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SUPREME COURT

CONSTITUTIONAL REVIEW CHAMBER

JUDGMENT

in the name of the Republic of Estonia

Case number 3-4-1-1-15

Date of judgment 29 May 2015

Formation

Chairman: Priit Pikamäe; members: Hannes Kiris, Indrek Koolmeister, Saale Laos and Jüri Pöld

Case

Review of the constitutionality of subsections 1 and 4 of § 55 of the National Audit Office Act

Judgment of the Tallinn Administrative Court of 28 January 2015 in case no. 3-14-5203

Basis for procedure

Hearing Written procedure

OPERATIVE PART

To dismiss the request of the Tallinn Administrative Court of 28 January 2015.

FACTS AND COURSE OF PROCEDURE

1. On 14 March 2012, the Riigikogu adopted the National Audit Office Act and the Chancellor of Justice Act Amendment Act whose clause 3 of § 1 added “except regarding the recalculation of the office-related salary and pension serving as the basis for the pension” after the word “Act” to subsection 1 of § 55 of the National Audit Office Act. Clause 5 of the same section of the Amendment Act added subsection 4 to § 55 of the National Audit Office Act, worded as follows: “The pension of an official of the National Audit Office, except for the pension calculated on the basis of the salary of the current year, shall be indexed annually by April 1 using the pension index approved by a regulation of the Government of the Republic on the basis of § 26 of the State Pension Insurance Act.” The amendments entered into force on 1 January

2013.

2. On 23 July 2014, L. Heinlo, M. Kaasik, R. Harjo, R. Karpa, E. Kuld, M. Kuura, L. Kuuser, L. Känd, K. Leesment, L. Lillo, E. Maidu, R. Orasmäe, M. Piirmets, A. Pilvet, M. Soost, T.-M. Sõrmus, J. Zubova, J. Vabaoja, E. Vanker, M. Veski and M. Viherpuu submitted to the Social Insurance Board an application for recalculation of their pensions on the basis of the official salaries that entered into force in the National Audit Office as of 1 April 2013 and 24 January 2014.

Pensions had been granted to these persons on the basis of § 38 of the National Audit Office Act (NAOA) that had entered into force in 1995.

3. By letter no. 6-9/9494 dated 11 August 2014, the Social Insurance Board refused to recalculate the applicants' pensions.

4. On 10 September 2014, the persons listed in paragraph 2 of this judgement submitted to the Tallinn Administrative Court a claim requesting that the Social Insurance Board be ordered to review the claimants' application of 23 July 2014 again and to recalculate the pension granted to them as of 1 April 2013 and 24 January 2014.

JUDGMENT OF THE TALLINN ADMINISTRATIVE COURT

5. By a judgment of 28 January 2015, the Tallinn Administrative Court: declared subsections 1 and 4 of § 55 of the NAOA unconstitutional and did not apply them to the extent that they did not, as of 1 January 2013, allow for recalculating the former pensions of the officials of the National Audit Office based on the official salaries of the officials of the National Audit Office, which entered into force as of 1 April 2013 and as of 24 January 2014 (point 2 of the operative part); granted the claimants' claims (point 1 of the operative part) and obligated the Social Insurance Board to review the claimants' applications again and to recalculate, on the basis of subsection 1 of § 55 of the NAOA, the pension of an official of the National Audit Office granted to the claimants on the basis of the official salaries of officials of the National Audit Office, which entered into force as of 1 April 2013 and 24 January 2014 (point 3 of the operative part).

6. The pension of an official of the National Audit Office was established by the NAOA that entered into force in 1995 and it was in force until 1 June 2002, when the new consolidated text of the NAOA entered into force. Officials who worked in the National Audit Office between 1995 and 2002 and fulfilled the prerequisites arising from subsection 3 of § 38 of the NAOA obtained the right to the pension of an official of the National Audit Office. A retired official of the National Audit Office was (is) granted a pension that amounts to 60% of their last official salary. Upon a change of the official salary, the pension was recalculated. Under subsections 1 and 4 of § 55 of the NAOA, which entered into force on 1 January 2013, the previously granted pensions are no longer recalculated, but indexed.

