



# CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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## J U D G E M E N T

on Behalf of the Republic of Latvia

in Riga, on 15 February 2018,

in Case No. 2017-09-01

The Constitutional Court of the Republic of Latvia comprised of: chairperson of the court hearing Ineta Ziemele, Justices Sanita Osipova, Aldis Laviņš, Gunārs Kusiņš, Jānis Neimanis, and Artūrs Kučs,

having regard to a constitutional complaint submitted by Sanita Bokta-Strautmane, on the basis of Article 85 of the *Satversme* of the Republic of Latvia and Para 1 of Section 16, Para 11 of Section 17 (1) as well as Section 19<sup>2</sup> and Section 28<sup>1</sup> of the Constitutional Court Law, at the court hearing of 16 January 2018, reviewed the case “**On Compliance of Para 3 of Section 10<sup>4</sup> (1) of the law “On Maternity and Sickness Insurance” (in the wording that was in force from 1 January 2012 until 31 December 2013) with Article 110 of the *Satversme* of the Republic of Latvia**”.

### The Facts

1. From 1 January 2008, a new social insurance benefit – parents’ benefit – was introduced in the law “On Maternity and Sickness Insurance”. It was granted and disbursed to a socially insured person, who took care of a child until the age of one, if this person, as a parent of the child, was on a child-care leave or due to taking care of the child was not gaining income as a self-employed person, or continued working during this period of caring for the child.

On 16 June 2009, the *Saeima* adopted the law “Amendments to the Law “On Maternity and Sickness Insurance “ ”. It provided that in future, with respect to children who had been born starting with 3 May 2010, the parents’ benefit would be granted only to those socially insured persons, who would be on a child-care leave and, thus, would not work or gain income as self-employed persons.

By Section 3 of the law of 2 December 2010 “Amendments to the Law “On Maternity and Sickness Insurance “ ”, Para 3 of Section 10<sup>4</sup> (1) of the law “On Maternity and Sickness Insurance” was adopted (the amendments entered into force on 4 January 2011). The aforementioned Para, in the wording that was in force from 1 January 2012 until 31 December 2013, provided that parents’ benefit was granted and disbursed to a socially insured person, who took care of the child or several children born during one delivery in the age up to one year (to one of the parents of the child, one of the adoptive parents, in whose care and supervision the child had been transferred in accordance with a decision of the Orphan’s Court, to a member of the foster family, who had concluded an agreement with the local government, guardian or another person, who in accordance with a decision of the Orphan’s Court actually took care of the child), if this person was employed on the day of granting the benefit (was to be considered as an employee or a self-employed person in accordance with the law “On State Social Insurance”) and as a self-employed person did not earn income due to taking care of the child (hereafter – the contested norm).

On 6 November 2013, the *Saeima* amended the law “On Maternity and Sickness Insurance”, providing that, as of 1 October 2014, also a person, who was employed at the time of caring for the child but was not on a child-care leave or gained income as a self-employed person during the period of caring for the child would receive a reduced parents’ benefit (30 per cent). The wording of the law that is currently in force also envisages to a person, who within a calendar month has income as an employee or a self-employed person, the right to the reduced amount (30 per cent) of parents’ benefit.

**2. The applicant – Sanita Bokta-Strautmane** (hereafter – the Applicant) – is a self-employed person, a sworn advocate, who resumed her professional activities, although the child that had been born to her had not reached the age of one yet. On the basis of the contested norm, by the decision of the State Social Insurance Agency, the Applicant was refused the granting of parents' benefit until the moment when the child would reach the age of one. The decision by the State Social Insurance Agency was left unchanged also by the judgement of the Administrative Regional Court. The Applicant has submitted a constitutional complaint, being of the opinion that the contested norm is incompatible with Article 110 of the *Satversme* of the Republic of Latvia (hereafter – the *Satversme*).

The Applicant notes that she had resumed her professional activities not to lose competitiveness, clients and, thus, the ability to ensure her family's welfare also after the child would reach the age of one. If a parent is unable to suspend her professional activities but the family cannot subsist on income from half-time work then the parent has to work full time and entrust the child-care in full to another person. This, allegedly, has the outcome to the contrary, i.e., the parent is forced to work full time, reducing to the minimum the time that can be dedicated to the child. Hence, it is alleged that the contested norm restricts a person's fundamental rights and does not reach its legitimate aim, as indicated by the legislator, – so that the families, in which a child's parent both receives the state support and gains income as a self-employed person or in employment, would not be placed in more favourable situation compared to other families.

The restriction that has been established for a self-employed person, who continues her professional activities in the period when her child has not reached the age of one yet, is said to influence this person's professional activities in the future. Whereas the employees are said to be in a different situation because the provisions of the Labour Law guarantee to them that their job is retained when the child-care leave ends. Self-employed persons do not have such guarantees, and, thus, they are being discriminated against according to the type of employment.

It is maintained that the contested norm had also created a differential treatment of self-employed persons, compared to persons who had not been employed at the moment

of granting the benefit and thus, until the moment when the child reached the age of one, could receive the child-care benefit. No requirements had been set for receiving the child-care benefit to persons, who had not been employed at the moment of granting the benefit.

The legislator could have provided state support in another way to a person, who continues to gain income after the birth of a child and during the period of caring for the child, e.g., by decreasing the state established expenditure, reducing the mandatory state social insurance contributions or fully releasing from these payments.

If a person would lose her income or it would significantly decrease after the child reached the age of one and the person resumed professional activities that would have a significant long-term impact on the family's general welfare. Allegedly, the State's duty is to provide support to parents and other persons who are raising children, using the maximum amount of resources at its disposal. In Article 110 of the *Satversme*, the State had committed itself to provide financial support to parents during the child's first years of life.

The Applicant is of the opinion that since she had been denied the parents' benefits and other benefits related to the birth of a child and child-care for seven months until the child reached the age of one, she had been deprived of the right to receive state support in connection with the birth of a child or caring for the child until the age of one at least in the minimal amount. The Applicant argues that by prohibiting her from receiving the parents' benefit at all she had been denied the right guaranteed in Article 110 of the *Satversme* to the social and economic protection of a family at least in the minimal scope. Hence, by the contested norm, the legislator had failed to fulfil the positive obligation to provide support to a family that follows from Article 110 of the *Satversme*.

The restriction is said to be disproportional because the child-care benefit is paid to those persons, who care for a child after he or she has reached the age of one, irrespectively of the type of their employment and income.

After acquainting herself with the materials in the case, the Applicant noted, additionally, that the contested norm did not indicate that the legislator had differentiated between a situation, where a self-employed person's income after the birth of a child and

taking care of the child, did not decrease and a situation, where, in the same period, the income decreased for a certain amount. However, the *Saeima* has noted in its written reply that the objective of the parents' benefit is to compensate, at least partially, the lost income of parents who care for the child until the age of one. Moreover, the legislator had at its disposal several mechanisms for fulfilling the positive obligation that followed from Article 110 of the *Satversme*, setting such amount of benefit that could differ from the amount of benefit set for those persons who do not gain income during the period of caring for the child. The economic situation of the state should not create a conviction that the State could totally discontinue fulfilment of its positive obligation with respect to a certain group of socially insured persons. Moreover, the parents' benefit, although assigned to another budget, similarly to the child-care benefit, is said to perform also the support function in connection with additional expenditure that parents incur while caring for a child until the age of one.

**3. The institution, which issued the contested act, – the *Saeima* – holds that the contested norm complies with Article 110 of the *Satversme*.**

The parents' benefit is said to be one of the special types of protection for families. The State supports families with new-borns for a certain period of time, in view of the fact that infants need special care and the presence of at least one of the parents. Usually, the child's parents assume this care; however, during the period of caring for the child they cannot gain the same level of income as before the birth of the child if they have discontinued performing the duties of their job or professional activities. Hence, the aim of the parents' benefit is to compensate for the loss of this income to socially insured persons in the amount that depends on the mandatory state social insurance contributions made by the parent and to protect the rights of the child by ensuring to him or her his parents' presence and full care.

