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 THE PHRASE "THE PROOF ON SENDING THE COMPLAINT … TO THE PARTICIPANTS TO THE CASE" PRESCRIBED IN PART 5 OF ARTICLE 368 AND THE PROVISION "SHORTCOMINGS IN THE RE-SUBMITTED COMPLAINT…" PRESCRIBED IN PART 5 OF ARTICLE 371 OF THE RA CIVIL PROCEDURE CODE WITH THE CONSTITUTION ON THE BASIS OF THE APPLICATION OF SEVAG HAJI HAGOPIAN

Yerevan 24 September 2019

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) of:

the representative of the applicant: lawyer A. Khachatryan,

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, as well as articles 22 and 69 of the constitutional law on the Constitutional Court,

examined in a public hearing by a written procedure the case on the case of conformity of the phrase "the proof on sending appeal … to the participants to the case" prescribed in part 5 of article 368 and the provision "Shortcomings in the re-submitted appeal…" prescribed in part 5 of article 371 of the RA Civil Procedure Code with the Constitution on the basis of the application of Sevag Haji Hagopian.

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

Part 5 of article 368 of the Code, titled **"The form and content of the appeal"**, establishes:

"5. The evidence on the payment of the state duty, the sending of the complaint to the participants to the case, and a copy of the complaint to the court that passed the judicial act shall be attached to the appeal. In cases where the law provides for a concession to pay the state fee, a petition is attached to the appeal or the complaint regarding this if the applicant is not exempt from paying the state fee. Other petitions of the applicant may be attached to the complaint. If there is no power of attorney in the case, a document confirming his/her authority is attached to the complaint signed by the representative".

Part 5 of article 371 of the Code, titled **"Returning the appeal"**, prescribes:

"5. After addressing the shortcomings made in the complaint after the appeal is returned on the grounds prescribed in clauses 1, 2, 4 and 5 of part 1 of this article and upon receiving a decision, in case of re-submitting an appeal in due procedure, where a complaint is filed against a judgment within 15 days, and where an appeal is submitted to challenge the order on payment or a decision within 3 days, the appeal shall be considered as submitted to the Court of Appeal on the initial date. A new deadline for addressing the shortcomings of the re-submitted appeal shall not be provided".

No changes or additions were made to the challenged provisions of the Code.

The case was initiated on the basis of the application of Sevak Achi Hakobyan submitted to the Constitutional Court on 17 May 2019.

Having studied the application, the written explanation of the respondent, other documents of the case, as well as having examined the relevant provisions of the Code, the Constitutional Court **FOUND**:

1. Applicant's arguments

The applicant notes that, accordingly, the wording, "…the evidence on sending the complaint … to the participants to the case" prescribed in part 5 of article 368 and the provision "Shortcomings in the resubmitted complaint …" prescribed in part 5 of article 371 of the RA Civil Procedure Code (and not even the "clue" of the Civil Court of Appeal of the Republic of Armenia) does not provide any

wording that would allow to conclude that in the case of the resubmission of the appeal of the Court of Appeal, it was necessary to resubmit the complaint to the parties and attach a postal receipt regarding the re-sending".

According to the applicant, it turns out that the appeal was not examined by the court, since the party who submitted the complaint did not re-send the same appeal (to which only an additional receipt of the state duty was attached) to the other party, in the case when the Code does not literally provide for such a requirement.

According to the applicant, in this case, the Civil Court of Appeal of the Republic of Armenia interprets part 5 of article 368 in a special manner and applies it in such a way that it entails a breach of the right to a fair trial stipulated by the Constitution.

The applicant considers that "... the above situation ... is nothing but a contradiction of the constitutionally prescribed right to a fair trial".

Based on the foregoing, the applicant considers that according to the interpretation of the challenged provisions in law enforcement practice, they do not comply with the requirements of article 63 of the Constitution.

2. Respondent's arguments

The Respondent notes that the Code clearly establishes such mechanisms for the form, content of the complaint by the court of first instance, the Court of Appeal and the Cassation Court, the legal tools and the procedure for returning the complaint, which comply with the constitutional requirement to ensure access to justice, therefore the provisions challenged in this case are not conditional on the constitutionality of these norms. According to the respondent, the applicant raises the issue of the lawfulness of the application of the challenged norms.

