



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

J U D G E M E N T

on Behalf of the Republic of Latvia

in Case No. 2014-08-03

12 February 2015, Riga

The Constitutional Court of the Republic of Latvia, comprised of: chairman of the court sitting Aldis Laviņš, Justices Kaspars Balodis, Kristīne Krūma, Gunārs Kusiņš, Uldis Ķinis, Sanita Osipova and Ineta Ziemele,

having regard to an application submitted by the Ombudsman of the Republic of Latvia,

on the basis of Article 85 of the Satversme of the Republic of Latvia and Para 3 of Section 16, Para 8 of Section 17 (1) and Section 28¹ of the Constitutional Court,

at the court sitting of 13 January 2015 examined in written procedure the case

“On the Compliance of Para 555 of Annex 16 “Tariffs of Health Care Services for Preventive, Diagnostic, Treatment and Rehabilitation Services” to the Cabinet of Ministers Regulation of 17 December 2013 No. 1529 “The Procedure for Organising and Financing Health Care”, insofar it does not

Envisage a Tariff for Scheduled Delivery outside Inpatient Facilities, with the First Sentence of Article 91 of the Satversme of the Republic of Latvia”.

The Facts

1. On 31 January 2002 the Saeima passed “Sexual and Reproductive Health Law”, which entered into force on 1 July 2002. Section 4 (2) of this Law provides, *inter alia*, that the State implements the principles of sexual and reproductive health by providing free-of-charge assistance in deliveries.

In accordance with Para 6 of the 25 July 2006 Cabinet of Ministers Regulation No. 611 “The Procedure for Ensuring Assistance in Deliveries” (hereinafter – Regulation No. 611), assistance in deliveries, in accordance with individual medical indications and competence, is ensured in inpatient medical facility and scheduled deliveries outside an inpatient facility.

Pursuant to Section 4 (1) of “Medical Treatment Law”, procedures for organising and financing health care, procedures for establishing queues of applicants for receipt of systematic health care services, the types and amounts of medical treatment services thereof, which are paid for from the State basic budget and from the resources of recipients of services, as well as the procedures for such payments is established by the Cabinet. In accordance with this legal provision, the Cabinet on 17 December 2013 adopted Regulation No. 1529 “The Procedure for Organising and Financing Health Care” (hereinafter – Regulation No. 1529).

Para 7 of Regulation No. 1529 sets out that the services paid for by the state budget resources allocated for health care are provided by those medical facilities that have concluded a contract with the National Health Service in accordance with the procedure set out in Chapter XI of this Regulation, as well as institutions of public administration that provide health care services in accordance with the Statute (hereinafter also – inpatient facilities).

Pursuant to Regulation No. 1529 assistance in deliveries belongs to secondary health care. Para 219 in Chapter XI of this Regulation provides that in selecting providers of secondary inpatient health care as one of the pre-requisites

for concluding a contract with the National Health Service, the Service takes into consideration the following: the types of secondary inpatient health care services indicated in Para 3 of Annex 25 to this Regulation “The Planning Units of Secondary Health Care Services and the Minimum Provision of Types of Health Care Services in Health Care Services Planning Unit” (hereinafter – Annex No. 25) must be ensured in each planning unit for providing health care services, without including into them the health care services provided by the admissions department of the inpatient medical facility, as well as by urgent health care stations.

Chapter XIV of Regulation 1529 regulates the procedure for calculating the costs of health care services, whereas Para 555 of Annex 16 to this Regulation “Tariffs of Health Care Services for Preventive, Diagnostic, Treatment and Rehabilitation Services” (hereinafter – Annex No. 16) sets out the tariff for paying for psychological labour.

2. The Applicant – the Ombudsman of the Republic of Latvia (hereinafter – the Ombudsman) – holds that Para 555 of Annex No.16, insofar it does not provide a tariff for scheduled delivery outside inpatient facility (hereinafter – the contested norm) is incompatible with the first sentence in Article 91 of the Satversme of the Republic of Latvia (hereinafter – the Satversme).

The Ombudsman with the decision of 10 July 2013 in verification procedure No. 2012-297-5D has turned to the Cabinet of Ministers and the Ministry of Health, proposing that within one month the deficiencies identified in the valid legal regulation should be eliminated and that it should be provided that the scheduled delivery outside an inpatient facility should be paid for from the State budget resources.

The Cabinet of Ministers, in turn, in the letter of 14 August 2013 No.18/TA-1667 pointed out that it could not uphold the findings included in Ombudsman’s opinion of 10 July 2013 and that the Cabinet of Ministers was not legally obliged to envisage resources from the state budget to pay for scheduled delivery outside an inpatient facility.

The Ombudsman holds that the Cabinet of Ministers, in drafting Regulation No. 1529, has not taken into consideration the Ombudsman's recommendation regarding abiding by the principle of legal equality with regard to free-of-charge assistance in deliveries.

