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 CLAUSE 2 OF PART 1 OF ARTICLE 182, PART 8 OF ARTICLE 183, AND ARTICLE 203 OF THE CIVIL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION ON THE BASIS OF THE APPLICATION OF THE FIRST INSTANCE COURT OF GENERAL JURISDICTION OF YEREVAN

Yerevan 10 March 2020

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

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

the applicant – the First Instance Court of the General Jurisdiction of Yerevan,

the respondent: K. Movsesyan, 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, part 4 of article 169 of the Constitution, and articles 22, 40 and 71 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on clause 2 of part 1 of article 182, part 8 of article 183, and article 203 of the Civil Procedure Code of the Republic of Armenia with the Constitution on the basis of the application of the First Instance Court of General Jurisdiction of Yerevan.

The Criminal Procedure Code of the Republic of Armenia (hereinafter also referred to as the Code) was adopted by the National Assembly on 01.07.1998, signed by the President of the Republic on 01.09.1998, and entered into force on 12.01.1999.

The challenged article 35 of the Code, titled: “Circumstances Excluding Criminal Prosecution”, prescribes:

The Civil Procedure Code of the Republic of Armenia (hereinafter - 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.

Clause 2 of part 1 of Article 182 of the Code, titled “**Grounds for termination of proceedings in the case**,” prescribes:

"1. The court of First Instance terminates the proceedings at any stage of the proceedings if:

…

2) there is a final judicial act of the court that has entered into legal force regarding the case between the same persons, on the same subject matter and on the same factual grounds, with the exception of a ruling to leave the claim (statement) without consideration ”.

Part 8 of Article 183 of the Code, titled **“Procedure and Consequences of Termination of Proceedings of the Case,”** prescribes:

“8. In case of termination of the proceedings of the case, it is not permitted to reapply to the court in a dispute between the same persons, on the same subject matter and on the same grounds, except for the case when the court, after termination of the proceedings on the case on the grounds prescribed in paragraph 3 of part 1 of Article 182 of this Code, refused to issue a writ of execution of the enforcement of the arbitration or the decision of the Financial System Arbitrator that has become binding on the parties ”.

Article 203 of the Code, titled **“Peculiarities of consideration of a case in family disputes”, e**nvisages:

"1. When considering family disputes, the examination of the case is carried out in compliance with the rules provided for by this Code, taking into account the specifics established by the Family Code of the Republic of Armenia and part 2 of this article.

2. Based on the need to ensure the best interests of the child, the court, in order to form the internal conviction necessary for the resolution of the case, is obliged, not being limited to the petitions of the persons participating in the case and the evidence presented by them and other

materials of the case, to take reasonable measures for a full, comprehensive consideration of the case, in particular, to demand information, evidence, additional explanations, to instruct the persons involved in the case to appear at the court session, to appoint an examination, to interrogate witnesses, to demand documents from state bodies and local self-government bodies, individuals and legal entities.

3. Proceeding from the need to ensure the best interests of the child, the court, on its own initiative or at the request of a party in order to secure the claim, may prohibit the parties to the case or other persons or oblige them to perform certain actions, even if the applied means of securing the claim obviously leads to the actual fulfillment of the claim.

The reason for the consideration of the case was the appeal of the Court of General Jurisdiction of First Instance of the city of Yerevan, registered in the Constitutional Court on November 13, 2019, on the basis of the ruling of the same court of November 7, 2019 on the civil case YD / 9967/02/19 “On Appealing to the Constitutional Court”.

Having examined the application and the attached documents, the written explanations of the parties, other documents of the case, as well as the relevant regulations of the Code, the Constitutional Court **ESTABLISHES:**

1. **Approach of the applicant**

The applicant applies with a request to determine the conformity of paragraph 2 of part 1 of Article 182, part 8 of Article 183, Article 203 of the Code of Part 1 of Article 61 and Part 1 of Article 63, Parts 2 and 3 of Article 37, and Article 78 of the Constitution.

