



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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Riga, February 25, 2002

## Judgment

in the name of the Republic of Latvia

**in case No. 2001 – 11 – 0106**

The Republic of Latvia Constitutional Court in the body of the Chairman of the Court session Aivars Endziņš, the justices Ilma Čepāne, Romāns Apsītis, Juris Jelāgins, Andrejs Lepse, Ilze Skultāne and Anita Ušacka

under Article 85 set by the Republic of Latvia Satversme (Constitution) as well as Articles 16 (Item 1), 17 (the first part of Item 8) and 28<sup>1</sup>,

on the basis of the claim submitted by the State Human Rights Bureau

holding the proceedings in writing reviewed the case

**” On the Compliance of the Requirement Incorporated into the First Part of Article 6 of the Law ” On Employment” on the Necessity of Having the Permanent Residence Permit to Obtain the Status of the Unemployed with Articles 91 and 109 of the Republic of Latvia Satversme”.**

The Constitutional Court

*established:*

On December 23, 1991 the Republic of Latvia Supreme Council passed the Law ” On Employment”.

With its December 16, 1993 law, October 1, 1997 law and August 27, 1998 law the Saeima has amended the first part of Article 6 of the above law. The wording in effect determines that ” any able-bodied citizen of the Republic of

Latvia or any foreigner (stateless person) is considered unemployed, having received permission of permanent residence or Residents' person register mark with identity code in the passport, and who does not work, who is at working age, who does not have other revenues in amount of, or at least, minimum wage, who does not undertake any business activities, who is looking for a job, who is registered at state employment service at a place of his/her residence and, at least once a month, attends this service."

On October 22, 1996 in accordance with Article 14 (Item 3) of the Law on the Structure of the Cabinet of Ministers, the Cabinet of Ministers passed Regulations No. 407 "Regulations on the Status of the Unemployed Person" (henceforth – Regulations No. 407), which regulate the procedure of granting the status of the unemployed person. Item 1 of the Regulations, specifying the law, determines that the status of the unemployed person is granted first of all to the Republic of Latvia citizen or a foreigner (a stateless person) in whose passport or any other document there is the Residents' service note with the individual code and the place of residence, secondly the foreigner (a stateless person) who has received the permanent residence permit.

**The applicant of the claim** requests the Constitutional Court to declare the requirement to have the permanent residence permit in order to obtain the status of the unemployed person (henceforth – the challenged legal norm), which is incorporated into Article 6 of the Law on Employment as unconformable with Articles 91 and 109 of the Republic of Latvia Satversme (henceforth – the Satversme) and null and void from the moment of announcement of the judgment.

The applicant holds that persons who have received the temporary residence permit have been denied the right of obtaining the status of the unemployed person and thus also the possibility of receiving unemployment benefit.

In the claim it is stressed that all the foreigners, who have received the temporary residence permit, live and are registered in Latvia, pay taxes and are socially insured. **However they cannot realize their right to social security in case of unemployment.**

The submitter of the claim makes reference to Article 3 of the Law "On the State Social Insurance" and points out that one of the types of social insurance is social insurance in case of unemployment. In accordance with the first part of Article 5 of the Law, social insurance shall obligatory cover all employees who have reached the age of 15 years, employed by an employer – domestic (inland) taxpayer. In its turn the first part of Article 12 determines that a person, by (for) whom the insurance premium is paid, shall receive social insurance services anticipated by the Law.

In the claim is expressed the viewpoint that in the social sphere there is no objective basis for a differentiated approach to persons with a different legal status if they work in Latvia and pay the compulsory insurance premiums.

Article 9 of the UNO International Covenant on Economic, Social and Cultural Rights recognizes the right of every person to social security, including social insurance. In accordance with Article 2 of the above Covenant, the Member States undertake the duty of guaranteeing the above rights without any discrimination – i.e. regardless of race, sex, language, political or other conviction, national or social origin, financial position, birth or other status.

Article 12 of the European Social Charter (henceforth – the Charter) also envisages the right to social protection. The States Parties undertake to take steps to guarantee equal attitude both to the citizens of their states and to the citizens of the contracting States Parties, including maintaining social security schemes (benefits) without taking into consideration moving of the persons to other places of residence within the territory of the States Parties.

Besides the applicant stresses that the Law "On Social Security" determines that every person, who lives in the territory of Latvia, shall be entitled to social insurance. Article 5 (Item 2) of the above Law determines that a person, who has been insured by social insurance institutions, shall be entitled to material support in case of illness, pregnancy and childbirth, disability and age as well as unemployment.