It is maintained that it follows from the content of Regulation No. 611 that those women, who receive assistance in delivery at an inpatient facility, and the women, who receive assistance in delivery outside it, with regard to receiving obstetric service are under similar and comparable circumstances. Thus, all women, who receive obstetric assistance, must also be under similar and comparable circumstances with regard to the pre-conditions for financing the received assistance in delivery.

The contested norm also defines the tariff for physiological labour; however, without specifying whether it refers to delivery at an inpatient facility or scheduled delivery outside an inpatient facility. The Ministry of Health has recognised that scheduled delivery outside an inpatient facility, if the indications referred to in Annex 3 to Regulation No. 611 are not present, is physiological labour. It follows from the above that all women, to whom assistance in delivery in the case of physiological labour is ensured, are eligible to receive the scope of service, *inter alia*, also with regard to funding. The tariff defined in the contested norm applies only to services provided at an inpatient medical facility. However, the approved description of medical technology "Management of Physiological Labour, including the Necessity to Perform Episiotomy", is said to applicable also to scheduled delivery outside an inpatient facility, and, thus, problems linked to covering the costs of such deliveries from the state budget resources are linked to the lack of legal regulation (*see Case Materials, pp. 21 – 31, and 38 – 49*).

It is maintained that the regulation that is in force lacks clear objective and reasonable grounds, hence, Section 4(2) of "Sexual and Reproductive Health Law" does not allow interpreting the concept "free-of-charge assistance in deliveries" narrowly, and the right to free-of-charge assistance in delivery established by this norm cannot be restricted.

In accordance with Section 8 in “Sexual and Reproductive Health Law”, the term “assistance with deliveries” comprises activities starting with promotion of family reproductive health up to infant care during the post-natal period. Whereas Section 7 of this law is said to establish several sources of financing sexual and reproductive health promotion and care services – the State budget, as well as the means of natural and legal persons in accordance with the procedures specified by regulatory enactments. Thus, the legislator had established a comprehensive regulation for covering the costs of sexual and reproductive health promotion and care.

Pursuant to Section 3 of “Sexual and Reproductive Health Law”, the concept “sexual and reproductive health care” is said to include also ensuring assistance with deliveries. Thus, Section 7 of this Law should apply also to ensuring assistance in deliveries, unless the law has established a special regulation for that. Section 4 (2) of “Sexual and Reproductive Health Law” should be seen as a special legal norm with respect to Section 7 in the same law.

If a woman has been allowed to choose – to have the delivery at home or at an inpatient facility, then, it is maintained, the same service should not be provided free-of-charge in one case, but in another – for a charge. Additional charge for assistance in scheduled delivery outside an inpatient facility could be demanded only if the expenses of providing this kind of assistance were, indeed, larger. Moreover, some studies have emphasized that expenses in the case of scheduled delivery outside an inpatient facility are lower compared to assistance with deliveries provided at an inpatient facility. Thus, it is cheaper; hence, there can be no grounds for not including the necessary assistance that would ensure service at least in the same quality on the list of health care services paid for by the State.

The Ombudsman, referring to guidelines of the World Health Organisation, as well as a number of studies conducted in Latvia and abroad, notes that, in the process of labour, actions that are typical of inpatient facilities should be reduced to the extent possible. The institution of midwives is said to be the most acceptable and cost-effective measure in the case of physiological labour. Moreover, scheduled deliveries outside inpatient facilities can be allowed only in low-risk

cases, when the pregnant woman receives professional obstetric assistance and the delivery takes place in a location from which, if complications occur, an inpatient facility can be easily reached. A woman should be ensured the possibility to choose a place for delivery that she herself considers safe and where professional assistance in delivery would be provided to her. During the birth of the first child scheduled delivery outside an inpatient facility is said to be as safe as delivery at an inpatient facility; whereas results collected with regard to women, who have given birth to more than one child, show that scheduled delivery outside an inpatient facility is safer. It is maintained that delivery outside an inpatient facility improves also other indicators linked to the mother's and the child's emotional state. However, it should be taken into consideration that scheduled deliveries outside an inpatient facility are not common in Latvia.

3. The institution, which adopted the contested act, – the Cabinet of Ministers, – does not uphold the Ombudsman's opinion and holds that the contested norm complies with the first sentence in Article 91 of the Satversme.

It is maintained that systemic examination of the provisions made by Section 4 (2) and Section (7) allows concluding that the Ombudsman's argument that the law guarantees to every person free-of-charge assistance in delivery, irrespectively of its type and place, where the service is provided, is unsubstantiated. Allegedly, Section 7 of this Law refers not only to paying for a service, but also the State's obligation to implement a set of measures to embody one of the principles of sexual and reproductive health care – providing assistance in delivery with the overarching aim to protect the unborn life and the health and the life of the woman in labour. The right to choose, granted to a person by legal acts and its exercise in accordance with a person's will, should not be an obstacle in reaching the aim defined by the State.

