

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

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**ON THE CASE CONCERNING THE CONSTITUTIONALITY OF PART 2  
OF ARTICLE 401 OF THE CRIMINAL PROCEDURE CODE OF THE  
REPUBLIC OF ARMENIA, RAISED BY THE APPLICATION OF HAYK  
MAMIJANYAN**

City of Yerevan

4 June 2024

The Constitutional Court, composed of A. Dilanyan (Presiding Judge), V. Grigoryan, H. Tovmasyan, D. Khachaturyan, Y. Khundkaryan, H. Hovakimyan, E. Shatiryan, S. Safaryan, and A. Vagharshyan,

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

advocates S. Poghosyan and A. Navasardyan, the representatives of the applicant Hayk Mamijanyan, and

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

according to point 1 of Article 168 and point 8 of part 1 of Article 169 of the Constitution, as well as Articles 22 and 69 of the Constitutional Law “On the Constitutional Court”,

examined in an open session through written procedure the case concerning the constitutionality of part 2 of Article 401 of the Criminal Procedure Code of the Republic of Armenia, raised by the application of Hayk Mamijanyan.

The Criminal Procedure Code of the Republic of Armenia (hereinafter also referred to as “the Code”) was adopted by the National Assembly on 30 June 2021, was signed by the President of the Republic on 27 July 2021, and entered into force on 1 July 2022.

Part 2 of Article 401 of the Code titled “Proceedings for exceptional review and the scope of judicial acts subject to exceptional review” stipulates:

“2. The following are subject to exceptional review:

- (1) a judgment that has entered into legal force, or a court decision on the termination of proceedings or criminal prosecution;
- (2) a judicial act issued in the context of proceedings for contesting pre-trial judicial acts, that has entered into legal force which establishes the legitimacy of non-initiation of criminal prosecution or termination of criminal prosecution, as well as the non-legitimacy of resuming criminal prosecution or the legitimacy of terminating proceedings;
- (3) a decision of the Court of Appeal or of the Cassation Court that has entered into legal force and was issued as a result of the review of judicial acts prescribed by points 1 and 2 of this part”.

The above provision of the Code was not amended or supplemented.

This case was initiated by Hayk Mamijanyan’s application which was submitted to the Constitutional Court on 31 January 2024.

Having examined the application, the written explanation of the respondent, and other documents in the case, as well as having analysed the contested legal provision and other legislative norms interrelated with the latter, the Constitutional Court **ESTABLISHED:**

### **1. Procedural background of the Case**

On 14 March 2023, Hayk Mamijanyan (hereinafter also referred to as “the applicant”) submitted an application to the Constitutional Court requesting to determine the issue of compliance with the Constitution of parts 1 and 2 of Article 290 of the RA Criminal Procedure Code adopted on 1 July 1998, insofar as the latter fail to envisage the restraint measure subscription on recognizance to be directly subject to judicial review over pre-trial proceedings.

In the Procedural Decision PDCC-52 of 30 May 2023, the Constitutional Court has held: “The proceedings on the case on determining the issue of compliance with the Constitution of part 1 of Article 290 of the RA Criminal Procedure Code adopted on 1 July 1998 – insofar as it fails to envisage the restraint measure subscription on recognizance to be directly subject to judicial review over pre-trial proceedings, raised by the application of Hayk Mamijanyan – shall be terminated partially, i.e. under part 2 of Article 290 of the RA Criminal Procedure Code adopted on 1 July 1998.”

By the Decision DCC-1690 of 30 May 2023, the Constitutional Court has assessed the constitutionality of the contested part 1 of Article 290 (including its interpretation in law enforcement practice) of the RA Criminal Procedure Code adopted on 1 July 1998, in the aspect of compliance with Article 40 and part 1 of Article 61 of the Constitution, and decided as follows:

“1. Part 1 of Article 290 of the RA Criminal Procedure Code adopted on 1 July 1998 complies with the Constitution by the interpretation that the decision of the prosecuting authority on applying the restraint measure subscription on recognizance is subject to appeal before a court in accordance with the procedure prescribed by the Law.

2. In accordance with part 10 of Article 69 of the Constitutional Law “On the Constitutional Court”, the final judicial act issued against the applicant shall be subject to revision upon the grounds of a newly emerged circumstance as prescribed by the Law, since part 1 of Article 290 of the RA Criminal Procedure Code adopted on 1 July 1998, had been applied against the applicant by an interpretation other than prescribed by this Decision”.

