# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

**J U D G E M E N T**

**on Behalf of the Republic of Latvia**

**in Case No. 2015-10-01**

**23 November 2015, Riga**

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

having regard to an application submitted by A. (hereinafter – the Applicant),

on the basis of Para 1 of Section 16, Para 11 of Section 17(1), as well as Section $19^2$ and Section $28^1$ of the Constitutional Court Law

at the sitting of 23 October 2015 examined in written procedure the case

**"On Compliance of Section 7(3) of the Law "On Prevention of Conflict of Interest in Activities of Public Officials" with the first sentence of Article 91 and Article 110 of the Satversme of the Republic of Latvia."**

## The Facts

**1.** The law "On Prevention of Conflict of Interest in Activities of Public Officials" (hereinafter – Law on Prevention of Conflict of Interest") was adopted on 25 April 2002 and entered into force on 10 May 2002. It has been amended a number of times. At the moment of submitting the application

Section 7(3) of Law on Prevention of Conflict of Interest (hereinafter also – the contested norm) provided:

(3) The Governor of the Bank of Latvia, his or her deputy and members of the Council of the Bank of Latvia, the Auditor General, members of the Council of the State Audit Office, the Chairperson of the Central Electoral Commission and his or her deputy, the Director of the Constitution Protection Bureau and his or her deputy, the Ombudsman and his or her deputy, members of the National Electronic Mass Media Council of Latvia, the Chairperson and members of the Council of the Public Utilities Commission, the chairperson of the Finance and Capital Market Commission, his or her deputies and members of the Council of the Finance and Capital Market Commission, the Director-General of the State Revenue Service, directors of administration of the State Revenue Service and their deputies, judges, prosecutors, sworn notaries and sworn bailiffs, the Director of the Corruption Prevention and Combating Bureau and his or her deputies, central administration divisional heads and their deputies, heads of territorial offices and investigators, the head of the Office for Prevention of Laundering of Proceeds Derived from Criminal Activity and his or her deputy, are permitted to combine the office of a public official only with:

1) offices which they hold in accordance with the law or international agreements ratified by the Saeima, Cabinet regulations and orders, if it does not jeopardize the independence of the public official or institution, in which the relevant public official is employed, stipulated in laws and regulations;

2) the work of a teacher, scientist, professional athlete and creative work;

3) the work of an expert (consultant) performed in the administration of another state, international organisation or a representation (mission) thereof, if it does not entail a conflict of interests and a written permit has been received from the public official or collegial authority which has appointed, elected or approved the relevant person in the office or which is referred to in Section $8^1$ (11) of this Law;

4) the office in a trade union or association of the relevant profession, except the heads of the institutions referred to in this Paragraph;

5) the office in an association, if it does not entail a conflict of interests and a written permit has been received from the public official or collegial authority which has appointed, elected or approved the relevant person in the office or which is referred to in Section $8^1$ (11) of this Law, and if it is not provided otherwise by the law.

**2.** The Applicant is a judge. Her family is raising a disabled child, who requires special care.

At the end of 2014 the Applicant had considered the possibility of combining the office of a judge with performing the obligations of her child's assistant. It is impossible to involve other members of the family in performing the assistant's duties, because it is difficult for the child to establish a psychological contact with any other person, except her mother. The contested norm prohibits her as a judge (public official) to assume the duties of her child's assistant and to receive remuneration for it. The Applicant holds that the contested norm "imposes ungrounded and disproportional restrictions", thus violating the fundamental rights defined in Article 91 and Article 110 of the Satversme of the Republic of Latvia (hereinafter – the Satversme).

The obligation to ensure to a family as extensive protection and assistance as possible is said to follow from Article 23 of the International Covenant on Civil and Political Rights and Article 10 of the International Covenant on Economic, Social and Cultural Rights. The Applicant is also referring to the United Nations Convention on the Rights of the Child (hereinafter – Convention on the Rights of the Child), underscoring that children with physical or mental disorders should lead a full and adequate life in such circumstances that would ensure to them dignity, would foster self-confidence and promote their active participation in social life.

The interests of a disabled child should be seen as priority. The Applicant refers to the findings of the Constitutional Court and notes that the

State, in caring for children and the family, should implement such measures of support that would be sufficiently effective and would, to the utmost, comply with the needs of the addressees, first of all, those of children. Setting the rights of the child as the priority is said to mean that the court and other institutions should adopt their decisions, but the legislator should adopt and amend legal acts by taking into consideration the rights and interests of a child in the best possible way.

It is stated that the State has the obligation not only to declare rights, but also to "embody" them. The positive obligation of the State to establish and to maintain a system aimed at the social and economic protection of a family, thus, also of a disabled child, follows from the Satversme and Latvia's international commitments.

The Applicant points to practical obstacles that make caring for a disable child difficult in Latvia. It is difficult to find persons, who would be willing to assume the duties of an assistant to a child like this. Since no institution ensures availability of potential assistants, finding of an assistant has been left for the parents to take care of.

Caring for a disabled child requires considerable financial resources from the family. Introduction of services of an assistant paid for by the state is one of the ways, in which special care to a family that is raising a disabled child is shown. The aim of the institution of an assistant paid for by the state is not only social integration of disabled persons, but also increasing the material wellbeing of the respective families. However, by prohibiting a judge to be an assistant to her own disabled child, the right of a family, including a disabled child, to special protection, which is guaranteed in Article 110 of the Satversme, is said to be violated.

Allegedly, the contested norm is incompatible also with Article 91 of the Satversme. All parents, who are raising a disabled child, are in similar and comparable circumstances. The parents of disabled children to whom the contested norm does not apply may perform the duties of their child's assistant. Performing the duties of an assistant, allegedly, can be combined with the

office of a judge. This combining is harming neither the honour and dignity of a judge, nor the objectivity of a court. Moreover, judges are allowed to engage in, for example, pedagogical work and in some economic activities. Therefore it is not clear, why judges are not allowed to engage in "work of social nature" and be an assistant to their disabled children [and later already to a disabled adult]. The Applicant is unable to discern the legitimate aim of the restriction upon rights. Therefore the established restriction is said to be disproportional.

**3.** The institution, which adopted the contested act, – the **Saeima** – holds that the contested norm complies with Article 110 of the Satversme and the first sentence of Article 91 of the Satversme.

Allegedly, Article 110 of the Satversme and the international treaties in the field of human rights that are binding upon Latvia define the State's positive obligation to establish and maintain a system of social and economic protection of the family. However, the establishment of this system is said to depend upon the economic situation in the State. In deciding on issues of social rights, the State is said to enjoy broad discretion and it may establish various restrictions.

Pursuant to Section 3(1) of the Law on State Social Allowances, a family, which is raising a disabled child, may receive four types of State allowances or benefits that are disbursed regularly: State family allowance, supplement to the State family allowance for a child with disability, allowance for caring for a disabled child and an allowance for compensation of transport expenses for a disabled person who has difficulties in movement. Persons, who are entitled to these state social allowances or supplements, can receive all of them concurrently. In addition to the state support in the form of social allowances or supplements, various exemptions are ensured to a family, which is raising a disabled child. For example, pursuant to Sub-paragraph 2.2 of the Cabinet Regulation of 4 August 2009 No. 872 "Regulation on Categories of Passengers Entitled to Use Fare Concessions on the Routes of Transport Route Network", a person with disability, who is below the age of 18, and the

companion (assistant) of this persons have the right to use domestic public transport services free-of-charge. Moreover, pursuant to Section 25(1) of Social Services and Social Assistance Law and the Cabinet Regulation of 15 December 2009 No. 1472 "Procedure in which the Latvian Society for the Blind and the Latvian Association of the Deaf Provide Social Rehabilitation Services and Ensures Technical Aids – Assistive and Sonar Technology and Surdotechnology"", as well as the Cabinet Regulation of 15 December 2009 No. 1474 "Regulation on Technical Aids" , a person with disability below the age of 18 has the right to receive free-of charge technical aids, which are enumerated in this Regulation. Pursuant to the Cabinet Regulation of 21 December 2010 No. 1170 "Regulation on the Procedure, in which Persons with Disability Receive Support for Home Adjustment and on Conditions for Receiving Support" ,persons below the age of 18, who have been certain indications with regard to the need for special care, have the right to receive allowance for adapting one residence. In addition to the types of state social assistance referred to above, a family, which is raising a disabled child, has the right to receive services of an assistant paid for by the State intended for this child.

