Constitutional judgment 3-4-1-7-03

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-7-03
Date of judgment	21 January 2004
Composition of court	Chairman Uno Lõhmus and members Tõnu Anton, Lea Kivi, Ants Kull and Jüri Põld
Court Case	Review of constitutionality of § 221(4) of the Social Welfare Act.
Basis of proceeding	Judgment of the Tartu Administrative Court of 27 June 2003 and petition of the Chancellor of Justice of 2 July 2003
Date of hearing	8 October 2003
Persons participating in the hearing	Representative of the Chancellor of Justice Madis Ernits, representative of the Tartu City Government Jüri Mölder
Decision	**To declare that § 22^1(4) of the Social Welfare Act, in force since 1 January 2002 until 5 September 2003, was unconstitutional 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.**

FACTS AND COURSE OF PROCEEDING

1. On 17 April and 16 May 2003 A. Maisurjan, a student of Faculty of Medicine of the University of Tartu, submitted to social welfare department of the Tartu City Government applications to obtain a subsistence benefit. He annexed to the application a lease contract for leasing a room in a hostel as document proving the right to use the dwelling and a document of the Faculty of Medicine certifying that he did not get a scholarship and that he was not on an academic leave.

By its resolutions of 17 April and 16 May of 2003 the social welfare department of the Tartu City Government refused to pay subsistence benefits to A. Maisurjan. According to the resolutions the document submitted by A. Maisurjan to prove the legal basis for the permanent use of the dwelling did not comply with the legal bases referred to in § 22^1(4) of the Social Welfare Act (hereinafter "the SWA").

2. A. Maisurjan contested the resolutions of the social welfare department in the Tartu Administrative Court. He requested that the resolutions be annulled and subsistence benefits for April and May be paid to him. On

27 June 2003 the Tartu Administrative Court satisfied his action and declared § 22^1(4) of the SWA unconstitutional and did not apply it.

3. On 27 February 2003, already before the A. Maisurjan's court case started, the Chancellor of Justice proposed to the Riigikogu to bring § 22^1(4) of the SWA into conformity with the Constitution. On 30 April 2003 the Riigikogu supported the Chancellor of Justice's proposal and required the Social Affairs Committee to initiate a draft to bring the Social Welfare Act into conformity with the Constitution.

On 15 May 2003 the Social Affairs Committee of the Riigikogu initiated a draft Act to amend the Social Welfare Act. At the extraordinary session of the Riigikogu of 30 June 2003 the legislative proceeding of the draft Act was suspended on the proposal of the Social Affairs Committee. 5 August 2003 was set as the date by which amendment proposals should be submitted. On 2 July 2003 the Chancellor of Justice submitted a petition to the Supreme Court for the review of constitutionality of § 22^1(4) of the SWA. The Chancellor of Justice requests that § 22^1(4) of the SWA be declared unconstitutional to the extent that it deprives those persons who are using dwellings on the bases different from those established in § 22^1(4) of the Social Welfare Act of the possibility to get subsistence benefits.

4. On 18 September 2003 the Constitutional Review Chamber of the Supreme Court joined both petitions for joint proceedings.

5. On 8 August 2003 the Riigikogu passed the Social Welfare Act Amendment Act, which entered into force on 5 September 2003 (RT I 2003, 58, 388). Also, the wording of § 22^1(4) was amended by the Act.

JUSTIFICATIONS OF THE ADMINISTRATIVE COURT AND THE PARTICIPANTS IN THE PROCEEDING

Justifications of the Tartu Administrative Court

6. The Tartu Administrative Court decided not to apply § 22^1(4) of the SWA to the case because it was in conflict with §§ 3(1), 10, 11, 12 and § 28(2) of the Constitution.

The court argued that the grant of assistance should be based on a person's actual need for assistance, not on the legal bases for the use of a dwelling. It is possible to permanently use a dwelling on the basis of grounds other than those established in § 22^1(4) of the SWA. The administrative court is of the opinion that there is no reasonable ground for the restrictions provided for in the referred subsection. Excluding hostels from among dwellings acceptable as permanent dwellings for the purposes of granting subsistence benefits amounts to discrimination against a group of persons with a certain social status, i.e. students. This also creates social inequality among the students themselves. Those students who use a permanent dwelling on the bases referred to in § 22^1(4) of the SWA receive subsistence benefits, whereas those students who use dwellings on some other bases do not receive the benefit. As a rule, it is the students who are in poorer financial situation who decide to live in hostels.

