THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF LATVIA

JUDGMENT
ON BEHALF OF THE REPUBLIC OF LATVIA
Riga, December 19, 2007
in case No. 2007-13-03

The Constitutional Court of the Republic of Latvia, composed of the Chairman of the Court session Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Juris Jelāgins, Kristīne Krūma, Uldis Ķinis and Viktors Skudra,

having regard to the application of Irina Ševčenko,

according to Article 85 of the Satversme [*Constitution*] of the Republic of Latvia and Article 16 (3), Article (1) (11) and Articles 19.[2] and 28.[1] of the Constitutional Court Law,

on November 20, 2007 in the Court Session examined the following case in written proceedings,

"On Compliance of the Words "on an Ongoing Basis" of the Provision Included in Para 6 of the Cabinet of Ministers Regulation No. 644 of 8 August 2006, Regulations Regarding the Amount of the Allowance for Child Care and the Supplement to the Allowance for Child Care for Twins or More Children Born During One Delivery, the Review Procedures Thereof, Procedures for the Granting and Payment of the Allowance and Supplement with Articles 91 and 110 of the Satversme (Constitution) of the Republic of Latvia"

The Constitutional Court has established:

1. Item 2 of Section 3 of the Law on State Social Allowances provides that childbirth allowance is one of allowances to be disbursed once, but Section 7 of the same Law provides for conditions for granting the childcare benefit. According to the first part of Section 15 of the same Law, The amount of the State social allowances shall be determined by the Cabinet, whilst according to the first part of Section 16 of the same Law, Allowances for a child shall be granted in accordance with the procedures specified by the Cabinet. Both, conditions for allocation of the childcare benefit and regulations by the Cabinet of Ministers that regulate conditions and amount of granting thereof have changed several times after coming into force of the Law on State Social Allowances.

1.1. On January 1, 2005, the Law passed on November 11, 2004 "Amendments to the Law on State Social Allowances" came into force, which, among the rest, formulated the first part of Section 7 of the Law on State Social Allowances in the following wording:

"A child care benefit shall be granted to a person caring for a child:

1) up to one year of age, if this person is not employed (is not deemed to be an employee or self-employed person in accordance with the Law on State Social Insurance) or is employed and is on parental leave;

2) from one to two years of age, if this person is employed (is deemed to be an employee or self-employed person in accordance with the Law on State Social Insurance) or is employed and is on parental leave, or has a part-time work according to the order established by the Cabinet of Ministers."

From January 1, 205, the amount and order of granting of the child care benefit was established by Regulation No. 1003 of December 7, 2003 by the Cabinet of Ministers "Procedure for Granting and Paying Child Support Benefits and Additional Benefits for Twins or More Children Delivered in One Confinement" (hereinafter – Regulation No. 1003). According to Para 3 of the Regulation, the amount of the benefit constitutes LVL 50 for persons caring for a child up to one year of age if this person is not employed, and at the amount of 70 percent from the average wage of

social payments of a person (but not less then LVL 56 per month and not more than LVL 392 per month) if a person is employed and is on a parental leave. Whilst the amount of the child care benefit for persons caring for a child from one to two years of age was LVL 30.

1.2. On November 4, 2005, the Constitutional Court announced a judgment in the case No. 2005-09-01 "On Compliance of the Provision Incorporated in Section 7 (Item 1 of the First Paragraph) of the Law on State Social Allowances – "if this Person is not Employed (is not Considered to be an Employee or Self-Employed Person in Accordance with the Law on State Social Insurance) or is Employed and is on Parental Leave" with Articles 91, 106 and 110 of the Satversme (Constitution) of the Republic of Latvia" and recognized this provision as being incompatible with Article 110 of the Satversme of the Republic of Latvia and invalid as of March 1, 2006.

1.3. From March 1, 2006, Item 1 of the first part of Section 7 of the Law on State Social Allowances was valid in the following wording: "A childcare benefit shall be granted to a person caring for a child: 1) up to one year of age". Whilst Item of the first part of Section 7 of the same Law, compliance of which with the Satversme was not contested before the Constitutional Court, remained valid in the following wording: "A childcare benefit shall be granted to a person caring for a child: from one to two years of age, if this person is employed (is deemed to be an employee or self-employed person in accordance with the Law on State Social Insurance) or is employed and is on parental leave, or has a part-time work according to the order established by the Cabinet of Ministers".

The amount of the benefit prescribed in the Regulation No. 1003 remained unchanged, namely, a person caring for a child up to one year of age, the benefit constituted LVL 30 per month.

1.4. On March 2, 2006, the Law "Amendments to the Law on State Social Allowances" was adopted. It came into force on March 8, 2006 and the wording of the first part of Section 7 thereof was as follows:

A childcare benefit shall be granted to a person caring for a child:

1) up to one year of age, if this person was not been employed on the day of the granting of the benefit (is not deemed to be an employee or self-employed person in accordance with the Law on State Social Insurance);

2) up to one year of age, if this person was employed on the day of the granting of the benefit (is deemed to be an employee or self-employed person in accordance with the Law on State Social Insurance) and was on parental leave;

3) up to one year of age, if this person was employed on the day of the granting of the benefit (is deemed to be an employee or self-employed person in accordance with the Law on State Social Insurance) and is employed during the period of childcare, but is not on parental leave; and

4) from one year up to two years of age.

