



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

---

## JUDGMENT ON BEHALF OF THE REPUBLIC OF LATVIA in Riga, February 11, 2007 in case No. 2006-08-01

The Constitutional Court of the Republic of Latvia composed of the Chairperson of the court session Gunārs Kūtris, as well as the justices- Aija Branta, Romāns Apsītis, Juris Jelāgins and Uldis Ķinis,

having regard to the application of Ms.Jeļena Patrina, Ms.Alla Malohatko and Ms.Ilga Beča,

in accordance with Section 85 of the Satversme of the Republic of Latvia (Constitution) and Paragraph 1 of Section 16, Paragraph 11 of the first part of Section 17 and Section 28<sup>1</sup> of the Law On Constitutional Court,

on January 23, 2007 in the court session in writing examined the case

**“On the Compliance of the provision contained in Section 7<sup>1</sup>, part one of the law “On the State Social Allowances” – “if the referred to person is not employed (is not deemed to be an employee or self-employed person in accordance with the Law On State Social Insurance)” with Section 91 and 110 of the Satversme of the Republic of Latvia (Constitution)”.**

**The Constitutional Court**

**has established:**

1. On 31 October, 2002 the Saeima (Parliament) of the Republic of Latvia, hereinafter referred to as – the Saeima adopted the Law On The State Social Allowances (hereinafter– the Law On Allowances) that came into force on 1 January, 2003. The Law On Allowances established the types of the state social allowances and the persons who shall be entitled to receive these allowances.

Under the first part of Section 3 of the Law On Allowances, one of the allowances to be disbursed on a regular basis is the care of disabled child benefit and it is payable since 1 January, 2006.

The first part of Section 7<sup>1</sup> of the Law On Allowances provides, “The care of disabled child benefit shall be granted to a person who cares for a child for whom the State Medical Commission for Expert-Examinations of Health and Working Ability has specified invalidity and issued an opinion regarding the necessity for special care in relation to serious physical and functional disorders, if the referred to person is not employed (is not deemed to be an employee or self-employed person in accordance with the Law “On State Social Insurance”)”.

This Section also provides that the care of disabled child benefit shall not be granted if in the same time period the parents of the child in relation to the birth or care of such child have been granted maternity benefits or childcare benefits. The right to receive the care of disabled child benefits is created from the day that the disabled child has been issued the State Medical Commission for Expert-Examinations of Health and Working Ability’s opinion regarding the necessity for special care. The payment of the care of disabled child benefits shall be terminated when the time period ends for which the invalidity and the necessity for special care have been specified or when the child reaches the age of 18 years.

Under Section 16 of the Law On Allowances, the care of disabled child benefit shall be granted to one of the parents or a guardian, if the child’s parents have been deprived of the right to childcare or child guardianship, the child’s parents are dead or absent without information as to their whereabouts. or the child’s parents have not reached the age of social legal capacity specified in the Law “On Social Security”.

On December 13, 2005 the Cabinet of Ministers of the Republic of Latvia (hereinafter - the Cabinet of Ministers) passed the Regulation No. 940 “Regarding the Amount of Allowance for Disabled Child Care, the Procedures of Review Thereof and the Procedures for the Granting and Disbursement of the Allowance” (hereinafter– Regulations No.940).

Paragraph 2 thereof provides that the amount of care of disabled child benefit shall be 50 lats a month.

2. On 28 June, 2006 The Constitutional Court of the Republic of Latvia (hereinafter - the Constitutional Court) instituted a proceeding in regard to the application submitted by Jelena Patrina and Alla Malohatko, and on 24 August, 2006 – the proceeding in regard to the application submitted by Ilga Beča. In order to facilitate detailed and quick examination of both cases, they were combined under the sixth part of Section 22 of the Law On Constitutional Court.

**Submitter of the application** (hereinafter– applicant) requests to admit the provision of the first part of Section 7<sup>1</sup> of the law “On the State Social Allowances” – “if this person was not employed (is not deemed to be an employee or self-employed person in accordance with the Law “On State Social Insurance”)” (hereinafter referred to as – the contested provision) – as not being in compliance with Sections 91 and 110 of the Satversme (Constitution) of the Republic of Latvia (hereinafter – the Satversme) and invalid from the date of adoption thereof.

**2.1** There are two children in Ms.J.Patrina’s family. One child was pronounced invalid by the the State Medical Commission for Expert-Examinations of Health and Working Ability (hereinafter referred to as – SMCEEHW) and was issued an opinion regarding the necessity for special care. The Applicant J.Patrina indicates that she has to have a paid employment since she is the only family supporter. It is also necessary to maintain the labour relations in order not to lose competitiveness in the labour market. She is employed, therefore does not receive the care of disabled child benefit.

