



LATVIJAS REPUBLIKAS SATVERSMES TIESAS TIESNESIS

Jura Alunāna iela 1, Rīga, LV 1010

Tālrunis: 67830735, 67210274 Fakss: 67830770
e-mail: tiesa@satv.tiesa.gov.lv

SEPARATE OPINION

of Justice Artūrs Kučs of

the Constitutional Court of the Republic of Latvia

in Riga on 26 March 2020

in Case No. 2019-11-01

“On Compliance of Section 464¹ (3) of the Civil Procedure Law with the First Sentence of Article 91 and the First Sentence of Article 92 of the *Satversme* of the Republic of Latvia”

1. On 12 March 2020, the Constitutional Court passed the judgement in case No. 2019-11-01 “On Compliance of Section 464¹ (3) of the Civil Procedure Law with the First Sentence of Article 91 and the First Sentence of Article 92 of the *Satversme* of the Republic of Latvia” (hereafter – the Judgement) and recognised Section 464¹ (3) of the Civil Procedure Law as being compatible with the first sentence of Article 91 and the first sentence of Article 92 of the *Satversme* of the Republic of Latvia.

The case was initiated on the basis of Mihails Kondakovs’ application.

2. I subscribe to the conclusion made in the Judgement that the contested norm is compatible with the first sentence of Article 91 and the first sentence of Article 92 of the *Satversme* of the Republic of Latvia.

However, I do not uphold the finding made in the Judgement that there are no such groups of persons that could be compared from the perspective of equality.

My opinion is based on the arguments presented below. In substantiating my opinion, I shall use abbreviations used in the Judgement.

3. It is concluded in Para 16 of the Judgement that the criterion of disputed amount, included in the contested norm, *per se* cannot be regarded as a feature allowing to identify comparable groups of persons in the meaning of Article 91 of the *Satversme*. This conclusion is substantiated, *inter alia*, by the argument that the application of the contested norm does not result in the formation of a group of persons that could be identified by a personal trait. The judicial collegium, exercising the discretion granted to it, may apply the criteria included in the contested norm to civil law disputes of a certain type and amount, considering, in each particular case, whether the case under examination is significant in ensuring unified case law or further formation of law, but always striving to achieve justice.

I do not uphold the conclusion that persons, who appeal in cassation procedure against a judgement by an appellate instance court in the part of a dispute of a financial nature, which is below EUR 2000, and persons, who appeal in cassation procedure against a judgement by an appellate instance court in the part of a dispute of a financial nature, which is at least EUR 2000, or in a dispute of nonfinancial nature are not comparable from the perspective of equality.

To determine, whether and which groups of persons are in similar and comparable circumstances, the feature that unites these groups must be identified (*see Judgement of 4 December 2003 by the Constitutional Court in Case No. 2003-14-01, Para 14*). Two situations are never totally identical. Therefore, such a situation, which has one or several elements in common with the situation to be verified, must be chosen for comparison. The common element must unite both situations under one superordinate concept (*see Judgement of 4 January 2007 by the Constitutional Court in Case No. 2006-13-0103, Para 7*).

All those persons, who appeal in cassation procedure against a judgement by an appellate instance court, irrespectively of whether the dispute is of a financial or non-financial nature, as well as of the disputed financial amount, are united by one common

feature. This common feature is appealing in cassation procedure against a judgement by an appellate instance court.

It has to be admitted that one common feature *per se* does not always serve as a sufficient argument for establishing that two groups of persons are in similar and comparable circumstances. The Constitutional Court also must assess whether no significant considerations exist pointing to the fact that such persons are not in similar and comparable circumstances (*see Judgement of 9 April 2013 by the Constitutional Court in Case No. 2012-14-03, Para 17.2.*). In reviewing compliance of a legal norm with the equality principle, included in Article 91 of the *Satversme*, not only the presence of a common feature must be established but also whether the circumstances, in which persons are, are similar and comparable (*see Judgement of 11 October 2017 by the Constitutional Court in Case No. 2017-10-01, Para 9*). As pointed out by the European Court of Human Rights, in assessing, whether particular groups of persons are comparable in the context of prohibition of discrimination, they should not mandatorily be in identical circumstances. To recognise that the particular groups are in comparable circumstances, it must be, first and foremost, established that these groups are substantially comparable. The similarity, in turn, must be established, *inter alia*, also in the context of the aim defined for the contested regulation (*see Judgement of 5 September 2017 by the European Court of Human Rights in Case “Fábián v. Hungary”, Application No. 78117/13, Para 113 and Para 121*).

