



JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

1 Jura Alunāna Street, Rīga, LV-1010. Phone: 67830735, 67210274. E-mail: tiesa@satv.tiesa.gov.lv

DISSENTING OPINION of the Constitutional Court Justice

Sanita Osipova

Riga, 26 November 2020

in case No. 2019-33-01

“On the Compliance of Article 155(1) of the Labour Law with the First Sentence of Article 110 of the Constitution of the Republic of Latvia”

1. On 12 November 2020, the Constitutional Court proclaimed the judgment in case No. 2019-33-01 “On the Compliance of Article 155(1) of the Labour Law with the First Sentence of Article 110 of the Constitution of the Republic of Latvia” (hereinafter, the Judgment) and adjudged:

1) to recognise Section 155, Paragraph one of the Labour Law, insofar as it envisages protection and support to the partner of the child’s mother in relation to the birth of the child to be incompatible with the first sentence of Article 110 of the Constitution of the Republic of Latvia and void as of 1 June 2022;

2) with respect to Person C to recognise Section 155, Paragraph one of the Labour Law, insofar as it envisages protection and support to the partner of the child’s mother in relation to the birth of a child to be incompatible with the first sentence of Article 110 of the Constitution of the Republic of Latvia and void as of the moment when the infringement on her fundamental rights occurred.

I do assent to that which is recognised in the Judgment that from the first sentence of Article 110 of the Constitution, in conjunction with the principle of human

dignity, a positive obligation derives to ensure legal, social and economic protection for each and every family, including a family of same-sex partners, but the legislator has failed to fulfil this obligation. Nevertheless, I cannot assent to the finding that, due to the above reason, the contested norm,

insofar as it envisages protection and support to the partner of the child's mother in relation to the birth of the child, is incompatible with the first sentence of Article 110 of the Constitution.

I shall use the abbreviations used in the Judgment to explain my point.

1. In the examined case, as requested by the submitter of the constitutional complaint in her application, the Constitutional Court did not assess the constitutionality of the leave envisaged for the father of a child by the contested norms or the procedure for the granting thereof, but rather whether the situation, where there is no protection and support envisaged to the partner of the child's mother in relation to the birth of a child in a family of same-sex partners, is compatible with the first sentence of Article 110 of the Constitution. Namely, the Constitutional Court assessed the constitutionality of the contested norm insofar as the contested norm did not envisage protection and support to the partner of the child's mother in relation to the birth of a child. Thus, the court, in terms of substance, assessed the constitutionality of the absence of regulation of legal protection for same-sex couples.

I assent to that which was recognised in the Judgment that the positive obligation of the State to protect and support the family, which is included in the first sentence of Article 110 of the Constitution, does not apply only and solely to a family established through marriage. Even in the absence of a biological link or legally recognised child-parent relationship, *de facto* family relationships can exist between a child and the person taking care of the child, depending on whether they live together, on the duration and quality of their relationship, as well as the adult's role in the relationship with the child. The existence of close personal ties follows from a concluded marriage or the fact of kinship; however, in social reality close personal ties also develop in another way, for instance, as a result of *de facto* cohabitation.

The Constitutional Court has already before recognised that the obligation of the State contained in Article 110 of the Constitution to ensure legal protection, inter alia, requires

introducing such legal regulation that establishes and maintains a legal framework of family relationship, specifying the personal and property relationship of the family members. The type of social and economic protection and support for a family to be provided for in the laws and regulations, observing the general principles of law and other norms of the Constitution, must be determined by the legislator. Besides, the legislator, in respect of considerations to be taken into account in determining the content of this legal framework, has broad discretionary powers (*cf. see Clause 16.2.1 of the judgment of the Constitutional Court of 5 December 2019 in case No. 2019-01-01*).

It was also recognised by the European Court of Human Rights that from Article 8 of the Convention a positive obligation of the State may arise to ensure the legal recognition of the family of same-sex partners, when the *de facto* recognition of such relationship has already taken place in the social and lawful reality of the State, as well as to establish the legal framework for the protection of such families. Nevertheless, according to the case-law of the European Court of Human Rights, the State has discretionary powers as to the form and content of the legal regulation for legal protection of the families of same-sex partners (*see, for example, Clauses 97, 105, 108-109 of the judgment of the European Court of Human Rights of 24 June 2010 in the case “Schalk and Kopf v. Austria”, application No. 30141/04, and Clauses 162-187 of the judgment of the European Court of Human Rights of 21 July 2015 in the case “Oliari and Others v. Italy”, application Nos 18766/11/09 and 36030/11*).

