



IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION

OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

**ON THE CASE OF CONFORMITY OF PART 1 OF ARTICLE 207,
PART 1 OF ARTICLE 140, PART 3 OF ARTICLE 213 OF THE RA
CIVIL PROCEDURE CODE WITH THE CONSTITUTION
OF THE REPUBLIC OF ARMENIA ON THE BASIS
OF THE APPLICATION OF VARTGEZ GASPARI**

Yerevan

June 28, 2016

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

with the participation of (in the framework of the written procedure) representatives of V. Gaspari: T. Yegoryan, G. Petrosyan and L. Hakobyan,

representative of the Respondent: V. Danielyan, official representative of the RA National Assembly, Chief Specialist at the Legal Consultation Division of the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100 and Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia (with Amendments through 2005), Articles 25, 38 and 69 of the Law of the Republic of Armenia on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Part 1 of Article 207, Part 1 of Article 140, Part 3 of Article 213 of the RA Civil Procedure Code with the Constitution of the Republic of Armenia on the basis of the Application of Vartgez Gaspari.

The Case was initiated on the basis of the Application submitted to the RA Constitutional Court by Vartgez Gaspari on 11 February 2016.

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

1. The RA Civil Procedure Code (hereinafter referred to as the Code) was adopted by the RA National Assembly on 17 June 1998, signed by the President of the Republic of Armenia on 7 August 1998 and entered into force on 1 January 1999.

Part 1 of Article 140 of the Code challenged by this Case stipulates:

“1. Judicial acts of the court of general jurisdiction deciding the case on the merits shall enter into force one month following the promulgation, except for the cases provided for by Points 2 and 3 of this Article”.

Part 1 of Article 207 of the Code challenged by this Case stipulates:

“1. An appeal against a judicial act deciding the case on the merits may be lodged prior to the time limit prescribed for the entry into legal force of that act”.

Part 3 of Article 213 of the Code challenged by this Case stipulates:

“3. In case of elimination of errors in the appeal after the return of the appeal on the ground stipulated by Sub-point 1 of Point 1 of this Article and resubmission of the appeal within a period of two weeks after receiving the decision, the appeal shall be considered as accepted in the court. In case of resubmission of the appeal, no new time limit shall be provided for the elimination of errors”.

2. The procedural background of this Case is the following:

A. Demirkhanyan submitted a lawsuit to the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts against Vartgez Gaspari with a demand for a public apology for insulting honor and dignity and compensation for damage. By the 19.12.2014 Decision of the Court, the claim was partially satisfied.

By this civil case, on 26.01.2015 an appeal was lodged with the calculation of the one-month time limit provided for by the law from the

moment the Judgment became available to the appellants, i.e. on 24.12.2014.

On 12.02.2015, the RA Civil Court of Appeal made a Decision on returning the appeal, and the appellants received the said decision on 19.02.2015. The appeal was returned on the following grounds: "... the appeal was lodged on 26.01.2015, i.e. after the expiry of the time limit provided for by the law, and the appeal does not contain a motion for recovering the missed time limit, thus violating Part 1 of Article 207 of the RA Civil Procedure Code, therefore the appeal shall be returned".

By this civil case, on 05.03.2015 once again an appeal was lodged in compliance with the two-week time limit, and a motion was also filed for recognizing the one-month time limit – calculated from the moment of the announcement of the judicial act – missed due to reasons independent of the will of the appellants as valid by the force of law (*ex jure*) and recovered, and for recognizing the appeal lodged in due time, considering that the one-month time limit - from the moment the Judgment became available to the appellants - expires on 26.01.2015.

On 18.05.2015, the RA Civil Court of Appeal made a Decision on rejecting the motion for recognizing the missed time limit for appealing the Judgment as valid and for recovering the said time limit, and on returning the appeal lodged on behalf of V. Gaspari against the Judgment of the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts dated 19.12.2014.

