



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

J U D G E M E N T

On Behalf of the Republic of Latvia

Riga, 27 December 2010

Case No. 2010-38-01

The Constitutional Court of the Republic of Latvia, composed of the Chairman of the Court hearing Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Kristīne Krūma, Vineta Muižniece, and Vikotrs Skudra,

having regard to an application of Ms. J.F. (hereinafter – the Applicant),

according to Article 85 of the Satversme [Constitution] of the Republic of Latvia, Article 16 1st indent, Article 17 (1), 11th indent, and Article 19.² and 28.¹ of the Constitutional Court Law,

on 30 November 2010 in writing examined the case

“On Compliance of Section 358 and Section 364 of the Civil Law with Article 96 of the Satversme of the Republic of Latvia”.

The Facts

1. Section 358 of the Civil Law provides: “The mentally ill, who lack all or a large part of their mental capacity, shall be acknowledged as lacking the capacity to act and as

legally incapable to represent themselves, administer their property and to deal with it, for which reasons trusteeship may be established for them.”

However, Section 364 of the Civil Law envisages: “If a court has found a mentally ill person as having recovered their health, i.e. as having the capacity to act, it shall direct the orphan's court to release the trustees from their appointment after they have submitted an accounting and transferred the property which was under their administration to the person who has recovered his or her health.

Section 358 and Section 364 of the Civil Law (hereinafter – the Contested Norms) in the above mentioned wording are effective since 1 September 1993 or the date when the Family Rights Chapter of the Civil Law came into force.

2. The Applicant was recognized as lacking the capacity to act by 5 June 2003 judgment of the Riga City Court of the Latgale Region [*Rīgas pilsētas Latgales priekšpilsētas tiesa*]. A brother of the Applicant was nominated a trustee of the Applicant. Based on the application of the Applicant, the Riga Orphans Court [*Rīgas bāriņtiesa*] addressed a court regarding recognition of her [the Applicant] as capacitated and termination of trusteeship, whilst on 19 December 2007 the Riga City Court of the Latgale Region rejected the application of the Riga Orphans Court.

The Applicant is of the viewpoint that the Contested Norms infringe her rights to inviolability of private life guaranteed in Article 96 of the Satversme of the Republic of Latvia (hereinafter – the Satversme). The restriction introduced by the Contested Norms has been established by law and it has a legitimate aim, which is ensuring of welfare of the society and protection of the rights of other persons by primarily trying to protect persons having mental disturbances from the risk of abuse and to ensure them assistance necessary for implementation of their rights. However, this restriction is not proportional.

The legitimate aim can be reached by other more lenient measures. Section 358 of the Civil Law establishes only establishment of complete incapacity to act; it fails to take into account the level of mental disturbance of a person. Consequently, the law provides for a restriction of a certain kind and extent and excludes other alternatives that would restrict the rights of a person at a lesser extent, for instance, partial limitation of legal capacity or adoption of a supported decision. According to the Applicant, a person

lacking the majority of mental capacity should not be limited in his or her legal capacity at full extent. Moreover, the law should distinguish between cases when a person lacks a half or a lesser extent of his or her mental capacity, and establish proportional restriction. At present, the law does not envisage the possibility to establish restrictions proportional to a person's loss of mental capacity; instead, it provides for establishment of uniform status and restrictions to persons with mental and intellectual development disturbances of different character and level of gravity.

Likewise, Section 364 of the Civil Law admits restoration of legal capacity only in case if a person has recovered his or her health. Consequently, it restricts without reason the circle of those person to whom restoration of legal capacity can be applied because it is not possible for a person to recover from intellectual development disturbances, like it is the case with the majority of mental diseases. The Law fails to provide restoration of legal capacity based on the same criteria applied when establishing legal capacity, namely, based on the ability to protect oneself and administer one's property, as well as to deal with it. Likewise, recovery has been established as the only criterion, and the ability of a person to acquire new or develop existing skills by thus improving his or her ability to adopt independent decisions.

