Non-Official Translation

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 300 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 COURT OF CASSATION OF THE REPUBLIC OF ARMENIA

Yerevan 26 June 2018

The Constitutional Court of the Republic of Armenia composed of H. Tovmasyan (Chairman), A. Gyulumyan, F. Tokhyan, A. Tunyan, A. Khachatryan, H. Nazaryan, A. Petrosyan (Rapporteur),

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

the Applicant: Court of Cassation of the Republic of Armenia,

Respondent: A. Kocharyan, official representative of the RA National Assembly, Chief Legal Expert of the Legal Expertise Division of the Legal Expertise Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 168, Part 4 of Article 169 of the Constitution of the Republic of Armenia, Articles 22, 40 and 71 of the RA Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the Case of conformity of Article 300 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 Court of Cassation of the Republic of Armenia with the Constitution of the Republic of Armenia.

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

The case was initiated on the basis of the Applications submitted to the Constituional Court on April 25, 2018 which present the decisions on “Suspension of the Proceedings on the Complaint and Applying to the RA Constitutional Court” of in the criminal cases of ԵԷԴ/0063/01/17 and ԵԿԴ/0250/01/17 of 18 April 2018.

Having examined the written explanations of the Applicant and the Respondent of this Case, as well as analyzing the relevant provisions of the Code, other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The Applicant's positions

The Applicant challenges Article 300 of the Code, titled "Decision on the measure of restraint", which envisages "Simultaneously with issuing the judgments, in addition to the decision to forward the case by jurisdiction, the court is obliged to consider the issue of choosing or not choosing the measure of restraint against the detainee, and whether these measures are reasoned or not, if the measure of restraint is prescribed". The Applicant raises the following legal issue: the challenged legal regulation at the stage of pre-trial preparation of the proceeding in case of choosing or not choosing detention as the measure of restraint does not envisage the procedure for conducting a discussion whether these measures are reasoned or not at a judicial session with the participation of the detainee or his/her lawyers.

The Applicant, analyzing the legal provisions of Chapter 40 of the Code, titled "Preparation of the trial", concludes that at the above stage the court is not competent to convene a hearing, and the issues to be resolved at this point are decided by a single judge in his/her chamber. One of the decisions issued at the discussed stage is scheduling the litigation, and one of the issues to be resolved is the issue of choosing or not choosing the measure of restraint. Meanwhile, detention may also be used as a measure of restraint, since the Code does not prescribe any exception on this aspect. The Applicant also notes that even if there is a motion to challenge a person's detention, i.e. changing or cancelling the measure of restraint, the court is not entitled to hold a hearing and ensure the person's participation.

The Applicant, referring to the relative norms of the Constitution of the Republic of Armenia and the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) and legal positions expressed in a number of judgments of the European Court of Human Rights (ECHR), considers that in the case of choosing detention as a measure of restraint, inability of the possibility prescribed in Article 300 of the Code to hold a discussion on the issue whether these measures are reasoned or not at a court session with the participation of the detainee or his lawyers jeopardize the exercise of the person's right to challenge his deprivation of liberty, guaranteed by Part 5 of Article 27 of the RA Constitution and Part 4 of Article 5 of the Convention. On the basis of the above-mentioned, the Applicant considers that Article 300 of the Code contradicts Parts 4 and 5 of Article 27 of the Constitution.

2. **Positions of the Respondent**

According to the Respondent, Article 300 of the Code in general violates the right of a person to freedom from the point of view of the right to challenge being promptly brought before a judge and the right to challenge the legitimacy of depriving him of liberty.

The Respondent also, referring to the relative norms of the RA Constitution and the Convention, legal positions expressed in a number of judgments of the ECHR, believes that from the point of view of the realization of the person's right to lawyers, the impossibility of submitting any objection or motion and in connection with these circumstances, the substantiations of the court justifying the application of detention may lead to undue restrictions on the person's right to liberty, thereby depriving the person of the opportunity to challenge the circumstances of being deprived of liberty from the time of the appointment of the trial on the case till the first court session.

