

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

**ON THE CASE OF CONFORMITY OF PART 2 OF ARTICLE 176
OF THE RA ADMINISTRATIVE PROCEDURE CODE WITH
THE CONSTITUTION OF THE REPUBLIC OF ARMENIA
ON THE BASIS OF THE APPLICATION OF HAYK MASHURYAN**

Yerevan**October 18, 2016**

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), K. Balayan, A. Gyulumyan, F. Tokhyan, A. Tunyan (Rapporteur), A. Khachatryan, V. Hovhanissyan, H. Nazaryan, with the participation of (in the framework of the written procedure) A. Zeynalyan and R. Revazyan, representatives of the Applicant Hayk Mashuryan,

representatives of the Respondent: official representatives of the RA National Assembly H. Sargsyan, Head of the Legal Department of the RA National Assembly Staff, and V. Danielyan, Chief Specialist at the Legal Consultation Division of the same Department,

pursuant to Point 1 of Article 100 and Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia (with Amendments through 2005), Articles 25, 38 and 69 of the Law of the Republic of Armenia on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Part 2 of Article 176 of the RA Administrative Procedure Code with the Constitution of the Republic of Armenia on the basis of the Application of Hayk Mashuryan.

The Case was initiated on the basis of the Application submitted to the RA Constitutional Court by Hayk Mashuryan on 20.06.2016.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondents, as well as 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 (HO-139-N) (hereinafter referred to as the Code) was adopted by the RA National Assembly on 5 December 2013, signed by the RA President on 28 December 2013 and entered into force on 7 January 2014.

Part 2 of Article 176 of the RA Administrative Procedure Code challenged in this Case stipulates:

“Article 176: Order of the new consideration of the case

...

2. During the new consideration of the case, the grounds, the subject matter of the claim or the size of the claims shall not be changed, no counterclaim shall be submitted.”

The above-mentioned Article of the Code was not amended and supplemented.

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

the Central Division of Yerevan City Department of the Police submitted a claim to the RA Administrative Court on 12.09.2013 demanding that the Applicant be subjected to administrative liability for non-compliance with the legitimate requirements of a police officer. By the Decision of 07.10.2013, the Administrative Court accepted the claim for examination.

By the Decision of 08.10.2014, the Administrative Court granted the claim of the RA Police against the Applicant on subjecting the latter to administrative liability, and the Applicant was subjected to administrative liability in the amount of 50.000 (fifty thousand) AMD on the basis of Ar-

ticle 182 of the Administrative Offences Code of the Republic of Armenia. The Applicant appealed the given Decision to the RA Administrative Court of Appeal, and the latter granted the appeal by the Decision of 25.02.2015, cancelled the Decision of the RA Administrative Court dated 08.10.2014, and sent the Administrative Case No. ՎԴ/8125/05/13 to the RA Administrative Court for new and full consideration.

The acceptance of the counterclaim submitted by the Applicant on 12.06.2015 was rejected by the Decision of 16.06.2015 of the RA Administrative Court, with the justification that “Prescribing the order of the new consideration of the case, Article 176 of the RA Administrative Procedure Code excludes the opportunity to submit a counterclaim during the new examination of the case.” At the same time, the Court noted that within the framework of grounds and justifications presented in the counterclaim, the interested person may protect her/his rights and legitimate interests by submitting a separate claim.

The Applicant submitted an appeal to the RA Administrative Court of Appeal, and by the Decision of 07.08.2015 of the RA Administrative Court of Appeal, the appeal was rejected and the Decision of the RA Administrative Court “On rejecting to accept the counterclaim” was unchanged.

On 11.09.2015, the Applicant submitted a cassation appeal to the RA Court of Cassation against the Decision “On rejecting the appeal” on the Case No. ՎԴ/8125/05/13, and on 02.12.2015, the RA Court of Cassation issued a Decision “On rejecting to accept the cassation appeal for examination”.

3. The Applicant finds that the RA Constitution guarantees persons under the jurisdiction of Armenia, inter alia, the right to judicial protection, equality and non-discrimination. Referring to a number of decisions of the RA Constitutional Court, the Applicant notes that guaranteeing the right of access to justice, as well as the right to a fair and effective trial have been considered by the Constitutional Court as necessary components of the right to judicial protection.

