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JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

No. of the case 3-4-1-6-03

Date of decision 16 September 2003.

Composition of court Chairman Uno Lõhmus, members Eerik Kergandberg, Ilea Kivi, Villu Kõve and Jüri Põld.

Court case Review of constitutionality of § 9(8) and the second sentence of § 12(1) of the Land Valuation Act and annex I of the Government of the Republic Regulation no. 276 of 22 August 2001.

Basis of the proceeding the Judgment of the Pärnu Administrative Court of 14 April 2003.

Type of proceeding Written proceeding

Resolution To dismiss the petition of the Pärnu Administrative Court

FACTS AND COURSE OF PROCEEDING

1. On 17 November 1999, by resolution no. 10/11, the Saare County Committee for Return and Compensation of Unlawfully Expropriated Property recognised Vilhelmine Schmiedeberg as the entitled subject in relation to plot of land located 26 Põllu street (registered immovable no. 269). By order no. 871 of the Kuressaare City Government of 5 December 2000 it was decided that this plot of land could not be returned, therefore the proceeding for compensation for the unlawfully expropriated property was commenced. V. Schmiedeberg passed away on 12 January 1995. On the basis of succession certificate, on 8 August 2001, Leonardo-Aleksander Laesson and Helge-Mall Soopalu became the successors of the right of claim. By order no. 739 of 10 December 2002 of the Kuressaare City Government a legal instrument

concerning the value of the land in the amount of 13 270 kroons was approved, and both successors were awarded 6635 kroons each as compensation for the land.

2. L.-A. Laesson and H.-M. Soopalu submitted complaints against the order of the Kuressaare City Government to the Pärnu Administrative Court. The court joined the administrative matters into a single proceeding.

The complainants are of the opinion that the city government order no. 739 of 10 December 2002 violated their constitutionally guaranteed right to equal treatment, as they are not treated equally with those entitled subjects of land reform to whom the land has been or will be returned. They were of the opinion that the Land Valuation Act (hereinafter "the LVA") in the wording of 1994, pursuant to which the value of land to be compensated for was equal to the value of ordinary land located in the same value zone, i.e. to the average market value, guaranteed the equal treatment of those to whom land was returned and those to whom compensation was paid. The amount of compensation was equivalent to the value of land which was not returned.

§ 22(4) of the Land Reform Act, pursuant to which a person to whom land was not returned had the right to purchase land by closed auction, whereas the starting price was the assessed value of land, was also based on the principle of equal treatment. But the amendment to the Land Valuation Act of 7 March 2001 essentially changed the principle of compensation for land, because the assessed value of land was determined not on the basis of results of the latest, i.e. 2001 assessment, but on the results of the 1993 assessment.

The plot of land of the complainants is located in the price zone where, pursuant to the assessment of 1993, the value of a square metre of land was 16 kroons, but pursuant to the assessment of 2001 - 70 kroons, i.e. 4.5 times higher. By the assessment the ordinary value of land was determined. This is also the price of land upon privatisation and starting price of an auction. Consequently, the entitled subjects to whom the land in the same price zone was or will be returned, own land the value of square metre of which is 70 kroons. Yet, to them only 16 kroons per square metre, 23% of the ordinary value of land, will be compensated for the land of the same value, which is not an equivalent compensation.

3. By its judgment of 14 April 2003 the Pärnu Administrative Court annulled the Kuressaare City Government order no. 739 of 10 December 2002 and did not apply § 9(8) and the second sentence of § 12(1) of the Land Valuation Act. The court declared these provisions unconstitutional to the extent that they give rise to unequal treatment of entitled subjects of ownership reform depending on whether the unlawfully expropriated land is returned or compensated for. Also, the court did not apply and declared unconstitutional the part of annex I of the Government of the Republic Regulation no. 276 of 22 August 2001 "Assessed values of land in areas of high population concentration" which determined that in Kuressaare the assessed value of unlawfully expropriated land shall be 16 kroons per square metre.

