



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

THIRD SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 34334/04
by Ashot HARUTYUNYAN
against Armenia

The European Court of Human Rights (Third Section), sitting on 7 December 2006 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr C. BÎRSAN,
Mrs A. GYULUMYAN,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON,
Mrs I. BERRO-LEFÈVRE, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 14 September 2004,
Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Ashot Harutyunyan, is an Armenian national who was born in 1952 and lives in Yerevan. He is represented before the Court by Mr H. Alumyan, a lawyer practising in Yerevan.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Institution of criminal proceedings against the applicant and his detention

a. The investigation

On 29 November 2001 criminal proceedings were instituted in respect of the applicant on account of fraudulent acquisition of property and falsification of documents. The applicant was suspected of defrauding his business partner, V.G.

On 8 February 2002 the investigating authority ordered a handwriting expert opinion to be prepared by a handwriting expert. On 8 May 2002 the investigating authority ordered two accounting expert opinions to be prepared by accounting experts V.A. and A.M. According to the applicant, at an unspecified point during the investigation he was able to question all the above-mentioned experts.

On 29 May 2002 the investigating authority decided to terminate the criminal proceedings due to the lack of *corpus delicti*.

On 26 June 2002 the Yerevan City Prosecutor (*Երևան քաղաքի դատախազ*) quashed this decision and reopened the investigation.

On 8 July 2002 the investigating authority recognised V.G. as a victim and as the civil plaintiff.

On 14 March 2003 the applicant was formally charged with the above offences, including a new charge of tax evasion.

On 12 June 2003 the investigating authority prepared the indictment which contained the list of persons subject to appear in court. This list included the applicant's accountant K.S., treasurer K.M. and ten other witnesses and experts.

b. The applicant's state of health and the alleged lack of requisite medical assistance in detention

On 6 May 2003 the Kentron and Nork-Marash District Court of Yerevan (*Երևան քաղաքի կենտրոնն և Նորք-Մարաշ համայնքների ամսջին ատյանի դատարան*) decided to detain the applicant on remand. He was placed in Nubarashen Detention Facility (*«Նուբարաշեն» քրեակատարողական հիմնարկ*).

On 20 June 2003 the applicant was examined by a surgeon of the medical unit to whom he complained of pain in the epigastric region. The surgeon recommended surgery of the acute bleeding duodenal ulcer from which the applicant suffered. The applicant agreed in writing to have the surgery.

On 26 June 2003 the applicant was transferred to the Hospital for Prisoners (*«Դատապարտյալների հիվանդանոց» քրեակատարողական հիմնարկ*) where, according to the information provided by the Government in reply to a request made under Article 49 § 2 (a) of the Rules of Court, he underwent the recommended surgery. The applicant contests this fact and claims that no surgery was carried out.

According to an undated discharge summary (*էպիկրիզ*) issued by the Chief of the Hospital and the Head of the Surgical Unit:

“Following the relevant examination and consultations carried out in the unit, [the applicant] was diagnosed as having ulcer, acute bleeding duodenal ulcer, diabetes (type 2, medium degree, subcompensated stage) and diabetic angiopathy, for which, apart from the relevant treatment, on 4 July 2003 [the applicant] received haemostatic therapy of ulcer and was discharged on 29 July 2003. The patient must undergo regular medical check-ups.”

On 29 July 2003 the applicant was transferred back to the detention facility.

On 5 August 2003 the applicant was transferred to the medical unit of Nubarashen Detention Facility for further treatment since his state of health deteriorated. At the medical unit the applicant was examined by a doctor to whom he complained of, *inter alia*, pain in his chest, dry mouth, asthenia, headache and dizziness, and occasional vomiting. According to the records made in his medical file provided by the Government, from 11 to 29 August 2003 the applicant was under regular medical observation and received medication.

On 9 September 2003 the applicant’s counsel applied to the Head of the Criminal Corrections Unit of the Ministry of Justice (*ՆՀ արդարադատության նախարարության քրեակատարողական վարչության պետ*), stating that the applicant’s state of health required regular medical check-ups and requesting that he be transferred for treatment to the Hospital for Prisoners.

