Non-Official Translation

IN THE NAME OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA

ON THE CASE ON CONFORMITY OF PARAGRAPH "B" OF SUB-CLAUSE 3 OF CLAUSE 8 OF N 1 ANNEX TO THE DECISION N 275-N OF THE RA GOVERNMENT DATED 6 MARCH 2014 "ON THE ESTABLISHMENT OF THE AMOUNT OF ONE –TIME ALLOWANCE FOR A CHILD BIRTH, APPROVAL OF THE PROCEDURE OF ASSIGNMENT AND PAYMENT OF ONE –TIME ALLOWANCE FOR A CHILD BIRTH" WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE ADMINISTRATIVE COURT OF THE REPUBLIC OF ARMENIA

Yerevan 15 January 2019

The Constitutional Court composed of H. Tovmasyan (Chairman), A. Gyulumyan (Rapporteur), A. Dilanyan, F. Tokhyan, A. Tunyan, A. Khachatryan, H. Nazaryan, A. Petrosyan

with the participation (in the framework of the written procedure):

the applicant: the Administrative Court of the Republic of Armenia.

the respondent: the Government,

pursuant to clause 1 of Article 168, part 4 of Article 169 (4) of the Constitution, as well as Article 71 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of paragraph "b" of sub-clause 3 of clause 8 of N1 Annex to the decision N 275-N of the RA Government dated 6 March 2014 "On the Establishment of the Amount of One –Time Allowance for a Child Birth, Approval of the Procedure of Assignment and Payment of One – Time Allowance for a Child Birth" with the Constitution of the Republic of Armenia on the basis of the application of the Administrative Court of the Republic of Armenia.

Decision N 275-N “On the Establishment of the Amount of One –Time Allowance for a Child Birth, Approval of the Procedure of Assignment and Payment of One – Time Allowance for a Child Birth” (hereinafter – the Decision) was adopted by the RA Government on March 6, 2014, signed by the Prime Minister on March 27, 2014 and entered into force on April 3, 2014.

Clause 8 of Annex N1 (hereinafter – Procedure), titled “Procedure for the appointment and payment of a one-time allowance for the birth of a child”, which was last amended and supplemented by the decision N 1178-N of November 18, 2016, establishes:

“8. **When determining the ordeal number of a newborn child, the current application for the appointment of the allowance (regardless of address of residence (registration) of registered population in the state population register is taken into consideration:**

1) children descended from the parents (father and mother) of a newborn child (siblings of a newborn child);

2) children descended from the mother of a newborn child, with the exception of cases when at a minor age their support is transferred by a court decision to another person or the mother is judicially deprived of parental rights;

3) children descended from the natural father of a newborn child if:

a. their mother deceased before the birth of the newborn child or, in the manner prescribed by law, was recognized as deceased or missing, or by the court is declared to be legally incapable;

b. at a minor age, their support is transferred by a court decision to the father of a newborn child or;

c. the mother of these children is deprived of parental rights or;

d. the court established the fact that their mother maliciously (intentionally) evaded the execution of parental rights and duties (did not fulfill parental rights and duties) and at a minor age the maintenance of these children (up bring children, protecting their rights and interests) was performed by the father of the child. "

The consideration of the case was initiated by the appeal of the RA Administrative Court registered in the Constitutional Court on October 24, 2018, which presented the Decision of the Administrative Court “On the termination of the proceedings on the administrative case and appeal to the Constitutional Court” on the case of ՎԴ/11309/05/17 dated October 22, 2018 .

Having examined the application, the explanation of the Respondent, as well as analyzing the challenged legal act and other legislative norms interrelated with the latter, the Constitutional Court **ESTABLISHES:**

1. Applicants' positions

The applicant considers that the provision applicable in case ՎԴ/11309/05/17, prescribed by paragraph “b” of sub-clause 3 of clause 8 of Annex N 1 to the Decision, contradicts Article 29 of the RA Constitution, as it provides for a discriminatory approach, on the one hand to those parents-fathers whose children born in a previous marriage, when they were under age, lived with them, maintained these children on the basis of a judicial act that entered into legal force (since there was no mutual agreement between the parents), and on the other hand regarding those father parents whose children born in a previous marriage, when they were under age, lived with them, maintained these children by mutual agreement with the mother of children (therefore there was no need to resolve the issue in court, as well as a judicial act).

