2) of the SPIA, see also § 9(1) and § 10(1) of the SPIA) or even earlier (see § 1 of the Old-Age Pensions under Favourable Conditions Act and the Superannuated Pensions Act; e.g. also § 112(1) of the Defence Forces Service Act, § 79 of the Courts Act (CA)). A person who is 65 years of age shall not receive old-age pension if they have selected a deferred old-age pension (§ 8(1) of the SPIA) or have continued working until retirement on an occupational pension (see e.g. § 47 of the Prosecutor's Office Act, § 99(1)2) of the CA) or lack the required length of employment (§ 7(1)2) of the SPIA). Whereas, the legislator does not restrict, until the age of 65, the duration of the payment of sickness benefits to persons entitled to receive them and who have retired on a deferred old-age pension in their late 40s or early 50s due to work that poses an extreme health hazard. Based on the aforementioned, limiting the duration of the payment of sickness benefits to persons who are 65 years of age or older is also not justifiable by the fact that their income is ensured by the receipt of an old-age pension.

57. The discount for medicinal products and dental care prescribed by the state for persons who have been granted an old-age pension on the basis of the State Pension Insurance Act and insured persons who are at least 63 years of age (§ 24(4)4), § 44(2) of the HIA) (§ 63(1) and (3) of the HIA; § 3(1) and (5) of the Minister of Social Affairs regulation of 16 December 2002 no. 145 „Rates and Procedure for Payment of Adult Dental Care Benefit, and List of Documents Required for Receipt of Benefit, Data Contained therein and Procedure for Submission of Documents“) does not make the distinction regarding the duration of the payment of sickness benefit moderate.

58. Upon ensuring social rights, the Legislature has an extensive right of discretion and the courts must not make social policy-related decisions in lieu of the Legislature. The exact volume of social fundamental rights also depends on the state's economic situation. However, decisions based on the state's social policy-related considerations must not result in a situation where limited health insurance funds are distributed by violating the fundamental right to equality arising from § 12(1) of the Constitution. As stated above (point 32), unequal treatment on the grounds of a characteristic irrespective of a person's will – age – must be justified by weighty reasons. The Supreme Court *en banc* is of the opinion that the worse-than-average state of health of the elderly or the receipt of an old-age pension do not justify the saving on health insurance funds spent on the payment of sickness benefits to persons who are at least 65 years of age. An age limit as a formal criterion and the receipt of a state old-age pension cannot be sufficient reasons to deprive persons who are at least 65 years of age of benefits which persons below the age of 65 receive under § 57(5) of the HIA. Therefore, in the estimate of the Supreme Court *en banc*, the unequal treatment of persons who are at least 65 years of age regarding the duration of payment of sickness benefits per calendar year provided for in § 57(6) of the HIA compared to persons who are below the age of 65 (§ 57(5) of the HIA) is not a reasonable measure for the purpose of saving on health insurance funds.

59. On the basis of § 15(1)2) of the CRCPA, the Supreme Court *en banc* declares § 57(6) of the HIA unconstitutional and invalid insofar as it entitles insured persons who are at least 65 years of age to receive the sickness benefit for no more than a total of 90 calendar days per year.

VI

60. The Supreme Court *en banc* had, in the course of the adjudication of the matter, reasonable doubt regarding the constitutionality of § 57(6) of the HIA in the part insured persons who are at least 65 years of age have the right to receive sickness benefit in the event of an illness and injury for up to 60 consecutive calendar days for one illness.

61. According to a report on accident at work of 29 July 2009, H. Insler had an accident at work on 19 July 2009 as a result of which a certificate for incapacity for work no. 1000818 was issued until 23 July 2009, i.e. total of five days. 22 August 2009, the date of termination of the next certificate for incapacity for work no. 00014222 which was issued on 24 July and was the basis of the order contested in the administrative matter, was H. Insler's 35th consecutive sick day.

21 September 2009, the date of termination of the continuation certificate no. 00014309 which was valid from 23 August until 21 September 2009 and was the basis of the order also contested in the administrative matter, was his 65th consecutive sick day. Consequently, 16 September 2009 was H. Insler's 60th consecutive calendar day up to which he had the right to receive sickness benefit for this work injury pursuant to § 57(6) of the HIA. § 57(6) of the HIA does not enable the payment of sickness benefit under the certificate for incapacity for work no. 00014309 for the five days until 21 September 2009, the date of termination of the certificate for sick leave which was the basis of the contested order.

