

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.

**CHILDCARE SERVICE FOR CHILDREN OF MEN  
(SERVICIO DE GUARDERÍAS PARA HIJAS E HIJOS DE VARONES)**

**CASE:** *Amparo en Revisión 59/2016*

**REPORTING JUSTICE:** Margarita Beatriz Luna Ramos

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

**DATE OF THE DECISION:** June 29, 2016

**KEY WORDS:** right to social security, right to equal treatment between women and men, right to non-discrimination, best interest of the child, daycare, judging with a gender perspective, working women, working men, insured mothers and insured fathers.

**CITATION OF THE DECISION:** Supreme Court, *Amparo en Revisión 59/2016*, Second Chamber, Margarita Beatriz Luna Ramos, J., decision of June 29, 2016, Mexico.

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

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-01/AR59-2016.pdf>

**CITATION SUGGESTED FOR THIS DOCUMENT:** Center for Constitutional Studies the Supreme Court, Excerpt of the *Amparo en Revisión 59/2016*, Mexico.

## SUMMARY OF THE AMPARO EN REVISION 59/2016

**BACKGROUND:** A filed an application for daycare services for his son, J, with the Department of Daycare (the Department) of the Mexican Social Security Institute (IMSS). The latter denied A's application through an official notice based on articles 201 and 205 of the Social Security Law. The articles stated that it was necessary for the applicant to submit a court decision verifying that he exercised parental authority and custody over J, his rights before IMSS were current, and that he himself could not take care of his son. A and G, J's father and mother, filed an *amparo indirecto* lawsuit against this decision in which they challenged various provisions, as well as the official notice denying the daycare service because they considered their rights violated. The judge hearing the case dismissed the lawsuit. A, G and J filed a *recurso de revisión*, which was heard by the Supreme Court (the Court), because a constitutionality problem remained.

**ISSUE PRESENTED TO THE COURT:** Whether imposing on A additional requirements to access the daycare service, such as verifying by means of a judicial decision that he exercises parental authority and custody over his son, that he is current in his rights before IMSS, and that he cannot take care of J, in contrast to what is required of insured women, i.e., only the condition of being a mother, violates the human rights to equal treatment, non-discrimination, social security, and the best interests of the child.

**HOLDING:** The *amparo* was granted to A, G and J essentially for the following reasons. In this case, it was necessary to analyze the admissibility of the *amparo* before entering into the study of the merits. In order to declare, first of all, that the *amparo* lawsuit is admissible, the Supreme Court considered that in this case the constitutionality of various legal provisions was challenged and, therefore, the lawsuit is admissible regardless of the fact that the act of application is of an insurance entity such as IMSS. Furthermore, there was an express provision in the law to the effect that it was optional for the suing party to exhaust the ordinary means of defense. Moreover, that party established that it was the holder of a personal right that was harmed by the challenged laws. Therefore, there was no legal impediment for A, G and J to file an *amparo indirecto* lawsuit.

In addition, it was decided that the challenged provisions were unconstitutional and violated the human rights to non-discrimination, equal treatment, social security, and the best interests of the child. This was because these articles established requirements for men different from those that are required for insured women in order to access the benefit of daycare for their children. Also because they deprived J of access thereto through his father insured by the IMSS. Consequently, the *amparo* was granted to A, G and J for the Department to disregard the distinction derived from the unconstitutional provisions and to issue a new resolution granting the requested daycare service, under the same terms and conditions as those for mothers insured in the IMSS in the daycare sector. However, the request should be processed according to the degree of preference that the affected party had over other applicants prior to it, providing the facts and legal provisions that justify any waiting time that may have been caused.

**VOTE:** The Second Chamber of the Supreme Court decided this case by a majority of four votes of justices Margarita Beatriz Luna Ramos, Eduardo Medina Mora (cast his vote with reservations), Javier Laynez Potisek and Alberto Pérez Dayán. Justice Jose Fernando Franco Gonzalez Salas voted against.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=192864>

## EXTRACT OF THE *AMPARO EN REVISION* 59/2016

p.1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice, in session of June 29, 2016, issues the following decision.

### BACKGROUND

- p.9 On February 4, 2015, A filed an application for daycare services for his youngest child J with the Department of Daycare (the Department) of the Mexican Social Security Institute (IMSS).
- p.9,13 On February 16, 2015, the Department notified A with an official notice informing him that, based on articles 201 and 205 of the Social Security Law, it was not feasible to admit his application. In order to obtain the daycare service, it was necessary for the applicant to submit a court decision on the exercise of parental authority and custody of the child, provided that his rights were current before IMSS and that he himself could not take care of the child.
- p.2,10 On March 6, 2015, A and G, parents of the minor, in their own right and on behalf of the minor J, filed an *amparo indirecto* lawsuit in which they challenged both the laws and the official notice denying the daycare service. The challenged provisions were Articles 201 and 205 of the Social Security Law; 171 of the Federal Labor Law; 2, 3, 9 and 16 of the Regulations for the Provision of Daycare Services of the IMSS (the Regulations) and point 8.1.3. of the Standard that establishes the provisions for the operation of the Daycare Service of the IMSS (the Standard).
- p.10 The judge that heard the case issued a decision on September 21, 2015, in which he decided to dismiss the *amparo* lawsuit.
- p.7,10 On October 13, 2015, A, G and J filed a *recurso de revisión* against that determination. In session of December 2, 2015, the Collegiate Circuit Court requested that the Supreme Court assert its original jurisdiction and transferred the *recurso de revisión* to it. On January 25, 2016, the Supreme Court agreed to hear the *recurso de revisión* since a constitutionality issue was raised in the case.

