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

THIRD SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 36549/03
by Misha HARUTYUNYAN
against Armenia

The European Court of Human Rights (Third Section), sitting on 5 July 2005 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mr V. ZAGREBELSKY,
Mrs A. GYULUMYAN,
Ms R. JAEGER, *judges*
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 29 October 2003,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Misha Harutyunyan, is an Armenian national who was born in 1980 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.

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1. Background to the case

On 25 June 1998 the applicant was drafted to the army and assigned to military unit 33651 situated next to the border with Azerbaijan.

On 3 December 1998 the applicant, together with five co-servicemen, was appointed on watch in position no. 24.

On 4 December 1998 one of the six watchmen, serviceman H., was found in a nearby trench dead from a machine gun shot. At the time of the killing, only three of the remaining five watchmen were in the area of position no. 24, i.e. the applicant and servicemen T. and A. The latter two were together apparently not far from the position, cutting wood. It appears that the applicant was seen to have an argument with H. earlier that day.

2. Arrest of the applicant and servicemen T. and A., and their ill-treatment

On 4 and 5 March 1999 the applicant and servicemen T. and A. were brought to a military police station. The police officers started to beat them, forcing them to confess to H.'s murder. According to the applicant, they told the police officers that H. must have been shot from the other side of the border, to which the officers responded that it was already established that H. had been killed from a close distance and continued to beat them.

At first, the applicant was punched and kicked. Then the police officers started to hit him with rubber clubs. The applicant regularly fainted but was being brought back to consciousness and continued to be beaten. After a while the police officers started to squeeze the applicant's fingernails with pliers. The same torture techniques were applied to servicemen T. and A.

After two days, serviceman T. confessed to the investigator that he had eye-witnessed how the applicant took his machine-gun and shot H. Since serviceman A. was together with T. at the time of the murder, he was coerced to make a statement, according to which T. had told him that he had eye-witnessed the murder.

After this the police officers continued to torture the applicant, forcing him to confess to the murder. According to the applicant, this continued for over a month. He was not able to properly walk and talk, and all his fingernails were swollen.

On 16 April 1999 the applicant was interrogated by the investigator, to whom he confessed that he had accidentally shot H. On 17 April 1999 the applicant was taken to the crime scene, where he had to make the same statement in front of a video camera and a relevant record was drafted.

According to the applicant, immediately after their release from the Police Station on an unspecified date, servicemen T. and A. informed the Military Prosecutor of Armenia (ՀՀ *զինվորական դատախազ*) in writing that they had been coerced to slander the applicant.

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On 19 June 1999 the applicant and servicemen T. and A. were subjected to medical examinations, during which various injuries were recorded on their fingers and A.'s head.

3. Criminal proceedings against the applicant and his conviction at first instance

On an unspecified date, criminal proceedings were brought against the applicant.

It appears that on 11 August 1999 a confrontation was held between the applicant and serviceman T., during which the latter confirmed his earlier testimony against the applicant.

On an unspecified date, the case was put before a court. On 26 October 1999 a hearing was held, during which serviceman T. apparently made similar oral submissions as a witness.

On 6 December 1999 the Syunik Regional Court (*Սյունիքի մարզի առաջին ատյանի դատարան*) found the applicant guilty of premeditated murder and sentenced him to 13 years in prison.

On 15 June 2000 the Criminal Court of Appeal (*ՀՀ քրեական և զինվորական գործերով վերաքննիչ դատարան*) quashed this judgment and remitted the case for an additional investigation.

On 12 September 2000, following the additional investigation, the case was put before a court.

On 13 June 2001 the Syunik Regional Court decided to remit the case for a further investigation.

On 3 August 2001 the Criminal Court of Appeal quashed this decision upon the prosecutor's appeal and remitted the case to the Regional Court to be examined on the merits.

In the proceedings before the Syunik Regional Court, the applicant's defence counsel asked for the applicant's confession statements of 16-17 April 1999 and the first testimonies of witnesses T. and A. to be declared inadmissible, since these had been obtained under torture. It appears that, at that time, criminal proceedings had been already brought against the relevant military police officers on account of the applicant's and servicemen T. and A.'s torture.

On 19 June 2002 the Regional Court found the applicant guilty of premeditated murder and sentenced him to ten years in prison. In doing so, the Regional Court first stated that "on 16 and 17 April 1999 the applicant confessed of having accidentally killed serviceman H. Later he revoked this confession as one made under the influence of ill-treatment and threats, and submitted that he was not aware of the circumstances of H.'s murder. However, this submission contradicted other evidence obtained in the case".

As such evidence, the Court first cited "the first testimony given by witness T. to the investigator, according to which he secretly followed the applicant and eye-witnessed the murder. Similar submissions were made by

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witness T. during the confrontation with the applicant and at the court hearing of 26 October 1999. At a later stage and during these proceedings, witness T. revoked these statements as ones made under the influence of ill-treatment and submitted that he was not aware of the circumstances of serviceman H's murder. Similar submissions were made by witness A.".