62. In case of the unconstitutionality of the restriction of 90 days on the payment of sickness benefit arising from § 57(6) of the HIA, the circuit court should have applied in regard to the receipt of the benefit from 24 July until 21 September 2009 the other norm arising from § 57(6) of the HIA, pursuant to which insured persons who are at least 65 years of age have the right to receive sickness benefit in the event of an illness and injury for up to 60 consecutive calendar days. If the restriction included in § 57(6) of the HIA, pursuant to which sickness benefit for one illness or injury may be paid for up to 60 consecutive calendar days, would be unconstitutional and invalid, the circuit court should have rendered a different judgment than in case of the provision's constitutionality. Based on the aforementioned, the said provision is a relevant norm, i.e. a norm which the court actually should have applied (see also the Constitutional Review Chamber judgment of 8 June 2010 in case No. 3-4-1-5-10, point 14; and of 31 March 2011 in case No. 3-4-1-19-10, point 28).

63. § 57(6) of the HIA is a specific norm. The general provision is included in subsection 1 of the same section, pursuant to which an insured person, in the event of a disease or injury, has the right to receive sickness benefit until the date on which his or her capacity for work is restored as specified in the certificate for sick leave or until the date on which of his or her permanent incapacity for work is declared, but not for more than 240 consecutive calendar days in the case of tuberculosis or 182 consecutive calendar days in the case of any other disease.

64. The Supreme Court *en banc* is of the opinion that due to the reasons stated in part V of the judgment, it is also unreasonable to set the maximum limit of consecutive payment of sickness benefit to persons who are at least 65 years of age in the event of one illness or injury to 60 days. Therefore, the Supreme Court *en banc* declares § 57(6) of the HIA unconstitutional and invalid also in the part insured persons who are at least 65 years of age have the right to receive sickness benefit in the event of an illness and injury for up to 60 consecutive calendar days for one illness.

A dissenting opinion of the justices of the Supreme Court Henn Jõks, Priit Pikamäe and Tambet Tampuu on the Supreme Court *en banc* judgment in matter no. 3-4-1-12-10.

1. We find that the part "or insured persons who are at least 65 years of age" of § 57(6) of the HIA [Health Insurance Act] is in conformity with the Constitution and there were no grounds to declare it invalid.

2. The Supreme Court *en banc* found first that if a person who is e.g. 64 years of age is entitled to receive sickness benefit for a total of up to 250 days per one calendar year, then a person who is 65 years of age

shall be compensated for the loss of income due to an illness or injury for a period that is nearly 2.5 times shorter, i.e. for a total of up to 90 days per one calendar year. At the same time the age limit of 65 years arising from statistics is due to such groups created by statisticians, and not due to the comprehension that persons' state of health would automatically and substantially deteriorate upon reaching the age of 65. The statistics would probably be quite similar if upon the creation of the age groups one group would have consisted of persons who are e.g. either 62 or 68 years of age and older (paragraph 51 of the judgment). Next, the Supreme Court *en banc* concluded in paragraph 52 the following: "Since it cannot be stated with certainty that precisely 65 years is the limit starting from which the state of health of a person deteriorates so that a long-term illness constitutes permanent decrease in the capacity for work, restricting the duration of the payment of sickness benefit on the grounds of age constitutes an intensive infringement of the fundamental right to equality of persons who are 65 years of age and older."

Consequently, the Supreme Court *en banc* has based its conclusion on the intensive infringement of the fundamental right to equality on the assumption that the statistics would probably be quite similar if upon the creation of the age groups one group would have consisted of persons who are e.g. either 62 or 68 years of age and older. It must be noted that the assumption of the Supreme Court *en banc* is no more certain than is the conclusion of the legislator based on research that catching various illnesses increases in the age group starting from 65 years and persons in that age group receive more different benefits on the account of the health insurance funds than younger persons. In its case-law the Supreme Court has found that declaring legislation or a provision thereof unconstitutional cannot be based on assumptions (the Supreme Court *en banc* judgment of 16 March 2010 in matter no. 3-4-1-8-09, paragraph 95).

3. The Supreme Court *en banc* did not concur with the opinion of the participants in the proceedings that since the difference between most persons who are under the age of 65 and who are at least 65 years of age and who are entitled to receive sickness benefit is also that the latter have the right to receive old-age pension pursuant to § 7 of the SPIA [State Pension Insurance Act], the objective of the payment of both the pension and the benefit for temporary incapacity for work is replacement of lost income, and the payment of two different benefits for the same purposes may constitute non-economical use of public resources (paragraph 53 of the judgment).

