Constitutional judgment 3-4-1-20-04

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-20-04
Date of decision	2 December 2004
Composition of court	Chairman Tõnu Anton, members Eerik Kergandberg, Ants Kull, Villu Kõve, Jüri Põld
Court case	Review of constitutionality the petition of the President of the Republic to review the constitutionality of the Act to Amend the Dwelling Act and § 121 the Republic of Estonia Principles of Ownership Reform Act.
Court hearing	Written proceeding
Decision	**To dismiss the petition of the President of the Republic**.

FACTS AND COURSE OF PROCEEDING

1. On 15 June 2004 the Riigikogu passed the "Act to Amend the Dwelling Act and § 12^1 of the Republic of Estonia Principles of Ownership Reform Act". By its resolution no. 671 of 30 June 2004 the President of the Republic refused to proclaim the Act and proposed to the Riigikogu to bring the Act into conformity with the Constitution. On 20 July 2004 the Riigikogu again passed the "Act to Amend the Dwelling Act and § 12^1 of the Republic of Estonia Principles of Ownership Reform Act", unamended. The President of the Republic petitioned the Supreme Court to declare the "Act to Amend the Dwelling Act and § 12^1 of the Republic of Estonia Principles of Ownership Reform Act" (hereinafter "the contested Act") unconstitutional.

OPINIONS OF THE PRESIDENT OF THE REPUBLIC AND THE PARTICIPANTS IN THE PROCEEDING

2. In his petition the President of the Republic argues that the date of entry into force of the amendments made to the Dwelling Act and to the Republic of Estonia Principles of Ownership Reform Act (hereinafter "the PORA") by the contested Act is not in conformity with the principle of legal certainty, proceeding from the principle of a state based on social justice, democracy, and the rule of law, established in § 10 of the Constitution, which requires that upon enforcing new regulations a reasonable time be given to the subjects of the norms for re-arranging their activities under new circumstances. The President is of the opinion that the less than two-months' period, prescribed by the contested Act, is too short. Furthermore, the Presidents points out that upon the implementation of the Act the current social security system will not fully guarantee the right to housing, proceeding from § 28 of the Constitution and established in international conventions of the protection of human rights.

In his supplementary opinion, submitted to the Supreme Court, the President argues that the amendments to the Dwelling Act, which created a possibility to extent the tenancy contracts concerning restituted dwellings for five years and established that the rent margins established by a local government council shall be the margins concerning all restituted dwellings referred to in § 12^1 of the PORA, are inter-related regulations. These created a legitimate expectation to a tenant using a restituted dwelling that there will be a possibility to extend the tenancy contract, and that the rent margins shall be determined during a fixed period. The President also points out that although the vacatio legis, prescribed for by the contested Act, is a sufficient time for the addressees of the norm for familiarising themselves with the rights and obligations imposed by the Act, the time period is obviously insufficient for preparation of changes in their activities and life-arrangements.

3. In its written opinion submitted to the Supreme Court the Constitutional Committee of the Riigikogu argues that the contested Act does not violate the principle of legitimate expectation and therefore the Act is constitutional.

The Constitutional Committee points out that when the ownership reform was carried out, the Acts and the actual activities of the state gave a signal to the tenants of houses that were restituted to lawful owners that they do not and will not have the right to privatise a restituted dwelling and that the right to live in a restituted dwelling and pay a rent lower than the market price was but a temporary measure. As the establishment of rent margins is, according to law, a right and not an obligation of local governments, the declaration of invalidity of rent margins can not be regarded as a perfidious act of the state in regard to tenants. Furthermore, the contested Act does not permit to unilaterally cancel a tenancy contract or to increase the rent drastically. To avoid imposition of unreasonably high rents and forcing anyone to cancel a tenancy contract, the Law of Obligations Act (hereinafter “the LOA”) establishes several remedies for tenants. Among other things a tenant is entitled to contest an excessive increase in rent in a lease committee or court.

Neither does the contested Act violate the tenants’ right to housing, because the invalidation of a norm delegating the authority to establish rent margins does not result in depriving the tenants of a housing. The tenants whose income – after the deduction of expenses – falls under subsistence level after the possible increase in rent, shall be paid subsistence benefits.

The Constitutional Committee also points out that the tenants of the restituted houses had had the right, pursuant to the procedure established by law, to apply for a loan or an aid award from the state or a local government unit for relocation or purchasing a new dwelling, etc.

4. The Chancellor of Justice is of the opinion that the contested Act does not violate the principle of legal certainty and is thus not in conflict with § 10 of the Constitution.

The Chancellor of Justice points out that as the President of the Republic does not contest the abolition of rent margins as such and is only of the opinion that the time period before entering into force of the possibility to abolish rent margins is too short, the Chancellor of Justice shall only form his opinion on the conformity of the term of entering into force of the Act with § 10 of the Constitution.