The amount of the benefit and procedure of calculation thereof established in the Regulation No. 1003 remained unchanged.

1.5. On August 8, 2006 the Cabinet of Ministers passed the Regulation No. 644 "Regulations Regarding the Amount of the Allowance for Child Care and the Supplement to the Allowance for Child Care for Twins or More Children Born during One Delivery, the Review Procedures Thereof, Procedures for the Granting and Payment of the Allowance and Supplement" (hereinafter – Regulation No. 644), Para 2 of which (in the wording that came into force on August 12, 2006 to June 8, 2007) provided:

"The amount of the allowance shall be as follows:

2.1. to a person who takes care of a child under 1 year of age, if this person is unemployed (is not considered to be an employee or a self-employed person in accordance with the Law On State Social Insurance) on the day on which the allowance is granted – LVL 50 per month;

2.2. to a person who takes care of a child under 1 year of age, if this person is employed (is considered to be an employee or a self-employed person in accordance with the Law On State Social Insurance) on the day on which the allowance is granted and is on child care leave – in the amount of 70% from the person's average monthly wage subject to insurance contributions, but not less than LVL 56 per month and not more than LVL 392 per month;

2.3. to a person who takes care of a child under 1 year of age, if this person is employed (is considered to be an employee or a self-employed person in accordance with the Law On State Social Insurance) on the day on which the allowance is granted and is employed during the child care period, but is not on child care leave – in the amount of 50% from the allowance specified for the person referred to in Sub-paragraph 2.2 of these Regulations, but not less than LVL 56 per month; and

2.4. to a person who takes care of a child from 1 to 2 years of age – LVL 30 per month."

According to Para 3.1 of the Regulation No. 644, for specification of the allowance, a person's monthly average wage subject to insurance contributions for an employee shall be calculated in the following way: from a person's wage subject to insurance contributions regarding the 12 calendar months period, terminating this period 3 calendar months before the month in which the child was born.

Whist Para 6 of the Regulation No. 644 provides: "If the right to an allowance for the next child arises for a person who on an ongoing basis takes care of a child up to 2 years of age, for which the allowance has been granted in accordance with Sub-paragraph 2.2 of these Regulations, the allowance for child care for the next child under 1 year of age shall be granted in the greater amount which has been granted in accordance with Sub-paragraph 2.2 of these Regulations for taking care of the previous child under 1 year of age or which may be calculated in accordance with Paragraphs 3, 4 and 5 of these Regulations."

2. According to Sections 6 and 19 of the Law "On State Social Insurance", mandatory contributions for pension insurance for the persons caring for a child up to one year of age shall be made from the State basic budge. Whilst the third part of Section 14 of the same Law provides that the object of mandatory payments to be made form the State basic budget shall be determined by the Cabinet of Ministers.

According to Paras 3.2 and 4.2 of the Regulation No. 230 of June 5, 2001 by the Cabinet of Ministers "Regulations Regarding Mandatory Payments of the State Social Insurance from the State Basic Budget and Special Budgets of State Social

Insurance", mandatory payments starting with LVL 50 shall be made for persons caring for a child up to one and a half year of age.

3. The submitter of the application Irina Ševčenko (hereinafter – Applicant) contests compliance of the words "on an ongoing basis" (hereinafter – Contested Provision) with Articles 91 and 110 of the Satversme of the Republic of Latvia (hereinafter – Satversme).

3.1. The following factual conditions of the case follow from the application and the documents attached:

On March 4, 2005, the Applicant gave birth to her first child Grigorijs Ševčenko (*see: case materials, Vol. 1, pp. 9*). Before that, the Applicant was employed, and her average wage subject to insurance contributions, when calculating the benefit for the first child, was LVL 658.51. The State Social Insurance Agency (hereinafter – SSIA) calculated the maximum amount of the child care benefit, which constituted LVL 392 (*see: case materials, Vol. 1, pp. 14*).

From April 14, 2005 to March 3, 2006, namely, up to the time when the first child reached one year of age, the Applicant was on a parental leave and State social mandatory payments starting from LVL 50 were made for her from the State budget, according to legal provisions (*see: Para 2 of this Judgment*).

On Match 4, 2006, the Applicant resumed working in a full-time job and worked till August 9, 2006, when she took a maternity leave.

The Applicant did not receive the child care benefit of LVL 30 for a child aged from one to two years from March 4, to March 7, 2006, because, according to the norms valid at that time (*see: Para 1.1 and 1.3 of this Judgment*), only a person who is not employed or is employed and has a parental leave, or has a part time work can only receive a childcare benefit for a child aged from one to two years.

