

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

**ON THE CASE OF CONFORMITY OF CLAUSES “C” AND “E” OF PART 3 OF
ARTICLE 66 OF THE LAW OF THE REPUBLIC OF ARMENIA ON THE
FUNDAMENTALS OF ADMINISTRATION AND ADMINISTRATIVE PROCEDURE
WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF
THE APPLICATION OF VLADIMIR MKRTCHYAN**

Yerevan

30 April 2019

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

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

the representative of the applicant: V. Zurnachyan,

the respondent: A. Kocharyan, Official Representative of the National Assembly of the Republic of Armenia, Head of the Legal Expertise Division of the Legal Expertise Department at the Staff of the National Assembly of the Republic of Armenia,

pursuant to Clause 1 of Article 168, Clause 8 of Part 1 of Article 169 of the Constitution, and Articles 22 and 69 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of Clauses “C” and “E” of Part 3 of Article 66 of the Law of the Republic of Armenia on the Fundamentals of Administration and Administrative Procedure with the Constitution of the Republic of Armenia on the basis of the application of Vladimir Mkrtychyan

The Law of the Republic of Armenia on the Fundamentals of Administration and Administrative Procedure (hereinafter referred to as the Law) was adopted by the National Assembly on 18 February 2004, signed by the President of the Republic on 16 March 2004, and entered into force on 31 December 2004.

Clauses “C” And “E” of Part 3 of Article 66 of the Law, titled “Ceasing to be in Effect of the Lawful Administrative Act” consequently prescribe:

“3. Lawful favorable administrative act may cease to be in effect, if

....

(c) the addressee of the act was under obligation to fulfill an obligation prescribed by the law in connection with that administrative act, but did not fulfill it or fulfilled it improperly;

....

(e) the administrative body would have the right not to adopt the administrative act as a result of amendment in normative legal act, as long as the addressee of administrative act have not yet disposed of the benefits granted by the administrative act, or the activities guaranteed by the administrative act have not yet been implemented towards the addressee, and if prevalent public interest may be violated in case administrative act does not cease to be in effect.”

The mentioned provisions of the Law have not been a subject of amendment and supplement.

The case was initiated on the basis of the application of Vladimir Mkrtychyan submitted to the Constitutional Court on 19 November 2018.

Having examined the application, the written explanations of the respondent, other documents contained in the case, as well as having analyzed the relevant provisions of the challenged provision and the other norms of correlated documents of the case, the Constitutional Court **ESTABLISHED:**

1. Applicant’s arguments

1. The applicant considers that the legal regulations, prescribed in Clauses “c” and “e” of Part 3 of Article 66 of the Law, are in contradiction with Articles 5, 6, 8, 60, 73, 75, 78 and 79 of the Constitution with the following reasoning:

- the considered legal regulations when regulating the fundamental rights and freedoms enshrined by the Constitution do not sufficiently define the organizational mechanisms and procedures necessary for the effective exercise of these rights and freedoms;

- the considered regulations do not define the grounds and scope of these limitations; they are not sufficiently certain and, as a result, the holders and the addressees of these rights and freedoms are not able to manifest a proper conduct;

- the measures selected for the limitation of the fundamental rights and freedoms enshrined by the Constitution are not suitable nor necessary for achieving the goal defined by the Constitution, and they are not equivalent to the significance of the limited fundamental rights and freedoms;

- the considered legal regulations allow to grant retroactive effect to the laws and other regulatory legal acts that deteriorate the legal status of a person.

According to the applicant, the legislation, in particular, the Code of Administrative Offenses of the Republic of Armenia contains many norms that compulsory ensure conduct or proper conduct of the duties of the addressee of the administrative acts. Therefore, according to the applicant, if the addressee of the administrative act has not fulfilled or improperly fulfilled the obligation imposed on him/her by the administrative act, then it may be fulfilled by the means of compulsion, and in such conditions there will be no need to recognize the administrative act as completely invalid.

