

**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 OF CONFORMITY OF THE PROVISION “IN THE CASE WHEN THE APPEAL DOES NOT CONFORM WITH THE REQUIREMENTS PRESCRIBED BY THIS ARTICLE,..., BY THE DECISION OF THE COURT OF APPEAL THE APPEAL IS LEFT WITHOUT EXAMINATION” OF PART 2 OF ARTICLE 381 OF THE RA CRIMINAL PROCEDURE CODE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE COURT OF CASSATION OF THE REPUBLIC OF ARMENIA**

Yerevan

19 June 2018

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

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

the Applicant: Court of Cassation of the Republic of Armenia,

the Respondent: V. Danielyan, official representative of the RA National Assembly, Head of the Legal Support Division of the Legal Expertise Department of the RA National Assembly Staff,

pursuant to Point 1, Article 168, Part 4, Article 169 of the Constitution of the Republic of Armenia, Articles 22, 40 and 71 of the RA Constitutional Law on the Constitutional Court,

Examined in the open proceeding the case of conformity of the provision “In the case when the appeal does not conform with the requirements prescribed by this article,..., by the decision of the Court of Appeal the appeal is left without examination” of Part 2 of Article 381 of the Ra

Criminal Procedure Code with the Constitution of the Republic of Armenia on the basis of the application of the Court of Cassation of the Republic of Armenia”,

The Criminal Procedure Code of the Republic of Armenia (hereinafter the Code) was adopted by the National Assembly on July 1, 1998, signed by the President of the Republic of Armenia on September 1, 1998 and entered into force on January 12, 1999.

The case was initiated on the basis of the applications submitted to the Constitutional Court on 26 March 2018 by the RA Court of Cassation which present the decisions of the RA Court of Cassation of 20 March 2018 on “On suspension of the proceedings on the complaint and appeal to the RA Constitutional Court” under the criminal case no. ՄԴ/0088/01/12 and case no. ԵԿԴ/0056/11/17.

Having examined the Application, written explanations of the parties, as well as analyzing the relevant provisions of the Code, other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

### **1. The applicant's positions**

According to the applicant, as follows from the comparative analysis of Parts 1 and 2 of the challenged Article the legislator, on the one hand, prescribed the formal requirements of the appeal, and, on the other hand, in case of non-compliance with these requirements, "the legal consequences expressed in the form of leaving the appeal without examination".

Arguing for the disproportionate restriction of the right of access to a court for the pursued goal, referring to Article 78 of the Constitution of the Republic of Armenia, the applicant considers that as follows from the content of the principle of proportionality the measure chosen for the restriction of the law should be suitable and necessary to achieve the goal pursued and be in an equal ratio.

In other words, there should be a fair balance between the measure applied and the objective pursued; the measure applied for achievement of the goal should not be too strict, bypassing the reasonable possibility of achieving the same goal by other measures with minimal effort.

The applicant believes that the requirements to the appeal prescribed in Part 1 of the challenged Article are technical, in most cases, which often non-observation of such measures are due to negligence, are non-recoverable, and in case of their non-compliance, lodging of an appeal with errors can be corrected by the complainant.

In such conditions, from the point of view of the criterion of "suitability", though leaving the appeal without consideration allows to achieve the goal of properly tailored justice, that is, excludes the possibility of further proceeding of the appeals with errors, but the interference in this way with the right of access to the Court of Appeal, prima facie, does not meet the criterion of necessity.

In particular, if the properly tailored justice can achieve the same goal, for instance, after correction of the error of a formal nature in the appeal lodged by the complainant, then the interference with the right of access to the Court of Appeal, in form of leaving the appeal without consideration, cannot be considered as such an exceptional measure, only the application of which may allow to achieve the goal pursued.

If the appeal is left without examination and the person, as a result of the formal error in the appeal, is deprived of the right to review the legality of the judicial act adopted by a higher court, the equivalent ratio between the measure applied and the goal pursued is violated, since the implied interference by its nature restricts the right of access to the Court of Appeal.

The Applicant concludes that, by virtue of the wording of Part 2 of Article 381 of the Code, "if the appeal does not conform with the requirements prescribed by this article,..., leaving the appeal is left without examination by the decision of the Court of Appeal" due to formal errors, leaving the appeal without consideration disproportionately restricts the person's right to a fair trial, including the right of access to the Court of Appeal.