According to the applicant, the challenged norm also reveals discrimination between the parent-father and the parent-mother on the basis of their gender, as according to sub-clause 2 of clause 8 of the Procedure, children when determining the ordinal number of the newborn child the children descended from the mother of a newborn child are taken into account except for the cases when in their minor age their maintenance is transferred by a court decision to another person or the mother is deprived of parental rights by a court decision.

The applicant considers that pursuant to the provision of sub-clause 2 of clause 2 of the Procedure, a mother who by mutual agreement did not maintain children born in a previous marriage, in case of birth of children in a new marriage can claim to receive a larger amount of one-time allowance at birth of the child, since when determining the ordinal number of a newborn child born in a new marriage, children born by her and born in a previous marriage are taken into account, even in cases where she did not participate in the maintenance of these children, and the parent-father, who maintained the children born by this woman and, in the case of having children in a new marriage, cannot claim to receive a larger amount of one-time allowance at the birth of the child, since the children born of the former wife cannot be taken into account in determining the ordinal number of the newborn child, although he actually maintained these children, but there is no judicial act about it.

The applicant notes that under the conditions stipulated by the Family Code of the Republic of Armenia, there are cases when, after the dissolution of marriage, the father will be responsible for upbringing the children, protecting their rights and interests by mutual agreement of the parents, and if there is an agreement, there is no need for the judicial act.

2. Respondent's position

The respondent notes that there are cases when, after the dissolution of marriage of the parents, the address of registration of children does not change. In such cases, a situation is related where children descended from the father of a newborn child, who actually reside in the Republic of Armenia, remain registered with the father at the same residential address, but their maintenance and upbringing is carried out by the mother. That is, it is **not the family, formed after the second marriage of the father that maintains** and brings up the newborn child and the children recorded when determining the ordinal number of this child.

Given the possibility of such a situation and pursuing the goal in the implementation of any action regarding the child proceeded from his/her best interests, the respondent believes that it is necessary to establish additional regulations to define accurately the family that maintains and brings up both the newborn child and the children taken recorded when determining the ordinal numbers of a newborn baby.

According to the respondent, the legal ruling regulating the sphere, are aimed at eliminating such cases of possible abuse, when, for instance, for obtaining a higher sum of one-time allowance for a child, born in the new marriage, the ordinal number of the child may be used by the parent who did not participate in the maintenance and upbringing of these children (at the same time, it is fair to use the ordinal number of children born in a previous marriage, by the parent who carried out the maintenance and upbringing of these children).

The respondent asserts that the direct requirement "transferring the maintenance of the child to the father can be certified only by a judicial act" is based on such logic that, firstly, in practice, when the marriage is dissolved, there are more cases of the child's maintenance by the mother, and only a judicial act can unconditionally resolve the issue which parent actually maintained the child.

According to the respondent, the discrimination in the challenged norm due to the presence of the judicial act is justified as a need to disclose the fact of the child's residence with one of the parents and follows basically a legitimate goal.

At the same time the respondent informs that the draft decision of the Government of the Republic of Armenia "On Making Amendments and Addenda to the Decision N 275-N of the Government of the Republic of Armenia dated March 6, 2014" provides paragraph "b" of sub-clause 3 of clause 8 of the Procedure approved by Annex N 1 to the Decision in new edition.

3. The circumstances to be established in the framework of the case

To assess the constitutionality of the challenged provision, the Constitutional Court considers it necessary to clarify:

a) whether the differentiated approach prescribed in this provision for the realization of the right to social security has an objective basis; whether it follows a legitimate goal and does not violate the constitutional principles of the prohibition of discrimination and equality between men and women (Articles 29 and 30 of the Constitution);

b) whether the conditions of such legal regulation guarantee the equal rights of women and men upon marriage, during marriage, and upon divorce (Part 2 of Article 35 of the Constitution);

c) does the challenged legal regulation restrict the possibility of exercising the rights and obligations of parents (Part 1 of Article 36 of the Constitution), and are the interests of the child addressed as a matter of priority within this legal regulation (Part 2 of Article 37 of the Constitution)?