According to the opinion of the Chancellor of Justice the observance of the principle of legal certainty requires that a reasonable time be prescribed for the entering into force of new regulations, during which the addressees of norms could re-arrange their activities in new circumstances. The Chancellor of Justice argues that although the persons living in dwellings restituted to lawful owners can not possibly have a reasonable expectation that the rent margins will remain in force interminably, they do have a legitimate expectation that after the decision of the legislator to declare invalid the application of rent margins to dwellings restituted during ownership reform, they will have sufficient time to adjust to changes.

The Chancellor of Justice is of the opinion that proceeding from the term of entering into force of the Act,

and from the terms provided for in the Law of Obligations Act for increasing the rent and for cancellation of tenancy contracts, with the possible additional time of proceedings in a lease committee or court, a person will have sufficient time for performing the acts that could be considered necessary for re-arranging of one's life in changed circumstances.

The Chancellor of Justice touches upon the rest of the reasoning of the President of the Republic, although he points out that considering the reasoning of the petition of the President of the Republic he does not consider the issues of existence of a sufficient housing reserve and deficiencies of social security system to be relevant. The Chancellor of Justice points out that as the housing development plan, adopted by the Government of the Republic, and the actual financial allocations to local governments contribute to the protection of the interests and rights of tenants, the Riigikogu has, upon passing the contested Act, sufficiently considered the possibilities of cooperation between the state and local governments in implementation of measures supporting the interests of owners and tenants.

In regard to the allegation of the President of the Republic that upon implementation of the Act the current social security system will not fully guarantee the right to housing, the Chancellor of Justice points out that the issue of conformity of the current social security system to the constitutional right to state assistance in the case of need is not the object of this dispute.

Furthermore, the Chancellor of Justice points out that implementation of extensive ownership restrictions, which the rent margins in fact are, may no longer prove to be justified, bearing in mind the development of society.

5. The Minister of Justice is of the opinion that the contested Act is not in conflict with the Constitution.

The essence of the principle of legitimate expectation does not lie in the presumption that any legal norm and the rights conferred thereby will remain in force interminably. Bearing in mind that it was generally known that the possibility of establishing rent margins was a temporary one, a reasonable person should have foreseen that the possibility for public authorities to establish rent margins and exceptions concerning regulation of tenancy relationships of restituted dwellings and other dwellings, shall be abolished sooner or later.

The abolition of the possibility to establish rent margins does not, in itself, change the rights and freedoms of persons living in restituted dwellings on the bases of tenancy contracts. Rent is fixed by a tenancy contract and the Act can not directly and materially affect already concluded contracts. When the contested amendments enter into force, the lessor of residential space shall not acquire a unilateral right to increase the rent. The rights of a tenant are protected by the provisions of the Law of Obligations Act and the Dwelling Act. As the increase of a rent for a restituted dwelling, due to the invalidation of rent margins, and the contestation of the increase of rent take place pursuant to the procedure established by the Law of Obligations Act, the rights of the tenants living in restituted dwellings are protected equally with the rights of other tenants. Lease committees have been set up for extra-judicial resolution of rent disputes.

Furthermore, the Minister of Justice points out that the possibility to establish rent margins is a measure restricting the ownership right of the owners of houses.

As for the capability of the current social security system to guarantee the right to housing to the tenants of restituted dwellings after the entry into force of the contested Act, the Minister of Justice points out that state assistance to persons in need shall be guaranteed through aid awards, benefits, and the like, and can not be arranged through imposing on individuals the obligation to support.

Contested Provisions

6. It appears from the petition that the President of the Republic had refused to proclaim the Act to Amend the Dwelling Act and § 12^1 of the Republic of Estonia Principles of Ownership Reform Act because of a conflict of § 1(2) and § 3 of the Act with the Constitution. §1(2) of the contested Act repeals § 37^1(2) of

Dwelling Act.

§ 37^1(2) of Dwelling Act (*RT 1992, 17, 254; … RT I 2003, 15, 86*) establishes the following:

"(2) Relevant rate margin established by a local government council shall be the margin in regard of all dwellings referred to in § 12^1 of the Republic of Estonia Principles of Ownership Reform Act, located on the same administrative territory. An amount of rate, different from the rate margin, may be agreed upon in a tenancy contract with the consent of the tenant."

According to § 37^1(1) of the Dwelling Act a local government council shall have the right to establish on its administrative territory the rate margins for the dwellings in the municipal property. Pursuant to the second sentence of the same subsection a local government council shall change the rent margins once every 12 months, if the prices affecting rent have changed since the time the margins were established.