There are two children in Ms.A.Malohatko’s family. SMCEEHW pronounced invalid one of her children and issued an opinion regarding the necessity for special care. She receives the care of disabled child benefit as is unemployed. The Applicant A.Malohatko emphasizes that by thinking of the family welfare in long term she would have to work in order not to lose competitiveness in the labour market. In turn, having a part-time job and losing the allowance by this reason she after all will not earn enough to be able to hire another person and provide the proper care of the disabled child.

There are four children are in Ms.I.Beča’s family. SMCEEHW pronounced invalid two of her children and issued an opinion regarding the necessity for special care. The Applicant

I.Beča specifies that she is employed, therefore she does not receive the care of disabled child benefit, though this could be a considerable support for the family.

**2.2** Applicants hold that the contested provision is in conflict with Section 110 of the Satversme, as the Legislator has not provided for appropriate resources in order to ensure protection of the disabled children interests.

A care of disabled child benefit together with the family allowance and additional payment for a disabled child would not provide sufficient funds in order that a person being the only supporter, having refused from paid employment, could provide subsistence and care for a disabled child, herself, as well as other children in the family. The Legislator has not assessed the fact that by permitting to receive the care of disabled child benefit and to be employed this would not cause additional large expenses form the state budget, which might affect interests of the society.

Prohibition to be employed would cause burden on the society in future. Sometimes it is gainfully for parents, if only it is not necessary for them to maintain the professional skill, to be employed at a part-time job at least, as wage does not cover the costs required for the care of a disabled child. According to the Applicants', the Legislator, contrary to the approaches of employment of the European Union and Latvian employment policy, favours creation of circumstances where a parent who takes care of a disabled child and has not been employed for a long time, loses competitiveness in the labour market and often becomes an outcast, for integration of whom it shall be necessary to spend much resources of the society.

Parents who take care of disabled children run a risk to lose professional qualification, since one has to take care of such child during its entire life. Furthermore, the state terminates payment of the allowance when a child reaches the age of 18. Thus income gained by a child parent at work becomes the only source of incomes for his parent, which he/she probably will not be able to gain any more after not having worked for a long time and not having maintained his/her professional qualification.

The Applicants conclude that a Legislator when passing the contested provision has not taken into account the long-term interests of a family. Namely – what kind of consequences this provision shall cause regarding disabled child's and other children' rights, since the living standard of a child directly depends upon the living standard of his parents.

**2.3.**The Applicants hold that the contested provision also does not comply with Section 91 of the Satversme, since the limit determined therein has no legitimate objective and it does

not meet the principle of proportionality. Different attitude, which depending on a person's – a disabled child nurse's - employment is determined by the contested provision, has no reasonable basis.

Moreover, this limit does not meet the objective the care of disabled child benefit, i.e. provision of a special care for a disabled child and incomes to a person who is not employed and takes care of a disabled child – incomes in accordance with the full subsistence minimum per capita determined by the Central Statistical Bureau in 2004.

Having got acquainted with the materials of the case, the Applicants maintain their demand expressed in the constitutional application.

3. The authority that has passed the contested provision – **the Saeima** – replies in response letter that the provision is not in conflict with Sections 91 and 110 of the Satversme.

3.1. The Saeima holds that the contested provision meets the requirements of Section 91 of the Satversme, as in this particular case it does not separate several groups of persons and does not provide for different attitude towards any of them. The response letter contains the viewpoint that the first part of Section 7<sup>1</sup> of the Law On Allowances is applicable only to a single group of persons, i.e. to the persons who take care of disabled children and are unemployed. This group has not been placed in another situation compared to any other group, for example, the persons who might work and receive the care of disabled child benefit. Therefore the contested provision is not in conflict with the principle of legal equality provided for in Section 91 of the Satversme.

3.2. The Saeima considers that the contested provision also meets the requirements of Section 110 of the Satversme, as this Section itself does not confer a person the subjective right to demand the particular type and amount of allowance from the State.

The response letter specifies that Section 7<sup>1</sup> of the Law On Allowances has been introduced in order to provide additional financial support to the families with disabled children, where one of the parents is unemployed and to ensure continuous care and supervision of a disabled child at home. This provision is necessary in order to support the parents who participate directly in care of disabled children and to allow at least one of the parents to be together with a disabled child who needs a special care because of serious physical and functional disorders. The Saeima emphasizes that these children should be provided with the continuous presence of at least one parent or qualified nurse for taking care after the patient. Thus, the contested provision has a legitimate purpose – to protect a child's

rights providing the full value care after a disabled child with serious physical and functional disorders taken by one of the parents or any other person.

The Saeima considers that the contested provision meets the principle of equality since the amount of care of disabled child benefit may not be the decisive criterion, whereby to judge whether the contested provision complies or does not comply with Section 110 of the Satversme.

When assessing the compliance of the contested provision with the principle of equality, it is necessary to take into account the fact that the care of disabled child benefit is not the only allowance provided for the families bringing up disabled children. Granting of other allowances does not depend on the fact of employment of parents of a disabled child. In turn, care of the disabled child benefit, in its essence and in accordance to its objective, is provided for a rather narrow and specific target group.

