

**ON BEHALF OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA**

**THE CASE ON CONFORMITY OF ARTICLE 68, PART 3 OF THE
ADMINISTRATIVE PROCEDURE CODE OF THE REPUBLIC OF ARMENIA
WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF
THE APPLICATION OF THE POLITICAL PARTY “REPUBLIC”**

Yerevan

22 February 2011

The Constitutional Court of the Republic of Armenia composed of the Chairman G. Harutyunyan, Justices K. Balayan, F. Tokhyan, M. Topuzyan (Rapporteur), A. Khachatryan, V. Hovhannisyanyan, H. Nazaryan A. Petrosyan, V. Poghosyan,

With the participation of the representative of Applicant: A. Zeynalyan,
the Respondent: the National Assembly of the Republic of Armenia, officially represented by D. Melkonyan, the Adviser to the Chairman of the National Assembly of the Republic of Armenia,

Pursuant to Article 100, Point 1, Article 101, Part 1, Point 6, of the Constitution of the Republic of Armenia, Articles 25, 38 and 69 of the Law on the Constitutional Court of the Republic of Armenia,

examined by a written procedure in a public hearing the Case on conformity of Article 68, Part 3 of the Administrative Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of application of the of the political party “Republic”.

The case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the political party “Republic” on 07.09.2010.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, having studied the Administrative Procedure Code of the Republic of Armenia and the other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The Administrative Procedure Code of the Republic of Armenia was adopted by the National Assembly of the Republic of Armenia on 28 November 2007, signed by the President of the Republic of Armenia on 10 December 2007 and came into force on 1 January 2008.

Part 3 of Article 68 of the RA Administrative Procedure Code, titled “Lawsuit for Recognition,” challenged in this Case, states:

"Bringing a lawsuit for recognition, the Plaintiff may demand to declare the intervening administrative act without legal force or the action as unlawful, if the Plaintiff is truly interested in declaration of the act or action as unlawful, i.e.:

- 1) there is a risk to adopt similar administrative act of intervention or to perform same action again in similar situation;
- 2) the plaintiff intends to claim compensation for property damage, or
- 3) it pursues the aim to restore honor, dignity and business reputation of the Plaintiff. "

2. The procedural background of the considered Case is the following: on 16.11.2009 the Applicant brought a lawsuit before the RA Administrative Court against the RA Government demanding to declare the Government's inaction as unlawful (void) and to oblige the latter to recognize the facts of violation of the right to assembly, freedom of expression, right to be free from discrimination and right to effective legal remedies before public bodies. The Administrative Court dismissed the brought lawsuit by the Decision on Refusal to Accept a Lawsuit dated 23.11.2009 (Administrative Case ՎԴ/4816/05/09).

The abovementioned decision of the RA Administrative Court was appealed on 01.12.2009, and the Administrative Court rejected the submitted appeal by the decision On Rejection of the Appeal adopted collegially on 04.12.2009. The Decision of the Administrative Court adopted collegially on 04.12.2009 was appealed before the RA Court of Cassation on 21.12.2009. The submitted cassation appeal was returned by the Decision of the Court of Cassation on Returning the Cassation Appeal dated 10.02.2010.

3. The Applicant finds that the Article 68, Part 3 of the RA Administrative Procedure Code challenged by him contradicts Articles 18 and 19 of the RA Constitution. In this regard, in the challenged legal norm the Applicant highlighted the significance of the criteria for guaranteeing certainty, accessibility and effective remedies ensuring the right to judicial protection and its effective implementation prescribed in the mentioned Articles of the Constitution, which is particularly stressed within the case law of the European Court of Human Rights.

Referring to Article 59, Part 3, Point 1 of the Administrative Procedure Code, the definition of the term "administration" prescribed in Article 3, Point 2 of the RA Law on Foundations of Administration and Administrative Proceeding, as well as Articles 69 and 96 of the same Law, the Applicant concludes that the Procedure Code shall provide an appropriate legal regulation to ensure the right to bring a lawsuit before the Administrative Court for declaring the **inaction** of the administrative body as unlawful. Meanwhile, according to the Applicant, in the given Case the Administrative Court interpreted the provisions in constitutional legal dispute in a way like the Court is not authorized to initiate the proceeding on lawsuit for nullification of the inaction of the administrative body.

In addition to the abovementioned, the Applicant, referring to Article 69 of the RA Law on Foundations of Administration and Administrative Proceeding, as well as the definition of the term "administrative act" prescribed in the Recommendation R2004(20) of the Committee of Ministers, expressed the point of view that if the term "administrative act" used in Article 68, Part 3 of the RA Code of Administrative Procedure, includes also the act "action", then it is meaningless along with the referring to the three acts in one term, to mention also one of them separately. In his opinion, that causes uncertainty, as well as provides with possibility for ambiguous and discretionary interpretations, which contradicts the principle of legal certainty.

