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## Constitutional judgment 5-20-7

S U P R E M E C O U R T

CONSTITUTIONAL REVIEW CHAMBER

**JUDGMENT**

in the name of the Republic of Estonia

<b>Case number</b>	5-20-7
<b>Date of judgment</b>	16 March 2021
<b>Composition of court</b>	Chairman: Villu Kõve; members: Velmar Brett, Heiki Loot, Kaupo Paal and Ivo Pilving
<b>Case</b>	Review of the constitutionality of § 132 <sup>5</sup> of the Courts Act
<b>Basis for proceedings</b>	Tallinn Administrative Court judgment of 30 October 2020 in administrative case No 3-19-2111
<b>Participants in the proceedings</b>	Tamara Vijard Social Insurance Board Riigikogu Chancellor of Justice Government of the Republic
<b>Hearing</b>	Written procedure

## **OPERATIVE PART**

**To repeal § 1325 of the Courts Act insofar as it precludes granting and paying a judge's survivor's pension to a family member of a judge who held office after 31 December 1991 and before 2 July 2013.**

## **FACTS AND COURSE OF PROCEEDINGS**

**1.** Since 1959, Tamara Vijard (hereinafter 'the appellant') was married to Armand Vijard who was a justice of the Supreme Court of the Estonian SSR and subsequently a justice of the Supreme Court of the Republic of Estonia from 1 January 1978 to 30 September 1993. From 1 September 1994, A. Vijard was granted a judge's pension under § 33 of the Status of Judges Act.

[ ... ]

**7.** A. Vijard died on 1 September 2019. On 17 September 2019, the appellant applied to the Social Insurance Board asking to be granted a survivor's pension for judge's family members.

**8.** By decision No 08155 of 17 September 2019, the Social Insurance Board denied the application since under § 132<sup>5</sup> of the Courts Act the appellant is not entitled to a survivor's pension for judge's family members. The Social Insurance Board also declined to grant the appellant a survivor's pension under § 20 of the State Pension Insurance Act since this would have been smaller than the appellant's old-age pension (518 euros).

**9.** On 12 November 2019, the appellant lodged an action (subsequently amended) with Tallinn Administrative Court, seeking annulment of the decision of the Social Insurance Board and an order obliging the Board to grant the appellant a survivor's pension for judge's family members as of 17 September 2019 to the extent of 30% of the salary of a member of the Supreme Court. The appellant requested § 132<sup>5</sup> of the Courts Act to be set aside on account of its conflict with §§ 10 and 12 of the Constitution.

**10.** Tallinn Administrative Court satisfied the action by judgment of 30 October 2020, annulled the decision of the Social Insurance Board and obliged the Board to grant the appellant a survivor's pension for judge's family members as of 17 September 2019. The Administrative Court set aside and declared unconstitutional § 132<sup>5</sup> of the Courts Act insofar as it does not enable granting a survivor's pension for judge's family members for a family member of a judge who was in office after 31 December 1991 and before 2 July 2013 if the judge died after 30 June 2016. On 30 October 2020, Tallinn Court of Appeal referred its judgment to the Supreme Court for initiating constitutional review court proceedings.

## **REASONING BY TALLINN ADMINISTRATIVE COURT**

[ ... ]

## **OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS**

[ ... ]

## **PROVISION DECLARED UNCONSTITUTIONAL**

**28.** Section 132<sup>5</sup> of the Courts Act (wording in force from 1 July 2016):

### **“§ 132<sup>5</sup>. Survivor’s pension for judge’s family members**

A judge’s family member whose right to receive a judge’s survivor’s pension has arisen before 1 July 2016 shall be granted and paid the pension based on the version of this Act in force until 1 July 2016.

## **OPINION OF THE CHAMBER**

**29.** The Chamber finds that the application by Tallinn Administrative Court for verification of the constitutionality of § 132<sup>5</sup> of the Courts Act is admissible (I) and the contested provision contravenes the Constitution since it interferes with the fundamental right to property (II and III) unconstitutionally (IV).

### **I**

[ ... ]

### **II**

**35.** The right to a survivor’s pension of judge’s family members is a pecuniary position arising under the law and protected by the fundamental right to property laid down by § 32 of the Constitution. When changing the rules concerning this right, the legitimate expectation of individuals (§ 10 Constitution) and the relation of this right to guarantees of independence of judges (§ 147(4) Constitution) must also be taken into account.

