# Constitutional judgment 5-21-3

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

CONSTITUTIONAL REVIEW CHAMBER

**JUDGMENT**

in the name of the Republic of Estonia

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| **Case number** | 5?21?3 |
| **Date of judgment** | 15 June 2021 |
| **Composition of court** | Chairman: Villu Kõve; members: Velmar Brett, Ants Kull, Ne Pilving |
| **Case** | Review of the constitutionality of § 20 subsections ($2^2$) and ( Conservation Act and Government of the Republic Regulation 2004. |
| **Basis for proceedings** | Judgment of Tallinn Administrative Court of 19 March 2021 in ca |

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| **Participants in the proceedings** | Riigikogu |
| | Chancellor of Justice |
| | Government of the Republic |
| | Minister of Justice |
| | Minister of the Environment |
| | Environmental Board |
| | OÜ Rohe Invest |
| **Type of hearing** | Written procedure |

**OPERATIVE PART**

**1.To dismiss the application by Tallinn Administrative Court.**

**2. [Expenses, omitted]**

**FACTS AND COURSE OF PROCEEDINGS**

**1.** On 4 April 2013, the company OÜ Rohe Invest (hereinafter also ‘the applicant’) acquired [...] the Kullajõe immovable. At the moment of acquisition, this consisted of one cadastral unit and was located within the conservation zone of the Veia species protection site of the lesser spotted eagle to the extent of 2.12 hectares (40%). [...] 1.7 hectares of forest land remained within the conservation zone. The sale contract of the immovable contained information that the immovable was located in the conservation zone of the species protection site and a new Veia species protection site of the lesser spotted eagle was being planned on it.

**2.** By Regulation No 55 of 21 September 2015, the Minister of the Environment amended Regulation No 12 of 19 April 2010 of the Minister of the Environment on “Placing species protection sites of the lesser spotted eagle under protection, and protection rules”. As a result, the conservation zone of the species protection site on the immovable increased to 48% of the immovable. [---] an area of 2.54 hectares in the conservation zone of the species protection site is entirely forest land on which economic activity and exploiting natural resources is prohibited under the Nature Conservation Act. Thus, a further 0.84 hectares of forest land was incorporated under the protection regime of the conservation zone.

**3.** On 7 March 2016, division of the Kullajõe immovable into two cadastral units was recorded in the land register. One of them, a Kullajõe cadastral unit of the size of 3.02 hectares, is located in the conservation zone of the species protection site to the extent of 84%.

**4.** On 29 March 2016, OÜ Rohe Invest filed an application with a request that the contested cadastral unit be acquired by the state. By directive of 23 May 2016, the Minister of the Environment initiated proceedings for acquisition of the immovable.

**5.** On 23 November 2018, the Environmental Board made a price offer to OÜ Rohe Invest for transfer of the Kullajõe cadastral unit to the state for 16 476 euros and 90 cents. In its reply to the price offer, OÜ Rohe Invest expressed the opinion that the value of the cadastral unit was at least 27 871 euros and 91 cents, i.e. approximately 70% higher than the offer. The Environmental Board and the applicant did not reach agreement on the price of the cadastral unit.

**6.** On 3 April 2019, OÜ Rohe Invest lodged an action with Tallinn Administrative Court seeking a declaration that the price offer by the Environmental Board did not correspond to the market value of the cadastral unit and an order obliging the Environmental Board to organise proceedings for acquisition of the cadastral unit so that the basis is the market value of the cadastral unit. The applicant sought a declaration that the procedure for acquisition of a protected natural object by the state was unconstitutional.

**7.** By judgment of 18 March 2021 in case No 3?19?613, Tallinn Administrative Court satisfied the action by OÜ Rohe Invest, established the unlawfulness of the price offer by the Environmental Board of 23 November 2018 and obliged the Environmental Board to make a new price offer that would comply with the requirement of awarding fair and immediate compensation in the event of expropriation and would take account of the market price of the immovable. The court set aside and declared unconstitutional § 20 subsections ($2^2$) and (4) of the Nature Conservation Act (NCA), and, in its entirety, Government of the Republic Regulation No 242 of 8 July 2004 on account of their conflict with § 32 of the Constitution.

