



**Suprema Corte**  
de Justicia de la Nación



**DERECHOS**  
**HUMANOS**

This summary contains the cover page, the synthesis and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

**SEPARATION OF CHILDREN FROM MOTHERS IN PRISON**  
**(SEPARACIÓN DE HIJOS DE MADRES EN PRISIÓN)**

**CASE:** *Amparo en Revisión* 644/2016

**REPORTING JUDGE:** Arturo Zaldívar Lelo de Larrea

**DECISION ISSUED BY:** First Chamber of Mexico's Supreme Court of Justice

**DATE:** March 8, 2017

**KEY WORDS:** best interest of the child, gradual separation of children from mothers in prison, suitable interpretation.

**CITATION OF THE DECISION:** Supreme Court of Justice of the Nation, *Amparo en Revisión* 644/2016, First Chamber, Arturo Zaldívar Lelo de Larrea, J., decision of March 8, 2017.

The full text of the decision can be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emplematicas/sentencia/2020-12/AR%20644-2016.pdf>

**SUGGESTED CITATION FOR THIS DOCUMENT:** Human Rights Office of Mexico's Supreme Court of Justice, *Extract of Amparo en Revisión* 644/2016, Mexico.

## SUMMARY OF THE *AMPARO EN REVISIÓN* 644/2016

**BACKGROUND:** KVA, who is deprived of her freedom, claimed that the authorities of the Social Reintegration Center of Puebla (*Centro de Reinserción Social de Puebla, Cereso*) attempted to completely separate her from her daughter based on article 32 of the Regulation of Social Reintegration Centers for the State of Puebla (Regulation) which establishes that at 3 years old, the children can no longer live with their mothers. KVA filed an *amparo* against that decision. The federal district judge of Puebla that heard the matter decided to dismiss the complaint, and therefore she filed a *recurso de revisión appeal*, which was heard by the First Chamber of Mexico's Supreme Court of Justice (this Court) through the exercise of its authority to assert its jurisdiction.

**ISSUE PRESENTED TO THE COURT:** Whether the interpretation by the district judge of article 32 of the Regulation, based on which the authorities ordered the complete separation between KVA and her minor daughter, was constitutional.

**HOLDING:** The *amparo* was granted for the following reasons: The complete separation of the mother and her daughter is not constitutional, and therefore the authorities must implement a gradual, sensitive and progressive separation, and guarantee that the minor maintains close and frequent contact with her mother based on an evaluation of the needs and interests of the child. For this purpose, the authorities must facilitate an adequate space in which they can be together according to the needs of the child.

**VOTE:** The First Chamber decided this matter by the unanimous vote of the five judges Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Jorge Mario Pardo Rebolledo, Alfredo Gutiérrez Ortiz Mena (reserved the right to draft a concurring opinion) and Norma Lucía Piña Hernández.

The votes can be consulted at the following link:

<http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=199790>

## EXTRACT OF THE *AMPARO EN REVISIÓN* 644/2016

- p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of March 8, 2017, issues the following decision.

### BACKGROUND

- p. 2 On October 16, 2006, KVA and JOOA were married inside the Social Reintegration Center of the City of Puebla (*Centro de Reinserción Social de Puebla, Cereso*), where they were serving a sentence of 50 years of prison from the year 2001, for committing the crimes of kidnapping, homicide and robbery.

Years later, on June 18, 2011, KVA and JOOA had a daughter, who they registered with the name of AJOV. Since then, the minor has lived with her mother in the Cereso.

In August 2014, a litter after she turned 3 years old, AJOV was enrolled by her grandfather JLVC in a kindergarten close to his house, so she could begin her studies. Therefore, the minor began to leave the detention center on Sunday of each week, returning on Thursday to be with her mother again.

On August 27, 2014, KVA spoke with the Director of the Cereso, to request verbally that her daughter AJOV continue living with her on the weekends. The Director of the detention center answered that this was impossible because the minor had turned 3 and under article 32 of the Regulation of the Social Reintegration Centers for the State of Puebla (Regulation), that circumstance was an impediment for the child to remain with her mother inside the reintegration center. Therefore, the Director decided that in the future the child would be denied access to the Cereso.

