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JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

No. of the case 3-4-1-11-10

Date of judgment 08 March 2011

Composition of court Chairman Märt Rask, members Tõnu Anton, Henn Jõks, Ott Järvesaar and Jüri Pöld

Court Case Request of the Chancellor of Justice to declare the first sentence of paragraph 3.1, the second sentence of paragraph 3.2 and the first sentence of paragraph 3.5 of the "Procedure for payment of social benefits not depending on family income" imposed by a Tallinn City Council regulation no. 13 of 10 February 2005

Basis of proceedings The request no. 6 of 28 October 2010 of the Chancellor of Justice

Hearing Written proceedings

DECISION To dismiss the request of the Chancellor of Justice

FACTS AND COURSE OF PROCEEDINGS

1. The Tallinn City Council adopted on 10 February 2005 a regulation no. 13 approving the "Procedure for payment of social benefits not depending on family income" (the Procedure) which provides, among other, the conditions and the procedure for receiving childbirth allowance.

2. On 19 October 2009 the Chancellor of Justice initiated, on the basis of a received application, proceedings with respect to paragraph 3.1 of the procedure which, in the opinion of the applicant, is contrary to the equal treatment principle. On 20 November 2009 the Chancellor of Justice addressed the Tallinn City Council with a request for information asking explanations on the objective of the payment of childbirth allowance and

justifications for why the child's both parents are required to be residents of Tallinn.

3. The Tallinn City Council replied to the Chancellor of Justice on 14 December 2009 pointing out the following objectives of childbirth allowance: to support families living in the city of Tallinn regarding the birth of a child, to support a strong family and the birth of children to families with parents living together, and the need to ensure receipt of the income tax of both of the parents to the Tallinn city budget. Further, the council explained that childbirth allowance is paid to the child's mother also if in the child's birth certificate there is no entry on the child's father or if the entry has been made based on the mother's statement.

4. The Tallinn City Council amended the procedure by a regulation no. 43 of 17 December 2009, and as of 1 January 2010 childbirth allowance is paid in two parts: 50% is paid when the child is born and 50% when the child reaches the age of one on the condition that the child and the parents have, based on the population register data, continuously been the residents of Tallinn.

5. The Chancellor of Justice made on 8 July 2010 a proposal to the Tallinn City Council to bring the first sentence of paragraph 3.1, the second sentence of paragraph 3.2 and the first sentence of paragraph 3.5 of the procedure into conformity with the Constitution. The Chancellor of Justice found that the said provisions are in contradiction with the fundamental right to equality provided in § 12 (1) of the Constitution.

6. The Tallinn City Council replied to the Chancellor of Justice on 11 October 2010 that in the assessment of the council, the provisions are constitutional and the procedure will not be amended based on the proposal of the Chancellor of Justice.

7. The Chancellor of Justice had recourse to the Supreme Court with the request no. 6 on 28 October 2010 requesting declaration of invalidity of the first sentence of paragraph 3.1, the second sentence of paragraph 3.2 and the first sentence of paragraph 3.5 of the "Procedure for payment of social benefits not depending on family income" imposed by the Tallinn City Council regulation no. 13 due to contradiction with the Constitution.

REQUEST OF THE CHANCELLOR OF JUSTICE

[8.-41. Not translated.]

CONTESTED PROVISIONS

42. The first sentence of paragraph 3.1 of the "Procedure for payment of social benefits not depending on family income" of the Tallinn City Council regulation no. 13 of 10 February 2005:

"Childbirth allowance is granted to the child's parent on the condition that the child's both parents are, based on the population register data, residents of Tallinn before the birth of the child and at least one parent has, based on the population register data, resided in Tallinn for at least one year prior to the birth of the child."

43. The second sentence of paragraph 3.2 of the "Procedure for payment of social benefits not depending on family income" of the Tallinn City Council regulation no. 13 of 10 February 2005:

"The allowance shall be paid in two parts: 50% is paid after the birth of the child and 50% when the child reaches the age of one on the condition that the child and the parents have, based on the population register data, continuously been the residents of Tallinn from the birth of the child until the child reaches the age of one."

44. The first sentence of paragraph 3.5 of the "Procedure for payment of social benefits not depending on family income" of the Tallinn City Council regulation no. 13 of 10 February 2005:

"Childbirth allowance in case of multiple birth (3 children or more) is granted to the children's parent on the condition that the children's both parents are, based on the population register data, residents of Tallinn before the birth of the children and at least one parent has, based on the population register data, resided in Tallinn for at least one year prior to the birth of the children."