Justifications of the administrative court and participants in the proceeding

Justifications of the Pärnu Administrative Court

4. § 9(8) of the Land Valuation Act establishes that assessed value of land for determining the value of unlawfully expropriated land shall be approved by the Government of the Republic based on the results of the assessment carried out in 1993. The court analysed the conformity of § 9(8) of the LVA to §§ 12(1) and 32(1) of the Constitution and found that as the amount of compensation was related to the results of the assessment of land of 1993, the benefits of those persons to whom land is returned are several times higher than the compensation payable to those persons to whom land is compensated for. The principle of equal treatment of entitled subjects of ownership reform has been violated and such unequal treatment is not justified.

The court also found that neither § 9(8) nor the second sentence of § 12(1) of the LVA taken separately are unconstitutional; that is why the court declared these provisions unconstitutional only to the extent that they

give rise to unequal treatment of entitled subjects depending upon the fact that the land to be compensated for is to be valued on the basis of the results of the assessment of 1993.

Justifications of the participants in the proceeding

5. The complainants support the judgment of the Pärnu Administrative Court.

6. The Kuressaare City Government agrees with the opinion of the Pärnu Administrative Court that the principle of equal treatment has been violated and the contested provisions are unconstitutional. The city government failed to form an opinion on whether the assessed values of land in areas of high population concentration, established by the Government of the Republic Regulation no. 276, are constitutional.

7. The Riigikogu sent to the Supreme Court documents concerning the legislative proceeding of the Land Valuation Act, but did not submit an opinion on the constitutionality of the Act.

8. The Chancellor of Justice points out that § 32(1) of the Constitution is not applicable to claims for the return of and compensation for unlawfully expropriated property, because the provision protects persons against expropriations effected by the Estonian state after the Constitution entered into force. The given case amounts to unequal treatment of entitled subjects of ownership reform without an infringement of the right of ownership. The legislator had a reasonable cause for compensating for unlawfully expropriated property pursuant to uniform and simplified principles, namely to simplify and expedite the proceedings that were at a standstill. Changing the basis of determining the compensation value at the time when the compensation for unlawfully expropriated land was practically completed may cause unequal treatment of entitled subjects to whom compensation is payable. That is why the Chancellor of Justice is of the opinion that the contested provisions are compatible with the Constitution.

9. The Minister of Justice is of the opinion that the disputed provisions are constitutional and the unequal treatment of entitled subjects of ownership reform is reasonable. It is important that the persons to whom property is compensated for are treated equally. Declaration of unconstitutionality of § 9(8) and the second sentence of § 12(1) of the Land Valuation Act would result in unequal treatment of those entitled subjects of ownership reform to whom land had been compensated for on the basis of 1993 assessed value of land, in comparison to those persons to whom compensation would be calculated on the basis of presently valid assessed value of land after the previously referred decision is made. The Minister of Justice is of the opinion that the reference of the Pärnu Administrative Court to § 32(1) of the Constitution is irrelevant, because that fundamental right is not applicable in relation to property which was expropriated before the Constitution took effect.

10. The Minister of the Environment is of the opinion that the persons to whom land was returned can not be compared to persons to whom land shall be compensated for. The law prescribes equal conditions for all persons to whom compensation is payable and the land which will not be returned shall be compensated for to everyone on an equal footing. Thus, all the persons to whom land is to be compensated for are treated in accordance with the principle of equal treatment, established in § 12 of the Constitution. The Minister of the Environment is of the opinion that § 9(8) and the second sentence of § 12(1) of the LVA are compatible with the Constitution and do not infringe the constitutionally protected rights of persons. Annex I of the Government of the Republic Regulation no. 276 of 22 August 2001 "Assessed values of land in areas of high population concentration", is constitutional, too.

11. The Minister of Finance points out that the compensation for unlawfully expropriated property should be regarded as an alternative to the return of property, whereas the non-return may be either voluntary or constrained. The law does not differentiate between persons who requested for compensation and persons who received so called compulsory compensation because of the impossibility to return the land. Thus, in conformity with § 12 of the Constitution, the law treats equally all persons who get compensation for unlawfully expropriated land. As the return of and compensation for property are different forms of restitution, those persons who have received their land back can not be treated equally with those persons to

whom the land is compensated for.

To compensate for land it is necessary to determine the moment in time to be regarded as the basis for calculating the value of property to be compensated for. Compensation can not be dependent on the market price, because this would create inequality based on the time of submitting an application for compensation and the hearing thereof.

