



# CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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## DISSENTING OPINION of the Constitutional Court Justice Aija Branta in the Case No. 2006-10-03

**“On Compliance of the Words “and not More than 392 Lats per Month” of Item 3.1. of the Cabinet of Ministers December 7, 2004 Regulations No. 1003 “On the Procedure under which the Allowance for Childcare and Additional Payment for Twins or Several Children Born in one Confinement shall be Granted and Paid” and the Words of Item 2.2 of the Cabinet of Ministers August 8, 2006 Regulations No. 644 “On the Amount of the Allowance for Childcare and Additional Payment for Twins or Several Children Born in one Confinement as well as the Procedure for its Revision, Granting and Payment” with Article 91 of the Republic of Latvia Satversme”.**

According to the Judgment of December 11, 2006 by the Constitutional Court in the case No. 2006-10-03 (hereinafter – the Judgment), the Contested Provision complies with Article 91 of the Satversme of the Republic of Latvia. Unfortunately, I cannot agree with the conclusion of my dear colleagues.

1. I entirely share the viewpoint that compliance of the Contested Provision shall be assessed in the context of Article 109 and Article 110 of the Satversme. It has been justly concluded in the Judgment that “in the sector of realization of economic, social and cultural rights one cannot advance the same strict requirements as those with regard to non–interference with realization of civil and political rights of a person” (*see: Para 14.2 of the Judgment*).

I neither agree with the viewpoint that Article 110 of the Satversme does not require that the State shall fully ensure material welfare of each child. It has been justly indicated in the Judgment that “not only the State but also parents shall take care and provide for the needs of the children. [...] However, the State shall be able to render a reasonable support to the family, especially in cases, when the parents cannot ensure all the necessary means for the child” (*see: Para 13.4 of the Judgment*).

However, the objective of the child care benefit and that of the mechanism of calculation thereof was not ensuring of material welfare of a child. When establishing support with the view to ensure material welfare of a child, it would not be possible to justify and substantiate the amount of the benefit. Hence, the amount of the child care benefit in this case, as well as the amount of the child birth benefit constituting LVL 296 determined for the neonate’s layette, should be equal for all children.

2. Article 109 of the Satversme provides that “everyone has the right to social security in old age, for work disability, for unemployment and in other cases as provided by law”.

It has been justly indicated in the Judgment that Article 109 of the Satversme does not provide for all cases when a person shall be entitled to receive social security, and it neither provides for the way and extent, at which the State is obligated to fulfil these rights. It is generally related to the condition that the rights guaranteed to the person by Article 109 of the Satversme pertain to the second generation human rights, namely, social, economic and cultural rights of a person.

Social rights is a specific field of human rights, which is formulated in international human rights documents and constitutions of other states in the form of general duties of the State (*see: Judgment of November 8, 2006 by the Constitutional Court in the case No. 2006-04-01, Para 16*). However, since these social rights are included into the constitution, then the State can not wave them. These rights have no more a declarative nature (*see: Judgment of March 13, 2001 by the Constitutional Court in the case No. 2000-08-0109, the Concluding Part*).

Item 2 of the first part of Section 3 of the Law on State Social Allowances provides that one of the allowances to be disbursed at regular intervals shall be a child care benefit. The amount and order of granting is regulated by the Law on State Social Allowances and regulations of the Cabinet of Ministers passed on the basis of the above Law (Regulation No. 644, before coming into force of this Regulation – the Regulation No. 1003). Consequently this benefit, as it has been established in Para 15 of the Judgment, is an element of social assistance system of the State.

**2.1.** Several legal policy objectives are indicated in both, the Conception on the Increase of the State Social Allowance for Families after Childbirth (*see full text of the Conception: <http://ppd.mk.gov.lv/ui/DocumentContent.asp?ID=3434>*) and in the Cabinet Regulation of December 7, 2004 No. 1003 “On the Procedure under which the Allowance for Childcare and Additional Payment for Twins or Several Children Born in One Confinement shall be Granted and Paid”:

First of all, to favour birth rate in the State in all social groups, as well as in those, the level of income of which is average and high, because introduction of such benefit ensures that a child birth shall not worsen financial situation not only of low income families, but also of the persons with average and high incomes during one year.

Second, to favour tax payment in the State.

Third, to favour involvement of unemployed persons into the labour market (*see: case materials, Vol. 2, pp. 167 – 168*).