OPINION OF THE CHAMBER

45.

The Chamber first addresses the situations where there are the child and his or her two parents, identifies the comparable groups and a breach of equal treatment or lack thereof (I). Secondly, the Chamber assesses the constitutionality of paragraphs 3.1–3.2 and 3.5 in a situation where the child lacks, legally or in fact, one parent at the time of applying for the allowance (II).

I

46. To establish the infringement of the equal treatment principle, two groups to be compared have to be identified. In the current matter, forming of the groups to be compared depends on what to consider as the objective of the payment of childbirth allowance.

47. In the assessment of the Chamber, supporting the child or the parents separately cannot be deemed the objective of the childbirth allowance, but supporting the child and the parents or the children and the parents jointly.

48. Under paragraphs 3.1 and 3.5 of the Procedure, childbirth allowance to a parent of a child or children is granted on the condition that the both parents are, based on the population register data, residents of Tallinn before the birth of the child and at least one parent has, based on the population register data, resided in Tallinn for at least one year prior to the birth of the child or children. On the basis of the third sentence of paragraph 3.1 of the procedure, the child shall be, based on the population register data, a resident of Tallinn as of birth and reside at the same address as the applicant for the allowance.

The Chancellor of Justice found that the objective of childbirth allowance is, above all, covering the expenses related to the birth of the child or the children (hereinafter both as the child), and children whose both parents are, based on the population register data, residents of Tallinn at the time of the birth of the child, and children whose one parent is at the time of the birth of the child, based on the population register data, a resident of Tallinn shall be considered comparable groups. The Tallinn City Council is of the opinion that determining the subject of the allowance is a free decision of the local government and no-one else can determine otherwise, and based on that, the subject is the parent. In the assessment of the Tallinn City Council, comparable groups could be considered children if they would be ensured the option to independently apply for childbirth allowance and demand for it to be used in their interests. The Chamber cannot concur with either opinion for the reasons hereunder.

49. Who is the recipient of the allowance under the legislation and what is to be considered the actual objective of the allowance may not be the same. For instance, caregiver's allowance was formerly paid to a caregiver of a disabled person under the Social Benefits for Disabled Persons Act. However, the actual objective of the allowance was to support the disabled person.

The Tallinn City Council is of the opinion that newborn children cannot be considered comparable groups because they are not able to independently exercise their subjective rights (see paragraphs 18 and 48 of this judgment). The choice of comparable groups cannot be based on whether a person him- or herself is capable of enforcing his or her rights. According to that opinion, discrimination of helpless persons would always be precluded because they themselves cannot protect their rights. That would not be justified.

50. The fact that only the recipient of the allowance defined in the act could be considered comparable groups is opposed also by the following. Article 2(2)b) of the Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin provides that indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons. The provision has been adopted to the Estonian legal order by § 3 (4) of the Equal Treatment Act which defines indirect discrimination. Although the scope of application of the said Directive and the Act is limited, the principle is the same also in case of other characteristics – in identifying the fulfilment of the requirement of equal treatment it is not decisive how the provision has been worded, rather than what is behind the provision.

51. Although at the centre of payment of childbirth allowance is the child because the allowance is paid for the reason of his or her birth, it cannot be agreed with that comparable groups are only children. There are expenses accompanying the birth of a child. The child him- or herself lacks income and the expenses are borne by the parents. Even if the child has assets, use and disposition thereof is decided by the parents. A part of the expenses related to the birth of a child are expenses that are associated more with the convenience of the parents in caring for the child and not with the needs of the child. Based on § 27 of the Constitution, parents have the right and the duty to raise and care for their children. This duty extends to both the mother and the father. It means, among other, that a parent needs to use a part of his or her assets to support the child. The objective of the childbirth allowance is to ensure the child and his or her parents better coping with the expenses accompanying the birth of the child. Based on the objective, the child and the parents jointly shall be considered the subject of support.

52. Therefore, comparable groups are children and their parents who are registered as the residents of Tallinn, and children and their parents, one of who is not registered as a resident of Tallinn. A common trait for both groups is that one parent has to have been a resident of Tallinn for at least one year prior to the birth of the child. No-one has contested the constitutionality of this requirement and the Chamber does not address the matter further.

53. Based on paragraph 3.2 of the Procedure, 50% as the second part of the allowance is paid when the child reaches the age of one. Therefore, comparable groups are also children who have been registered as residents of Tallinn from birth with their parents who are registered as residents of Tallinn continuously until the child reaches the age of one, and children with their parents, one of who is not continuously a resident of Tallinn until the child reaches the age of one.