The Minister of Finance added that the ownership reform processes have been completed in the amount of more than 90%. Compensating for land on the basis of market value and application of the principle retroactively would increase the total amount of privatisation vouchers to be issued for the compensation of possible claims for the compensation of damage against state by approximately two billion kroons and would thus put enormous additional proprietary obligations on the state.

RELEVANT PROVISIONS

12. § 9(8) of the Land Valuation Act, which entered into force on 29 December 1994 and was in force until 7 April 2001 (RT I 1994, 94, 1609) reads as follows:

"§ 9. Valuation of unlawfully expropriated land
[...]

(8) The assessed value of land set out in subsections (4), (5) and (7) of this section for determining the value of land shall be approved by the Government of the Republic."

§ 9(8) of the Land Valuation Act, which entered into force on 7 April 2001 (RT I 2001, 31, 172) reads as follows:

"§ 9. Valuation of unlawfully expropriated land
[]

(8) The assessed value of land set out in subsections (4), (5) and (7) of this section for determining the value of unlawfully expropriated land shall be approved by the Government of the Republic based on the results of the assessment carried out in 1993."

13. § 12(1) of the Land Valuation Act in the wording which entered into force on 7 June 1996 (RT I 1996, 36, 738) reads as follows:

"§ 12. Implementation of Act

(1) The determination of the assessed value of land in 1993 is deemed to be the first assessment. Determination of the value of unlawfully expropriated land for the purposes of compensation is effected on the basis thereof."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

I.

14. In the complaint submitted to the Pärnu Administrative Court the complainants pointed out that in the course of compensating for unlawfully expropriated land their right to equal treatment, guaranteed by the Constitution, had been violated. The complainants found that the wording of the Land Valuation Act of 1994 guaranteed equal treatment of persons to whom land was returned and persons to whom the land was compensated for, because the amount of compensation was equivalent to the ordinary value, i.e. the market value, of the land not to be returned. The assessed values of land, determined as the result of the 2001 assessment, were substantially different from the assessed values of land determined as the result of 1993 assessment. On the basis of 1993 assessment the value of a square metre of the plot of land owned by the complainants' mother in Kuressaare city was 16 kroons, whereas on the basis of the 2001 assessment the value was 70 kroons, which is 4.5 times higher. The complainants argue that because of that the determining the amount of compensation for land on the basis of 1993 values violates the principle of equal treatment.

15. The Pärnu Administrative Court accepted the justifications of the complainants. The court is of the opinion that the groups of persons the treatment of whom can be evaluated on the equality basis are the entitled subjects of ownership reform to whom land is to be returned and those entitled subjects to whom the unlawfully expropriated property is to be compensated for. The court is of the opinion that § 9(8) and the second sentence of § 12(1) of the LVA in their conjunction violate the equality right established in § 12 of the Constitution and the right to inviolability of property, established in § 32 of the Constitution, because the unequal treatment is not justified. The judgment points out that the disputed provisions are also in conflict with §§ 10 and 14 of the Constitution, but the court has not substantiated these allegations.

16. The Chamber reminds that the protection of § 32 of the Constitution does not extend to the unlawfully expropriated property which is returned or compensated for in the course of ownership reform. The Supreme Court *en banc* has underlined that according to international law the Republic of Estonia is not responsible for the unlawful acts committed on its territory, which was not controlled by a legal government. That is why the provisions of § 32 of the Constitution can not be taken into account upon reviewing the constitutionality of an Act stipulating the return of or compensation for property. The decision to undo the injustices caused by violation of the right of ownership and to create the preconditions for the transfer to a market economy, was based on the principle of a society based on democracy and the rule of law, and was possible because a big proportion of the unlawfully expropriated property was in the possession of the state when Estonia's independence was restored. (*See judgment of the Supreme Court en banc of 28 October 2002 no. 3-4-1-5-02 -- RT III 2002, 28, 308*).

The Chamber shall check only whether the disputed provisions are in conformity to the general right to equality expressed in the first sentence of § 12(1) of the Constitution.

17. Pursuant to the second sentence of § 15(1) and § 152(1) of the Constitution an Act not applied by a court must be relevant. A norm which is of decisive importance for the resolution of a case is relevant (*see judgment of the Supreme Court en banc of 22 December 2000 no. 3-4-1-10-2000 -- RT III 2001, 1, 1*). In the present case none of the participants in the proceeding has contested the relevance of §§ 9(8) and 12(1) of the LVA. The Chamber, too, is of the opinion that the contested provisions are relevant, because the solution of the administrative dispute initiated by the complainants depends on the validity of these norms.