Referring to the positions expressed in a number of decisions of the Constitutional Court regarding the access to justice, guaranteeing the rights to a fair and effective trial, the respondent notes that from the point of view of guaranteeing the realization of the right to judicial protection of human rights and freedoms, the answer to the question how accessible justice is and how effective the conditions and tools for exercising the right to appeal to court to protect the violated rights of a person are.

At the same time, referring to a number of positions expressed by the European Court of Human Rights, the respondent states that the provisions of the Code, which are the subject of this constitutional legal dispute, provide appropriate tools to guarantee the access to justice.

Taking as a basis the relevant provisions of the constitutional law on the Constitutional Court, as well as referring to the Decision PDCC-21of the Constitutional Court of March 17, 2009, the respondent considers that the application should be dismissed.

According to the respondent, the alleged violation of the rights indicated by the applicant is not caused by the constitutionality of the challenged norm. Moreover, according to the respondent, the applicant did not submit the relevant justification for the challenged provisions of the Code and their unconstitutionality.

Summing up the above-mentioned, the respondent considers that the challenged provisions of the Code are in accordance with the Constitution and motions to terminate the proceedings.

3. Issues to be determined within the scop[es of the case

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

- Do the challenged provisions intrude the exercise of any of the fundamental human rights of a person, including the right to an effective judicial protection and a fair trial?

- Does the invasion, if any, comply with the constitutional principles of certainty and proportionality of the restriction of fundamental rights and freedoms, and does it violate the essence of access to justice?

4. Legal assessments of the Constitutional Court

4.1. Part 1 of article 61 of the Constitution envisages:

"1. Everyone shall have the right to effective judicial protection of his/her rights and freedoms."

Part 1 of article 63 of the Constitution envisages:

"1. Everyone shall have the right to a fair and public hearing of his or her case, within a reasonable time period, by an independent and impartial court".

The Constitutional Court has repeatedly considered articles 61 and 63 of the Constitution as a single legal phenomenon. This applies in particular to the right to access to justice as a part of the right to a fair trial.

Nevertheless, the legal regulation of article 63 of the Constitution underlies the right to a fair trial, since in addition to establishing the framework for the application of this right; it also establishes more general guarantees.

The Constitutional Court considers it necessary to state that the legal regulation of articles 61 and 63 of the Constitution is based on those constitutional legal principles of guaranteeing the right to judicial protection of the rights and freedoms of a person in the context of which the Constitutional Court expressed its legal assessments in its decisions. These positions also reflect the results of a comprehensive study of the international legal experience.

The Constitutional Court noted the importance of the principles (criteria) of legal regulation, which from the point of view of assessing the constitutionality of the challenged norm are of fundamental importance, in particular:

- no procedural peculiarity can be interpreted as a justification for restricting the right to access to a court guaranteed by article 63 of the Constitution;
- the accessibility of the court (justice) may have some restrictions that should not violate the very essence of this right;
- when applying to the court, a person should not be burdened with unnecessary formal requirements;
- conditions for the admissibility of a complaint against a judicial act: when determining the deadline for appeal, priority must be given to guaranteeing the right to access to a court;
- validity of the judicial act, according to which the person's application is accepted or rejected, as well as the right to appeal the judicial act serves as the guarantee of the right to accessibility of the court;
- legislative regulation cannot cause a disproportionate social burden for individuals depending on their financial capabilities, without ensuring, as a result, the right to access to a court.

4.2. In the context of the foregoing, the Constitutional Court also considers it necessary to turn to legislative regulations for the effective application of the institution of judicial appeal, considering the problem from the point of view of assessing and ensuring its compliance with both the principles of the constitutional system, the goals of justice, and international legal commitments undertaken by the Republic of Armenia.

Concerning the above-mentioned, the Constitutional Court in a number of decisions has repeatedly expressed, in particular, the following legal assessments:

a) "The entire logic of the institution of appeal in general, in particular within the justice system, implies to the fact that challenging the illegal behavior of one link should be addressed exclusively to a higher authority. The entire appeal mechanism within the RA justice system is built on this logic" (DCC - 719);

b) "...a special institution for guaranteeing judicial protection (its effectiveness) of violated rights and freedoms, such as a person's right to review a judicial act by a higher court (judicial appeal (part 3 of article 20 of the RA Constitution), is constitutionally provided. The implementation of judicial protection of the rights of a person and a fair trial is within the scopes of the primary responsibility of the state as well as the realization of the goals of justice through a certain procedure and through the correction of possible judicial errors" (DCC-936);

c) "The Constitutional Court finds that the following primary legal terms should be implemented in the basis of regulation and application of the institution of judicial appeal, in particular:

