Non-Official Translation

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

ON THE CASE OF CONFORMITY OF PART 1 OF ARTICLE 401 OF THE CIVIL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATIONS OF KADZHYK KARAPETIAN, HAMBARDZUM DAVTYAN AND EDIK HAKOBYAN

Yerevan April 2, 2019

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

with the participation (in the framework of the written procedure) of**:**

the applicants: K. Karapetian, H. Davtyan, E. Hakobyan, and their representatives: advocates K. Tonoyan and A. Ghazaryan,

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

pursuant to clause 1 of article 168, clause 8 of part 1 of article 169 of the Constitution, and articles 22 and 69 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of part 1 of article 401 of the Civil Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the applications of Kadzhyk Karapetian, Hambardzum Davtyan and Edik Hakobyan.

The Civil Procedure Code of the Republic of Armenia **(hereinafter - the Code)** was adopted by the National Assembly on 9 February 2018, signed by the President of the Republic on 27 February 2018, and entered into force on 9 April 2018.

Part 1 of article 401 of the Code, titled: **“Procedure of examination of appeals in the Cassation Court”** prescribes:

"The Cassation Court shall examine cassation appeals lodged against a judicial act of the Court of Appeal and accepted for proceedings, and shall render decisions by a written procedure, except for cases when the Cassation Court concluded that it is necessary to examine the cassation appeal in a court session".

The case was initiated on the basis of three applications of Kadzhyk Karapetian, Hambardzum Davtyan and Edik Hakobyan submitted to the Constitutional Court on 8 and 11 January 2019 accordingly, and based on the latter, the cases were joined to be examined at the same session of the Constitutional Court, in accordance with article 41 of the Constitutional Law on the Constitutional Court.

Having examined the applications and attached documents, the written explanation of the respondent and other documents of the case, as well as having analyzed the relevant provision of the Code, the Constitutional Court **ESTABLISHES:**

1. Positions of the applicants

The applicant considers that as a result of examination of the cassation appeal by a written procedure, their right to a public hearing of the case was violated, in particular, the non-implementation of a public hearing deprived the latter of the possibility of free expression of their opinion, presentation of their arguments and positions, opposing to their procedural opponent and challenging his allegations by a public trial.

At the same time, according to the applicants, the legislator has not established in which cases the Cassation Court, on an exceptional basis, considers the case at a court hearing, under what circumstances the discretion of the Cassation Court is vague, lacks legal certainty and, as such, does not ensure predictability both for the participants in the proceedings and for the public. In addition, the participants in the court proceedings are deprived of the legal possibility of filing a motion with the Cassation Court for the consideration of the case by oral procedure.

According to the applicants, the law does not stipulate that in cases where the Cassation Court considers a case by written procedure and carries out a review of the fact, it should not have the authority to reverse and change the judicial act.

According to the applicant K. Karapetian, in his case, the Cassation Court addressed the issue of an erroneous assessment of evidence made by the Court of Appeal and examined the case on this basis.

Consequently, the Cassation Court, during the examination of the appeal, turned to such factual circumstances that had not previously been the subject of judicial proceedings, and the participant in the court proceedings did not have the possibility to present arguments about the latter, or which were essential for the resolution of the case, therefore it was necessary to ensure the application of an oral procedure.

According to the applicant E. Hakobyan, in the consideration of cases by written procedure, it is worth attention whether the Cassation Court carries out the consideration of a fact or a law, and in all cases when the Cassation Court carries out the consideration of a fact, it should not have the right to conduct the consideration of a case by written procedure, since thereby the Court deprives the parties of the right to present their position on the fact being assessed.

As for the applicant A. Davtyan's assertion, in his case it was referred to a factual circumstance, in particular, participation in the agreed deal, and in case of referring to this circumstance it was necessary to provide an oral procedure for the consideration of the case, giving the applicants the possibility to present their positions with regard to the above-mentioned fact.