**JUDGMENT OF TALLINN ADMINISTRATIVE COURT**

[…]

**OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS**

**[…]**

**PROVISIONS DECLARED UNCONSTITUTIONAL**

**24.** Section 20($2^2$) of the Nature Conservation Act stipulates as follows:

“($2^2$) The value of an immovable covered with forest will be determined as the sum of the value of the plot of land and the forest growing on it. If, upon determination of the value of an immovable covered with forest, the value of the growing forest is not of material importance and, arising from the market situation of the region, the taxable value of land does not reflect the market price of the region, a representative of the state may commission an appraisal in order to determine the value of the immovable covered with forest.”

**25.**Section 20(4) of the Nature Conservation Act stipulates as follows:

“(4) The acquisition of an immovable will be decided in the sequence of receipt of the applications for acquisition, unless there are compelling reasons for extension of the proceedings. If a compelling reason exists, an application will be resolved after the compelling reason has ceased to exist. Information on the sequence of receipt of applications for acquisition will be published on the website of the Ministry of the Environment.”

**26.**By Regulation No 242 of 8 July 2004, the Government of the Republic established a procedure for acquisition by the state of an immovable containing a protected natural object and for processing the relevant proposals, the criteria based on which the protection regime of an area is considered as significantly restricting the use of an immovable for its intended purpose, and the procedure and bases for determining the value of the immovable.

**OPINION OF THE CHAMBER**

**I**

**[Procedural issues, omitted] [...]**

## II

**31.** The Administrative Court reached the opinion that, due to extensive restrictions applicable in the conservation zone of the species protection site, use of one of the applicant's cadastral units is essentially precluded, which amounts to*de facto* expropriation of that part of the immovable.

**32.** The fundamental right to property guaranteed by § 32 subsections (1), (2) and (3) of the Constitution protects everyone's property against interference by the state, i.e. against any unfavourable influence (see e.g. Supreme Court*en banc* judgment in case No 5?20?3/43, para. 66). Depending on the intensity of influence, instances of interference with the fundamental right to property are divided in two, and the Constitution lays down different conditions for them. The conditions for expropriation of property without the owner's consent are laid down in the second sentence of § 32(1) of the Constitution. Under § 32(2) (second sentence) of the Constitution; other limitations on the fundamental right to property, i.e. property restrictions, are guaranteed by a simple statutory reservation (cf. Supreme Court Constitutional Review Chamber judgment of 17 April 2012 in case No 3?4?1?25?11, paras 35 and 37).

**33.** If nature conservation related restrictions imposed on an immovable almost completely deprive the owner of the possibility to exercise their right of ownership, in principle this may amount to*de facto* expropriation within the meaning of the second sentence of § 32(1) of the Constitution [...]. The protection regime of a conservation zone strongly restricts a person's possibility to use their immovable. Use of a forest immovable is expressed primarily in the possibility to manage the forest (§ 16 Forest Act).

**34.** The Administrative Court ascertained that on a significant part (40%) of the surface area of the contested immovable the protection regime of the conservation zone applied even before 2013 when the applicant acquired the immovable. In 2015, the borders of the conservation zone were expanded but the protection regime did not become stricter on that part of the immovable where nature conservation related restrictions were already applicable beforehand. The Chamber finds that regardless of how seriously the protection regime interferes with the applicant's freedom of property the Constitution does not give rise to an obligation to compensate the applicant in respect of restrictions that applied even before the immovable was acquired [...]. Acquisition of an immovable with nature conservation related restrictions was the applicant's conscious choice and presumably the restrictions were reflected in the price of the immovable. There was nothing that could have led the applicant to develop a legitimate expectation that the state would compensate them for the negative effect of those restrictions on more favourable terms than prescribed under § 20 of the Nature Conservation Act (NCA) and Regulation No 242. Under § $20(1^1)$ of the NCA, the state will not acquire an immovable in accordance with the procedure laid down in § 20 if a person has acquired the immovable after it was placed under protection and the transfer transaction contained information concerning the natural object to be protected, except in the cases set out in the same section.

**35.** When assessing the intensity of interference, it should first be taken into account what proportion the additional part incorporated in the conservation zone made up of the area of the whole immovable. The intensity of interference cannot be affected by the fact that the applicant divided the immovable into two cadastral units under § 20($1^2$) of the NCA.

