



**IN THE NAME OF THE REPUBLIC OF ARMENIA**

**DECISION**

**OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA**

**ON THE CASE OF CONFORMITY OF POINT 3 OF PART 2  
OF ARTICLE 231 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 OJSC “YERFREZ”**

**Yerevan**

**July 12, 2016**

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

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

representative of the Applicant: Kh. Ohanyan,

representative of the Respondent: S. Tevanyan, official representative of the RA National Assembly, Adviser to the Legal Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 100 and Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia, Articles 25, 38 and 69 of the RA Law on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Point 3 of Part 2 of Article 231 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 OJSC “Yerfrez”.

The Case was initiated on the basis of the Application submitted to the RA Constitutional Court by OJSC “Yerfrez” on 16 February 2016.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, as well as having studied the RA Civil Procedure Code 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 President of the Republic of Armenia on 7 August 1998 and entered into force on 1 January 1999.

Point 3 of Part 2 of Article 231 of the Code, titled “Content of the cassation appeal”, stipulates:

“2. In case of submitting the cassation appeal on the ground provided for in Point 1 of Part 1 of Article 234 of this Code, the person having lodged the appeal must justify that the decision of the Court of Cassation on the appeal should promote ensuring the uniform application of the law, and particularly justify in the cassation appeal that:

...

3) the interpretation of any norm in the disputed judicial act contradicts the interpretation given to the said norm in the decision of the European Court of Human Rights, attaching those judicial acts and citing the contradicting parts thereof, as well as making comparative analysis regarding the contradiction of the disputed judicial act and the judicial act of the European Court of Human Rights on the case which includes certain actual circumstances”.

The RA National Assembly has made a number of amendments and supplements to the above-mentioned Article, and the challenged provision was enshrined in the RA Civil Procedure Code by the RA Law HO-49-N on Making amendments and supplements to the Civil Procedure Code of the Republic of Armenia dated 10.06.14.

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

The Court of General Jurisdiction of Arabkir and Kanaker-Zeytun Administrative Districts of Yerevan examined the case number ԵԱՔԴ/1104/02/11 under the claim of OJSC “Yerfrez” v. the RA Ministry of Finance, with a demand for early termination (on 01.07.2010) of the contract of the Renewable Energy and Energy Saving Foundation of Armenia signed on 01.06.2005, and, as a consequence, to oblige

the return of equipment provided to the Respondent in the form of a loan, and on the counterclaim of the RA Ministry of Finance and the Renewable Energy and Energy Saving Foundation of Armenia as a third party against OJSC “Yerfrez” for recovery of the amount. By the 20.05.2013 Decision of the Court, the claim of OJSC “Yerfrez” was satisfied, and the counterclaim of the RA Ministry of Finance was rejected.

The RA Ministry of Finance lodged an appeal against the 20.05.2013 Decision of the Court of General Jurisdiction of Arabkir and Kanaker-Zeytun Administrative Districts of Yerevan. By the Decision of 25.12.2013, the RA Civil Court of Appeal partially satisfied the appeal: the 20.05.2013 Judgment of the Court of General Jurisdiction of Arabkir and Kanaker-Zeytun Administrative Districts of Yerevan was partially abolished in regard to the part of the rejection of the counterclaim of the RA Ministry of Finance, and the abolished part of the case was sent for a new consideration to the same Court. The Decision remained in force in regard to the rest part.

The RA Ministry of Finance filed a cassation appeal against the 25.12.2013 Decision of the RA Civil Court of Appeal, and the cassation appeal was returned by the 05.03.2014 Decision of the RA Court of Cassation.

By the 05.12.2014 Judgment of the Court of General Jurisdiction of Arabkir and Kanaker-Zeytun Administrative Districts of Yerevan the counterclaim was rejected.

By the 22.04.2015 Decision of the RA Civil Court of Appeal the appeal of the RA Ministry of Finance was partially satisfied: the 05.12.2014 Judgment of the Court of General Jurisdiction of Arabkir and Kanaker-Zeytun Administrative Districts of Yerevan was partially abolished and amended in regard to the part of rejection of the counterclaim of the RA Ministry of Finance, i.e. the counterclaim was satisfied.