The non-concurrence was justified by the Supreme Court *en banc* by the fact that state old-age pension is financial compensation in case of old age. However, sickness benefit is financial compensation paid by the health insurance fund to an insured person on the basis of a certificate for incapacity for work in cases where the person does not receive income subject to individually registered social tax due to temporary release from his or her duties or economic or professional activity (§ 50(1) and (3) of the HIA). The objective of the benefit for temporary incapacity for work is to ensure income during the time the person is due to temporary incapacity for work unable to continue work necessary for the receipt of usual income. On the other hand, the state old-age pension is state benefit in case of old age to persons who have contributed their labours and whose wages have been subject to taxes generally during at least 15 years. The receipt of state old-age pension does not depend on the person's state of health or his or her ability to earn a living otherwise (paragraph 55 of the judgment).

We find that the protection of social rights, including payment of old-age pension and benefit for temporary incapacity for work, includes a concept of assistance and care for those who are unable to insure themselves to the sufficient extent. It should be asked why the state is paying financial benefit in case of old age. In our assessment, the state is paying financial benefit in the form of old-age pension, among other, because the persons' capacity for work and income has presumably decreased. Consequently, it is justified to restrict the payment of various benefits for the achievement of the same objectives.

4. In paragraph 58 of the judgment the Supreme Court *en banc* has noted the following in brief: "The Supreme Court *en banc* is of the opinion that the worse state of health than average of the elderly or the receipt of old-age pension does not justify the saving of health insurance money spent for the payment of sickness benefit to persons who are at least 65 years of age. Age limit as a formal criterion and receipt of state old-age pension cannot be sufficient reasons to deprive persons who are at least 65 years of age from

benefits which persons under the age of 65 receive based on § 57(5) of the HIA."

Although in paragraph 50 of the judgment the Supreme Court *en banc* stresses the need to weigh, upon assessing the moderation of the restriction, the extent and intensity of the interference with the fundamental right to equality on the grounds of age via unequal treatment, on the one hand, and the importance of the objective of saving the health insurance funds, on the other hand, it does not appear from the judgment that the Supreme Court *en banc* assessed the importance of the objective and weighed the significance of the infringement of the fundamental right to equality and of the objective justifying it.

The obligation of the state to render assistance in case of old age, incapacity for work, loss of a provider, or need arises from § 28(2) of the Constitution. Pursuant to the same provision, the categories and extent of assistance, and the conditions and procedure for the receipt of assistance shall be provided by law. Performance of the said obligation includes, among other, on the account of health insurance funds a system for covering health care expenses incurred to finance the disease prevention and treatment of and purchase of medicinal products and medical devices for insured persons and to pay benefits for temporary incapacity for work and other benefits (§ 2(1) of the HIA). Considering the volume of the aforementioned measures, their importance upon protection of health as a significant value (§ 28(1) of the Constitution), the amount of money incurred for that purpose and the limitedness of the health insurance funds, we find that saving the health insurance funds and rational use thereof is a very substantial objective.

We find that saving the health insurance funds and rational use thereof outweighs in terms of importance the infringement of the fundamental right to equality of insured persons who are at least 65 years of age included in § 57(6) of the HIA. The state old-age pension paid to these persons decreases the intensity of the infringement because they maintain an income regardless of the application of § 57(6) of the HIA.

We admit that both the dissenting opinion and the judgment of the Supreme Court *en banc* are subjective regarding the assessment of moderation. Upon ensuring social rights it would be correct to leave more room for the legislator in regard to making decisions of discretion.

A dissenting opinion of the justice of the Supreme Court Jüri Põld on the Supreme Court *en banc* judgment in constitutional review matter no. 3-4-1-12-10

I am of the opinion, as is the majority of the Supreme Court *en banc*, that the part "or insured persons who are at least 65 years of age" of § 57(6) of the Health Insurance Act [HIA] is in contradiction with the Constitution.

Unlike the majority of the Supreme Court *en banc*, I would not, however, have formed such an opinion in the current matter. I would have formed such an opinion upon an abstract norm control.

The current matter constitutes a concrete norm control in the matter of Heino Insler who was temporarily incapacitated for work as a result of an accident at work. I therefore find that in the current matter § 57(6) of the HIA is relevant only in the part the provision concerns an insured person who is at least 65 years of age and who is temporarily incapacitated for work as a result of an accident at work.

I admit that it is practical that the majority of the Supreme Court *en banc* has chosen to widely address the issue of relevance because it eliminates the need of persons who have reached the age of 65 to have recourse to the courts in the future in order to contest the constitutionality of § 57(6) of the HIA.

I note that I find no justification to the application of § 57(6) of the HIA to persons who have reached the age of 65 in case of an accident at work.