II.

18. Although the protection of § 32 of the Constitution is not extended to unlawfully expropriated property, the fundamental right to equality, referred to in § 12 of the Constitution, must be observed upon the return of or compensation for land on the basis of laws on ownership reform and land reform.

In order to ascertain a violation of the fundamental right to equality, it is first necessary to find the closest common generic concept of the persons to be compared, and after that to describe the alleged unequal treatment.

19. Pursuant to the Principles of Ownership Reform Act one of the purposes of ownership reform is to undo the injustices caused by violation of the right of ownership. Injustices are undone by the return of or compensation for unlawfully expropriated property to former owners or their legal successors. Property, the return of which is impossible due to public interest or the need to protect an owner in good faith, or the return of which is not sought by an entitled subject, shall be compensated for by the state to the extent and pursuant to procedure established by law.

The same principles are followed in regard to unlawfully expropriated land. The initial version of § 3 of the Land Reform Act, which entered into force on 1 November 1991, provided for three ways of undoing injustices: the return of, replacement of or compensation for land. The amendment to the Act, which entered into force on 7 June 1996 (RT I 1996, 36, 738) exempted allocation of replacement land from the ways of

undoing injustices.

20. The Kuressaare City Government decided not to return the registered immovable, which had belonged to the complainants' mother, and commenced a property compensation proceeding. Thus, the complainants belong among those entitled subjects of ownership reform, to whom it was decided to compensate for the property.

The Chamber is of the opinion that in order to ascertain the violation of the fundamental right to equality the administrative court has erroneously compared the entitled subjects of ownership reform to whom the property is returned with those subjects to whom the property is compensated for. It is true that persons, to whom land was returned in the course of ownership reform or who received compensation for unlawfully expropriated land, were in a similar situation at the initial stage of ownership reform. Both could submit an application for the return of or compensation for land. It is only in the course of proceedings that it became clear that it was possible to return land to some persons who had requested for the return, but not to others.

The owners of unlawfully expropriated property and their legal successors must be treated equally in regard to procedural rights. As a result of the restitution process some of the subjects will get their property back, to others the property is compensated for. When comparing the entitled subjects of ownership reform, different treatment consists first and foremost in the fact that the state returns property to some persons and compensates it to others.

21. It appears from the complaint submitted to the administrative court that the complainants are of the opinion that unequal treatment consists in the fact that until the 2001 assessment of land the land was compensated to entitled subjects of ownership reform pursuant to the ordinary, i.e. the market value of land, but since the approval of the results of 2001 assessment the amount of compensation does not correspond to the ordinary value of land.

Pursuant to the complainants' allegations it is necessary to compare the persons, the amount of compensation payable to whom was calculated on the basis on the results of land assessment valid at the time of granting the compensation, with the persons the compensation to whom is not based on the results of the last assessment of land. Thus, the closest common generic concept of those to be compared is the persons who get compensation for unlawfully expropriated property. Next the Chamber shall analyse whether these persons are treated unequally.

22. The Principles of Ownership Reform Act (§ 13(1)) establishes that unlawfully expropriated property which can not be returned shall be compensated for to the extent and pursuant to procedure established by law. Thus, the legislator did not express a principle that the compensation determined for unlawfully expropriated property must correspond to the market value of land. The Principles of Ownership Reform Act expressed the political will to effect restitution to the extent and in ways that will not cause new injustices and would be within the state's economic means. Compensating must not be too burdensome on the taxpayer and must not prevent the making of expenses necessary for the society. The extent and manner of undoing injustices was justified by the fact that the Republic of Estonia had not expropriated property unlawfully and thus can not be responsible for the damage caused.

