ON BEHALF OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

THE CASE ON CONFORMITY OF ARTICLE 141, PART 1 OF THE ADMINISTRATIVE PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATIONS OF THE CITIZENS SHAVARSH AND RAYA MKRTCHYAN AND OTHERS

Yerevan **8 February 2011**

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

with the participation of the representative of the Applicant: K. Mejlumyan, Advocate

the representative of the Respondent: D. Melkonyan, the Adviser to the Chairman of the National Assembly of the Republic of Armenia,

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

examined in a public hearing by a written procedure the Case on conformity of Article 141, Part 1 of the Administrative Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the applications of the citizens Shavarsh and Raya Mkrtchyan and others.

The Case was initiated on the basis of the applications submitted to the Constitutional Court of the Republic of Armenia by the citizens Shavarsh and Raya Mkrtchyan and others on 17.08.2010.

By its DCCCC/1-25 decision dated 06.09.2010 the Court Chamber of 3 Members of the Constitutional Court of the Republic of Armenia took the application for consideration in part of Article 141, Part 1 of the Administrative Procedure Code of the Republic of Armenia.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicants and the Respondent, having studied the Administrative Procedure Code of the Republic of Armenia, the challenged norm, other laws regulating procedural relations and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Administrative Procedure Code was adopted by the RA National Assembly on 28 November 2007, signed by the RA President on 10 December 2007 and came into force on 1 January 2008.

Article 141 of the RA Administrative Procedure Code is titled: “The ground for appealing the Administrative Court judgments in cases of challenging the validity of the

normative legal acts." Prior to the adoption of the RA Law (ՀՕ-135-Ն) on making amendments to the Administrative Procedure Code dated 28.10.2010, the Part 1 of the Article challenged in this Case provided as follows:

"1. Administrative Court judgments in cases challenging the validity of the normative legal acts may be appealed to the Court of Cassation based only on the violation of substantive law."

According to the Case materials, adopting the final judgment, namely the decision in administrative case No. ՎԴ/4394/05/09 dated 05.05.2010, the Administrative Court applied Article 141, Part 1 of the RA Administrative Procedural Code in previous edition to the Applicants, which was amended by the Law ՀՕ-135-Ն after the Applicants applied to the Constitutional Court, and it states as follows:

"1. Administrative Court judgments in cases challenging the validity of the normative legal acts may be appealed to the Court of Appeal, and Court of Appeal judgments may be appealed to the Court of Cassation based only on the violation of substantive law."

According to the Case materials, on 02.10.2009 the Applicants brought the case for invalidation of the Decision No. 944- Ն of the RA Government dated 26.06.2009 before the RA Administrative Court. On 30.10.2009 the Administrative Court made a decision on admission of the submitted complaint. On 25.02.2009 the RA Administrative Court officially notified of the administrative case examination in a written procedure according to Article 138 of the RA Administrative Procedure Code and the date of announcement of the judgment on the merits. The Applicants filed a motion to the Administrative Court for a public examination of the Case. The court found the motion to be ill-founded, denied it and announced the decision No. ՎԴ /4396/05/09 on dismissal of the demand for invalidation of the decision 944- Ն of the RA Government dated 26.06.2009.

The Applicants filed an appeal in cassation against the decision of the Administrative Court. By its decision ՎԴ /4396/05/09 dated 05.05.2010 the RA Court of Cassation returned the appeal, and, referring to the Applicant's reasoning on the violation of Article 138 of the RA Administrative Procedure Code, mentioned that Article 138 of the Code is a procedural norm in accordance with Article 141, Part 1 of the RA Administrative Procedure Code, and the Administrative Court judgments in the cases challenging the validity of the normative legal act may be appealed only on the basis of violation of substantive law.

2. Challenging the provisions of Article 141, Part 1 of the RA Administrative Procedure Code in edition of 28 November 2007, the Applicants finds that "with the interpretation in law-enforcement practice" they contradict Articles 3, 18 and 19 of the RA Constitution, as they give a factual opportunity to the Administrative Court to deliver the judgments on the merits in the cases of challenging the normative legal acts without public trial or application of other constitutional principles of justice. The Applicants substantiate

their arguments, referring also to the requirements of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

According to the Applicant, the practice of administrative justice states that the current procedure of case consideration in a written procedure entirely ignores the principle of publicity and the right to public hearing is violated, and the RA Court of Cassation, while referring to the provisions of Article 141, Part 1 of the RA Administrative Procedure Code, has considered this fact neither.

