

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

**ON THE CASE OF CONFORMITY OF POINT 2 OF PART 1 OF ARTICLE 379 OF THE
CRIMINAL PROCEDURE OF THE REPUBLIC OF ARMENIA WITH THE
CONSTITUTION OF THE REPUBLIC OF ARMENIA OF THE BASIS OF THE
APPLICATION OF THE RA COURT OF CASSATION**

Yerevan

October 23, 2018

The Constitutional Court composed of H. Tovmasyan (Chairman), A. Gyulumyan, A. Dilanyan, F. Tokhyan, A. Tunyan (Rapporteur), A. Khachatryan, H. Nazaryan, A. Petrosyan,

with the participation (in the framework of the written procedure) representatives of the Applicant: Court of Cassation of the Republic of Armenia

representatives of the Respondent: representative of the RA National Assembly A. Kocharyan, Chief of the Legal Expertise Division of the Legal Expertise Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 168, Part 4 of Article 169 of the Constitution, as well as Articles 22, 40 and 71 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case of conformity of point 2, part 1, article 379 of the Criminal Procedure of the Republic of Armenia with the Constitution of the Republic of Armenia of the basis of the application of the RA Court of Cassation.

The Criminal Procedure Code of the Republic of Armenia (hereinafter referred to as the Code) was adopted by the National Assembly on 1 July 1998, signed by the President of the Republic on 1 September 1998 and entered into force on 12 January 1999.

Point 2 of Part 1 of Article 379 of the Code, titled “Time term of lodging an appeal” prescribes: “The court shall terminate proceedings at any stage of the consideration of the case if: (...) the claimant has withdrawn the claim, except for the cases prescribed by Chapter 26 of this Code, consideration of which follows from the interests of the society or the state ...”. The Case was initiated on the basis of the Application of A. Mashuryan lodged at the Constitutional Court on 5 April 2018. Having examined the Application, the written explanation of the Applicant, as well as having analyzed the relevant provisions of the Law and other documents of the Case, the Constitutional Court ESTABLISHES: 1

“1. The appeal is lodged:

...

2) in the case prescribed in paragraph 2 of Article 376¹ of this Code, within a period of six months from the moment the judicial act enters into force.”

The Case was initiated on the basis of the application of Court of Cassation of the Republic of Armenia lodged at the Constitutional Court on 23 July 2018 which elicited the decision of the Court of Cassation “On suspension of the proceedings on the case and appeal to the RA Constitutional Court” on the case of July 20, 2018 / 0182/01/11.

Having examined the application, the written explanation of the applicant, as well as having analyzed the relevant provisions of the Law and other documents of the Case, the Constitutional Court ESTABLISHES:

1. Position of the Applicant

Based on a comparative analysis of part 2 of article 412 and part 6 of article 21 of the Code, the applicant states that the legislator for filing a cassation appeal on grounds entailing an improvement in the position of the person did not prescribe any time limit, which, according to the applicant, is in the interests of justice and the need to protect rights of individuals.

In the context mentioned above, the applicant considers it necessary to note that “... unlike a cassation appeal on the grounds entailing an improvement of the position of the person, in the case of a fundamental violation, for which no limitation in time terms has been established, for lodging a complaint to the Criminal Court of Appeal of the RA on the same basis legislator has prescribed a six-month term.”

According to the applicant, the legislator has taken a differentiated approach in the matter of the timing of a complaint with respect to a similar revision method depending on the courts. As a result, if a person has previously appealed the relevant judicial act adopted against him in an order of supremacy before entering into legal force, then he may, without time limits, file an appeal in the Court of Cassation based on the fundamental violation, and the person who has not appealed the judicial act of the court of first instance, and it entered into legal force, after the expiration of a six-month period, he is deprived of the possibility of filing a complaint to the Criminal Court of Appeal on the basis of the fundamental violation.

The applicant also notes that “... unlike submitting a complaint to the RA Court of Cassation, the legislator provided for broader restrictions for submitting a complaint to the RA Criminal Court of Appeal, which does not follow from the logic of the principle of an upward decrease in judicial review”.

Summarizing the above, the applicant states that the establishment of a six-month period for filing a complaint on the grounds leading to the improvement of the position of a person in the

case of a fundamental violation to the Criminal Court of Appeal threatens the fundamental rights to universal equality before the law, effective judicial protection, a fair trial and appeal convicted.