§ 3 of the Act to Amend the Dwelling Act and § 12^1 of the Republic of Estonia Principles of Ownership Reform Act establishes the following:

"The Act shall enter into force on 1 September 2004."

Opinion of the Constitutional Review Chamber

7. In order to adjudicate the matter the Chamber shall first examine the effect of the amendments made by the contested Act and shall resolve the issue of the addresses of the norm (I). Next, the Chamber shall examine whether the amendment to the Dwelling Act and the Republic of Estonia Principles of Ownership Reform Act, which deprives local governments of the possibility to establish rent margins in relation to dwellings situated in unlawfully expropriated and restituted houses, violates the legitimate expectation of tenants living in dwellings situated in restituted houses (hereinafter: tenants of restituted houses) that the rent margins will remain in force (II). After that, the Chamber shall analyse whether the time period between the publication and entering into force of the contested Act (*vacatio legis*) is sufficient for the tenants of restituted houses for adaptation to the changed legal situation (III). Fourthly, the Chamber shall address the relation of the amendments made by the contested Act with the right to housing, proceeding from the Constitution (IV). Finally, the Chamber shall analyse the entering into force of the Act after the judgment of the Supreme Court (V).

I.

8. The principal content of the amendments made to the Dwelling Act and to § 12^1 of the Republic of Estonia Principles of Ownership Reform Act is the declaration of invalidity of the norm delegating authority to a local government council to establish rent margins on its administrative territory in regard to dwellings listed in § 121 of the PORA, that is in regard to dwellings situated in restituted houses. Thus, first of all the Chamber considers it necessary to analyse the legal situation resulting in the declaration of invalidity of the referred norm delegating authority, and to ascertain the direct and indirect addressees of the contested norm.

9. Pursuant to § 93(1) of the Administrative Procedure Act a regulation is valid until it is repealed by an administrative authority or the Supreme Court, or until expiry, or until repeal of the provision delegating authority. As a rule, pursuant to this provision, if a provision delegating authority is repealed, the regulation shall automatically become invalid. Local government regulations, establishing rent margins on their administrative territories, shall become invalid – upon entering into force of the contested Act – to the extent that they established rent margins in regard to dwellings situated in restituted houses on their administrative territories.

10. A direct addressee of the contested Act is a local government council, who is deprived of the right to establish rent margins. The tenants and owners of restituted dwellings are the indirect addressees, because after the entry into force of the contested Act they will be in a new legal situation irrespective of the activities of the direct addressees of the Act. The Chamber considers it necessary to analyse the effect of the

contested Act on the indirect addressees, too.

II.

11. The President of the Republic argues in his petition that the term of entering into force of the amendments made by the contested Act is not in conformity with legal certainty and legitimate expectation, proceeding from the principle of a state based on social justice, democracy, and the rule of law, established in § 10 of the Constitution. The President of the Republic argues that, among other things, the regulatory framework is unconstitutional because when abolishing the rent margins the legislator has not sufficiently taken into account the legal interests of different persons, especially those of tenants. In essence, the President of the Republic argues that the tenants of restituted houses had a legitimate expectation that the state shall not abolish rent margins until it has found an alternative solution to their housing problem. In his supplementary opinion, submitted to the Supreme Court, the President of the Republic argues that the 2002 amendment to the Dwelling Act, which created a possibility to again extend the tenancy contracts of restituted dwellings for five years, created a legitimate expectation for the tenants of restituted houses that during the referred period there will be a possibility to extend the tenancy contracts and to establish rent margins.

12. The principle of legal certainty is based on § 10 of the Constitution, according to which the rights, freedoms and duties set out in Chapter II of the Constitution shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution and conform to the principles of human dignity and a state based on social justice, democracy, and the rule of law. In the most general sense this principle should create certainty in regard to the current legal situation. Legal certainty means clarity in regard to the content of valid norms (principle of legal clarity) as well as certainty that the enforced norms shall remain in force (principle of legitimate expectation).

13. The petition of the President of the Republic is primarily based on the principle of legitimate expectation. Pursuant to the principle of legitimate expectation everyone should have a possibility to arrange his or her life in reasonable expectation that the rights given to and obligations imposed on him or her by the legal order shall remain stabile and shall not change dramatically in a direction unfavourable for him or her. In 1994 the Constitutional Review Chamber of the Supreme Court pointed out that according to the principle of legitimate expectation "[…]everyone has a right to conduct his or her activities in the reasonable expectation that applicable Acts will remain in force. Everyone must be able to enjoy the rights and freedoms granted to him or her by law at least within the period established by the law. Modifications to the law must not be perfidious towards the subjects of the law" (*see judgment of the Constitutional Review Chamber of 30 September 1994 in case no. III-4/A-5/94 – RT I 1994, 80, 1159*).