The applicant submitted a complaint for exceptional review against the Decision “On rejecting to accept for proceedings the complaint for exceptional review” issued by the Cassation Court in case No. YD/0753/11/21 of 26 December 2022.

By the Decision of 29 September 2023, the Cassation Court rejected to initiate proceedings for exceptional review upon the grounds of a new circumstance, raised by the complaint of Hayk Mamijanyan’s representative, reasoning as follows: “The Cassation Court states that by the Decision DCC-1690 of 30 May 2023, the RA Constitutional Court has stated that the final judicial act issued against the applicant shall be subject to revision upon the grounds of a newly emerged circumstance as prescribed by the Law, since part 1 of Article 290 of the RA Criminal Procedure Code adopted on 1 July 1998, had been applied against the applicant by an interpretation other than prescribed by this Decision. However, under part 2 of Article 401 of the RA Criminal Procedure Code adopted on 30 June 2021 – which defines an exhaustive list of judicial acts subject to exceptional review, though it does not include the act issued on the restraint measure – the Cassation Court finds that the initiation of proceedings for exceptional review based on the complaint of the representative S. Poghosyan is subject to rejection since the complaint was submitted against such a judicial act that is not subject to exceptional review”.

## **2. Positions of the applicant**

The applicant notes that in Chapter 49 of the Code entitled “Exceptional Review”, in particular in part 1 of Article 401, the proceedings upon the grounds of new circumstances are established as a type of proceedings on exceptional review. Moreover, part 1 of Article 403 of the Code, *inter alia*, stipulates the grounds for submitting a complaint upon the grounds of a new circumstance in the case where the Constitutional Court has declared the provision of a normative legal act applied by the court in the given proceedings as contradicting the Constitution and void, or the Constitutional Court has, by its interpretation, declared it to be in conformity with the Constitution, although considering that the given provision had been applied by a different interpretation. At the same time, part 2 of Article

401 of the Code defines an exhaustive list of judicial acts subject to exclusive review, which does not include judicial acts issued on the application of a restraint measure. That is, it turns out that in the event that a provision of a normative legal act applied against an applicant by a judicial act on the application of a restraint measure is declared as contradicting the Constitution and void, as well as in the event that the Constitutional Court, having declared this provision to be in conformity with the Constitution by its interpretation, simultaneously considered that it had been applied against the applicant by a different interpretation, the final judicial act on the restraint measure applied against the applicant upon the grounds of a newly emerged circumstance shall not be subject to review.

The applicant considers that regardless of any circumstances and without any exception or reservation, all those final judicial acts – by which the Constitutional Court has declared the provision of a normative legal act applied against the applicant as contradicting the Constitution and void, as well as when the Constitutional Court, having declared the given provision to be in conformity with the Constitution by its interpretation, simultaneously considered that it had been applied against the applicant by a different interpretation – must be subject to review upon the grounds of a newly emerged circumstance.

According to the applicant, in cases where, under point 10 of part 1 of Article 64 of the Constitutional Law “On the Constitutional Court”, the decision of the Constitutional Court contains an indication that the final judicial act issued in a specific case is subject to review upon the grounds of a newly emerged circumstance, such final judicial acts, regardless of their nature, type or other characteristics, shall be subject to review without any exception.

The applicant finds that the contested provision contradicts part 1 of Article 61 of the Constitution, since, firstly, it does not provide for a full opportunity to restore the rights of individuals through a judicial appeal upon the grounds of a newly emerged circumstance, which were violated as a result of the application by the courts of a norm contradicting the Constitution, as well as the application of a normative legal provision by an interpretation other than the legal positions of the Constitutional Court, thus limiting the right of access to court, and secondly, it makes ineffective the judicial protection of the rights and freedoms of individuals at the Constitutional Court, since the respective decisions of the Constitutional Court, issued as a result of the consideration of an individual appeal, are not executed, as the final judicial acts issued with respect to the person having submitted the individual appeal, also regarding the restraint measure, are not reviewed, and the fundamental rights and freedoms violated thereby are not restored.

The applicant justifies the contradiction of the contested provision with Article 75 of the Constitution by the fact that the contested provision stipulates a mechanism that is not only ineffective for the implementation of the right to judicial protection but also hinders the

review of certain judicial acts upon the grounds of a new circumstance, also devaluing the institution of restoring the violated rights of an individual through constitutional justice, since the contested provision defines a mechanism for reviewing judicial acts upon the grounds of a new circumstance on the basis of Constitutional Court decision that does not provide an individual with a full opportunity to restore his violated right on the basis of the Constitutional Court decision.