On 10.06.2015 the appellants filed a cassation appeal against the above-mentioned Decision. By the Decision of 08.07.2015 the RA Court of Cassation rejected to accept the cassation appeal for examination.

3. Analyzing the challenged provisions of the RA Civil Procedure Code, the Applicant notes that in the event that the appeal is lodged with violation of the procedural time limit and does not contain a motion for recovering the time limit, the appeal shall be returned without providing a time limit for elimination of the error, which in this case leads to rejection to accept the appeal. Such restriction does not pursue any legitimate and reasonable aim, in which case depriving the person - who committed such error - of the opportunity of lodging an appeal may be considered fair.

According to the Applicant, “in this case the RA Administrative Procedure Code provides for diametrically opposite regulation, assessing the failure to file a motion for recognizing as valid the missed time limit as formal error”. In such circumstances, the person who lodges the appeal is given the opportunity to re-submit the appeal within a specified time limit after correcting this formal error.

The Applicant finds that in the present Case the challenged provisions were applied by the courts in the interpretation that an appeal against a judicial act of the court of general jurisdiction deciding the case on the merits may be filed one month following the promulgation of the relevant judicial act, but not following the moment the judicial act became available to the party, and it is possible to appeal the judicial act starting from the moment of receipt of that act within a month only in case a motion for recovering the missed time limit is filed.

The Applicant also finds that the challenged provisions – by the above-mentioned interpretation given to them in the court practice – directly contradict Part 1 of Article 61, Part 1 of Article 63, Articles 28 and 29 of the RA Constitution, as well as the legal positions expressed in the Decision DCC-1052 of the RA Constitutional Court which state that the time limits of appeal should be calculated from the moment of the appearance of a real opportunity the judicial act becomes available, that is, from the moment of receipt of the judicial act.

Based on the comparative analysis of the challenged provisions, the Applicant requests to determine the conformity of Part 1 of Article 140, Part 1 of Article 207 and Part 3 of Article 213 of the Code with Articles 1, 3, 28, 29, 78-81, Part 1 of Article 61 and Part 1 of Article 63 of the RA Constitution (with Amendments through 2015).

4. The Respondent’s position on the constitutionality of the challenged norms is as follows:

a) the right to access to a court may be subject to legitimate restrictions according to the law, which occurs when the restriction pursues a legitimate aim, a reasonable ratio exists between the measures applied and the aim pursued, and the access to a court is effective in terms of this restriction.

In the case of the legal regulation under discussion, the person is actually deprived of the opportunity of correcting a technical error,

according to Point 2 of Part 1 of Article 213 of the Code, and it leads to negative consequence that the person's right to apply to the court is actually restricted. According to the Respondent, such restriction may not pursue a legitimate aim, since the differentiation of this condition from other conditions stipulated by Point 1 of Part 1 of Article 213 of the Code is not reasonable and objectively justified. "In terms of such legal regulation, the person is deprived of a concrete and practical opportunity to appeal a judicial act affecting her/his rights", which restricts the right of a person to apply to a court:

b) with regard to the beginning of the calculation of the time limit for appealing the judicial act provided for by the law, and filing the relevant motion, "the legal positions of the RA Constitutional Court are as follows: 1) the beginning of the time limit for appealing the judicial act provided for by the law shall not be calculated from the moment of the announcement of the judicial act, but from the moment of actual receipt of the judicial act by the person, 2) the motion for recognizing the missed time limit as valid after the expiry of the one-month appeal time limit provided for by the law is an objective legal necessity".

According to the Respondent, the discussed mechanism for filing the relevant motion is fully in line with the requirements of the RA Constitution, i.e. in case of the mechanism for filing a motion, the access to a court is effective as the person has a concrete and practical opportunity to appeal a specific judicial act.

