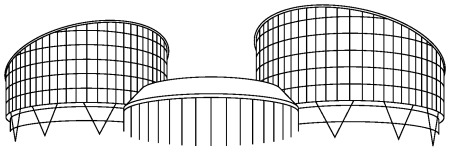

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ARZUMANYAN v. ARMENIA

(Application no. 25935/08)

JUDGMENT

STRASBOURG

11 January 2018

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Arzumanyan v. Armenia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Linos-Alexandre Sicilianos, *President,*
Kristina Pardalos,
Krzysztof Wojtyczek,
Ksenija Turković,
Armen Harutyunyan,
Pauliine Koskelo,
Jovan Ilievski, *judges,*

and Abel Campos, *Section Registrar,*

Having deliberated in private on 5 December 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 25935/08) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Aleksandr Arzumanyan ("the applicant"), on 29 December 2007.

2. The applicant was represented by Mr V. Grigoryan, a lawyer practising in London. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Republic of Armenia to the European Court of Human Rights.

3. The applicant alleged, in particular, that the domestic courts had failed to provide relevant and sufficient reasons for his detention.

4. On 6 September 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1959 and lives in Yerevan. He is a former Minister of Foreign Affairs and at the material time he headed a political movement called "Civil Disobedience".

6. On 5 May 2007 criminal proceedings were instituted under Article 190 § 3 (1) of the Criminal Code (money laundering) in respect of the applicant.

7. On 7 May 2007 the applicant was arrested and on 10 May 2007 the Kentron and Nork-Marash District Court of Yerevan ordered the applicant's detention for a period of two months, upon an application by the investigator, taking into account the nature and the dangerousness of the imputed offence and the fact that the applicant, if remaining at large, could abscond and obstruct the investigation by exerting unlawful influence on the persons involved in the proceedings. The applicant objected to that application, arguing that the investigator had failed to submit any well-founded arguments in support of the allegation that he would abscond or obstruct justice, whereas he had no previous convictions, was known to be of good character, had a permanent place of residence and stable social life, and was a well-known public figure. The District Court's decision stated that it could be contested before the Criminal Court of Appeal within fifteen days.

8. On 11 May 2007 the applicant lodged an appeal, raising similar arguments.

9. On 24 May 2007 the Criminal Court of Appeal decided to uphold the decision of the District Court, finding that the nature and the dangerousness of the imputed offence, the particular circumstances of the case and the possible investigative measures to be carried out gave sufficient reasons to believe that the applicant could obstruct the investigation.

10. On 2 July 2007 the Kentron and Nork-Marash District Court of Yerevan extended the applicant's detention by two months, upon an application by the investigator, finding that the applicant, if remaining at large, could obstruct the investigation, abscond, exert unlawful influence on the persons involved in the proceedings and commit another offence. The District Court's decision stated that it could be contested before the Criminal Court of Appeal.

11. On 3 July and 3 September 2007 the applicant lodged an appeal, raising arguments similar to those previously raised.

12. On 24 July 2007 the Criminal Court of Appeal decided to uphold the decision of the District Court, finding that the nature and the dangerousness of the imputed offence, the particular circumstances and complexity of the case; the investigative measures to be carried out and the applicant's behaviour, namely his refusal to give any testimony, which was a factor slowing down the investigation, gave sufficient reasons to believe that the applicant could obstruct the investigation by exerting unlawful influence on the persons involved in the proceedings and also abscond.

13. On 31 August 2007 the Kentron and Nork-Marash District Court of Yerevan extended the applicant's detention by two months, upon an application of the investigator, on the same grounds as before. The District Court's decision stated that it could be contested before the Criminal Court of Appeal.

14. On 3 September 2007 the applicant lodged an appeal, raising arguments similar to those previously raised

15. On 6 September 2007 the investigator decided to replace the applicant's detention with a written undertaking not to leave his residence and to release him in view of the fact that the investigative measures would take some time and it was no longer necessary to keep the applicant in detention.

