IN THE NAME OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

THE CASE ON CONFORMITY OF ARTICLE 138 OF THE RA ADMINISTRATIVE PROCEDURE CODE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE CITIZEN SHAVARSH MKRTCHYAN AND OTHERS

Yerevan 11 April 2012

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), Justices K. Balayan, F. Tokhyan, M. Topuzyan, A. Khachatryan, V. Hovhannisyan, H. Nazaryan (Rapporteur), A. Petrosyan,

with the participation of the representative of the Applicant K. Mejlumyan,

official representative of the Respondent A. Mkhitaryan, Senior Specialist and H. Sardaryan, Leading Specialist of the Legal Expertise Division of the Legal Division of the RA National Assembly Staff,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 6 of the Constitution of the Republic of Armenia, Articles 25, 38, 68 and 69 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by a written procedure the Case on conformity of Article 138 of the RA Administrative Procedure Code with the Constitution of the Republic of Armenia on the basis of the application of the citizen Shavarsh Mkrtchyan and others.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the citizen Shavarsh Mkrtchyan dated 17.01.2012.

Having examined the report of the Rapporteur on the Case, the explanations of the representatives of the Applicant and the Respondent, having studied the RA Administrative Procedure Code, other legislative acts and international legal practice concerning the legal regulation of the challenged issue, the international obligations of the Republic of Armenia, as well as other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES**:

1. The RA Administrative Procedure Code was adopted by the RA National Assembly on 28 November 2007, signed by the RA President on 10 December 2007 and came into force on 1 January 2008.

The challenged Article 138 of the Code titled “Peculiarities of the Consideration of the Claims “stipulates, “The court considers the cases prescribed by Article 135 of the Code in written procedure except for the cases when, by the court assesses the case as having public sonority or its oral consideration will contribute the quicker revelation of the circumstances of the case”.

2. The procedural background of the case under consideration is the following: Shavarsh Mkrtchyan and others submitted a claim to the RA Administrative Court against the RA Government with the demand to declare as invalid the Decision N 944-N of the RA Government dated 26.06.2009 on “Declaring of exceptional prevailing public interest towards the property of citizens of the Halidzor Village Community of Syunik Region of the Republic of Armenia and changing the target significance of the lands”. Based on Article 138 of the RA Administrative Procedure Code the Administrative Court accepted the claim to be considered by written procedure. The Applicants motioned to consider the case in public, which was declined by the Court based on the absence of necessary grounds for case consideration the by oral procedure, prescribed by Article 138 of the RA Administrative Code, and on 01.03.2010 the Decision VD/4396/05/09 on declining the demand to recognize invalid the Decision N 944-N of the RA Government adopted on 26.06.2009, was announced. By the Decision dated 05.05.2010 the RA Court of Cassation returned the cassation complaint submitted against the decision of the

Administrative Court based on Part 1, Article 141 of the RA Administrative Procedure Code, reasoning also that the Administrative Court judgments on challenging the legitimacy of normative legal acts may be appealed in the RA Court of Cassation only due to the fact of violation of the substantial right. By Decision DCC – 936 of the RA Constitutional Court Part 1 of Article 141 of the RA Administrative Procedure Code was declared as contradicting Articles 3, 18 and 19 of the RA Constitution and invalid in regard to blocking the person's right to appeal the Administrative Court judgments in cases challenging the validity of the normative legal acts based on the violation of the norm of procedural law, to be incompatible with Articles 3, 18 and 19 of the RA Constitution and invalid. Based on the mentioned Decision of the Constitutional Court, the Applicants submitted a cassation appeal due to a new circumstance which was satisfied partially by the RA Court of Cassation by the Decision dated 29.07.2011, and was declined on the grounds of violation of the procedural right of the Applicant, and the Administrative Court Decision dated 01.03.2010 was left in force. At the same time, the RA Court of Cassation considered the position of the RA Administrative Court on declining the motion on considering the case by oral procedure to be reasonable and well-founded, as no condition, prescribed by Article 138 of the RA Administrative Procedure Code, i.e. the case has public sonority or its oral trial will contribute the quicker revelation of the circumstances of the case, was available.