Justifications of the Chancellor of Justice

7. The Chancellor of Justice is of the opinion that § 22^1(4) of the SWA should be declared unconstitutional to the extent that it deprives those persons who are using dwellings on the bases different from those established in § 22^1(4) of Social Welfare Act of the possibility to get subsistence benefits. The referred provision is in conflict with §§ 28(2) and 12(1) of the Constitution in their conjunction.

On the basis of the Social Welfare Act those students the address details of whose residence do not coincide with the address details of their family and who are using dwellings on the basis of legal grounds referred to in § 22^1(4) of the SWA, are entitled to subsistence benefits. Persons using dwellings on the bases not enumerated in the referred provision are not entitled to subsistence benefits. At the same time § 12(2) of the Constitution contains a requirement that if a state has created a certain functioning system of public services, the state must not arbitrarily exclude some of its citizens from among the beneficiaries of the services. The

Chancellor of Justice argues that the justifications expressed by the legislator do not justify the imposition of restrictions provided for in § 22^1(4) of the SWA and the exclusion of actually needy persons from among those entitled to subsistence benefits. Upon fulfilling its social obligations the state must proceed from the actual need for assistance, namely the need referred to in § 28(2) of the Constitution.

Justifications of participants in the proceeding

8. The Minister of Justice is of the opinion that § 2^{21}(4) of the SWA is not in conflict with the principles of legitimate expectation and proportionality provided for in §§ 10 and 11 of the Constitution. The Minister of Justice does consent to the opinion that the provision may contain a conflict with the principle of equal treatment of § 12(1) of the Constitution. The restriction in § 22^1(4) of the SWA treats unequally persons who are in a similar situation, and that is why a considerable number of needy persons can not get assistance from the state. The legislator has not presented a reasonable justification as to why needy persons are differentiated in such a way.

9. The complainant is of the opinion that § 22^1(4) of the SWA is in conflict with §§ 3, 10, 11, 12(1) and 28(2) of the Constitution. The Social Welfare Act unreasonably and disproportionately deprives those persons who are using dwellings on the bases different from those established in § 22^1(4) SWA of the possibility to receive subsistence benefits.

10. The Tartu City Government is of the opinion that § 22^1(4) SWA is in conflict with §§ 3, 10, 11, 12(1) and 28(2) of the Constitution. § 28(2) of the Constitution gives a person the right not only to assistance but to receive sufficient assistance. The Social Welfare Act is in conflict with the principles of the Constitution and with the fundamental rights proceeding from the Constitution and, thus, also with § 3(1) of the Constitution.

11. The Riigikogu sent to the Supreme Court materials relating to the adoption of the Act, but failed to express its opinion as to whether the contested provision was constitutional or not.

RELEVANT LEGISLATIVE PROVISIONS

12. § 22(1) of the Social Welfare Act, in force since 1 January 2002 (RT I 2001, 85, 509) reads as follows:

"§ 22. Subsistence benefit

(1) A person living alone or a family whose monthly net income, after the deduction of the fixed expenses connected with dwelling calculated under the conditions provided for in subsections 222(5) and (6) of this Act, is below the subsistence level has the right to receive a subsistence benefit. Subsistence level is established based on minimum expenses made on consumption of foodstuffs, clothing, footwear and other goods and services which satisfy the primary needs."

13. § 22^1(4) of the Social Welfare Act in the wording in force since 1 January 2002 until 5 September 2003 (RT I 2002, 61, 375 … RT I 2003, 58, 388) reads as follows:

"§ 22^1. Application for subsistence benefit

[…]

(4) In the grant of a subsistence benefit the right of ownership concerning the dwelling, membership in a housing association or a residential lease contract in accordance with § 29 of the Dwelling Act, shall be considered the legal basis for the use of dwelling."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

I.

14. The petitions of the Chancellor of Justice and the Tartu Administrative Court pertain to the right to state assistance in the case of need, provided for in § 28(2) of the Constitution. The referred right is a fundamental social right, proceeding from the principles of a state based on social justice and human dignity referred to in § 10 of the Constitution. Both are constitutional principles.