The applicant applies for determination of compliance of paragraph 2 of part 1 of article 379 of the RA Criminal Procedure Code with the requirements of article 28, part 1 of article 61, part 1 of article 63, articles 69 and 78 of the Constitution.

2. The positions of the Respondent

After analyzing a number of provisions of the Constitution, as well as referring to a number of positions expressed by the European Court of Human Rights regarding the Convention for the Protection of Human Rights and Fundamental Freedoms, the respondent states that the right to accessibility of justice may be subject to lawful restrictions, which occurs when the law restricts the goal there is a reasonable ratio between the measures applied and the goal pursued, and under the conditions of this limitation the accessibility of the court is effective, namely, the person has a concrete and practical opportunity to challenge judicial act concerning his rights.

According to the respondent, from the point of view of exercising the rights to accessibility of justice, a fair trial, effective judicial protection, the right to appeal a person's verdict, no procedural peculiarity or procedure can obstruct or prevent the effective implementation of the person's right to appeal to the court on grounds of entailing improvement of his position, and no procedural peculiarity can be interpreted as a justification for limiting the right to access to court guaranteed by the Constitution. Therefore, the right to accessibility of the court can have only such restrictions that do not distort the very essence of this right.

Based on the abovementioned, the respondent believes that the legislator cannot establish such procedures that would lead to a violation of the essence of the right. In particular, the conditions for appeal against a judicial act on the grounds entailing an improvement in the position of the person, including the time limit for appeal, should not impede the exercise of the right to accessibility of the court.

Summarizing, the defendant notes that paragraph 2 of part 1 of Article 379 of the Criminal Procedure Code of the Republic of Armenia contradicts the requirements of the Constitution, as in the case established by paragraph 2 of Article 376¹ of the Criminal Procedure Code of the Republic of Armenia, the establishment of a six-month period for filing a complaint to the Criminal Court of Appeal on grounds entailing an improvement in the position of the person jeopardizes the fundamental rights of the person.

3. The circumstances to be established in the framework of the case

In determining the constitutionality of the challenged paragraph in the present case, the Constitutional Court deems it necessary, in particular, to address the issue whether the provision of a six-month deadline for not appellate review of appeals and resolving on the merits judicial acts entered into power which improves the position of a person due to elimination of fundamental violations of material or procedural rights, proportionally limits the rights provided by the Constitution on judicial protection, a fair trial and appealed against the conviction.

4. Legal positions of the Constitutional Court

4.1. Article 69 of the Constitution envisages the right of a sentenced person to appeal, according to which everyone sentenced for committal of a criminal offence, shall have the right to have the criminal judgment, rendered against him or her, reviewed by superior judicial instance, on the grounds and under the procedure prescribed by law. This constitutional right is reflected in several articles of the Code. In particular, according to part 7 of article 103 of the Code, “every sentenced person has the right to review the sentence and the decision adopted by a higher court in the manner prescribed by this Code.” Moreover, the convict has the right to appeal both non-enforceable judgment and, in exceptional cases, the enforceable judgment.

According to Article 376¹ of the Code, the legal acts of the court of first instance that have entered into force to resolve the case on the merits may be appealed on the basis of newly revealed or new circumstances, as well as in those exceptional cases where such fundamental violations of substantive or procedural law were committed during the previous trial, adopted as a result of which judicial acts distort the very essence of justice.

In contrast to the review on the basis of newly revealed or new circumstances, the possibility of appealing judicial acts of the court of first instance adopted during the previous trial, distorting the very essence of justice, which allowed violation of substantive or procedural law, is limited to a six-month period from the entry into force of the relevant judicial act. And overdue complaints are left without consideration, as to what the higher court makes a decision.

Under the terms of such legal regulations, situations may arise where, for any subjective or objective reason, in case of non-appeal of resolving the case on the merits of the judicial act of the court of first instance, it will be impossible to eliminate the fundamental violations of the substantive or procedural right committed by these acts within six months from its entry into force. The issue is of particular importance when a judicial act substantially violates such constitutional rights as human dignity, personal freedom, the right to free movement, the right to property, the right to a fair trial and other rights.

