THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

SEPARATE OPINION

of the Justice of the Constitutional Court

of the Republic of Latvia

Aldis Laviņš

in Riga, on 18 December 2019

in Case No. 2019-01-01

"On Compliance of Para 1 of Section 163 (4) of the Civil Law with Article 96 and Article 110 of the *Satversme* of the Republic of Latvia".

1. On 5 December 2019, the Constitutional Court passed the Judgement in Case No. 2019-01-01 "On Compliance of Para 1 of Section 163 (4) of the Civil Law with Article 96 and Article 110 of the *Satversme* of the Republic of Latvia" (hereafter – the Judgement) and held:

1) to terminate legal proceedings in the case in the part regarding the compliance of Para 1 of Section 163 (4) of the Civil Law, insofar it established the absolute prohibition with respect to persons, who submitted an application for adopting the other spouse's child, with Article 96 of the *Satversme* of the Republic of Latvia;

2) to recognise Para 1 of Section 163 (4), insofar it established the absolute prohibition with respect to persons, who submitted an application for adopting

the other spouse's child, as being incompatible with Article 110 of the *Satversme*;

3) with respect to persons, who had started defending their rights by general legal remedies, to recognise Para 1 of Section 163 (4) of the Civil Law, insofar it established the absolute prohibition with respect to persons, who submitted an application for adopting the other spouse's child, as being incompatible with Article 110 of the *Satversme* and void as of the date when it was applied to them by the Orphans' and Custody Court.

I cannot concur with the methodology used in the Judgement to review the constitutionality of Para 1 of Section 163 (4) of the Civil Law (hereafter – the contested norm) and with several findings that have been the basis for the ruling on the incompatibility of this norm with Article 110 of the *Satversme*.

2. I concur with the conclusion made in the Judgement that the compatibility of the contested norm with the *Satversme* should be examined insofar it applies to persons, who submit an application to adopt the other spouse's child. Likewise, I consent to the reasoning presented in the Judgement regarding the scope of Article 96 and Article 110 of the *Satversme* as well as that, in the present case, only whether the State, by adopting the contested norm, has fulfilled its obligation, established in Article 110 of the *Satversme*, to ensure legal protection to the family in the area of adoption, should be examined. The Judgement validly refers to criteria to be assessed in order to verify, whether the State has fulfilled this obligation: 1) whether the legislator has introduced measures for ensuring legal protection to the family in the area of adoption; 2) whether these measures have been introduced properly; i.e., whether the proportionality principle has been complied with (*see Para 15–18 of the Judgement*).

The Constitutional Court has recognised in the Judgement that the prohibition, included in the contested norm, is absolute. Successively, in examining the constitutionality of the contested norm, the Court has used the

methodology for assessing the proportionality of an absolute prohibition, i.e., it verified, whether the legislator had: 1) substantiated the need for the absolute prohibition; 2) assessed the substance of the absolute prohibition and the consequences of its application; 3) substantiated that by envisaging exemptions to this absolute prohibition, its aim would not be reached in equal quality.

I cannot concur with the definition of an absolute prohibition, provided in the Judgement, and the conclusion that the prohibition, included in the contested norm, is absolute. This finding has become the basis for the Constitutional Court using an inappropriate methodology for examining the constitutionality of the contested norm.

3. The Constitutional Court has revealed the content of the concept "absolute prohibition" already in the judgement of 24 November 2017 in case No. 2017-07-01. The prohibition to work as a teacher for a person, who had been punished for a serious or particularly serious intentional crime, was examined in it. In revealing the content of the concept "absolute prohibition", the Constitutional Court has referred to Para 106 in the judgement of 22 April 2013 by the European Court of Human Rights in the case "*Animal Defenders International v. The United Kingdom*" (hereafter also – judgement in the case *"Animal Defenders International v. The United Kingdom"*). Also in the reviewed case, the Constitutional Court has referred to the judgement by the European Court of Human Rights (hereafter also – the Court) mentioned above. However, in the part of the Findings of this Judgement, the Court has not even used the concept of an absolute prohibition and has not indicated the criteria, according to which a prohibition, included in a legal norm, should be recognised as being absolute.