**36.** The Constitution protects everyone’s right to freely possess, use, and dispose of their property (first sentence of § 32(2) of the Constitution). Interference with the fundamental right to property means exerting any unfavourable influence on a legal position falling within the scope of protection of this right [ ... ]. By requiring the state to equally protect everyone’s property, the first sentence of § 32(1) of the Constitution also lays down a special fundamental right to equality to which, if applied, the general fundamental right to equality under § 12 of the Constitution gives way.

**37.** The scope of protection of the fundamental right to property includes things as well as rights and claims valued in money, including the right to a pension as a pecuniary position in public law [ ... ].

**38.** A pecuniary right in public law originates on the basis of a law (or other legal act) and is manifested in a person’s right to expect that the state delivers the performance promised in the legal act and measurable in money. If the legal act sets the person’s own prior performance (e.g. taking up employment, years of service) as a precondition for performance by the state, the person already acquires the pecuniary right once they begin to fulfil the conditions laid down by the legal act. In this respect, the more of the conditions laid down by the legal act a person has fulfilled, the stronger their pecuniary position. A pecuniary right in public law is interfered with when promised performance is not delivered or is delivered to a lesser extent than promised.

**39.** The weight of a pecuniary right in public law may be increased by a legitimate expectation developed by a person, and the expectation is the stronger the longer the legal act based on which the person developed the right to expect performance by the state has been in force and the longer the person has arranged their actions by relying on the legal act, including fulfilling the conditions laid down by the legal act which have

been set as a precondition for performance. A legitimate expectation or the principle of protection of trust, which is part of the principle of the rule of law laid down by § 10 of the Constitution, entitles everyone to act with a reasonable expectation that the applicable law will remain in force and prohibits the state from behaving perfidiously. “Perfidy by the state has occurred when a person with their activity has fulfilled the preconditions arising from which they are entitled in the future to application of regulatory arrangements favourable to them” [ ... ].

**40.** A survivor’s pension for judge’s family members is a type of judge’s pension (a judge’s occupational pension) which was laid down by law from 25 October 1996 to 1 June 2016 [ ... ].

**41.** The purpose of that pension was to ensure, in the event of a judge’s death, income for the judge’s family members who either lacked or had reduced capacity to earn their own subsistence (due to age or other reasons [ ... ]). Survivor’s pension replaced the judge’s salary or pension that had until then provided subsistence to a family member, thereby ensuring a standard of living closer to the family member’s habitual standard of living [ ... ]. A person presumably applies for grant of that pension when it would be larger than any other benefit to which the person is also entitled (first and foremost [ ... ] an old-age pension, national pension, survivor’s pension) would have been.

**42.** As this involves a judge’s occupational pension, a survivor’s pension for judge’s family members does not fall within the scope of protection of the fundamental right laid down by § 28(2) of the Constitution ensuring the right to state assistance in the case of loss of a provider [ ... ].

**43.** Together with other types of judge’s pension, a survivor’s pension for judge’s family members was a significant part of guarantees of judicial independence whose more distant aim is to ensure the independence and impartiality of administration of justice (§ 147(4) and § 146 Constitution). Independence of the courts is an extremely robust constitutional value since it is unavoidably necessary to protect everyone’s fundamental rights and freedoms (§ 15(1)) and thereby for implementing the fundamental constitutional principle of a state governed by the rule of law (§ 10) [ ... ]. The purpose of a judge’s occupational pension is to ensure independence, inter alia, by balancing the extensive occupational restrictions imposed on judges, first and foremost the ban on obtaining supplementary legal income [ ... ] as well as the maximum age threshold [ ... ].

**44.** The Chamber finds that the constitutionally protected pecuniary position in public law – the right of expectation, valuable in money, to a survivor’s pension for a judge’s family member – arises when a judge is appointed to office. The Chamber notes that the contested provision – § 132<sup>5</sup> of the Courts Act – uses the term “arising of the right” in a different meaning, having in mind the right to claim payment of pension, i.e. the moment when the pecuniary position in question matures [ ... ].

**45.** The right of a judge’s family member to a survivor’s pension did not depend on whether the judge died while in office or while in retirement. In the event of death of a judge in office, how many years of pensionable service the judge had acquired did not play any role. In the event of the death of a retired judge, the right to a survivor’s pension did not depend on what kind of judge’s pension the judge had been paid (a judge’s old-age pension, a superannuated pension, a judge’s incapacity for work pension). In all cases, the amount of a survivor’s pension was calculated based on the judge’s final salary (the pension was 30% of the salary but not more than 70% in total for all family members together [ ... ]).