Article 63 of the RA Constitution, as well as Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) establish the guarantees and standards for ensuring the effectiveness of the right of a person to judicial protection. The latter in their integrity are called upon to ensure the full-fledged restoration of the violated rights of a person.

The Applicant notes that in its decisions, the European Court has repeatedly noted that Part 1 of Article 6 of the Convention guarantees the right to apply to a court in the event of a dispute over the civil rights and duties of a person. This provision embodies the right to a court, i.e. “to initiate a civil action in court.”

The Applicant refers to Part 1 of Article 3 of the RA Administrative Procedure Code, according to which any natural person or legal entity shall be entitled to apply to the Administrative Court in the manner prescribed by this Code, if she/he considers that by the administrative acts, actions or inaction of state or local self-government bodies or their officials her/his rights and freedoms – enshrined in the RA Constitution, international treaties, laws and other legal acts – are violated or may be violated, and if she/he considers that some responsibility is unlawfully imposed on her/him or she/he is unlawfully subjected administratively to administrative liability.

Based on the foregoing, the Applicant concludes that by applying Part 2 of Article 176 of the RA Administrative Procedure Code, the RA Administrative Court limited the Applicant’s right to submit a counterclaim to the Court. Part 2 of Article 176 of the RA Administrative Procedure Code does not provide for any differentiation, however, according to the Applicant, one should accept that situations can be substantially different. Particularly, within the framework of this Case, the Applicant did not have the opportunity to submit a counterclaim against the claim filed against him. He was notified about the case brought against him only after receiving the final judicial act of the Administrative Court. The matter would be different if the Appli-

cant had been notified that a claim had been filed against him, and if he had objectively had the opportunity to make a counterclaim. However, for substantially different situations, the legislator has established the same procedure.

According to the Applicant, not establishing any differentiation, Part 2 of Article 176 of the RA Administrative Procedure Code contains a legal gap that contradicts Articles 3, 61 and 63 of the RA Constitution.

In addition, according to the Applicant, the challenged procedural norms of the RA Administrative Procedure Code impede the realization of the “right of access to a court” of the person in general and the Applicant in particular, which violates the fundamental principle of constitutional law, according to which “the procedural norm of law cannot impede the full-fledged implementation of the substantive norm.”

4. Referring to the provisions envisaged in Part 1 of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the positions expressed by the European Court regarding the access to a court, that is part of a fair trial (*Sialkowska v. Poland*, Judgment of 22 March 2007), the Respondent concludes that the above-mentioned legal principle may be violated when the right of access to a court is limited to the extent that in practice limits the enjoyment by a person of the right to judicial protection.

Referring to the legal positions expressed by the RA Constitutional Court in the Decision DCC-1289 of 23 June 2016, the Respondent notes that the counterclaim – as a procedural means of protecting the interests of the respondent – aims to promote the realization of the right of the respondent to effective judicial protection and ensure the exercise of the person’s right to consideration of the case within a reasonable period, which is an integral part of the right to a fair trial. This means that the RA Constitutional Court considers the establishment

of an effective mechanism for joint consideration of the counterclaim with the initial claim as an integral part of the constitutional legal content of the institution of counterclaim in administrative proceedings, which will fully guarantee the exercise of the right to effective judicial protection.

Regarding legal certainty, the Respondent refers to the legal positions expressed by the European Court, as well as the RA Constitutional Court, and notes that “(...) no legal norm may be regarded as ‘law’ unless it complies with the principle of legal certainty (*res judicata*), i.e. it is not formulated accurately enough to allow citizens to reconcile own behavior with the latter”.

In the Respondent’s opinion, Part 2 of Article 176 of the Code contains a clear time restriction (prohibition) for submitting a counterclaim at a certain stage of administrative proceedings, which is a legitimate solution.

Based on the foregoing, the Respondent finds that in regard to this part, the disputed provision fully complies with the RA Constitution, particularly, the legal requirements for legal certainty, clarity of the wordings used in the law, sufficient accessibility, practical real possibility of bringing the behavior of respective participants in line with the requirements of the prescriptions of the law and the requirements of foreseeability of the occurrence of possible negative legal consequences in case of non-compliance with the requirements of the law. The question is that public relations are extremely manifold, and it is objectively impossible to provide solutions for all cases due to any legal formulation.