Depending upon the course of labour and individual medical indications, physiological labour, labour in the case of labour pathology and labour as the result of a Caesarean section are distinguished. Regulation No. 1529 ensures to all women equal possibility to receive one type of these obstetric services, moreover,

the services of all types referred to above, if provided at an inpatient facility, are fully paid for by the State budget resources. In the case of delivery outside an inpatient facility, the medical practitioner provides only one of these services, i.e., ensures physiological labour.

It is maintained that the State's obligation is to use all resources at its disposal to facilitate that health care services are provided in circumstances of maximum safety and in as good quality as possible. During a delivery scheduled at an inpatient facility, the woman in labour is guaranteed greater safety compared to circumstances outside an inpatient facility, especially, if an unforeseeable situation of risk occurs. During scheduled delivery outside an inpatient facility, assistance is provided only by one specialist (a gynaecologist or a midwife); however, at an inpatient facility, according to medical indications, it can be ensured by a number of specialists, who have access to material technical equipment and infrastructure of a hospital. In view of the above, the State is attempting to influence a woman's choice in favour for scheduled delivery at an inpatient facility, which fully complies with the purpose set out in Section 1 of "Sexual and Reproductive Health Law".

It is contended that the foreign research that the Ombudsman refers to cannot be applied to Latvia's circumstances, since the main safety criteria for the respective services are well developed infrastructure, *inter alia*, the speed of access to emergency assistance, as well as particularly high qualification and experience of service providers, which is proven by statistical data, as well as traditions.

The tariff included in the contested norm cannot be applied to scheduled delivery outside an inpatient facility, since in its calculation the possibility of providing the respective services under conditions outside an inpatient facility was not taken into consideration.

The technology of delivery outside an inpatient facility has not been adopted and is not included in the list of services paid for by the State budget resources. In accordance with Para 3 of the 28 June 2005 Cabinet Regulation No. 468 "The Procedure for Approving and Implementing new Medical Technologies to be Used in Treatment", in order to achieve that medical technology is approved,

a medical facility, a medical practitioner or a professional organisation of medical practitioners fills out an application and submits it to the National Health Service. On 18 May 2012 the Association of Midwives of Latvia submitted to the National Health Service an application requesting approval of the medical technology “Medical technology of scheduled delivery outside an inpatient facility”. The National Health Service indicated that all documents provided for in legal acts had not been submitted; however, the Association of Midwives of Latvia has not eliminated the deficiencies that were identified.

The Cabinet of Ministers, referring to the case law of the Constitutional Court, notes that the principle of legal equality embedded in the first sentence of Article 91 of the Satversme should be predominantly applied alongside other fundamental rights, therefore in the case under review the content of fundamental rights included in Article 111 of the Satversme is significant. The State may not derogate from implementing the social rights included in the Satversme; however, the scope of their implementation may depend upon resources that the State has at its disposal, since, it is contented, the State has the task to allocate them and decide to who, under what circumstances and what kind of treatment will be paid for. Since no universal criteria exist allowing to define priorities in this field, the State has broad discretion in deciding on these issues. In verifying, whether the State has implemented measures necessary for exercising the fundamental rights included in Article 111 of the Satversme, it must be assessed, whether the legislator has established a system that ensures accessibility of health care.

The State, by passing “Medical Treatment Law”, “Sexual and Reproductive Health Law”, Regulation No. 1529 and Regulation No. 611, has created a system that allows persons to receive the obstetric service assistance, *inter alia*, also service of scheduled delivery outside an inpatient facility. In examining, whether the State has fulfilled the respective duties adequately, i.e., whether the possibility has been ensured the possibility to exercise their rights at least in minimum scope, it must be verified, whether the system created by the legislator ensures adequate possibility to receive obstetric care.

In case of physiological labour, the health care service in full scope is ensured free-of-charge by the state with the mediation of inpatient facilities. Thus, a system has been created that envisages special support in receiving obstetric service even above the minimum guaranteed in the Satversme, and it is aimed at reaching a higher level.

One shared feature *per se* cannot always be used as a sufficient argument to establish that two groups of persons are under similar and comparable circumstances. The provisions of Regulation No. 1529 establish persons' social rights in a limited scope, therefore concrete groups of persons should be compared in the context of services paid for by the State. As regards the persons indicated by the Ombudsman, one group of persons is discerned – women, who receive health care services in the case of physiological labour.

It is contended that the contested norm, as well as other norms of Regulation No. 1529 ensures equal scope of rights to all women belonging to this group, i.e., they are ensured the right to receive health care services paid for by the state in the case of physiological labour with the mediation of those facilities that provide health care services paid for by the State budget resources. Whereas services in other medical facilities or other types of services to be provided in the case of physiological labour, the covering of which from the State budget is not envisaged, can be received privately. Thus, the legal regulation that is currently in force allegedly does not violate the principle of equality and guarantees to all women equal possibility to receive the obstetric assistance that they need, also in the case of physiological labour.