7. For the purposes of the Civil Service Act (CSA) that was in force until 31 March 2013 and entered into force on 1 April 2013, the terms "salary" [in Est. "palk"] (see subsection 1 of § 8 of the CSA), "salary of an official" [in Est. "ametniku palk"] (subsection 1 of § 61 of the CSA), "office-related salary" [in Est. "ametipalk"] (see subsection 2 of § 81 of the CSA) and "basic salary" [in Est. "põhipalk"] (see subsection 2 of § 61 of the CSA) are comparable. In response to the claimant's submission, the administrative court held that the former office-related salary and additional remuneration was not included in the salary of an official following 1 April 2013. The terms "office-related salary" and "basic salary" are comparable, as also indicated by the salary grades of the staff of the National Audit Office in 2011, 2013 and 2014. The same documents also indicate that in the framework of the new CSA, the salary system of the National Audit Office and reorganisation of the pension system the basic salary of the officials of the National Audit Office rose considerably in 2013 in comparison with the office-related salary of 2011 and in 2014 the salary rose further.

8. Subsections 1 and 4 of § 55 of the NAOA are relevant to the extent that they do not allow for recalculating the old-age pensions of the officials of the National Audit Office based on the official-related salaries of the officials of the National Audit Office as of 1 April 2013 and upon further revisions of the office-related salary (basic salary).

9. The claimants had a legitimate expectation that they would receive the pension of an official of the National Audit Office in their old-age pension age at the rate of 60% of the office-related salary of an official of the National Audit Office holding a respective position. The regulation was in force for approx. 18 years. An official of the National Audit Office was

subject to the requirement of independence and to activity restrictions. Comparing the salary grades of the staff of the National Audit Office in 2011, 2013 and 2014 (case file pp. 25-27), it appears that in 2013 the salaries of officials of the National Audit Office increased considerably. The court agreed with the claimants in that the salary difference and, accordingly, the pension difference was, depending on the position, 20-51% by 2014. Thus, the claimants' pension is currently, depending on the position, 20-51% lower than that of an official who held the same position and retired or will retire after 24 January 2014.

10. It is an infringement of the fundamental right of equality. The recipients of the pension of an official of the National Audit Office whom the pension of an official of the National Audit Office was granted or will be granted on 1 April 2013 or later are in a situation comparable to that of the claimants. Both groups have worked as officials of the National Audit Office and fulfilled the conditions of receipt of the pension. The only difference is that the claimants' group has been granted the pension of an official of the National Audit Office not later than by 31 March 2013 and it is smaller.

11. The legitimate aim of the restriction is the economical use of public funds.

12. The infringement is not proportional. The different treatment of the persons belonging to the comparison groups is accidental. From 2011 to 2014, 0.004% of the budget was spent on the pensions.

OPINIONS OF PARTIES

Social Insurance Board

13.-15. [Omitted.]

Riigikogu

16.-18. [Omitted.]

Chancellor of Justice

19.-23. [Omitted.]

Ministry of Justice

24. [Omitted.]

PROVISION DECLARED UNCONSTITUTIONAL

25. Subsections 1 and 4 of § 55 of the National Audit Office Act:

“(1) A person receiving the pension of an official of the National Audit Office under the National Audit Office Act in force until the entry into force of this Act shall be entitled to the pension on the grounds and in the amount in force until the entry into force of this Act, except regarding the recalculation of the office-related salary and pension serving as the basis for the pension.

[---]

(4) The pension of an official of the National Audit Office, except for the pension calculated on the basis of the salary of the current year, shall be indexed annually by April 1 using the pension index approved by a regulation of the Government of the Republic on the basis of § 26 of the State Pension Insurance Act.”

OPINION OF CHAMBER

26. First, the Chamber will identify relevant provisions of law (I) and then the infringements of the fundamental rights (II, III). Next, the Chamber will discuss the constitutionality of the infringement and decide the request of the Tallinn Administrative Court (IV and V).

27. A provision is relevant if the Court, applying it upon adjudication of the case, should, in the event of its unconstitutionality, have to decide otherwise than in the event of its constitutionality (see, for instance, the Supreme Court *en banc* judgment of 22 December 2000 in case no. 3-4-1-10-00, point 10; judgment of 28 October 2002 in case no. 3-4-1-5-02, point 15).

28. Under subsection 2 of § 38 of the National Audit Office Act adopted by the Riigikogu on 10 January 1995, the size of the pension of a retired official of the National Audit Office was 60% of their last office-related salary and the pension was recalculated once the office-related salary of the position changed.