23. The Land Reform Act specifies that land shall be compensated for pursuant to the procedure provided for in the Land Valuation Act (§ 13). The plan was to carry out land reform as quickly as possible and pursuant to a simple procedure. That is why the idea to base the determination of the assessment value of unlawfully expropriated property on the value of 1940 and to value each plot of land on the basis thereof was abandoned. On 9 February 1994, at the discussions of the bill of the Land Valuation Act, the Minister of Justice K. Kama said the following: "Upon conducting land reform we can choose between two evils. One of the evils consists in the fact that the reform will take a terrible lot of time, the other evil is that the principle of justice will be prejudiced. This means that it is impossible to achieve absolute justice and restoration of justice even if we calculated everything with ultimate precision, taking into account all circumstances, and extended the reform over several decades. In any case, we will not be able to achieve absolute justice or

compensation of everything that people were deprived of in 1940. So, we will simply have to take a separate decision in each case, whether to generalise certain indicators so to say more roughly, in the name of quicker reform, or to aspire towards greater accuracy. Each attempt to be more precise, to achieve greater justice, will inevitably make the reform longer and more complicated. The Government is of the opinion that in the name of more speedy conducting of reform we will have to look upon possible instances of injustice that become evident less strictly." (*The Riigikogu Stenographs 1994 vol. I, p 340*).

24. The initial text of the Land Valuation Act of 9 February 1994 and the following wordings observe the principle that the value of unlawfully expropriated land shall be determined on the basis of the results of the assessment carried out in 1993 (§§ 9(8) and 12(1)). The decision to use the values determined as a results of the assessment carried out in 1993 was taken with the aim of speeding up restitution.

The Chamber is of the opinion that all entitled subjects, in regard to whom a decision to compensate for the unlawful expropriation of land has been or will be taken, are treated equally in the sense that the amount of compensation payable for unlawful expropriation of land is determined on the basis of the value of land fixed as a result of the assessment carried out in 1993, and the time of taking the decision to pay compensation does not influence the amount of compensation. Such regulatory framework guarantees legal equality of the persons who get compensation.

25. The Chamber does not accept the allegations that the amendments to the Land Valuation Act, which entered into force on 7 March 2001, created a situation where those who get compensation for unlawfully expropriated land are actually treated unequally. The Chamber has pointed out above that the referred amendment did not change the bases for granting compensation. Neither is accurate the allegation that by the assessment carried out in 1993 the average local market value of land was determined. The initial version of the Act of 1994 established that assessed value of land shall be calculated using either the market value method or the capitalised earnings method (§ 6(1)). Minister L. Hänni pointed out on 19 January 1994 from the Riigikogu pulpit, at the discussions of the Land Valuation Act, that as land is not yet fully in civil commerce, the Government will have to decide, when to use one or the other method or the combinations thereof (*see The Riigikogu Shorthand Notes, vol. I, p 127*). Due to the fact that the market of immovables was not fully formed by the time of 1993 assessment, it was not possible to determine either the market value of each plot of land or the average local market value.

26. The Chamber is of the opinion that upon deciding on the fundamental right to equality the nature of compensation has to be taken into account, too. According to the ideology of ownership reform the unlawfully expropriated property shall not be compensated for in money, instead a person shall be given a compensation voucher (§ 17(1) of the Principles of Ownership Reform Act). The Unlawfully Expropriated Property Valuation and Compensation Act specifies that a compensation voucher (EVP) is a registered and inheritable security, which can be used for purchasing state or municipal property being privatised, including land and dwellings and Compensation Fund bonds (§ 14(1)). In the sphere of land reform the value to be compensated for was brought into conformity with the privatisation value, because both were determined on the basis of the value of land determined as a result of the 1993 assessment.

27. The Chamber admits that the possibilities of use of the compensation vouchers referred to in the Act have become more narrow and upon privatisation of land the selling price is no longer tied to the assessed value of land. Nevertheless, this fact does not render § 9(8) and the second sentence of § 12(1) of the LVA unconstitutional. The disputed provisions do not regulate the use of compensation vouchers, instead it regulates the determination of the amount of compensation.

28. On the basis of the foregoing the Constitutional Review Chamber is of the opinion that § 9(8) and the second sentence of § 12(1) of the Land Valuation Act are not in conflict with the principle of equal treatment established in § 12(1) of the Constitution, and the petition of the Pärnu Administrative Court is to be dismissed. That is why, furthermore, the Chamber does not agree with the opinion of the Pärnu Administrative Court that annex I of the Government of the Republic Regulation no. 276, based on § 9(8) of Land Valuation Act, is unconstitutional.

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