14. The principle of legitimate expectation does not mean that any restriction of persons' rights or withdrawal of benefits is impermissible. The principle of legitimate expectation does not require fossilization of valid regulatory framework – the legislator is entitled to re-arrange legal relationships according to the changed circumstances and, by doing this, inevitably deteriorate the situation of some members of society. The legislator is competent to decide which reforms to undertake and which groups of society to favour with these reforms. The Chamber shall not analyse the expediency of the political decision taken by the legislator – the Chamber can only review the constitutionality of the Act.

15. Thus, it is necessary to answer the question of whether the tenants of restituted houses have a legitimate expectation that the rent margins will remain in force, or in other words, whether the abolition of rent margins in regard to dwellings situated in houses restituted to lawful owners is perfidious towards the tenants. First, the Chamber considers it necessary to clarify why the rent margins were created and the legal character of the authority of local governments to establish rent margins.

16. § 37^1 was inserted into the Dwelling Act on 10 June 1998, by the Republic of Estonia Dwelling Act Amendment Act. Before the adoption of the referred Act the calculation of rent for a dwelling was regulated

by “Methodological principles of calculation of rent for dwellings upon the lease thereof”, approved by the Government of the Republic Regulation no. 254 of 12 August 1993, which established the bases for calculating the amount of rent for all lessors of residential spaces on the territory of the Republic of Estonia, irrespective of the form of ownership of the dwelling. According to clause 3 of this legal act a rent exceeding the rent margin established by a local government body could not be imposed. The right to establish rent margins was given to local governments by the Government of the Republic Regulation no. 69 of 6 March 1992 “Amendments to procedure for calculating rent for dwellings and establishment of rent margins”.

17. It appears from the history of development of rent margins that from the very beginning the rent margins had been considered to be a transitory measure.

According to the explanatory letter to the draft of the Dwelling Act Amendment Act (628 SE), passed on 10 June 1998, the right of local governments to establish rate margins was to create possibility “to gradually start to free up the rent amounts, thanks to which an actual housing market will be created as well as the interest of the owners to take better care of houses.” On 19 November 1997, at the second reading of the draft in the Riigikogu, the Minister of Economic Affairs, acting as the representative of the Government, pointed out that the transition period in housing can not be extended interminably and the rents should be set free as soon as possible. At the continuing of the second reading on 18 February 1998 the Minister of Economic Affairs emphasised that the local governments had a right, not an obligation, to establish rent margins, and expressed his hope that with the increase of standard of living the gap between the rent equal to market prices and the rent that people can actually afford to pay shall diminish, which “shall bring us closer to the possibility to free up the rent some day.”

During the debates over the “Law of Obligations Act, the General Principles of Civil Code Act and the International Private Law Act Implementation Act” in the Riigikogu in 2002 it was repeated again that rent margins were of temporary character. The Minister of Justice, representing the Government, who presented the draft, pointed out at the second reading of draft 894 SE on 23 January 2002, that abolition of rent margins within the framework of such an extensive legal act was unthinkable and would require a separate discussion. The Minister of Justice emphasised that the necessity to establish rent margins was related to the level of social development and pointed out that “it shall be up to the Riigikogu to decide when to take the decision [to abolish rent margins].”

Thus, the legislator considered the rent margins to be temporary both when adding the provision to the Dwelling Act allowing to establish rent margins, and when discussing the issue later on.

18. It is also important that the tenants of restituted houses have never been given a subjective right to rent margins by law. A local government was allowed to establish on its administrative territory a rent margin, but it was also allowed not to do it, as well as to change its decision in both directions. The local governments were also entitled to abolish rent margins.

Besides, rent margins for dwellings situated in restituted houses have not been established by all Estonian local government units. Neither is it unprecedented that a local government unit, which used to have rent margins, has abolished these. If the tenants of restituted houses had the right to demand that a local government unit establish such a benefit in payment of rents for them, the right of a local government to establish or not to establish a rent margin on its administrative territory would become but an illusory one.

19. The non-existence of a conflict with the principle of legitimate expectation is further manifested by the fact that the Dwelling Act does not prescribe for a term during which the rent margins shall not be abolished. The Dwelling Act does not prohibit to revise rent margins and does not establish the upper limit of rent margins, either.

20. In his supplementary opinion, submitted to the Supreme Court, the President of the Republic argues that the promise that rent margins will remain in force was given by the “Law of Obligations Act, the General Principles of Civil Code Act and the International Private Law Act Implementation Act”, passed on 5 June

2002.