- p. 3 As a result, KVA in her own right and in representation of her minor child AJOV, requested the *amparo* on August 28, 2014.
- p. 5 In her *amparo* claim, KVA argued that article 32 of the Regulation is unconstitutional, because it orders the complete separation of the minor from her parents when she reaches the age of 3. Therefore, this provision violates the constitutional protection of the family unit, deprives the child of the right to live with her family and could have an adverse impact on her psychological and emotional wellbeing.

The complainant specified that it is not her intention that her daughter remain with her indefinitely, since she is aware that the minor must go to school. Nevertheless, she considers that article 32 is invalid because it does not allow the child to be separated from her mother gradually.

- p. 6 The federal district judge of Puebla issued a decision on January 14, 2015, in which he dismissed the *amparo* proceeding with respect to the claims against the Congress of the State of Puebla and denied the *amparo* with respect to the claims against the Governor of the State of Puebla (Governor) and the Director of the Cereso.
- p. 7 KVA filed an appeal (*recurso de revisión*) against this decision on April 14, 2015, before the District Court.
- p. 9-10 The Delegate of the Governor filed an adhesive appeal (*recurso de revisión adhesivo*) on May 17, 2015.
- p. 10-11 The appeal was timely filed over which this Court assumed jurisdiction.

### STUDY OF THE MERITS

- p. 12 It is settled doctrine in this Court that the best interest of the child must prevail in any judicial dispute involving the rights of children. In this regard, the best interest of the child requires the supplementation of any deficiency in the complaint, in all decisions that could affect the rights and interests of minors, even when this means considering some issues not advanced by the parties in their complaints. That offers a procedural window to guarantee the interests of minors when the claims of the parties are insufficient in that regard.
- p. 13 Following this reasoning, the fundamental purpose of the decision on this matter must be to privilege the interests of AJOV, a minor that has lived inside a detention center with her mother.
- p. 13-14 In this regard, on the one hand there is a fundamental interest in the mother and child remaining together, and not being separated unless there is some impact on the rights of the child. On the other hand, it must be recognized that the situation of detention can

complicate the exercise of the right of the child to enjoy the maternal relationship, since penitentiaries are not meant for the development or protection of children. In fact, they often lack the infrastructure and services necessary for this. Therefore, in this case the State has the duty to specially guarantee the enjoyment of the maternal relationship through protection measures intended to overcome the difficulties inherent in the context of incarceration.

- p. 14 Whether the child remains in the Cereso must be strictly evaluated in light of the best interest of the child. Thus, it may be that the child must leave the place in order to satisfy other needs that do not depend on the family unit —such as receiving an education in the classroom—, among other reasons. However, given the importance of the maternal relationship for the minor and the devastation that can result from a separation, the State is obligated to implement a sensitive and gradual separation, and guarantee close and frequent contact between mother and child, provided it is the most beneficial arrangement for the child in the specific case.

## I

### **Principle of keeping the child with its biological family**

- p. 17-18 Following international law —and especially the precedents of the Inter-American Court [of Human Rights]—, this First Chamber has recognized the principle of keeping the child with its biological family as a fundamental protection with the enjoyment of the stability and permanency of the child in its nuclear family. As with the Inter-American doctrine, it has been understood that this protection is linked with the right of persons not to receive arbitrary interferences in their family, which is expressly recognized by article 12 of the Universal Declaration of Human Rights.
- p. 18 In this regard, this First Chamber established in the *Amparo Directo en Revisión* 3799/2014 that “a primordial right of children lies in not being separated from their parents, unless [this] is necessary in order to protect their best interest.” In the same light, the *Amparo en Revisión* 504/2014 established that children have the right to live with their family, primarily their biological family, and therefore the measures of protection dispensed

by the State must prioritize the strengthening of the family as a principal element of protection and care of the child. Also, the *Amparo en Revisión* 518/2013 recognized the duty of the state authorities not to separate minors from their parents unless it is necessary for their best interest.