If a person wishes to receive the service in such a way and in a place, which differs from the service ensured by the State, then such circumstance does not create a different scope of rights and the possibilities for the person to exercise them, but ensures to a person the possibility to implement the rights that are embedded in Section 8 of Law on the Rights of Patients.

4. The summoned person – the Ministry of Justice – holds that the contested norm is incompatible with the first sentence in Article 91 of the Satversme.

The European Court of Human Rights (hereinafter – ECHR) on 14 December 2010 in the judgement in the case “*Ternovszky v. Hungary*”, application No. 67545/09, has noted that the right of women to choose the circumstances and the location for labour is an element in women’s right to private life. The system that exists in Latvia cannot be considered as such that guarantees this right.

It is maintained that the services provided by the state in medical field must, to the extent possible, comply with the principle of public administration established in Section 10 of “State Administration Structure Law”, in particular, the provisions of the first, third, fifth, sixth, eighth and tenth part of this section.

There are no grounds, why scheduled physiological labour outside an inpatient facility could not be paid for by the State budget on the same terms as physiological labour in a medical institution.

The opinion that the Ministry of Health expressed in the framework of a verification procedure initiated by the Ombudsman that the description of medical technology for delivery outside an inpatient facility has not been prepared, is said to be unsubstantiated, since the line ministry has the possibility to participate in the elaboration of this document, in order to ensure good governance.

Pregnant women are under similar circumstances as regards obstetric assistance that they need; whereas the rules on payment for it from the State budget differ, depending upon the place for delivery that the woman chooses. Thus, it can be concluded that different rules are applied to persons, who are in similar circumstances. An individual’s discretion to select the place of delivery does not collide with the legal interests of other persons, thus, the principle of equality is said to comprise also the State’s obligation to elaborate such regulation that would ensure similar procedural order to persons, who are in similar circumstances.

In the case under review a specific cause of differential treatment has not been indicated, except for institutionalised formalities, therefore the legitimate aim and proportionality of the differential treatment cannot be discerned.

5. The summoned person – the National Health Service – provides information that it has participated in preparing the documents of the Cabinet of Ministers and the Ministry of Health for submission to the Ombudsman and to the Constitutional Court, and, thus, upholds the argumentation provided in these regarding the compatibility of the contested norm with the first sentence in Article 91 of the Satversme.

The normative acts that regulate the system of health care should be examined in their totality – in a systemic and teleological way. Even though the payment for health care services from the State budget resources could be considered as only a part in the measures for protecting an unborn life, nevertheless, the principles embedded in law cannot be perceived as only the range of health care services paid for by the State. Legal regulation does not grant to persons the subjective right to demand that the State paid for any health care services outside the procedure for organising and financing health care established by the State.

Law on the Rights of Patients does not set a mandatory requirement to ensure to all patients health care services outside an inpatient facility. However, this right can be exercised if a person's state of health, living conditions and economic situation allow it. The content of Regulation No. 1529 is said to indicate that health care services that are provided to a person at home or another place he or she prefers are paid for by the State budget resources only in such cases, where the provision of these services in the particular location has objective and reasonable grounds that are linked to the person's health condition. However, the Cabinet of Ministers, in the presence of pre-requisites set out in legal acts, may include new services in the range of health care services to be paid for by the state, also such that may be provided at home.

The procedure for approving medical technologies, established in “Medical Treatment Law”, at the time of adoption had been aimed only at identifying and systematizing technologies. The medical technology “Management of Physiological Labour, including the Necessity to Perform Episiotomy” had been approved by the decree of 8 August 2001 No. 5 by the Department of Health of the Ministry of Welfare. Whereas the requirement to submit an expanded description of the method of medical technology had been established later (*see Case Materials, pp. 116 and 117*). Therefore the National Health Service, abiding by the principle of legal certainty, has no right to demand medical practitioners or professional associations thereof to supplement the already approved medical technologies with an expanded description of a method, therefore expanded descriptions of a number of approved medical technologies are not available.

6. The summoned person – association “Latvian Association of Homebirth Families” – notes that it had submitted proposals to the Ministry of Health a number of times regarding such amendments to legal acts that would introduce in the paying for obstetric assistance the principle “money follows the woman giving birth”. These principles had not been taken into account.

The Association supports the opinion expressed in the application and the views expressed by the Ombudsman in the opinion of 10 July 2013.

It is contended that the procedure for ensuring scheduled deliveries outside inpatient facilities in Latvia is one of the best in the region. The research conducted in those countries, where scheduled deliveries outside inpatient facilities are included in the range of health services paid for by the State, shows that the number of manipulations performed upon women giving birth outside inpatient facilities is lower than among women belonging to the same risk group giving birth at an inpatient facility. Thus, the more pregnant women belonging to a low risk group chose scheduled deliveries outside inpatient facilities, the greater savings of the State resources would be achieved. In the case of delivery outside an inpatient facility the expenses of the bed-days do not have to be covered, thus, such

deliveries are the most appropriate choice both terms of medical considerations and expenses.