The Saeima expresses the opinion that the arguments and conclusions specified in the concluding part in the judgement in the case No.2005-09-01 of November 4, 2005 by the Constitutional Court may not be applied to this particular case. First, another kind of allowance is assessed under the case in adjudication, granting provisions of which are different. Secondly, disability of a child, especially in the case of the first disability group requires consistent presence and care. Thirdly, Section 7<sup>1</sup> of the Law On Allowances does not require that only a child's parent can take care of a disabled child and receive the allowance. At the same time the Saeima points out that the group of persons who are conferred the right to receive the care of disabled child benefit shall be defined under Section 16 of the Law On Allowances.

The Saeima draws attention to the fact that the support measures provided for the disabled are still undergoing improvements. This is also proved by the guidelines to the policy of the Decree No.544 of the Cabinet of Ministers of 10 August 2005 on minimizing disability and its consequences for 2005-2015. It provides for developing of the state support programme for the disabled (including disabled children) with serious physical and functional disorders. For example, to fund, from the state budget, assistant's services for the blind and for the persons who use wheelchairs.

Having admitted that it is possible to improve the contested provision choosing other mechanisms of supporting the families bringing up disabled children and that in particular

situations this provision may not be applicable flexibly enough; however the Saeima considers that in general it complies with Sections 91 and 110 of the Satversme.

**4. The Cabinet of Ministers** indicates that the care of disabled child benefit provided for in Section 7<sup>1</sup> of the Law On Allowances has been introduced in accordance with the objective defined by the Government in Section 4 of the chapter Welfare” of the Declaration of December 1, 2004 – to introduce the care of disabled child benefit and the state social insurance for a person who has no possibilities to work while bringing up a disabled child.

To achieve the above aim, in 2005 a number of laws were subject to amendments. First, the Law On Allowances. Secondly, the law “On the State Social Insurance”. In accordance to the above amendments unemployed persons who take care of disabled children are subject to the obligatory social insurance from January 1, 2006. It means that the social insurance payments for the specified persons shall be made from the state master budget for provision of the state pension insurance, and the period of disabled child care shall be taken into account when calculating old age pension.

The Cabinet of Ministers admits that the contested provision has a complex legitimate objective. First, to provide additional financial support introducing a new state social allowance for families with disabled children, wherein one of the parents is unemployed and provide a continuous care and supervision of a disabled child at home. Secondly, to maintain direct involvement of parents in disabled child care and allow at least one of the parents to be permanently with the disabled child, who needs a special care because of serious physical and functional disorders.

**5. The Ministry of Welfare** considers that the issue regarding disabled child care and supervision using the services of a third person including qualified nurse of a patient, which would allow the disabled child’ parents to coordinate their family life with work, shall be settled within the framework of the social service system.

The Ministry indicates that the Law On Social Services and Social Assistance provides for local authorities’ commitment to support families with disabled children so that the children because of their disability were not placed for a long time at social care institutions. Local authorities should provide these families with the social care services, which are closer to the family environment (care houses, services at the day care centre).

The Ministry has prepared the guidelines to the policy on minimizing disability and its consequences for 2005-2015, where it is provided to determine the state support programme

for the disabled (*inter alia*, for children) with serious physical and functional disorders in order to provide them assistant's services. The Ministry holds that by implementing this measure for the persons who take care of disabled children, there will be more opportunities to get involved in the labour market and work full time.

**6. The State Medical Commission for Expert-Examinations of Health and Working Ability** informs that under Section 4.4 of the Regulation No. 940 in the first half of the year 2006 it made expert's examination of children till the age of 18 on their disablement and issued 854 opinions to children who needed special care.

**7. The Latvian National Human Rights Office** (at present – the law enforcement agency) holds that the contested provision disproportionately restricts disabled children' right of special protection provide for in Section 110 of the Satversme. The Office specifies that by envisaging, by law the care of disabled child benefit, it was declared necessary to support in particular the families with disabled children who suffer from serious physical and functional disorders. This allowance is granted in the cases when disabled children need a continuous care or supervision. At present these care personnel' services are not available in Latvia for families with disabled children who need special care, which could provide a long-term care after a child (eight or even ten hours per day), and the child' parents or could work. Currently there are not enough care centres so that families with a disabled child in any region of Latvia could use these services on a regular basis. Moreover, not in all cases families with a disabled child could use the day centers because of a child's state of health.

By denying the right of receiving the care of disabled child benefit, persons are not provided with alternative disabled child care services. Financial condition of each family and the ability thereof to provide the full value care by its own financial resources for a disabled child also is not taken into account. This does not favour the fact that disabled children who need special care were not separated from families and placed into care institutions for a long time.

Because of restriction provided for in the contested provision a disabled child' parent does lose his/her competitiveness in the labour market. The provision does not permit employment even during some hours per day, which would allows one of the parents to take care of a child a part of the day and to work the other part of the day. Hence the person who takes care of a disabled child becomes isolated from the society.