**2.2.** It is necessary to agree to the fact that the benefit and the mechanism for calculating the amount thereof could favour involvement of unemployed persons into the labour market.

Tax payment in the State could be favoured also by several other measures. However, the mechanism for calculating the benefit effective at present, namely, limited or maximum amount of the benefit, ensures reaching of the above objective only in relation to the persons whose average insurance contributions wage does not exceed LVL 560 per month.

Both, the Ministry of Welfare and the Cabinet of Ministers have indicated that it is possible to reach the legitimate objective set forth in the Conception – increasing of the birth rate, by ensuring that the financial situation of a family will not worsen one year after the child birth (*see: case materials, Vol. 1, pp. 36, Vol. 1, pp. 168*). By merging the amount of the

benefit with the previous amount of incomes of a person, the State has declared that it wants to find an optimal solution – to provide a person caring for a child up to one year of age with the benefit, which would comply with his or her incomes before the child birth, if a person has been employed, as well as to provide support for the persons who have not been employed in a remunerated job before the child birth (*see: Judgment of November 4, 2005 by the Constitutional Court in the case No. 2005-09-01, Para 13*).

The objectives of such order of calculation of the child care benefit were emphasized by the Head of the Department of Youth Affairs of the Ministry for Children and Family Affairs, by indicated that “[...] we want to considerably increase the benefit so that one of the parent had a possibility to spend the first year of age with the child without being employed and simultaneously not aggravating the material situation of the family. The objective of the benefit is to almost substitute the incomes from employment” (*see: Kesnere R. Kad pabalsts atvieto darbā gūtos ienākumus // Latvijas Vēstnesis, March 10, 2005, No. 41*).

However, it can be concluded from the case materials that the benefit of some Applicants does not at all substitute the incomes from employment (*see, e.g.: case materials, Vol. 1, pp. 123*).

Moreover, it has been, among the rest, indicated in the reply by the Cabinet of Ministers to the Constitutional Court that after adoption of the Cabinet Regulations of August 8, 2006 No. 644 “Regulations on the Procedure under which the Amount and Revision of the Allowance for Childcare and Additional Payment for Twins or Several Children Born in one Confinement shall be Granted and Paid” (hereinafter – Regulations No. 644) persons are not forbidden to be employed (in a part-time or full-time job) and to receive the child care benefit at the amount of 50 percent. According to the viewpoint of the Cabinet of Ministers, this provision does not ensure a possibility to gain the necessary means of subsistence.

It is hard to understand why the previous income level is preserved during one year after the child birth for those persons, whose average insurance contributions wage was lower than LVL 560 per month, but simultaneously ensuring of the same income level one year after the child birth for those persons, whose average insurance contributions wage constitutes more than LVL 560 per month, is possible only if they do not

participate in child care and is not together with the child, namely, if they resume working. Moreover, in order to favour birth rate, it is particularly important to preserve the previous income level by simultaneously providing one of the parents with a possibility to stay with the child for those families, where a mother is the only supporter, where the neonate is not the only child (resources are needed for upbringing of other children), as well as for those mothers who can not be employed one year after the child birth due to health problems or work load or specific character.

Hence I hold that the opinion expressed by the Cabinet of Ministers does not at all comply with the objective of the Conception – to ensure a wholesome care for children, especially that of neonates, to favour involvement of parents in child care and babysitting and to provide at least one of the parents with the possibility to stay with the child on a regular basis. When establishing the minimum amount, the birth rate is favoured only in those families, the average insurance contribution wage does not exceed LVL 560 per month, and in the families where one of the parents was not employed in a remunerated job.

**2.3.** In the Judgment, the Constitutional Court has made a reference to the Department of Administrative Cases of the Senate of the Supreme Court that, when analysing the essence of social assistance, has concluded: “One of the fundamental principles of the social rights is that the social assistance is ensured only if the seeker of the support can not deal with the situation himself or herself and can not receive any help from the relatives. Social assistance shall provide a persons with minimum living conditions [...]” (*see: Supreme Court Administrative Cases Department of the Senate April 20, 2004 Judgment in case No. SKA-33, Item 11; Judgments and Decisions of the Republic of Latvia Supreme Court Administrative Cases Department of the Senate // Riga, TNA, 2005, pp. 288 – 289*).