29. On 29 January 2002, the Riigikogu adopted the National Audit Office Act, according to subsection 1 of § 55 of which, a person receiving the pension of an official of the National Audit Office on the basis of the National Audit Office Act previously in force had the right to the pension on the grounds and in the amount in force until the entry into force of the National Audit Office Act adopted on 29 January 2002. The right to the pension of an official of the National Audit Office on the grounds and in the amount in force until the entry into force of the National Audit Office Act adopted on 29 January 2002 also belonged to an official of the National Audit Office who, by the moment of entry into force of the Act, had attained at least 70% of the length of service required for the receipt of the pension of an official of the National Audit Office, on the condition that the person attains the required length of service before retirement (subsection 2 of § 55 of the NAOA).

30. On 14 March 2012, the Riigikogu adopted the National Audit Office Act and Chancellor of Justice Act Amendment Act (NAOA Amendment Act), which amended subsection 1 of § 55 of the NAOA. As of the entry into force of the amendment on 1 January 2013, subsection 1 of § 55 of the NAOA stipulates that a person who receives the pension of an official of the National Audit Office on the basis of the National Audit Office Act previously in force has the right to the pension on the grounds and in the amount in force before 1 January 2013, except as regards the recalculation of the office-related salary and pension serving as the basis for calculation of the pension. The NAOA Amendment Act added subsection 4 to § 55 of the NAOA, according to which the pension of an official of the National Audit Office, except for the pension calculated on the basis of the salary of the current year, shall be indexed annually by April 1 using the pension index approved by a regulation of the Government of the Republic on the basis of § 26 of the State Pension Insurance Act.

31. The administrative court established that the pension of an official of the National Audit Office had been granted to the claimants before 1 January 2013.

32. It appears from the aforementioned that, at the time when the pension of an official of the National Audit Office was granted to the claimants, the recalculation thereof was dependent on the amount of the office-related salary of the respective position. Thus, when the official salary changed, the amount of the granted pension (the so-called recalculation system) changed as well. According to the amendment of the National Audit Office Act, which entered into force on 1 January 2013, the amount of the granted pension of an official of the National Audit Office no longer depends on the amount of the office-related salary of the respective position, but the granted pension was indexed (the so-called indexing system).

33. The Chamber agrees with the Chancellor of Justice in that the relevant provision is subsection 1 of § 55 of the NAOA to the extent that it stipulates “except as regards the recalculation of the office-related salary and pension serving as the basis for calculation of the pension” as well as subsection 4 to the extent that it replaces the office-related pension of officials of the National Audit Office with indexing based on a change in the office-related salary. The explanatory memorandum of the NAOA Amendment Act also allows for drawing a conclusion that subsection 1 of § 55 of the NAOA was caused by the fact that subsection 4 of § 55 of the NAOA provides for a transition from the recalculation system to the indexing system. These provisions are relevant because it depends on their constitutionality as to whether the claimants’ claim must be granted and the pensions granted to them must be recalculated whenever the salary of the official of the National Audit Office changes or the pensions granted to them are indexed.

34. In addition, the Chancellor of Justice expressed the doubt that, based on the difference between the terms “office-related salary” and “basic salary” of the Civil Service Act, § 546 and subsection 3 of § 55 of the NAOA could also be deemed as relevant provisions (see para. 20 above).

35. According to the Chamber, the problem raised by the Chancellor of Justice concerns, above all, the issue of the amount of remuneration that had to or must be used as the basis for granting the pension. However, the claimants contested the activities of the Social Insurance Board in the form of not recalculating the pensions granted to them, not the amount of the remuneration used as the basis for granting the pensions. Therefore, the Chamber does not consider the additional provisions pointed out by the Chancellor of Justice as relevant in the present case (see the 6 January 2015 judgment of the Supreme Court *en banc* in case no. 3-4-1-18-14, para. 52).

36. All in all, the Chamber finds that the relevant provisions are subsections 1 and 4 of § 55 of the NAOA to the extent that they replaced the system of recalculation of the pension of an official of the National Audit Office with the indexing system.

II

37. Section 32 of the Constitution guarantees the fundamental right of ownership. It is a general provision protecting property rights, which, besides immovables and movables, also covers rights and claims that can be assessed in money (see the 17 June 2004 judgment of the Supreme Court *en banc* in case no. 3-2-1-143-03, para. 18). Thus, the right to office-related pension as a right that can be assessed in money belongs within the protective zone of the fundamental right of ownership (the 26 June 2014 judgment of the Supreme Court *en banc* in case no. 3-4-1-1-14, para. 88).

