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 PART 3 OF ARTICLE 69 THE ADMINISTRATIVE PROCEDURE CODE OF THE REPUBLIC OF ARMENIA AND ARTICLE 96 OF THE LAW OF THE REPUBLIC OF ARMENIA ON THE FUNDAMENTALS OF ADMINISTRATION AND ADMINISTRATIVE PROCEDURE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE ADMINISTRATIVE COURT OF THE REPUBLIC OF ARMENIA

Yerevan December 17, 2019

The Constitutional Court composed of H. Tovmasyan (Chairman), A. Gyulumyan, A. Dilanyan, A. Tunyan, A. Khachatryan, H. Nazaryan (Rapporteur), A. Petrosyan,

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

the applicant: Administrative Court of the Republic of Armenia,

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

pursuant to clause 1 of article 168, part 4 of article 169 of the Constitution, and articles 22 and 71 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of part 3 of article 69 the Administrative Procedure Code of the Republic of Armenia and article 96 of the Law of the Republic of Armenia on the Fundamentals of Administration and Administrative Procedure with the Constitution of the Republic of Armenia on the basis of the application of the Administrative Court of the Republic of Armenia.

The Administrative Procedure Code of the Republic of Armenia (hereinafter also referred to as 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.

The Law of the Republic of Armenia on the Fundamentals of Administration and Administrative Procedure (hereinafter also referred to as the Code) was adopted by the National Assembly on 18 February 2004, signed by the President of the Republic on 16 March 2004, and entered into force on 31 December 2004.

The challenged parts 3 and 6 of article 69 of the Code, titled: "Claim for recognition", prescribe:

"3. In a claim for recognition, the plaintiff may demand to recognize as unlawful the act of administrative intervention with no legal effect, or an action or inaction that has exhausted itself by execution or in any other way, if the plaintiff is justly interested in recognizing the act or action or inaction as unlawful, that is:

1) there is a threat of re-adoption of a similar act of administrative intervention or re-execution of an action in a similar situation;

2) the plaintiff intends to demand compensation for property damage, or

3) it aims to restore the honor, dignity or business reputation of the plaintiff".

The challenged article 96 of the Law, titled: "Prerequisite for damage compensation", prescribes:

"Compensation for damage is not carried out until the legal act, action or inaction of the administrative authority that caused damage to the person is not recognized as unlawful in the prescribed manner, except for the cases prescribed in article 109 of this Law".

The case was initiated on the basis of the application of the Administrative Court of the Republic of Armenia submitted to the Constitutional Court on 18 June 2019, which included the decision on "Terminating the proceedings of the administrative case and applying to the Constitutional Court" on the case VD/10890/05/18 of 18 June 2019.

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

1. Applicant's arguments

Referring to articles 61, 62 and 75 of the Constitution, to the legal position expressed by the Constitutional Court in Decision DCC-1121, to the case-law of the European Court of Human Rights, analyzing the legal regulations prescribed by the challenged norms of the Code and the Law, the applicant considers that in part of omitting to include the person's intention to apply for compensation for non-pecuniary damage in part 3 of article 69 of the Law, and in the conditions of legal regulation of article 96 of the Code, the effectiveness of exercising the constitutional right to compensation for damage is not ensured. In particular, in the applicant's opinion, "Part 3 of article 69 the RA

Administrative Procedure Code violates the constitutional right to compensation for moral damage insofar as it does not make it possible to challenge the act of administrative intervention with no legal effect, or an action or inaction that has exhausted itself by execution or in any other way, based on the intention to apply for compensation for non-pecuniary damage... ", and this is the result of the "two-tier system" arisen due to the challenged legal regulation of the Law, and thus the effective procedure for compensation for damage is not ensured.