When substantiating her viewpoint, the Applicant has referred to several international law documents, especially to United Nations Organization (hereinafter – the UN) Convention on the Rights of Persons with Disabilities. The Applicant also indicates that, in the majority of European States, alternative solutions for incapacitating a person have been introduced.

3. The institution that adopted the contested act, the Saeima does not share the viewpoint of the Applicant and holds that the Contested Norms do comply with Article 96 of the Satversme.

The Contested Norms restrict the right to private life; however, the restriction is proportional. Section 358 of the Civil Law does not provide a mechanical restriction of capacity to act disregarding the level of loss of mental capacity of a person. Quite on contrary, the above mentioned section establishes incapacitating of a person only in cases when a person lacks all or a large part of his or her mental capacity. In other cases, based

only on presence of mental illness, it is not possible to incapacitate a person. Moreover, the procedure, according to which a person is recognized as lacking capacity to act ensures sufficient assessment before adopting final decision, as well as balances interests of different parties.

To restore person's ability to act, Section 364 of the Civil Law does not require that a court should recognize the ill person as having completely recovered his or her health. In the meaning of Section 364 of the Civil Law, a person shall be recognized as recovered his or her health if a person does not lack mental capacity to master ordinary things. Likewise, norms of the Law on Orphan's Courts in conjunction with Section 270 (1) of the Civil Procedure Law establishes the duty of the orphans court to monitor situation of a person lacking the ability to act and to initiate restoration of capacity to act of a person whenever it is legally grounded. This mechanism should be ensured certain regularity in reassessment of incapacitating of a person.

Incapacitation is being effected only in the gravest cases. In "borderline" situations when recognition of a person as lacking capacity to act is disputable theoretically and hypothetically by reasonably applying legal norms, it is necessary to decide on preservation of capacity to act by avoiding restricting the right to inviolability to private life guaranteed in the Satversme.

Article 12 of the UN Convention of the Rights of Persons with Disabilities does not commit parties to the Convention to include, into normative act, legal regulation on recognizing of a person as partially lacking capacity to act. It only requires applying proportional measures when incapacitating a person. Partial incapacitation of a person is only one of the instruments applied in other states. Other instruments include personal assistants, observance of previously established, supported decision-making etc. Within the limits of executive power, it is currently being assessed whether normative acts of Latvia in this respect should be improved.

Appointment of a trustee in accordance with the Contested Norm allows a person to administer his or her property and to get involved in everyday life at a certain extent rather than infringes the rights of persons with mental disturbances. Consequently, the Contested Norms restrict, at a reasonable extent, the right to private life, and they comply with the principle of proportionality.

4. The summoned person, the Ministry of Welfare informs that, by means of 12 October 2009 Cabinet of Ministers Order No. 693, the Action Plan 2010 – 2012 of the for the Implementation of the UN Convention on the Rights of Persons with Disabilities has been ratified. The Action Plan included the duty to assess the necessity to update the Family Rights Chapter of the Civil Law and to adopt a decision regarding usefulness of elaboration of amendments to the Civil Law. A working group composed of representatives of the Ministry of Welfare, the Ministry of Justice, the Ministry of Health, the Ombudsman office and other public institutions was established to fulfil the above mentioned task. The working group was committed to adopt, before 21 December 2010, a decision regarding usefulness of elaboration of amendments into normative acts.

The following has been established in the previous meetings of the working group: in order to fulfill liabilities established in Article 12 of the UN Convention on the Rights of Persons with Disabilities, national normative acts regulating issues related with legal capacity of persons should envisage maximum level of preservation of ability to act of a person. When restricting person's legal capacity, particular normative acts should be based on the principle of proportionality, the right to regular reassessment of legal capacity of a person should be ensured, as well as a person should be ensured the right to be heard at any stage of legal proceedings.

Members of the working group were of the opinion that, in order to exercise Article 12 of the UN Convention on the Rights of Persons with Disabilities, it is necessary to introduce amendments into the Civil Law, the Civil Procedure Law and the Law on Orphan's Courts by establishing prohibition of incapacitation of a person at full extent. It is necessary to concretize criteria for restricting legal capacity by establishing maximum preservation of legal capacity. Likewise, restriction of legal capacity should be established for a certain period of time, and it must be reassessed. When restricting legal capacity of a person, it is necessary to execute individual assessment, and the restriction should be applied only to those fields, in which a person is not able to adopt independent decisions.

