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

THE CASE ON CONFORMITY OF ARTICLE 208, PART 2 OF THE CIVIL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE CITIZEN NELLY MKRTCHYAN

Yerevan 18 July 2012

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), Justices K. Balayan, F. Tokhyan, M. Topuzyan (Rapporteur), A. Khachatryan, V. Hovhannisyan, H. Nazaryan, A. Petrosyan, V. Poghosyan,

with the participation of the representative of the Applicant: Advocate G. Torosyan,

official representative of the Respondent: A. Mkhitaryan, the Chief Specialist of the Legal Expertise Division of the Legal Department of the National Assembly Staff of the Republic of Armenia and H. Sardaryan, Leading Specialist of the same Division,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 6 of the Constitution of the Republic of Armenia, 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 Article 208, Part 2 of the Civil Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the application of the citizen Nelly Mkrtchyan.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the citizen Nelly Mkrtchyan on 06.03.2012.

Having examined the report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondents, having studied the Civil Procedure Code of the Republic of Armenia and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES**:

1. The RA Civil Procedure Code was adopted by the RA National Assembly on 17 June 1998, signed by the RA President on 7 August 1998 and came into force on 1 January 1999.

Part 2 of Article 208 of the RA Civil Procedure Code, titled "Limits for filing appeals," states: "Appeals in civil cases with property demand are permissible to be considered only if the amount in dispute fifty times exceeds the minimum wage."

2. The procedural background of the Case is the following: on 08.12.2010 the Applicant submitted a claim to the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts against "Yerevan Hotel" OJSC with the demand to recover the amounts unjustifiably withheld from wages.

The Applicant informed the Court that from 24 March to 27 July 2009 she worked at "Yerevan Hotel" OJSC as registrar according to the labor contract. She was dismissed due to the expiration of the contract. On 07.09.2009 she was again employed by "Yerevan Hotel" OJSC as registrar and was dismissed on 8 October 2010. No new labor contract was signed for that period of time, and she was informed that the labor contract signed on 24.03.2009 is in force. During the final calculation it was found out that 45.000 /forty-five thousand/ AMD were deducted from her as a fine. Based on the above-mentioned, the Applicant asked the court to recover the afore-mentioned 45.000 /forty-five thousand/ AMD from "Yerevan Hotel" OJSC.

On 07.06.2011 the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts made a decision to reject the claim.

The Applicant filed an appeal against the mentioned judgment.

By its decision of 25.07.2011 the RA Civil Court of Appeal returned the appeal with the reasoning that Article 208, Part 2 of the RA Civil Procedure Code does not allow to appeal the judgments, if the amount of property demand does not exceed the minimum wage for fifty times, and the amount in dispute of the considered case is 45.000 /forty-five thousand/ AMD, that is "appeals in cases of such property demand are not allowed."

By its decision dated 07.09.2011 the RA Court of Cassation returned the appeal filed by the Applicant against the decision of 25.07.2011 of the RA Civil Court of Appeal, and reconfirmed the legal positions of the RA Civil Court of Appeal.

3. Challenging the constitutionality of Article 208, Part 2 of the RA Civil Procedure Code, the Applicant finds that it contradicts Articles 1, 3, 18, 19 and 20 of the RA Constitution.

Referring to the mentioned articles of the Constitution and citing Article 6 of the Constitution, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Applicant asserts that the unity of the mentioned provisions is the content of the rights to judicial protection and fair trial. According to the Applicant the right to judicial protection supposes not only the entitlement to go to the court for protection and restoration of violated or challenged rights, but also the state-guaranteed opportunity to appeal judgments. According to the Applicant, if any interested person has the right to apply to the court for protection of violated rights, the participants of civil circulation apply to the court of first instance submitting a claim /application/ and to the higher courts –submitting an appeal and cassation petition. Based on this, the Applicant concludes that the right to appeal judgments directly follows from the content of the right of the person to judicial protection and the state shall bear the obligation to guarantee it. Reproducing the content of Article 3 of the RA Constitution, the Applicant concludes that the RA legal system shall contain the necessary mechanisms for the implementation of the right to appeal judgments, which include the appeal and cassation form of judgments review.

Referring also to the legal positions expressed by the RA Constitutional Court in the Decision DCC-765, as well as in the Decisions DCC-652, DCC-665, DCC-673, DCC-719 and DCC-780, the Applicant finds that judicial review should be considered as a mechanism for ensuring the implementation of the right to appeal and cassation, which simultaneously provides with opportunity to guarantee making lawful and well-grounded judgments, the

uniform application of the law, protection of the rights, freedoms and legitimate interests of the participants of civil circulation.