- the person's fundamental rights and freedoms, as the highest value, are subject to unconditional protection by the courts within the framework of both examining a specific case on the merits and its possible further review;

- judicial appeal, as a remedy of judicial protection, should serve as an effective means for restoring the person's violated rights and freedoms, observing the constitutional principles of administering justice (in particular, articles 18 and 19 of the RA Constitution);

- the institution of judicial appeal, without exception, should be a means of identifying and eliminating in conditions of equality, as a result of an objective, multilateral, fair and public trial, within a reasonable time, all those judicial errors that were made as a result of violation of the norms of both substantive and procedural law, consequently, they led to an improper resolution of the case;

- review of judicial acts (on the basis of an appeal or cassation appeal) as a function of justice can serve the implementation of the above constitutional legal tasks if it is carried out by an independent and impartial court" (DCC-936);

d) "The goal of the institution of appeal of judicial acts is not only to verify the lawfulness of rejection or satisfaction of the submitted request. This institution is the main and essential legal guarantee by which the basic elements of the right to a fair trial are ensured by a lower court, in particular, the procedural guarantees prescribed in part 1 of article 19 of the Constitution and in part 1 of article 6 of the European Convention. In all cases where the First Instance Court failed to comply with the above-mentioned procedural guarantees, the citizen, with no right to appeal, loses the ability to exercise effectively the right to a fair trial of his/her case and an effective remedy against violation of the right to a fair trial" (DCC-1190).

The applicant's appeal to the civil case YKD/2634/02/17, filed to the Civil Court of Appeal of the Republic of Armenia was not considered by the court, since the applicant, after receiving the decision to return the appeal on 12.11.2018, eliminating the shortcomings (state duty payment in

sufficient amount), having resubmitted the same appeal, did not send it again to the respondent party, which the Court of Appeal found not satisfying the requirements of part 5 of article 368 of the Code and, on the basis of part 5 of article 371 of the Code, did not provide new deadline for correcting the shortcomings in resubmitted the appeal, so the applicant was deprived of the right to judicial protection.

In this regard, the Constitutional Court considers it necessary to emphasize that the goal of the legislator is not to burden the applicant with any unreasonable obligation, but to guarantee the participants to have an access to the content of the complaint, which will allow them to uphold effectively the claims presented in the complaint, that is, the participants to the case could effectively implement their fundamental right to judicial protection.

4.3. In order to provide a proper constitutional legal assessment of the legal provisions challenged by the applicant in the context of ensuring the right of a person to file an appeal for judicial protection and fair trial, the Constitutional Court also considers it necessary to refer to the role and content of the institution of the return of the appeal.

Part 1 of article 371 of the Code comprehensively prescribes the cases of return of the appeal. Accordingly, "... the appeal is returned if:

1) The requirements of article 368 of this Code are not met;

2) The appeal is filed after the deadline and does not contain a request to restore the missed period;

3) Before rendering a decision on the adoption of the complaint by the Court of Appeal to the proceedings, the person who filed the complaint submitted a refusal statement;

4) The person who filed the complaint submitted a request to postpone the payment of the state duty or to reduce its size, which was rejected;

5) Appeal is filed against more than one judicial act".

Moreover, the decision on the return of the appeal shall indicate the shortcomings in the complaint so that the person who submitted the complaint can correct them.

With the exception of the case prescribed in clause 3 of the above regulation, namely, that the person who filed the complaint submitted a refusal statement, after eliminating the shortcomings in the complaint and receiving a resolution in case of resubmission of the appeal in the prescribed manner within fifteen days, filed for a decision, and within three days after the complaint is filed for a payment order, it shall be considered as filed to the Court of Appeal on the day of the initial filing.

Based on the foregoing, the Constitutional Court states that the institution of the return of the appeal is aimed at establishing an effective mechanism for the implementation of the right of the person who filed the complaint for the judicial protection by appealing against the judicial act, and under no circumstances the formal shortcomings should impede the exercise of the constitutional right to judicial protection.