However, in the Respondent’s opinion, under a certain combination of circumstances in a specific case, the person was objectively deprived of the right to submit a counterclaim, which neither follows from the objective of legal regulation stipulated by Part 2 of Article 176 of the Code, nor the logic of legal positions expressed by the RA Constitutional Court in the Decision DCC-1289 of 23 June 2016.

Taking into account the foregoing, the Respondent finds that the

provision stipulated by Part 2 of Article 176 of the RA Administrative Procedure Code is not in conformity with the requirements of the RA Constitution, insofar as it does not provide the possibility of submitting a counterclaim by a person who failed to submit a counterclaim during the new consideration of the case due to reasons independent of the will of the person.

5. Assessing the constitutionality of the legal provision challenged in this Case, the RA Constitutional Court considers it necessary to touch upon the following key issues:

- whether the prohibition on submitting a counterclaim in the event of sending the case for new and full consideration as a result of satisfaction of the appeal by a higher court, does not restrict the right of a person – guaranteed by the RA Constitution and international legal acts – to effective judicial protection, as well as the possibility of the consideration of the case within a reasonable period, which is an integral part of the right to a fair trial;
- whether the challenged provision does not contradict the principle of equality of the initial conditions of the parties, which is one of the principles of a fair trial stipulated by the RA Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- whether there is a legal gap in the challenged provision in terms of the possibility of independently submitting a claim, taking into account also the legal positions regarding the latter expressed in the decisions of the RA Constitutional Court.

6. The RA Administrative Procedure Code has established a number of conditions, in the presence of which the adoption of a counterclaim for consideration becomes possible. Those conditions are stipulated by Part 2 of Article 87 of the RA Administrative Procedure Code, namely:

- 1) demand of the counterclaim is aimed at offsetting the initial demand, or
- 2) satisfaction of a counterclaim excludes the satisfaction of the initial claim in whole or in part, or
- 3) there is an interlink between the counterclaim and the initial claim, and their joint consideration can ensure the prompt and proper resolution of the dispute.

In addition, according to the RA Administrative Procedure Code, a counterclaim may not be submitted against challenging and binding claims, as well as the cases provided for by Chapters 26 and 28 of the Code.

Considering the institution of counterclaim – provided for by the RA Administrative Procedure Code – from the perspective of effective implementation of the person’s right to judicial protection, the RA Constitutional Court reaffirms the legal positions expressed in the Decision DCC-1289. In particular, the Constitutional Court emphasized that:

- “in the aspect of protection of constitutional rights, the institution of counterclaim is meaningless unless necessary and sufficient procedures are provided for its consideration together with the initial claim,”
- “as a procedural means of protecting the interests of the respondent, the counterclaim aims to exercise the respondent’s right to effective judicial protection and ensure the exercise of the individual’s right to consideration of the case within a reasonable period, which is an integral part of the right to a fair trial.”

Based on the foregoing, the RA Constitutional Court states that, although restrictions on the possibility of submitting a counterclaim generally do not hinder the possibility of judicial protection of a person, since in any case she/he has the right to independently submit a claim to a court in the manner prescribed by the Administrative Procedure Code, nevertheless, in case of inconsistency with the principle of proportionality within the framework of a specific legal relationship, such restrictions may be inconsonant with the constitutional

legal content of the right to judicial protection provided for by Article 61 of the RA Constitution, as well as the requirements of Part 1 of Article 63 of the RA Constitution, according to which everyone shall have the right to a fair and public consideration of the case concerning her/him **within a reasonable period** by an independent and impartial court.

7. The RA Constitutional Court states that the legislative prohibition on submitting a counterclaim after cancellation of the judicial act deciding on the merits of the case by the higher court and sending the case for new consideration should be considered in the whole context of the institution of the new consideration of the case.

