# Constitutional judgment 3-4-1-8-08

**JUDGMENT**
**OF THE CONSTITUTIONAL REVIEW CHAMBER**
**OF THE SUPREME COURT**

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| **No. of the case** | 3-4-1-8-08 |
| **Date of judgment** | 30 September 2008 |
| **Composition of court** | Chairman Märt Rask and members Eerik Kergandberg, Indrek Koolmeister, Villu Kõve and Harri Salmann. |
| **Court Case** | Review of constitutionality of § 28(2)3) of the State Pension Insurance Act to the extent that it establishes the condition that years of pensionable service shall include time during which a person is in compulsory military service “if the person is referred to service from Estonia”. |
| **Disputed judgment** | Judgment of the Tallinn Administrative Court of 19 May 2008 in administrative matter no 3-08-471. |
| **Type of proceeding** | Written proceeding |
| **DECISION** | **To declare § 28(2)3) of the State Pension Insurance Act unconstitutional and invalid to the extent that it does not allow to include the time during which a person is in compulsory military service or compulsory alternative service in the years of pensionable service when before and after referral to compulsory military or alternative military service from outside Estonia a person resided in Estonia and if the pension qualifying period of the person earned in Estonia is at least fifteen years.** |

**FACTS AND COURSE OF PROCEEDING**

**1.** On 7 December 2007 Helger Kõiv filed with the Tallinn office of the Pension Board a pension application

together with his employment record book and additional documents certifying the years of pensionable service.

**2.** On 10 December 2007 by its decision no. 421093/1 the Tallinn office of the Pension Bard granted H. Kõiv old-age pension. The time of compulsory military service in the Armed Forces of the former USSR from 9 June 1969 to 15 June 1972 was not included in the years of pensionable service of H. Kõiv.

**3.** The Tallinn office of the Pension Board justified the failure to include the referred period in the years of pensionable service with § 28(2)3) of the State Pension Insurance Act (hereinafter "the SPIA"), pursuant to which years of pensionable service shall include the time during which a person is in compulsory military service or compulsory alternative service if the person is referred to service from Estonia. H. Kõiv does not meet this criterion.

**4.** H. Kõiv filed an action against decision no. 421093/1 of 10 December 2007 of the Tallinn office of the Pension Board, applying for the annulment of the referred decision and requesting that the court obligate the Tallinn Office of the Pension Board render a new decision on the grant of pension to H. Kõiv including in the years of pensionable service also the period of his compulsory military service.

**5.** The Tallinn Administrative Court considered the action of H. Kõiv to be justified and satisfied it by its judgment of 19 May 2008 in administrative matter no. 3-08-471. The administrative court annulled the decision of the Tallinn office of the Pension Board of 10 December 2007 and issued a precept to the Tallinn office of the Pension Board to review the pension application of H. Kõiv. The Tallinn Administrative Court did not apply and declared unconstitutional § 28(2)3) of the SPIA to the extent that it establishes a restriction upon inclusion of compulsory military service in the years of pensionable service by establishing the condition "if the person is referred to service from Estonia", and by this the court initiated a constitutional review proceeding in the Supreme Court (see §§ 4(1) and (4) of the Constitutional Review Court Procedure Act (hereinafter "the CRCPA")).

**JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING**

**6.** The Tallinn Administrative court satisfied the action of H. Kõiv by its judgment of 19 May 2008 on the ground that § 28(2)3) of the SPIA violated the principle of equality in legislation, arising from the first sentence of § 12(1) of the Constitution, to the extent that it establishes that the time of compulsory military service shall be included in the years of pensionable service only if a person was referred to such service from Estonia. According to the judgment of the administrative court § 28(2)3) of the SPIA constitutes a ground for unequal treatment, which consists in the fact that a person who wanted to acquire a profession that was not taught in Estonia and who therefore had to acquire higher education in another higher educational establishment on the territory of the USSR (the time of studies in which is included in the years of pensionable service) and who was subjected to compulsory military service after gradation, is neither entitled to have the time of compulsory military service included in the years of pensionable service in Estonia nor to receive compensation in the Russian Federation. At the same time, in regard to a person who came from the territory of the former USSR to study in Estonia and who was called up for compulsory military service, the time of compulsory military service is included in the years of pensionable service. If the latter person does not apply for pension in Estonia the time of compulsory military service is included in the years of his or her pensionable service in the Russian Federation. In regard to the young people who resided in Estonia the State Pension Insurance Act, by unequal treatment of persons, creates an advantage to those persons who could acquire a desired profession in Estonia and who – for that reason – were referred to compulsory military service from Estonia.

The administrative court is of the opinion that the different treatment of the referred groups of persons is not justified either by the wish to decrease the expenses of state pension insurance through § 28(2)3) of the SPIA so that obligation to cover these expenses is presently assumed only in regard to those persons who have tight connections with Estonia, or by the aim of compensating for the time during which a person – due to the fact that he or she was subjected to military service was deprived of the possibility to reside and work in Estonia.

The administrative court points out that in regard to other activities referred to in § 28(2) of the SPIA and included in the years of pensionable service under § 28(4) of the SPIA a person's connection to Estonia is not considered important, neither is there a requirement that the referred activities must have been carried out in Estonia. That is why there is no ground to conclude that upon conditional inclusion of the activity referred to in § 28(2)3) of the SPIA in the years of pensionable service the fact that during that time the person could not have worked in Estonia was born in mind, and that the connection of a person to Estonia is an underlying principle of § 28(2) of the SPIA. On the contrary, under § 28(2) of the SPIA several activities which have no connection to Estonia are included in the years of pensionable service.

