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 124 PART 2 OF THE ADMINISTRATIVE PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION ON THE BASIS OF THE APPLICATION OF NELIK VARDANYAN

Yerevan December 1, 2020

The Constitutional Court composed of A. Dilanyan (Chairman), V. Grigoryan, A. Tunyan, A. Khachatryan, Y. Khundkaryan, E. Shatiryan, A. Vagharshyan,

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

Applicant: N.Vardanyan,

Respondent: K. Movsisyan, official representative of the National Assembly, Head of the Legal Support and Service Division at the Staff of the National Assembly,

pursuant to Clause 1 of Article 168, Clause 8 of Part 1 of Article 169 of the Constitution, Articles 22, 23 and 69 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of Part 2 of Article 124 of the Administrative Procedure Code of the Republic of Armenia with the Constitution on the basis of the application of Nelik Vardanyan.

The Administrative Procedure Code of the Republic of Armenia (hereinafter – the Code) was adopted by the National Assembly on 5 December 2013, signed by the President of the Republic on 28 December 2013 and entered into force on 7 January 2014.

Part 2 of Article 124 of the Code, titled **"Issues to be resolved by a judicial act adjudicating the case on the merits"**, stipulates: "2. Lawfulness of the challenged administrative act shall be determined within the framework of the evidence obtained in the administrative proceedings for the adoption of that act and on the basis of the laws in force at the moment of its adoption, except in the cases when later a law, more favorable to natural or legal persons participating in the trial, was adopted, and if it is provided by that law."

The case was initiated on the basis of the application of N. Vardanyan submitted to the Constitutional Court on 23 March 2020.

Having examined the application, the written explanation of the respondent, as well as analyzing the relevant provisions of the Code and other documents of the case, the Constitutional Court **FOUND**:

1. Applicant's arguments

Referring to Part 1 of Article 61 and Part 1 of Article 63 of the Constitution and Part 1 of Article 6 of the European Convention for Protection of Human Rights and Fundamental Freedoms, according to which everyone is entitled to a fair and public hearing within a reasonable time-period by an independent and impartial tribunal established by law, as well as Articles 75 and 78 of the Constitution, pursuant to which, "when regulating fundamental rights and freedoms, laws shall define organizational mechanisms and procedures necessary for effective exercise of these rights and freedoms" and "the means chosen for restricting fundamental rights and freedoms must be suitable and necessary for achievement of the objective prescribed by the Constitution", the applicant considers that the disputed provision should be recognized as unconstitutional and invalid.

In particular, the applicant states that within the framework of the case, "Expert Opinion" N P-022-01-16 of the "Expert" Independent Research Center of 08.06.2016 was submitted to the Court, which is not an expert opinion in the sense of administrative proceeding or any other proceeding, as in accordance with Parts 5 and 6 of Article 37 of the RA Administrative Procedure Code, the Court adopts a decision on appointing an expert and decides on the name of the court, the date of appointment of the expertise, the title of the case, the questions to be submitted to the expert, the name of the expert or the name of the specialized expert institution assigned to conduct the expertise, the materials (documents) provided to the expert in case of need the terms of working on the latter, as well as the court warns the expert about criminal liability for providing apparently false conclusion.

The applicant emphasizes that, unlike the "Expert Opinion", the expert's opinion assigned in the criminal case No. 63200717 provides completely different facts and assessments on urban planning norms and property rights violations, but the Administrative Court of Appeals of the Republic of Armenia, having taken the disputed provision as a ground, excluded the expert's opinion assigned in the framework of the criminal case No. 63200717 of 28.02.2018 from the list of evidences to be examined, and due to this, no comprehensive, complete and objective examination of the evidence was held.

According to the applicant, Article 63 of the Constitution guarantees the right to a fair trial, which implies that for the fair resolution of the case all evidence obtained in accordance

with the law must undergo a comprehensive, complete and objective examination and only afterwards the conclusions must be drawn on confirmation of any fact.

According to the applicant, the disputed provision does not provide possibility for the assessment of evidence obtained in accordance with the law, which is of essential importance for assessing the legality of an administrative act, and such a regulation disproportionately restricts the fundamental right to a fair trial because such a restriction cannot pursue any constitutional goal.

2. Respondent's arguments

The respondent notes that the institutional procedural rights and duties of the participants to the proceedings are defined by the legal norms defining the procedure of the given administrative proceedings as the procedural rights may be exercised, and the duties must be exclusively exercised within the limits, cases, and procedures regulated by the legal norms.