The Office considers that the contested provision does not comply with Section 91 of the Satversme, since all families with disabled children who need social care appear to be in equal situation. Irrespective of the number of family members or family incomes, these families are obliged to take care of a disabled child, moreover it is required to provide continuous care and supervision of a disabled child in these families. The contested provision provides for different attitude since it is possible to receive the allowance only if one of the parents or a guardian takes care of the child. Furthermore, only in case if this person is not employed. If a child's parents or a guardian provides the child's care with the help of other persons and are still employed, the allowance is no more granted to them.

**8. The Latvian Centre of Human Rights indincares** that the contested provision can be admitted as being in compliance with Section 91 of the Satversme, because the fact that the parents who take care after a disabled child and are unemployed, are granted the allowance, *per se* is not discriminating. In essence it is a legitimate action of the State – by creating the social security system, to determine that parents who take care after a disabled child and can not be employed because of that reason, receive certain incomes.

However, in the present-day circumstances the contested provision shall not be admitted as being in compliance with Section 110 of the Satversme. Taking into account the amount of allowance, the value of full minimum subsistence basket of goods and services per month per capita and the minimum wage, it is possible to conclude that the care of disabled child benefit does not ensure even a half of a person's subsistence minimum. Consequently, for a family with a disabled child who is cared of by only one parent, the subsistence minimum could be ensured only in the case, if the parent is an employed person receiving sufficiently high wage in order to meet the needs of himself/herself, those of the carer of a disabled child and other children, if any.

It is also required to take into account the fact that disabled children have additional needs, e.g. medical remedies, rehabilitation lessons, which are only partially paid by the State. Moreover, no system is created in Latvia so that a family with a disabled child were provided with services of a social worker. Hence it follows that it is necessary to provide additional guarantees appropriate to a child's needs for a family with a disabled child with serious physical and functional disorders.

**9. The State Social Insurance Agency** (hereinafter – the Agency) informs that within a period from May till August 2006 there were 616 care of disabled children benefits allowances granted and LVL 226 750 were used for making payments thereof.

### **The Constitutional Court holds that:**

**10.** Section 110 of the Satversme defines that “the State shall protect and support marriage – a union between a man and a woman, family, the rights of parents and rights of the child. The State shall provide special support to disabled children, the children left without parental care or who have suffered from violence”.

In order not to cause the subjective right of a person to receive a particular state support in the form of allowance of a particular form or amount by what has been provided for in Section 110 of the Satversme, this imposes an obligation on the State to form a proper system (normative, institutional, etc.) and to take care after children, family and marriage and observe other provisions and legal principles of the Satversme, to take measures, which are effective enough and meet the needs of an addressee, first of all, those of a child (see Paragraph 13.1 of the judgement of the Constitutional Court of November 2, 2006 in the case No. 2006-07-01 and judgement of the Constitutional Court of December 11, 2006 in the case No. 2006-10-03).

Interpreting the basic rights provided for in Section 110 of the Satversme, we should simultaneously take into account the provisions contained in international civil rights documents and practical application thereof. The Constitutional Court has earlier already indicated that “it follows from Section 110 of the Satversme and the Latvian international commitments *inter alia* that the State has a positive obligation to form and maintain the system aimed at the social and economic protection of a family” (Paragraph 8.2 of the judgement of the Constitutional Court of 4 November 2005 in the case No. 2005-09-01). The obligation to provide protection and aid as wide as possible the widest to a family follows from the International Covenant on Civil and Political Rights and from the International Covenant on Economic, Social and Cultural Rights, as well as also from the European Social Charter.

In turn, the rights of disabled children for special care and aid are guaranteed by the UNO Convention of 1989 on the Rights of the Child. Under Article 23, Paragraph 1 of the Convention, States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community..

Paragraph 2 of the same Article provides that the States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to

available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. In turn, Paragraph 3 provides that Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

It follows from the provisions of the Convention that the State is obliged to favour the economic, legal and social protection of a disabled child. However, the Convention does not provide neither for any particular support structure, nor the scope thereof.

**Hence it follows from Section 110 of the Satversme that the State shall be liable to form and maintain the system providing a special social and economic protection for disabled children.**

**11.** To provide the economic protection of a disabled child, different kinds of allowances have been determined. Under the first part of Section 3 of the Law On Allowances, the State allowances to be disbursed at regular intervals shall be the following: State family allowance, care of disabled child benefit and the allowance for compensating transport expenses for disabled who have difficulties in movement. The specified allowances are funded from the State master budget.

The objective of the State family allowance is providing a regular support to the families incurring additional costs due to bringing up a child. The State family allowance is granted in accordance with Sections 6 and 16 of the Law On Allowances. Under the Regulation No. 562 of the Cabinet of Ministers of July 26, 2005 "Regulations regarding the Amount of State Family Benefit and Supplement to State Family Benefit for Disabled Child, the Procedures for Review Thereof and the Procedures for Granting and Disbursement of Benefit and Supplement" (hereinafter – Regulation No.562), the amount of allowance for the first child constitutes LVL 6.