- p. 18-19 In summary, this Court has understood that the principle of keeping children in their biological family is a fundamental interest to protect because children grow up and are cared for by their parents. According to this, the authorities must preserve and always favor keeping children in the nuclear family, unless such situation can have an adverse impact on their interests.
- p. 19 The above suggests that the State must not only safeguard the stability of children in their nuclear family, but also guarantee that they can effectively enjoy their family relations. In that regard, even if the separation is considered necessary because of an adverse impact on the wellbeing or rights of the child, the State must ensure that children maintain constant contact with their parents, unless that is contrary to the wellbeing or rights of the child.
- p. 20-21 In this regard, and as established when deciding the *Amparo Directo en Revisión* 1573/2011, nature ensures that the child experiences complete identification with the mother in the first months and years of life. This is so not only with respect to the biological needs of the minor regarding nursing, but also, as has been developed by various specialists internationally, regarding the prominence of mothers in the formation of the personality of their children during the first stage of their lives, which is decisive in the development of their conduct in the future.
- p. 22-23 In conclusion: the affective relationship between a small child and that child's mother has a crucial influence on the development of the child. This strengthens the fundamental interest that the young minor remain close to her mother. As a consequence, even when the separation is necessary, in the case of young minors, it is especially important that

mother and child remain in close, personal and frequent contact to the extent possible, unless such circumstance is contrary to the interests of the child.

## II

### **The situation of incarceration and the maternal relationship**

p. 23 It must be recognized that detention centers can hinder the exercise of the right of the child to enjoy the affections and care of her mother in appropriate conditions. In this regard, penitentiary institutions not only do not have the purpose of child development, they often have fundamental deficiencies in services and infrastructure that can obstruct the enjoyment of the maternal relationship.

In this regard, the specialized literature indicates a variety of conditions that make detention centers inappropriate for a child to be with her mother. Thus, it is argued that minors frequently observe inappropriate practices such as sexual relations, drug consumption, or quarrels and fights. It is also pointed out that the penitentiary is inconvenient for the constitution of children, because it exposes them to a certain visual and auditive violence. It is also stated that minors could be in unsafe conditions given the possibility of uprisings or riots.

p. 23-24 Furthermore, the absence of services that minors need is obvious, such as healthcare, education, food, specialized and alternative care, professional attention, among others. In addition, some limitations are asserted in relation to the infrastructure. This is the case of green areas, infirmaries, nursery schools, play areas, toys, *inter alia*; all of which would be positive for the development of the child.

p. 24-25 As is seen, the situation of incarceration places the relationship between a mother and her child in a complex context. However, this circumstance in itself should not be an excuse for minors not to fully enjoy their maternal relationship. Therefore, the challenges brought by confinement must be remedied through reinforced measures of protection, intended to guarantee that the mother and child can have a positive relationship, in dignified and adequate conditions.

p. 25 In this regard, given the special condition of vulnerability faced by children and their mothers in this context, the duty of diligence of the State is especially intensified. Therefore, in this particular case the State must take specific measures that guarantee the right of the child to maintain frequent, personal and direct contact with its mother; especially in the case of a small child that fundamentally needs maternal closeness.

p. 26 Thus, in this case the State must implement specific actions intended to guarantee that the child has a life close to its mother, enjoying her affection and her care in positive conditions.

Therefore, efforts must be made in the penitentiaries to articulate a respectful context for the dignity of the child and its right to privacy, and an environment friendly to it that contributes to a positive parent-child interaction. In this regard, the States are called to implement the best practices for detention, making the necessary adjustments in order to preserve the best interest of the children for mothers who are incarcerated. In other words, placing “the children and their rights as the center of the actions and of the manner in which they are applied.”

p. 27 Pursuant to the above, the penitentiaries that house mothers in detention must adopt the necessary policies so the children have sufficient healthcare, food, hygiene, clothing, potable water and recreational services. It is especially important that parents have a context that allows them to perform their role in the best way possible, without the limits of the situation of incarceration.

p. 27-28 Thus, the prisoners must be provided the maximum possibility to dedicate time to their children. It is also relevant that women have adequate information regarding their maternal responsibilities and the care of their children. The children also must have appropriate services for medical care, and their development should be supervised by specialists in collaboration with the health services of the community. Specifically, it is important that the State provide advice on the health and diet of mothers, supplying sufficient food



without charge to pregnant women, babies and nursing mothers, on a regular basis, in a healthy environment, that allows the women to nurse their babies and care for them.

p. 28-29 Additionally, it is advisable that all personnel of the prison have training in human rights, including instruction in gender perspective and children's rights. In this regard, it is relevant for the personnel of the center to be sensitized on the development needs of the children and receive basic notions of healthcare of minors so they can react correctly in case of need and emergency. For this purpose, documents may be consulted such as the human rights training Manual for prison officials, published by the Office of the High Commissioner of the United Nations for Human Rights.

p. 29 Likewise, disciplinary sanctions and other corrective measures should never include the prohibition or limitation of contact between mother and child. In addition, as a result of the best interest of the child, the point of view of the child must be taken into consideration in any decision related to her interest.

