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IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF PARAGRAPH 2 OF PART 2 OF ARTICLE 90 OF THE RA LAW ON BANKRUPTCY WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF "MOUSSALER PRINTING HOUSE" LLC

Yerevan **January 27, 2015**

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

with the participation (in the framework of the written procedure) of the representative of the Applicant: S. Tsakanyan, representative of "Moussaler Printing House" LLC,

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

pursuant to Article 100, Point 1, Article 101, Part 1, Point 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 in a public hearing by a written procedure the Case on conformity of Paragraph 2 of Part 2 of Article 90 of the RA Law

on Bankruptcy with the Constitution of the Republic of Armenia on the basis of the application of "Moussaler Printing House" LLC.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by "Moussaler Printing House" LLC on July 17, 2014.

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

1. The RA Law on Bankruptcy was adopted by the RA National Assembly on December 25, 2006, signed by the RA President on January 22, 2007 and came into force on February 10, 2007.

Paragraph 2 of Part 2 of Article 90 of the RA Law on Bankruptcy prescribes: "In such case suspensions provided for by Parts 4 and 5 of Article 13, and Part 3 of Article 19 of this Law shall be eliminated from the moment of closure of the case. Meanwhile, the financially recovered person shall be exempt from all those obligations deriving from the claims not having been submitted within the scope of the closed bankruptcy case, and such creditors shall be deprived of the right to submit claims in the future against the financially recovered person, with the exception of cases as provided for by Parts 3 and 4 of this Article."

2. The procedural background of the Case is the following: on 01.02.2013 the Applicant submitted a claim to the Court of General Jurisdiction of Armavir Marz against "Armavir Milk Factory" CJSC for levying execution in the amount of 1.073.940 AMD (Civil Case No. ԱՄԴ/0068/02/13).

On 20.06.2013 the Court, adopting the debt of the respondent company in the amount of 1.073.940 AMD, made a decision to reject the claim based on the provisions of Part 2 of Article 90 of the RA Law on Bankruptcy, stating that the debtor "Armavir Milk Factory" CJSC was declared bankrupt, then financially recovered; and the Applicant did not submit a claim to be included in the list of the

creditors of the bankrupt company by the procedure and scopes provided by the law.

3. The Applicant finds that the challenged provision contradicts Articles 8, 31 and 18 of the RA Constitution, since no legally stipulated objective grounds necessary for deprivation of the right to property are available in the challenged provision, and such regulation in itself leads to making judicial acts without ensuring precise judicial procedure for the claimant and without providing a possibility for protection of rights and interests of the latter. On the Applicant's judgment, taking into account the challenged legal regulation, the court considering the case on bankruptcy makes a judicial act on the bankruptcy case ipso facto releasing the person declared bankrupt then financially recovered, from the liability of fulfillment of prior obligations, which in itself comprises provisions on deprivation of the right to property (including cash and obligations in rem) of the person not party to the case. In future it leads to the following: the person, who, for objective reasons, was not informed of the judicial proceedings against the debtor's bankruptcy proceeding that also concerned her/him, actually is deprived of the legally protected opportunity of protection of the right to property, and no other legal remedy is available, which would provide the creditor with the opportunity of protection of rights by any means stipulated by Article 14 of the RA Civil Code. The Applicant also finds that not being in the know about the announcement of bankruptcy of the creditor company and not submitting an application in accordance with the RA Law on Bankruptcy may not be taken as grounds for deprivation of the right to property, since it is clear that "There is no imperative norm in the Republic of Armenia" which obliges the parties of civil circulation everyday to follow the press or the currently operating www.azdarar.am website and moreover read each publication and line of the latter, and this is not realistic. According to the Applicant the challenged legal norm entails inconsistency also with the generally accepted rules of civil-law circulation, i.e. the principles of the RA Civil legislation (Article 3 of the RA Civil Code), since in this situation by the general manner the person is allotted a period for implementation of protection of

her/his rights (institution of statute of limitations) and in the framework of the latter the person may freely choose any behavior stipulated by the law or not prohibited, and at the same time another norm unfairly and indirectly restricts that opportunity. The Applicant also finds that the regulation of the norm of the RA Law on Bankruptcy specifically contradicts also the provision of Paragraph 2 of Part 2 of Article 90 of the RA Law on Bankruptcy, since it causes the appearance of certain adverse effects for the person without provision of the case or cases of violation of the obligations directly stipulated by the law, otherwise, an obligation directly not defined by the law is imposed on the person by that norm, i.e. to follow all the publications in the press and "www.azdarar.am" website.

4. Objecting the arguments of the Applicant, the Respondent finds that the challenged provision is not a violation of the right of inviolability of ownership, and stipulating such provision is conditioned by the necessity of implementation the principles of legal certainty and predictability in the framework of bankruptcy proceedings. Based on the results of the study of Part 1 of Article 23 of the RA Law on Compulsory Enforcement of Judicial Acts, Part 1 of Article 1227 of the RA Civil Code as well as the civil-law institution of statute of limitations, the Respondent concludes that according to several other legal regulations stipulated by the RA legislation, in case of failure to submit a claim against the debtor within the prescribed time limit the creditor will also be deprived of such opportunity, and as a result the right to property of the creditor is actually restricted. However legislatively stipulating the mentioned time limits may not be described as violation of the right of inviolability of ownership, on the contrary stipulating these limits follows from the constitutional principle of legal certainty, and envisaging such regulations aims at ensuring timely and proper exercise of the rights and duties of the parties of civil-law circulation and the stability of civil-law relations. The Respondent finds that in case of absence of such regulation, it may open up possibilities to submit previously not filed claims against the financially recovered company, and re-initiation of bankruptcy proceeding may follow the debtor's

financial recovery, and the latter may make the package of measures implemented within the scope of the financial recovery plan applied to the debtor and lead to overload of the judicial system, as well as prejudice business environment. According to the Respondent, in case the creditor does not apply to the debtor in the course of bankruptcy proceedings with a request to fulfill the current obligations with respect to her/him, the creditor by her/his actions in itself exercises debt forgiveness, and in that case also from the perspective of the law it is not emphasized, whether the creditor did not file such claims because of not being informed or renouncing the debt indeed.

5. The Constitutional Court states that according to the materials of the Case, the application of the provision (stipulated by the challenged paragraph of the Law) "...and such creditors shall be deprived of the right to submit claims in the future against the financially recovered person, with the exception of cases as provided for by Parts 3 and 4 of this Article" with respect to the Applicant incurred unfavorable consequences for the latter.

For revealing the issue of constitutionality of the above-mentioned provision, the Constitutional Court finds it necessary to consider the challenged regulation firstly in the light of the right to property of the person guaranteed by the RA Constitution and Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

According to Article 8 of the RA Constitution, "The right to property shall be recognized and protected in the Republic of Armenia."

According to the case-law of the European Court of Human Rights, within the meaning of Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, not only the existing possession but also the legitimate expectation to acquire possession shall be deemed property (in particular, the Judgment of 11 June 2009 in the Case of Trgo v. Croatia).

The Constitutional Court states that it becomes clear from the Application and the materials attached to the Application that in the bankruptcy case the Applicant signed a contract with the debtor on

providing paid services, according to which the Applicant provided printing services to the debtor, and the debtor assumed a duty to pay for those services but did not fully perform his duties. Therefore, the Applicant had legitimate expectation to receive the relevant possession for the provided services.

The challenged regulation exempts the debtor from the obligation of fulfillment of the obligations after the process of financial recovery, with several exceptions (Parts 3 and 4 of Article 90 of the Law).

Article 345 of the RA Civil Code, titled "Concept of obligation and grounds for the arising thereof," states: "1. By virtue of obligation one person (debtor) shall be obliged to perform an action to the benefit of another person (creditor) — that is, to pay money, transfer property, perform works, deliver services, etc. — or abstain from performing a certain type of action, and the creditor shall have the right to demand from the debtor to fulfill her/his obligation.

2. Obligations shall arise from a contract, as a consequence of causing damage and from other grounds referred to in this Code."

Part 4 of Article 90 of the RA Law on Bankruptcy prescribes that the debtor may not be declared exempt from:

"(a) alimony payments;

(b) payment of arrears hidden from tax authorities within one year preceding the moment of declaring bankrupt;

(c) obligations arising from injuries inflicted to health and life;

(d) obligations arising from compensation of damage caused by criminal offence."

Based on the results of the systems analysis of the above-mentioned articles, as well as the RA Civil Code, the Constitutional Court states that the legislator exempts the financially recovered party from the obligations mainly following from contracts, and the best part of contractual obligations in the framework of civil legal relations, according to the object of obligation (to pay money, transfer property or perform work, supply services, or abstain from certain actions), has both proprietary and non-property nature.

The RA Constitutional Court has repeatedly touched upon the issues of legitimacy of restrictions on the right to property of the person. In particular, by the decisions DCC-903 and DCC-1073, the Court expressed the position that Article 31 of the RA Constitution stipulates four separate circumstances of restrictions on exercise of the right to property:

a) restrictions on the exercise of the right to property with prohibition of causing damage to the environment, infringing the rights and legitimate interests of other persons, the public and the State (second sentence of Part 1 of Article 31),

b) deprivation of property (Part 2 of Article 31),

c) compulsory expropriation of property for the needs of society and the State (Part 3 of Article 31),

d) restrictions on ownership right over land with respect to foreign citizens and stateless persons.

The Constitutional Court referred to the constitutional legal content of the concept "deprivation of property" in the Decision DCC-630, in which the Court characterized deprivation of property as a compulsory action following from liability. Based on the mentioned characterization as well, the Constitutional Court stated that the main mandatory elements characteristic of the institution of deprivation of property are as follows:

- in case of deprivation of property, ownership right to the given property is irretrievably terminated against the will and consent of the property owner,
- deprivation of property is applied as a means of liability,
- in case of deprivation of property, the powers of the property owner to possess, use and dispose of the given property are simultaneously and completely terminated without guaranteeing continuity.

Examining the unfavorable consequences for the Applicant within the framework of the above-mentioned legal positions, the Constitutional Court states that the challenged norm of this Case does not anyhow concern subjecting the person to liability, therefore also deprivation of property.

By the decision DCC-1073 the RA Constitutional Court expressed the legal position that the legislator conditions the exercise of the right to property by the prior necessity of ensuring certain public values. Those are: the environment, the rights and legitimate interests of **other persons**, the public and the State. Such approach aims at ensuring reasonable balance between the rights of the property owner and the rights of other persons and public interests, recognizing the ownership right of the person on property guaranteed but not absolute.

By the decision DCC-735 of 25.02.2008 the Court also expressed the following legal position: "The institution of bankruptcy aims at providing the bona fide and dutiful creditor with the opportunity to restore her/his regular activities and overcome financial difficulties, as well as ensuring restructuration and financial reorganization of insolvent companies and restoration of their viability, and at the same time **ensuring the protection of the interests of creditors."**

The Constitutional Court states that the challenged regulation might be directed at the protection of the rights and legitimate interests of the debtor **only in the course of bankruptcy proceeding,** which includes also the financial recovery aimed at preserving the party /considered a debtor/ from the claims submitted against her/him by the creditors, in order that the debtor's solvency be restored, the debtor fully participated in civil circulation, and this cannot be justified after the closure of bankruptcy case with the same purposes, i.e. financial recovery of the debtor, when the financially recovered company becomes a full-fledged participant of civil circulation and civil-law relations. Stipulation of the concept "financial recovery plan" applied in the law also indicates of the latter, according to which: the financial recovery plan shall be deemed a complex of measures not proscribed by law and applied to the debtor for restoring the solvency thereof, as a result of which the debtor will not be liquidated or no judgment will be made on the closure of the bankruptcy case with respect to a natural person by releasing her/him from performing obligations (Article 59).

6. Analysis of the provision "Meanwhile, the financially recovered person shall be exempt from all those obligations deriving from the

claims not having been submitted within the scope of the closed bankruptcy case, and such creditors shall be deprived of the right to submit claims in the future against the financially recovered person, with the exception of cases as provided for by Parts 3 and 4 of this Article" stipulated by Part 2 of Article 90 of the RA Law on Bankruptcy states that:

1. not only the financially recovered person shall be exempt from all those obligations conditioned by the claims not having been submitted within the scope of the closed bankruptcy case, but also by virtue of right such creditors shall be deprived of the right to submit any claim (including through judicial procedure) in the future in regard to the part of the mentioned obligations against that person, where such claim does not follow from the possibility of exercise of the right to appeal as prescribed by Part 5 of Article 90 of the Law.

2. exceptions are also available:

a/ where the bankruptcy case has been closed within six months from the moment of entry into legal force of the judgment on declaring bankrupt, the debtor shall not be exempt from all those obligations deriving from the claims not having been submitted within the scope of the closed bankruptcy case,

b/ by virtue of law, the debtor may not be exempt from obligations such as alimony payments, payment of arrears hidden from tax authorities within one year preceding the moment of declaring bankrupt, obligations arising from injuries inflicted to health and life, obligations arising from compensation of damage caused by criminal offence.

Within the framework of the above-mentioned legal and logical approach the following two questions have no answer from the viewpoint of guaranteeing the principle of the rule of law:

1. how should we act in the case where, due to objective circumstances, the person did not submit claims within the scope of the bankruptcy case?

2. whether there is no discrimination where the creditors are deprived of the right to submit claims in the future against the financially recovered person, but there is an exception in respect of performing tax obligations.

Those questions may be answered in the issue of comparative analysis of a number of other articles of the law at issue. In particular, it regards Articles 19, 33, 34, 42, 46, 69, 74 and 89 of the RA Law on Bankruptcy. The analysis of the legal regulations stipulated by those articles states that:

1. a relevant announcement available on the official website of public notifications of the Republic of Armenia (http://www.azdarar.am) shall be considered to be a proper notification for the creditors (Article 34),

2. if the creditor, regardless of the reason, did not participate in the first Meeting of Creditors, s/he shall forfeit the right of vote,

3. as prescribed by Articles 29, 33, 42, 46, 52, 69 and 87 of the Law, the study of the procedure of preparing, keeping and approving the register of claims of creditors states that no precise obligation is imposed on the debtor in regard to filing her/his duties with respect to the creditors. All those creditors who for some reasons were not informed of the relevant announcement available on the official website of public notifications of the Republic of Armenia (http://www.azdarar.am) or they are not considered as creditors having registered the largest claim in the total number of claims, shall be deprived of legal opportunities of further protection of their rights.

The Constitutional Court finds that such legal regulation not only comprises legal danger of violation of the creditors' rights, but also corruption risks are high. Firstly, the debtor, filing a petition in bankruptcy, shall be obliged to precisely present the real picture of own obligations. This should also except the hiding of the property by the creditors or its groundless decrease, and the latter is also emphasized in Point 9 of the summary and Point 36 of the main Report of the World Bank (2014) on the Solution of the issue of bankruptcy in the Republic of Armenia.

The register of claims of creditors should be prepared in accordance with the mentioned legal picture, and by virtue of right, it should include all those obligations legally recognized by the debtor, and it should not make the discretionary approach absolute. Legislative regulation should mostly be based on the ap-

proach that the bankruptcy administrator must first of all act in accordance with the information provided by the debtor, and this may result in certain obligation also for the creditor. Moreover, **all those creditors who, for objective reasons, were not informed of the relevant announcement available on the official website of public notifications of the Republic of Armenia (http://www.azdarar.am), in future must have the right to judicial remedy.** Otherwise, not only their rights, stipulated by Articles 18 and 19 of the RA Constitution, are violated but also the constitutional principles of comparability and proportionality are infringed in respect of the exceptions stipulated by Part 4 of Article 90 of the Law.

The Constitutional Court considers it necessary to emphasize that for the interested parties being properly notified of the course of bankruptcy proceeding is an essential condition for the protection of their rights /conditio sine qua non, i.e. a term without which it cannot be possible/, without which it cannot be possible to guarantee the effective protection of their rights. Therefore, the legal regulations of the institute of notification must not be formal, but must be aimed at detecting all creditors of the party (debtor) in the course of bankruptcy proceedings, and protecting their rights guaranteed by the Constitution and the laws. For this purpose, the legislator must provide for **a procedure for registration of obligations and effective notification** of the debtor, and this will, in practice, rule out the situations where the interested persons, for objective reasons, were not informed of the bankruptcy proceeding. The problem is that the creditor must receive proper notification of the initiation of bankruptcy proceedings and the necessity of filing claims. The debtor must provide precise and complete information on her/his obligations by the procedure stipulated by the law.

The Constitutional Court does not consider it legitimate also to selectively release the debtor — declared financially recovered in the framework of bankruptcy proceedings — from the obligations, since the challenged legal regulation provides for a differentiated approach between the state, as a creditor of tax obligations, and natural or legal persons as creditors of other type obligations.

