constitutional-judgment-5-23-1

Case number	5-23-1
Date of judgment	21 November 2023
Judicial panel	Chairman: Villu Kõve; members Velmar Brett, Hannes Kiris, Ants K Kullerkupp, Julia Laffranque, Saale Laos, Viive Ligi, Heiki Loot, K Pilving, Paavo Randma, Kalev Saare, Juhan Sarv, Heili Sepp, Nele S Volens and Margit Vutt
Case	Review of the constitutionality of § 111^2(2) of the Police and Borde version in force until 30 June 2022)
Basis for proceedings	Judgment of Tallinn Administrative Court of 18 January 2023 in adr No 3-22-586
Participants in the proceedings	Riigikogu Chancellor of Justice Minister of Justice Minister of Social Protection Social Insurance Board XX
Manner of examination	Written procedure

OPERATIVE PART

1. To declare that§ 111^2(2) of the Police and Border Guard Act, in the version in force until 30 June 2022, was unconstitutional insofar as it did not enable calculation of a police officer's superannuated pension to take into account the most favourable salary rate chosen from the last five years of the officer's service in the amount valid on the day as of which the pension was awarded.

2. To replace the applicant's name in the published judgment with an alphabetical character.

FACTS AND COURSE OF PROCEEDINGS

1. On 12 January 1991, XX ('the applicant') entered the police service and served there in different positions during the periods from 12 January to 30 March 1991 and from 8 May 1991 to 31 December 2009 on the basis of the Police Service Act (PSA), and during the period from 1 January 2010 to 30 September 2014 on the basis of the Police and Border Guard Act (PBGA).

2. On 30 September 2014, the applicant was dismissed from the police service on account of redundancy. By the time of redundancy, the applicant had accrued the required length of pensionable service to receive a police officer's superannuated pension (20 years of police service in line with § 117(1) clause 3 PBGA), but had not reached pensionable age (50 years in line with § 117(1) PBGA).

3. From 10 October 2014 to 10 June 2018, the applicant worked at the Emergency Response Centre.

4. On 11 June 2018, the applicant rejoined the police service.

5. On 14 June 2018, the Riigikogu adopted the Act amending the Military Service Act and other Acts, which was published in the Riigi Teataja on 6 July 2018 and entered into force on 1 January 2020. That Act added § 111^2(2) to the PBGA, according to which, if a police officer's superannuated pension is calculated on the basis of the most favourable salary rate chosen from the officer's last five years of service, it is to be taken into account in the amount in force during the officer's employment in that position. Before the entry into force of this amendment (under § 100(1^1) of the PBGA in force from 1 January 2013 to 31 December 2019), a police officer's superannuated pension was calculated on the basis of the salary rate corresponding to the position which was the most favourable at the time when the pension was awarded.

6. On 10 January 2022, the applicant applied to the Social Insurance Board for the award of police officer's superannuated pension (hereinafter also referred to as 'the police pension') on the basis of the PBGA.

7. By **decision** of 8 February 2022, the **Social Insurance Board** awarded the applicant police officer's superannuated pension on the basis of § 117(1) of the PBGA as of 14 November 2021 (the date of the applicant's eligibility for the police pension) for life in the amount of 1280.25 euros a month. The applicant's length of police service as at the date of eligibility to the police pension was 33 years, 8 months and 7 days.

8. The applicant lodged a **complaint** with Tallinn Administrative Court, seeking annulment of the Social Insurance Board decision of 8 February 2022 and an order obliging the Board to reconsider the applicant's complaint. At the same time, the applicant sought a declaration that § 111^2(2) of the PBGA was in conflict with the Constitution to the extent that it did not enable calculation of a superannuated pension to be based on the salary rate in the amount applicable on the day as of which the pension was awarded, and to set aside this provision.

9. Tallinn Administrative Court upheld the complaint, declared § 111^2(2) of the PBGA in the version in force from 1 January 2020 to 30 June 2022 (hereinafter this version is meant unless otherwise indicated) unconstitutional to the extent sought by the applicant, and set this provision aside in resolving the administrative case.

10. The applicant wanted calculation of their superannuated pension to be based on the salary rate (salary grade 14) of their position as head of a police station chosen from their last five years of police service in the amount in force at the time of award of pension, i.e. 8 February 2022, but the Social Insurance Board based the calculation on the salary rate in the amount applicable as the most favourable rate during their employment in this position, i.e. during the period from 1 October 2013 to 30 September 2014.

11. The decision of the Social Insurance Board is lawful if § 111^2 (2) of the PBGA, on which the decision was based, is compatible with the Constitution. If § 111^2(2) of the PBGA is unconstitutional, it must be set aside and the applicant's claim must be upheld. Thus, the provision is relevant.

