Constitutional judgment 3-4-1-7-04

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-7-04
Date of decision	31 May 2004
Composition of court	Chairman Tõnu Anton and members Eerik Kergandberg, Lea Kivi, Ants Kull and Villu Kõve
Court case	Petition of the Tartu Administrative Court to review the constitutionality of § 89(4) of the Health Insurance Act.
Basis of proceeding	Judgment of the Tartu Administrative Court of 18 February 2004
Date of court hearing	28 April 2004
Persons participating in the hearing	Johannes Toom and his representative sworn advocate Rein Napa, representative of the Health Insurance Fund sworn advocate Toomas Vaher, representatives of the Chancellor of Justice Madis Ernits and Ave Henberg and the representatives of the Minister of Social Affairs Signe Vool and Riina Paal
Decision	**To dismiss the petition of the Tartu Administrative Court.**

FACTS AND COURSE OF PROCEEDING

1. On 6 December 2002 the director of the South Estonian division of Health Insurance Fund sent a notice to J. Toom on the basis of § 89(4) of the Health Insurance Act (hereinafter "the HIA") to inform him that his insurance cover will expire on of 1 January 2003.

2. On 7 January 2003 J. Toom filed an action with the Tartu Administrative Court requesting that the court declare the termination of his insurance cover by the South Estonian division of Health Insurance Fund unlawful and the Health Insurance Act unconstitutional. The person who filed the action argued that he was deprived of his constitutional right to health protection and that the state and local governments have not arranged for the provision of health care to persons not covered by health insurance.

3. On 4 March 2003 the Tartu Administrative Court dismissed the action of J. Toom. The court pointed out that pursuant to § 89(4) of the HIA the dependant spouse of an insured person was also deemed to be a person considered equal to insured persons. The letter from the Health Insurance Fund did not terminate the insurance cover, instead it informed of the termination. In addition, the Tartu Administrative Court pointed out that the Constitution did not guarantee the right of every person to any type of health care free of charge.

4. J. Toom filed an appeal against the judgment of the Tartu Administrative Court, in which he requested that the judgment of the administrative court be annulled. The Tartu Circuit Court, too, dismissed the appeal of J. Toom. The circuit court reasoned as follows:

1. § 89(4) of the HIA is not in conflict with § 28 of the Constitution, as the Constitution does not establish concrete criteria a health insurance system set up by the state shall conform to.

2. The fact that health insurance is solidarity-based does not mean that all persons should have insurance cover. Solidarity means that those persons, who are unable to pay insurance premiums themselves, shall have insurance cover.

3. The court did not consent to the argument of the person who filed the appeal that expiry of insurance protection significantly restricts his free movement in Estonia and possibilities to see a doctor, because the Health Care Services Organisation Act guarantees everyone the right to emergency care.

5. J. Toom filed an appeal in cassation against the judgment of the Tartu Circuit Court, in which he requested that the judgments of the administrative court and of the circuit court be annulled, because the courts failed to review the constitutionality of the Health Insurance Act. Furthermore, the appellant in cassation argued that no preconditions or age preferences should be established in regard to persons covered by health insurance. The Act establishes that persons with up to five years left until attaining pensionable age, who are maintained by their spouses who are insured persons, are considered to be equal to insured persons. But in the case of unemployment a person with chronic illnesses may not find a job already 15 years before attaining pensionable age.

6. By its judgment of 10 November 2003 in case no. 3-3-1-65-03 the Administrative Law Chamber of the Supreme Court allowed the appeal in cassation of J. Toom and referred the matter back to the Tartu Administrative Court for a new hearing. Pursuant to the referred judgment the courts had interpreted the requests in the appeal too narrowly and had failed to ascertain the facts relevant to the adjudication of the matter.

7. By its judgment of 18 February 2004 the Tartu Administrative Court satisfied the action of J. Toom, declared the measure of the director of the South Estonian division of Health Insurance Fund of 6 December 2002 unlawful, declared § 89(4) of the HIA unconstitutional and did not apply it.