In a particular case, the negative legal consequences for a person are caused by the failure to file the relevant motion to the court, the return of the appeal on the said basis, and the legal interpretations of the court on this matter, and not the legal interpretations of the court regarding the calculation of the appeal time limit:

c) in the sense of the principle of legal certainty, the wordings in the challenged provisions of the Code are clear enough and fully comply with the requirements of the law (which is in accordance with the principles of the rule of law). As to the challenged Part 1 of Article 140 and Part 1 of Article 207 of the Code, the latter – in the Respondent's opinion – provide legitimate regulations, and correspond to the RA Constitution.

The Respondent also finds that “the differentiated legal regulations of the relevant norms of the Code and the RA Administrative Procedure Code are discriminatory, since such differentiation is not grounded in any legitimate aim, and the restriction in question stipulated by the Code is not reasonable and objectively justified”.

The Respondent concludes that: “1) The provisions of Part 1 of Article 207 and Part 1 of Article 140 of the RA Civil Procedure Code are in conformity with the requirements of the RA Constitution. 2) Part 3 of Article 213 of the RA Civil Procedure Code is not in conformity with the requirements of the RA Constitution, insofar as it does not sufficiently guarantee the person’s access to a court not providing an opportunity to correct the said error in the event of failure to file the relevant motion”.

5. Assessing the constitutionality of the norms challenged by this Case, the Constitutional Court considers it necessary to be based on:

- the need for effective protection of fundamental human rights and freedoms by the public authorities based on international treaties ratified by the Republic of Armenia (Articles 3 and 81 of the RA Constitution with Amendments through 2015);
- the need for guaranteeing the right to effective judicial protection and the right to a fair trial, enshrined in Part 1 of Article 61 and Part 1 of Article 63 of the RA Constitution (with Amendments through 2015), taking into account the legal positions expressed in the decisions of the RA Constitutional Court.

Within the framework of review of this Case, the RA Constitutional Court reaffirms the legal positions on similar legal regulation expressed in the Decisions DCC- 1052, DCC-1062, DCC-1249, DCC-1254 and DCC-1268.

6. Within the framework of review of this Case, the RA Constitutional Court considers it necessary to state that the logic of legal regulation of Part 1 of Article 207 of the RA Civil Procedure Code is comparable with the logic of legal regulations of Point 3 of Part 1 of Article 379 of the RA Criminal Procedure Code at issue in the Decision DCC-1052 of the RA Constitutional Court, Part 1 of Article 412 of the RA Criminal Procedure Code at issue in the Decision DCC-1062 of the

RA Constitutional Court, Part 1 of Article 156 of the RA Administrative Procedure Code at issue in the Decision DCC-1254 of the RA Constitutional Court, as well as Part 1 of Article 132 of the RA Administrative Procedure Code at issue in the Decision DCC-1268 of the RA Constitutional Court.

Considering the contextual equivalence of legal regulations at issue in the Decisions DCC-1052, DCC-1062, DCC-1254 and DCC-1268, and the provision of Part 1 of Article 207 of the RA Civil Procedure Code challenged in this Case, as well as arguing that the legal positions stipulated by these Decisions are applicable also in the aspect of the said provision at issue in this Case, the Constitutional Court is based on the legal positions expressed by the Constitutional Court on the issue of constitutionality of the provisions which were at issue in the said Decisions.

Within the framework of the above-mentioned Decisions, as a condition of the constitutionality of the challenged provisions, the Constitutional Court noted that, firstly, providing the judicial act to the person entitled to lodge an appeal in accordance with the procedure and time limits provided for by the law must be guaranteed, as well as the fact that the missed time limit due to reasons independent of the will of the person entitled to lodge an appeal must be recognized as valid by the force of law (*ex jure*). Moreover, according to the assessment of the Constitutional Court, only in these circumstances the constitutional rights to lodge a justified appeal within a reasonable time, access to a court and fair trial will be guaranteed for a person entitled to lodge an appeal.

