

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

**ON THE CASE CONCERNING THE DETERMINATION OF THE ISSUE REGARDING
THE CONFORMITY OF PARAGRAPH 2, PART 2, ARTICLE 285 OF THE CRIMINAL
PROCEDURE CODE ON THE BASIS OF THE APPLICATION OF THE CITIZEN KH.
SUKIASSYAN WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA**

Yerevan

12 September 2009

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (presiding judge), K. Balayan, H. Danielyan (rapporteur), F. Tokhyan, V. Hovhanissyan, H. Nazaryan, R. Papayan, V. Poghosyan, M. Topuzyan,

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

examined in a public hearing by a written procedure the case based on the application of the citizen Kh. Sukiassyan regarding the determination of the issue concerning the conformity of Paragraph 2, Part 2, Article 285 of the RA Criminal Procedure Code with the Constitution of the Republic of Armenia.

The case was initiated through the application of 23.04.2009 submitted to the Constitutional Court by Kh. Sukiassyan.

Having examined the rapporteur judge's report and written explanations of the parties on this case, the RA Criminal Procedure Code and other documents of this case, the Constitutional Court of the Republic of Armenia

FOUND

1. The RA Criminal Procedure Code was adopted by the National Assembly of the Republic of Armenia on July 1, 1998, signed by the RA President on September 1, 1998, and entered into force on January 12, 1999.

The disputed Article 285 of the RA Criminal Procedure Code was amended by the RA National Assembly on May 25, 2006 by the Law on “Amendments and Additions to the Criminal Procedure Code of the Republic of Armenia”.

Article 285 of the RA Criminal Procedure Code is entitled as “Examination of the motions regarding selection of detention as a measure of restriction or prolonging the terms of detention” Paragraph 2 of Part 2 which according to the editing of 25 May, 2008 defines: “The court discusses the motion to select detention as a measure of restriction against a person under retrieval in the presence of the party who has submitted the motion and the defense of the person under retrieval, if the latter participates in the hearing.”

2. The procedural prehistory of the case subject to examination concludes the following: on 05.03.2008, Yerevan Kentron and Nork-Marash communities General Jurisdiction Court made a decision to enforce detention against defendant Kh. Sukiassyan as a measure of restriction for 2 months from the moment of his reveal thereof.

The representatives of the Applicant submitted a motion to the General Jurisdiction Court of the Communities of Kentron and Nork-Marash on 11.11.2008 on recognizing the decision of the mentioned court on the missing deadline defined for the appeal as valid and restituted.

By the decision of 21.11.2008, the General Jurisdiction Court of Kentron and Nork-Marash of Yerevan dismissed the motion. The representatives of the applicant appealed the above-mentioned decision at the RA Criminal Court of Appeal of 08.12.2008, simultaneously submitting an appeal against the decision of the General Jurisdiction Court to administer the detention as a measure of restriction and investigate it on the merits.

The RA Criminal Appeal Court by the two decisions of 22.12.2008 dismissed the first appeal and the second appeal was left without consideration.

Pursuant to the decision of 03.03.2009 of the RA Cassation Court, the cassation complaint against the above-mentioned decisions was declined.

3. According to the Applicant, the disputed provision of Article 285 of the RA Criminal Procedure Code contradicts the requirements of Article 3, Part 3, Article 16, and Article 25 of the RA Constitution.

According to the Applicant, the contents of Part 3 of Article 16 of the RA Constitution prescribes that only an arrested person can be detained only by the court ruling within 72 hours, “i.e. arrest of a person is the precondition for the detention within the court ruling. Otherwise, the mentioned norm of the Constitution prohibits the court to adopt a decision on detention of a person if the latter has not been arrested, or, although he has been arrested 72 hours of keeping him in the status of arrested has expired until the appropriate decision of court has been made.” Consequently, according to the Applicant, the disputed norm provided the court with the opportunity to adopt a decision on detaining a person in absentia in the condition of the absence of latter, which factually contradicts the requirements of Part 3 of Article 16 of the Constitution.

The Applicant states that “...the procedure which is prescribed by Part 3, Article 16 of the RA Constitution, guarantees a wanted person not only to take part in the judicial examination of the issue of the criminal process of administering or not the detention as a measure of restriction against him, but also during the hearing to present the his objections, including the motions to be released on bail.”

Reflecting this issue, if in the case of adopting a decision of the detention in absence of the latter contradicts the right of freedom of movement prescribed by Article 25 of the RA Constitution, the Respondent considers necessary to mention that pursuant to the requirements of Article 43 of the RA Constitution the right of free movement of a person may be temporarily restricted only by law if it is necessary in a democratic society in the interests of national security, public order, crime prevention, protection of public health and morality, constitutional rights and freedoms, as well as the honor and reputation of others.