OPINION OF THE ADMINISTRATIVE COURT AND PARTICIPANTS IN THE PROCEEDING

8. The Tartu Administrative Court held that § 89(4) of the HIA was in conflict with § 28 of the Constitution. § 28 of the Constitution establishes the subjective right of persons to the protection of health and pursuant to

§ 15(1) of the Constitution the judicial protection of the right shall be guaranteed. The Tartu Administrative Court also referred to Articles 9 and 12 of the International Covenant on Economic, Social and Cultural Rights, and to Articles 11, 12 and 13 of Chapter I of the European Social Charter (Revised).

The court held that although the expiry of health insurance did not prevent J. Toom from seeing a doctor, J. Toom lacked the means – regardless of his own intentions to pay for health care services. In his action and in the course of court proceedings J. Toom had repeatedly pointed out that he was not capable of paying insurance premiums and paying for health care services, because he could not find work meeting his capabilities because of his disease which has remained untreated due to the lack of money.

The court held that it proceeded from the Constitution and the referred provisions of the international agreements that the health insurance of a person who does not find work regardless of his or her intentions and who is a needy person need not be the same as that of a person for whom social tax is paid, yet the difference must not be disproportionally big.

9. The Chancellor of Justice is of the opinion that § 89(4) of the HIA was not a relevant provision for the adjudication of the case. Declaration of unconstitutionality of § 89(4) of the Health Insurance Act would mean that J. Toom would have lost his health insurance protection as of the entering into force of the Act on 1 October 2002. J. Toom wished that the court recognise that he as a dependent, non-working spouse of an insured person was a person considered equal to insured persons also after 1 January 2003. Thus, he contested the expiry of insurance protection and requested that the court recognise his continued insurance protection. The health insurance of J. Toom expired on the basis of § 5(4)4) of the HIA, and thus the constitutionality of this provision should be reviewed.

The Chancellor of Justice is of the opinion that the regulation of § 5 of the HIA, to the extent that it excluded from among the circle of persons covered by health insurance the persons with up to five years left until attaining pensionable age who are maintained by their spouses who are insured persons, and who – irrespective of their intent – can not find a job and who have not refused to accept the jobs offered, is in conflict with § 28(1) of the Constitution in conjunction with the principle of equal treatment established in the first sentence of § 12(1) of the Constitution.

10. The Minister of Justice is of the opinion that § 89(4) of the HIA is not a relevant provision for the adjudication of the action of J. Toom and the declaration of unconstitutionality of the provision will not contribute to the restoration of the rights of J. Toom.

Neither is the wording of the Health Insurance Act which entered in force on 1 October 2002 in conflict with §§ 10, 11 and 28(1) of the Constitution. The entering into force of the Act did not mean that persons who are capable for but can not find suitable jobs and who lack other grounds for health insurance were deprived of all health care, because health insurance system is not the only form of arrangement of health care.

11. The Social Affairs Committee of the Riigikogu is of the opinion that § 89(4) of the HIA is not relevant for the adjudication of the matter. Pursuant to § 89(4) of the HIA, until 1 January 2003, the dependent spouse of an insured person was also deemed to be a person considered equal to insured persons. Similar regulation was in force also on the basis of § 2(2)1) the Republic of Estonia Health Insurance Act, which was in force until 1 October 2002. The objective of the referred provisions was to guarantee the health insurance protection to women raising children, on the condition that their husbands earned income taxable with social tax. The aim was worded more clearly in the new Health Insurance Act. In regard to the dependent spouse of an insured person, who lost health insurance cover, § 89(4) of the HIA established a three-months' transition period.

It is not justified to consider a person who has a capacity for work but does not have a suitable job to be equal to insured persons. If the unemployed persons obtained health insurance cover without anyone paying insurance premiums for them, this would deteriorate the situation of insured persons. Social protection is guaranteed to the unemployed for 270 days and the period may be extended by 90 days. A person capable

for work must be active himself and the state can not maintain a person capable for work for an unlimited period. Emergency care and emergency medical care are guaranteed to every person. Through this the state is fulfilling the obligation proceeding from § 28(1) of the Constitution.

12. The Minister of Social Affairs is also of the opinion that § 89(4) of the HIA is not a relevant norm. § 89(4) of the Health Insurance Act provides for specific implementation cases of the Act, the content of which is to extend the health insurance cover to those persons who had been insured as the dependent spouses of insured persons.

