



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

**ON THE CASE OF CONFORMITY OF ARTICLE 196 OF THE RA ADMINISTRATIVE
PROCEDURE CODE WITH THE CONSTITUTION OF THE REPUBLIC OF
ARMENIA ON THE BASIS OF THE APPLICATION OF THE RA ADMINISTRATIVE
COURT**

Yerevan

October 6, 2015

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

with the participation (in the framework of the written procedure),
of the RA Administrative Court as an Applicant,

representative of the Respondent: H. Sardaryan, official representative of the RA National Assembly, Head of the Legal Department of the RA National Assembly Staff,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 7 of the Constitution of the Republic of Armenia, Articles 25, 38 and 71 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by a written procedure the Case on conformity of Article 196 of the RA Administrative Procedure Code with the Constitution of the Republic of Armenia.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the RA Administrative Court on June 1, 2015.

Having examined the written reports of the Rapporteur on the Case, application and the written explanation of the Respondent, having studied the RA Administrative Procedure Code and other documents of the Case, the Constitutional Court of the Republic of Armenia **FOUND**:

1. The RA Administrative Procedure Code was adopted by the RA National Assembly on December 5, 2013, signed by the RA President on December 28, 2013 and came into force on January 7, 2013.

Since the adoption the Code has been amended four times (Laws of NA 21.06.2014 LA-99-H, NA 21.06.2014 LA-89-H, NA 17.12.2014 LA-250-H, NA 18.05.2015 LA-66-H), but Article 196 was not amended.

Article 186 of the RA Administrative Procedure Code titled “Composition of the Administrative Court regarding the cases on challenging the legality of normative legal acts” prescribes:

“1. The cases envisaged by this Chapter, as well as appeals submitted against the interim judicial acts of the Administrative Court shall be examined and resolved by the Administrative Court collegially consisting of five judges”.

2. The procedural background of the case is the following:

On 12.11.2014 H. Marutyan, A. Ter-Hovhannisyan, M. Stepanyan, M. Aghajanyan, N. Sahakyan and G. Asoyan submitted a claim to the RA Administrative Court requesting to recognize Subpoint 5, Point one of the decision N604-N of the RA Government of 29.05.2009 regarding the state registration of the property Plot N78 located at the address Yerevan, M.Mashtots ave, building 48 by the Municipality of Yerevan, on the auction announced by the Yerevan City Hall on 14.06.2014 on selling the mentioned plot and as result of the auction, agreement signed between the community of Yerevan and citizen N. Harutyunyan on 18.07.2012. The claimants requested to restore the missed procedural deadline prescribed by law for challenging the legitimacy of the normative legal act.

By the decision of 19.11.2014 of the RA Administrative Court, the motion on restoration of the right to exercise the actions conditioned with the procedural deadline and submission of the claim was rejected.

The claimants submitted a cassation claim against the mentioned decisions to the RA Administrative Court of Cassation. On 19.12.2014, based on Article 196 of the RA Administrative Procedure Code the claim was declined and the mentioned decision was not appealed in the prescribed time term.

On 30.01.2015, the claimants submitted an appeal to the RA Administrative Court.

By the decision of 09.02.2015, the RA Administrative Court initiated the proceeding.

Based on the examination of the above-mentioned appeal, on May 22, 2015 the RA Administrative Court made a decision to terminate the proceeding of the above-mentioned case and applied to the RA Constitutional Court.

3. The Applicant states that the resolution of the case is possible only by the implementation of Article 196 of the RA Administrative Procedure Code and the expression of this norm “as well as appeals submitted against the interim judicial acts of the Administrative Court” is problematic from the perspective of conformity with the provisions of Articles 18, 19 and Part 1 of Article 92 of the RA Constitution.

According to the Applicant, authorizing the Administrative Court with the right to examine the claims against the interim judicial acts of the Administrative Court on challenging the legitimacy of normative legal acts is not only motivated but also creates problems from the perspective of hierarchy guaranteed by Article 92 of the RA Constitution.

Referring to the legal position prescribed in paragraph 5 of the Decision of DCC-719, the RA Constitutional Court, the Applicant finds that as a result of the current legal regulation, it does not provide an additional guarantee of the effectiveness and objectivity, as in the present conditions of the Administrative Court of Appeal, the interim judicial act of the Administrative Court reviews the court, which adopted this act, with the same number of judges.