According to the applicant, such a system "... forces a person to go through two proceedings in order to solve one common problem. Moreover, the law enforcement practice shows that in both cases the consideration of the case, as a rule, does not end with administrative proceedings and there is a need for a trial. As a result, the process of the protection from the exhausted administration of the administrative authority and the full restoration of the violated right, as a rule, undergoes six court instances (not including the interim administrative proceedings), which may take years". According to the applicant, "... challenging the exhausted administration of an administrative authority does not itself restore the violated human right. In accordance with this, part 3 of article 69 of the RA Administrative Procedure Code provides for additional conditions of legal interest. Therefore, if there is damage, the sole purpose of challenging the given administration is to obtain compensation for damage. Consequently, the legality of the administration and the issues of compensation for damage inflicted as a result of such administration are highly interconnected, and one investigation depends on another". The applicant concludes that ".... the sole purpose of this two-tier system of compensation for damage is to provide the administrative authority with the opportunity to consider the issue of compensation for damage caused by this authority after confirming the illegality of the administration carried out by the same administrative authority". Therefore, as claimed by the applicant, "... considering the law enforcement practice of administrative bodies and the level of legal awareness of officials, serious doubts may arise regarding the objectivity of the claim for compensation for damage inflicted by the same administrative body as a result of its unauthorized administration". According to the applicant, ".... the legislative ban on consideration of claims for compensation for damages, along with the question of the legality of the exhausted administration of the administrative body, does not pursue justifiable interest and violates the effectiveness of constitutional rights to compensation for damages and judicial protection", and in a number of decisions of the Cassation Court of the Republic of Armenia (in particular, in the case of VD/0277/05/09) it was stated that ".... with a claim for compensation for damage inflicted by the administration, it is necessary that the legal act, action or inaction of the administrative authority, that caused damage to the person, be recognized as unlawful, and only after that the person is obliged firstly to apply to the administrative authority that caused the damage, and in case of full or partial rejection of a claim for compensation or non-consideration of an application the person may appeal the administrative act, action or inaction to a higher authority or in court".

2. Respondent's arguments

According to the respondent, the challenged provisions comply with the requirements of the Constitution and ".... the legal regulations established by part 3 of article 69 of the RA Administrative Procedure Code and article 96 of the RA Law on the Fundamentals of Administration and Administrative Procedure do not create artificial obstacles to effective exercise of the rights of a person".

The respondent believes that after the court recognized the actions or inactions of the administrative authority as unlawful, the plaintiff is not deprived of the opportunity to receive moral (non-pecuniary) compensation for the violation of his or her rights.

According to the respondent, the terms ".... procedural difficulties, bureaucratic red tape, level of legal awareness of officials, six court instances, long-term processes" used in the law enforcement practice cannot be the result of legal uncertainty and unconstitutionality of legal norms, and " .... although the unreasonable delay of certain procedural processes prescribed by law reduces the possibility of effective protection of the rights and legitimate interests of a person within a reasonable time, nevertheless, under such conditions, they cannot be considered as contradicting the Constitution and void".

3. Issues to be ascertained within the framework of the case

In determining the constitutionality of the provisions challenged in the present case, the Constitutional Court considers it necessary to clarify:

1) whether the challenged legal regulations guarantee effective mechanisms and procedures for exercising the right to compensation for non-pecuniary damage inflicted by public authorities and officials;

2) whether the simultaneous consideration within the same case of claims for recognizing as unlawful the administrative act, action or inaction of an administrative body and of claims for compensation for non-pecuniary damage would follow from the purpose of effective protection of the fundamental right to compensation for damage within the framework of legal regulations of the Administrative Procedure Code and the Law of the Republic of Armenia on the Fundamentals of Administration and Administrative Procedure.

Based on the foregoing, the Constitutional Court assesses the constitutionality of the challenged provisions from the standpoint of articles 62 and 75 of the Constitution.

4. Legal assessments of the Constitutional Court

4.1. The possibility of compensation for damage caused to a person is a fundamental right. The right to compensation for damage (including non-pecuniary) is enshrined in both international and domestic legislation. In particular, the European Convention for the Protection of Human Rights and

Fundamental Freedoms (with Protocols) establishes not only the fundamental rights and freedoms, but also the right to just satisfaction in case of violation.