On the other hand, emphasizing the need to comply with judicial procedures, as well as the constitutional legal requirement for conducting a court proceeding within a reasonable time, the legislator established a provision according to which a new deadline is not provided to address the shortcomings in the resubmitted appeal. That is, the institution of the return of the appeal in general terms provides an appropriate balance between addressing shortcomings in the complaint and the inadmissibility of abuse by this institution.

Failure to meet the deadlines for the addressing shortcomings in the resubmitted appeal after return is conditioned with the following legal guarantees:

First, the decision on the return of the appeal shall indicate the breaches committed in the complaint (part 3 of article 371 of the Code). That is, the decision on the return of the appeal must indicate **all breaches** committed by the person who submitted the appeal;

Second, to address the shortcomings in the complaint after the return of the appeal, the Code prescribes reasonable deadline - a fifteen-day period for a complaint filed against a judgment and a three-day period for a complaint filed for a payment or a decision (part 5 of article 371 of the Code);

Third, the decision to return the appeal may be appealed to the Cassation Court in the manner prescribed by the Code (part 6 of article 371 of the Code). Moreover, if the Cassation Court cancels the decision to return the appeal, the Court of Appeal accepts the complaint for consideration if there are no other grounds for returning the appeal or grounds for refusing to accept the appeal (part 7 of article 371 of the Code).

Based on the foregoing, the Constitutional Court states that the institution of the return of the appeal provides the necessary guarantees of appeal of the judicial act, at the same time ensuring the right to a court proceeding within a reasonable time as an element of a fair court proceeding. In this context, the Constitutional Court finds that the failure to provide a new deadline for addressing shortcomings in the resubmitted appeal is a necessary and appropriate measure in the circumstances where all the shortcomings revealed by the court have not been addressed by the applicant within the prescribed period.

4.4. Article 367 of the Code envisages the procedure for submitting an appeal. According to the relevant article, the attached appeal and documents are sent or filed to the Appeal Court. At the same time, in accordance with the legal regulations prescribed in the article, the person filing the complaint shall forward the appeal and copies of the attached documents to the participants to the case, and a copy of the complaint to the court that issued the judicial act.

The Constitutional Court states that the requirement prescribed in the aforementioned article on sending an appeal and copies of the attached documents to participants to the case is not an end in itself. This follows from the principle of adversarial trial and provides the possibility of more effective organization of the procedural defense of the participants to the case.

On the other hand, article 368 of the Code prescribes the requirements for the form and content of the appeal. In particular, the appeal is submitted in writing and must be presented in legible handwriting in Armenian or another language with a proper Armenian translation.

Taking into account the mandatory requirement of sending the appeal and copies of the attached documents to the participants to the case and the copies of the complaint to the court that rendered the judicial act (as prescribed in article 367 of the Code), article 368 which deals with the form of the appeal, establishes that the evidence on the payment of the state duty, the sending of the complaint to the participants to the case, and a copy of the complaint to the court that passed the judicial act shall be attached to the appeal.

That is, for the admission of the appeal, it is important to pay the state duty (if the person who filed the complaint is not exempted from the obligation to pay the state duty), send the complaint to the parties involved, and also send a copy of the complaint to the court that rendered the judicial act.

In cases, where the law provides benefits for the payment of the state duty, a motion regarding this is attached to the appeal or the complaint.

The Constitutional Court considers it necessary to note that, according to article 2 of the Law of the Republic of Armenia on State Duties, the state duty in the Republic of Armenia is a mandatory duty for the services or actions established by this Law, resulting from the exercise of powers of state bodies, paid to the state budget of the Republic of Armenia and (or) municipal budgets by natural persons or legal entities".

In other words, the payment of the state duty serves as basis for the admission of the appeal, consideration of the case and adoption of an appropriate decision. In this aspect, the circumstance of payment or non-payment of the state duty is not directly related to the legitimate interests of the participants to the case.

On the other hand, according to articles 101 and 109 of the Code, judicial costs shall consist of state duty and other expenses related to case examination, which are distributed among the participants of the case proportionate to the amount of the claims for compensation. However, the Constitutional Court considers that the determination of the amount of the state duty and its inclusion in judicial costs is obviously predictable process in accordance with the relevant legal regulations.

The requirement to notify the participants to the case on the amount of the state duty paid by the person who submitted the appeal and attaching the evidence confirming the notification cannot prevail over the person's right to judicial protection, therefore, the phrase "... evidence ... on sending the complaint to the participants to the case ..." in the challenged part 5 of article 368 of the Code should not be interpreted in such a way that failure to submit to the participants in the case with the resubmitted complaint on the evidence regarding the payment of the state duty becomes an obstacle to the right to submitting an appeal.