The respondent states that "...all essential factual grounds for adopting the relevant administrative act must be mentioned in the substantiations of the administrative act. …hence the disclosure of the existing availability of a set of facts in the legal norm serves as a prerequisite for application of the legal consequences enshrined in the legal norm in regard to a person. In legal norms, the legislator envisages certain sets of facts, the existence of which practically causes legal consequences only for the persons involved in a certain case, i.e. the administrative body is authorized to adopt an administrative act, according to which the legal consequences are applied against a certain person, if the set of facts described in law is present."

According to the respondent, the current regulations prescribed in the disputed provision are conditioned with the features of administrative justice; in particular, the adoption of an administrative act by an administrative body must be conditioned by certain essential factual and legal groundings of the administrative body during the administrative proceedings aimed to the adoption of administrative act. The respondent finds it logical that when assessing the lawfulness of an administrative act, the subject of evidence is only a combination of legal facts that serves for the administrative body to adopt the challenged act. In this regard, the legislator's determination regarding the limits of judicial review of the lawfulness of an administrative act is only conditioned by the purpose of assessment of the lawfulness of administrative act challenged by the Court, that is, "to find out whether the adoption of disputed administrative act is adopted in accordance with the requirements of the law, i.e. whether, based on the factual and legal grounds, the adoption of such an administrative act by the administrative body was lawful."

Therefore, the respondent states that not considering the evidence, other than the evidence obtained in the administrative proceedings for the adoption of the disputed

administrative act during the assessment of lawfulness of the administrative act, cannot be considered as a disproportionate or inappropriate restriction of the right to a fair trial.

Based on the above-mentioned, the respondent requests to recognize Part 2 of Article 124 of the RA Administrative Procedure Code in conformity with the Constitution.

3. Circumstances to be clarified in the framework of the case

In the framework of this case, the Constitutional Court considers it necessary to invoke, in particular, the following issues when deciding the constitutionality of the disputed provision:

a) whether the determination of lawfulness of the administrative act challenged only within the framework of the evidence obtained in the administrative proceedings violates the right of a person to a fair trial by an independent impartial court provided by the Constitution,

b) in terms of current legal regulations, is the possibility of judicial protection of the rights of the third party violated due to the adoption of a legitimate lawful administrative act preserved, when further, at the trial stage of the case, the new evidence emerges which confirms the fact of violation of rights of the third party due to the adoption of the lawful administrative act?

At the same time, the Constitutional Court considers it necessary to note that the constitutional-legal issue and the concerns raised by the applicant relate to the evidence of essential importance relevant to the assessment of the lawfulness of the administrative act, which did not exist or was not at the disposal of the administrative body at the time of adoption of the administrative act. Due to this, the applicant does not provide any substantiation in regard to constitutionality of the following provision of Part 2 of Article 124 of the Code, “and the laws in force at the moment of its adoption, except in cases when a more favorable law is subsequently adopted in regard to natural or legal persons participating in the proceeding and if it is provided by that law".

Based on the above-mentioned, as well as a result of the examination of the provision of the Code, the Constitutional Court notes that the alleged violation of the applicant's constitutional rights and the unfavorable consequences are not conditioned by the disputed provision of Part 2 of Article 124 of the Code. Therefore, in the framework of the present case, the Constitutional Court does not consider the issue of the constitutionality of the mentioned provision of the Code.

4. Legal assessments of the Constitutional Court

4.1. The Constitutional Court considers it necessary to examine the disputed provision from the perspective of judicial protection and the right to a fair trial. The right to judicial protection of the rights and freedoms envisaged in the Constitution is enshrined both in international and domestic law. According to Articles 61-63 of the Constitution, everyone shall have the right to a fair and public hearing of his or her case, within a reasonable time period, by an independent and impartial court.

"Appeal to the court is the person's right, the realization of which is a legal procedure envisaged by the law which is not conditioned by the discretion of the judiciary or the other body of public authority, and the legal consequences of which are binding for the applicant, as well as for the other participants of the trial and the court, as long as the analysis of the relevant norms of the procedural legislation (Civil, Criminal and Administrative Procedure Codes of the Republic of Armenia) states that the person's lawsuit is followed by public relations regulated by the procedural norms, within the framework of which the mutual rights and responsibilities are exercised." (DCC-1257, 10.03.2016).

It should be noted that, in accordance with the Recommendation Rec 2004 (20) of 15 June 2004 of the Committee of Ministers of the Council of Europe on Judicial Review of Administrative Acts, all administrative acts should be subject to judicial review. The tribunal should be able to review any violation of the law, including lack of competence, procedural impropriety and abuse of power..