From the contents of articles 3 and 62 of the Constitution it follows that compensation for damage, including the damage inflicted by public authorities as a result of lawful administration, is not only a right, but also an important constitutional principle for the protection of human rights, and in accordance with article 3 of the Constitution, the public power shall bear the direct responsibility for the implementation of this right.

In a number of decisions, the Constitutional Court has referred to the constitutional legal content of the mechanism for compensation for damage. In particular, summarizing the international legal practice of compensation for damage and comparing it with its constitutional legal content, the Constitutional Court found:

1) persons who suffered from illegal actions - crimes and abuses of power, are identified by their status, and they need to be treated accordingly (DCC-929);

2) moral damage and the possibility of material compensation for moral damage result from the constitutional legal approaches to the issue of protecting human rights, and the prevention of moral suffering caused by individual signs, inter alia, is one of the core elements of human dignity (DCC-1121);

3) general criteria and the procedure for material compensation for moral damage should be clearly fixed at the legislative level, so that a reasonable and fair compensation for moral damage caused to a person is guaranteed in appropriate cases and procedure (DCC-1121).

In a number of judgments regarding the Republic of Armenia, the failure to provide material compensation for moral damage caused to a person was considered by the European Court of Human Rights (hereinafter also referred to as the ECHR) as a violation of the relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (with the Protocols, hereinafter also the Convention). In particular, in the Judgments made in the case of Khachatryan and others v. the Republic of Armenia (Application no. 23978/06, 27.11.2012) and in the case of Poghosyan and Baghdasaryan v. the Republic of Armenia (Application no. 22999/06, 12.06.2012), the failure to provide pecuniary compensation with reference to domestic law was recognized as a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the Judgment made in the case of Poghosyan and Baghdasaryan v. the Republic of Armenia, the ECHR also stated that "....in the event of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies". The same Judgment also stated that the applicant should have been able to apply for compensation for non-pecuniary damage suffered by him as a result of his ill-treatment. The Court also referred to Article 3 of Protocol No. 7 to the Convention, and therefore stressed that "The Court reiterates that the aim of Article 3 of Protocol No. 7 is to confer the right to compensation on persons convicted as a result of a miscarriage of justice where such conviction has been reversed by the

domestic courts on the ground of a new or newly discovered fact". In the same Judgment, the ECHR also stated the following: "As regards compliance with the guarantees of Article 3 of Protocol No. 7, the Court considers that, while this provision guarantees payment of compensation according to the law or the practice of the State concerned, it does not mean that no compensation is payable if the domestic law or practice makes no provision for such compensation".

At the same time, in the Judgment in the case of Khachatryan and others v. the Republic of Armenia, the European Court of Human Rights stated a violation of Article 5 § 5 of the Convention and considered that Article 5 § 5 should not be construed as affording a right to compensation of purely pecuniary nature, but should also afford such right for any distress, anxiety and frustration that a person may suffer as a result of a violation of other provisions of Article 5.

The main approaches of domestic legal regulation in the aspect of compensation are set out in the Recommendation Rec(2006)8 of the Committee of Ministers of the Council of Europe, which delegates to the member states:

- Compensation should be provided for treatment and rehabilitation for physical and psychological injuries;

- States should consider compensation for loss of income, funeral expenses and loss of maintenance for dependants. States may also consider compensation for pain and suffering;

- States may consider means to compensate damage resulting from crimes against property.

4.2. According to article 62 of the Constitution, everyone shall have the right to compensation for damage inflicted by unlawful actions or inaction of state and local self-government bodies and officials, and in cases prescribed by law, also by lawful administration. The law shall define the conditions and procedure of compensation for damage.

It follows from the content of the aforementioned norm, that the damage caused in the framework of public legal relations shall be compensated in accordance with certain constitutional principles, in particular:

1) everyone shall have an undeniable right to compensation for damage in all those cases when the damage was inflicted as a result of an unlawful action or inaction of an administrative authority;

2) everyone shall have the right to compensation for damage inflicted by lawful administration, if this is established by law:

3) the conditions and procedure for compensation for damage are established by law.