Additional payment of the State family allowance for a disabled child is granted in accordance with the third part of Section 6 of the Law On Allowances. It provides that “If the State family allowance has been granted for a disabled child who has not reached 18 years of age, a supplement shall be disbursed with the allowance in the amount specified by the Cabinet. The right to this supplement for a person raising a disabled child shall remain regardless of the payment of the State family allowance until the disabled child has reached 18 years of age”. Under the Regulation No.562, the amount of additional payment constitutes LVL 50 per month.

The allowance for compensating transport expenses of disabled children who have difficulties in movement shall be granted in accordance with Section 12 of the Law On Allowances. This allowance is aimed at providing support in purchasing a specially adapted car. Under the Regulation No.563 of the Cabinet of Ministers dated 26 July 2005 “Regulations regarding the Amount of Allowance for the Compensation of Transport Expenses for Disabled Persons who have Difficulties in Movement, the Procedures for the Review thereof and the Procedures for the Granting and Disbursement of Allowance”, the amount of allowance constitutes LVL 56 for each period of full six months.

The care of disabled child benefit is granted in accordance with Sections 7<sup>1</sup> and 16 of the Law On Allowances and it is payable since January 1, 2006.

The care of disabled child benefit shall be granted to one of parents of a disabled child (with serious physical and functional disorders) based on the opinion issued by the State Medical Commission for Expert-Examinations of Health and Working Ability , if it is provides that the disabled child needs special care and at the same time one of the parents is not granted the maternity allowance or the child care benefit due to this child’ birth or the child’ care. Under Regulation No. 940, the amount of allowance is LVL 50 per month. A person who takes care after a disabled child with such disorders shall receive additional payment to the State family allowance for the disabled child and the care of disabled child benefit. In the result, the amount of the State support granted to a person in the form of allowance reaches LVL 100 per month, which on average meets the value of the full minimum subsistence basket of goods and services per capita per month determined in 2004 by the Central Statistical Bureau.

Having assessed the situation prior to adopting amendments to the Law On Allowances, it was concluded that the “present-day amount of the state support provided in the form of the State social allowance is not sufficient for families with disabled children, who need a special

care”. (See annotation of “Amendments to the State Social Law”. Page 94 of the materials of the case).

It is specified in annotation of the draft law that the care of disabled child benefit is determined so that “the persons who take care after disabled children with the moderately pronounced disorders of vital functions and the persons who take care after disabled children with pronounced disorders of vital functions, which determines the necessity in a special care after a disabled child (e.g. permanent care or supervision of a disabled child), would not enjoy unequal socio-economic circumstances”. It is also held in the annotation that the “parents of with pronounced disorders of vital functions have to take care after disabled children refusing from paid work or using paid services of a qualified cared of patients, which causes great additional costs for them”. (See page 94 of the materials of the case).

**By fulfilling the obligations established in Section 110 of the Satversme to provide special service to disabled children, the Legislator specified this Section by incorporating the mechanism of right protection in laws.**

**12.** Provisions for receiving the care of disabled child benefit were simultaneously included in Section 7<sup>1</sup> of the Law On Allowances by providing for the opportunity to receive the allowance. The allowance is granted to an unemployed person (is not deemed to be an employee or self-employed person in accordance with the Law “On State Social Insurance”).

Moreover, Section 16 of the Law On Allowances clearly specifies the group persons covered by the law, who have the right to receive the care of disabled child benefit. Namely, the allowance is granted to one of parents of the child. In turn, the guardian allowance is granted, if a child’s parents are deprived of the rights of the child’s care or the child’s protection, the child’s parents have died or are missing or also the child’s parents have not attained the age of social capacity determined by the law “On Social Security”.

In the case of a person’s employment, parents are it is fully deprived of the right to receive the care of disabled child benefit, thereby depriving of right to the special State allowance for disabled children with serious physical and functional disorders.

**The restriction established in the contested provision shall be recognized as restriction of the basic rights provided for in the Satversme, since a person has the right to receive the care of disabled child benefit by a person who takes care after a child with serious physical and functional disorders, only in the case, if the person is unemployed.**

**13.** The basic rights may be restricted only in the cases established in the Satversme, if it is requested by protection of important public interests and if the principle of proportionality is observed. Hence, the Court has to assess whether the restriction established in the contested provision, first, is provided by law. Secondly, whether the restriction is established for the sake of a legitimate objective. Thirdly, if the Legislator's chosen measures are proportionate and applied for achieving the legitimate goal.

**14.** The contested provision, which contains the basic rights restriction established in Section 110 of the Satversme, is incorporated in the Law On Allowances by the law "Amendments to the The State Social Allowances Law" of 27 October 2005, which is passed and announced in the order provided by the Satversme rules of order of the Saeima.

