

(Translated from Arabic)
IN THE NAME OF GOD, MOST GRACIOUS, MOST MERCIFUL

Republic of Iraq
Federal Supreme Court
Ref. 189/federal/media/2018



Kurdish text

The Federal Supreme Court (FSC) has been convened on 5.12.2018, headed by the Judge Madhat Al-Mahmood and the membership of Judges Farooq Mohammed Al-Sami, Jaafar Nasir Hussein, Akram Taha Mohammed, Akram Ahmed Baban, Mohammed Saib Al-Nagshabandi, Abood Salih Al-Temime, Michael Shamshon Qas Georges and Hussein Abbas Abu Al-Temmen who are authorized in the name of the people to judge and they made the following decision:

The Plaintiff: (Alif. Teh. Sad.) - his agent the attorney (Ghain. Ain. Ain.).

The Defendant: head of the parliament/ being in this capacity - his agents the director (Sin. Ta. Yeh.) and the assistant legal advisor (Heh. Mim. Sin.).

The Claim:

The agent of the Plaintiff claims that her client has already filed the case No(6561/ Shin/ 2017) before the Personal Status Court in Al- shaab against the defendant (Zin. Ha. Mim.) requested in it to judge to increase the number of viewing and accompanying of his daughter (Ra. Alif.) for twice or once a week and to increase the duration of the accompanying to a full day, however she only stay overnight with the holder of custody, the subject court has issued a decision to reject the case and to challenging the decision appealingly, whereas the cassation court has ratified the decision, will the viewing and the custody subject

is based on article (57) from the Personal Status code No (188) for 1959 the modified one, include paragraph (1) in it stipulated that (the mother have the right to the custody and upbringing the child in marital and in case of separation unless the child is harmed from it), and paragraph (2) stipulated that (the woman who have the custody should be adult, reasonable, reliable, able to raise the child and to watch for him, the custody of the divorced mother shall not be nullified by her marriage, in this case the court shall determine the right of the mother or father to custody in the light of the interests of the child), and paragraph (4) of the same article stipulated that (the father can look into the affairs of the child about raising him and teaching him when he is ten years old and the court may authorize the extension the custody of the child until his fifteen years old if it is proved after reference to the specialized committees the medical and the popular, that the interest of the child require so but only stay overnight with the holder of the custody), and paragraph (7) from the aforementioned article stipulated that (if the mother loses one of the conditions of the custody or she died, the custody shall be transferred to the father, unless the interests of the child require otherwise, then the custody shall be transferred to the a person chosen by the court, taking into account the interests of the child), these paragraphs violate the Sunnah of the Prophet and also the fatwa of Ayatollah Ali Al-Sistani which state the following (if the parents are separated by a splitting or divorce before the child reaches two years, the mother's right of the custody does not fall unless she marries someone else, so they must agree to exercise their common right alternately or in any other way they agree) and (if the mother married after separation from the father she loses her right to custody and the custody shall become the right of the father, and if the second husband leave her does her right return to her or not ? two sides the second is not without power) and (if the mother died will she have the custody, then the custody is specialized to the father, neither her guardian nor her father nor her mother nor any of her other relatives have the right to it), and these paragraphs violate and conflict clearly with the provisions of paragraph (1st) from article (2) from the Iraqi Constitution which stipulate that (the Islam is the official religion of the country and it is the basis of legislation), and also with the provisions of paragraph (Alif) from the same article that stipulate (it is not permissible to enact a code that contradicts the provisions of Islam) which make the paragraphs (1, 2, 4 and 7) from article (57) in the valid Personal Status code unconstitutional and void, because article (13) of the Constitution states that first: (this Constitution is the