## **2. Respondent's positions**

According to the respondent, for the initiation of proceedings on appeal, "both the preconditions for the right to appeal and the conditions for exercising the right to appeal" are necessary. In the respondent's opinion, "the legislator cannot prescribe such procedures that by the improper implementation of the condition will not allow rectifying it if the the right to appeal is exercised." According to the respondent "... in order to exclude the endless cycle of such corrections, in the procedural codes the legislator legitimately prescribes one possibility for correcting a technical error. However, in this specific case, the legislator did not prescribe a legal

possibility to eliminate technical mistakes in the judicial act as rejection of the appeal by the court, the correction of mistakes made by the applicant and the re-submission of the complaint, which should be called to ensure the practical implementation of the principle of access to a court." According to the respondent, in the terms of the legal regulations envisaged by the provision which is the subject of the constitutional legal dispute in this case, the accessibility of the court is "ineffective", since the applicant does not have a clear and practical possibility to appeal the judicial act affecting his rights due to any technical omission. According to the respondent, the provision, which is the subject of the constitutional legal dispute, "disproportionately restricts the person's right of access to the court," therefore the respondent considers that it contradicts the requirements of the RA Constitution.

### **3. Circumstances relevant to the outcome of the case**

The Constitutional Court considers that the following circumstances must be clarified for the outcome of the case:

a) In fact, does the legal regulation in dispute ensure the exercise of the right to judicial protection guaranteed by Article 62 of the Constitution, and are the preconditions necessary for the implementation of the duty of public authority, enshrined in Article 3 of the Constitution, to respect and protect this right?

b) By the legal regulative relevance, is the challenged norm actually sufficient for maintaining the proportionality of the restriction of fundamental rights and freedoms, as well as the requirements of Articles 78 and 80 of the Constitution on the inviolability of the essence of the provisions on fundamental rights and freedoms?

c) Does the legal regulation in dispute, from the point of view of the constitutional legal content of Article 75 of the Constitution, meet the criteria for the effective implementation of rights and freedoms?

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

**4.1.** The mechanism of appeal of judicial acts is an important guarantee for the protection of rights and freedoms guaranteed by the Constitution. The current legislation provides procedures for the application of this mechanism.

Moreover, 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 Constitutional Court, in of previously adopted numerous Decisions (DCC-690, 719, 733, 765, 780, 849, 873, 890, 918, 922, 936, 1037, 1052, 1062, 1114, 1115, 1190, 1191, 1192, 1196, 1197, 1220, 1222, 1231, 1249, 1254, 1257, 1263, 1265, 1268, 1275, 1289, 1290, 1293, 1395) addressed the problems of fair trial and judicial appeal, accessibility of the court, indicating the latter as the most important precondition for the effective protection of fundamental rights and freedoms guaranteed by the Constitution.

The legal positions expressed in the abovementioned Decisions, based on the essence of the issue raised in this case, basically reached the following:

- not any procedural requirement or procedure can prevent or suppress the possibility of effective implementation of the right to appeal to the court, render the constitutionally guaranteed right to judicial protection meaningless or hamper its implementation;

- not any procedural requirement can be interpreted as a justification for restricting the right of access to a court guaranteed by the Constitution of the Republic of Armenia;

- the accessibility of a court (justice) may have certain restrictions that must not distort the true essence of this right;

- when applying to a court, a person should not be burdened with unnecessary formal requirements;

- proceeding from the requirements of ensuring legal certainty, the existence of certain imperative preconditions necessary for the exercise of the right of access to a court in itself cannot be considered as contradicting the RA Constitution.. Other issue is that such a precondition must be feasible, reasonable and must not lead to breach of the essence of law.

The Constitutional Court reaffirms the legal positions expressed in the abovementioned Decisions and at the same time states that they are inherently comparable to the constitutional amendments of 2015 as well as are applicable in the framework of the constitutional legal issue raised by the applicant.

**4.2.** In the scopes of criminal proceedings, based on the realities of a possible objective restriction of the rights and freedoms of individuals, the Constitution specifically outlines the constitutional legal significance of an effective mechanism for appealing judicial acts. According to Article 69 of the Constitution, everyone sentenced for committal of a criminal offence shall

have the right to have the criminal judgment, rendered against him or her, reviewed by superior judicial instance, on the grounds and under the procedure prescribed by law. Comparing the general legal content of Article 61 of the Constitution, and taking as basis the inviolability of Articles 3, 23, 27, 28 and 75 of the Constitution, the Constitutional Court considers that the procedures for the realization of this right must be unconditionally comparable to the requirements of the above constitutional norms, they must also comply with the principles of proportionality and certainty of legal regulation stipulated by Articles 78 and 79 of the Constitution, ensure the inviolability of the essence of this right and comply with international legal practice guaranteeing this right (Articles 80 and 81 of the Constitution).