3.1. First and foremost, I recall the facts of the case "*Animal Defenders International v. The United Kingdom*" – a non-governmental organisation was prohibited from broadcasting on TV an advertisement, in which it turned against keeping animals in cages and exposing them. The Court had to review, whether

the prohibition of political advertising on the radio and television, established by a legal norm, complied with the proportionality principle.

The Court has noted in Para 106 of the Judgement that prohibitions on political advertising can be established by general measures, i.e., by a legal norm. Then, the Court has noted that the restrictions on rights, established by general measures, should be distinguished from such measures, which are established by an individual act of applying law, and, to this end, the facts of the particular case need to be examined. Thus, in Para 106 of the judgement, the Court has concluded only that the prohibition of the political advertisement to be reviewed has been established by general measures and that its compliance with the European Convention on Human Rights and Fundamental Freedoms is to be reviewed by applying a particular methodology, which is succinctly revealed in Para 110 of this judgement.

Irrespectively of different opinions on the meaning of Para 106 in the judgement in the case *"Animal Defenders International v. The United Kingdom"*, substantially, the question that needs to be addressed is, whether the prohibition of political advertising, established by a legal norm (by general measures), is to be recognised as being absolute. Para 124 of this judgement contributes significantly to finding the answer. The court has underscored in it that the legal norm had not prohibited the political advertising in all mass media; i.e., it prohibits the broadcasting of the political advertising on radio and the television but not in other mass media, for example, on the internet (social media), in newspapers, on posters. The Court took into account the considerations presented by the government of the United Kingdom as to why the political advertising was prohibited exactly on the radio and television, i.e., because the radio and television were the most popular and most influential mass media. The Court recognised that the legislator of the United Kingdom, in establishing the prohibition of political advertising as a general measure, had respected the limits of the margin of appreciation granted to it since, in the meticulous process of legislation, had struck the due balance between various rights and interests. Hence, the prohibition of political advertising under review is not such that

would apply to all mass media, in other words, it is not all-embracing (unlimited), and this is exactly why, in my opinion, the Court has not recognised it as being an absolute prohibition.

3.2. Tom Lewis, Professor at the Nottingham Trent University, analysing the judgement in the case "*Animal Defenders International v United Kingdom"*, has concluded in his article that the scope of the prohibition of political advertising had been the basis for the European Court of Human Rights to assess it as a general measure rather than an absolute prohibition. Although the Professor is critical of the Court's position, he, however, notes that, in the future, after the judgement in the aforementioned case, it will be of decisive importance whether the Court qualifies a restriction on rights as a blanket ban or a general measure because, exactly due to the applicable methodology, when the restriction is recognised as a blanket ban, it will be much harder for the Member States to substantiate its compliance with the proportionality principle [*see: Lewis T. Animal Defenders International v United Kingdom: sensible dialogue or a bad case of Strasbourg jitters? The Modern Law Review, 2014, 77 (3), pp. 460–474*].

3.3. Finally, to reveal more clearly the differences between an absolute prohibition and a prohibition, which has been established as a general measure, another judgement by European Court of Human Rights should be dwelled upon, i.e., the judgement of 6 October 2005 in the case "*Hirst v. The United Kingdom"*. To remind, the facts of the case were related to the right of detained persons to vote. The law of the United Kingdom "The Representation of the People Act 1983" provided that persons, who had been sentenced to imprisonment, while being in the prison, did not have the right to vote at the parliamentary or the local government election.

