

# Social Security

## Ability to cope

The emergency situation established due to the spread of SARS-CoV-2 put many people's ability to cope under question. It also made us think about how secure we actually are for occasions when earning a livelihood to the previous extent is not possible, quick realisation of assets is not conceivable or financially reasonable, but when we have no considerable savings with the help of which to survive a difficult (lingering) period.

The Chancellor of Justice often has to answer the question whether an individual should be entitled to state support. This is natural, and the Constitution also promises people support during difficult times, equal treatment, protection of property, and respect for legitimate expectations. The state must have a constitutionally based response as to why it assists someone on one occasion and does not on another. For example, in an [opinion](#) sent to the Supreme Court the Chancellor found that the state has no constitutionally based convincing answer why some children in blended families should be left without support because the other parent of their sibling does not agree to give up family benefits or use them by taking turns.

Often people also ask about the amount of support: how much assistance should the state give someone? Is giving someone less than others allowed, or should someone be given more? On the one hand, these are political choices in which the Chancellor cannot or even may not intervene. On the other hand, it is also clear that even in the case of such a sensitive social issue decided on the political level the Constitution sets limitations and says that the Riigikogu is not infinitely free in its decision-making.

One such limitation is human dignity. In an [opinion](#) to the Supreme Court concerning a ban on deducting from a person's income the expenses incurred on prescription medication when deciding on a grant of subsistence benefit to the person, the Chancellor pointed out that the state has violated the Constitution if no minimum necessary means of subsistence are ensured to an individual. The Supreme Court also [held](#) that no justification can be found for failure to ensure the minimum necessary means of subsistence. This would result in degradation of human dignity and would distort the essence of the right enshrined in § 28(2)

of the Constitution. In a significant ruling, which unfortunately did not receive wider public attention, the Supreme Court further explained that the Riigikogu enjoys a broad margin of appreciation in defining what should be considered as 'need' in terms of subsistence, and an even broader margin of appreciation in deciding how assistance should be ensured.

Nevertheless, the court may review the sufficiency of measures of assistance and intervene in the event of an obvious discrepancy between what was established by the Riigikogu and what is required by the Constitution. That is, if the subsistence level is set too low as compared to actual circumstances, or if the types, extent and procedure for provision of assistance as a whole fail to ensure that the assistance stipulated by law prevents the need from arising.

In her opinion the Chancellor noted that ensuring all the necessary prescription medication to a person for the sum intended as subsistence benefit should be treated separately. So far, people both with or without health insurance have received assistance for buying medication from a local authority or through charity (e.g. the cancer treatment foundation). The Supreme Court said that, in view of the subsistence level and the assistance provided or offered to the applicant by public authorities (including local authority support, food aid distributed through the Estonian Food Bank, and European Union food aid), there is no reason to conclude that the applicant had suffered need. Yet it is probable that expenses incurred for prescription medication (similarly to satisfying some other essential need) may be so large as to result in a person's destitution. The court noted that, in such a situation, the public authorities may not forget that under § 14 of the Constitution a person suffering need in terms of subsistence must be ensured the right to state assistance (§ 28(2) Constitution).

The Chancellor was asked to verify whether the Riigikogu decision to reduce the amount of work ability allowance of persons with partial or no capacity for work during the months when the person himself or herself is earning sufficient income was constitutional as well as compatible with the UN Convention on the Rights of Persons with Disabilities. The Chancellor [explained](#) that under the Constitution as well as international law the state should assist people in a more difficult situation but to what extent and how the state provides assistance is decided by the Riigikogu. In addition to the work ability allowance, the state has stipulated various support and other measures to assist those who have incurred additional expenses due to their disability and/or reduced capacity for work. Sufficiency of assistance and support can be contested on the basis of legal arguments only if those in need of assistance have been generally and manifestly left in difficulty.

In another case concerning reduction of the work ability allowance, the petitioner asked the Chancellor whether reduction of their work ability allowance was correct if their income earned in Germany was low in view of the living standard there. The Chancellor explained that the Constitution allows reducing the work ability allowance if an individual themselves is able to earn income. Reduction of the work ability allowance is compatible with European Union rules.

