

Republic of Iraq
Federal Supreme Court
Ref. 97 / federal /2023



Kurdish text

The Federal Supreme Court (F S C) has been convened on 11/6/2023 headed by Judge Jassim Mohammed Abood and membership of Judges Sameer Abbas Mohammed, Ghaleb Amir Shunain, Khalef Ahmed Rajab, Hayder Ali Noori, Hayder Jaber Abid, Ayoob Abbas Salih, Abdul Rahman Suleiman, and Dyar Mohammed Ali who are authorized in the name of the people to judge and they made the following decision:

The Plaintiff: Ahmed Taqi Salih – his agent the barrister Wissam Abid Ali Khadhim.

The Defendant: Speaker of the ICR/ being in this capacity – his agents the legal counselor Haytham Majid Salim and the official jurist Saman Muhsin Ibrahim.

The Claim

The plaintiff, through his agent, claimed that on 31/8/2022, the judge of the Third Karkh Investigation Court, according to referral decision No. (2447), decided to refer him as a sponsor to the Karkh Misdemeanor Court to conduct his trial in a summary lawsuit in accordance with the provisions of Article (382) of the Penal Code, and he appealed against the referral decision before the Karkh Criminal Court in its discriminatory capacity, and the referral decision was certified by the discriminatory decision No. (2176/Ta/2022) on 27/9/2022, and because the decision is contrary to the law and violates his rights, therefore, he took the initiative to challenge before this court the unconstitutionality of article 382 of the Penal Code No. 111 of 1969, as amended, which states: (1. Whoever is sponsoring a child and whoever has the right to request it based on a decision or judgment issued by the judicial

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authority regarding custody or custody of the child and does not hand him over to him shall be punished by imprisonment for a period not exceeding one year or a fine not exceeding one hundred dinars. 2. The same penalty shall apply to any parent or grandparent who takes by himself or through another his young child or the child of his young child from whom he has been sentenced to custody or custody, even without deception or coercion.), for violating the Constitution in articles (2/1st/Alif, 13/2nd, and 29/2nd), which affirmed: that Islam is the official religion of the state and is a source of the basis for legislation, and the inadmissibility of enacting a law that contradicts the constants of Islam or contradicts the provisions of the Constitution, and the right of children over their parents to education, care, and education, and the right of parents over their children to respect and care, and his almighty said (No mother shall be harmed on account of her child, and no father shall be harmed on account of his child), and the saying of the Messenger of Allah (peace be upon him) (no harm on you, and no hurt to others), it also violates the Iraqi Civil Code No. 40 of 1951, as amended, in articles 102 and 216 thereof, which state that the guardian of the minor is his father, then the guardian of his father, and then ... And the Law on the Care of Minors No. (78) of 1980 in Article (27) thereof, which confirmed that the guardian of the minor is his father and then the court, and therefore his compulsory guardianship over his daughter is absent in the presence of the article - the subject of the challenge - in addition to the stability of the Iraqi judiciary in many of its discriminatory decisions on: (the text of the article - the subject of the challenge - does not apply to the father's act to take his children unless the complainant (mother) possesses a final judicial ruling obliging the father to hand over the children to her, issued by the Personal Status Court, and even the decision to uphold custody has no place to apply the article - the subject

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of the challenge - against the father) and among those decisions is the decision of the Wasit Court of Appeal in its cassation capacity in the number (241/Ta/Misdemeanors/ 2020 on 17/3/2020), and the decision of the Babylon Court of Appeal in its cassation capacity in the number (397/398 / penal/2020 on 20/5/2020), and the decision of the Court of Appeal Karkh felonies in their discriminatory capacity in number (1589/Ta/2.21 on 3/8/2.21), whereas Article 14 of the Constitution affirms equality among Iraqis and that the main reason for his delay in returning his daughter (Reem) to her mother (the complainant) is the deterioration of the health condition of his mother on the same day, as established by medical reports, he requested a ruling on the unconstitutionality of Article (382) of the Penal Code No. (111) of 1969, as amended, and that the defendant be charged with expenses, fees, and attorney's fees. The case was registered with this court in the number (97/Federal/2023), and the legal fee was collected for it, and the defendant is informed of its petition and documents in accordance with Article (21/1st and 2nd) of the Internal Regulations of the Federal Supreme Court No. (1) of 2022, his agents replied with the reply dated 22/5/2023 requesting the dismissal of the plaintiff's lawsuit and charging him fees, expenses, and attorney's fees, as the text in question was contained in one of the laws in force under Article (130) of the Constitution and is considered a legislative option, and that judicial rulings of all kinds (penal or civil) when they acquire the degree of bits are considered an argument, including on their parties, and acquire the authority of res judicata and enforceable, and refraining from doing so is a crime punishable by law, so there is no basis from the Constitution or the law For plaintiff's claim. After completing the procedures required by the rules of procedure of the court, a date was set for the pleading following Article (21/3rd) thereof, and the parties were informed of it,