The State should not ensure deliveries outside inpatient facilities free-of-charge. Women giving birth may freely choose medical practitioners, which, in a certain sense, should be considered as additional convenience (likewise, a person at an inpatient facility also pays if a specially chosen midwife or doctor attends to the delivery). However, all taxpayers are entitled to a certain minimum of medical services, and therefore it would be fair to provide that the State covers a certain part of the costs of scheduled deliveries outside inpatient facilities.

Covering the expenses of scheduled deliveries outside an inpatient facility according to a uniform price-list cannot be influenced by the fact that the description of technology is lacking; moreover, this does not depend upon the recipient of the respective service.

7. The summoned person – association “The Association of Latvian Midwives” – holds that the State should ensure qualified obstetric assistance in the place, where a woman has chosen to give birth, unless it is incompatible with legal acts. Obstetric care is said to be a service covered from the State budget, which should be ensured irrespectively of the place of delivery. Currently women giving birth are not ensured equal opportunities in receiving this service.

Representatives of the National Health Service and the Ministry of Health in discussion have reached the conclusion that in order to decide on the option of paying for assistance provided in scheduled deliveries outside an inpatient facility an approved medical technology “Scheduled Delivery outside Inpatient Facility” is necessary, which would indicate the actual costs of such deliveries. Essentially, scheduled delivery outside an inpatient facility is physiological labour, and medical technology “Management of Physiological Labour, including the Necessity to Perform Episiotomy” has already been approved. However, there are certain differences with regard to the necessary equipment, environment requirements, working hours and workload of a midwife, as well as other factors in the technologies referred to above.

8. The summoned person – Dr. iur., MD Solvita Olsena – in general upholds the views expressed by the Ombudsman and is of the opinion that the contested norm is incompatible with the first sentence in Article 91 of the Satversme.

In the case under review the ECHR Judgement of 14 December 2010 in case “*Ternovszky v. Hungary*”, application No. 67545/09 should be taken into consideration. Pursuant to it, legislation which dissuades professionals to act in those cases, where they could offer the necessary assistance, are to be recognised as such that interferes with the exercise of patients’ right to respect for private life.

The regulation that is in force in Latvia should also be recognised as this kind of regulation, since a woman, who is “not rich”, essentially, cannot choose scheduled delivery outside an inpatient facility and use the assistance of a professional medical practitioner during it, because the State does not ensure payment for it. Likewise, in a situation like this it is impossible to receive a home-visit by a paediatrician to examine the newborn. This allegedly impacts a woman’s right to exercise those rights that are included in Article 8 of the European Convention on Protection of Human Rights and Fundamental Freedoms. Thus, families may be discriminated against exactly because of their choice, since negative consequences are created to those families that choose deliveries outside an inpatient facility – additional expenses, in difference to the situation where a woman chooses to give birth at a hospital.

Outcomes of various studies show that in cases of normal pregnancy deliveries outside an inpatient facility are not linked to greater risk compared to deliveries at an inpatient facility, moreover, had a series of positive benefits, especially – in the long-term.

Allegedly, it has been unfoundedly noted in the written reply by the Cabinet of Ministers that during scheduled delivery at an inpatient facility a more comprehensive health-care is provided, and that it is safer. The Cabinet of Ministers has noted, with good reason, that in the case under review the rights should be examined not only in the context of Article 91 of the Satversme, but also

that of Article 111. And yet, the interpretation of legal norms and court findings provided in the written reply is said to be unfounded and leading to erroneous conclusions.

It is contended that the Ombudsman has erroneously noted in the application that the costs of scheduled deliveries outside an inpatient facility should be covered at least in the same amount as the respective services provided at an inpatient facility. Such comparison allegedly has no legal grounds, since the content of the work performed by medical practitioners and the time spent, as well as the equipment to be used and organisation of the procedure differs in these two types of deliveries. Such comparison is even said to be inadmissible, since inpatient facilities receive additional financial resources for infrastructure maintenance, purchase of medical equipment and construction of premises.

Allegedly the State has not implemented the measures necessary to implement the fundamental rights included in Article 111 of the Satversme, since obstetric assistance should be included in the content of the concept “minimum of medical assistance”.

The Findings

9. To establish, whether grounds exist for examining the compatibility of the contested norm with the Satversme, first of all its true meaning must be established (*see Decision of 22 April 2005 by the Constitutional Court on Terminating Legal Proceedings in Case No. 2004-25-03, Para 6, and Decision of 20 January 2010 on Terminating Legal Proceedings in Case No. 2009-14-01, Para 7*). Thus, before examining the compatibility of the contested norm with the first sentence in Article 91 of the Satversme, the Constitutional Court must establish, whether the contested norm prohibits from paying for deliveries outside an inpatient facility from the State budget resources, as noted by the Ombudsman.

9.1. Para 555 of Annex 16 envisages tariff for payment for “physiological labour”.

Physiological labour is low risk, natural labour, in the process of which no special interference by medical practitioners is needed, i.e., no labour pathology has been identified or a medical necessity to perform a Caesarean section (*see Opinion by the National Health Centre, Case Materials p. 114*).