The Respondent argues that, since September 14, 2012, the draft of the RA Criminal Procedure Code, submitted by the Government of the Republic of Armenia as a legislative initiative, has been put into circulation in the National Assembly of the Republic of Armenia, in which, in particular, it is proposed to establish the institution of preliminary hearings, thus resolving at a court session with the participation of the parties the issue of precise prescription of the measure of restraint within the framework of this institution.

Based on the foregoing, the Respondent also believes that Article 300 of the Code insofar as at the stage of preparation of the case for trial in the case of choosing or not choosing detention

as a measure of restraint does not prescribe the procedure for discussion of the issue whether these measures are reasoned or not at a court session with the participation of the detainee or his lawyers, contradicts the Constitution of the Republic of Armenia.

3. Circumstances to be clarified within the framework of the Case

In the framework of the constitutional-legal issue raised in the present Case, the Constitutional Court considers it necessary, in particular, to address the issue when considering during the preparation of a criminal case for trial without the participation of the detainee and/or his lawyers, consideration of the issue of choosing or not choosing detention (arrest) as a measure of restraint, in the case of choosing detention as a measure of restraint, if it is reasoned or not, whether:

a) restricting the right to personal freedom is consonant with the constitutional and legal standards enshrined in Article 27 of the RA Constitution;

b) it guarantees the right to be heard, which is an element of the right to a fair trial, enshrined in Part 1 of Article 63 of the RA Constitution, taking into account also the constitutional and legal requirements of the existence of mechanisms and procedures necessary for the effective exercise of fundamental rights and freedoms;

c) it limits the person's ability to challenge the legitimacy by depriving him of his freedom;

d) it is consonant with the practice of bodies acting on the basis of international human rights treaties ratified by the RA.

On the basis of the foregoing, the Constitutional Court considers the constitutionality of the legal regulation challenged in the present Case in the context of Article 27, Part 1 of Article 63, Articles 75 and 81 of the RA Constitution.

4. **Legal positions of the Constitutional Court**

4.1. The study of the criminal procedure legislation of the Republic of Armenia shows that consideration of the issue of choosing detention as a measure of restraint, its validity or the extension of its term by the court is carried out both at the pre-trial stage and at the stages of preparing the case for trial and at the trial of the criminal case.

In the framework of pre-trial proceedings of a criminal case, if detention is selected as a measure of restraint against the detainee or the duration of detention is extended, as a legislative

guarantee for the protection of the rights of a person, in particular the right to personal freedom, the following legal regulations also apply:

- the decision to initiate a motion for the choosing detention as a measure of restraint shall be subject to immediate consideration by the single judge with the participation of the person who filed the motion, the detainee, his/her legal representative, the defense counsel, if s/he is present at the hearing where the preliminary investigation is being conducted. The failure of the defendant or the lawyers who are informed in a due manner to appear on time does not preclude the consideration of the motion. The court is obliged to inform the person, the detainee, his/her legal representative, the defense counsel, involved in the case, in the due manner about the time and place of the court session. The motion on choosing the detention as a measure of restraint for a wanted person shall be examined by the court with the participation of the person who filed the motion and the defense counsel of the wanted detainee if s/he participates in the case (Part 2 of Article 285 of the Code);

- the issue of participation of the detainee in a trial where the motion regarding choosing the detention as the measure of restraint shall be ensured by the body conducting the proceedings (Part 3 of Article 285 of the Code);

- when considering a motion, the judge has the right to request additional materials, explanations substantiating the motion (Part 4 of Article 285 of the Code);

- after examining the motion, the judge issues a decision on choosing the detention as a measure of restraint or on extension of the detention or on the rejection of the motion. The decision of the judge is forwarded to the person who initiated the motion for choosing this preventive measure, is sent to the detainee, the victim and is subject to an immediate execution. On the day of issuing the decision, the court serves on the decision with a signature of the person, who initiated the motion to choose detention as a measure of restraint or to extend the detention, to the detainee, to the defense counsel and the victim, and in case of failure to appear at the court session, forwards them in due form. The decision is a subject to immediate execution (Part 5 of Article 285 of the Code).