Based on the review of the Case and being governed by the requirements of Article 100, Point 1 and Article 102 of the Constitution of the Republic of Armenia, Articles 19, 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 declare the provision "...and such creditors shall be deprived of the right to submit claims in the future against the financially recovered person, with the exception of cases as provided for by Parts 3 and 4 of this Article" stipulated by Paragraph 2 of Part 2 of Article 90 of the RA Law on Bankruptcy systemically interrelated with Part 4 of the same Article, so far as it does not stipulate any exception in the **cases recognized by the court as valid reasons** for the creditors who had not submitted claims within the scope of the closed bankruptcy case, as well as stipulating disproportional restriction of protection of the rights of the latter, contradicting Article 18 of the Constitution of the Republic of Armenia and void.

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

Chairman **G. Harutyunyan**

January 27, 2015
DCC - 1189

IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF ARTICLE 154, PART 4 AND ARTICLE 158, PART 5 OF THE RA ADMINISTRATIVE PROCEDURE CODE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATIONS OF THE CITIZENS ARA SARGSYAN, DVIN ISANYANS, RUDOLF HOVAKIMYAN, MAGDA YEGHIAZARYAN, ARAM SARGSYAN AND KHACHATUR MAROZYAN

Yerevan **March 3, 2015**

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

with the participation (in the framework of the written procedure) of A. Zeinalyan, the representative of the Applicants D. Isanyans, R. Hovakimyan, M. Eghiazaryan and A. Sargsyan,

Applicants: A. Sargsyan and Kh. Marozyan,

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

pursuant to Article 100, Point 1, Article 101, Part 1, Point 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 in a public hearing by a written procedure the Case on conformity of Article 154, Part 4 and Article 158, Part 5 of the RA Administrative Procedure Code with the Constitution of the Republic of Armenia on the basis of the applications of the citizens Ara Sargsyan, Dvin Isanyans, Rudolf Hovakimyan, Magda Yeghiazaryan, Aram Sargsyan and Khachatur Marozyan.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the citizens Ara Sargsyan, Dvin Isanyans, Rudolf Hovakimyan, Magda Yeghiazaryan, Aram Sargsyan and Khachatur Marozyan consequently on 09.07.2014, 26.09.2014 and 27.12.2014.

By the Procedural Decision PDCC-70 of the Constitutional Court of 09.12.2014, the Case on conformity of Article 154, Part 4 and Article 158, Part 5 of the RA Administrative Procedure Code with the Constitution of the Republic of Armenia on the basis of the applications of the citizens Ara Sargsyan, Dvin Isanyans, Rudolf Hovakimyan, Magda Yeghiazaryan, Aram Sargsyan and Khachatur Marozyan and the Case on conformity of Article 154, Part 4 of the RA Administrative Procedure Code with the Constitution of the Republic of Armenia on the basis of the application of the citizen Ara Sargsyan were combined.

By the Procedural Decision PDCC-1 of the Constitutional Court of 20.01.2015, the Case on conformity of Article 154, Part 4 of the RA Administrative Procedure Code with the Constitution of the Republic of Armenia on the basis of the application of the citizen Khachatur Marozyan and the Case on conformity of Article 154, Part 4 and Article 158, Part 5 of the RA Administrative Procedure Code with the Constitution of the Republic of Armenia on the basis of the applications of the citizens Ara Sargsyan, Dvin Isanyans, Rudolf Hovakimyan, Magda Yeghiazaryan and Aram Sargsyan were combined.

Having examined the written reports of the Rapporteurs on the Case, the written explanations of the Applicants and the Respon-

dent, having studied the RA Administrative Procedure Code and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

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

Article 154, Part 4 of the RA Administrative Procedure Code prescribes: "Natural and legal persons may submit cassation claim only via lawyer."

Article 158, Part 5 of the RA Administrative Procedure Code prescribes: "A document confirming payment of state due in accordance with the order and amount prescribed by law and the proof of sending the copy of the appeal to the court which tries the case and to the parties of the case and the electronic version (electronic carrier) of the cassation claim."

Since the adoption of the RA Administrative Procedure Code, Article 154, Part 4 and Article 158, Part 5 were not amended.

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

2.1. Dvin Isanyan's Application

On 20.11.2013 the Police submitted a claim to the RA Administrative Court against the Applicant with a demand to subject the latter to administrative liability.

On 09.01.2014 on the behalf of the Applicant a counterclaim worded "On reclining the claim on subjecting to administrative liability Dvin Isanyans by the Central Department of the RA Police of Yerevan City, recognizing the fact of violating the right to free expression, expression of free opinion and formation of alliances (freedom of peaceful gatherings), freedom of movement, personal freedom and immunity and recognizing the actions of the police as illegitimate" was submitted to the Administrative Court against the Police.

On 20.01.2014 the Administrative Court by the decision on re-

turning the counterclaim refused to admit the counterclaim which was appealed in the RA Administrative Appeal Court. The latter, by the decision on declining the motion on recovery of the missed procedural timeline and declining admission of the appeal refused to admit the appeal.

The Applicant submitted the cassation claim in person, and regarding which the RA Court of Cassation by the decision on returning the cassation claim dated 26.03.2014 returned the cassation claim with the reasoning that the electronic version of the claim and the license of the lawyer was not attached to the claim. The Applicant was provided with one month period to re-submit the claim.

Regarding the re-submitted cassation claim, the RA Court of Cassation by the decision on leaving the cassation claim without consideration dated 29.05.2014 refused to consider the cassation claim with the following reasoning: "In this case the Court of Cassation states that by the decision of the Civil and Administrative Chamber of the RA Court of Cassation dated 26.03.2014 the cassation claim submitted by Dvin Isanyans was returned and, simultaneously, date for correcting the errors and re-submitting the cassation claim were prescribed. Meanwhile, Dvin Isanyans corrected the errors partially, in particular the cassation claim was not submitted via the lawyer, as well as, the license (certificate on advocate activity) defined in accordance with the order was not submitted and, simultaneously, the Applicant in the re-submitted cassation claim did not sufficiently mention which norms of the material or procedural right were violated or implemented wrongly and did not substantiate its impact on the outcome of the case and submitted the cassation claim with the same substantiation and the Court of Cassation had already made a decision on the given cassation claim."

2.2. Magda Yeghiazaryan's Application

Magda Eghiazaryan submitted a motion to the RA Administrative Court to eliminate the violation made in the claim for considering the missed timelines for valid reasons and to recover it.

The Administrative Court refused the submission of the motion and the claim.

The Applicant submitted an appeal which was refused likewise.

The Applicant submitted a cassation claim.

By the decision on administrative case ՎԴ/1178/05/13 on returning the cassation claim the Court of Cassation on 05.03.2014 returned the Applicant's appeal substantiating that the electronic version of the claim and the license of the lawyer was not attached to the claim. The Applicant was provided with one month period to re-submit the claim.

Regarding the re-submitted cassation claim, the RA Court of Cassation by the decision on dismissing the cassation dated 05.03.2014 refused to consider the cassation claim with the following reasoning: "In this case the Court of Cassation states that by the decision of the Civil and Administrative Chamber of the RA Court of Cassation dated 26.11.2013 the cassation claim submitted by Magda Eghiazaryan was returned and, simultaneously, date for correcting the errors and re-submitting the cassation claim were prescribed. Meanwhile, Magda Eghiazaryan's representative did not eliminate the errors mentioned by the decision, i.e. the cassation claim was not submitted by the lawyer and once again the cassation claim was submitted by the same reasoning and regarding which the Court of Cassation had already made a decision."

2.3. Aram Sargsyan's Application

From his personal e-mail address (electronic document, electronic version) the Applicant's representative on 09.01.2014 sent a cassation claim signed with digital signature via e-mail to the Court of Cassation, Administrative Court of Appeal and the Respondent against the decision ՎԴ3/0222/05/13 on the administrative case of December 10, 2013. On the same day the cassation claim was delivered to the addresses. The notion No ԴԴ6-Ե-33 of the Head of the Staff of the Court of Cassation was received on 10.01.2014, which stated that that the Head of the Staff of the Court of Cassation had admitted the fact of receiving the cassation claim by e-mail on 09.01.2014. The note states, "...In accordance with Part 4 of Article 2 of the RA Administrative Procedure Code the proceeding of the administrative cases is administered in accordance with the law active during the examination of the case, but according to the RA Administrative Procedure Code, electronic proceeding form is

not prescribed and in accordance with the logics of legal regulation of Articles 118.4 and 118.5 of the same Code, the original version of the cassation claim shall be submitted to the Court of Cassation. ... Based on the above-mentioned, I state that you may submit your cassation claim by following the requirements of the mentioned legal norms, therefore the above-mentioned electronic document file cannot be considered as cassation claim submitted to the RA Court of Cassation."

On the behalf of the Applicant the mentioned cassation claim was submitted in hard copy version, and as a result the RA Court of Cassation by the decision on returning the cassation claim returned the cassation claim amongst other mentioning that the Applicant had not attached the electronic version of the claim and the license of the lawyer (certificate on advocate activity) to the appeal. The Applicant was provided with one month period to correct the mistakes and re-submit the claim.

As for the re-submitted cassation claim, the RA Court of Cassation adopted the decision on dismissing the cassation claim with the reasoning, "... Thus, in the case of submission of the appeal again with violation of the requirements of the law, defining anew timeline for correcting the mistakes will contradict the principle of legal certainty."

Taking into consideration that in case of not correcting the mistakes of the appeal submitted anew on the same grounds do not eliminate the obstacles to examine the appeal, but on the other hand the Court of Cassation had already adopted a decision on the case, the Court of Cassation states that in such cases anew submitted appeal shall be dismissed based on the fact that such a decision is already adopted by the Court of Cassation.

In this case the Court of Cassation states that by the decision of the Civil and Administrative Chamber of the RA Court of Cassation of 05.03.2014 the cassation claim of Aram Sargsyan's representative Artak Zaynalyan was returned and, simultaneously, the timeline was defined for correcting the mistakes of the cassation claim and for its re-submission. Meanwhile, Aram Sargsyan's representative did not eliminate the mistake mentioned in the decision and had not attached the license of his representative (certificate on advocate ac-

tivity) and submitted cassation claim on the same grounds and regarding which the Court of Cassation had already made a decision."

2.4. Rudolf Hovakimyan's Application

On 17.12.2003 the RA Traffic Police Service adjunct to the RA Government with two different claims on payment applied to the RA Administrative Court against the Applicant with a demand to issue a payment order in the amount of 50.000 AMD regarding which the RA Administrative Court consequently issued orders of payment on 19.02.2014 and 25.02.2014.

Regarding the mentioned orders of payment on 21.03.2014, on the behalf of the Applicant two different counterclaims were submitted with a demand to recognize actions of the Traffic Police Service adjunct to the RA Government and issued five-fold fine as illegitimate and decline the claim.

Regarding the mentioned counterclaims, the RA Administrative Court consequently on 28.03.2014 and 02.04.2014 adopted decisions on "Transition of the proceeding of payment order to action proceeding, returning the counterclaim" and "Transition of the proceeding of payment order to action proceeding and returning the counterclaim," which were appealed at the RA Administrative Court of Appeal. Regarding the above-mentioned the RA Administrative Court of Appeal on 22.04.2014 adopted the decision on returning the appeal and on 09.06.2014 the decision on declining the appeal.

The decision of the RA Administrative Court of Appeal on returning the appeal made on 22.04.2014 was appealed at the RA Court of Cassation which by its decision on returning the cassation claims dated 04.06.2014 returned the cassation claim with the following reasoning, "... Pursuant to Part 4 of Article 158 of the RA Administrative Procedure Code the cassation claim shall be signed by the Applicant, Prosecutor General or her/his deputy. The representative's power of attorney formulated in accordance with the order stipulated by this Code shall be attached to the claim.

In accordance with Part 4 of Article 154 of the RA Administrative Procedure Code, natural and legal persons submit cassation claim only through the lawyer.

In accordance with Part 1 of Article 157 of the RA Administrative Procedure Code, the cassation claim is sent to the Court of Cassation and the copy of the claim to Court of Appeal and the parties of proceedings.

In this case the person who submitted the appeal did not attach the evidence of sending the copy of cassation claim to the Service... " The Applicant was provided with one month period for re-submitting the claim.

The decision of the RA Administrative Court of Appeal on returning the appeal made on 09.06.2014 was also appealed at the RA Court of Cassation Appeal on 22.04.2014 which by its decision on returning the cassation claim dated 23.07.2014 returned the cassation claim by the following reasoning, "In accordance with Part 4 of Article 158 of the RA Administrative Procedure Code, cassation claim shall be signed by the applicant, Prosecutor General or her/his deputy. The representative's certificate formulated in accordance with the order prescribed by the same Code shall be attached to the appeal.

The Court of Cassation stated that although the appeal was submitted by Rudolf Hovakimyan's representative Artak Zeinalyan (basis – certificate issued on 18.03.2014 record number 21), but no evidence proving that Artak Zeinalyan functions as a lawyer, is available, thus the person who submitted the appeal, violated the requirement of Part 4 of Article 154 of the RA Administrative Procedure Code and did not submit the cassation claim through the lawyer, that is the certificate (license on advocate activity) formulated in accordance with the order prescribed by the law was not attached to the appeal." The Applicant was provided with the term to re-submit the application.

Regarding the re-submitted cassation claim, the RA Court of Cassation by its decision on leaving the cassation claim without consideration dated 09.03.2014 dismissed the cassation claim by the following reasoning, "In this case the Court of Cassation states that by the decision of the Civil and Administrative Chamber of the RA Court of Cassation dated 23.07.2013 the cassation claim submitted by Rudolf Hovakimyan's representative was returned and, simultaneously, date for correcting the errors and re-submitting the cassa-

tion claim were prescribed. Meanwhile, Rudolf Hovakimyan's representative did not eliminate the errors mentioned by the decision, i.e. the cassation claim was not submitted by the lawyer although the cassation claim was submitted by Artak Zeinalyan, the representative of Rudolf Hovakimyan (basis – certificate issued on 18.03.2014 record number 21) but no evidence proving that Artak Zeinalyan functions as a lawyer, is available. That is, Rudolf Hovakimyan once again submitted the cassation claim by the same reasoning and regarding which the Court of Cassation had already made a decision.

In such conditions the Court of Cassation states that the cassation claim shall be dismissed..."

2.5. Ara Sargsyan's Application

The Mayor of Yerevan submitted an application to the RA Administrative Court with a demand to issue an order of payment to levy 400.000 /four hundred thousand/ AMD, regarding which the RA Administrative Court issued an order of payment on 01.02.2012.

Regarding the mentioned order of payment, the Applicant submitted a counterclaim to the RA Administrative Court with a demand to recognize the Mayor's decision No Վ-35/4 of 26.10.2011 invalid.

Regarding the mentioned counterclaim the RA Administrative Court adopted a decision on "Transition of the proceeding of payment order to action proceeding, returning the counterclaim"

on 21.02.2013.

Regarding the re-submitted counterclaim, by its decision of 03.07.2013, the RA Administrative Court declined the claim and satisfied the counterclaim.

As a result of the examination of the decision on the cassation claim submitted by the City Hall of Yerevan the RA Administrative Appeal Court by its decision of 24.01.2014 cancelled the judgment of the RA Administrative Court and changed it: regarding the counterclaim the proceeding of the case was dismissed and the clam of City Hall of Yerevan was satisfied.

As a result of the examination of the cassation claim against the mentioned decision submitted by the Applicant, the RA Court of Cas-

sation by its decision on returning the cassation claim returned the cassation claim with the following reasoning: "In this certain case the person who submitted the appeal ...did not file the appeal by the advocate..." The Applicant was provided with fifteen day time-limit from the moment of receiving the decision to correct the errors and resubmit the cassation claim.

Regarding resubmitted cassation claim, the RA Court of Cassation by its decision on dismissing the cassation claim dated 14.05.2014 dismissed the cassation claim by the reasoning that "...Ara Sargsyan ...did not file the cassation claim by his advocate..."

2.6. Khachatur Martozyan's Application

Erebuni district Tax Inspectorate of State Revenue Committee adjunct to the RA Government submitted a claim to the RA Administrative Court with a demand to issue an order to levy 2.000.000 /two million/ AMD from Khachatur Marozyan.

Khachatur Marozyan submitted a counter claim to the RA Administrative Court with a demand to recognize the act No. 1104074 of 14.05.2012 and based on it the decision No 194186 of 12.06.2012 of Erebuni district Tax Inspectorate of State Revenue Committee adjunct to the RA Government as null or invalid.

By the decision of 01.05.2012 the RA Administrative Court transited from the proceeding of payment order to action proceeding and returning the counterclaim, and by the decision of 28.02.2014 satisfied the submitted claim.

As the result of examination of the appeal submitted by the Applicant, the RA Administrative Court of Appeal by its 27.05.2014 decision refused the motion to recover the missed procedural time period and submission of the appeal.

As the result of examination of the cassation claim submitted by the Applicant, on 09.07.2014 the RA Court of Cassation adopted the decision on returning the cassation claim according to which the cassation claim was returned amongst others with the following reasoning: "... The person who submitted the appeal...did not file the cassation claim by the advocate..." The Applicant was provided with fifteen day time-limit from the moment of receiving the decision to correct the errors and re-submit the cassation claim.