The content of the contested norm is revealed by Para 7 of Regulation No. 1529, which provides: “The services paid for by the state budget resources allocated for health care are provided by those medical facilities that have concluded a contract with the [National Health] Service, as well as institutions of public administration that provide health care services in accordance with the Statute.”

Labour outside an inpatient facility is also to be regarded as physiological labour. However, those persons, who provide assistance in scheduled deliveries outside an inpatient facility, have not concluded contracts with the National Health Service, and neither are they institutions of public administration that provide health care services in accordance with the Statute, referred to in Para 7 of Regulation 1529.

Thus, Para 555 of Regulation No. 16 does not envisage a tariff for scheduled delivery outside an inpatient facility, since such obstetric assistance is not provided in institutions referred to in Para 7 of Regulation No. 1529.

9.2. The Ombudsman has not contested Para 7 of Regulation No. 1529 before the Constitutional Court. Therefore the Constitutional Court must assess, whether in the case under review the scope of claim should be expanded and also the compatibility of Para 7 of Regulation No.1529 with the first sentence in Article 91 of the Satversme should be reviewed.

The Constitutional Court has concluded a number of times that in particular cases the scope of claim in already initiated cases can be expanded (*see, for example, Judgement of 19 December 2007 by the Constitutional Court in Case No. 2007-13-03, Para 6, and Judgement of 29 December 2014 in Case No. 2014-06-03, Para 17*).

The Constitutional Court can expand the scope of claim by, first of all, abiding by the “concept of close link”. To establish, whether in a particular case

the scope of case can be and should be expanded, it must be, first of all, be found, whether the norm with regard to which the claim is being expanded is so closely linked to the norm that is contested in the case that it can be examined within the framework of the same substantiation and is necessary for adjudicating the particular case, and, secondly, whether the scope of claim should be expanded in order to abide by the principles of legal proceedings before the Constitutional Court (*see, for example Judgement of 3 April 2008 by the Constitutional Court in Case No. 2007-23-01, Para 17, and Judgement of 29 December 2014 in Case No. 2014-06-03, Para 17*).

In the context of the issue to be examined in the case, Para 7 of Regulation No. 1529 is closely linked with the contested norm, since only by examining these two norms in interconnection allows concluding that Para 555 of Annex No. 16 does not envisage a tariff for paying for delivery outside an inpatient facility from the State budget resources. The participants of the case and the summoned persons also presented their considerations regarding the nuances in the procedure for financing health care services established by the State, materials regarding this have been submitted in the case. Therefore, the two norms can be examined within the framework of legal substantiation provided by the participants of the case.

Thus, to foster comprehensive and unbiased examination of the case, complying with the principle of economy of proceedings before the Constitutional Court, the scope of the claim in the case under examination can and should be expanded.

Thus, the Constitutional Court will examine also the compatibility of Para 7 of Regulation No. 1529 with the first sentence in Article 91 of the Satversme.

10. The first sentence in Article 91 of the Satversme provides: “All human beings in Latvia shall be equal before the law and the courts.”

The Constitutional Court has recognised that it is not always possible to examine the constitutionality of a particular restriction upon fundamental rights only from the vantage point of the first sentence in Article 91 of the Satversme. It

should also be taken into account that the principle equality established in the first sentence of Article 91 of the Satversme frequently must be applied together with other fundamental rights. In assessing, whether legal norms are not incompatible with the principle of equality, the field of law that they belong to must also be taken into consideration (*see, Judgement of 8 November 2006 by the Constitutional Court in Case No. 2006-04-01, Para 15*).

In those cases, where the accessibility of the State financed health care services and medicinal products was examined in the context of Article 91 of the Satversme, the Constitutional Court has recognised that in such instances the legal norm should be examined in interconnection with a person's right to health protection, which on the constitutional level has been embedded in Article 111 of the Satversme (*see, for example, Judgement of 29 December 2008 by the Constitutional Court in Case No. 2008-37-03, Para 11, and Judgement of 28 June 2013 in Case No. 2012-26-03, Para 11*). Identical consideration regarding the case under examination was expressed also by the Cabinet of Ministers and the summoned persons – the National Health Service and S. Olsena.

The summoned persons, however, – the Ministry of Justice and S. Olsena, as well as the Ombudsman (after familiarising himself with the case materials) noted, by referring to the case law of ECHR, that the system existing in Latvia could not be recognised as such that would guarantee the right to private life established in Article 96 of the Satversme, i.e., women's right to choose the circumstances and place, under which and where they would give birth to a child.

In the ECHR case, referred to by the summoned persons, regarding deliveries outside an inpatient facility, a situation in Hungary was examined, where, essentially, the possibility to receive qualified medical assistance at deliveries outside an inpatient facility was denied (*see Judgement of December 14 by ECHR in Case "Ternovszky v. Hungary", application No. 67545/09, Para 22*).