The Minister of Social Affairs is of the opinion that health insurance system provided for in the Health Insurance Act is not in conflict with § 28(1) of the Constitution. Health insurance has been arranged solidarily – all insured persons contribute in the form of insurance premium payments and benefits are paid as necessary.

To strengthen the principle of insurance the Health Insurance Act has enlarged the circle of persons who are obliged to make payments into the budget of the Health Insurance Fund and has restricted the circle of persons who are of working age and capable for work who are entitled to receive health insurance benefits without having to pay for them. Health insurance system is not the only form of arrangement of medical care. The minimum level of medical care is established by §§ 6(1) and 16(2) of the Health Services Organisation Act, pursuant to which each person staying in the territory of the Republic of Estonia has the right to receive emergency care and emergency medical care.

13. J. Toom is of the opinion that pursuant to Health Insurance Act health insurance is solidarity-based and it is unlawful to confine health insurance to insured persons only. It is also unlawful to limit the duration of health insurance. In addition to § 89(4) of the HIA J. Toom also wishes to contest the constitutionality of § 5(4)4) of the HIA, which establishes an age-related condition to the dependent spouse of an insured person. The representative of J. Toom adds that in essence J. Toom had contested § 5(4)4) of the HIA already in the Tartu Administrative Court.

14. The Health Insurance Fund is of the opinion that the Tartu Administrative Court held erroneously that § 89(4) of the HIA was the relevant norm which terminated the relationship under public law between the Health Insurance Fund and Johannes Toom. On the basis of this provision the insurance protection of J. Toom was not terminated, instead it was extended. In regard to those unemployed dependent spouses of insured persons, who were deprived of health insurance cover when the new Health Insurance Act entered into force, the contested § 89(4) of the HIA provided for a three-months' transition period. The declaration of unconstitutionality of the transition period or declaration of invalidity of § 89(4) of the HIA would mean that J. Toom should have been deprived of health insurance cover already from 1 October 2002.

The Health Insurance Fund is of the opinion that § 89(4) of the HIA is not in conflict with the Constitution. Fundamental social rights, including the right to the protection of health, are not absolute rights. It has been accepted internationally that guarantee of social rights is directly dependent on a state's economic capabilities. Neither the Constitution nor international agreements prescribe to a state how it should organise the protection of health of persons. The question of how to guarantee necessary medical care to the unemployed is a political decision which should be made by the Riigikogu. A court can only interfere when the state does not guarantee the minimum protection established by the Constitution.

It is not correct to interpret the principle of solidarity of health insurance system to the effect that it must cover all persons, who do not make insurance premium payments. Persons who are capable for work should themselves contribute to health insurance in order to be covered by the insurance system.

The Constitution gives rise to a two-level system – the level of insured persons and the level of all persons. The state has guaranteed the minimum level prescribed by the Constitution in the form of emergency care and emergency medical care, provided for by the Health Care Services Organisation Act. Thus, the exclusion of dependent spouses from among the circle of insured persons is not in conflict with the

Constitution.

CONTESTED NORM

15. The Health Insurance Act, which entered into force on 1 October 2002 (RT I 2002, 62, 337 … 2003, 88, 591) reads as follows:

"§ 89. Transitional provisions

[…]

(4) Until 1 January 2003, the dependent spouse of an insured person is also deemed to be a person considered equal to insured persons pursuant to law and social tax is not paid for him or her.

[…]"

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

16. The Tartu Administrative Court held that the health insurance cover of J. Toom expired on the basis of § 89(4) of the HIA, pursuant to which his health insurance cover in his capacity of the dependent spouse of an insured person expired not upon the entry into force of the Act on 1 October 2002, but on 1 January 2003.

17. Pursuant to the established practice of the Supreme Court a provision the constitutionality of which the Supreme Court shall review must be relevant for the adjudication of the matter. An Act which is of decisive importance for the adjudication of a case 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 decisive importance if, in the case of unconstitutionality of the Act, a court should make a judgment different from a judgment in the case of constitutionality of the Act (*see judgment of the Supreme Court en banc of 28 October 2002, case no. 3-4-1-5-02 – RT III 2002, 28, 308, paragraph 15*).