3. Objecting to the arguments of the Applicants, the Respondent finds that the legislator included the challenged provisions in Chapter 24 titled "Special Proceedings" of the RA Administrative Procedure Code, which indicates their peculiarity, in particular, the methodology of consideration of the cases challenging the validity of normative legal acts compared with the consideration of administrative cases via the general proceedings and, as a result, special appellate procedure against the delivered judgments. According to the Respondent: "in this case, as opposed to other proceeding rules, from the perspective of protection of the litigants' rights, the importance and significance of the procedural norms become of secondary importance, as in these cases the justice is administered based only on the norms of substantive law ... through the checking of the conformity of the normative legal acts with the superior normative acts, except for the RA Constitution."

The Respondent also finds the proceeding of the Case to be terminated, as the Applicants, formally challenging the constitutionality of the legislative provision, in essence, raise the issue of legitimacy of application of that provision, and in addition, the issue of the constitutionality of the challenged provisions of the Code is ill-founded in the application.

4. In this case the Constitutional Court finds no grounds upon which to terminate the proceeding, and while assessing the constitutionality of the challenged norm, necessitates deriving from:

- the need to ensure the judicial protection of fundamental human and civil rights in conformity with the principles and norms of international law (Article 3 of the RA Constitution),
- the need to guarantee the right to judicial protection and its important component the right to appeal the judgments, stipulated in Article 18 of the RA Constitution, as well as the right to fair trial stipulated in Article 19 of the Constitution, deriving from the common concept of complex legislative developments in that sphere, which follows from the decisions of the RA Constitutional Court on the constitutionality of the institution of judicial appeal,
- the necessity to implement the legal positions expressed in the previous decisions of the Constitutional Court concerning the increasing of the effectiveness and further improvement of the institution of administrative justice in the Republic of Armenia.

While evaluating the constitutionality of the challenged norm stipulated in Article 141, Part 1 of the RA Administrative Procedure Code, the Constitutional Court considers that, the abovementioned norm was amended by the Law ՀՕ-135-Ն dated 28.10.2010, which resulted in no substantial amendments to the legal regulation concerning the issue raised by the Applicants.

5. The RA Constitutional Court states that the RA Constitution guarantees:
- the right to protect the rights and freedoms of physical and legal persons before the court;
- the right to effective judicial remedies;

- the right to equal judicial protection in accordance with all requirements of fairness;

- the right to restore the violated rights by an independent and impartial court within reasonable time and in a public hearing.

Simultaneously, the person's right to judicial review by a higher court, i.e. the judicial appeal is a constitutionally prescribed special institution guaranteeing the judicial (effective) protection of the violated rights and freedoms (Article 20, Part 3 of the RA Constitution). During the execution of the right to judicial protection and the administration of fair trial, the judicial appeal is the state's primary duty, that is, the fulfillment of justice objectives through the certain procedure, including the correction of possible judicial errors. The RA current legislation prescribes such procedures in the spheres of criminal, civil and administrative justice. In particular, the norms prescribed in Chapters 46 and 48 of the RA Criminal Procedure Code, as well as in Sections 4 and 5 of the RA Civil Procedure Code, regulate the relations connected with the judicial appeal in criminal and civil cases. For administrative cases, these relations are mainly regulated by the norms stipulated in Chapters 19.1 and 20 of the RA Administrative Procedure Code, as well as Sections 4 and 5, and partially the challenged Article 141 of Chapter 24.