12. Section 111^2(2) is contrary to the right to property under § 32 of the Constitution, in conjunction with the principle of legitimate expectations and the general fundamental right to equality under § 12(1) of the Constitution, to the extent that it does not enable calculation of a pension to be based on the salary rate in the amount in force on the day as of which the pension is awarded. Before 1 January 2020, under § 100(1^1) of the PBGA, calculation of the police pension was based on the salary rate on the day as of which pension was awarded.

13. The scope of protection of the fundamental right to property also includes the right to a pension. Interference with the applicant's fundamental right to property depends, first of all, on whether the applicant had a legitimate expectation that, at the time when their right to retirement arose on 14 November 2021, they would be entitled to a police pension based on the salary rate and service rank remuneration most favourable to them as chosen from the last five years of service in the amount in force on the day as of which pension is awarded.

14. The applicant was justified in hoping that the pension system would not be altered to their disadvantage, and consequently their fundamental right to property, in conjunction with the principle of legitimate expectations, was interfered with.

15. A police officer's superannuated pension in re-independent Estonia was provided as an additional social guarantee to compensate for the restrictions and work-related risks associated with the police service and to attract qualified labour. Although the police pension has been repeatedly reformed in the past and the procedure for calculating its amount has been changed, § 100(1^1) of the PBGA was in force for a period of seven years during the applicant's service in the wording which ensured that the police pension was calculated in relation to the amount of the salary rate in force on the day as of which pension was awarded. If a person had fulfilled the prerequisites according to which they would be eligible for application of favourable regulatory arrangements in respect of them in the future, but the state imposed new, less favourable regulatory arrangements, the state had broken its word.

16. The fundamental right to property must, as a general rule, be equally protected. The present case involves a situation in which police officers who retired before 1 January 2020 and police officers (such as the applicant) who retired after that date are treated differently. While in the case of the former the amount of a police officer's pension is calculated on the basis of the salary rate in force on the day as of which pension was awarded, in the case of the latter the amount of pension is calculated according to the rate that was most favourable during their employment in this position. These are comparable groups who are treated unequally.

17. In view of the legislator's broad margin of appreciation, unequal treatment is arbitrary if it is manifestly inappropriate. According to the explanatory memorandum to the Draft Act that introduced the disputed amendment to the PBGA, the amendment was only due to the wish of the Police and Border Guard Board (PBGB) to change the salary system (reduce the number of salary grades) if necessary, but this was prevented by the pension system for police officers in force before 1 January 2020. This is a technical problem, resolving which would not be excessively difficult.

18. While an excessive burden on the state budget would be a valid argument, it cannot justify unequal treatment. It is contrary to the principle of equality if, in the interests of saving resources, some have to receive smaller benefits than others who have contributed to the public interest to the same extent. When amending the law, no impact on the state budget was analysed or whether the amendment might lead to unequal treatment. The legislator must have understood that the consequences of the amendment were predominantly detrimental to its addressees, since the employees of the PBGB often have an interval between employment in their last position and retiring. In an economic environment with high inflation, this means that they would lose significantly in their superannuated pensions as a result of the change. No good reason exists for unequal treatment, and it is clearly inappropriate.

19. The **Constitutional Review Chamber of the Supreme Court** had fundamental disagreements in resolving the case, and on 2 June 2023 the Chamber referred the case to the Supreme Court *en banc* on the basis of the first sentence of § 3(3) of the Constitutional Review Court Procedure Act (CRCPA).

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

[…]

PROVISION DECLARED UNCONSTITUTIONAL

42. Section 111^2(2) of the Police and Border Guard Act (in the version in force from 1 January 2020 to 30 June 2022) laid down as follows:

"Calculation of the amount of pension of a police officer shall be based [...] on the most favourable salary rate from the last five years to the extent applicable during their service in that position as specified in clause 1 of this section."

OPINION OF THE COURT*EN BANC*

43. The core issue in the case is whether police officers, such as the applicant, who were awarded a police officer's superannuated pension under § 111^2(2) of the PBGA, in the version in force from 1 January 2020 to 30 June 2022, are entitled under the Constitution to require that the pension be calculated on the basis of the most favourable salary rate chosen from the last five years of service in the amount in force on the day as of which pension is awarded.

44. In order to answer this question, the Court *en banc* will first check the relevance of the provision declared unconstitutional (I) and identify the fundamental rights interfered with (II). Then the Court *en banc* will deal with the legitimacy of the objectives of interference (III) and the constitutionality of interference (IV).

I

45. Under § 14(2) of the Constitution, the provision whose constitutionality the Court *en banc* is assessing must be relevant to adjudicating the case (Supreme Court *en banc* judgment of 15 February 2023 No 3-18-477/73, para. 33). A provision is relevant if in the event of its unconstitutionality the court should decide differently than if it were constitutional (Supreme Court *en banc* judgment of 28 October 2002 in case No 3-4-1-5-02, para. 15, and judgment of 15 March 2022 No 5-19-29/38, para. 49).