In summary, the fact that the mother of a minor is deprived of her liberty is a circumstance that can prevent the child from fully enjoying the maternal relationship. Therefore, in this situation the State has various duties intended to reduce those difficulties. Ultimately, those duties ensure that the situation of incarceration does not mean the need to separate a child from her mother, in a moment when it fundamentally needs the care of her mother.

p. 29-30 Nevertheless, it must be emphasized that the right of the minor to live with her mother is important to the extent that such circumstance is best for the interests of the child. In effect, international law and the precedents of this First Chamber protect keeping the child with her mother because there are solid bases showing that that is appropriate in light of the best interest of the child. However, the reality may be different.

### III

#### **The separation of the minor**

p. 30 In effect, even though there may be other reasons that justify separating a minor from her mother in detention, this Court notes that one frequent reason is that the minor reaches a

particular age. Thus, with the growth of the child a progressive process of individuation takes place through the arising of new needs for her development. In this situation, the minor still needs her mother, but requires other things that do not depend strictly on the family unit.

p. 31 In this line of thinking —and although there is no consensus regarding an appropriate age for a minor being separated from her mother in detention— the mere growth of the child may justify that she enter into contact with the outside world in order to enjoy other rights and, as a result, be separated from her mother.

However, it must be emphasized that the separation of mother and child is a delicate intervention in the principle of maintenance of the minor with her nuclear family, above all, because it can be devastating for the development of a small child. This seems to be true for any mother-baby relationship, but it is even more delicate in the case of children with mothers in detention.

In fact, it has been indicated that the separation of a child from her mother can be devastating for the physical health of the child. In addition, even when such separations only last a few days, it has been shown that their consequences persist even 6 months after the children have reunited with their attachment figures.

p. 33 The case of children that live with their mothers in detention is no different. On the contrary, the frequent separation of the minor with respect to its parents intensifies, instead of alleviating, the challenges a child faces whose mother is deprived of liberty. In fact, the separation of the minor with respect to her mother in detention can be more painful than other forms of parental separation due to the stigma, the ambiguity and the lack of social support and compassion that it results in.

The literature recognizes that the separation between mother and child due to parental incarceration can produce a serious breaking of the affective relationship, and severely challenge the reconstruction of the relationship later.

In this regard, the interruption can cause the child to lose her primary source of emotional and psychological resources, compromising its social, emotional and cognitive development. The studies reveal that the most frequent reactions of children separated from their mothers include sadness, confusion, depression, worry, anger, aggressiveness, fear, developmental regressions, sleep problems, food disorders and hyperactivity. Otherwise the research indicates that minors separated from their mothers deprived of liberty are more likely to exhibit behavior and discipline problems, poor school performance, depression, anxiety and hostility toward others.

p. 34 In that regard, while the lawmaker can decide that from a certain date the minor must leave the prison and therefore may be separated from her mother, the importance of the mother-baby relationship for the child in connection with the best interest of the child, conditions the specific form in which that separation should be carried out.

In the judgment of this Court the authorities must articulate a sensitive and gradual separation, and also guarantee close and frequent contact between mother and child once separated, provided this is the most beneficial for the child in light of all the specifics of the particular case.

#### IV

##### **Conforming Interpretation of the challenged provision**

p. 34-35 This Court considers that the first paragraph of article 32 of the Regulation is not unconstitutional, provided it is interpreted in conformity with the best interest of the child, such that once the child reaches 3 years of age, the separation be carried out slowly and sensitively with the child, carefully taking into account her interests and ensuring that subsequently mother and child can have close and frequent contact, according to what is best for the child.

p. 35 Therefore, the challenged provision is constitutional as long as it is interpreted in the terms explained below:

First of all, once the minor reaches 3 years of age, the removal must be done sensitively and gradually, as long as alternatives for care convenient for the best interest of the child have been identified. In this regard, both the parents and the children must be provided with psychological and emotional accompaniment during and after the separation. This is in order to prevent and minimize any possible impact, mainly on the wellbeing of the minor.

