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## Constitutional judgment 3-4-1-9-05

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

<b>No. of the case</b>	3-4-1-9-05
<b>Date of judgment</b>	21 June 2005
<b>Composition of court</b>	Chairman Märt Rask, members Lea Kivi, Ants Kull, Villu Kõve and Jüri Pöld
<b>Court Case</b>	Action of the Republic of Estonia against Rein Uustalu claiming the overpaid early-retirement pension in the amount of 19 024 kroons.
<b>Basis of proceedings</b>	Judgment of Tartu County Court of 27 April 2005 in civil matter No 2-2095-04
<b>Hearing</b>	Written proceeding
<b>DECISION</b>	<b>To declare that § 43(1) of State Pension Insurance Act in the wording in force before 7 January 2005 was in conflict with § 12 of the Constitution to the extent that the provisions did not allow to pay early-retirement pension to those employed persons who had attained pensionable age.</b>

#### FACTS AND COURSE OF PROCEEDING

1. The Republic of Estonia submitted an action against Rein Uustalu, requesting that the court order that he pay back the amount of 19 024 kroons paid to him as early-retirement pension under §§ 43 and 47 of the State Pension Insurance Act (hereinafter "SPIA") during the time he was employed.
2. By its judgment of 27 April 2005 Tartu County Court dismissed the action of the Republic of Estonia against R. Uustalu and declared § 43(1) of SPIA in the wording in force before 7 January 2005 unconstitutional to the extent that the provision provided for termination of payment of early-retirement pension to an employed person after the person attains pensionable age.

#### JUSTIFICATIONS OF THE COURT AND PARTICIPANTS IN THE PROCEEDING

3. The county court was of the opinion that § 43(1) of SPIA was discriminatory towards persons receiving early-retirement pension, because it did not allow such persons to be employed and receive the pension when they attained pensionable age established in § 7 of SPIA. The latter provision did not prevent persons receiving old-age pension from being employed and receiving pension at the same time. Thus, persons who have attained pensionable age are in an unequal situation depending on whether they have been granted an early-retirement pension under § 9 of SPIA, or old-age pension under § 7 of SPIA. The court argued that this regulation was in conflict with § 12 of the Constitution.

4. R. Uustalu is of the opinion that § 43(1) of SPIA is discriminatory against persons receiving early-retirement pension, because the provision does not allow him to be employed even when he reaches the pensionable age established in § 7 of SPIA. At the same time the law does not prevent persons receiving old-age pension from being employed. § 43(1) of State Pension Insurance Act is not in conformity with § 12 of the Constitution.

By amendment to the referred Act, which entered into force on 7 January 2005, the state has admitted that the earlier wording was disproportionate and in conflict with the principle of equal treatment.

5. The Republic of Estonia, represented by the Ministry of Social Affairs, is of the opinion that the whole amount of pension overpaid until the amendment entered into force should be ordered to be paid back.

6. The Social Affairs Committee refers to the opinion of the Constitutional Committee of the Riigikogu that there is no reasonable justification for different treatment of the referred groups of old-age pensioners. Proceeding from this the Riigikogu is of the opinion that § 43(1) of SPIA was in conflict with § 12 of the Constitution to the extent that it did not allow a person receiving early-retirement pension to be employed when attaining pensionable age.

7. The Chancellor of Justice is of the opinion that the wording of § 43(1) of SPIA, which was in force from 1 January 2002 until 6 January 2005, establishing a prohibition on a person receiving early-retirement pension to be employed or to engage in enterprise, was in conflict with § 29(1) and with the first sentence of § 31 of the Constitution in conjunction with § 11 of the Constitution. The prohibition serves a legitimate aim - to prevent the payment of old-age pension substantially earlier than at the pensionable age established in § 7 of SPIA. Prolongation of the period of pension payments by three years would result in additional costs for the state. The measure opted for by the legislator is a measure suitable and necessary for the achievement of the referred aim, because it is difficult to imagine another measure as effective as non-payment of pension if a person is employed. Yet, the infringement of the right to work and the freedom of enterprise is not proportional in the narrow sense. The right of a person who has made mandatory insurance payments to choose a place of employment and to be employed there equally with others is being intensively infringed upon if he or she can not, similarly with employed old-age pensioners, receive old-age pension when employed. The social-economic interests of the state do not outweigh such an intensive infringement into a person's freedom to choose a place of employment and to be employed there.