7. Based on the study of the materials of the Case as well as the Applicant's positions regarding Part 1 of Article 140 of the RA Civil Procedure Code, the Constitutional Court states that the alleged violation of constitutional rights to a fair trial and judicial protection, as the Applicant mentioned, as well as the adverse consequences that have arisen for him are not due to the constitutionality of the challenged Part of the said Article of the Code, as well as within the framework of this constitutional legal dispute there is no causal relationship between the application of the said provision by the courts to the Applicant and the alleged violation of the aforementioned constitutional rights of the Applicant.

In this regard, the Constitutional Court argues that the mentioned provision of Article 140 of the Code stipulates the procedure for the entry into legal force of judicial acts of the courts of general jurisdiction deciding the case on the merits. Its application does not directly deprive the Applicant of the opportunity of lodging an appeal after the expiry of the time limit provided for by the law. Consequently, the adverse consequences that arose for the Applicant – i.e. the deprivation of the opportunity of filing an appeal (as provided for by the law) in the case of missed time limit due to reasons independent of the will of the Applicant – are not due to the application of the said provision by the courts to the Applicant.

Consequently, based on the requirements of Article 32, Part 1 of Article 60, Part 7 of Article 69 of the RA Law on the Constitutional Court, the Case on conformity of Part 1 of Article 207, Part 1 of Article 140, Part 3 of Article 213 of the RA Civil Procedure Code with the Constitution of the Republic of Armenia on the basis of the Application of Vartgez Gaspari is subject to termination in regard to the part of Part 1 of Article 140 of the RA Civil Procedure Code.

8. Referring to the issue of constitutionality of Part 3 of Article 213 of the RA Civil Procedure Code and taking into account the positions of the Applicant and the Respondent concerning the constitutionality of the said provision, the Constitutional Court states that within the framework of the present Case, the constitutionality of the said provision is assessed only regarding the part that the challenged provision does not provide for the opportunity to correct the said error on the basis of failure to file the relevant motion for recovering the missed time limit after the return of the appeal and resubmit the appeal within a period of two weeks.

According to the legal regulation of Point 1 of Part 1 of Article 213 of the Code, the appeal shall be returned in case the requirements of Article 210 of the same Code are not met, however, the case of absence of an appeal for recognizing the missed time limit as valid is not provided by those requirements. That is, the challenged provision of Article 213 of the Code does not provide for the opportunity to correct the error after the return of the appeal on the basis of failure to file the motion for recovering the missed time limit.

Taking into account the above-mentioned, the Constitutional Court states that the appeal is returned without providing time term for elimination of the error, which involuntarily leads to an actual refusal to accept the appeal.

In the Decisions DCC-864 and DCC-914, the RA Constitutional Court expressed legal positions, according to which the issue of the constitutionality of the legislative gap shall be subject to consideration by the Constitutional Court when the criteria established by the Constitutional Court are simultaneously available in a particular case, i.e. violation of a specific constitutional law or the potential possibility of this violation and the absence of other legal guarantees of filing this legislative gap, or conflicting law enforcement practice formed in the presence of appropriate legal guarantees in the legislation.

In this regard, the RA Constitutional Court also states that, among other things, the effective implementation of the rights to effective judicial protection and a fair trial provided for by Articles 61 and 63 of the RA Constitution (with Amendments through 2015) can be ensured **in case of legislative guarantees for mandatory consideration by a higher court of the motion for recovering the missed time limit.**

Article 78 of the RA Constitution (with Amendments through 2015) states: “The means chosen for restricting fundamental rights and freedoms have to be suitable and necessary for the achievement of the aim prescribed by the Constitution. The means chosen for restriction have to be proportionate to the significance of the fundamental right that is restricted”.

Assessing the constitutionality of the challenged norm in the context of the mentioned provisions of the Constitution, it is necessary to take into account the circumstance that the opportunity to correct the error after the return of the appeal on the basis of failure to file the motion for recovering the missed time limit is not provided.

In this sense, the Constitutional Court finds that the approaches of the Applicant and the Respondent are grounded in regard to the issue that the legal regulation stipulated by Part 3 of Article 213 of the Code creates obstacles for individuals in the protection of the right to access to a court, and does not pursue any legitimate and reasonable aim.