38. The rights and obligations can be exercised in full only if the person does not have to fear that the actions of the state will result in unforeseeable disadvantageous consequences. Thereby, the realisation of one's own rights, i.e. the exercise of the rights and freedoms granted to a person by law, requires acting on the basis of a legal provision, hoping that it will remain in force. The state has broken its promise when a person has, by their acts, fulfilled the prerequisites owing to which the person has the right to expect the application of advantageous rules towards them, but the state nevertheless establishes new less advantageous rules towards the person (the 26 June 2014 judgment of the Supreme Court *en banc* in case no. 3-4-1-1-14, para. 90).

39. In the claim, the claimants requested that the court order the Social Insurance Board to recalculate their pensions on the basis of the salary grades of the staff of the National Audit Office, which were established as of 1 April 2013 by directive no. 1-1.1/13/6 of the Auditor General dated 1 February 2013 and as of 24 January 2014 by directive no. 1-1.1/14/3 of the Auditor General dated 24 January 2014.

40. The pension of an official of the National Audit Office was provided by § 38 of the NAOA that entered into force in 1995 and remained in force until the entry into force of the new National Audit Office Act. Subsection 1 of § 55 of the NAOA that entered into force on 4 March 2002 retained the pension system of an official of the National Audit Office of 1995-2002 until 1 January 2013. Thus, the provisions according to which the pension had to be recalculated in the event of a change of the office-related salary were in force for approx. 18 years.

41. The claimants had fulfilled the requirements for receiving the pension of an official of the National Audit Office and the pension had been granted to them before 1 January 2013, i.e. when the recalculation system was in force, according to which the granted pension amounted to 60% of the office-related salary of an official of the National Audit Office holding the same position. Since the claimants have retired, they could not change their work-related choices or contribute to the receipt of the pension any longer. According to the Chamber's estimate, the claimants had, given the aforementioned circumstances, a legitimate expectation that the pension granted to them would amount to 60% of the office-related salary of an official of the National Audit Office holding the same position during the period of paying the pension.

42. It follows from the reasons stated by the administrative court that the replacement of the recalculation system with the indexing system resulted in a situation where the amount of the granted pension will be smaller than 60% of the basic salary of an official of the National Audit Office holding the same position. The administrative court noted that since in 2013 the salaries of the officials of the National Audit Office rose, the salary and, accordingly, the pension difference rose by 20-51% by 2014, depending on the position. Thus, the administrative court took the view that the claimants' right of ownership in combination with the principle of legitimate expectation was infringed.

43. The Chamber finds that the infringement of the legitimate expectation must be assessed in the light of the salary

reform, which was brought about by the Civil Service Act, which entered into force on 1 April 2013.

43.1. Before 1 April 2013, the salary of an official (incl. an official of the National Audit Office) consisted of the office-related salary and various periodical and one-off allowances. Under subsection 1 of § 34 of the NAOA, performance pay could be paid to an official of the National Audit Office in accordance with the procedure established by the Auditor General. Upon setting other additional remunerations, the Civil Service Act was applied to the civil servants of the National Audit Office under subsection 2 of § 34 of the NAOA. The Civil Service Act in force until 31 March 2013 provided for additional remuneration of 5%, 10% or 15% of the office-related salary (§ 37) for years of service; additional remuneration of 10% or 20% of the office-related salary for an academic degree (§ 38); additional remuneration of 10% of the office-related salary, but not more than 30% of the office-related salary (§ 39) for the skills of a third and each additional foreign language; and additional remuneration for performing the duties of an absent official (§ 64).

43.2. For instance, according to section 3.2 of the Staff Remuneration Rules of the National Audit Office approved by directive no. 1-1.1/11/1 of the Auditor General of 14 January 2011, permanent additional remunerations included additional remuneration for the length of service and an academic degree at the rates provided for in the Civil Service Act and individual additional remuneration that was set until the end of the calendar year for the purpose of remunerating qualifications, experience, permanent special duties and effectiveness. To make proposals to set permanent additional remuneration, the head of the unit had at their disposal an additional remuneration fund that amounted up to 49% of the office-related salaries of filled positions. Besides permanent additional remuneration, the given Staff Remuneration Rules of the National Audit Office also provided for one-off or short-term additional remuneration (sections 3.3 and 3.4) and performance pay that could be paid following the completion or approval of a specific audit or project or end of a work period (section 4).