3. The Applicant finds that the challenged norm with the interpretation of the RA Administrative Court and the Court of Cassation does not correspond the Constitution "as, the rule on case consideration by written procedure prescribed by Article 138 of the RA Administrative Procedure Code, may not be considered as the right of the court to announce the judgment without the public trial" and does not derive from the requirements of Article 19 of the RA Constitution and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms "and the rights guaranteed by them are violated". The right to public trial is the constitutional right of an individual, "the cases of restriction of which are listed in the Constitution and which are not present in instant case and, according to Article 3 of the Constitution, this is an ultimate value and the state shall be limited by that right". Applicant finds that opposite to the above mentioned principle ensured by the Constitution and Convention, the Administrative Court did not carry out public consideration of the case with the participation of parties in the courtroom and "without the public consideration of the case shall announce the judgment on the merits, which violated our above mentioned rights". The Applicant also finds that this approach of the court they deprived them of the possibility to submit evidences to the court. Besides, "the court identified and thus mixed two different principles – the constitutional principle of publicity which guarantees the public hearing of the cases as an exception prescribing the cases of the closed court session and the principle of oral procedure which concerns consideration of the cases by oral or written procedure." According to the Applicant, "the principle of publicity is not similar to the case consideration by oral or written procedure, in particular the oral closed court session may take place, which will be maintenance of the requirement of oral consideration but violation of the principle of publicity, if the grounds for closed trial prescribed by the Constitution and Convention are not present". As a result, the Applicant finds that "the Administrative Court is provided with the possibility to consider the case without public trials on the basis of pretence on written procedure, in particular, after receiving the application, without the public or closed consideration of the case", which violated the rights of the litigants guaranteed by Article 19 of the Constitution and Article 6 of the Convention.

4. The Respondent finds that Article 138 of the RA Administrative Procedure Code is in conformity with Articles 3, 18 and 19 of the RA Constitution on the reasoning, that taking into consideration the importance of the publicity for execution of the person's right to fair trial, the publicity of trial is equaled to the constitutional principle of justice and is reflected both in the international legal instruments stipulating the independence of the judicial system and guarantees for protection of human rights, and in the national legislation. According to the Respondent "publicity has broad and limited meaning. In a broad sense publicity means the presence of the citizens and mass media at the case a trial, and in a limited sense - presence of the litigants at the case trial." Oral consideration of the case is one of the procedural principles "which provides with the possibility to ensure the more complete implementation of publicity principle in case trial". The procedural principles, although independently, by their essence characterize this or that institution (stage)of proceeding, but at the same time are interlinked and are one united logical-legal system. The Respondent also finds that "implementation of oral consideration is a

precondition for implementation of the principle of publicity." Oral consideration is clear and accessible for all litigants, which provides the court and participants of the case "to comprehend the circumstances of the case easier, assess them correctly, and the citizens and representatives of mass media, who are present at the court hearing, to get acquainted with the considered case, to carry out review over the activity of the court. Due to oral consideration, the parties of the case may exchange ideas lively and quickly." Simultaneously, according to the Respondent, reasonable implementation of the trial only through the application of the principle of oral consideration is impossible and taking into consideration the peculiarities of some cases, their more effective consideration may be implemented in written form and absence of the oral procedure is justified if the court considers exclusively legal issue, when "presenting evidences is not only the right but the obligation of the party." According to the Respondent, the RA Administrative Procedure Code provides with possibility to present additional evidences after the end of the preparation of the case to consideration as well as the plaintiff is entitled to change the substance and subject of the plea before carrying out the proceeding.