Justifying their viewpoints with the help of the positions expressed in the decisions of the Constitutional Court, as well as in the judgments of the European Court of Human Rights, the applicants concluded that in such circumstances, when the higher court based its decision on such an issue of the law and/or the fact, which was not previously subject to judicial review, the participant in the proceedings did not have the possibility to object and present the relating facts, which was crucial for the resolution of the case and actually was a final judicial act, in such circumstances, a court decision to proceed to a written trial is a decision that disproportionately restricts the right to a public trial.

Summarizing their findings, the applicants request the challenged provision be recognized as contradicting article 63 of the Constitution and void, insofar as since the challenged provision provides the Cassation Court with unlimited and uncontrolled discretion, does not ensure predictability, balance of public and private interests, and as a result limits the right of a person to a public trial.

2. Positions of the respondent

The respondent considers that the challenged provision is consonant with the requirements of the Constitution, presenting, in particular, the following positions.

For ensuring the written procedure of consideration of appeals by appropriate legal mechanisms, as prescribed by the challenged provision, the legislator stipulated in article 403 of the Code that the consideration of the cassation appeal by written procedure shall be conducted without convening a court session, therefore, in case a decision on examining a cassation appeal by written procedure is rendered, persons participating in the case shall be informed only about the day of promulgation of the judicial act to be rendered after examination of the appeal.

At the same time, in article 404 of the Code the legislator clearly defined the scope of cassation proceedings, according to which, during examination of the case by cassation procedure, the Cassation Court shall review the judicial act within the scope of grounds and substantiations of the cassation appeal. The Cassation Court shall not be restricted with the claim of the person having lodged the appeal, as well as with the factual or legal stance of the person having submitted the response to the cassation appeal.

While adhering his position, the respondent notes that, for ensuring the balance between the “consideration of the fact” and “consideration of the law” in the three-tier judicial system, which follows from the right to a fair trial, the legislator clearly stipulated the regulations of the scope of consideration of the claim (application) that has been accepted for proceedings in the court of first instance of general jurisdiction, and the scope of review of cases by the Court of Appeal; in particular, unlike the Cassation Court, in the first instance court of general jurisdiction and the Court of Appeal the consideration of cases is public with reference to the facts of cases.

The respondent also notes that article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides two independent guarantees that ensure the publicity of the trial - open court proceedings and the publication of the sentence.

Justifying his viewpoint by a number of positions of the European Court of Human Rights, the respondent notes that the legislator in general has established a mandatory element of a public consideration of cases in the court of first instance of general jurisdiction and in the Court of Appeal, while establishing a written procedure for the consideration of appeals on the merits and rendering decisions on them, but also not excluding the cases where the Cassation Court may conclude that the consideration of the appeal must be conducted by a public trial, “which will be directed solely at ensuring the need for assessing the actual realities by a public trial, which was missed by the court of first instance of general jurisdiction and the Court of Appeal”.

Summarizing his judgments, the respondent notes that within the framework of this constitutional legal dispute, the RA legislation establishes sufficient legal mechanisms and procedures to ensure the realization of the right to a public hearing, following from the principle of the effective exercise of fundamental human rights and freedoms, as the most important element of the right to a fair trial prescribed in the Constitution (articles 63 and 75).

3. Circumstances to be ascertained within the framework of the case

To determine the constitutionality of the norm challenged in the present case, the Constitutional Court considers it necessary, in particular, to address the following issues:

1) Does the challenged provision violate the right to a public trial, which is an element of the right to a fair trial, insofar as the consideration of the case by oral procedure at the Cassation Court is considered an exception to the general rule, the exercise of which is left to the discretion of the Court?

2) Is the challenged provision consonant with the constitutional legal principle of legal certainty, taking into account the circumstance that the legislation does not establish the specific cases where the consideration of the cassation appeal is conducted at a court hearing?