**7.** The Social Affairs Committee of the Riigikogu is of the opinion that the restriction on calculation of years of pensionable service established in § 28(2)3) of the SPIA is in conformity with the Constitution. The Social Affairs Committee adds further that the general purpose of the State Pension Insurance Act is to grant and pay state pension for the time worked in Estonia. Although, as a rule, the compulsory military service or compulsory alternative service are not included in the years of pensionable service, an exception is made in regard to those persons who resided and worked in Estonia before entering the compulsory military or alternative service and whose activities in Estonia were interrupted by referral to military or alternative service. In comparison to the latter the persons who were referred to compulsory military or alternative service from outside Estonia did not have to discontinue their studies of work in Estonia.

**8.** The Constitutional Committee of the Riigikogu is of the opinion that the provision of the State Pension Insurance Act under discussion violates the principle of equal treatment established in § 12(1) of the Constitution and is unconstitutional as regards the words "if the person is referred to service from Estonia". In comparison to H. Kõiv an advantage is given to the group of persons who acquired professions in Estonia and where therefore referred to military service from Estonia, as well as to those persons who arrived to study in Estonia from somewhere else in the USSR and were referred to military service from Estonia, because in regard to these groups of persons in addition to the time of studies also the time of compulsory military service is included in the years of pensionable service. The place of residence at the time of call-up for military service alone does not justify the different treatment; no other justifications for the different treatment of the groups of persons appear from the explanatory letter to the State Pension Insurance Act. Neither can the different treatment be justified by connection with Estonia, because e.g. under § 28(2)4) of the SPIA time during which a person is enrolled in daytime study at a vocational educational institution, in full-time study at a university or institution of applied higher education, or in a form of study deemed to be equal thereto is included in the years of pensionable service, whereas under § 28(4) of the SPIA the time of studies in the territory of the former Union of Soviet Socialist Republics up to 1 January 1991 is included in the years of pensionable service if the pension qualifying period of the person earned in Estonia is at least fifteen years.

**9.** Helger Kõiv is of the opinion that § 28(2)3) is in conflict with the Constitution, and maintains the opinion submitted to the administrative court, supporting the judgment of the Tallinn Administrative Court of 19 may 2008. In his action filed with the Tallinn Administrative Court H. Kõiv applied among other things for the declaration of unconstitutionality of § 28(2)3) of the SPIA, serving as the ground for the disputed decision of the Tallinn office of the Pension Board, due to the conflict thereof with §§ 11, 12 and 28(2) of the Constitution in their conjunction. H. Kõiv is of the opinion that § 28(2) of the SPIA in conjunction of § 4(2) of the same Act places an Estonian citizen at a disadvantage in comparison to an alien residing in Estonia or a person staying in Estonia on the basis of a temporary residence permit or a right of residence for a specified term. An Estonian citizen residing in Estonia has no right to receive a pension or some other compensation from the Russian Federation for the years of military service in the USSR, because the Russian Federation as the legal successor of the Union of Soviet Socialist Republics guarantees pension only to its citizens or aliens or stateless persons permanently residing in the Russian Federation. Also, categorisation of Estonian citizens into groups on the basis of the place of referral to military service whereas some groups are more favoured than others – without a good and well-considered reason is wrong and unfair, and unreasonably infringes the rights of Estonian citizens and disproportionally distributes the rights. § 28(2)3) of the SPIA does not serve the aim of compensating for the time when a person was

deprived, due to referral to military service, of the possibility to reside and work in Estonia; instead the provision places a group of persons at a disadvantage whereas a person who had went from Estonia to study somewhere else, just like a person who was referred to military service from Estonia, had been for three years deprived of the right and possibility to reside and work in Estonia.

H. Kõiv points out that in 1963, after finishing secondary school, he continued his studies in the department of navigation of the Admiral S. O. Makarov Maritime Academy in Leningrad, because at that time there was no possibility to acquire higher maritime education in Estonia. In 1969 he graduated from the Maritime Academy as engineer-deck officer and was subjected to compulsory military service on submarines in the USSR Navy in the north region (Jekaterinskaja gavna north of Murmansk) pursuant to § 61(b) of the USSR Law on Universal Obligation to Serve in the Army, passed in 1967, which allowed to subject to compulsory military service as officers all the graduates of higher educational establishments (including civil universities; and other reserve officers) either for two years (the army) or three years (the navy). Initially his first assignment was to be back to Estonia, to Estonian Shipping Company, where he had worked during his practical training. Practical training is a part of studies, because in order to acquire the diploma of a deck officer it was necessary to undergo 24 months of sea-going service as a seaman, and one was referred to practical training directly from the Maritime Academy.

**10.** The Tallinn office of the Pension Board of the Social Insurance Board is of the opinion that the provision, which was not applied by the Tallinn Administrative Court, to the extent that it provides that the time of compulsory military service shall be included in the years of pensionable service only if a person was referred to such service from Estonia, does not violate the right to equality before the law, arising from the first sentence of § 12(1) of the Constitution. The Tallinn office of the Pension Board does not agree with the opinion of the administrative court that the persons who had gone from Estonia to study elsewhere and had been referred to compulsory military service from there are treated unequally in comparison to the persons who had come to study in Estonia from elsewhere and had been referred to military service from Estonia. Unlike the administrative court, the Pension Board is of the opinion that there is no ground to presume that a person who has commenced studies in another Soviet Socialist Republic shall return to Estonia, as often such professions were acquired outside Estonia that could not be studied in Estonia and the demand for such specialists in Estonia was small. Also, it can not be excluded that a person who came from some other Soviet Socialist Republic to study in Estonia commenced professional work, after graduation, in Estonia. The general principle of the State Pension Insurance Act is to grant and pay state pension for the time worked in Estonia and therefore the time of compulsory military service is included in the years of pensionable service only if the military service interrupted employment in Estonia and on the condition that the pension qualifying period of the person earned in Estonia is at least fifteen years.