The legislator has not deprived the Applicant of the permanently granted right to the parents' benefit. Likewise, by the contested norm, the legislator has not amended the terms for granting the parents' benefit, the procedure for calculating it or its amount. The legal regulation with respect to linking the receiving of the parents' benefit to the

prohibition to gain income as a self-employed person had been stable and constant for a longer period before the birth of the Applicants' child (from 1 July 2009).

The contested norm *per se* does not restrict the fundamental right, enshrined in Article 110 of the *Satversme*, to the state support for the family because it ensures the possibility to receive the parents' benefit to all socially insured persons. Whether the requirements for receiving the benefit are met is said not to depend on the State's interference but rather on the choice made by both parents of the child to receive the benefit, by one of them discontinuing to receive the income. Thus, the State has fulfilled the obligation to guarantee social security, at least on the minimal level, to a family with a child below the age of one.

The criterion included in the contested norm is said to serve the legitimate aim – protecting the rights of the child, since it provides incentives for parents' direct involvement in caring for and looking after the child, and ensuring to at least one of the parents the possibility to be with the child constantly. This is said to comply with the nature of the parents' benefit as a social insurance service. One of the child's parents can receive this service only if one of the cases of insurance or social risk has set in, which is linked to caring for a child and lost income as the result of it. The purpose of the parents' benefit is to compensate to a socially insured person the loss of income gained thus far; however, if the professional activities are continued such loss does not occur.

In the context of the present case, the parents' benefit should not be considered as social assistance (social allowance) for families with children; i.e., additional support for covering the expenses linked to the birth of a child and child-care. For this purpose, in the period indicated by the Applicant, the State had envisaged other types of support.

The legislator had taken appropriate measures to ensure financial support provided by the State to all persons who care for a child below the age of one. All persons have been ensured the possibility to exercise their social right to receive the state support for the family at least in the minimal amount until the moment when the child reaches the age of one. In addition to the parents' benefit and the child-care benefit, in the period when the Applicant did not have the right to receive the parents' benefit, the State had envisaged also other social insurance and social allowances to families with children.

The reason why Applicant did not receive the parents' benefit was not because the State had not ensured to her the possibility to exercise her social right to this state support in at least the minimal amount but rather because she herself had chosen not to receive the parents' benefit. In fact, the *Saeima* believes, the Applicant is complaining about the lack of such legal regulation that would comply with her wish – to receive the parents' benefit also in the case where caring for the child is combined with the performance of professional activities.

The legislator is said to have discretion in regulating the conditions for receiving social insurance services, by reviewing the State's economic possibilities and by envisaging that, *inter alia*, a person in situation, where she is able to gain income herself also during the period of caring for the child, does not need additional help from the State. Moreover, during the period of caring for the child, the amount of Applicant's income, the object of mandatory contributions and the mandatory contributions made had been approximately the same as in the last years before the birth of her child. Hence, there are no grounds to assume that the pre-condition for granting the parents' benefit – prohibition to continue gaining income, would have decreased the level of welfare in the Applicant's family and the possibility to ensure the best interests of the child. In fact, the Applicant herself had decided to ensure herself the resources needed for caring for the child.

Since the prohibition to gain income during the period of caring for the child had been included in the law "On Maternity and Sickness Insurance" for a long time before the birth of the Applicant's child, the contested norm could not have affected the Applicant's legitimate expectations. Likewise, the *Saeima* does not see how the contested norm could have placed children's parents in unequal situations since it had been applied identically to all socially insured parents, irrespectively of the form of their employment.

Allegedly, self-employed persons are not in more adverse position compared to an employee with respect to the possibility to continue performing the duties of one's job or one's professional activities and to gain income after the period of caring for the child. Each of these types of employment has its own risks and also advantages that compensate for them. A self-employed person has the possibility to plan her income and expenditure freely and, in the future, will receive social insurance services in the amount of her own

participation in this system. Likewise, self-employed persons have certain flexibility in organising their work because, in difference to employees, they set their own working hours and place, as well as the amount of work to be done. Whereas decrease or loss of income following the period of caring for the child can be experienced by any person, irrespectively of the form of employment. The previous job is not always guaranteed to employees after returning from the child-care leave. For example, a company where a person is employed can be closed in the period following the birth of the child. As to the professional skills and abilities, inevitably, all persons lose them during the period of caring for the child, irrespectively of the form of employment. The loss of clients and decrease in income after the period of caring for the child are said to be such risks, which no person is protected against.

**4. The summoned person – the Ministry of Justice** – holds that the contested norm complies with Article 110 of the *Satversme*.

The Ministry of Justice holds that in the circumstances, where due to the economic crisis the state social insurance budget had insufficient resources, the *Saeima* could restrict the disbursement of the parents' benefit to stabilise this budget. The restriction had been set only with respect to such parents who gained income and, thus, the main aim of social insurance – to ensure support in the absence of income – had been met. The proportionality of this restriction is said to depend on the fact, whether the legislator had had at its disposal alternative measures, less restrictive on a person's rights. The Ministry of Justice underscores that there had been a discussion at the *Saeima* Committee of Social Affairs and Labour Matters whether also those parents who gain income during the period of caring for the child would be able to receive the benefit; however, it had reached the conclusion that there were not sufficient resources in the social insurance budget for it.

The Ministry of Justice also notes that, in the framework of the state social security system, it is important to differentiate between benefits that depend and do not depend on the social insurance contributions. The parents' benefit depends on the social insurance contributions and in this it differs from the child-care benefit.

**5. The summoned person – the Ombudsman** – believes that the contested norm is incompatible with the State's obligation, which follows from Article 110 of the *Satversme*, to establish and maintain social and economic protection of the family at least in the minimal amount.

By introducing the parents' benefit, the State had fulfilled its obligation to ensure a special system of support for families with children. However, the Ombudsman does not uphold the statement made by the *Saeima* that the State had envisaged also other social insurance benefits and social benefits, for example, the maternity benefit and the family benefit, thus ensuring financial support to all persons who care for a child below the age of one. When the maternity leave ends, the state support guaranteed for families with children is not ensured to a socially ensured person, who has decided to continue working or to gain income as a self-employed person during the period of caring for the child. In the Applicant's case, the State had not envisaged support for compensating for additional expenditure that the person had incurred in connection with caring for a child below the age of one.

By envisaging the possibility to receive the parents' benefit also to a person, who is employed or gains income as a self-employed person during the period of caring for a child, the State has defined the level on which it will ensure the system of special support for families with children. Hence, by denying the right to receive the parents' benefit to persons, who are employed or gain income during the period of caring for the child, the State had decreased the level of social security that had been guaranteed before. This restriction had been established by law and it has legitimate aims – ensuring the sustainability of the social budget (social welfare) and protecting the rights of the child; however, the contested norm prohibits a person from working or gaining income as a self-employed person during the period of caring for the child. This is said to be neither in the interests of society nor an individual. For the social insurance budget, a person, who, while receiving the parents' benefit, is employed or gains income as a self-employed person and, thus, pays contributions to the social budget also during the period of caring for the child, is said to be economically more advantageous. A person, who while caring for the child is on a child-care leave and does not gain income as a self-employed person,

does not contribute to the social budget. Hence, the legitimate aim that has been set – to ensure long-term stability of the social insurance system – cannot be reached by the contested norm.

Allegedly, the legitimate aim of the restriction established in the contested norm could be reached by measures that are less restrictive on a person's rights. A person could work and receive the benefit in a smaller amount compared to the benefit received if not working. Thus, it would be an incentive for parents to choose not to work during the first year of the child's life; however, for those parents in need of it, the possibility to work half-time would be preserved. This solution would both contribute to the social insurance budget and would also have a positive impact on the families' general welfare.

Moreover, the contested norm also restricts the rights of the child in the long term. The Ombudsman does not uphold the statements made by the *Saeima* in its written reply that the possibility to receive the parents' benefit fully depends on the person's own choice to discontinue or to continue his or her professional activities in the status of a self-employed person. The Ombudsman notes that the child's best interests would be ensured by the regulation on the system for family support that would respect the child's interests not only during the first year of his or her life (by ensuring a parent's presence to the child) but also onwards, by allowing the parent to retain the professional qualification that is necessary to provide for the family's welfare in the future.