The Chamber is of the opinion that the referred Act did not establish a new regulation in regard to rent margins of restituted houses and did not entitle the tenants of restituted houses to demand the application of rent margins in tenancy relationships. The Act only withdrew the right of local governments to establish rent margins irrespective of form of ownership and the pertinent right was left in force in regard to restituted houses.

21. Bearing in mind the aforesaid the Chamber is of the opinion that the tenants of restituted houses do not have and have not had a ground for the legitimate expectation that rent margins will remain in force. The abolition of rent margins is not perfidious towards tenants of restituted houses, be it done by a legislation of a local government or by an Act.

22. It appears from the petition of the President of the Republic that the principle of legitimate expectation could also be violated if, upon withdrawal of the right to establish rent margins, the housing problems of tenants of restituted houses are not solved by some other way.

23. Legitimate expectation primarily amounts to a requirement that a law, which has already been implemented, shall not be declared invalid perfidiously. During the course of establishment of rent margins the state has never legitimised the principle that the abolition of rent margins should be accompanied by alternative measures for increasing the wellbeing of tenants of restituted houses. Although relevant possibilities (compensation for the amount of rent, construction of municipal houses for all tenants of restituted houses, etc.) have been touched upon during the debates in the Riigikogu, it has not lead to an imposition of a pertinent obligation on the state by a law. The principle of legitimate expectation does not mean that it could be invoked to demand that the legislator establish the benefits that have been a subject of political discussions.

III.

24. The President of the Republic argues in his petition that the term prescribed for the entering into force of the new regulation (*vacatio legis*) is not in conformity with the principles of legal certainty and legitimate expectation, proceeding from the Constitution.

25. It was on 15 June 2004 that the Riigikogu passed the Act, contested by the President of the Republic, for the first time. Taking into account the time spent on sending the passed Act to the President, time needed for proclamation of the Act pursuant to § 107 of the Constitution and time needed for publication of the Act in the Riigi Teataja [State Gazette], and the fact that pursuant to the Act, which was not proclaimed, it should have taken effect as of 1 September 2004, about 6 weeks would have been left for the addressees of the norm to adjust themselves to a new legal situation. In his petition the President of the Republic also refers to a “less than two-months’ period”.

26. The principle of legal certainty means, *inter alia*, that for the enforcement of a new regulation a reasonable time period should be provided for, during which the addressees could familiarise themselves with the new provisions and re-arrange their activities accordingly. A situation where the state does not establish new regulations arbitrarily and overnight, is in conformity with the principle of legal certainty. The same requirement can be derived from § 13(2) of the Constitution, pursuant to which the law shall protect everyone from the arbitrary exercise of state authority, and from general principles of law.

Thus, when creating a new legal order, the legislator must guarantee that the addressees of law have reasonable, i.e. sufficient amount of time for re-arranging their activities. Sufficiency or reasonableness can be assessed taking into account the nature of the legal relationship under discussion, the extent of change of the relationship and the necessity of re-arrangement of the activities of addressees of norm arising from the change, and also by assessing whether the change in the legal situation was a predictable or unexpected one.

27. According to § 108 of the Constitution an Act shall enter into force on the tenth day after its publication in the Riigi Teataja. This principle has not been established randomly – this is the time left for the addressees of a norm for familiarising themselves with the rights and obligations established by an Act and for re-arranging their lives accordingly. As the Constitution considers, as a rule, a nine-day *vacatio legis*to be acceptable, there must be very good reasons for declaring entering into force of an Act on the tenth day unconstitutional, with the justification that a longer term before entering into force is necessary. Such reasons may probably exist, for example, in the course of a comprehensive reform of a whole branch of law.

28. The President of the Republic is of the opinion that in the case of abolition of rent margins the observance of general rules is not justified. The Chamber is of the opinion that there is no sufficient ground for considering a nine-day vacatio legis too short, because in the given case the change is not an unexpected or a large-scale one. To check this opinion of principle the Chamber shall analyse the changes in the relationships between tenants and lessors.

29. Upon entering into force of the contested Act the local government council regulations shall automatically become invalid to the extent that they establish rent margins for dwellings situated in restituted houses. The Chamber is of the opinion that if, subsequently, a lessor had the right to increase the rent immediately and without any limits, the entering into force of the Act pursuant to general procedure would bring about grave social consequences, and this could, in principle, serve as a reason why a longer period before enforcement would be necessary.

30. Firstly, the Chamber considers it necessary to underline that the abolition of a provision permitting the establishment of rent margins does not mean an automatic increase in rent. The relationship between a lessor and a tenant is regulated, in addition to law, also by a contract concluded between them. To answer the question of whether upon entering into force of the Act a lessor will have a possibility to increase the rent immediately and without any limits, and do it unilaterally, it is necessary to examine the provisions concerning tenancy contracts between tenants and lessors.