**11.** The Chancellor of Justice is of the opinion that to the extent that § 28(2)3) of the SPIA establishes a restriction on the inclusion of compulsory military service in the years of pensionable service it is not in conflict with the Constitution. To ascertain the infringement of the sphere of protection of the general right to equality the Chancellor of Justice compares the persons who were referred to compulsory military service from elsewhere outside Estonia with the persons who were referred to compulsory military service from Estonia. The aim of the legislator upon enacting § 28(2)3) of the SPIA was to compensate for the time when a person was deprived of the possibility to work in Estonia through referral to compulsory military or alternative service, and thus to treat differently the persons who were referred to military service from Estonia as compared to the persons who were referred to military service from elsewhere. The state pension insurance is related to Estonian territory, i.e. the accumulation period and years of pensionable service are generally calculated for the activities carried out in Estonia; when working on the territory of another state a person does not contribute to the Estonian state pension insurance system and therefore, in regard to respective period, a person lacks insurance cover in Estonia and he or she is not entitled to claim that the time be included in the years of pensionable service. A person who was referred to compulsory military service from Estonia was deprived of the possibility – during the military service to work or to engage in other activities that could be included in the years of pensionable service (see § 28(2) of the SPIA). A person who was referred to compulsory military service from somewhere else has no connection to Estonia directly

before referral to service. In this regard it is irrelevant whether the person had voluntarily left Estonia to reside, work and study elsewhere or for other reasons. Consequently, a reasonable and appropriate reason for the unequal treatment of the referred groups of persons is the wish of the state to compensate for the time when, due to referral to compulsory military or alternative service from Estonia, the person's possibility to work in Estonia was interrupted.

**12.** The Minister of Justice is of the opinion that § 28(2)3) of the SPIA is unconstitutional to the extent that the provision excludes the possibility that in regard to those persons who were referred to compulsory military or alternative service by the soviet regime and who, for that reason, could not earn the pension qualifying period during that time, the time of military or alternative service be included in the years of pensionable service. The Minister of Justice specifies that the provision, not applied by the administrative court, is in conflict with the referred fundamental right to the extent that it excludes the inclusion of the time of military or alternative service in the years of pensionable service, if a person had commenced studies outside Estonia and was referred to military or alternative service from there and he or she returned to Estonia thereafter. In his analysis, with the aim of ascertaining the violation of the general right of equality under § 28(2)3) of the SPIA, the Minister of Justice forms the following groups of persons: the persons who were referred to compulsory military or alternative service from Estonia, and the persons who were referred to compulsory military and alternative service from elsewhere outside Estonia. The legislator has a reasonable cause to treat the referred groups of persons differently, because the objective of the provision is to compensate for the time during which, due to army service, a person could not reside and work in Estonia, i.e. the person could not earn the years of pensionable service. Another pair of comparable groups distinguished by the Minister of Justice is the following: the persons who were referred to military or alternative service from elsewhere and who before and after the service resided in Estonia, and the persons who were referred to military and alternative service from Estonia and who before and after the service resided in Estonia. In regard to these two groups there is no reasonable ground for unequal treatment, because while in military or alternative service both groups of persons lacked the possibility to reside and work in Estonia and earn the years of pensionable service. Thus, in the cases where a person's course of life before and after military or alternative service indicates that the military service constituted an obstacle to earning years of pensionable service, the time spent in the service should be included in the years of pensionable service. Even a person who was referred to alternative or military service from outside Estonia did have sufficient connection with Estonia, if before commencing the studies the person resided in Estonia and returned to Estonia after the alternative or military service.

**13.** The Minister of Social Affairs is of the opinion that the provision not applied by the administrative court is not in conflict with the Constitution, and that the persons who were referred to compulsory military or alternative service from Estonia and the persons who were referred to compulsory military or alternative service from elsewhere are not comparable groups of persons. The general purpose of the State Pension Insurance Act is to grant and pay state pension for the time worked in Estonia. As a rule the time of compulsory military service outside Estonia is not included in the years of pensionable service, but an exception is made in regard to those persons who resided and worked in Estonia before and after referral to service and whose employment was interrupted by referral to military service. The aim of § 28(2)3) of the SPIA is not to establish the inclusion of the time of military service in the years of pensionable service; instead the aim is to compensate for the time when a person was deprived, due to call-up for the army, of the possibility of residing and working in Estonia. The referred period is included in the years of pensionable service only if the pension qualifying period of the person earned in Estonia is at least fifteen years. The referred conditions have been established with the aim of ensuring that this controversial period is taken into account upon paying pensions in Estonia only if it is certain that the person is connected to Estonia. The persons who were referred to compulsory military service from elsewhere outside Estonia did not have to interrupt work in Estonia, at the time of referral to service they had no connection to Estonia and therefore the inclusion of the time of service of such persons in the years of pensionable service is not justified.