With the entry into force of Regulation No 12 in 2015, the area of the conservation zone of the species protection site increased by 8% of the area of the immovable. The proportion of forest land covered by the protection regime of the conservation zone increased from 1.7 hectares to 2.54 hectares, i.e. by 0.84 hectares.

**36.** Second, it should be taken into account to what extent the restrictions arising from the protection regime of the conservation zone prevented the applicant from possessing, using and disposing of the immovable as previously.

Although in the case of a forest immovable the possibility of cutting the forest and using the timber is the most important type of use of the immovable, managing this kind of immovable is not limited to cutting only [...]. Assessment of the possibilities for use of an immovable also cannot be based only on its owner's business plan. It should also be clarified whether the immovable can, in principle, be used in the private interest. Section 30 of the NCA and Regulation No 12 (protection regime of a conservation zone) leave few opportunities for this though do not completely preclude serving the private interest [...]. For example, after 2015 the applicant used the immovable to apply for support payments.

**37.** Nor do the restrictions preclude disposing of an immovable, for instance selling it on the free market, although certainly they may affect its price. That transfer of an immovable beyond the possibility of transfer created under § 20 of the NCA is not a mere theoretical possibility is also demonstrated by the fact that the applicant itself bought the immovable at a time when extensive nature conservation related restrictions already applied to it.

**38.** At the time of acquisition of the immovable, the applicant also lacked a firmly guaranteed possibility of cutting forest on the part not subject to restrictions. On that part of the immovable, even before 2015 nature conservation related restrictions for protecting animal and bird species had to be observed (§ 55 NCA, see also Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds, Article 5). Forest cutting presumes registration of a forest notice with the Environmental Board [...]. If planned cutting does not comply with the requirements of legislation, the Environmental Board has the duty to refuse registration of the notice, in which case cutting is ruled out [...]. If cutting would have resulted in disturbing the lesser spotted eagle, it could not have been permitted [...]. Since the justification for

expanding the conservation zone was protection of the eagle's nest, it may be assumed that cutting could have affected the habitat of the eagle. The applicant has not contested the expansion.

**39.** In conclusion, additional restrictions imposed on the immovable in 2015 do not completely, or even almost completely, preclude possessing, using and disposing of it, so that imposition of restrictions cannot be interpreted as*de facto* expropriation within the meaning of § 32(1) of the Constitution. The situation constitutes a property restriction within the meaning of the second sentence of § 32(2) of the Constitution.

**III**

**40.** The Constitution does not require compensating all property restrictions imposed on a person in the public interest. Nor does the Constitution give rise to the requirement that in the event of paying compensation the compensation should be full and immediate. A person should be compensated for damage caused by restrictions imposed on their property primarily when non-payment of compensation would be contrary to the principle of the fundamental right to equality under § 12 of the Constitution and the principle of proportionality under § 11 of the Constitution. The Supreme Court has noted that it would contravene the principle of equality if one or only some should have to bear greater expenses in the public interest than others who also use the means and resources created in the public interest. The need to pay fair compensation to ensure the proportionality of interference with the fundamental right to property arises in situations where an individual's pecuniary loss is disproportionately large in comparison to others (Supreme Court*en banc* judgment of 31 March 2011 in case No 3?3?1?69?09, para. 61; Supreme Court Constitutional Review Chamber judgment of 17 April 2012 in case No 3?4?1?25?11, paras 49–50). In this regard, the stronger the public interest justifying a property restriction, the stronger a person's duty to tolerate restrictions imposed on their property without compensation.

The Chamber explains that this kind of duty to compensate can also only arise if a person, despite their will and the steps taken by them, finds themselves in a situation where they have to tolerate more intense restrictions on subjective rights in comparison to others [...].

**41.** Nature conservation is a task arising from the Constitution and is also everyone's duty. Section 5 of the Constitution stipulates that the natural wealth and resources of Estonia are national riches which must be used sustainably. Under § 53 of the Constitution, everyone has a duty to preserve the living and natural environment and to compensate for damage they cause to the environment. Imposing nature conservation related restrictions is justified by strong public interest and, as a rule, a person's duty to tolerate nature conservation related restrictions is high. Natural environment is under constant change, so that measures intended for nature conservation or the scope of their implementation may also change. The need to implement such measures in the future cannot be fully anticipated and the whole responsibility for property restrictions arising from them cannot be placed on the state. The third sentence of § 32(2) of the Constitution

imposes a duty of toleration on owners by prohibiting use of property contrary to the public interest.