46. Under § 100(1) clause 1 of the PBGA (in the version in force before 1 January 2020), a police officer had two options in choosing the salary based on which the amount of their pension was calculated. The basis for calculating the pension could be:

(a) the salary rate corresponding to the salary grade of the police officer's last position (or differentiated salary rate) and the service rank remuneration corresponding to their last service rank, or

(b) the police officer's most favourable salary rate from their last five years of service (or differentiated salary rate) according to the position in which they served for at least 12 consecutive months, and the service rank remuneration corresponding to their last service rank.

47. Under § $100(1^1)$ of the PBGA (in the version in force before 1 January 2020), the most favourable salary rate from the last five years of service specified in clause 1 of subsection (1) of the same section and the service rank remuneration corresponding to the last service rank is to be taken into account in calculating a police officer's pension in the amount *applicable on the day starting from which the pension is awarded.*

48. On 14 June 2018, the Riigikogu adopted the Act amending the Military Service Act and other Acts, which, among other things, amended the provisions of the PBGA regarding police officers' superannuated pension. After the entry into force of this amendment on 1 January 2020, the basis for calculating the amount of a police officer's superannuated pension was laid down by § 111^2 of the PBGA. In accordance with the first subsection of that section, a police officer retained the options referred to in para. 46 of this judgment in choosing the salary based on which the pension was to be calculated. However, under subsection (2) of that section, a police officer's pension was to be calculated on the basis of their most favourable salary rate from their last five years of service in the amount *in force during the officer's employment in that position*.

49. As the basis for calculating their pension, the applicant chose the salary rate most favourable to them from the last five years of their service, which was not the salary rate corresponding to the salary grade of their last position. There is no dispute that the version of the PBGA in force before 1 January 2020 would have allowed the applicant to be awarded a police pension calculated from the salary rate in force on the day as of which they were awarded a pension. Since the applicant was awarded a police pension on the basis of the version of the PBGA in force from 1 January 2020 and thus on the basis of the salary rate in force at the time of their employment in the position of their choice, § 111^2(2) of the PBGB, in the version in force at the time pension was awarded, is a relevant provision. The constitutionality of that provision determines whether the applicant is entitled to a police pension calculated on the basis of the salary rate chosen by them in the amount in force during their employment in that position or at the time when they became eligible to receive a police pension.

50. Next, the Court *en banc* will focus on the question whether the contested provision violated the applicant's constitutional rights.

II

51. The court which initiated constitutional review proceedings is of the opinion that the contested provision violates the applicant's fundamental right to property, in conjunction with the principle of legitimate expectations, and the general fundamental right to equality.

52. The Supreme Court has previously noted that the scope of protection of the fundamental right to property under § 32 of the Constitution includes things as well as rights and claims valued in money, including the right to a pension (Supreme Court *en banc* judgment of 26 June 2014 in case No 3-4-1-1-14, para. 88). A pension right as 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 performance as 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 (Supreme Court Constitutional Review Chamber judgment of 16 March 2021 No 5-20-7/12, para. 38).

53. A distinction must be drawn between changes in the conditions for entitlement to a pension and changes in the procedure for calculating or paying a pension. If a person has begun to comply with the conditions set for entitlement to a pension, this does not mean that their right (expectation) to a pension and, by extension, their fundamental constitutional right to property is interfered with by whatever change in the procedure for calculating or paying their future pension. Whether amendments to pension regulations result in interference with the fundamental right to property depends primarily on whether the person had a legitimate expectation that the situation existing before the amendment was made would be maintained (see also the cited Supreme Court *en banc* judgment in case No 3-4-1-1-14, para. 88, and judgment of 6 January 2015 in case No 3-4-1-18-14, para. 54).

54. The principle of legitimate expectations, which must give individuals confidence in the continuance of established norms, arises from § 10 of the Constitution. Everyone has the right to act in the reasonable expectation that the applicable law will remain in force. An amendment to a law may not be perfidious in respect of subjects of law (Supreme Court Constitutional Review Chamber judgment of 30 September 1994 in case No III-4/1-5/94; Supreme Court *en banc* judgment of 20 October 2020 No 5-20-3/43, para. 73).

55. Therefore, it is necessary to answer the question whether, even before publication of the contested amendment in the Riigi Teataja gazette on 6 July 2018, the applicant could reasonably expect that, if they satisfy the conditions for entitlement to a police pension and choose the salary rate most favourable to them from the last five years of their service as the basis for calculating the pension, the pension would be

calculated on the basis of that rate in the amount in force on the day of award of pension and not in the amount in force at the time of their employment in that position.