3. Regarding Part 4 of Article 154 of the RA Administrative Procedure Code the arguments of the Applicants united in one case conclude that Part 4 of Article 154 of the Code contradicts Articles 3, 14.1, 18, 19 and 20 of the RA Constitution and Article 6 of the European Convention on Human Rights and Fundamental Freedoms, since it excludes the possibility to submit the cassation claim on behalf of natural and legal persons in person of through the person appointed by her/him.

Stating that previously the person could appeal the judicial acts of the RA Court of Appeal without and hindrance, the Applicants concluded that nowadays the order to apply to the Cassation Court directly is abolished restricting the possibilities of effective protection of rights.

To substantiate their demand, the Applicants mention that in the conditions of legislative ban to submit the acts subject to appeal exclusively through a lawyer, it is necessary to regulate by law any mechanism for providing guaranteed free legal assistance by the lawyers despite the party's financial position.

The Applicants also highlight the issue that financial means are needed for enjoying the facilities provided by the lawyer, which often makes impossible to employ these facilities.

Regarding Part 5 of Article 158 of the RA Administrative Procedure Code, the arguments of the Applicants conclude that Part 5 of Article 158 of the Code contradicts Articles 1, 3, 18 and 19 of the RA Constitution.

To substantiate their demand, the Applicants mention that Part 5 of Article 158 of the Code does not meet the requirements of certainty, assurance and predictability of the legal law. It is formulated vaguely as it is not clear what kind of electronic version should be attached to the cassation claim and on what electronic carrier. The Applicants also state that the mentioned provision makes impossible to challenge the judicial acts at the Court of Cassation for the persons for whom computer, printer and electronic carrier are not available.

Regarding Part 5 of Article 158 of the RA Administrative Procedure Code, which deals with the obligation to attach evidence on sending the copy of the case to the court which tries the case and

the parties of trial to the cassation claim, the Applicants state that in this provision in law-enforcement practice the term "send" is interpreted in such a manner which excludes the possibility to sent the cassation claim signed with digital signature via e-mail to the court trying the case and to the parties of trial. To substantiate the mentioned notion, the Applicants allude that the legal positions concerning Article 4 of RA Law on Electronic Document and Electronic Digital Signature stipulated in Decision DCC-722 and legal positions of the RA Court of Cassation on civil case ԵԿԴ/2293/02/10 concerning part 3 of Article 1087.1 of the RA Civil Code.

4. Referring to Applicants' arguments, the Respondent states that the challenged norms of the RA Administrative Procedure Code are in conformity with the RA Constitution.

Regarding Part 4 of Article 153 of the RA Administrative Procedure Code, alluding the case law of the European Court of Human rights, state that the requirement to introduce the interests of the applicant by the qualified advocate cannot be considered contradicting Article 6 of Convention and defining such a procedure is justified only by the necessity of submitting more literate appeals.

Referring to the issue from the viewpoint of similarities and differences between lawyer and certified lawyer and citing the decision DCC- 765 of the RA Constitutional Court, Article 41 of the RA Law on Advocacy and in particular the provision of the Article according to which the right to free legal assistance includes compilation of appeals, the Respondent emphasizes that by the RA Law on Advocacy the scopes of free legal assistance and the persons enjoying free legal assistance has increased. According to the Respondent, any insolvent natural person not included in the categories mentioned in Article 41 of the RA Law on Advocacy may also enjoy free legal assistance.

From the perspective of proportionality of the remedy and pursued goal, the Respondent states that choosing of such remedy is conditioned with restriction of the grounds for initiating proceedings of the cassation claim which demands necessary legal knowledge.

The Respondent summarized stating that **first;** the ability of the party to the proceedings as well as the legal equality of the parties

of proceedings is not dependent to the person's financial capacities, **secondly;** unlike the institution of certified advocates, the legal regulation on filing cassation claim exclusively by the advocate does not cause any discrimination between the advocates; **thirdly,** the pursued legal term is proportionate to the pursued goal.

Regarding Part 5 of Article 158 of the RA Administrative Procedure Code, the Respondent states that the requirement to the cassation claim are not an end in itself, but in their logics are aimed to implement effectively the functions of the Court of Cassation and are dictated by the development of science and techniques.

Referring to the RA Law on Electronic Document and Electronic Digital Signature, the Respondent states that in this case any type of carrier capable for preserving and transferring the electronic version of cassation claim can serve as electronic carrier and its types are not specified by the legislation pursuing the goal to provide wider possibility of choice and to minimize the expenses on purchasing the electronic carrier.

The Respondent does not consider as grounded to condition restriction of right of accessibility of justice with the lack of necessary financial means to purchase electronic carrier, as according to the Respondent submission of cassation claim itself demands certain expenses for the Applicant related to amongst others sending the copies of the state due and the appeal to the court trying the case and parties of proceedings. For financially vulnerable persons the legislator envisaged the right to free legal assistance which according to Article 41 of the RA Law on Advocacy includes compilation of appeals.

5. In the framework of the constitutional legal challenge, the RA Constitutional Court considers necessary to clarify and assess:

- The significance of legal requirements stipulated by Part 4 of Article 154 and Part 5 of Article 158 of the RA Administrative Procedure Code and taking into consideration guaranteeing necessary structures of fully-fledged implementation and the rights to accessibility of justice which serves as an effective remedy of judicial remedy of human rights and an element of fair trial prescribed by Articles 18 and 19 of the RA Constitution as well

as Article 6 of the European Convention of Human Rights and Fundamental Freedoms,

- The systemic logics and legitimate significance of legislative regulation to file a cassation claim to the RA Court of Cassation exclusively by the advocate, also taking into consideration the essence and contents of the institution of judicial remedy of the rights by the advocate, legal provisions stipulated in the decisions DCC-765 and DCC-833 of the RA Constitutional Court concerning the efficiency of the issues of legal regulation and constitutionality.

6. In the above-mentioned decisions considering the challenged issues in the context of necessity of fully-fledged and precise legislative regulation of the right to accessibility of justice and the right to effective judicial remedy, the RA Constitutional Court in particular expressed the following legal positions:

a) "The restriction of the right to accessibility of the Court of Cassation by the obligatory demand to file to the Court of Cassation by the accredited in the Court of Cassation advocate relevant to the pursued goal since such restriction does not permit effective and free implementation of persons right to fair justice" (DCC-765),

b) "As for ensuring respect towards the principle of equality before the law for the proceeding participants, then, taking into consideration the circumstance that **the RA legislation does not guarantee free legal assistance for compiling a cassation claim,** ... the Constitutional Court states that by the presence of the institution of accredited advocates the equality between the proceeding participants is violated conditioned on their financial position" (DCC-765).

c) "... taking into consideration the entrepreneurial and monopoly nature of the mentioned institution and comparatively high fees demanded for compilation of the cassation claim by the accredited advocates and the mandatory demand to apply to the Constitutional Court as well as to the European Court of Human Rights only after exhaustion of remedies of protection, it may be stated that the institution of accredited advocates in the Court of Cassation by its existence restricts the rights of accessibility and effective judicial

remedy not only at the Court of Cassation, but also the Constitutional Court and the European Court of Human Rights, and in essence it creates conductive environment for possible cases of discriminatory attitude based on financial position of the person" (DCC-765),

d) "... conditioned with functional peculiarities of the Court of Cassation, the demand to file to the Court of Cassation by the advocate may be considered legitimate if it derives from the interests of natural and legal persons to be represented by professional and experiences specialists. The Constitutional Court at the same time considers necessary to emphasize that the institution to file to the Court of Cassation by the advocate is an alternative option can be considered as a legitimate option only in the case when the legislation guarantees every person the possibility to obtain the services of lawyers despite the financial position of the person" (DCC-765),

e) "... the mandatory requirement concerning representation by the advocate prescribed in the challenged norm concerning submission of the appeal regarding the review of judicial acts by the advocates in the cases of not providing possibility of legal assistance on free basis while submitting application on review of judicial acts by the advocates disproportionally restricts the violated rights guaranteed by the Constitution and the Convention... thus endangering the effective implementation of person's right to constitutional justice and constitutional right to judicial protection of her/his violated right at the international instances" (DCC-833).

Restating the legal positions prescribed in Decisions DCC-765 and DCC-833 and stating that they were neglected in further legislative amendments, the Constitutional Court finds that the mentioned legal positions concern also this case.

7. For the implementation of authorities of the Court of Cassation to review the judicial acts by the subordinate court amongst the others the institution of appeal of judicial acts, by such a material and procedural legislative regulation which will ensure the effective and fully fledges implementation of the person's rights and freedoms of judicial protection, is an important guarantee. In the mentioned context the Constitutional Court highlights the systemic integrity of the

institution of appeal of judicial acts and presence of relevant structural and legislative guarantees which ensure efficient implementation which is necessary for preciseness of implementation of the right to judicial protection as well as for assessment in the cassation proceeding.

The Constitutional Court states that any judicial peculiarity or procedure cannot hinder or prevent the possibility of efficient implementation of the right to apply to the court and make senseless the right guaranteed by Article 18 of the RA Constitution or hinder its implementation. While defining the terms for accepting the cassation claim the guarantees of accessibility of the justice and ensuring the right to effective appeal shall prevail. The structural status of the Court of Cassation as a supreme body in the system of general jurisdiction courts system cannot hinder the precise implementation of competence prescribed by law and effective exercising of the right to appeal if legal and structural guarantees necessary for its creation are created.

Prescription of the requirement of filing the cassation claim by the advocate to the Court of Cassation, in the case of precisely established and functioning advocate system, shall be called to assist exercising of the person's constitutional right to effective judicial protection. In the case of such an approach definition of such requirements of acceptance of cassation claim, which may be even stricter, will not be problematic. Although in this instance likewise the admission of claim to examination deriving from **administrative as well as civil legal regulations cannot be implemented due to neglection of constitutionally protected rights or disproportionate restriction.** That is, restriction of preconditions shall not be disproportionate by creating obstacle for protection of rights for people. In this context the Constitutional Court considered necessary to mention that the Court in its Decision DCC-1167 stipulated "... any especially new legal term shall have more effective guarantees to create legitimate goal which shall not be exercised by virtue of neglecting any constitutional legal norm or principle." In the context of the mentioned, the Constitutional Court considered essential to emphasize the circumstance that, for instance, in accordance with Part 1 of Article 46 of the RA Law on the Constitutional Court, in the

body of constitutional jurisdiction parties may appear before the Constitutional Court personally as well as through their representatives.

8. Regarding the issue of constitutionality of the challenged provision the Constitutional Court considers necessary to turn to also in the context of development of administrative - judicial legislation. Before adoption of the current of the RA Administrative Procedure Code, in the former Administrative Procedure Code the mandatory requirement to file the cassation claim to the RA Court of Cassation by the advocate is not present, i.e. the procedure to submit directly the cassation claim is prescribed. Meanwhile the challenged provision not only defines the mediated procedure of submission of the appeal to the Court of Cassation which excludes the possibility to submit the cassation claim directly. In fact, nowadays the mediated procedure functions only and only by the advocate. That is, the only necessary way, which ensured the possibility to apply to the court of cassation directly, has been eliminated. Due to such legal regulation the accessibility of the court of cassation has been essentially restricted.

Admission of the cassation claim by the Court of Cassation is conditioned with the level and circumstance of submission of the cassation claim which follows the requirements prescribed by the legally literate, substantiated legislation. Simultaneously, one should consider that in case of filing the cassation claim by the advocate the possibility of returning the cassation claim by the Court of Cassation or leaving the claim without consideration or refusing to consider is still possible. That is, as in past when the direct procedure of submission of the cassation claim was in force, as well as now when cassation claim can be filed only by the advocate the Court of Cassation did (does) not admit those cassation claims – which do not correspond other requirements stipulated by the RA Administrative Procedure Code and legal norms which are not challenged in this case – by returning the cassation claim leaving it without consideration or by dismissing it. In response to the note submitted to the RA Judicial Department, the Head of the RA Judicial Department in the response note No ԴԴ-1 Ե-693 of 16.02.2015 mentions that

the study of actual statistic data reflected in the note reveals that in particular, from 820 cassation claims submitted to the RA Civil and Administrative Chamber of the Court of Cassation only 43 cassation claims were, which comprises 5.24 percent of the submitted complaints and in 2015 the RA Civil and Administrative Chamber of the Court of Cassation from 820 cassation claims adjudicated only 50 of cassation claims, which comprises 4.97 percent of the submitted complaints. The mentioned data state that even in the case when the cassation claim was submitted by the advocate, it did not cause any essential and perceptible changes related to adjudication of cassation claim.

9. The Constitutional Court considers necessary to state that the legislator has not taken into consideration the precise and consistent legal positions expressed in the decisions of the RA Constitutional Court when establishing institutional regulations on submitting cassation claim only by advocate. In the elaboration of legislative regulations of the challenged issue, the legislator did not take into consideration the legal positions expressed in the decisions of the Constitutional Court. In particular, the issues related to the property discrimination have not received legislatively proper solution; meanwhile, the problem is present in the framework of the unique legislative politics of preconditions of administrative proceeding and submitting cassation claim, which creates favorable conditions for possible expression of discriminative attitude conditioned with the property status of a person. This circumstance is based on Part 2 of Article 9 of the RA Law on Legal acts which definitely prescribes that "Laws shall comply with the Constitution of the Republic of Armenia and shall not contradict the decisions of the Constitutional Court of the Republic of Armenia". And the latter get sense and contents, become the source of the law by their completeness based on the legal positions of the Constitutional Court. The legal positions of the Constitutional Court expressed in this decision are significant source of the legislative elaborations.

Considering the challenged issue in the light of legal positions, the Constitutional Court concludes that by the challenged provision stipulation of the requirement to submit the cassation claim by the

advocate although followed the legitimate aim to assist efficient and precise implementation of the right to judicial protection of human rights and freedoms, actually brought to illegitimate restriction of that law and to irrelevant restriction of possibility of application of the law of appeal of the judicial act and right to accessibility of the court.

Meanwhile, the RA Chamber of Advocates came to the same conclusion (in accordance with the interpretations stated in the letter Ъ/202 dated 27.02.2015 of the Chair of the RA Chamber of Advocates to the RA Constitutional Court).

10. The Constitutional Court, regarding the requirement to attach the electronic version of the appeal to the cassation claim, stipulated in Part 5 of Article 158 of the RA Administrative Code, as a necessary precondition for submission of the cassation claim, states that this regulation is directly linked to the rights guaranteed in Article 18 of the RA Constitution, as well as right to access to court which is a component to the judicial protection of a person guaranteed by Article 6 of European Convention of Human Rights and Fundamental Freedoms. The European Court of human rights in a number of its decisions states that this right is not absolute, and the states may condition the possibility of its application only certain requirements and standards (Judgment on Luordo v. Italy, 2003, October 17, Judgment on Staroszczyk v. Poland, 2007, 2007, July 9, judgment on Stanev v. Bulgaria, 2012, January 17 , etc.). The challenged provision is stipulated in Article 158 of the RA Administrative Procedure Code which envisages the requirements presented to the contents and to the documents attached to cassation claim. Thus, study of Article 158 states that it prescribes certain legal requirements for enjoying the right to access to court, thus presentation of the electronic version attached to the complaint is also considered as the precondition of the application of this right. The Constitutional Court states that deriving from the requirement of ensuring legal certainty presence of necessary certain imperative precondition for application of the right to access to court cannot be considered as contradicting the RA Constitution. Such precondition should be applicable, reasonable and by its gravity should not bring

to violation of the essence of right. The RA Constitutional Court states that the requirement to present the electronic version attached to the appeal does not block the possibility of application of the person's right to access to court, taking into consideration the circumstance that with such a demand the obligation to show a behavior which is not applicable and contradicts the axiology of the Constitution, consequently it does not lead to violation of the essence of right. The Constitutional Court at the same time states that neither the RA Administrative Code nor any legal act prescribe the requirements presented to the appeal (criteria of formation of the electronic document, ratification terms, format etc.). Absence of such requirements shall be interpreted as the right of the applicant to choose any format to submit the documents electronically and possibility of choice of any criteria. Meanwhile, no requirement is prescribed concerning the electronic digital signature, consequently, the person is not obliged to have such a signature and use it when applying the requirement of Part 5 of Article 158 of the RA Administrative Procedure Code.

The Constitutional Court states that the requirements presented to "electronic carrier" stipulated by Part 5 of Article 158 of the RA Administrative Procedure Code are revealed by the RA Law on Electronic Document and Electronic Digital Signature. In particular, Article 2 of the mentioned Law prescribes: "electronic carrier means magnetic disk, tape, laser disk, semi-conductor or other data carrier, which are used in electronic or other devices to record and store data." Taking into consideration the circumstance that Part 5 of Article 158 of the RA Administrative Procedure Code prescribes the term "electronic carrier" and does not prescribe any other demand concerning the carrier, hence in the case of submission of electronic version of the appeal by any electronic carrier is supposed to be complete.