The Court went on to cite a number of circumstantial and hearsay witness statements and an expert opinion, according to which the shot had been made from a close distance, and concluded that:

> "Having evaluated the contradictory statements made by witnesses T. and A. during the preliminary investigation and the court proceedings, the court finds that in reality the coercion was applied by [the police officers] ... for the disclosure of the truth."

The Court found that "the new statements made by witness T. were false and were aimed at helping the applicant to avoid criminal liability. The fact that witness T. was aware of the circumstances of serviceman H.'s murder was confirmed by the unconstrained submissions he made at the court hearing of 26 October 1999 without being subjected to any ill-treatment or threats, and the stories he told to two co-villagers following his demobilisation".

The Court finally cited other evidence substantiating the applicant's guilt, such as (i) a forensic examination of the victim's tissue samples and a medical examination of his corpse, according to which he had died from a shot made from a close distance; (ii) a ballistic examination, according to which the shell found at the crime scene had been fired from AK-74 type machine-gun no. 916236 which was issued to the applicant; (iii) the record of examination of the crime scene drafted on 17 April 1999, and a number of other materials.

4. Conviction of the military police officers

On 9 October 2002 the Avan and Nor Nork Districts Court of Yerevan (*Երևան քաղաքի Ավան և Նոր Նորք համայնքների առաջին ատյանի դատարան*) found military police officer M. and three others guilty of abuse of power and imposed sentences between three to three and a half years in prison. The Court found:

> "On 4 March 1999 [police officer M.], in connection with the murder of [serviceman H.] ... brought [servicemen A. and T.] and others to the military police station. On 5 March 1999 [the applicant was also brought to the station]. There [the police officers] beat them for several days, delivered numerous blows to [the applicant] and others with a rubber club, squeezed their fingernails with pliers, causing injuries of various degrees. Then [the police officers] forced them to take off their shoes, to put their hands on the backs of their heads and to go down on their knees, and started to club their soles. Under the threat of continuing the ill-treatment, [the police officers] forced [the applicant] to confess that he had murdered [serviceman H.], [serviceman T.] to state that he had eye-witnessed that murder, and [serviceman A.] to state that he was aware of that murder. [The police officers] also

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threatened the victims with retaliation, if they informed any higher authority about the ill-treatment...

On 5 January 2000 [police officer M.], in his office in the military police department in Yerevan, forced [serviceman A.] to state, in relation to the ill-treatment, that he was not familiar with [police officer M.], that nobody had beaten him and that the injuries on his fingers had been sustained as a result of his hand being squeezed by a car door...

This judgment was based on various witness statements, including those of the victims, and the results of the medical examinations.

In his witness statement, the applicant submitted, *inter alia*, that he was kept in the military police station until the end of March 1999 where he was regularly beaten. In the end of March 1999 he was transferred to a military prosecutor's office but then brought back to the police station on 10 April 1999. On his way back, police officer M. threatened him with retaliation, if he refused to confess. The same day another police officer also threatened him but promised to qualify the offence as accidental, if the applicant agreed to confess, after which he made his confession statement.

In his witness statement, serviceman A. submitted, *inter alia*, that after testifying to the investigator, he and serviceman T. were kept in the cafeteria of the police station for about a month. In the beginning of April, police officer M. called him and serviceman T. and demanded that, when questioned by the investigator, they tell him that they had not been beaten or ill-treated in the police station, and that the injuries on their fingers had been sustained as a result of being squeezed by a car door. On 5 January 2000 police officer M. threatened to kill him, if he informed the investigator about the ill-treatment.

In his witness statement, serviceman T. submitted, *inter alia*, that on 30 November 1999, under pressure from police officer M., he testified to the investigator that nobody had beaten him.

On an unspecified date, the applicant's defence counsel lodged an appeal against this judgment.

On 14 November 2002 the Criminal Court of Appeal refused to examine the appeal since, according to the domestic law, the victim in criminal proceedings had the right to appeal only if the proceedings had been instituted on the basis of his complaint.

On 26 December 2002 the Criminal and Military Chamber of the Court of Cassation (*ՀՀ վճռաբեկ դատարանի քրեական և զինվորական գործերով պալատ*) upheld this decision in the final instance.

5. Appeal and cassation proceedings in the applicant's case

On an unspecified date, the applicant lodged an appeal against his conviction of 19 June 2002.

In the proceedings before the Criminal Court of Appeal, during which the applicant was kept in the courtroom in an iron cage, he submitted that he

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was not aware of the circumstances of the serviceman H.'s murder and he had been coerced to make his confession statement.

Witness T. submitted that he had not seen who had killed serviceman H. since he and witness A. had been away at the material time. He further submitted that his statement made during the preliminary investigation, according to which he had eye-witnessed the murder, was untrue and he had been forced to make it. Immediately after the incident all five servicemen agreed to say that serviceman H. had been killed by an Azeri sniper, but in reality he knew nothing about the circumstances of H.'s murder. Witness A. made similar submissions.