**The Saeima** holds that the challenged norm complies with Articles 91 and 109 as well as with Article 9 of the International Covenant on Economic, Social and Cultural Rights.

It is stated in the written reply that in accordance with the Law "On the State Social Insurance" social insurance is an aggregate of activities organized by the state in order to insure the risk of any person to lose income not only due to unemployment but also due to sickness, disability, age. To receive guarantees of the above, the person makes one obligatory social insurance payment. If the person does not experience the right of receiving the status of the unemployed, he/she is not denied the right of receiving other social benefits envisaged by the law.

It is stressed in the written reply that the person, who has obtained the status of the unemployed person experiences the right of receiving unemployment benefit and besides the right of obtaining information about vacant positions, receiving job offers, and participating in professional training and re-qualification courses. The above social services are financed both from the social insurance premiums and the state budget.

A viewpoint was expressed in the written reply that criteria for acquisition of the status of the unemployed person have been determined by taking into consideration the "whole packet" of social benefits, accessible to an unemployed person and the required funding. With the challenged legal norm the state undertakes the duty to socially insure its citizens, non-citizens and foreigners (stateless persons), who have received permanent residence permits in case of unemployment. At the same time, when determining limitations to foreigners and stateless persons, who have not received permanent residence permits, the state has acted legitimately.

In the written reply it is pointed out that the procedure under which a foreigner or a stateless person may receive a permanent or temporary residence permit is determined in the Law "On the Entry and Residence of Foreign Citizens and Stateless Persons in the Republic of Latvia". In accordance with Article 17 of the Law, first of all, a foreign citizen or a stateless person may receive temporary residence permit for a period not exceeding six months. The short term itself already indicates that the person does not envisage to remain in the country for a long time. One may consider that such a person has no employment relations, does not make social insurance premium payments, thus he/she is not and need not be subject to the social protection system.

Secondly, in compliance with Item 2 of Article 17, a person may receive temporary residence permit for the period stipulated in an employment contract or educational program. If the person has an employment contract, then he/she pays the social insurance premiums and receives that part of the social security, which refers to the person (because of illness or disability). In case of unemployment the person has to leave Latvia as the basis of the temporary residence permit has ceased to exist.

The third range of persons, who may receive temporary residence permit, is the spouses of the Latvian citizens, foreigners (stateless persons). These persons, if they pay social insurance premiums, have guarantees to that part of security, which the laws envisage to them.

In difference from the first two categories, these persons have an intension to stay in Latvia for a long period. Therefore to avoid contracting marriages just to receive a permanent residence permit or be naturalized, the law does not envisage granting permanent residence permits to the above persons immediately after getting married. The right of receiving a permanent residence permit and together with it also the right to social security guarantees may be obtained only after five years of married life.

Besides it should be taken into consideration that realization of the social security guarantees needs financial investment and every state may render it in compliance with its economic feasibility.

The Constitutional Court, evaluating the compliance of the challenged norm with the Satversme,

*concluded:*

**1. Article 109 of the Satversme determines that everyone has the right to social security for unemployment.**

Social human rights are regarded as a specific sector of human rights, which in constitutional laws and international instruments is defined as general obligations of the state, therefore the regulating mechanism to guarantee the above is elaborated by the legislator of the particular state (*see Constitutional Court 26.06.01. Judgment in case No. 2001 -02 -0106*).

The notion of social security, guaranteed by Article 109 of the Satversme, is specified in the Law "On Social Security". Regarding different activities, also social insurance as the guaranty to social security, the Law **refers to " all persons whose place of residence is in the territory of Latvia"** (*the first part of Article 3*).

The Law determines the principles of creating the social security system and enumerates the fundamental social rights and obligations of persons. In the sphere of social rights the Law is to be regarded as the law determining the legal procedural norms.

First of all the Law acknowledges that the right to social insurance is one of the fundamental social rights.

Secondly the law determines that "everyone shall be entitled to social insurance in accordance with the law" (*the first part of Article 5*);

that " a person who has been insured by social insurance institutions shall be entitled to material support ... in case of unemployment" (*Article 5, the second part, Item 2*);

that " persons who are employed and paid for their work shall be obligatorily subject to social insurance" (*Item 1 of the third part of Article 5*).