By the 03.06.2015 Decision of the RA Court of Cassation returned the cassation appeal filed on behalf of OJSC “Yerfrez”, setting a fifteen-day period from the moment the decision was received to correct the errors indicated in the decision and resubmit the cassation appeal. The cassation appeal was resubmitted to the RA Court of Cassation, on the basis of which the RA Court of Cassation on 22.07.2015 adopted the

Decision “On dismissal of the cassation appeal”, arguing that “... the cassation appeal filed earlier on behalf of the Company was also returned by the 03.06.2015 Decision of the Civil and Administrative Chamber of the RA Court of Cassation with the justification that in the cassation appeal the person, who lodged the appeal, referred to the 09.10.1979 Judgment of the European Court of Human Rights in the case of Airey v. Ireland (application no. 6289/73), the 28.10.1999 Judgment of the European Court of Human Rights in the case of Brumarescu v. Romania (application no. 28342/95), the 06.12.2007 Judgment of the European Court of Human Rights in the case of Beian v. Romania (No. 1), (application no. 30658/05), as well as the 24.07.2009 Decision of the RA Court of Cassation in the civil case number ԵԱՆԴ/2534/02/08 and the 04.07.2013 Decision of RA Court of Cassation in the administrative case number ՎՂ3/0011/05/10, however the person, who lodged the appeal, did not attach these judicial acts to the appeal. At the same time, a deadline was fixed for the correction of the given formal error in the cassation appeal and resubmission of the cassation appeal. Now the representative of the Company resubmitted the cassation appeal on the same grounds, not having corrected the above-mentioned error stated by the 03.06.2015 Decision of the Civil and Administrative Chamber of the RA Court of Cassation. In these circumstances, the Court of Cassation finds that the cassation appeal must be dismissed”.

3. The Applicant notes that the Republic of Armenia is governed by the rule of law, and the decisions of the Constitutional Court of the Republic of Armenia and the decisions of the European Court of Human Rights are constituent parts of the legal system of the rule of law state. According to the logic of the 03.06.2015 Decision of the RA Court of Cassation and the 22.07.2015 Decision of the RA Court of Cassation “On dismissal of the cassation appeal”, when filing a cassation appeal, it is also necessary to attach copies of the relevant norms of the RA Civil, Administrative, Criminal Codes and other legal acts to which reference is made in the appeal. The exercise of justice by the court and the constitutional guarantee for the implementation of fair trial must operate uninterruptedly. These values may not be diminished for technical reasons, i.e. due to the reasoning that the decisions of the Consti-

tutional Court of the Republic of Armenia and the decisions of the European Court of Human Rights were not attached to the cassation appeal. Moreover, no such norm is prescribed for applying to the Constitutional Court, according to which the applicant, when referring to any position of the Constitutional Court and indicating the number of the decision, must also attach the said decision.

The Applicant also argues that the European Court of Human Rights has repeatedly stated that the right to judicial protection, part of which constitutes the right of access to the court, is not absolute and may be limited especially in connection with the terms for acceptance of the appeal. In any case, states in this regard enjoy the freedom of discretion. Nevertheless, along with what has been said, the restrictions applied must not anyhow or to any extent restrict the person's right of access to a court thus causing damage to the very essence of this right and diminishing justice. Therefore, the Applicant finds that the challenged legal regulation contradicts the separate recommendations of the Committee of Ministers of the Council of Europe and the case law of the European Court of Human Rights, it does not follow from international legal approaches, and it is aimed at excluding the exercise of the right of access to justice.

The Applicant's arguments in connection with the challenged provision are that the right of access to a court and the right to effective remedies are violated, as the legislatively stipulated legal norm does not allow restoring the violated rights, imposes a disproportionate obligation and blocks the realization of substantive law.

Analyzing the challenged norm in a comparative manner, the Applicant concludes that Point 3 of Part 2 of Article 231 of the RA Civil Procedure Code contradicts Part 1 of Article 61, Part 1 of Article 63 and Article 78 of the RA Constitution (with Amendments through 2015), and Articles 1 and 6 of the European Convention for the Protection of Human rights and Fundamental Freedoms.

**4.** The Respondent finds that Point 3 of Part 2 of Article 231 of the RA Civil Procedure Code is in conformity with the requirements of the RA Constitution.

Referring to the legal positions regarding the right of access to a court, expressed in the 22 March 2007 Judgment of the European Court

of Human Rights in the case of *Sialkowska v. Poland*, and stating that the right of access to a court is not absolute and may be subject to lawful limitations, the Respondent finds that a violation of the principle of the right of access to a court may occur when the said right is limited to an extent that in practice it restricts the person's right to benefit from the legal protection of the court. Meanwhile, according to the Respondent, in terms of current legal regulation, a person has a practical opportunity to enjoy the right to judicial protection, since the decisions of the European Court are public and available to everyone. And even the non-attachment to the appeal for the first time of the relevant acts of the European Court does not deprive the person of the opportunity to enjoy the right to judicial protection, since the court sets a time limit for the elimination of the violation and resubmission of the appeal.