It has been established in the Judgment that State social benefits, including the child care benefit, is an element of the State social assistance system but, unlike other State social benefits, the amount of the child care benefit depends on previous incomes of a person earned at work. In the frameworks established by the Cabinet of Ministers, the benefit is related to the average social insurance contributions wage per month. However this circumstance (the fact that the average insurance contributions wage per month affects the amount of the benefit) does not change the essence of the

benefit. This benefit becomes a state social insurance service only in the case if it would be paid from the special budget of social insurance.

By drawing conclusions from what has been expressed in the Judgment, it is necessary to admit that such approach would have a rational grounds only if the child care benefit did not depend on previous incomes of a person and would be paid at the same amount for everyone, as it has been established in relation to persons who have not been employed and earned incomes from remunerated job. In such case such care for a child would be grounded if it established the child care benefit within limits of the allowance budget and would preserve the possibility to revise and increase the amount of the benefit, as it has been provided in Para 8 of the Regulation No. 644.

As to the issue regarding the essence of the child care benefit, I would like to draw attention to what has been established in the Action Strategy Project 2007 – 2009 of the Ministry of Welfare, that “the mixed system of child care benefits (i.e. the child care benefit for employed persons caring for a child up to one year of age is calculated and granted according to the principles of social insurance, whereas the child care benefit for unemployed persons is a typical State social allowance of an invariable amount) does not comply with the essence of the State social allowances”

*http://www.mk.gov.lv/lv/mk/tap/?pid=30250594 &mode=mkk&date=2006-10-09*). Also in the letter to the Constitutional Court, the Ministry of Welfare has drawn attention to the dual essence of the benefit. However, the Cabinet of Ministers has indicated in the reply that that it has planned “to equalize the benefit with the previous incomes of an employed person, as well as to care for persons who have not been previously employed” (*see: case materials, Vol. 1, pp. 35*). Consequently, observing the objective of the State to improve the demographic situation and favour birth rate, as well as the fact that all persons who have the right to the benefit are persons caring for a child, it is possible to distinguish between two target audiences. First of all, persons who were not previously employed and who need State support (at least at the minimum amount). Second, persons who were employed and for whom it is planned to preserve their previous income level with a view to favour birth rate as far as possible.

Hence the child care benefit considerably differs from other social allowances and this benefit can not be assessed by taking into consideration its specific objective and dual nature. The objective “favouring of birth rate” is not typical for social allowances. This benefit is allocated to the person caring for a child and hence favours involvement of this person into caring for the child. Consequently, the objective of such child care benefit is not to ensure minimum means of subsistence to a person and the preconditions of reception thereof is not disability of a person to deal with the situation himself or herself.

To my mind, it is important to mention the fact that the Cabinet of Ministers is planning to determine the child care benefit as a social security service (*see: case materials, pp. 171 – 172*). One of the main tasks established in the Action Strategy Project 2007 – 2009 of the Ministry of Welfare in the field of State social allowances is as follows: to assess possibilities for revision of the financing order of the child care benefit. The Ministry for Children and Family Affairs has indicated in the letter to the Constitutional Court that one of the preconditions for Latvia to become more family-friendly and more suitable State is adjustment of the child care benefit system. Therefore the Ministry for Children and Family Affairs is planning to participate in assessment of possible solutions, including the initiative by the Ministry of Welfare for cancelling of the restriction or the minimum amount of the child care benefit (*see: case materials, Vol. 2, pp. 35*).

According to the Action Strategy Project 2007 – 2009 of the Ministry of Welfare, it is planned to create a new State social insurance benefit for parents in the frameworks of optimization of the child care benefit system. “It is planned to determine the parents’ benefit at the amount of the average insurance contributions wage, and its maximum amount shall depend only from the maximum amount of the object of State social insurance contributions. Whilst the child care benefit is planned to be preserved at the present amount for socially uninsured persons caring for a child up to one year of age – LVL 50, and to pay the benefit from the State basic budget” (*see full text of the Action Strategy Project 2007 – 2009 of the Ministry of Welfare:*

*<http://www.mk.gov.lv/lv/mk/tap/?pid=30250594&mode=mkk&date=2006-10-09>*).

Consequently the aforesaid testifies the efforts of the Cabinet of Ministers to eliminate the shortcomings of the benefit disbursement mechanism. However these efforts do not justify non-compliance of the Contested Provision effective at present and the unequal attitude enshrined therein.