The concept of a state based on social justice and the protection of social rights contain an idea of state assistance and care to all those who are not capable of coping independently and sufficiently. Human dignity of those persons would be degraded if they were deprived of the assistance they need for satisfaction of their primary needs.

15. The Constitution determines neither the amount nor the conditions for the receipt of social assistance. The second sentence of the second indent of § 28 of the Constitution, pursuant to which the categories and extent of and conditions and procedure for the receipt of assistance shall be provided by law, leaves it for the legislator to decide to what extent the state shall grant assistance to needy persons. The legislator is granted an extended power of decision because of the fact that economic and social policies and the formation of the budget are within the competence of the legislator. Still, an increase of tax burden and redistribution of resources may result in a collision of social rights with other fundamental rights.

16. Nevertheless, an extended freedom of decision of the Riigikogu in the sphere of fundamental social rights does not mean that the legislator as the developer of economic and social policies may, using the argument of limited resources, freely decide to what extent and to whom the social rights established by § 28 of the Constitution shall be guaranteed (*see also judgment of the Administrative Law Chamber of the Supreme Court of 10 November 2003 in matter no. 3-3-1-65-03 - RT I 2003, 34, 349*). In making social policy choices the legislator is bound by the constitutional principles and the nature of fundamental rights. The right to receive state assistance in the case of need is a subjective right, in the case of violation of which a person is entitled to go to court, and the courts have an obligation to review the constitutionality of an Act granting a social right. But a court of constitutional review must avoid a situation where the development of budgetary policies goes, to a large extent, into the hands of court. That is why in implementing social policies the court can not replace the legislative or executive powers.

The Constitution provides for the right to state assistance in the case of need. Arising from this the court has a duty to intervene when the assistance falls below the minimum level. The Constitution empowers the constitutional court to prevent the violation of human dignity. The understanding that the principles of a state based on social justice and human dignity are guaranteed when the state guarantees the satisfaction of primary needs of needy persons, helps to delimit and balance the competencies of branches of power.

17. A state, having created social security systems and provided for social assistance, must also ensure the observance of the fundamental right to equality, expressed in § 12(1) of the Constitution. The connection of social fundamental rights with the general right to equality is closer than that with other fundamental rights. The first sentence of the first indent of § 12 of the Constitution guarantees equality in application of law. The Supreme Court has repeatedly pointed out: "The first sentence of § 12(1) of the Constitution must also be construed in the meaning of equality in legislation. As a rule, the equality in legislation requires that laws in substance treat equally all persons who are in a similar situation" (*see judgment of the Supreme Court en banc of 17 March 2003 in case no. 3-1-3-10-02 - RT III 2003, 10, 95, paragraph 3*6).

18. In deciding on state social assistance and the extent thereof the provisions of § 27 of the Constitution must be taken into account. The fifth indent of the referred section establishes the duty of family to care for its needy members. Thus, it proceeds from the Constitution that the right of claim of a needy person under § 28(2) of the Constitution is totally or partly excluded if he or she has family members, capable of caring for the needy members of family. The extent of state's duty to grant social assistance, established in the first

sentence of the second indent of § 28 of the Constitution, thus depends on the interpretation of the concept of family referred to in § 27(5) of the Constitution.

The duty to maintain members of family is regulated by several Acts. The Family Law Act (RT I 1994, 75, 1326 … RT I 2003, 78, 527) requires a spouse to maintain a spouse who needs assistance and is incapacitated for work (§§ 21 and 22), requires a parent to maintain his or her minor child, also a child who needs assistance and is incapacitated for work, and a child who attends basic school, upper secondary school or vocational school (§ 60). Also, a child who has become an adult is required to maintain his or her parent who needs assistance and is incapacitated for work (§ 64), a grandparent is required to maintain a grandchild and vice versa (§§ 65 and 66), and a step-child or foster-child is required to maintain a step-parent or foster-parent (§ 68). Brothers and sisters have the reciprocal duty of maintenance (§ 67). The Social Welfare Act (RT I 1995, 21, 323 … RT I 2003, 58, 388) extends the notion of a family member to persons using one or more sources of income jointly or with a shared household (§ 22(2)). In the present case the Chamber shall not assess the joint effect or conformity of these Acts with § 27(5) of the Constitution.