8. The Minister of Justice argues that § 43(1) of SPIA is proportional and in conformity with the principle of equal treatment. As early retirement means additional burden on the pension system of the state, the measure can be deemed proportional to the nature of a pension more favourable than in general as well as with the aim of the restriction. It is problematic to compare groups of persons one of which has fulfilled all conditions necessary for receiving old-age pension and the other has not. Also, persons who have attained pensionable age and receive old-age pension and persons who have attained pensionable age and receive early-retirement pension are in different situations. The former have worked until they attained the pensionable age. The latter have retired before the attainment of pensionable age and receive state pension from general pension fund. Taking into account the substantial difference between the referred pensions the different treatment of persons receiving different pensions is justified. The amendment which entered into force on 7 January 2005 can be treated as a so called positive special measure, which allows to pay early-retirement pension to persons who are employed and who have reached the pensionable age established in § 7 of SPIA.

## **CONTESTED PROVISION**

9. Tartu County Court declared unconstitutional and did not apply § 43(1) of SPIA in the wording in force from 1 January 2002 until 6 January 2005 (included) to the extent that it provided for non-payment of early-retirement pension to a person who was employed after attainment of pensionable age.

The contested wording of § 43(1) of State Pension Insurance Act (RT I 2002, 100, 648, ... 2004, 16, 120) established the following:

**"§ 43. Payment of state pensions to persons who are employed**

(1) An early-retirement pension or survivor's pension shall not be paid to persons who are employed (except to children under 18 years of age, or to students under 24 years of age enrolled in daytime study or, for medical reasons, in another form of study, or full-time study); a national pension shall not be paid to persons who are employed (except to persons who are declared permanently incapacitated for work, to children under 18 years of age or to students under 24 years of age enrolled in daytime study or, for medical reasons, in another form of study, or full-time study)."

**OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER**

**10.** § 7 of the State Pension Insurance Act, which entered into force on 1 January 2002, provided for old-age pension on general grounds and § 9 for early-retirement pension. § 9(1) of State Pension Insurance Act establishes the right to receive an early-retirement pension up to three years before attaining the pensionable age, if a person has earned the pension qualifying period provided for in clause 7 (1) 2) of the same Act required for grant of an old-age pension. An early-retirement pension shall be calculated pursuant to the established procedure for calculation of old-age pensions, by reducing the pension by 0.4 per cent for every month and a period shorter than a month which remains until the person attains the pensionable age (§ 9(2) of SPIA). Thus, an early-retirement pension is smaller than the old-age pension granted pursuant to general principles.

§ 43(1), which is under dispute, precluded the payment of early-retirement pension to an employed person even when the person had attained the pensionable age established in § 7 of SPIA. § 43(1) did not preclude the payment of old-age pension, granted on general grounds of § 7, to employed persons.

**11.** This constitutional review case rose from the fact that the Republic of Estonia claimed, by way of action, that R. Uustalu - to whom early-retirement pension had been granted - pay back also those amounts that R. Uustalu was paid when employed after the attainment of pensionable age.

Tartu County Court, R. Uustalu, the Riigikogu and the Chancellor of Justice are of the opinion that § 43(1) of SPIA was unconstitutional. The Minister of Justice is of the opinion that the referred provision was not in conflict with the Constitution.

Tartu County Court, R. Uustalu and the Riigikogu argue that the regulation is in conflict with § 12 of the Constitution because there is no reasonable justification, upon granting pensions, for unequal treatment of employed persons who have attained pensionable age depending on whether they receive old-age pension under § 7 of SPIA or early-retirement pension under § 9 of SPIA.

The Chancellor of Justice is of the opinion that the regulation under examination constitutes a prohibition to work and to engage in enterprise, and that this prohibition is in conflict with § 29(1) and with the first sentence of § 31 of the Constitution in their conjunction with § 11 of the Constitution.

**12.** § 29(1) of the Constitution establishes the freedom to choose the sphere of activity, profession and place of work and § 31 the right to engage in enterprise.