5. In the frames of the instant case the Constitutional Court necessitates clarifying:

- The content and peculiarities of the legislative assurance of the written procedure as the procedural form of implementation of the constitutional right to fair and public trial,
- The content and peculiarities of the written procedure in the international legal (European) practice and in case law of the European Court of Human Rights in this sphere,
- The assurance of protection of the litigants' rights (including procedural) in the challenged norms, as well as in the norms systemically interrelated with them, during the consideration of the cases under the jurisdiction of the Administrative Court.

6. According to Article 19 of the RA Constitution, everyone shall have a right to restore his violated rights, and to reveal the grounds of the charge against him in a fair public hearing under the equal protection of the law and fulfilling all the demands of justice by an independent and impartial court within reasonable time. This right is also guaranteed by the European Convention of Human Rights (hereinafter Convention); according to Part 1, Article 6 of which in determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time. In addition, **the public hearing** (in particular public information concerning the trial court, the pending case, place and date of the court hearing, procedure of hearing, etc), as well as **compulsory pronunciation of the judgment** is the least and important guarantees for the implementation of this right.

Pursuant to Article 3 of the RA Constitution, as well as in the framework of the assumed international obligations, the task of the state is to ensure the administration of justice according to the procedural rules which will ensure the legal terms necessary for the implementation of the right to public trial, including also through the implementation of different procedural forms of the case consideration in the court, deriving from the peculiarities of the considered cases and necessity of their fair, immediate and effective solution. The latter conditions the availability of the procedural forms of case consideration, such as **oral and written procedures** of case trial or principles of oral and written examination. During the written procedure the case consideration is performed without "oral hearings", without direct participation of the parties which is conditioned with a number of procedural peculiarities.

The above-mentioned two trial principles are equally highlighted in the established international legislative and judicial practice, and have different manifestation conditioned with the legal system, structure of judicial system, contents of the functions of the bodies administering justice, as well as peculiarities of the certain cases considered by the court, other circumstances prescribed by the domestic legislation. The complex research of this experience principally concludes to following:

- The principles of oral and written hearing is equally applicable in all spheres of justice (general jurisdiction (criminal and civil cases), administrative, constitutional and other specialized justice),
- If the oral procedure is applicable without exception, then the case consideration by written procedure is implemented in certain cases and in certain circumstances, in particular,
    1. when there is no necessity in oral examination of factual circumstances of the case, or, if the oral examination of the materials (documents, etc.) submitted to the court will not contribute

the further clarification of the challenged issue, and if, it does not contradict the famous principles of protection of human rights and fundamental freedoms,

2. when the court, based on motion of the litigants or without it, makes a decision to consider the case by written procedure,
3. at the stage of preparation of the case consideration when the issue of admissibility of the application is considered,
4. in the cases when the court makes a decision on implementation of temporary remedies for prevention of the danger threatening the public interests or for other necessary objectives,
5. by court decision if the motion of the parties on non-participation in trial is available,
6. if the court considers necessary to make a decision on the basis of the written documents available in the case,
7. if the clarification of the circumstances of the case is impossible otherwise (through oral examination),
8. for ensuring speedy case trial,
9. in the cases of necessity to hold a decision on the issues of right and procedure,
10. while considering cases (appeals, complaints) in accordance with judicial supremacy (appeal, cassation), if other procedure is not stipulated,
11. if the examination of the case does not bring to factual or legal issue and the facts are clarified,
12. if the court decision will not contain legal assessments,
13. if the application under consideration of the court, is unconditionally well-founded or is obviously ill-founded, and the court finds that there is no need for the oral examination,
14. if the disputes on public law are considered,
15. if there is no legal dispute between the parties or the respondent agrees with the demands presented to the court.

The above-mentioned legal terms are also reflected in case law of the European Court of Human Rights. In particular, the European Court stated that right to public hearing prescribed in Article 6 of the Convention necessarily entails an entitlement to "oral" hearing." However, the obligation to conduct such hearings is not absolute. Thus, the absence of oral trial may be compatible with the requirements of Article 6, when the examined issue does not raise a question of fact or law which can adequately be resolved on the basis of the case materials without oral observations of the parties (Elsholz v. Germany, Judgment of 13 July 2000, p. 66, Fredin v. Sweden (no.2) Judgment of February 1994, pp, 21-22, Fischer v. Austria, Judgment of 26 April 1995, p.44).