The Chancellor was also asked to [verify](#) whether the Unemployment Insurance Fund had acted lawfully when withholding sums from the work ability allowance based on instruments of seizure issued by bailiffs, and whether the [Code of Enforcement Procedure](#) which authorises this is constitutional. In February 2020, the Unemployment Insurance Fund launched a new information system enabling withholding sums from the work ability allowance based on several instruments of seizure issued by a bailiff. As a result of implementing the information system, people were left with less money in their hands than allowed by law. The law does not allow the Unemployment Insurance Fund to withhold sums based on more than one instrument of seizure or to make payments to several bailiffs from a debtor's work ability allowance. From March 2020, instruments of seizure are executed one by one, i.e. the next instrument is not executed before execution of the previous one is complete.

According to the Chancellor's assessment, the Code of Enforcement Procedure which enables withholding sums from work ability allowance is compatible with the Constitution. Enforcement proceedings give priority to the legitimate interest of the claimant; yet the legitimate interest of the debtor – i.e. their right to a dignified life – must also be taken into account. Work ability allowance constitutes income which supplements or replaces a person's income from work. As a rule, work ability allowance cannot be seized but in exceptional cases this is possible to a limited extent. If over a longer period no payments to satisfy a claimant's claim can be obtained from a person receiving work ability allowance, since the person has no other assets, seizing part of the work ability allowance may be fair depending on the type of claim and amount of income. Under the law, a bailiff must find a fair balance between the interests of the claimant and the debtor, as well as a solution appropriate in each particular case.

## 21st century work

The current unemployment insurance system deprives of financial assistance the majority of people who have lost work-related income. For years the state has paid unemployment insurance benefit only to a third of those registered as unemployed in the Unemployment Insurance Fund. The remaining unemployed are not entitled to benefit because they do not meet all the requirements imposed on entitlement to benefit. Two years ago the Chancellor contacted the Riigikogu Social Affairs Committee and the Minister of Health and Labour with a [proposal](#) to update the unemployment insurance system. The fact that the current system has become outdated was affirmed by urgent amendments induced by the corona crisis, which legalised so-called 'gigs' (i.e. very short-term jobs).

During the emergency situation, the Chancellor received a fair number of enquiries about the conditions for entitlement to unemployment insurance benefit (e.g. [unemployment benefits in the case of termination of a contract of mandate](#)). Inter alia, it was found that if a person loses their main job but they have a natural person business account then they are not entitled to apply for unemployment insurance benefit. The Chancellor [drew the attention of the Riigikogu Social Affairs Committee](#) to the fact that depriving a person of unemployment insurance benefit merely because they have a natural person business account is very similar to the problem of unemployment insurance of members of boards of companies, which the Supreme Court adjudicated in 2017. In that judgment, the [Supreme Court held](#) that a person may not be deprived of unemployment insurance benefit if they lose their work-related income while all the other insurance conditions are fulfilled.

The Riigikogu resolved the [issue raised](#) before by the Chancellor concerning calculation of the amount of unemployment insurance benefit. Namely, based on the formula set by the Riigikogu the unemployment insurance benefit of a person having worked in Estonia or also in another European Union member state could turn out to be significantly smaller than the person's contribution to the Estonian unemployment insurance system would have presumed. The Riigikogu supplemented the Unemployment Insurance Act with [§ 9\(1<sup>1</sup>\)](#).

During the reporting year, issues were also raised by the [conditions for obtaining the business start-up subsidy](#) stipulated in the [Labour Market Services and Benefits Act](#). The Chancellor received complaints that business start-up subsidy was not granted to persons who own or, during six months prior to applying for subsidy, owned part of a general or

limited partnership or more than 50 per cent of another company. Thus, subsidy cannot be applied for by those entrepreneurs who operate only seasonally – for example, only in summer – but who would like to start another business that would also keep them active during the remaining months of the year.