p. 35-36 Secondly, the form in which the separation of the minor from her mother is executed cannot be based on generalizations or conjectures without basis, but must part from a detailed assessment of the real conditions of the case, based on the result most favorable for the interests of the child. In that regard, even though the separation can take place from when the minor has reached 3 years of age, what is relevant is not the age itself, but the fact that because of the minor's growth, it has needs that cannot be satisfied inside the social reintegration center, such as receiving a classroom education.

p. 36 Therefore, the questions to consider must include the conditions in the prison and the quality of the alternative care that the child will receive outside of the center, including the needs that it must satisfy outside. In this respect, the authorities must act with flexibility and make decisions based on the individual circumstances of the minor and her family. This shows the importance of deciding on the basis of all the possible information.

Thirdly, even when the separation is necessary, it must be procured that mother and child maintain close, frequent and direct contact, as much as possible in each case. In this aspect the duty of the State to implement reinforced measures of protection becomes especially relevant.

p. 37 In this respect, it is advisable that the visits of the children that lived in prison take place in a manner and with a frequency in line with the best interest of the minor, taking into account the closeness with which the minor interacted with her mother when it lived with her, as well as the needs of the infant outside. According to the above, it is useful that the relatives and the child protection institutions collaborate with the penitentiary authorities

to ensure that the minor can visit her mother as frequently as possible, unless there are exceptional considerations based on the rights of the child.

- p. 37-38 It is also important to take into account the opinion of the child upon separating it from her mother and placing it in alternative care, however young the child may be. In this respect, it is advisable to take into account that (i) the right includes listening to the children and taking their opinions into account; (ii) the relevance of the opinion of the minor must be evaluated in function of her maturity; and (iii) the right of participation of minors does not imply that the wishes of the minor must always be followed, since such rigidity could ignore the specific conditions that surround the children in particular cases, and be in detriment of their own best interest.
- p. 38 Finally, it is relevant to consider that small children need an explanation as to why they cannot remain by their mother's side in the center, and they need to know if they can — and in what manner— visit her subsequently.

Given this panorama, the provision is not unconstitutional as long as it is interpreted and applied in the above explained terms.

## V

### **Analysis of the challenged state action**

- p. 39 First of all, it is important to note that while the article does not establish the conditions in which the distancing between mother and child should be carried out, the Director of the Cereso applied the provision in a specific manner.
- p. 40 In effect, there is no evidence in the court record of any other consideration regarding the individual conditions of AJOV, except that she had reached 3 years old. In this regard, no care was given to ensure that mother and daughter maintained close or frequent contact after the separation, according to the needs of the child. In addition, the authorities did not take any course of action to listen to the opinion of the child. In this regard, the separation was declared without fully evaluating the circumstances of the particular case, without

investigating the impact of the decision on the psychological or emotional wellbeing of AJOV and without considering the possibility of a gradual and sensitive separation.

p. 40-41 Consequently, it is clear that in this case there was an unconstitutional application of the rule. Therefore, this Court must grant the *amparo* to the complainant and her minor child against the application of said legal provision. Thus, the determination of the Director of Cereso is annulled and it is ordered that a separation between mother and daughter be done in a manner that is fully compatible with the best interest of AJOV.

### DECISION

p. 42 In view of the arguments explained in this decision, this Court revokes the appealed decision and grants the *amparo* for the effect that the Director of the Cereso, authority indicated as responsible in the *amparo* proceeding, annuls the decision to remove AJOV from and not permit her to return to the Cereso, and issues a new one ordering a separation that abides by the following guidelines:

1. The departure of AJOV from the social reintegration center must be gradual and progressive, articulated based on an assessment of the needs of the minor, by virtue of what is more favorable for her interests.
2. In addition, the removal must be done with sensitivity, providing to the extent possible psychological accompaniment to the minor, in order to minimize any possible impact on her wellbeing.
- p. 42-43 3. Providing it is in the best interest of AJOV, the authorities must facilitate that mother and daughter maintain close, direct and frequent contact, through the establishment of a visitation schedule articulated with full support of the needs of the child. In the schedule that is set, the need of the minor to receive the care and affection of her mother must especially be taken into account, above all in view of her young age and the closeness she has had with her.

p. 43

4. For these purposes, the authorities must facilitate an adequate space in which KVA and AJOV can be together according to the needs of the child.