The applicant also considers that the circumstance of contradiction with the legislation is not sufficiently enough for recognizing the administrative act as invalid on the basis of the claimant's application. It is also necessary that this act violates the person's rights and freedoms enshrined by the Constitution, international treaties, laws and other legal acts, or it creates danger for their violation.

The applicant considers that "the provisions defined by Clauses "c" and "e" of Part 3 of Article 66 of the Law of the Republic of Armenia "On the Fundamentals of Administration and Administrative Procedure" contradict Articles 5, 6, 8, 75, 78 and 79 of the Constitution, as they do not correspond to the principle of the legal certainty, and while regulating fundamental rights and freedoms they have not established the organizational mechanisms and procedures required for the effective exercise of these rights and freedoms, and the measures chosen to limit fundamental rights and freedoms are unsuitable and unnecessary for the achievement of the goal established by the Constitution and are not equivalent to the significance of the limited basic right and freedom".

2. Respondent's arguments

While opposing the applicant's arguments, the respondent considers that within the framework of the given constitutional and legal dispute, the legislation of the Republic of Armenia has defined sufficient legal mechanisms and procedures necessary for the effective implementation of the fundamental rights and freedoms established by the Constitution (Articles 60 and 79) and the measures chosen for the restriction of these rights and freedoms are not only consonant (Article 66 of the Law), but they also derive from the requirements of the relevant constitutional and legal norms.

The respondent, on the basis of a systemic analysis of the above-mentioned legal acts and the law, considers it necessary to state that the legislator pursued the goal of establishing such a legal regulation, which amongst the others, will guarantee the complete and effective implementation of the requirement of restricting the property right, as well as the property right which is conditioned with the prevalent public interest.

According to the respondent, Clauses “c” and “e” of Part 3 of Article 66 of the Law comply with the requirements of the Constitution.

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

Within the scopes of the given case, the Constitutional Court considers it necessary, in particular, to address the following issues:

1. Can the non-fulfillment by the addressee of a lawful administrative act of any obligation related to the administrative act, prescribed by the Law, and imposed on a person by an administrative act on the basis of law, become a legislative basis for recognizing a lawful administrative act as ceased to be in effect?

2. Do the disputed legal regulations allow granting retroactive effect to the laws or other regulatory legal acts that deteriorate the legal status of a person?

3. Do the challenged legal regulations restrict any fundamental right and, in case of restriction, do they comply with the principle of proportionality?

4. Are the challenged legal regulations certain?

5. Does the court’s interpretation of Clause “e” of Part 3 of Article 66 of the Law violate the right of a person to effective judicial protection of his/her rights and freedoms?

The Constitutional Court considers, that the applicant's argumentation in regard to the contradiction of the challenged provisions with Articles 5, 6, 8 and 60 of the Constitution, in fact, do not relate to the subject of the given application.

When implementing the examination for the present case, the Constitutional Court shall assess the compliance of the challenged legal regulations with the requirements of Articles 39, 61, 73, 75, 78 and 79 of the Constitution.

4. Legal assessments of the Constitutional Court

4.1. According to Clause “a” of Part 2 of Article 53 of the Law, within the meaning of this Law, **a favorable** administrative act is the administrative act through which the administrative bodies grant rights to persons or create for them any other condition that improves the legal or factual situation of those persons, and according to Part 1 of Article 66 of the Law, the **lawful** administrative act is the administrative act, which was adopted in accordance with the requirements of law.

The Constitutional Court states that the challenged provisions relate to those administrative acts that are adopted in accordance with the requirements of the laws and which grant rights to persons or create any other condition that improves the legal or de facto situation of these persons.

The challenged Clause “c” of Part 3 of Article 66 of the Law stipulates that a favorable lawful administrative act may cease to be in effect if the addressee of the act was under obligation to fulfill an obligation prescribed by law in connection with that administrative act, but did not fulfill or fulfilled improperly. That is, this case concerns the **administrative acts with the condition: the legal prerequisite** for the enjoyment of the rights provided for by the administrative act or any other condition that improves a person's legal or de facto position **is the performance of any obligation provided by the law and imposed on this person by an administrative act.** The Constitutional Court states that the wording “an obligation prescribed by law in connection with that administrative act” means that **the obligation shall be prescribed by the law** and, through an administrative act, it shall be directed to its addressee. Consequently, the requirement of the second sentence of Article 39 of the Constitution that “**no one may bear obligations that are not prescribed by law**” was followed.