At the same time, the applicant submits that the contested provision also contradicts part 2 of Article 5 and Article 80 of the Constitution insofar as the contested provision does not comply with part 10 of Article 69 of the Constitutional Law “On the Constitutional Court”, and as a result of the mechanism established thereby, the very essence of the right to judicial protection prescribed by part 1 of Article 61 of the Constitution, is violated.

### **3. Positions of the respondent**

The National Assembly (hereinafter also referred to as “the respondent”) submits that the legislator has identified the scope of the judicial acts which although are final, however, as a guarantee of the constitutional rights of individuals, may be subject to exceptional review not only upon the grounds of new or newly emerged circumstances but also on the basis of violations of fundamental rights.

According to the respondent, the contested provision does not exclude the exceptional review of judicial acts upon the grounds of a new circumstance, and it specifies the type of judicial acts that are subject to exceptional review. Otherwise, if we consider that the contested provision excludes the initiation of exceptional proceedings upon the grounds of a new circumstance, point 1 of part 1 of Article 401 of the Code and/or part 4 of Article 403 of the Code would become an end in itself.

According to the respondent, the nature of all the grounds prescribed by Article 403 of the Code indicates that the legislator has defined special grounds for submitting a complaint upon the grounds of new circumstances, and the nature and content of these grounds imply that the latter are not limited to certain types of judicial acts but are specific grounds.

The respondent argues that providing the scope of acts subject to exceptional review in part 2 of Article 401 of the Code does not limit the exceptional review of the judicial acts where the Constitutional Court, by its interpretation, has declared the provision of a normative legal act applied by the court to be in conformity with the Constitution and has found that the given provision had been applied by a different interpretation.

On the basis of the above, the respondent states that part 2 of Article 401 of the Code is not problematic in terms of constitutionality, in particular, by the interpretation that the facts that the Constitutional Court has by its interpretation declared the normative legal act

applied by the court to be in conformity with the Constitution and that the provision has been applied by a different interpretation, regardless of the type of judicial act, shall serve as grounds for submitting a complaint for exceptional review. In other words, part 2 of Article 401 of the Code does not limit the application of Article 403 of the Code.

Based on the above, the respondent finds that part 2 of Article 401 of the Code is in conformity with the Constitution.

#### **4. Scope of examination of the present Case**

To assess the constitutionality of the contested legal norm within the scopes of the constitutional and legal dispute in this Case, the Constitutional Court considers it necessary to address the following question:

– Is part 2 of Article 401 of the Code consistent with the constitutional and legal content of Articles 61 and 75 of the Constitution, insofar as it fails to provide for the possibility of reviewing a final judicial act issued against a person on the application of a restraint measure based on the Constitutional Court decision as a new circumstance?

#### **5. Legal positions of the Constitutional Court**

Considering the fact that this Case is being considered following the procedure prescribed by Article 69 of the Constitutional Law “On the Constitutional Court”, the Constitutional Court states that the provision contested within the scopes of this Case is considered by the Constitutional Court only in part of the possibility of reviewing final judicial acts on the application of a restraint measure based on the Constitutional Court decision as a new circumstance.

**5.1.** The Constitutional Court deems it necessary to consider part 2 of Article 401 of the Code – which excludes the legal possibility of reviewing final judicial acts on the application of a restraint measure upon the grounds of a new circumstance – in the context of the legal nature of the Constitutional Court decisions, the significance of the institution of constitutional review in specific cases, and the need to ensure judicial protection of violated rights of an individual through the Constitutional Court.

The rights and freedoms of a person in a state governed by the rule of law can be guaranteed, ensured, and effectively protected, inter alia, in the conditions of ensuring constitutional and legislative guarantees equivalent to the realization of the person’s right to constitutional justice. In this respect, the Constitutional Court has its own special mission, the decisions of which are of pivotal importance both in the context of the formation and

development of constitutional culture in public life and in the context of restoring the violated constitutional rights of each person seeking justice.