The rights to receive a child care benefit for a child aged from one to two years were conferred to the Applicant on March 8, 2006 by amendments to the legal norms (*see: Para 1.4 of this Judgment*).

On October 16, 2006, the Applicant gave birth to the second child Vladimirs Ševčenko (*see: case materials, Vol. 1, pp. 10*).

Due to the fact that the Applicant resumed working in a full time job from April 4, 2006, and she did not receive the child care benefit up to March 7, the Contested Provision did not provide her a possibility to receive a child care benefit for the second child (aged up to one year of age) at the same amount of the child care benefit for the first child (aged up to one year of age). The child care benefit for the second child up to one year of age was recalculated.

When calculating child care benefit for the second child aged up to one year of age, the four months when the Applicant was employed and her average wage subject to insurance contributions constituted LVL 624 – 672 and the eight months when mandatory payments were made for the Applicant from the State budget were included in the period of 12 months used for necessary calculations. Namely, the eight months when the wage subject to insurance contributions constituted LVL 50 were included in the calculation period. In the result of this, the benefit was calculated from the average wage subject to insurance contributions – LVL 251,64, and the amount of the benefit per month constituted LVL 176,15 *(see: case materials, Vol. 1, pp. 12*).

3.2. There is an opinion expressed in the application that the situation when persons who have constantly been on a parental leave have rights to a higher child care benefit if compared to persons who have discontinued the leave and resumed working does not comply with the principles of justice and legal security that follow from Article 1 of the Satversme, the principle of legal equality established in Article 91 of the Satversme and the duty of the State to take care for families, children and parents as good as possible, as provided for in Article 110 of the Satversme.

3.3. The Applicant indicates that the principle of non-discrimination prohibits treating persons differently on the basis of particular features. Gender is one of these features. The European Union Law requires ensuring an equal attitude towards men and women regarding work opportunities, professional training and promotion at work, as well as conditions of work by thus prohibiting both, direct and indirect

discrimination. The Contested Provision makes a person refuse from short-time return to work in favour of the child care benefit and it restricts women's return to work.

3.4. The Applicant holds that, when calculating the child care benefit, a different attitude is permitted towards parents who have rights to a child care benefit for a child up to one year of age, while the previous child has not reached one year of age, depending on the fact whether parents have or have not been actively involved in employment during the period between the births of the children. Such different attitude has no objective and reasonable grounds, and it does not comply with Article 91 of the Satversme.

However, it is indicated in the opinion submitted to the Constitutional Court after getting acquainted with the case materials that the restriction of rights which is formed by the condition "on an ongoing basis" has no legitimate objective.

3.5. The Applicant holds that Article 110 of the Satversme provides for the positive duty of the State to take such family support measures that are sufficiently effective and as far as possible comply with the needs of addressees, first of all those of children. Simultaneously, there is an opinion expressed that Article 110 of the Satversme requires ensuring the interests of a family, parents and children as well as possible.

It is also indicated in the application that the child care benefit for a child aged from one to two years of age is not adequate as to its amount, because it is not enough for survival, and there also is an opinion expressed that the legislator is not entitled to restrict the rights of persons in the situations when the amount of the granted allocation is insufficient for a person to keep a family.

4. The institution that passed the contested act – the Cabinet of Ministers – holds that the provision of Para 6 of the Regulation No. 644 is not in conflict with Article 91 and 110 of the Satversme.

4.1. The Cabinet of Ministers maintains that several conclusions made in the application are indirect because since March 8, 2007 a person who receives a child

care benefit is also allowed to work. In the case if the Applicant would have resumed working after March 8, 2006, she could choose the amount of the benefit according to the order established in Para 6 of the Regulation No. 644. The Cabinet of Ministers emphasizes that "at present in a similar situation, no interruption in the child care period would occur for a person who receives the child care benefit" (*see: case materials, Vol. 1, pp. 37*).

4.2. By referring to the practice of the Constitutional Court in the cases No. 2006-10-03, 2000-07-0409 and 2002-15-01, it is indicated in the reply that the principle of equality enshrined in Article 91 of the Satversme permits a different attitude towards persons who enjoy equal and comparable conditions if it has an objective and reasonable grounds. A different attitude has no reasonable and objective grounds if it has no legitimate objective and there is no proportionate (commensurate) division between the objectives set and means selected for reaching thereof.

There is an opinion expressed in the reply that all persons who, according to Item 2 of the first part of Section 7 of the Law "On State Social Allowances", as employed persons, are conferred the rights to receive a child care benefit for caring for a child up to one year of age while the previous child has not reached two years of age, enjoy equal and comparable conditions.

The Cabinet of Ministers admits that in the case under review it is possible to establish a different attitude; however it considers that the different attitude has a legitimate objective and the measures taken are fit for reaching of the legitimate objective. The Contested Provision favours the fact that parents during the period of reception of a child care benefit when preparing for the birth of a child, choose not to work and hence ensures a care of full value for their child, as well as simultaneously takes care of the health of the child.