Referring to the legal positions expressed in the judgments of the European Court of Human Rights regarding the terms of acceptance of cassation appeal, and similar legal regulations in some countries, particularly in France, as well as Article 92 of the RA Constitution, Part 1 of Article 234, Part 2 of Article 231 of the RA Civil Procedure Code, and also emphasizing the role of the RA Court of Cassation in the RA justice system, the Respondent considers that the requirement of attaching the judicial act of the European Court to the cassation appeal is legitimate on the grounds that the requirement in dispute is a legal guarantee that the person is fully acquainted with the content of the legal acts she/he referred to, since the person is obliged to substantiate the contradiction of the legal acts she/he referred to via citing the contradicting parts.

Touching upon the arguments of the Applicant regarding the non-conformity of the challenged provision with the requirements of legal certainty, the Respondent refers to the legal positions regarding legal certainty, expressed in the 6 December 2012 Judgment of the European Court of Human Rights in the case of *Michaud v. France*, the legal positions on the same issue expressed in 18 April 2006 Decision DCC-630 and 2 April 2014 Decision DCC-1142 of the RA Constitutional Court, and finds that the challenged provision meets the requirements of the law (which is in accordance with the principles of the rule of law).

5. In order to determine the conformity of the legal provision challenged in this Case with the RA Constitution, the Constitutional Court considers it necessary to assess the constitutionality of the challenged norm in the context of the right to judicial protection and the right of access to justice, which is an element of the latter, and attaching special importance to:

- guaranteeing the free implementation of the right of access to justice (the right to a court) as an important precondition for the exercise of the right to judicial protection as provided for by the Constitution. To assess it within the framework of current procedural rules for the exercise of this right and the possible legal consequences arising during their application, taking into account also the legal positions expressed by the Constitutional Court in connection with this right, as well as international legal criteria for the realization of this right,
- the comparability of the legal restriction with the essence of the principle of proportionality stipulated by Article 78 of the RA Constitution (with Amendments through 2015) due to the regulation in dispute.

6. The right to judicial protection of the rights and freedoms of the person is envisaged in Articles 61 and 63 of the RA Constitution (with Amendments through 2015), according to which: everyone shall have the right to effective judicial protection of her/his rights and freedoms, the right to a fair and public hearing of her/his case within a reasonable period by an independent and impartial court.

From the perspective of guaranteeing the realization of the right to judicial protection of the rights and freedoms of the person, it is of pivotal importance to answer these questions: how accessible is justice and how effective are the terms and tools for exercising the right to a court for the protection of the violated rights of the person?

The full-fledged guarantee of the realization of a person's right to a court is one of the initial legal preconditions for the protection of constitutional rights and freedoms of the person in a judicial procedure. Among other things, the assessment of the constitutionality of the legal regulation in dispute especially in the context of the right of access to a court is due to that circumstance.

7. In a number of decisions (DCC-652, DCC-690, DCC-719, DCC-765, DCC-844, DCC-873, DCC-890, DCC-932, DCC-942, DCC-1037, DCC-1052, DCC-1115, DCC-1127, DCC-1190, DCC-1192, DCC-1196, DCC-1197, DCC-1220, DCC-1222, DCC-1257 and DCC-1289) the Constitutional Court referred in detail to the issues of constitutionality of guaranteeing the right of access to justice, as well as the right to fair and effective trial, having considered them as necessary components of the right to judicial protection, and equally emphasizing their importance in the judicial process.

The Constitutional Court states that the constitutional legal principles guaranteeing the right to judicial protection of the rights and freedoms of the person are underlying the legal regulation of Articles 61 and 63 of the RA Constitution with Amendments through 2015, in the context of which the Constitutional Court expressed legal positions in the above-mentioned decisions.

In the aforementioned decisions, the Constitutional Court underlined a number of principles of legal regulation, which are of fundamental importance from the perspective of assessing the constitutionality of the norm challenged in this Case, and in particular:

- no judicial peculiarity or procedure may impede or prevent the effective implementation of the right to a court, make the right to judicial protection guaranteed by the RA Constitution senseless, or prohibit its implementation;
- no procedural peculiarity may be interpreted as a justification for limitations on the right of access to a court guaranteed by the RA Constitution;
- the right of access to a court may have limitations that do not distort the very essence of this right;
- when applying to a court, the person should not be burdened with unnecessary formal requirements;
- based on the requirement of ensuring legal certainty, the presence of a certain imperative precondition necessary for the exercise of the right of access to a court may not be considered as contradicting the RA Constitution. Another question is that such precondition must be feasible, reasonable and not lead to a violation of the essence of law;



- stipulating requirements to the acceptance of cassation appeal, that may be even more rigorous, is not problematic itself;
- the terms of acceptance of cassation appeal filed against a judicial act, including the time limits of appeal, may not exceed or impede the guarantees for ensuring the right of access to a court.