54. Different treatment has to be justified by a legitimate objective. The participants in the proceedings have deemed as a legitimate objective the goal to support the birth of children to a family where the parents are living together, and to ensure receipt of income tax to the budget of the city of Tallinn, and to favour only local residents.

55. The objective to support the birth of children to a family where the parents are living together is legitimate but the regulatory framework for the procedure is not suitable for achieving the objective. Paragraphs 3.1 and 3.5 of the Procedure prescribe that the allowance is paid to the parent living at the same address as the child. The other parent's place of residence need not be at the same address, but simply in the city of Tallinn. Thus, the Procedure does not require for the parents to live together.

56. The objective to ensure receipt of income tax to the Tallinn city budget and to favour only local residents is legitimate.

Pursuant to § 154 (1) of the Constitution, all local issues shall be resolved by local governments. On the one hand, it means the right to resolve independently, on the other hand, it provides territoriality – only issues concerning the local community are resolved. Based on that, the local government's objective to support only local residents is legitimate.

57. According to § 5 (1) 1) of the Income Tax Act, 11.4 per cent of the taxable income of a resident natural person is received by the local government of the taxpayer's residence. Pursuant to the first sentence of § 5 (2) of the Income Tax Act, the place of residence of a resident natural person as indicated on 1 January of a calendar year in the register of taxable persons maintained by the Tax and Customs Board is deemed to be his or her place of residence throughout the same calendar year. Based on § 14 (2) of the Government of the Republic of Estonia regulation of 30 July 2007 no. 240 "Statutes of establishment of the "Register of Taxable Persons" and for maintenance of the register", the Tax and Customs Board obtains information on natural persons from the population register.

58. Thus, the local government funding system has been formed in a way that one income of local

governments is a part of the income tax of their residents. Local residents pay income tax partly to the budget of the local government which in turn enables the local government to provide services for the residents. Children are generally born to workforce who have a job or in case of lack thereof wish to get a job. Since receipt of income tax to the local government budget depends on the registration of a person's place of residence in the population register, the local government has a clear interest that local residents would be registered in that local government. Knowing the number of residents is also necessary for the local government to plan the performance of its duties, for example to assess how many people may need social assistance and how many there are of potential every-day public transport users. Persons living in the local government use the services provided by the local government, if nothing else, then at least the public street network and lighting. A legitimate objective has to be considered the fact when a local government takes measures for persons actually living on its territory to register themselves as residents of that local government.

59. The local government's right of self-management and financial guarantee are related to the local government's financial issues. The right of self-management arises from § 154 (1) of the Constitution which provides that all local issues shall be resolved and managed by local governments, which shall operate independently pursuant to law. The rights relating to the financial guarantee are oriented at the creation of necessary conditions for the exercise of the right of self-management (the Constitutional Review Chamber of the Supreme Court judgment of 9 June 2009 no. 3-4-1-2-09, para. 43). § 154 (1) of the Constitution gives rise to the right to have sufficient financial resources, allowing the local government to resolve and manage both mandatory and voluntary local government issues (the Constitutional Review Chamber of the Supreme Court judgment of 9 June 2009 no. 3-4-1-2-09, para. 42). The same right is also established by Article 9 (1) of the Charter of Local Self-Government which provides that local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers.

60. The Supreme Court *en banc* has found regarding the local government's right of self-management and financial guarantee that financial guarantees serve as the basis for arrangement of financing of local authorities and that the right and obligation to independently resolve and organise all local issues based on law arising from § 154 (1) of the Constitution also includes making decisions regarding how to use the funds allocated for resolution of local issues (the Supreme Court *en banc* judgment of 16 March 2010 no. 3-4-1-8-09, paras 54 and 61). On the other hand, it also gives rise to the right of the local government to decide on how to ensure receipt of funds to the budget. It means that finding budget incomes is a part of the right of self-management. How to guarantee the biggest possible number of taxpayers is not a matter of arrangement of financing of local authorities, but a matter of which choices to make for guaranteeing receipt of income to the budget. It is related to the local government's right to an independent budget provided in § 157 (1) of the Constitution.

61. Payment of childbirth allowance irrespective of the family's income is a local obligation assumed by the local government itself. Childbirth allowance is also paid by the state under § 10 of the State Family Benefits Act. The childbirth allowance in question in the current matter is a benefit provided by the local government which means expense to the local government. It is not an allowance for needy children and their parents, but the childbirth allowance is paid to everyone. Pursuant to § 23(1) of the Social Welfare Act, rural municipality governments and city governments may grant and pay supplementary social benefits from a local government budget under the conditions and pursuant to the procedure established by the local government council. Based on the local government's right of self-management, the local government has the right to decide which allowances, benefits and services it provides in addition to the obligatory services arising from the Constitution and the law.