Should the Supreme Court, nevertheless, be of the opinion that the referred groups of persons are comparable, the Minister of Social Affairs is of the opinion that he has presented appropriate justifications

for different treatment of these persons.

**RELEVANT PROVISION**

**14.** § 28(2)3) of the State Pension Insurance Act (RT I 2001, 100, 648; 2007, 62, 395) provides as follows:

"28. Time included in years of pensionable service
[...]
(2) Years of pensionable service shall also include:
[...]
3) time during which a person is in compulsory military service or compulsory alternative service if the person is referred to service from Estonia; […]".

**OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER**

**15.** First, the Constitutional Review Chamber shall ascertain the relevant norm (part I of the judgment) and the formal constitutionality thereof (part II). Thereafter the Chamber shall review the substantive constitutionality of the regulatory framework through ascertaining the infringed fundamental right (part III), the purpose of the infringement (part IV) and assessing the constitutionality of the infringement in regard to different comparable groups (part V paragraphs 35 and 36). Finally, the Chamber shall evaluate the constitutionality of the regulation contained in § 28(2)3) of the SPIA (part VI).

**I.**

**16.** A prerequisite of permissibility of the concrete norm control, initiated by the Tallinn Administrative Court, is the relevance of the provision subjected to review (see §§ 15 and 152 of the Constitution and § 9(1) and the first sentence of § 14(2) of the CRCPA). Namely, pursuant to the first sentence of § 14(2) of the CRCPA the Supreme Court shall, within constitutional review court proceeding, review the constitutionality of only those provisions that are relevant to the adjudication of the matter. An Act which is of decisive importance in the adjudication of the matter is relevant (see judgment of the Supreme Court en banc of 22 December 2000 in case no. 3-4-1-10-00 – RT III 2001, 1, 1, paragraph 10). An Act is of a decisive importance when in the case of unconstitutionality of the Act a court should render a judgment different from that in the case of constitutionality of the Act (see judgment of the Supreme Court en banc of 28 October 2002 in case no. 3-4-1-5-02 – RT III 2002, 28, 308, paragraph 15). A norm which actually regulates a disputed relationship or situation, applied in regard to a person, should be regarded as relevant (see judgment of the Constitutional Review Chamber of the Supreme Court of 2 November 2006 in case no. 3-4-1-8-06 – RT III 2006, 40, 337, paragraph 17).

**17.** In 1963 H. Kõiv started to acquire the profession of engineer-deck officer in Leningrad. After graduation from the Admiral S. O. Makarov Maritime Academy in 1969, under the then laws, he was referred to compulsory military service in the Soviet Army (navy) for three years from the place of his studies, i.e. Leningrad. By the Tallinn office of the Pension Board decision, under § 28(2)4) of the SPIA, the time of studies in the Admiral S. O. Makarov Maritime Academy in Leningrad was included in the years of pensionable service, but under § 28(2)3) of the SPIA the time of compulsory military service in the armed forced of the former USSR from 9 June 1969 until 15 June 1972 was not included in the years of pensionable service on the ground that H. Kõiv had not been called up to military service from Estonia, but from Leningrad. Thus, § 28(2)3) of the SPIA, applied upon calculating the years of pensionable service of H. Kõiv, is the norm on the basis of which the Tallinn office of the Pension Board refused to include in H. Kõiv's years of pensionable service the three-years' period during which he served in the armed forces of the former USSR. If § 28(2)3) of the SPIA were unconstitutional to the extent that it establishes the condition "if the person is referred to service from Estonia" upon inclusion of the time of compulsory military service in the years of pensionable service, it would have been without a legal basis that H. Kõiv's time of service in the armed forces of the former USSR was not included in the years of his pensionable service. Consequently, this is a relevant norm that actually regulates the situation under discussion.

## II.

**18.** The State Pension Insurance Act was passed on 5 December 2001 by a competent body – the Riigikogu – within the limits of its competence. The Act has been promulgated (§ 107(1) of the Constitution) and published (§§ 3(2) and 108 of the Constitution) and there is no information to the effect that upon passing the Act the prescribed procedural norms had been violated. Also, the relevant norm is unambiguous and there is no dispute about the comprehensibility thereof; consequently the regulatory framework is constitutional in the formal sense.

## III.

**19.** To adjudicate this constitutional review matter it is first necessary to ascertain the fundamental right infringed by § 28(2)3) of the SPIA and, thereafter, if the infringement exists, to evaluate the constitutionality thereof (part V of the judgment).

Thus, in the action filed with the Tallinn Administrative Court H. Kõiv has argued that § 28(2)3) of the SPIA infringes §§ 11, 12 and 28(2) of the Constitution in their conjunction. At the same time the Tallinn Administrative Court, as well as the other participants in the constitutional review proceeding, share the opinion that what is infringed is the general right of equality included in (the firsts sentence of) § 12(1) of the Constitution, pursuant to which everyone is equal before the law. The Minister of Justice has further added in his written opinion that § 11 of the Constitution, establishing the conditions for the infringement of fundamental rights, has been violated (see in this regard part II of the judgment).

**20.** The Supreme Court has held as follows: “The first sentence of § 12(1) of the Constitution does not expressly refer to a subjective right. It only states that everyone is equal before the law. Nevertheless, these words embrace the right of a person not to be treated unequally. The wording of the first sentence expresses, above all, the equality upon application of law and means a requirement to implement valid laws in regard of every person impartially and uniformly. [...]The Chamber shares the opinion that the first sentence of § 12(1) of the Constitution is to be interpreted as also meaning the equality in legislation. The equality in legislation requires, as a rule, that persons who are in similar situations must be treated equally by law. This principle expresses the idea of essential quality: those, who are equal have to be treated equally and those who are unequal must be treated unequally.“ (see judgment of the Constitutional Review Chamber of the Supreme Court of 3 April 2002 in case no. 3-4-1-2-02 – RT III 2002, 11, 108, paragraphs 16 and 17).