Thirdly, when envisaging that "the range of the insured persons as well as the types of insurance to which they are obligatorily subject shall be determined by law", reference to the system of legal regulation of social security has been made.

The Law "On the State Social Insurance" regulates social insurance as the aggregate of activities organized by the state and determines both – the range of persons to be insured and the types of social insurance. The objective

of this system is to insure the risk of a person to lose income when the unfavorable circumstances, enumerated in the law (among them also unemployment) set in.

One of the main groups of persons to be socially insured is the employees, regardless of the fact if they are the permanent residents of Latvia or persons with temporary residence permits (foreign workers) , whether they are employed by an employer – domestic taxpayer or an employer – foreign taxpayer (the first and second parts of Article 5).

The Law determines that ” employees shall be socially insured according to all types of social insurance” (the first part of Article 6). However this general legal norm envisages also exceptions i.e. several categories of employees, which shall enjoy only separate types of social insurance (Article 6). If the employer is a foreigner then the foreign employee shall not be insured for unemployment (part 6 of Article 6). In its turn, the foreign employee, who is employed by the domestic taxpayer shall receive the unemployment benefit. It means he/she is subject to all types of social insurance.

One of the basic principles of social insurance is solidarity between the payers of social insurance premiums and the recipients of social insurance services. Thus, if the employee has been obligatorily insured for unemployment, then, the insurance circumstances setting in, i.e. when losing income because of unemployment, he/she has the right to material support if his/her place of residence is Latvia. (Article 3/the second part, Item 2/ and the first part of Article 12 of the Law ” On the State Social Insurance” as well as Article 5 /the second part, Item 2/ of the Law ”On Social Security”).

**Thus any employee, who has been obligatorily insured for this case and whose place of residence is in Latvia, has the right to social security in case of unemployment, guaranteed in Article 109 of the Satversme.**

2. To ascertain if the challenged norm complies with the Satversme, it shall be interpreted together with normative acts, regulating both – the stay of foreign citizens (stateless persons) in the Republic of Latvia and their right to employment and being included into the social insurance system in the territory of Latvia.

The first part of Article 6 of the Law ”On Employment” determines the criteria of obtaining the status of an unemployed. Even though the foreign employees, even persons without the permanent residence permit, are included into the Latvian social insurance system , the challenged legal norm envisages that a foreign citizen (a stateless person) may obtain the status of an unemployed person only if he/she has received the above permit.

In its turn the Law "On Insurance for the Case of Unemployment" envisages that the right to unemployment benefit is granted only to those persons, who have obtained the status of an unemployed person, are insured for unemployment and who have the determined length of insurance.

It is allowed to employ foreign citizens (stateless persons) if their arrival and stay in Latvia is legal. In its turn, the basis for legal immigration and stay is the permanent residence permit, a temporary residence permit or a special visa.

The Law "On the Entry and Residence of Foreign Citizens and Stateless Persons in the Republic of Latvia" determines that "a temporary residence permit is a document received by a foreign citizen or a stateless person, if his/her stay in Latvia is for a limited time period". Out of three categories of persons, who experience the right of receiving the temporary residence permit, only the objective of staying in Latvia of the Latvian citizen, non-citizen or a spouse of a foreign citizen (stateless person), who has received the permanent residence permit (henceforth – the spouse, who has received a temporary residence permit) essentially differs from the objective of the other persons, who have received the temporary residence permit. Taking into consideration the fact of the person getting married (creating a family) only the spouse, who has received a temporary residence permit might have the objective of permanent staying in Latvia. The Law (Articles 25, 25<sup>1</sup>, 26) determines that the spouse, who has received a temporary residence permit may receive a permanent residence permit after the third request.

The procedure of employing those foreign citizens (stateless persons) who have received a temporary residence permit or a special visa is regulated by the Cabinet of Ministers March 28, 2000 Regulations No. 116 "The Procedure of Employing Foreign Citizens and Stateless Persons in Latvia" (henceforth – Regulations No. 116). By envisaging different procedure of employment, Regulations No.116 set the spouse, who has received the temporary residence permit, apart from the other foreign citizens (stateless persons). Only spouses, who have temporary residence permits, may receive employment permit without paying for it (naturally only for the period mentioned in the temporary residence permit). Besides the spouse, who has received a temporary residence permit has the right of receiving employment permit regardless of his/her profession, education and vacancies registered at the State Employment Service. In difference from all the other persons, who have received the temporary residence permit, only the spouse, who has received it, has the right to work at any employer in Latvia (Items 24, 25).