62. Although the local government has an obligation to consider the equal treatment requirement provided by § 12 of the Constitution, it has more freedom in decision making if allowances or services for needy persons or allowances or services which a person could demand from the local government due to its obligatory duties are not at issue. The Constitution does not prescribe an absolute prohibition to treat persons differently, but persons may be treated differently if there is a legitimate objective and it is proportional. Due

to the nature of the local government it operates only on the local level, meaning on its territory or relating to it. Powers of the local government are clearly limited to its territory. It cannot be otherwise regarding the obligations of the local government – the local government has no obligations before a person who has no connection with that local government.

63. By childbirth allowance, the child and his or her parents are supported jointly. If one of them is not a resident of that local government based on the register, the connection of the child and his or her parents with the local government is weaker than of those who are all registered as residents of that local government. If it would be provided that the registration of one person would suffice and all local governments would impose the same, and the father, the mother and the child would be registered in different local governments, they would have the right to receive the allowance from three local governments.

64. The rights and obligations relationship between persons and the local government is different if the persons are registered as residents of that local government and if the persons are not residents of that local government according to the register. Although the local government does not provide services directly as compensation for the persons' contribution, including receipt of income tax, it can be considered justified that the relationship between the local government and the persons is mutual. The balance is off if a person refuses to assume obligations before the local government but still gets the right to demand benefits. If to deny the mutuality of the relationship between the local government and the persons, it is possible to form an opinion that the local government should offer allowances to everyone, regardless of their place of residence.

65. Childbirth allowance is paid to the child and the parents jointly. Both of the parents, despite their place of residence, are obligated to care for the child and support him or her. It means joint expenses of the parents. Childbirth allowance helps to bear the joint expenses. The relationship between persons and the local government has to be based on mutuality, taking account of the subjects of the allowance jointly. Therefore, the local government is not required to guarantee payment of childbirth allowance to persons who have not registered as local residents on equal basis with persons who have registered as local residents.

66. Consequently, the local government does not treat unfoundedly unequally those children and parents, one of who has not registered as a resident of the same local government compared to those children and parents who have registered as residents of that local government. Thus, it is not a breach of the equal treatment principle provided in § 12 of the Constitution.

67. The arguments of the analysis of equal treatment of the comparable groups pointed out in paragraph 53 of this judgment are the same as above. Therefore the Chamber does not address these groups separately and finds that also in case of those groups there is no breach of the equal treatment principle.

II

68. Paragraph 3.1 of the Procedure provides that "the child's both parents", paragraph 3.2 "the parents" and paragraph 3.5 "both parents" shall be residents of Tallinn based on the population register data. Not every child has two parents – an entry about the father in the child's birth registration may be lacking, i.e. the child does not legally have the other parent, or one parent may be deceased, i.e. the parent is lacking in fact. Next, the Chamber interprets the referred provisions in case the child lacks one parent, and assesses the constitutionality of such an interpretation.

69. The Tallinn City Council explained that all such cases where the child lacks, legally or in fact, a parent, childbirth allowance has been paid when applied for.

It must be kept in mind that in a constitutional review procedure the constitutionality of an Act is verified, not the constitutionality of its application practice. Constitutional application of an unconstitutional Act does

not make the Act itself constitutional. Therefore, the question is how to interpret the provisions "the child's both parents are, based on the population register data, residents of Tallinn" and "the parents" in a situation where there is no entry about the father in the child's birth registration or where one parent is deceased.

70. The definition of "both parents" and "the parents" is based on the fact that a child usually has two parents, and to receive the allowance the child's both parents must be registered as residents of the city of Tallinn. It would be absurd to demand that a person who does not exist would be a resident of Tallinn based on the population register data.

71. If to interpret the definition "both" purely grammatically, it would be possible to form an opinion that there must be two parents who are residents of Tallinn based on the population register data. Such an interpretation would, however, be unconstitutional for the following reasons.