In a number of decisions, the Constitutional Court has addressed the special legal nature of its decisions in the system of acts of courts of general jurisdiction and specialized courts of the Republic of Armenia. In particular, in the Decision DCC-943 of 25 February 2011, the Constitutional Court stated the following:

“– The RA Constitutional Court shall have the exclusive competence (...) to administer constitutional justice and, within the scopes of that function, to issue decisions on the merits (part 2 of Article 92 and Article 93 of the RA Constitution), [similar regulation is also contained in part 1 of Article 167 and part 1 of Article 171 of the Constitution with the amendments of 2015];

– When considering constitutional cases (of a public-legal nature), the Constitutional Court shall issue decisions subject to mandatory enforcement by other authorities of the judicial system, i.e. by all the courts of general jurisdiction and specialized courts of the Republic of Armenia;

– When determining the constitutionality of legal acts – based on the requirements of Articles 19 and 63 of the RA Law “On the Constitutional Court” [Articles 32 and 63 of the Constitutional Law “On the Constitutional Court” dated 2018] – the Constitutional Court shall also assess the judicial practice (the practice of courts of general jurisdiction and specialized courts), also disclosing the constitutional and legal content of the applied (including in judicial practice) laws (the certain provisions thereof), developing both constitutional law and branch law;

– The Constitutional Court decision on the contradiction of legal acts to the RA Constitution is followed by legal consequences (new circumstances), which necessarily lead to the reviewing of judicial acts following the procedure prescribed by law”.

In the above-mentioned decision, the Constitutional Court has also stated that “the acts [of the Constitutional Court] have a special place and role in the RA legal system both in terms of content and legal regulatory significance, as well as their legal consequences. The relations regulated thereby concern all spheres of public life and all subjects of legal relations. The Constitutional Court decisions are subject to immediate implementation (or within the timeframes specified by the Court) throughout the territory of the Republic of Armenia, and are not up for discussion (contestation or consideration) by any state or local government authority, or an official, organization or individual”.

In the context of ensuring the restoration of violated fundamental rights through the instrumentality of reviewing judicial acts on the basis of the Constitutional Court decision, the Constitutional Court has expressed the legal position in the Decision DCC-984 of 15

July 2011, according to which: “The restoration of violated rights requires the elimination of negative consequences that arose for a given person as a result of the violation, which in turn requires the restoration of the situation, if possible, that existed before the violation (*restitutio in integrum*). In the case when the constitutional right of a person is violated by a judicial act that has entered into legal force, the restoration of the situation (to restore the given right) that existed before the violation assumes the creation of a situation that existed in the absence of the mentioned judicial act. That is, in the case at issue, the restoration of the violated right is possible in the event of the invalidation of the respective judicial act. Consequently, the proceedings for the review of a judicial act, as a means of restoring the violated constitutional right of a person, must lead to the invalidation of the judicial act that violated the right”.

In the Decision DCC-1099 of 31 May 2013, the Constitutional Court emphasized the fact that “(...) the effective implementation of the right of an individual to appeal to the Constitutional Court requires a comprehensive legislative regulation of reviewing judicial acts on the basis of the Constitutional Court decision that would enable a person to restore his constitutional right violated as a result of the application of a normative act declared by the Constitutional Court as contradicting the Constitution”.

The Constitutional Court states that review of judicial acts in due legislative procedures – based on the decisions issued in the cases on determining the conformity of legal acts with the Constitution – is an effective means of guaranteeing the supremacy of the Constitution, and therefore also a constitutional and legal requirement. The mission of the institution of reviewing judicial acts based on the Constitutional Court decisions is to ensure the restoration of violated constitutional rights through this institution. The need to review a judicial act (where the respective Constitutional Court decision is available) also follows from the nature and significance of the institution of constitutional review in specific cases. Therefore, in the case where a final judicial act had been issued against a person through the application of a provision declared by the Constitutional Court as unconstitutional, as well as through the application of a provision declared as constitutional by the interpretation of the Constitutional Court, which, according to the Constitutional Court, had been applied against the applicant by a different interpretation, the consequence of this case should be a review of this judicial act upon the grounds of a new circumstance. Therefore, the legislator must envisage the respective mechanisms for the implementation of the effective implementation of the right to review judicial acts on the basis of the Constitutional Court decision.

In this regard, the Constitutional Court notes the key importance of the clarity and efficiency of legislative regulations on the legal relations concerning the review of judicial acts based on the decisions issued by the Constitutional Court, emphasizing that these legal regulations, on the one hand, directly guarantee the accessibility of justice, and on the other



hand, ensure the effectiveness of judicial protection of the constitutional rights of individuals. In such circumstances, from the perspective of ensuring the effective implementation of the right of an individual to constitutional justice, the effective implementation of the institution of review of judicial acts upon the grounds of new circumstances based on the respective Constitutional Court decision is of fundamental importance. In this regard, the Constitutional Court argues that legislative regulations must be based on such reasonable logic that public authorities, being limited by fundamental human and civil rights and freedoms, are obliged to ensure the restoration of violated rights.