Having examined the norms regulating the relations connected with the judicial appeals to the Appellate and Cassation Courts in the RA legal system, their features, the Constitutional Court states:

- the judgments, whether in force or without effect, such as the judgments on the merits and interim acts listed by the law, are appealable by the procedure prescribed by law;

- the courts entitled to review the judgments based on the appeal or cassation, the review procedures and the resulted decisions are set forth;

- the appeal grounds against the judgments, including a judicial error, are set forth by law;

- According to the RA Criminal Procedure Code, the RA Civil Procedure Code, as well as the RA Administrative Procedure Code, except for the cases of challenging the validity of normative legal acts, the appeal grounds are the violation or misuse of the norm of both substantive and procedural law, which is the fundamental violation under Article 207, Part 7 of the RA Civil Procedure Code. Moreover, according to the abovementioned Codes (Articles 380.1, 406 and others of the RA Criminal Procedure Code, Articles 226, 227, 228 and others of the RA Civil Procedure Code, as well as Article 117.4 of the RA Administrative Procedure Code) the judgment on the merits may be reviewed and abrogated only on the grounds of the violation of substantive and procedural norms, which affected the outcome of the Case or resulted in wrong adjudication. If the legislator meant the misinterpretation of the given norm, the implementation of the norm that should not have been implemented or non-implementation of the norm that should have been implemented, as the grounds for the violation of substantive norms, then as the grounds for violation of the procedural norm, it presumed the ones which hindered the comprehensive, complete and objective examination of the Case, violated the procedural rights of the litigants and resulted in the violation of the principles of justice.

Thus, the legislator stipulated procedures for appealing the judgments and considers as a precondition for their review (except for review due to new and newly revealed circumstances) only those violations of substantive and procedural law, which affected **the outcome of the Case or resulted in wrong adjudication**. In some cases, such as the cases of cassation appeal in a civil case, the legislator forbids to abrogate on formal grounds the court's decision which is correct on the merits. That is, in the abovementioned cases,

the legal regulation is based on the principle, according to which, the judgment which is **a result of a judicial error,** may be abrogated on the basis of violation of substantive and procedural law.

6. The Constitutional Court necessitates referring to the constitutional-legal content of the term **"judicial error"**, as well as to the scope of its manifestations as a crucial legal fact for the effective implementation of the right to judicial appeal, and finds that it may not be subject to expanded interpretation and may not be understood as any error or atrocity by the court. Judicial error may be made only as a result of adoption of the judgment on the merits, that is, the act, which will be called upon to adjudicate on criminal, civil or administrative Case, to eliminate its argumentativeness, i.e. to determine the indisputable legal status of the litigants or participants of disputable legal relations, to make possible for the persons implement their rights and protect their legitimate interests, therefore, it is called to implement objectives of judicial protection and justice stipulated in Articles 18 and 19 of the RA Constitution. In that process, the **court applies the norms of both substantive and procedural law**, which resulted in the judgment. Therefore, judicial challenge of the validity of that act may be necessarily based on the violation of the norms of both **substantive** and **procedural** law. And the judicial error or the fact of violation of the substantive or procedural norms, **which led to the wrong adjudication of the given case**, thereby, violating objectives of justice and jeopardizing the reputation of justice and court, shall be assessable and be confirmed by the competent court as a result of the consideration of the appeal or cassation.

The stipulation of the abovementioned procedural conditions regulating the appeal against the judgment shall be based on the principles ensuring the regulatory requirements of Articles 3, 5 (Part 1), 18 and 19 of the RA Constitution. The Constitutional Court finds that the regulation and implementation of the institution of judicial appeal shall be based on the realization of the following prior legal terms, particularly:

- the fundamental rights and freedoms of a person, as the ultimate value, are protectable in an unreserved manner by the courts in the scopes of both the consideration of the case on the merits and its possible further review;
- the judicial appeal, as a remedy of judicial protection, shall be an effective remedy for restoration of the violated rights and freedoms of the person, following the constitutional principles of justice administration, particularly, the ones under Articles 18 and 19 of the RA Constitution;
- the institution of judicial appeal, without exception, shall be a remedy for revealing the judicial errors in equal, objective, comprehensive, fair and public trial, within the reasonable time, and for rectifying all those judicial errors which, resulting from the violation of both substantive and procedural norms, consequently led to the wrong adjudication of the judicial case;
- the review of judgments based on the appeal or cassation, as a function of justice administration, may support the implementation of the abovementioned constitutional legal tasks, if carried out by an independent and impartial court.