Allegedly, Article 110 of the Satversme does not create subjective rights for a person to receive particular State support of concrete type and amount. It is the State's obligation to ensure that a family, which is raising a disabled child, would receive sufficient assistance from the State to ensure his full life or for creating such conditions that would allow the child to retain self-respect and would improve the possibilities for active participation in social life. Allegedly, the Applicant does not have the subjective right to demand the State to ensure that she would have the right to provide the services of an assistant, paid for by the State, to her disabled child. The State has performed its positive duty to guarantee social security at least on the minimum level, *inter alia*, by establishing also the possibility to receive services of an assistant paid for by the State. Allegedly, the contested norm does not restrict the rights of the Applicant's child to receive this service, nor the state support for the family in

general. In general, the State assistance in the case under review should be recognised as being compatible with Article 110 of the Satversme.

It is contended that the contested norm is compatible also with Article 91 of the Satversme. The Saeima admits that the restriction established by the contended norm envisages differential treatment of parents, who are performing the duties of a judge. The contested norm, indeed, prohibits the Applicant from providing an assistant's services to her disabled child and to receive remuneration for it; however, it does not prohibit her from accompanying her child in daily activities, also together with an assistant, whose services are paid for by the State.

The legitimate aim of the established prohibition is said to be the protection of other persons' rights and lawful interests and the democratic state order, by ensuring independence of the judicial power. The State has the task to ensure fair legal proceedings and a judge's independence in each concrete legal proceedings. The performance of this task comprises drafting and adoption of complicated legal regulation. The independence of the judicial power and of judges on the institutional level is ensured by a number of regulatory enactments, *inter alia*, Law on Preventing Conflict of Interest. The contested norm is said to be part of the systemic legal regulation, which guarantees judges' financial independence, separates the judicial power from the other branches of state power and private persons both institutionally and financially.

The contested norm is allegedly suitable for reaching the legitimate aim. It ensures that a judge as a public official is neither in employment, nor any other relationship of financial dependence with institutions from other branches of the sate power, including local governments, and that neither private persons have the possibility to influence a judge's independence through relationships of such kind. The contested norm first of all ensures the independence of a judge as an institution and not the independence of a particular judge in a particular case. Thus, this regulation is aimed at ensuring a judge's independence generally, on regulatory level and may not be substituted by those additional safeguards, which are envisaged by the concrete law on legal

proceedings in a concrete case. Very high demands should be set with regard to judges' independence.

As regards the possibilities to choose other, less restrictive measures, the Saeima notes that the contested norm applies to public officials belonging to different branches of the state power. In view of the various functions of these persons, combining particular offices might not create a risk for one group of public officials, but could cause such a risk for another group of public officials. Defining a complete list of all those types of occupations that could be permitted for combining with the performance of the duties of office of each individual public official would be a disproportionally complicated and inexpedient task.

The Saeima notes that including "social work" in that category of occupations that may be combined with the office of a judge would not reach its legitimate aim. Law on Preventing Conflict of Interest does not prohibit a person prom participating in activities that are beneficial for society, but prohibits performing such duties that in the understanding of this law is to be recognised as being work or an office. The inclusion of "social work" for remuneration in the contested norm could collide with the aim of Law on Preventing Conflict of Interest, whereas inclusion of voluntary social work in the contested norm would be inexpedient.

The Saeima does not uphold the Applicant's view that in case, if the Applicant were allowed to provide an assistant's services to her disabled child, then considerable financial support would be ensured to her whole family. If the amount of a judge's family income and the judge's ability to provide for her family would depend from the possibility of combining this office with another occupation, a judge's independence would be seriously jeopardized. In setting the amount of judges' salary the legislator has already taken into consideration and compensated for the restrictions to combine offices defined for judges.

The Applicant's fundamental rights are said to be restricted in "insignificant scope". She has not been prohibited to accompany her child at events, where she becomes involved outside home. Moreover, a general

prohibition to use the financing that the State has allocated for ensuring services of an assistant has not been imposed upon the family. Only the Applicant herself has been prohibited from receiving the assistant's remuneration. Thus the damage caused to the Applicant's interests is said to be smaller than the benefit that other persons and society in general gain from the established restriction.

**4.** The summoned person – **the Ministry of Justice** – holds that the restriction that has been established is not commensurate with the benefit that society in general gains from it.

The Ministry of Justice upholds the Applicant's opinion that all parents of disabled children, who can provide assistant's services to their children themselves, are in similar and comparable circumstances. By prohibiting a judge to provide assistant's services to her child, a differential treatment of a person, who holds the office of a judge, is established compared to a person, who does not hold such an office. For the differential treatment to be justifiable, the legitimate aim of the established restriction should comply with the principle of proportionality. The more abstract the established restriction is, the more convincingly it should withstand the proportionality test.

The legitimate aim of the established restriction is said to be ensuring judges' neutrality and objectivity, as well as public trust in the judicial power. The legislator has the right to establish restrictions for a judge that are aimed at ensuring his independence. However, a judge's independence is not an aim in itself, but a means for reinforcing democracy and the rule of law. In view of the judge's status and the fact that a judge performs the functions of administration of justice, the legislator has the right to establish restrictions for a judge that are aimed at ensuring his independence. A person, upon becoming a judge, should take into consideration the restrictions that the office of a judge imposes.

However, neither a legitimate aim, nor proportionality can be discerned with regard to a restriction that prohibits a judge to combine her office with provision of assistant's services to her disabled child. The aim of assistant's

services is to facilitate the social integration possibilities of a disabled person and movement towards independent life. An assistant's support is required for performing such activities outside home that the person because of her disability is unable to perform independently. Performing the duties of an assistant for her disabled child could not jeopardize a judge's independence, objectivity and performance of a judge's duties of office in high quality, nor create a negative attitude towards the judge in society. Allowing a judge to combine her office with performing the duties of her child's assistant would also comply with the interests of the child, since that would allow her to be among her family members and at the same time receive the necessary care.

The Ministry of Justice notes that the restrictions upon combining offices that have been defined for public officials in Law on Preventing Conflict of Interest are differentiated according to groups of officials, envisaging restrictions that are appropriate for each group; however, the annotation to the law does not provide substantiation for such differential approach. Likewise, the Ministry of Justice draws attention to another circumstance, i.e., that Section 7 of Law on Preventing Conflict of Interest allows combining the office of a judge with economic activity in the status of an individual merchant or by registering as a person performing economic activity, if within the scope of such activity the income is derived from farming, forestry, fishery, rural tourism or professional activity of a general practitioner, as well such economic activity, which is performed by administering the immoveable property that belongs to the judge.

**5.** The summoned person – **the Ministry of Welfare** – holds that the proportionality of the legal regulation that restricts the possibilities for a disabled person to attract an assistant must be meticulously considered. Establishment of ungrounded restrictions might leave a negative impact upon the rights of disabled children to full lives that follow from Article 110 of the Satversme and have been defined in Article 23 of the Convention on the Rights of a Child. The Ministry of Welfare holds that it is essential to respect the

rights of children with disabilities by facilitating their self-reliance and active participation in social life.