4.2. In the framework of the present case, the Constitutional Court considers it necessary to examine the situation in dispute from the point of view of the legality of establishing the procedural deadlines provided for the review of judicial acts.

In a number of its decisions, the Constitutional Court addressed the issue of the constitutionality of the terms of appeal provided for the review of judicial acts, and determined its significance in terms of ensuring the principle of immutability of judicial acts. In particular, in the Decision DCC-780 of November 25, 2008 the Constitutional Court reiterated that “in a legal state, as a rule, not reviewing of a judicial act that has entered into force on the basis of any judicial error is inadmissible. Thus, the idea of the entry into legal force of a judicial act, the essence of which is to provide these acts with the possible sustainability and protect the parties of judicial proceedings in their immutability, loses its meaning.”

In another Decision DCC-754 of May 27, 2008, Constitutional Court reiterated that “the well-known principle of international law“ re-examination of a similar dispute is not allowed ”(res judicata) is prescribed both in the constituent documents of international judicial bodies and in the legislation of a number of states concerning criminal and civil justice. This principle implies that the final decision adopted in a court case as a result of legal certainty must be respected.”

From this point of view, the Constitutional Court states that, in accordance with the challenged provision, the six-month period stipulated for the review of the resolving substance on the merits of a judicial act entered into legal force is generally aimed at ensuring the sustainability of judicial acts, the principle of certainty and inviolability of a legal act that entered into legal force.

On the other hand, developing its position regarding the guarantee of the right to judicial protection, the Constitutional Court, in its Decision DCC-984 of 15 July 2011 refers to the law-enforcement practice of the European Court of Human Rights, according to which “... the requirements of legal certainty are not absolute. Deviation from this principle is justified only when it is dictated by circumstances that are significant and insurmountable, or if serious legitimate considerations dominate the principle of legal certainty. The possibility of resuming criminal proceedings is in itself compatible with the Convention, including the guarantees of Article 6. Paragraph 2 of Article 4 of Protocol No. 7 clearly allows the proceedings to be resumed on the basis of new facts or a fundamental violation occurred in previous proceedings affecting the outcome of the case.”

It should also be noted that the European Court of Human Rights, in a number of its judgments, reaffirmed the position according to which the process of annulment of a judicial act that entered into legal force, due to substantial or insurmountable circumstances, may comply with

the principle of legal certainty when it is necessary to correct a judicial error (**Pravednaya v. Russia, November 18, 2004**).

4.3. According to Article 2 of the Code, the most important task of the legislation on criminal proceedings is not only the protection of the individual, society and the state from crime, but also the protection of the person and society from self-government actions and abuses of state power in connection with a real or alleged criminal act. On this basis, the bodies conducting criminal proceedings are obliged to take all measures so that, as a result of their activities, no one is illegally or unnecessarily subjected to measures of procedural coercion, punishment, or other restriction of rights and freedoms.

The limitation to six months of the possibility of reviewing **a substantive violation of substantive or procedural law and distorting the essence of justice**, which has already entered into legal force, resolving the case on the merits of the judicial act of the court of first instance makes the right to judicial protection ineffective while at the same time making it impossible for a person to exercise the right to a fair trial. Regardless of the reason for the non-appeal of the relevant judicial act within the prescribed period, a judicial act in the legal state that distorts the very essence of justice violates the fundamental rights of the convicted person.

In addition, the Constitutional Court states that the differentiated approach of the legislator, related to the possibility of review in the appeal or cassation procedure of judicial acts already entered into force is unjustified. Thus, part 2 of article 412 of the Code prescribes that “in the cases prescribed by the sixth part of article 21 of this Code, a cassation complaint on the grounds entailing an improvement in the position of a person may be filed without a time limit, and grounds worsening the position of a person within six months after entering a judicial act into force.”

Taking into account the fact that the legislator for filing a cassation appeal on the same grounds did not provide for any time limit, the provision for filing an appeal for a six-month period is not a mechanism necessary for the effective exercise of fundamental rights to judicial protection and a fair trial.

In addition, it must be notified that the European Court of Human Rights expressed the position that the requirements for filing a cassation appeal may be more stringent than the requirements for applications to lower courts (**Levages Prestations Services v. France, 23 October 1996 of the year**).