Hence **the basic right restriction established in the contested provision is provided by law.**

**15.** In the basis of each basic rights restriction there should be circumstances and arguments why it is necessary, namely, the restriction is defined due to the legitimate objective, i.e. for protection of important interests.

In response letter the Saeima indicated that the legitimate objective of the contested provision is protection of the children's rights, providing disabled children with serious functional disorders the full value care, taken by one of the parents or another person. The contested provision is necessary for supporting parents in direct involvement related to the care after a disabled child and enabling at least one of the parents to be permanently with a disabled child, who needs a special care due to serious physical and functional disorders. When taking care after these children in a family environment, at least continuous presence of one of the parent or qualified nurse after patients should be provided to them. (See page 38 of the materials of the case).

The restriction is adopted with the aim to meet a child's interests as well as possible. The Constitutional Court has also held that protection of the child's rights may be admitted as the legitimate objective of the basic right restriction. (See Paragraph 11 of the judgement of the Constitutional Court of 4 November 2005 in the case No. 2005-09-01).

Hence **the contested provision has a legitimate objective – to provide the full value care after a disabled child with serious physical and functional disorders in a family environment.**

**16.** In order to assess whether the contested provision achieves this aim, it is necessary to investigate whether the Legislator's chosen means are proportionate and suitable for achieving thereof.

**16.1.** The Constitutional Court has indicated several times that in accordance with the provisions of the international law the social and economic protection system (types and amounts of allowances) and maintenance thereof is under the jurisdiction of the State and depends on the economic situation and available resources of the State. Moreover, the State has a freedom of action when deciding on the issues of the social rights (See the Concluding part, Paragraph 1 of the judgement of the Constitutional Court of February 25, 2002 in the case No. 2001-11-0106, Paragraph 14.1 of the judgement of the Constitutional Court of November 4, 2005 in the case No. 2005-09-01 and Paragraph 9 of the judgement of the Constitutional Court of December 22, 2005 in the case No. 2005-19-01).

Implementation of the social rights depends on the state financial facilities and common economic situation. Along development of economy, the State has the opportunity to grant higher allowance to separate inhabitants and hence the obligation to increase the financial and other types of investments into a person's social, economic and cultural rights implementation system. Simultaneously it is necessary to take into account that the State can not fully undertake care after a person's social, economic and cultural needs (See Paragraph 13.3 of the judgement of the Constitutional Court of December 11, 2006 in the case No. 2006-10-03).

Social rights in the international human right documents and constitutions of other states generally are formulated as the general state commitments (See the Concluding part, Paragraph 4 of the judgement of the Constitutional Court of June 26, 2001 in the case No. 2001-02-0106). However, this conclusion does not mean that the person has no right to demand, namely the right to demand that the State grants the necessary social security. If any social rights are incorporated in the constitution, then the State may not waive them. These rights has not only a declarative nature (See the Concluding part of the judgement of the Constitutional Court of March 12, 2001 in the case No. 2000-08-0109 and Paragraph 14.3 of the Concluding part of judgement of the Constitutional Court of December 11, 2006 in the case No. 2006-10-01).

Furthermore, the states irrespective of the level of its development are liable to take measures in order to use all necessary resources to provide the social rights at least at the minimum level (See Paragraph 8 of the judgement of the Constitutional Court of January 14, 2004 in the case No. 2003-19-0103). By implementing the rights and social security

established in the *Satversme*, the State is liable not only to determine the regulatory control of these rights, but also to form the efficient mechanism of implementation of the law. State obligation is not only to declare the rights but also “to put them into practice” and supervise application thereof (See Paragraph 9.3 of the judgement of the Constitutional Court of January 14, 2004 in the case No. 2003-19-0103).

The European Court of Human Rights has indicated that when implementing the social and economic policy, the Legislator has wide powers. Similarly, one has also take into account the decision made by the Legislator since it meets the interests of the society, unless this decision is not grounded (See *The James and Others v. the United Kingdom*, judgement of 21 February 1986, Series A no.98, para. 46).

Guarantee on provision of the social rights at least at the minimum level, which may appear in the form of allowance, is especially important for disabled children with serious physical and functional disorders. Therefore, there is the opportunity for these children to stay in family environment and get care.

**16.2.** The United Nations Committee on the Rights of the Child, when discussing the rights of disabled children, indicated that it is important to support the families with a disabled child. Furthermore, Section 23 of the Convention On The Rights of the Child is aimed at guaranteeing that disabled children were provided with all the rights determined in this Convention. [See: Summary of the general discussion “The Rights of Children With Disabilities” of the United Nations Committee on the Rights of the Child (CRC/C69) paragraphs 319, 331 and 333].

Both, the first part of Section 3 of the Convention On The Rights of the Child and the first part of Section 6 of the Child Rights Protection Law determine the priority of interests of the child. This principle provides for that in all actions and decisions that affect children, attention should first paid to meeting their needs as well as possible. This is one of the fundamental principles of the Convention, which defines the interpretation of all rights and freedoms of the child.