Consequently, upon ascertaining the infringement of the general right of equality it must be found out whether similar persons or groups of persons have been treated unequally. If there is unequal treatment of these groups, the general right of equality has been infringed. The comparable groups of persons in regard to whom unequal treatment is exercised have to be ascertained and the unequal treatment of these groups described.

**21.** There can be an infringement for the purposes of the first sentence of § 12(1) of the Constitution when the persons who, from the aspect of concrete differentiation, are in an analogous situation are treated unequally. Namely, the Supreme Court en banc has held the following: „the issue of whether unequal treatment of two persons, two groups of persons or situations is justified or unjustified (i.e. arbitrary) can only arise if the groups who are treated differently are comparable, i.e. they are in an analogous situation from the aspect of concrete differentiation.“ (judgment of the Supreme Court en banc of 27 June 2005 in case no. 3-4-1-2-05 – RT III 2005, 24, 248, paragraph 40).

**22.** Pursuant to § 28(2)3) and § 28(4) of the SPIA the legislator has enacted the following conditions for the inclusion of the time of compulsory military and alternative service in the years of pensionable service: the person was referred to compulsory military service from Estonia; the person was called up for the service in the army of the former USSR and during the period until 1 January 1991; and the pension qualifying period

of the person earned in Estonia must be at least fifteen years.

Thus, in regard to the person who was referred to compulsory military service from elsewhere outside Estonia, the referred time is not included in the years of pensionable service, whereas in regard to the person who was referred to compulsory military service from Estonia the referred time is included in the years of pensionable service.

In this regard the comparable groups of persons are those who were referred to compulsory military service from Estonia and those who were referred to the service from elsewhere outside Estonia. The common characteristics of these groups are that they meet the conditions for the acquisition of pension (§§ 481), 7(1), 27(1) and 28(4) of the SPIA) and that the persons were called up for the service in the army of the former USSR and not later than 1 January 1991. The Chancellor of Justice further adds a common characteristic of the referred comparable groups – by referral to service the persons were deprived, for that period, of the possibility to work or to engage in other activities established in § 28(2) of the SPIA that are included in the years of pensionable service. Similar comparable groups of persons were distinguished by the Tallinn Administrative Court, the Constitutional Committee and the Social Affairs Committee of the Riigikogu, the Tallinn office of the pension Board of the Social Insurance Board, the Chancellor of Justice and the Minister of Justice.

**23.** In addition, the Tallinn Administrative Court formed narrower comparable groups of persons by adding the commencement of studies outside home country as a common characteristic, namely – the persons who from Estonia went to study elsewhere and were referred to service from there, and the persons who arrived to study in Estonia from elsewhere and were referred to service from here. The same groups were referred to by the Constitutional Committee of the Riigikogu. At the same time the two referred participants in the proceeding, to justify unequal treatment of the groups they distinguish, have given as examples the unequal treatment described in this paragraph as well as in paragraph 22 of the judgment, so that it is difficult to draw a line between the argumentation concerning the different approach to broader (see paragraph 22) and more narrow groups (in this paragraph).

**24.** In his written opinion the Minister of Justice, in his turn, formed new even narrower comparable groups of persons, namely – the persons who were referred to military or alternative service from elsewhere and who resided in Estonia before and after the service, and the persons who were referred to military or alternative service from Estonia and who resided in Estonia before and after the service.

As already stated, an infringement of the fundamental right to equality can exist when the persons who are in an analogous situation from the aspect of concrete differentiation are treated unequally. Whereas the smallest common denominator should be found on the basis of the fact that it shall depend on who is compared to who. This means that in principle everybody is comparable to everybody else (see dissenting opinion of J. Põld to judgment of the Supreme Court en banc of 3 January 2008 in case no. 3-3-1-101-06, paragraph 8.4). Thus, in addition to the comparable groups of persons distinguished in paragraph 22 above it is possible to form narrower alternative comparable groups by adding a common criterion of „who resided in Estonia before and after“ to the common characteristics arising from the State Pension Insurance Act (persons meet the conditions for receiving pension in Estonia and they were called up to compulsory military or alternative service on the territory of the former USSR and not later than on 1 January 1991).

**25.** Consequently, to the extent that it establishes a restriction on the inclusion of the time of military service in the years of pensionable service by establishing the condition „if the person is referred to service from Estonia“, § 28(2)3) of the SPIA infringes the fundamental right to equality established in the first sentence of § 12(1) of the Constitution. § 28(2)3) of the SPIA also infringes the fundamental right to equality to the extent that it establishes a restriction on the inclusion of the time of compulsory military service in the years of pensionable service by establishing the condition „if the person is referred to service from Estonia„ in regard to those persons who resided in Estonia before and after referral to military or alternative service from outside Estonia.

**26.** Next, the Constitutional Review Chamber shall examine the substantive constitutionality of the unequal treatment. After having established the objective of the infringement (part IV of the judgment) the Chamber shall analyse the comparable groups of persons formed in paragraph 22 (part V paragraph 35) and paragraph 24 (part V paragraph 36) in regard to violation of prohibition of arbitrariness.