In his explanation the Respondent also interpreted the requirement of Part 5 of Article 158 of the RA Administrative Procedure Code and in particular mentioned that "Although the legislator did not show unified approach in formulating in the codes and did not specify the format of the electronic document and the type of electronic carrier, that circumstance in the current law-enforcement

practice cannot bring to violation of rights... By not specifying the type of carrier, the legislator by merits considered as admissible any type of carrier which can preserve and transfer the electronic version of cassation claim."

Regarding Part 5 of Article 158 of the RA Administrative Procedure Code, the Constitutional Court states that although the notion "electronic version" is uncovered in the brackets as "electronic carrier," these terms are not identical: the first one concerns the computer file containing the text of the cassation claim which is accessible to any computer program, and the second one is used for preservation and transition of the text to technical device. The Constitutional Court signifies this differentiation as the electronic version of the appeal may be submitted not only by electronic carrier but also by e-mail and the Respondent in his explanation mentioned "electronic version of the document which is not submitted by e-mail can be accessible by the means of any carrier capable to carry the electronic version of the document." Therefore, the requirement prescribed in Part 5 of Article 158 of the RA Administrative Procedure Code does not exclusively concern submission of the electronic version of the appeal attached to the hard copy by the electronic carrier but allows the person to submit the electronic version of the appeal also by the means of e-mail.

The Constitutional Court also states that the relevant unified criteria for ensuring uniformity of application of the requirement to submit the electronic version of the cassation claim prescribed in Part 5 of Article 158 of the RA Administrative Procedure Code shall be legally defined. The study of international practice regarding this issue also states that in the cases when a person is obliged to submit the electronic version of documents together with documents of to apply directly to the relevant body electronically, defined in detail the requirements presented to the electronic version of documents and are accessible in the electronic official web pages of the relevant bodies (Canada, Great Britain etc).

Thus, the Constitutional Court states that absence of unified criteria for submission of electronic version of the cassation claim attached to the appeal stipulated by Part 5 of Article 158 of the RA Administrative Procedure Code implies the Applicant's right to sub-

mit the electronic version of appeal in any format and in any compilation of the document by any type of electronic carrier and e-mail. The unified criteria for presentation of electronic version of the appeal attached to the cassation claim stipulated by Part 5 of Article 158 of the RA Administrative Procedure Code shall be stipulated legally, hence, the law-enforcement practice shall be elaborated in the framework of legal positions expressed in this decision.

Based on the review of the Case and being governed by the requirements of Article 100, Point 1 and Article 102 of the Constitution of the Republic of Armenia, 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 declare Part 4 of Article 154 of the RA Administrative Procedure Code contradicting Article 14.1, Part 1 of Article 18, Part 1 of Article 19 of the RA Constitution and void, taking into consideration that application of this provision in the current legal regulations creates disproportionate social burden for the persons relating to their financial capacities and does not ensure fully-fledged application of the effective remedy of fair trial, judicial protection of a person and rights to access to court.

2. To declare Part 5 of Article 158 of the RA Administrative Procedure Code in conformity with the Constitution of the Republic of Armenia in the framework of legal positions expressed in this decision.

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

Chairman **G. Harutyunyan**

March 3, 2015
DCC - 1192

IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF ARTICLE 404, PART 4, ARTICLE 407, PART 5 AND ARTICLE 414.1, PART 2, POINT 2 OF THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATIONS OF THE CITIZENS VALENTINA MKRTICHYAN AND SOFYA TOROSYAN

Yerevan **March 17, 2015**

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

with the participation (in the framework of the written procedure) of R. Ayvazyan, the representative of the Applicant V. Mkrtchyan and the Applicant S. Torosyan,

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

pursuant to Article 100, Point 1 and 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 in a public hearing by a written procedure the Case on conformity of Article 404, Part 4, Article 407, Part 5 and Article 414.1, Part 2, Point 2 of the Criminal Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the applications of the citizens Valentina Mkrtchyan and Sofya Torosyan.

The Case was initiated on the basis of the applications submitted to the Constitutional Court of the Republic of Armenia by the citizens V. Mkrtchyan and S. Torosyan on 02.12.2014 and 19.01.2015 accordingly.

By the Procedural Decision PDCC-9 of 24.02.2014 of the Constitutional Court the Case on conformity of Article 404, Part 4 and Article 407, Part 5 of the Criminal Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the application of the citizen Sofya Torosyan and the Case on conformity of Article 404, Part 4, Article 407, Part 5 and Article 414.1, Part 2, Point 2 of the Criminal Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the application of the citizen Valentina Mkrtchyan were joined.

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

1. The RA Criminal Procedure Code was adopted by the RA National Assembly on July 1, 1998, signed by the President of the Republic of Armenia on September 1, 1998 and came into force on January 12, 1999. Later it has undergone numerous amendments.

Part 4 of Article 404 of the Code, titled "Persons having the right to file a cassation appeal," prescribes: "The persons prescribed by Point 1 of Part 1 of the Article may file a cassation appeal only through the advocate." Point 1 of Part1 of the Article prescribes: "1. Judicial acts of the Court of Appeal on deciding on the merits of the case and not deciding the case on the merits, as well as the decisions rendered by the Court of Appeal as a result of review of ju-

dicial acts not deciding the case on the merits may be appealed against in the Court of Cassation: 1) by the participants to the proceedings, except for criminal prosecution authorities, and the applicants in cases stipulated by law."

Part 5 of Article 407 of the Code, titled "Cassation appeal," prescribes: "The cassation appeal shall be signed by the representative of the person having lodged the appeal, Prosecutor General or latter's deputy. The power of attorney of the representative formulated as prescribed by this Code shall also be attached to the appeal. The electronic version of the cassation appeal (electronic carrier) shall be attached to the cassation appeal."

Point 2 of Part 2 of Article 414.1 of the Code titled "Returning or dismissal of the cassation appeal" stipulates the following legal regulation: "2. Cassation appeal shall be dismissed if ... 2) the cassation appeal has been filed by a person who does not have the right to lodge a cassation appeal."

2. The procedural prehistory of the joint cases is the following:

On 08.04.2014 the Applicant Valentina Mkrtichyan filed an appeal to the Court of General Jurisdiction of Arabkir and Kanaker-Zeytun Administrative Districts of Yerevan on annulling the institution of criminal case by the materials of the decision of 26.03.2013 of the Inspector of Investigation Unit of Arabkir Division of the RA Police on filing a case. The Court of General Jurisdiction of Arabkir and Kanaker-Zeytun Administrative Districts of Yerevan by its decision of 06.05.2014 refused Valentina Mkrtichyan's appeal of 08.04.2014. On 19.05.2014 the Applicant filed an appeal against the decision of 06.05.2014 of the Court of General Jurisdiction. The RA Criminal Court of Appeal by its decision of 06.08.2014 refused the appeal and left in power the decision of 06.05.2014 of the Court of General Jurisdiction of Arabkir and Kanaker-Zeytun Administrative Districts of Yerevan. The Applicant filed a cassation appeal against the decision of 06.08.2014 of the RA Criminal Court of Appeal. The RA Court of Cassation by its decision of 03.10.2014 left the cassation appeal of Valentina Mkrtichyan without consideration.

The Applicant Sofya Torosyan applied to the Court of General Jurisdiction of Shirak Marz to annul the judgment of the investiga-

tor. The Court of General Jurisdiction of Shirak Marz by its judgment of 21.07.2014 satisfied the demand of the Applicant. The prosecutor submitted an appeal against the mentioned decision. The RA Criminal Court of Appeal by its decision of 20.08.2014 satisfied the appeal of the prosecutor of the Prosecutor's Office of Shirak Marz. The Applicant Sofya Torosyan filed a cassation appeal against the decision of 20.08.2014 of the RA Criminal Court of Appeal. By the decision of 22.10.2014 the RA Court of Cassation left the cassation appeal without consideration.

3. According to the Applicant Valentina Mkrtichyan, Part 4 of Article 404, Part 5 of Article 407 and Point 2 of Part 2 of Article 414.1 of the Code contradict Articles 18, 19, 20 and 42 of the RA Constitution.

The Applicant substantiated the contradiction of the abovementioned provisions of the Code and Article 18 of the RA Constitution that, in the presence of Part 5 of Article 407 and Point 2 of Part 2 of Article 414.1 of the Code, additional investments shall be made for preparing the electronic carrier and in such cases the legislator has not envisaged the possibility for assisting socially vulnerable persons.

The Applicant substantiated the contradiction between the abovementioned provisions of the Code and Part 1 of Article 19 of the RA Constitution by stating that the provisions of Part 1 of Article 19 of the RA Constitution do not function in the Republic of Armenia as the provisions of Article 404, Article 407 and 414.1 of the RA Criminal Procedure Code have been changed, and this caused real obstacle for access to court.

The Applicant substantiated the contradiction between the abovementioned provisions of the Code and Part 1 of Article 20 of the RA Constitution by stating that the RA Court of Cassation violated her right to legal assistance ensured by the Constitution as this assistance cannot be obligatory. The Applicant emphasizes also the circumstance that she could not afford to pay for one signature of the lawyer as she had written the cassation appeal herself. According to the Applicant, in the case of the legislative requirement to submit the acts subject to appeal at the RA Court of Cassation only through

the advocate, the law needs to provide a mechanism of providing a free legal assistance basis despite the material conditions of the party. In the conditions of current legislative regulations the right to access to the Court of Cassation is disproportionally restricted.

The Applicant substantiated the contradiction between the abovementioned provisions of the Code and Part 3 of Article 42 of the RA Constitution by stating that the provisions of Article 404, Article 407 and 414.1 of the RA Criminal Procedure Code "are laws which deteriorate the person's legal status and these legal acts are not retroactive".

The Applicant Sofya Torosyan substantiated the contradiction between the provisions of Part 4 of Article 404, Part 5 of Article 407 of the Code and Articles 18, 19 and 20 of the RA Constitution by stating that they restrict the possibility of exercising the right to effective legal protection as prescribed by Article 18 of the RA Constitution and contradict the right to fair examination of the case for the protection of the person's rights in equal conditions and following all requirements of justice as prescribed by Article 19 of the RA Constitution.

4. The Respondent objected to the Applicants' arguments stating that the challenged norms of the RA Criminal Procedure Code are in conformity with the RA Constitution.

Regarding Part 4 of Article 404 of the RA Criminal Procedure Code, the Respondent adverts to the case law of the European Court of Human Rights and states that the requirement to present the interests of the Applicant at the court of cassation through the certified advocate cannot be considered as contradicting Article 6 of the Convention, and envisaging such a procedure is justified by the necessity to submit more literate appeals.

Referring to the similarities and differences of the advocate and the certified advocate, as well as adverting to the Decision DCC-765 of the RA Constitutional Court, Article 41 of the RA Law on the Profession of Advocate and, particularly, the provision of the Article according to which the right to free legal assistance includes compilation of appeals, the Respondent emphasizes that by the RA Law on the Profession of Advocate the frames of free legal assistance

and range of the persons having the right to free legal assistance significantly expanded. According to the Respondent, each insolvent natural person not included in the categories prescribed by Article 41 of the RA Law on the Profession of Advocate may also enjoy free legal assistance.

Referring to this issue from the perspective of proportionality of the remedy and the aim pursued, the Respondent reiterates that choice of such a remedy is conditioned with the restriction of the grounds for initiating proceeding of a cassation appeal which demands certain legal knowledge.

Summarizing, the Respondent states that, first, the chance to enjoy the rights to defense by the party of proceeding at the court of cassation as well as the legal equality of the parties do not depend on the person's financial capacities, as unlike the institution of certified advocate, in this case the legislation prescribes sufficient guarantees to ensure the possibility for each person to enjoy the advocate's service despite her/his financial capacities, secondly, the challenged legal term is proportionate to the aim pursued.

Regarding Part 5 of Article 407 of the RA Criminal Procedure Code, the Respondent states that the requirements presented to the cassation appeal are not an end in itself but, by their logics, directed to support the effective implementation of the functions of the Court of Cassation and dictated by the development of the science and technique.

Reiterating the RA Law on Electronic Document and Electronic Digital Signature, the Respondent claims that in this Case the electronic carrier is any kind of carrier suitable for preserving and transferring the electronic version of the cassation appeal, and its types have not been specified by the legislation pursuing the aim to provide wide range of choice and to minimize the expenses for purchasing electronic carrier.

The Respondent does not consider substantiated the restriction of the right to access to court by the absence of financial means necessary for purchasing electronic carrier, since, according to the Respondent, the submission of cassation appeal itself demands certain expenses from the appellant in regard to, amongst others, delivering the copies of the state due and the appeal to the adjudicating court

and the participants to the proceeding. And for the financial vulnerable persons the legislator prescribed the right to free legal assistance which, according to Article 41 of the RA Law on the Profession of Advocate, amongst the others, includes the compilation of appeals.

Regarding Point 2 of Part 2 of Article 414.1 of the RA Criminal Procedure Code, the Respondent states that the latter stipulates one of the grounds for dismissing the appeal. Unlike the grounds for returning the appeal, in the case of this substantiation the appeal is not returned and time-term is not provided for correcting the shortcomings in the appeal and resubmitting the appeal. Not following the requirement to submit the cassation appeal through the advocate in this case is considered as breach of the procedure of appeal and hinders the procedure of appealing.

5. Taking into consideration the certain similarity of the constitutional legal disputes raised in DCC-1192 and this Case, the Constitutional Court in the framework of this Case considers necessary to clarify and assess:

- the significance of legal requirements prescribed in Part 4 of Article 404, Part 5 of Article 407 and Point 2 of Part 2 of Article 414.1 of the RA Criminal Procedure Code, taking into consideration ensuring of the necessary structures for fully fledged implementation and guarantees of the rights to access to court as the efficient remedy for judicial defense of the rights of a person and as an element of fair trial as prescribed by Articles 18 and 19 of the RA Constitution, as well as Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,
- the systemic logics and legitimate significance of the legislative regulation to lodge a cassation appeal to the RA Court of Cassation exclusively through the advocate, also taking into account the legal provisions stipulated by the Decisions DCC-765, DCC-833 and DCC-1192 of the RA Constitutional Court on the issues of the essence and contents of the institution of judicial protection of the rights through the advocate and the issues of legislative regulation of its constitutionality,

- the peculiarities of criminal proceeding regarding the disputed issue.

6. Based on the study of the RA Criminal Procedure Code, the Constitutional Court reiterates that in the criminal proceeding the victim, the civil claimant, their legitimate representatives and representatives, the suspect, the accused, their legitimate representatives, the advocate, civil respondent, her/his representative as well as the applicant, amongst others, are the interested persons. Meanwhile, in the cases provided for by law the suspect, by virtue of law is considered acquitted, and the accused, by virtue of law is considered convicted or acquitted, hence the **convicted and acquitted** are included in the framework of the persons authorized to lodge a cassation appeal.

In accordance with Part 1 of Article 68 of the Code, Defense attorney is the lawyer, representing the legitimate interests of the suspect or the accused at the proceedings of the criminal case and offering them legal assistance by all means not prohibited by the law.

Based on the study of the above-mentioned provisions of the Code, as well as Point 3 of Part 2 of Article 5 of the RA Law on the Profession of Advocate, the RA Constitutional Court also states that in the criminal proceeding, the mandatory condition of representing legitimate interests of persons only through the advocate and providing them with legal assistance exceptionally relates to the suspect and the accused. Meanwhile, according to the Code, the latter, pursuant to Point 4 of Part 2 of Article 63 and Point 3 of Part 2 of Article 65 accordingly, **enjoy the right to defend themselves except for the cases of mandatory participation of the defender when the free legal assistance is provided.**

According to part 1 of Article 78 of the Code, representatives of the victim, civil plaintiff, and civil defendant are the persons, authorized by the mentioned participants of the trial to represent their legitimate interests at the proceedings of the criminal case.

The Constitutional Court considers necessary to state that the Code uses the term **"defender"** exclusively for the suspect, accused, including convicted and acquitted, the term **"representative"** for

other participants of the proceedings and applicants, stipulates by Part 4 of Article 404 the right to lodge a cassation appeal only through the **advocate** and in first and second sentences of Part 5 of Article 407 uses the term **"representative"** in the provisions concerning signing the cassation appeal and the documents attached the cassation appeal. To avoid possible misunderstanding, the Constitutional Court states that the provisions relating to the **representative** as prescribed in the first and second sentences of Part 5 of Article 407 also concern the **advocate.**

7. Touching upon the issue of clarifying and assessing the circumstances mentioned in Point 5 of this Decision, the RA Constitutional Court once again reconfirms the legal positions prescribed in the Decisions DCC-765, DCC-833 and DCC-1192, reiterating that, in particular, the legal positions stipulated in the Decisions DCC-765 and DCC-833 are not fully fledged implemented during further legislative amendments, and the RA Constitutional Court states that the legal positions stipulated in the mentioned decisions are applicable also for the provisions of Part 4 of Article 404 and Part 5 of Article 407 of the RA Criminal Procedure Code. This especially concerns the principal approach that, when the proposed legitimate aim must be implemented in the framework of guaranteeing the principle of rule of law. In this case the latter presumes that the legislative regulation cannot cause disproportionate social burden for the persons depending on their material capacities and, as a result, it does not ensure the fully fledged implementation of the rights of fair trial, effective remedy of judicial protection and access to court.