Likewise, members of the working group were of the viewpoint that it is necessary to introduce the mechanism of supported decision into national normative acts by appointing a special person in certain fields of life. These fields of life should be determined and the supporting person should be appointed by means of a court judgment

taking into account state of health of a person, as well as his or her desires and interests. It is also necessary to establish that a person has the right to communicate his or her intents in case if a person is unable to adopt certain decisions because of the state of health.

Certain amendments are also necessary in the Civil Procedure Law in respect to participation of a person at a court hearing, the duty and methods of hearing a person and other issues. It is necessary to emphasize the duty of a judge to assess impact of illness on the ability of a person to decide issues of a particular field rather than take into consideration expert examination opinion. The word “to become healthy” from Section 270 of the Civil Procedure Law should be crossed out because there are certain diseases that cannot be cured. Likewise, it is necessary to broaden the circle of person who would have the right to submit an application regarding restoration of their legal capacity.

The Ministry of Welfare is of the viewpoint that the Contested Norms do infringe the fundamental right guaranteed in Article 96 of the Satversme, and the principle of proportionality has not been observed in respect to this restriction. Although limitation of capacity to act is necessary as a kind of protective measure, the restriction should be related with certain circumstances. When establishing such restriction, it is necessary to take into account the capacity to act of a person and his or her needs. Moreover, restriction of legal capacity as a protective measure should interfere with the rights of a person at the lesser extent possible.

5. The summoned person, the Ombudsman of the Republic of Latvia (hereinafter – the Ombudsman) indicates that, after having summarized applications submitted before the Ombudsman Office regarding issues of legal capacity, it is possible to make the following conclusions:

1) in certain cases, legal proceedings regarding incapacitating of a person is initiated without notifying the concerned person; moreover, courts fail to appropriately assess whether an application contains sufficient amount of evidence to initiate particular legal proceedings;

2) in certain cases, a person is incapacitated by ignoring his or her rights to participate in court hearing and provide explanations;

3) in certain cases, summoned experts (orphan's court, a public prosecutor, experts of different courts) hold that a person should be restricted his or her legal capacity in a particular field rather than be fully incapacitated; unfortunately, the present normative regulation fails to provide such possibility;

4) case-law of courts show that it is seldom that legal capacity of a person is restored.

Already in the frameworks of examination of 2008, the Ombudsman has concluded that legal norms regulating the issue of legal capacity do not comply with the Satversme and international documents on human rights. Therefore, on 14 October 2008, a letter was sent to the Ministry of Justice appealing to introduce necessary amendments into the Civil Law and the Civil Procedure Law in respect to incapacitation of person and restoration of legal capacity of persons. In the reply of the Ministry of Justice, support to improve normative regulation was expressed.

At present, the representative of the Ombudsman office is a member of the working group established by the Ministry of Welfare; the task of the working group is to assess the necessity to introduce amendments regarding the institute of legal capacity and trusteeship. One of the main opinions of the working group is that that, in order to implement the duty established in Article 12 of the UN Convention on the Rights of Persons with Disabilities, it is necessary to introduce amendments into the Civil Law, the Civil Procedure Law, the Law on Orphan's Courts by establishing prohibition of full incapacitation of a person.

The Ombudsman is of the viewpoint that the duty of the Republic of Latvia to establish such normative regulation that would provide the possibility to partially restrict legal capacity of a person follows from Article 12 of the UN Convention on the Rights of Persons with Disabilities, as well as from Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the European Human Rights convention) in conjunction with 23 February 1999 Council of Europe Committee of Ministers Recommendation No. R (99) 4 “On Principles Concerning the Legal Protection of Incapable Adults”. It is necessary to establish measures for individual assessment of each case by establishing the restriction only in certain fields depending on the needs of the person.