Under § 28(2) of the Constitution, the state is obliged to ensure social protection to an individual in the event of unemployment but the Constitution does not specify the measures used to ensure that protection. The state must assist a person who has become unemployed but the state may choose to whom and what kind of assistance it provides. First, the Riigikogu has created an unemployment insurance system based on compulsory insurance entitling an unemployed person to apply for unemployment insurance benefit. Second, labour market benefits and services are offered which help an unemployed person to find work and promote their work-related development. The law lists several services (§ 9 Labour Market Services and Benefits Act) but an unemployed person need not receive all of them. Each service has its purpose and target group whose return to work the service promotes.

## **Organisation of social services**

During the reporting year, the [Supreme Court satisfied](#) the Chancellor's [application](#) to repeal several provisions in Narva City Council regulations on mandatory social services. The fact that this was a significant judgment is also demonstrated by the Supreme Court [press release](#) and an [opinion article](#) published by a Supreme Court justice.

The Supreme Court ruled that the state and local authorities may share the functions of provision of social services. The court noted that the ultimate responsibility for organising social services lies with the parliament and settled the case on that premise. With regard to that issue, one Supreme Court justice wrote a [dissenting opinion](#). Based on earlier Supreme Court case-law, the justice wondered whether the obligation of a local authority stemmed from the fact that it was an inherent task of a local authority or whether it was a legal obligation imposed on it by the state. The justice also raised the issue whether the provisions on funding rural municipalities, towns and cities and provisions of the Social Welfare Act were in breach of the right of rural municipalities, towns and cities to receive sufficient money from the state for provision of social services. In the view of the dissenting justice, the Supreme Court was not in a position to adjudicate the Chancellor's application without having first answered these questions.

In the course of constitutionality review of the provisions of Narva City Council regulations, the Supreme Court agreed with the Chancellor that: (1) issues of organising social services fall under the exclusive competence of municipal councils, (2) all services must be governed by regulation(s), (3) a municipal council may restrict fundamental rights only if a statutory legal basis for this exists, and (4) no conflict with statutory provisions may arise, i.e. no restrictions can be imposed to exclude the grant of assistance to people who have a statutory entitlement to receive assistance, or to provide less assistance than prescribed by law.

The Court also highlighted some important issues which the Riigikogu must take into consideration when regulating the organisation of social services. For example, it pointed out to the Riigikogu that appropriate rules should be laid down by law. The Court noted that with a view to effective protection of fundamental rights it is vital that the rules laid down by the parliament are sufficiently precise about how a local authority can determine the level of contribution charged from those who apply for assistance (including how to take into account the financial situation of those in need and that of their families and the extent of their maintenance obligation) and in which cases the obligation to pay for the services passes to the local authority.

The Supreme Court also pointed out that § 5(3) of the Social Welfare Act did not have any regulatory effect. Sufficient funds are needed to fulfil a task: the state cannot allow a situation to arise where the availability of critical public services varies, depending to a large extent on the capacity of the local authority of the person's place of residence or location. If local

authorities are not capable of providing services at a sufficient level, people's fundamental rights might be left without protection. Supervision must be arranged over performance of a function. In addition, effective possibilities should be created for people to assert their rights.

The Chancellor sent a [circular](#) to rural municipalities, towns and cities explaining the Supreme Court judgment. In addition, a Chancellor's adviser and a Supreme Court analyst clarified the positions of the Court in the [journal](#) *Sotsiaaltöö*. The Chancellor's advisers paid a visit to the city of Narva and town of Põlva where they introduced the judgment.

Petitions sent to the Chancellor show that people and local authorities have been confused by the Minister of Social Protection Regulation No 4 of 26 February 2018 on "The physical adaptation of dwellings of disabled people", established on the basis of § 14 of the European Union Budget Period 2014–2020 Structural Assistance Act. Because of this support measure aimed at local authorities, it is often forgotten that the right of a disabled person to adaptation of their dwelling is stipulated by the Social Welfare Act and that the service is one of the mandatory services organised by a local authority. Therefore, a rural municipal, town or city government must always assess a disabled person's need for assistance in the aggregate, even when a person applies to the local authority only for adaptation of their home. If a person has applied for specific adaptations, a local authority must take a position in its administrative act on whether the applicant is entitled to those adaptations. The decision must be made within a reasonable time (see the Chancellor's [opinion](#)).

