



Satversmes tiesa

Press release

Case No. 2021-05-01

05.11.2021

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Prohibition on a Person who has Been Convicted of a Criminal Offence Involving Violence or Threat of Violence From Being a Guardian of a Child for Life and Regardless of Individual Circumstances is Unconstitutional

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On 4 November 2021, the Constitutional Court adopted a judgement in Case No 2021-05-01 “On Compliance of Section 242, Clause 5 of the Civil Law with Articles 96 and 110 of the Constitution of the Republic of Latvia”.

#### THE CONTESTED NORM

- Section 242, Clause 5 of the Civil Law (hereinafter referred to as – the contested norm):

“Persons who have been punished for criminal offences related to violence or threatening of violence may not be guardians regardless of expungement or setting aside of conviction.”

#### NORMS WITH A HIGHER LEGAL FORCE

- Article 96 of the Satversme of the Republic of Latvia (hereinafter — the Satversme):

“Everyone has the right to inviolability of his or her private life, home and correspondence.”

- Article 110 of the Satversme:

“The State shall protect and support marriage - a union between a man and a woman, the family, the rights of parents and rights of the child. The State shall provide special support to disabled children, children left without parental care or who have suffered from violence.”

#### THE FACTS OF THE CASE

The case was initiated on the basis of an application of the Administrative District Court. Its records contain a case concerning the annulment of a decision of the Orphan's and Custody Court, which has declared the applicant in an administrative case as incompatible for performance of the duties of a guardian because she had committed a criminal offence involving violence or threat of violence. This was done while the person was a minor and the conviction was expunged. The Administrative District Court is of opinion that the prohibition established in the contested norm disproportionately restricts the fundamental rights of a person contained in Articles 96 and 110 of the Satversme. The legitimate aim of such a restriction on fundamental rights can be allegedly achieved by means less restrictive on the individual's rights. The court explained that the applicant's spouse had acquired the status of the children's guardian and that the children had been residing with her family for half a year. The children and the spouses have developed a strong emotional bond and trust. However, only confirming a guardianship would provide also the applicant with the possibility to efficiently exercise the rights of the child and the legal protection of the family.

### CONCLUSIONS OF THE COURT

#### On the scope of Article 96 of the Satversme

The Constitutional Court noted that Article 96 of the Satversme protected both the freedom of a person to form relationships with other people and the family from unjustified interference, but did not protect in itself a person's wish to implement out-of-family care for a particular child. In the present case, the Administrative District Court has not pointed at any circumstances which would allow it to conclude that there has been interference with a person's right to inviolability of family or freedom to form relationships with other people. [10.1 and 10.3]

Consequently, the Constitutional Court terminated the proceedings in the part concerning compliance of the contested norm with Article 96 of the Satversme. [10.3]

#### On the scope of Article 110 of the Satversme

The Constitutional Court concluded that the arguments of the Administrative District Court were essentially aimed at the fact that the state did not provide adequate protection to a child left without parental care and to such de facto family relations that had been established as a result of implementation of the child's out-of-family care. [10.3 and 10.4]

Article 110 of the Satversme establishes the state's obligation to set up a family protection system. This Article also contains obligation of the state to ensure protection of every child left without parental care by promoting the child's

upbringing in a family environment in accordance with the best interests of the child. [10.3]

Taking into account the aforementioned, the Constitutional Court concluded that, in the present case, it had to assess whether, by adopting the contested norm, the state had fulfilled the obligations established in Article 110 of the Satversme. [10.4]

#### In respect of non-compliance with Article 110 of the Satversme

The Constitutional Court concluded that the prohibition to be a guardian established in the contested norm applied to any person who had been convicted of a criminal offence involving violence or a threat thereof, but which had not been directed against morality or sexual inviolability. In particular, this prohibition covers a wide range of situations, different threats to the interests protected by the Criminal Law and different nature and harmfulness of the threat, but does not allow for exceptions. It is also for life – it remains in force indefinitely, even after the expungement or setting aside of conviction. This prohibition is therefore absolute. [16]