**5.2.** Within the scope of consideration of the constitutional and legal dispute in this Case, the Constitutional Court deems it important to consider the possibility of exceptional review, as defined by domestic legislation, aimed at restoring the violated rights of an individual, in the context of guaranteeing the right to effective judicial protection, as prescribed by Article 61 of the Constitution.

Thus, part 1 of Article 61 of the Constitution stipulates that everyone shall have the right to effective judicial protection of his rights and freedoms.

Considering the fundamental human rights and freedoms as the immutable foundation for a democratic state governed by the rule of law, the constituent power guaranteed their provision by effective mechanisms for the protection and restoration of rights, which are put into action through the implementation of the fundamental rights to judicial protection and a fair trial, so that fundamental rights and freedoms did not become mere declaratory.

Having revealed the content of the right to judicial protection, the Constitutional Court has, inter alia, expressed the following legal positions:

– “The positive obligation of the State to ensure the constitutional right of an individual to judicial protection in the implementation of both norm-setting and law enforcement activities derives from the given right. This presupposes, on the one hand, the obligation of the constituent power to stipulate in the laws the possibility and mechanisms of full judicial protection, and on the other hand, the obligation of the law enforcer to accept for consideration, without exception, the applications legally submitted by individuals whereby they seek legal protection from the alleged violation of their rights” (DCC-719 of 28 November 2007);

– “(...) no procedural feature or proceeding may hinder or prevent the possibility of the effective exercise of the right to apply to the court (...)” (DCC-1249 of 22 December 2015);

– “Guaranteeing the implementation of a person’s right to appeal to the court is a primary condition for the judicial protection of the constitutional rights and freedoms of a person” (DCC-1257 of 10 March 2016).

In light of the above positions, the Constitutional Court argues that the right to judicial protection prescribed by Article 61 of the Constitution will be guaranteed when domestic legislative regulations provide the necessary instrumentality for the implementation of the right to judicial protection, and no procedure (or lack thereof) hinders the implementation of the right to judicial protection.

At the same time, when considering the right to judicial protection in the context of the need to ensure judicial protection related to the significance of the institution of concrete constitutional control, and the restoration of violated rights of persons, the Constitutional Court considers it necessary to also mention the legal position expressed in the Constitutional Court Decision DCC-751 of 15 April 2008, according to which “the concrete control carried out by the Constitutional Court is characterized, in particular, by the application of the decision on the constitutionality of a legal act to the legal relations concerning the given case. In the case of concrete control, the task of protecting individual rights also comes to the fore. In consonance with these characteristic features, the domestic legislation of the Republic of Armenia has provided for the possibility of reviewing a judicial act issued against a certain applicant based on the Constitutional Court decision rendered on the basis of an individual application submitted by an interested person, due to which the protection of the constitutional rights of a person, as directly applicable rights, becomes comprehensive and efficient when the respective individual application is submitted to the Constitutional Court”.

In consonance with the above approach, the legislator has envisaged the possibility of reviewing a judicial act issued against the certain applicant based on the Constitutional Court decision issued on the basis of an individual application submitted by the applicant, which is aimed at ensuring the comprehensive and efficient system for protecting the constitutional rights of a person when the respective individual application is submitted to the Constitutional Court. In particular, in the case of part 10 of Article 69 of the Constitutional Law “On the Constitutional Court” titled “Consideration of cases with regard to determining the constitutionality of normative legal acts applied against natural and legal persons by the final judicial act issued in specific cases, based on their applications”, stipulates that, where a provision of a normative legal act applied against the applicant with regard to the cases referred to in the above article is declared as contradicting the Constitution and void, as well as where the Constitutional Court has declared it as complying with the Constitution and has simultaneously found that the provision had been applied against the applicant by a different interpretation, the final judicial act issued against the applicant shall be subject to revision upon the grounds of a newly emerged circumstance as prescribed by the Law. Moreover, according to the Constitutional Court Decision DCC-1417 of 15 May 2018, the provision of part 10 of Article 69 of the Constitutional Law “On the Constitutional Court”, according to which “it is not necessary each time to prescribe in the operative part of the Constitutional Court decision the provision of part 10 of Article 69

of the Constitutional Law “On the Constitutional Court”, according to which: “(...) the final judicial act rendered against the applicant shall be subject to revision upon the grounds of a newly emerged circumstance as prescribed by the Law” since it is mandatory under the aforementioned Constitutional Law.