56. In order to assess whether someone's legitimate expectation that the pension calculation scheme would be maintained has been violated, it is necessary to bear in mind, in particular, the following factors: how long the legal act had been in force on the basis of which the person could expect the current pension calculation procedure to be maintained; how long the person had been organising their activities on the basis of that legal act, including fulfilling the conditions set out in the legal act, which were the prerequisite for entitlement to the pension; the extent to which the person had fulfilled the prerequisites for entitlement to the pension by the time the disputed amendment was introduced (cf. cited judgment No 5-20-7/12, paras 37–39). It is also important to assess the extent of the negative impact of the legislative amendment on a person's pension rights. A person has reason to assume that no changes will be introduced to the law that would fundamentally reshape the basis for calculating their pension and, along with this, the amount of the pension. There is reason to speak of perfidiousness on the part of the state, in particular, if a person's rights or duties change in a strikingly unfavourable direction (Supreme Court Constitutional Review Chamber judgment of 31 January 2012 in case No 3-4-1-24-11, para. 50). However, even a circumstance of prima facie minor importance may be decisive in development of legitimate expectations or in assessment of their weight, if the person's choices concerning organisation of their life depend on it.

57. Section 100(1^1) of the PBGA, which provided, inter alia, that the basis for calculating the police pension would be the most favourable salary rate chosen from the last five years of service and the service rank remuneration in the amounts in force on the date as of which pension is awarded, was valid from 1 January 2013 to 31 December 2019. The disputed § 111^2(2) of the PBGA, according to which the salary rate in force during the person's employment in this position is taken as the basis for calculating the police pension, was adopted by the Riigikogu on 14 June 2018 as part of the Act amending the Military Service Act and other Acts and was published in the Riigi Teataja on 6 July 2018 and entered into force on 1 January 2020.

58. When assessing the length of the period of validity of the regulatory scheme favourable to the applicant, the following should also be noted. Before 1 January 2013, the PBGA contained no provision explicitly linking the basis for calculating the police pension to the salary rate applicable at the time the pension was awarded. However, a procedure for calculating pensions, under which pensions were recalculated when the salary changed (§ 21^1(5) PSA; § 106(1) PBGA), applied to all police officers under the Police Service Act from 1 January 2002 to 31 December 2009, and to all police officers in service at the time of entry into force of the PBGA under the PBGA from 1 January 2010 to 31 December 2012. Thus, the regulatory scheme, which had already been in force for a long time previously, made the amount of the police pension dependent on the salary of an officer working in the corresponding position at the time of awarding or recalculating the pension, but not on the amount of the officer's salary during their service. Section 100(1^1) of the PBGA was enacted by the same Act that abolished the system for recalculating the salaries of police officers (see Draft Act amending the Police and Border Guard Act 326 SE, XII Riigikogu, explanatory memorandum page 1). Therefore, § 100(1^1) of the PBGA can be regarded as a compensatory measure by which the legislator retained one element of the previously more favourable pension recalculation scheme for police officers retiring in the future.

59. Section 100(1^1) of the PBGA, as amended by the contested regulatory provisions, therefore reflected the principle applicable until then, i.e. that changes in the salaries of police officers during the period between the person's employment in the position based on which pension was calculated and the moment of the

person's retirement are taken into account when awarding pension. Indirectly, such an arrangement also took into account the increase in the cost of living during the same period. In essence, police officers were promised that if the salary underlying the pension calculation was raised in the future, their pension would also increase.

60. The applicant entered the police service on 12 January 1991 and served there essentially without interruption until 30 September 2014. Thus, the applicant was also in the police service at the time of entry into force of the PBGA on 1 January 2010. The applicant returned to the police service on 11 June 2018.

61. The applicant was awarded a police pension under § 117(1) and §§ 111^1–111^3 of the PBGA. The combined effect of these provisions created the right to a superannuated pension for a 50-year-old police officer who fulfilled all the following conditions: *(a)* they were in the police service under the Police Service Act at the time of the entry into force of the PBGA (i.e. on 1 January 2010); *(b)* they were appointed to a position as a police officer under the PBGA immediately upon the entry into force of the PBGA, and *(c)* they had at least 20 years of police service as laid down by the PBGA.

62. Thus, the applicant is a police officer who has been in service for a long time. The applicant was also in service at the time of introduction of § $100(1^1)$ of the PBGA and fulfilled all the conditions for entitlement to pension other than the age threshold (50 years) even before adoption and publication in the Riigi Teataja of the amendment which invalidated that provision and which is in dispute in the present case.

63. The applicant was not in the police service in the years 2014–2018. Then, as well as under § 117(1) of the PBGA currently in force, the right to a pension arises under that provision only if a person retires directly from the police service. The applicant could not expect to be able to return to the police service and meet all the conditions for entitlement to a pension. However, that fact is not decisive for the purposes of assessing the applicant's legitimate expectations. As stated, the applicant returned to the police service during the period of validity of § $100(1^1)$ of the PBGA and before publication of the disputed amendment in the Riigi Teataja. The weight of the applicant's pension expectations is reinforced by the fact that, believing in the continuance of the existing law, they once again changed their life arrangements and returned to the police service for a relatively short time before the age of 50, probably wishing to meet the conditions for a police pension.