**6.** The summoned person – **the Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) – holds that the contested norm is incompatible with the first sentence of Article 91 and Article 110 of the Satversme. Allegedly, the contested norm restricts the rights of a disabled child to receive assistant's services that are most appropriate for her interests and needs.

In every society protection of human rights is said to begin by society guaranteeing the rights of a child, ensuring to children such conditions that allow them to develop their potential in the best possible way, so that later they would be able to lead full adult lives. Article 110 imposes a special obligation upon the State to assist children with disability.

The Ombudsman agrees to the statement made in the written reply by the Saeima that "the contested norm does not prohibit a judge from accompanying her child in her daily activities"; however, he underscores that parents have the obligation to take care of their child's best interests. The child's parents are the persons, who can make the best possible assessment of their child's needs. If the mother considers that it would be in the best interests of the child if she herself were to provide assistant's services to the child, i.e., a person, who has the closest link and mutual trust with the child, then nobody has the grounds to contest this. The established restriction prohibits a disabled child from receiving an assistant's services that would be most appropriate for her interests and needs.

The judges, who have disabled children, are said to be placed in an unequal situation compared to those parents, who are not judges and may choose to provide to their disabled child the necessary assistant's services themselves.

The legitimate aim of the established restriction is to ensure that a judge as a public official should not be in a relationship of employment or other

financial dependence with institutions from other branches of state power, including local governments. The Ombudsman holds that this measure used for insuring a judge's independence is not appropriate for reaching its legitimate aim. Other measures are said to exist, apart from restrictions on combining offices, that the State may use to ensure judges' independence, for example, the procedure for suspending or recusing judges or the income return of a public official, in which, *inter alia*, information about all types of income must be entered. These measures are said to be sufficient for ensuring judges' independence, therefore the established restriction is incompatible with the principle of proportionality.

**7**. The summoned person – **the Corruption Combatting and Prevention Bureau** (hereinafter – the Bureau) – holds that in the particular situation the differential treatment of the Applicant is justifiable and aimed at reaching the legitimate aim of the established restriction.

Allegedly, the contested norm does not substantially infringe the rights guaranteed in Article 110 of the Satversme. Pursuant to Disability Law and the Cabinet Regulation of 18 December 2012 No. 942 "Procedure in which Assistant's Services are Granted and Financed in a Local Government" (hereinafter – Regulation No. 942) the provision of assistant's services to a disabled person is ensured. Allegedly, there are no doubts with regard to the legitimate aim of the established restriction. This is said to comply with the aim defined in Section 2 of Law on Preventing Conflict of Interest.

In the particular case it should be assessed, whether the fundamental rights established in the first part of Article 91 of the Satversme have been violated. The Bureau holds that with regard to the Applicant and other parents, who have disabled children, similar actual circumstances can be identified, however, different legal circumstances that follow from the status of a public official exist.

Parents have the right and the obligation to supervise and care for a disabled child, *inter alia*, ensuring her upbringing and education. Allegedly,

there are no grounds to consider that parents would be unable to perform this obligation without concluding an agreement with a local government on provision of an assistant's services. A conclusion like this would be "contrary to the reality of everyday life". The fact that one of the child's parents is a judge is said to have no legal significance in ensuring parental guardianship.

However, the Bureau holds that in the particular case there could be grounds for assessing, whether the benefit that society gains by the differential treatment of comparable groups of persons, is commensurate to the damage caused to the particular person.

**8.** The summoned person – **the Latvian Umbrella Body for Disability Organisations SUSTENTO** (hereinafter – organisation Sustento) – holds that the restriction upon fundamental rights established by the contested norm does not have a legitimate aim.

Organisation Sustento underscores that in all cases the decisions that are adopted with regard to children should be based upon the best interests of the child. Currently the possibility to use the services of a professional assistant is not offered to disabled persons in Latvia. Local governments ensure only payment for the assistant's services; however, the disabled person herself chooses the assistant. The situation is worsened by the low remuneration rate. Therefore without supplementary payment it is difficult to hire an assistant to a disabled person, in particular, for people who have difficulties in communication and have mental development disorders. The average costs of such services is said to be 10 euro per hour after deduction of taxes. For a large part of families this financial burden is too large. Therefore, actually the obligations of a disabled person's assistant are usually performed by family members or friends of the disabled person. Under the circumstances, where attracting a professional assistant to a disabled child with problems in communication is incommensurately expensive and such professional services are offered neither by the local government, nor the State, often the best option

is that a family member of the disabled person performs the duties of an assistant to a disabled person.

Organisation Sustento holds that the office of a judge can be combined with provision of assistant's services to one's own disabled child and that this combining does not cause a conflict of interest for the judge.

**9.** The summoned person – ***Dr. psych.*** **Ieva Bite** – holds that disabled children, in particular those with severe functional disorders, often require not only specific physical assistance, but also special emotional understanding. These children have heightened sensitivity against stress inducing factors, and thus they can develop serious emotional and behavioural problems, moreover, these can manifest themselves in a particularly acute form. Children and adolescents with speech and other communication disorders encounter special difficulties, since they are unable to express their emotions verbally and in a socially acceptable way. Therefore not only the disabled child herself, but also surrounding persons may experience serious complications.

In-depth understanding of the disabled child's needs, possibilities for overcoming stress and regulating emotions is required to overcome these difficulties. Parents are the main caregivers of the child, therefore they usually are the ones, who have the best knowledge of their child and understanding of her needs.

In general it would be important to involve in caring for the child also other persons, who would have the same understanding of the concrete child's needs and would be able to provide support in everyday life; however, for a number of objective reasons it is complicated to attract such persons. A disabled child's psychological attachment to the primary caregiver is also said to be an important aspect. When the physical or mental disorders of a child or an adolescent become more acute, the attachment only to one or two persons may become very close and specific. To establish contact with such a child special knowledge, as well as stability in caring for the child is required.

A number of significant shortcomings can be identified in the current system of care, which make the life of disabled children and members of their families more difficult. Criteria for assessing the education of persons and their suitability for performing the duties of an assistant to a disabled person are lacking. The financing allocated for paying for assistant's services is also insufficient and the procedure for granting it is said to be faulty. These circumstances make it difficult to attract a suitable assistant for long-term. Therefore, in fact, the accessibility of assistant's services is not ensured to many disabled children and adolescents. Likewise, psychological assistance and psychotherapy are available to disabled children and their caregivers only in limited scope.

Lack of support and social isolation is said to be the cause for the development of serious emotional problems, for example, depression. In order to facilitate public welfare, the provision of non-medication assistance to disabled persons should be improved in the state. Likewise, it would be advisable to decrease stigmatisation that still can be observed in society towards various different groups, including people with physical or mental disorders and their relatives. The utmost effort should be taken to ensure equality of all persons, irrespectively of their health condition.

**10.** The summoned person – ***assoc. prof. Dr. iur.*** **Kristīne Dupate** – holds that the contested norm is incompatible with Article 91 of the Satversme, insofar it prohibits the Applicant to perform the duties of an assistant to her disabled child for remuneration.

K. Dupate underscores that there is an approach of formal equality and an approach of real equality. The approach of formal equality is said to be narrower and manifesting itself as ensuring equal treatment of equals. Whereas the approach of real equality is manifested as ensuring that equal opportunities are created for all societal groups and is aimed at ensuring the rights of each particular group to the extent that allows people belonging to this group to enjoy all public goods in the same way as other members of society. This

particular situation should be assessed on the basis of real approach to equality, i.e., by taking into consideration those social obstacles that actually exist and deny equal opportunities to some groups of persons. The families, which are raising a disabled child, are said to be in a completely different situation than other families. In Latvia there are still rather numerous social obstacles that deny the families that are raising a disabled child the possibility to actually enjoy public goods, equally to other families. The mechanism of State support that has been established pursuant to Article 110 of the Satversme is unable to prevent the obstacles existing in real life that this group of persons has to face.