31. According to § 12^1(1) of the PORA, a residential lease contract in force at the time of return of a residential building is deemed to be valid for three years after the transfer of the right of ownership in the residential building to the entitled subject unless the tenant and the owner agree otherwise upon return of the residential building. According to subsection (3) of the same section, upon expiry of the term of a residential lease contract the contract is extended for five years. Under the second sentence of § 12^1(11) of the PORA, upon expiry of the term of a residential lease contract which was extended for five years pursuant to § 12^1, the residential lease contract may be extended pursuant to § 32 or 33 of the Republic of Estonia Dwelling Act. Pursuant to § 32(4) of the Dwelling Act, § 32 of the Dwelling Act is applied, upon expiry of the five-year term of a residential lease contract indicated in § 12^1(3) of the PORA, for the one-time extending of the contract or for concluding a new contract, whereas the lessor is entitled to contest the extension of the contract only in the cases enumerated in § 33 of the Dwelling Act. § 2 of the Act, submitted for the constitutional review by the President of the Republic, supplements § 12^1 of the PORA by subsection (13), pursuant to which to increase in rent resulting from the abolition of rent margins, and to contestation thereof the terms and the procedure established in the Law of Obligations Act shall apply.

32. The regulation of the Law of Obligations Act concerning increase in rent is a general one and does not depend on whether a dwelling is restituted or not. Rules differ depending on whether a tenancy contract was entered into for a specified or unspecified term. Subsections (1) and (3) of § 12^1 of the PORA prescribed for the conclusion of contracts for a specified term. Also, § 31(2) of the Dwelling Act, which was in force until 1 July 2002, provided by way of a general rule that tenancy contracts shall be concluded for a specified term and that if no term is indicated in the contract, the contract is considered to have been concluded for the term of five years. Thus, as a rule, until 1 July 2002, the law did not allow for the conclusion of tenancy contracts for an unspecified term. Pursuant to § 15(3) of the “Law of Obligations Act, the General Part of Civil Code Act, and the International Private Law Act Implementation Act” the legal situation in regard to tenancy contracts concluded for an unspecified term before 1 July 2002 did not change upon entering into force of

the Law of Obligations Act. The referred contracts were considered to have been entered into for five years, as of the conclusion thereof. The Civil Chamber of the Supreme Court was of the same opinion in its judgment of 28 October 2004 in case no. 3-2-1-94-04 (RT III 2004, 30, 320).

33. Pursuant to the Law of Obligations Act an increase in rent in case of tenancy contract for unspecified term is possible only in exceptional cases. Pursuant to § 300 of the Law of Obligations Act (hereinafter "the LOA") increase in rent in case of tenancy contract for a specified term is possible only if an agreement on a periodical increase in the rent of a dwelling has been entered into. The agreement is valid only if the lease contract is entered into with a term of at least three years, the rent increases not more than once a year, and the extent of the increase in the rent or the basis for calculation thereof are precisely determined. Consequently, in case of a tenancy contract for a specific term the rent can be increased only if the tenant of a restituted building and the lessor have agreed upon the increase in the rent or the basis for calculation thereof. Thus, in case of contracts for specific terms, the abolition of rent margins shall not bring about any significant changes in the relationships between a tenant and a lessor. Consequently, in regard to contracts for specified term, the term for entering into force of the Act is clearly sufficient. The regulation of the LOA concerning tenancy contracts is imperatively in favour of tenants (§ 275 of the LOA).

34. In case of tenancy contracts concluded for unspecified term a lessor of a dwelling shall, pursuant to § 299(2) of the LOA, notify the tenant of any increase in the rent in a format which can be reproduced in writing not later than thirty days before the increase in the rent and shall provide the reasons therefor. Pursuant to § 303(1) of the LOA a lessee may contest an excessive increase in the amount of the rent for a dwelling. Pursuant to § 301(1) of the LOA the rent for a dwelling is excessive if unreasonable benefit is received from the lease of the dwelling, except in the case of a luxury apartment or house. Pursuant to § 301(2) of the LOA the amount of the rent for a dwelling is not excessive if it does not exceed the usual rent for a dwelling in a similar location and condition. Pursuant to § 301(3) of the LOA an increase in the rent is not excessive if it is based on an increase in the expenses incurred in relation to the dwelling or an increase in the obligations of the lessor or if the increase in the rent is necessary in order to make reasonable improvements or alterations. Thus, if a restituted dwelling is used on the basis of a contract for unspecified term to which the rent margin was applicable up to now, the increase in the rent would also be possible not earlier than 30 days after the entering into force of the Act abolishing rent margins. Even then it would not be possible to increase the rent to unjustifiable extent.