All persons, who submit a cassation complaint, wish that the issues regarding application of substantial and procedural norms, resolved erroneously, to their mind, in the appellate instance would be reviewed in the cassation procedure. The persons who submit a cassation complaint in connection with financial disputes involving small claims and nonfinancial disputes, and the persons who submit a cassation complaint in connection with financial disputes of large amounts, must submit this complaint in the same procedure, defined in the Civil Procedure Law (*compare, see Judgement of 11 October 2017 by the Constitutional Court in Case No. 2017-10-01, Para 19*). Both the contested norm and the rest of the regulation that determines access to the cassation instance in civil procedure share the same aim – protecting the order of a democratic state governed by the rule of law.

I cannot uphold the Court's finding that the comparable groups of persons, from the perspective of equality, form only on the basis of a personal feature. Prohibition of discrimination, included in the second sentence of Article 91 of the *Satversme*, indeed, prohibits differential treatment, based on certain prohibited criteria. Whereas the equality principle provides that treatment should be equal in two similar situations, but different – in two different situations. For example, in defining in law the right to social benefit, prohibition of discrimination would not permit differentiation of people on the basis of race or ethnicity, because these belong to the prohibited criteria, but would allow the State to differentiate between the people on the basis of their income level. In such a situation, it should be verified, whether such differentiation is compatible with the equality principle (*see: Levits E. 91. panta komentārs. In: Balodis R. (zin. red.) Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. Rīga: Latvijas Vēstnesis, 2011, 99. lpp.*).

The European Court of Human Rights has noted that differential treatment may be prohibited also if it is based on features, which are not strictly personal or, to put it differently, inherent to or characteristic of a particular group of persons (*see Judgement of 24 May 2016 by the European Court of Human Rights in Case "Biao v. Denmark", Application No. 38590/10, Para 89*).

Hence, persons who appeal in cassation procedure against a judgement by an appellate instance court in the part of a dispute of a financial nature, which is below EUR 2000, and persons, who appeal in cassation procedure against a judgement by an appellate instance court in the part of a dispute of a financial nature, which is at least EUR 2000, or in a dispute of nonfinancial nature are comparable from the perspective of equality.

4. Since the persons referred to above are in similar and comparable circumstances, it must be established, whether the contested norm envisages differential treatment of these groups of persons. To provide an affirmative answer to this question, the result of the treatment should be different – it is not sufficient to have only formal differences (*see: Levits E. 91. panta komentārs. In: Balodis R. (zin. red.) Latvijas*

Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. Rīga: Latvijas Vēstnesis, 2011, 95. lpp.).

In Para 15 of the Judgement the Constitutional Court has concluded that the contested norm is not imperative as to its nature and allows the judicial collegium assessing the public benefit *vis-à-vis* the individual's legal interest in the particular case if this case were initiated in the cassation instance and a full judgement would be drawn up. The contested norm ensures that the court considers both the interests of each participant in the case and assesses the public interest in meaningful and effective use of the resources of the cassation instance court. Thus, in each particular case, the public legal interests and the legal interests of an individual are balanced. Para 16 of the Judgement provides that the judicial collegium, in exercising its discretion, applies the contested norm to disputes of a financial nature of a certain amount, considering in each particular case, whether the case under review is significant in ensuring unified case law or further formation of law, but always striving to achieve justice.

Thus it can be concluded that both the interests of persons who appeal in cassation procedure against a judgement by an appellate instance court in the part of a dispute of a financial nature, which is below EUR 2000, and persons, who appeal in cassation procedure against a judgement by an appellate instance court in the part of a dispute of a financial nature, which is at least EUR 2000, or in a dispute of nonfinancial nature, must be balanced with the public legal interests. Thus, for example, also in those cases when the cassation complaint has been submitted for a part of dispute below EUR 2000, the cassation instance court must initiate cassation proceedings if there are obvious grounds to consider that the outcome of the case, included in the appealed judgement, is erroneous and if the other statutory requirements regarding submission of a cassation complaint have been met.

Therefore it can be concluded that the contested norm does not envisage differential treatment of persons who are in similar and comparable circumstances. **Hence, the contested norm complies with the first sentence of Article 91 of the *Satversme*.**

Artūrs Kučs