Setting an identical benefit for a working parent and a parent, who is on a child-care leave, would be contrary to the principle of legal equality established in Article 91 of the *Satversme*, unless there were reasonable and objective grounds for it. Irrespective of the different forms of employment, the treatment of employees, who are (or are not) on a child-care leave, and self-employed person, who during the period of caring for the child do not gain (or gain) income, should be equal. This is said to apply also to the disbursement of the parents' benefit. The parents' benefit is a social insurance benefit because both an employee and a self-employed person makes social insurance contributions for the particular type of insurance – parents' insurance. Moreover, for persons belonging to both these categories, the contribution rate is the same.

In view of the above, it can be concluded that the aim set by the legislator – to ensure long-term stability of the social insurance system and the protection of children’s rights – is not reached by the contested norm. This aim could be attained by other measures, less restrictive on an individual’s rights. Hence, the contested norm is said to be incompatible with the principle of proportionality and, thus, also with Article 110 of the *Satversme*.

Since 1 October 2014, such parents’ benefit has been introduced that ensures disbursement that is fair and complies with the principle of equality both to persons, who are on a child-care leave or do not gain income as self-employed persons, and also to those persons, who, during the period of caring for the child, are employed or gain income as self-employed persons. The Ombudsman does not see the reason why the legislator had been unable to adopt a similar model for parents’ benefit already in 2009.

**6. The summoned person – the Ministry of Welfare** – holds that the contested norm complies with Article 110 of the *Satversme*.

The Ministry of Welfare upholds the arguments provided in the written reply by the *Saeima* and is of the opinion that the legislator had the right to deny the parents’ benefit, i.e., a social insurance benefit, to those recipients of this benefit who resumed their professional activities, irrespectively of the fact, whether the professional activities were resumed in full or partially.

The parents’ benefit is said to be a support measure of the social insurance system, intended for parents, who choose not to work during the first year of the child’s life and provide full care to the child, dedicating to him or her the attention that is particularly needed during this stage. The restriction on the disbursement of the parents’ benefit with respect to working parents had been established by taking into account exactly the child’s needs.

The parents’ benefit, as to its purpose and nature, has been established as one of the benefits of the social insurance system, the purpose of which is to prevent or reduce income loss for a person, when the social risks envisaged in the law set it. Initially, any of the child’s parents could choose to receive the parents’ benefit, however, the practice

showed that, often, this benefit did not reach its purpose, because usually it was claimed by the parent who, prior to the birth of the child, had received higher remuneration. This practice had become incompatible with both findings expressed by the Constitutional Court in its judgement in case No. 2006-07-01 and the social insurance system that was effective in the state because a group of persons, who were not socially insured in the period of caring for the child, had formed. In view of this, on 16 June 2009, the *Saeima* adopted amendments to the law, in the future denying the parents' benefit to those persons, who were on a child-care leave and at the same time worked or gained income. The legitimate aim of the amendments with respect to self-employed persons had been to protect the child's interests, by providing incentives to the parents, if possible, to not work and provide full care to the child themselves. The contested norm had had a legitimate aim – protecting the rights of the child, ensuring that best interests of a child below the age of one were insured; i.e., full care by the parents. The second legitimate aim had been linked to ensuring the self-financing of the social insurance system in the long term, since the type of insurance – parents' insurance, introduced on 1 January 2008, had not envisaged increasing the rate of social insurance contributions to ensure the new service – the parents' benefit. Hence, the situation of the state social insurance budget had significantly deteriorated.

For self-employed persons, in difference to employees, the object of mandatory contributions is freely chosen income. Hence, a self-employed person is able to plan his or her economic activities timely and according to their own choice in order to receive an adequate amount of the social insurance service in the period of caring for the child.

Retaining one's professional qualification is said to be a matter that is relevant both for self-employed persons and employees. The legislator, in setting restrictions on the disbursement of the parents' benefit to working employees or self-employed persons, had not forced them to give up the state support to maintain one's professional qualification but, respecting the child's interests and the purpose of social insurance service, ensured the possibility to choose – either to receive the parents' benefit in full amount and not work, thus, not gaining income from professional activities, or – if the person chooses to work – to receive income as a self-employed person.

The State's obligation to establish a sustainable and balanced policy for ensuring public welfare is said to follow from the principle of a socially responsible state. The State should balance its economic possibilities not only with a person's rights in the social area but also the need to ensure the welfare of the whole society and must create such legal regulation that is aimed at sustainable national development. In 2009, Latvia's economic situation deteriorated fast, the state budget revenue decreased, unemployment grew significantly and the expenditure of the special social insurance budget had increased. The Constitutional Court already had found that parents' insurance had been introduced in haste and without due consideration, and, thus, jeopardising the sustainability of the social insurance budget, which was an important precondition for the State to be able to ensure in the long term disbursement of both pensions and social insurance benefits.

**7. The summoned person – the Latvian Council of Sworn Advocates** – is of the opinion that the contested norm is incompatible with Article 110 of the *Satversme* and upholds the Applicant's arguments.

Sworn advocates discontinue their professional activities for the whole period of caring for a child very seldom because they could fall behind the new trends in judicature and legislation but the clients use the assistance provided by another sworn advocate.

The changes in qualification during the period of caring for the child are said to be the same for a person, who is employed on the basis of a labour contract, and for a self-employed person; however, the legal consequences of these changes for a self-employed person – a sworn advocate – are more disadvantageous because the same obligations have not and cannot be imposed on an advocate's clients as on an employer. Legal norms provide that an employee's job is preserved, a sworn advocate, however, does not have such guarantees.

Allegedly, the contested norm envisages differential treatment of persons, who during the child-care leave gain income, and persons, who during the same leave do not gain income. This differential treatment cannot be justified. Moreover, in particular, in conditions of economic recession, it is important to promote employment. However, the

contested norm had forced the recipient of the benefit to choose between the possibility to receive the benefit and the risk to lose one's client base and qualification, i.e., to lose the self-created job. Thus, the contested norm is more favourable towards persons, who do not attempt to return to the labour market, and more unfavourable towards persons acting to the contrary – making the effort to improve their welfare not only at the expense of the state's support. Therefore the economic purpose of the contested norm should be viewed critically. Likewise the argument that the Applicant, in choosing her profession, should have accepted also the tax-related consequences that have occurred as the result of this choice should be examined critically, – the contested norm entered into force almost ten years after the Applicant chose her profession. The principle of legitimate expectations does not mean the rights of a person to expect, after choosing one's profession, that the State will not introduce amendments to the legal regulation on taxes but gives the grounds to expect that the State will not allow discrimination of persons, *inter alia*, also in implementing measures for protecting families.

**8. The summoned person –Mg. iur. Zane Voroslava, a lecturer at Riga Stradins University** – holds that the contested norm complies with Article 110 of the *Satversme*.

By the contested norm, the legislator has not prohibited the Applicant from receiving a state-provided benefit but only had envisaged conditions for receiving the benefit. Hence, the legislator has fulfilled the obligation defined in Article 110 of the *Satversme*.

Realising the right to the parents' benefits is a direct obligation of the State to fulfil fundamental rights that should be viewed in interconnection with Article 110 of the *Satversme*. In view of specific nature of social rights, including the right to the parents' benefit, these should be exercised in compliance with the provisions set in the Universal Declaration of Human Rights; i.e., that every person, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and free development. Social rights are said to be special and different human rights, since the exercise of these

directly depends on the economic situation and the available resources of each State, thus, closely linked to the possibilities of each State. Likewise, international law imposes an obligation on the State to achieve, within the framework of available resources and by appropriate measures, in fast pace, as comprehensive exercise of social rights as possible.

In view of the inconstancy of social rights and the respective legal norms as well as frequent amendments, it is difficult to forecast the scope and system for exercising particular social rights; however, the status of a socially insured person, allegedly, does not grant to a person the right to rely on concrete conditions for disbursement of a reward. It only grants the right to a person to expect that the State will grant her social security in accordance with the legal norms that will be in effect at the time when the person needs the particular security.