64. The introduction of § $111^2(2)$ to the PBGA did not deprive the applicant of their right to a pension, but it did have a considerable negative impact on the amount of their pension. Specifically, one element was amended in the rules for calculating the police pension applicable until then, which could influence the applicant's choices in organising their life (see the first sentence of para. 53 and the last sentence of para. 56).

65. The applicant wanted calculation of their pension to be based on the position of head of a police station (salary grade 14), which they held from 1 October 2013 to 30 September 2014. The Social Insurance Board based its calculation on the salary rate of grade 14, which was the most favourable rate during the applicant's employment in that position, in the amount of 1615 euros (see the Minister of the Interior regulation No 18 of 2 May 2013 on "The salary rates corresponding to salary grades of police officers, the bases for their differentiation, the amount of the service rank remuneration, and the bases for payment of additional remuneration", Annex 1 in the wording of the annex to the Minister of the Interior regulation No 3 of 10 January 2014

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66. According to the Administrative Court, the applicant's pension should have been calculated on the basis of a salary rate in the amount of 2060 euros corresponding to the 14th salary grade of police officers. This rate took effect on 1 January 2022 when the regulation on salary rates corresponding to salary grades of police officers, Annex 1 in the wording of the annex to the Minister of the Interior regulation No 25 of 23 December 2021 entered into force. The same salary rate was also in force at the time of the decision on awarding a pension to the applicant on 8 February 2022. Since § 100(1^1) of the PBGA, in the version in force before 1 January 2020, laid down that the most favourable salary rate from the last five years of service was to be used as the basis for calculating a police officer's pension in the amount of the rate in force on the date as of which pension is awarded, and at the time when the applicant's pension entitlement arose (14 November 2021) the relevant rate was 1965 euros (see the regulation on salary rates corresponding to salary grades of police officers, Annex 1 in the wording of the annex to the Minister of the Interior regulation No 46 of 21 December 2020), in the opinion of the Supreme Court *en banc*, in the event of unconstitutionality of the provision the latter salary rate must be used as the basis.

67. According to the wording of § 111^1(2) of the PBGA, which was in force at the time of awarding a pension to the applicant, the pension of a police officer with at least 20 years of police service was 50 per cent of the salary based on which their pension was calculated. Under § 70(2) of the PBGA, the salary of a police officer was defined as their graded salary together with service rank remuneration. Under § 111^1(3) and (4) of the PBGA, for each year by which a police officer's length of police service exceeded 20 years of police service, the amount of the officer's pension was increased by 2.5 per cent of their salary which served as the basis for calculating pension, but the maximum amount of a pension was 75 per cent of the salary which served as the basis for calculating pension. Assuming that the other parameters based on which the applicant's pension was calculated (length of service and service rank remuneration) remained the same, the pension awarded to the applicant with the salary rate of 1965 euros and with the service rank remuneration of 92 euros would have been 1542.75 euros. This sum is 262.5 euros (i.e. by approximately one-fifth) higher than the pension awarded to the applicant on the basis of the contested provision (i.e. 1280.25 euros).

68. The applicant was in the police service for a long time even when the earlier principles for calculating the police pension were in force. Even before the contested regulatory scheme was introduced, the applicant had already fulfilled other conditions for entitlement to pension apart from the age threshold. During the applicant's period of service, for a long time a law was in force which linked the basis for calculating the police pension to the salary rate in force at the time the pension was awarded. The applicant, believing in the continuance of the current scheme, changed their life arrangements by rejoining the police service. In the opinion of the Court *en banc*, the applicant could not have been expected to foresee a considerable reduction in their pension relatively shortly before their entitlement to pension arose. Consequently, the applicant had a legitimate expectation that their pension would be calculated on the basis of the salary rate in force at the time when a pension was awarded. Since the contested amendment to the procedure for calculating the applicant's pension interferes with their legitimate expectations, it also interferes with the applicant's fundamental right to property.

69. Next, the Court *en banc* will check whether, together with the fundamental right to property, the applicant's fundamental right to equality has been interfered with.

70. 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 (cited judgment No 5-20-7/12, para. 36). As in the case of the general fundamental right to equality, interference with the special fundamental right to equality under § 32 (1) of the Constitution can only occur if persons in a similar situation are treated unequally. In order to ascertain unequal treatment, the point of departure for comparison must be determined and, on that basis, the groups of comparable persons identified (cited judgment No 5-19-29/38, para. 70).