In addition, in the above-mentioned aspect, the judicial review of the legality and validity of choosing or not choosing detention as a measure of restraint, as well as the extension or refusal to extend the detention (Part 1 of Article 288 of the Code) with the participation of the

prosecutor and the lawyers (Part 3 of Article 288 of the Code) serve as important judicial guarantees.

The legislative guarantee of the protection of the rights of a person amongst others is the fact that the court, during the trial, after hearing the explanations of the defendant and the opinion of the parties has the right to choose, reverse or modify the measure of restraint against the defendant (Article 312 of the Code).

The Constitutional Court argues that, unlike the aforementioned, in the framework of preparation of the case for the trial, when considering the issue of choosing or not choosing detention by the court as a measure of restraint without the participation of the defendant and/or without the participation of his/her lawyers, in case of choosing detention as a measure of restraint, whether these measures are reasoned or not, in particular, **there are no legislative guarantees for ensuring the rights to personal freedom, fair trial, principles of competitiveness during the criminal proceeding**. In this aspect at the stage of preparation of the case for trial the legislator has only prescribed the duty of the court to consider the issue of choosing and not-choosing the detention as the measure of restraint against the detainee and the issue whether the types of these measures are reasoned or not in the case if the type of measure of restraint is chosen (Article 300 of the Code), and the court exercises this duty without convocation of a court session.

It follows from the challenged legal regulation that at the stage of preparation of the case for trial, when considering the issue of the validity of choosing or not choosing measure of restraint against the detainee and its validity in the case of the already chosen measure of restraint, the court may choose detention as a measure of restraint against the detainee, if it is not chosen or may consider reasoned the detention already chosen as a measure of restraint. It is characteristic that in both cases - as in the case of choosing detention as a measure of restraint and in the case of considering the already chosen detention as reasoned - there is a restriction of the constitutional right to personal freedom. In the first case, a measure of restraint is imposed which provides for the restriction of the right to personal freedom. In the first case, a measure of restraint is imposed which provides for the restriction of the right to personal freedom In the second case, at the stage of preparation of the case for trial, when the court considers the detention already chosen against the detainee as a measure of restraint at the pre-trial stage as reasoned, it remains unchanged and the issue of the duration of custody is considered. Moreover,

it should be noted that at the trial stage the maximum duration of detention is not provided. Consequently, at the stage of preparation of the case for trial, if the court selects detention as a measure of restraint against the detainee, as well as in the case of considering the already chosen detention as a measure of restraint reasoned, the constitutional legal standards for restricting the right to personal freedom must be observed. Consequently, at the stage of preparation of the case for trial, in the case of choosing the detention as a preventive measure for the detainee by the court, as well as in the case of combining the reasoned detention as a preventive measure, the constitutional legal standards for restricting the right to detention personal freedom must be applied.

The Constitutional Court also applied constitutional-legal standards for restricting the right to personal freedom in the Decision DCC-1295 of September 2, 2016, stating that the legal content of the norms of Article 27 of the RA Constitution directly implies that, in particular:

- the legal criteria for the deprivation of personal freedom are prescribed in the Constitution;
- the procedure for the deprivation of personal freedom is prescribed by law;
- a person has the right to challenge the deprivation of his/her freedom in court.

In the present Case, also reaffirming the aforementioned legal positions, the Constitutional Court considers it important to observe the constitutional and legal standards of restricting the right to personal freedom, especially the exercise of judicial control over the legitimacy of depriving a person of freedom also at the stage of preparing the case for trial.