The Constitutional Court, by its decision DDC-1190 of 10 February 2015, expressed the legal position according to which introduction of specialized justice, including the introduction of the institution of administrative justice, aims, amongst the others, to ensure the effectiveness and completeness of the exercise of the right to judicial protection in the given area by taking into account the feature inherent to this type of justice.

In this regard, the challenged provision should first be considered as a feature of the administrative justice.

4.2. Parts 1 and 2 of Article 5 of the Code stipulate:

"1. The court, ex officio, clarifies the factual circumstances of the case..

2. The court shall not be constrained by the evidence, motions, propositions, explanations and objections brought by the parties to the trial, and the court, upon its own initiative, shall undertake the adequate measures to obtain potentially possible and available information on the actual facts required for the resolution of a certain case."

According to Parts 1 and 2 of Article 27 of the Code:

"1. Directly evaluating all the evidence in the case, the court, by an inner conviction which is based on a comprehensive, complete and objective examination, decides whether the fact is confirmed.

2. The court shall substantiate the formation of such a persuasion in the judicial act."

Articles 18, 25, 28 and 29 of the Code, in particular, define: the trial participant's right to present evidence and to participate in the examination; the duty of the court to explore all fact haven essential importance for resolving the case by examination and evaluation of the obtained evidences, the duty of the party to present to the court all possessed or disposed

evidences based on which it grounds its demands or objections; the duty of the administrative body to present to the court all possessed or disposed evidences based on which the demands and objects of the other party are being grounded; the duty of the court to undertake adequate measures for acquiring, upon its own initiative, the required evidences for resolving the case, and in case of non-establishment of any of facts – the requirement for the court to incur the negative consequences envisaged for a party responsible for the burden of proof.

The Constitutional Court states that in order to ensure the realization of constitutional rights to effective judicial protection and a fair trial, the Code prescribes sufficient structures for the court to obtain necessary evidences, as well as for a participant of the trial to present evidence and to examine them.

In addition, it follows from the above-mentioned norms that for achieving an inner conviction based on a comprehensive, complete and objective examination, the court must directly assess all the evidence of the case and then, through their examination and assessment, find out all the facts of essential importance for resolving the case and only as a result of compliance with the requirements decide the issues on the full or partial satisfaction or rejection of the claim.

In this regard, the Constitutional Court considers it necessary to refer to the relevant formed legal practice. Thus, by the decision in the administrative case No. VD5/0029/05/14, the Cassation Court expressed the following legal positions,

".... although the inner conviction is a subjective category, nevertheless, the legislator considers it as a means for assessing evidence, which leads to legal assessment; therefore by the procedural legislation, the legislator envisaged certain guarantees aimed to ensure its objectivity, in particular:

1) the comprehensive, complete and objective examination of the combination of each piece of evidence and the set of evidence must serve as grounds for the inner conviction of the court.

2) The court is free to assess the evidence.

The free assessment of the evidence upon the inner conviction implies that the court is not constrained by the opinions expressed by the participants and other parties involved in the case."

In previously adopted decisions, the Cassation Court of the Republic of Armenia has repeatedly referred to the issue of substantiation of judicial acts, stating that the court should not only indicate the evidence on which the disputed facts were based on and as a result a judicial act was rendered, but the Court also shall reason why any evidence presented by the party is rejected. Only such substantiation may testify on the comprehensive examination of the case *(Razmik Marutyan v. Stepan and Anahit Marutyan civil case No. 3-54 (VD) decision of the Cassation Court of 27.03.2008).*

Referring to the peculiarities of exercising the court's ex officio authority to explore the factual circumstances of the case expressed in the previous decisions, the Cassation Court of the Republic of Armenia found that the right of the court - to implement procedural actions regarding initiation of reasonable measures for indicating facts essential for resolving the dispute and demanding relevant evidence, for formation of inner conviction - is restricted by a substantiated by the duty of the court to achieve reasoned inner conviction based on comprehensive, complete and objective analysis, and it shall derive from the constitutional provision on preservation of all requirements of justice (decision of the RA Court of Cassation of 17.04.2009 on administrative case VD/5525/05/08 on "Arabkir Tax Inspectorate of the State Revenue Committee adjunct the Government of the Republic of Armenia" v. "George and Brand" LLC) .

4.3. Pursuant to Part 1 of Article 4 of the Law on Fundamentals of Administration and Administrative Proceedings of the Republic of Armenia (hereinafter referred to as the Law), the administrative bodies are obliged to comply with the observance of the laws. According to Part 1 of Article 10 of the same law, "The data or information pertaining to factual circumstances that persons have presented to administrative bodies for consideration shall be deemed trustworthy in all cases, unless administrative body proves otherwise".