35. Upon entry into force of the contested Act not all tenancy contracts, referred to in § 12^1 of the PORA, extended for five years, will have been expired. Pursuant to § 12^1(11) of the PORA, upon expiry of the term of a residential lease contract which was extended for five years pursuant to § 12^1, the residential lease contract may be extended pursuant to § 32 or 33 of the Dwelling Act. In that case the tenancy contract provisions of the Law of Obligations Act shall not be applied to the extension of tenancy contracts. Thus, those tenants, whose tenant contracts, extended by five years pursuant to § 12^1(3) of the PORA, have not expired by the time of entry into force of the contested Act, shall have the pre-emptive right on the basis of § 32(1) of the Dwelling Act, when the tenancy contract expires – to conclusion of a new tenancy agreement or the contract shall be considered extended under § 32(2) of the Dwelling Act. The Chamber is of the opinion that although § 32(1) of the Dwelling Act allows to demand the change of contract terms upon entering into a new tenancy agreement, the lessor of a dwelling can not change the conditions unilaterally and immediately after the expiry of the contract. Pursuant to § 32(3) of the Dwelling Act, if a tenant does not conclude a new tenancy contract, a lessor may have a recourse to the court for concluding a new tenancy contract only after thee months as of sending a written notice. The Chamber is of the opinion that the protection against the increase in rent, provided for in §§ 32 and 33 of the Dwelling Act, is also a measure, which gives a tenant sufficient time for adjusting to the changed situation.

36. Thus, the Law of Obligations Act contains several protective measures against immediate and excessive increase in rent. When establishing the contested regulation the legislator has considered the referred measures sufficient for the protection of the rights of tenants. The Chamber has no reason to doubt the efficiency of the protective measures chosen by the legislator.

37. The Law of Obligations Act also contains several protective measures against unilateral cancellation of tenancy contracts. Pursuant to § 313 of the LOA a contract entered into for a specified term may be cancelled only with good reason. Extraordinary cancellation is permissible primarily in the circumstances referred to in §§ 314-319 of the LOA. Pursuant to § 312(1) of the LOA, either party may cancel a lease contract entered into for an unspecified term by giving at least three months' notice. Like in the case of tenancy contracts for specified term, the contracts entered into for an unspecified term may be cancelled with a good reason and mainly in the circumstances enumerated in §§ 314-319 of the LOA. And even a valid cancellation can be contested by a tenant in a court pursuant to § 326(1) and § 327 of the LOA, if the cancellation is contrary to the principle of good faith (*see judgment of the Civil Chamber of the Supreme Court of 29 October 2004 in civil matter no. 3-2-1-100-04 – RT III 2004, 30, 321*). Further protection to tenants is provided by § 326(2) of the LOA, pursuant to which, upon cancellation of a lease contract by the lessor, the lessee of the dwelling may demand that the lessor extend the lease contract for up to three years if termination of the contract would result in serious consequences for the lessee or his or her family. Tenants are guaranteed a possibility to address a lease committee or a court for the protection of their rights. Pursuant to the principle of good faith a lessor may not cancel a tenancy contract during a period when proceedings are pending concerning the lease contract before a lease committee or court (§ 327(2) of the LOA).

38. What is also to be taken into account is the fact that the Dwelling Act does not guarantee a rent margin or the amount thereof. Local governments only had a right and not an obligation to establish rent margins. The abolition of the possibility to establish rent margins does not result in a change in the relationships of all lessors and tenants. In several towns of Estonia no rent margins have ever been established.

39. The Chamber is of the opinion that as there are no grounds for establishing a longer term for entering into force of the contested Act than prescribed by the Constitution, and as the lessor when increasing the rent must, in addition to the term of entering into force of the Act, also observe the restrictions on the increase in rent proceeding from the Law of Obligations Act, and has to take into consideration the possibility of contestation, sufficient time has been given to tenants of restituted houses to perform the acts necessary for re-arranging their lives in the changed situation.

40. The Chamber considers it necessary to point out that within the framework of abstract norm control on the basis of a petition of the President of the Republic the constitutionality of a contested Act or a part thereof is assessed in an abstract, general way. Irrespective of the outcome of abstract norm control, everyone shall retain a possibility to contest the increase in rent and the constitutionality of the norms serving as a basis for the increase in rent within a concrete court case (*see mutatis mutandis the judgment of Constitutional Review Chamber of 8 November 1996 in case no. 3-4-1-2-96 – RT I 1996, 87, 1558, IV*) with other justifications than the insufficiency of time period between the publication of the Act, which was not proclaimed at first by the President of the Republic, and the entering into force thereof (*vacatio legis*).

IV.