It could be said that Article 110 of the Satversme "recognizes" the different situation that the families, which are raising a disabled child, are in. Accordingly, Article 110 of the Satversme reflects the provision of Article 91 of the Satversme that persons, who are in a different situation, should be treated differentially. This imposes an obligation upon the legislator to establish such effective legal regulation that would ensure to those families, which are raising a disabled child, equal opportunities to other families. In the case under review Article 91 of the Satversme is the main one to be applied, in view of the fact that the Applicant is in a discriminating situation exactly due to her office.

K. Dupate upholds the statement included in the written reply by the Saeima that the legitimate aim of the contested norm is to protect the rights and lawful interests of other persons and the democratic state order by ensuring the independence of the judicial power. However, the reflections by the Saeima on the necessity of the chosen measure for reaching the legitimate aim are said to be unfounded. Neither is the argument provided by the Saeima that nothing prohibits the Applicant to take care her disabled child without payment is substantiated. The right to receive remuneration for providing assistant's services is said to mean that the work invested into caring for a disabled child is recognised as being socially significant and such that can be evaluated in material terms. She does not uphold the Saeima's opinion that the Applicant could attract other persons as providers of assistant's services. This is said to be incompatible with the principle of the effectiveness of law. Due to both

physical and emotional problems it could be difficult for the child to be in contact with other persons. Moreover, the right to accessibility of assistant's services is not effectively ensured. I. e., the remuneration that the State has set for providers of assistant's services is low, but at the same they are expected to have specific experience and knowledge. Therefore it is difficult to find qualified specialists, who would be willing to perform duties of an assistant to a disabled person.

Likewise, no reasonable grounds can be found to explain, why a judge is allowed to combine the status of a public official with a teaching job and even certain types of economic activities, but providing services of social nature within one's own family, which would in no way jeopardize a judge's independence, is prohibited.

Since in the case under review, on its merits, the main issue is employment rights in connection to care required by disabled persons, the Directive of the Council of the European Union of 27 November 2000 No. 2000/78/EC, which defines the common system for equal treatment in employment and occupation, should be applied.

## The Findings

**11.** It follows from the application that the Applicant needs to provide assistant's services to her disabled child. Due to the child's health condition attracting other persons for the provision of these services has become impossible.

The contested norm prohibits the Applicant as a judge to provide assistant's services to her disabled child, since it is not allowed to combine the provision of these services with the office of a judge. The Applicant holds that because of the contested norm the treatment of her differs from the treatment of other parents, who have not been prohibited from providing assistant's services to their disabled children. The Applicant holds that the differential treatment is

unfounded and, thus, it violates her fundamental rights established in Article 110 and the first sentence of Article 91 of the Satversme.

**12.** The Constitutional Court has noted that in examining a case the limits of the claim are binding upon it; i.e., it must review the compatibility of the contested norm with the legal norms of higher legal force, taking into consideration the Applicant's reasoning and the motives and considerations reflected in the application (*see Judgement of 12 February 2008 by the Constitutional Court in Case No. 2007-15-01, Para 5*). Thus, in examining a case that has been initiated on the basis of a constitutional complaint, the actual circumstances, in which the contested norms has violated the Applicant's fundamental rights, should be seen as being of particular significance (*see Judgement of 25 October 2011 by the Constitutional Court in Case No. 2011-01-01, Para 12*).

**12.1.** In view of the considerations expressed by the Applicant, the Saeima and the summoned persons, first of all compliance of the contested norm with Article 110 of the Satversme will be reviewed in the Judgement, and only then it will be examined, whether the contested norm causes a violation of fundamental rights established in the first sentence of Article 91 of the Satversme.

**12.2.** The Saeima and the summoned persons in the case have provided their opinion about the contested norm only with regard to the Applicant's concrete situation.

The Saeima and the Ministry of Justice have underscored the fact that Law on Preventing Conflict of Interest as regards combining offices envisages different restrictions for different groups of officials and therefore the restrictions set for each group should be examined separately. After familiarizing itself with the case materials the Saeima provided supplementary opinion, underscoring repeatedly that in the case under review compatibility of the restrictions on combining offices established by the contested norm with the Satversme with regard to other public officials should not be examined.

Such assessment should be performed with regard to each official separately, examining systematically the requirements set for the activities of officials and the established legal regulation. The Saeima also underscored that in the case under review the Applicant's right to provide assistant's services to disabled persons, who are not members of her family, should not be examined.

The contested norm applies to a broad circle of subjects of Law on Preventing Conflict of Interest. In the case under review those subjects, with regard to whom the contested norm must be examined, should be identified, since specific requirements for each official are set in Law On Preventing Conflict of Interest, allowing the official to be active in the particular field. The Constitutional Court will examine the contested norm only with regard to judges (*see, for example, Judgement of 28 May 2009 by the Constitutional Court in Case No. 2008-47-01, Para 6*).

Consequently, in the case under review compliance of the contested norm with Article 110 and the first sentence of Article 91 of the Satversme will be examined only with regard to the office of a judge in a situation, where one of the parents, who holds this office, needs to provide assistant's services to his disabled child.

**Thus, the Constitutional Court will examine compatibility of the contested norm with Article 110 and the first sentence of Article 91 only insofar it applies to a judge as a public official, who needs to provide assistant's services to his disabled child.**

**13.** Article 110 of the Satversme provides: "The State shall protect and support marriage – a union between a man and a woman, the family, the rights of parents and rights of the child. The State shall provide special support to disabled children, children left without parental care or who have suffered from violence."

The right of a disabled child to special support by the State is among the rights that are guaranteed by Article 110 of the Satversme (*see Judgement of 21 February 2007 by the Constitutional Court in Case No. 2006-08-01,*

*Para 11).* Article 110 of the Satversme imposes upon the State the obligation to guarantee to families with children at least the minimum of internationally recognised rights, *inter alia*, also social rights (*see Judgement of 2 November 2006 by the Constitutional Court in Case No. 2006-07-01, Para 13.2*).

The rights of disabled children to special protection have been enshrined in the Convention on the Rights of Persons with Disabilities, and Latvia is a member state thereof. Article 7 of this Convention provides that member states must take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children, and that in all decisions concerning children with disabilities the best interests of the child shall be a primary consideration.

The rights of children with disabilities to special care are guaranteed also by the Convention on the Rights of the Child, of which Latvia is a State Party. Pursuant to Para 1 of Article 23 of this Convention, the State Parties recognise 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. Whereas Para 2 of the same Article provides that the State Parties recognise the rights of the disabled child to special care. The State must encourage and ensure the extension, subject to available resources, to the eligible child and the persons responsible for his 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 (*see Para 2 of Article 23 of the Convention on the Rights of the Child).* The United Nations Committee on the Rights of the Child has noted that the support to be extend to the family is envisaged to relieve the stress of the child's parents and to maintain healthy family environment (*see: Committee on the Rights of the Child, General Comment No. 9, The Rights of Children with Disabilities, U.N.Doc. CRC/C/GC/9, 27 February 2007, p. 41*).

The finding that the positive obligation of the State to establish and to maintain a system for social economic protection of the family follows from Article 110 of the Satversme has been consolidated in the case law of the

Constitutional Court. This right has become the right of an individual, and a person may demand respect for this right from the State and may also defend this right in court (*see Judgement of 4 November 2005 by the Constitutional Court in Case No. 2005-09-01, Para 9.3*). Likewise, it has been recognised in the judicature of the Constitutional Court that the State, in providing care for children and the family and abiding by all other legal norms and principles of the Satversme, must implement such measures of support that are sufficiently effective and, to the extent possible, are appropriate for the needs of the addressees, first of all, children (*see, for example, Judgement of 2 November 2006 by the Constitutional Court in Case No. 2006-07-01, Para 13.1, and Judgement of 11 December 2006 in Case No. 2006-10-03, Para 13.1*).