19. § 28(2) of the Constitution refers to need as one of the grounds entitling a person to receive state assistance and requiring the state to provide assistance. The Constitution does not specify the circle of persons who may be considered needy. Such persons may be, for example, children, the elderly, sick persons, persons who are incapacitated for work or disabled persons. But an adult who attends a school or is unemployed may be needy, too.

20. The Constitution does not specify when a person is needy, that is when the satisfaction of his or her primary needs is not guaranteed, and that is why, to interpret the Constitution, it is necessary to examine international agreements to which the Republic of Estonia has acceded.

Article 11 of the International Covenant on Economic, Social and Cultural Rights (RT II 1993, 10/11, 13) recognises "the right of everyone to an adequate standard of living for himself and his family".

According to Article 13(1) of the European Social Charter (revised) (RT II 2000, 15, 93) a state must "ensure that any person who is without adequate resources and who is unable to secure such resources whether by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance […]". The Social Charter requires that the states establish systems of social security (Article 12(1)) that guarantee benefits in certain situations (sickness, incapacity for work, maternity, unemployment, family, old age, death, widowhood, industrial accidents, occupational diseases). Social insurance systems require the contribution of people themselves into the accumulation of funds out of which the payments shall be made. The Constitution does not expressly speak of the state's duty to create social insurance systems. The application practice of the Social Charter, in assessing the need, proceeds from the minimum means of subsistence, established by state, which means that those persons are needy whose resources do not guarantee the minimum means of subsistence. That is why the amount of assistance given to such a person must not be in manifest inconformity with the minimum means of subsistence of the state.

Pursuant to the Charter of Fundamental Rights of the European Union, which is not yet legally binding on Estonia at present, the Union recognises the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.

21. The Riigikogu has made the existence of need dependent primarily on the subsistence level, the amount of which for a person living alone or to the first member of a family is established by the Riigikogu for each budgetary year by the state budget (§ 22 of the SWA). Pursuant to the same provision an income which conforms to the subsistence level should guarantee the minimum expenses of a person or family made on consumption of foodstuffs, clothing, footwear and other goods and services which satisfy the primary needs (see § 22(1)). The explanatory letter to the draft Act amending the referred Act points out that the other goods and services which satisfy the primary needs are, first and foremost, necessary toiletries, medicinal products, visit fee for provision of health care, as well as charges for cobbler's services and for sauna and transport services (page 5). The minimum expenses made on dwelling are not taken into account in

establishing the subsistence level, and this makes comparison of subsistence level and minimum means of subsistence difficult. According to the estimates of the Statistical Office the minimum means of subsistence in 2002 amounted to 1389 kroons.

According to the "State Budget for 2003 Act" the subsistence level is 500 kroons (RT I 2003, 3, 18 § 6(6)), the subsistence level of the second and each subsequent member of a family is 80 per cent of the amount (§ 22(12) of SAW). In this case the dispute is not over whether the subsistence level established by law guarantees the minimum means of subsistence and decent existence. That is why the Court has underlined only the general principles.

II.

22. The granting of state assistance in the case of need, and the conditions and procedure for the receipt of assistance are regulated by the Social Welfare Act. The Act is based on the principle that the state has an obligation to provide assistance if the potential for a person or family to cope is insufficient (§ 3(1)3)). A needy person is entitled to subsistence benefit. Permanent residents of Estonia, aliens lawfully residing in Estonia and refugees staying in Estonia have the right to receive this benefit (§ 4(1) of the SWA).

23. The Tartu Administrative Court declared § 22^1(4) of Social Welfare Act unconstitutional in relation to the court case in which the refusal of the Tartu City Government to grant subsistence benefit to a student who was using a part of a hostel room on the basis of a residential lease contract was contested. The court argues that § 22^1(4) of the SWA does not allow the payment of a subsistence benefit if the person applying for assistance uses one room or a part of a room of a dwelling. The administrative court is of the opinion that the provision restricts the constitutional right of students living in hostels to state assistance in the case of need.

24. The Chancellor of Justice argues that the Social Welfare Act deprives those persons who are using dwellings on the bases different from those established in § 22^1(4) of the SWA of the possibility to receive subsistence benefits.