The Constitutional Review Chamber disagrees with the Chancellor of Justice in that § 43(1) of SIPA established a prohibition to work. The Chamber is of the opinion that § 43(1) of SPIA only precluded payment of early-retirement pension while employed. Neither is the present case brought about by the fact as if R. Uustalu could not work after attainment of pensionable age, instead it was caused by the fact that the pension he received while employed after the attainment of the general pensionable age was claimed back from him.

The fact that § 43(1) did not establish a prohibition to work is illustrated by § 9(6) of SPIA, the implementation of which presumed and presumes the employment of a person receiving early-retirement pension. § 9(6) of State pension Insurance Act establishes the following: "Upon acquisition of an additional pension qualifying period, the amount of an early-retirement pension shall be re-calculated pursuant to the procedure provided for in § 25 of this Act."

The Chamber shall not examine the allegation of the Chancellor of Justice that § 43(1) of SPIA was in conflict with § 31 of the Constitution, because the case of R. Uustalu is not related to engagement in enterprise.

**13.** Next, the Chamber shall examine the conformity of the contested regulation to § 12 of the Constitution, which establishes the general right to equality.

**14.** The county court declared § 43(1) of SPIA, which entered into force on 1 January 2002, unconstitutional to the extent that it prevented payment of early-retirement pension also to those employed persons who had been granted early-retirement pension and who had attained pensionable age, and it allowed to pay old-age pension to those employed persons who had reached pensionable age and to whom old-age pension had been granted on general grounds.

**15.** The county court did not call in question the constitutionality of § 43(1) of SPIA to the extent that it precluded the payment of pension to employed persons who receive early-retirement pension and who have not attained the general pensionable age established by § 7 of SPIA. The Chamber points out that the latter regulation is caused by the nature of old-age pension, because payment of (full) pension to persons who receive the referred pension and who have not attained the general pensionable age would essentially mean lowering the general pensionable age so that old-age pension on general grounds, established in § 7 of SPIA, would very much lose its meaning. It would be unreasonable to wait until the attainment of general pensionable age and to apply for old-age pension under § 7 of SPIA in a situation where, while employed before the attainment of general pensionable age, early-retirement pension is being paid.

**16.** That is exactly the possibility created by the former State Pension Insurance Act, which was passed on 26 June 1998 and entered into force on 1 April 2000, § 8 of which established the early-retirement pension and § 40(4) did not prevent the payment thereof while employed. The Act was amended even before it entered into force. On 8 December 1999 the State Pension Insurance Act, Social Tax Act and State Allowances Act Amendment Act was passed. The Amendment Act added subsection (5) to § 40 of SPIA, which established that early-retirement pension shall not be paid to employed persons. In the explanatory letter to draft No 196 the amendment was justified as follows: "payment of early-retirement pension even while a person is employed would distort the meaning of the type of pension. Early-retirement pension lowers the actual average pensionable age as a result of which the number of pensioners increases. The preclusion of payment of early-retirement pension to employed persons will decrease the burden on pension insurance budget by about 280 million kroons per year."

The content of § 50(5) of that State Pension Insurance Act was introduced also into § 43(1) of the State Pension Insurance Act, which entered into force on 1 January 2002.

Thus, a situation was created where, upon payment of pensions, the employed persons who had attained general pensionable age were treated differently depending on whether they had been granted an early-retirement pension or an old-age pension on general grounds.

**17.** The referred regulation was declared invalid as of 7 January 2005, by "§ 43 of State Pension Insurance Act Amendment Act". Today, all old-age pensioners who have attained pensionable age receive pension, while employed, pursuant to general procedure - the full amount of the pension granted is being paid out. Pursuant to § 43(1<sup>1</sup>) of SPIA, which entered into force on 7 January 2005, early-retirement pension is not paid while a person is employed until he or she attains the pensionable age established in § 7 of the same Act.

**18.** Drafts 325 and 380 were joined in the draft Act Amending § 43 of State Pension Insurance Act. These drafts were submitted with the objective of eliminating unequal treatment of pensioners and paying pension to those employed persons who received early-retirement pension.

At the first reading of the draft the author thereof argued that as a rule persons who retire early are those who have not succeeded in finding a new job and they decide, despite of some loss in the amount of pension, to retire early. By now it is clear that if those who retired early find employment later on, they are in a substantially different situation than other old-age pensioners who are employed. In the supplementary report of the leading committee it was argued that the rules of payment of early-retirement pension of that time even gave a small advantage to those who retired early, because the amount they received during the whole pensionable age was a little bigger than the amount received by those who had waited until the attainment of pensionable age. This situation would be eliminated by increasing the percentage of reducing pension from 0.4 to 0.5%.