Disproportionality of such restriction becomes more evident when compared with other grounds provided for in Article 210 of the Code (for example, failure to file a motion by the appellant for deferment or

installment of payment of state duty or their reduction, failure to provide substantiation of violation of substantive or procedural law in the appeal, as well as on their impact on the outcome of the case, failure to submit a claim by the appellant, as well as non-signing of the appeal), and in those cases the person is given the opportunity to correct the error and re-submit the appeal.

9. The Constitutional Court considers it necessary to state that the aforementioned disproportionate restrictions of a person's right to access to a court were stipulated by the legislator not only in the framework of the civil procedure, but also the criminal procedure and partly the administrative procedure, and those restrictions concern the institution of appeal of judicial acts in both appellate and cassation procedures.

The Constitutional Court takes note of the information provided in the Applicant's explanation that "... the legal issue under discussion has already been resolved in the RA draft Law on Amending the Civil Procedure Code of the Republic of Armenia, designed and discussed by the Ministry of Justice, which proposes a new edition of the Code. Pursuing the aim to give a conceptual solution to a number of civil and judicial-legal institutes, considering the legal positions expressed by the RA Constitutional Court and the RA Court of Cassation, the said draft proposes to provide also the basis for the return, i.e. the appeal was lodged after the defined time limit and does not contain a motion for recovering the missed time limit, and the opportunity to resubmit the appeal within 15 days in case of elimination of the error".

Attaching particular importance to the institute of appeal of judicial acts in civil cases, the corresponding complex legislative regulation, and the necessity of stipulating properly regulated procedures for the motions for recovering the missed time limit, the Constitutional Court states that due to the gap in the legal regulation of Part 3 of Article 213 of the RA Civil Procedure Code, excluding the opportunity to correct the error after the return of the appeal on the basis of failure to file the motion for recovering the missed time limit may lead to violation of the person's rights to a fair trial and judicial protection in the law enforcement practice.

Based on the review of the Case and being governed by Point 1 of Article 100 and Article 102 of the Constitution of the Republic of Armenia (with Amendments through 2005), Point 6 of Article 32, Point

1 of Article 60, Articles 63, 64 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To partially terminate the proceedings of the Case on conformity of Part 1 of Article 207, Part 1 of Article 140, Part 3 of Article 213 of the RA Civil Procedure Code with the Constitution of the Republic of Armenia on the basis of the Application of Vartgez Gaspari with regard to Part 1 of Article 140 of the RA Civil Procedure Code.

2. Part 1 of Article 207 of the RA Civil Procedure Code is in conformity with the RA Constitution insofar as – in line with the legal positions expressed in the Decisions DCC-1052, DCC-1062, DCC-1254 and DCC-1268 of the RA Constitutional Court – providing the judicial act to the person entitled to lodge an appeal in accordance with the procedure and time limits provided for by the law is guaranteed, and the missed time limit due to reasons independent of the will of the latter – in case of relevant motion and evidence – is recognized as valid by the force of law (*ex jure*).

3. To declare Part 3 of Article 213 of the RA Civil Procedure Code contradicting the requirements of Articles 61, 63 and 78 of the Constitution of the Republic of Armenia (with Amendments through 2015) and void in regard to the part that it does not provide for the opportunity to correct the error on the basis of failure to file a motion for recovering the missed time limit after the return of the appeal and resubmit the appeal within the time limit provided for by the law.

4. According to Point 9.1 of Article 64 and Part 12 of Article 69 of the RA Law on the Constitutional Court, the judicial act adopted against the Applicant with the application of the disputed Part 3 of Article 213 of the RA Civil Procedure Code is subject to review due to new circumstances and in accordance with the procedure provided for by the law.

5. Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia this Decision is final and enters into force from the moment of the announcement.

Chairman

G. Harutyunyan

June 28, 2016
DCC-1290