The Applicant points out that the Constitution has defined unlimited right to judicial protection, incidently, Articles 18 and 19 of the latter do not include reference to any specific law regarding judicial protection, and the terms and conditions for implementation of that right must only be determined by the Civil Procedure Code, without limiting the provisions of the RA Constitution.

According to the Applicant, in this case the tendency or aim to limit the right to appeal with 50.000 /fifty thousand/ AMD is also very uncertain. If this restriction is based on the circumstance that the amount is not large enough, the Applicant draws attention to the fact that according to Article 1 of the RA Law on the Minimum Wage, the minimum wage in the Republic of Armenia is 32.000 AMD, and according to the data of the RA National Statistical Service, the cost of the minimum consumer basket in the Republic of Armenia is 43.499.8 AMD.

The Applicant also mentions the circumstance that the challenged norm of the Code does not stipulate exceptions to appeal: for example, opportunity to appeal in case of certain gross procedural violations.

4. Objecting the arguments of the Applicant, the Respondent finds that Article 208, Part 2 of the RA Civil Procedure Code is in conformity with the RA Constitution. To reason his position, the Respondent refers to the certain Recommendations of the Committee of Ministers of the Council of Europe and the case law of the European Court of Human Rights, concluding that the challenged legal regulation is derived from the international legal approaches and is not intended to exclude the implementation of the right to access to justice. In principle, the possibility to review the judgments of the court of first instance in the Court of Appeal is ensured. The challenged norm does not restrict the person's constitutional right to appeal, but it limits the implementation of the right to review only for those cases where the subjects in disputes are small claims.

The Respondent states that in Point a/ of Article 1, titled Right to judicial control, of the Recommendation No. 95/5 adopted by the Committee of Ministers of the Council of Europe on 7 February 1995 concerning the Introduction and Improvement of the Functioning of Appeal Systems and Procedures on Civil and Commercial Cases, states that "in principal, it should be possible for any decision of a lower court ("first court") to be subject to the control of a higher court ("second court"). Should it be considered appropriate to make exceptions to this principle, any such exceptions should be founded in the law and should be consistent with general principles of justice." Referring also Article 3 of this Recommendation, titled "Matters excluded from the right to appeal," the Respondent emphasizes the circumstance that in order to ensure the consideration of by the second court, the states should consider certain measures, excluding cases of certain category, for example possibility of exclusion of appeal in cases concerning the claims of small amount. Based on that, the Respondent concludes that "The procedure of appeal defined by the RA legislation is fully in conformity with the requirements of the above-mentioned Recommendation of the Committee of Ministers of the Council of Europe."

5. Within the framework of the constitutional legal dispute of the instant case, the Constitutional Court emphasizes the following legal issues:

- Whether it is legitimate to limit the possibility of implementation of the right to appeal based on the amount of the claim;
- What criteria should be taken as basis when setting the rate of amount of the claim, while limiting the right to appeal?;
- Whether certain exceptions are legitimate and necessary fro such limitation?

The Constitutional Court finds necessitates considering these issues in the context of the right to judicial protection and fair trial, taking into account international legal experience and approaches concerning the issue in dispute.

The study of international legal approaches and international experience concerning the issue in dispute states that the right to appeal in civil cases is not absolute, and the possibility to appeal in certain cases may be excluded being justified by certain circumstances.

So, according to Point 15 of the Recommendation No. R (81) 7 of the Committee of Ministers of the Council of Europe on Measures Facilitating Access to Justice, adopted on 14 May 1981, where there is a dispute about a small amount of money, a special procedure should be provided that enables the parties to put their case before the court without incurring expense that is out of proportion to the amount at issue. To this end consideration could be given to the provision of simple forms, the avoidance of unnecessary hearings and **the limitation of the right of appeal**.

In accordance with Principle 8, Part 1, Point b) of the Recommendation No. R (84) 5 of the Committee of Ministers of the Council of Europe on the Principles of Civil Procedure Designed to Improve the Functioning of Justice, adopted on 28 February 1984, particular rules or sets of rules should be instituted in order to expedite the settlement of disputes in cases relating to an undisputed right or an established liquidated claim and **in cases involving small claims**.

Point 3 of the Recommendation No. R (86) 12 of the Committee of Ministers of the Council of Europe Concerning Measures to Prevent and Reduce the Excessive Workload in the Courts, adopted on 16 September 1986 states that, in order to reduce the workload in the courts, the member states should provide with bodies of **justice** which shall be at the disposal of the parties to solve **disputes on small claims** and in some specific areas of law.

Point a) of Article 3 titled "Matters excluded from the right to appeal" of the Recommendation No. R (95) 5 "Concerning the Introduction and Improvement of the Functioning of Appeal Systems and Procedures in Civil and Commercial Cases" adopted by the Committee of Ministers of the Council of Europe on 7 February 1995, states: "In order to ensure that only appropriate matters are considered by the second court, states should consider taking any or all of the following measures… excluding certain categories of cases, for example small claims."