25. The judgment of the administrative court and the petition of the Chancellor of Justice pertain to the wording of § 22^1(4) of the SWA, which was in force since 1 January 2002 until 5 September 2003. The judgment of the court and the petition of the Chancellor of Justice coincide in the argument that the Act excludes from among the beneficiaries of subsistence benefits those persons who use dwellings that do not meet the description of § 22^1(4) of the SWA. The complainants are of the opinion that the exclusion of those persons from among the entitled subjects of social benefits is not in conformity with the right to state assistance in the case of need established in § 28(2) of the Constitution, in conjunction with the principle of equal treatment established in § 12(1) of the Constitution.

III.

26. The Constitutional Review Chamber is of the opinion that in order to ascertain whether the petitions are justified, it is first necessary to find out who and under what conditions is entitled to a subsistence benefit and what has been the practice of payment thereof so far.

27. The granting of social assistance to needy families and individuals was initially regulated by the Government of the Republic Regulation no. 276 of 2 September 1993 (RT I 1993, 61, 852). By this Regulation the consumer coefficients of families of different size and composition were approved, as well as the amount of calculated poverty level. Social assistance was provided for to families with incomes lower than the calculated poverty level. The Government of the Republic Regulation no. 316 of 18 October 1993 (RT I 1993, 67, 956) established housing benefits for partial compensation for expenses connected with dwelling to families with small incomes.

28. On 1 April 1995 the Social Welfare Act (RT I 1995, 21, 323) entered into force, on the basis of which a person whose monthly net income is below the subsistence level established by the Government of the Republic based on minimum expenses made on consumption has the right to receive a subsistence benefit. Subsistence benefits were paid by rural municipality governments and city governments under the conditions and pursuant to the procedure established by the Government of the Republic (§ 22). By its Regulation no. 318 of 23 December 1996 (RT I 1996, 91, 1615) the Government of the Republic established the conditions and procedure for payment of state social benefits. The Social Welfare Act did not specify whether housing benefits were included in subsistence benefits. The referred Regulation, though, established that since 1 January 1997 housing benefits and subsistence benefits shall be paid as common subsistence benefits. On 1 January 2002 the Government of the Republic repealed the Regulation on the ground that as a result of the amendments made to the Social Welfare Act on 9 October 2001 the same issues are established by the Act.

29. According to the wording of the Social Welfare Act in force at the time when the action of A. Maisurjan was proceeded and when the Chancellor of Justice submitted his petition the right to receive a subsistence benefit was granted to a person living alone or a family whose monthly net income, after the deduction of the fixed expenses connected with dwelling specified in the Act, is below the established subsistence level (§ 22(1)). The subsistence level is established by the Riigikogu for each budgetary year by the state budget and in recent years it has been 500 kroons.

30. § 22 and the following sections of the Social Welfare Act do not establish clearly that a needy person or family has the right to receive a housing benefit in addition to a subsistence benefit. The Act does not refer to a housing benefit. On the basis of the referred the Government of the Republic Regulation no. 318 and the established practice it can be concluded that the Act speaks of a subsistence benefit in narrower and broader senses. A subsistence benefit in the broader sense embraces the subsistence benefits in the narrower sense and a housing benefit. In his letter to the Supreme Court the Minister of Social Affairs confirmed that on the basis of the Act it is both allowed and possible to pay to a needy student a subsistence benefit in the amount of minimum means of subsistence, including the expenses connected with the dwelling he or she uses during the studies.

31. Next, the Chamber shall weight whether the Social Welfare Act allowed to pay a subsistence benefit to a needy individual or a family if they lacked expenses connected with dwelling or if the dwelling did not meet the characteristics described in § 22^1(4) of the SWA.

The Tartu City Government is of the opinion that under § 22^1(4) of the SWA the payment of subsistence benefits is made dependent on the legal basis for the use of the permanent dwelling by the person who needs assistance. The administrative court consented to this interpretation of the Act, writing in its judgment that § 22^1(4) of the SWA allows to pay subsistence benefits only if the permanent dwelling is in the ownership of the benefit applicant or if the applicant is a member in a housing association or has concluded a residential lease contract in conformity with § 29 of the Dwelling Act. The Chancellor of Justice shares this view.