71. In the opinion of the Administrative Court, the contested provision treats unequally those police officers who retired before 1 January 2020 and police officers (such as the applicant) who retired after that date. For the former, the amount of police pension was calculated on the basis of the salary rate in force on the date as of which they became entitled to a police pension. For the others, the amount of pension is calculated at the rate that was most favourable during their employment in the particular position. According to the Administrative Court, these are comparable groups who are unconstitutionally treated unequally.

72. In the opinion of the Court *en banc*, it is appropriate to take as a point of departure the police officers who became entitled to a police pension and who wished their police pension to be calculated on the basis of the most favourable salary rate from the last five years of service and corresponding to the salary grade of their position.

73. The first comparison group consists of police officers (such as the applicant) who became entitled to a police pension and who wished their pension to be calculated on the basis of the most favourable salary rate from their last five years of service and who were awarded a pension under the version of the PBGA in force from 1 January 2020 to 30 June 2022. The second comparison group consists of police officers who became entitled to a pension and who wished their pension to be calculated on the basis of the most favourable salary rate from their last five years' service and who were awarded a pension under the version of the PBGA in force before 1 January 2020.

74. These groups are treated differently on the basis of a characteristic, namely the moment when a pension is awarded. For police officers who were awarded a pension before 1 January 2020, the basis was the salary rate in force on the date on which their pension entitlement arose. At the same time, for police officers who were awarded a pension from 2020 the basis was the salary rate in force during their employment in that position.

75. Since persons who were awarded a pension under § 111^2(2) of the PBGA in the version in force before 1 January 2020 would have received a higher police pension in case of meeting the same conditions (see also para. 67 above), this amounts to different treatment, i.e. interference with the special fundamental right to equality arising from the first sentence of § 32(1) of the Constitution.

III

76. Section 11 of the Constitution allows restricting fundamental rights only in accordance with the Constitution, while 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 long-standing case-law of the Supreme Court, this means that interference with a fundamental right must have a (legitimate) purpose compatible with the Constitution. Second, interference must be proportionate for achieving its purpose, i.e. appropriate, necessary and proportional in the narrow sense (cited judgment No 5-20-3/43, para. 74).

77. Both the fundamental right to property, as well as the special fundamental right to equality arising from the first sentence of § 32(1) of the Constitution, are fundamental rights subject to a simple statutory reservation which may be restricted for any purpose that is not incompatible with the Constitution (cited judgment No 5-20-7/12, para. 59).

78. In the opinion of the Riigikogu Legal Affairs Committee as the representative of the body that adopted the contested provision, the purpose of amending the regulatory scheme of police pensions was expedient and economical use of public funds and ensuring sustainable development of the state and society. As a justification, the committee refers to the explanatory memorandum to the second reading of the Draft Act amending the Military Service Act and other Acts, entering into force on 1 January 2020 (447 SE, Riigikogu XIII composition). According to this, the main purpose of the amendment, which is the subject-matter of the current proceedings, was to decouple the system of police officers' superannuated pension from the police officers' salary system from 2020 onwards. According to the proposal by the Police and Border Guard Board to this effect, the old version of the PBGA limited the possibility of changing the salary system for police officers, e.g. reducing the number of salary grades, as it linked the amount of police pension to the police officers' salary system (see 447 SE, Riigikogu XIII composition, explanatory memorandum to the second reading, page 11).

79. The Administrative Court held that the contested amendment had no legitimate purpose, since the need to amend the police salary system and compare it with the previous salary system is only a technical problem which cannot justify different treatment of individuals. The legislator has also not analysed the impact of the amendment on the state budget or on the fundamental right to equality. Therefore, the legitimate purpose of the amendment cannot be to save public money either.

80. The Court *en banc* does not agree with these observations. In principle, it is not inconceivable that even a sufficiently compelling administrative or technical complexity may constitute a legitimate reason for treating individuals differently (see, for example, cited judgment No 5-20-3/43, para. 100). Similarly, assessment of the legitimacy of the purpose of limiting a fundamental right does not depend solely on whether and, if so, in what detail the legislator has analysed that purpose.

81. The explanatory memorandum to the Draft Act containing the contested amendment, together with the explanation by the Riigikogu Legal Affairs Committee can be interpreted so that, ultimately, the main purpose of the amendment was to save public money. This aim includes, inter alia, the objective of finding

money to ensure sustainability of police occupational pensions along with the rest of the pension system, as well as to raise the salary of police officers currently in service (cf. cited judgments in case No 3-4-1-1-14, para. 112 and No 3-4-1-18-14, para. 59, and Supreme Court Constitutional Review Chamber judgment of 22 October 2015 in case No 3-4-1-21-15, paras 39–41).