At the same time, part 2<sup>1</sup> of Article 401 of the Code titled “Proceedings for exceptional review and the scope of judicial acts subject to exceptional review” stipulates:

“2. The following are subject to exceptional review:

- (1) a judgment that has entered into legal force, or a court decision on the termination of proceedings or criminal prosecution;
- (2) a judicial act issued in the context of proceedings for contesting pre-trial judicial acts that has entered into legal force, which establishes the legitimacy of non-initiation of criminal prosecution or termination of criminal prosecution, as well as the non-legitimacy of resuming criminal prosecution or the legitimacy of terminating proceedings;
- (3) a decision of the Court of Appeal or of the Cassation Court that has entered into legal force and was issued as a result of the review of judicial acts prescribed by points 1 and 2 of this part”.

Point 4 of part 1 of Article 403 of the Code (interrelated with the disputed provision) titled “Grounds for submitting a complaint for exceptional review”, as a ground for submitting a complaint upon the grounds of new circumstances, inter alia, also establishes the case where the Constitutional Court has declared the provision of a normative legal act applied by the court in the given proceedings as contradicting the Constitution and void, or the Constitutional Court has, by its interpretation, declared it to be in conformity with the Constitution, although considering that the given provision had been applied by a different interpretation.

At the same time, as a ground for rejecting to initiate proceedings for exceptional review, point 5 of part 3 of Article 407 of the Code stipulates the procedure for submitting a complaint against a judicial act, which is not subject to exceptional review.

In fact, it follows from the content of the above-mentioned articles of the Code that the instrumentality of exceptional review upon the grounds of a new circumstance can be applied simultaneously under the following circumstances:

– Where the Constitutional Court has declared the provision of a normative legal act applied by the court in the given proceedings as contradicting the Constitution and void, or

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<sup>1</sup> According to part 10 of Article 483 of the Code titled “Transitional Provisions”, starting from 1 July 2022, complaints for exceptional review of judicial acts that have entered into legal force prior to the entry into force of the same Code, shall be submitted and considered in the procedure prescribed by the same Code.

the Constitutional Court has, by its interpretation, declared it to be in conformity with the Constitution, although considering that the given provision had been applied by a different interpretation;

and, at the same time;

– the provision declared as contradicting the Constitution and void, was applied against the applicant either by a judicial act which the Constitutional Court has declared to be in conformity with the Constitution by its interpretation, though it was applied by a different interpretation against the applicant by a judgment that has entered into legal force, or by a court decision on termination of proceedings or criminal prosecution, as well as by a judicial act, issued in the context of proceedings for contesting pre-trial judicial acts, that has entered into legal force, which establishes the legitimacy of non-initiation of criminal prosecution or termination of criminal prosecution, as well as the non-legitimacy of resuming criminal prosecution or the legitimacy of terminating proceedings, as well as by a decision of the Court of Appeal or of the Cassation Court that has entered into legal force and was issued as a result of the review of judicial acts listed above.

That is, legislative regulations conclude that the instrumentality of exceptional review upon the grounds of a new circumstance allows reviewing only the judgments and decisions defined by the contested norm. In this regard, in the case of a final judicial act issued on the application of a restraint measure, the initiation of proceedings for exceptional review is subject to rejection on the grounds that the complaint was submitted against a judicial act, which is not subject to exceptional review. As a result, a situation arises where, by the Constitutional Court decision issued on the basis of an individual application submitted by a person, the provision of a normative legal act applied against the applicant is declared as contradicting the Constitution and void, or the provision of a normative legal act applied against the applicant is declared to be in conformity with the Constitution by the interpretation of the Constitutional Court; meanwhile, the Constitutional Court considers that the given provision was applied against the applicant by a different interpretation, but does not ensure a review of the final judicial act issued against to the applicant (as indicated, this requirement is also prescribed by part 10 of Article 69 of the Constitutional Law “On the Constitutional Court”) by virtue of the prohibition prescribed by part 2 of Article 401 of the Code. In such circumstances, the absence in the Code of the possibility of reviewing the final judicial act on the application of a restraint measure issued against the applicant upon the grounds of a new circumstance makes meaningless the very essence of the person’s right to constitutional justice, thus making constitutional justice illusory.