### **The Findings**

9. Pursuant to the first sentence of Article 110 of the *Satversme*, the State protects the family, the rights of parents and the rights of the child. It has been enshrined in the Preamble to the *Satversme* that family is the foundation of a cohesive society. Each individual takes care of oneself, one's relatives and the common good of society by acting responsibly toward other people and future generations. The Constitutional Court has recognised that the State must protect every family (*see, for example, Judgement of 11 October 2004 by the Constitutional Court in Case No. 2004-02-0106, Para 14*). The Constitutional Court has also recognised that the State's positive obligation to establish and maintain a system of social and economic protection for the family followed from Article 110 of the *Satversme* (*see Judgement of 4 November 2005 by the Constitutional Court in Case No. 2005-09-01, Para 8.2.*).

In interpreting the fundamental rights defined in the first part of Article 110 of the *Satversme*, the norms included in international human rights documents and the practice of applying these must be taken into account (*see Judgement of 11 October 2004 by the Constitutional Court in Case No. 2004-02-0106, Para 10*). The first part of Article 23 of the International Covenant on Civil and Political Rights provides that the family is the

natural and fundamental group unit of society and is entitled to protection by society and the State. The first part of Article 10 of the International Covenant on Economic, Cultural and Social rights provides that the Member States ensure the widest possible protection and assistance to the family, in particular, in the stage of its establishment, whereas the family is responsible for the dependent children and their upbringing. Similarly, Article 16 of the European Social Charter guarantees, *inter alia*, the family's right to social and economic protection. It provides that the Contracting Parties, with a view to ensuring the necessary conditions for the full development of the family as a fundamental unit of society, undertake to promote, *inter alia*, the economic and social protection of family life by such means as family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means. The Constitutional Court has recognised that Article 16 of the European Social Charter does not provide an exhaustive list of instruments in family policy, i.e., it does not determine what the benefits may be like and on what conditions these should be disbursed. Abiding by the minimum requirements that have been set, the States are entitled to choose their own measures for implementing social and economic protection of the family (*see Judgement of 4 November 2005 by the Constitutional Court in Case No. 2005-09-01, Para 8.2.*).

The State provides special support to families with children below the age of two because infants require special care, and usually this care is provided by the child's parents, therefore they cannot gain the same level of income as before the birth of the child (*compare: Judgement of 15 March 2010 by the Constitutional Court in Case No. 2009-44-01, Para 8*). Although a person's right to receive the State's support in a particular form and amount of a benefit does not follow from Article 110 of the *Satversme*, the State, nevertheless, in caring for children and family and complying with legal principles and other norms of the *Satversme*, must introduce such measures of support that are sufficiently effective and, to the extent possible, meet the addressee's needs (*compare: Judgement of 2 November 2006 by the Constitutional Court in Case No. 2006-07-01, Para 13.1.*).

In fulfilling the positive obligation derived from Article 110 of the *Satversme* to establish and maintain a system for social and economic protection of the family, the

family's right to special protection has been specified in the law, defining various mechanism of protection (*compare: Judgement of 4 November 2005 by the Constitutional Court in Case No. 2005-09-01, Para 9.3.*).

One among these special, state-established mechanisms of social protection for the family, envisaged for families with children, is the right to the parents' benefit.

**10.** The parents' benefit was introduced into the law "On Maternity and Sickness Insurance" with Article 6 of the law of 8 November 2007 "Amendments to the Law "On Maternity and Sickness Insurance"", at the same time, by the amendments of 8 November 2007 to "Law on State Social Allowances", excluding the possibility for socially insured persons to receive the child-care benefit until the date when the child reaches the age of one.

Thus, as of 1 January 2008, a new state social insurance benefit was introduced – the parents' benefit, which is granted and disbursed to a socially insured person, who cares for a child below the age of one (to one of the child's parents, guardian or another person who, in accordance with a decision by the orphan's court, actually takes care and raises the child), if this person is on a child-care leave or because of caring for the child does not gain income as a self-employed person, or continues to work in the said period of caring for the child. By keeping in the system of state social benefits those child-care benefits that are paid in a particular amount and transferring to the state social insurance system those benefits, the amount of which is determined by the remuneration for work of socially insured persons (i.e., by replacing the child-care benefit for employed persons, who take care of a child below the age of one, with a new state social insurance benefit – the parents' benefit), a system of benefits to be paid during the child-car period that was clear and understandable to all recipients of the state social benefits and the state social insurance benefits was established (*see, the written reply by the Saeima, Case Materials, Vol. 1, pp. 125–138, and annotation to the draft law submitted to the Saeima on 8 October 2007 No. 468/Lp9 "Amendments to the Law "On Maternity and Sickness Insurance"*). It is noted in the annotation to these amendments that this system would have a negative impact on the special social insurance budget in the long term because

compensating for additional expenditure, as it is was the case of the parents' benefit, was incompatible with the principles of social insurance and the nature of the state social insurance (*see annotation to the draft law submitted to the Saeima on 8 October 2007 No. 468/Lp9 "Amendments to the Law "On Maternity and Sickness Insurance "*).

On 16 June 2009, the *Saeima* adopted the law "Amendments to the Law "On Maternity and Sickness Insurance " ", which entered into effect on 1 July 2009. These amendments envisaged that for the children, who have been born starting with 3 May 2010, the parents' benefit would be granted only to those socially insured persons, who were on a child-care leave and, thus, did not work or did not gain income as self-employed persons.

By excluding from the law "On Maternity and Sickness Insurance " a norm that provided that the parents' benefit was granted to a person, who in the period of caring for the child gained income as an employee or a self-employed person, the functioning of the basic principle of the state social insurance, implemented in the state, was ensured; namely, that the state social insurance guaranteed to a person certain substitute income if he or her lost the income from work (*see, the written reply by the Saeima, Case Materials, Vol. 1, pp. 125–138, and annotation to the draft law submitted to the Saeima on 29 May 2009 No. 1241/Lp9 "Amendments to the Law "On Maternity and Sickness Insurance "*).

The contested norm, in turn, was adopted by Article 3 of the law of 2 December 2010 "Amendments to the Law "On Maternity and Sickness Insurance " ". This article provides, *inter alia*, that in the future the parents' benefit will be granted and disbursed to one of the parent – a socially insured person, who cares for the child until the age of one, if this person is employed on the date when the benefit is granted (is to be considered as being an employee or a self-employed person in accordance with the law "On State Social Insurance") and as one of the child's parents, who has claimed the parents' benefit, is on a child-care leave or due to caring for the child does not gain income as a self-employed person. Essentially, this article specifies the pre-requisite defined in the law of 16 June 2009 "Amendments to the law "On Maternity and Sickness Insurance " " for granting the parents' benefit – the parent does not work and does not gain income as a self-employed person. Hence, by the contested norm, the legislator has attempted to ensure the presence

of one the parents for the child in his or her first year of life, compensating, in a certain amount, to this parent the income lost due to caring for the child.

**11.** The Constitutional Court has recognised that the criteria for evaluating the compliance of a legal norm with the fundamental right to social security may differ depending on whether the particular norm restricts the rights granted to a person or determines performance of the State's positive duties (*see Judgement of 19 December 2011 by the Constitutional Court in Case No. 2011-03-01, Para 15.1.*). In the present case, the right to social protection of the family already granted to the Applicant has not been restricted by the contested norm.

Although the Applicant, being a self-employed person, would have the right to receive the parents' benefit for caring for the child born on 15 March 2010, in compliance with the contested norm, she had to meet the pre-requisite for receiving the particular benefit, i.e., to not gain income while caring for the child. Therefore, the Applicant, as a self-employed person, who continued to gain revenue in the period of caring for the child, until the child reached the age of one, was not entitled to the parents' benefit. Therefore, in accordance with the Applicant's and the Ombudsman's opinion, for several months, until the child reached the age of one, the State had not ensured to the Applicant's family the right to social security at least in the minimal amount.

Thus, in the present case, the Constitutional Court must examine, whether the State, by establishing in the contested norm such pre-conditions for the receipt of the parents' benefit for self-employed persons that they do not gain income during the period of caring for the child, has fulfilled the positive obligation that follows from Article 110 of the *Satversme* to ensure a system of social protection for the family.

