

IN THE NAME OF THE REPUBLIC OF ARMENIA

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

**ON THE CASE OF DEFINITION OF THE ISSUE OF CONFORMITY OF ARTICLE
14 PART 4 OF THE JUDICIAL CODE WITH THE CONSTITUTION OF
REPUBLIC OF ARMENIA ON THE BASIS OF APPLICATION OF THE RA
OMBUDSMAN**

Yerevan city

23 December 2008

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (presiding judge), K. Balayan, H. Danielyan F. Tokhyan, V. Hovhanissyan(rapporteur), Z. Ghukhassyan, H. Nazaryan R. Papayan, V. Poghosyan,

with the participation of

the representatives of the Applicant, the Ombudsman of the Republic of Armenia: G.Kutoyan, the respondent: the representative of the National Assembly of the Republic of Armenia, the head of the Department of Analysis of Legislation of the Staff of the RA National Assembly A.Khachatryan,

pursuant to Article 100, point 1, Article 101, point 6 of the RA Constitution, Articles 25, 38 and 68 of the Law on “The Constitutional Court”

examined in a public hearing the case applied by the RA Ombudsman concerning the determination of the issue regarding the conformity Part 4 Article 14 Judicial Code of the Republic of Armenia on the conformity with the Constitution of Republic of Armenia

The case was initiated through the application of 21.11.2008 submitted to the Constitutional Court by the Ombudsman of the Republic of Armenia.

Having heard the report put forward by the rapporteur judges on this case, the explanations of the representatives of the Applicant, having studied Administrative-Procedural Code of the Republic of Armenia, the Constitutional Court of the Republic of Armenia

FOUND

1. The RA Judicial Code PA was adopted by the RA National Assembly on February 21, 2007, signed by the President of the Republic of Armenia on April 7, 2007 and has come into force on 18 of May 2007.

Article 14 of Judicial Code is entitled “Non-changeability of judges.” Part 4 of Article establishes: “ In the case when the given claim cannot be considered owing to the insufficient number of the judges which has occurred because of satisfaction of the motions on the challenges of the judges or for other reason, by the decision of the Chairperson of the Cassation Court, the judge (of the same instance or higher) can be sent to that court pursuant to Part 7 of the above-mentioned Articles. Part 7 of the same article states that “If the law provides liquidation of a court or chamber of the Cassation Court, the corresponding judges are considered in reserve, and their status, including the salary and the right of reception of extra charges, the right of being included in the list of service promotion are preserved in a post till the expiration of age retirement limitations stipulated by the Constitution if the Code in force does not stipulate the other one.”

2. In the beginning, the RA Ombudsman challenged the constitutionality of parts of 3.4 and 5 of Article 14 of the RA Judicial Code.

The Constitutional Court in its procedural decision of December 2, 2008, based on Part 3 of Article 32 of the RA Law “ On the Constitutional Court ”, declined to accept for consideration the cases connected with contest of constitutionality of Parts 3 and 5 of Article 14 of the RA Judicial Code considering availability of interrogation of constitutionality of these norms of the Decision of the Constitutional Court. Based on the application of the Ombudsman, the claim was accepted to consideration regarding the definition of a question of conformity of Part 4 Articles 14 of the RA Judicial Code with Part 1 Article 18 of the RA Constitution.

3. Challenging constitutionality of Part 4 Article 14 of the RA Judicial Code, the party-applicant considers that the challenged provision does not match with Part 1 Article 18 of the RA Constitution and proves it as follows. Part 1 Article 18 of the RA Constitution establishes that everyone has the right to effective means of a legal protection of the rights and freedom in judicial and other state bodies. The court, created based on the decision of chairperson of the Cassation Court, on sending the judge to the same or higher instance court cannot be considered as judicial body, as according to Part 2 Article 94 of the RA Constitution, the Constitution and laws establish power, order of formation and activity of courts.

Meanwhile, the court formed based on the decision of the chairperson of the Cassation Court, mismatches to the concept that “the court created on the basis of the law.” Besides, the challenged provision, according to the applicant, mismatches to Part 1 of Article 6 of the European Conventions on Protection of Human Rights and Fundamental Freedoms according to which everyone has the right of definition of his/her civil rights and responsibilities or by consideration of any criminal case, presented to him/her, on fair public trial of the case in reasonable terms by independent and impartial court created on the basis of the law.

4. The party-respondent, objecting to arguments of the applicant, considers that concerning the challenged provision of the RA Judicial Code, the question of constitutionality does not occur. According to the applicant, the decision of the Cassation Court on sending the reserve judges does not concern to the requirement of formation of new judicial structure in the procedure of formation of a court or simple creation of a judicial body. The challenged position concerns to the formation of new judicial structure by including the reserve judges in the court, created based on the law according to requirements of Point 11 of Article 55 and Article 95 of the RA Constitution.