At the same time, the Constitutional Court argues that the constitutionality of any procedure for criminal proceeding that provides for the restriction of the constitutional right to personal freedom depends not only on the proper and effective implementation of judicial control over compliance of the above-mentioned standards of the lawfulness of restricting this right, but also on guaranteeing the right to defend from the application of coercive measures in connection with the deprivation of freedom. In this regard, the Constitutional Court, in Decision DCC-1295, affirmed the following: "... the right to defend themselves against the application of coercive measure with regard to deprivation of liberty by its constitutional and legal content cannot exclude the person's right to defend him/herself in person if there is a clearly expressed desire (procedural motion) The Constitutional Court considers it important to realize the right of a person to be heard (to defend him/herself in person), which is an element of the right to a fair

trial, both in the first instance court as well as in further procedures for judicial review (verification)."

By another Decision DCC-827 of 12 September 2009, the Constitutional Court affirmed that, given the fact that the exercise of the right to be assigned to a judge and to be heard directly and inextricably linked to the fact of the actual detention of a person, namely the physical isolation of a person from society, the duty of the state to guarantee the realization of this right arises from the moment of actual deprivation of the person of liberty, namely physical isolation of a person from society. All the guarantees prescribed in Article 16 of the Constitution of the Republic of Armenia with the amendments of 2005 and Article 5 of the Convention, including the right to be heard before the court, come into effect only from the moment when the person is actually deprived of liberty by the state.

In the framework of the present Case, also reaffirming the aforementioned legal positions, the Constitutional Court considers that it follows from the provisions of Article 27 of the RA Constitution that **every person deprived of his/her liberty has the right to be heard by a court, the exercise of which must be carried out in accordance with the procedure prescribed by law**.

Within the framework of the challenged legal regulation, the Constitutional Court considers it important to refer to the issue of guaranteeing the person's right to be heard also in a different context. The constitutional right to be heard by a court is enjoyed not only by the persons deprived of liberty, but also by everyone who exercises their constitutional right to a fair trial.

In the framework of this constitutional and legal dispute, the Constitutional Court, which has indicated that the right of a person to a fair trial is guaranteed, also believes that at the stage of preparation of the case for trial during the court's consideration of the issue of choosing detention as a measure of restraint, the presence of the both parties to the lawyers and the prosecution shall be ensured deriving from the need to ensure the principle of competitiveness during the criminal proceedings. The trial, including the preliminary hearing, is considered effective in the aspect of ensuring the protection of rights and freedoms if it meets the requirements of justice and is based on the principle of competitiveness. This circumstance in the case of consideration of the issue of choosing detention as a measure of restraint presupposes the provision by the court of the necessary conditions for the parties to exercise their procedural rights and perform procedural duties. In addition, it is necessary for the court to examine the legal and factual grounds, in

particular for making a decision by the means of self-assessment of significant circumstances providing the lawyers and the prosecution with the possibility of presenting their positions, excluding arbitrary, subjective discretionary and unreasonable approaches.

The Constitutional Court considers that at the stage of preparing the case for trial the court, when deciding whether to select or not detention as a measure of restraint on its own initiative, in the case if detention as a measure of restraint is already chosen - whether these measures are reasoned or not - cannot be contracted out of the obligation to listen to the opinions of the parties, and the parties cannot be prevented from presenting their positions. Otherwise, this may contain the risk that the court assumes the functions of prosecution or lawyers. In addition, the court is deprived of the actual possibility of comprehensive, full and objective consideration of the issue; the most important precondition for guaranteeing is also listening to the opinions, arguments, and positions of the parties. The Constitutional Court considers that **restriction of the constitutional right to personal freedom is lawful only by a court decision adopted at a court session when the court selects detention as a measure of restraint, and if there is the possibility of comprehensive and unbiased consideration of the grounds and substantiations for the detention already chosen, including representation of the position by the detainee and/or his/her lawyers in the court.**

Proceeding from the above-mentioned, the Constitutional Court considers that the challenged legal regulation insofar does not prescribe the possibility of participation of the detainee and/or his/her defense counsel in the consideration of the issue of choosing or not choosing detection as a measure of restraint, and in the case, if detention is already chosen as a measure of restraint, the issue, whether these coercive measures are reasoned or not, does not ensure the exercise of the constitutional right of a person to be heard by the court in the manner prescribed by law, therefore, it also does not meet the criteria for a fair trial.