The Constitutional Court reiterated that the state had an obligation to protect every child from violence, but the mere fact that a person had been convicted of a criminal offence involving violence or the threat of violence was not always sufficient grounds to establish that that person posed a long-term threat to society and children. A person's behaviour can change over time. [20]

The contested norm precludes assessment of the best interests of a child left without parental care, including the child's interest to remain in a family environment or environment familiar to them – under the guardianship of the child's relatives or persons close to the child. The materials for the elaboration of the contested norm do not confirm that the legislator, when adopting the contested norm, essentially considered the possibility that a person's behaviour may change over time, as well as assessed the need to ensure, as far as possible, that the child remains in a family environment or environment familiar to them. The legislator had also failed to consider how such a prohibition set out in the contested provisions affects protection of de facto families formed as a result of the implementation of out-of-family care of a child. [20]

Thus, the Constitutional Court recognised that the legislator had not assessed the essence of the absolute prohibition and the consequences of its application. [20]

#### Individual assessment concerning protection of the best interests of the child – a less restrictive mean of protecting individual's rights

The Constitutional Court concluded that the Orphan's and Custody Court, in compliance with the precautionary principle, was able to assess individually

whether the particular person who had previously committed a criminal offence related to violence or threat of violence could pose a greater threat to the safety of a child than a person with no criminal record, furthermore, the Orphan's and Custody Court constantly monitors whether the guardianship of a child is being exercised in accordance with the best interests of the child. During the process of such an individual assessment, the Orphan's and Custody Court is obliged to respect also the principle of an individual approach to ascertaining the child's opinion. Thus, protection of the best interests of the child and the objective of the absolute prohibition laid down in the contested norm can be achieved to an equivalent quality by means less restrictive on individual's rights. [21]

Taking into account the aforementioned, the Constitutional Court recognised that the contested norm, insofar as it established an absolute prohibition, was incompatible with Article 110 of the Satversme. [21]

On the moment the absolute prohibition laid down in the norm ceases to have effect

With regard to the persons who have commenced proceedings for the protection of their rights, the Constitutional Court recognised the contested norm, insofar as it establishes an absolute prohibition, null and void as of the moment of occurrence of infringement of fundamental rights of these persons. With regard to other persons, the contested norm, insofar as it establishes an absolute prohibition, shall lose its effect as of the date of publication of the judgement. The authority or court must make an individual assessment of the circumstances when assessing whether a person is entitled to be a guardian. [22]

### The Constitutional Court ruled the following:

1 To dismiss proceedings in the case in the part concerning compliance of Section 242, Clause 5 of the Civil Law with Article 96 of the Satversme of the Republic of Latvia.

2 To recognise Section 242, Clause 5 of the Civil Law, insofar as it establishes an absolute prohibition for a person who has been convicted of a criminal offence related to violence or threat of violence to be a guardian, regardless of expungement or setting aside of conviction, as being incompatible with Article 110 of the Satversme of the Republic of Latvia.

3 With regard to the persons to whom Section 242, Clause 5 of the Civil Law has been applied and who have commenced and continue proceedings for the protection of their fundamental rights by general means for the protection of rights, to recognise Section 242, Clause 5 of the Civil Law, insofar as it establishes an absolute prohibition for a person who has been convicted of a criminal offence related to violence or threat of violence to be a guardian, regardless of expungement or setting aside of conviction, as being incompatible with Article 110 of the Satversme of the Republic of Latvia as of the day of occurrence of infringement of fundamental rights of these persons.

The judgement of the Constitutional Court is definitive and not subject to appeal, it shall enter into force on the day of its publication.

Text of the Judgement is available on the website of the Constitutional Court:  
[https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/01/2021-05-01\\_Spriedums.pdf](https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/01/2021-05-01_Spriedums.pdf)

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This press release has been prepared to inform the society on the work of the Constitutional Court. More detailed information on the latest developments, cases opened and examined by the Constitutional Court is available on the website of the Constitutional Court [www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv). We invite you to follow the information also on the Court's *Twitter* account [@Satv\\_tiesa](https://twitter.com/Satv_tiesa) and the Court's *YouTube* [channel](#).

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