4. Legal positions of the Constitutional Court

4.1. According to article 83 of the Constitution, "Everyone shall, in accordance with law, have the right to social security in cases of maternity, having many children, sickness, disability, accidents at work, need of care, loss of bread-winner, old-age, unemployment, loss of employment, and in other cases.

The extent of everyone's right to social security is prescribed by law. The law also envisages the procedure and terms for the exercise of this right. That is, the legislator is obliged to envisage legal regulations guaranteeing the right to social security and at the same time enjoys a wide discretion as to what regulations should be defined. The Law "On State Allowances" (hereinafter - the Law) is aimed at guaranteeing the right enshrined in Article 83 of the Constitution.

According to part 2 of article 3 of the Law, “The purpose of providing state benefits is: 1) to help improve the living standards of poor families or prevent its deterioration; 2) partial reimbursement of certain expenses of a family or citizen; 3) improvement of the demographic situation; 4) realization of the right to social security.

According to clause 4 of part 1 of article 5 of the Law, **one-time allowance for a child birth** is one of the types of state benefits.

Part 4 of Article 24 of the Law provides for differentiation of the size of the one-time allowance for child birth according to the ordinal number of the newborn child, given the number of other children of the parents of the newborn child. According to part 5 of the same article, “The procedure for determining the next ordinal number of a newborn child, the terms and procedure for registering other children to determine the next ordinal number of a newborn child are established by the Government of the Republic of Armenia”. In order to ensure the implementation of the Law, on March 6, 2014, the Government of the Republic of Armenia adopted the Decision “On the Establishment of the Amount of One –Time Allowance for a Child Birth, Approval of the Procedure of Assignment and Payment of one – time Allowance for a Child Birth”.

By virtue of part 7 of Article 24 of the Law, **one-time allowance for a child birth is assigned for each child born**. Consequently, every newborn child, regardless of any circumstances, is entitled to receive one-time allowance, and the state, in turn, is obliged to provide it to the parents or the parent of the child - father or mother or legal representatives, depending on the specific situation.

4.2. According to paragraph “b” of sub-clause 3 of clause 8 of Annex N 1 to the Decision, when determining the ordinal number of a newborn child, children descended from the **father** of the newborn child are registered in the state population register as of the day of application, **if by the decision of the court their maintenance is passed to the father of a newborn child**.

It should be noted that the above provision is supplemented by the Government Decision N 1178-N of November 18, 2016 and was not previously acted. According to Article 24 of the Law, which prescribes the right to one-time allowance for a child birth, a **parent**, adoptive parent or guardian has the right to apply for the appointment of the one-time allowance for a child birth, and the one-time allowance for a child birth is assigned and paid if the **parent** and the newborn child live (are registered) at the residential address in the Republic of Armenia. **The law does**

not indicate specifically which of the parents, therefore, both mother and father are entitled to apply for the above-mentioned allowance and the right to receive it. Part 3 of Article 25 of the Law prescribes that when appointing one-time allowance for a child birth, the residential address (registration) of other children of the parents of a newborn child is determined on the basis of data of the state population register. According to part 4 of the same article, within 10 working days, the territorial authority ascertains the accuracy of the data submitted by the parent of the newborn child and decides whether or not to assign one-time allowance for a child birth.

From the point of view of compliance with the hierarchy of legal norms enshrined in Article 5 of the Constitution, laws have higher legal force than sub-legislative normative legal acts.

Nevertheless, the legal regulation enshrined by the Decision requires a judicial act on the transfer of the maintenance and up-bringing of the elder children **to the father** of the newborn child. The government, by amending the relevant provision of the Decision, supplementing and establishing the requirement of presenting a court decision, **pursued the goal of avoiding possible abuses and excluding cases when a parent who actually did not maintain children born in a previous marriage could receive a higher allowance.**

The system analysis of the Decision shows that in determining the ordinal number of a newborn child, children who descended from the father of a newborn child are taken into account only if the maintenance of the latter is **transferred** to the father of the newborn child **by a court decision**.