On 13 October 2003 the applicant was transferred back to his cell in the detention facility.

According to the applicant, from the date of his transfer to the detention facility until his transfer to a correctional facility on 13 August 2004, he was never examined by a doctor. He has verbally applied on numerous occasions to the administration of the detention facility requesting medical assistance, but no such assistance or medication was provided, or any special diet prescribed. The necessary medicines and food products were provided by his relatives on a regular basis.

The Government confirmed that the applicant had verbally applied to the administration of the detention facility for medical assistance within the mentioned period, but claimed that such assistance had been provided to the applicant on each and every occasion, including necessary medicines and diet. He was regularly checked by a doctor and, if any symptoms were disclosed, he promptly received the necessary treatment. The detention facility was staffed with the following specialists: two physicians, one psychiatrist-neurologist, one dermatologist, one dentist, one tuberculosis specialist, one laboratory assistant and six doctors’ assistants. The latter every day visited the detainees to check their health and the doctors were immediately alerted if there were any problems.

On 9 February 2004, as it appears from the relevant certificate, the applicant was found to be fit for work after being examined by a doctor.

On 17 June 2004 the applicant's counsel applied to the Chief of Nubarashen Detention Facility, complaining that it was dangerous for the applicant's health to be kept in a common cell. He further complained that, in spite of this, the applicant had been recently transferred to another cell which had even worse conditions. The counsel requested that the applicant be transferred to a hospital for treatment.

On 17 July 2004 the applicant's counsel applied to the Head of the Criminal Corrections Unit of the Ministry of Justice, complaining that, notwithstanding the applicant's state of health, he was kept in a common cell. He further complained that the Chief of Nubarashen Detention Facility had failed to transfer the applicant to a hospital and to provide treatment.

On 27 July 2004, at 1.20 a.m., an ambulance was called to the detention facility since the applicant suffered a heart attack.

On 28 July 2004 the applicant's counsel lodged a similar complaint as on 17 July 2004, with a copy to the Chief of Nubarashen Detention Facility.

By a letter of 29 July, the Head of the Criminal Corrections Unit replied to the counsel's complaints, stating that the applicant had been already twice hospitalised for treatment on 26 June-29 July 2003 and 5 August-13 October 2003. The applicant was currently under observation of the medical staff and his state of health was satisfactory.

On 11 and 12 August 2004 the applicant's counsel lodged two complaints with the Head of the Criminal Corrections Unit and with the Minister of Justice, with a copy to the Chief of Nubarashen Detention Facility, claiming that the applicant's state of health was deteriorating day by day, but no measures were being taken. He submitted that the applicant's illnesses required a special diet, regular medical check-ups and medication. In spite of this, the applicant was kept in conditions where none of this was available.

On 13 August 2004, following his conviction, the applicant was transferred to a correctional facility to serve his sentence.

2. The court proceedings

On 14 June 2003 the criminal case against the applicant was put before the Malatia-Sebastia District Court of Yerevan (*Երևան քաղաքի Մալաթիա-Սեբաստիա համայնքի առաջին ատյանի դատարան*).

On 3 December 2003 the applicant's counsel requested the Malatia-Sebastia District Court of Yerevan to order an additional accounting expert opinion. The court refused this request stating that there was sufficient evidence in the case file to conclude whether the charges against the applicant were substantiated.

On the same date, the victim lodged his civil claim seeking damages in the amounts of 34,159,008 Armenian drams (AMD) and 119,000 United States dollars (USD).

On 27 January 2004 the Malatia-Sebastia District Court of Yerevan found the applicant guilty as charged and sentenced him to seven years in prison. The court also fully granted the victim's civil claim for damages. The court based its judgment on the relevant expert opinions, various documents and statements of witnesses and experts, including accountant K.S., treasurer K.M. and accounting expert V.A., who were called and examined in court.

On 10 February 2004 the applicant's defence counsel lodged an appeal with the Criminal and Military Court of Appeal (*ՀՀ քրեական և զինվորական գործերով վերաքննիչ դատարան*). The applicant also submitted written explanations, in which he requested the Court of Appeal to call and examine the victim's accountant S.H. as a witness. He also requested that accountant K.S. and treasurer K.M. be called for an additional examination. He further asked to call three other persons, K., H. and Z. To substantiate his request to have accountants S.H. and K.S. called and examined, the applicant submitted to the court two accounting reports prepared by them, which, according to him, contained exculpatory information.