The practice of the European Court of Human Rights in respect of Article 6 assesses the written trial as fair and public, if

- it is conditioned with exceptional circumstances,
- is implemented within a reasonable time as well as for ensuring speedy case trial,
- is conditioned with the peculiarities of the examined case,
- is implemented principally in the solution of the issues of law, during the examination of such factual circumstances which are justified in the terms of written procedure.

Consequently, while deciding the constitutionality of the challenged norms, the Constitutional Court is also guided by the necessity of assessment of their conformity with the above-mentioned criteria.

Thus, the Constitutional Court states that both oral and written procedures of trial are organizational procedural forms of justice administration, were brought in the practice of justice by legal stipulation and are aimed, in one case, at the implementation of procedural actions without "oral hearings", and in other case at the assurance of fair, effective and public trial, adoption of judgments and their publication. In all cases, the trial by both oral and written procedure should provide necessary guarantees for exercising the rights litigants.

7. The institution of trial by written procedure is introduced into the spheres of constitutional, as well as into the administrative justice and is called to ensure fair and public trial of certain case and in

certain circumstances. In the framework of administrative trial the written procedure may be implemented based on the will of the parties and initiative of the court in the cases of availability of certain grounds. That procedure is implemented for the cases of speedy trial (Article 108, Part 1, Point 3 of the RA Administrative Procedure Code), while considering the appeals submitted against the judgments (as well as interim judgments) of the Administrative Courts (Article 117.10, Parts 3, 4 and 5 of the RA Administrative Procedure Code), while considering the cases challenging the lawfulness of the normative legal acts (as well as for the cases prescribed in Article 147 of the RA Administrative Procedure Code), except for the cases when the court assessed the case to have public sonority or when oral trial will contribute the quicker revealing of the circumstances of the case (Article 138 of the RA Administrative Procedure Code), as well as while considering the claim on payment order (Article 158, Part 1 of the RA Administrative Procedure Code).
It is worth mentioning that in contrast to the rules of written examination prescribed in the above-mentioned Code, the rules for oral trial or the general order (in the form of systemized norms) of the case consideration in the administrative courts is prescribed in Chapter 16 of the Code.

8. As to the constitutionality of the challenged norm, the Constitutional Court states that in accordance with the norms prescribed in Chapter 24 of the RA Administrative Procedure Code, including Article 138, the Administrative Court implements the written procedure for the proceedings of the cases challenging lawfulness of the normative legal acts (listed in Article 135), except for the cases when the court assesses the case to have public sonority or when oral trial will contribute the quicker revealing of the circumstances of the case. As it follows from the content of legal regulation, the legislator considers the cases consideration by written procedure compulsory for the cases when the court faces **the issue of identical and correct understanding and interpretation of the content of the right (lawfulness of the legal provision)** prescribed by the normative act, the solution of which demands from the Administrative Court, first, to examine the challenged normative legal act, to conduct legal comparative analysis with the provisions of the normative acts having supreme legal force, etc. That is, for the cases deriving from the public-legal disputes, the court, as a rule, does not have the necessity to conduct trial actions publicly and orally with direct participation of the parties, which is aimed at the organization of effective trial. Simultaneously, considering that certain and legally-grounded circumstances and based on the necessity to provide wider participation of the society and more direct public control over the case trial, as well as on the necessity to organize more prompt examination, the court is authorized to render the substantiated decision on conducting the case trial by oral procedure. Besides, based on the certain circumstances, as well as on the above mentioned considerations, the Administrative Court, on its discretion or by reasoned motion of the parties, is authorized to combine the oral and written procedures within the trial of the same case (e.g. on the grounds prescribed in Articles 108, 111 and 138 of the RA Administrative Code), having the aim to provide more effective and prompt clarification of the circumstances of the case.
It shall be also considered that even for the cases of oral trial the clarification of the circumstances of the case is conducted not only through "oral hearings" in the court, but also **through the examination of written evidences.** Consequently, the Constitutional Court finds that **the principle of the oral examination is not absolute** in the framework of the challenged legal regulation.