In this regard, the Constitutional Court emphasizes that the legal regulations defined by the procedural legislation should not hinder the execution of the Constitutional Court decisions, and the restoration of the violated rights of a person. A person should have the opportunity to submit a complaint to review the legally effective final judicial act on the

application of a restraining measure upon the grounds of a new circumstance when it is necessary to review the final judicial act issued against a person based on the respective Constitutional Court decision.

The Constitutional Court considers that the prohibition stipulated by part 2 of Article 401 of the Code in some cases makes meaningless the submission of individual applications to the Constitutional Court, since the decision issued by the Constitutional Court cannot, in fact, be a prerequisite for reviewing the final judicial act for the applicant in a specific case, and the implementation of the Constitutional Court decision in terms of the protection of subjective rights is blocked, as well as the implementation of the principle of guaranteeing the rule of law, and therefore the supremacy of the Constitution comes to a standstill. Moreover, in terms of this prohibition, a person has no opportunity for the restoration and protection of the violated rights and freedoms in some cases, which is problematic in the aspect of the right to judicial protection, as prescribed by Article 61 of the Constitution.

**5.3.** The Constitutional Court deems it necessary to consider the constitutional and legal dispute raised in this Case also in the light of ensuring the organizational structures and procedures necessary for the effective exercise of the right to judicial protection, guaranteed by Article 61 of the Constitution, in the context of Article 75 of the Constitution.

Article 75 of the Constitution stipulates that when regulating fundamental rights and freedoms, laws shall define the organizational structures and procedures necessary for their effective exercise.

Previously having referred to the content of this constitutional requirement, the Constitutional Court has expressed the following positions:

“The above-mentioned requirement of the Constitution is aimed at the effective and actual implementation of the fundamental rights and freedoms prescribed by the Constitution, since merely stipulating the right or freedom is not sufficient for the full realization of the envisaged legal opportunity; therefore, the legislative consolidation of the respective structures and procedures is a necessary guarantee for ensuring the effective realization of the fundamental rights and freedoms” (DCC-1618 of 30 November 2021).

“(…) the content of Article 75 of the Constitution directly implies the positive duty of the State to establish by virtue of law such legal measures of protection of rights that will ensure effective and fair protection of the fundamental rights and freedoms of individuals through independent, impartial and accessible justice, both within the scopes of the merits of the case and in the scopes of the further appeal of judicial acts.

(…)

The requirement of Article 75 of the Constitution is that, when regulating fundamental rights and freedoms, laws establish the organizational mechanisms and procedures necessary

for the effective exercise of these rights and freedoms. Consequently, from this point of view, the Constitutional Court considers it important not only to ensure that the law provides for the order of implementation of this right, but also the effectiveness of such an order, that is, the availability of such law-regulating measures, forms and the possibility of their enactment which guarantee the full implementation of the constitutionally determined goal, and in a particular case, taking into account also the requirements of Articles 78, 79, 80 and 81 of the Constitution” (DCC-1420 of 19 June 2018).

“The Constitutional Court states that any legislative regulation, and not just any restriction of a fundamental right or freedom, must aim to and provide for (3) organizational (4) structures and (5) procedures (2) necessary for the (1) effective exercise of all fundamental rights. Only the simultaneous existence of all these conditions in any legislative regulation, especially in a legislative regulation restricting the fundamental right or freedom, can ensure its compliance with the Constitution” (DCC-1546 of 18 June 2020).

“The State must create the necessary guarantees for the effective realization of human rights and freedoms. The State is obliged not only to recognize, respect and protect rights and freedoms, but also to create State legal structures that can effectively prevent and eliminate any violations, and restore the violated rights and freedoms” (DCC-1571 of 8 December 2020).

In the light of the above-mentioned positions, referring to the issue raised in this Case, the Constitutional Court states that the legislator has strictly limited the scope of the subject to exclusive review, and defined that only the following are subject to exclusive review: a judgment that has entered into legal force, or a court decision on the termination of proceedings or criminal prosecution, a judicial act, issued in the context of proceedings for contesting pre-trial judicial acts, that has entered into legal force, which establishes the legitimacy of non-initiation of criminal prosecution or termination of criminal prosecution, as well as the non-legitimacy of resuming criminal prosecution or the legitimacy of terminating proceedings, as well as a decision of the Court of Appeal or of the Cassation Court that has entered into legal force and was issued as a result of the review of the above-mentioned judicial acts. In other words, the legislator has considered it possible to review a judicial act upon the grounds of a new circumstance only in the case of the above-mentioned judicial acts, and, accordingly, considered the appeal against the judicial act issued outside the scope of the mentioned judicial acts as a ground for rejecting the initiation of the proceedings for exceptional review.