16. On 17 September 2007 the Criminal Court of Appeal decided to leave the applicant's appeal of 3 September 2007 unexamined in view of the fact that he had been released.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution

17. The Armenian Constitution was enacted in 1995. On 27 November 2005 the Constitution was amended with effect from 6 December 2005. In accordance with the new Article 92 of the Constitution, the Court of Cassation, as the highest judicial instance, was entrusted with a new role, namely to ensure the uniform application of the law.

18. Article 22 of the Constitution provided at the material time that no one was obliged to testify against himself, his spouse or a close relative.

B. Code of Criminal Procedure (in force since 1999)

19. Article 137 § 5 provides that a court decision imposing detention as a preventive measure may be contested before a higher court.

20. Article 287 provides that an appeal against a court decision whether or not to impose or extend detention may be lodged with the Court of Appeal.

21. Article 403 provided at the material time that an appeal on points of law might be lodged against final judgments and decisions of the first instance courts and the Court of Appeal.

C. Decisions of the Council of Court Chairmen

1. Decision no. 20 of 12 February 2000

22. Paragraph 4 of the Decision stated that Article 137 § 5 of the Code of Criminal Procedure (CCP) prescribed that a court's decision to impose detention as a preventive measure might be contested before a higher court. However, the Code did not provide for a procedure for contesting the lawfulness and reasons of the Court of Appeal's decisions imposing and

extending detention. Hence, in such cases the Court of Appeal's decisions might be contested before the Court of Cassation.

2. Decision no. 83 of 8 December 2005

23. The Decision stated that Paragraph 4 of Decision no. 20 of the Council of Court Chairmen of 12 February 2000 was repealed, taking into account that under Article 92 of the Constitution the Court of Cassation, as the highest general jurisdiction court, was called upon to ensure the uniform application of the law.

3. Decision no. 96 of 5 April 2006

24. The Decision set out the new text of Paragraph 4 of Decision no. 20 of the Council of Court Chairmen of 12 February 2000. It stated that, since under Article 92 of the Constitution the Court of Cassation was the highest judicial instance called upon to ensure the uniform application of the law, an appeal to that court against decisions taken in pre-trial proceedings, including any decision on detention, did not follow from its constitutional status. Such appeals were to be left unexamined. In exceptional cases they might be examined by the Court of Cassation, if they raised issues of importance for judicial practice.

D. Decisions of the Court of Cassation

25. On 13 July and 30 August 2007 the Court of Cassation examined appeals on points of law in two detention cases (decisions nos. VB-115/07 and VB-132/07). Both appeals on points of law were lodged by the General Prosecutor's Office against decisions of the Criminal Court of Appeal releasing the relevant detainees on bail. The appeals on points of law were admitted for examination on the ground that a decision by the Court of Cassation in those cases might have a significant impact on the uniform application of the law. The Court of Cassation quashed the decisions of the Court of Appeal, finding, *inter alia*, that that court had no authority under the law to release a detainee on bail, if that issue had not been the subject of examination before the trial court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

26. The applicant complained that the domestic courts had failed to provide relevant and sufficient reasons for his detention as required by Article 5 § 3 of the Convention, which reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

27. The Government contested that argument.

A. Admissibility

28. The Government claimed that the applicant had failed to exhaust the domestic remedies. In particular, he had not lodged appeals on points of law with the Court of Cassation against the decisions of the Criminal Court of Appeal of 24 May and 24 July 2007. The Government argued that such a procedure was envisaged by the domestic law, namely Article 403 of the CCP. The Government contested the applicant's argument that the Court of Cassation was no longer an available remedy in detention cases after the introduction of the constitutional amendments of 2005 and argued that there was no law limiting the jurisdiction of the Court of Cassation to examine such cases. They also contested the applicant's reliance on the case of *Grigoryan v. Armenia* (no. 3627/06, 10 July 2012) and pointed to the fact that the Court of Cassation had in fact examined two detention cases in 2007 and 68 such cases in 2008. Therefore, the applicant's failure to lodge appeals on points of law had been based on mere doubts.

