Dissenting opinion of Supreme Court Justices Julia Laffranque, Kaupo Paal, Paavo Randma, Kalev Saare, Juhan Sarv and Urmas Volens to the Supreme Court *en banc* judgment of 5 July 2024 in case No 5-23-38

On the basis of § 57(5) of the Constitutional Review Court Procedure Act

I

1. We find that the Supreme Court should have satisfied the principal claim of Räpina and Põlva Rural Municipal Councils and of Tartu City Council and declared unconstitutional the absence of a legal provision stipulating that the 24-hour general care service provided outside the home (§§ 20–22^1 of the SWA, hereinafter also the '*general care service*') is fully financed by the state.

2. We agree with the majority of the Court *en banc* that the obligation to finance the general care service laid down by § 22^1(2) and (5) of the Social Welfare Act (SWA) is not a separate obligation, as the applicants assert. The obligation to finance the general care service (to a certain extent) from public funds is part of the organisation of the social service in question. We also share the majority view that social welfare is divided between the state and local authorities in the Constitution. At the same time, we are of the opinion that by considering the organisation of provision of the general care service to be a local government obligation, the legislature erred against the Constitution. Organisation of the general care service is a state-level obligation *within the meaning of the Constitution* and thus, pursuant to the second sentence of § 154(2) of the Constitution, it must be financed by the state (on financing state obligations, see Supreme Court *en banc* judgment of 16 March 2010, 3-4-1-8-09, para. 74).

3. Based on the substantive criterion, local government tasks (termed as *local issues* in § 154(1) of the Constitution) are those that arise from and affect the local community and are not included within the competence of a state body according to the formal criterion or assigned to it by the Constitution (Supreme Court *en banc* judgment 3-4-1-8-09, para. 53). State-level tasks are public tasks that have no or mostly no connection with the special interests of the local community (Supreme Court Constitutional Review Chamber judgment of 8 February 2022, 5-21-18/18, para. 20). In delimiting local government and state-level tasks, the legislature enjoys freedom of decision within the limits granted by the Constitution. However, it is subject to judicial review whether a law has caused a conflict with the Constitution by deeming a state-level obligation to be a local government one. (Supreme Court *en banc* judgment 3-4-1-8-09, para. 73)

4. According to § 20(1) of the SWA, the aim of the service is to ensure a safe environment and coping by an adult who is temporarily or permanently unable to cope independently at home due to reasons relating to their state of health, functional capacity or physical and social environment. Thus, the general care service is aimed at ensuring the most existential basic needs – including life and health – and human dignity of a person in a particularly vulnerable situation.

5. The purpose of the general care service does not stem from the local community and does not concern the special interests of such a community. A person's need for the service in question or the content of the service does not considerably depend on the municipality in which the person lives. The requirements for providers of the general care service are established by law and are the same everywhere in Estonia (§ 22 SWA). As the participants in the proceedings pointed out at the Supreme Court hearing, not every vacant care home place is suitable for every person in need of the general care service, and care homes are partially specialised. In addition, there is a shortage of care home places in Estonia. Therefore, a suitable care home place for a person in need of the general care service must often be sought across the country. Local authorities do not have to provide the general care service (run a care home) themselves, but only organise its provision. The mere fact that a person in need of the general care service is a resident of a local authority does not make the organisation of this service a local government obligation.

6. According to § 28(2) of the Constitution, Estonian citizens have the right to *state* assistance, inter alia, in the case of old age. According to § 28(3) of the Constitution, the *state* also has the obligation

to promote voluntary and municipal welfare services. The aforementioned norms must be interpreted in conjunction with the principles of the social state and human dignity arising from § 10 of the Constitution (Supreme Court Constitutional Review Chamber judgment of 9 December 2019, 5-18-7/8, para. 119). Under § 14 of the Constitution, the state cannot allow a situation to arise where the accessibility of essential public services is largely dependent on the capacity of the local authority of the person's residence or location (Supreme Court *en banc* judgment 3-4-1-8-09, para. 67). Therefore, the core of social welfare – which also includes organisation of the general care service – is constitutionally the task of the state. When choosing between the extent of local government autonomy and the effectiveness of protection of people's fundamental rights, preference must be given to the latter.