supreme and highest code in Iraq and is binding in all its aspects without exception). Second: (it is not permissible to enact a code that contradicts with this Constitution, any text contained in the constitutions of the territories or any other legal text contradicting it shall be null and void), she repeated that the paragraphs (1,2,4 and 7) from article (57) from the Personal Status code No(188 for 1959 the modified one) is violation to the valid Iraqi constitution and the Islamic Sharia and the Sunnah of the Prophet, and the fatwas of the religious reference. Finally she requested to issue a decision that the paragraphs (1,2,4and7) from the Personal Status code is unconstitutional and to repeal it, and to burden the defendant/ being in this capacity all the expenses and the advocacy fees. After the case has been registered for this curt according to paragraph (3rd) from article (1) in its Bylaw, the agents of the defendant/ being in this capacity submit an answering draft that requesting to reject the case for the reasons listed in it, where they demonstrated that the purpose does not always come from adhering to the literal text and its appearance and the insist of the literally make an imbalance between rights and obligations which is arranged by the text on the acts and facts thus leading to the weight of one of the scales of justice on the other. And the purpose of legislating the provisions and codifying the codes is the human interests in bringing benefits and removing harm off them, as such the Iraqi legislator has purified the text of the article (57) from the Personal Status code in order to preserve the child's interest by staying at his incubator if its conditions are met, and by that the challenged legislative text is not violating the principles of Islamic Sharia or the constitutional texts referred to by the agent of the plaintiff. After the required procedure has been completed according to paragraph (2nd) from article (2) in the FSC Bylaw the date 5/12/2018 was set to argument, the court has been convened, the agent of the plaintiff has attend, the agents of the defendant also attend, the argument started in presence and publicly, the agent of the plaintiff repeated the case petition and submitted answer list to the answering draft and its conclusion were linked to the case petition. The agents of the defendant repeated what stated in the answering draft and requested to reject the case for what listed in it. As the case was completed, the judge decided to close the argument and the decision was is issued publicly in court.

The Decision:

During scrutiny and deliberation by the (FSC), the Court found that the agent of the plaintiff challenged the paragraphs (1,2,4 and7) from the Personal Status code No (188 for 1959 the modified one) under the pretense that it violate the Islamic Sharia and the Sunnah of the Prophet and the fatwas of the religious reference, and violate paragraph (1st) from article (2)in the Iraqi constitution that stipulate (the Islam is the official religion of the country and it is the basis of legislation) and also violate paragraph (Alif) from the same constitutional article which stipulate that (it is not permissible to enact a code that contradicts the provisions of Islam). The (FSC) found from Hadith of the Prophet and the views of jurists and similar legislation in Islamic countries and what the judiciary is based on in the field of personal status provisions as a whole, that it does not prevent dealing with the facts of the custody each according to his circumstances because the original in the legislation that it is placed to service the humanity and remove the damage off them, spatially the children because they deserve care more than the interests of the litigants, taking into account the interests of the child and to prevent harm from him, when the case is brought before the court it investigates this interest through social research which is carried out by the specialists and by the evidence of the litigants and estimated in light of that where dose the child's interests is, so according to that the court will judge to favor of the mother who is married to others or in favor of the father if the mother's marriage could cause harm to the child or distracted her from taken care of him, because the original in custody provisions that it revolves with the interest of the child, and the Personal Status code No(188) for 1959 the modified one has detailed that in its provisions in particular the article (57) within its paragraphs (1,2,4and7) which has been challenged to be illegitimacy and unconstitutional in this case, also the plaintiff has already filed the a case No(98/federal/2017) before this court against the same defendant in this case he challenged the paragraph (2) from article (57) from the Personal Status code and the court decision was issued to reject the case on 7/11/2017 in form and subject to the detail listed in it. For all the above the plaintiff case is lake its legal substantiation which requires to be rejected. According to that the FSC decided to reject the case and to burden the plaintiff the expenses and advocacy fees for the agents of the defendant/being in this capacity amount of one hundred thousand Iraqi dinars. The decision has been issued decisively, and unanimously

according to article (94) of the Constitution, and article (5) of the FSC Bylaw and issued publicly On 5/12/2018.