Consequently, restriction of the right of free movement by the means of detention of the accused does not contradict to Article 25 of the RA Constitution.

4. The Respondent objected to the Applicant's statements and stated that the legal norm defined by Article 16 of the RA Constitution concerns the institute of arrest and not the detention. Therefore, it is not accidental that the phrases “arrested person” and “from the moment of arrest” are used in the mentioned norm, from which follows that the given norm concerns not all persons and cases, when it is possible to administer detention, but only the institute of arrest.

Concerning the requirement of adoption of the decision within 72 hours and ensuring the presence of the person at the hearing, according to the Respondent are just guarantees so that the court could provide with adequate assessment concerning the actions of the bodies of prosecution and motivation of the decision.

Simultaneously, the Respondent considers as vital to emphasize the circumstance that the court is completely competent to adopt a decision on detention without the motion of the criminal prosecution, or the criminal prosecution can enter such a motion also in the cases when the arrest has not been enforced against that person. That is, the legal consequences of arrest in any case shall be either releasing a person within 72 hours or adopting a decision on detention, but the fact of arrest of a person is not a precondition for the detention.

Consequently, from the interpretation of Part 3 of Article 16 of the RA Constitution does not follow that arrest is the only precondition for detention; sometimes they follow one another.

Concerning the issue that adopting a decision on the detention of a person in absentia contradicts the requirements prescribed in Article 25 of the RA Constitution, i.e. right of free movement, the Respondent states that pursuant to the requirements of Article 43 of the Constitution, the right of free movement of a person may be restricted by law if it is necessary in a democratic society in the interests of national security, public order, crime prevention, protection of public health and morality, constitutional rights and freedoms, as well as honor and reputation of others. Consequently, by implementing detention against the accused, the restriction of the right of free movement does not contradict Article 25 of the RA Constitution.

5. The Constitutional Court states that the Republic of Armenia, by proclaiming itself as a rule-of-law state, pursuant to Article 16 of the RA Constitution distinctly prescribes and ensures the right to personal liberty and immunity for each person. This Article of the Constitution, reproduces the provisions of Article 5 of the European Convention on Protection of Human Rights and Fundamental Freedoms, Article 3 of Universal Declaration on Human Rights, Article 9 of International Pact on Civil and Political Rights and distinctly defines the cases of depriving a person of liberty predetermining in each case the lawful goals of the restriction of the liberty of a person.

Article 43 of the RA Constitution does not consider the right of personal liberty and immunity as a restricting right on the grounds of this Article. A specific case of restriction of rights is available when the Constitution decides the criteria of limitation of the given right, its frames and cases and does not even reserve it to the competence of the legislator.

The Constitutional Court emphasizes that the constitutionalist stipulating the cases of depriving of liberty in Part 1, Article 16 of the RA Constitution and, simultaneously, reserves the choice of forms of depriving the liberty within the goals and grounds expressed in them to the legislator and does not predetermine what procedural means can be implemented in each case or for achieving a specific goal. In accordance with the RA Criminal Procedure Code and Part 1, Article 16 of the RA Constitution has envisaged arrest and detention as procedural means for achieving separate lawful goals prescribed by them, and simultaneously have defined the function, goal, and basis for each of them.

Article 16 of the Constitution pursues the aim to exclude depriving a person of liberty arbitrarily; in its Parts 2, 3, and 4 it stipulates the legal guarantees, which are called to defend a person from depriving of liberty illegally.

Part 3 of Article 16 contains the most important guarantees:

1. A person cannot be arrested and kept in custody more than 72 hours,
2. A person shall be detained only on the basis of the court ruling. This guarantee is conditioned by the fact that the court being independent and impartial, is called to present the interest of the right exclusively, and can present a fair and objective assessment of reasonableness of depriving a person of liberty.
3. If the arrested person is not detained within 72 hours by the court ruling he/she must be released immediately.

Thus, the aim of the provision stipulated in Part 3 of Article 16 is to exclude keeping an arrested person in custody arbitrarily if a decision to detain him within the timeframe prescribed by this provision was not made. Accordingly, the subject of legal regulation of this norm is the legal consequences of non-adoption a decision on detention within the period defined by this norm. The subject of legal regulation and the aim of the norm stipulated in Part 3 of Article 16 show that it defines the legal consequences of non -adopting a decision on detention within the time frame prescribed by the Constitution in the case of implementation of the institute of detention.