9. The Constitutional Court necessitates mentioning that, according to the general content of the positions of the Applicant, the issues presented in the instant case demand to reveal also the legal content of interrelations of implementation of the principles of written and oral case trial, as well as the principle of access to justice.
The Constitutional Court finds that the publicity of trial first means possibility to implement public control over the trial and the judgments adopted by the court.
Simultaneously, the Constitutional Court necessitates mentioning that "supposed conflict" between the principles of trial by written procedure and publicity of the case trial is especially obvious, when any legal provision excluding the principle of orality in the context of guarantee of public hearing prescribed in Article 19 of the RA Constitution may seem to be disputable only outwardly. Although the implementation of the trial by written procedure may not be considered as violation of the guarantees of the fundamental principles of justice, if implemented based on mutual consent, as well as in the cases

prescribed by law when it is not necessary to listen to the expert, to interview the witnesses, to make an inspection and to give judicial assignments (Article 108, Part 1, Point 3, Article 117.10, Part 5 of the RA Administrative Procedural Code).
On the other hand, the written trial is excluded when compulsory circumstances for oral trial precisely prescribed by law are present. The Constitutional Court also states that the trial by written procedure, in the sense of Article 19, Part 1 of the RA Constitution, may not be interpreted as administration of justice based on the principle of non-publicity, even moreover be interpreted as means for neglecting the normative terms of Part 2 of Article 19 of the RA Constitution, if it is implemented in accordance with precisely prescribed procedure thus guaranteeing the effective implementation of the rights of litigants.

In accordance with the principle prescribed in the case law of European Court on Human Rights, **holding the consideration of the case circumstances (or "oral hearing") and pronouncement of the decision** are prior elements of public trial (regardless the procedural manner of implementation). In accordance with position of that court " Whilst the member States of the Council of Europe all subscribe to this principle of publicity, their legislative systems and judicial practice reveal some diversity as to its scope and **manner of implementation**, as regards both the holding of hearings and the "pronouncement" of judgments. The formal aspect of the matter is, however, of **secondary importance** as compared with the purpose underlying the publicity required by Article 6 para. 1(art. 6-1)." (Sutter v. Austria Judgment of 26 March 1982, para. 30, Pretto and others v. Italy Judgment of 26 March, 1982, para. 23 and Axen v. Germany Judgment of 8 December 1983, para. 25).

From this it follows that while considering the issue of law, the Administrative Court being obliged to follow the principle of publicity of justice guaranteed by Article 19 of the RA Constitution, and based on specific circumstances of the case, is competent and in the cases prescribed by the Code is obliged to implement (for making the circumstances of the case consideration more accessible for the public) or not to implement the wider means of application of that principle in one case, and to organize more prompt and effective trial in the other case.

The Constitutional Court finds that in all above mentioned cases the legislator obliges the Administrative Court, regardless the peculiarities of the considered case and other circumstances which serve as grounds for the solution of the case by written procedure**, to implement fair, effective and public trial unconditionally,** thus such legal regulation pursues a constitutional legal objective.