The fact that rural municipalities, towns and cities have problems with observing the principle of good administration was also demonstrated by a case concerning termination of a local authority's mandatory social service. Specifically, a rural municipality stopped paying for provision of the service without informing the person under care or their carer about this. A closer look revealed that the rural municipality itself was also unable to justify with certainty the circumstances of having done so. Since the rural municipality did not issue a written administrative act and the person was not notified about the decision, the administrative act establishing care remained in force, as did the care agreement which the municipality had concluded with the carer until the need for care ceased to exist. Based on the same agreement, care had been provided to the person during the whole period. The Chancellor asked the rural municipality to consider the possibility of making payments to the carer retrospectively. The rural municipality paid the money withheld to the carer.

The Chancellor was contacted by the father of an adult disabled son who needed

explanations as to what service his child was entitled to and to what extent, and whether the necessary services laid down by law had been provided to him. It was found that the father had applied to the Social Insurance Board to receive the necessary services. Having examined the administrative act issued by the Social Insurance Board, the Chancellor [recommended](#) that, in the future, the Social Insurance Board should draw up its official decisions so that a person understands their rights and options. Since the decision by the Social Insurance Board essentially repeated the provisions of the law, the scope of the service to which the petitioner's son was entitled still remained unclear based on the letter sent by the Board. The Board should have justified the scope of the service provided to the petitioner's son.

## Reform of mandatory funded pensions

At the beginning of 2020, the Riigikogu adopted the Act on reform of mandatory funded pensions laying down the right for people to withdraw from the so-called second pension pillar before reaching retirement age and, on certain conditions, to withdraw the money collected in the pension pillar. Inter alia, people get the opportunity to independently invest their assets in the second pillar by using a pension investment account to this effect.

The reform has generated a lively debate in society, including a dispute over the constitutionality of the law. The Head of State refused to promulgate the law and referred the issue to the Supreme Court. The Supreme Court Constitutional Review Chamber [referred](#) the application by the President of the Republic to the Supreme Court *en banc* which held its session on 4 August. At the time of writing this overview, the Supreme Court *en banc* had not yet delivered its judgment.

It is not surprising that the reform of funded pensions has caused such a lively debate. It might be recalled that even before adoption of the Funded Pensions Act there was a heated debate over whether this kind of pension system supported by three pillars was right. The Chancellor has also received numerous petitions concerning funded pensions: people are dissatisfied with pension fund management charges or performance, and questions have also been raised, for instance, in connection with the duty to enter into pension contracts and the amount of disbursements.

Since this is a very fundamental and forward-looking issue decided a long time ago and affecting almost the whole of society, the broad debate on it and review of its constitutionality by the Supreme Court is extremely important. Questions which the Court needs to assess

relate mostly to the constitutionality of different aspects of withdrawal of the money collected in the second pillar. The Chancellor submitted her [opinion](#) to the Court, concluding that the Act on reform of funded pensions is incompatible with the Constitution.

The President of the Republic first raised the question concerning the amount of future pensions and found that, after reform of so-called funded pensions, they would no longer correspond to the level required by the Constitution. The Chancellor found that even though the amounts of pensions immediately after the reform might not be insufficient, it cannot be claimed that they would remain precisely on the same level even without the funded pension. The reason is that the Riigikogu has not significantly changed the State Pension Insurance Act simultaneously with the reform. Since social protection of the elderly would diminish (without any sound reason) as a result of the reform, this is not compatible with the Constitution or international law binding on Estonia.

Withdrawal of money from the second pension pillar also has an adverse effect on the rights of other pension fund unit-holders who wish to continue collecting money for the pension in the second pillar. Those unit-holders have made their choice in the knowledge that no large amount of money can be withdrawn at once from second-pillar pension funds. Thus, the Court will be assessing the constitutionality of interference with the fundamental right to property and legitimate expectations of second-pillar unit-holders. Also at issue is the constitutionality of different treatment of people who have joined the mandatory funded pension and those who have not: the first group would obtain the possibility of immediate access to the funds collected to the pension fund on account of social tax, whereas the second group would not have that possibility. Another issue to be considered is whether interference with the freedom of entrepreneurship and legitimate expectations of insurers is constitutional.