The Ministry of Social Affairs seems to interpret the Act differently. In its letter to the Supreme Court of 11 December 2003 the Ministry informed the Court that subsistence benefits were paid also to such persons or families who did not have fixed expenses connected with dwelling during the given month, on the condition that they had a permanent or habitual residence on the territory of the local government.

32. The Supreme Court does not consent to the above interpretation of the Social Welfare Act by the Chancellor of Justice and the administrative court. According to § 22(1) of the Act it is essential for the receipt of a subsistence benefit that the monthly net income of the person or family be below the established subsistence level. For the receipt of a subsistence benefit the only essential condition meeting the principles and purposes of social welfare established in § 3 of the SWA is the existence of need. Persons living alone or families will always become entitled to a subsistence benefit if they lack income or if the net income is below the subsistence level, which in 2003 was 500 kroons for a person living alone and for the first member

of a family, and 80 per cent of the amount for the second and each subsequent member of a family. A needy person or family has the right to receive also a housing benefit. A housing benefit covers the fixed expenses connected with dwelling within the limits established by local governments.

§§ 22^1, 22^2 and 22^3 of the Social Welfare Act regulate application for, the bases for calculating and grant of the benefit, and the procedure for determining the fixed expenses connected with dwelling, procedural issues that shall ensure that benefits are granted to persons and families who need them, and that the amount of income and expenses is substantiated and justified.

33. Pursuant to § 22^1(3)1) of the SWA an applicant for the subsistence benefit shall submit to the rural municipality government or city government in whose administrative jurisdiction the person is permanently living a document which proves the right to use the dwelling. This document is essential for the deduction of the fixed expenses connected with dwelling from the monthly net income as well as for the determination of the amount of a housing benefit. It appears from subsection (4) of the same section that only fixed expenses connected with such dwellings that are used on the legal bases referred to in this subsection can be deduced from the monthly net income of a needy person or family.

Thus, the Chamber is of the opinion that the fundamental issue of this court case is whether exclusion of fixed expenses connected with the dwellings not referred to in § 22^1(4) of the SWA in calculating the amount of a subsistence benefit and the refusal to pay a housing benefit to those who live in such dwellings is in conformity with §§ 12(1) and 28(2) of the Constitution in their conjunction. In other words, do the referred provisions of the Constitution justify the situation that some needy persons and families are deprived of the right to receive a housing benefit. Expenses connected with dwelling are not taken into account upon granting and calculating a subsistence benefit in the narrower sense.

IV.

34. The Chamber points out that since 1 January 2002 until 5 September 2003 § 22^1(4) of the SWA was in force in the wording pursuant to which only a residential lease contract in conformity with § 29 of the Dwelling Act could serve as a legal basis for granting a subsistence benefit. This provision of the Dwelling Act determined the object of residential lease contract. According to § 29(2) a room or a part thereof, connected to another room by a common entrance, as well as an indirectly heated room or ancillary premises could not be objects of residential lease contracts. Thus, § 22^1(4) of the Social Welfare Act did not allow, in calculating the amount of a subsistence benefit, to deduct from the net income of a person or family the expenses connected with the use of such dwellings that were not covered by § 29 of the Dwelling Act. For example, the expenses were not taken into account if several people jointly used a hostel room or if a person rented one room or a part thereof in a flat. Also, the expenses exceeding the limits established by the local government were not to be compensated for.

§ 29 of the Dwelling Act, referred to in the provision under discussion, was repealed by the Law of Obligations Act, General Principles of the Civil Code Act and International Private Law Act Implementation Act, which entered into force on 1 July 2002 (RT I 2002, 53, 336), whereas the reference of the Social Welfare Act to the repealed section of the Dwelling Act went unamended. The Chancellor of Justice is of the opinion that this did not essentially change the legal situation in regard to application for subsistence benefits, because under § 272(4) of the Law of Obligations Act the provisions concerning residential lease contracts do not apply to lease contracts the object of which is a dwelling which is part of the dwelling used by the lessor and the greater part of which is furnished by the lessor, and to lease contracts the object of which is a dwelling which is leased to a person acquiring education.