According to the applicant, in the case of termination of proceedings on the basis of dismissal of the claim, the absolute legislative prohibition on re-applying to the court in a dispute between the same persons, on the same subject and on the same grounds makes it impossible to defend the child's best interests in the cases of the claim for the recovery of alimony.

The applicant considers that clause 2 of part 1 of Article 182 of the Code contradicts the Constitution insofar as the unconditional basis for termination of the proceedings is established by all final judicial acts of the court without exception, which have entered into legal force on a dispute between the same persons, on the same subject and on the same ground, including in cases of family disputes.

The applicant states that in the presence of a final judicial act that has entered into legal force on the termination of the proceedings on the basis of the refusal of the claim, the

prohibition to reapply to the court in a dispute between the same persons, on the same subject and on the same grounds has the goal of no longer burdening courts on the same dispute, specify the implementation of the parties' right to judicial protection and prevent cases of possible abuse of the right.

In the applicant's conviction, however, the prohibition on re-applying to the court in a dispute between the same persons, on the same subject and on the same grounds, which comes at any stage of civil proceedings as a result of the exercise of the plaintiff's right to withdraw from the claim without setting a certain period, is too strict limitation of the right that is clearly disproportionate to the aim pursued and violates the fair balance between the realization of the right to a fair trial and the goals of limiting this right to the detriment of the right to appeal to court. As a result, by virtue of the law, **an excessively disproportionate negative burden** is imposed on a person, when the plaintiff simply for reasons of resolving the issue extrajudicial at the initial stage of the consideration of the case or even before the convocation of a preliminary court session, refuses the claim, but in the future the issue is not resolved extrajudicial, and the plaintiff is generally deprived of the right to take a legal action.

According to the applicant, in any case, the plaintiff should have been given a reasonable and definite time frame for resolving the issue of exercising the right to withdraw from the claim, which would become a just, reasonable and necessary restriction of the fundamental constitutional right, taking into account the grave negative consequences that subsequently arise for the plaintiff, who is deprived of the right to re-submit a claim in the presence of a final judicial act that has entered into legal force on the termination of proceedings on the basis of a refusal from the claim.

Part 8 of Article 183 of the Code, according to the applicant, also contradicts the Constitution insofar as in the event of termination of proceedings in cases of all disputes without exception, including family disputes, with regard to the legal consequences of termination of proceedings in the case, it is not allowed to re-appeal to the court in the dispute between those the same persons, on the same subject and on the same grounds, regardless of when the plaintiff abandoned the claim - depending on the stage of the proceedings or the procedural action. According to the applicant, it is up to the legislator to decide what period of time is actually appropriate or lawful, but in the event of such a consequence of rejection of the claim**, the absence of any period is a disproportionate limitation of this right.**

With regard to Article 203 of the Code, the applicant considers that it does not comply with the Constitution insofar as, in the event of termination of family dispute proceedings on the basis of withdrawal of the claim, it does not provide for special regulation (as an exception) regarding the plaintiff's right to appeal at any time to the court in dispute between the same persons, on the same subject and on the same grounds.

2. Approach of the respondent

The respondent considers that clause 2 of part 1 of Article 182, part 8 of Article 183 and Article 203 of the Code are in conformity with the Constitution.

Referring to some positions of the European Court of Human Rights and the Constitutional Court, the respondent states that the right to accessibility of the court is not an absolute right: in some cases it may be subject to indirect restrictions, but any restriction must pursue a legitimate aim, there must be reasonable proportionality between the measures applied and the aim pursued and the limitation should in no way affect the essence of the law.

The respondent argues that the principle of procedural economy of funds ensures the rational use of forces, a faster and more efficient administration of justice with the application of minimum efforts, and the principle of legal certainty also includes the principle of the finality of court decisions, which, in turn, is an essential guarantee as a principle of procedural economy of funds and the principle of the effectiveness of legal proceedings.

The respondent notes that the prohibition, without any exception, from re-applying to the court in a dispute between the same persons, on the same subject and on the same grounds, or the absence of a provision ensuring the right of the plaintiff to apply to the court at any time, is intended to ensure compliance with the principles predictability of justice and legal certainty.