The RA Constitutional Court states that Article 20 of the RA Constitution definitely recognizes that everyone shall have the right to legal assistance and in cases provided for by law, legal assistance shall be provided at the expense of state funds.

Recommendation No R(2002)21 adopted by the Committee of Ministers of the Council of Europe also proposes the member states to exclude possible blocking of the right to access to court "for the persons in economically weak position".

8. Touching upon the issue of constitutionality of the provision prescribed in Point 2 of Part 2 of Article 414.1 of the Code, the Constitutional Court states that there is no causative-consecutive link between the disputed provision and the provisions stipulated in Part 4 of Article 404 and Part 5 of Article 407 of the Code. That is, the Applicant V. Mkrtichyan's arguments regarding the provisions of Part 4 of Article 404 and Part 5 of Article 407 of the Code do not concern the provision of Point 2 of Part 2 of Article 414.1 of the Code.

In particular, Article 414.1 and the provision of Point 2 of Part 2 of Article 414.1 regulate the legal consequences which occur in the case of non-observance of certain legal requirements of enjoying the right to access to court as prescribed by the RA Criminal Procedure Code. The constitutional legal dispute, raised within the scopes of this Case regarding Part 4 of Article 404 and Part 5 of Article 407 of the RA Criminal Procedure Code, concerns the constitutionality of the content of certain legal requirements necessary for enjoying the right to access to court as prescribed by the RA Criminal Procedure Code. Furthermore, the challenged Point 2 of Part 2 of Article 414.1 of the RA Criminal Procedure Code in its content does not include the negative consequence of not lodging an appeal only through the advocate, and it also includes, inter alia, the consequences of lodging an appeal by the subjects other than stipulated by Article 404 of the RA Criminal Procedure Code. **Such legal regulation is not only a necessity, but also it is not a direct consequence of envisaging the institution of lodging cassation appeal only through the advocate.** That is, in the case if the requirement to lodge cassation appeal only through the advocate prescribed by Part 4 of Article 404 of the RA Criminal Procedure Code is not prescribed, the challenged Point 2 of Part 2 of Article 414.1 of the RA Criminal Procedure Code could not anyhow restrict the right to access to court and cause certain negative consequences for the Applicant. Consequently, the challenged Point 2 of Part 2 of Article 414.1 of the RA Criminal Procedure Code cannot be considered as a norm restricting the constitutional right to judicial protection, in particular, the right to access to court.

Based on the review of the Case and being governed by the requirements of Article 100, Point 1 and Article 102 of the Constitution of the Republic of Armenia, 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. In regard to the part concerning the participants of the proceeding who do not have an advocate and for whom the ground for providing free legal assistance is not guaranteed by the procedure prescribed by law, to declare Part 4 of Article 404 of the RA Criminal Procedure Code contradicting Article 14.1, Part 1 of Article 18 and Part 1 of Article 19 of the Constitution of the Republic of Armenia and void, taking into account that the implementation of this provision in the conditions of current legal regulations causes disproportionate social burden for the persons depending on their material capacities, also not ensuring the fully-fledged implementation of the person's right to fair trial, effective remedy of judicial protection and the right to access to court.

2. To declare the provisions stipulated in the first and second sentences of Part 5 of Article 407 of the RA Criminal Procedure Code contradicting Part 1 of Article 18 and Part 1 of Article 19 of the Constitution of the Republic of Armenia and void, in regard to the participant of the proceeding who at the moment of signing the cassation appeal did not have an advocate and did not receive free legal assistance by the procedure prescribed by law, taking into account that the implementation of this provision in the conditions of current legal regulations excludes the possibility to lodge a cassation appeal by the mentioned persons in the context of representing their legitimate interests.

3. The provision "The electronic version of the cassation appeal (electronic carrier) shall be attached to the cassation appeal" stipulated in the third sentence of Part 5 of Article 407 of the RA Criminal Procedure Code is in conformity with the Constitution of the Republic of Armenia within the framework of legal positions expressed in the Decision DCC-1192 of the Constitutional Court of the Republic of Armenia.

4. Point 2 of Part 2 of Article 414.1 of the RA Criminal Procedure Code is in conformity with the Constitution of the Republic of Armenia within the framework of legal positions expressed in this Decision.

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

Chairman **G. Harutyunyan**

March 17, 2015
DCC - 1196

IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF SECOND SENTENCE OF PART 1 OF ARTICLE 171 AND FIRST SENTENCE OF PART 1 OF ARTICLE 173 OF THE RA CIVIL PROCEDURE CODE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE HUMAN RIGHTS DEFENDER OF THE REPUBLIC OF ARMENIA

Yerevan **April 7, 2015**

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

with the participation (in the framework of the written procedure) of the representative of the Applicant: L. Sargsyan, Head of the Legal Analysis Department of the Staff of the RA Human Rights Defender,

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

pursuant to Article 100, Point 1, Article 101, Part 1, Point 8 of the Constitution of the Republic of Armenia, Articles 25, 38 and 68 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by a written procedure the Case on conformity of second sentence of Part 1 of Article 171 and first sentence of Part 1 of Article 173 of the RA Civil Procedure Code with the Constitution of the Republic of Armenia on the basis of the application of the Human Rights Defender of the Republic of Armenia.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the RA Human Rights Defender on 15.10.2014.

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

1. The RA Civil Procedure Code was adopted by the RA National Assembly on June 17, 1998, signed by the RA President on August 7, 1998 and came into force on January 1, 1999.

The second sentence of Part 1 of Article 171 (titled "Examination of the application") of Chapter 29 of the Code prescribes: "The citizen may be summoned to the court sitting provided he or she is in good health condition." Meanwhile, the first sentence of this Article prescribes: "The court shall examine the case on declaring the citizen having no active legal capacity in mandatory presence of the representative of the guardianship and curatorship authorities."

The above-mentioned provision has not been amended.

The first sentence of Part 1 of Article 173 of the Code, titled "Declaring a citizen having active legal capacity and lifting the restriction imposed on his or her active legal capacity," prescribes: "Where provided for by the Civil Code of the Republic of Armenia the court shall, upon the application of the guardian, family member or management of the psychiatric institution and based on the relevant opinion of the forensic psychiatric expert examination, adopt a decision on declaring the recovered person having active legal capacity."

The above-mentioned provision has not been amended.

2. The Applicant finds that the challenged provisions of the Code contradict Part 1 of Article 18, Part 1 of Article 19, Part 1 of Article 20 and Article 43 of the RA Constitution with the following substantiation:

- by force of Part 1 of Article 171 of the Code, discretional approach is stipulated for the court regarding the issue of involving the person (the case on declaring the latter having no active legal capacity is examined) in the court proceedings. The participation is conditioned with health condition of the certain person, as well as the discretion of the court. That is, even in the case when the person's health condition is sufficient for participation in the court proceedings, the issue of summoning the latter to the court sitting is left to the discretion of the court. According to the Applicant, the legislator does not stipulate a requirement of mandatory presence, but, in certain cases, the possibility of participation and its exercise is conditioned with the discretion of the court,
- the legislation does not also reveal content of the provision "health condition is sufficient," and this by contextual ambiguity may bring to an interpretation and application in the law-enforcement practice, which violates or may violate the right of the person (the case on declaring the latter having no active legal capacity is examined) to judicial protection and fair court proceedings,
- the principles of the Resolution No. 46/119 on the protection of persons with mental illness and the improvement of mental health care adopted by the UN General Assembly in 1991 stipulate that the person whose capacity is at issue shall be entitled to be represented by a counsel. The right to appeal at the superior court the decisions by the latter, as well as by his/her representative (in case of any) or any interested party regarding legal capacity is prescribed likewise,
- Recommendation Rec (2004) 10 of the Council of Europe of Committee of Ministers concerning the protection of the human rights and dignity of persons with mental disorder prescribes that persons with mental disorder should be entitled to exercise all their civil and political rights. Any restriction to the exercise

of those rights should be in conformity with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and should not be based on the mere fact that a person has a mental disorder (Article 4).

- Recommendation R(99) 4 of the Council of Europe of Committee of Ministers on Principles concerning the legal protection of the incapable adults prescribes that no measure of protection which restricts the legal capacity of an incapable adult should be taken unless the person taking the measures has seen the adult or is personally satisfied as to the adult's condition and an up-to-date report from at least one suitably qualified expert has been submitted. Principle 13 of the Recommendation prescribes the right to be heard in person. Thus, the person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity.

The Applicant also refers the Recommendation No 818 (1977), as well as Recommendation R (83) 2 of the Committee of Ministers of EU also envisage the procedures and guarantees, which according to the Applicant are relevant.

The Applicant refers to a number of decisions of ECHR. In particular, in the judgments adopted by the Court on the cases of Shtukaturov v. Russia, Kovalyev v. Russia, Winterwerp v. Netherlands, Mantovanelli v. France, the court, according to the Applicant, highlighted that person with the mental disability shall enjoy the right to be heard in person and in case of need by the means of ensuring representation. According to the Applicant, in the case of Winterwerp v. Netherlands the issue of discussion was the freedom of the Applicant, moreover, the Court highlighted that the procedural outcome of the case is equally important for the Applicant as it discusses the issue of limitation of the personal autonomy in all fields of his life. According to the Applicant, the Court emphasized that in such cases the person plays dual role – as an interested party and the main subject of the proceeding, consequently, the participation of the person at the proceeding is essential not only for representation of his or her interests, but also for the formation of his or her own opinion on the mental condition. According to the Ap-

plicant, the court concluded that the decision of the court on exercising the examination of the case based only on the documents without seeing or hearing the Applicant is not reasonable, as it violates the principle of competitive proceeding prescribed by Part 1 of Article 6 of the Convention.

The Applicant referred to the relevant legislative provisions of the Russian Federation and legal positions of the Constitutional Court of the Russian Federation on this issue.

Referring to Part 1 of Article 173 of the RA Civil Procedure Code, the Applicant states that by virtue of the mentioned provision that the person who is recognized as incapable by the judgment of the court cannot act as a subject authorized to submit an application on restoration of legal capacity. The latter's possibility to restore the legal capacity is exclusively conditioned with the expression of the will of his or her guardian, family member or management of the psychiatric institution, and the person having no active legal capacity is directly deprived of the right to apply to the court for restoration of his or her active legal capacity.

The Applicant also refers to a number of ECHR judgments. Particularly, in the case of Nataliya Mikhaylenko v. Ukraine the Court stated that the right to a fair trial, guaranteed by Article 6 of the Convention, is not absolute and may be rateably restricted when it pursues legitimate aim such as e.g. protection of the interests of persons who have been deprived of legal capacity, or others and the proper administration of justice. According to the Applicant, the Court also stated that the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned since such a procedure will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity. According to the Applicant, the Court noted that the approach pursued by domestic law, according to which an incapacitated person has no right of direct access to a court with a view to having his or her legal capacity restored, is not in line with the general trend at European level. In particular, the comparative analysis conducted in the case of Stanev shows that seventeen of the twenty national legal systems studied provided at the time for direct access to the courts for persons who have been declared incapable. According to

the Applicant, the Court also noted that the general prohibition on direct access to a court by that category of individuals does not leave any room for exception, at the same time, the domestic law does not provide safeguards to the effect that the matter of restoration of legal capacity is to be reviewed by a court at reasonable intervals. According to the Applicant, the Court stated that there has therefore been a violation of Article 6 of the Convention, since the absence of the right of access to a court, which seriously affected many aspects of the applicant's life, cannot be justified by the limitations on access to a court by incapacitated persons.

3. The Respondent does not deny the Applicant's arguments in principle and states that regarding the challenged legal regulations the issue of amendment of the legislation is present. The Applicant also finds that participation of each person at his/her trial is the guarantee of the fair proceeding and right to judicial protection, moreover, when one has to deal with recognizing someone as incapable, i.e. with the restriction of his/her civil rights and duties.

Coming back to the issue mentioned in the application that the Code does not prescribe the right to apply to the court for restoration of his/her capacity, the Respondent mentions that absence of such a right may have negative impact on the person's legal status. Thus, the Respondent presumes that from the perspective of protection of the rights of the incapacitated person such a special legal regulation should be envisaged that allows the latter to apply to the court for the court for restoration of his/her capacity.

Simultaneously, the Respondent presented the draft of the RA Law Պ-732-05.2015-ՊԻ-010/0 on making amendments and addenda in the RA Civil Procedure Code, stating that this draft has been circulated by a number of deputies of the RA national Assembly for resolving this issue.

4. The Constitutional Court states that the challenged norms directly concern the principles of accessibility of the court and fair proceeding as well as permissible limitation of the mentioned rights guaranteed by Articles 18 and 19 of the RA Constitution and Article

6 of the European Convention of Human Rights and Fundamental Freedoms.

The Constitutional Court states that a number of international documents concerning the legal protection of the persons with mental disability exist. In particular, the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care adopted by General assembly resolution 46/119 of 17.12.1991 directly point out impermissibility of any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of the internationally recognized rights to exercise all civil, political, economic, social and cultural rights will become impossible or complicated (Principle 1, Points 4 and 5). The mentioned principles prescribe that the person whose capacity is at issue, his or her personal representative, if any, and any other interested person shall have the right to appeal to a higher court against any such decision (Principle 1, Point 6).

Recommendation 818 (1977) "On the situation of the mentally ill" of the Parliamentary Assembly of the Council of Europe (hereinafter PACE) of 08.10.1977, Recommendation R (83) 2 of the Committee of Ministers to member states concerning the legal protection of persons suffering from mental disorder placed as involuntary patients adopted on 22.02.1983, as well as Recommendation R(99) 4 of the Council of Europe of Committee of Ministers on Principles concerning the legal protection of incapable adults adopted on 23.02.1999 and Recommendation Rec(2004)10 concerning the protection of the human rights and dignity of persons with mental disorder adopted on 22.09.2004 also highlight that persons with mental disorder shall have the possibility to exercise all civil and political rights and the restrictions of such rights are allowed exclusively in concordance with the Convention and may not only be substantiated on the fact of mental disorder of a person. Meanwhile, the above-mentioned recommendations propose the member states of the Council of Europe to define **that the judgment cannot be adopted on the mere medical conclusion only.**

The above-mentioned recommendations also envisage that the **right** of persons suffering from mental disorder **to be listened** shall be ensured and the participation of the lawyer during the entire

proceeding shall be guaranteed. The above-mentioned recommendations also prescribe that when adopting a judgment concerning persons suffering from mental disorder, the right to be listened in person as well as the right to appeal the judgment shall be guaranteed.

Recommendation R(99)4 stipulates the principles concerning the legal protection of incapable adults and recommends the member states of the Council of Europe to follow the mentioned principles while defining legislative regulations. Particularly, flexibility of legal regulations is one of these principles, which amongst others permits to apply such tools of legal regulations which will fully take into consideration, amongst others, the degree of incapacity in a certain legal position. The mentioned recommendation considers the principle of retaining the person's right to be listened in person during any proceeding which may concern the person's capacity as well as envisagement of the possibility to review or appeal regularly for the issues linked with the recognizing the person as incapable.

5. The Applicant states that the European Court of Human Rights referred to the issue raised in this case in a number of decisions. In particular, in the case of Shtukaturov v. Russia the European Court of Human Rights states that the rights of Pavel Shtukaturov guaranteed by Article 6 of the Convention, who was recognized as incapable, were violated on the following grounds:

- The Government argued that the decisions taken by the national judge had been lawful in domestic terms. However, the crux of the complaint is not the domestic legality but the "fairness" of the proceedings from the standpoint of the Convention and the Court's case-law (Paragraph 70 of the Case),
- The applicant played a double role in the proceedings: he was an interested party, and, at the same time, the main object of the court's examination. His participation was therefore necessary not only to enable him to present his own case, but also to allow the judge to form her personal opinion about the applicant's mental capacity (Paragraph 72 of the Case), (see, *mutatis mutandis, Kovalev v. Russia,* §§ 35-37).

- Decision of the judge to decide the case on the basis of documentary evidence, without seeing or hearing the applicant, was unreasonable and in breach of the principle of adversarial proceedings (Paragraph 73 of the Case),
- The applicant's appeal was disallowed without examination on the ground that the applicant had no legal capacity to act before the courts. As a result, the proceedings ended with the first-instance court judgment (Paragraph 75 of the Case),

Regarding the case Nataliya Mikhaylenko v. Ukraine, the Court states that the right of access to the courts is not absolute but may be subject to limitations, Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired: such a limitation should pursue a legitimate aim and there should be reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The Court acknowledges that restrictions on the procedural rights of a person who has been deprived of legal capacity may be justified for that person's own protection, the protection of the interests of others and the proper administration of justice. On the other hand, the Court has stated that the importance of exercising procedural rights will vary according to the purpose of the action which the person concerned intends to bring before the courts. In particular, the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity. The absence of judicial review of that issue, which seriously affected many aspects of the applicant's life, could not be justified by the legitimate aims underpinning the limitations on access to a court by incapacitated persons. There has therefore been a violation of Article 6 § 1 of the Convention.