4.5. Considering the fact that the applicant had the grounds for returning the appeal provided for in clause1 of article 371 of the Code, in particular, the requirements of article 368 of the Code were not complied with, the Constitutional Court considers it necessary to emphasize that the preconditions for the return of the appeal on the above-mentioned basis are divided into two groups:

The first group includes those terms that relate to the requirements for the content of the complaint. According to the Code, a complaint must contain, in particular, the name of the Court of Appeal, the names and addresses of the participants to the case, and the person filing the complaint, the name of the court against the judicial act against which the appeal is filed, the case number, the year, month, date of the judicial act, the grounding for the appeal - violation of substantive or procedural law that may affect the outcome of the case, the justification of the appeal - violation of substantive or procedural law specified in the complaint, the justification of their affect on the outcome of the case, the request of the person who submitted the complaint, as well as the list of documents attached to the complaint;

The second group includes the terms related to the appeal form, which, amongst others, include the documents attached to the complaint.

According to Article 368 of the Code, the following are attached to the appeal:

1) evidence confirming the payment of the state duty, if the applicant is not exempted from the obligation to pay the state duty. In cases where the law provides for a concession to pay the state duty, a motion regarding this is attached to the appeal or the complaint;

2) evidence on sending the complaint to the participants in the case;

3) evidence on sending the copy of the complaint to the court that rendered the judicial act;

4) if there is no power of attorney in the case, a document confirming his/her authority is attached to the complaint signed by the representative;

5) other motions of the person who filed the complaint.

The Constitutional Court states that the aforementioned legal regulations do not provide for a direct requirement to send evidence to the participants to the case confirming the payment of the state duty.

The obligation to send evidence to the participants of the case confirming the payment of the state duty as a document attached to the complaint arises from the provision prescribed in part 1 of article 367 of the Code (Procedure for submitting an appeal), according to which "the person filing the complaint shall forward the appeal and copies of the attached documents to the participants to the case and a copy of the complaint to the court that issued the judicial act".

The Constitutional Court considers that upon the resubmission of a returned appeal, the provisions challenged in the present case should not be interpreted literally depriving a person of the possibility of exercising the right to bring an appeal.

4.6. With regard to the challenged provisions, the Constitutional Court considers that the mechanisms related to the re-submitted appeal should not unduly burden individuals. In this aspect, the provision expressed in the Decision DCC-1363 of 18 April 2018 of the Constitutional Court is also applicable in the framework of the present case, according to which "... when the shortcomings identified by the Cassation Court do not relate to the text of the cassation appeal, the requirement to present the evidence on resending the copy of the same decision to the court adjudicating the case and to the participants to the case, in accordance with part 5 of article 231 of the Code, unnecessarily overloads not only the applicant, but also the relevant parties who will have to re-examine the complaint having the same content. From this perspective, re-sending the parties after returning the copy of the re-submitted complaint with the same text does not follow from the right of a person to effective judicial protection prescribed in part 1 of article 61 of the RA Constitution and does not pursue any legitimate goal".

Based on the examination 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, as well as articles 63, 64 and 69 of the constitutional law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. Part 5 of article 368 of the Civil Procedure Code is in conformity with the Constitution, in accordance with the interpretation that in the case of re-submission of the returned appeal on the basis of non-complience with the form and content, there is no need to resend the proof on the payment of the state duty, as well as sending of the copy of the complaint to the participants to the case and to the court that passed the judicial act.

2. Part 5 of article 371 of the Civil Procedure Code, in part of the provision "Shortcomings in the re-submitted complaint…" is in conformity with the Constitution, in accordance with the interpretation that the shortcomings in the re-submitted complaint relate to the shortcomings mentioned by the court, which have not been eliminated.

3. In accordance with part 10 of article 69 of the constitutional law on the Constitutional Court, the final judicial act issued in respect of the applicant shall be subject to review in the manner prescribed by law on the basis of a newly revealed circumstance, since in respect of the applicant part 5 of article 368 and part 5 of article 371 of the Civil Procedure Code were applied in the interpretation other than the constitutional legal content revealed in the first and second clauses of the final part of the present Decision.

4. 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**

September 24, 2019
DCC -1477