For complaints that did not overcome the threshold of admissibility of cassation complaints, but containing an alleged fact about the distortion of the essence of justice, imposing time limits does not provide an adequate opportunity to review also in the second instance - the “instance of fact”, which is the Court of Appeal, which entered into force case on the merits of the judicial act

of the court of first instance. Consequently, the differentiation between appeals and cassation complaints adopted by the legislator is beyond the bounds of the system logic of effectively guaranteeing judicial protection and is unequal in the goal of guaranteeing the sustainability of judicial acts.

Thus, the Constitutional Court states that the restriction of the possibility of appealing against substantive judicial acts of the court of first instance, distorting the very essence of justice and entailing adverse consequences for individuals as a result of fundamental violations of substantive or procedural law, for six months from the moment they take effect disproportionately to the legitimate purpose, namely to ensure the principle of certainty and immutability of a judicial act that has entered into legal force, as a result of which disproportionately limited a person's right to judicial protection and a fair trial and the right of a convicted person to review by a higher tribunal handed down the sentence against him on the grounds and in the manner prescribed by law.

The Constitutional Court also argues that Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms does not preclude the possibility of reviewing the final judicial act in accordance with the laws of the state when there are new or newly revealed circumstances or if during the previous proceedings significant violations occurred. However, it is important that the procedure for reviewing judicial acts that have entered into legal force should be resorted to in exceptional cases, namely, to rectify significant judicial errors, to eliminate abuses of justice, and not for serving as a reason to re-examine the case.

In this aspect, the Constitutional Court considers it important to note that the wording used in the Code or the category of “fundamental violation” implies the existence of a more serious or serious violation of substantive or procedural law than “incorrect application of criminal law” or “substantial violation of criminal procedure law”. The essence of the fundamental violation is that it initially determines the unlawful course of the criminal proceedings, devalues its content, leading to the adoption of an illegal and unjustified judicial act.

At the same time, such a violation must be in causal connection with the adopted judicial act and distorting the very essence of justice. Criminal justice is ultimately aimed at justifying the innocent, convicting the person who committed the crime, imposing a just punishment on him, protecting the rights and legitimate interests of the victim of the crime, compensation for the harm done to him. That is, the alleged fundamental violation should devalue the justice carried out in a criminal case, reduce the role and importance of the judicial act. In particular, such a situation may arise when the case was considered and the judicial act was rendered by an unlawful composition of the court or when a person was convicted of an act that received a clearly erroneous legal assessment (for more details see the decision of the RA Court of Cassation dated 05.06.2015 in ԵՄԴ/0020/01/14 criminal case).

As a result of the systematic analysis of the Code, the Constitutional Court argues that that the following additional guarantees provided by the Code are aimed at ensuring a reasonable balance between the principle of certainty and immutability of judicial acts that have entered into legal force and the possibility, without limitation, of reviewing judicial acts that distort the essence of justice and contain fundamental violations of substantive or procedural law:

first, the revision of the unresolved, distorting the essence of justice and the resolving case on the merits of a judicial act of the court of first instance that has entered into legal force is possible in exceptional cases when there are **fundamental** violations of substantive or procedural norms;

secondly, a judicial act of the court of first instance that has entered into legal force allowing a case on the merits can be reconsidered by the appeals instance on the aforementioned basis, if it has not previously been appealed in a higher order;

thirdly, the Criminal Court of Appeal makes a decision on the revision of the collegial composition.

Based on the review of the Case and governed by Point 1 of Article 168, Part 4 of Article 169, Part 4 of Article 170 of the Constitution, Articles 63, 64 and 71 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. Point 2 of Part 1 of Article 379 of the Criminal Procedure Code of the Republic of Armenia insofar as it provides for a time limit for reviewing the person who resolves the case on the merits of a judicial act of the court of first instance aimed at improving the situation when such fundamental violations of the material or procedural law, as a result of which the adopted judicial act distorts the very essence of justice, to recognize as contradicting Part 1 of Article 61, Part 1 of Article 63, Articles 69 and 78 of the Constitution and void.

2. Pursuant to Part 2 of Article 170 of the Constitution this Decision shall be final and shall enter into force upon its promulgation.

Chairman

H. Tovmasyan

October 23, 2018

DCC-1431