4. In objection to the arguments of the Applicant, the Respondent finds that the state may regulate the procedure, the mechanisms and time limits of implementation of the right to judicial protection, by legislatively stipulating distinct terms for the holder of that right. Based on the results of the comparative analysis of Articles 3, 65-68 the RA Administrative Procedure Code, the Respondent concludes that the Code precisely prescribes all those legal mechanisms that ensure the implementation of the right to judicial protection guaranteed by Articles 18 and 19 of the RA Constitution.

At the same time, analyzing the factual circumstances of the Case, the Respondent finds that the Applicant did not use all legal remedies prescribed in the RA Administrative Procedure Code, which are aimed to implement the right to judicial protection.

The Respondent also makes a motion on dismissal of the proceeding with the motivation that the challenged provision was not applied to the Applicant, and, the questioning of the constitutionality of the challenged norm, does not actually pursue the aim to protect the subjective rights.

5. The RA Constitutional Court finds no grounds to dismiss the proceedings, and considering that the Applicant, based on the terminology prescribed in the RA Law on Foundations of Administration and Administrative Proceeding, challenges the constitutionality of Article 68, Part 3 of the RA Administrative Procedure Code in the aspect of constitutional-legal content of the concepts stipulated therein, necessitates firstly touching upon the issue of separation of the concepts of administrative act, action and inaction prescribed in the mentioned Law .

The comparative analysis of the subject matter of general legal regulation, as well as the particular provisions (Article 2, Part 2, Articles 3, 69, Article 71, Part 1, Articles 76, 96, 101, 102 and 108) of the RA Law on Foundations of Administration and Administrative Proceeding indicates that a clear differentiation was made between the terms **administrative act, action and inaction**, in accordance with the content inherent to each of them. While using the term “**act**” in Article 69 of the Law, the legislator has not identified these three terms presenting them as “**an administrative act.**” The analysis of this Article indicates that in the sense of the subject matter of legal regulation of the latter, the term “**act**” is just used as a collective concept, which may not be a basis for the identification of these terms within the frames of legal regulation of Articles 3, 65-68, 70-72, 114, 145, 154-156, 158 of the RA Administrative Procedure Code.

At the same time, the Constitutional Court highlights the revelation of the logic of legal regulation of the RA Administrative Procedural Code from the perspective of assurance of effective remedies for judicial protection and access to the court.

In this respect, the RA Constitutional Court, in its Decisions DCC-719, DCC-721, DCC-780, DCC-844 and DCC-882, highlighted the necessity of judicial protection against the **inaction** of the administrative bodies, without which the system of protection of rights and freedoms will be incomplete.

Addressing the revelation of the logic of legal regulation of the RA legislation, in particular the Administrative Procedure Code, based on the systematic analysis of the Articles of the Code, the Constitutional Court states that the legislature intended to establish such a legal

regulation in the system of administrative justice which shall ensure full and effective implementation of the right of the **person** to judicial protection not only against **the administrative and normative acts adopted by the state or self government bodies or their officials and their actions**, but also against their **inaction**. Continuing the consistent implementation of the mentioned logic, the legislator included Section Two titled "Proceeding and Settlement of the Case before the Administrative Court", and in the context of the latter, Chapter 11 titled "Grounds for Filing a Case and Types of Lawsuits" in the Code as the legal guarantee, which ensures the effective implementation of Articles 1 and 3 of the Code. It prescribes the following types of lawsuits brought before the Administrative Court: nullity lawsuit (Article 65 of the Code), lawsuit **requiring the issue of administrative act** (Article 66 of the Code), lawsuit for the performance of **a certain action** (Article 67 of the Code), lawsuit for **recognition** (for the establishment of the existence or absence of a legal relation, Article 68 of the Code), through which the persons immediately start the judicial protection of their violated rights and freedoms.

The examination of the mentioned lawsuit types prescribed in Articles 65-67 of the Code indicates that both the lawsuit requiring the issue of administrative act and lawsuit for the performance of a certain action are called to guarantee the judicial protection of person's violated rights and freedoms caused by inaction of state or local self-government bodies or their officials. Besides in the case of a lawsuit requiring the issue of administrative act, the judicial protection is implemented against the inaction **related to the adoption of an administrative act**, and in case of lawsuit for the performance of a certain action it concerns an inaction **not related to the adoption of the administrative act**.

Moreover, the general logic of the Administrative Procedure Code, according to which within the administrative justice, the judicial protection shall be equally ensured also against inaction of the administrative bodies and public officials, consistently reflected in Article 70 of the Administrative Procedure Code, where the legislator, along with the terms "administrative act" and "action" also uses the term "inaction", and extends it also to **the lawsuit for recognition**.

The Constitutional Court states that, as opposed to Articles 1, 3 and 70 of the Code an inconsistent approach is taken in Article 68, Part 3 of the Code, and along with the terms "administrative act" and "action", the term "inaction" is not emphasized. However, as it follows from the logic of the legal regulation of the Code, in the law-enforcement practice it shall not be interpreted to the detriment of human rights protection.