43.3. Subsection 1 of § 61 of the CSA that entered into force on 1 April 2013 provides for a basic salary (instead of the office-related salary), variable salary and additional remuneration specified in subsection 3 of § 38, subsection 6 of § 39, subsections 3 and 4 of § 40 and § 57 of the CSA. The new salary system of officials does not provide for any periodically payable additional remuneration for the length of service, academic degree or foreign language skills. Under subsection 5 of § 61 of the CSA, the variable salary is an irregular part of the remuneration of an official, which may be paid as a performance payment as an additional payment for the performance of additional duties, and a variable salary of up to 20% of the basic salary of the official may be paid in addition to the basic salary of the official in a calendar year. As a result of the amendment, the share of additional remuneration decreased considerably in the (total) salary of officials. The aim of the legislature was to increase the transparency and comparability of the salary systems of public authorities, give the basic salary guarantee to officials, and reduce the rigidity of the salary system and reduce the administrative burden (explanatory memorandum of the draft Civil Service Act 193 SE, page 45).

43.4. The amendments that entered into force as of 1 April 2013 did not merely concern additional remuneration and their share in the (total) salary and were not limited to the replacement of the term “office-related salary” with the term “basic salary.” The office-related salary and basic salary are calculated differently. The amendment resulted in the basic salary being considerably higher than the former office-related salary as of 1 April 2013. The Chancellor of Justice has correctly noted in his opinion that the administrative court was in error when it found that the claimant's submission, according to which the office-related salary along with previous additional remuneration was included in the basic salary after 1 April 2013, is wrong. As noted above, the amount of the basic salary can be explained by the waiver of numerous additional remunerations. In addition, upon setting the basic salary, the official's service knowledge, skills and experience (subsection 2 of § 61 of the CSA) are taken into account besides the service duties of the position, as a result of which the basic salary of the officials holding the same position may differ. The value of the knowledge, skills and experience of the official contained in the basic salary since 1 April 2013 was previously added to the office-related salary in the form of additional remuneration on the basis of the Civil Service Act or the National Audit Office Act (see paras. 43.1-43.2 above).

43.5. For instance, in the salary grades of the staff of the National Audit Office approved by directive no. 1-1.1/11/24 of the Auditor General on 30 November 2011, the office-related salaries were as follows: director of audit, Head of Development Service – 1718 euros; senior auditor – 1253 euros; auditor – 1146 euros; junior auditor, assistant to Auditor General – 931 euros. However, for example, the basic salary of an official was placed at the following ranges in the salary grades of the staff of the National Audit Office approved by directive no. 1-1.1/14/3 of the Auditor General on 24 January 2014: director of audit, Head of the Development Service – 2400-3100 euros; senior auditor – 1900-2300 euros; auditor – 1500-2100 euros; junior auditor, assistant to Auditor General – 1100-1500 euros.

43.6. In order to compensate officials for the consequences of the changes in the principles of remuneration, clause 1 of subsection 1 of § 111 of the CSA, as a transitional provision, provides that if the basic salary of the official corresponding

to the salary guide of the authority appears lower than their salary along with periodic additional remuneration for the calendar month prior to the entry into force of this Act, the basic salary in the amount of the current salary will be paid.

44. It follows from the aforementioned that the office-related salary paid to officials who served before 1 April 2013 and the basic salary paid, among other things, in accordance with clause 1 of subsection 1 of § 11 of the CSA, to officials who continued their service after 1 April 2013, have evolved on considerably different premises.

45. The former system of additional remuneration (except for the remuneration for the length of service and for an academic degree) came into existence because the office-related salary was not competitive in the labour market, but office-related salaries were nevertheless not raised. It is highly probable that a basic salary comparable to the amount of the former office-related salary would not have been competitive in the labour market in the case of new officials following 1 April 2013. Therefore, it is logical to assume that, upon setting the basic salary as of 1 April 2013, the amount of the office-related salary and the amount of the periodically paid additional remuneration of the officials who served before 1 April 2013 were taken into account.

46. As a result of the salary reform and upon transition from the recalculation system to indexing, the share of the office-related salary of the claimants has not been reduced as the base for the pension amount as of 1 April 2013 and 24 January 2014. The claimants' legitimate expectation is also not affected by the fact that the legislature decided to include other salary components in the basic salary covered by the CSA, which were not contained in the basic salary under the CSA that was in force until 31 March 2013. The amount of the claimants' pension was dependent solely on the office-related salary, not other salary components, incl. periodical additional remuneration.

47. In view of the above, the Chamber finds that the claimants' legitimate expectation that the pension granted to them, at the time of payment of the pension, 60% of the office-related salary of an official of the National Audit Office holding the same position, has not been infringed as of 1 April 2013 and 24 January 2014.