According to the Applicant, the challenged provision causes a confusion in the issue of implementation of the right to appeal against interim judicial acts of the Administrative Court, as the appeal proceeding is clearly regulated by Chapter 22 of the Administrative Procedure Code of the Republic of Armenia and the challenged norm provides diametrically opposite regulation, thereby causing uncertainty.

The Applicant points out that by the RA Administrative Court Code the judicial competence of the Court, considering the appeals submitted against interim judicial acts of the

Administrative Court in cases challenging the legality of legal acts as well as the procedure and the characteristics for their consideration, is not regulated.

According to the Applicant, a situation is created when the Administrative Court, on the basis of the contested provision, should take into consideration of the appeals but it has no authority to implement follow-up actions that endangers the possibility of fully fledged implementation of the person's right to judicial protection guaranteed **by Articles 18 and 19 of the RA Constitution**, thus making it unrealistic.

4. According to the Respondent, under the terms of a three-tier judicial system functioning in the Republic of Armenia, each of the courts has its own function: considering and resolving the merits, the Court of First Instance shall protect the violated rights and legitimate interests of the person, the Appeal Court shall protect individual's rights through correction the judicial mistakes and the Court of Cassation is intended to ensure the uniform application of the law.

According to the Applicant, the legislator, by creating the functional relationship between the different courts, followed the aim to ensure the legality and validity of judicial decisions, as well as the full protection of the violated rights of individuals. In the context of the availability of a three-tier judiciary system, review of the judicial acts made by the Administrative Court departs from the general logic of the three-tier system of judicial protection, and the appeal against interim judicial acts in the cases challenging the legality of legal acts must be carried out by means of appeal at the Administrative Appeal Court of the Republic of Armenia.

The Respondent also notes that in order to solve the above-mentioned problems, the RA National Assembly has prepared a draft Law on Amendments to the RA Administrative Procedural Code, which will soon come into force.

5. The Constitutional Court considers necessary to assess the constitutionality of the challenged legal norm:

- from the point of view of compliance with the hierarchy of courts envisaged in the RA Constitution;

- from the point of view of guaranteeing the person's full realization of the constitutional rights to judicial protection and fair trial.

In accordance with Part 1 of Article 92 of the Constitution of the Republic of Armenia a three-tier court system operates in the Republic of Armenia: First Instance Courts of General Jurisdiction and the Administrative Court, Court of Appeal and the Court of Cassation.

According to Article 94 of the RA Constitution, the powers, procedure of formation and activities of the courts are established by the Constitution and laws.

The hierarchy of the courts is primarily designed to provide control over the legality and validity of judicial decisions by the higher courts and timely correction of mistakes of justice, which ensures even greater protection of the rights and legitimate interests of natural and legal entities.

According to Part 1 of Article 35 of the RA Judicial Code, the Administrative Court considers administrative cases by the merits prescribed by the Administrative Procedure Code, and according to Part 2 of the same article, the acts of the Administrative Court may be challenged only at an appeal hearing.

Article 39 of the same Code, titled "The powers of the Court of Appeal", prescribes the provision according to which the Court of Appeals reviews the interim judicial acts in the exceptional cases stipulated by law.

The European Court of Human Rights considered that the interim judicial acts cannot be regarded as defining in the aspect of the civil rights and obligations and, as a rule, they are not protected by Article 6 of the Convention, unless, of course, interim decisions (definitions) do not require exclusivity. (*Markass Car Hire Ltd v. Cyprus*, (dec.), no. 51591/99, 23 October 2001). Having considered the definition on refusal to accept the claim as an exceptional case, the legislator has included it in the list of interim judicial acts subject to appeal in the appeal proceedings of Article 131 of Chapter 22 of the Administrative Procedure Code the Republic of Armenia.

According to Article 3 of the RA Judicial Code, the Administrative Court and the Administrative Court of Appeal are specialized courts, meanwhile, in accordance with Article 153 of Chapter 23 of the RA Administrative Procedure Code, titled: "Proceeding in the Court of Cassation," interim judicial acts of the Administrative Court of the Republic of Armenia may be appealed in cassation order by the Court of Cassation.

The legislator, in fact, observing the principle of hierarchy of the judiciary, provided an opportunity to appeal against interim judicial acts in the higher courts, which, however, does not

apply to interim judicial acts of the Administrative Court in cases challenging the legality of normative legal acts.

Regarding the specialized courts, the Constitutional Court in its Decision DCC-1190 expressed the legal position that “the establishment of the institution of specialized justice, including the administration of justice, among other things, intended primarily to follow the aim of the effectiveness and usefulness of the exercise of the right to judicial protection in the sphere, taking into account the features and characteristic of this kind of justice.