Bases on the above-mentioned, the Constitutional Court states that, according to Recommendations No. R (84) 5 and R (95) 5 of the Committee of Ministers of the Council of Europe **not excluding the implementation of the right to appeal in civil cases**, nevertheless, as opposed to the right of appeal in criminal cases, appeals on civil cases in the court of second instance (court of appeal) may be subjected to certain limitations, in particular, for the disputes on small claims.

6. The comparative analysis of Articles 18, 19 and 20 of the RA Constitution states that the RA Constitution, as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the additional protocols has stipulated the right to appeal in criminal cases.

Article 19 of the RA Constitution concerns the appropriate procedures, and, in particular, the procedures corresponding to the demands of justice, of the certain case consideration in the court of each instance. That is, the provision prescribed in Article 19 of the RA Constitution concerning fair trial is applicable only after implementation of the right to appeal or cassation, if the right to appeal or cassation is defined for such cases. The same concerns Article 6 of the European Convention. According to the European Court, the right stipulated by Article 6 of the Convention does not include the right to appeal. The case law of European Court sequentially expresses the principal legal position, according to which, the

European Convention does not compel the Contracting States to set up courts of appeal or of cassation, however, where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that it guarantees to litigants to enjoy the guarantees of Article 6… (particularly, the case of Staroszczyk v. Poland, application No. 59519/00, Judgment of 22 March 2007, Point 125).

Touching upon the revelation of the constitutional legal content of the provisions of Article 18, Part 1 of the RA Constitution from the perspective of the right of judicial protection and the right to effective remedies for judicial protection, the Constitutional Court finds that even though the right to appeal the judgment or the right to review are elements of the right of access to court and the right of effective judicial protection in case of existence of the courts of appeal and cassation, nevertheless, these rights are not absolute and are subject to certain restrictions, one of which is the restriction of the right to appeal in civil cases of certain categories stipulated by the challenged provision of the Code. In this regard, the Constitutional Court considered as lawful the restriction of the right to appeal in civil cases based on the amount of the claim, per se. The lawfulness of the amount stipulated by the challenged norm of the Code, as well as the conformity of such restriction as an exception to the general rule, with the common principles of justice is another issue.

7. Based on the results of study of international experience, the Constitutional Court states that in all those states, the legislation of which allows to restrict the right to appeal the judgments in case of a "small" amount of the claim, there are certain criteria and factors, and the legislator determines the rate of the amount of the certain claim in a reasonable relation with them. In particular, the rate of minimum wage, the cost of the minimum consumer basket, the living standards of the population serve as similar criteria. By the way, in some cases, for example in the Federal Republic of Germany, where the possibility to appeal is not defined, the rate of the amount of the claim significantly bates the rate of minimum wage.

Assessing the availability of the significant disadvantage, as a requirement for accessibility of individual complaints involved by Protocol No. 14 of the European Convention as a new term, the European Court often bases on financial influence of the given violation on the Applicant, particularly the circumstance that the amount in dispute is small.

In this aspect, it is characteristic that often being guided by the fact of availability or absence of pecuniary interest of the Applicant while assessing the availability of significant disadvantage, at the same time the European Court acknowledges that pecuniary interest is not the only element to determine the availability or absence of significant disadvantage. Particularly, in its decision of 1 July 2010 on the case of Korolev v. Russia the European Court expressed the following fundamental legal position: "… violation of the Convention may concern important questions of principle and thus cause a significant disadvantage without affecting pecuniary interest."

Moreover, according to Article 12 of the Protocol No. 14, individual application shall not be declared inadmissible even if no significant disadvantage exists, unless respect for conventional rights requires an examination of the application on the merits.

Based on the study of international procedural experience and taking into account the above-mentioned factors, the Constitutional Court finds that within the dispute in question the consideration of any sum of money as the maximum limit of "small" claims, in particular, shall be based on criteria specific to the concrete social reality, such as, for example, correlation of the rate of average monthly income of the citizens in the state, the minimum wage and the cost of the minimum consumer basket.

It must be borne in mind that, for example, according to Article 1 of the RA Law on the Minimum Wage, the minimum wage in the Republic of Armenia composes 32.500 AMD. At the same time, the cost of the minimum consumer basket composes 43.499.8 AMD. According to Article 175, Part 4 of the RA Criminal Code, **large amount** of embezzlement

starts from the amount that thirty times exceeds the calculated minimum wage (30.000 AMD). In all cases determination of not appealable limit of money is the competence of the legislator, though it must be defined deriving from the purpose of a fair and reasonable balance of the mentioned factors, at the same time, the necessity making the constitutional legal issues of justice serve the purpose of social justice must be taken into consideration.