**42.** When acquiring the immovable the applicant knew, on the basis of information in the transfer transaction, that the immovable was partially located in the conservation zone of a species protection site and that the extent of restrictions may change (a species protection site of the lesser spotted eagle was being planned on the immovable). The applicant had to take into account the possibility that nature conservation related restrictions might rule out cutting the forest on the immovable and that in the foreseeable future the restrictions might be extended or become stricter, but nonetheless they decided to acquire the immovable.

**43.** In view of these circumstances, the applicant could not have developed a constitutional right to compensation that would cover the market value of the whole area of the conservation zone added to their immovable in 2015, without taking into account the restrictions imposed on it.

**44.** The applicant acquired the immovable of 5.32 hectares in 2013 for the price of 6500 euros (1222 euros per hectare). In 2018, the Environmental Board made a price offer to the applicant for transfer of a part of the same immovable cadastral unit with the size of 3.02 hectares– to the state for 16 476 euros and 90 cents (5456 euros per hectare). Thus, the price offer by the Environmental Board for one part of the immovable exceeded by more than 2.5 times the purchase price paid by the applicant for the whole immovable, and the price offer per hectare exceeded the price per hectare paid upon its acquisition 4.5 times.

**45.** The value of the cadastral unit might exceed the price offered by the Environmental Board only if the price for forest land and timber had increased manifold in 2013–2018. Since compensation for property restrictions need not be full, in the instant case it does not have to cover lost income that the person could have earned merely due to an increase in purchase prices for timber. Thus, in order to resolve the application by the Administrative Court, no need exists to ascertain the exact market value of the applicant's immovable if the contested legal provisions ensure fair compensation.

**46.** The price offer made to the applicant should be viewed as a whole. It included payment both for the area already subject to nature conservation related restrictions at the time of its acquisition as well as the area (0.84 hectares) subject to additional restrictions imposed in 2015. The price of both cadastral units has been calculated by using the methodology for determining the value of an immovable covered with forest prescribed by § $7^2$ of Regulation No 242. The calculations did not take into account the restrictions arising from the protection regime and applicable to the immovable even before or those added later.

**47.** In line with the second sentence of § 20($2^1$) of the NCA, restrictions which form the basis for acquisition of an immovable are not taken into account when determining the value of the immovable. Since the restrictions already applicable in 2013 were not the basis for acquisition of the immovable in line with § 20(1 $^1$) of the NCA, by taking them into account the value of the immovable should have been decreased in comparison to the offer made by the Environmental Board.

**48.** Even if it were to be considered justified to compensate the applicant for the forest land at a price of 9229 euros per hectare as requested by them, the applicant can be entitled to request such compensation only for 0.84 hectares, i.e. 7752 euros and 36 cents. There is no doubt that the market value of the remaining part of the cadastral unit may be small in view of the restrictions already applicable beforehand. In view of the foregoing, the compensation offered to the applicant in any case exceeds the compensation that the state had to pay to the applicant under the Constitution due to imposing additional property restrictions.

In the opinion of the Chamber, in a situation where no immediate and full compensation needs to be paid for property restrictions due to the duty to tolerate, it would not be unconstitutional, at least not always and also not in the present case, to set compensation on the basis of the methodology laid down by § $7^1$ and § $7^2$ of Regulation No 242, including in some cases proceeding from the taxable price of the land and average unit prices for timber during the three previous calendar years. In particular, this methodology cannot be considered unconstitutional in a situation where a person when acquiring an immovable must already take into account nature conservation related restrictions or the risk of those restrictions becoming stricter.

No basis exists to satisfy the court's application to declare a legal norm unconstitutional unless the norm has led to violation of the Constitution in a specific court case. Declining to satisfy such an application does not preclude unconstitutionality of the norm in other situations (Supreme Court*en banc* judgment of 11 June 2019 in case No 5?18?8/19, paras 52 and 71).

**49.** On the basis of the foregoing and relying on § 15(1) clause 6) of the Constitutional Review Court Procedure Act, the Chamber dismisses the application by Tallinn Administrative Court.

**IV**

**[Expenses, omitted][...]**

Villu Kõve, Velmar Brett, Ants Kull, Nele Parrest, Ivo Pilving

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