In fact, this constitutional legal dispute concerns the manifestation of a differentiated approach in appointing a one-time allowance for a child birth, depending on the fact, the maintenance of other children that have descended from the father of the newborn child is transferred to the father of the newborn child **by a court decision, by mutual consent of the parents or on the basis of the guardianship agreement**.

Part 2 of Article 53 of the Family Code of the Republic of Armenia stipulates that parents (one of them) of a child, if mutual consent is not reached, may, in order to resolve disagreements on all matters relating to the maintenance and upbringing of children, refer to the tutorship or guardianship authority or the court, as well as in accordance with part 3 of this article in the case of separation of parents, the residential address of children is determined by the court in the absence of agreement of the parents. According to part 1 of article 17 of the same Code, if a

marriage is dissolved by a judicial procedure, or when a marriage is dissolved in the bodies of state registration of civil status acts, the spouses may submit **an agreement to the court on who the children will be living with**.

Thus, it follows from the current legal regulations that the maintenance of a child can be transferred to one of the parents either by the agreement of the parents or by a court decision. Consequently, the court's decision on the transfer of the maintenance of the child to the father, in fact, is **an additional document,** which must be presented if needed in case of absence of the agreement of the parents.

Meanwhile, it follows from the by-law under consideration that in determining the ordinal number of a newborn child the children born from the father of a newborn child are included, the maintenance of which is transferred to the father **only by a court decision**, and the option of transfer of the maintenance as the mutual agreement of the parents prescribed by the Law is not taken into account.

. As a result, the legislator has provided more than one option for transferring the maintenance of children to one of the parents or another person, but the Government associates the emergence of the right to receive benefits exclusively with one of these options - with the court's decision to transfer the maintenance to the father. With such a regulation, on the one hand, the possibilities of the parent provided by the Law are limited, on the other hand, a differentiated approach towards the mother and father is manifested.

4.3. The principles of the prohibition of discrimination and legal equality of women and men are guaranteed by the Constitution (Articles 29 and 30), the Family Code of the Republic of Armenia (Article 1), as well as a number of important international documents - the Universal Declaration of Human Rights (Article 7), the International Covenant on Civil and Political Rights (Article 26), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 14) and Protocol No. 12 to this Convention. Part 2 of Article 35 of the Constitution also stipulates that when entering into marriage, during marriage, upon dissolution of marriage, a woman and a man have equal rights.

It follows from these legal provisions that it is the positive duty of the state to ensure conditions that provide with the equal opportunities to individuals with equal status to exercise their rights, and if they are violated, protect their rights; otherwise the aforementioned principles of prohibition of discrimination and equality will be violated.

The Constitutional Court, within the framework of the principle of the prohibition of discrimination, considers any differentiated approach acceptable due to an objective basis and a legitimate goal. The principle of non-discrimination does not mean that any differentiated approach within individuals of the same category can be considered as discrimination. Violation of the principle of the prohibition of discrimination is such a differentiated approach, which is deprived of the objective basis and a legitimate goal (DCC-881, 04.05.2010).

In the context of the subject to review, a differentiated approach has been taken in relation to the persons of the same category – the parents.

The differentiated approach enshrined in the Decision is deprived of an objective basis, since the legislator, in fact, prescribed several procedures for determining the issue of maintenance of a child, and a person's choice of a procedure cannot create negative legal consequences for the latter in terms of exercising the right to receive a one-time allowance for a child birth .

This differentiated approach cannot pursue a legitimate goal in the context that is aimed at eliminating possible abuses. To exclude such abuses by the legislator or the executive power, other mechanisms may be envisaged, and this goal cannot be achieved through a differentiated approach to individuals of the same category.

4.4. From the case law of the European Court of Human Rights (hereinafter - the ECtHR) it follows that the Court addressed the protection of citizens' rights in the field of social security in the aspect of eliminating discrimination in the context of the payment of pensions and benefits, as well as the protection of other rights not directly provided for by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The ECtHR found that the rule on the right to respect of property "there is no restriction to decide whether or not to have any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a State does decide to create benefits or pension scheme, this creates an obligation for the state and leads to the emergence of property rights of citizens who are already under the influence of Protocol No. 1 to the Convention" **("Stec and Others v. The United Kingdom", 12/04/2006, app. no. 65731/01, 65900/01, §53)**.