## STUDY OF THE MERITS

p.11 The Court considers that the complainants are right to argue that the dismissal declared at trial was improper, since the constitutionality of various legal provisions was contested as challenged acts. The *amparo* lawsuit is admissible regardless of whether the act of application comes from an insurance entity, since in such cases the act of application may come not only from authorities, but also from a private party. Thus, even though in this case IMSS acts in its capacity as insurer, the Supreme Court has held that *amparo* lawsuits against laws are admissible even if the act of application comes from a private party.

p.11-12 With the official notice signed by the Head of the Department, it is demonstrated that the provisions of the Social Security Law were applied to the detriment of A – in his capacity as insured person -. Consequently, he may pursue the *amparo indirecto* lawsuit.

p.14 The dismissal ordered by the district judge was incorrect in determining that the ground for non-admissibility (*causal de improcedencia*) related to the fact that IMSS is not an authority for purposes of the constitutional lawsuit is applicable. As long as the application to the detriment of A, G, and J of the rules described as unconstitutional is proven, the concepts of infringement against them must be analyzed.

The Supreme Court overturned the decision of the trial court and studied the causes of inadmissibility that were asserted and that were not analyzed in the decision.

p.14-16 The defendant authorities and agencies of IMSS asserted the following grounds for dismissal in the lawsuit: that prior to the initiation of the *amparo* lawsuit, the affected party should have attempted ordinary means of defense before the Federal Conciliation and Arbitration Board. They also asserted that A, G, and J did not have standing to file an *amparo indirecto* lawsuit.

The Court considers that the first ground does not apply because, according to article 61, section XIV, third paragraph of the Amparo Law, since there is an express provision to the effect that it is optional to exhaust the ordinary means of defense, there is no legal

impediment for A, G, and J to file the *amparo indirecto*. The second ground is unfounded because A, G, and J claim to be holders of a personal right harmed by the laws they challenge, which is proven by the official notice that denied J access to the daycare. Therefore, the standing of A, G, and J to file the *amparo* lawsuit is evidenced.

- p.17 Having reviewed the grounds for non-admissibility not addressed by the judge, the Court will now review the proposed concepts of infringement.
- p.22-25 The concepts of infringement asserted by A, G, and J are justified. It is seen from the challenged provisions that the daycare service provided by IMSS is exclusively for insured working women and only extraordinarily provided to men. For that purpose, men must prove one of the following premises: a) to be a widower, b) to be divorced, c) that by judicial decision they exercise custody of their children, provided they do not marry or join in a domestic partnership, and d) that, by judicial decision, they exercise parental authority and custody of a minor, provided that their rights before IMSS are current and they cannot provide care and attention for the child.
- p.25 The law makes a clear distinction in the benefit of daycare service by granting it exclusively to insured women, whose only condition is that of being a woman; whereas, for insured men, it establishes a series of requirements, in their capacity as fathers or for men who have the custody of a minor. The Supreme Court considered that this distinction is unjustified and discriminatory insofar as, in terms of Article 4 of the Federal Constitution, men and women are equal before the law.
- p.27 The right to equal treatment between men and women provided for in article 4 of the Constitution seeks to treat both equally before the law, which implies that both women and men enjoy, in this case, as insured workers, the same benefits that social security provides, including daycare service, in accordance with the provisions of article 123, part A, section XXIX of the Federal Constitution.

Hence, the Supreme Court considered that, without there being any objective justification for differential treatment, the challenged provisions result in a situation of discrimination by restricting to certain premises the worker's right to enjoy the service.

p.28 The difference analyzed violates the equality of rights that must govern for everyone regardless of sex. Furthermore, it hinders working fathers from enjoying the service on an equal basis with working women, placing them at a disadvantage.

This differential treatment results from the assignment to women of the role of childcare for the mere fact of being a woman, which implies a gender stereotype, without considering that this is a shared responsibility of the parents in which they should participate in equal measure.

p.29 Article 205 of the Social Security Law also establishes that widowers, male divorcees or fathers who judicially retain custody of their children cannot receive the service if they remarry or having a domestic partner. This presumes that their new spouse or domestic partner would be a woman who can take care of the worker's children. The foregoing entails a structural differentiation that underlies the provision, assigning women a certain role solely on the basis of gender, reaffirming the stereotypical view and disadvantaged situation that permeates the provision, reducing women to the role of caring for the household and children.