This substantiation for recognizing a favorable lawful administrative act as ceased to be in effect applies to those cases when the favorable condition (benefit) of the administrative act may be enjoyed by the beneficiary person **only in case of duly administering of the obligation prescribed by the law and imposed on him/her by the administrative act**, which means that the consequence of failure to fulfill or improper fulfillment of this obligation is the non-occurrence of the favorable condition provided by the administrative act, that is, the non-occurrence of the favorable consequences prescribed for him/her due to the fault of the addressee of the administrative act.

Consequently, the Constitutional Court holds that **the disputed provision of the Law is not applicable** in all cases where **an obligation or other restriction (unfavorable condition)** prescribed by the law and specified in an administrative act **is not a prerequisite for the exercise of the right or other favorable condition provided by the administrative act.**

As for the issue whether the imposition of any obligation restricts the corresponding right or freedom of a person, the Constitutional Court considers that it at least restricts the fundamental right of a person to freedom of action and may also affect the exercise of more specific, in comparison with this fundamental right, basic rights. With regard to the loss of effect of a favorable administrative act, within the guaranteed boundaries of the protection of trust, this is itself an interference with the exercise of the rights and freedoms of a person.

In the given case, the limitation is the combination of providing the beneficiary person with the benefit granted by a favorable administrative act and the proper fulfillment of the obligation prescribed by the law, which, by envisaging a favorable condition, aims to direct the beneficiary to the proper fulfillment of the obligation, which is prescribed by the law but is not fulfilled yet, and which the Constitutional Court assesses as a lawful goal.

The Constitutional Court considers that directing a person in such a manner to the proper fulfillment of his/her lawfully enshrined obligations is a precise (and special) mechanism

prescribed on the level of the law, by the means of which, and through establishing predictable consequences for a person, that is by stipulating the authority to declare an administrative act to cease to be in effect, it becomes clear or it at least should be clear, that he/she can make use of the favorable condition prescribed by the administrative act only if he/she properly perform obligation put on him/her, otherwise s/he is deprived of this opportunity.

The condition defined by an administrative act only concretizes the obligation prescribed by the law in respect to the specific legal relations, including a specific addressee, which is a legislative guarantee typical for the legal state aimed to ensure the enforcement of laws, which in turn is one of the elements of legal security. Consequently, this mechanism is not controversial from the perspective of the requirements prescribed by Article 75 of the Constitution.

The Constitutional Court, at the same time, considers that the conditioning of the benefits provided by the administrative act with the proper fulfillment of the obligation may refer to those cases when they are interconnected in the terms of content. In the other cases, this mechanism cannot be applied.

The Constitutional Court considers that in admissible situations the legislator has chosen a suitable mean for achieving the above-mentioned lawful aim. No other alternative mean, according to the assessment of the Constitutional Court, could correspond to the essence of the administrative acts with the condition, that is, to be suitable, since it should have presupposed the differentiation of the provided benefits and obligations in the situation when they are interrelated.

Thus, the Constitutional Court considers that Clause “c” of Part 3 of Article 66 of the Law complies with the requirement of legal certainty, since it is clearly formulated and enables the addressee of the act to bring his/her behavior in line with the requirements of the Law, and the chosen mean to condition the benefit granted by the administrative act with the fulfillment of the obligation prescribed by the law is a suitable mean for achieving the lawful goal of fulfilling the requirements of the law in the situations of content interconnection of rights and obligations, therefore, from the standpoint of Article 79 of the Constitution, it is not controversial.

Moreover, the mechanism envisaged by the Law, as a part of the system of the Law, creates an effective opportunity for the beneficiary person, through the proper fulfillment of the obligation imposed on him/her, to exercise the right granted to her/him by the administrative act or to challenge the legal lawfulness of the adopted administrative act, in other words, the administrative act may impose an obligation on the person which is only prescribed the law, while Part 2 of Article 109 of the Law stipulates the mechanism of compensation of suffered damage to the beneficiary persons in the event of the loss of the effect of favorable lawful administrative acts and by the virtue of the protection of trust.