4. Legal positions of the Constitutional Court

4.1. Part 1 of article 63 of the Constitution, titled: “Right to Fair Trial” establishes that everyone shall have the right to a fair and public hearing of his case within a reasonable period by an independent and impartial court.

The right to a fair trial includes both the possibility of appeal to the court and the right to a fair and public hearing of the case within a reasonable period, which means that the possibility of claiming for the consideration of the case in compliance with the principle of publicity is an essential element of the right to a fair trial. As the Constitutional Court noted in the Decision DCC-1020 of 11 April 2012 “... **the public hearing** (in particular, public information about the court considering the case, the case under consideration, the time, venue and the order of the trial etc) as well as the **mandatory publication of the judicial act** are the minimum and important guarantees for the realization of this right”.

Referring to the principle of publicity, the Constitutional Court noted in the same Decision that "… publicity of court proceedings first of all means the possibility of exercising public control over court proceedings and the acts rendered by the court".

Along with the constitutional regulation of the requirement for a public trial, the Constitution also prescribes the circumstances in which there is a possibility of limiting the publicity of the trial. In particular, part 2 of article 63 of the Constitution states that in the cases and procedure provided by law, the court proceedings or a part thereof may be held in camera by a court decision with the aim of protecting the private life of the participants of proceedings, the interests of minors or the interests of justice, as well as state security, the public order, or morals. Considering the above, the Constitutional Court states that the principle of publicity presupposes, first of all, open court proceedings and the publication of a judicial act.

Turning to the applicants' position that the application of the written procedure is considered a violation of the right to a public hearing, the Constitutional Court states that in the context of the logic of the aforementioned constitutional provision, a public hearing assumes an open court hearing and (or) the promulgation of a judicial act, which means that a public hearing can be conducted both by written and oral procedures. Moreover, a closed court session, which is a limitation of the principle of publicity, can also be conducted by oral procedure. Consequently, the oral or written procedures for the consideration of a case is not identical to the consideration of a case in open or closed court sessions and, which is the same, the principle of publicity.

In this aspect, reiterating the legal positions expressed in the Decision DCC-1020 regarding the comparison of the consideration of cases by oral and written procedures with the principle of publicity, the Constitutional Court considers it necessary to note the following:

1) Within the framework of the Constitution, international legal acts and procedural legislation, the principle of publicity is the most important and inviolable principle of exercising procedural rights, which implies the application of both written and oral procedures due to specific procedural peculiarities;

2) It is necessary to give preference to oral proceedings in all cases where an oral proceeding is necessary due to the peculiarities of the certain case, where the reference should be made to such factual data that are essential for the resolution of the case;

3) The principle of publicity may be limited only in case of circumstances clearly prescribed by the Constitution, and when the restriction is exercised in accordance with the procedure provided by law, also there is no violation of the principle of publicity.

Considering the above, the Constitutional Court states that the application of the written procedure cannot be considered as a violation of the principle of publicity if it is conducted in accordance with the principles and procedures clearly prescribed by the Constitution and the law. In particular, the matter at hand are the rights of a person and a citizen prescribed in articles 28, 29, 63-69 and other articles of the Constitution, which may be applicable within the framework of a specific judicial procedure, as well as the principles of civil procedure prescribed in chapter 2 of the Code, the general rules of court session prescribed in Chapter 15 of the Code, the requirements for special proceedings, the specifics of their resolution, etc.

The choice of a judicial procedure, within the framework of the Constitution and laws, is the authority of the court considering the particular case. The Constitutional Court considers that the choice of a written procedure for the consideration of a case may be justified, in particular, in all those cases when solely the legal issues are the matter at hand or when the factual circumstances of the case are not controversial.

At the same time, the Constitutional Court states that the choice of the judicial form, i.e. the procedure for the consideration of the case, is not the absolute discretion of the court; therefore, it must be conditioned by ensuring all guarantees of fair trial, including the right of the parties to the proceeding to be heard, which will allow to protect the parties to the proceeding from “unexpected” decisions rendered by the court, which are based on facts not examined during the consideration of the case and (or) rendered without hearing the positions of the parties to the proceeding.