The Chamber agrees with the opinion of the Chancellor of Justice that the legal situation did not change with the repeal of § 29 of the Building Act referred to in the Social Welfare Act, but this was not due to the fact that § 272(4) of the Law of Obligations Act provides for a regulatory framework similar to that of § 29 of the Building Act, which has become invalid. It is a generally recognised principle of legal theory that should an

Act containing a referred provision be repealed, whereas the referring Act remains in force unamended, the referred provisions shall remain in force through the force of the referring provision and shall be applicable as part of the content of the provision, irrespective of the fact that the referred Act a or a part thereof has been repealed. That is why, when interpreting § 22^1(4) of the Social Welfare Act the provisions of § 29 of the Building Act must be taken into Account.

35. The practice of granting subsistence benefits allows to come to the conclusion that the application practice of § 22^1(4) of the Social Welfare Act was neither uniform nor consistent. Thus, the Tartu City Government informed the Supreme Court that the Tartu City Council Resolution no. 496 of 7 February 2002 allowed the City Government, in granting subsistence benefits, in addition to legal bases referred to in of § 22^1(4) of the Social Welfare Act, consider other legal bases for the use of dwellings, including living in a hostel. The City Council repealed the Resolution on 27 March 2003, and since 1 April 2003 subsistence benefits were not granted to persons who used a part of a hostel room. Pursuant to the practice in Tartu a student who used a hostel room alone still had the right to receive a subsistence benefit. Also, according to the explanations of the Ministry of Social Affairs, sent to the Supreme Court, it was possible to take into account the expenses connected with the use of a hostel in calculating and granting a subsistence benefit in the broader sense.

36. The Supreme Court is of the opinion that although the application practice of § 22^1(4) of the SWA differs, the provision meant that in granting subsistence benefits to those needy persons and families whose dwelling did not meet the provisions of § 29 of the Dwelling Act, the expenses connected with the dwellings could not have been taken into account and housing benefits were not paid to them. When granting subsistence benefits in the broader sense to those needy persons whose dwellings were in conformity to § 29 of the Dwelling Act, the expenses connected with the dwellings within the limits established by a local government had to be taken into account and housing benefits had to be paid to them. Thus, the Act treated needy persons and families differently, depending on where they lived.

37. Because of this conclusion the next issue for the Chamber to assess is whether there was a reasonable ground for different treatment of needy persons and families and whether the unequal treatment was justified or arbitrary. Recognising the wide margin of appreciation of the legislator, an unequal treatment is arbitrary when it is manifestly inappropriate.

38. The Chancellor of Justice refers to possible justifications of the unequal treatment; in his opinion these are elimination of unjustified applications for subsistence benefits (e.g. applications to compensate for the expenses connected with a hotel room), avoidance of technical problems in administrating the subsistence benefit applications, and maintenance of the financial-economic balance of the state.

The amendments to the Social Welfare Act, including amendments to § 22^1, which entered into force on 1 January 2002, or the debates in the Riigikogu and the explanatory letter to the draft do not reveal the reasons why the Riigikogu considered the unequal treatment of needy persons justified. The Supreme Court can not guess what where the aims that justified the unequal treatment in the eyes of the Riigikogu and that is why the Chamber shall assess the possible justifications presented by the Chancellor of Justice.

39. The Chamber points out that it is possible to avoid unjustified applications for subsistence benefits when the legislator empowers local government councils to establish the limits of expenses connected with a dwelling. Unequal treatment can not be justified by difficulties of mere administrative and technical nature. Excessive burden on the state budget is an argument that can be considered when deciding on the scope of social assistance, but the argument can not be used to justify unequal treatment of needy persons and families.

40. On the basis of the foregoing the Chamber concludes that there was no reasonable ground for unequal treatment of needy persons and families, and the violation of the right to equality and ignoring the right to state assistance in the case of need were manifestly inappropriate.

§ 22^1(4) of the Social Welfare Act in the wording in force since 1 January 2002 until 5 September 2003 was in conflict with the right of every person to state assistance in the case of need, established in § 28(2) of the Constitution, in conjunction with the general right to equality, established in § 12(1) of the Constitution, to the extent that in granting subsistence benefits to some persons and families it did not take into account the expenses connected with dwelling and these persons and families were not paid housing benefits.