The Cabinet of Ministers emphasizes that a different attitude towards calculation of a child care benefit, "taking into consideration the conditions that a person during the time period between the births of the children, when caring for the first child, has simultaneously got involved in the labour market" complies with Article 91 of the Satversme.

4.3. There is a viewpoint expressed in the reply that the provision of Para 6 of the Regulation No. 644 does not create an indirect discrimination on the basis of the gender, but on contrary – it eliminates it.

4.4. The Cabinet of Ministers holds that by introducing the provision of Para 6 of the Regulation No. 644, the State has directly protected and supported a family, parents and children rights, namely, this provision protects and supports those families where the period between births of children is small.

The Constitutional Court holds that:

5. The Applicant and the Cabinet of Ministers (hereinafter – Participants of the Case) assess the content of Para 6 of the Regulation No. 644 in conjunction with the provisions of the Law on State Social Allowances that were effective in different periods of time.

5.1. The Applicant assesses Para 6 of the Regulation No. 644 in conjunction with the wording of Section 7 of the Law on State Social Allowances, which was effective up to March 8, 2006 and which prohibited a person who has a full-time job, to receive a benefit for a child aged from one to two years of age. According to these provisions, the SSIA, during the time frame from March 4 to March 7, 2006 has not paid the Applicant the child care benefit for caring for a child aged from one to two years of age. When calculating the child care benefit for the second child aged up to one year of age, the SSIA has taken into consideration the fact that from March 4 to March 7, 2006, the Applicant has not received the child care benefit and hence has not cared for a child on an ongoing basis.

5.2. However, the Cabinet of Ministers assesses Para 6 of the Regulation No. 644 in conjunction with the wording of Section 7 of the Law on State Social Allowances, which is effective from March 8, 2006. Although the Cabinet of Ministers does not deny, in the part of the reply where the factual circumstances of the case are disclosed, that the Applicant "had a break in reception of the child care benefit from March 4 to March 7, 2006" (*see: case materials, Vol. 1, pp. 36*), the Applicant is being reproached

in the part of the reply where legal justification is provided that she "has not understood the essence of the above mentioned provision or has misunderstood it" (*see: case materials, Vol. 1, pp. 37*).

The case was initiated based on the constitutional complaint. A person may submit a constitutional complaint in order to protect his basic rights established by the Satversme. The fact that a part of the regulation has changed does not relieve the Constitutional Court from the responsibility to assess compliance of the Contested Provision with the Satversme in conjunction with other legal norms that were valid when a decision, which is of an importance in the case under review, was made regarding the Applicant. In the case under review, the Constitutional Court must assess the Contested Provision, first of all, in conjunction with the provisions of the Law on State Social Allowances, which was effective up to March 7, 2006.

6. Compliance of Item 2 of the first part of the Law on State Social Allowances (in the wording that was valid up to March 8, 2006) with Article 110 of the Satversme is also analysed in the opinion of the Applicant regarding the case materials (*see: case materials, Vol. 2, pp. 139*). Compliance of this norm with legal norms of a higher legal power is not contested, and no case regarding such a claim has been initiated in the Constitutional Court. The institution that passed the contested act – the Saeima, is not a participant of the case under review and has not submitted its reply. Although in the proceedings of the Constitutional Court in separate cases "exceeding the limits of the claim in a judgment is permitted and even necessary in order to ensure a more efficient protection of rights of a person and execution of a judgment" *(Pastars E. Prasījuma robežu ievērošana Satversmes tiesā. Jurista Vārds, 31.07.2007., Nr. 31; Endziņš A. Kā vērtēt jaunāko Satversmes tiesas praksi. Jurista Vārds, 09.10.2007., Nr. 41)*, whilst such assessment of compliance of a normative enactment, which is not contested in the respective case at all, would be in conflict with the principles of proceedings of the Constitutional Court. Hence the Constitutional Court does not assess the arguments of the Applicant related to compliance of Item 2 of the first part of Section 7 of the Law on State Social Allowances (in the wording that was valid up to March 7, 2006) with

Article 110 of the Constitution. Consequently, the Constitutional Court shall not assess whether such a situation that during the time period from March 4 to March 10, 2006 the Applicant did not receive the child care benefit for a child aged from one to two years of age due to the fact that she was employed in a full-time job complies with Article 110 of the Satversme.

7. It is *expressis verbis* established in Para 6 of the Regulation No. 644 that the provisions of this paragraph shall be applied to a person who is conferred the right to an allowance for the next child and "who takes care of a child up to two years of age on an ongoing basis". Both, the SSIA and the Cabinet of Ministers interprets the words "who takes care of a child on an ongoing basis" in conjunction with the condition whether a persons has continuously received the child care benefit. The Cabinet of Ministers indicates in the reply that Para 6 of the Regulation No. 644 could not be applied to the case of the Applicant, since "when caring for a child up to two years of age, she had a break when receiving the child care benefit from March 4 to March 7, 2006" (*see: case materials, Vol. 1, pp. 36*), and that "at present in a similar situation, no break in child care would arise for a receiver of a child care benefit due to resumption of work" (*see: case materials, Vol. 1, pp. 37*). Namely, by saying "a break in child care" the Cabinet of Ministers implies "a break in receiving a child care benefit", but by the words – "who cares for a child on an ongoing basis" – "who receives a child care benefit on an ongoing basis". By interpreting the above mentioned words in this manner, the SSIA has refused calculating for the Applicant a child care benefit for the care for the second child up to one year of age according to what has been established in Para 6 of the Regulation No. 644, which is a more favourable regulation for the Applicant.