7. Touching upon the issue of assessment of the constitutionality of the challenged legal norm of the current case, namely Article 141, Part 1 of the RA Administrative Procedure Code, the Constitutional Court states that, according to the matter of legal regulation, it is called to regulate the relations connected with appealing of the judgments rendered by the Administrative Court in the cases challenging the validity of the normative legal acts in administrative special proceeding, insofar as connected with the grounds for the judicial appeal, according to which judgments rendered in such cases may be

appealed only on the grounds of violation of substantive law. Thus, for the abovementioned cases the legislator has excluded the possibility of appealing the judgments of the Administrative Court and challenging their validity based on violation of the norms of procedural law according to the procedure prescribed by law, and did not allow persons to enjoy full and effective implementation of their constitutional right to judicial protection while challenging the normative acts of state and local self government bodies and their public officials.

In a number of decisions, such as DCC-652, DCC-665, DCC-673, DCC-719, DCC-758, DCC-780 etc., the Constitutional Court emphasized the legislative assurance of effective implementation of the institution of judicial appeal, including in the sphere of administrative justice, considering the issue in terms of assessment and assurance of its conformity with the principles of constitutional order, objectives of justice administration, as well as international legal obligations assumed by the RA. In particular, in decision DCC-780 it has been stressed that it is necessary to implement the right to judicial appeal, which is a significant element of the right to judicial protection, in a way which will ensure "… the effective implementation of that right and the minimization of the probability of judicial errors". The Constitutional Court also highlighted the necessity of implementation of judicial effective review over the obligations assumed by the Republic of Armenia under international treaties, in particular ensuring the protection of human rights and freedoms by domestic, including judicial remedies, as well as the necessity to administer effective judicial review over administrative acts on the basis of the Recommendation (2004)20 of the Committee of Ministers of the Council of Europe, emphasizing that "… the domestic legislation shall define the terms of appeal … which shall be in conformity with the requirements of Article 6 of the European Convention on Human Rights."

Reconfirming its legal positions expressed in the abovementioned decisions, the conclusions resulting from the generalization of the international legal practice, the Constitutional Court finds that the provision of Article 141, Part 1 of the RA Administrative Procedure Code, which entirely excludes the possibility of appealing the judgments of the Administrative Court on the basis of violation of the norm of procedural law, is not in conformity with the constitutional and international legal criteria for the effectiveness of justice, the judicial protection of violated rights and freedoms of a person, as well as the implementation the right to judicial appeal. It is not also in conformity with the general conceptual approaches of judicial appeal, which was legislatively brought in the RA legal system.

The Constitutional Court states that, despite the fact that for the implementation of the legal positions expressed in the decision DCC-780, the RA administrative justice system was replenished and a new system of judicial appeal was brought in, nevertheless, the current procedure of appeal, in particular, regarding the cases challenging the validity of the normative legal acts through a special proceeding, was not amended correspondingly, which resulted in the restriction of the constitutional right of persons to fair, accessible and effective judicial protection. The Respondent's position stating that, from the viewpoint of the protection of litigants' rights, the significance and gravity of the procedural norms concerning the cases challenging the validity of normative legal acts is of secondary importance, does not derive from the constitutional legal content of justice, from the decisions of the Constitutional Court, as well as from the general concept of the regulation on the institution of judicial appeal legislatively brought in the RA legal system. The court's decision, adopted in violation of the procedural rules, may not be considered legitimate and in conformity with the requirements of justice.

The Constitutional Court finds that any procedural peculiarity or proceeding type, namely special proceeding, may not be legislatively interpreted or implemented in a way that

makes human fundamental rights guaranteed by Articles 18 and 19 of the Constitution completely meaningless or impedes their implementation. Consequently, the principles of legal regulation of the RA procedural relations in the sphere of judicial appeal, which are underlined in Point 6 of this decision, must be included in all procedural norms regulating this institution, including the ones on challenging the validity of the normative legal acts.

Proceeding from the results of consideration of the case and being ruled by the provisions of Article 100, Point 1, Article 101, Part 1, Point 6 of the Constitution of the Republic of Armenia, Articles 63, 64 and 69 of the RA Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. To declare Article 141, Part 1 of the RA Administrative Procedure Code in regard to blocking the person's right to appeal the Administrative Court judgments in cases challenging the validity of the normative legal acts based on the violation of the norm of procedural law, to be incompatible with Articles 3, 18 and 19 of the RA Constitution and invalid.

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

Chairman G. Harutyunyan

8 February 2011

DCC-936