It is not possible to agree with the opinion expressed in the Saeima reply that the Contested Norms permit a differentiated approach in restriction of legal capacity of a person. They, in fact, establish only extreme solutions, namely, wither a person is fully incapacitated, or his or her legal capacity is fully preserved. This does not ensure appropriate protection of person with mental disturbances. The contested regulatory framework fails to establish alternative solutions that would restrict the rights of persons at a lesser extent, for instance, by establishing partial loss of ability to act or envisaging the possibility to adopt supported decisions. Likewise, it should be taken into account that, by fully preserving legal capacity of a person in case when a person lacks a part of mental capacity, this does not ensure protection of the rights of the particular person, as well as those of other persons. Consequently, Section 358 of the Civil Law restricts the right of a person to private life in a non-proportional manner, and it cannot fully ensure reaching of the set aims.

However, Section 364 of the Civil Law establishes, without reason, recovering of health as the main criterion for restoring person's legal capacity. The Law fails to clearly establish the possibility to restore person's legal capacity based on the same criteria that were taken into account when incapacitating the person. Moreover, the former case-law of courts shows that this norm has been interpreted in a grammatical manner. Consequently, the effective regulatory framework fails to ensure the right to private life to persons with mental disturbances in cases when a particular illness cannot be cured.

The Findings

6. In the present case, the constitutional complaint was submitted by an incapacitated person. It has been indicated in the decision regarding initiation of a case that the issue regarding the capacity of the Applicant to submit a constitutional complaint shall be assessed during adjudication of the case.

The Constitutional Court Law fails to *expressis verbis* solve the issue regarding legal capacity in the Constitutional Court proceedings. However, the first part of

Article 19.² of the Constitutional Court Law establishes that an application before the Constitutional Court can be submitted “by any person who considers that their fundamental rights as defined in the Constitution infringe upon legal norms that do not comply with the norms of a higher legal force”. Consequently, this is the ability to be subject to fundamental rights rather than legal capacity of a person that serves as the criterion for submitting a constitutional complaint.

The Applicant has submitted the constitutional complaint regarding legal norms that are directly related with her status of an incapable person. Moreover, it is necessary to take into account the fact that a trustee of the Applicant has not showed his/her interest in contesting the particular norms. Therefore, in case if the Constitutional Court would refuse accepting and reviewing constitutional complaint of the Applicant, she would be denied the right to protect her fundamental rights.

The opinion that the primary aim of a constitutional complaint is protection of fundamental rights and that this should be particularly taken into account when deciding of legal capacity in a Constitutional Court proceedings has also been expressed in the domain of law (*see: Rodiņa A., Konstitucionālās sūdzības teorija un prakse Latvijā. Rīga: Latvijas Vēstnesis, 2009, pp. 75*). The European Human Rights Committee has also rejected the argument that incapacity of a person could deny his or her right to submit a complaint (*see: Decision of the European Human Rights Committee in the case Matter v. The Slovak Republic, decision as to the admissibility, 16 September 1997, appl. No. 31534/96, Para. 1*).

Consequently, it can be established that the Applicant does have the right to submit a constitutional complaint regarding the Contested Norms.

7. The Applicant holds that the Contested Norms fail to comply with the rights to inviolability of private life guaranteed in Article 96 of the Satversme.

Article 96 of the Satversme provides: “Everyone has the right to inviolability of his or her private life, home and correspondence.”

When explaining the right to private life guaranteed in Article 96 of the Satversme, the Constitutional Court has indicated that this right apply to different aspects. It protects

the physical and moral integrity, honour and reputation, use of person's name and identity, personal data of a person. The right to private life means that the individual has the right to its private home, the right to live as he likes, in accordance with his nature and wish to develop and improve the personality, tolerating minimum interference of the state or other persons. The right includes the right of an individual to be different, retain and develop virtues and abilities, which distinguish him from other persons and individualizes him (*see: Judgment of 26 January 2005 by the Constitutional Court in the case No. 2004-17-01, Para 10*).