The Constitutional Court has already found that Article 110 of the Satversme recognises the right of a child with special needs to special care. The State, in accordance with its resources, ensures that assistance is provided to the eligible child and to the persons responsible for his care. The obligation of the State to establish and to maintain a system that ensures to disabled children special social and economic protection follows from Article 110 of the Satversme. The aim of the system is to guarantee that access to education, vocational training, medical care, measures for restoring health is ensured to a child with disability, as well as to ensure as complete as possible socialisation of such child and facilitate the development of his personality, at the same time relieving the stress for his parents (*see, for example, Judgement of 21 February 2007 by the Constitutional Court in Case No. 2006-08-01, Para 10*).

**Thus, the positive obligation of the State to establish and to maintain such a system of social and economic support that ensures that the rights of a disabled child are respected and is suitable for a family, which is raising a child with disability, follows from Article 110 of the Satversme.**

**14.** To assess, whether the State has fulfilled the positive obligations that follow from a person's fundamental social rights, the Constitutional Court

must verify, whether: 1) the legislator has taken measures to ensure to persons the possibility to exercise their social rights; 2) these measures have been duly implemented, i.e., whether persons have been ensured the possibility to exercise their social rights at least in a minimum scope; 3) the general principles of law that follow from the Satversme have been complied with (*see, for example, Judgement of 19 December 2007 by the Constitutional Court in Case No. 2007-13-03, Para 8.4*).

**14.1.** The Applicant admits that a support system for disabled children and families, which are raising a child with disability, has been created in Latvia. However, it is said to be faulty. A number of persons summoned in the case also uphold this opinion. The rate of remuneration set for assistants is said to be too low and incompatible with the actual costs of the service. The Applicant and the persons summoned in the case emphasise that a list of persons, who would be able to provide professional assistant's services, is not offered. Therefore families themselves have to search for a suitable person wishing to provide these services.

As noted in the written reply by the Saeima, to ensure social and economic protection to families, which are raising children with disabilities, as well as to provide special protection to disabled children, pursuant to Section 3(1) of Law on State Social Allowances, four types of allowances or supplements are envisaged for the respective families: State family allowance, supplement to the State family allowance for a disabled child, allowance for caring for a disabled child and an allowance for compensation of transport expenses for disabled persons, who have difficulties in movement. In addition to these the State provides for various exemptions.

The aim of granting the state family allowance is to provide regular support to families raising a disabled child. Pursuant to Section 7 of the Law on State Social Allowances, a care of disabled child benefit is 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

functional disorders. A family with a child, who has a disability and requires special care, may choose the most effective way for using the sum of the benefit in the interests of the child. Section 12 of the Law on State Social Allowances provides that a family raising a disabled child, who has been issued an opinion by the State Medical Commission for Expert-Examinations of Health and Working Ability, is eligible to receive a benefit for purchasing a specially adopted car and compensation for costs of transport. In addition to the state support in the form of social allowances, exemptions are also provided to the family. For example, a disabled person, until the age of eighteen, and the assistant of this person has the right to use free-of-charge domestic public transport.

The everyday life of a family raising a disabled child is also made easier by the fact that pursuant to Regulation No. 942 a disabled child has the right to receive services of an assistant, paid for by the State. It follows from the Disability Law that assistant's services are granted with the aim of reducing consequences of disability to persons with very severe or severe restrictions to functionality and make them easier to perform such activities outside their home that these persons would not be able to perform independently due to their disability. Thus, accessibility of assistant's services is a necessary pre-requisite for social integration of disabled persons.

Disability Law and Cabinet Regulation No. 942, issued on the basis of it, is part of the system of social and economic support, by which the legislator and the Cabinet of Ministers have specified the ways of implementing fundamental rights defined in Article 110 of the Satversme with respect to disabled children and families with such children.

The Saeima holds that the State has fulfilled its positive duty to establish and maintain such system of social and economic support that would be appropriate for raising a child with disability. Each type of state support has a certain aim, and all types of state support have been designed so that they would complement each other and would be as appropriate as possible for all needs of disabled children and their families.

Even though the Applicant and some of the persons summoned in the case point to deficiencies in the regulation on assistant's services, the Constitutional Court recognizes that the necessary system of social and economic support for disabled children has been created and, thus, obligations to implement the rights of these children have been fulfilled. The legislator has envisaged the right of disabled children to receive assistant's services and, hence, also the possibility to ensure their social integration to the minimum extent. The case comprises documents that prove that the Applicant's child had been granted assistant's services (*see Case Materials, p. 12*). The Law on Preventing Conflict of Interest does not fall within the created support system. Within the limits of the claim, the Constitutional Court will examine its compatibility with the first sentence of Article 91 of the Satversme.

**14.2.** The Constitutional Court has recognised that Article 110 of the Satversme does not require the State to fully provide for all needs of a disabled child and his family with the help of the system for social and economic support. Such total care by the State would be contrary to the first sentence of Article 110 of the Satversme, since not only the State, but also the parents have the obligation to take care of their children (*see Judgement of 2 November 2006 by the Constitutional Court in Case No. 2006-07-01, Para 13.5*). Parents' duty to care for and to bring up their children follows from Article 177 of the Civil Law.

The Constitutional Court has also recognised that Article 110 of the Satversme does impose the obligation upon the State to support the family, but does not create subjective right to a person to receive concrete state support in a specific way (*see, for example, Judgement of 2 November 2006 by the Constitutional Court in Case No. 2006-07-01, Para 13.1*).

Thus, the State's positive obligation that follows from Article 110 of the Satversme cannot be specified to the extent that it would ensure to every disabled child and the person, whose family is raising a disabled child, the right to receive the envisaged state support in a form that they prefer.

**Therefore, with regard to a judge, whose family is raising a disabled child, the contested norm complies with Article 110 of the Satversme.**

**15.** The Applicant holds that the contested norm is incompatible with the principle of equality included in Article 91 of the Satversme, i.e., that all parents, who are raising a disabled child, should have equal rights to provide assistant's services to their child and to receive for it remuneration as established by the State.

Article 91 of the Satversme provides: "All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind." The Constitutional Court has recognised that the objective of the principle of equality enshrined in the first sentence of Article 91 of the Satversme is to ensure that such requirement of a judicial state as comprehensive impact of law upon all persons and that law would be applied without any privileges whatsoever would be ensured (*see Judgement of 2 February 2010 by the Constitutional Court in Case No. 2009-46-01, Para 7*). However, this does not mean levelling out, but requires similar treatment of persons, who are in genuinely similar and comparable circumstances. Namely, the principle of equality allows and even demands differential treatment of persons, who are in different circumstances, as well as allows differential treatment of persons, who are in similar circumstances, if there are objective and reasonable grounds for it (*see, for example, Judgment of 3 April 2001 in Case No. 2000-07-0409, Para 1 of the Findings, and Judgement of 13 May 2005 in Case No. 2004-18-0106, Para 13 of the Findings).*

The second sentence of Article 91 of the Satversme, which provides that human rights shall be realised without discrimination of any kind, supplements the first sentence of the same Article (*see Judgement of 3 April 2001 by the Constitutional Court in Case No. 2000-07-0409, Para 1 of the Findings).* Prohibition of discrimination is an auxiliary element included in the principle of equality, which in certain situations specifies this principle and helps to apply it in concrete situations (*see: Latvijas Republikas Satversmes komentāri.*