6. It derives from the above-mentioned international documents and legal positions of the European Court of Human Rights regarding the legal protection of persons with mental illness that the legal protection of persons with mental illness should include in particular

the following rights: **right to be heard at the court, right to fully-fledged participation at the proceeding and right to appeal the judgment.** Within the framework of the examination of this Case, the RA Constitutional Court considers necessary to clarify to what extent the above-mentioned rights are precisely guaranteed for the persons with mental illness in the RA Civil Procedure Code. It is also essential to clarify if:

- restriction of person's capacity inevitably brings to possible restriction of the person's rights and freedoms in different spheres of life,
- as a result of legal regulations prescribed by the RA Civil Procedure Code the person, whose capacity is examined at the court, during the proceeding shall **act not only as a subject of court proceedings but also as an interested party.**

7. The norms of Chapter 5 of the RA Civil Procedure Code exhaustively lists the participants of the case, such as the parties, third parties, as well as the applicants prescribed by Section 3 of the RA Civil Procedure Code (Article 27 of the Code).

Article 28 of the RA Civil Procedure Code stipulates the rights and obligations of the participants of the case, which amongst other, ensure the right of the participants to be heard at the court, the right to participate in the examination of the case and the right to appeal a judgment.

The norm of Chapter 7 of the RA Civil Procedure Code exhaustively lists other participants of the examination of the case, such as the witness, expert, interpreter (accordingly Articles 44, 45 and 46 of the Code).

Part 1 of Article 205 of the RA Civil Procedure Code envisages the scope of the persons authorized to lodge an appeal against judicial acts. They are: the persons participating in the case, the prosecutor in cases provided for by law, the persons not involved in the case, on whose rights and responsibilities a judicial act deciding on the merits of the case has been rendered.

Part 1 of Article 223 of the RA Civil Procedure Code envisages the scope of persons having the right to lodge a cassation appeal. They are: persons participating in the case, Prosecutor General and

his or her deputies in the cases provided for by law in cases of protection of state interests.

Part 2 of Article 223 of the RA Civil Procedure Code envisages the scope of persons participating in the case shall have the right to appeal against interim judicial acts of the Court of Appeal, and the decisions adopted by the Court of Appeal in connection with the interim judicial acts appealed against in the Court of Appeal. These are the participants of the case.

Based on the contrastive analysis of the norms of the RA Civil Procedure Code, the Constitutional Court considers necessary to state that the Code does not authorize the person, whose capacity is at issue, is not authorized with precise procedural status. However, only the second sentence of the challenged Article 171, Part 1 of the Code refers to the exercise of the procedural rights of the mentioned persons. Simultaneously, the Code does not stipulate the rights and obligations of the Code regarding the person summoned to the court sitting, whose issue of legal capacity is being examined. Thus, the person, whose issue of legal capacity is being examined at the court, though he or she is a holder of right, can participate at the hearing merely as "a subject of court proceeding."

The Constitutional Court states that the above-mentioned regulations of the RA Civil Procedure Code regarding the persons whose capacity is being examined at the court, do not ensure precisely the rights of equality, access to court, judicial protection, fair trial and the right to appeal the judgments. The right to be heard at the court for persons with mental illness is not also guaranteed by the mentioned international documents concerning legal protection and stipulated by the legal positions of the European Court of Human Rights. By virtue of the mentioned fundamental rights, any person whose capacity is at issue at the court shall be authorized with the relevant procedural status, hold procedural obligations as well as enjoy the procedural rights deriving from the status of the participant of proceeding, including the right to appeal judgments.

Taking into consideration the above-mentioned, the RA Constitutional Court states that regarding the discussed issues **there is a gap in legal regulation in the RA Civil Procedure Code, which demands a systemic solution and can be overcome only by the**

means of making relevant legislative amendments by the RA National Assembly.

That issue cannot be solved precisely and fundamentally in the scopes of the challenged provision of Article 171 of the RA Civil Procedure Code. The issue does not concern the discretion of the judge. From the perspective of constitutional legal contents, the challenged provision, by merits, is not restrictive. That is, in the framework of general logics of legislative legal regulation the mentioned provision, by merits, shall be interpreted and implemented in the manner provided he or she is in good health condition. However, the legal regulation regarding this issue is not complete and precise. Moreover, even in the case of legal circumstances, being summoned to the court sitting, within the framework of the mentioned constitutional legal contents of the challenged provision, does not play essential role if the person does not enjoy precise procedural status prescribed by law. This issue should get a complex solution by the RA National Assembly.

Reviewing the issue upon the light of the Decision DCC-1135 of the RA Constitutional Court and guided by the reasoning to exclude violation of the constitutional principle of equality of rights and taking into consideration the legal positions of banning the principle of discrimination, judicial protection and the legal positions of the rights to access to court issued by the RA Constitutional Court and the European Court of Human Rights, international documents on legal protection of persons with mental illness, the Constitutional Court finds that the rights of the person to judicial protection, access to court including the right to appeal judgments shall equally concern the persons whose capacity is at issue at the court.

8. Regarding the issue of constitutionality of the provision envisaged in the first sentence of Part 1 of Article 173 of the RA Civil Procedure Code, the Constitutional Court states that in the provision envisaged in the first sentence of Part 1 of Article 173 of the RA Civil Procedure Code the issue of constitutionality is present, as the subject who should be recognized as capable is missing from the framework of the subjects who submit to the court. As a result, the person who is recognized as capable by the first sentence of Part 1

of Article 173 of the RA Civil Procedure Code is deprived of possibility to be heard, to participate at the court hearing and appeal the judgment.

Regarding the international practice of the challenged issue the Constitutional Court also states that according to the relevant legislation of the 17 member states to the Council of Europe (Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Luxembourg, Monaco, Poland, Portugal, Romania, Russian Federation, Slovakia, Sweden, Switzerland) the persons declared as incapable are permitted to apply to the court with the demand to restore their capability in person or through a representative.

Simultaneously, the Constitutional Court considers necessary to state that the European Court of Human Rights referred to the issue of the subjects applying for the review of the legal status of the person declared as incapable in the judgment of the case Mikhaylenko v. Ukraine dated August 30 2013, where the Court provided that not prescribing the possibility to apply to the court to the person who has been cured is not in concordance with the legislative approaches of the Member States of the Council of Europe. In this judgment the European Court of Human Rights also mentioned that such an obstacle does not prescribe the order of regular review of the cases by the persons declared as incapable. As a result the European Court of Human Rights stated violation of the right granted by Article 6 of the Convention.

Deriving from the abovementioned, the Constitutional Court considers that regulation of Part 1 of Article 173 of the Code by not envisaging the possibility of a person to be heard or participate at the hearing, de facto deprive the person from the possibility of implementation of the rights granted by Articles 18 and 19 of the RA Constitution.

9. The Constitutional Court considers necessary to refer to the notions "capacity", "incapacity" or "partial capacity" applied in the RA Civil Procedure Code.

In this concern, the RA Constitutional Court states that the contents of the mentioned notions are revealed in the relevant articles of the RA Civil Procedure Code. Thus, Article 24 of the RA Civil

Code, in particular, prescribes, "The capacity of a citizen to acquire and exercise civil rights, to create civil responsibilities therefore and perform them by his or her actions (civil active legal capacity) shall arise in full from the moment of reaching the age of majority, namely upon attaining the age of eighteen."

Article 31 of the Code reveals the features of the incapacity by envisaging, "A citizen who as a result of mental disorder is unable to realize the meaning of his or her actions or control them, may be declared by the court as having no active legal capacity as prescribed by the Civil Procedure Code of the Republic of Armenia."

Article 32 of the Civil Procedure Code, in its turn refers to the definition of the notion "partial capacity", in particular, mentioning that "Active legal capacity of a citizen having driven his or her family into a difficult material situation as a result of alcohol or drug abuse, as well as addiction to gambling, may be limited by the court as prescribed by the Civil Procedure Code of the Republic of Armenia."

The Judgment of the European Court of Human Rights on the Case of Shtukaturov v. Russia defines that declaring a person incapable is an interference with the latter's right to respect for his private life. The doctors found certain mental illnesses with Shtukaturov but the Court took note that the measure applied to him had not been lawful and had not pursued any legitimate aim.

The Court reiterated that also in accordance with the legislation of the Russian Federation, absence of the interim or alternative option (except for those who abused drugs or alcohol), taking into consideration the logics that not all mental disorders lead to full incapacitation (Paragraphs 91-95 of the Judgment).

In this regard the Constitutional Court considers necessary to reiterate that during the further legislative amendments that issue should also be touched upon properly which will permit to exclude any disproportionate interference, thus making more precise the grounds of recognizing the person as "incapable" or "partially incapable."

Simultaneously, the RA Constitutional Court takes notice that the draft Պ-732-05.03.2015-ՊԻ-010/0 of the RA Law on Making amendments and addenda to the RA Civil Procedure Code is being

circulated at the RA National Assembly, by which the legislator tries to solve the issues raised in the application where legal positions expressed in the Decision of the RA Constitutional Court should be taken into consideration.

Based on the review of the Case and governed by the requirements of Article 100, Point 1, Article 101, Part 1, Point 8 and Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 68 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. The provision prescribed by sentence 2 of Part 1 of Article 171 of the Civil Procedure Code of the Republic of Armenia is in conformity with the Constitution of the Republic of Armenia in the frames of legal positions expressed in this Decision by the Constitutional Court.

2. The provision prescribed by sentence 1 of Part 1 of Article 173 of the Civil Procedure Code of the Republic of Armenia insofar does not provide a person with the possibility to enjoy his/her right to be heard in person and act as a part of proceeding recognize as contradicting Part 1 of Article 18 and Part1 of Article 19 of the Constitution of the Republic of Armenia and void.

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

Chairman **G. Harutyunyan**

April 7, 2015
DCC-1197

IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF ARTICLE 223, PART 3 AND ARTICLE 231, PARTS 4 AND 5 OF THE RA CIVIL PROCEDURE CODE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATIONS OF THE CITIZENS HOVHANNES SAHAKYAN AND KARAPET HAJIYAN

Yerevan **June 16, 2015**

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

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

R. Ayvazyan, representative of the Applicant H. Sahakyan and the Applicant K. Hajiyan

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

pursuant to Article 100, Point 1, Article 101, Part 1, Point 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 in a public hearing by a written procedure the Case on

conformity of Article 223, Part 3 and Article 231, Parts 4 and 5 of the RA Civil Procedure Code with the Constitution of the Republic of Armenia on the Basis of the Applications of the citizens Hovhannes Sahakyan and Karapet Hajiyan.

The Case was initiated on the basis of the applications submitted to the Constitutional Court of the Republic of Armenia accordingly on 16.02.2015 and 23.03.2015 submitted by the citizens Hovhannes Sahakyan and Karapet Hajiyan.

By the Procedural Decision PDCC-20 "On the Case of Conformity of Article 223, Part 3 and Article 231, Part 4 of the RA Civil Procedure Code with the Constitution of the Republic of Armenia on the basis of the Application of the Citizen Karapet Hajiyan" of 07.04.2015 and accepted for consideration by the CC "On the Case of Conformity of Article 223, Part 3 and Article 231, Parts 4 and 5 of the RA Civil Procedure Code with the Constitution of the Republic of Armenia on the basis of the Application of the Citizen Hovhannes Sahakyan" were joined.

Having examined the written reports of the Rapporteur on the joint Case, the written explanations of the Applicants and the Respondent, 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 was adopted by the RA National Assembly on June 17, 1998, signed by the RA President on August 7, 1998 and came into force on January 1, 1999.

The challenged Part 3 of Article 223 of the RA Civil Procedure Code titled "Persons having the right to lodge a cassation appeal" prescribes:

"3. Natural and legal persons participating in the case may lodge cassation appeal only through the lawyer."

A number of amendments and addenda were made to the mentioned Article by the RA National Assembly, and the challenged provision was stipulated in the RA Civil Procedure Code by the RA Law HO-49-N of 10.06.14 on "Making amendments and addenda to the Civil Procedure Code of the Republic of Armenia."

Parts 4 and 5 of Article 231 of titled: "Content of the cassation appeal" accordingly stipulate:

"4. The cassation appeal is signed by the representative of the applicant, Prosecutor General or his deputy. The license formulated in accordance with the order prescribed by law is attached to the appeal.

5. The document verifying payment of state due in accordance with the procedure prescribed by law and the rate of state due and the copy of the appeal, as well as the evidence of sending the case to the court and the parties to the case and the electronic carrier of the cassation appeal are attached to the cassation appeal. In the cases when the possibility of postponing of payment of the state due or reducing its rate is prescribed by law, then a motion is attached to the cassation appeal or is included in the appeal."

In the above-mentioned Article the RA National Assembly made amendments and addenda to the disputed provisions were stipulated in the RA Civil Procedure Code by the RA Law HO-49-N of 10.06.14 on "Making amendments and addenda to the Civil Procedure Code of the Republic of Armenia."

2. The procedural background of the joined Cases is the following:

One of the Applicants, citizen Garnik Isaghulyan submitted a claim to the Court of First Instance of Arabkir and Kanaker-Zeytun Administrative Districts and demanded to sell the flat (Apt. 1 Building 12, Orbeli Str., Yerevan) by public auctions and impose levy of execution on Hovhannes Sahakyan's share. The Court satisfied the claim by the judgment of 23.04.2014. Applicants Hovhannes Sahakyan and Silva Stepanyan lodged a cassation appeal against the Judgment of 23.04.2014 of the Court of First Instance. The RA Civil Court of Appeal by its judgment of 17.09.2014 declined the appeal and leave in force the judgment of the Court of First Instance of Arabkir and Kanaker-Zeytun Administrative Districts of 23.04.2014. Hovhannes Sahakyan, Silva Stepanyan and Ruben Ayvazyan lodged a cassation appeal against the judgment of the RA Civil Court of Appeal of 17.09.2014, and on 12.11.2014 the RA

Court of Cassation adopted a decision on "Returning the cassation appeal" for correcting errors and defined fifteen day period for re-submitting the cassation appeal. In the mentioned decision the RA Court of Cassation, amongst other circumstances mentioned that, "In this certain case Hovhannes Sahakyan and Silva Stepanyan ... have not submitted the cassation appeal through the lawyer. ...In this certain case, the persons who submitted the cassation appeal have not attached the electronic carrier of the cassation appeal." The cassation appeal was re-submitted to the RA Court of Cassation and based on it on 14.01.2015 the RA Court of Cassation adopted the decision on dismissing the cassation appeal.

The Applicant Karapet Hajiyan - as a third party - was involved in the civil case ԵԱՔԴ/1517/02/14, according to which the citizen Nune Zakaryan applied to the Court of First Instance of Arabkir and Kanaker-Zeytun Administrative Districts with a claim to eliminate the violations of the right to property and restore the right to dispose of the property. By the decision of 10.10.2014 the Court dismissed Karapet Hajiyan's application in which he asked for clarification. Karapet Hajiyan lodged an appeal against the decision of the Court of General Jurisdiction dated 10.10.2014 the RA Civil Court of Appeal returned the appeal by the decision of 30.10.2014. Karapet Hajiyan lodged a cassation appeal against the decision of 30.10.2014 of the RA Civil Court of Appeal and on 03.12.2014 the RA Court of Cassation adopted a decision on dismissing the cassation appeal and for correcting errors and defined fifteen day period for re-submitting the cassation appeal. In the mentioned decision, the RA Court of Cassation amongst other circumstances mentioned that, "besides the applicant ..., did not submit the cassation appeal through the lawyer..." The Cassation claim was re-submitted to the RA Court of Cassation and on 18.02.2015 the RA Court of Cassation adopted a decision to dismiss the cassation appeal.

3. The Applicants state that Part 3 of Article 223 and Part 4 of Article 231 of the RA Civil Procedure Code contradict Articles 18, 19, 20, and 42 of the RA Constitution and Article 6 of the European

Convention on Human Rights and Fundamental Freedoms as they exclude the possibility to lodge cassation appeal by natural or legal persons on their own behalf personally or through the person they chose.

Mentioning that the right to legal assistance cannot be obligatory especially in the case when the person is not able to pay for the services provided by the lawyer, the Applicants state that the legal norm to submit cassation appeal to the RA Court of Cassation through the lawyer violates and disproportionally restricts the right to access to justice by in practice conditioning the possibility of the party to the proceeding to enjoy protection of the rights at the courts by her/his financial capacities. Simultaneously, by stating that in past the person could appeal the judgments by cassation procedure without any obstacle, the Applicants are convinced that "The possibilities of effective protection of the rights have been eliminated thus restricting the procedure to apply to the RA Court of Cassation directly. For substantiating their demand the Applicants state that "In case of legislative obstacle to submit the acts subject to appeal to the RA Court of Cassation exclusively through the lawyer, the law should regulate some mechanisms to provide free legal assistance regardless of the person's financial position."

Regarding Part 5 of Article 231 of the RA Civil Procedure Code the arguments of the Applicant Hovhannes Sahakyan state that Part 5 of Article 231 of the RA Civil Procedure Code contradicts Articles 18, 19, 20 and 42 of the RA Constitution.