8. The aim of the institution to appeal judgments is not only checking the legitimacy of rejecting or satisfying the claim set forth. This institution is the basic and essential legal guarantee, whereby observance of the basic elements of the right to fair trial, in particular, those stipulated by Article 19, Part 1 of the RA Constitution and Article 6, Part 1 of the European Convention is ensured by the lower courts. In all cases, when the court of first instance did not observe the mentioned procedural guarantees, having no right of appeal, in fact the citizen is deprived of the opportunity to effective implementation of his/her right to fair trial and effective remedies against the violations of the right to fair trial. Hence, considering the challenged legal regulation in the context of the right to fair trial, the Constitutional Court finds that conditioned with the rate of the amount of the claim, the restriction of the right to appeal may be considered legitimate only when the main essence of the right to fair trail is not violated. In this regard, the Constitutional Court necessitates revealing the common logic, which is the basis of Article 207 and Article 228, as well as Article 204.32 of the RA Civil Procedure Code that regard the institution of appeal. In particular, Article 207, Part 7 of the RA Civil Procedure Code prescribes the exceptional cases when appeal may be also filled to the court of first instance against the judgment on the merits which is in force. Namely, when in the process of previous trial of the case such fundamental violations of substantive or procedural law were committed, **which are resulted in the rendered the judgment violating the main essence of justice**.

Article 228, Part 2 of the RA Civil Procedural Code defines the violations of the norms of procedural law that are the basis for mandatory abolishment of the judgment. Namely, the court considered the case in illegal composition, the court considered the case in the absence of one of the litigants (violation of the principle of competition of parties and legal equality), the judgment was signed by the judge who did not issue it, the judgment was issued by the judge, who is not a part of the trial court, and no court record is available in the case.

Article 204.32 of the RA Civil Procedural Code prescribes the cases when the judgments in force are disputable due to newly revealed circumstances. In particular, the following serve as such grounds: obviously false testimonies of the witness established in the court judgment in force; obviously false conclusions of the expert; obviously false translation of the translator; forgery of documents or material evidences; commitment of crimes by the participants of the case, their representatives or the judges within the case trial; as well as annulment of the judgment, verdict, decision of administrative authorities or local government authorities served as a basis for rendering the judgment.

The Constitutional Court states that the exceptions and grounds stipulated by the above-mentioned articles concern judicial errors or situations violating the main essence of the right to fair trail, and the common logic of those legal regulations brings to the fact that the judgment adopted as a result of violating the main essence of the right to fair trail, may not have legal force.

The Constitutional Court finds that determining restrictions of the right to appeal the cases stipulated by the challenged norm, the legislator deviated from the aforementioned common logic of the Code and did not prescribe exceptions to the restriction of the right to appeal in all cases when the court of first instance made a judicial error violating the main essence of the right to fair trail.

The Constitutional Court also states that necessity to establish such exceptions follows from the requirements of Point b/ of Article 1, titled Right to judicial control, of the Recommendation No. 95 (5) adopted by the Committee of Ministers of the Council of Europe on 7 February 1995 concerning the Introduction and Improvement of the Functioning of Appeal Systems and Procedures on Civil and Commercial Cases, according to which should it be considered appropriate to make exceptions to this principle, any such exceptions should be founded in the law and should be consistent with **general principles of justice**. Such approach is also consonant with the approaches of the European Court that were formed in the practice of assessing "significant disadvantage."

The Constitutional Court also finds necessary to note that in the letter N01/3091-12 of 23.05.2012 of the RA Ministry of Justice provided as an answer to the request of the Constitutional Court, the necessity to facilitate workload of the Court of Appeals is mentioned as a circumstance that justifies the determination of the challenged provision in the RA Civil Procedure Code. In this regard, the Constitutional Court states that in practice such legal regulation not only serves its purposes ineffectively, but, making the interested parties file a claim with the demand exceeding 50.000 AMD to circumvent the challenged restriction of appeal, it leads to workload of courts by the unreasonable demand regarding the amount of the claim in excess of 50.000 AMD.

Based on the review of the Case and being governed by Article 100, Point 1, Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 69 of the RA Law on Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare Article 208, Part 2 of the RA Civil Procedure Code, so far as it does not determine exceptions to the restriction of the right to appeal in all cases when the court of first instance made a judicial error violating the main essence of the right to fair trail, particularly, when the procedural guarantees stipulated by Article 19, Part 1 of the RA Constitution and Article 6, Part 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms dated 4 November 1950, contradicting Articles 18 and 19 of the Constitution of the Republic of Armenia and void.

2. Pursuant to Article 102, Part 2 of the RA Constitution this Decision is final and enters into force from the moment of its announcement.

Chairman G. Harutyunyan

18 July 2012
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