82. The Supreme Court has repeatedly noted that economical use of public money is a legitimate purpose both for interference with the fundamental right to equality under § 12(1) of the Constitution and for restricting the fundamental right to property under § 32 of the Constitution in conjunction with the principle of legitimate expectations (since the cited judgment in case No 3-4-1-1-14, para. 115). The Supreme Court has also specified that since pensions, including occupational pensions, are a long-term growing obligation of the state for which sources of coverage must exist, economical use of public money also includes ensuring the long-term functioning of both the specific occupational pension and the entire pension system, while taking into account the actual possibilities of the state (cited judgment in case No 3-4-1-18-14, para. 59, and Supreme Court Constitutional Review Chamber judgment of 29 May 2015 in case No 3-4-1-1-15, para. 55).

83. As stated in the explanatory memorandum to the Draft Act amending the PBGA and other Acts, entering into force on 1 July 2022, the cost of police pensions will continue to increase and will only begin to decrease from 2040. As of approximately 2060, this expenditure will no longer exist, as police officers entering the system from 2020 onwards will not become entitled to a police pension (508 SE, Riigikogu XIV composition, explanatory memorandum, page 184). The report of the National Audit Office submitted to the Riigikogu in 2014, titled “Sustainability of the state pension system”, points out that the state spends three times more money on maintaining one person receiving an occupational pension than on an average pensioner (Report of the National Audit Office, page 54).

84. In addition to a decrease in the number of working age people, the increase in average life expectancy and an increase in the number of people receiving occupational pensions, another factor significantly contributing to state expenditure on occupational pensions has also been and will continue to be an increase of the salary (basic salary) on which they are calculated. Thus, for example, the explanatory memorandum to the Draft Act 508 SE states that the said Act entails additional expenditure for the state due to an increase in the basic salary for the police pension, and state expenditure on the police pension will increase by 26 million euros in ten years and 84 million euros in 20 years (Draft Act 508 SE, Riigikogu XIV composition, explanatory memorandum, page 183).

85. If the amount of the police pension were no longer linked to the salaries of police officers in service, an increase in police officers’ salaries – which may be necessary to ensure sustainability of the police service – would not automatically lead to an increase in police pensions and the resulting burden on the state budget. Thus, decoupling the police pension from the current salary system is expected to reduce the costs of the state budget, thereby saving public money and allowing it to be used for other purposes specified by the legislator.

86. The intention to reduce the number of salary grades of police officers, as stated in the explanatory memorandum to the second reading of Draft Act 447 SE, can also ultimately be seen as related to the objective of saving public money for other expenditure. Changes in the salary system, including reduction of salary grades, entail the need to compare the tasks and qualification requirements for new and old positions. It is possible to do this, but it can be unreasonably costly.

87. Several of the parties to proceedings also considered the contested legislative amendment to be aimed at more equal treatment of persons in pension schemes, i.e. an end to differences in treatment between different groups of recipients of the police pension, as well as between occupational and ordinary pensioners.

88. That objective is not mentioned in the explanatory memorandum to the second reading of the Draft Act 447 SE in justifying the contested amendment. Nor has it been regarded in previous case-law as a legitimate aim of changing the occupational pension system (cited judgment in case No 3-4-1-18-14, paras 58–59). The Court *en banc* acknowledges the legislator's broad margin of appreciation in determining the objectives of restricting fundamental rights. However, more equal treatment of occupational and ordinary pensioners cannot be an objective which, in itself, justifies the kind of change in the occupational pension system which would interfere with the applicant's existing legitimate expectations. The substance of the promise made to police officers earlier was that they would be treated more favourably than ordinary pensioners.

89. The Court *en banc* sees no other purpose that the contested amendment might serve. Thus, the only legitimate purpose of interference with fundamental rights resulting from the contested amendment is saving public money.

IV

90. Interference with a fundamental right is a measure appropriate for attaining a purpose if it helps to attain the purpose. However, interference is necessary only if the purpose 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 purpose of the restriction. The more serious the interference with a fundamental right, the more compelling the reasons justifying it have to be (cited judgment No 5-20-3/43, paras 74 and 80).

91. The contested provision is appropriate for saving public money. Salaries, including salaries in the civil service, tend to increase over time. There is no reason to doubt that if police officers retiring from 1 January 2020 who choose the most favourable salary rate from the last five years of service as the basis for calculating their pension were also entitled to a pension on the basis of the salary rate in force at the time when their pension entitlement arose, then the state's costs would increase. The conclusion as to the appropriateness of the measure is not altered by the fact that public money savings achieved by the contested provision are not necessarily great. The provision is also necessary because the parties to the proceedings have not indicated and the Court *en banc* does not see any measure of similar savings but less burdensome for the applicant or other persons. Although, in theory, the state could achieve the same amount of savings in other ways, including by differently reforming the occupational pension system, it is not clear whether, in

such a case, interference with the rights of the applicant or of other persons would be smaller.

92. Next, it is necessary to consider whether, in the instant case, interference with the fundamental right to property and unequal treatment is outweighed by the savings achieved by the state.