Since the Cabinet of Ministers has interpreted the legal norm, which it has adopted, the Constitutional Court must make sure that the Contested Provision in the above interpretation complies with legal norms of a higher legal force.

8. It has been established in the jurisprudence of the Constitutional Court that a positive responsibility of the State to form and maintain social and economic protection system for a family follows from Article 110 of the Satversme (*see: Judgment of November 4, 2005 by the Constitutional Court in the case No. 2005-09-01, Para 9.3, Judgment of November 2, 2006 in the case No. 2006-07-01, Para 13.1 and Judgment of December 11, 2006 in the case No. 2006-10-03, Para 13.1*).

8.1. The legislator, when implementing the positive duty of creating and maintaining the system of family social and economic system, has specified the right of a family to specific protection by determining several protection mechanisms (benefits, allowances etc.) and these rights have become the rights of an individual. (*see: Judgment of November 4, 2005 by the Constitutional Court in the case No. 2005-09-01, Para 9.3*). The childcare allowance is an integral part of the above system (*see: Judgment of November 2, 2006 by the Constitutional Court in the Case No. 2006-07-01, Para 10*). By determining the restriction to receive the childcare allowance, determined by the Law for a person, who works part-time work, the impugned norm denies the right to social and economic protection of the family in case of childbirth, which is guaranteed in Article 110 of the Satversme and specified in normative acts. Thus such a restriction shall be considered as the restriction of the fundamental rights, determined by the Satversme (*see: Judgment of November 4, 2005 by the Constitutional Court in the case No. 2005-09-01, Para 10*).

8.2. However, unlike the contested provision analysed in the Judgment of November 4, 2005 by the Constitutional Court in the case No. 2006-07-01, the Contested Provision of the case under review, like in the case No. 2006-07-01, does not prohibit a person who is employed and cares for a child, to receive a child care benefit as such.

Although "Article 110 of the Satversme bids to support the family, however, it does not create for the person subjective rights to receive a concrete State support in the certain form and amount of a benefit" (*see: Judgment of Novenber 2, 2006 by the Constitutional Court in the case No. 2006-07-01, Para 13.1*). The duty of the State, which follows from the first sentence of Article 110 of the Satversme, has not been

concretized to the extent that it per se would confer the rights to a persons caring for the second child to one year of age to receive a benefit, which would not be lesser that that for the first child up to one year of age.

8.3. Although the basic rights of a person are ensured and protected as a single system, it is impossible to ignore structural differences between civil and political rights and economic, social and cultural rights. In the sector of realization of social and cultural rights one cannot advance the same strict requirements for the legislator as those with regard to non-interference in realization of civil and political rights of a person (*see: Judgment of November 8, 2006 by the Constitutional Court in the case No. 2006-04-01, Para 16*).

8.4. The particular character of social rights establishes the limits of judicial control in this field. When implementing social rights, the legislator enjoys a broad freedom of action insofar as it is reasonably related to the economic situation of the State, however this freedom of action is not unlimited (*see: Judgment of November 2, 2006 by the Constitutional Court in the Case No. 2006-07-01, Paras 13 – 14*). Whereas "the Judicial Power has the duty of assessing whether the legislator has observed the limits of the above freedom of action" (*see: Judgment of December 11, 2006 by the Constitutional Court in the case No. 2006-10-03, Para 16*). This means that the Court must investigate, as far as possible, whether:

1) the legislator has taken measures to ensure a possibility for socially insured persons to implement their social rights;

2) these measures were fulfilled adequately, namely, whether persons are provided with a possibility to implement their social rights at, at least, the minimum extent;

3) all general legal principles are observed.

9. Child care benefits for both children were calculated for the Applicant based on the regulations that was elaborated by implementing the Concept on Increase of the State Social Allowance for Families after Child Birth approved on August 30, 2004 by the Cabinet of Ministers (*see: Order of August 30, 2004 by the Cabinet of Ministers*

No. 591 "On the Concept on Increase of the State Social Allowance for Families after Child Birth"). According to this Concept, the Law "Amendments to the Law On State Social Allowances" was passed on November 11, 2004, as well as the Regulation No. 1003. Later this Regulation was improved by, among other things, substituting the Regulation No. 1003 by the Regulation No. 644.

Separate norms of the above mentioned acts have already been assessed by the Constitutional Court, and the Constitutional Court has established that the Cabinet of Ministers, when forming this system, has taken measures fro ensuring of social rights that follow from Article 110 of the Satversme.