At the same time, the Constitutional Court considers it necessary to refer to the legal positions of the ECHR regarding the limitations on the right of access to a court, according to which:

- this right is not absolute, and States may condition the possibility of its implementation by certain requirements and criteria (Luo-rdo v. Italy, Judgment of 17 October 2003, Staroszczyk v. Poland, Judgment of 9 July 2007, Stanev v. Bulgaria, Judgment of 17 January 2012, etc.),
- the State may establish certain terms for enjoying the right to a court, “... the limitations applied by the State must not restrict or reduce a person’s access in such a way or to such an extent that the very essence of the right is impaired. In addition, the limitation will not be compatible with Part 1 of Article 6, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved” (Case of Khalfaoui v. France, application no. 34791/97, 14/03 /2000),
- such limitations will not be compatible with the requirements of Part 1 of Article 6 of the European Convention on Human Rights, if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (Case of Marini v. Albania (application no. 3738/02), Judgment of 18 December 2007, para.113).

These positions are important especially for providing legislative guarantees for the rights of the person to fair justice, as stipulated by Part 1 of Article 61 and Part 1 of Article 63 of the RA Constitution (with Amendments through 2015).

**8.** It follows from the legal regulations stipulated by Part 2 of Article 231 of the RA Civil Procedure Code that in case the person having lodged the appeal finds that the decision of the Court of Cassation regarding the issue raised in the appeal may be of significant importance

for the uniform application of the law, the person having lodged the appeal must, in particular, justify that:

- at least in two judicial acts of lower courts the same norm in different cases has been applied in contradictory interpretation,
- the interpretation of any norm in the disputed judicial act contradicts the constitutional legal content of the said norm, revealed in the conclusive part of the decision of the Constitutional Court of the Republic of Armenia,
- the interpretation of any norm in the disputed judicial act contradicts the interpretation given to the said norm in the decision of the European Court of Human Rights,
- the interpretation of any norm in the disputed judicial act contradicts the interpretation given to the said norm in the decision of the Court of Cassation of the Republic of Armenia on the case which includes similar actual circumstances.

The Constitutional Court finds that the requirement of the legislator to submit a proper legal justification in case of submitting a cassation appeal is legitimate, since it includes such elements as citing the parts of the disputed judicial act that contradict the judicial act referred to, as well as making comparative analysis of the contradiction between the disputed judicial act and the judicial act referred to.

In the mentioned context, the legal requirement of submitting a justification does not itself block the opportunity of exercising the person's right of access to a court, considering that such a requirement does not impose an unenforceable duty on a person, taking into account the possibilities of objective reality. The Constitutional Court considers that this also does not cause damage to the essence of the law. Moreover, establishing requirements for submitting a justification is not aimed at burdening the person, who lodged the appeal with unnecessary duties, and it is aimed at reasoning the legitimacy of the circumstances presented in the given disputed case.

The Constitutional Court also states that the legal requirement of submitting a proper legal justification pursues a legitimate aim, i.e. to ensure implementation of judgments and decisions of the European Court of Human Rights, decisions of the RA Constitutional Court and RA Court of Cassation, and to promote uniform law enforcement practice, since the legal positions expressed by the European Court of

Human Rights, the RA Constitutional Court and the RA Court of Cassation are the main guidelines for stable dynamic development of the law enforcement practice and the legal system in general.

Thus, the requirement of making comparative analysis of the legal positions referred to by the person, who filed cassation appeal and the legal positions expressed in the relevant judicial acts is legitimate. Moreover, this may be ensured only in the case when not only the relevant legal position is indicated, but also the identification, characteristic and typical data of the judicial act are indicated, in which the referred legal positions are fixed (in particular, the name of the authority that adopted the referred judicial act, title of the judicial act, date of adoption, and case number).

9. It is obvious that any restriction on a right must be applied only in exceptional cases, as a means of ensuring a balance between the interests of democratic institutions and a particular person. In order the notion “exceptional cases” was not interpreted too broadly or arbitrarily, the European Convention on Human Rights establishes that the rights of a person may be restricted only if necessary in a democratic society and if it derives from the interests of state security, public order, economic well-being of the country, prevention of crimes or other interests that are of greater public significance than providing the person with the mentioned rights.

