



**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. Gyu-lumyan, 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 I of Article 18, Part I of Article 19, Part I of Article 20 and Article 43 of the RA Constitution with the following substantiation:

- by force of Part I of Article 171 of the Code, discretionary 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 №-732-05.2015-№-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 I 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 I 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 *Shtukaturv 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 *Shtukaturv* 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 Part 1 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**