3. It has been concluded in the Judgment that the specific character of social rights as second generation human rights “determine also the limits of the control of the judicial power” (*see: Para 16 of the Judgment*). Although the legislator, when implementing the social rights, enjoys a broad freedom of action insofar as it is related to the economic situation of the State, the judicial power still is obligated to assess whether the legislator has observed the limits of its freedom of action.

As it follows from Para 16 of the Concluding Part of the Judgment, the legislator has exceeded the limits of its freedom of action if:

first of all, has not taken measures for implementation of the rights established in the Satversme,

second, has not adequately implemented the social rights (at least at the minimum extent),

third, when implementing the social rights, it has violated the fundamental legal principles, including the fundamental principles of social security system.

One of the fundamental principles of the social security system is prohibition of a different attitude (*see: Item 1 of Section 2 of the Law “On Social Security”*). Moreover, observation of the fundamental principles of the social security, including prohibition of a different attitude must be ensured in relation to all social services – the State social insurance services and social allowances disregarding the fact whether the average insurance contributions wage per month influences of not the amount thereof. A social allowance must not become a social insurance service so that the general legal principles could be applied thereto, including the fundamental principles of social security system.

The Grand Chamber of the European Court of Human Rights, in the decision of July 6, 2005 regarding proceedings on the case where the applicant complained against inequality in the welfare system, has

emphasized that if the State chooses to form an allowance or pension system, then it shall be executed in accordance with Article 14 of the European Convention of the Protection of Human Rights and Basic Freedoms (*see: Stec and Others against the United Kingdom, Grand Chamber decision of 6 July 2005, Para 54, 55*).

4. It has been established in the Judgment that the Contested Provision establishes a different attitude towards persons who enjoy equal and comparable conditions. When assessing whether the different attitude has a legitimate objective, it has been concluded in the Judgment that “In the sector of realization of social rights the interests of the State basic budget shall not always be regarded as illegitimate aim” (*see: Para 21 of the Judgment*). It is impossible not to agree with this conclusion because in separate cases the interests of the basic budget can be regarded as a legitimate objective and it can justify several restrictions of the rights of persons.

The Ministry of Welfare has indicated in its letter to the Constitutional Court that the amount of the child care benefit depends on the financial feasibilities of the State basic budget. These feasibilities shall be assessed by taking into consideration expenses for other allowances (*see: case materials, Vol. 2, pp. 167*). If the amount of finances, needed for the payment of some allowance, would be noticeably increased, then the possibility might arise that the rights of other persons to social aid within the framework of the system of social aid would be violated.

It is indicated in both, the Judgment and additional explanations by the Cabinet of Ministers that, when choosing such mechanism for calculation of the benefit and determining the amount of the benefit, including the maximum amount of the benefit, the long term financial feasibilities of the State budget have been taken into consideration. However no justification for prognosis and calculations made can be found in the case materials – the letter of the Ministry of Welfare and the reply of the Cabinet of Ministers, nor in the submitted additional explanations.

No matter how we formulate the legitimate objective – as “ensuring of budget” or “protection of the rights of other people” (it is indicated in Para 21 of the Judgment that additionally to the child care benefit, eight more benefits to be disbursed on regular basis and two benefits to be

disbursed once are planned), no unequal attitude is permissible. The principle of legal equality enshrined in Article 91 of the Satversme is concretized in Section 2.<sup>1</sup> of the Law “On Social Security”, which explicitly provides that “when ensuring social services, any different attitude depending on person’s [...] property or family status or other conditions is prohibited”.

5. When indicating that the rights guaranteed to a person by Article 109 of the Satversme belong to the second generation human rights, namely, social, economic and cultural rights of the person, the Constitutional Court has not assess whether it is possible to reach the legitimate objective with other means that would restrict the rights and legal interests of a person at a lesser extent, as it has been done by the Constitutional Court when adjudicating previous cases (*see, e.g.: Judgment of March 18, 2002 by the Constitutional Court in the case No. 2001-12-01, Para 3.1*). Hence it is not being contested what kind of benefit calculation mechanism should be used in order to ensure equal attitude towards all receivers of the benefit and not to jeopardize the interests of the budget.