*VIII nodaļa. Cilvēka pamattiesības. Autoru kolektīvs prof. R. Baloža zinātniskajā vadībā. Rīga: Latvijas Vēstnesis, 2011, 74. lpp.*). The aim of the prohibition of discrimination, which is included in the second sentence of Article 91 of the Satversme, is to eliminate unequal treatment, if its founded upon an inadmissible criterion, for example, race, ethnicity or gender (*see, for example, Judgement of 29 December 2008 by the Constitutional Court in Case No. 2008-37-03, Para 6).* The catalogue of prohibited criteria reflects society's choice of those differences between its members that are inadmissible as the grounds for differential treatment. If differential treatment is based on any of the criteria that have been included in the catalogue of prohibited criteria, then it either cannot be justified at all or can be justified only in an exceptional case (*see: Latvijas Republikas Satversmes komentāri, 104. lpp.*). In difference to the first sentence of Article 91 of the Satversme, the essence of the principle on prohibition of discrimination is as follows: to eliminate the possibility that in a democratic and judicial state, on the basis of an admissible criterion, a person's fundamental rights were restricted (*see Judgement of 14 September 2005 by the Constitutional Court in Case No. 2005-02-0106, Para 9.3*).

Such differential treatment, which is based on any of the prohibited criteria, creates the so-called direct discrimination. In some cases differential treatment may be based upon a neutral criterion, but in fact this treatment affects a certain group of people, to which this neutral criterion typically applies, causing the so-called indirect discrimination (*see: Latvijas Republikas Satversmes komentāri, 105. lpp.*). The Court of Justice of the European Union also recognises that discrimination may manifest itself indirectly. Indirect discrimination may be established when an apparently neutral rule, criterion or practice places a group of persons, which can be identified by a certain feature, in a more disadvantageous state, unless this rule, criterion or practice cannot be justified by objective factors that do not follow from the prohibited criteria (*see, for example, Judgement of 3 October 2006 by the Court of Justice of the European Union in Case C-17/05, Para 30 and Para 31*).

The Constitutional Court has recognised that the legislator, in adopting a legal act, must take into consideration the principle of equality included in Article 91 of the Satversme (*see, for example, Judgement of 3 April 2001 by the Constitutional Court in Case No. 2000-07-0409, Para 1 of the Findings).* Accordingly, the legislator has the obligation to draft such provisions that provide for differential treatment of persons, who are in different circumstances, unless there are reasonable and objective grounds for not doing so. Thus also a neutral legal regulation must comply with this understanding of the principle of equality.

**Thus, the first sentence of Article 91 of the Satversme applies also to a neutral legal regulation or a criterion, which causes differential treatment of a group of individuals, which can be identified by a certain feature.**

**16.** To assess, whether the contested norm complies with the principle of equality that Article 91 of the Satversme comprises, it must be identified:

1) whether and which persons (groups of persons) are in similar and according to certain criteria comparable circumstances;

2) whether the contested norm envisages similar or differential treatment of these persons;

3) whether such treatment has objective and reasonable grounds, i.e., whether it has a legitimate aim and whether the proportionality principle has been complied with (*see, for example, Judgement of 2 February 2010 by the Constitutional Court in Case No. 2009-46-01, Para 7*).

**17.** The Constitutional Court has noted that two situations are never completely identical. A situation that shares one or more features with the situation to be scrutinised should be chosen for comparison (*see, for example, Judgement of 4 January 2007 by the Constitutional Court in Case No. 2006-13-0103, Para 7*). In assessing, whether the principle of equal treatment is complied with, the decisive factor is, whether several groups of persons are

united by a common and significant feature. To establish, whether and which groups of persons are in similar and comparable circumstances, the main feature that these groups share must be identified.

**17.1.** First of all it must be established, whether and which persons (groups of persons) are in similar and according to certain criteria comparable circumstances. The Applicant holds that all parents, who have a disabled child and who must themselves provide assistant's services to this child, are in comparable circumstances. The shared typical feature is that these parents are raising disabled children. Irrespectively of the number of family members, income of the family or sectors, where the parents are employed, they have the obligation to take care of their disabled child, providing constant care and supervision to him.

All disabled children have the right to assistant's services paid for by the State. Para 3 of Regulation No. 942 defines requirements for providers of assistant's services. Any natural person, who has work related or personal experience in communicating with disabled persons, may be an assistant. Regulation No. 942 does not provide for any other restrictions. Thus, also parents may provide assistant's services to their disabled child. However, this is not allowed to those parents of disabled children, who are judges. Thus, the distinctive element, which characterizes this group of parents, is the field of their employment, concretely – the status of a judge. I.e., judges are not allowed to provide assistant's services to their disabled children.

The Saeima upholds the Applicant's view on the groups of persons to be compared in the case. After familiarizing itself with the case materials, the Saeima has expanded its opinion, noting that the summoned persons lack uniform understanding of which groups of persons are in similar and comparable circumstances in the case under review. The Ombudsman, the Ministry of Justice and I. Bite hold that all those parents, who have disabled children, are in comparable circumstances. The Bureau has underscored that the same actual circumstances can be identified with regard to the Applicant and others parents, who are raising disabled children, however, the legal

circumstances, which follow from the Applicant's status as a judge and the restrictions set in connection therewith, differ (*see, Case Materials, p. 75*). K. Dupate holds that the situation of the Applicant significantly differs from those judges, whose families do not have a disabled child, since she needs to assume assistant's duties for her disabled child.

All participants in the case recognise that a disabled child has the right to use assistant's services also in the case, if these are provided by one of her parents. It follows from the case materials that in the particular case the Applicant needs to provide assistant's services to her childe due to her health condition (*see Case Materials pp. 6 and 9).* Those parents, who have a disabled child, but do not hold the office of a judge, in case of necessity may provide assistant's services to their child. However, due to the prohibition to combine offices that the contested norm establishes with regard to judges the Applicant is not allowed to provide these services. Thus, the Applicant is in a comparable situation with all those parents, who need to provide assistant's services to their disabled child themselves.

**Thus, all parents, who need to provide assistant's services to their disabled child themselves, are in similar and comparable circumstances.**

**17.2.** The nature of the contested norm is of importance in the case under review. Pursuant to Section 6 (1) of Law on Preventing Conflict of Interest, a public official is permitted to combine an office of the public official with another office, in the performance of a work-performance contract or authorisation, if restrictions on the combining of the offices of the public official are not provided for in this Law or in another regulatory enactment. The special restrictions on combining offices, which apply to judges, have been established in the contested norm. I.e., it points to concrete types of occupations, with which the office a judge may be combined. The Bureau has recognised that performance of assistant's duties is to be considered as office in the meaning of the Law on Preventing Conflict of Interest. Since the contested norm does not permit a judge to perform duties of assistant to his disabled child, in the framework of regulation that is in force those parents of disabled

children, who are judges, may not conclude a contract on work-performance to provide assistant's services to their child (*see Case Materials, p. 7).* The Bureau holds that the contested norm is restrictive as to its nature and that the aim of this norm is to ensure that the public officials it refers to act or perform the public function in the interests of society.

The aim of the Law on Preventing Conflict of Interest is to ensure that all public officials act in the interests of society, preventing that the personal or material interests of a public official, his relatives or business partners impact the activities of a public official, as well as to promote transparency of a public official's activities and public accountability and public trust in actions by public officials (*see Section 2 of Law on Preventing Conflict of Interest*). The Constitutional Court considers the finding that has been consolidated in the case law of the European Court of Human Rights (hereinafter – ECHR) as well-founded, i.e., that the status of a public official is characterised by a special relationship of trustworthiness and loyalty with the State (*see, for example, ECHR Judgement of 18 November 2014 in Case Spūlis and Vaškevičs versus Latvia, Applications No. 2631/10 and 12253/10, Para 41*). The provision on the relationship of special trustworthiness and loyalty towards the State is the basis for restrictions linked with the status of a public official, which *per se* cannot be perceived as being disproportional from the vantage point of the equality principle.