18. Johannes Toom was a person deemed to be person considered equal to insured persons (dependent spouse of an insured person) on the basis of § 2(2)1) of the Republic of Estonia Health Insurance Act, which was valid until 1 October 2002. The Health Insurance Act which entered into force on 1 October 2002 no longer deems all dependent spouses to be persons considered equal to insured persons, but only persons with up to five years left until attaining pensionable age.

19. On the basis of § 89(4) of the Health Insurance Act, until 1 January 2003, also the dependent spouse of an insured person was deemed a person to be considered equal to insured persons, irrespective of whether he or she had five or more years to pensionable age. Thus, § 89(4) of the HIA established a transition period in regard to expiry of insurance cover of dependent spouses.

20. J. Toom addressed the court arguing that he was a dependent spouse unable to find employment, with more than 5 years left until attaining pensionable age, and that he should be covered by health insurance also after 1 January 2003.

21. The Chamber is of the opinion that declaration of unconstitutionality of § 89(4) of the HIA would mean that the health insurance cover of J. Toom expired not on 1 January 2003 but on 1 October 2002. This would deteriorate J. Toom's situation.

In the case of conflict of § 89(4) of the Health Insurance Act with the Constitution the court would not have to adjudicate the matter differently than in the case of constitutionality of § 89(4) of the HIA. If the contested provision were declared unconstitutional J. Toom would, nevertheless, not obtain health insurance cover. Thus, § 89(4) of the HIA is not a relevant provision for the adjudication of this case, and the constitutionality thereof can not be reviewed in this proceeding. That is why the Constitutional Review Chamber of the Supreme Court shall dismiss the petition of the Tartu Administrative Court.

22. As it was already pointed out, the Chancellor of Justice, too, was of the opinion that § 89(4) of the HIA – i.e. the provision the review of constitutionality of which was requested – was not relevant. Nevertheless, the Chancellor of Justice argued that the petition of the Tartu Administrative Court should not be ignored. The Chancellor of Justice is of the opinion that the Supreme Court, in the course of the constitutional review procedure, should proceed from the action of J. Toom and should check whether it is constitutional that from 1 January 2003 he as a non-working dependent spouse of an insured person is no longer deemed to be a person considered equal to insured persons. Thus, the Chancellor of Justice is of the opinion that in this constitutional review matter the Supreme Court should go beyond the scope of the petition and should consider relevant what is provided for in § 5 of the HIA.

The Chancellor of Justice based his argument, that the Supreme Court is competent to look for and ascertain a relevant provisions and review the constitutionality of provisions not referred to in a petition, on the judgment of the Constitutional Review Chamber of the Supreme Court of 3 May 2001, in case no. 3-4-1-6-01 (*RT III 2001, 15, 154*). The Chamber does not consent to the Chancellor of Justice's opinion for the following considerations.

23. Pursuant to § 14(1) of the Constitutional Review Court Procedure Act the Supreme Court is not bound by the reasoning of a court's judgment when rendering its own judgment. This means, first and foremost, that the Supreme Court is not bound by the arguments used in the judgment of the court who initiated a constitutional review proceeding. It does not proceed from § 14(1) of the Constitutional Review Court Procedure Act that the Supreme Court is in no ways bound by the constitutional review petitions and that it may form a totally new object of proceeding for constitutional review. It unambiguously proceeds from § 1(1) of the Constitutional Review Court Procedure Act that upon reviewing the constitutionality of legislation of general application the Supreme Court shall be bound by petitions.

The Chancellor of Justice has correctly pointed out that in the practice of the Supreme Court the review of constitutionality has also covered provisions not referred to in petitions. This is exactly what the Supreme Court did in case no. 3-4-1-6-01 (*RT III 2001, 15, 154*) referred to by the Chancellor of Justice, as well as in case no. 3-4-1-10-02 (*RT III 2003, 2, 16*). But such broadening of the object of a proceeding, arising from the fact that provisions are inseparably interrelated, can not be considered equal to a situation when the Supreme Court declares a provision, the review of constitutionality of which was requested, constitutional, and then starts searching for an unconstitutional provision on its own initiative.