On 19 March 2004 the Criminal and Military Court of Appeal held its first hearing. In the proceedings before the Court of Appeal, the applicant was placed in an iron cage which measured about 3 sq. m. The applicant's defence counsel requested the court to release the applicant from the cage. The court refused this request, finding that the applicant's placement in the cage was not degrading or humiliating, nor did it violate the equality of arms. Furthermore, it was necessary for security reasons.

At the hearing of 21 May 2004 the applicant repeated his request to call witnesses made earlier in his written explanations. The Court of Appeal refused this request on the ground that K.S. and K.M. had been already examined and made detailed statements during the investigation and the proceedings in the District Court. As to the accountant S.H., the court stated that it was unnecessary to call her in this particular case. As to K., H. and Z., the court stated that their identity was unknown.

At the same hearing, the applicant also requested the Court of Appeal to order an additional accounting expert opinion. The Court of Appeal decided to adjourn the examination of this request and to revert to it in the deliberation room when adopting its judgment.

On 25 May 2004 the Criminal and Military Court of Appeal upheld the sentence imposed on the applicant. The court only partially granted the victim's civil claim and reduced the amount of compensation. In its judgment, the Court of Appeal referred, *inter alia*, in detail to the relevant

expert opinions and found that there was no need to order an additional accounting expert opinion.

On 4 June 2004 the applicant's defence counsel lodged a cassation appeal with the Criminal and Military Chamber of the Court of Cassation (ՀՀ վճռաբեկ դատարանի քրեական և զինվորական գործերով սպաստ).

On 30 July 2004 the Criminal and Military Chamber of the Court of Cassation dismissed the counsel's appeal and upheld the applicant's conviction. The applicant was absent from this hearing, which was held in the presence of his defence counsel, the prosecutor, the victim and the latter's lawyer. The applicant submits that he requested the Court of Cassation to allow him to be present at this hearing but this request was refused.

B. Relevant domestic law

1. Medical assistance in detention

According to Article 13 of the Law on Conditions for Keeping Arrested and Detained Persons, a detainee has the right, *inter alia*, to healthcare, including to receive sufficient food and urgent medical assistance.

According to Article 21 of the Law, the administration of a detention facility shall ensure the sanitary, hygienic and anti-epidemic conditions necessary for the preservation of health of detainees. At least one doctor having a general specialisation shall work at the detention facility. A detainee in need of specialised medical assistance must be transferred to a specialised or civilian medical institution.

2. Calling of witnesses

According to Article 65 § 2 (12) of the Code of Criminal Procedure (CCP), the accused has the right to lodge requests.

According to Article 271 § 1 of the CCP, the list of persons subject to be called to court is attached to the indictment. The investigator must indicate in the list the location of these persons and the pages of the case file which contain their statements or conclusions.

COMPLAINTS

1. The applicant complains under Article 3 of the Convention that

(a) his placement in an iron cage during the proceedings in the Criminal and Military Court of Appeal in front of his family and the public amounted to degrading treatment; and

(b) he did not receive requisite medical assistance while in detention. In particular, he submits that he suffered from a number of diseases which required special treatment, medicine and diet, which were not provided to him.

2. The applicant complains under Article 6 § 1 of the Convention that

(a) the Chairman of the Criminal and Military Chamber of the Court of Cassation was not impartial since his son worked as an investigator at the Yerevan City Prosecutor's Office where the criminal case was investigated;

(b) the courts examined and granted the victim's civil claim for damages in an amount which exceeded and did not form a part of the indictment against him. They also failed to give reasons for the harshness of the sentence imposed. Furthermore, the Court of Appeal failed to adopt a reasoned judgment. In particular, it admitted as evidence certain exculpatory documents submitted by the applicant but failed to consider them, since there was no reference to them in its judgment;

(c) he was not allowed to be present at the hearing of the Court of Cassation, while the prosecutor, the victim and the latter's lawyer were present; and

(d) the proceedings were not conducted within a reasonable time.