**IV.**

**27.** Only unjustified restriction of rights is considered a violation of fundamental rights, whereas justified restriction of the right to equality is permissible. „But not any unequal treatment of equals amounts to the violation of the right to equality. The prohibition to treat equal persons unequally has been violated if two persons, groups of persons or situations are treated arbitrarily unequally. An unequal treatment can be regarded arbitrary if there is no reasonable cause for that." (See judgment of the Constitutional Review Chamber of the Supreme Court of 3 April 2002 in case no. 3-4-1-2-02 – RT III 2002, 11, 108, paragraph 17). „If there is a reasonable and appropriate cause the unequal treatment in legislation is justified." (Judgment of the Supreme Court en banc of 14 November 2002 in case no. 3-1-1-77-02 – RT III 2002, 32, 345, paragraph 22).

Thus, the next question to be answered is whether the legislator had a reasonable and appropriate reason to treat comparable groups of persons unequally. That is why it will be necessary to ascertain whether § 28(2)3) of the SPIA amounts to justified infringement of the fundamental right established in the first sentence of § 12(1) of the Constitution. To this end the objective of infringement of the fundamental right and the reasonableness and appropriateness of the infringement have to be ascertained (part V of the judgment).

**28.** The restriction established in § 28(2)3) of the SPIA was enacted by the State Pension Insurance Act which entered into force on 1 January 2002 (passed on 5 December 2001 – RT I 2001, 100, 648). § 18(2)3) of the State Pension Insurance Act that was in force until then provided for a similar possibility of including the time of military service in the years of pensionable service without the condition „if the person is referred to service from Estonia". The explanatory letter to the State Pension Insurance Act which entered into force on 1 January 2002 does not identify the objective of the referred restriction or the reason for different treatment of persons arising from the restriction, neither is it possible to ascertain the objective of the restriction from the shorthand notes of the sittings of the plenary assembly or the Social Affairs Committee of the Riigikogu of that time. Therefore it can be concluded that the legislator has failed to justify the objective of different treatment of the referred comparable groups of persons.

**29.** At the same time it appears from the documents of legislative proceeding of a draft for the amendment of § 28(2)3) of the SPIA, which was initiated by the Riigikogu faction of the Social Democrats and was later on rejected, that the Social Affairs Committee of the Riigikogu was of the opinion that the general purpose of the State Pension Insurance Act was to grant and pay state pensions for the time worked in Estonia. The same is emphasised in the written opinions submitted to the Supreme Court by the Ministry of Social Affairs and the Tallinn office of the Pension Board of the Social Insurance Board (paragraph 1 of the opinion). The objective of § 28(2)3) of the SPIA is not to provide for the inclusion of the time of military service in the years of pensionable service but to compensate for the time during which a person was deprived – due to referral to the army of the possibility to reside and work in Estonia. As a rule the time of compulsory military service or alternative service outside Estonia is not included in the length of employment in Estonia. An exception is made in regard to those persons who resided and worked in Estonia before the military service and in regard to who the time of working in Estonia was interrupted by referral to military service. The explanatory letter to „the Act Amending the State Pension Insurance Act and the State family Benefits Act", initiated by the Government of the Republic on 8 May 2008, also points out that „[...] the State Pension Insurance Act is meant to value working in Estonia. By referral to compulsory military service a person's possibility to work in Estonia was interrupted and therefore the referred time is included in the years of pensionable service, but only if the person returned to Estonia and worked here for at least 15 years, thus contributing to the development of the Estonian state."

30. Thus, it can be assumed that the legislator's objective upon establishing § 28(2)3) of the SPIA was to compensate for the time during which a person was deprived – due to referral to compulsory military or alternative service – of the possibility to work in Estonia. As pursuant to the State Pension Insurance Act the state pension is granted and paid for the work in Estonia (§§ 7(1) and 27(1) of the SPIA), the will of the legislator was not that the time of compulsory military or alternative service be included, in the majority of cases, in the years of pensionable service. This possibility is provided when the conditions established in § 28(4) and in § 28(2)3) of the SPIA are met (15 years of pension qualifying period in Estonia and referral to military or alternative service from Estonia). Therefore, as a rule, state pension is granted taking into account only the pension qualifying period in Estonia, but under certain conditions also the time of activities on the territory of the former USSR until 1 January 1991.

**31.** Although it is stated in paragraph 22 of the Tallinn Administrative Court judgment of 19 May 2008 that the presumable objective of the legislator in establishing the unequal treatment in § 28(2)3) of the SPIA was the wish to decrease the expenses on state pension insurance through considering it justified to undertake to bear the costs of pension insurance only in regard to those persons who have close connection to Estonia, this opinion is to be ignored because the legislator has, upon legislative proceedings of different draft Acts, revealed the objective of establishing this norm.

**V.**

**32.** The reason for infringing the fundamental right of equality must be reasonable and appropriate. „[...] although the review of arbitrariness is extended to the legislator, the latter must be awarded a wide margin of appreciation. If there is a reasonable and appropriate cause, unequal treatment in legislation is justified." (See judgment of the Constitutional Review Chamber of the Supreme Court of 3 April 2002 in case no. 3-4-1-2-02 – RT III 2002, 11, 108, paragraph 17). A cause is reasonable and appropriate one if it is proportional in the narrow sense. To ascertain whether unequal treatment is proportional in the narrow sense it is necessary to weigh the objective of unequal treatment and the gravity of the unequal situation that has been created.

