

Decision No 106 of 16 March 2023 on the exception of unconstitutionality of the third sentence of Article 31 (3) of Law No 273/2004 on the adoption procedure, Published in the Official Gazette of Romania, Part I, No 310 of 12 April 2023

Summary

I. As grounds for the exception of unconstitutionality, its author argued that the provisions of the third sentence of Article 31 (3) of Law No 273/2004 on the adoption procedure was discriminatory, since they created a different procedural framework between citizens who benefited from the conditions laid down in the Code of Civil Procedure for the appointment of a guardian and citizens who were parties to the adoption procedure and who did not benefit from the conditions laid down in the Code of Civil Procedure for the appointment of a guardian. Thus, the provisions of law criticised adversely affects equality before the law, in so far as the natural persons who are defendants in the context of the procedure for the opening of adoption proceedings are only persons in respect of whose children the placement protection measure was adopted due to material conditions, severe medical conditions, family situations (extreme aggression, chronic alcoholism, etc.) unsuitable for the child's development. In such situations, it is necessary to appoint a guardian, since own representation of legitimate interests in the proceedings is extremely difficult or even impossible. Therefore, it is precisely in those situations that either *ex officio* guardianship or legal aid must be binding and surely not prohibited.

II. Having examined the exception of unconstitutionality, the Court held that the main complaint concerned the existence of discrimination between natural persons who are defendants in the proceedings for the opening of the adoption and the other natural persons who are defendants in other cases, in terms of providing *ex officio* a guardian from amongst the lawyers of the Bar Association or legal aid.

As regards the summons of natural parents in the proceedings for the opening of adoption, the Court found that this was done, as a matter of principle, in accordance with the general rules laid down in the Code of Civil Procedure. By way of exception, however, from the rules laid down in the Code of Civil Procedure, in accordance with Article 31 (3) of Law No 273/2004 on the adoption procedure, in the case provided for in Article 8 (4) of that legislative act [according to which, exceptionally, where one of the natural parents, although sufficient steps have been taken, could not be found to express consent, the consent of the other parent is sufficient. When both parents are in this situation, adoption may be completed without their consent⁷], the natural parents who could not be found are summoned by displaying the summons at the court door and at their last known place of residence, and in this case, in accordance with the third sentence of Article 31 (3) – the text of the contested law, the provisions of the Code of Civil Procedure concerning the appointment of guardians in the event that a summons by publicity is ordered are not applicable.

The Court held that the summons represented the act by which the party is informed of the existence of a dispute, of the date and place of appearance for the purposes of the proceedings. The purpose of the summons is to ensure the right to a fair trial enshrined in Article 21 (3) of the Constitution and the right of defence guaranteed by Article 24 of the Constitution. That was also the reason why the Code of Civil Procedure introduced, in the case of summons by publicity, the rule requiring the appointment of a guardian from amongst the lawyers of the Bar Association, representing the interests of the defendant whose domicile could not be identified.

As regards the institution of the special guardian, in accordance with Article 58 (1) of Law No 134/2010 on the Code of Civil Procedure, republished, in cases of urgency, if the

natural person deprived of the capacity to exercise civil rights does not have a legal representative, the court, at the request of the interested party, shall appoint a special guardian to represent him or her until the appointment of the legal representative, in accordance with the law. The court will also appoint a special guardian in the event of a conflict of interest between the legal representative and the represented person or when a legal person or an entity referred to in Article 56 (2) of the same code, that is called before the court, does not have a representative. Pursuant to Article 58 (3) of the Code of Civil Procedure, these guardians will be appointed by the court hearing the proceedings, from among the lawyers specifically appointed for this purpose by the Bar Association for each court. The special guardian shall have all the rights and obligations laid down by law for the legal representative. At the same time, under Article 167 (3) of the Code of Civil Procedure, if the court allows the defendant to be summoned by publicity, it is obliged to appoint a guardian from among the lawyers of the Bar Association, in accordance with Article 58 of the same code, who will be summoned at the debates in order to represent the interests of the defendant.

As regards the summons of the child's natural parents, the Court held that this is a justified and necessary measure, since their consent to adoption is a legal requirement to allow the opening of adoption proceedings. Under Article 14 (1) of Law No 273/2004, the consent of the natural parents or, as the case may be, of the guardian shall be given before the court when the application for the opening of adoption proceedings is decided, and, in accordance with Article 8 (3) of the same law, consent to adoption may not be given in place of the child's natural parents/legal guardian by the special guardian, proxy or other person empowered to do so. Therefore, under that mandatory rule, the special guardian may not, under any circumstances, express consent to adoption instead of the child's natural parents/legal guardian.

In the proceedings for the opening of adoption, the child's natural parents are directly concerned by the decision of the court – the granting of the opening of adoption or the rejection of the request of the Directorate-General for Social Assistance and Child Protection to open adoption – because the adoption of the child calls into question the natural parenthood relationship between them and the child. In this procedure, the child's natural parents must enjoy, like any party to legal proceedings, the right of defence, a fundamental right guaranteed by Article 24 of the Constitution.

However, where natural parents could not be found, they are summoned by publicity (by displaying the summons at the court door and at their last known place of residence), without the court ordering the appointment of a guardian from among the lawyers of the Bar Association, to be summoned for the debates to represent their interests, as laid down in the general rule laid down in Article 167 (3) of the Code of Civil Procedure. Therefore, the difference in legal treatment – in terms of the right of defence – between the child's natural parents, who are parties to the proceedings for the opening of adoption, and the parties to any other judicial proceedings, difference covered by the contested legal text, has no objective and reasonable justification, establishing discrimination in terms of the right of defence, which is contrary to Article 16 (1) of the Constitution, relating to the prohibition of discrimination, and to Article 24 of the Constitution on the rights of the defence. In conclusion, the third sentence of Article 31 (3) of Law No 273/2004 is unconstitutional.

The Court held that, since the provision relating to the prohibition of discrimination contained in Article 16 (1) of the Constitution is relevant in the present case, the specific constitutional remedy, in the event of a finding of unconstitutionality of the discrimination, means – in the case of natural parents who could not be found and whose summons are served by publicity – the benefit consisting of the court ordering the appointment of a guardian from among the lawyers of the Bar Association. Similarly, in the procedure for the opening of adoption, in order to ensure the effective right of defence of natural parents who could not be found and who were summoned by publicity, the legislator should have provided that the fee

due to the special guardian is to be borne by the State budget, and that the respective fee cannot be charged to the natural parents – parties to the proceedings for the opening of adoption.

III. For all those reasons, the Court unanimously upheld the exception of unconstitutionality and found that the third sentence of Article 31 (3) of Law No 273/2004 on the adoption procedure were unconstitutional.