Taking into account the constitutional-legal context of Article 16 of the RA Constitution, the subject of legal regulation and aim of Part 3, Article 16 of the RA Constitution, the Constitutional Court states that Article 16 of the RA Constitution, as well as the provision stipulated in Part 3, do not define the succession of implementation of “arrest” and “detention” and adoption of necessary decisions on arrest and detention by the competent bodies and do not consider arrest as an obligatory precondition for detention; consequently, absence of the fact of being arrested is not considered as a circumstance excluding the detention. Simultaneously, at the stage of pretrial proceeding of a criminal case, the ruling on detention adopted by court for administering its function of control is not a convictive act towards a person but a precondition insuring the effective and impartial implementation of justice and requirements of Article 16 of the RA Constitution and Article 5 of European Convention on Human Rights and Fundamental Freedoms.

6. The Constitutional Court finds that the possibility of the obligatory succession of implementation of the institutes of “arrest” and “detention” is excluded also in the context of the essence, aims, and grounds for implementation of these institutes.

The essence and aims of the institute of “arrest” are revealed in Part 1 of Article 128 of the RA Criminal Procedure Code. Arrest is a means of judicial compulsion and, the obligatory attribute of the latter is its short term and it aims to prevent the commitment of a crime and prevention of his/her escape after commitment of a crime. The aims of arrest are in conformity with the aims stipulated in Point 4, Part 1, Article 16 of the RA Constitution, i.e. the legislator prescribed arrest as a procedural means for achieving the aims stipulated in the mentioned constitutional norm. Deriving from the aims of arrest, Chapter 17 of the RA Criminal Procedure Code defines the basis and order (procedure) of arrest.

The essence of the institute of “detention” as a kind of measure of restriction is revealed in Article 134 of the RA Criminal Procedure Code. Pursuant to the latter, detention is a measure of restriction towards the accused, which follows the prevention of a person’s non-adequate behaviour during the proceeding. In distinct from arrest, detention, as one of the measures of restriction, has an alternative and is chosen from all measure of restriction only in the case when only that kind of measure of restriction can assist to achieving the followed aims taking into consideration the circumstances prescribed in Part 3 of Article 135 of the RA Criminal Procedure Code. Article 135 of the Code prescribes the basis for detention and points out possible manifestations of non-adequate behavior for preventing which detention is

implemented as a measure of restriction. Analysis of the aims and basis of detention states that the aims, which follow detention by essence, are in conformity with Part 1, Article 16 of the RA Constitution, in particular the aim mentioned in Point 3, i.e. for insuring the fulfillment of certain obligations prescribed by the law and preventing the escape after commitment of the crime mentioned in Point 4, i.e. for the achievement of the aims prescribed in the norm, the legislator prescribed detention as a procedural means.

The analysis of the aims and basis of the institutes of “arrest” and “detention” defined by the legislation concludes that all these institutes possess their independent contents and follow completely different aims and have completely different backgrounds of implementation. The legislator has chosen them as an independent judicial means for achieving separate aims prescribed in Part1, Article 16 of the RA Constitution and they are implemented in the case of availability of different grounds. Consequently, each of them can be implemented independently without any interconnection and succession when the followed aims and necessary grounds for its implementation are available. In the case of the accused under investigation when the grounds for detention are more evitable and not disputable, detention is an adequate lawful means, which is necessary for achieving the aim of the detention.

7. Point 3, Article 5 of European Convention on Human Rights and Fundamental Freedoms which stipulates the right to person’s liberty and personal immunity as an important guarantee for insuring the legality of depriving a person of liberty demands that the latter shall be brought promptly before a judge or other officer authorized by law to exercise judicial power. Case - law of the European Court, formed on this provision of the Convention, considers as an element of the mentioned requirement of judicial review for depriving a person of liberty amongst the other the issue of insuring the right of trial of a given person during the examination of legality of depriving a person of liberty (in particular, see Point 47 of the judgment of July 13, 1995, on the European Court on the case of Kampanis v. Greece, and Points 47-50 of the judgment of April 29, 1999 Aquilina v. Malta). The implementation of this right becomes possible by bringing a person promptly before a judge from the moment of depriving a person of liberty.

Pursuant to the RA Criminal Procedure Code, the discussion of the issue of depriving a person of liberty in the form of detention proceeds in the frames of judicial discussion of the motion of the body conducting criminal proceeding to exercise detention as a measure of restriction. Part 2 of Article 285 of the RA Criminal Procedure Code defines the frame of the

subjects present at the discussion of the motion on selecting detention as a measure of restriction and in accordance with the requirements of Point 3 of Article 5 of the Convention ensures the implementation of the right to trial of a person deprived of liberty.