**12.** Assessing, whether the State has fulfilled its positive obligations that follow from a person's fundamental social rights, the Constitutional Court must verify, whether:

1) the legislator has taken measures to ensure to persons the possibility to exercise their social rights;

2) whether these obligations have been fulfilled appropriately, i.e., whether persons had been ensured the possibility to exercise their social rights at least in minimal scope;

3) whether general principles of law have been complied with (*see Judgement of 19 December 2011 by the Constitutional Court in Case No. 2011-03-01, Para 15.1.*).

Hence, in the present case, the Constitutional Court must verify:

1) whether the State has created a system of social protection for the family, *inter alia*, envisaged the Applicant's right to support in the period when the child has not yet reached the age of one;

2) whether the system of social protection for the family at the time when the contested norm was in force ensured that the rights of the Applicant's family to social protection were appropriately exercised at least in minimal scope;

3) whether the contested norm complies with the principle of the priority of the child's best interests, the principle of legitimate expectations and the principle of legal equality.

**13.** In view of the above, the Constitutional Court must verify, first and foremost, whether the State had established a system of social protection for the family and had envisaged support for the family until the time when the child reached the age of one.

The Applicant notes that to her, as a self-employed person, who continued to gain income during the period of caring for her child, support for the family had not been ensured without grounds for several months until the time when the child reached the age of one.

The system of social protection for the family, created by the legislator at the time when the contested norm was in force, envisaged the following types of support to families raising children below the age of one:

1) the right to a maternity benefit, which was granted and disbursed for the whole period of pregnancy leave and maternity leave, if the woman did not come to work and therefore lost the income from salaried work or if a self-employed woman lost income;

2) the right to a paternity benefit, which was granted and disbursed to a child's father for the ten calendar days of the granted paternal leave;

3) the right to a child-care benefit, which was granted to a person, who cared for the child until the age of one if this person was not employed on the date when the benefit was granted (was not be considered as being an employee or a self-employed person in accordance with the law “On State Social Insurance”) and did not receive a maternity benefit or parents’ benefit for the same period (in the wording of 20 November 2013, only with the pre-conditions that the person who cared for the child did not receive the maternity benefit or the parents’ benefit for the same period);

4) the right to a childbirth benefit when the child was born;

5) the right, in accordance with Section 32 of “Law on Social Services and Social Assistance”, to receive social assistance – material support to needy, low-income families (persons) in a crisis situation in order to satisfy their basic needs.

Thus, the legislator had envisaged various kinds of support for families in connection with the birth of a child, the aim of which was to compensate for the income lost due to caring for the child (social insurance benefits) and expenditure linked to the birth of a child (social benefits), as well as to provide to support to the family for satisfying its basic needs (social assistance) (*compare see also the written reply by the Saeima, Case Materials, Vol. 1, pp. 125–138*).

Moreover, during this period, the legislator had also established the right to the parents’ benefit to all socially insured persons, for whom, as one of the child’s parents, the social risk had set in – loss of income due to caring for the child. This regulation on granting the parents’ benefit complied with the basic principle of social insurance – to insure a person’s risk to lose income from work, *inter alia*, also due to caring for a child (*see Section 3 (1) of the law “On State Social Insurance”*).

Hence, the contested legal norm envisaged the right to the parents’ benefit to all self-employed persons (also, the Applicant), who as one of the child’s parents did not gain income due to caring for the child until the child reached the age of one.

**Thus, the State had created a system of social protection for the family and had envisaged support for the family until the date when the child reached the age of one.**

**14.** The Constitutional Court must verify, whether, during the period when the contested norm was in force, the system of social protection for the family ensured that the rights of the Applicant's family to social protection were appropriately exercised at least in minimal scope.

**14.1.** The Applicant holds that the pre-requisite for receiving the parents' benefit established in the contested norm – not gaining income during the period of caring for the child – is not justified with respect to a self-employed person, who has resumed her professional activities only partially during the period of caring for the child. It had been necessary for the Applicant to engage in her professional activities in a decreased scope during the period of caring for the child in order to retain her professional qualification and client base, thus ensuring her family's welfare in the future. In this case, when the parents' benefit was not disbursed, the self-employed person had had to choose – to care for the child herself and, thus, jeopardise the family's welfare in the long term or to resume her professional activities in full and entrust the child-care to another person. In the latter case, the regulation on parents' benefit, allegedly, does not reach its aim, i.e., does not ensure to the child the parents' presence.

In enacting the fundamental rights defined in Article 110 of the *Satversme*, the legislator enjoys broad discretion, in regulating the issue of the amount of benefit and the criteria, according to which one or another group of persons receives it (*see, Judgement of 15 March 2010 by the Constitutional Court in Case No. 2009-44-01, Para 12*). Moreover, in the area of social rights, it is impossible to prevent cases, where the actual situation of a person in each particular case may differ from the presumed situation. The legislator, in exercising its discretion, may rely on reasonable, experience-based notions about the social reality (*compare: Judgement of 29 October 2010 by the Constitutional Court in Case No. 2010-17-01, Para 14.2.*).

Already in its judgement of 15 March 2010 in Case No. 2009-44-01, the Constitutional Court assessed the way legal regulation, by which the parents' benefit had been introduced, was developing and what kind of consequences it caused. The Constitutional Court found that after implementing such regulation on parents' benefit that gave the right to receive this benefit also to an employed person a situation evolved

where the families could choose to claim this benefit not in the name of the parent who did not work and stayed with the child but in the name of that parent, who worked and prior to the birth of the child had received higher remuneration. The Constitutional Court made the conclusion that the parents' benefit, used in this way, was contrary both to the previously expressed findings and the social insurance system that was effected in the State, since a group of persons, who were not socially insured while caring for the child, formed. The Constitutional Court noted in the aforementioned judgement that the newly established type of insurance – parents' insurance – did not envisage an additional rate of social insurance contributions, and significantly worsened the status of the state social insurance budget. As the result of it, it was envisaged to no longer grant the parents' benefit to persons, who were not a child-care leave in the period of caring for the child but were working or gained income as self-employed persons. This ensured that the basic principle of social insurance implemented in the state functioned; i.e., the state social insurance guarantees to a person certain substitute income of he loses income from work (*see Judgement of 15 March 2010 by the Constitutional Court in Case No. 2009-44-01, Para 9–10*).

When the law of 2 December 2010 “Amendments to the Law “On Maternity and Sickness Insurance “”, by which the contested norm was adopted, was examined by the *Saeima*, a proposal was made to add to the contested norm a provision that would stipulate, *inter alia*, that the benefit would be disbursed also to a person, who, during the period of caring for the child, worked part-time and was not on a child-care leave or gained income as a self-employed person. However, this proposal was not supported. The *Saeima* has argued in its written reply that the need to care for the sustainability of the social insurance special budget prohibited from introducing this kind of regulation (*see Case Materials, Vol. 1., pp. 125–138*).

The Constitutional Court finds that one of the aims of the parents' benefit is to ensure constant presence of a parent and care to a child in his or her first years of life. Whereas with respect to whether the parents' benefit is granted to compensate for he expenditure related to child-care and the parents' lost income or for only the lost income, the aim of the parents' benefit had been changed. At the time when the contested norm

was in force, in this respect, the aim of the parents' benefit corresponded to the basic principle of social insurance – to substitute to a person certain loss of income if a social insurance risk set in. Since at the time when the contested norm was in force the right to the parents' benefit was not envisaged for persons who gained income in the period of caring for the child, the parents' benefit did not serve the purpose of compensating for the expenditure related to child-care. The legislator had chosen this type of support for parents to facilitate the receipt of the parents' benefit by the very person who was actually caring for the child, and to ensure the sustainability of the social budget.

Thus, the legislator, by envisaging in the contested norm the same pre-condition for self-employed persons for receiving the parents' benefit, i.e., social insurance benefit, namely, that they do not gain income in the period of caring for the child, has relied on the consideration that a person, who, in the period of caring for the child, chooses to continue professional activities and gain income, does not incur the need for state support because the social risk – lost income due to caring for the child – does not set it (*compare, see the written reply by the Saeima, Case Materials, Vol. 1, pp. 125–138*).