3. The applicant complains under Article 6 §§ 1 and 2 of the Convention that the principles of equality of arms and of the presumption of innocence were violated by his placement in an iron cage during the proceedings in the Criminal and Military Court of Appeal. This made him feel unequal vis-à-vis the prosecution and also made him look like a criminal.

4. The applicant complains under Article 6 § 3 (b) of the Convention that he did not have the possibility to properly build his defence and to submit evidence since the courts rejected his requests to order additional expert opinions. He submits that the handwriting and accounting expert opinions, which formed a part of the indictment against him, were ordered and prepared at the investigation stage when he was not yet formally charged and was therefore deprived of the rights enjoyed by an accused.

5. The applicant complains under Article 6 § 3 (d) of the Convention that the Court of Appeal rejected his request to call witnesses K.S. and S.H. He further complains that the law itself fails to guarantee equality between the parties since, according to Article 271 of the CCP, the prosecution is free to choose the witnesses it wants to call without any prior permission by the court, while the accused is obliged to seek such permission.

6. The applicant complains under Article 4 of Protocol No. 7 that he was prosecuted twice, since the investigator's decision of 29 May 2002 discontinuing the criminal proceedings against him was set aside and the proceedings were reopened by an authority (the Yerevan City Prosecutor's Office) which did not have the competence to do this.

THE LAW

1. The applicant complains about being kept in an iron cage during the appeal proceedings. He also complains that he did not receive requisite medical assistance in detention. He invokes Article 3 of the Convention which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The Court considers that it cannot, on the basis of the file, determine the admissibility of this part of the application and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of the Court, to give notice of this complaint to the respondent Government.

2. The applicant complains about a violation of various fair trial guarantees in the proceedings against him. He invokes Article 6 § 1 of the Convention which, insofar as relevant, provides:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by an ... impartial tribunal established by law...”

a) As to the complaint concerning the alleged lack of impartiality of the Chairman of the Criminal and Military Chamber of the Court of Cassation, the Court considers that the fact that the Chairman had a relative working in the relevant prosecutor’s office, who had no apparent involvement in the applicant’s particular trial, cannot be regarded as a feature casting doubt on his impartiality as far as the said trial is concerned (see, *mutatis mutandis*, *Harutyunyan v. Armenia* (dec.), no. 36549/03, 5 July 2005).

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

b) As to the amount of civil damages and the sentence imposed by the courts and the reasons given in their judgments, the Court, first of all, reiterates that it is not for the Court to act as a court of appeal in respect of the decisions taken by domestic courts. It is the role of the domestic courts to interpret and apply the relevant rules of procedural or substantive law (see, e.g., *Fehr v. Austria*, no. 19247/02, § 32, 3 February 2005). Furthermore, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, *inter alia*, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

The Court further recalls that, even though Article 6 § 1 obliges the courts to give reasons for their judgments, it cannot be understood as requiring a detailed answer to every argument. Nor is the Court called upon to examine whether arguments are adequately met (see *Van de Hurk v. Netherlands* judgment of 19 April 1994, Series A no. 288, p. 20, § 61). Moreover, while Article 6 of the Convention guarantees the right to a fair

hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see, e.g., *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, §§ 45-46).

In the present case, the Court notes that the applicant had the benefit of adversarial proceedings. At various stages of these proceedings he was able to submit arguments and evidence which he considered relevant to his case. Furthermore, he was represented by a lawyer at all the stages of these proceedings. The judgments of both the District Court and the Court of Appeal, which examined the case on the merits, contained detailed factual and legal reasons for the finding of the applicant's guilt and the sentence imposed. The fact that the Court of Appeal did not expressly mention in its judgment certain evidence submitted by the applicant does not suggest that this evidence was not considered by this court. In view of the above, the Court considers that there is no appearance of a violation of Article 6 § 1 of the Convention.