**4.3.** The analysis of the legal regulation subject of dispute and the comparison with other relevant norms of the Code shows that when providing for a procedure for appeals against the acts of the court of first instance (Chapter 46 of the Code) in criminal proceedings, within the framework of the relevant procedural stage the legislator pursued the objective to establish measures to implement the individual's right to judicial protection of his/her rights and freedoms and certain legal possibilities of their enforcement, including binding formal and content requirements aimed at protecting the complainant's rights.

In particular:

- the court considering cases on appeals (Article 377 of the Code);
- the circle of persons who have the procedural right to file an appeal (Article 376 of the Code);
- the range of judicial acts liable to appeal (both on the merits and interim) (Article 376.1 of the Code);
- general procedure and terms for submitting an appeal, the grounds for filing such an appeal (Articles 378, 379, 380 and 380.1 of the Code);
- the content of the appeal and the conditions for initiating proceedings (Article 381 of the Code);
- the range of procedural rights and duties of other persons interested in the proceedings, and the procedure for their implementation conditioned by the processing of the appeal. (Article 382 of the Code),
- impact of appeal (Article 383 of the Code).

Thus, the Constitutional Court states that the aforementioned regulations, with their general content, are aimed at providing for legal measures and procedures for the exercise of the

constitutional right of individuals to appeal in the appellate procedure within the framework of criminal proceedings. Consequently, the overall focus of this legal goal pursues a goal predetermined by the Constitution, since these regulations are objectively called for ensuring the application of the norms of the Constitution.

At the same time, it follows from the precise analysis of the above-mentioned legal regulation that it also contains requirements to the appeal which are of purely content character.

Thus, the person who lodged the appeal must substantiate the "grounds and claims of the appeal," "substantiation of the violation of the rules of substantive or procedural law specified in the appeal, as well as their impact on the outcome of the case, referring to such decisions of the Constitutional Court of the Republic of Armenia, the Court of Cassation of the Republic of Armenia , the European Court of Human Rights, which the person who lodged the appeal considers relevant, citing their contradictory parts thereof and conducting a comparative analysis, or which are based on the review of the case on newly revealed or new circumstances", "in the presence of such proof that the applicant justifies the demands and that must be studied in the court of appeal, including the evidence previously not studied in the court of first instance".

Under such conditions, it is obvious that a differentiated approach should be shown with regard to the deficiencies or errors found in the appeal, as a result of which it will also be necessary to differentiate the possible legal consequences arising from them. If, in case of violation of formal requirements, the provision of overly restrictive consequences restricts the possibility of the person's exercise of the fundamental right, then a disproportionately lenient assessment of violations of the substantive nature may create the preconditions for the abuse of this right.

The requirement of Article 75 of the Constitution is that, when regulating the fundamental rights and freedoms, laws establish the organizational mechanisms and procedures necessary for the effective implementation 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, in a particular case taking into account also the requirements of Articles 78, 79, 80 and 81 of the Constitution.

**4.4.** Turning to the issue of presenting the above-mentioned requirements, especially the formal ones, the legal regulatory in the scopes of the appeal in the criminal proceeding, the Constitutional Court considers it necessary to examine this issue in terms of compliance with principles approved in international legal practice (Article 81 of the Constitution).

According to the case law of the European Court of Human Rights (ECtHR) "... excessive formalism refers to particularly strict interpretations of procedural rules that may deprive applicants of their right of access to a court. This can include strict interpretations of time-limits, rules of procedure and evidence."<sup>1</sup>

In a number of its case-law judgments, the ECtHR in particular found as follows:

1. Case of *Reklos and Davourlis v. Greece*, 15 January, 2009, Application no. 1234/05

28. ... To declare the single ground of appeal inadmissible because the applicants "[had] not indicate[d] in their appeal the factual circumstances on which the Court of Appeal had based its decision dismissing their appeal" amounted to excessive formalism and prevented the applicants from having the merits of their allegations examined by the Court of Cassation (see, to this effect, *Běleš and Others v. the Czech Republic*, no. 47273/99, § 69, ECHR 2002-IX, and *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 55, ECHR 2002-IX)<sup>2</sup>.

