IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION

OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF PARTS 1 AND 5 OF ARTICLE 156, POINT 1 OF PART 1 OF ARTICLE 160 OF THE RA ADMINISTRATIVE PROCEDURE CODE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATIONS OF KAREN HARUTYUNYAN, ARTAK GEVORGYAN, DAVIT HARUTYUNYAN AND VARTGEZ GASPARI

Yerevan **February 9, 2016**

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

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

the Applicants K. Harutyunyan, A. Gevorgyan, D. Harutyunyan, V. Gaspari and their representatives A, Zeynalyan, T. Safaryan and T. Yegoryan,

representative of the Respondent: H. Sardaryan, official representative of the RA National Assembly, Senior Specialist of the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100, Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia (with Amendments throgh 2005), 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 Parts 1 and 5 of Article 156, Point 1 of Part 1 of Article 160 of the RA Administrative Procedure Code with the Constitution

of the Republic of Armenia on the basis of the Applications of Karen Harutyunyan, Artak Gevorgyan, Davit Harutyunyan and Vartgez Gaspari.

The Case was initiated on the basis of the Applications submitted to the Constitutional Court of the Republic of Armenia by the citizens Karen Harutyunyan, Artak Gevorgyan, Davit Harutyunyan and Vartgez Gaspari on 19 August, 9 November and 23 December accordingly.

By the Procedural Decisions PDCC-55 of 8 September 2015, PDCC-74 of 4 December 2015 and PDCC-3 of 29 January 2016 of the Constitutional Court, the Applications were taken into consideration and the Constitutional Court, guided by Article 39 of the RA Law on Constitutional Court, decided to join the mentioned cases and examine them in one hearing.

Having examined the written report of the Rapporteur on the joint Case, the written explanations of the Applicant and 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 (hereinafter referred to as the Code) was adopted by the RA National Assembly on December 5, 2013, signed by the President of the Republic of Armenia on December 28, 2013 and entered into force on January 7, 2014.

Parts 1 and 5 of Article 156 of the Code prescribe:

"1. Cassation appeal may be submitted against the judgment resolving the case by merits till the deadline prescribed for entering into legal force except for the cases of appealing the judgment based on the grounds envisaged by Part 3 of this Article,

…

5. After expiry of the deadlines prescribed by Parts 1- 3 of this Article the Cassation Appeal may be submitted to the Cassation Court which may initiate the proceeding if a motion is submitted on considering the omission of the respective deadline valid and the court satisfied it".

Point 1 of Part 1 of Article 160 of the Code prescribes:

1. The cassation appeal is not considered, if:

1) The cassation appeal is submitted after the expiry of the deadline and motion on restoring the missed deadline misses or it is refused…"

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

2.1. With regard to Karen Harutyunyan's application:

The RA Police submitted a claim to the RA Administrative Court against Karen Harutyunyan demanding to bring him to the administrative responsibility. The Administrative Court satisfied the claim by the decision dated on 25.07.2014. The representative of Karen Harutyunyan appealed the decision at the RA Administrative Appeal Court but the latter by the decision of 18.12.2014 refused the appeal and left the decision of the Administrative Court of 25.07.2014 in force. The representative of Karen Harutyunyan submitted a cassation claim against this decision demanding to cancel the mentioned decision of the RA Administrative Appeal Court and review or terminate the case. On 11.02.2015 the RA Civil and Administrative Chamber of the Court of Cassation adopted a decision on Leaving the cassation claim without consideration, stating, "In this case the decision of 18.12.2014 of the Appeal Court was sent to the applicant on 19.12.2014; it was received on 20.12.2014, the cassation claim against the decision of the Court of Appeal of 18.12.2014 was forwarded by post on 20.01.2014, i.e. one day after the deadline prescribed for submission of the cassation claim by law and motion ommission of the deadline for submission of cassation claim as valid and restoring the deadline was not submitted.