4.2. With regard to the Applicant's position that the challenged legal regulation contradicts Part 5 of Article 27 of the Constitution of the Republic of Armenia, the Constitutional Court considers it necessary to examine the mentioned issue from the point of view of the possibility of challenging the legitimacy of depriving him/her of his/her freedom by the person, either through judicial review (verification) or by the means of other forms of challenging.

The Constitutional Court considers that in the preparation of a criminal case for trial, the court's consideration of the issue of choosing detention as a measure of restraint and examination

of the issue whether the selected detention as a measure of restraint is substantiated without the participation of the detainee and/or his/her lawyers does not limit the person's ability to challenge the legitimacy of depriving him/her of his/her freedom in the form of the judicial review (verification).

Article 292 of the Code provides that the judge, who takes over the proceeding of the criminal case, examines the case file and within 15 days from the date of instituting proceeding of the criminal case, issues one of the decisions prescribed by the law adopted during preparing the case for trial, and the challenged legal regulation of the Code provides that simultaneously with the adoption of these decisions, in addition to the decision to refer the case from one court to another, the court must also decide on the measure of restraint.

Consequently, at the stage of preparation of the case for trial as a result of consideration of the issue of the measure of restraint, which, by virtue of the challenged legal regulation, restricts the right of the detainee to personal liberty, a decision is made (Part 2 of Article 293 of the Code), which, inter alia, by virtue of Point 20 of Part 2 of Article 65 of the Code, as well as Point 15 of Article 73 of the Code may be appealed by the detainee, by his/her lawyers (as in the criminal cases ԵԷԴ/0063/01/17 and ԵԿԴ/0250/01/17 presented in this Case) and within the framework of the common law (in particular, Articles 390 and 418 of the Code), the possibility of participation of the detainee and his/her lawyers in the consideration of this appeal is provided. Consequently, the Constitutional Court considers that **the legal regulation challenged in this case is not controversial in the context of Part 5 Article 27 of the RA Constitution as the Code, in particular, prescribes legislative guarantees for judicial review (verification) of the decision adopted as a result of consideration of the issue on detention as a measure of restraint.**

With regard to the issue of the constitutionality of the presentation of other manifestations of a person's ability to prepare a criminal case for legal proceedings, to challenge the lawfulness of depriving him of his/her liberty as a part of the court's consideration of the issue of choosing detention as a measure of restraint and finding the detention reasoned without the participation of the detainee and/or his/her lawyers, namely counterarguments, objections, motions, other forms of opposing, defensive and substantiating positions, the Constitutional Court considers that there is no possibility of challenging the lawfulness in the mentioned forms, in particular in the context of exercising the right of the detainee and/or his/her defense counsel to be heard in court, which

does not follow from the provisions of Part 5 of Article 27, as well as Part 1 of Article 63 of the RA Constitution. In addition, the Constitutional Court considers that guaranteeing adequate protection of the constitutional rights of a person in criminal proceedings should equally be available both during the trial and in preparation for the trial, which is an important guarantee in terms of ensuring the implementation of the right to a fair trial. Consequently, the Constitutional Court considers that in the aspect of constitutional and legal evaluation such a differentiated approach is groundless.