The analysis of the content of the legal regulations challenged in the present case and of others interrelated with the latter indicates that the right to compensation for damage caused to a person by administration, in a general aspect, can be exercised within the framework of the legal preconditions and successive processes, which are as follows:

1) compensation for damage may first of all be carried out in cases where a legal act, action or inaction that caused damage to a person, is recognized as unlawful in the prescribed manner (article 96 of the Law);

2) a claim for compensation for damage (through an application) must be submitted to the administrative authority which caused the damage (article 100 of the Law);

3) a full or partial rejection by the administrative authority of a claim for compensation for damage or failure to consider the application may be appealed in the general manner prescribed by law (part 2 of article 102 of the Law);

4) a legal act, action or inaction of the administrative authority, that caused damage to a person, can be recognized as unlawful by filing a claim for recognition in a competent administrative court (part 3 of article 69 of the Code);

5) in the framework of a claim for recognition, a person may demand to recognize as unlawful the act of administrative intervention with no legal effect, or an action or inaction that has exhausted itself by execution or in any other way (part 3 of article 69 of the Code);

6) in the framework of a claim for recognition, a person may demand to recognize as unlawful the act of administrative intervention with no legal effect, or an action or inaction that has exhausted itself by execution or in any other way, if he or she is justly interested in recognizing the act or action or inaction as unlawful (part 3 article 69 of the Code);

7) in the framework of a claim for recognition, a person may demand to recognize as unlawful the act of administrative intervention with no legal effect, or an action or inaction that has exhausted itself by execution or in any other way, if, inter alia, he or she intends to demand compensation for property damage (clause 2 of part 3 articles 69 of the Code).

Thus, in connection with the issue raised in the application, the logic of the legal regulation of the process of compensation for damage caused to a person by administration implies that the compensation for damage received exclusively substantive manifestation within the framework of the preconditions for the realization of this right exhaustively established by law.

The Constitutional Court considers that the mechanism established by law for compensation for damage caused to a person by administration, along with the above-mentioned general principles of legal regulation, is aimed at guaranteeing the fulfillment of the requirements of part 1 of article 62 of the Constitution, i.e. by providing the conditions and procedure for compensation for damage, as well as by providing for an extrajudicial and judicial procedures for compensation for damage, the legislator did not violate the mentioned commandments of the Constitution.

4.3. When assessing the constitutionality of the legal regulation challenged in the present case and taking into account the questions put forward by the applicant, the Constitutional Court considers it necessary to first of all consider it within the framework of general mechanisms for the legal regulation of compensation for damage in order to establish those objective features caused by entities with different legal status that underlie the resolution of disputes on compensation for damage which

arise, on the one hand, from civil-legal relations and, on the other hand, from administrative-legal relations. In this aspect, the Constitutional Court considers it necessary to state that the mechanism of compensation for damage is also envisaged in the framework of civil-legal relations. However, a general comparative analysis of these mechanisms is necessary from the perspective of identifying the features of compensation for damage arising from public-legal relations.