In fact, by studying the challenged provisions with a gender perspective, they result in a differentiated treatment that is discriminatory on the basis of gender, regardless of the fact that in this case such treatment deprives the working father of a right.

The principle of equal protection and non-discrimination on the basis of gender must not only be assessed from the point of view of women, because although it is true that by tradition, mainly due to cultural patterns, it is they who may see their rights diminished, the truth is that men can also be affected by this same gender view, as is the case of the provisions under analysis.

p.29-30 Judging with a gender perspective is a method that aims to detect and eliminate all barriers and obstacles that discriminate against people on the basis of sex or gender. That means to judge by considering the situations of disadvantage that, due to questions of gender, discriminate and prevent equality. The aforementioned obligation stems from the

Convention on the Elimination of All Forms of Discrimination against Women and its Committee's General Recommendation 33: "On Women's Access to Justice".

Consequently, judges must question the preconceived stereotypes in the laws regarding the functions of one or the other gender and act neutrally in the application of the legal provision in each situation. The State must ensure that in any judicial dispute where a situation of violence, discrimination or vulnerability for reasons of gender is noted, this is taken into account in order to clearly visualize the problem and guarantee access to justice in an effective and equal manner.

- p.30 In addition, the State is obligated to guarantee, through the law, equal conditions so that both parents (co-responsibility) can contribute to the full development of the family, always ensuring the best interests of the child, since children have a human right to the satisfaction of their needs for food, health, education, and healthy recreation for their full development, in terms of article 4 of the Constitution.
- p.30-31 In view of the above, this Court considers that men, like women, have the right to access the daycare service which, as insured persons, IMSS provides to women broadly. There is no legal, constitutional or conventional justification that deprives them from obtaining it on equal terms, insofar as both are equal before the law.
- p.31 The Supreme Court also determined that the challenged legal provisions, that is, Articles 201 and 205 of the Social Security Law; 2 and 3 of the Regulations and Article 8.1.3. of the Standard violate the rights to social security established in Article 123, section XXIX of the Constitution; as well as the rights of the child and the best interest of the child established in Article 4 of the Constitution..
- p.31-32 Part B) section XI, sub-section a) of article 123 of the Constitution not only contains the minimum social security bases for workers in the service of the State, but the constitutional principle of social security also stems from it, based on the obligation to establish a comprehensive system that provides tranquility and personal well-being to workers and their families in light of the risks they are exposed to, aimed at improving their standard of living. This constitutional principle is not exclusive to workers in the service of the State



provided for in part B) of article 123 of the Constitution, but also protects the workers referred to in section A) (workers, laborers, domestic employees, craftsmen and, in general, those subject to any employment contract).

p.33 Therefore, there is no constitutional justification for the man insured by IMSS to have the daycare service limited through certain extraordinary requirements (widowhood, divorce and the exercise of custody and judicial parental authority of the child), which are not required of women, because this benefit is not exclusive to women.

As a result, the rights of children and the best interest of the child are violated by depriving children of access to the daycare service provided by IMSS through their father and by limiting it in a discriminatory manner only to insured women.

Children, in terms of article 4 of the Federal Constitution, have the right to the satisfaction of their needs for food, health, education and healthy recreation for their full development. Furthermore, the duty to protect minors corresponds to both parents equally. A setting of equitable co-responsibility entails the need for a man to be able to see his interest in the care and development of the child satisfied through the benefit of daycare.

p.33-34 The Court concludes that A, G, and J are correct when they state that articles 201 and 205 of the Social Security Law; 2 and 3 of the Regulations and article 8.1.3. of the Standard violate their human right to non-discrimination, equal treatment, social security and the best interests of the child contained in articles 1, 4 and 123, part A, of the Federal Constitution. These provisions establish requirements for men different from those applicable for insured women to be able to access the benefit of daycare and deprive the child of access to the service through the father insured by IMSS.

## DECISION

p.34 Since the challenged provisions are unconstitutional, the requested *Amparo* and protection of the federal courts should be granted and extended to the act of application of the provisions.

p.34-35 Therefore, the decision of the trial court is overturned and the *amparo* is granted in order for the Department to disregard the distinction referred to in articles 201 and 205 of the

Social Security Law; 2 and 3 of the Regulations and article 8.1.3. of the Standard and issue a new resolution granting daycare services to A, G, and J under the same terms and conditions as to mothers insured in the IMSS daycare branch.

However, the Supreme Court takes into account that it is a well-known fact that this is a benefit for which demand ordinarily exceeds the direct capacity of IMSS to provide it. Therefore, this entity must process their request according to the degree of preference that A, G, and J had over other applicants prior to them, providing the facts and legal provisions that justify any waiting time that may delay the entry of the minor because the capacity of the corresponding daycare center is filled.