For substantiation of his demand the Applicant states that the requirement to attach the electronic carrier to the appeal stipulates waste of extra financial means, which is a legal regulation aggravating the person's legal situation as the legislation does not ban the hand written option of the cassation appeal. The Applicant also considers that in accordance to the current legal regulations the hand written version shall be digitalized beside the RA Court of Cassation should have such a computer which would read the electronic carrier of the submitted cassation appeal.

4. The Respondent states that the European Court of Human Rights has stated for many times that the right to judicial protection – which also includes the right to access to justice – is not absolute and it can be restricted especially in regard to the terms of acceptability of the appeal. In all cases, in this regard the states enjoy discretionary freedom. Together with the above-mentioned, the Respondent also admits that, anyway, the applied restrictions should not restricted any way or to any extent the person's right to access to justice which will damage the main essence of this right.

The Respondent states that taking into consideration the case-law legal positions of the RA Constitutional Court, for declaring the mandatory requirement to submit cassation appeal through the lawyer null as prescribed by Part 3 of Article 223 of the RA Civil Procedure Code, the RA National Assembly put into circulation the draft of the RA Law on Making amendments to the Civil Procedure Code of the Republic of Armenia (documentary code ՊՈ-6331 - 09.10.2014, 03.04.2015-ՊԻ-010/0), which is included in the agenda of coming session.

Referring to the issue of constitutionality of the challenged legal positions of Article 231 of the RA Civil Procedure Code, the Respondent finds that though the format of the electronic document and type of the electronic carrier are not specified in the procedural codes, such circumstance cannot cause violation of rights in the law-enforcement practice. The electronic version of the document can be accessible by any carrier able to carry the electronic version of the document. The legislator by not specifying the type of carrier, by merits considered as acceptable option any kind of carrier valid for preserving and transferring the electronic version of cassation appeal. By not specifying the type of electronic carrier by the Code, the person who submits cassation appeal is provided with wide options to decreasing the expenses made for purchasing the electronic carrier to the minimum. The Respondent states that the Applicant's statement that obligatory requirement to submit the cassation appeal via electronic carrier demands additional investments and thus makes impossible the constitutional right to judicial protection, is not substantiated, as submission of the cassation appeal demands certain

expenses from the applicant such as state due. Delivering the copy of the appeal to the court and the parties to the proceeding etc., which are completely included in preconditions of realization of the right to judicial protection.

According to the Respondent, not following the requirements of Article 231 of the RA Civil Procedure Code cannot hinder the right to access to the Court of Cassation. Not following the requirements of the mentioned Article serves as grounds for returning cassation appeal, which enables to apply to the court after elimination of the mentioned shortcomings in accordance with Article 233 of the RA Civil Procedure Code.

The Respondent concludes that "the provision of Part 3 of Article 223 and the provisions of Part 4 of Article 231 of the RA Civil Procedure Code in so far as correlated with the legal regulation to submit a cassation appeal through the lawyer /in regard to the part concerning the representative/ contradict the RA Constitution but the provisions of Part 5 of Article 231 of the RA Civil Procedure Code are in conformity with the RA Constitution."

5. The RA Constitutional Court considers necessary to mention that the study of the application states that the issue raised by the Applicant H. Sahakyan, by merits does not concern entire Part 5 of Article 231 of the RA Civil Procedure Code, but the first sentence of Part 5 of the mentioned Article.

The Constitutional Court states that the RA Civil Procedure Code by prescribing in Part 3 of Article 223 the right to submit the cassation appeal only through the lawyer in the first and second sentences of Part 4 of Article 231 uses the term "representative." The Constitutional Court finds that in the first and second sentences of Part 4 of Article 231 of the RA Civil Procedure Code the provisions regarding the representative concern the lawyer.

6. The Constitutional Court states that the legal provisions stipulated by the decisions DCC-765, DCC-833, DCC-1192 and DCC-1196 are applicable and subject to reconfirmation for the provisions stipulated in Part 3 of Article 223, Part 4 of Article 231 and the

first sentence of Part 5 Article 231 of the RA Civil Procedure Code. The Constitutional Court also states that in the above-mentioned decisions, the Court regarding the legislative regulation to submit a cassation appeal only through the lawyer had already formulated a number of legal positions, which amongst others are of significant importance for the adjudication of this Case. In particular, taking into consideration the certain similarity of constitutional legal disputes in the Decision DCC-1192 and this Case, the Constitutional Court considers necessary to refer to the legal decisions stipulated in those decisions:

a) "... conditioned with functional peculiarities of the Court of Cassation, the demand to apply to the Court of Cassation through the lawyer may be considered legitimate if it derives from the interests of natural and legal persons to be represented by professional and experiences specialists. The Constitutional Court at the same time considers necessary to emphasize that the institution to apply to the Court of Cassation through the lawyer is an alternative option can be considered as a legitimate option only in the case when the legislation guarantees every person the possibility to obtain the services of lawyers despite the financial position of the person" (DCC-765),

b) "... the mandatory requirement concerning representation through the lawyer prescribed in the challenged norm concerning submission of the appeal regarding the review of judicial acts by the lawyers in the cases of not providing possibility of legal assistance on free basis while submitting application on review of judicial acts by the lawyers disproportionally restricts the violated rights guaranteed by the Constitution and the Convention... thus endangering the effective implementation of person's right to constitutional justice and constitutional right to judicial protection of her/his violated right at the international instances" (DCC-833).

The Constitutional Court in the Decision DCC-1192 also states the following: "For the implementation of authorities of the Court of Cassation to review the judicial acts by the subordinate court amongst the others the institution of appeal of judicial acts, by such a material and procedural legislative regulation which will ensure

the effective and fully fledges implementation of the person's rights and freedoms of judicial protection, is an important guarantee. In the mentioned context the Constitutional Court highlights the systemic integrity of the institution of appeal of judicial acts and presence of relevant structural and legislative guarantees which ensure efficient implementation which is necessary for preciseness of implementation of the right to judicial protection as well as for assessment in the cassation proceeding. The Constitutional Court states that any judicial peculiarity or procedure cannot hinder or prevent the possibility of efficient implementation of the right to apply to the court and make senseless the right guaranteed by Article 18 of the RA Constitution or hinder its implementation. While defining the terms for accepting the cassation claim the guarantees of accessibility of the justice and ensuring the right to effective appeal shall prevail. The structural status of the Court of Cassation as a supreme body in the system of general jurisdiction courts system cannot hinder the precise implementation of competence prescribed by law and effective exercising of the right to appeal if legal and structural guarantees necessary for its creation are created."

7. The Constitutional Court also states that taking into consideration the contextual equivalency of the provisions challenged in the decisions DCC-1192 and DCC-1196 (except for Point 2 of Part 2 of Article 4141 of the RA Criminal Procedure Code) and the provisions challenged in this Case, other legal positions of the Constitutional Court on the issue of constitutionality of provisions challenged in the aforementioned decisions also serve as basis. This especially concerns the matter of principal, according to which the contended legitimate aim must be realized within the framework of guaranteeing the principle of supremacy of law, which presumes that the legislative regulation cannot cause social disproportional burden for the persons regarding their financial capacities and, as a result, the latter does not ensure fully-fledged realization of fair trial, effective means of judicial protection and the right to access to justice. In this content it should be mentioned that Article 20 of the RA Constitution unambiguously recognizes that the right to receive legal as-

sistance which is provided for free in the cases speculated by law. Recommendation No. R(2000)21 of the Committee of Ministers of the European Council to member States also suggests to exclude the possible blocking of the right to access to justice for the persons in an economically weak position.

The Constitutional Court considers significant the statistic data presented in the response note No. ԴԴ-1 Ե-2262 of the RA Judicial Department dated 22.04.2015. According to that statistics, from 03.07.2014 to 21.04.2015, from 849 cassation appeals received in the Civil and Administrative Chamber of the RA Court of Cassation 170 were left without consideration, 506 were dismissed, and only 53 applications were accepted for consideration, which comprises only 6.24 percent of the cassation appeals.

Based on the review of the Case and being governed by the requirements of Article 100, Point 1 and Article 102 of the Constitution of the Republic of Armenia, 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 declare Part 3 of Article 223 of the RA Civil Procedure Code contradicting Article 14.1, Part 1 of Article 18, Part 1 of Article 19 of the RA Constitution and void, taking into consideration that in the terms of current legal regulations it creates social disproportionate burden for the persons application of this provision in the current legal regulations creates disproportionate social burden for the persons regarding their financial capacities, and also not ensuring fully-fledged realization of the right to fair justice, effective means of judicial protection and the right to access to justice.

2. To declare Part 4 of Article 231 of the RA Civil Procedure Code, in regard to the part concerning the parties to the case who did not have a lawyer at the moment of signing cassation appeal and no possibility to obtain free legal assistance prescribed by law contradicting Part 1 of Article 18 and Part 1 of Article 19 of the Constitution of the Republic of Armenia and void, taking into consideration that the application of this provision in the conditions of current legal regulation excludes the possibility to lodge cassation

appeal in the context of presenting their legitimate interests by the mentioned persons.

3. To declare the provision "Electronic carrier of the cassation claim shall also be attached to the cassation appeal" in conformity with the Constitution of the Republic of Armenia in the framework of legal positions on the same issue expressed in the Decision DCC-1192 of the RA Constitutional Court.

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

Chairman **G. Harutyunyan**

June 16, 2015
DCC - 1220

IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF ARTICLE 181 OF THE RA ADMINISTRATIVE PROCEDURE CODE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE CITIZEN SAMVEL ALAVERDYAN

Yerevan **June 26, 2015**

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

with the participation (in the framework of the written procedure) of A. Zeinalyan, the the Applicant's representative M. Ghulyan,

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

pursuant to Article 100, Point 1, Article 101, Part 1, Point 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 in a public hearing by a written procedure the Case on conformity of Article 181 of the RA Administrative Procedure Code

with the Constitution of the Republic of Armenia on the basis of the applications of the citizen Samvel Alaverdyan.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the citizen Ara Alaverdyan on February 23, 2015.

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

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

The challenged Article 181 of the Code prescribes:

"Article 181: Grounds for review of the judgment due to newly revealed circumstances

1. The newly revealed circumstances serve as grounds for review of judgment, if:

1) The judgment was adopted and entered into force on the basis of false evidence of the witness, apparently false conclusion of the expert, apparently wrong translation of the translator, falsified documents and exhibits;

2) By the judgment in force it was confirmed that the party to proceeding or her/his representative or the judge committed a crime regarding the examination of the case."

By the wording of the RA Administrative Procedure Code of 28.11.2007 the procedure for review of judgment due to newly revealed circumstances was stipulated by Article 134 of the Code, according to which:

"Judgments of the Administrative Court can be reviewed due to newly revealed circumstances or new circumstances based on the grounds and by the procedure stipulated by the Civil Procedure Code of the Republic of Armenia."

2. The procedural background of the Case is the following: Erebuni Tax Inspectorate of the State Revenue Committee adjunct to the Government of the Republic of Armenia applied to the court with the claim to issue an order to levy 6.242.610 AMD from private entrepreneur Samvel Alaverdyan. The Applicant in his counterclaim submitted to the court on 09.02.2012 requested to recognize invalid the inspection act No 10000445 of Erebuni Tax Inspectorate. By the decision ՎԴ 3170/05/12 of 29.07.2013 of the RA Administrative Court the claim was satisfied but the counterclaim was refused. The above-mentioned judgment of the RA Administrative Court was appealed and by the decision of the RA Administrative Court of Appeal of 18.12.2013 was refused. The cassation claim submitted by the Applicant was dismissed by the judgment of the RA Court of Cassation on 19.02.2014.

The Applicant submitted a cassation claim due to newly revealed circumstances, which was refused by the judgment of the RA Court of Cassation on 29.05.2014. The Applicant's re-submitted cassation claim to the RA Court of Cassation due to newly revealed circumstances was once again refused by the decision of the RA Court of Cassation on 27.08.2014 and by the decision of 05.11.2014 it was dismissed.

Previously, by the decision of February 23, 2012 of the body of preliminary investigation the Applicant was charged by Part 1 of Article 2005 of the RA Criminal Code for evading taxes, duties and other obligatory payments. Within the framework of criminal case No ԵԿԴ/0233/01/12 the Court appointed additional forensic accounting expertise, based on which the fact that the Applicant had only 924.882 AMD additional tax obligation was confirmed and he was acquitted in the certain episode of indictment and relevant judgment was adopted. The latter was appealed at the RA Court of Appeal and was left unchanged by the decision of 19.09.2014.

3. The Applicant finds that the challenged legal provision contradicts the requirements of Articles 1, 3, 6, 18 and 19 of the RA Constitution and presents the following groundings:

Article 181 of the RA Administrative Procedure Code precisely lists the newly revealed circumstances "which does not allow the court to implement grounds for review of judgment other than the listed grounds," and in this certain case such a situation occurs "when two judicial acts of the RA judicial system contradict each other, in particular, the judgment of the RA administrative Court prescribes one liability and the judgment of the criminal case prescribes another liability. The current legislation does not prescribe any structure of adjudication of this situation".

The Applicant states that the challenged provision of the RA Administrative Procedure Code contradicts Articles 18 and 19 of the RA Constitution as 'restricts the right to access to court". According to the Applicant, in the case of limited regulation of the challenged norm "the person is deprived of the right of judicial protection in the case when a circumstance of essential significance for the adjudication of the case, which is unknown to the person, is revealed". In the law-enforcement practice such diverse circumstance may occur when certain circumstance essential for the adjudication of the case were unknown to the persons, could not be known and were not presented for reasons beyond control, and, as the Applicant states, in the interest of jurisdiction the law shall prescribe certain structures for ensuring protection of person's rights in such circumstances. The Applicant also states that the RA Criminal and RA Civil Procedure Codes prescribe similar ground according to which due to newly revealed circumstances the judgments are reviewed when other unknown circumstances are revealed. Meanwhile, "the interpretation provided to Article 181 of the RA Administrative Procedure Code restricts the right to access to court as among the newly revealed circumstances does not prescribe revealing of other circumstances which were unknown before and could not be known to the parties to proceeding or these circumstances were known to the parties to proceeding but for the reasons beyond their control were not presented at the court, and these circumstances are of essential significance for the adjunction".

Thus, the Applicant concludes that "the current legislation shows different approach to the cases examined by administrative and civil

procedure in the case of definition of the grounds for review of judgment" which did not occur in the former legal regulation.

4. The Respondent objected the Applicant's arguments stating that unlike the RA Criminal Code and the RA Civil Procedure Code, the RA Administrative Procedure Code prescription of comprehensive list for the grounds of review of the final judicial acts due to newly revealed circumstances is conditioned with "peculiarities of the administrative litigation. Unlike the civil litigation, the administrative litigation is anchored on the principle of ex officio clarification of the circumstances of the case which suggests that the judge independently, irrespective to the parties to proceeding, shall undertake all equivalent remedies for revealing the real facts of the case" and that "the administrative court shall undertake equivalent remedies to perceiving possible and accessible information concerning the necessary real facts". According to the Respondent, deriving from the circumstances of the case, based on the principle of clarifying ex officio, "if any circumstance essential for adjudication of the case has not been revealed, then procedural violation made by the court is present as the court is obliged to reveal that circumstance. In the case of procedural violation of the made by the court, the relevant circumstance cannot be considered as newly revealed".

Simultaneously, regarding the circumstances related to the issue of legitimacy of action or inaction of the administrative body or newly revealed circumstances, the formerly adopted administrative act shall be reviewed".

5. In the framework of the case, the Constitutional Court considers necessary in judging the constitutionality of the challenged legal regulation to esteem:

- In the framework of the institution of review of the judgments due to newly revealed circumstances, constitutional legal compatibility of the challenged legal regulation deriving from the legal positions expressed in the decisions of the Constitutional Court relating the challenged issue, taking also into consideration the practice formed in the European legal system,

- In the framework of the challenged issue, constitutional legitimacy of ensuring judicial protection of the person's rights, as well as access to court and rights to fair trial, by considering them in the context of the peculiarities of procedures of administrative litigation.