It has been indicated in the Judgment that “In the sector of social rights finding of a legally substantiated and more favourable for a person solution, which would allow receiving a bigger social allowance from the State, is almost always possible”. None of the Applicants have contested the broad freedom of action of the State when determining the amount and order of calculation of the benefit. In this case the Cabinet of Ministers have chosen an inadequate order of calculation of the benefit. The objective of the State is to favour birth rate in all families (disregarding the level on incomes), but the Contested Provision causes a different attitude towards persons with a different level on incomes without a reasonable and proportionate grounds.

What has been established in the Judgment, namely, that the maximum amount of the benefit ensures social assistance, because it exceeds by several times the minimum benefit, however it can not serve as the basis for the conclusion that the Contested Provision complies with Article 91 of the Satversme.

6. Unacceptable and incomprehensible seems the note by the Ministry of Welfare and the Cabinet of Ministers that the different attitude towards the receivers of the maximum amount of the benefit is commensurate with the benefit that is gained by the society. This statement is justified by the fact that the different treatment (namely, the child care benefit is disbursed at the amount which constitutes not less than 70 percent of the average insurance contributions wage of a persons) has been applied to 610 persons out of all 32 000 receivers of the child care benefit in 2005 (*see: case materials, Vol. 2, pp. 169*).

The Ministry of Welfare indicates that the objective of the Conception is being implemented – the established maximum amount creates feeling of safety, namely, a person may feel sure that the material situation of the family shall not become worse during caring of a child up to one year of age. However, it must be admitted that in this case the feeling of security is created only for those persons whose average insurance contributions wage does not exceed LVL 560 per month. As it can be concluded from the case materials, e.g. the persons A receives the child care benefit at the amount of 23 percent of the average insurance contributions wage (*see: case materials, Vol. 1, pp 2*). The child care benefit of the person B constitutes 61.9 percent of the average insurance contributions wage (*see: case materials, Vol. 2, pp. 67*). Whilst the person C receives the child care benefit at the amount of 49.3 percent of the average insurance contributions wage (*see: case materials, Vol. 2, pp. 126*).

7. The Supreme Court of Estonia, on January 21, 2004 in the case No. 3-4-1-7-03 has established that an extended power of decision of the legislator in the sphere of social fundamental rights does not mean that the legislator as the developer of economic and social policies may, using the argument of limited resources, freely decide to what extent and to whom the social rights established by Constitution shall be guaranteed. In making social policy choices the legislator is bound by the constitutional principles and the nature of fundamental rights. [*see: Judgment of the Constitutional Review Chamber of the Supreme Court, 21 January, 2004, Case No. 3-4-1-7-03 Review of the constitutionality of §22<sup>1</sup>(4) of Social Welfare Act, Para 16, see: <http://www.riigikohus.ee/?id=377>].*

Although the judgment deals with another field of social services established for low-income persons, it explicitly states the necessity to ensure an equal attitude towards all receives of the particular social service. The Supreme Court of Estonia has concluded in the judgment that a state, having created social security systems and provided for social assistance, must also ensure the observance of the fundamental right to equality, expressed in the Constitution. The connection of social fundamental rights with the general right to equality is closer than that with other fundamental rights. Unequal treatment may not be justified by administrative and technical problems. Excessive burden on the state budget is an argument that can be considered when deciding on the scope of social assistance, but the argument can not be used to justify unequal treatment [*see: Judgment of the Constitutional Review Chamber of the Supreme Court, 21 January, 2004, Case No. 3-4-1-7-03 Review of the constitutionality of §22<sup>1</sup>(4) of Social Welfare Act, Para 16, see: <http://www.riigikohus.ee/?id=377>]. .*

**Taking into consideration the aforesaid, I hold that the Words “and not More than 392 Lats per Month” of Item 3.1. of the Cabinet of Ministers December 7, 2004 Regulations No. 1003 “On the Procedure under which the Allowance for Childcare and Additional Payment for Twins or Several Children Born in one Confinement shall be Granted and Paid” and the Words of Item 2.2 of the Cabinet of Ministers August 8, 2006 Regulations No. 644 “On the Amount of the Allowance for Childcare and Additional Payment for Twins or Several Children Born in one Confinement as well as the Procedure for its Revision, Granting and Payment” with Article 91 of the Republic of Latvia Satversme” do not comply with Article 91 of the Satversme of the Republic of Latvia.**

Riga, December 18, 2006

Justice of the Constitutional Court, Aija Branta