Recognition of a person as incapable impacts its ability to act independently and adopt decisions in all spheres of life, namely, a person cannot conclude agreements independently, including labour, purchase or lease agreement, a person cannot participate in ballot, enter into marriage, testate and perform all other activities having legal consequences. Consequently, recognizing of a person as incapable restricts the right to private life at a considerable extent. A similar conclusion was also made by the European Court of Human Rights (*see: Judgment of the European Court of Human Rights in the case Shtukaturov v. Russia, judgment of 27 March 2008, appl. No. 44009/05, Para. 83*).

Since the Contested Norms regulate incapacitating of a person and restoration of person's legal capacity, it can be concluded that they apply to the right to inviolability of private life established in Article 96 of the Satversme.

8. The Constitutional Court has already indicated that inviolability of a person's private life is one of the fundamental values of a democratic society. However, there are limits even to the right to inviolability of a private life (*see: Judgment of 21 December 2001 by the Constitutional Court in the case No. 2001-04-0103, Para 4.1*).

Article 116 of the Satversme provides that the rights established in Article 96 of the Satversme can be restricted in case if the restriction has been established by means of a law property adopted, it has a legitimate aim and it is proportional (*see: Judgment of 26 January 2005 by the Constitutional Court in the case No. 2004-17-01, Para 11*).

9. The Contested Norms are included into the Civil Law. In the present case, there is no dispute whether the restriction has been established by means of a law properly adopted.

10. Pursuant to Article 116 of the Satversme, the fundamental rights established in Article 96 of the Satversme may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals.

The Saeima indicates that the legitimate aim of the Contested Norms is protection of the rights of other persons and safety of the society. The Saeima has failed to substantiate the above mentioned opinion.

The Constitutional Court shares the opinion of the Applicant and the Ombudsman that the main aim of incapacitating of a person is protection of the rights of the person having mental disturbances. Legal capacity is being restricted in order to manage all affairs if such person by mediation of a trustee, as well as to protect a person from such consequences of his or her activities that the person could not be aware of or control.

Consequently, the restriction of the right to private life established in the Contested Norms does have a legitimate objective.

11. In order to justify restriction of the fundamental rights, it is necessary to ensure its proportionality with the aim to be reached. When assessing proportionality of the restriction, the Constitutional Court shall assess: 1) whether it is possible to reach the legitimate aim by means of the measure selected (appropriateness); 2) whether the legitimate aim could be reached by other measures that would restrict the rights of a person at a lesser extent (necessity), and 3) whether the benefit gained by the society is greater than the detriment done to the rights of a person (compliance).

If, when assessing the legal provision, it is acknowledged that it is in conflict with at least one of the above criteria, then it is in conflict with the principle of proportionality and is unlawful (*see: Judgment of 16 May 2007 by the Constitutional Court in the case No. 2006-42-01, Para 11*).

Taking into account the fact that the main aim of incapacitation of a person is protection of the rights of the person having mental disturbances, it is necessary to assess proportionality of such restriction of the right to private life.

Consequently, legal capacity of a person cannot be restricted at a greater extent than it is necessary for protection of the rights of a particular person. The restriction should be established at the extent that would be the most advantageous and necessary for a particular person.

12. When establishing the content of the basic rights provided for in the Satversme, it is necessary to take into account the international liabilities of Latvia in the field of human rights. International norms of human rights and the practice of their application serve as means of interpretation on the level of constitutional law to determine the contents and scope of fundamental rights and the principle of the law-governed state, as far as it does not lead to decrease or limitation of fundamental rights included in the Satversme (*see: Judgment of 23 April 2009 by the Constitutional Court in the case No. 2008-42-01, Para 10*).

Rights of a person to private life are protected by Article 8 of the European Human Rights Convention and Article 17 of the International Charter on Civil and Political Rights that establishes that it is prohibited to arbitrarily and unlawfully interfere with private life of persons.

Moreover, as to restriction of the legal capacity, Article 12 of the UN Convention on the Rights of Persons with Disabilities is of great importance. Section 2 of the above mentioned article provides that States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life, whilst Section 3 thereof commits the States Parties to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. Meanwhile, Section 4 of the same article provides the following:

“States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are

free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.”