Pursuant to Para 7 of Section 1 of the law “On the Regulated Professions and the Recognition of Professional Qualifications”, a self-employed person is a person who earns remuneration for work independently, without entering into contractual employment relations with an employer, and does not occupy a position that gives the right to remuneration. With respect to the profession of a sworn advocate, it is especially noted also in Section 115 of “Advocacy Law of the Republic of Latvia” that sworn advocates are financially independent in their professional activities.

Moreover, in accordance with Section 14 (2) of the law “On State Social Insurance”, the object of mandatory contributions of a self-employed person is the freely selected income (or revenue for payers of fixed personal income tax) from the production of goods, performance of work, provision of services, creative and professional activity and other income from economic activity, except for the income that is obtained by a natural person who has been referred to in Section 6, Paragraph seven, eleven, or thirteen of this Law, from agricultural (fish) farming, his or her immovable property, self-produced production in an individual subsidiary farm or household farm, copyright and

related rights. A self-employed person may decide on the income, from which insurance contributions are made once in a quarter; however, a self-employed person must make these at least for the minimal amount of the object of contributions defined by the Cabinet, which is 12 minimum monthly salaries defined by the Cabinet. The record-keeping of a self-employed person's income, the procedure for paying the personal income tax and insurance contributions also differs from the ones established for employees. Accordingly, a self-employed person decides himself or herself on how he or she will provide security in the case various social risks set it. If a self-employed person does not make insurance contributions he or she is not entitled to receive the respective insurance services (*see, for example, Judgment of 19 October 2017 by the Constitutional Court in Case No. 2016-14-01, Para 22.2.*).

Hence, the Constitutional Court finds that the amount of a self-employed person's income may differ in various periods of time and therefore the legislator cannot predict the cases, where a self-employed person will resume her professional activities on a reduced scale to retain her professional qualifications and client basis, and the cases, where she will resume full professional activities. I.e., in this case, the legislator cannot create such preconditions for granting a benefit that would fully comply with the actual situation of each person.

The Constitutional Court has recognised that the State has the obligation to create such social security system that would cover all significant social risks (*compare: Judgement of 29 October 2010 by the Constitutional Court in Case No. 2010-17-01, Para 7*). The Constitutional Court also has recognised that the aim of the social insurance system is to ensure that a person's risk to lose income from would be insured when adverse conditions, specified in law, set in (*see Judgement of 25 February 2002 by the Constitutional Court in Case No. 2001-11-0106, Para 1*). If, during the period of caring for the child, a person continues her professional activities to retain professional qualification and client base and gains income then, in this period, the social risk does not set in for the person and income is not fully lost due to caring for the child. Accordingly, also the family of this person does not lose financial security due to caring for the child.

Thus, the legislator had reasonable grounds to consider that a self-employed person, who continued to gain income while caring for the child, was able to provide for her family. In view of the fact that the parents' benefit that was granted to employed persons and did not comply with the basic principle of social insurance – to compensate, in a certain amount, for the lost income due to the onset of a social risk, facilitated decrease in the reserves of the state social budget, the legislator had reasonable grounds to set such pre-condition for self-employed persons for receiving the parents' benefit that they did not gain income in the period of caring for the child.

Thus, the legislator had the right to set, by the contested norm, such pre-condition for receiving the parents' benefit for a self-employed person that she did not gain income during the period of caring for the child.

**14.2.** The Applicant and the Ombudsman hold that the legislator, by adopting the contested norm, had not fulfilled the obligation to ensure to the Applicant's family the right to social protection at least in minimal scope because support to compensate for the additional expenditure linked to child-care had not been provided to the Applicant for several months until the child had reached the age of one. There had been no obstacles for the legislator to establish in the contested norm a benefit in decreased amount for persons, who continued their professional activities while caring for the child.

It is not the task of the Constitutional Court to review the correctness of a decision based on considerations regarding political expedience (*compare: Judgement of 13 February 2013 by the Constitutional Court in Case No. 2012-12-01, Para 14.2.4.*). However, the Constitutional Court also has recognised that, with the improvement of economic situation, the State has possibilities to provide greater amount of support to some residents and, hence, also has the obligation to increase the financial and other types of investment into the system for ensuring a person's social, economic and cultural rights (*see Judgement of 11 December 2006 by the Constitutional Court in Case No. 2006-10-03, Para 13.3.*). However, the fact that the legislator later had increased the social support to families for self-employed persons, *per se*, are not grounds for the conclusion that because of the contested norms the right to social protection in at least in minimal scope had not been ensured.

The aim to level out significant social differences and to ensure an adequate standard of living to each group of residents follows from the principle of a socially responsible State (*compare: Judgement of 2 November 2006 by the Constitutional Court in Case No. 2006-07-01, Para 18*). The State must ensure a system of social protection for a family that envisages the minimum of social protection, taking into account society's interests. However, this does not mean that the State would have the obligation to cover the financial burden affecting each family. First and foremost, the person and the family must care for themselves and provide for their welfare, to the extent possible.

The Constitutional Court has recognised that Article 110 of the *Satversme* does not require the State to ensure in full the material welfare of each child. Full state care would be contrary to the first sentence of Article 110 of the *Satversme* because also the parents, not only the State, have the duty to care for their children and ensure that their needs are met. If parents' financial care would be taken over by the State in full, that would disrupt the traditional structure of family relationships, prohibiting the parents from caring for their children and feel satisfaction about it. However, the State should be able to provide reasonable support to the family (*compare: Judgement of 15 March 2010 by the Constitutional Court in Case No. 2009-44-01, Para 11*).

The Constitutional Court has recognised that the purpose of the right to social security at least in minimal scope is, to the extent possible, serve to ensure existence worthy of human dignity (*see Judgement of 21 December 2009 by the Constitutional Court in Case No. 2009-43-01, Para 31.2.*). Likewise, the Constitutional Court has underscored that the State should be able to provide reasonable support to the family in special cases, when parents are unable to provide the necessary means for the child (*see Judgement of 2 November 2006 by the Constitutional Court in Case No. 2006-07-01, Para 13.5.*).

Hence, in ensuring the family's right to social protection in at least minimal scope, the State has the obligation to establish such system of social protection for the family that would ensure support to the family when it is unable to provide for itself.

**14.3.** All measures of social support intended for the family belong to the system of social protection for the family. The State's positive obligation to provide to the family of

a child, until he reaches the age of one, regular financial support to cover the expenditure related to caring for the child does not follow from Article 110 of the State.

By the contested norm, the legislator had set a pre-condition for receiving the parents' benefit for a self-employed person that during the period of caring for the child, until the child reached the age of one, he or she did not gain income. Hence, the possibility to receive the parents' benefit was envisaged for the Applicant as a self-employed person only in the case if she did not gain income due to caring for the child.

Professional activities and gaining income prove that a person is able to provide for her family herself. Moreover, until the moment when the child reached the age of one, the possibility to receive the maternity benefit, the paternity benefit, the child-care benefit and, in a situation of crises, also social assistant for satisfying basic needs had been envisaged for the Applicants' family. Thus, the Constitutional Court finds that the right to social protection in minimal scope had been ensured to the Applicant's family until the moment when the child reached the age of one.

**Therefore, the Applicant was ensured the possibility to exercise the right to the family's social protection at least in minimal scope.**

**15.** The social support for the family, ensured by the State, also must comply with the principle of the priority of the child's best interests, the principle of legitimate expectations, and the principle of legal equality.

**15.1.** One of the aims of granting the parents' benefit is to ensure the presence of a parent to the child below the age of one, thus respecting the child's best interests. Therefore, the Constitutional Court must examine in the present case, whether the pre-condition included in the contested norm to receive the parents' benefit that the self-employed person, until the date when her child reaches the age of one, does not gain income complies with the principle of the priority of the child's best interests.