2. Case of *Shuli v. Greece*, 13 July 2017, (Application no. 71891/10)

26. ... In applying the rules of procedure, the national courts must avoid both excessive formalism, which would affect the fairness of the procedure, and excessive flexibility, which would result in removing procedural requirements established by law (see *Walchli v. France*, no. [35787/03](#), § 29, 26 July 2007, and *Peca v. Greece (no. 2)*, no. [33067/08](#), § 30, 10 June 2010). In fact, the right of access to court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court (see *Kart v. Turkey [GC]*, no. [8917/05](#), § 79, ECHR 2009 (extracts); *Efstathiou and Others v. Greece*, no. [36998/02](#), § 24, 27 July 2006; *Vamvakas v. Greece*, no. [36970/06](#), § 26, 16 October 2008; *Louli-Georgopoulou v. Greece*, no. [22756/09](#), § 39, 16 March 2017).

29. The Court ... notes refusing to consider non-reasoned appeal pursues the legitimate aim of granting a proper administration of justice and legal certainty. In this case, the question

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<sup>1</sup> Source: official website of the judgments of the European Court, <https://hudoc.echr.coe.int>, Handbook on European law relating to access to justice, 2016, pages 119-121.

<sup>2</sup> <http://hudoc.echr.coe.int/eng?i=001-90617>.

arises as to whether the Nafplio five-member Appeal Court, in pursuing such legitimate aims, struck a fair balance between the means employed and the aims pursued. More specifically, the question arises as to whether the applicant's appeal was declared inadmissible as a result of excessive formalism on the part of the domestic courts in view of the importance of the appeal and what was at stake in the proceedings for the applicant, who had been sentenced to a long term of imprisonment (see *Labergere v. France*, no. [16846/02](#), § 20, 26 September 2006). The Court will therefore next assess whether the restriction was proportionate to the aim pursued. 34. ... In view of the circumstances described above, in particular the provision of a pre-printed form to the applicant by the registry of the court which gave him the impression of having lawfully lodged an appeal, as well as the role of the registrar in the present case, and what was at stake for the applicant, the Court considers that the Nafplio five-member Court of Appeal, by dismissing the applicant's appeal as inadmissible, prevented the applicant from using a legal remedy available to him under domestic law (see *Louli-Georgopoulou*, cited above, § 47)<sup>3</sup>.

3. Case of *Masirevic v. Serbia*, 11 February 2014, (Application no. 30671/08)

48. ... The Court's role in cases such as the present case is to determine whether the procedural rules were intended to ensure the proper administration of justice and compliance with, in particular, the principle of legal certainty (see, *mutatis mutandis*, *Efstathiou and Others v. Greece*, no. 36998/02, §§ 24, 27 July 2006, and *Syngelidis v. Greece*, no. 24895/07, § 41, 11 February 2010) and whether the applicant was able to count on a coherent system that struck a fair balance between the authorities' interests and his own interest (see, *mutatis mutandis*, *Lay Lay Company Limited v. Malta*, no. 30633/11, § 56, 23 July 2013)<sup>4</sup>.

4. *Poitot v. France*, 15 December 2011, Application no. 29938/07

"The Court observed that Ms Poirot had not been formally required by Article 186-3 of the Code of Criminal Procedure to make explicit reference to the grounds of her appeal, namely that she was challenging the legal classification of the alleged acts. .... The Court accepted that the national authorities were in the best position to interpret domestic legislation and that the formalities governing appeals were designed to ensure the proper administration of justice and, in particular, to ease the courts' caseload. It considered, however, that in today's case the judicial

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<sup>3</sup> <http://hudoc.echr.coe.int/eng?i=001-175158>

<sup>4</sup> <http://hudoc.echr.coe.int/eng?i=001-140775>

authorities had applied the relevant procedural rules in an excessively formalistic manner, thereby infringing Ms Poirot's right of access to a court"<sup>5</sup>.

Thus, the ECtHR's case-law demonstrates that the existence of formal requirements in judicial and procedural norms is due to what extent this is necessary for the implementation of the right, but the nature and content of such requirements, the implementation procedures should not create an incommensurate restriction of the right, leading to a distortion of its essence. The Constitutional Court considers that those serve as criteria for the procedure for the effective exercise of rights and freedoms.

**4.5.** The analysis of the challenged norm and related legal regulations show that in scopes of the criminal proceedings any violation of the preconditions of the complaint lodged to the court (for instance, failure to identify the name of the court and the list of materials attached to the appeal, the signature of the applicant, etc.) by the decision of the Court of Appeal the appeal is left without consideration.

Part 6 of Article 103 of the Code also contains the norm of almost similar content, according to which "... the appeal can be left without consideration and returned to a participant in the process if it is not signed by him or his representative or contains no indication of challenged action or decision".

As a result, the complainant loses the right to exercise his right guaranteed by Article 69 of the Constitution - the right to the review of the verdict against him adopted by a higher court on the grounds provided by the law (in this case, the Court of Appeal).