At the UN Human Rights Committee, on 26 January 2009, the United Nations High Commissioner for Human Rights presented its Thematic Study on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities. It has been indicated therein that, in the area of civil law, interdiction and guardianship laws should represent a priority area for legislative review and reform. It is also stated in the report that legislation currently in force in numerous countries allows the interdiction or declaration of incapacity of persons on the basis of their mental, intellectual or sensory impairment contradicts Article 12 Paragraph 2 of the Convention (*see: Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities, 26 January 2009, A/HRC/10/48, Para. 45*).

However, Principle 2 of the Council of Europe Committee of Ministers Recommendation No. R(99) 4 “On Principles Concerning the Legal Protection of Incapable Adults” emphasizes that the measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable a suitable legal response to be made to different degrees of incapacity and various situations. However, pursuant to Principle 3 of the Recommendations, the legislative framework should, so far as possible, recognize that different degrees of incapacity may exist and that capacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. The European Court of Human Rights has indicated that, although these principles have no force of law for this Court, they may define a common European standard in this area (*see: Judgment of the European Court of Human Rights in the case Shtukaturov v. Russia, judgment of 27 March 2008, appl. No. 44009/05, Para. 95*).

The European Court of Human Rights recognized in the judgment in the case “Shtukaturov v. Russia” that Article 8 of the European Convention on Human Rights is

breached by the fact that the Russian Civil Code distinguishes between full capacity and full incapacity, but it does not provide for any “borderline” situation other than for drug or alcohol addicts. The European Court of Human Rights has emphasized that the Russian legislation did not provide for a “tailor-made response” and that the existing legislative framework did not leave the judge another choice (*see: Judgment of the European Court of Human Rights in the case Shtukaturov v. Russia, judgment of 27 March 2008, appl. No. 44009/05, Para. 95*).

The Saeima has indicated in its reply that facts of the case “Shtukaturov v. Russia” differ substantially; therefore conclusions made by the European Court of Human Rights cannot be applied to the present case. It should still be noted that in the present case it is of no importance whether facts of the above mentioned case and those of the Applicant are similar or different. The Constitutional Court shall not assess whether the Applicant was incapacitated lawfully or not; it shall only assess compliance of the Contested Norms with Article 96 of the Satversme. Since in the judgment in the case “Shtukaturov v. Russia” the European Court of Human Rights has expressed its opinion on legal regulatory framework that is similar to the Contested Norms, the conclusions made by the European Court of Human Rights play a substantial role in adjudication of the present case.

Consequently, it follows from international liabilities of Latvia in the field of human rights that the State has the duty to establish such mechanism for restricting legal capacity of persons that embrace individual assessment of satiation and selection of the most appropriate restriction for each particular case. The regulatory framework that fails to establish any “borderline” situation and envisages only full incapacitation of a person fails to comply with requirements of human rights.

13. When assessing the Contested Norms, it can be concluded that they establish the same kind of restriction. Section 358 of the Civil Law provides either full incapacitation or person or preservation of person’s legal capacity at full extent. It fails to establish partial incapacitation of a person. It neither establishes any other more lenient and appropriate solution.

Similar considerations shall be applied to Section 364 of the Civil Law. The fact that in cases, when a person has recovered one’s health, the appointed trustees are

released shall be regarded as a positive aspect. Moreover, becoming healthy means reaching of such state of health when a person cannot be recognized as incapable pursuant to Section 358 of the Civil Law, namely, when the largest part of mental capacity is present. The regulatory framework of the both Contested Norms is mutually related. Also in situations when a court decides on restoration of legal capacity, it can decide whether to fully restore person's capacity to act, or to preserve full incapacitation of a person. A partial restoration of legal capacity of a person or establishment of another more lenient and appropriate solution is not possible. Moreover, the Applicant has reasonably indicated the following: Article 364 of the Civil Law fails to take into account the possibility that a person might acquire new skills or develop the existing ones by thus improving his or her ability to adopt independent decisions irrespective of changes in state of health.