However, the legal acts of Latvia, *inter alia*, Para 6 of Regulation No. 611 provide the possibility to women, in accordance with Article 96 of the Satversme, to choose scheduled delivery either at an inpatient facility or outside it, receiving in both cases qualified medical assistance. This Regulation was adopted with the

aim, among others, to ensure that it would be possible for a woman, who chooses to give birth outside an inpatient facility, to receive the respective service in a safe way. This regulation defines the mandatory requirements to a provider of assistance in delivery outside an inpatient facility to reduce health risks for the woman and the newborn to the extent possible (*Information submitted by the Cabinet of Ministers in the framework of the Ombudsman's verification procedure, Case Materials p. 35*).

Thus, it follows from the case materials that in the case under review the issue that must be examined is not, whether a woman can exercise her rights that follow from Article 96 of the Satversme to choose a scheduled delivery outside an inpatient facility, receiving qualified medical assistance, but the issue regarding the model for financing this kind of obstetric assistance. Since the basis for examining the constitutionality of various aspects in the model for financing the system of health care is Article 111 of the Satversme, in assessing the compatibility of the contested norms with the first sentence in Article 91 of the Satversme, a person's right to health protection must be taken into consideration.

11. Article 111 of the Satversme provides: "The State shall protect human health and guarantee a basic level of medical assistance for everyone."

11.1. This norm imposes the duty upon the State to protect every person's right to care for his or her health, as well as an obligation to refrain from activities that would hinder a person to exercise this right. Article 111 of the Satversme does not impose an obligation upon the State to ensure to everybody as high level of health care as possible; however, the obligation of the State, in certain cases and to the extent that is closely linked with the economic possibilities of the State, to take measures for protecting human health follows from the provisions of this article. The obligation of the State to take measures that are necessary to protect human health, *inter alia*, to ensure the existence and accessibility of health care services follows from the right to health protection (*see, for example, Judgement of 22 October 2002 by the Constitutional Court in Case No. 2002-04-03, Para 1 of the Findings, and Judgement of 29 December 2008 in Case No. 2008-37-03, Para 11*).

The State must respect the core of a person's fundamental rights, i.e., the minimum level of state support, from which it cannot deviate by referring to lack of financial resources (*see Judgement of 15 March 2010 by the Constitutional Court in Case No. 2009-44-01, Para 16*). However, this does not mean that every person would have the right to receive any kind of medical services free-of-charge. The State has broad discretion in choosing the way, in which persons can exercise their right to receive health care services.

The legislator, by exercising its discretion, may create only such system for providing health care services that complies with the norms and principles enshrined in the Satversme.

The Saeima, as well as the Cabinet of Ministers have adopted a number of legal acts ("Medical Treatment Law", "Sexual and Reproductive Health Law", Regulation No. 1529 and Regulation No. 611), the regulation of which envisages the monitoring and course of pregnancy, as well as pre-requisites for providing and paying for health care services connected to obstetric assistance.

11.2. A scheduled delivery outside an inpatient facility should be recognised as secondary inpatient health care service. However, assistance in the case of such delivery is not included in the list of services provided in Para 2 and Para 3 of Annex No. 25; therefor payment from the State budget resources for this service is not envisaged and a tariff has not been defined.

Pursuant to Para 288 of Regulation No. 1529 the National Health Service must assess the possibility to include a certain health service in the range of services to be paid for from the State budget resources if it has received an application from a medical facility or an professional association of medical practitioners, which, *inter alia*, comprises information of the name of the new health care service or parts thereof, abiding by the requirement that it must be created in compliance with a medical technology that has been approved for use in treatment. Thus, legal acts establish a procedure that allows including a health care service into the totality of services defined in Para 2 and Para 3 of Annex No. 25.

The Association of the Midwives of Latvia has elaborated the medical technology "Medical Technology of Scheduled Deliveries outside an Inpatient

Facility” and has submitted documents to the National Health Service for it to be approved; however, due to identified deficiencies it has not been approved (*see Case Materials, pp. 159 and 160*). Thus, pre-requisites for the National Health Service to prepare, in accordance with Para 291.1 of Regulation No. 1529, an opinion to be submitted to the Ministry of Health on the possibility to include the particular health service in the range of health services to be paid for from the State budget have not set in.

11.3. In the case of physiological labour, pursuant to Para 7 of Regulation No. 1529, health care services within defined scope are provided free-of-charge by the State, with the mediation of those medical facilities that have concluded a contract with the National Health Service, as well as with the mediation of those institutions of public administration, which provide health care services in accordance with the Statute. Para 212.2 of Regulation No. 1529 provides that contracts regarding provision of secondary inpatient health care services are concluded with the National Health Service in accordance with the procedure established in Para 215; i.e., providers of secondary inpatient health care services are identified in a procedure of selection in accordance with Para 223 and Para 224 of Regulation No. 1529. Currently, obstetric care services paid for from the State budget resources in Latvia can be received at 19 inpatient medical facilities (*see written answer by the Cabinet of Ministers, Case Materials p. 73*).