93. The Court *en banc* acknowledges that a person does not have a fundamental right to an occupational pension and the Riigikogu has a broad margin of appreciation in shaping the occupational pension system (cited judgments in case No 3-4-1-21-15, para. 35, and No 3-4-1-1-15, paras 57 and 58). However, that margin is not as broad in the case of a regulatory scheme being amended that has been in force for a long time and for the continuance of which the persons concerned have acquired legitimate expectations.

94. Saving public money is generally a compelling objective. As already stated above (in para. 83 et seq.), it is clear that state expenditure on occupational pensions will increase over time, reducing the capacity of the state to perform other duties, in this case in particular to ensure a stable increase in the salary of police officers currently in service and, consequently, sustainability of the police service. The importance of an adequate level of pay for sustainability of the police service is particularly enhanced by the fact that police officers who enter service as of 1 January 2020 no longer have an occupational pension. This may reduce the attractiveness of the police service.

95. It is difficult to estimate exactly how much money the state will save with the help of the contested amendment. However, it should be noted that for most police officers their highest salary is the one they receive right before retirement. Therefore, choosing an earlier salary as the basis for calculating one's pension was rather an exception even before the entry into force of the contested amendment (see Draft Act 508 SE, Riigikogu XIV composition, explanatory memorandum, page 49). According to the Social Insurance Board, from 1 January 2020 to 31 August 2023, a police pension was awarded to 463 people, of whom 459 chose their last basic salary as the basis for calculating the pension while four police officers chose the most favourable basic salary from their last five years of service. It is possible that, without the amendment at issue, the number of persons who would have chosen their previous salary as the basis for calculating the pension would have been somewhat higher. However, even taking this into account, the Court *en banc* considers it possible to conclude without a more thorough analysis that the savings resulting from the amendment are small in view of the state's overall cost of paying occupational pensions.

96. The slight savings are measured against serious interference with the applicant's fundamental right to property and the fundamental right to equality. As stated in para. 67 of the present judgment, the pension awarded to the applicant was 262.5 euros less than the pension which should have been awarded to them had the contested rule not been enacted. Since the police pension is indexed (§ 111^3(2) PBGA), the cumulative effect that the difference between pensions will have on the amount of the applicant's pension in the future must also be taken into account when assessing the seriousness of interference (see also Supreme Court Constitutional Review Chamber judgment of 23 February 2023 No 5-22-12/19, paras 46 and 47).

97. The seriousness of interference with the applicant's fundamental rights is enhanced by interference with their legitimate expectations by introducing the contested provision (para. 68 of the judgment). Although the Constitution does not guarantee the right to a police pension, a person may not be treated perfidiously with

regard to the benefits that the legislator has promised them.

98. The explanatory memorandum to the Draft Act introducing the contested amendment states that the date of entry into force of the Act – 1 January 2020 – was chosen with the consideration that a sufficient period would remain between publication of the Act and its entry into force, i.e. *vacatio legis* to adapt to the changing situation (447 SE, Riigikogu XIII composition, explanatory memorandum, page 34). About a year and a half remained between publication of the Act in the Riigi Teataja and its entry into force. Approximately three years and four months remained between publication of the Act and the moment of the applicant's entitlement to police pension. This period is too short to secure additional income for one's retirement to cover the negative effects resulting from the contested amendment. Moreover, a person in a situation analogous to that of the applicant did not previously presumably have any anticipated need to use alternative ways of saving for retirement, such as joining the funded pension system. Therefore, it cannot be assumed that the person could have insured themselves against a considerable reduction in the amount of their pension by contributing to that end themselves (cf. cited judgment in case No 3-4-1-21-15, para. 57). This conclusion is also not altered by the fact that, under the amendments to the PBGA entering into force on 1 May 2019, the applicant is entitled to the full superannuated pension of a police officer even if they continue to work in the police service. The applicant does not have to assume any additional obligations to maintain the level of pension protected by a legitimate expectation that has already arisen.

99. In conclusion, the Court *en banc* finds that even though the contested provision helps the state to achieve some cost savings, that objective, which in itself is legitimate, cannot be regarded as sufficiently compelling to justify serious interference with the applicant's fundamental right to property resulting from this provision, in combination with interference with legitimate expectations, also involving the applicant's unequal treatment with regard to property. In view of the specificities of the applicant's situation (see, in particular, para. 68 of the judgment), the change in the salary rate used to calculate the amount of pension constituted an excessive and, therefore, disproportionate interference with the applicant's fundamental right to property and equality.

100. Relying on § 15(1) clause 5 of the Constitutional Review Court Procedure Act, the Court *en banc* declares that § 111^2(2) of the PBGA, in the version in force from 1 January 2020 to 30 June 2022, was unconstitutional insofar as it did not enable calculation of a police officer's superannuated pension to take into account the most favourable salary rate chosen from the last five years of the officer's service in the amount valid on the day as of which the pension was awarded.

(signed digitally)