The Constitutional Court explained that the priority of rights and interests of the child means that not only the Court and other institutions should make decisions by taking into account the rights and interests of the children but also regulatory enactments should be passed or amended by the Legislator in order to protect the rights and interests of children as

well possible. (See Paragraph 11 of the judgement of the Constitutional Court of 11 October 2004 in the case No. 2004-02-0106).

Thus, it is necessary to assess whether the restriction contained in the contested provision is the best means for achieving the legitimate objective – ensuring interests of a child. First, it should be assessed whether protection of child's interests is ensured as well as possible. Secondly, it should be assessed whether the measures chosen by the State for achieving the legitimate objective in general affect the welfare of the families with a disabled child with serious physical and functional disorders.

**16.3.** When establishing the social service system, the State has a freedom of action and the State may determine different restrictions. However, in the case of application the contested provision, the right of receiving the care of disabled child benefit is fully prohibited and the State special allowance for disabled children with serious physical and functional disorders is not provided even at the minimum amount.

The Seima admits that children who need a special care, namely, continuous care and supervision, have been mainly disabled already from their childhood and their disablement is usually serious, i.e. falling within the first disability group. The basic diagnosis of these children is generally related to serious physical and functional disorders, which often excludes the possibilities to move independently and satisfy their basic needs. These diseases are, for example, inherited pathology of bone and joint system, nervous system diseases, mental disorders. Taking care of such disabled children in the family environment, it is required to provide them at least continuous presence of one parent or qualified patients' carer. (See page 38 of the materials of the case). The Ministry of Welfare also admits that these children need a special care (See page 80 of the materials of the case). Furthermore, if a disabled child has serious physical and functional disorders, the presence of qualified patients' care nurse may be also necessary in the case if one of the parents at the same time takes care of the child. In addition, care after the child also comprises purchasing of the necessary medical products and providing of rehabilitation, which requires considerable financial resources.

In the case of application the restriction contained in the contested provision, the total amount of allowance becomes equal to that intended for disabled children with the moderately pronounced disorders of vital functions and disabled children with serious physical and functional disorders. Therefore, the objective to provide an additional allowance to the disabled children with serious physical and functional disorders is not attained and different attitude is not provided to separate groups of persons.

Any decision relating to children should be made in the form, which as far as possible meets child's interests and ensures their rights. Interests and rights are affected not only when a decision must be made in direct relation to the child but also when the decision may only be applied to the child or may indirectly affect the child. Recognition of any other priority without a serious reason and justification is inadmissible (See Paragraph 11 of the judgement of the Constitutional Court of December 22, 2005 in the case No. 2005-19-01). The Seima has not provided arguments, which would excuse the non-observance of interests of the disabled children with serious physical and functional disorders.

**16.4.** In addition, the restriction relative to employment established in the contested provision may considerably affect common welfare in the family with a disabled child with serious physical and functional disorders.

The welfare of many families is affected by the problems related to a long-term disease or disability of a child or parents. People with mental and physical disorders and their family members enjoy the unwritten right to be respected. That is why they and their families should be involved in the appropriate social integration measures (See conception "The State Family Policy" [http://www.bm.gov.lv/lat/gimenes\\_vasts\\_politika](http://www.bm.gov.lv/lat/gimenes_vasts_politika)).

When introducing the care of disabled child benefit one of the objectives was to increase the purchasing capacity of families with disabled children, hence effecting positively on the economic processes in the State, to improve the living standard of families with disabled children, as well as to provide the full value development of disabled children and safer care at home (See annotation of "The Amendments to the State Social Law". Page 94 of the materials of the case).

Taking into account the fact that a disabled child's care lasts for many years, the restriction contained in the contested provision may considerably affect competitiveness of the child's parents in the labour market. Sometimes the allowance receiver's part-time employment may serve as a significant opportunity not to lose the professional qualification. It follows that the State while trying to provide existence of a disabled child in the family environment, may affect the interests of the disabled child itself and his care, as well as other family members, *inter alia*, those of other children.

A person who takes care after a disabled child with serious physical and functional disorders for many years and is unemployed can not only lose its competitiveness but also to receive in future potentially insignificant old age pension. "Amendments to the State Social

Security Law” provides that from January 1, 2006 the persons who receive the care of disabled child benefit, are subject to the compulsory social insurance. Namely – the social insurance payments are made from the State master budget for the particular person for insurance of the State pension and as soon as this person reaches the pension age, the period of care after the disabled child is taken into account when calculating the old age pension. Under Section 3 of Regulation No. 230 of the Cabinet of ministers of June 5, 2001 “Regulations of the State Social Insurance Compulsory Payments from the State Master Budget and from the State Social Insurance Special Budgets”, for the persons receiving the disabled child care benefit the obligatory payments made from the state master budget to insure pension constitute 20% from LVL 50. If a person who takes care of a disabled child and receives the care of disabled child benefit, had a possibility to work, this would allow not only gaining additional incomes for the family and not losing the professional qualification but also enable to receive higher old age pension in future.