Comparing the above-mentioned approaches with the constitutional status of the Cassation Court, the Constitutional Court considers that the procedures for the consideration of cassation appeals are based on the following logic:

a) Although ensuring the uniform application of laws and other legal acts is one of the main constitutional functions of the Cassation Court, nevertheless, the Court performs these constitutionally defined functions by the administration of justice;

b) In civil proceedings, the Cassation Court does not exercise the power of direct establishment of facts, and reviews the case in the framework of the facts established by the courts of the previous instances;

c) The lack of the power of direct establishment of facts, the right to submit a response to the cassation appeal, the possibility of submitting motions under the general rules of civil procedure, and other procedural rules are intended to ensure the predictability of cases considered in the Cassation Court by written procedure;

d) The status of the Cassation Court determines that the written procedure is most applicable in this instance.

It is also clear that either by the legislation nor in practice it can be excluded to conduct oral consideration in a certain instance, due to a number of circumstances, including also the fact of actual failure to ensure for the parties to the proceedings the guarantees of a fair trial in previous judicial instances, especially the right to be heard.

At the same time, the Constitutional Court states that although the application of the written procedure for consideration of the case by the Cassation Court is legitimate, nevertheless, the discretion of its application in this instance cannot be absolute.

4.2. With respect to publicity, as well as written and oral procedures for the consideration of cases, the Constitutional Court considers it necessary to mention the legal positions expressed in the decisions of the European Court of Human Rights, which, in particular, are as follows:

- The primary elements of a public trial (regardless of the procedural form of implementation) are **the conduct of consideration of the circumstances of the case (or "oral hearings") and the promulgation of the decision**. According to the position of the European Court of Human Rights, "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 of secondary importance** as compared with the purpose underlying the publicity required by Article 6 para. 1" (Sutter v. Switzerland, Judgment of 22 February 1984, p. 27, Adolf v. Austria, Judgment of 26 March 1982, para. 30, Pretto and others v. Italy, Judgment of 8 December 1983, para. 23, and Axen v. Germany, Judgment of 8 December 1983, para. 25);

- "... the right to a public hearing of a case, as required by Article 6 of the Convention, necessarily includes the right to an "oral hearing". However, the obligation to conduct such hearings is not absolute. Thus, the absence of an oral hearing can be compatible with the requirements of Article 6, when the matter at issue does not raise a question relating the fact or the law that could be properly resolved on the basis of the materials of the case without oral comments from the parties (Elsholz v.

Germany, Judgment of 13 July 2000, p.66, Fredin v. Sweden (no. 2), Judgment of 23 February 1994, pp. 21-22; Fischer v. Austria, Judgment of 26 April 1995, p. 44)";

- within the meaning of Article 6 of the Convention, the written proceeding is assessed as fair and public, if: a) conditioned by exceptional circumstances; b) conducted within a reasonable time, as well as for reasons of ensuring a speedy trial; c) conditioned by the peculiarities of the case in question; d) principally applied when resolving issues of law, as well as when considering such factual circumstances that are justified under the conditions of the written procedure.

The European Court of Human Rights also noted in a number of its decisions that in the case when the Court considers the issue on the basis of the fact and the position of the party to the proceedings on the issue is to be heard, the trial should be conducted by oral procedure (Fischer v. Austria, Judgment of August 29, 2001, application number 37950/97, para. 44; Malhous v. the Czech Republic, Judgment of July 12, 2001, application number 33071/96, para. 60; Miller v. Sweden, Judgment of February 8, 2005, application number 55853/00, para. 34).

Considering the above, the Constitutional Court states that the application of oral and written procedures for the consideration of a case depends on both the peculiarities of the activities of the court and the particular case. At the same time, the legislation provides for those basic principles that, if necessary, ensure the conduct of oral hearing; in other cases, the written procedure of consideration of the case is not problematic in terms of publicity.