10.In the framework of this case, necessitating to clarify the issue of ensuring the rights of the litigants by challenged legal regulation, it shall be stated that as it derives from the analysis of the norms included in Chapter 24 of the RA Administrative Procedure Code and other norms systemically interconnected with them, in the cases of the trial by written procedure **the litigants, including parties, are not limited to implement their procedural rights and bear relevant obligations** (Articles 15. 16. 19, 25, Article 26, Part 4, Article 36, Part 4, Articles 39, 42, 43, 44, 48, 83, 84 and 85 of the RA Administrative Procedure Code) which may be implemented **considering the peculiarities of written trial,** in particular in the cases when the issue concerns the implementation of procedural actions (examination of evidences, as it is prescribed by rules of Chapter 7 of the RA Administrative Procedure Code), and rights and responsibilities of the parties concerned. Consequently, **the Constitutional Court states that the implementation of these peculiarities does not change the essence of the rights and obligations of the participants.** That is, as it derives from the above mentioned analysis, also in the case of the written procedure, the legislator **guaranteed the preservation of the rules of competitive trial** (including the normative requirements of Chapter 2 of the Code). The judgments rendered by this procedure, as it follows from the content of the above mentioned norms, are unconditionally subject to both **pronouncement** (for the parties) and to **official publication** (for the public) (Article 142 of the Administrative Procedure Code). That is, the complete texts of these acts are made accessible in the same way as they would have been done as a result of oral hearings. Simultaneously, as a result of case trial by written procedure, the necessary legislatively prescribed legal consequences follow the adoption and pronouncement of the judgments (Article 140 of the RA Administrative Procedure Code), which are accessible and assessable both for the litigants and for the public, and those acts **are subject to review** in accordance with the manner prescribed in the rules of Article 141, Chapters 19.1, 20 and 22, and Section 4 of the Code.

11. The Constitutional Court also necessitates considering the issue of ensuring the rights of the litigants in the trial by written procedure in the context of peculiarities of implementation of these rights and possibilities of their manifestation in the framework of judicial discretion, taking into consideration the fact that, unlike the oral procedure (Chapter 16 of the Code), as well as the RA constitutional judicial practice, the rules for written procedure are not defined and systemized in the RA Administrative Procedure Code. Although their absence does not directly cause issue of constitutionality, it may become an obstacle for ensuring the rights of persons, as well as for fair and public trial. In the framework of such consideration the possible (clearly predictable) means for the implementation of the rights of persons, guaranteed by the Code, are indefinite and can be resolved on the merits in the framework of absolute discretion of the court.

The Constitutional Court finds a gap of legal regulation in the RA Administrative Procedure Code, which concerns the absence of precise procedure for the trial by written procedure. Overcoming of that gap is within the competence of the legislative body which may be implemented by prescribing rules for written procedure in the RA Administrative Procedure Code, amongst them:

- the rules for preparation and conduct of written procedure,
- the manner of implementation of the rights (connected with the written evidences, additional materials, explanations, arguments (counter arguments), motions and time terms of their submission and exercising of other procedural actions during the whole trial) of the parties prescribed by the RA Administrative Procedure Code,
- the procedure for adoption of interim judgments in the framework of written trial,
- the framework of the necessary actions of the court (connected with the organization and procedure (time terms) of the circulation of documents, on one hand between the parties, and on the other hand between the parties and the court) during the written case trial,
- the rules for registration of the process of written trial and getting acquainted with it,
- the procedure for adoption and pronouncement of decisions on the merits as a result of trial by the written procedure.

Consequently, deriving from the constitutional legal content of the challenged norms and other norms systematically interconnected with them, comparing the common legal regulation of written procedure in the sphere of the RA administrative justice with principles and approaches stipulated in the procedural forms applied the international legal practice for ensuring the right of fair and public trial, as well as with the normative general content of Article 19 of the RA Constitution, at the same time necessitating the solution of the existing gap in the RA administrative procedure by the legislative body, the Constitutional Court finds that Article 138 of the RA Administrative Procedure Code, per se, may not cause any problem of constitutionality.

Proceeding from the results of consideration of the case and being ruled by Article 100, Point 1 and Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 69 of the RA Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. Article 138 of the RA Administrative Procedure Code is in conformity with the Constitution of the Republic of Armenia.
2. Pursuant to Article 102, Part 2 this Decision is final and enters into force from the moment of announcement.

Chairman G.Harutyunyan

April 11, 2012
DCC -1020