4.3. Guided by the requirement of Part 1 of Article 81 of the Constitution of the Republic of Armenia, the Constitutional Court considers it important to address the criteria for restricting the right to personal freedom formed in the practice of bodies acting on the basis of international human rights treaties ratified by the RA. In particular, within the framework of the ECtHR case-law (judgment on the case of Kampanis v. Greece dated 13 July 1995, application no. 17977/91, judgment on the case of Aquilina v. Malta dated 29 April 1999, application no. 25642/94, judgment on the case Piruzyan v. Armenia dated 26 June 2012, application no. 33376/07, judgment on the case of Sefilyan v. Armenia on 2 October 2012, application no. 22491/08, etc.), inter alia, the following standard of restriction of the right to personal freedom such as restriction of the right of a person deprived of liberty to be immediately assigned to a judge is provided.
As a part of the case law of the ECtHR, there is also a legal position directly related to the problem of guaranteeing the rights of the detainee during the consideration of the issue of the choosing detention as a measure of restraint by the court at the stage of preparation of the case for trial. In particular, by the judgment on the case of Khodorkovsky v. Russian Federation (application no. 5829/04) of 31 May 2011, **the ECtHR assessed pretrial detention remaining as unchanged and consideration of the issue of detention at the stage of preliminary hearing without the appointment of a court hearing in the absence the applicant or his/her lawyer as a violation of the rights of a person protected by Part 4 of Article 5 of the Convention.**

In the context of the case law of the ECtHR, particular importance is attached to the fact that, in the context of reviewing the continued detention of a person, the proceedings must be adversarial and must ensure "equality of arms" between the prosecutor and the detainee (Judgment of the Grand Chamber in the case of Nikolova v. Bulgaria of 25 March 1999,

application no 31195/96, Altinok v. Turkey Judgment of 29 November 2011, application no 31610/08).

In the context of the issue under consideration, the ECtHR regards as the primary fundamental guarantee of securing the right to an effective trial when reviewing the lawfulness of detention in the context of both Articles 5 and 13 of the Convention (Chahal v. The United Kingdom Grand Chamber Judgment of 15 November 1996, application no. 22414/93). An important guarantee is also the resolution of the issue of the need for continuing detention of a person by a competent body (Judgment in the case of Altinok v. Turkey of November 29, 2011, application no. 31610/08, Judgment in the case of Knebl v. the Czech Republic of October 28, 2010, application no. 20157/05).

It should also be noted that the rights that are relevant to the issue under consideration are also considered in a number of other international documents on human rights, in particular, in Part 4 of Article 9 of the International Covenant on Civil and Political Rights (adopted by the UN General Assembly Resolution 2200 A (XXI) of December 16, 1966) and in paragraph 28 of the Recommendation Rec(2006) 13 of the Committee of Ministers of the Council of Europe of September 27, 2006.

Proceeding from the foregoing, the Constitutional Court considers that **the legal regulation challenged in the present Case in the part which does not provide for the possibility the detainee and/or his/her lawyers to participate in the consideration of the issue of choosing or not choosing detention as a measure of restraint in the process of preparing the case for trial and in the case if detention is selected as a measure of restraint – whether it is reasoned or not, is not consonant with the standards of restriction of personal freedom, formed within the framework of authorities, functioning on the basis of international treaties on human rights ratified by the Republic of Armenia.**

4.4. Turning to the issue of legislative provision (legislative gap) of the implementation of the procedural rights of the detainee and/or his/her lawyers in the framework of the challenged legal regulation, the Constitutional Court states that in a number of its decisions, the Court turned to the content of the notion of a legislative gap (legal lacunae). In particular, in Decision DCC-914 of 14 September 2010, the Constitutional Court stated that "... in all cases where the legal gap is caused by the **absence of a normative precept** regarding the specific circumstances in the sphere of legal regulation, overcoming of such a gap is within the framework of competencies of

the legislative power". The Constitutional Court, within the framework of the consideration of the case, refers to the constitutionality of a certain legislative gap if the legal uncertainty in law enforcement practice resulting from the content of the challenged norm leads to such an interpretation and application of this rule that violates or may violate a concrete constitutional law. "

Developing the aforementioned legal positions, the Constitutional Court states that the legislative gap can be subject to consideration by the Constitutional Court only if the legislation does not have other legal guarantees to fill this gap or if conflicting law enforcement practice has developed in the legislation, or when the existing legislative gap does not ensure the implementation of one or other right. Otherwise, the issue of constitutionality of the gap in the legal regulation is not a subject to consideration by the Constitutional Court."