Thus, *there are no strict legal standards established with respect to the form and content* of the legal regulation for the protection of the families of same-sex partners *that would impose* an obligation on the State to act in a certain specified way. Therewith, *the issue* as to in what way and to what extent exactly legal protection for families of same-sex partners is to be ensured, is an issue of the choice of the legislator. Such situation is related to the moral and ethical dimension of this issue and the fact that the European Union Member States are not unanimous as to the types of protection of such families (*see, for example, Clause 162 of the judgment of the European Court of Human Rights of 21 July 2015 in the case “Oliari and Others v. Italy”, application Nos 18766/11/09 and 36030/11*).

Therefore, I consider *as substantiated* the instruction of the Constitutional Court contained in the Judgment for the legislator, *namely, that from the first sentence of Article 110*

of the Constitution, in conjunction with the principle of human dignity and the rights of a person to the inviolability of private life, the obligation of the State *derives* to protect and support each and every family, *inter alia*, also families of same-sex partners.

2. The contested norm prescribes that the father of a child is entitled to leave of 10 calendar days immediately after the birth of the child, but no later than within two months from the birth of the child.

When interpreting the contested norm in conjunction with the provisions of the Civil Law, it was *correctly* concluded in the Judgment that a man is to be recognised as the father of the child having the right to receive the paternity leave envisaged in the contested norm who: 1) is to be recognised as the father of a child on the basis of the presumption of paternity; 2) has acknowledged the paternity voluntarily; 3) has been recognised as the father of a child by a judgment of a court. The purpose of this leave is to give the child's father the opportunity to be with his family immediately after the birth of the child, in order to provide support to the child's mother, *inter alia*, by assuming care for the child. At the same time, this leave allows the child's father, already at an early stage, to develop an emotional link with the child (*see Clauses 11.1 and 11.2 of the Judgment*).

Thus, the contested norm clearly and unambiguously stipulates that the rights to leave envisaged therein are the rights of the father of a child. It must be emphasised that the obligation of the European Union Member States, including Latvia, to ensure such leave specifically to the father of a child, derives from Article 4 of Directive 2019/1158. The purpose of the leave of the father of a child is to encourage the more equal sharing of responsibilities of caring for a child between women and men, and to create such circumstances, which allow for the early creation of a bond between the father and children (*see Recital (19) of Directive 2019/1158*). The contested norm has been adopted exactly in order to promote gender equality, break the stereotypes in society as to gender roles, first and foremost in an institution as important to society as family, strengthening the role of a man - father - in bringing up a child.

In accordance with the norms of Chapter V of the Law On Registration of Civil Status Documents "Registration of the Fact of Birth" information about the new-born child, as well as about its parents

- mother and father - shall be registered in the birth register within a period of one month from the birth of the child. Thus, the legislator has established a legal framework allowing one to clarify the persons who are the mother and the father of a particular child, entitled to support due to the birth of a child. The leave established in the contested norm is intended exactly for the father of a child, and not a partner of the mother of a child (irrespective of the gender of such partner). This leave is being granted irrespective of whether or not the parents of a child are married or actually cohabit, or the father of a child is not living together with the mother of a child in a single household at all. The law On Maternity and Sickness Insurance provides for several support measures due to the birth of a child - maternity benefit, paternity benefit and parental benefit. The paternity leave contained in the contested norm is closely linked to the paternity benefit disbursed to the father of a child during the referred to leave.

I believe that the norm contested in the examined case only creates the rights to the father of child, and not to a male partner, female partner of the mother of a child or any other family member. The father of a child not only has the rights arising out of the birth of a child, but also obligations towards a child and responsibility with respect to a child. Therefore, only the father of a child, who has this special bond and legal status in the relationship with a child, is entitled to receive the leave referred to in the contested norm. No other person enjoys the legal status comparable to the father of a child, whose status entails special rights, obligations and responsibility with respect to a particular child. Therewith, the contested norm does not infringe on the rights of the Applicant. As the case has been initiated according to the constitutional complaint, which must be based upon infringement on the fundamental rights of the Applicant created exactly by the contested norm, legal proceedings in case No. 2019-33-01, in my opinion, had to be terminated.

3. The Judgment of the Constitutional Court is not to be enforced in a narrow sense, merely by amendments to the contested norm, because this could create chaos in the system of family law of Latvia. The rights to leave due to the birth of a child cannot be granted to a person, who has not, first of all, established enduring legal bonds with a child, namely, has no legal status that would entail the rights with respect to a particular child, obligations towards him/her and responsibility with respect thereto. However, for a person to obtain such status in the family of a child, first of all, he/she needs to establish legal ties with the mother of a child.

Thus, the legislator, in order to enforce the Judgment, will have to perform considerable work with respect to the legal system, corroborating therein a legal basis for the protection of families of same-sex partners.

As the contested norm has not created a sufficient infringement on the fundamental rights of the Applicant, I cannot assent to the finding that the contested norm, insofar as it envisages protection and support to the partner of the child's mother in relation to the birth of the child, is incompatible with the first sentence of Article 110 of the Constitution.

Constitutional Court Justice

Sanita Osipova