2.2. With regard to Artak Gevorgyan's application:

The RA Police submitted a claim to the RA Administrative Court against Artak Gevorgyan demanding to bring him to the administrative responsibility. The Administrative Court by the decision of 10.02.2015 satisfied the claim. The representative of Artak Gevorgyan appealed the decision at the RA Administrative Appeal Court but the latter by the decision of 10.06.2015 refused the appeal and left the decision of the Administrative Court of 10.02.2015 in force. The representative of Artak Gevorgyan submitted a cassation claim against this decision. On 26.08.2015 the RA Court of Cassation adopted a decision on leaving the cassation claim without consideration, stating, "…the cassation claim was submitted to the Court of Cassation on 22.07.2015 (the post envelope served as grounds), i.e. after expiry of the deadline of one month to submit the cassation claim and motion on missing the deadline for submission of cassation claim as valid and restoring the deadline was not submitted".

2.3. With regard to David Harutyunyan's application:

The RA Police submitted a claim to the RA Administrative Court against David Harutyunyan demanding to bring him to the administrative responsibility. The Administrative Court by the decision of 05.11.2014 satisfied the claim. By the decision of 24.06.2015 of the RA Administrative Appeal Court, David Harutyunyan's appeal was refused and the decision of the Administrative Court of 05.11.2014 was left in force. The representative of David Harutyunyan submitted a cassation claim against this decision. On 26.08.2015 the RA Court of Cassation adopted a decision on leaving the cassation claim without consideration, stating, "…the cassation claim was submitted to the Court of Cassation on 22.07.2015, i.e. after expiry of the deadline of one month to submit the cassation claim and motion on ommission of the deadline for submission of cassation claim as valid and restoring the deadline was not submitted".

2.4. With regard to Vartgez Gaspari's application:

The RA Police submitted a claim to the RA Administrative Court against Vartgez Gaspari demanding to bring him to the administrative responsibility. The Administrative Court by the decision of 02.10.2014 satisfied the claim. By the decision of 07.04.2015 of the RA Administrative Appeal Court the appeal of Vartgez Gaspari's representative was refused and the decision of the Administrative Court of 02.10.2014 was left in force. The representative of Vartgez Gaspari submitted a cassation claim against this decision. On 03.06.2015 the RA Court of Cassation adopted a decision on leaving the cassation claim without consideration, stating, "…the cassation claim was submitted to the Court of Cassation on 11.05.2015, i.e. after expiry of the deadline. Simultaneously, the person who submitted the motion on recognizing the reason for omission of the deadline for submission of the cassation claim and restoring the missed deadline…" The Court of Cassation states that … in accordance with the enclosed to post warranty note, the latter received the decision of the Court of Cassation on 10.04.2014, meanwhile the cassation claim was submitted on 11.05.2015, i.e. after the deadline for submission of the cassation claim prescribed by law. … That is, the motion of the complainant is not grounded and is subject to refusal as the arguments of the representative of Vartgez Gaspari on considering the missed deadline as void is

not grounded, in particular, there is no argumentation for the time period from 10.04.2014 to 11.05.2015".

3. The Applicants analyzed the challenged provisions of the RA Administrative Procedure Code and stated that the contents of the latter conclude that even in case of "omission" of the deadline beyond control of the Applicant (such as, due to delayed receipt of the post delivery), for considering it valid and exercising the right to submit the cassation claim within one month time period after receiving the judgment, the complainant needs to submit a motion to allow the Court of Cassation to permit exercise of his/her right, and the merits and frameworks of discretion of the latter are not prescribed by law. The Applicants also state that the period prescribed by law for appealing the judge means that the complainant may submit his/her complaint any day within that time period, as well as the last day of the time period. In this case the complainant, besides getting familiarized with the challenged judgment, discussing the main theses with the client, developing, agreeing the actions depending on his/her professional workload, as well as on other circumstances, based on these circumstances s/he decides the possible day for submitting the appeal within one month time period, which in certain cases may be the last day of the defined time period. Meanwhile due to the reason, which does not depend on the control of the complainant, such as receiving the judgment late by mail, the time period prescribed for submitting the complaint is reduced, if the time for appeal is calculated from the day of publication of the judgment and not from the day of receiving the latter. And in this case it does not matter how late the complainant receives a judicial act.