The Constitutional Court considers it necessary to emphasize that, within the meaning of Clause “c” of Part 3 of Article 66 of the Law, the constitutionality of the provision securing the obligation established by (another) the law was not a subject of dispute by the applicant, therefore, the Constitutional Court by the virtue of Part 13 of Article 69 of the Constitutional Law “On the Constitutional Court” in conjunction with Part 10 of Article 68 of the mentioned Law is not entitled to assess the compliance of this provision with the Constitution.

4.2. According to the challenged Clause “e” of Part 3 of Article 66 of the Law, a lawful favorable administrative act may cease to be in effect, if the administrative body would have the right not to adopt the administrative act as a result of amendment in normative legal act, if the addressee of administrative act have not yet disposed of the benefits granted by the administrative act, or the activities guaranteed by the administrative act have not yet been implemented towards the addressee, and if prevalent public interest may be violated in case administrative act does not cease to be in effect. In this case, we refer to another ground for the cessation of the effect of a favorable lawful administrative, the constitutionality of which, in addition to the above mentioned criteria, shall also be assessed from the standpoint of Article 73 of the Constitution.

The analysis of the above mentioned provision of the Law indicates that a favorable lawful administrative act may cease to be in effect if the following conditions are simultaneously present:

- 1) if the administrative body would have the right not to adopt the administrative act as a result of amendment in normative legal act;
- 2) if the prevalent public interest may be violated in case the respective administrative act does not cease to be in effect;
- 3) if the addressee of administrative act have not yet disposed of the benefits granted by the administrative act, or the activities guaranteed by the administrative act have not yet been implemented towards the addressee.

In the absence of any of these conditions, the cessation of effect of a favorable lawful administrative act on the basis of the challenged provision is inadmissible. The existence of these conditions within the framework of the actual circumstances of each particular case shall be assessed by the administrative body, and in the case of judicial protection – it shall also be assessed by the court, and as a result, the administrative body, and in the case of judicial protection - also the court shall come to the conclusion that:

- 1) any normative legal act conditioning the cessation of effect of an administrative act has been a subject of such amendments that they would exclude the adoption of such an administrative act, if these requirements were in effect when the administrative act was adopted;

2) there is a real prevalent public interest at place, which must be identified, and a possible violation of this interest can be suppressed only in the event of the cessation of effect of this act;

3) the addressee of the administrative act has not disposed of the benefits granted by the administrative act or activities guaranteed by the administrative act have not yet been implemented towards him/her.

The provision “prevalent public interest” is of pivotal importance for the assessment of the lawfulness of an intervention. The analysis of the Constitution shows that in general the public interest is a constitutional value, for the protection of which a fundamental right or freedom can be restricted.

The stipulation of the prevalent public interest in the challenged provision means that the right or freedom, which is limited in the event of the cessation of effect of a favorable administrative act, should have less importance in this particular case of restriction than the right or freedom limited by it. Consequently, the administrative body, and in the case of judicial protection - also the court, **are obliged to assess the significance of the public interest.**

The Constitutional Court, at the same time, considers that the more important is the right or freedom in which the state interferes, and the more intense is the interference with the right or freedom, the weightier shall be the substantiation for interference in the respective administrative and judicial acts.

The Constitutional Court states that if the administrative body would have the right not to adopt the administrative act as a result of amendment in normative legal act, if the addressee of administrative act have not yet disposed of the benefits granted by the administrative act, or the activities guaranteed by the administrative act have not yet been implemented towards the addressee, then **the cessation of the force of a favorable lawful administrative act aimed to ensure a prevalent public interest** cannot in itself be assessed as an unlawful interference with any fundamental right or freedom.