The Riigikogu passed the Act Amending § 43 of State Pension Insurance Act, without amending § 9(2), pursuant to which an early-retirement pension is calculated by reducing the pension by 0.4 per cent for every month which remains until the person attains the pensionable age.

**19.** It appears from the materials of the legislative proceeding of the draft Act Amending § 43 of State Insurance Payment Act that the regulation which entered into force on 7 January 2005 was enacted because the Riigikogu could not see any reasonable justifications to different treatment of the referred groups of pensioners, and it wished to eliminate the unequal treatment. The Social Affairs Committee of the Riigikogu reiterates in the opinion submitted to the Supreme Court that the Constitutional Committee of the Riigikogu was of the opinion that there were no reasonable justifications. The Social Affairs Committee agrees with the conclusion of the Constitutional Committee.

**20.** Next, the Chamber shall examine whether the declaration of invalidity of the contested regulation constituted elimination of unequal treatment or a so called positive special measure.

**21.** It appears from the materials of the case that early-retirement pension has been established in order to guarantee permanent means of subsistence to persons who have not yet attained pensionable age and are no longer competitive enough on labour market. A person who has not yet attained pensionable age and who does not find employment is very often facing an alternative - when the period for receiving unemployment benefits, established by law, ends - either to continue without permanent income or have an early-retirement pension granted to him or her. The Chamber is of the opinion that in such a situation the choice in favour of early-retirement pension is, in the majority of cases, a forced choice.

Early-retirement pension is by 0.4% smaller than old-age pension on general grounds per each month which remains until the person attains the pensionable age. Depending on the age when person retires the monthly amount of early-retirement pension may be significantly smaller than the amount of old-age pension. Namely, § 9(7) establishes an unambiguous prohibition to recalculate early-retirement pensions as old-age pensions on general grounds or as old-age pensions under favourable conditions.

Thus, the monthly amount of pension payable to a person who had retired early is smaller than the amount payable to persons receiving old-age pension on general grounds.

**22.** The Chamber admits that the total amount of early-retirement pension receivable during the pensionable age depends on the life-span of a person and may be bigger than old-age pension, granted to those who wait until the attainment of general pensionable age.

When seeking the reasons for different treatment of groups of pensioners who have attained pensionable age it is also necessary to take into account why, as a rule, people retire early, and that the monthly pension of a person who has retired early is always smaller than that of a person to whom old-age pension has been granted.

Upon weighing the Chamber shall also take into consideration that the competitiveness of a person who has attained pensionable age has decreased due to his or her age. That is why it can be anticipated that the pension payable to an employed person who has attained pensionable age and receives early-retirement pension can not be an excessive burden on state pension insurance fund. The fact that this burden can not be excessive is also indicated by the fact that the Riigikogu passed the Act Amending § 43 of the State Pension Insurance Act without amending § 9(2) of SPIA, pursuant to which an early-retirement pension shall be calculated by reducing the pension by 0.4 per cent for every month and a period shorter than a month which remains until the person attains the pensionable age. The referred percentage was not increased to 0.5.

The Chamber points out that the income earned when in the retirement age may even somewhat decrease the expenditure of the state on supporting persons who have retired early and are not employed.

**23.** Bearing in mind the aforesaid the Chamber is of the opinion that the somewhat bigger total amount of pension receivable during the whole period of retirement and a small additional burden on the budget of state pension insurance does not justify that pensioners who have attained general pensionable age and are employed are treated differently depending on whether an early-retirement pension or an old-age pension under § 7 of SPIA has been granted them. That is why the Chamber is of the opinion that the amendment of law, which entered into force on 7 January 2005, can not be regarded as a so called positive special measure but as elimination of unequal treatment.

**24.** For the above reasons the Chamber holds that the wording of § 43(1) of SPIA, in force before 7 January 2005, was in conflict with § 12 of the Constitution to the extent that the provision did not allow to pay early retirement pension to those employed persons who had attained the pensionable age established by § 7 of SPIA.

Märt Rask, Lea Kivi, Ants Kull, Villu Kõve, Jüri Põld

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