Based on the legal positions enshrined in a number of decisions of the Constitutional Court of the Republic of Armenia and judgments of the European Court of Human Rights, the applicants believe that establishing an obligation to appeal a judicial act of the Court of Appeal that resolves the case on the merits in a shorter period instead of the one-month period prescribed by legislator for the commission of this action and imposition of this on the person who filed the complaint is a disproportionate restriction of the right of access to the court.

As a result of a comparative analysis of the challenged provisions, the Applicants concluded that so far as Parts 1 and 5 of Article 156,

Paragraph 1 of Part 1 of Article 160 of the Administrative Procedure Code of the Republic of Armenia do not prescribe the duty of courts, by virtue of the right, to recognize as a valid deadline missed for reasons beyond the complainant's control which contradicts Articles 18 and 19 of the RA Constitution (with Amendments throgh 2005) and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4. Objecting to the Applicants' arguments, the Respondent states that the provisions of Parts 1 and 5 of Article 156, Paragraph 1 of Part 1 of Article 160 of the RA Administrative Procedure Code are in conformity with Articles 18 and 19 of the Constitution of the Republic of Armenia (with Amendments throgh 2005).

In the Respondent's opinion, although the monthly period for appealing the judicial decisions that resolve the case on the merits is calculated from the moment of their publication, at the same time, the legislator, by securing legal guarantees, ensured the possibility of effective exercising of the right of individuals to appeal. The legislator also established a legal procedure to restore the missed procedural deadline. It is a specific legal procedure in the framework of which the court assesses the validity of the reasons for the omission of the procedural period.

Regarding the legal positions expressed in the Decision No. 36 of the Council of Courts Chairmen of 22 December 2000 and the Decision DCC-1052 of the Constitutional Court of the Republic of Armenia of 16 October 2012, the Respondent considers that the restoration of the missed time term is one of those issues where the court is competent to exercise discretion, but judicial discretion must be exercised not arbitrarily and within the framework of the law. The validity of the reasons is decisive in the issue of restoring the missed time period, which is considered the starting point for the court's decision.

According to the Respondent, in international practice in the issue of restoring the missed time period, the legal regulations differ significantly. However, the Respondent also argues that, as a rule, cases where a person for objective reasons beyond his control was unable to file a complaint within the time period prescribed by law.

Regarding the issue of the lawful exercise of the discretionary powers of the courts, the Respondent thinks that the prevention of formation

of a non-uniform or controversial law enforcement practice would be facilitated by the legislative establishment of those criteria or an approximate non-exhaustive range of grounds for the validity of the reasons for the omission of the procedural time period, which in each case would be initial for the courts in assessing the validity of the missed time period.

In conclusion, the Respondent states that the Applicants received the judicial acts in a timely manner, they did not comply with the procedure established by law for restoring the missed time, therefore, the court did not discuss the validity of the reasons for the omission of the term. In the Respondent's opinion, the alleged violation of the Applicants' rights is not due to the constitutionality of the norm of law, but is due to the fact that they did not comply with the requirements of the law. Consequently, there is a reason to terminate the proceedings of this case.

5. In this case, the Constitutional Court considers it necessary during the assessment of the constitutionality of the challenged norms to proceed from:

- the need to ensure effective protection by public authorities on the basis of international treaties ratified by the Republic of Armenia on fundamental human rights and freedoms (arts. 3 and 81 of the RA Constitution (with Amendments through 2015);
- from the need to guarantee the right to effective judicial protection and the right to a fair trial, as stipulated in Articles 61 and 62 of the RA Constitution (with amendments through 2015), taking into account the legal positions expressed in the decisions of the Constitutional Court of the Republic of Armenia.