The Constitutional Court has already indicated that the Constitutional Court must not enumerate all possible measures that would restrict the rights of a person at a lesser extent. Having established that there exists at least one more lenient remedy, it is possible to recognize that the Contested Norm restricts the basic rights of a person in a non-proportionate manner (*see: Judgment of 23 April 2009 by the Constitutional Court in the case No. 2008-42-01, Para 17.2*). A more lenient means are not any means, but only such by which the aim may be reached in the same quality (*see: Judgment of 13. May 2005 by the Constitutional Court in the case No. 2004-18-0106, Para 19*).

The information included in the case materials show that there exist different methods that the State can use to restrict legal capacity of person in accordance with requirements of human rights. To give an example, it is possible to mention partial restriction of legal capacity of a person, provisions of support in decision-making, personal assistances, observance of prescribed instructions, etc.

Likewise, models put into practice in various states differ. Partial restriction of legal capacity of a person is provided in the majority of European States, like, the Czech Republic, Croatia, Estonia, Poland, Germany and other states. For instance, the Estonian Civil Code provides that in cases when a person has been appointed a trustee, his or her legal capacity shall be regarded as restricted in respect to issues, in relation to which the trustee has been appointed. Consequently, in each particular case, a court has to decide on activities that cannot be understood and managed by a particular person, in relation to

which a trustee should be appointed (*see: Case materials, Vol. 1, pp. 183*). However, in the Netherlands and Luxemburg, apart from the institute of trusteeship, the possibility to appoint a supervisor for a particular person is also established. In Norway, however, a person having mental disturbances has the right to conclude agreements, whilst in certain cases its trustee may request cancelling them (*see: Case materials, Vol. 1, pp. 170-172*). The Ministry of Welfare also mentions different mechanisms for restriction legal capacity of a person that have already been established in England and Wales, in Italy, Canada, Sweden and other states (*see: Case materials, Vol. 1, pp. 142 – 145*).

The Constitutional Court does not have the duty to express its opinion on the most appropriate solution of the suggested ones. However, the above mentioned examples allow concluding that there exist other more lenient measures; moreover, it is possible to reach the aim of the Contested Norm more effectively.

Consequently, the Contested Norms restrict the right to private life established in Article 96 of the Satversme in a non-proportional manner.

14. It can also be concluded that immediate cancellation of the Contested Norm would not solve the existing problems and would even cause inadmissible gap in the national legal regulatory framework. In order to coordinate the normative regulatory framework with requirements that follow from Article 96 of the Satversme and international documents on human rights, it is necessary to thoroughly assess the existing system and improve legal regulatory framework.

The norms assessed in the present case apply only to a part of issues related with restriction of legal capacity of persons. Documents on human rights binding on Latvia and documents of recommending character, as well as the case-law of the European Court of Human Rights deals with a considerably broader range of issues and problems, that Latvia has to take into account when fulfilling its international liabilities in the field of human rights. It is possible to mention such examples as restriction of legal capacity of a person for a certain period of time by establishing examination of the restriction on regular basis, the right of a person to participate at a court hearing and be heard in respect of restriction of his or her legal capacity or establishment of such protective measures that would not restrict legal capacity of a person, etc.

Consequently, in order to improve legal regulatory framework in accordance with the above mentioned principles, the duty of the State is not only to introduce necessary changes in material and procedural norms, but also to provide material and institutional basis for successful functioning of such system, to ensure appropriate training of judges and other persons applying particular legal norms, and to perform all other necessary measures. The Constitutional Court takes into account the fact that performance of respective measures requires reasonable time period.

The Constitutional Court

Based on Article 30 – 32 of the Constitutional Court Law,

h o l d s :

Section 358 and Section 364 of the Civil Law do not comply with Article 96 of the Satversme of the Republic of Latvia and shall be null and void as from 1 January 2012.

The Judgment is final and not subject to appeal.

The Judgment shall come into force on the date of publishing it.

Presiding Judge

G. Kūtris