While referring to the alleged violation of the prohibition of retroactive effect of laws and the other legal acts deteriorating the legal condition of a person, the Constitutional Court considers that the challenged provision does not and cannot relate to the cases when the person has fully or partially received the benefit granted by the administrative act, therefore, it is not about deterioration, as long as the legal relationship has not completed. In addition, a full-fledged opportunity for compensation for damage gives a possibility for an effective exercise of the right to protection of trust of the addressee of an administrative act.

The Constitutional Court, simultaneously, considers it necessary to note that the recognition of a favorable administrative act as ceased to be in effect on this basis cannot be linked to the ground defined by Clause “c” of Part 3 of Article 66 of the Law: this ground is one

of the alternatives for the cessation of force of a favorable administrative act. Moreover, the Constitutional Court finds it necessary to note that in the case of an administrative act conditioned with the proper fulfillment of an obligation, the non-fulfillment or improper fulfillment of this obligation cannot but lead to the failure to provide the benefits granted by this administrative act, therefore, the right to protection of trust in respect to this benefit cannot arise by itself only on the basis of the adoption and entry into force of such an administrative act.

The Constitutional Court finds that the requirements of the challenged Clause “e” of Part 3 of Article 66 of the Law are stated precisely, they are clear to all addressees, while the use of evaluative concepts in the Law is in itself acceptable practice and cannot lead to a contradiction with the Constitution.

This provision of the Law pursues the goal of implementing the prevalent public interest, it does not imply the retroactive effect of ceased to be in effect favorable administrative acts on the benefit received by the person, and also it does not in any way limit his/her right to compensation for a possible suffered damage.

5. The interpretation provided to the challenged provisions by the final act of the court

As a result of research of the judicial practice regarding the provisions challenged in the given case, the Constitutional Court states that when interpreting Clause “c” of Part 3 of Article 66 of the Law, the Administrative Court of Appeal in its Decision of 14 June 2018 expressed the following legal position: “In the present case, when issuing an administrative act, the administrative body defined also certain special conditions that the addressee of the act had to comply with. The first special condition relates to the compensation for a damage caused to the persons. In the act, particularly, it is noted that the construction developer had to come to an agreement on compensation for the damage caused before the launch of construction and during it with the subjects who may suffer damage as a result of construction.

As a result of the consideration of the case, it becomes clear that the third party did not comply with the condition defined by the administrative act, i.e. the construction developer did not come to an agreement with the subjects who could suffer damage as a result of the construction, in particular with the plaintiff, given the fact that the territory owned by the plaintiff and the construction site are neighboring and as a result of the construction the plaintiff is receiving a damage.

That is, the construction developer did not fulfill the obligation prescribed by the Law in connection with the administrative act, which he had to fulfill as the addressee of that act.

As a result of the above, the Court of Appeal considers that there is a basis for recognizing an administrative act as ceased to be in effect, on the basis of the ground established by Clause “c” of Part 3 of Article 66 of the RA Law “On the Fundamentals of Administration and Administrative Procedure”.

The Constitutional Court finds, that the legal positions expressed by the Administrative Court of Appeal in the given respect cannot become a subject of assessment by the Constitutional Court, as long as they do not relate to problematic interpretation of the disputed provision from the viewpoint of the Constitution, and the possible correction of judicial mistakes is out of the scopes of powers of the Constitutional Court.

The Constitutional Court states that the Administrative Court of Appeal expressed the following position regarding the contested Clause E of Part 3 of Article 66 of the Law: “While referring to the ground for cessation of effect of administrative act, defined by Clause E of the same part of the same Article, the Court of Appeal states: the administrative act with a reference to this part can cease to be in effect only if all the requirements specified in this part are at place, in particular:

- after the adoption of the administrative act, a change in the normative legal act took place;
- the change is of such a nature that, as a result of the change, the administrative body would have the right not to adopt the given administrative act;
- the addressee of administrative act have not yet disposed of the benefits granted to him/her by the administrative act;
- prevalent public interest may be violated in case administrative act does not cease to be in effect.

In the given case, the subject of consideration should also be the circumstance whether all the conditions envisaged by the mentioned norm for recognizing an administrative act ceasing to be in effect were preserved.