Thus, a comprehensive analysis of the norms of the Civil Code of the Republic of Armenia, regulating both the relations connected with compensation of damage and the scope of applicability of civil-legal norms, indicates that the civil legislation, as a rule, shall not apply to the relations based on administrative or other authoritative subordination (part 6 of article 1 of the Civil Code of the Republic of Armenia). According to part 5 of article 162.1 of the same Code, intangible damage caused as a result of unlawful administrative actions shall be compensated as prescribed by the Law of the Republic of Armenia on the Fundamentals of Administration and Administrative Procedure. At the same time, a comparative analysis of the norms of chapter 7 of the Law of the Republic of Armenia on the Fundamentals of Administration and Administrative Procedure, which establish the grounds and procedure for compensation for damage, including non-pecuniary damage caused by administration, indicates that the mechanism for compensation for damage caused by administration cannot be equated with the mechanism for compensation for damage arising in the framework of civil legal relations, since the legal relations connected with the compensation for damage caused by administration are public legal relations, which are characterized by features arising from public law. In particular, the administrative authority vested with public power that has caused damage, is an obligatory participant in the mentioned legal relations (article 95 of the Law). For the emergence of legal relations between this authority and the person who suffered damage, it is necessary and sufficient only a claim for compensation for damages (article 100 of the Law), i.e. the freedom of expression of the will of the two parties to the legal relationship, such as in civil-legal relations, is not required (part 2 of article 3 of the Civil Code of the Republic of Armenia). In addition, if a relevant application is submitted to an administrative authority, the latter is obliged to exercise appropriate public power in connection with compensation for damage, i.e. administration resulting in the adoption of an administrative act on satisfying or rejecting the claim for compensation (article 102 of the Law), which may be challenged in a general order. That is, due to the nature of public relations, the legal processes that arise to compensate for any damage due to the action (inaction) of an administrative body, are specific and multi-stage.

At the same time, the Constitutional Court considers it necessary to state that the compensation for damage in the field of civil-legal relations is in essence the application of a measure of civil-legal liability, while the compensation for damage caused by administration, in compliance with the preconditions established by law, is an obligation conditioned by public power.

Consequently, the Constitutional Court considers that the differentiated legislative regulation of the mechanism of compensation for damage, based on the particular legal relations and the legal status of the entities participating therein, has a specific constitutional goal and is aimed at guaranteeing the effective exercise of the right to compensation for damage caused to a person.

4.4. Referring to the applicant's question that the challenged part 3 of article 69 of the Code does not provide an opportunity to appeal against the act of administrative intervention with no legal effect, or an action or inaction that has exhausted itself by execution or in any other way especially on the basis of the intention to demand compensation for non-pecuniary damage, the Constitutional Court deems it necessary to consider the raised issue from the perspective of the need to assess the consequences arising from the certain action or inaction of the responsible entity and to restore the violated right based on the content of article 62 of the Constitution and, in particular, on the need for implementation of the constitutional requirements for the legislative establishment of conditions and procedures of compensation for damage.

The analysis of the content of article 62 of the Constitution shows that the term "damage", which is the essence of the right to compensation for damage, has a general legal meaning, and at the level of the Constitution, types of material and non-pecuniary damage do not differ.

Nevertheless, the fundamental right to compensation for damage is not subject to any restrictions. Although according to the second sentence of part 1 of article 62 of the Constitution, the law shall define the conditions and procedure of compensation for damage, which presupposes, on the one hand, guaranteeing the inviolability of the essence of this fundamental right (article 80 of the Constitution), as well as the conformity of any condition or procedure with the requirements of article 75 of the Constitution, considering that this fundamental right is not subject to restriction; nevertheless, the differentiation of procedural structures by the nature of the damage inflicted, creates a constitutionally unjustified obstacle to the effective implementation of the goals pursued by the recognition claim. First of all, it is unreasonable that the legislator considered as justifiable the intention to compensate only material damage as the basis for justified interest. Despite the fact that conditioning with certain prerequisites the recognition as unlawful of the act of administrative intervention with no legal effect, or an action or inaction that has exhausted itself within the framework of a claim for recognition, as the goal of the legislator, is justified from the perspective of the Constitution taking into account the features of this type of claim and its relationship with other types of claims; however, the implementation of a fundamental right not subject to restriction cannot be determined by the nature of the damage, therefore the legislator must ensure the possibility of judicial protection also for a claim for recognition also equally for non-pecuniary damage, and not only for the protection of honor, dignity and business reputation of the plaintiff. Such a **distinction has no objective basis, which means that the Code has a gap in the law,** which contradicts part 1 of article 62 and article 75 of the Constitution.