The RA Constitutional Court finds that **Article 68, Part 3 of the RA Administrative Procedure Code also assumes the cases of judicial protection against the inaction of the administrative body according to the logic of the systematic analysis of other norms of the Code**, and the law-enforcer shall proceed from the interpretation of the legal norm prescribed in Article 68, Part 3 of the Code, considering that:

- a) As it follows from the aim of the legislator and the trend of the legal regulation, prescribed in Articles 1 and 3 of the Code, the mentioned Articles stipulate the

possibility of the judicial protection also in the case of **inaction** of the administrative body;

- b) in Article 70 of the Code, the legislator, along with the terms "administrative act" and "action", **equally attributed** the term **‘inaction’ to the lawsuit for recognition as well.**

6. Simultaneously, the RA Constitutional Court necessitates stating that the subject matter of the lawsuit for recognition prescribed by Article 68, Part 3 of the RA Administrative Procedure Code, is characterized by the following feature: within the subject matter of the lawsuit for recognition, the legislator provides with the possibility to challenge the legitimacy of those administrative acts of intervention or actions (inaction) **which no longer have the legal force and meaning for their addressees.** Moreover, while bringing such a lawsuit, the Applicant shall pursue the aim to solve the issues prescribed in Article 68, Part 3, Points 1- 3 of the Code.

The abovementioned feature indicates that Article 68, Part 3 of the Code is a separate institution for protection of the rights, which differs from the institution of judicial protection prescribed by Articles 65-67 of the Administrative Procedure Code by the subject matter of its legal regulation and pursued objectives, in the essence of its content, and if in the frames of the latter, the judicial protection is exercised against the acts with legal force and significance for the person, in the case of Article 68, Part 3 of the Code the judicial protection is exercised against **the acts with no legal force and significance for the person, i.e. against the acts which do not have immediate legal effects for the addressee by their adoption, implementation and manifestation.**

7. In accordance with Article 68, Part 9 of the RA Law on the Constitutional Court, the RA Constitutional Court necessitates referring also to the constitutionality of Article 114, Part 1, Point 5 of the RA Administrative Procedure Code, systemically interconnected with the challenged norm.

Article 114, Part 1 of the RA Administrative Procedure Code, titled "Types of the Judgments on the Merits", exhaustively lists the types of judgments on the merits delivered in administrative cases. Moreover, the provisions, listed the types of mentioned judgments, simultaneously, relate to the powers of the Administrative Court. In that regard, the Constitutional Court, taking into account Article 5, Part 2 of the Constitution, states that the existence of the relevant legislatively prescribed powers for the courts and their execution makes possible to guarantee the person's rights to court access, to effective judicial protection and fair trial.

The examination of Article 114 of the RA Administrative Procedure Code states that it is called, in particular, to ensure the implementation of Articles 65-68 of the Code guaranteeing the justice administration regarding the lawsuits brought in the frames of the mentioned articles. In particular, Article 114, Part 1, Point 5 of the Code is systematically interconnected with Article 68, Part 3 of the Code and is called to ensure the implementation of the Plaintiff's right to declare as unlawful the interfering legal act or the action, which have no legal force anymore. Meanwhile, as opposed to Article 68, Part 3 of the Code, which stipulates the possibility to challenge, along with the administrative act, the actions (also inaction within the

abovementioned legal positions) of the administrative body, in violation of the logic of the Code, in particular, the legal regulation of Articles 1, 3, and 70, thus Article 114 of the Code grants the Administrative Court with the corresponding power **regarding the administrative act only**. As a result, considering that Article 114, Part 1 of the Code concerns the powers of the Administrative Court, and, that according to the requirements of Article 5, Part 2 of the RA Constitution the Administrative Court may act only within the powers, clearly stipulated by the Constitution and the Law, the Constitutional Court finds that the mentioned provision blocks the possibility of implementation of Article 68, Part 3 of the Code, in regard to challenging the action and inaction of the administrative body, thus causing violation of the constitutional principle of court access, constitutional rights to effective judicial protection and fair trial, as well as a blockage of the function of the state to administer justice.

Proceeding from the results of consideration of the case and being ruled by Article 100, Point 1, Article 102 of the Constitution, Articles 63, 64, and 69 of the RA Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. Article 68, Part 3 of the Administrative Procedure Code is in conformity with the Constitution of the Republic of Armenia within the frames of the legal positions expressed in this Decision, considering also the possibility of the judicial protection against the inaction of administrative body.

2. To declare Article 114, Part 1, Point 5 of the Administrative Procedure Code of the Republic of Armenia, systematically interconnected with Article 68 Part 3, of the Administrative Procedure Code, insofar as it does not include the action and inaction of the administrative body along with administrative act, contradicting to the requirements of Articles 18 and 19 of the Constitution of the Republic of Armenia and invalid.

3. Pursuant to Part 2, Article 102 of the RA Constitution, this decision is final and enters into force from the moment of announcement.

Chairman

G. Harutyunyan

22 February 2011

DCC – 942