In Para 82 of this judgement, the Court recognised that the restriction on the voting right under review was to be qualified as an absolute prohibition since it was established with respect to all convicted and detained persons, irrespectively of the criminal offence for which the prison sentence had been given to the person or the length of the prison sentence. Thus, the prohibition reviewed was all-embracing (unlimited) since it applied to all imprisoned persons,

irrespectively of any other characteristics. The Court, examining the restriction on the right to vote, recognised that such prohibition was incompatible with the proportionality principle.

3.4. The findings expressed in the judgements by the European Court of Human Rights, referred to above, indicate that a prohibition, included in a legal norm, should be recognised as being absolute if it, as to its nature, all-embracing or unlimited, e.g., if advertising of a certain kind is prohibited in all mass media or some rights are denied to all persons belonging to a certain group. Such explanation of an absolute prohibition complies with the understanding of the concept "absolute"; i.e., the meaning of it given by the dictionary of foreign words is "unlimited, total" (*see. Terminu un svešvārdu skaidrojošā vārdnīca, www.letonika.lv*).

4. To clarify the nature of the prohibition, included in the contested norm, the findings, expressed in the judicature of the European Court of Human Rights, should be applied to the case heard by the Constitutional Court.

Section 162 (1) of the Civil Law provides that the adoption of a minor child is allowed if it is in the interests of the child. Section 163 of this law, in turn, establishes various restrictions for adoption, *inter alia*, defines the circle of persons, who may not be an adopter. With respect to persons, who once had been punished for committing a criminal offence, it is provided that only such persons, who previously have been punished for committing criminal offences related to violence or threatening of it as well as criminal offences against morals and sexual inviolability, may not be an adopter. Thus, if adoption is in the interests of the child, in general, a person, who once has been punished for committing a criminal offence, can be an adopter. However, to protect adoptees against domestic violence and duly ensure the protection of the rights of the child, the legislator has established an exemption to the general rule, i.e., has established the prohibition to become and adopter only to those persons with a criminal record, who might cause risks for the child's safety. If we keep in mind the special part of the Criminal Law, it is clear that the prohibition applies to a rather

narrow circle of persons, who previously have been punished for committing criminal offences. Thus, the legislator, in a targeted and well-considered way, has established a prohibition not to all persons with a previous criminal record but to persons, who have been punished for criminal offences that are related to violence or threatening of it as well as criminal offences against morals and sexual inviolability. Thus, the prohibition included in the contested norm is not of all-embracing or unlimited nature, and this means that preconditions for recognising this prohibition as absolute do not exist.

It is noted in Para 19.2. of the Judgement: to establish that the prohibition included in a legal norm is absolute, it must be examined, firstly, whether it applies to all persons belonging to a certain group, i.e., whether it envisages an individual assessment of each particular case, thus allowing exemptions, and, secondly, whether it has been established for a certain period or for life. I am of the opinion that this definition of absolute prohibition is too broad since, actually, it means that any prohibiting legal norm, which does not envisage an individual assessment, is to be assessed as an absolute prohibition.

Following the understanding of an absolute prohibition, reflected in the Constitutional Court's judgement, even in such a case, where the legislator were to establish prohibition due to committing even one criminal offence, envisaged in the Criminal Law, for example, providing that a person, who has been punished for robbery, cannot be an adopter, one had to recognise that even such, obviously narrow, prohibition should be deemed absolute.

5. In a democratic state governed by the rule of law, the legislator may include an absolute prohibition in legal norms. For example, the prohibition, established in Section 35 (1) of the Civil Law, for a person to enter into marriage with a kin in direct line. The provision of Para 1 of Section 55 of the law "On Judicial Power" could serve as another obvious example, i.e., that a person who previously has been punished for committing any criminal offence, disregarding the extinguishment or removal thereof, may not be a candidate for a judge's office.

I agree that, due to the strictly restrictive nature of an absolute prohibition, more stringent requirements may be set for the legislator in the procedure of adopting such legal norms with respect to substantiation and assessment of the prohibition (*see Para 21 of the Judgement*). However, I am of the opinion that is not valid to set such requirements to the legislator in the case of adopting every prohibition envisaged in a legal norm.