10. When assessing whether implementation of social rights is ensured at, at least, the minimum extent, it is necessary to take into consideration the fact that neither Article 110 of the Satversme, nor international liabilities of Latvia require that the State would fully ensure material welfare of each child only by means of social security system services (*see: Judgment of November 2, 2006 by the Constitutional Court in the case No. 2006-07-01, Para 13.5*).

Such absolute State care would come into conflict with the first sentence of Article 110 of the Satversme, since not only the State, but also parents have the duty to care for their children and meet the needs of the children (*see: Judgment of May 13, 2005 by the Constitutional Court in the case No. 2004-18-0106, Para 10 of the Concluding Part*).

By establishing particular principles of calculation of a child care benefit, by, among other things, relating the amount of the benefit with the average wage subject to social insurance contributions of employed persons, the Cabinet of Ministers has implemented particular objectives of legal policy within the frameworks of its freedom of action conferred thereto by Article 110 of the Satversme.

10.1. The amount to be paid for care for the second child, in the case of the Applicant, is impacted not only by general provisions of calculation of the child care benefit or the Contested Provision per se, but also the amount, from which mandatory social insurance payments were made into the State budget for persons who care for a

child up to one year of age. Namely, mandatory insurance contributions are made for a person who is on a leave for child care according to the order established in the normative acts – from LVL 50 (*see: Para 2 of this Judgment*). If the child care benefit is received by an employed person who is on a leave for child care, these contributions are the only that form the wage subject to insurance contributions during the months when the persons has been on a leave for child care.

The provisions that provide for the amount of these contributions are not contested before the Constitutional Court.

10.2. The opinion by the Cabinet of Ministers regarding the fact that, by introducing the provisions of Item 6 of the Regulation No. 644, the State has directly protected and supported those families, where children are born after small time intervals and where one of the parents care for children on an ongoing basis, is grounded. Hence Para 6 of the Regulation No. 644 is generally not directed towards reduction of the child care benefit, but, on contrary – towards creation of more favourable provisions for a particular persons.

The fact that the Applicant is excluded from the circle of these persons and the more favourable provisions can not be applied to her can not be *per se* regarded as a restriction of the basic rights insofar as it complies with all other norms of the Satversme and general legal principles.

11. Article 91 of the Satversme provides: "All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realized without discrimination of any kind."

The Participants of the Case agree to the conclusion made in the jurisprudence of the Constitutional Court that the legislator has included into Article 91 of the Satversme two mutually related principles: the principle of equality in the first sentence of the Article, and the principle of non-discrimination in the second sentence thereof (*see: Judgment of September 14, 2005 by the Constitutional Court in the case No. 2005-02-0106, Para 9*).

The Applicant indicates that the Contested Provision is in conflict with both, the principle of legal equality and the principle of non-discrimination.

11.1. The Participants of the Case agree to the conclusions established in the jurisprudence of the Constitutional Court regarding the essence of the principle of legal equality. Namely, the principle of equality forbids the State institutions to pass norms that without a reasonable ground permits different attitude to persons who find themselves in equal and comparable conditions. However equality does not mean levelling. It demands equal attitude to persons who really enjoy equal and comparable conditions. Hence the principle of equality allows and even demands different attitude to persons who enjoy different conditions, as well as allows different attitude to persons who enjoy equal and comparable conditions, if there is an objective and reasonable grounds (*see: Judgment of April 3, 2001 by the Constitutional Court in the case No. 2000-07-0409, Para 1 of the Concluding Part*). A different attitude has no objective and reasonable grounds if it has no legitimate objective, or if the means selected and the objectives advanced are not proportional (*see: Judgment of December 23, 2001 by the Constitutional Court in the case No. 2002-15-01, Para 3 of the Concluding Part*).

11.2. Participants of the Case share the opinion that all persons who, according to Item 2 of the first part of Section 7 of the Law on State Social Allowances, as employed persons, are conferred the rights to receive a child care benefit for caring for a child up to one year of age while the previous child has not reached two years of age, enjoy equal and comparable conditions.

In the case under review there is no dispute regarding the fact that a different attitude can be established. The Cabinet of Ministers justly indicates that employed persons, according to the Contested Provision, are divided into two groups:

1) persons who have, on an ongoing basis, cared for the previous child up to the birth of the next child (i.e. have continuously received a child care benefit);

2) persons who have cared for the previous child up to the birth of the next child with pauses (i.e. have received a child birth benefit with pauses).

The first group of persons are granted a child care benefit at a greater amount, if compared to the benefit for the previous child up to one year of age or to the benefit that could be recalculated. The benefit for the second group of persons, including the Applicant was recalculated.

When recalculating the benefit, such a situation is formed for the employee who has previously cared for a child up to one year of age and who gave birth to the next (the second) child during the period when the first child has not yet reached one year of age.

First of all, according to Para 3.1 of the Regulation No. 644, the average wage subject to insurance contributions is calculated for an employee from a person's wage subject to insurance contributions regarding the 12 calendar months period, terminating this period 3 calendar months before the month in which the child was born.