As it has been noted above, after the administrative act was adopted, a change in the normative legal act occurred; in this case, it becomes evident that if the change in the normative legal act had taken place before the administrative act was adopted, then the administrative body would have had the opportunity to issue another administrative act. **As for the circumstances of the person disposing the benefits granted by the administrative act, it should be noted that during the examination of the present case it turned out that the addressee of the act has not yet exercised the right granted to him by the administrative act, that is, the construction has not been carried out.**

While referring to the expression “prevalent public interest may be violated in case administrative act does not cease to be in effect” used in the aforementioned norm, the Court of

Appeal states that in the present case, preserving the administrative act in force may lead to a violation of the prevalent public interest, bearing in mind the circumstance that if the given construction is carried out, then the distance between the buildings will be out of scopes defined by the given legal regulation, as a result of which not only the interests of the owner (plaintiff), but also the interests of society will be violated, as long as in case of any natural disaster, fire and other similar situations there will be a need to protect the rights of every person, and the building to be constructed will directly affect the implementation of the protection of the rights of persons. Consequently, the current dispute, by its essence, inherently affects not only the property rights of the plaintiff and a third party, but it also concerns the safety of the population, which is a prevalent public interest.

Based on the foregoing, the Court of Appeal ascertains that in the present case there are also implicit grounds, defined by clause “e” of part 3 of Article 66 of the RA Law “On the Fundamentals of Administration and Administrative Procedure”, for declaring the administrative act to cease to be in effect, and the administrative body, in the case of availability of these grounds, was obliged to declare the building permit issued to a third party as ceased to be in effect”.

The Constitutional Court considers that from the position of the Administrative Court of Appeal it becomes clear that the Court, when applying the contested norm, gave a narrow interpretation to the wording “**dispose of the benefits granted to him/her**”, did not substantiate it, in particular, the Court did not address the issue of what the dispose of the granted benefit means, and in this case, what extent/amount of work performed can be assessed as a disposal of the benefit. The Administrative Court of Appeal stated that **the addressee of the act has not yet exercised the right given to him by the administrative act, that is, the construction has not been carried out**. Consequently, according to the interpretation of the Administrative Court of Appeal, only **the full exercise of the right granted by the administrative act can be considered as the disposal of the benefits provided to him**.

Such an interpretation does not provide an effective judicial protection of the rights of a person, since as a result of partial use of all the benefits, the person has suffered certain damages, the presence of which, regardless of the need for further assessment of their validity in the manner prescribed by the Law and their volume, was, in the essence, not assessed by the Administrative Court of Appeal.

Based on the results of the consideration of the case and guided by Part 1 of Article 168, Clause 8 of Part 1 of Article 169, Article 170 of the Constitution, Articles 63, 64 and 69 of the Constitutional Law "On the Constitutional Court", the Constitutional Court **DECIDED**:

1. Clause “c” of Part 3 of Article 66 Law of the Republic of Armenia “On the Fundamentals of Administration and Administrative Procedure” is in conformity with the Constitution.

2. Clause “e” of Part 3 of Article 66 of the Law of the Republic of Armenia “On the Fundamentals of Administration and Administrative Procedure” complies with the Constitution in the interpretation that the provision “the addressee of the administrative act did not dispose the benefits granted by the administrative act” includes not only the complete implementation by the addressee of any right or freedom or other favorable condition prescribed by that act, but also a partial exercise of this right or freedom or a favorable condition, and within the framework of the factual circumstances of each particular case it shall be assessed by an administrative body, and in the case of the judicial protection it shall also be assessed by a court.

3. According to Part 10 of Article 69 of the Constitutional Law “On the Constitutional Court”, the final judicial act adopted against the applicant shall be subject to review in the manner prescribed by law on the basis of a newly revealed circumstance, since Clause “e” of Part 3 of Article 66 of the Law of the Republic of Armenia “On the Fundamentals of Administration and Administrative Procedure” was applied against the applicant in a different interpretation.

4. According to Part 2 of Article 170 of the Constitution, this Decision is final and shall enter into force upon promulgation.

Chairman H. Tovmasyan

30 April 2019

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