The study of case No. YD/0753/11/21 (which serves as the basis for the initiation of the application submitted in this Case) allows concluding that the Cassation Court rejected to initiate proceedings for exceptional review upon the grounds of a new circumstance, raised by the complaint of the applicant’s representative, reasoning as follows: “The Cassation Court states that by the Decision DCC-1690 of 30 May 2023, the RA

Constitutional Court has stated that the final judicial act issued against the applicant shall be subject to revision upon the grounds of a newly emerged circumstance as prescribed by the Law, since part 1 of Article 290 of the RA Criminal Procedure Code adopted on 1 July 1998, had been applied against the applicant by an interpretation other than prescribed by this Decision. However, under part 2 of Article 401 of the RA Criminal Procedure Code adopted on 30 June 2021, which defines an exhaustive list of judicial acts subject to exceptional review, though it does not include the act issued on the restraint measure, and the Cassation Court finds that the initiation of proceedings for exceptional review based on the complaint of the representative S. Poghosyan is subject to rejection, since the complaint was submitted against such a judicial act that is not subject to exceptional review”.

Based on the above, the Constitutional Court states that in the contested provision, the legislator has not stipulated the necessary organizational mechanisms and procedures necessary to review the final judicial act on the application of a restraining measure against the applicant upon the grounds of a new circumstance, in the event that the Constitutional Court has declared the provision applied against the applicant as contradicting the Constitution and void, as well as in the event that the Constitutional Court, having declared the given provision to be in conformity with the Constitution by its interpretation, simultaneously considered that it had been applied against the applicant by a different interpretation.

The Constitutional Court considers that, although the legislator has defined in the Code the legal norms related to exceptional review, however, in the absence of organizational mechanisms and procedures necessary for the effective exercise of rights and freedoms, the given legal norms do not fully ensure the effectiveness of exercising the right to judicial protection of a person, insofar as in the event the Constitutional Court indicated the violation of a person’s fundamental right by the final judicial act on the application of a restraining measure, no possibility is provided for reviewing the judicial act issued against the person upon the grounds of a new circumstance, which, according to the assessment of the Constitutional Court, is also problematic in the context of Article 75 of the Constitution.

Moreover, the Constitutional Court lays special emphasis on the fact that the failure to review the final judicial act issued against Hayk Mamijanyan based on the Constitutional Court Decision DCC-1690 of 30 May 2023 upon the grounds of a new circumstance, in essence, leads to the continuous violation of the applicant’s rights prescribed by Article 40 and part 1 of Article 61 of the Constitution, as indicated in the above-mentioned decision of the Constitutional Court.

Thus, the Constitutional Court considers that part 2 of Article 401 of the Code is not consistent with part 1 of Article 61 of the Constitution and the constitutional requirement prescribed by Article 75 of the Constitution, insofar as it does not provide for the possibility of reviewing the final judicial act issued against a person upon the grounds of a new

circumstance in the event that the Constitutional Court has declared the provision applied against the applicant by the final judicial act on the application of a restraint measure upon the grounds of a new circumstance as contradicting the Constitution and void, as well as in the event that the Constitutional Court, having declared the given provision to be in conformity with the Constitution by its interpretation, simultaneously considered that it had been applied against the applicant by a different interpretation, since part 2 of Article 401 of the Code fails to guarantee the organizational mechanisms and procedures necessary for the effective exercise of the fundamental right, as prescribed by Article 61 of the Constitution.

Based on the results of an examination of the Case and guided by point 1 of Article 168, point 8 of part 1 of Article 169, and Article 170 of the Constitution, as well as Articles 63, 64, and 69 of the Constitutional Law “On the Constitutional Court”, the Constitutional Court **DECIDED:**

1. To declare part 2 of Article 401 of the Criminal Procedure Code of the Republic of Armenia contradicting Articles 40, 61, and 75 of the Constitution and void, insofar as it fails to provide for the possibility of reviewing a final judicial act issued against a person on the application of a restraint measure based on the Constitutional Court decision as a new circumstance.

2. According to part 2 of Article 170 of the Constitution, this Decision shall be final and enter into force upon its promulgation.

**PRESIDING JUDGE**

**A. DILANYAN**

4 June 2024

DCC - 1736