Childbirth allowance is paid to those children and parents who have decided to tie themselves legally to the city of Tallinn, i.e. who have a rights and obligations relationship with the local government based on mutuality. If the child's other parent is registered in another local government (see paras 63 and 64 of this judgment), the connection of the child and his or her parents with the city of Tallinn is weaker than if both parents are registered as residents of the city of Tallinn. If the child and his or her only parent are residents of the city of Tallinn based on the population register data, their connection with the city due to the lack of the other parent is not weaker than the child's and his or her two parents' who are all registered as residents of Tallinn. If to interpret the provisions so that based on them a single parent would not have the right to childbirth allowance, it would be a breach of the equality principle and the provision would be unconstitutional.

72. The Supreme Court *en banc* has found that if there are many possibilities of interpretation, the constitution-conforming interpretation should be preferred to those interpretations that are not in conformity with the Constitution (see the Supreme Court *en banc* judgment of 22 February 2005 no. 3-2-1-73-04, para. 36). If the child and his or her parent are registered as residents of Tallinn and the other parent is lacking, paragraphs 3.1, 3.2 and 3.5 of the procedure shall be interpreted so that a single parent would also have the right to childbirth allowance because such an interpretation is reasonable and constitutional, and a contrary interpretation would be unreasonable and unconstitutional.

73. As it appears from the abovementioned, the provisions contested by the Chancellor of Justice are, in the opinion of the Constitutional Review Chamber, in conformity with the Constitution. Thus, the request of the Chancellor of Justice shall be dismissed.

A dissenting opinion of the justice of the Supreme Court Jüri Põld on the Constitutional Review Chamber judgment in matter no. 3-4-1-11-10

1. I concur with the part I of the justifications. I agree with the decision of the judgment in the part it is related to the part I of the justifications. I do not concur with the part II of the justifications and with the decision in the part it is related to the part II of the justifications. I find that the request of the Chancellor of Justice should have been satisfied in part and paragraphs 3.1, 3.2 and 3.5 of the "Procedure for payment of social benefits not depending on family income" approved by the Tallinn City Council Regulation no. 13 of 10 February 2005 should have been declared unconstitutional in the part which requires the existence of the child's both parents to receive the allowance.

2. In my opinion, paragraphs 3.1, 3.2 and 3.5 of the procedure approved by the Tallinn City Council Regulation no. 13 of 10 February 2005 have been worded with legal clarity. It arises unambiguously from these provisions that the child is required to have both parents to receive the childbirth allowance. I find that also the majority of the Chamber admits in paragraph 71 of the judgment that the wording of these provisions is unambiguous.

3. I do not deem possible an interpretation, as a result of which the wording of the provision and the content attributed to the provision by the interpretation (legal provision) are completely opposite. Any interpretation cannot result in a situation where a reader of an Act sees one thing but, according to the Supreme Court judgment, is required to see something that is completely opposite to that seen by his or her own eyes.

I find that such interpretations may sow legal vagueness and mislead people upon deciding on behaviour. People cannot be blamed if they based their decision on behaviour on a grammatically clear provision and could not foresee that for relying on such a provision they need to look for a Supreme Court judgment which may have given opposite content to the provision.

The majority of the Chamber has chosen the aforementioned way of interpretation and attributed to the provision under dispute content which does not appear from the text of the Act in any way. I am of the opinion that the majority of the Chamber exceeded the limits of interpretation and established a new legal provision differing by content from the provision under dispute.

4. I am placing myself in the position of a single parent reading the contested provisions. I am proceeding from the fact that the interpretations of the Supreme Court are not found in the legislation databases next to the provisions which the Supreme Court did not declare unconstitutional, and that an average person is not up to date with the Supreme Court judgments and does not have to presume that a Supreme Court judgment interprets the provision completely opposite to that what is stated in the provision itself.

As a single parent I would understand those provisions prior to the Supreme Court judgment so that a single parent lacks the right to childbirth allowance. Also after the Supreme Court judgment, without reading it, my understanding of these provisions would be the same.

5. I admit that in the current case, exceeding the limits of interpretation may not result in harmful consequences for the person reading the contested provisions and who still wishes to receive the allowance. Namely, the Tallinn City Council claims that the application practice of the contested provisions is such that the allowance is granted also to a single parent applying for it. However, it cannot be precluded that a single parent reading the contested provisions who believes what is written in the Act with legal clarity thinks that he or she lacks the right to the allowance and does not apply for it.

6. What concerns me is that continuing to apply the way of interpretation chosen by the majority of the composition of the court may result in a situation where a person is afraid, even according to clearly worded provisions, to take any steps, i.e. a situation where a person also in case of an unambiguously worded provision turns, just in case (for certainty), to a lawyer who he or she presumes is up to date with the practice of the Supreme Court. Creation of such a situation would hardly comply with § 13 (2) of the Constitution.

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