The Constitutional Court considers it important to state that, **if other legal remedies have been exhausted, the purpose of the claim for recognition, regardless of the nature of the damage, inter alia, is to guarantee compensation for damage in public-legal relations**, which will become the basis for the interested person to apply with the corresponding requirement to the detriment of the administrative authority within the framework of the procedures envisaged in section 7 of the Law.

The Constitutional Court considers that, following the legal positions expressed in this Decision, the law enforcement practice should be guided by the principle of inviolability of the essence

of law guaranteed by part 1 of article 62 of the Constitution, which is a requirement of article 80 of the Constitution, i.e. everyone shall have **the right to compensation for damage inflicted by unlawful actions or inaction** of state and local self-government bodies and officials, **and in cases prescribed by law, also by lawful administration**. That is, the law should establish only the **conditions and procedure** of such compensation for damage, which cannot be interpreted as blocking the exercise of the right to compensation for damage, including non-pecuniary damage, directly arising from part 1 of article 62 of the Constitution.

4.5. Creating the necessary legislative prerequisites for the exercise of the fundamental right to compensation for damage, especially for exercising this right extra judicially as soon as possible, on the one hand and preventing excessive workload of administrative bodies and courts on the other hand are the main objectives of the precondition established by the challenged article 96 of the Law of the Republic of Armenia on the Fundamentals of Administration and Administrative Procedure.

Obviously, the administrative implementation of the mechanisms prescribed by the Law and special laws, especially the requirements for compensation of damage in a short and specific time, from the perspective of protecting the same fundamental right is more effective than the consideration in the general aspect of the case in an administrative court within a reasonable time. On the other hand, the prerequisite for compensation for damage is its infliction, i.e. the presence of unlawful, and in exceptional cases, legitimate legal actions (or real acts). Obviously, filing a claim for compensation of damage to the administrative authority that caused the damage (part 1 of article 100 of the Law), and in a more simplified form, presenting this claim by applying in a general order (part 2 of article 100 of the Law) aims at making easier the exercise of the fundamental right to compensation of damage.

In addition, the consideration of a claim for damages by an administrative authority that is aware of this issue allows providing maximum guarantees in determining the amount of damage and compensation based on the assessment given to the unlawful administration of this authority, and in exceptional cases also the consequences of lawful administration. Meanwhile, the administrative authorities or the court that are not yet aware of the given issue should at least be informed about this. The simultaneous loading of uninformed authorities with a complaint or lawsuit filed against an administrative act and a claim for damages would inevitably and in some cases significantly increase their workload, which, especially in the case of courts, will lead to a delay in the consideration of the case in terms of assessing the legality of the legal (or real) act that allegedly caused damage.

Based on the foregoing, the Constitutional Court considers that the challenged legal regulation of the Law is not problematic from the perspective of the Constitution. Nevertheless, the Constitutional Court considers unacceptable the practice of artificially delaying or, moreover, refusing by administrative authorities to compensate for damage caused as a result of unlawful, and in cases specified by the Constitution or law, legitimate administration, although in the framework of the present case the Court does not consider it necessary to touch upon the constitutionality of this issue. The Constitutional Court considers that this issue should be resolved as a matter of priority within the framework of appropriate administrative and specialized judicial supervision.

Based on the review of the case and governed by clause 1 of article 168, part 4 of article 169 and parts 1 and 4 of article 170 of the Constitution, articles 63, 64 and 71 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. To declare clause 2 of part 3 of article 69 of the Administrative Procedure Code of the Republic of Armenia contradicting part 1 of article 62 and article 75 of the Constitution and void, insofar as it does not make it possible for the person to file a claim for recognition based on the intention to demand compensation for non-pecuniary damage as prescribed by law.

2. Article 96 of the Law of the Republic of Armenia on the Fundamentals of Administration and Administrative Procedure is in conformity with the Constitution.

3. Pursuant to part 2 of article 170 of the Constitution this Decision shall be final and shall enter into force upon its promulgation.

Chairman **H. Tovmasyan**

December 17, 2019

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