At the same time, within the framework of the present case, the Constitutional Court considers it necessary to state the following:

a) the study of appeals and justifications shows that they, in fact, concern not only Part 1 of Article 156 of the Administrative Procedure Code of the Republic of Armenia as a whole, but only the provisions of this Part stating that "a cassation complaint on a judicial act resolving the case on merits, can be filed before the deadline established for this act till the entry of it into legal force";

b) at the time of registering the appeals, the Constitution of the Republic of Armenia with amendments through 2005 was in force, and

the Applicants considered the challenged legal provisions controversial in terms of their compliance with Articles 18 and 19 of the Constitution in this edition. Taking into account the fact that Chapters 1-3 of the Constitution of the Republic of Armenia (with amendments through 2015) entered into force on December 22, 2015, the issue of constitutionality of the provisions challenged in the present case is subject to consideration in the context of Parts 1 of Articles 61 and 63 of the Constitution (with amendments through 2015).

6. The Constitutional Court of the Republic of Armenia, taking into account the legal positions expressed in connection with the same issue in its Decisions DCC-1052, DCC-1062 and DCC-1249, and according to the results of analysis of the legal practice of the European Court of Human Rights and certain countries on the issue of the institution of appeal of judicial acts, within the framework of consideration of the present case, reaffirms previously expressed legal position that **legislatively it is necessary to establish the necessary and sufficient guarantees to receive the complete judicial act filed by the complainant in a reasonable time term and effective implementation of the right to access to the court and a fair trial**.

The Constitutional Court, within the scope of the subject matter of the present case, noted the importance of the Recommendation of the Committee of Ministers of the Council of Europe on December 15, 2004, N (2004) 20 "Regarding judicial review of administrative acts", which establishes separate legal standards for effective judicial control of administrative acts. In particular, the point is: a) providing a reasonable time term for appealing the administrative act (paragraph 46); b) the establishment of a reasonable period for challenging the lawfulness of the administrative act (paragraph 47); c) the moment when the person is notified of the administrative act as the beginning of the reference period for the appeal (para. 48).

Thus, paragraph 46 of the above-mentioned Recommendation invites the member states of the Committee of Ministers of the Council of Europe "... to guarantee that the parties have a reasonable time to initiate their case in court", with due regard to the fact that "if the deadline for filing a statement of claim is too short, the parties control will be deprived of the opportunity to appeal the administrative act." Para-

graph 47 of the same Recommendation requires state parties to set a reasonable time limit for challenging the legality of an administrative act in court with a view to ensuring effective access to judicial review, as well as by the national legislation, clarifying the term "reasonable time term".

At the same time, in accordance with the requirements of paragraph 48 of the same Recommendation, the Committee of Ministers of the Council of Europe invites the participating States to take into account the fact that the beginning of the period for the appeal of an administrative act should not be directly related to the moment when an individual or legal entity learned or should have learned about the relevant act. It is obvious that this period starts from the moment of notification of the person about this act, and in connection with this circumstance, invites the participating States also establish the time of notification of the relevant act as the beginning of the reference period for the appeal.

Based on the above, the Constitutional Court of the Republic of Armenia considers that, despite the fact that the period for appealing court decisions is generally counted from the moment of publication, nevertheless, sufficient legislative guarantees are needed which control will ensure the effective exercise of the person's rights for judicial protection and fair trial.