Although Article 1 of Protocol No. 1 to the said Convention does not provide for the right to receive any social security benefit if the contracting state has legislation in force, according to which such payments constitute the right to receive benefits aimed at improving welfare,

regardless whether it is conditional or not, this legislation should be qualified as creating a property right and for persons meeting the requirements of this article should subject to Article 1 of Protocol No. 1 **(“Andrejeva v. Latvia”, 18/02/2009, app. no 55707/00, § 77, Moskal v. Poland, 01/03/2010, app. no. 10373 / 05, § 38**).

In another case, the refusal to pay benefits based on the status of the parent, the ECtHR expressed the position that “the refusal to pay maternity benefit to the applicants is considered differentiated” and “this wide range of entitled persons proves that **the allowance is aimed at supporting newborn children and the whole family upbringing them, and not only at reducing the hardship of giving birth sustained by the mother.** Therefore, the status of the applicant may be compared with status of the families and their members who are granted with the maternity benefit. Meanwhile, neither the domestic authorities nor the Government have put forward any objective and reasonable ground to justify the general exclusion of natural fathers from a benefit aimed at supporting all those who are upbringing newborn children, when mothers, adoptive parents and guardians are entitled to it” **(“Weller v. Hungary”, 31/03/2009, app. no. 44399/05**).

4.5. The Constitutional Court states that parents are legal representatives of their children and have equal rights and duties.

The Constitution states that:

a) Parents shall have the right and obligation to take care of the upbringing, education, health, comprehensive and harmonious development of their children (part 1 of article 36);

b) In matters concerning the child, primary attention must be given to the interests of the child (part 2 of article 37).

Parts 1 and 2 of Article 3 of the Convention on the Rights of Children (Republic of Armenia is a member to this Convention) prescribes:”1**. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.**

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”

The Constitution does not enshrine a provision directly relating to the allowance for children, but this right must be considered in the context of Article 37 of the Constitution on the rights of children.

Article 8 of the Law "On the Rights of the Child" prescribes the right of the child to the necessary living conditions: "Every child has the right to the living conditions necessary for the full physical, mental and spiritual development. **The parents or other legal representatives carry the main responsibility for ensuring the necessary living conditions for the development of the child.** In case of inability or impossibility of the parents or other legal representatives to provide the necessary living conditions for the child, the state provides appropriate assistance" (emphasized by the Constitutional Court).

According to Article 14 of the same Law, the protection of the rights and legitimate interests of a child is the primary responsibility of the parents or other legal representatives. Part 2 of Article 27 of the Law stipulates that the child has the right to receive benefits, the procedure for the appointment and payment of which is determined by the Government.

The amount that the child is entitled to receive in the form of a one-time allowance is given to his/her parents or one of the parents or a legal representative, and is aimed at resolving issues related to the maintenance, upbringing and education of the child.

In a number of decisions the Constitutional Court addressed to the logic of the legal regulations prescribed by the Family Code of the Republic of Armenia, and reaffirms the position that in family legal relations the notion **"child's interest"** is elevated to the level of universal recognition of the legal principle, and it is an independent principle underlying family legislation (DCC-919, 05.10.2010).

The Constitutional Court considers that in order to ensure the best interests of the child before bringing the challenged provision into conformity with the requirements of this Decision, the law enforcement practice should be guided by such an approach that there should be no significant difference in the question whether the maintenance of children that have descended from the father of the newborn child was carried on by the court decision or by mutual agreement with the child's mother.

Based on the review of the Case and governed by clause 1 of article 168, Part 4 of article 169 of the Constitution of the Republic of Armenia, Articles 63, 64 and 71 of the Constitutional Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare paragraph “b” of sub-clause 3 of clause 8 of N1 Annex to the decision N 275-N of the RA Government dated 6 March 2014 “On the Establishment of the Amount of one –time Allowance for a Child Birth, Approval of the Procedure of Assignment and Payment of One – Time Allowance for a Child Birth” contradicting article 29, part 2 of article 35 and part 2 of article 37 of the Constitution and void.

2. Pursuant to part 2 of article 170 of the Constitution this Decision shall be final and shall enter into force upon its promulgation.

Chairman **H. Tovmasyan**

15 January2019

DCC-1438