However, no procedural feature or procedure can impede or prevent the possibility of a full and effective implementation of the right to challenge the judicial act, which is a part of the constitutional right to judicial protection, to make senseless the right guaranteed by Article 18 of the RA Constitution or become the prohibition to implement it”.

In addition to the above-mentioned, the Constitutional Court confirms its legal position expressed in the Decision DCC-719, according to which “the entire logic of the institution of appeal in general, and within the justice system in particular, is to ensure that the challenge of the illegal behavior of one of the link was addressed exclusively to a higher authority. In the RA justice system the whole mechanism of appeal is built on this logic”.

6. Regarding the state duty to guarantee accessibility of the court, the Constitutional Court in its Decision of DCC-765 referred to the following approach of the European Court of Human Rights: "According to well-formed case law of the European Court of Human Rights, the Convention on the Protection of Human Rights and Fundamental freedoms does not oblige the Contracting States to establish Appeal or Cassation Courts, however if they are created, it must be ensured that the persons concerned also enjoy the right provided for by Article 6 of the Convention to apply to these courts for the basic guarantees of a fair trial, including the access to the court due to civil rights and obligations".

European Court of Human Rights, referring to the efficient and effective implementation of the right to judicial protection, finds that Article 6 of the European Convention on Human Rights does not prescribe the right to appeal the decision of the lower court to a higher court, but when such a right is prescribed by the national legislation, Article 6 is applicable regarding a higher authority with legal authority (Delcourt v.Belgium, §25, Application no. 2689/65, 17.01.1970).

The practice of application of the contested legal status suggests that the Administrative Court of Appeal refuses to accept the appeal with the motivation that it is not within its competence. In this situation, the administrative court is forced to carry out the function of the appeal, which was not originally included in its functions, thus violating the hierarchy of judiciary.

The Constitutional Court considers it necessary to note that the case law of the Court of Cassation of the Republic of Armenia of July 27, 2015 regarding the administrative case ՎԴ / 5478/05/14 with the same factual circumstances formed such a practice of implementation of the norms prescribed by the challenged provision, which excludes appeal of the interim judicial acts in cases challenging the legality of normative legal acts of the RA Administrative Court. In particular, the Court of Cassation, considering the legal position of the Constitutional Court, states that the interim judicial acts of the Administrative Court in the cases of challenging the legality of normative legal acts are subject to challenge at the Administrative Court of Appeal.

The decision of the Cassation Court of the above mentioned case stated that “... participants of the proceedings must be able to challenge ... validity of the decision in a higher court - the Administrative RA Court of Appeals, as one of the important part of the right to judicial protection, guaranteed by the Constitution of the Republic of Armenia, is the right of appeal, and the absence of a legal possibility of appeal against the interim judicial act of the Administrative Court in the cases of challenging the legality of normative legal acts unlawfully deprives a person of the right of appeal a judicial act to a higher court regarding, which is a component of the constitutional right to judicial protection”.

7. The Constitutional Court has the task of evaluating signals of the impartiality of the court in considering the appeal by the same court lodged against the interim judicial acts of the Administrative Court challenging the legality of normative legal acts. The hearing held by the independent and impartial tribunal is a fundamental guarantee of a fair trial, enshrined in Article 19 of the Constitution.

The case law of the European Court of Human Rights highlights the subjective impartiality of the standard - personal attitude of the judge to the case and an objective standard - the availability of sufficient guarantees to exclude any reasonable doubt on the issue (Gautrin and others v France, the case of the ECHR on May 20, 1998.).

Based on the above mentioned, the Constitutional Court considers controversial the legal position in the terms of assessing the partiality of the court which may be an impartial judgment in the matter reviewed by the judicial act enshrined in Article 196 of the Code.

As a result of the comparative analysis put forward in the framework of the constitutional legal dispute in the case dealt with, by the legal regulation of the former RA Administrative Proceeding Code (28.11.2007) and the current RA Administrative Proceeding Code, as well as the Judicial Code of the Constitutional Court finds that:

a. according to the RA Law "On introduction of amendments and addenda to the Judicial Code of the Republic of Armenia" adopted on 29 October 2010, from 1 December 2010 the RA Administrative Appeal Court shall function in the Republic of Armenia and administrative justice shall be carried out in the framework of a three-tier system instead of the previous two-tier system;

b. the legal provision of the challenged by this case reviewing the interim judicial acts of the Administrative Court by the same court, in fact, continued its existence as well as after the establishment of the RA Administrative Court of Appeal.