The Constitutional Court considers that the Code, in the aspect of legal regulation of preparation of the case for trial in general and, in particular, in the context of the legal regulation challenged in the present Case, **insofar as the preparation of the case for trial does not provide for the possibility of participation of the detainee and/or his/her lawyers in the consideration of the issue of choosing or non-choosing of detention as a measure of restraint against the detainee, and in the case of detention already chosen as a measure of restraint, whether it is reasoned or not, there is such a legislative gap that cannot be filled with other legislative guarantees and in particular, does not ensure the effective exercise of the right to personal freedom and the right to be heard, which is an element of the right to a fair trial. This can be ensured only by the appropriate legislative guarantees and by clearly establishing the organizational mechanisms and procedures necessary for the effective implementation of these rights and freedoms, which follows from the need to ensure the rule of law, as well as from the practice of bodies acting on the basis of international human rights treaties ratified by the RA.**

In the framework of this Case, the Constitutional Court examined the law enforcement practice. In response to the relevant inquiries, by letter dated 17.05.2018 ՎԵ-Ե-3525 the Acting Chairman of the Court of Cassation reported that in accordance with the information received from the first instance courts of general jurisdiction of the RA, in the preparation of the case for trial, when considering the issue of choosing or non-choosing of measures of restraint against the detainee and whether it is reasoned or not, in the cases when the measure of restraint has been

selected, information on the cases of participation of the detainee and/or his lawyers is not available in judicial practice over the past three years. The Chairman of the RA Chamber of Advocates also by the letter No. 05/05/696-18 of 21.05. 2018 concerning the regarded issue informed that the RA Chamber of Advocates is not aware of such cases.

Proceeding from the constitutional requirement of the direct operation of basic human rights, as well as from the general logic of legislative regulation of procedures for criminal proceeding of the consideration of the issue of the court's choosing as a measure of restraint and its validity, the Constitutional Court considers that, prior to the establishment of relevant legal regulations by the National Assembly, **judicial practice should be guided by the approach that when preparing a criminal case for trial, when considering the issue of choosing or non-choosing by the court of detention as a measure of restraint against the detainee and in the cases when detention has been chosen as a measure of restraint, whether it is reasoned or not, in particular, with the participation of the detainee and/or his/her lawyers (as provided, in particular, by Articles 285 and 312 of the Code), guided by the need to the full and effective implementation of the right to personal freedom, the right to be heard, as an element of a fair trial, ensuring the principle of the adversarial proceeding.**

Based on the review of the Case and governed by Point 1 of Article 168, Part 4 of Article 169, Parts 1 and 4 of Article 170 of the Constitution of the Republic of Armenia, Articles 63, 64 and 71 of the RA Constitutional Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare Article 300 of the RA Criminal Procedure Code, insofar as it does not prescribe the participation of the detainee and/or his/her lawyers in the preliminary hearing when considering the issue of choosing or non-choosing by the court of detention as a measure of restraint against the detainee in the cases when detention has been chosen as a measure of restraint, whether it is reasoned or not, contradicting Part 5 of Article 27, Part 1 of Article 63, Articles 75 and 81 of the Constitution of the Republic of Armenia and void.

2. Pursuant to Part 2 of Article 170 of the Constitution of the Republic of Armenia this Decision shall be final and enter into force upon promulgation.

Chairman **H. Tovmasyan**

26 June 2018

DCC -1421