29. The applicant submitted that he had not lodged appeals on points of law against the decisions of the Criminal Court of Appeal because the Court of Cassation had stopped examining such appeals in detention cases following the entry into force of the 2005 constitutional amendments. He referred to the circumstances of the case of *Grigoryan* (cited above, §§ 25-27 and 110-115) in which the Court of Cassation had left an appeal on points of law against a detention decision unexamined with reference to the constitutional amendments and the decision of the Council of Court Chairmen of 8 December 2005, and argued that the Government's submissions were in contradiction with the official position of the Court of Cassation. As regards the two cases examined by the Court of Cassation in 2007, neither decision had even been published for the applicant to be aware of the fact that the Court of Cassation had abandoned its malpractice. Furthermore, the existence of a mere two decisions for the whole period between 2005 and August 2007 clearly demonstrated that that remedy had

been unavailable in practice. Moreover, the decisions in question had been taken either during the running of the appeal time-limit in his detention case or after its expiry. He could therefore not predict such developments.

30. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 et al., ECHR 2010). Under Article 35 of the Convention, the existence of remedies which are available and sufficient must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Paksas v. Lithuania* [GC], no. 34932/04, § 75, ECHR 2011 (extracts)). It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Kennedy v. the United Kingdom*, no. 26839/05, § 109, 18 May 2010). Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case (see *Betteridge v. the United Kingdom*, no. 1497/10, § 48, 29 January 2013).

31. The Court notes in this connection that the CCP was enacted in 1999 and it contained no explicit provision providing for a procedure for contesting detention decisions before the Court of Cassation, as confirmed by the decision of 12 February 2000 of the Council of Court Chairmen, a body vested with the authority of providing advisory and non-binding interpretation of domestic law (see paragraph 22 above). Thus, the Government's allegation that such a right was provided by Article 403 of the CCP appears to contradict the interpretation given to the relevant provisions of the CCP by the judicial authorities. The Court further notes that, following the decision of 12 February 2000, the right to appeal to the Court of Cassation in detention cases was made available in practice if not in law, but – as the Government themselves had acknowledged in their observations in the case of *Grigoryan* (see *Grigoryan*, cited above, § 110) – that practice was abandoned following the introduction of the constitutional amendments of 6 December 2005: on 8 December 2005 the Council of Court Chairmen repealed its decision of 12 February 2000 and on 5 April 2006 it issued another decision stating that, due to its new constitutional status, the Court of Cassation was no longer to examine appeals against decisions taken in pre-trial proceedings, including any decision on detention (see paragraphs 17, 23 and 24 above). As it appears from the case of

Grigoryan, the Court of Cassation applied that new approach in practice (as *Grigoryan*, cited above, §§ 25-27 and 113-115).

32. Nothing suggests that there had been any decisive shift on that matter in law or in practice by the time the courts examined the applicant's detention case. The decisions of the Council of Court Chairmen of 8 December 2005 and 5 April 2006 had not been repealed or modified and there had not been any pertinent amendments to the CCP. It is notable also that none of the decisions taken by the Court of Appeal in the applicant's case stated that they could be contested before the Court of Cassation, which was the normal practice (see paragraphs 9 and 12 above and compare with paragraphs 7, 10 and 13 above). As regards the two decisions of the Court of Cassation indicated by the Government (see paragraph 25 above), it is not clear on what grounds appeals on points of law were lodged in those two cases by the General Prosecutor's Office and, moreover, admitted for examination by the Court of Cassation. It is noteworthy that the Court of Cassation did not provide any explanation or reasoning for its decisions to admit those appeals or any interpretation of the relevant domestic provisions regarding the right to appeal in detention cases that would signal a shift in its approach. Thus, the situation at hand must be distinguished from cases in which a new remedy is created as a result of interpretation of the domestic law by the courts, in which cases it normally takes six months for such a development of the case law to acquire a sufficient degree of certainty before the public may be considered to be effectively aware of the domestic decision which had established the remedy and the persons concerned be enabled and obliged to use it (see, among other authorities, *Majski v. Croatia*, no. 33593/03, § 70, 1 June 2006; *Depauw v. Belgium* (dec.), no. 2115/04, 15 May 2007; and *Provide S.r.l. v. Italy*, no. 62155/00, § 18, 5 July 2007). Furthermore, it cannot be ruled out that those two cases simply fell into the category of "exceptional cases" mentioned in the decision of the Council of Court Chairmen of 5 April 2006 (see paragraph 24 above). However, no explanation has been provided by the Government – or the Court of Cassation itself – as to whether that was indeed the case and, if so, what criteria were applied in such "exceptional cases". In such circumstances, the Court cannot but endorse its earlier findings and conclude that the right to appeal to the Court of Cassation in detention cases was not available at the material time (see *Grigoryan*, cited above, § 113), since it has not been demonstrated that such a right was sufficiently certain either in law or in practice and in fact all the circumstances point to the contrary. The Court would nevertheless lastly add that, even assuming that there was a clearly defined shift in the Court of Cassation's approach and the principles and time limits enshrined in the above-mentioned case law were applicable in the present case, the first appeal in question was examined by the Court of Cassation on 13 July 2007, that is roughly around the same period when the applicant's detention case