The State's obligation to protect the rights of the child, established in the *Satversme*, has been specified in Section 6 of "Law on Protection of Children's Rights". The first part of this Section provides that in lawful relations that affect a child, the rights and best interests of the child must take the priority. The second part stipulates that in all activities

in regard to a child, which are carried out, *inter alia*, by the State, ensuring the interests of the child must take priority. The Constitutional Court has recognised that also the legislator should ensure that the normative acts would protect the child's interests in the best possible way (*compare: Judgement of 11 October 2004 by the Constitutional Court in Case No. 2004-02-0106, Para 11*).

The first part of Article 3 of the Convention on the Rights of the Child also reinforces the priority of the child's interests. The second part of this Article stipulates that the States Parties undertake to ensure to every child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, must take all appropriate legislative and administrative measures. Article 26 of the Convention provides, *inter alia*, that the States Parties must recognise for every child the right to use benefits of the social security system, social insurance included, and that benefits, where appropriate, should be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child.

The Ombudsman holds that the contested norm restricts the child's rights in the long-term. The Ombudsman does not uphold the statements made in the written reply by the *Saeima* that the possibility to receive the parents' benefit fully depends on the person's own choice to discontinue or continue one's professional activities in the status of a self-employed person. The Applicant and the Ombudsman holds that such regulation on the system of social support for the family, where the child's best interests would be respected not only during the first year of his or her life (by ensuring a parent's presence) but also further on – by allowing the parent to retain the professional qualification needed to ensure the family's welfare in the future, would correspond to the best interests of the child.

The social security system should be sustainable to ensure that both the current and also the future generations would be able to exercise the right to social security (*compare: Judgement of 26 November 2009 by the Constitutional Court in Case No. 2009-08-01, Para 18.1. and 22.3.*). Insofar the family is ensured the right to social security at least in

the minimal scope, the State may not envisage the right to social insurance benefit in cases, where it would jeopardise the sustainability of the social budget. The State cares for the interests of children, including the next generation, also through this.

The legislator has fostered protection of the child's interests by envisaging the right to the parents' benefit to every self-employed person, who as one of the parents does not gain income in the period of caring for the child, until the child reaches the age of one. This facilitates the constant presence and care of a parent for the child in this period that is decisive for his or her development.

By denying this support to a self-employed parent, who continues gaining income in the period of caring for the child, turn, the legislator has balanced the need for the parents' benefit of those parents, who gain income and, thus, are able to ensure the care for their child themselves, with the need for a sustainable social budget, which, similarly to granting a certain benefit, is important in the protection of children's rights, *inter alia*, those of the future generations.

**Thus, the contested norm complies with the principle of the priority of the child's best interests.**

**15.2.** The principle of legitimate expectations envisages that public institutions, in their activities, should be consistent with respect to the normative acts that they issue and must respect legitimate expectations that persons might develop in connection with a particular legal norm. Whereas an individual, in accordance with this principle, may expect constancy and unchangeability of a legal norm that has been issued. He or she can safely plan his future in connection with the rights granted by this norm (*compare: Judgement of 19 March 2002 by the Constitutional Court Case No. 2001-12-01, Para 3.2. of the Findings*). However, it should be taken into account that the principle of legitimate expectations protects only such rights with respect to the exercise of which a person could develop legal, valid and reasonable expectations.

It was envisaged by the law of 16 June 2009. "Amendments to the Law "On Maternity and Sickness Insurance " ", which entered into force on 1 July 2009, that with respect to children born starting with 3 May 2010 the parents' benefit would be granted only to those socially insured persons, who were on a child-care leave and, thus did not

work or did not gain income as self-employed persons. The Constitutional Court has found already in its judgement of 15 March 2010 in Case No. 2009-44-01 that, thus, a decision was made to no longer grant the parents' benefit to persons, who in the period of caring for the child were not on a child-care leave but worked or gained income as self-employed persons, likewise, a transitional period of 306 days was set to align the disbursement of parents' benefits in accordance with the social insurance system that was in force in the state (*see Para 10 of the aforementioned judgement*).

Article 3 of the law of 2 December 2010 "Amendments to the Law "On Maternity and Sickness Insurance " ", by which the contested norm was adopted, entered into force on 4 January 2011 and, substantially, specified the precondition envisaged already from 1 July 2009 for receiving the parents' benefit for self-employed persons – not gaining income in the period of caring for the child, until the child reached the age of one.

In view of the above, the Applicant did not have reasonable grounds to expect that she, as a self-employed person, who gained income in the period of caring for the child, would be entitled to the parents' benefit for a child born on 15 March 2012.

**Hence, the contested norm complies with the principle of legitimate expectations.**

**15.3.** The principle of equality, included in the *Satversme*, must guarantee the existence of a united legal order. I.e., its task is to ensure that such requirement of a state governed by the rule of law as a comprehensive effect of laws on all persons and application of law without privileges whatsoever would be met. It also guarantees full effect of law, objective and impartial application of it and also that no one is allowed not to abide by the prescriptions of law (*see Judgement of 14 September 2005 by the Constitutional Court in Case No. 2005-02-0106, Para 9.1.*). However, this legal order does not mean levelling downwards because "equality allows differential approach if it is justifiable in a democratic society" (*see Judgement of 26 June 2001 by the Constitutional Court in Case No. 2001-02-0106, Para 4 of the Findings*).

The Constitutional Court recognised that the equality principle prohibited public institutions from issuing such norms that, without reasonable grounds, allowed differential treatment of persons, who were in similar and according to certain criteria

comparable circumstances. The equality principle allows and even demands differential treatment of persons who are in different circumstances and also allows differential treatment of persons who are in similar circumstances if there are objective and reasonable grounds for that (*see, for example, Judgement of 3 April 2001 by the Constitutional Court in Case No. 2000-07-0409, Para 1 of the Findings, and Judgement of 11 November 2005 in Case No. 2005-08-01, Para 5*). Differential treatment lacks objective and reasonable grounds if it does not have a legitimate aim and if the relationship between the measures chosen and the aims set are disproportional (*see Judgement of 23 December 2002 by the Constitutional Court in Case No. 2002-15-01, Para 3 of the Findings*).

Thus, to examine, whether the contested norm complies with the equality principle, it must be established:

1) whether and which persons (groups of persons) are in similar and according to certain criteria comparable circumstances:

2) whether the contested norm envisages similar or differential treatment of these persons;

3) whether this treatment has objective and reasonable grounds, i.e., whether it has a legitimate aim and whether the proportionality principle has been complied with (*see, for example, Decision of 6 April 2017 by the Constitutional Court to Terminate Legal Proceedings Case No. 2016-10-01, Para 13*).

**15.3.1.** Thus, the Constitutional Court must verify, first and foremost, whether the indicated groups of persons are in similar and comparable circumstances. In assessing, whether the principle of equal treatment is respected, the decisive fact is whether several groups of persons share one common and essential trait (*see Judgement of 23 November 2015 by the Constitutional Court in Case No. 2015-10-01, Para 17*).

The Applicant notes that contested norm has violated the principle of legal equality because it had a created differential treatment of self-employed persons compared to persons, who, at the moment when the benefit was granted, were not employed, and therefore could receive a child-care benefit until the child reached the age of one. Allegedly, the parents' benefit had been created also to support the family when it

incurred additional expenditure in connection with the birth of a child and child-care. Therefore, a partial concurrence of the purposes set for the parents' benefit and child-care benefit can be identified. The contested norm set a pre-condition for self-employed persons for receiving the parents' benefit that they, in the period of caring for the child, until he reached the age of one, did not gain income, whereas no pre-conditions for receiving the benefit had been set for persons who at the moment when the benefit was granted were not employed.

The *Saeima* notes in its written reply that the aim of the parents' benefit is to compensate for parents, who undertake caring for the infant and, thus, discontinue their professional activities and are unable to gain income on the same level as prior to the birth of the child, the lost income in the amount that depends on the mandatory state social insurance contributions made by the parent, as well as to protect the rights of the child, by ensuring to him or her the presence of a parent and full care. In the context of the present case, the aim of this benefit is said to be ensuring to families with children additional support for covering the expenditure related to the birth of the child and child-care. Any family raising a child below the age of one may experience the need for state support.