III

48. The right of ownership must usually also be equally protected (the 6 January 2015 judgment of the Supreme Court *en banc* in case no. 3-4-1-18-14, para. 57). The right of equality has been infringed if comparable groups are treated differently in a similar situation (the 27 December 2011 judgment of the Constitutional Review Chamber of the Supreme Court in case no. 3-4-1-23-11, para. 42). To identify an infringement of the fundamental right of equality, a group of persons that are in a situation similar to that of the appellant and in comparison with whom the appellant is being treated worse must be found (the 22 April 2014 judgment of the Supreme Court *en banc* in case no. 3-3-1-51-13, para. 69).

49. The Chancellor of Justice and the administrative court considered the following as comparable groups:

- 1) recipients of the pension of an official of the National Audit Office whom the pension was granted before 1 April 2013; and
- 2) recipients of the pension of an official of the National Audit Office who, as of 1 April 2013, have fulfilled the requirements established for obtaining the pension of an official of the National Audit Office and whom the pension of an official of the National Audit Office was granted or will be granted on 1 April 2013 or later.

However, the Chancellor of Justice delimited the comparable group based on the additional condition that the length of service requirement necessary for receiving the pension of an official of the National Audit Office has been fulfilled as of 1 April 2013. The Chancellor of Justice and the administrative court found that the common share of the groups was that both have served as officials of the National Audit Office and fulfilled the requirements for receiving the pension of an official of the National Audit Office. The difference lies in the fact that the pension of an official of the National Audit Office has been granted to the claimants' group before 1 April 2013, while the comparable group was granted it after 1 April 2013. Since the claimants' pension may be considerably smaller than that of the comparable group in the event of a time difference of merely a few days, they are treated worse than the comparable group.

50. When the new salary system of officials was introduced on 1 April 2013, replacing the former office-related salary system with the basic salary, the term "office-related salary" was not amended in the provisions regulating pensions. The office-related pension of the officials of the National Audit Office must, according to the law, still be calculated based on the office-related salary (subsection 3 of § 55 of the NAO), even though the current legal order does not provide for the latter anymore. The term was retained upon granting pensions regardless of the fact that the office-related salary and the

basic salary are inherently different. The basis for calculation of the pension of an official of the National Audit Office was, until 31 March 2013, the office-related salary exclusive of any additional remuneration.

51. Upon agreeing with the claimants, the administrative court has relied on the fact that the pension of an official of the National Audit Office is granted on the basis of the last basic salary of an official who retires as of 1 April 2013. According to the law in force, the basis for calculation of the pension of an official of the National Audit Office as of 1 April 2013 is, thus, unclear. However, according to the Social Insurance Board, the respective basic salary has been used as the basis for granting the pension of an official of the National Audit Office who retired after 1 April 2013. The staff salary grades of the National Audit Office approved by directive no. 1-1.1/14/3 of the Auditor General on 24 January 2014 contain an explanation that, in order to grant the National Audit Office pension, the data of the salary conditions of the civil servant at the moment of their retirement are forwarded based on the basic salary, while in the case of a person who does not work in the National Audit Office the average of the basic salary grades set to the respective position is forwarded.

52. In the present case the Chamber uses the different amounts of the pensions of officials of the National Audit Office as the basis and forms comparable groups based thereon. If one is to assume that as of 1 April 2013 the basic salary, not the office-related salary, as the basis for determining the pension of an official of the National Audit Office, the claimants are put at a disadvantage in comparison with the comparable group, thus resulting in an infringement of the fundamental right of equality.

IV

53. The fundamental right of equality can be restricted for a purpose that is in accordance with the Constitution (the 6 January 2015 judgment of the Supreme Court *en banc* in case no. 3-4-1-18-14, para. 59 and the case-law referred therein).

54. According to the explanatory memorandum of the NAOA Amendment Act, the purpose of the amendment was to ensure the equal treatment of persons in pension schemes and reduce expenditure in the state budget in paying pensions (the National Audit Office Act and the Chancellor of Justice Act Amendment Act, 151 SE, explanatory memorandum, page 1).