Consequently, the calculation period for the second child for determination of the amount of the benefit to be paid begins 15 calendar months before the birth of this child. The second child has been born during the time when the first child has not yet reached two years of age. Hence the calculation period in any case begins at the time when the first child has not yet reached one year of age.

Second, according to Para 3.1 of the Regulation No. 6644, the following formula is used for the calculation:

Vmēn = (A1 + A2 .. + A12) : 12, where:

Vmēn - the monthly average wage subject to insurance contributions;

A1, A2... - the amount of the wage subject to insurance contributions obtained in the relevant calendar month of the 12 calendar months period specified;

12 – the number of months;

If an employed person has cared for the first child when having a leave for child care until the child reached one year of age, the calculation period includes also those months, the average wage subject to insurance contributions of which is formed by mandatory insurance contributions that are made form the State budget. Namely, the variables A1, A2 … of the above mentioned formula is LVL 50 for these months, but they coincide with social contributions made by an employer for moths when a person

has been employed. The formula provides for summarizing the average wage subject to insurance contributions for the period of 12 months and to divide the sum by 12.

If a person has received the child care benefit for caring for the first child at the minimum amount and, when the child has reached one year of age, the person has been employed for a definite period of time, then, when recalculating the benefit for the second child up to one year of age, it may be higher than that for the first child. However, only 35 percent of women and 3.3 percent of men receive the child care benefit at the amount of LVL 50, but 9.8 percent of women and 2.6 percent of men – at the amount of LVL 56 (*see: case materials, Vol. 1, pp. 203*).

If a person received a child care benefit for the first child at a large amount, but then was employed for a definite period of time, when, when recalculating the benefit for the second child up to one year of age, it can turn out to be considerably lower if compared to the benefit for the first child up to one year of age. Such is the situation of the Applicant. The benefit at it maximum amount is received by 8.4 percent of women and 23.6 percent of men (*see: case materials, Vol. 1, pp. 203i).*

Hence a group of persons may receive a benefit for the second child up to one year of age at a lower amount than that for the first child up to one year of age. Consequently, the different attitude established in the Contested Provision manifests itself as possible reduction of the child care benefit for the above mentioned group of persons, if compared to the second mentioned group of persons.

12. There is no dispute in the case under review, whether the different attitude has been established by a legal norm established according to an adequate order, however there is a dispute regarding the fact whether the different attitude has bee established with a legitimate objective and whether it complies with the principle of proportionality.

12.1. The Applicant holds that the different attitude has no legitimate objective and therefore is in conflict with Article 91 of the Satversme.

The Cabinet of Ministers holds that the different attitude do has such an objective. The Cabinet of Ministers indicates in its reply that the provision of Para 6 of the Regulation No. 644 "has bees established in order to protect and support families who expect giving birth to a child during the first child care period – i.e. in order to protect those parents who give birth to children with a small time interval and who, due to ongoing care of the first child, had not have an opportunity to get involved in the labour market and hence improve their material situation" (*see: case materials, Vol. 1, pp. 38 – 39*).

By means of this statement, the Cabinet of Ministers justifies the objective of the norm in general, but it does not justify the different attitude towards the two above mentioned groups of people. Namely, it does not justify why the Cabinet of Ministers does not protect all parents who give birth to children with a small time interval and who have not had an opportunity to get fully involved in the labour market and improve their material situation due to the care for the previous child, but it protect those parents who have not had an opportunity to get fully involved in the labour market due to care for the previous child on an ongoing basis.

Hence, there is reason to conclude that in the frameworks of the particular provision the different attitude, which is determined by the criterion of a child care on an ongoing basis, has a legitimate objective.

12.2. However it must be taken into consideration that Para 6 of the Regulations No. 644 has been adopted from a similar provision of the previous regulation. The Regulation No. 1003 already provided:

"If the right to an allowance for the next child arises for a person who on an ongoing basis takes care of a child up to 2 years of age, for which the allowance has been granted in accordance with Sub-paragraph 3.1 of these Regulations, the allowance for child care for the next child under 1 year of age shall be granted in the greater amount which has been granted in accordance with Sub-paragraph 3.1 of these Regulations for taking care of the previous child under 1 year of age"

The Regulation No. 1003 was elaborated based on the principle that a child care benefit is not received by a person who is employed but does not have a leave for child

care, and in all cases possible a person caring for a child must be motivated not to work a remunerated hob but to devote his or her time to the child. This principle manifested itself through the provisions of the Regulation No. 1003.

The abovementioned statement based itself of the regulation established in the first part of Section 7 of the Law on State Social Allowances. When adjudicating the case on compliance of Item 1 of Section 7 of the Law on State Social Allowances with Article 110 of the Satversme, the Constitutional Court established that the State has wished to protect the rights of the child in order to ensure an adequate care for the child in his or her first year of age, which shall be taken by one of the parents. Thus the Contested Provision has a legitimate objective – protection of the rights of a child by ensuring an adequate care, taken by the parents, for a child aged up to one year of age (*see: Judgment of November 4, 2005 by the Constitutional Court in the case No. 2005-09-01, Para 13.3*).