was pending before the lower courts. In such circumstances, the applicant could not reasonably be expected to have predicted such a development or be blamed for not being aware of it. Nor would the existence of only two decisions suggest that there was an established practice at the material time. In view of the foregoing, the Court decides to dismiss the Government's non-exhaustion objection.

33. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

34. The applicant alleged that the courts had failed to provide relevant and sufficient reasons for his detention.

35. The Government argued that the courts had provided relevant and sufficient reasons when imposing and extending the applicant's detention, such as the risk of absconding and obstructing the investigation.

36. The Court refers to its general principles under Article 5 § 3 of the Convention relating to the right to be released pending trial (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, §§ 92-102, ECHR 2016 (extracts), and *Ara Harutyunyan v. Armenia*, no. 629/11, §§ 48-53, 20 October 2016) and notes that it has already found the use of stereotyped formulae when imposing and extending detention to be a recurring problem in Armenia (see *Piruzyan v. Armenia*, no. 33376/07, §§ 97-100, 26 June 2012; *Malkhasyan v. Armenia*, no. 6729/07, §§ 74-77, 26 June 2012; *Sefilyan v. Armenia*, no. 22491/08, §§ 88-93, 2 October 2012; and, most recently, *Ara Harutyunyan*, cited above, §§54-59). The present case does not appear to be different: the domestic courts similarly justified the applicant's continued detention with a mere citation of the relevant domestic legal principles and a reference to the gravity of the offence without addressing the specific facts of his case or providing any details as to why the risks of absconding, obstructing justice or reoffending were justified (see paragraphs 7, 9, 10, 12 and 13 above). The Court therefore concludes that the domestic courts failed to provide relevant and sufficient reasons for their decisions imposing and extending the applicant's detention.

37. There has accordingly been a violation of Article 5 § 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

39. The applicant claimed 81,250 euros (EUR) in respect of non-pecuniary damage.

40. The Government claimed that there was no causal link between the violation alleged and the non-pecuniary damage claimed, which was also exaggerated and not supported by any evidence.

41. The Court considers that the applicant undoubtedly suffered non-pecuniary damage as a result of the violation found. It therefore awards the applicant EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

42. The applicant also claimed 850,000 Armenian drams (approximately EUR 1,630 at the material time) for the legal costs incurred before the Court. He submitted a copy of the contract concluded with his lawyer and of the relevant invoice.

43. The Government argued that the amount claimed was unreasonable and not well-documented and, in any event, had to be reduced since a part of the applicant's initial complaints had been declared inadmissible.

44. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002). In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 500 for the proceedings before the Court.

C. Default interest

45. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the alleged lack of relevant and sufficient reasons for the applicant's detention admissible;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 500 (five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 January 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Registrar	Linos-Alexandre Sicilianos President