Thus, the legislator has established a system of health care services that are paid for by the State, in the framework of which all women have the possibility to receive medical assistance free-of-charge in the case of scheduled physiological labour.

12. When the State establishes a system of health care services to be paid for from the State budget resources, it, *inter alia*, must ensure compliance with the principle of equality (*see, for example, Judgement of 28 June 2013 by the Constitutional Court in Case No. 2012-26-03, Para 11*). Thus, in the case under examination the Constitutional Court must verify, whether the procedure

established by the State complies with the first sentence in Article 91 of the Satversme.

The Constitutional Court, in interpreting Article 91 of the Satversme, has recognised that the principle of equality forbids state institutions to adopt such norms that without reasonable grounds allow differential treatment of persons, who are under similar and according to particular criteria comparable circumstances. The principle of equality allows and even demands differential treatment of persons, who are under different circumstances, as well as allows differential treatment of persons, who are under 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*).

To assess, whether the contested norms comply with the principle of equality included in the first sentence of Article 91 of the Satversme, first of all, it must be established, whether there are persons (groups of persons), who are under similar and according to particular criteria comparable circumstances (*see, for example, Judgement of 29 December 2008 by the Constitutional Court in Case No. 2008-37-03, Para 7*).

Regulation No. 611 regulates, *inter alia*, provision of health care services to women, who in the case of scheduled physiological labour receive it at an inpatient facility, and to women, who receive this assistance outside an inpatient facility.

A series of such health care services exists, which a person may receive both within the framework of health care system paid for by the state and outside it, i.e., a person is not denied the possibility to receive the same service in the place and in the way he or she has chosen. A woman chooses to receive obstetric services outside an inpatient facility, thus exercising her private autonomy.

Deliveries outside an inpatient facility do not take place in institutions that have concluded an agreement with the National Health Service, nor at institutions of public administration that provide health care services in accordance with the Statute. Thus, the women who have chosen to receive obstetric care outside an inpatient facility have preferred such service, which, in accordance with

Regulation No. 611 is allowed, however, is provided outside the system of free-of-charge obstetric care that has been established by the State and is accessible to all women.

Therefore, the Constitutional Court notes that in the case under review the following groups of persons exist:

- 1) the women, who in the case of scheduled physiological labour receive assistance within the system financing health care services that are ensured by the State;
- 2) the women, who in the case of scheduled physiological labour receive assistance outside this system.

13. The Constitutional Court must establish, whether the particular groups of persons are under similar and according to particular criteria comparable circumstances.

In deciding on this issue, the fact, whether the State's duty to ensure to all these groups of persons that the received obstetric assistance is paid for from the State budget resources follows from Article 111 of the Satversme, is decisive.

The legislator has guaranteed to all women the possibility to receive obstetric care free-of-charge within the framework of system of paid for health care services that has been established by the State.

Thus, the State has ensured the existence and accessibility of health care services in the particular field and it does not have the duty to guarantee obstetric care in another place and form that a person prefers, outside the aforementioned system. Hence, receiving obstetric care outside the system referred to above is to be recognised as circumstances that in the context of financing health care do not allow concluding that the aforementioned groups of persons were in similar and according to particular criteria comparable circumstances.

It follows from the case law of the Constitutional Court that it would be possible to compare groups of persons, if the medical service ensured within the system created by the State were not accessible at all to one of the groups or were

accessible in another quality (*see, for example, Judgement of 28 June 2013 by the Constitutional Court in Case No. 2012-26-03, Para 10*).

Therefore the women, to whom in the case of scheduled physiological labour assistance is provided within the framework of the system for financing health care services ensured by the State, and the women, to whom such obstetric care is provided outside the system referred to above, are under different circumstances and these groups are not comparable.

Since the groups of persons are not under similar and comparable circumstances, the contested norms comply with the first sentence of Article 91 of the Satversme.

14. As noted in Para 11 of this Judgement, the obstetric services outside an inpatient facility could be included in the system of health care services that are paid for by the State. Likewise, it must be taken into consideration that the State, within the limits of its economic possibilities, could expand the range of health care services paid for by the State, *inter alia*, in the field of sexual and reproductive health.

The Substantive Part

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

held:

to recognise Para 7 of the 17 December 2013 Cabinet of Ministers Regulation No. 1529 “The Procedure for Organising and Financing Health Care”, as well as Para 555 of Annex 16 “Tariffs of Health Care Services for Preventive, Diagnostic, Treatment and Rehabilitation Services”, insofar it does not Envisage a Tariff for Scheduled Delivery outside Inpatient Facilities, as being

compatible with the First Sentence of Article 91 of the Satversme of the Republic of Latvia.

The Judgement is final and not subject to appeal.

The Judgement enters into force on the day it is published.

Chairmen of the court sitting

Aldis Laviņš