The Constitutional Court finds that the requirement of attaching the judicial acts - referred to within the framework of the legal norm in dispute - to the appeal unjustly burdens the appellant. Moreover, such requirement not only unequally restricts the exercise of the right of access to a court and the right to effective remedies, but also becomes an obstacle in the aspect of effective and full implementation of the constitutional legal function of ensuring a uniform application of the law by the Court of Cassation, thus not allowing the Court of Cassation to accept the cassation appeal for examination and administer justice in case of satisfying other grounds provided for by the law.

Envisaging the requirement of attaching the referred judicial acts is not justified, when they are available to the parties to the proceedings and to the RA Court of Cassation (including through relevant official websites on the Internet). The positive duty of the State is to

ensure the accessibility of the judgments of the European Court of Human Rights, decisions of the Constitutional Court and the RA Court of Cassation, as well as judicial acts of lower courts. Meanwhile, this must be ensured through faithful and legally equally translated texts approved by a specific state authority. The requirement of the law creates a real danger of blocking the implementation of the person's right to a fair trial (in particular, see the 27 April 2016 Decision of the RA Court of Cassation in the civil case number ԵԱԲԴ/ 0229/02/16) in particular regarding the requirement of attaching to the appeal all acts referring the case law of the European Court of Human Rights when, on the one hand, they consist of dozens of pages and, according to law enforcement practice, must be submitted in a translated form (taking into account that in the Republic of Armenia, the proceedings are conducted in Armenian), and on the other hand, the time limit for filing an appeal is limited or the delay of the time limit may have irreversible negative consequences for the applicant.

In the context of what has been said above, the Constitutional Court considers it necessary also to emphasize that, unlike the disputed legal provision, Parts 3 and 4 of Article 15 of the RA Judicial Code do not envisage any duty for the appellant in the aspect of attaching the relevant judicial acts. The above-mentioned Parts stipulate that:

- at the time of examination of her/his case, everyone **shall have the right to invoke**, as legal argument, the reasoning of a final judicial act in legal force (including the interpretations of the law) of a court of the Republic of Armenia in another case with similar factual circumstances,
- reasoning of a judicial act of the Court of Cassation or the European Court of Human Rights (including the interpretations of the law) in a case with certain factual circumstances shall be mandatory for the court during the examination of the case with similar factual circumstances.

As a rule, formal procedural requirements are a necessity for the effective administration of justice. However, the Constitutional Court considers that the dismissal of the cassation appeal - in this case, with the justification for non-compliance with the requirement in dispute - is a disproportionate restriction on the right of access to a court. In this

regard, the Constitutional Court states that, when exercising the power of defining restrictions on rights and freedoms, the legislator should exercise this power in a proportion that the chosen restriction was consonant with the principle of proportionality provided for by Article 78 of the RA Constitution (with Amendments through 2015), i.e. the means chosen for restricting fundamental rights and freedoms have to be suitable and necessary for the achievement of the aim prescribed by the Constitution. Consequently, the Constitutional Court finds that the achievement of this legitimate aim is also possible without envisaging the requirement of attaching to the cassation appeal the judicial acts referred to in the provision in dispute, and without violating a reasonable balance between the measures applied and the aim sought to be achieved.

The Constitutional Court also states that Point 3 of Part 2 of Article 158 of the RA Administrative Procedure Code, and Point 3 of Part 2.2 of Article 407 of the RA Criminal Procedural Code also include legal regulations similar to the legal provision at issue in this Case. The RA National Assembly should also pay special attention to the latter, taking into account the legal positions of the Constitutional Court expressed in this Decision.

The Constitutional Court also requests the RA National Assembly to pay attention to the circumstance that the mentioned legal acts at issue include unequal application of the notions “judgment” and “decision” of the European Court of Human Rights.

Based on the review of the Case and being governed by Point 1 of Article 100, Point 6 of Part 1 of Article 101, and Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare Point 3 of Part 2 of Article 231 of the RA Civil Procedure Code contradicting the requirements of Part 1 of Article 61, Part 1 of Article 63 and Article 78 of the Constitution of the Republic of Armenia (with Amendments through 2015) and void in regard to the part of the requirement of attaching to the cassation appeal the referred judicial acts of the European Court of Human Rights.

2. Based on the requirements of Point 9.1 of Article 64 and Part 12 of Article 69 of the RA Law on the Constitutional Court, the final judicial act adopted against the Applicant is subject to review due to new circumstances and in accordance with the procedure provided for by the 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 the announcement.

**Chairman**

**G. Harutyunyan**

**July 12, 2016**  
**DCC-1293**