According to the legal regulations of Chapter 24 of the RA Administrative Procedure Code, the new consideration of the case in the Administrative Court or the Court of Appeal shall be conducted according to the rules prescribed by the RA Administrative Procedure Code for the consideration of cases in the Administrative Court or the Court of Appeal respectively. At the same time, based on the peculiarities of the new consideration of the case, the legislator provided for a number of exceptions:

Firstly, a judge who has tried the case in a lower court may not participate in the new consideration of the given case /Article 175/;

Secondly, during the new consideration of the case, the grounds, the subject matter of the claim or the size of the claims shall not be changed /Article 176/;

Thirdly, during the new consideration of the case, no counterclaim shall be submitted /Article 176/;

Fourthly, the new consideration of the case in a lower court shall be carried out on the basis of the decision of a higher court and in the extent established by a higher court /Article 177/;

Fifthly, during the new consideration of the case, the parties may not submit new evidence, except when the court points to a new fact to be proved, and demands to submit new evidence in this regard, as

well as hears the objections of the other party on the facts that led to the cancellation /Article 177/.

The presence of the above-mentioned peculiarities is due to the circumstance that, as a result of satisfying the appeal by a higher court, the stage of the new consideration of the case is aimed at a review of the judicial act deciding on the merits of the case based on a judicial error (violation or misapplication of the norms of substantive law, or violation or misapplication of the norms of procedural law). That is, due to the satisfaction of the appeal, the new consideration of the case is aimed at correcting substantive legal and/or procedural shortcomings in connection with the judicial act already issued.

In addition, the prohibition on changing the grounds, the subject matter of the claim, the size of the claim, as well as the prohibition on submitting a counterclaim, and submitting new evidence with certain exceptions, are aimed at ensuring the constitutional right of a person to consideration of the case concerning her/him within a reasonable period. The above-mentioned restrictions become necessary and effective in cases when a higher court, exercising its authority, cancels the judicial act completely or in part, sends the case in regard to the canceled part to the appropriate court for a new consideration, establishes the extent of the new consideration, and leaves the act unchanged in regard to the uncanceled part.

It should be noted that the prohibition on submitting a counterclaim within the framework of the new consideration of the case is related to the lack of possibility for the applicant to change the grounds, the subject matter of the claim, and the size of the claims. The provision of such restrictions by the legislator in the general sense pursues a legitimate aim, i.e. to ensure a reasonable balance between the possibilities of the parties in the course of judicial proceedings.

8. Thereby, the RA Constitutional Court states that another issue is that when the judicial act is canceled due to the non-participation of the respondent in the proceedings due to improper notification of

the time and place of the session, therefore the respondent is actually deprived of the possibilities to exercise her/his right to effective judicial protection, including the submission of a counterclaim.

According to the materials of the Case, the RA Administrative Court of Appeal cancelled the Decision of the RA Administrative Court, sent the Case for new and full consideration, and applied Part 2 of Article 152 of the RA Administrative Procedure Code, which served as the unconditional basis for the cancellation of the judicial act.

The RA Constitutional Court does not address the legitimacy of the application of the grounds for the cancellation of the judicial act within the framework of specific control, and finds that in this case one of the most important objectives of the new consideration of the case is to enable the respondent to participate in the proceedings, using legal remedies if necessary, including the submission of a counterclaim. This also ensures the principle of equality of the parties, stipulated by Article 6 of the RA Administrative Procedure Code, according to which each party should be given a **full** opportunity to present its position on the case under consideration.

Referring to the principle of equality of parties in proceedings, the European Court of Human Rights reaffirmed the legal position in the Judgment of Nikoghosyan and Melkonyan v. Armenia, according to which: "... the requirement of equality of parties in proceedings, one of the features of the concept of a fair trial, implies that each party must be afforded a reasonable opportunity to present their arguments – including evidence – under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent" (Nikoghosyan and Melkonyan v. Armenia, app. no. 11724/04).

In this aspect, the legal position expressed in the Decision DCC-1289 of the RA Constitutional Court, – which states that: "... according to the legislation, the main task of the legal regulation of the institution of counterclaim is to provide necessary and sufficient procedural guarantees to ensure its legitimate implementation," –

is also applicable in the event of sending the case for new and full consideration after the cancellation of the judicial act due to the respondent's improper notification of the time and place of the session.

9. The Constitutional Court also considers it important that the institution of counterclaim provides an opportunity to resolve mutual demands of the parties by one judicial act and in one proceeding, as well as to conduct the trial with the greatest effectiveness applying minimal procedural efforts and means.