55. The Supreme Court *en banc* found in the case concerning judges' pensions that the legitimate aim of the infringement of the fundamental right of equality set out in subsection 1 of § 12 of the Constitution is the economical use of public funds (the 26 June 2014 judgment in case no. 3-4-1-1-14, para. 115). In the case concerning police officers' pensions (the 6 January 2015 judgment in case no. 3-4-1-18-14, para. 59), the Supreme Court *en banc* found that the legitimate purpose of the amendment of the system of office-related pension is the more practical use of public funds, which include ensuring the long-term functioning of the given office-related pension as well as the entire pension system, taking account of what society is actually able to afford itself. Pensions are a long-term and increasing obligation of the state, which must be foreseeable and which must have a cover. Among other things, the Supreme Court relied on the 21 February 2014 report of the National Audit Office titled "Sustainability of the Pension System of the State", which stated that, in order to ensure the sustainability of the pension system, a long-term plan is required, taking into account the decrease in the number of people of working age, the increase in the number of retired people and the rise in life expectancy. The expenses of the state pension insurance exceed social tax revenue and this deficit will increase in the future, and without the amendments the huge deficit will remain for decades. The number of recipients of office-related pensions has increased over 21 times between 2000 and 2012; between 2005 and 2012 the number of new recipients of special pensions rose by approx. 30% and, on average, office-related pension is received for 29 years, while the average period of receipt of the old-age pension is 18 years. The state spends three times more money on maintaining one office-related pensioner than on an average pensioner (see page 3 et seq in the report of the National Audit Office).

56. The Chamber finds that, in view of the above, the legitimate aim of the infringement of the fundamental right by the reform of the pension system of officials of the National Audit Office is the sustainability of the given office-related pension as well as the state's pension system, which includes as equal treatment of persons as possible in pension schemes and the reduction of the share of pensions in the state budget.

V

57. There must be a reasonable and relevant reason in order to treat persons who retired before 1 April 2013 as recipients of the office-related pension and persons who retired or will retire after 1 April 2013 as recipients of the office-related pension differently and this reason must not be arbitrary. If the legislature has broad discretion in resolving an issue, unequal treatment is arbitrary if the treatment is clearly irrelevant (the 21 January 2004 judgment of the Constitutional Review Chamber of the Supreme Court in case no. 3-4-1-7-03, para. 37; cf. also the 30 September 2008 judgment in case no. 3-4-1-8-08, para. 32).

58. The economic and social policy and budgeting is within the competence of the legislature (the 26 June 2014 judgment of the Supreme Court *en banc* in case no. 3-4-1-1-14, para. 127). According to the Chamber, the legislature has broad discretion upon implementing the civil service salary reform as well as upon shaping the office-related pension system.

59. In the cases of the constitutionality of the pension of judges and police officers, the office-related salaries of judges and police officers had been reduced beforehand, resulting in a decrease of the pensions granted to the claimants or the reduced office-related salary used as the basis for granting the claimants' pension (the 26 June 2014 judgment of the Supreme Court *en banc* in case no. 3-4-1-1-14; the 6 January 2015 judgment in case no. 3-4-1-18-14). Furthermore, in the judges' pension case the reduction of the office-related salary was temporary and once it ended, the set base level of the pensions was not restored to the pre-reduction level either (the 26 June 2014 judgment of the Supreme Court *en banc* in case no. 3-4-1-1-14, paras. 126, 128 and 129). Thereby, once the indexing system entered into force, the office-related salaries were simultaneously raised. The Supreme Court took the view that in the aforementioned cases the treatment of people was arbitrarily different and a promise given to them was broken (the 26 June 2014 judgment of the Supreme Court *en banc* in case no. 3-4-1-1-14, para. 128; the 6 January 2015 judgment in case no. 3-4-1-18-14, para. 66).

However, in the present case the office-related salaries of the officials of the National Audit Office have not been reduced beforehand, which means that the claimants' pensions have not been reduced before the transition to indexing. If the legislature established the transition from the recalculation system to the indexing system, no reduced base level was used as the basis for indexing the pensions granted to the claimants.

60. For the purposes of the system of increasing the pensions granted to persons (indexing) the compared groups are in a similar situation. The pensions of officials of the National Audit Office who retired before 1 April 2013 or who retired or will retire after 1 April 2013 are increased annually by April 1 based on the pension index approved by a regulation of the Government of the Republic under § 26 of the State Pension Insurance Act. The pensions granted to both groups are indexed and the index is the same for all of them. The indexing system must ensure that the purchase power of the granted pensions is retained. In the case of indexing, the rise in pension is based on the method provided by law, which, unlike the amount of salary, is usually in correlation with the rise in the cost of living. Indexing takes place by April 1 each calendar year, unless the value of the index is below 1000 (subsection 5 of § 26 of the State Pension Insurance Act). Thus, if the index should remain below 1000, the granted pensions will not be reduced, but they will remain at the same level. In the case of the pension recalculation system, the pension may also decrease if the salary component serving as the basis for the calculation thereof is reduced.