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and on the appointed day, the court was formed, and the plaintiff and his agent attended, and the defendant's agent, the official jurist, Saman Mohsen Ibrahim, attended, and the public presence of the plaintiff and his agent began to conduct the public presence pleading, the plaintiff and his agent repeated what was stated in the lawsuit petition and requested a judgment according to what was stated therein, and they showed the court an explanatory list linking the original of it within the lawsuit papers, the defendant's agent answered and requested the dismissal of the lawsuit for the reasons stated in the answering draft linked to the case papers, and the parties repeated their previous statements and requests, and where there is nothing left to be said, the end of the argument has been made clear, and the court issued the following judgment decision:

The decision:

Upon scrutiny and deliberation, it was found that the plaintiff (Ahmed Taqi Saleh) filed the lawsuit before this court challenging the unconstitutionality of Article (382) of the Penal Code No. (111) of 1969, as amended, which states: (1. Whoever is sponsoring a child and whoever has the right to request it based on a decision or judgment issued by the judicial authority regarding custody or custody of a child and does not hand it over to him shall be punished by imprisonment for a period not exceeding one year or a fine not exceeding one hundred dinars. This provision even if the sponsor of the child is one of the parents or grandparents. 2. The same penalty shall be imposed on any of the parents or grandparents who took by himself or through others his young child or the child of his young child from whom he was sentenced to custody or custody, even if this was without trickery or

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coercion), and his appeal was based on the violation of Article - the subject of the challenge - of Articles (102) and (216) of the Iraqi Civil Code No. (40) of 1951, as amended, which indicated that the guardian of the minor is his father, then the guardian of his father, and then ... It violates Articles (2/1st/Alif), (13/2nd) and (29/2nd) of the Constitution, which affirmed: Islam is the official state religion and is a source of legislation, and it is not permissible to enact a law that contradicts the constants of the provisions of Islam or contradicts the provisions of the Constitution, and the right of children over their parents to education, care, and education, and the right of parents over their children to respect and care, this court found that the plaintiff was referred to the Karkh Misdemeanor Court, guaranteed to conduct his trial with a summary lawsuit in accordance with Article (382) of the Penal Code contested by its constitutionality, due to his delay in returning his daughter (Maryam) to her complaining mother, and he appealed against the referral decision and was ratified, according to the decision of the Karkh Criminal Court in its discriminatory capacity No. (2176/T/2022 on 27/9/2022) and upon careful consideration of the article whose constitutionality is challenged, it was found that the legislator had put the interest of the child under custody at the forefront and considered it the basis and may rule for one Parents to have custody of the child but not the other, taking into account that interest, when the other party who has not been sentenced to custody violates the agreement imposed on him by law to be obliged to return the child to the person who has been sentenced to custody or custody of him, the legislator stipulated that there should be a penalty for that act, and that the penalty is imprisonment for a period not exceeding one year or a fine, and that the assessment of that penalty is up to the Court of First Instance, which decides on the incident before it, so the said article is a punitive article

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applied to those who violate his obligation imposed on him under the law, and there is nothing that violates or contradicts the provisions of the Constitution, and it is considered one of the regulatory procedures that regulate the relationship of the parties regarding their children. In view of the above, the Federal Supreme Court decided to dismiss the lawsuit of the plaintiff (Ahmed Taqi Saleh) due to the absence of a constitutional violation and charging him fees and expenses and the amount of (one hundred thousand dinars) advocacy fees for the defendant's agents in addition to his job, legal counselor Haitham Majed Salem and official jurist Saman Mohsen Ibrahim, distributed according to legal ratios. The decision has been issued with majority, final, and binding for all authorities according to the provisions of Articles (93/1st and 94) of the Constitution of the Republic of Iraq for 2005 and Articles (4 and 5) of the FSC's law No. (30) for 2005 which was amended by law No. (25) for 2021. The decision has been edited on the session dated 23/Dhul Qaeda/1444 Hijri coinciding 11/June/2023 AD.

Judge

Jassim Mohammed Abbood

President of the Federal Supreme Court

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