According to the respondent, prescription of the exception by the legislator due to the peculiarity of the dispute will create not only the predictability of justice, but also the possible risks of violating the principle of equality of all before **the law**, which is unacceptable for a democratic and legal state.

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

Considering that the applicant, in fact, raises the issue of ensuring judicial protection of the best interests of the child in cases of the recovery of alimony in the presence of a legislative prohibition on re-applying to the court in a dispute between the same persons, on the same subject and on the same grounds in case of termination of proceedings on the basis of the waiver

of the claim, the Constitutional Court considers it necessary to examine the issue of compliance with the Constitution of the provisions contested in the present case in the context of Articles 36, 37, 61, 63, 75 and 78 of the Constitution, establishing, in particular, the following:

- What are the goals pursued by the legislative prohibition on re-applying to the court in a dispute between the same persons, on the same subject and on the same grounds in the event of termination of civil proceedings on the basis of a plaintiff, and does this prohibition limit the constitutional rights of a person to judicial defense, fair trial and is it proportionate to the aims pursued?

- Does the legal prohibition on re-applying to the court in a dispute between the same persons, on the same subject and on the same grounds in the event of termination of proceedings on the basis of a plaintiff equally apply to claims for the recovery of alimony, and in this case are the institutional arrangements and procedures necessary for judicial protection of the best interests of the child by law provided?

4. Legal assessments of the Constitutional Court

4.1. The content of the right to effective judicial protection prescribed by Article 61 of the Constitution is confined to guaranteeing the right to apply to the court to protect a person's rights and freedoms and the obligation of the state to take effective measures and provide conditions for the realization of this right.

Guarantees and standards for ensuring the effectiveness of the right to judicial protection are enshrined in article 63 of the Constitution, as well as in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - the Convention). The precedents of the European Court of Human Rights (hereinafter referred to as the ECHR) confirm that the right to a fair trial guaranteed by Article 6 (1) of the Convention, of which the right to the accessibility of the court is a particular element, is not an absolute right and may be subject to certain restrictions, and such "... will not comply with part 1 of Article 6 if it does not pursue a legitimate aim and if there is no reasonable proportionality between the measures applied and the aim pursued" ("Khalfaoui v. France", app. no. 34791/97, 14/03/2000).

The ban on re-consideration by the court of a claim in a dispute between the same persons, on the same subject and on the same grounds, aims, firstly, to guarantee the implementation of the constitutional principle of legal certainty, ensuring the finality of court decisions and preventing the court from issuing diverse decisions on the same the same question.

Secondly, the prohibition of re-consideration of the same issue is intended to ensure the administration of effective justice, without allowing the court to be re-burdened with the same issue. After all, the purpose of this prohibition is also to prevent the claimant from abusing the right to judicial protection.

The Constitutional Court considers that when re-applying to the court in a dispute between the same persons, on the same subject and on the same grounds, in the event of termination of civil proceedings on the basis of refusal of the claim, the indicated goals of restricting the right to access to the court are legitimate and do not distort the essence of this right.

4.2. The court undertakes the protection of the subjective rights or legal interests of a person only when the interested person submits a claim in accordance with the procedure established by law. Both the right to submit a claim to the court in order to protect the subjective rights and legitimate interests of a person, and the right to refuse an initiated claim due to the principle of dispositiveness belong exclusively to the plaintiff (Code, article 12).

Pursuant to Part 2 of Article 149 of the Code, titled "Refusal of Claims," **the first instance court, prior to making a ruling on the termination of the proceedings, explains to the persons participating in the case the procedural consequences of refusal of the claim.** The plaintiff is ex officio informed that the refusal of the claim will lead to the issuance of the corresponding final judicial act by the court - a ruling on the termination of the proceedings (clause 7 of part 1 of Article 182 of the Code), as well as that in the presence of such an effective judicial act, s/he will no longer be able to reapply to the court in a dispute between the same persons, on the same subject and on the same grounds (part 8 of Article 183 of the Code).