To ensure that the aims of the Law on Preventing Conflict of Interest are met, the contested norm refers to all those public officials, who are permitted to combine their office only with such office or performance of such contract for work-performance or authorisations, which is envisaged in the same norm. The contested norm equally applies to all officials that are referred to, judges including, without recognising any differences. Thus, the contested norm as such is neutral towards all judges. However, it places a judge in a different situation, if he needs to provide assistant's services to his disabled child.

**Therefore the contested norm, though being neutral, creates differential treatment of a judge, who is prohibited from providing assistant's services to his own disabled child.**

**17.3.** To determine whether the differential treatment caused by the contested norm has objective and reasonable grounds, it must be verified, whether the differential treatment has a legitimate aim.

The Constitutional Court has recognised that in the legal proceedings before the Constitutional Court the institution, which has adopted the contested act, has the duty to indicate and substantiate the legitimate aim of differential treatment (*see, for example, Judgement of 1 November 2012 by the Constitutional Court in Case No. 2012-06-01, Para 12*). The Saeima notes in its written reply that the legitimate aim of the restriction on fundamental rights that the contested norm comprises is to ensure independence of the judicial power, to protect the rights and lawful interests of other persons and the democratic state order (*see Case Materials, p. 37*). The Applicant, in her turn, does not discern the legitimate aim of the differential treatment. A number of persons summoned in the case uphold the Applicant's opinion.

Article 83 of the Satversme 83 provides: "Judges shall be independent and subject only to the law." The independence of judges and the court established by this constitutional norm is one of the fundamental principles of a democratic and a judicial state (*see Judgement of 18 January 2010 by the Constitutional Court in Case No. 2009-11-01, Para 7*). The principle of judges' independence included in Article 83 of the Satversme requires that the independence of the court in general and the independence of a judge in each specific case is ensured by the judicial system. This has been underscored also by the Saeima.

The requirement of judicial independence that is defined by international legal documents falls within the content of the right to a fair trial. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal

established by law. Article 14 of the United Nations International Covenant on Civic and Political Rights comprises a similar definition. The Consultative Council of European Judges has underscored that the independence of a court should been guaranteed both with respect to both parties of the concrete dispute and to society in general (*Opinion No 1 (2001) of the Consultative Council of European Judges on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, Strasbourg, 23 November 2001, para 11*). Even though this document is not legally binding upon states, it provides an authoritative opinion on the content of the principle of judges' independence. Thus, judges' independence guarantees safeguarding of the rule of law in the interests of society and the state in general (*see Judgement of 18 January 2010 by the Constitutional Court in Case No. 2009-11-01, Para 7.2*).

To ensure a fair trial and the independence of a judge in all legal proceedings, appropriate legal regulation has been elaborated. To ensure a judge's independence and objectivity in each particular case, the State has established procedures for recusing and dismissing a judge, prohibition to participate in repeated examination of the case and other safeguards in all laws that regulate legal proceedings. A number of legal acts guarantee the independence of the judicial power and judges on the institutional level, *inter alia*, the Satversme and the Law on Preventing Conflict of Interest.

Thus, the contested norm is part of the legal regulation that ensures the transparency of actions taken by a judge as an official and his public accountability, thus ensuring the independence of the judicial power in a democratic state.

**Hence, the legitimate aim of the differential treatment caused by the contested norm is protecting the rights of other persons and democratic state order.**

**18.** To assess, whether the differential treatment caused by the contested norm complies with the principle of proportionality, it must be verified:

1) whether the measures chosen by the legislator are appropriate for reaching the legitimate aim:

2) whether this action is necessary, i.e., whether the legitimate aim cannot be reached by other measures, less restrictive upon an individual's rights and lawful interests;

3) whether the legislator's actions are proportional, i.e., whether the benefit gained by society exceeds the damage inflicted upon an individual's rights and lawful interests (*see, for example, Judgement of 5 June 2003 by the Constitutional Court in Case No. 2003-02-0106, Para 4 of the Findings, and Judgement of 22 December 2008 in Case No. 2008-11-0, Para 13*). If in the examination of a legal norm it is recognised that it is incompatible with even one of these criteria, then it is incompatible with the proportionality principle and is unlawful (*see, for example, Judgement of 19 March 2002 by the Constitutional Court in Case No. 2001-12-01, Para 3.1 of the Findings*).

**18.1.** In assessing, whether the differential treatment is proportional, first of all it must be verified, whether the contested norm is appropriate for reaching the legitimate aim.

The Saeima has indicated that the contested norm is appropriate for reaching the legitimate aim. It ensures that a judge will not be in employment or other type of financial dependency relationship with institutions from other branches of state power (including local governments) and that private persons will not have the possibility to influence a judge's independence through this kind of relationship. The Saeima has also underscored that a judge is permitted to engage only in such economical activity that is linked with using his property or exercising rights of economic nature. Such exemptions are said to be established in connection with a judge's rights provided for in Article 105 of the Satversme and not with a general permission to engage in any kind of commercial activities.

Even though the contested norm prohibits the Applicant from providing assistant's services to her disabled child herself, it, nevertheless, does not prohibit her to accompany her child in her daily activities together with an

assistant, whose services are paid for by the State. The services of an assistant could be provided by other members of the family. The prohibition is said to apply only to the Applicant.

As regards the facts of the case under review, the Saeima has admitted that currently a situation that has evolved in practice, where a mother, whose child has a disability, is concurrently both claiming and providing the required assistant's services, is faulty from the law policy point of view. The Saeima holds that receiving of assistant's services as one type of State social support should be separated from the provision thereof, since the provider of these services should be an appropriately trained person. The aim of assistant's services is to provide practical support to a disabled child and, thus, also to his family, to the extent possible making its daily life easier. The restriction upon combining offices established by the contested norm would not influence the Applicant's family and would make its daily life easier, if, pursuant to the purpose and the meaning of assistant's services, the family were ensured the possibility to receive the services of a sufficiently qualified assistant.

The Applicant, in turn, does not see how provision of assistant's services to her disabled child might influence her independence as judge and how the provision of this service differs from types of activities included in the contested norm. The Applicant emphasizes that in her situation the primary factor is not the financial gain, but the need to provide services of social nature to her child. The Applicant underscores that the State is not ensuring availability of appropriately trained assistants and, thus, she needs to provide the respective service herself.

The Constitutional Court notes that in the case under review in assessing the compliance with the equality principle the particular situation of the Applicant should be taken into account. The Saeima's arguments that the restrictive impact of the contested norm is decreased by the fact that other members of the family are not prohibited from providing assistant's services and that the mother is not prohibited to accompany her child together with a person, who provides assistant's services paid for by the State, cannot be seen

as a solution in the Applicant's situation. It follows from the case materials that in the concrete circumstances only the mother, i.e., the Applicant, can provide assistant's services to the disabled child.