The argument that in case of rejection of a counterclaim, the respondent shall have the right to independently submit a claim thus exercising the right to judicial protection, cannot be considered fully justified from the perspective of effective judicial protection of the respondent's rights with the following argumentation:

Firstly, Article 21.2 of the RA Judicial Code, titled: "Procedure for the distribution of cases in the court of first instance," regulates the process of distribution of cases in courts, including the Administrative Court. In contrast to submitting a counterclaim, the above-mentioned regulation does not guarantee the consideration of the given claim in the same residence of the Administrative Court, in case the respondent independently submits a claim;

Secondly, in the case of independently submitting a claim, the court expenses stipulated by Articles 58 and 59 of the RA Administrative Procedure Code obviously increase;

Thirdly, as a result of the consideration of the counterclaim together with the initial claim, one judicial act is issued, which is most accessible and effective from the perspectives of appealing, as well as executing the given act.

10. Referring to the issue in the challenged provision regarding the absence of any possibility of submitting a counterclaim in case of the new consideration of the case, the RA Constitutional Court considers

it necessary to examine the challenged provision, on the one hand, in the context of the institution of submitting a counterclaim, and on the other hand, in the context of the statements of the Applicant concerning the legislative gap.

By the Decision DCC-1257 of 10 March 2016, the RA Constitutional Court reaffirmed the legal positions regarding the right to a fair trial and the right of access to a court, expressed in a number of its previous decisions /in particular, DCC-1127, DCC-1190 and DCC-1222/, and found that: "... no peculiarity or procedure may hinder or prevent the effective exercise of the right to a court, make the Constitutionally guaranteed right to judicial protection meaningless or become an obstacle to its implementation." It was also noted that: "... no procedural peculiarity may be interpreted as a justification for restricting the right of access to a court guaranteed by the RA Constitution ..."

As for the legislative gap, the RA Constitutional Court expressed a number of legal positions of fundamental importance (DCC-864, DCC-914, DCC-933 and DCC-1143), which, in particular, are as follows:

- "Within the framework of consideration of the case, the Constitutional Court refers to the constitutionality of one or another gap in the law if the legal uncertainty – conditioned by the content of the challenged norm – leads to the interpretation and application of the given norm in law enforcement practice, which violates or may violate a specific constitutional right" (DCC-864);
- "... the legislative gap may be subject to consideration by the Constitutional Court only in the case when there are no other legal guarantees in the legislation to fill this gap, or in the case when conflicting law enforcement practice is formed in the presence of relevant legal guarantees in the legislation, or in the case when the existing legislative gap does not allow exercising one or another right" (DCC-914);
- "... the legislative gap may not be mechanically identified merely with the absence of legislatively stipulated definition of one or another term. The legislative gap exists in the case, when due to

absence of the element ensuring the completeness of legal regulation or incomplete regulation of that element, the complete and normal implementation of legislatively regulated legal regulations is distorted” (DCC-1143).

Summarizing the foregoing, the RA Constitutional Court states that the restriction provided for by the challenged provision – regarding the exclusion of submitting a counterclaim in any case during the new consideration of the case – due to incomplete legal regulation, improperly restricts the right to effective judicial protection and the right to consideration of the case within a reasonable period, which is an integral part of the right to a fair trial, in the cases when the possibility of submitting a counterclaim by a person who failed to submit a counterclaim during the new consideration of the case due to reasons independent of the will of the person, as well as the possibility of full consideration of the counterclaim, are not provided.

Based on the review of the Case and being governed by Point 1 of Article 100 and Article 102 of the Constitution of the Republic of Armenia (with Amendments through 2005), Articles 63, 64, 68 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 2 of Article 176 of the Administrative Procedure Code of the Republic of Armenia contradicting the requirements of Articles 61 and 63 of the Constitution of the Republic of Armenia and void in regard to the part that the possibility of submitting a counterclaim during the new consideration of the case by a person who failed to submit a counterclaim due to reasons independent of the will of the person, is not provided.

2. The final judicial act rendered against the Applicant on the basis of Part 12 of Article 69 of the RA Law on the Constitutional Court, as well as Article 182 of the RA Administrative Procedure Code, is sub-

ject to review due to new circumstances, in accordance with the procedure provided for by law.

3. Pursuant to Part 2 of Article 102 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

October 18, 2016

DCC-1315