The persons shall not be required to submit documents or additional information proving the trustworthiness of the data or information they have submitted, except as prescribed by the law.

If as administrative body has a reasonable doubt regarding the trustworthiness of the data or information submitted by persons, then **administrative body on its own and at its own expenses shall take measures to ascertain the trustworthiness of the data or information".**

Part 1 of Article 63 of the Law stipulates: " An unlawful administrative act that has no legal effect shall be invalid, if it is adopted:

a) in violation of the law, as well as due to incorrect application or misinterpretation of the law;

b) on the basis of fraudulent documents or information, or if from the submitted documents it becomes obvious that in fact another decision should have been adopted;

c) in case of conflict of interest.

According to Part 4 of the same Article,

"The addressee of administrative act shall not have the right to trust the existence of the administrative act, if s/he;

a) achieved the adoption of the relevant administrative act by bribery, threat or by deliberately misleading the official of the administrative body;

b)achieved the adoption of the relevant administrative act by submission of false or incomplete documents;

c) was aware in advance of the unlawfulness of the administrative act or about the illegality of the administrative act or was obliged to know about it based on the information available to him / her.

It follows from the above-mentioned norms that the legislator has clearly defined the boundaries of challenging an administrative act in order to make the entire administration process predictable, which stems from the constitutionally envisaged goals, in particular, the necessity to exercise the right of proper administrative action enshrined in Article 50 of the Constitution.

Therefore, when assessing the lawfulness of an administrative act, it is necessary for the courts to exercise judicial review over the administrative body, first of all, within the framework of the evidence obtained during the administrative proceedings.

On the other hand, it follows from the content of Articles 5, 18, 25, 27, 28, 29 and 99 of the Code, that the Code provides a possibility to examine such new evidence during the examination of a case, which confirms that the administrative act was adopted, in violation of the law or based on false documents or which confirms that the addressee of the administrative act achieved the adoption of the relevant administrative act through bribery, threats, deliberately misleading the official of the administrative body or through submission of false or incomplete documents.

When the above-mentioned facts are confirmed by the court, the court is authorized to invalidate the given administrative act.

Moreover, the Code not only provides a possibility to examine new evidence during the examination of the case, but also, within the framework of principle of ex officio examination of the cases, obliges the court to obtain all necessary evidence and to reach a substantiated inner conviction based on their comprehensive, complete and objective examination which shall derive from the constitutional principle of observing all the requirements of justice.

In view of the above-mentioned, the Constitutional Court considers that the disputed provision, by restricting the administrative body's possibility to present new evidence in the administrative proceedings, shall not be interpreted in a way that may restrict the right of persons to judicial protection, in particular, it shall not restrict the possibility to present new evidence which may be significant for the fair resolution of the case.

However, the wording of the disputed provision of the Code may create the impression that while assessing the lawfulness of an administrative act in the context of a dispute, the courts examine exclusively the evidence obtained during the administrative proceedings. Such an approach towards the applicant was expressed by the Administrative Court of Appeal by providing a limited interpretation of the provision of Part 2 of Article 124 of the Code,

according to which, “The lawfulness of the disputed administrative act is determined within the framework of the evidence obtained in the administrative proceedings undertaken for the adoption of that act", as a result, the possibility of exercising the constitutional rights of judicial protection and a fair trial is blocked.

Based on the results of the examination of the case and governed by of Clause 1 of Article 168, Clause 8 of Part 1 of Article 169, Parts 1 and 4 of Article 170 of the Constitution, as well as Articles 63, 64 and 69 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS**:

1. Part 2 of Article 124 of the Administrative Procedure Code of the Republic of Armenia corresponds to the Constitution with the interpretation, according to which the provision "The lawfulness of the disputed administrative act is determined within the framework of the evidence obtained in the administrative proceedings undertaken for the adoption of that act", only constrains the administrative body which adopted the disputed act in terms of submitting the new evidence.

2. Pursuant to Part 10 of Article 69 of the Constitutional Law on the Constitutional Court, the final judicial act against the applicant is subject to review based on a newly revealed circumstance, in accordance with the procedure defined by the law, as the provision "The lawfulness of the disputed administrative act is determined within the framework of the evidence obtained in the administrative proceedings undertaken for the adoption of that act" prescribed by Part 2 of Article 124 of the Administrative Procedure Code of the Republic of Armenia was applied to the applicant with an interpretation other than the one provided in the first point of this Decision.

3. Pursuant to Part 2 of Article 170 of the Constitution this Decision is final and shall enter into force upon its promulgation.

Chairman **A. DILANYAN**

December 1, 2020

DCC-1565