Regardless the stage of the consideration of the case, the plaintiff's decision to drop the claim is voluntary and must be balanced and deliberate, taking into account all the circumstances pro et contra. Consequently, the legislative prohibition on re-applying to the court in a dispute between the same persons, on the same subject and on the same grounds in the event of termination of civil proceedings on the basis of refusal of the claim, being a procedural consequence of the expression of the will of the person, generally corresponds to that enshrined in Article 78 of the Constitution to the principle of proportionality.

4.3. The rights to effective judicial protection and fair trial presuppose the protection of a specific right or freedom of a specific person, the effectiveness of which can be assessed based on the characteristics of this right. In the framework of the present case, the effectiveness of judicial protection must also be considered from the point of view of whether the general

regulations under consideration regarding the termination of proceedings in a case concerning a child make it possible to give priority attention to the interests of the child in accordance with part 2 of Article 37 of the Constitution.

The need to ensure the best interests of the child also follows from the international obligations assumed by the Republic of Armenia.

So, in part 4 of article 23 of the UN International Covenant on Civil and Political Rights, the obligation of the states participating in the Covenant to take appropriate measures to ensure equality of rights and obligations of spouses, inter alia, upon divorce, as well as **the obligation to provide necessary protection for all children in the event dissolution of marriage**.

According to part 1 of article 3 of the UN Convention on the Rights of the Child, "**in all actions with regard to children,** regardless whether they are taken by public or private institutions dealing with social welfare, courts, administrative or legislative bodies, the best interests of the child are given priority ". In addition, Article 3 § 2 of the said Convention **obliges States Parties to provide the child with such protection and care as are necessary for his/her well-being, and to this end to take all appropriate legislative and administrative measures.**

Article 5 of **Protocol No. 7** to the Convention enshrines the equality of spouses, in particular the equal rights and equal responsibility of spouses of a private law nature in relations between themselves and with their children upon dissolution of marriage. **The article does not prevent states from taking such measures as are necessary to safeguard the interests of children.**

4.4. From a comprehensive analysis of the current legal regulations governing the sphere of family relations, it follows that the guarantee of protecting the best interests of the child is, in fact, ensuring the conditions established by the RA Law "On the Rights of the Child" necessary for the full and effective exercise of the rights of the child.

According to Article 8 of the RA Law "On the Rights of the Child", every child has the right to living conditions necessary for full physical, mental and spiritual development, and **in the matter of ensuring the necessary living conditions for the development of a child, parents or other legal representatives bear the main responsibility**. Article 14 of the same Law establishes the provision according to which the protection of the rights and legal interests of a child is one of the main duties of his parents or other legal representatives.

By virtue of part 1 of Article 43 of the Family Code of the Republic of Armenia, a child has the right to protect his/her rights and legal interests, however, the protection of the rights and legal interests of a child is carried out by his/her parents (legal representatives).

Referring to the relationship between the child and the parents, the ECtHR considered that Article 8 of the Convention requires the authorities to find a fair balance between the interests of the child and the parents and, in balancing these interests, pay special attention to the best interests of the child, which, depending on their nature and seriousness, may prevail over the interests of the parents. In particular, according to Article 8 of the Convention, a parent cannot be given the right to take measures that harm the health and development of the child. **(“Rytchenko v. Russia”, 20/01/2011, app. no. 22266/04, § 39)**.

Earlier, the ECHR noted that “family life” includes not only relations of a social, moral or cultural nature, but **also material interests, which, in particular, are alimony obligations ... ” (“Marckx v. Belgium”, 13/06/1979, app. no 6833/74, § 52)**.

4.5. Taking into account the peculiarities of family disputes, in particular their social, moral and overly emotional nature, the legislator has provided for a special procedure for considering these disputes. According to Article 202 of subsection of the second Code, family disputes are considered by courts in the order of a special action procedure, in which the general rules for the consideration of a case are applied in compliance with the special rules established by the provisions of the same subsection (Article 201).