With regard to the effective implementation of the rights to judicial protection and the fair trial, it should be noted that the Constitutional Court often considers Articles 18 and 19 of the RA Constitution as a single legal phenomenon and repeatedly appealed to them in a number of decisions /DCC-719, DCC- 780, DCC-936, DCC-1037, DCC-1190 etc/.

Articles 18 and 19 of the RA Constitution guarantee everyone's right to judicial protection and fair trial.

Article 7 of the Judicial Code also contains a provision according to which no one can be deprived of the right to public hearing of his/her case within a reasonable time by a competent, independent and impartial court under conditions of equality and in compliance with all the requirements of objectivity.

Such an approach is consistent with international legal requirements in the domain of fundamental human and civil rights and freedoms, as reflected, in particular, in the Universal Declaration of Human Rights /Articles 7, 8 and 10/, the International Covenant on Civil and Political Rights /Article 14/, the European Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 6, 13) etc.

Touching upon to the issue of the problematic implementation of the rights to judicial protection and fair trial in the context of the present constitutional and legal dispute, the Constitutional Court notes that in case of violation of those rights, their recovery **is the responsibility of the State through the adoption of certain mechanisms and procedures**. The State is also obliged to provide effective prevention and elimination of violations via the established mechanism.

In case the current legislation and practice make it impossible for judicial review of compliance with the law of certain legal acts on the basis of applications of natural and legal persons, it creates a situation incompatible with the principles and approaches acknowledged by the state of law State.

By the Decision DCC-936, the Constitutional Court outlined the possibility of ensuring judicial review of acts, finding that “... at the constitutional level, such a special institution to guarantee judicial protection (its effectiveness) violated human rights and freedoms as the right person for the revision of the judicial act by a higher court (judicial protest) is prescribed. The latter is also the primary responsibility of the state for the implementation of certain procedures, as well as judicial purposes by correcting possible legal errors in the domain of the rights of a person to judicial protection and a fair trial”.

8. Regarding to the Applicant's argument that the Code of Administrative Procedure of the Republic of Armenia does not have any legal regulation for the order of consideration of appeal presented against the interim judicial acts in the cases challenging the legality of legal acts and due to the character of the adopted acts, the method of examination and powers of the Administrative Court as a result of the review, the Constitutional Court finds that the above mentioned arguments of the Applicant by merits bring to the issue of the **legislative gap** and the distortion of the guaranteed rights enshrined in Articles 18 and 19 of the RA Constitution caused by this process. This in turn creates an obstacle in realization of the right of access to a court and in terms of the real possibility of appeal against the judicial act.

The normative possibility of taking to accepting the appeals by the Administrative Court of Appeal submitted against the interim judicial acts in cases of challenging the legality of normative legal acts on the basis of the disputed provisions in the framework of the institution of

appealing the interim judicial acts based on the above-mentioned cases **is not sufficient to ensure the realization of the constitutional right to judicial protection of individuals.**

In each instance of the judicial system established in the Republic of Armenia, initiation of proceedings, preparation, review, sequence of steps of resolution of the case, etc. should be clearly regulated by the relevant procedural codes and laws.

Moreover, in the case of Galstyan v. Armenia (Galstyan v. Armenia, Application no. 26986/03) the European Court of Human Rights found that the national legislation provided for the procedure of appeal must be clearly formulated, have a consistent practice of implementation and provide a person with a clear and accessible right to appeal.

Summarizing all the above mentioned, the Constitutional Court finds that Article 196 of the Administrative Procedure Code of the Republic of Armenia is problematic both in terms of compliance with the judicial hierarchy enshrined by the legislation and in the aspect of the definition of the law, and therefore it does not provide enough opportunity to the full implementation of the constitutional right to judicial protection and a fair trial.

Based on the review of the Case and being governed by the requirements of Article 100, Point 1, Article 101, Point 7 and Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 71 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare expression of this norm of Article 196 of the Administrative Procedure Code “as well as appeals submitted against the interim judicial acts of the Administrative Court” in non-conformity with the provisions of articles 18, 19 and part 1 of article 92 of the RA Constitution and invalid.

2. In accordance with Article 102, Part 2 of the RA Constitution this decision is final and enters into force from the moment of its announcement.

Chairman

G. Harutyunyan

October 6, 2015

DCC-1231