7. As a part of the consideration in the present case, the Constitutional Court of the Republic of Armenia states that:

a) the logic of the legal regulation of Part 1 of Article 156 of the Administrative Procedure Code of the Republic of Armenia is commensurable with the logic of legal regulations of Paragraph 3 of Part 1 of Article 379 of the RA Criminal Procedure Code, which is the subject of consideration in case DCC-1052 and Part 1 of Article 412 of the RA Criminal Procedure Code, which is the subject of consideration in the case of DCC-1062;

b) the logic of legal regulation of Part 5 of Article 156 of the Administrative Procedure Code of the Republic of Armenia is commensurable with the logic of legal regulations of Parts 1 and 2 of Article 380 of the RA Criminal Procedure Code, which are the subject of consideration in case of DCC-1052;

c) the logic of legal regulation of Paragraph 1 of Part 1 of Article 160 of the Administrative Procedure Code of the Republic of Armenia is commensurable with the logic of legal regulation of Poit 1 of Part 2 of Article 414.1 of the RA Criminal Procedure Code, which is the subject of consideration in the case of DCC-1249.

On the basis of the above-mentioned conclusions and taking into account the equivalence of the contents of the provisions subject to consideration in DCC-1052, DCC-1062 and DCC-1249 and the provisions challenged in the present case, arguing that the legal positions enshrined in these Decisions are also applicable to the subject matter under consideration, the Constitutional Court takes as a basis the legal positions expressed by the Constitutional Court concerning the issue of constitutionality of the provisions that have been the subject of consideration in the above mentioned decisions.

In particular, the Constitutional Court in its Decision DCC-1249 noted: "... when the reason for the omission of the deadline for filing a cassation appeal prescribed by law to the Court of Cassation is due to late receipt of the relevant appealed judicial act by the complainant for reasons beyond his/her control, the complainant must submit a petition for the restoration of the missed time, attaching to it evidence corroborating the relevant circumstance, and the Court of Cassation, taking into account this circumstance must satisfy this motion. In this case, the missed time is restored by the Court of Cassation by virtue of the law (ex jure), arguing this in the relevant judicial act."

8. The Constitutional Court finds necessary to state that the Applicant Vartgez Gaspari attached to the cassation appeal an application on the restoration of the missed deadline and a proof certifying that the late receipt of the judicial act was not dependent on the complainant (enclosed with the cover letter) which verified that Vartgez Gaspari received a judgment of the Administrative Court of Appeal of the Republic of Armenia on April 10, 2015. This is also argued by the RA Court of Cassation.

On June 3, 2015, the Court of Cassation adopted a judgment "On leaving the cassation complaint without consideration," on administrative case number ՎԴ/0277/05/14 noting that "... the complainant's motion is not justified and is subject to rejection, since Vartgez Gas-

pari's representative's argument on recognition of the reason for the omission of a valid time period is not justified, in particular, because it does not contain any motivation for the period from 10.04.2014 to 11.05.2015." Such a conclusion is not clear, given that the appealed decision of the Administrative Court of Appeal of the Republic of Armenia was adopted on 07.04.2015.

In connection with the above mentioned decision, the Constitutional Court considers it necessary to note that despite the fact that in this decision, in the six cases "2014" is indicated instead of "2015", at the same time **the RA Court of Cassation also certifies that the evidence was provided indicating the late receipt of a judicial act by the complainant for reasons beyond his control such as a postal certificate attached to the letter.** At the same time, it was ascertained that according to this certificate, the Applicant "received the judgment of the Court of Appeal on April 10, 2014, while the cassation appeal was filed on May 11, 2015, that is, after the deadline for filing a cassation appeal prescribed by law." However, it was not taken into account that May 10, 2015 was a non-working day, and according to Part 5 of Article 52 of the Administrative Procedure Code of the Republic of Armenia, "when the last day of the procedural period falls on a statutory non-working day, the next working day following the expiration of the deadline shall be considered as deadline."

The materials of the case show that in the application of this norm in judicial practice there are different approaches and the constitutional requirement of uniform application of the law is not guaranteed.

At the same time the Constitutional Court states that, in the context of the consideration of this case, the legal positions regarding the issue, envisaged in the above-mentioned Decisions DCC-1052 and DCC-1062 of the Constitutional Court, were not consistently taken into account.