**46.** Therefore, by assuming office a judge had begun to fulfil the preconditions so that in the event of the judge’s death the state would have an obligation to deliver performance to the judge’s family members – to pay a survivor’s pension [ ... ]. The emergence of a pecuniary position protected by the fundamental right to property does not depend on whether the right to survivor’s pension has matured [ ... ] or whether the right matured while the judge was in office or retired.

**47.** Due to establishment of a survivor’s pension for judge’s family members in the Status of Judges Act, the right to that pension was acquired by all judges in office or appointed to office from 25 October 1996 (inclusive) and their family members. That right was also expanded retroactively to all judges who were in

office on 1 January 1992 (§ 44 Status of Judges Act) (including the appellant's spouse). Since 29 July 2002, the same right arose from the Courts Act so that the right to a survivor's pension was also acquired by all judges appointed to office or in office from that date onwards.

**48.** The right to a survivor's pension for judge's family members was not acquired by judges appointed to office from 2 July 2013 (inclusive) and their family members because, for those judges, the legislator established different social guarantees – the calculation of salary was changed and pension rights were subsequently calculated on the basis [of another law] [ ... ]. Thus, for judges appointed to office from 2 July 2013 (inclusive) and their family members the state did not give a promise that in the event of a judge's death family members would be paid a survivor's pension under the Courts Act.

**49.** Thus, the right to a survivor's pension was acquired by all judges in office from 1 January 1992 to 1 July 2013 (inclusive) and their family members.

### III

**50.** Section 1325 of the Courts Act seriously interferes with the fundamental right to property of judges in office before 2 July 2013 and their family members (including the right to equal protection of property).

**51.** Section 1325 of the Courts Act deprives family members of a judge dying after 1 July 2016 (inclusive) of the right to claim that the state should comply with the obligation arising from a pecuniary position in public law and pay them a survivor's pension. Thus, a person's right to claim performance by the state is completely precluded from that date onwards.

**52.** However, the seriousness of interference for a specific person depends on how much their income is smaller due to not receiving a survivor's pension for judge's family members, i.e. how much that pension would increase their income. This, however, primarily depends on what other benefits the person would be entitled to. According to the Social Insurance Board, the pension in question is usually granted to a judge's child or widow(er).

**53.** In the case of a widow(er) in retirement age, as a rule the issue of the amount of the person's own old-age pension arises, i.e. how much smaller it is than a survivor's pension for a judge's family member. By way of illustration, a comparison can be made between the average old-age pension and salaries of first-instance judges and a potential survivor's pension calculated on that basis. Since 1 April 2020, the average old-age pension (with 44 years of service) is 528 euros. The salary of a county and administrative court judge since 1 April 2020 is 4330.15 euros (the highest salary rate of higher state servants 6661.77 euros multiplied by the coefficient 0.65; see § 2 and § 3(16) of the Salaries of Higher State Servants Act), 30% of which is 1299.05 euros. Thus, it may be said that the average old-age pension is more than a half smaller than the survivor's pension of a family member of a first-instance judge. In the case of a higher-instance judge, the difference may be even bigger. At the time of the court dispute, the old-age pension of the appellant in the administrative case was 518 euros but, according to the calculations of the Administrative Court, the appellant would have been entitled to a survivor's pension for a judge's family member in the amount of 1326 euros.

**54.** Interference with the fundamental right to property is made more serious by the fact that judges and their family members had developed a legitimate expectation that, in the event of a judge's death, the state would pay the judge's family member a survivor's pension on the conditions laid down by law. The right to a survivor's pension was laid down by law for a very long time and many of the persons concerned had already acquired the right to a survivor's pension years before the legislator adopted the law containing the contested provision in 2014. Therefore, the expectation of judges and their family members that the legislator does not retroactively make their situation less favourable can be considered reasonable.

**55.** By precluding the obligation of the state to pay a survivor's pension to a judge's family member after the

date specified in the law, the contested provision also treats the property of judges having been in office before 2 July 2013 and their family members unequally.

**56.** Although the right of all judges in office before 2 July 2013 and their family members to a survivor's pension arose during the same period (1 January 1992 – 1 July 2013) and, in general, on the same legal bases and conditions [ ... ], some persons could claim delivery of pecuniary performance from the state based on that right while others could not. And different treatment in this respect was not linked to any substantive characteristics of the pecuniary right in question but only to the time when the right matured, i.e. the moment of death of the provider.