The analysis of Article 203 of the above-mentioned subsection, titled “Peculiarities of consideration of a case in family disputes”, shows that the legislator, based on the need to ensure the best interests of the child, envisages a wider range of duties of the court than the court has when considering cases in a general manner**, as regards all stages consideration of the case.**

Although this article does not directly provide for an exception for going to court on a similar issue, however, its part 2, proceeding from the need to ensure the best interests of the child, **it establishes the duty of the court** in order to form the internal conviction necessary for the resolution of the case, not be limited to the motions of the persons involved in the case presented with evidence and other materials available in the case, **take reasonable measures for a full, comprehensive examination of the case**. According to the Code, a number of reasonable measures taken include, in particular, “to demand information, evidence, additional explanations, to instruct the persons involved in the case to appear at the hearing, to appoint an expert

examination, to interrogate witnesses, to request documents from state bodies and local authorities, physical and persons".

That is, the legislator, proceeding from the need to ensure the best interests of the child, provided for exceptions for the consideration of family disputes, since in these cases the state has a mission to ensure, guarantee and protect the best interests of the child, regardless of the rights and obligations exercised at the discretion of the parents in the conditions adversarial proceedings.

4.6. The constitutional obligation of parents (part 1 of Article 36 of the Constitution) is to take care of the upbringing, education, health, full and harmonious development of their children, which unconditionally includes the obligation to provide funds for the maintenance of the child.

Article 68 of the Family Code establishes the obligation of parents to support their children. According to part 2 of this article, if parents do not provide funds for the maintenance of their children, the funds for the maintenance of the latter (alimony) are collected from the parents in court.

There may be cases when the refusal of a claim on the claim for the recovery of alimony may be due to the desire of the plaintiff in this particular period not to apply the judicial protection mechanism in order to save the family, which does not mean that the plaintiff will forever abandon the claim for alimony.

In practice, there may also be cases when the plaintiff, as a result of a certain verbal agreement with the respondent, refuses the claim, but the latter, for some reason, does not fulfill the obligations arising from the agreement, even a situation may arise when the respondent, in reality, does not want to fulfill his material obligations to the child, abuses the confidence of the plaintiff, convinces the plaintiff to abandon the lawsuit brought against him/her, but does not fulfill the promises made to him. **As a result, the child finds himself in unfavorable conditions, and his/her interests are violated.**

4.7. It follows from the relevant provisions of the Family Code **that the parent's obligation to provide funds for the maintenance of the child does not end on the basis of the refusal of the other parent to demand alimony, but continues until the child's majority, and in the event of the child's incapacity for work - also after his majority.** Consequently**, alimony legal relations are permanent and may undergo certain changes in the course of time due to the behavior of the parties or property opportunities.** The legislator even considered it

possible for the amount of alimony already established by the final court decision to be changed if the property and marital status of one of the parties changed (Article 107 of the Family Code).

According to article 95 of the Family Code, a person who has the right to receive alimony can apply to the court for the recovery of alimony regardless of the time that has elapsed since the moment the right to alimony arises, if alimony has not been paid earlier under an agreement on the payment of alimony and, as a rule, alimony is provided with the moment of going to court.

According to Part 1 of Article 203 of the Code, when considering family disputes, the courts, based on the need to ensure the best interests of the child, are obliged to take into account the specifics established both by Part 2 of this Article and by the RA Family Code. Consequently, in the context of the aforementioned regulations of the Family Code **in regard to the need to ensure the best interests of the child and fulfill the parent's continuing obligation to take care of the child, the court is obliged to take into account changes in the behavior of the parties, their marital or property status after the decision to terminate the proceedings on the on the basis of rejection of the claim and in the case of a new claim on a dispute between the same parties, consider it on the merits.**

Based on the review of the case and governed by clause 1 of article 168, part 4 of article 169, and article 170 of the Constitution, as well as articles 63, 64 and 71 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. Clause 2 of Part 1 of Article 182 of the Civil Procedure Code of the Republic of Armenia is in conformity with the Constitution.

2. Part 8 of Article 183 of the Civil Procedure Code of the Republic of Armenia is in conformity with the Constitution.

3. Article 203 of the Civil Procedure Code of the Republic of Armenia is in conformity with the Constitution.

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**

11 February 2020

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