41. In his petition the President of the Republic has argued that in addition to the violation of the principle of legitimate expectation the abolition of rent margins is not justified also because upon entry into force of the Act the current social security system will not fully guarantee the right of every person to housing, proceeding from § 28 of the Constitution. By this statement the President of the Republic has, in essence, contested the activities of the legislator.

42. The legislator's failure to act or insufficient action may, indeed, be in conflict with the Constitution and the Supreme Court can ascertain unconstitutionality of the omissions of the legislator within constitutional review proceedings. The law clearly gives such competence within concrete norm control on the basis of a court judgment. Pursuant to § 9(1) of the Constitutional Review Court Procedure Act the courts of first and second instance may declare unconstitutional the failure to issue legislation of general application and refer pertinent judgments to the Supreme Court for the review of constitutionality. Even before the referred

provision entered into force the Supreme Court had recognised the unconstitutionality of the legislator's failure to act in relation to everyone's right to organisation and procedure (*see judgment of Constitutional Review Chamber of 17 February 2003 in case no. 3-4-1-1-03 – RT III 2003, 5, 48, paragraph 12*).

43. In addition to declaring the legislator's failure to act unconstitutional in the framework of concrete norm control, the Supreme Court has also accepted the right of the Chancellor of Justice to contest the omissions of the legislator. For example, on the basis of the petition of the Chancellor of Justice the Supreme Court has declared invalid § 221(4) of the Social Welfare Act to the extent that expenses connected with dwelling of needy people and families who were using dwellings not referred to in § 22^1(4) of the Social Welfare Act were not taken into account and were not compensated for upon the grant of subsistence benefits, because the provision was in conflict with §§ 28(2) and 12(1) of the Constitution (*see judgment of Constitutional Review Chamber of 21 January 2004 in case no. 3-4-1-7-03 – RT III 2004, 5, 45*).

44. The Chamber is of the opinion that the President of the Republic has the right to contest the legislator's failure to act. There are no convincing reasons why, in regard to review of laws, the President of the Republic should not have rights equal to those of the Chancellor of Justice. If an Act lacks a norm which it should contain pursuant to the Constitution, the President of the Republic is allowed not to proclaim the Act.

45. The right of the Chancellor of Justice and the President of the Republic to contest the legislator's failure to act can not be an unrestricted right. Otherwise the President of the Republic could raise any constitutional issue when proclaiming any Act. The President of the Republic can only assess Acts which have been submitted to him for proclamation. On the other hand, it is clear that not each norm has a determined place in the system of legal acts and that it is the legislator who is entitled to determine the structure of legislation of general application. That is why the President of the Republic can contest the legislator's failure to act only when the norm, which has not been passed, should be included namely in the contested legal act or is essentially related to the act.

46. The Chamber argues that the President of the Republic is not entitled to contest the legislator's failure to act when the norm, which was not passed, should undoubtedly be included in some other Act, already proclaimed, or if the legislator has provided for the allegedly non-issued norms in some other Act. In such a case it is the constitutionality of some other, already proclaimed Act, that is contested. The President of the Republic has no such competence – he can only contest the norms that he has not yet proclaimed.

47. In his petition the President of the Republic argues that upon the implementation of the Act the current social security system will not sufficiently guarantee the right to housing. In essence, the President of the Republic has contested the norms of the Social Welfare Act, concerning the right to housing allowance. Pursuant to § 22 of the Social Welfare Act, a person living alone or a family whose monthly net income, after the deduction of the fixed expenses connected with dwelling, is below the subsistence level has the right to receive a subsistence benefit, which also includes a housing allowance. A subsistence benefit can also be applied for by the tenants of restituted dwellings. The President of the Republic does not argue that the right to housing of tenants of restituted houses is or should be of different extent than the general right of every person to housing. Thus, the President of the Republic has contested the Social Welfare Act, which is already in force. The President of the Republic has no such competence, and that is why the Chamber can not review that part of the petition of the President of the Republic on its merits.

V.

48. Finally, the Chamber shall analyse the issues related to proclamation of the Act contested by the President of the Republic.

49. Pursuant to § 3 of the contested Act, the Act to Amend the Dwelling Act and § 121 of the Republic of Estonia Principles of Ownership Reform Act shall enter into force on 1 September 2004. This date has expired. The Chamber does not consider the retroactive enforcement of the Act possible. The Chamber has

found (see above paragraph 39) that the general nine-day *vacatio legis* contested by the President of the Republic, to which the terms for the amendment or cancellation of tenancy contracts and for the contestation thereof, provided by law, should be added, constitutes a time period sufficiently long for the tenants of restituted houses to be able to make necessary changes in their life-arrangements.

50. The Act contested by the President of the Republic shall enter into force pursuant to the general procedure, that is on the tenth day after publication in the Riigi Teataja, and not on 1 September 2004.