Moreover, the Constitutional Court states that the legislator, when providing the aforementioned preconditions for the exercise of the person's right to appeal the verdict, has not, in substance, demonstrated a differentiated approach in terms of violation of the precondition and subsequent possible legal consequences associated, in particular, with the provision of a legal possibility to amend the formal right which substantially does not prevent the exercise of the right of a particular omission (error) and reiterate lodging of the appeal, and such a possibility exists in the current court procedures in civil and administrative cases. However, there is a differentiated approach in the Code in the procedure of cassation appeal. Article 414.1 of the Code essentially separates the cases of the return of the cassation appeal and leaving it without consideration. Thus, if an appeal was lodged by a person who is not entitled to do so, or the

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<sup>5</sup> [https://hudoc.echr.coe.int/eng-press#{"fulltext":\["Poirot v. France"\]}](https://hudoc.echr.coe.int/eng-press#{)

appeal is overdue (there is no substantiated reason for the recovery), or it is submitted against a judicial act that cannot be appealed and in case of presence of other such reasoning, when a person, by virtue of a fact, from the legal point of view is objectively unable to exercise his right to a judicial appeal, then the prohibition on the exercise of this right, as provided for in Point 2 of Article 381 of the Code, can be assessed as legitimate as a result of the due process of law.

Meanwhile, on the basis of the violation of the content of the appeal, which is formal in nature, when there is a reasonable legal possibility to eliminate it, depriving the person of the exercise of the right to judicial review guaranteed by the Constitution and its restriction, according to the assessment of the Constitutional Court, cannot proceed from the constitutionally enshrined principles of guaranteeing and exercising the rights of a person to effective judicial protection of his/her rights and freedoms, as well as from the constitutional legal goals assigned to the public power of this domain. Consequently, the Constitutional Court considers that, based on the failure to comply with the formal requirements due to the challenged legal regulations, restricting the right of a person to judicial protection of his/her fundamental rights and freedoms, including the right of access to a court, the principle of proportionality enshrined in Article 78 is violated. From the point of view of the constitutional legal content of Article 75 of the Constitution, this legal regulation does not meet the criteria of the procedure of the effective exercise of rights and freedoms. Consequently, the Constitutional Court also reiterates that the arguments of the applicant and the respondent regarding the constitutionality of the challenged provision are justified.

The Constitutional Court also considers that the provision of Part 6 of Article 103 of the Code within the framework of submission of an appeal cannot be accepted and applied as a legal basis for the court to return the appeal if there is a reasonable possibility to correct the errors indicated in the said norm and re-submit the appeal.

Based on the review of the Case and governed by Point 1 of Article 168, Part 4 of Article 169 of the Constitution of the Republic of Armenia, Articles 63, 64 and 71 of the Constitutional Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To recognize the provision “in the case when the appeal does not meet the requirements prescribed by this article, ..., by the decision of the Court of Appeal, it remains without

consideration” of part 2 of Article 381 of the RA Criminal Procedure Code as far as in the case of non-compliance with the formal complaint and does not act as a significant obstacle to the requirements of the implementation of the right, precludes the legal possibility of its correction by the complainant and the repeated submission to the Court of Appeal, as contradicting Part 1 of Article 61, Articles 69, 75 and 78 of the Constitution of the Republic of Armenia

2. Taking as basis Part 3 of Article 170 of the Constitution of the Republic of Armenia on the basis of the requirements of Part 19 of Article 68 of the Constitutional Law of the Republic of Armenia "On the Constitutional Court", considering that the recognition in the operative part of this decision of the challenged provision of Part 2 of Article 381 of the RA Criminal Procedure Code contradicting the Constitution of the Republic Armenia, for persons exercising their right to appeal judicial acts in the Court of Appeal in the framework of criminal proceedings, will inevitably create such consequences that would jeopardize the legal security envisaged by the abolition of the above-mentioned provision, the final date of the lapses of the provision, recognized by this Decision as contradicting with the Constitution of the Republic of Armenia, to establish on December 1, 2018, allowing the National Assembly of the Republic of Armenia to bring the challenged legal regulation into compliance with the requirements of this Decision, taking into account also the need to guarantee the exercise of persons' right to appeal at the RA Criminal Court of Appeal upon promulgation of this Decision to the appropriate legislative regulation.

3. Pursuant to Part 2 of Article 170 of the Constitution of the Republic of Armenia this Decision shall be final and shall enter into force upon its promulgation.

**Chairman**

**H. Tovmasyan**

19 June 2018

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