Ensuring of the presence of parents is also necessary for a child aged from one to two years. Hence the Contested Provision has a legitimate objective.

12.3. In order to assess whether the different attitude is proportionate, first of all it is necessary to verify whether the Contested Provision is appropriate for reaching the legitimate objective.

The Contested Provision would reach the legitimate objective if it motivated an employed parent caring for a child up to one year of age to make a choice in favour of caring for a child from one to two years of age, knowing that the material support that becomes smaller when caring for a child up to two years of age would probably equalize by receiving a larger allowance for caring for the next child up to one year of age.

However, in many cases the norm can not reach this objective, because when the choice is made between caring for a child from one to two years of age or resuming work, the woman is not yet pregnant or the parents are not aware of it.

It is indicated in the opinion of the Applicant regarding the case materials that she was not able to fulfil the duty established by the Regulation No. 1003 on March 4,

2006 to make a deliberate choice between two future legal regulations regarding the birth of the next child, because:

1) already in 2005 she has agreed with the employer to resume working, whilst she was not aware of the birth of the next child;

2) when resuming work on March 4, 3006, she was not sure that she is pregnant (the doctor ascertained pregnancy on March 9, 2006).

Consequently, the Contested Provision could not reach the legitimate objective in respect of many persons, including the Applicant.

12.4. The Contested Provision reaches the legitimate objective in respect of a small circle of persons who, most probably, choose to care, on an ongoing basis, for a child from one to two years of age because of this regulation of the norm exactly. The benefit that the society gets from this choice is not grater than restriction of the interests of children from one to two years of age, care for whom the parents have discontinued in order to start working due to material or professional considerations, as well as because they have not known ore were not completely sure about the next pregnancy. Namely, the benefit for caring for a child op to one year of age in many cases is considerably lower.

By reducing a benefit for a person who has been employed during the time period when the first child has already reached one year of age but the second child was not yet born, to more precise – during the time when the presence of parents is less needed for the child, the interests of children are negatively influenced during the time when the second child has not yet reached one year of age and the presence of parents is particularly needed for him. A persons who receives a lower child care benefit probably has to work and hence can devote less time to his or her children.

Moreover, the objective of the conception of the benefit is not being reached, namely, to provide a person caring for a child up to one year of age with an allowance at the amount, which substitutes labour incomes as far as possible (insofar as the allowance does not exceed the maximum amount).

Hence the different attitude established by the Contested Provision does not comply with the principle of proportionality, but the Contested Provision itself – with the first sentence of Article 91 of the Satversme.

13. Having established the non-compliance of the Contested Provision with the Article of the Satversme, it shall be recognized as illegal and invalid. Hence there is no need to assess compliance of the Contested Provision with the second sentence of Article 91 of the Satversme.

14. When deciding on the date when the Contested Provision looses its force, the Constitutional Court shall take into account that the regulation assessed in the case No. 2005-09-01, which prohibited receiving an allowance for a person who is employed (who is employed and is not on a parental leave). In the above mentioned case, the contested norms were recognized as invalid as of March 1, 2006.

In the above mentioned Judgment, "when determining the moment of the contested provision loosing validity, the Court takes in to consideration the fact that the terms for receiving the childcare allowance are incorporated in the contested provision. Immediate abolition of them, without the existence of other normative regulation, may in separate cases create violation of the rights of a person. Therefore the legislator needs a certain period of time for improving the normative regulation of the childcare allowance both, in the interests of the child and the whole family" (*see: Judgment of November 4, 2005 by the Constitutional Court in the case No. 2005-09-01, Para 16*).

According to the second part of Article 32 of the Constitutional Court Law "a judgment of the Constitutional Court shall be binding on all State and municipal institutions, offices and officials, including the courts, also natural and judicial persons".

Persons were entitled to rely on the fact that the legislator, according to the conclusions made in the judgment of the Constitutional Court, shall improve the normative regulation in the time period offered by the Constitutional Court and after

March 1, 2006 the fact that a persons has a full-time job shall not cause breaks in receiving the child care benefit and shall not cause any negative consequences to a person when calculating the next allowance. Persons were entitled to adequately plan their professional activities, as well as pregnancy.

The Substantive Part

Under Articles 30 – 32 of the Constitutional Court Law, the Constitutional Court

holds:

The words "on an ongoing basis" of Para 6 of the Cabinet of Ministers Regulation No. 644 of August 8, 2006 "Regulations Regarding the Amount of the Allowance for Child Care and the Supplement to the Allowance for Child Care for Twins or More Children Born During One Delivery, the Review Procedures Thereof, Procedures for the Granting and Payment of the Allowance and Supplement" do not comply with Article 91 of the Satversme of the Republic of Latvia and are invalid as of March 1, 2006.

The Judgment is final and not subject to appeal.

The Judgment takes effect as of the day of publishing it.

The Presiding Judge Gunārs Kūtris