61. The different size of the office-related pensions granted to the claimants and granted or to be granted to the comparative group arises from the fact that the claimants' office-related salary serving as the basis for granting the pension, along with the recalculation practiced until 1 January 2013, and the basic salary of the comparative group are different and have evolved on the basis of different principles and the persons retire at different times. The more inherently different the comparative groups are, the more differently the legislature can treat them (the 29 January 2014 judgment of the Constitutional Review Chamber of the Supreme Court in case no. 3-4-1-52-13, para. 47). The claimants were in service and retired when the pension had to be granted based on the office-related salary, not the basic salary. Furthermore, the claimants have not been in service, performed any service duties or received any remuneration for performing them during the term of validity of the new salary system. The salary is not a constant amount and does not remain the same, but changes over time depending on the economic situation, budgetary funds, salary market and the nature of the job. Thereby public authorities, their structure, positions and the salary system change. Based mainly on their age, people inevitably retire at different times. Even though the average of the basic salary grade established for the respective position is taken as the basis for granting the pension of a former official of the National Audit Office who was not at the service of the National Audit Office at the time of retirement, this fact does not make the treatment of the claimants arbitrary.

The right of ownership of the persons who retired before 1 April 2013 as persons entitled to the pension of an official of the National Audit Office has, in combination with the principle of legitimate expectations, not been infringed upon the transition to the indexing system and the claimants cannot presume that their pension must be exactly as high as the pension of those who retire after the given date as persons entitled to the pension of an official of the National Audit Office.

62. In addition to amendments related to the salary reform of the civil service, it must be taken into account that the office-related pensions of the claimants have not been abolished and they are higher than the average old-age pension.

63. The purpose of the different treatment is to guarantee with the help of a broad reform the sustainability of the given office-related pension as well as of the state pension system, which includes as equal treatment of persons as possible in pension schemes and a decrease of the share of pensions in the state budget. It is not a clearly unreasonable or irrelevant reason.

63.1. Given the current situation in Estonia, office-related pensions constitute a long-term increasing obligation of the state. According to the Ministry of Social Affairs, the expenditure for office-related pension in 2000 amounted to 13 million Estonian kroons (i.e. approx. 83 000 euros), but by 2006 this expenditure had risen to 144 million Estonian kroons (approx. 9.2 million euros). According to the Social Insurance Board, the office-related pension expenditure in 2014 was 28 596 332 euros ([http://www.sotsiaalkindlustusamet.ee/2014-aasta-eelarve/\[1\]](http://www.sotsiaalkindlustusamet.ee/2014-aasta-eelarve/[1])) and in 2015 it is 32 045 618 euros ([http://www.sotsiaalkindlustusamet.ee/2015-aasta-eelarve/\[2\]](http://www.sotsiaalkindlustusamet.ee/2015-aasta-eelarve/[2])).

63.2. In the 2013 report to the Riigikogu, the Auditor General notes the following: "This year, fixed costs amount to 74% of the state budget, but in 2017 they will already amount to 77% of the budget. Most of the fixed costs consist of social expenditure, i.e. money spent on pensions, health insurance, family allowances, etc. These expenses already account for nearly a half of the state budget. [---] In five years, pensions have risen by a couple of dozens of euros, but social tax accruals are not sufficient to pay them. Every year, an increasing amount of other public revenue will need to be used for covering social expenses. This year, the state had to find approx. 370 million euros from other sources just to pay pensions and by 2017 it will need approx. 500 million euros for that purpose. According to surveys, the Estonian pension insurance system not sustainable in its current form." Under subsection 5 of § 55 of the NAOA, the pension of an official of the National Audit Office is paid from the state budget via the budget of the National Audit Office. Even though the grounds for financing of the pension of an official of the National Audit Office are different from those of the old-age pension, it does not change the fact that office-related pensions also constitute fixed expenditure in the state budget (see para. 55 of this judgment).

63.3. The pension reform did not only concern the claimants as persons entitled to the office-related pension of an official of the National Audit Office, but also, for instance, judges, police officers and servicemen, who are also subject to the indexing system. In addition, pensions paid on the basis of the State Pension Insurance Act are indexed.

64. For the aforementioned reasons the Chamber holds that there are reasonable and relevant reasons for the different treatment arising from the transition from the recalculation system to the indexing system and the different treatment is not arbitrary. Thus, the fundamental right of equality has not been violated and the Chamber dismisses the request of the Tallinn Administrative Court.

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