The Riigikogu justifies giving the right of free disposal of pension assets to those having joined the second pillar by the argument that pension fund units are a person's own property over which they should be able to decide freely. However, the mechanism for acquiring pension fund units has been created precisely for the purpose of collecting money for a pension. Allocation of four per cent of social tax to the second pillar instead of to the state pension insurance was justified by the fact that the money would be used to pay a pension in the future.

Allowing withdrawal of the social tax collected by the second pillar prior to the reform has no

substantial purpose. The mandatory funded pension could also be made voluntary so that the changes would not extend to assets collected before the pension reform. According to the Chancellor's assessment, the regulation on withdrawal from pension contracts is also not constitutional. Insurers and policyholders could not foresee these changes and they had reason to expect that the contractual relationship would continue to a significant extent on conditions under which the contracts were concluded.

## Healthcare

Due to the corona crisis, the Chancellor dealt extensively with healthcare issues, concerning for example the [prevention and control of infectious diseases](#) or protection of the [rights of women about to give birth](#). The Chancellor intervened when on 26 March 2020 the Health Board sent a letter to the Estonian Dental Association and the Estonian Private Healthcare Institutions Association, in which the Board ordered that, in connection with continuation of the spread of Covid-19 and the need for rational use of personal protective equipment, dentists and medical specialists in private healthcare institutions should stop providing planned medical care (including laboratory services and issuing health certificates) and limit services to emergency care only.

Although the Health Board letter intended to impose restrictions and duties on individuals, the letter was not formulated as an administrative act in line with the requirements of the Administrative Procedure Act. Moreover, the addressees of the letter were not notified of those restrictions (professional associations within the meaning of the law do not treat people). The legal basis of the restrictions imposed by the Health Board remained unclear, nor did the letter contain a reference to possibilities to contest the order.

The Chancellor found that, even during an emergency situation, the freedom of enterprise of businesses cannot be restricted arbitrarily, without a clear and logical justification and in a manner that does not enable understanding precisely who the addressees of the restriction are and what their duties are.

Of course, the Chancellor also dealt with other healthcare issues during the reporting year. For example, the Chancellor [enquired](#) why it was not possible for a disabled child to obtain dental treatment under anaesthesia within a reasonable time in Tallinn. Following the [Chancellor's intervention](#), the Health Insurance Fund checked the availability of dental treatment under anaesthesia more generally. After several verification phone calls, a

representative of the Health Insurance Fund was convinced that Tallinn Children's Hospital was not complying with the requirements for keeping a treatment queue because those wishing to register for treatment were not enabled to register for an appointment but were asked to call back later. The Health Insurance Fund drew the attention of Tallinn Children's Hospital to these shortcomings.

The Chancellor sent an [opinion](#) to the Supreme Court on whether it was compatible with the requirement of equal treatment if the state guarantees health insurance only to a dependant's spouse but deprives a dependant's registered partner of this. The Supreme Court [agreed](#) with the Chancellor, affirming that spouses and registered partners have a similar maintenance obligation in respect of each other. The Court found that even though the Riigikogu enjoys broad decision-making competence in social policy issues, due to different treatment the effect on registered partners is significant since, because of this, they are deprived of health insurance and pension insurance payments. When investigating the issue the Ministry of Social Affairs has found that expanding the range of people receiving benefit would not be too expensive for the state.

The Chancellor [analysed](#) why recipients of the doctoral student allowance are paid less temporary incapacity for work benefit than those working on the basis of an employment contract. The reason is that, unlike wages, payment of a doctoral student allowance may continue even when the recipient falls ill or is on maternity leave. Thus, the recipient of a doctoral student allowance need not lose the benefit due to illness, unlike an employee who would lose wages.