The Constitutional Court notes that the prohibition to combine offices that the contested norm sets for judges is not absolute. It is permitted to combine an office of the judge with the offices referred to in the contested norm, for example, the work of a teacher, researcher, professional athlete, and with creative work. It may also be combined with economic activity, if in the scope of such activity income is derived from farming, forestry, fishery, rural tourism or professional activity of a general practitioner, as well as such economic activity, which is performed by administering the immoveable property that belongs to the judge, as well as performing such authorisation, on the basis of which the official acts on behalf of his relative, if this does cause conflict of interest (*see Section 7(1), (10$^1$) and (11) of Law on Preventing Conflict of Interest).*

It follows from the contested norm and the Law on Preventing Conflict of Interest in general that the legislator, in defining offices and types of occupation that can be combined with a judge's office, have recognised as significant pre-requisites of a judge's autonomy, which derive from his kinship links (performing an authorisation granted by a relative), administering property he owns (for example, forestry, rural tourism) and individual professional activities (for example, practice of a general practitioner, teaching). Thus, the legislator has recognised that such pre-requisites do not create a risk of conflict of interest for the judge, irrespectively of the remuneration or the amount of any other financial benefit that he gains. In the course of examining the case the Saeima has not provided arguments on why the provision of assistant's services to one's own disabled child, in difference to all other types of activities permitted by the contested norm, would place a judge in a situation of conflict of interest. Likewise, no justification has been provided why combining the office of a judge with the provision of assistant's services to one's disabled child would subject the judge's independence to a

greater risk than combining the office of a judge with the types of activities that the contested norm permits.

The argument provided by the Saeima that the contested norm in the Applicant's situation prevented probable influence by other branches of state power could not be upheld. It must be taken into consideration that in all cases of combining types of activities and offices permitted in Law on Preventing Conflict of Interest a judge may enter a direct or indirect contact with other branches of state power. For example, in administering his immoveable property, it may be necessary for the judge to communicate with local government institutions. Nothing in the facts of the case under review proves that if a judge were to provide assistant's services to his disabled child, the need to communicate with officials of respective state or municipal institutions would be greater than in any other case of combining offices and types of activities permitted by the contested norm. State support for receiving assistant's services has been defined in the Disability Law. The agreement on provision of assistant's services is concluded with the respective local government in accordance with the procedure established by Regulation No. 942. Local governments, in administering the provision of assistant's services, perform certain functions, which are to be regarded as neutral with respect to the person providing assistant's services.

The Saeima holds that in establishing judges' remuneration it has taken into consideration and partially compensated for the restrictions regarding combining of offices. A number of persons summoned in the case consider that the remuneration for provision of assistant's services is symbolic and does not cover the actual costs of the service. Allegedly, the established remuneration influences also the availability of qualified assistants.

The Constitutional Court, having examined the regulation of various countries insofar it restricts combining the judge's office with other types of activities, concludes that it is permitted to combine the judge's office with another activity that follows from autonomy of a judge as an individual. In some countries restrictions have been established as general principles. For

example, in Austria judges are prohibited to perform other work that could not be combined with the status of a judge, would hinder them from effective performance of a judge's duties, because would demand or take too much time, would create concern about objectivity of judges or would significantly jeopardize the interests of judge's office in any other way. Similar provisions of general nature with regard to combining a judge's office with other activities are in force, for example, in Norway and Sweden.

The Constitutional Court has repeatedly recognised that in comparative law analyses the different legal, social, political, historical and systemic context of a state should be taken into consideration (*see, for example, Judgement of 8 June 2007 by the Constitutional Court in Case No. 2007-01-01, Para 24.1, and Judgement of 3 June 2009 in Case No. 2008-43-0106, Para 10.6*).

Thus, the national legal regulation in this field is indissolubly linked with the regulation on judicial power of the particular state, which ensures a judge's independence and abides by the autonomy of the judge as an individual.

**18.2.** In the case under review the fact that the contested norm as to its nature is neutral or does not envisage different regulation with regard to persons, who are in different situations, causes restriction upon the Applicant's equal rights. In some cases insufficient differentiation of persons being in different actual situations may cause a violation of the principle of equal treatment (*see Judgement of 12 April 2006 by the Grand Chamber of ECHR in Case "Stec and Others v. the United Kingdom", Applications No. 65731/01 and 65900/01, Para 51*).

The Constitutional Court notes that the legislator has the right to develop such system of regulatory enactments, which envisages special treatment of a certain group, only if it can be justified within the scope of equality principle. One of the ways for ensuring differential treatment of a group, which due to an important feature is in different circumstances compared to other groups, is establishing appropriately differentiated categories in regulatory enactments (*see, for example, ECHR Judgement of 6*

*April 2000 in Case "Thlimmenos v. Greece", Application No. 34369/97, Para 48*). Scholar of law E. Levits also notes that in certain cases Article 91 of the Satversme may be the grounds for elaborating more differentiated regulations, if the previous regulation has not been sufficiently differentiated (*see: Levits E. Par tiesiskās vienlīdzības principu. Par līdztiesību likuma un tiesas priekšā un diskriminācijas aizliegumu. Par Satversmes 91. pantu. „Latvijas Vēstnesis", 2003. gada 8. maijs, Nr. 68, 19. lpp.*).

The Constitutional Court recognises that it is impossible to regulate in law the concrete situation of every person; however, it notes that law should ensure sufficiently differentiated treatment so that a norm in different legal and actual situation would not cause incompatibility with the equality principle included in the first sentence of Article 91 of the Satversme. It has been recognised in the ECHR case law that the State enjoys considerable discretion in establishing to what extent some different features in comparable situations may serve as the grounds for establishing differential treatment (*see Judgement of 12 April 2006 by the Grand Chamber of ECHT in Case "Stec and Others v. the United Kingdom", Applications No. 65731/01 and 65900/01, Para 51*). The State has the discretion to assess, whether and to what extent differential treatment is admissible and justifiable, but this limit is defined by the nature and the cause of each particular case. It might be necessary, by taking into account the needs of concrete persons, to define broader groups to cover the different actual circumstances (*see, for example, Judgement of 16 March 2010 by the Grand Chamber of ECHR in Case "Carson and Others v. the United Kingdom", Application No. 42184/05, Para 61 and 62*).

**18.3.** The obligation of the state power to abide in its activities by the principles of a judicial state follows from the concept of a democratic republic enshrined in Article 1 of the Satversme (*see, for example, Judgement of 19 June 2010 by the Constitutional Court in Case No. 2010-02-01, Para 4*). First of all this means that the legislator is obliged to consider periodically, whether legal regulation continues to be effective, appropriate and necessary and whether it should not be improved in any way (*see, for example,*

*Judgement of 8 June 2007 by the Constitutional Court in Case No. 2007-01-01, Para 26, and Judgement of 2 June 2008 in Case No. 2007-22-01, Para 18.3*). The Constitutional Court notes that the Saeima has the obligation to assess, whether the valid regulation for preventing officials' conflict of interest complies with the equality principle.

The Constitutional Court recognizes that with regard to a judge, who is not allowed to provide assistant's services to his own disabled child, the legitimate aim of the restriction upon fundamental rights caused by the contested norm is not reached. Therefore the regulation established by the contested norm is not sufficiently differentiated and, thus, the Applicant, whose family is raising a disabled child, is not permitted to provide assistant's services to her own disabled child, if it is necessary.

Therefore the contested norm is not appropriate for reaching the legitimate aim with regard to a state official – a judge, who needs to provide assistant's services to her disabled child.

**Thus, the contested norm is incompatible with the principle of equality enshrined in the first sentence of Article 91 of the Satversme.**

## The Substantive Part

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

**h e l d :**

**1.** To recognise the third part of Section 7 of the law "On Prevention of Conflict of Interest in Activities of Public Official" with regard to a judge, who needs to provide assistant's services to his own disabled child, as being compatible with Article 110 of the Satversme of the Republic of Latvia.

**2.** To recognise the third part of Section 7 of the law "On Prevention of Conflict of Interest in Activities of Public Official" with regard to a judge, who needs to provide assistant's services to his own disabled child, as being incompatible with the first sentence of Article 91 of the Satversme of the Republic of Latvia.

The Judgement is final and not subject to appeal.

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

Chairperson of the court sitting A. Laviņš