However, one common trait *per se* not always can serve as a sufficient reason for establishing that persons are in similar and comparable circumstances. The Constitutional Court must examine also whether some essential considerations do not exist proving that the persons are not in similar and comparable circumstances (*see, for example, Decision of 6 April 2017 by the Constitutional Court on Terminating Legal Proceedings in Case No. 2016-10-01, Para 16*).

The Constitutional Court finds that in the period while the contested norm was in force until the moment when the Applicant's child reached the age of one, any person, who was not employed on the date when the benefit was granted, pursuant to Para 1 of Section 7 (1) and Section 7 (2) of "Law on State Social Allowances" had the right to receive a child-care benefit if the person was not receiving, for the same period, the maternity benefit or the parents' benefit.

However, it should be taken into account that the child-care benefit, in accordance with Para 1 of Section 7 (1) and Section 7 (2) of "Law on State Social Allowances", in the

period while the contested norm was in force until the moment when the Applicant's child reached the age of one, was granted to persons who were caring for a child and were not socially insured. These persons, in difference to the Applicant, i.e., a socially insured person, were not entitled to social insurance benefits; *inter alia*, the parents' benefit. Hence, the child-care benefit that was disbursed until the date when the child reached the age of one had a different aim – to ensure to persons, who were not socially insured and, thus, could not receive the maternity benefit or the parents' benefit, by financial assistance the right to social security at least in minimal scope. Whereas the parents' benefit, in the period when the contested norm was in force, was granted as a state social insurance benefit, the aim of which was to provide incentives for parents to care themselves for their child in his or her first year of life, discontinuing their professional activities, and which, in a certain amount, compensated to the parents, who had made this choice, the income lost due to caring for the child.

Hence, the parents' benefit for self-employed persons and the child-care benefit for persons, who were not employed on the date of granting the benefit, were envisaged by taking into account different circumstances, different needs and, accordingly, with different aims.

Hence, a self-employed person, who continued her professional activities in the period of caring for the child, and persons, who were not employed on the date when the benefit was granted, were not in similar and comparable circumstances.

**15.3.2.** The Applicant notes that the contested norm had violated the principle of legal equality because it had caused differential treatment of self-employed persons compared to those employees to whom, in accordance with the norms of the Labour Law, their previous job is guaranteed. Self-employed persons have to maintain their own professional activities, discontinuation thereof during the period of caring for the child may lead to loss of clients and circumstances, in which the self-employed person after the child-care period no longer is able to continue her professional activities in the former scope.

The *Saeima* notes in its written reply that self-employed persons are not in a more adverse situation compared to employees with respect to the possibilities to continue

performing their job duties or professional activities and gain income after the period of caring for the child. Each of these two kinds of employment is said to have risks and compensatory advantages of their own. Not always employees are guaranteed their previous job after returning from the child-care leave. For example, the company where the person was employed may be liquidated. Whereas the loss of clients and decreased income after the child-care period are said to be risks against which no person is protected, irrespectively of the form of employment.

The Constitutional Court finds that pursuant to Section 10<sup>4</sup> (1) of the law “On Maternity and Sickness Insurance”, in the wording that was in force from 1 January 2012 until 31 December 2013, neither the employees, whose employment continued in the child-care period, nor self-employed persons, who continued to gain income during the child-care period, were entitled to the parents’ benefit. Hence, the legislator had established equal regulation with respect to a self-employed person’s and an employee’s, in the meaning of the Labour Law, right to receive the parents’ benefit in the period of caring for the child.

The equality principle allows and even demands differential treatment of persons who are in different circumstances (*see, for example, Judgement of 19 October 2017 by the Constitutional Court in Case No. 2016-14-01, Para 20*).

Hence, the Constitutional Court must verify, whether, with respect to employment risks related to discontinuation of professional activities due to caring for the child, employees in the meaning of the Labour Law and self-employed persons are in similar and comparable circumstances.

Pursuant to Section 156 (4) of the Labour Law, the previous position of an employee who makes use of child-care leave must be retained; however, if this is not possible, the employer must ensure similar or equivalent position with not less advantageous working conditions and employment provisions.

Self-employed persons, *inter alia*, sworn advocates, organise their professional activities and, thus, ensure these independently. The amount of work may decrease for a self-employed person after discontinuation of professional activities in the period of caring for the child and after restoring it. However, the changes in the scope of

employment do not prohibit self-employed persons, the Applicant included, from returning to the previous profession (work).

The Constitutional Court has recognised that the legislator, in fulfilling its obligation to establish a procedure, in which the right to qualified legal assistance is guaranteed to persons, has created in Latvia advocacy as a system, in the framework of which strict requirements are set for accepting new members and in which a mechanism of control functions to supervise an advocate's professional activities, compliance with ethical requirements, maintaining and updating qualification, also, matters related to the legal counsel provided by an advocate are regulated (*see Judgement of 7 February 2014 by the Constitutional Court in Case No. 2013-04-01, Para 26.1.*). A special set of rights and obligations is applicable to sworn advocates, which differentiates this profession from the representatives of other professions. In difference to a legal services provided by a qualified lawyer, who has not acquired the status of an advocate, the effectiveness and quality of legal counsel provided by an advocate are guaranteed by affiliation with the system of courts, which grants him more extensive mandate and possibilities for protecting the client's interests (*compare: Decision of 6 April 2017 by the Constitutional Court on Terminating Legal Proceedings in Case No. 2016-10-01, Para 16*). Pursuant to Section 107 of the "Advocacy Law of the Republic of Latvia", the professional activities (practice) of sworn advocates are qualified as intellectual work and their aim is not linked to the making of a profit. Following the discontinuation of professional activities and restoring thereof in the period of caring for the child, the Applicant did not lose the status of a sworn advocate, which is the basis of her professional activities and grants extensive mandate and possibilities to perform intellectual work in the interests of her clients.

Pursuant to Section 28 (1) of the Labour Law, employees, upon entering into an employment contract, undertake to perform specific work, be subject to specified working procedures and the employer's orders. Moreover, in accordance with Section 130 of this Law, during the working time employees must be at the disposal of the employer. A self-employed person, who organises her professional activities herself, does not have such restrictions.

Employees, during the working time set for them, must be subject to certain working procedures and the employer's orders, they cannot take care of a child during the working time, therefore the legislator has envisaged to them the right to a child-care leave. I.e., the legislator has ensured protection to employees against losing their previous job so that they would not lose their previous job due to caring for the child and, thus, would have incentives for going on a child-care leave.

Consequently, discontinued professional activities in the period of caring for the child do not cause comparable consequences for self-employed persons and employees in the meaning of the Labour Law. For self-employed persons, the consequences that follow from discontinuing professional activities in the period of caring for the child depend on the person's own activities and the risk of economic activity, whereas for employees – directly on the employer.

Moreover, as validly noted by the *Saeima* and the Ministry of Welfare, a self-employed person, in difference to an employee in the meaning of the Labour Law, made her own social insurance contributions and, hence, can plan her social security in case the insurance risk sets in.

Thus, with respect to employment risk, linked to discontinuation of professional activities due to caring for the child, there are no grounds to recognise that a self-employed person was in similar and comparable circumstances in the meaning of the Labour Law.

**Hence, groups of persons who were in similar and comparable circumstances cannot be identified. Thus, the contested norm complies with the principle of legal equality.**

**16.** Having reviewed the compatibility of the contested norm with general legal principles, the Constitutional Court finds that the State, by envisaging in the contested norm the pre-condition for a self-employed person for receiving the parents' benefit that she does not gain income during the period of caring for the child, had fulfilled its positive obligation to ensure a system of social protection for the family.

**Therefore, the contested norm complies with Article 110 of the *Satversme*.**

## **The Substantive Part**

On the basis of Section 30 –32 of the Constitutional Court Law, the Constitutional Court

### **h e l d :**

**to recongise Para 3 of Section 10<sup>4</sup>(1) of the law “On Maternity and Sickness Insurance” (in the wording that was in force from 1 January 2012 until 31 December 2013) as being compatible with Article 110 of the *Satversme* of the Republic of Latvia”**

The judgement is final and not subject to appeal.

The judgement enters into force on the date of its publication.

Chairperson of the court hearing

I. Ziemele