The RA Judicial Code, establishing powers of the chairperson of the Cassation Court, at the same time provides him/her an opportunity of maintenance of natural activity of the Cassation Court and realization of other powers, given to him/her by the law. Part 4 Article 14 of the same Code in comparison to Part 7 provides the right of chairperson of the Cassation Court to adopt the decision on sending a reserve judge. According to the respondent, it means that chairperson of the Cassation Court can pass such decision on the basis and the conditions stipulated by the law.

In connection with the contradiction of the disputed Article 6 Part 1 of the European Convention on Protection of Human Rights and Fundamental Freedoms mentioned by the applicant, the respondent specifies that by the decision CCD 782 of December 2 2008 the Constitutional Court had rightfully considered that lawful consideration of the case by the judicial structure generated on the basis of sending the judge, conditioned by the presence of institute of sending of the judge in the case of necessity of insuring the right of judicial protection and the right of effective means of judicial protection of the person.

5. Article 14 of the RA Judicial Code envisages two categories of judges who can be sent to the other courts by chairperson of the Cassation Court:

- a. acting judge (part 3 and 5 of Article 14);
- b. reserve judge (part 4 of Article 14 in comprised with part 7).

The issue of conformity of the Constitution to Parts 3 and 5 Article 14 of the RA Judicial Code which establish legal regulation of sending the acting judges, the Constitutional Court solved that issue in Decision CCD-782 of 2 December 2008 and acknowledged it as contradicting and void the provisions of Part 2 of Article 3, Part 1 of Article 18, Part 11 Article 55 and Article 95 of the RA Constitution. In this Decision, returning to legitimacy of sending the judge to another court, the Constitutional Court stated that legal regulation stipulated in Article 14 of the RA Judicial Code on sending the judge is following a lawful purpose, that is, overcoming the judicial overburdening for the consideration of legal proceeding in reasonable terms, which, in its turn, is directed on insuring the effective realization of judicial protection and the rights of effective means of judicial protection.

The consideration of the possibility of sending the judge itself is competent, triggered in exceptional cases, justified from the legal point of view for overcoming the consequences of impossibility of consideration of the cases objectively because of insufficient number of judges in the given court.

In the specified Decision, the Constitutional Court simultaneously expressed a legal position that sending the judges should be in exceptional cases, and not become a common rule. According to the applicant, it should be carried out in such an order so that to exclude formation of the court beyond the established order which has exclusive character.

In the specified Decision, the Cassation Court has also specified that by virtue of Point 9 of Part 3 Article 61 of the RA Judicial Code, the chairperson of the Cassation Court can be granted such powers, which do not contradict with other powers, given to the chairperson of the Cassation Court by the law and, particularly, by Part 3 of Article 61 of the Code. The Cassation Court also considers that granted to the chairperson of the Cassation Court by Article 14 of the RA Judicial Code power concerning sending the judges to other courts does not proceed from the requirement of Point 1 of Part 3 of the abovementioned article.

6. According to Part 7 Article 14 of the Judicial Code, the institute of reserve judges is formed because of liquidation of courts or chambers of the Cassation Court. The status of reserve judges is preserved until the expiration of age of limits of a post stipulated by the Constitution. Similar legal regulation follows from the principle non-superseding of judges stipulated in Article 96 of RA Constitution and is a legal guarantee for insuring the realization of this principle.

Simultaneously, the Constitutional Court considers necessary to specify that according to Part 6 of Article 14 of the RA Judicial Code the judges who are cut off, in spite of the fact that they have the same status as the reserve judges do, who appeared as a result of liquidation of a court or a chamber, however, according to Part 7 of the same Article, are not considered as reserve judges and cannot be sent and, hence, the mechanisms providing their participation in realization of justice are not created.

The challenged position of Article 14 of Judicial Code, by establishing the cases of sending the reserve judges, simultaneously, as unique criterion of sending the reserve judges establishes the requirement of sending the judge who may be the judge of the same or higher instance. The similar requirement, first, in the case of business trip insures consideration of the case by the judge who has the qualification of the judge of the corresponding instance.

7. Acknowledging as the basis the conclusion that establishment of possibility of sending, as a whole, or the established possibility of sending reserve judges, in particular, by itself is lawful, and simultaneously considering that legal implementing practice concerning sending the reserve judges has not generated yet, the Constitutional Court considers that legitimacy of sending the reserve judges in legal implementing practice can be provided only in the case when the process of sending will be carried out in conformity with the abovementioned position, and by a position specified in Decision CCD-782 of the Constitutional Court.

Concluding the hearings and being ruled by Part 1, Articles 100, 102 of the RA Constitution, Articles 63, 64 and 75 of the RA Law on “The Constitutional Court”, the Constitutional Court of the Republic of Armenia **decides:**

1. Part 4 of Article 14 of the Judicial Code of Republic Armenia conforms to the requirements of the Constitution of Republic Armenia.
2. Pursuant to Part 2, Article 102 of the RA Constitution this decision is final and is in force from the date of publication.

PRESIDING JUDGE

G. HARUTYUNYAN

23 December 2008

CCD – 786

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