**33.** The aim of § 28(2)3) of the SPIA is to compensate for the time during which – due to referral to compulsory military or alternative service – the possibility of a person to work in Estonia was interrupted. The referred regulatory framework treats differently the persons who were referred to service from Estonia in comparison to the persons who were referred to service from elsewhere, as well as the persons who were referred to service from Estonia and who resided in Estonia before and after that, and the persons who were referred to service from elsewhere and who resided in Estonia before and after that.

**34.** Pursuant to the State Pension Insurance Act permanent residents of Estonia and aliens residing in Estonia on the basis of temporary residence permits or temporary right of residence are entitled to receive state pension (§ 4(1) of the SPIA). Persons who have attained 63 years of age and persons whose pension qualifying period earned in Estonia is 15 years have the right to receive an old-age pension (§ 7(1) of the SPIA). A pension qualifying period is a period during which an insured person is engaged in an activity which grants the right to receive a state pension (§ 27(1) of the SPIA). Pursuant to § 28(1) of the SPIA the time during which the employer of a person is required to pay social tax for the person is included in the years of pensionable service of the person (§ 27(2) specifies that a pension qualifying period shall be divided into the years of pensionable service which are calculated until 31 December 1998, and the accumulation period which is calculated as of 1 January 1999). On the basis of § 28(2) of the SPIA also (other) activities referred to in this subsection are included in the years of pensionable service.

As already ascertained above the general purpose of the State Pension Insurance Act is to grant and pay state pensions for the time worked in Estonia, as the years of pensionable service and the accumulation period are generally calculated for the activities in Estonia (see also the activities enumerated in § 28(2) of the SPIA). The time of activities enumerated in § 28(2) of the SPIA on the territory of the former USSR until 1 January 1991 is (by way of exception from the general rule) included in the years of pensionable service if a person's pension qualifying period in Estonia is at least fifteen years (§ 28(4) of the SPIA), i.e. if a person is

connected to Estonia through fifteen years of pensionable service, and through residence as a permanent resident or an alien residing in Estonia on the basis of a temporary residence permit or a temporary right of residence - § 4(1) of the SPIA). The establishment of pension qualifying period of at least fifteen years is justifiable by the principle of insurance: a person is insured if he or she pays social tax (self-employed persons) or the tax is paid for him or her (employer) in the state pension insurance system. When working on the territory of another state (as a rule) social tax is not calculated in regard of the person in Estonia, i.e. the person does not contribute to the state pension insurance system of Estonia, and therefore the person lacks insurance cover for the referred period in Estonia and the right to claim that the period be included in the years of pensionable service.

**35.** Permanent residence of a person who was referred to military service from Estonia was – prior to the referral – in Estonia and he had the possibility to work in Estonia. By referral to compulsory military service the person was deprived – for that period of the possibility to work or engage in some other activity that could be included in the years of pensionable service under § 28(2) of the SPIA (taking into account the requirement of § 28(4) of the SPIA). Unlike the referred person, a person who was referred to compulsory military service from elsewhere did not reside or work in Estonia before the referral, i.e. directly before entering the service he lacked connection to Estonia. At the same time it can not be excluded that before the referral the person had voluntarily or for some other reason left Estonia and started to reside, work and study elsewhere on the territory of the former USSR.

**35.1.** The objective of the legislator upon enacting § 28(2)3) of the SPIA was to determine the circle of persons in regard to who the time of compulsory military and alternative service shall be included in the years of pensionable service, by establishing the condition “if a person is referred to service from Estonia”, and this was done with the wish to compensate for the time during which, due to referral to compulsory military or alternative service, the person was deprived of the possibility to work in Estonia or engage in another activity enumerated in § 28(2) of the SPIA and thus earn years of pensionable service (see part IV of the judgment). This aim has been achieved by § 28(2)3).

As the general purpose of the State Pension Insurance Act is to grant and pay state pensions for the time worked in Estonia, and the will of the legislator upon establishing § 28(2)3) of the SPIA was not to provide for the inclusion of the time of military service in the years of pensionable service but to compensate for the time when a person was – due to referral to compulsory military or alternative service – deprived of the possibility to work in Estonia or engage in another activity referred to in § 28(2) of the SPIA, and this aim is achievable by the enacted regulatory framework, the legislator had – when enacting § 28(2)3) of the SPIA – a reasonable and appropriate cause for different treatment of the referred groups of persons. Upon the existence of a reasonable and appropriate cause the unequal treatment of different groups of persons in legislation is justified – namely, the legislator must be afforded a wide margin of appreciation (judgment of the Constitutional Review Chamber of the Supreme Court of 3 April 2002 in case no. 3-4-1-2-02 – RT III 2002, 11, 108, paragraph 17).

**35.2.** Among the participants in the proceeding it is the Tallinn Administrative Court and the Constitutional Committee of the Riigikogu, who deny the existence of a reasonable and appropriate cause for different treatment of the referred groups of persons; the Minister of Social Affairs shares the view and is of the opinion that these are not comparable groups, as does the Social Insurance Board, who is of the opinion that these groups have not been treated unequally (see paragraph 2 of the written opinion).