6. To assess in the examined case, whether the legislator, in introducing measures aimed at ensuring legal protection for the family in the area of adoption, has complied with the proportionality principle, it has to be established in the Judgement:

1) whether the measure chosen by the legislator is appropriate for reaching the aim of the prohibition, included in the contested norm, – ensuring the protection of children against violence, or whether this aim can be reached by the chosen measure;

2) whether such action is necessary or whether the aim of the prohibition cannot be reached by measures that are less restrictive on an individual's right;

3) whether proportional balance has been struck between the need to ensure the protection of children against violence with the need to ensure, to the extent possible, that the child grows up in a familial environment.

7. I concur with the reasoning presented in Para 20 of the Judgement as to why the prohibition, included in the contested norm, is appropriate for reaching its aim. I.e., it does not allow that a person, who has been punished for a criminal offence referred to in the contested norm, not only to become an adopter but also to acquire custody right over the adoptee. Thus, the prohibition, included in the contested norm, not only does not allow that a child would have to subject to such measures of upbringing that are introduced by a person, with respect to whom, in legislator's opinion, a risk is present that he might treat the child violently, but also that this person might maintain a personal relationship and

direct contacts with the child. Preventing a situation like this is aimed at protecting the child against violence and respecting the rights of the child.

8. I hold that the Judgement does not provide sufficient reasoning for concluding that, in the particular case, there are other measures that are less restrictive on a person's rights and lawful interests (*see Para 24.2. of the Judgement*).

In its case law thus far, the Constitutional Court has consistently underscored that a more lenient measure is not just any other measure but only such that allows reaching the legitimate aim in at least in the same quality (*see, for example, Judgement of 13 May 2005 by the Constitutional Court in Case No. 2004-18-0106, Para 19 of The Findings, and Judgement of 13 October 2015 in Case No. 2014-36-01, Para 21*). Thus, if, in the course of hearing the case, it is established that, in the particular case, there are more lenient measures, the Constitutional Court assesses, whether it is possible to reach the legitimate aim of the restriction by these measures in at least the same quality (*see, for example, Judgement of 7 November 2013 by the Constitutional Court in Case No. 2012-24-03, Para 18.3. , and Judgement of 7 July 2014 in Case No. 2013-17-01, Para 28.2. and Para 28.3.*).

Arguments have been expressed in the case that other measures, less restrictive on a person's rights and lawful interests, *inter alia*, an individual assessment performed by the Orphans' and Custody Court, would not allow ensuring the protection of the child against violence at least in the same quality as ensured by the prohibition included in the contested norm. It is impossible to guarantee that a person, who previously has committed criminal offences related to violence or threating of violence, would not, indeed, pose a threat for children. Subjecting even one child to the potential threat of violence is inadmissible (*see the opinion of summoned person K. Balodis in Case Materials, Vol. 2, pp. 58–62*).

It is noted in the Judgement that the possibility to assess, whether a person, who once has been punished for a criminal offence related to violence or

threatening of it, may become an adopter, would reach the aim of the prohibition, included in the contested norm, i.e., protecting the rights of the child, in the same quality. Thus, there is an alternative measure; the legislator, however, has not considered it (*see Para 24.2. of the Judgement*). The Judgement does not comprise assessment an arguments that would allow concluding that this measure would, indeed, allow reaching the aim of the prohibition, included in the contested norm, in at least in the same quality.