Taking into consideration the circumstance that exercise of the right to be brought before the judge and the right to trial are directly and inseparably linked with keeping a person in custody, i.e. physically isolating a person from the society, the Constitutional Court finds that the obligation of guarantee to exercise that right starts for the state from the moment of physical isolating of a person from the society. That is, all guarantees prescribed by Article 16 of the RA Constitution and as well as by Article 5 of the Convention and also the right to be brought before the judge start acting from the moment when a person is factually deprived of liberty by the state. Consequently, taking into consideration that a wanted person is factually not deprived of liberty in the case of his/her absence, during the discussion of the motion on selecting detention as a measure of restriction the person does not enjoy the above-mentioned guarantees, as well as the right to trial. Thus in such a circumstance, in the case of absence of the accused adoption of a decision on selecting detention as a measure of restriction does not result to violation of the rights prescribed by Article 16 of the RA Constitution and Article 5 of the Convention. Meanwhile, the duty of the criminal prosecution bodies is to ensure the presence of a person deprived of liberty at the hearing called for the discussion of the motion on implementing detention as a measure of restriction.

8. The Constitutional Court also mentions that the procedure on adopting a ruling on detention of a wanted person is exercised also in international documents on legal assistance of criminal matters and extradition, in the Conventions on “Legal Assistance and Legal Relations on Civil, Family and Criminal Cases” signed in Minsk, in the frames of the CIS, on January 22, 1993 and on October 7, 2003, in Chisinau, in the frames of the Council of Europe in the Convention on “Extradition”, etc. The analysis of the above-mentioned conventions states that as a rule the procedure of extradition is a long-term process and as a rule the mentioned international treaties, until extraditing a person to the competent bodies of the requesting Party, as a rule, permit to deprive him/her of liberty within a period of 30-40 days. Meanwhile the mentioned international documents demand the requesting Party to present such a procedural act, which shall allow keeping a person in custody for a definite long-term period. Particularly, Article 58 of the Convention of Minsk and Part 2, Article 67 of the Convention of Chisinau to the request on extradition define that for carrying out

criminal persecution or bringing to responsibility, the authenticated copies of the decisions on detention shall be attached. Consequently, Articles 60 and 68 prescribe a possibility to detain a person after receiving a memo on extradition. On the basis of the motion to detain or arrest an extradited person, Article 61 and 71 prescribe if there is no memo on extradition but the motion of the requesting Party is available, which contains reference to the judicial decision, according to which detention is exercised against the person in the requesting state and which shall be presented together with the memo on extradition, then the requested Party can detain a person without the decision of the court.

Taking into consideration that detention is a short term measure of restriction and the procedure of extradition demands longer period of time, a legal basis is needed for keeping the person due to extradition in custody; thus the extradition of a wanted person to the Republic of Armenia becomes possible only in the case of availability of the decision concerning the detention of the mentioned person. Besides, according to Decision 15 adopted by the 46th Session of the General Assembly of Interpol in Stockholm in 1977, Decision AG-2008-RAP-06 adopted by the 77th Session in Saint Petersburg in 2008 and other acts adopted by this organization it is impossible to announce international search for the people searched by Interpol channels without the availability of the decision on selecting the detention as the measure of restriction.

9. Depriving a person of liberty means his isolation from the society and family, which supposes amongst the others, impossibility of commitment of his/her official duties, movement on his/her own discretion and communication with unlimited number of people. That is, by the means of depriving of freedom by arrest or detention as an obligatory attribute, among the other, includes restriction of the right of free movement. The Constitutional Court states that if exercise of any legal institute necessarily and inevitably supposes lawful limitation of this or that right, then implementation of such an institute does not provide violation of the given right. On the basis of this, the Constitutional Court finds that pursuant to Article 16 of the Constitution, in the frames of limitation of the liberty and personal immunity, the supposed violation of liberty of movement prescribed by Article 25 of the Constitution cannot become a subject of examination in the Constitutional Court.

The position that in accordance with Article 5 of the Convention in the frames of the right to liberty and personal immunity the supposed violation of liberty of movement expressed also

in the case-law of the European Court also cannot be challenged (in particular, in the decision on the case *Guzzardi v. Italy* of November 6, 1980, Point 92).

Taking into consideration the above-mentioned, the Constitutional Court considers as groundless the Applicant's allegation that in the case of absence of a wanted person the decision of selecting detention as a measure of restriction violates his constitutional right of free movement.

Hence, proceeding from the results of the examination of the case and guided by Part 1, Article 100, Article 102 of the RA Constitution and by Articles 19, 63, 64, 69 of the Law of the Republic of Armenia on "The Constitutional Court", the Constitutional Court of the Republic of Armenia **holds:**

1. Paragraph 2, of Part 2 of Article 285 of the RA Criminal Procedure Code is in conformity with the Constitution of the Republic of Armenia.
2. Pursuant to Part 2, Article 102 of the Constitution of the Republic of Armenia this decision shall be final and shall come into force following the publication thereof.

PRESIDING JUDGE

G.HARUTYUNYAN

12 September 2009

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