7. Under § 22^1(1) of the SWA, a person has the right to receive the general care service partially financed from public funds whenever their *need* for such a service, i.e. so-to-say the need for physical assistance, has been established. According to the law, such a need must be determined by the local authority. The care plan, which determines the scope of the general care service provided to a person, also depends on the local authority (§ 21 of the SWA).

8. If organisation of the general care service is considered to be a local issue, it should presumably also mean that the local authority enjoys broader discretion in determining the need for assistance and deciding on the content of the care plan (see also Supreme Court Constitutional Review Chamber judgment of 9 November 2017, 5-17-8/8, p 62).). However, considering the substantial role of the general care service in guaranteeing the most important fundamental rights and human dignity, it is not in conformity with the spirit of §§ 10 and 28 of the Constitution if someone's actual possibility to receive the general care service or the content of the service depends to a significant extent on the capacity and readiness of the local authority of the person's place of residence to refer people to the general care service. According to the case materials, the limits for payment of general care service costs set by local authorities (§ 22^1(3) SWA) differ approximately twofold, even though there is essentially a single market for care home places in Estonia.

9. The general care service, being aimed at ensuring the life, health and human dignity of particularly vulnerable people, must, in addition to uniform accessibility, be subject to uniform national standards and state supervision. Opportunities to supervise organisation of the general care service are significantly better if it is considered a state-level and not a local government task.

10. Section 22^1(5) of the SWA links the amount of the share of the general care service financed from public funds to, inter alia, the difference between the average old-age pension and the income of the service recipient. Both indicators depend more or less directly or indirectly on decisions of the state, but not on decisions of local authorities. Similarly, under §§ 113 and 157(2) of the Constitution, establishment of taxes for public financing of the general care service is ultimately under the control of the state, not local authorities.

11. For these reasons, we consider organisation of the general care service to be a state-level obligation, not a local government obligation. This conclusion in no way calls into question the fundamentals of the care reform, in particular the legislature's aim to make the general care service more accessible to people.

II

12. In addition, we find that although alternative claim 1 by Räpina Rural Municipal Council and Põlva Rural Municipal Council is worded imprecisely, its actual content is unambiguously understandable on the basis of the reasoning of the application and the explanations given by the applicants at the court hearing, and it is a claim that is admissible in proceedings initiated under § 7 of the Constitutional Review Court Procedure Act.

13. Namely, the applicants essentially meant that even the current law lacks the norms necessary for compliance with § 154 of the Constitution, which would stipulate which obligations imposed on local authorities by law are local government obligations and which are state-level obligations, and would distinguish between funds intended for local authorities for deciding and organising local issues and

funds intended for performing state-level obligations (cf. Supreme Court *en banc* 3-4-1-8-09, operative part, para. 1).

14. In case No 3-4-1-8-09, which was also initiated according to the procedure laid down by § 7 of the Constitutional Review Court Procedure Act, the Supreme Court declared the absence of acts of general application referred to in the previous paragraph in the Estonian legal system at that time as being in conflict with the Constitution. To the extent that the Supreme Court is empowered to declare an act of general application or failure to issue such an act unconstitutional, the initiator of constitutional review proceedings is also entitled to seek a finding of unconstitutionality. In other words, the limits of admissibility of an application for constitutional review cannot be narrower than the powers of the Supreme Court to declare a norm or lack thereof unconstitutional in proceedings carried out on the basis of such an application. Consequently, a claim with the content submitted by Räpina Rural Municipal Council and Põlva Rural Municipal Council as the first alternative to their main application is also admissible.

15. For this reason, we find that in a situation where the majority of the Court *en banc* decided to deny the applicants' principal claim, the Supreme Court should have examined the merits of alternative claim 1 by Räpina Rural Municipal Council and Põlva Rural Municipal Council.

(signed digitally)