I cannot concur with the conclusion, made in the Judgement, that the legislator, in adopting the contested norm, has not examined alternative measures. In this particular case, the Constitutional Court has not granted sufficient importance to the fact that the contested norm establishes a prohibition to become an adopter only for those persons, who have been punished for criminal offences that are related to violence or threatening or violence and not for any criminal offence. The legislator has been aware of how and according to which criteria criminal offences should be divided as to the nature of the threat to a person's or society's interests and their hazardousness and that exactly those criminal offences, which are related to violence or threatening of it, are those crimes, the perpetrators of which might cause a special risk for a child. I hold that the legislator, by defining the categories of particular offences, the perpetrators of which are prohibited from applying for the status of an adopter, has already chosen a measure that is more lenient towards a person's rights. Thus, there are no alternative measures for reaching the aim of the prohibition, included in the contested norm.

9. In its case law thus far, the Constitutional Court has consistently recognised that, in the legal relationships that affect the child and in all actions with respect to the child, his rights and best interests should take priority. The legislator must ensure that all regulatory enactments that are adopted provide the best possible protection for the child's lawful interests (*see Judgement of 11 October 2004 by the Constitutional Court in Case No. 2004-02-0106, Para 11*). Moreover, the child's rights and lawful interests are affected not only

when the decision has to be adopted directly with respect to the child but also when the decision may be applied to the child or affect the child indirectly. Recognising any other priority without a serious reason and justification is inadmissible (*see Judgement of 16 May 2019 by the Constitutional Court in Case No. 2018-21-01, Para 16.2.*).

It is validly noted in the Judgement that, pursuant to the first part of Article 19 of the Convention on the Rights of the Child, the State's obligation is to protect children against violence and that the prohibition, included in the contested norm, is aimed at fulfilment of this obligation. At the same time, the State must ensure, to the extent possible, that the child grows up in a familial environment (*see Judgement of 16 May 2019 by the Constitutional Court in Case No. 2018-21-01, Para 16.2.*). Moreover, to ensure that the child's best interests are met, the family, pursuant to Article 110 of the *Satversme*, needs legal, economic and social protection by the State. Both the child's right to protection against violence and the child growing up in a familial environment are interconnected considerations, and both comply with the best interests of the child. In those cases, where these considerations clash, they need to be balanced in order to find a solution to the situation that would comply with the best interests of the child [*see: UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, para. 4, 81*].

In the particular case, the legislator's task is to find a proportional balance between the need to ensure to children protection against violence and the need to ensure, to the extent possible, that the child grows up in a familial environment. Thus, in the examined case, the Constitutional Court had to assess, how the legislator had balanced these various aspects to find the solution to the situation that would comply with the best interests of the child.

The legislator, in establishing a prohibition for a person, who has been punished for violence or threatening of it, to become an adopter, has considered that the regulation that protects children against even the lowest risk of violence

complies with the best interests of the child. I underscore that any violence against a child is inadmissible and it is the State's obligation to take all necessary measures to protect children against it, to the extent possible. However, as mentioned above, the child's right to grow up in a familial environment is also a consideration, linked to the protection of the rights of the child, that complies with the best interests of the child. In some exceptional cases, where a person, after his criminal record has been extinguished or removed, submits an application for adoption the other spouse's child and an actual familial relationship has developed between this person and his spouse's child, the prohibition to become an adopter, included in the contested norm, may not be compatible with the best interests of the child. This could happen in those cases, where the person, who submits the application for the adoption of the other spouse's child, has been cohabiting with this child for a long time and a genuine parent-child relationship has developed between this person and the child. However, I underscore once again that, in such exceptional cases, adoption could be permissible only if the person's criminal record had been extinguished or removed. Thus, the legislator, in adopting the contested norm, in a narrow aspect has not found a proportional balance between the need to ensure the protection of children against violence and the need to ensure, to the extent possible, that a child grows up in a familial environment.

Therefore, I hold that the prohibition, included in the contested norm, is not proportional and, thus, the contested norm, insofar it establishes prohibition with respect to persons, who, after their criminal record has been extinguished or removed, submit an application for the adoption of the other spouse's child, is incompatible with Article 110 of the *Satversme*.

Justice of the Constitutional Court A. Laviņš