6. In a number of its decisions (DCC-701, DCC-709, DCC-751, DCC-758, DCC-765, DCC-767, DCC-833, DCC-872, DCC-935, DCC-1049, DCC-1114 etc.) the Constitutional Court referred in details the issues of revealing the constitutional legal content, unique perception and application of the institution of review of judgments in force, including due to newly revealed circumstances, as an exceptional measure for fair and effective restoration of person's violated rights in accordance with Articles 18 and 19 of the RA Constitution. Based on the framework of legal regulations examined by this Case, the legal positions expressed in those decisions lead to the following pivotal conclusions:

- Revision of legitimacy and substantiality of the judgments due to newly revealed circumstances is a grave guarantee for restoration of person's violated rights, correction of judicial mistakes and revealing the truth,
- The essence of those circumstances is the following: although they objectively existed at the moment of adoption of final judgments, but were unknown (or) could not be known both for the parties to proceeding and the court, or were known to the parties to proceeding but were not presented for reasons beyond control, or in some cases were newly revealed (Point 4 of Part 1 of Article 204.32 of the RA Civil Procedure Code),
- Substantiations presented to the court by the competent person as newly revealed circumstances (information, argumentations) serve as a reason for studying the relevant legal procedure of legitimacy and substantiality of the judgment which entered into force and in the case of availability (assessment of these circumstances as significant importance for the court) serve as grounds for review (termination, reconsideration of the case by the competent court) of the judgment, i.e. in the framework

of such a examination the competent court shall decide to what extent the presented circumstances had impact on the outcome of the case, and how the possible violated rights of a person must be restored,

- By procedural (criminal, civil) legislation the exhaustive list of arguments, information and proofs assessed as a "newly revealed" circumstance is not stipulated, which becomes the task of assessment (decision) of the court in case of submission by the interested party; simultaneously it is the task of legislation not to exclude the possibility of examination of any legally assessable "newly revealed" circumstance in the competent court, if its non-consideration in the judgment has led to the adoption of illegitimate and unsubstantiated decision, therefore to violation of person's rights,
- The person who initiated such review carries the duty of legal substantiation (proof) of necessity to review the judgment in force due to this or that (previously known or unknown) circumstance,
- The review of judgments in force due to newly revealed circumstances is carried on in accordance with the judicial relevant procedure, in the framework of which the competent court is called to resolve the following judicial main tasks, study of not mentioned or newly revealed circumstances (proofs) not reflected in the decision in force, legal assessment and choice of relevant norms of legislation for the adjudication of the legal dispute, their interpretation and implementation, which were followed by the legal consequences, as well as related to the protection of the person's rights.
- Study of case of law of the European Court of Human rights in the framework of the judicial examinations of the abovementioned cases on constitutionality of the institution of review of judgments also states in the national justice procedures the necessity of implementation of the abovementioned criteria in each case when they are sufficient grounds for initiating "the review of the case" due to newly reveled circumstances. In particular, in a number of decisions ECHR confirmed that the

circumstances, which were available already during the examination of the case, but for some reason could not be presented to the court and become known only after the trial are considered as "newly revealed". The person who applied to the court to recognize the judgment as shall prove that the evidence was impossible to present at the last hearing, and this evidence is of decisive importance (Xheraj v. Albania, application no. 37959/02, §53-54, Yerogova v. Russia, application no. 77478/01, §33, Maltseva v. Russia, application no. 76676/01, §33, Kumkin and others v. Russia, application no 73294/01, §31).

In the other case, turning upon to the issue of legal significance of the process of review of judgment due to new circumstances, ECHR states, "...review of the case due to the newly revealed circumstances does not contradict the principle of legal certainty as it is used for correction of judicial errors. It is the task of court to clarify is the procedure was implemented in concordance with Paragraph 1 of Article 6 (Case of Kuznetsova v. Russia, Application no. 67579/01, see Pravednaya, cited above, §28).

Study of national legal regulations of a number of European Union states due to newly revealed circumstances for review of the case in particular in administrative litigation state that amongst the others the essential facts which existed during the examination of the case which were unknown to the court and could have led to completely different decision (Latvia (Law on Administrative Proceeding, Chapter 39, Due to newly revealed circumstances de novo of cases, Chapter 353, Newly revealed circumstances), Estonia (Code of Administrative Court Procedure (entered into force 01.01.2012), §240, Grounds for Review), Bosnia and Herzegovina (Law on Administrative Disputes, Article 238), Croatia (General Act on Administrative Procedure, Article 123), Bulgaria (Administrative Procedure Code, Chapter 14, Reversal on Motion by Party to Case Subject of Reversal, Section 1, Article 239), Czech Republic (Code of Administrative Procedure, Section 2, Resumption of Proceeding, §111, Reasons for Resumption), Poland (Procedural Law in Administrative Courts, Article 273), Germany (Code of Admin-

istrative Court Procedure, Article 153, Code of Civil Procedure, §580), Finland (Administrative Judicial Procedure Act, Section 27, Alteration of Appeal), etc. For instance, according to § 153 of Code of Administrative Court Procedure, of Germany the litigation ended by force of law may be resumed in accordance with the provisions of Book Four of the Code of Civil Procedure, i.e. on the basis of the claim lodged to null the judgment; according to §579 of the Code, when certain grave procedural violation are available, or as a requirement of restitution on the basis of the submitted claim in accordance with §580 of the Code of Civil Procedure of Germany, the judgment was based on the incorrect, in particular, falsified or incomplete or insufficient grounds. In accordance with Article 153 of the Administrative Procedure Code of the Federal Republic of Germany, "Proceedings ended by force of law may be resumed in accordance with the provisions of Book Four of the Code of Civil Procedure," and §580 of the latter stipulates: "An action for retrial of the case may be brought:

1. Where the opponent, by swearing an oath regarding his testimony, on which latter the judgment had been based, has intentionally or negligently committed perjury;

2. Where a record or document on which the judgment was based had been prepared based on misrepresentations of fact or had been falsified;

3. Where, in a testimony or report on which the judgment was based, the witness or experts violated their obligation to tell the truth, such violation being liable to prosecution;

4. Where the judgment was obtained by the representative of the party or its opponent or the opponent's representative by a criminal offence committed in connection with the legal dispute;

5. Where a judge contributed to the judgment who, in connection with the legal dispute, violated his official duties vis-a-vis the party, such violation being liable to prosecution;

6. Where judgment by a court of general jurisdiction, by a former special court, or by an administrative court, on which the judgment had been based, is reversed by another judgment that has entered into force;

7. Where the party a) Finds, or is put in the position to avail itself of, a judgment that was handed down in the same matter and that has become final and binding earlier, or where it b) Finds, or is put in the position to avail itself of, another record or document that would have resulted in a decision more favorable to that party's interests."

Thus, reconfirming the constitutional legal contents of the institution of review of the judgments due to newly revealed circumstances, on the principles of its uniform perception and implementation based also on the comprehensive study of relevant criteria in the European legal system, the Constitutional Court states the constitutional legal significance of that institution in different, including administrative judicial processes directed to ensuring guarantees of protection of the person's rights by fair, effective and accessible trial.

7. Regarding the issue of assessment of the constitutionality of the challenged legal regulation, the Constitutional Court considers necessary to consider the issue in the context of peculiarities of constitutional legitimacy and of administrative litigation prescribed by protection of person's rights (right to access to court and fair and effective trial) prescribed by Articles 18 and 19 of the RA Constitution as well as due to newly revealed circumstances general adjudication of the institution of review of judicial act and deriving from the inquiries of the parties emphasizing in particular:

- To what extent the norms of Article 181 of the RA Administrative Procedure Code in legal sense guarantee precisely the possibility to assess this or that information (evidence) as "newly revealed circumstance", in particular, if the circumstance presented by the party of hearing was known to the court (examined by the court), would any other decision be adopted than the one which is challenged due to newly revealed circumstance,
- To what extent do the effective litigation of examination and assessment fully guarantee the possibility of assessment of this or that information (evidence) guarantee "newly revealed cir-

cumstances" and, in particular, to the sense that the circumstance submitted by the party of hearing was known to the court (examined by the court), then would any other decision be adopted than the one which is challenged due to newly revealed circumstance?

- To what extent by the challenged legal regulation do effective judicial processes of examination and assessment of this or that information (evidence) which contain attributes of the legal term of "newly revealed circumstance" (DCC-935) are guaranteed,
- To what extent the person's right to fair, accessible and effective litigation prescribed by Articles 18 and 19 of the RA Constitution is guaranteed,
- To what extent is it legitimate to regulate the legal relations due to the newly revealed circumstances from the perspective of constitutional legitimacy?.

Taking into consideration the above-mentioned questions and general adjudication of institutional review of judgments due to the newly revealed circumstances, the Constitutional Court in its decisions expressed legal positions as well as analysis of the challenged regulation expressed in the context of the norms included in Chapter 25 titled "Review of the judgments due to new circumstances and newly revealed circumstances" of the RA Administrative Procedure Code, the Constitutional Court states that:

- Ensuring prescription of the institution of review of the judgments of the legitimacy and substantiality of the acts due to newly revealed circumstances in the RA Administrative Procedure Code as well as protection of the violated rights of a person an additional guarantee,
- For providing the study and proper legal assessment of the arguments and information assessed as "newly revealed circumstances" the legislator prescribes relevant procedure and legal status of the parties to proceeding which will allow in the framework of examination of the grounds prescribed in Article 181 of the RA Administrative Procedure Code to implement certain procedural rights and carry duties, amongst them prov-

ing the newly revealed circumstances in the court,

- For prescription of the grounds for newly revealed circumstances, the legislator was guided by the principle of limiting the list of possible information (facts) as for possible grounds for review of the judgment in force the criminal acts, committed only by the parties to proceeding (their representatives), judges as well as criminal acts available in the grounds for adoption of such a judgment and prescribed by the legislation, thus excluding objectively existing and (or) unknown to the parties to proceeding at the moment of adoption of judgment which are due to examination and real assessment of which would inevitably bring to the judgment other than the adopted one.

It should also be mentioned that no issue of constitutionality emerges in the framework of examined legal regulations in case of prescribing criminal acts in the judgment in force as a newly revealed circumstance. Availability of such circumstance can objectively be crucial for review of acts in force of the Administrative Court and for adopting just decisions. The RA Criminal Procedure Code and RA Civil Procedure Code provide inter alia the possibility of assessing such circumstances as "newly revealed" in the case of availability of relevant features. However, in such circumstances providing the judgments in legal force with legal exclusive significance essentially restrict the legal possibility of assessing such circumstances as newly revealed and review of acts in force of the Administrative Court (for instance, in the cases of determination of the criminal litigation and release from criminal liability both by amnesty or in other cases and procedure prescribed by the RA Criminal Code and the RA Criminal Procedure Code), when the fact of crime and the person who committed it are legally determined. Consequently, the Constitutional Court states that such legal regulation essentially limits possible margins of implementation of the institution of review of judgments by the above-mentioned grounding, and consequently it cannot serve as effective remedy for precise protection of the person's rights.

It also follows from the legal content of the challenged norms that

the person is deprived of the possibility to challenge the judgment in force of the Administrative Court due to other circumstances which are assessed as "newly revealed circumstances," in particular on the basis of newly revealed circumstances not linked to judicially determined crime, which at the moment of adoption of the judgment existed, were of significant importance for the fair adjudication of the case, but were not presented beyond the will of the parties to proceeding and were unknown to the court.

The Constitutional Court states that such legal regulation of review of judgments due to newly revealed circumstances, according to which the proper litigation of legal assessment of other factual circumstances which are of evidential significance, are essentially restricted in the cases when objective existence of such circumstances inevitably bring to (will bring to) other judgment than the one that was adopted before revealing those circumstances or which is similar to adoption of fair substantiated, legitimate judgment, consequently also restoration of the violated rights of the person, it restricts the right to effective and accessible court guaranteed by Articles 18 and 19 of the RA Constitution, contradicts the main objectives of justice and the principle of constitutional order prescribed in Article 1, 3 and Part 2 of Article 6 of the RA Constitution.

8. The Constitutional Court does not consider as substantiated the Respondent's position, according to which provision by the legislator (unlike previous legal regulation (Article 134 of the RA Administrative Procedure Code (in the wording of 28.11.2007) prescription of precise list of circumstances assessed as grounds for "newly revealed" circumstances or not prescription of other such grounds is conditioned with the prescription of judicial principle on clarifying ex officio the actual circumstances by the court envisaged in Article 5 of the RA Administrative Procedure Code.

It is obvious that the legal requirement and procedural principle to clarify ex officio the actual circumstances of the case are conditioned with the peculiarities of the administrative procedure examination and, in particular, in the frames of adjudication of public legal disputes resolved by the court, by the unique role of the court

in the competitive relations of the parties to proceeding etc. Although the Constitutional Court states that any peculiarity of the litigation cannot restrict, by merits, the legitimacy of the adopted judgment, examination of the disputable circumstance, as well as newly revealed circumstance by fair, effective and accessible judicial examination and review of the adopted judgment in the case of availability of the necessary groundings.

The Constitutional Court considers necessary to state that in case of availability of the procedural principles of clarifying ex officio the factual circumstances of the case (which points out the Respondent), not the court but **the interested party of litigation on his/her own will and by his/her own initiative** is authorized with the right and responsibility of presenting the circumstances (evidence) assessed as newly revealed circumstances. In the framework of administrative litigation not any peculiarity of the certain consideration can be interpreted as groundings for restriction of access to court guaranteed by the Constitution.

The Constitutional Court, in a number of its decisions, referred in details to the problems of constitutional legitimacy of guaranteeing the right of access to court, as well as the right to fair trial, emphasizing their significance equally signifying them in all domains of judicial process (criminal, civil and administrative). Re-ascertaining the previously expressed legal positions, the Constitutional Court also finds that no procedural peculiarity or procedure may hinder or prevent the possibility of effective implementation of the right to apply to the court and destroy the meaning of the right stipulated by Article 18 of the RA Constitution or hinder its implementation.

At the same time the Constitutional Court finds necessary to refer to the legal position expressed by the ECHR regarding the restrictions of access to court, which emphasizes that for enjoying the right to apply to the court the state may define certain terms, "...the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means

employed and the aim sought to be achieved" (Case of Khalfaouri v. France, application no. 34791/97, 14/03/2000).

The Constitutional Court states the principle of constitutional legal significance in any case of establishment of legislative order of realization of rights prescribed by Articles 18 and 19 of the RA Constitution as well as in the case of challenged legal regulation.

9. The Constitutional Court considers non-conforming from the perspective of constitutional legal content of Article 18 of the RA Constitution the legal position of the Respondent according to which in case of presence of this or that evidence grounding disputability of the judgment in force on the basis of the newly revealed circumstances, "the previously adopted judgment shall not be reviewed by the court, but, in the framework of relevant factual circumstance, the previously adopted administrative act shall be reviewed by the administrative body." That is, the issue of regulation of legal relations related to review of the judgment in force due to new circumstances and eventually challenging legitimacy of the judgment and elimination of judicial error, which appeared due to newly revealed circumstances and adopting fair decision is of pivotal significance.

The Constitutional Court does not refer to the aims and tasks prescribed by the law on administrative litigation and administrative proceeding as well as to the interpretation of those legal processes and their constitutional content of the general legal regulative role and states that in the decisions DCC-652, DCC-665, DCC-673, DCC-690, DCC-719, DCC-954 and in a number of other decisions the Court referred to the issue of revealing the constitutional legal content of the right to judicial protection, the Constitutional Court expressed the legal position that, from the viewpoint of ensuring and protecting rights of a person, **the task of Article 18 of the RA Constitution is to guarantee the right to initiate litigation based on the person's assertions on violation of right and elimination of consequences of such a violation.** The Constitutional Court stated that **the mentioned right is not subject to restriction.** Hence, based on the Respondent's assertions the Constitutional Court re-confirms its above-mentioned position. If the legitimacy of

the judgment adopted due to other arguments (evidence) assessed as newly revealed circumstances is dubious, within the challenged legal regulation the legislator shall not restrict the legal possibility of challenging such an act which directly restricts the possibility of the person's rights and their judicial protection guaranteed by the RA Constitution but, in the scopes of relevant litigation frames, the legislator shall enlarge the remedies to examine in the framework of relevant litigation processes other circumstances assessed as "newly revealed" circumstances and as a result of their legal assessment provide fair adjudication of the case ensuring protection of person's rights pursuant to the constitutional legal content of Articles 1, 3 and Part 2 of Article 6, Articles 18 and 19 of the RA Constitution.

Simultaneously, the Constitutional Court states that in case the person did not apply to the court for protection of her/his rights but chose legally provided extrajudicial remedy (in this case – administrative authority) of protection of her/his rights and legitimate interests, such legal regulation cannot bring to restriction of the rights guaranteed by Articles 18 and 19 of the RA Constitution.

Based on the review of the Case and being governed by the requirements of Article 100, Point 1 and Article 102 of the Constitution of the Republic of Armenia, Articles 19, 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 declare Article 181 of the Administrative Procedure Code of the Republic of Armenia, insofar as it blocks challenging of legality of effective judgments due to other legitimate "newly emerged" circumstances, resulting in limitation of the person's right to access to court and right to fair trail, as contradictory to Articles 1, 3, Article 6, Part 2, Articles 18 and 19 of the Constitution of the Republic of Armenia.

2. To determine 31 December, 2015 as the deadline for invalidation of norms declared as unconstitutional by this decision based on Article 102, Part 3 of the RA Constitution and Article 68, Part 15

of the RA Law on the Constitutional Court, considering the fact that the declaration of the norms in dispute as unconstitutional on the moment of the announcement of the decision of Constitutional Court, shall result in legislative gap which will distort the legal security to be established on the moment of the invalidation of the given norm, as well as enabling the National Assembly to bring the above-mentioned legal regulation in line with the requirements of this decision taking into consideration also the international legal experience regarding the issue.

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

Chairman **G. Harutyunyan**

June 26, 2015
DCC-1222

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