#### IV

**57.** Section 11 of the Constitution allows restricting fundamental rights only in accordance with the Constitution, setting the precondition that restriction must be necessary in a democratic society and may not distort the nature of the rights and freedoms restricted. In line with the long-standing case-law of the Supreme Court, this means that interference with a fundamental right must have a (legitimate) aim complying with the Constitution and interference must be proportionate to attaining it (appropriate, necessary and proportional in the narrow sense).

**58.** Interference with a fundamental right is a measure appropriate for attaining the aim if it helps to attain the aim. However, interference is necessary only if the aim cannot be attained by using a measure which is less restrictive of fundamental rights. To decide on the narrow proportionality of a measure requires considering, on the one hand, the extent and seriousness of interference with a fundamental right and, on the other hand, the aim of the restriction. The more serious the interference with a fundamental right, the more compelling the reasons justifying it have to be.

**59.** The second sentence of § 32(2) of the Constitution allows restricting, by law, the right to possess, use and dispose of one's property guaranteed by the first sentence of the same section. Thus, the fundamental right to property is a fundamental right subject to a simple statutory reservation which may generally be restricted for any aim that is not unconstitutional [ ... ].

**60.** The proceedings for establishing the contested provision in the Riigikogu [ ... ] do not indicate the aim of the provision.

**61.** When the Supreme Court assessed the constitutionality of § 132<sup>5</sup> (earlier version) of the Courts Act in 2015, the Constitutional Review Chamber considered legitimate aims of interference with fundamental rights to be the legislator's wish to implement a reform of occupational pensions, ensure sustainability of the pension system and increase the salary of judges at an increased pace [ ... ]. Those aims could essentially be deduced from the proceedings establishing § 132<sup>5</sup> (earlier version) of the Courts Act in the Riigikogu [ ... ].

**62.** In the opinion of the Chamber, the contested provision which precludes paying a survivor's pension to a judge's family member can be considered part of the reform of occupational or special pensions which the legislator started in 2013. More specifically, however, the aim of the provision is the legislator's wish to thereby reduce the state's expenses on occupational pensions of judges. The Supreme Court has repeatedly found that reducing the state's expenses is a legitimate aim for restricting fundamental rights [ ... ].

**63.** The contested provision is appropriate and necessary for attaining the above legitimate aim. By precluding the obligation to pay a survivor's pension to a judge's family member, the state's expenses on a judge's occupational pension are smaller than they would have been if the relevant provision had not been enacted, and no less burdensome measure exists for attaining that aim.

**64.** Although it is not known in how many cases the state should fulfil the contested obligation, based on existing data the potential expenses cannot be considered very large despite the fact that § 132<sup>5</sup> of the Courts Act interferes with the fundamental right to property of many judges.

**65.** There are currently about 300 judges who were in office before 2 July 2013; of these 122 judges are retired as at 1 January 2021. Although this constitutes a large number of all judges, the state's obligation to pay a survivor's pension in the event of a judge's death would probably be realised relatively seldom. According to the data from the Social Insurance Board submitted to the Supreme Court, since 2000 the pension in question has been paid to 9 persons (8 because of a judge's death, 4 of whom died while in office and 4 while retired). The duration of paying the pension (to one person) was on average 5 years and 8 months (the longest period 12 years, the shortest 1 year). The average monthly amount of that pension during this period was 985 euros.

**66.** When assessing how much the state's expenses would be reduced when not paying survivor's pension for judge's family members, a family member's probable entitlement to another benefit whose payment would be precluded by the survivor's pension should also be taken into account. That is, not paying the survivor's pension enables saving only the difference between those benefits (e.g. the difference between a survivor's pension and an old-age pension).

**67.** The Chamber finds that even though the contested provision helps the state to save some expenses, that aim, which in itself is legitimate, cannot be considered sufficiently compelling as to justify serious interference with the fundamental right to property (in combination with legitimate expectations) resulting from this provision, also involving unequal treatment of property of persons. A survivor's pension for judge's family members is part of the guarantees of judicial independence which, in a state governed by the rule of law, cannot be reduced without compelling reasons.

**68.** Based on the foregoing, [...] the Chamber repeals § 132<sup>5</sup> of the Courts Act insofar as it precludes granting and paying a survivor's pension for judge's family members to a family member of a judge who held office after 31 December 1991 and before 2 July 2013. Section 132<sup>5</sup> of the Courts Act in combination with the present judgment entitles family members of judges holding office after 31 December 1991 and before 2 July 2013 (including judges whose service relationship continued after the latter date) to grant and payment of a survivor's pension for judge's family members on the basis of § 132<sup>5</sup> (earlier version) of the Courts Act.

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