**36.** In regard to the comparable groups, i.e. the persons who were referred to military or alternative service from Estonia and who resided in Estonia before and after the referral, and the persons who were referred to military or alternative service from elsewhere and who resided in Estonia before and after the referral, the permanent residence of persons belonging to both groups but who were referred to compulsory military or alternative service from different republics of the USSR – either directly before referral to service or directly before leaving for another republic as well as after leaving the military or alternative service was Estonia. For example, it may have been that young men studying in Estonia were referred from here to compulsory military or alternative service and after the service they returned to work in the Estonian SSR; or it may have

been that young men from Estonia, after finishing secondary school were referred or voluntarily went to study in another republic – very often a speciality that could not be studied in Estonia and they were referred to military service from that republic but after the service they returned to Estonia and earned here the fifteen pension qualifying years required by § 28(4) of the SPIA. Both groups of persons had a connection with Estonia before and after referral to military or alternative service. Thus, their permanent residence before referral to military service (or directly before commencing studies in another republic of the USSR) was in Estonia and these persons had the possibility to work in Estonia. Consequently, by referral to compulsory military service these persons were deprived of the possibility to work in Estonia or engage in another activity that could be included in the years of pensionable service under § 28(2) of the SPIA.

**36.1.** It appears from the minutes of the session of the Tallinn Administrative Court of 28 April 2008 and from the file of administrative case no. 3-08-471, that in 1963, having finished secondary school, H. Kõiv commenced studies in the navigation department of the Leningrad Maritime Academy on the basis of an invitation (studies began on 1 September 1963), because at that time one could not acquire higher maritime education in the Estonian SSR. On 28 February 1969 he graduated from the Maritime Academy as engineer-deck officer and was referred to the navy of the Soviet Army. He served in the Soviet Army from 9 June 1969 until demobilisation on 13 June 1972. H. Kõiv argues that initially he was to be referred back to work in Estonian Shipping Company, where he had undergone all practical training. Practical training was a part of studies, because in order to acquire the diploma of a deck officer it was necessary to undergo 24 months of sea-going service as a seaman, and one was referred to practical training directly from the Maritime Academy. Immediately after the military service, namely from 17 October 1972 until 12 February 1973, H. Kõiv worked in Lenrõbholodoflot as third mate, and thereafter – from 19 February 1973 – commenced work as first mate in the fishermen's collective farm Hiiu Kalur. The time of work in Lenrõbholodoflot was included in the years of pensionable service (§ 28(1) of the SPIA).

**36.2.** As it has been repeatedly pointed out the objective of the legislator upon establishing § 28(2)3) of the SPIA was to determine the circle of persons in regard to who the time of compulsory military and alternative service shall be included in the years of pensionable service. For that purpose the condition "if a person is referred to service from Estonia" was established, wishing to compensate for the time during which, due to referral to compulsory military or alternative service, a person was deprived of the possibility to work in Estonia or engage in another activity enumerated in § 28(2) of the SPIA and thus earn the years of pensionable service in Estonia. At present this aim has not been achieved through the regulatory framework of § 28(2)3) of the SPIA in regard to both of the comparable groups. Namely, on the basis of § 28(2)3) of the SPIA it is possible to include the time of military or alternative service in the years of pensionable service in regard to those persons who were referred to military or alternative service from Estonia and who resided in Estonia before and after the service; this can not be done in regard to those persons who were referred to military or alternative service from elsewhere and who resided in Estonia before and after. At the same time the existence of sufficient connection with Estonia is to be affirmed, i.e. these persons, too, were deprived – by referral to compulsory military or alternative service of the possibility to work in Estonia or engage in another activity enumerated in § 28(2) of the SPIA and thus earn the years of pensionable service.

**36.3.** Namely, in regard to those persons who were referred to military or alternative service from elsewhere outside Estonia and who resided in Estonia before and after that it has to be born in mind that they are entitled to old age pension in Estonia if the pension qualifying period they have earned in Estonia either before or (first and foremost) after compulsory military or alternative service is 15 years (§ 7(1)2) of the SPIA). The pension qualifying period of 15 years is also a prerequisite for the inclusion of the time of compulsory military or alternative service in the years of pensionable service (§ 28(4) of the SPIA). The Chamber is of the opinion that the pension qualifying period of 15 years, earned in Estonia, is sufficient to prove a person's sufficient connection with Estonia also after military or alternative service. However, upon ascertaining sufficient connection the instances when a person shortly worked in another republic of the USSR after compulsory military or alternative service and before returning to Estonia are not of decisive importance.

**36.4.** As the general purpose of the State Pension Insurance Act is to grant and pay state pensions for the

time worked in Estonia, and the will of the legislator upon establishing § 28(2)3) of the SPIA was to compensate for the time during which a person was deprived – due to referral to compulsory military or alternative service – of the possibility to work in Estonia or engage in another activity enumerated in § 28(2) of the SPIA, and this aim is not achievable through the regulatory framework created by the legislator, the latter – when establishing § 28(2)3) of the SPIA – lacked a reasonable and appropriate cause for different treatment of the referred groups of persons.

**36.5.** The Chamber agrees with the Minister of Justice that in the instances when a person's course of life before and after military or alternative service indicates that the military service constituted an obstacle to earning pension qualifying period in Estonia, the time spent in military service should be included in the pensionable years of service. Even a person who was referred to alternative or military service from outside Estonia did have sufficient connection with Estonia, if before commencing the studies the person resided in Estonia and returned to Estonia after the alternative or military service, and if the pension qualifying period earned by the person in Estonia is 15 years.

**VI.**

**37.** On the basis of the foregoing the Supreme Court declares § 28(2)3) of the SPIA unconstitutional and invalid to the extent that it does not allow to include in the years of pensionable service the time of compulsory military or alternative service, if before and after referral to military or alternative service from outside Estonia the person resided in Estonia and the person's pension qualifying period earned in Estonia is fifteen years.

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