Due to the data of the social security common information system for 2004 and 2005 about the European Union Member States and the States of European Economic Zone, the Saeima and the Ministry of Welfare submitted a report on solutions of the above problems in other states. For example, In France the allowance is granted for presence of a parent and it depends on the degree of reduction in her/his professional activity. If a person is unemployed, the amount of allowance constitutes EUR 856 per month; if a person’s employment is partially limited – EUR 468 or 260 per month. In Slovenia, remuneration for loss of income is provided, and the amount thereof complies with the minimum wage determined in the State – EUR 512. In Island, a person who provides care for a disabled child is granted the home care allowance, which constitutes up to EUR 1226 per month and, in Italy, various privileges are provided for families with disabled children (*See pages 40 and 81-82 of the materials of the case*).

The situation in Latvia is different. In order to receive the care of disabled child benefit, a person has to refuse from wage labour, which often considerably affects the material welfare of a family. Though the amount of care of disabled child benefit is not disputed in this case, it has to be noted that when the draft law was under elaborate, the objective was to equate the total amount of allowance to the average value of the minimum subsistence basket of goods and services per capita per month, i.e. LVL 98,78 determined by the State Statistical Bureau in 2004 (See annotation to the “Amendments to the State Social Law”, Page 95 of the materials of the case). In turn, on January 1, 2006, when it was started to disburse care of disabled child benefits, the average value of the minimum subsistence basket of goods and

services per capita on per month was already LVL 111,97 (See page 44 of the materials of the case). Hence one can conclude that the total amount of allowance payable to a person is insufficient in order to provide maintenance of a disabled child and the person who takes care after this child and other children in the family, if a person who takes care after the disabled child is the only supporter of the family.

**Hence the measures selected the State are not suitable for achieving the legitimate objective and should be admitted as being in conflict with Section 110 of the Satversme.**

17. When assessing the number of potential care of disabled child benefit receivers, the number of disabled children with serious physical and functional disorders who need a special care, was taken as the basic criterion. It can not be concluded from the financial calculation of the draft law annotation that the data on the number of working parents of these children were analyzed. These calculations are generally based on presumptions.

As specified in the draft law annotation: “When assessing the number of receivers of the care of disabled child benefits, the presumption that the total number of potential receivers of the care of disabled child benefits is 15% of the disabled children, for whom an additional payment to the state family allowance was granted, was used”. (See page 98 of the materials of the case).

The funds required for care of disabled child benefits are calculated assuming that the allowance will be paid to all children who need a special care. It is indicated in the annotation that “the assumed number of receivers of the care of disabled child benefits (on average per month) is: in 2005 – 1493, in 2006 – 1526, in 2007 – 1559, in 2008 – 1594, in 2009 – 1629, in 2010 – 1664” (See pages 98-99 of the materials of the case).

Under Section 4.4 of Regulation No. 940 of the Cabinet of Ministers of December 13, 2005 the SMCEEHW making expert’s examination relative to disability of the children up to the age of 18, in the first half of 2006 opinions 854 children need a special care were issued (See page 84 of the materials of the case). However, the Agency indicates that within a period from May till August 2006, 616 care of disabled child benefits were sent for disbursement and LVL 226 750 were used for payment thereof (See page 86 of the materials of the case).

Hence one can conclude that the amount of care of disabled child benefits paid, in fact, is probably less than initially planned.

18. As soon as incompliance of the contested provision with at least one Section of the Satversme is stated, it shall be admitted as illegitimate and invalid. Thus, it is no need to assess conformity of the above provision contained in Section 91 of the Satversme.

19. During the time period from the date when the contested provision came into effect, it has limited Mrs. J Patrīna's and I. Beča's and, probably, other persons' rights to receive the care of disabled child benefit. Thus, to provide implementation of the rights established in Section 110 of the Satversme and protection of the rights of the child the contested provision shall be admitted as invalid from the date when it came into effect – January 1, 2006.

Under Section 11 of the Regulation No. 940 of the Cabinet of Ministers dated December 13, the care of disabled child benefit shall be granted from the date when the conclusion by the SMCEEHW or its structural units (general or special profile SMCEEHW) on the necessity in a special care of a child up to the age of 18 who need a special constant care due to physical and functional disorders, is made

### **The Substantive part**

Under Articles 30- 32 of the Law on Constitutional Court, the Constitutional Court

**holds:**

**to recognize the provision contained in the first part of Section 7<sup>1</sup> of the Law On The State Social Allowances - “if the referred to person is not employed (is not deemed to be an employee or self-employed person in accordance with the Law on State Social Insurance)” to be in conflict with Section 110 of the Satversme of the Republic of Latvia” and invalid from January 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

G. Kūtris