4.3. The Constitutional Court considers it necessary to address the challenged provision also from the perspective of ensuring legal certainty, taking into account, in particular:

a) The clarity of the conditions for the shifting to the oral procedure;

b) Predictability for the complainant of the shifting to the oral procedure.

The principle of legal certainty underlies the unamendable Article 1 of the Constitution, which states that the Republic of Armenia is a sovereign, democratic, and social state **governed by the rule of law**.

A legal state presupposes the existence of a legal law, which should be as clear and definite as possible, and enable its addressees to form and display appropriate behavior. The above position is affirmed in the Decision DCC-753 of the Constitutional Court dated 08.04.2008, which, in particular, states: "The principle of the rule of law, inter alia, also requires the existence of a legal law. The latter must be sufficiently accessible so that the subjects of law have the possibility in certain circumstances to determine which legal norms shall apply in a given case. A norm cannot be considered "law" if it is not formulated with sufficient accuracy that would enable legal entities and natural persons to engage

in appropriate conduct; they should be able to foresee the consequences that may cause the given action".

Referring to the principle of legal certainty, the Constitutional Court, in the Decision DCC-1176, also outlined the clarity of the concepts used in legislation, noting that "... in terms of ensuring legal certainty, the concepts used in the legislation shall be clear, certain, and not lead to the varying interpretations and confusion".

In connection with the above, the Constitutional Court considers that the principle of legal certainty presupposes both the presence of legal regulation, as precise as possible, and ensuring its predictability. In particular, the wording of the legal regulation should not only enable the person to engage in appropriate conduct, but also to foresee what actions the public authority can take and what consequences the application of the given legal regulation may entail.

Applying the aforementioned analysis to the provision challenged in this case, the Constitutional Court considers it necessary to state the following:

1) The challenged provision establishes the procedure for the consideration of an appeal by the Cassation Court, from the content of which it follows that the appeals accepted for proceedings **are examined and decisions are rendered by written procedure, while providing for an exception when the consideration of the appeal is conducted at a court session when the Cassation Court concludes so. That is, the general rule for the consideration of cassation appeals is the written procedure, and the exceptions are made in cases where the Cassation Court deems the oral consideration of the case necessary;**

2) The legislator rightly left to the discretion of the Cassation Court the competence of rendering the decision on the consideration of the cassation appeal at the court session, which is due to the circumstance that each case is characterized by its own peculiarities, therefore, the question of whether or not the oral consideration of the case is necessary may be clarified only as a result of study of the case;

3) Referring to the position of the applicants that the challenged provision does not establish the cases when the consideration of the appeal is conducted at a court session, the Constitutional Court finds that, along with establishing the requirement of certainty of law, it is impossible to define for all matters to be regulated solely by law, therefore, a clear interpretation of the law especially by the courts is very important in this case.

The Constitutional Court reiterates the legal position expressed in the Decision DCC-1270 of 03.05.2016 that "Judicial interpretation is not excluded even in the case of the most precise formulation of the legal norm. The need to clarify legal norms and bring them in line with changing circumstances, i.e. evolving social relations, always exists. Consequently, certainty and clarity of legislative regulations cannot be absolute; even a lack of clarity can be complemented by court interpretations". The foregoing is also evidenced by the legal positions of the European Court of Human Rights, in particular, by the judgment in the case of Busuioc v. Moldova (application no. 61513/00, 21/12/2004), the Court found that "... whilst certainty in the law is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice".

Based on the review of the case and governed by clause 1 of article 168, clause 8 of part 1 of article 169, and article 170 of the Constitution, Articles 63, 64 and 69 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. Part 1 of article 401 of the Civil Procedure Code of the Republic of Armenia is in conformity with the Constitution of the Republic of Armenia.

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**

April 2, 2019
DCC -1452