The objective of the residence permit and the procedure of joining the labor market as well as the fact that, when becoming an employee, the spouse, who has received a temporary residence permit, joins the social insurance system on general conditions i.e. like any person who has received a permanent residence permit, indicated that his/her legal status is nearer to the status of a person,

who has received a permanent residence permit than to the status of a foreign citizen (stateless person), who has arrived to be employed just for some time.

Even though the spouse, who has received a temporary residence permit, for the first five years he/she spends in Latvia, does not have the right of receiving a permanent residence permit, the Constitutional Court holds that in the sector of employment and social security he/she shall be placed on the same level as a foreign citizen (stateless person) whose permanent place of residence is Latvia.

Thus the rights to social security for unemployment, guaranteed in Article 109 of the Satversme, shall be applied also to the spouse, who has a temporary residence permit, is an employee and has been insured for unemployment.

Article 91 of the Satversme determines that human rights shall be realized without discrimination of any kind. And discrimination may be interpreted also as groundlessly differentiated attitude to persons, who find themselves in equal (comparable) circumstances (*see the Constitutional Court 26.06.2001 Judgment in case No. 2001-02-0106*).

The fact that the spouse, who has received a temporary residence permit and the foreign citizen (stateless person), who has received a permanent residence permit, join the state social insurance system on the basis of equal criteria- as employees they both are to be obligatorily insured for all the types of social insurance (including unemployment) – indicates that they are in equal (comparable) circumstances. Therefore in case of unemployment, a differentiated attitude to the above groups of employees is ungrounded.

**Thus the challenged norm (on the necessity of having a permanent residence permit to obtain the status of the unemployed) with regard to the spouse, who has received a temporary residence permit contradicts both Articles- 91 and 109 of the Satversme.**

**3.** Realization of the human social rights, guaranteed by the Satversme, depends on the economic situation and available resources (*see the Constitutional Court 13.03.2001 Judgment in case No.2000-08-0109 and 26.06.2001 Judgment in case No. 2001-02-0106*).

The Law "On the European Social Charter" is effective since December 18, 2001. By ratifying the Charter, the state has undertaken the duty of favoring the right to social security for all employees. In compliance with Article 20 of the Charter, the state has to acknowledge as binding on the state at least five of the

seven Articles named in the first part, Item "b" of Section II of the Charter (i.e. from Articles 1, 5, 6, 12, 13, 16, 19). Latvia has made use of the possibility of choice and has not considered Article 12 of the Charter, which regulates the rights to social security, as binding on it. Taking into consideration that the Charter itself envisages the mechanism of choice, the dealing of Latvia is legal and groundless is the statement of the applicant that the formulation of the challenged legal norm is unbecomable with the principles of the European legal system.

Latvia, taking into consideration its economic situation has not acknowledged Article 12 of the Charter as binding on it. Well-grounded is the viewpoint of the Saeima that the state, when guaranteeing the right to social security for unemployment, has first of all to take care of social security (protection) of its permanent residents. Thus the connection of a person with the state may have a decisive importance in securing social rights. Latvia has undertaken the task of guaranteeing the right to social security for unemployment only for those employees, whose place of residence is Latvia. Therefore there is no reason to regard determination of differentiated social guarantees to those employees, who have received temporary residence permits and are employed in Latvia just for some time (i.e. are guest workers), as illegal.

However, by taking into consideration the objective of the Latvian social insurance system and its basic principles, as well as the fact that the employees, whose permanent place of residence is not Latvia, are not guaranteed the right to social security for unemployment.

**The Constitutional Court holds that the legislator should evaluate whether the employees, who have received temporary residence permits (guest workers) and have joined the social insurance system shall be subject to social insurance in case of unemployment.**

On the basis of Articles 30 – 32 of the Constitutional Court Law

the Constitutional Court

*decided:*

**to declare the requirement, incorporated into the first part of Article 6 of the Law "On Employment", requiring that, to obtain the status of an unemployed, the spouses of Latvian citizens, non-citizens, foreign citizens or stateless persons, who have received a permanent residence permit shall have a permanent residence permit and not a temporary residence permit,**

**as unconfirmable with Articles 91 and 109 and null and void from the date of publishing of the Judgment.**

The Judgment is final and allowing of no appeal.

The Chairman of the Court session

Aivars Endziņš