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

c) As to the applicant's absence from the hearing of the Court of Cassation, the Court recalls that, provided that there has been a public hearing at first instance, the absence of "public hearings" before a second or third instance may be justified by the special features of the proceedings at issue. For instance, leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, although the appellant was not given an opportunity of being heard in person by the appeal or cassation court (see *Ekbatani v. Sweden*, judgment of 26 May 1988, Series A no. 134, § 31). Furthermore, the personal appearance of an accused before a higher court may not be required if he is legally represented before that court (*Kremzow v. Austria*, judgment of 21 September 1993, Series A no. 268-B, § 63).

In the present case, the applicant appeared both before the first instance and the appeal courts, which had the competence to examine the facts of the case and to impose a sentence, where he gave evidence and argued his case. The competence of the Court of Cassation was limited only to points of law and procedure. It could not examine the facts of the case, pronounce on the applicant's guilt or impose a sentence, and was competent only to remit the case for a new examination, if it were to grant the applicant's cassation appeal. Furthermore, the hearing before the Court of Cassation was held in the presence of the applicant's defence counsel. In such circumstances, the Court considers that the applicant's absence from the hearing before the Court of Cassation did not violate his right to a public hearing. Furthermore, the principle of equality of arms was not violated by the prosecutor's or the civil plaintiff's attendance since, as already indicated above, the applicant's defence counsel was present at this hearing.

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

d) As to the complaint about the length of proceedings, the Court notes that the proceedings were instituted on 29 November 2001 and terminated on 30 July 2004, which makes a total of about two years and eight months. Only about two years and three months fall within the Court's competence *ratione temporis*, since the Convention entered into force in respect of Armenia only on 26 April 2002. During this period an investigation was carried out and the case was examined at three judicial instances. In such circumstances, the Court considers that there is no appearance of a violation of the "reasonable time" requirement contained in Article 6 § 1 of the Convention.

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

3. The applicant complains under Article 6 § 1 of the Convention about being kept in an iron cage during the appeal proceedings. He also invokes Article 6 § 2 of the Convention which provides:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Court considers that it cannot, on the basis of the file, determine the admissibility of this part of the application and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of the Court, to give notice of this complaint to the respondent Government.

4. The applicant complains that the courts refused to order additional expert opinions. He invokes Article 6 § 3 (b) of the Convention which provides:

"Everyone charged with a criminal offence has the following minimum rights:

...

b) to have adequate time and facilities for the preparation of his defence;

..."

The Court reiterates that the domestic courts are best placed for assessing the relevance of the evidence to the issues in the case (see, e.g., *Fehr*, cited above). In the present case, the applicant was able to request the domestic courts to order additional expert opinions. His requests were duly examined by the courts and the reasons given for their refusals do not appear arbitrary. The Court further notes that the applicant was able to question all the relevant experts at various stages of the proceedings. Therefore, nothing suggests that the domestic courts, by refusing the applicant's relevant requests, overstepped the margin of appreciation enjoyed by the national authorities in such matters.

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

5. The applicant complains that he was not able to call and examine certain witnesses on his behalf. He invokes Article 6 § 3 (d) of the Convention which, insofar as relevant, provides:

“Everyone charged with a criminal offence has the following minimum rights:

...

d) ... to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

...”

The Court considers that it cannot, on the basis of the file, determine the admissibility of this part of the application and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of the Court, to give notice of this complaint to the respondent Government.

6. The applicant complains that he was prosecuted twice. He invokes Article 4 of Protocol No. 7 which, insofar as relevant, provides:

“No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.”

The Court recalls that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision (see *Gradinger v. Austria*, judgment of 23 October 1995, Series A no. 328-C, p. 65, § 53). In the present case, the final decision in the applicant’s case was taken by the Court of Cassation on 30 July 2004. No further proceedings on the same criminal charge have taken place. The fact that the criminal proceedings against the applicant were at some point discontinued but later resumed cannot be regarded as double jeopardy within the meaning of Article 4 of Protocol No. 7 (see, *mutatis mutandis*, *Smirnova and Smirnova v. Russia* (dec.), nos. 46133/99 and 48183/99, 3 October 2002).

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant’s complaints concerning his placement in an iron cage during the proceedings in the Criminal and Military Court of Appeal, the alleged lack of requisite medical assistance in detention, and the alleged violation of his right to call and examine witnesses;

Declares the remainder of the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President