9. The Constitutional Court considers it necessary to state that after the adoption of Decisions DCC-1052, DCC-1062 and DCC-1249, the institution of appeal of judicial acts was not subjected to the relevant comprehensive legislative regulations, thus, the clear and consistent legal positions enshrined in the above-mentioned Decisions of the RA Constitutional Court were not fulfilled.

The Constitutional Court also notes that legislative regulations on the subject of the examination are necessary, in particular, with the aim to find equivalent decisions regarding the preconditions for filing a complaint regarding judicial acts, within the framework of a single criminal procedural, civil procedural and administrative procedural policy.

This circumstance is also due to the fact that According to Part 2 of Article 9 of the Law of the Republic of Armenia on Legal Acts, "Laws shall comply with the Constitution and shall not contradict the decisions of the Constitutional Court of the Republic of Armenia", which suggests that the decisions of the Constitutional Court receive the meaning and content, become the source of law in their integrity based on the legal positions expressed in the same decisions.

In this context, the Constitutional Court considers positive that the above mentioned circumstance within the framework of the explanation presented in this case by the National Assembly on November 30, 2015, also substantiates the statement of the official representative of the Respondent that "... in general, the prevention of formation of a non-uniform or controversial law enforcement practice would be facilitated by the legislative establishment of those criteria or an approximate non-exhaustive range of grounds for the validity of the reasons for the omission of the procedural time period, which in each case will be initial for the courts in assessing the validity of the missed time period."

Based on the review of the Case and being governed by the requirements of Point 1 of Article 100 and Article 102 of the Constitution of the Republic of Armenia (with Amendments through 2005), 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. The provision of Part 1 of Article 156 of the Administrative Procedure Code of the Republic of Armenia "a cassation complaint on a judicial act resolving the case on merits, can be filed before the deadline established for this act till the entry into legal force" is in conformity with the Constitution of the Republic of Armenia insofar as it is con-

sonant with the legal positions expressed in relation to the same issue in the Decisions DCC-1052 and DCC-1062 of the Constitutional Court of the Republic of Armenia, guarantees the provision of a judicial act in the manner and time prescribed by law to the person who has the right to file a complaint and, for reasons beyond his/her control, omission of this deadline in the presence of a relevant motion and evidence by virtue of law (ex jure) is recognized as valid.

2. To declare Part 5 of Article 156 of the Administrative Procedure Code of the Republic of Armenia contradicting the requirements of Parts 1 of Articles 61 and 63 of the Constitution of the Republic of Armenia (with Amendments through 2015) and void insofar as the restoration of the missed deadline for filing a complaint due to reasons beyond the control of the person enjoying the right to file a complaint is left to the discretion of the court and, if there is an appropriate motion and evidence, is not considered valid by virtue of law (ex jure).

3. Point 1 of Part 1 of Article 160 of the Administrative Procedure Code of the Republic of Armenia is in conformity with the Constitution of the Republic of Armenia insofar as it is consonant with the legal positions expressed in the Decision DCC-1249 of the Constitutional Court of the Republic of Armenia, guarantees by the virtue of law (ex jure) omission of the deadline for filing a complaint due to reasons beyond the control of the person enjoying the right to file a complaint as valid, if there is an appropriate motion and evidence.

4. Based on the requirements of Point 9.1 of Article 64 and Part 12 of Article 69 of the RA Law on the Constitutional Court, as well as Point 1 of Part 1 of Article 182 of the Administrative Procedure Code of the Republic of Armenia, the final judicial act adopted on the case of Vartgez Gaspari is subject to review in the manner prescribed by law on the basis of new circumstances.

5. In accordance with Part 2 of Article 102 of the RA Constitution (with Amendments through 2005) this decision is final and enters into force from the moment of the announcement.

Chairman **G. Harutyunyan**

February 9, 2016
DCC-1254