On 1 April 2003 the Court of Appeal decided to uphold the applicant's conviction. In doing so, the Court found that the above submissions were made as a result of collusion between the applicant and the witnesses, aimed at helping him to avoid criminal liability. These submissions were rebutted by the evidence obtained in the case, such as:

(a) The applicant's confession statement of 16 April 1999 made to the investigator. Later and in court the applicant revoked this statement as one made under coercion, but failed to indicate the details of any coercion applied to him in the investigator's office.

(b) Submissions of witnesses T. and A. made during the court hearing of 26 October 1999, according to which one of them eye-witnessed and the other was aware of the murder. Witnesses T. and A. later revoked these submissions but accepted that no coercion had been applied to them in court and that these submissions, albeit untrue, had been made voluntarily.

(c) Other circumstantial and hearsay witness statements, the relevant expert opinions, various records and the video recording.

It appears that the Court of Appeal dismissed the applicant's defence counsel's request to call a hearsay witness on the applicant's behalf. It further appears that the Court refused to admit as evidence a specialist opinion presented by the applicant, which had been prepared by a Russian Forensic Expertise Centre. The Court found that the specialist opinion prepared by a foreign specialist had been presented in breach of the relevant domestic provisions and, in any event, according to the domestic procedural rules, it could not replace the expert opinion.

The Court concluded by saying that the evidence obtained under coercion in the military police station, which was corroborated by the factual circumstances of the case, had not constituted the basis for charges and had not been used as evidence.

On 14 April 2003 the applicant's defence counsel lodged an appeal. In his appeal he argued, *inter alia*, that the applicant's confession statement of 16 April 1999, as well as the record drafted and the video recording made the next day at the crime scene, had been made under the influence of the beatings, ill-treatment and threats inflicted on him, and, therefore, could not be used as evidence against him. Furthermore, the Court of Appeal should

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have not relied on the submissions made by witness T. at the very early stage of the proceedings, including the hearing of 26 October 1999, to justify the credibility of his first accusatory statement made under torture. These submissions had been the result of fear that witness T. had been experiencing following the unprecedented violence inflicted on him. He had been under constant pressure by the investigators, having been detained on several occasions, and at the time of the above hearing he had not yet been demobilised and was afraid of being taken back into custody and subjected to ill-treatment again. As an example of witness T. being afraid of telling the truth, the counsel referred to his testimony of 30 November 1999 in which he submitted that the injuries on his fingers had been sustained as a result of being squeezed by a car door. However, for the last three years, since he had revoked his earlier statements, witness T. had been insisting that he was not aware of the circumstances of serviceman H.'s murder. The counsel finally argued that, contrary to what had been indicated in the Court of Appeal's judgment, witness A. had never made any accusatory submissions against the applicant during the court examination of the case. To the contrary, he had always insisted that witness T. could not have eye-witnessed the murder since they had been together at the material time.

On 8 May 2003 the Criminal and Military Chamber of the Court of Cassation dismissed the counsel's appeal and upheld the applicant's conviction. In doings so, the Court found, *inter alia*, that:

> "The conclusions in the judgment are corroborated by the evidence examined in court, in particular, statements of [witnesses T., A. and others, and the results of various expert opinions].
>
> ... It has been established that after the incident [servicemen T. and A., the applicant and others] agreed ... to testify that [serviceman H.] had been killed by [the Azeris], nevertheless, [serviceman T.] testified in the first instance court on 26 October 1999 that [serviceman H.] had been killed ... by [the applicant].
>
> The arguments of [the applicant's] defence counsel that the judgment was based on statements of [witnesses T. and A.] which had been obtained under torture are groundless, contradict the materials of the case and are rebutted by the following evidence.
>
> [The applicant and witnesses T. and A. were beaten for several days by the police officers] who demanded that they make honest statements concerning the murder of [serviceman H.]. The police officers did not take any statements from them. The statements were taken by the relevant investigator of the military prosecutor's office who did not ill-treat them...
>
> [The relevant police officers were convicted]. No criminal proceedings were brought against any of the investigators dealing with the case.
>
> ... On 11 August 1999 a confrontation was held between [the applicant and serviceman T. in the presence of the applicant's defence counsel], during which [serviceman T.] contended that [serviceman H.] had been killed with a machine-gun

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> [by the applicant]. It has been established that no ill-treatment was inflicted on him at that time.
>
> At a later stage [serviceman T.] revoked the above statements and submitted that he had not seen who had killed [serviceman H.], not denying that previously several times he had made submissions that it was [the applicant] who killed [serviceman H.]. The Court of Appeal rightly considered [T's] confession statement as reliable and regarded it as proof of [the applicant's] guilt.
>
> [The applicant] during the preliminary investigation testified to the investigator of the military prosecutor's office that it was him who killed [serviceman H.], albeit accidentally.
>
> Thus, the evidence obtained in the case, irrespective of the fact that during the preliminary investigation the military police officers ill-treated [the applicant and witnesses T. and A.], if evaluated from the perspective of relativity and admissibility, in their entirety are sufficient to find [the applicant] guilty of the incriminated crime."

On 22 December 2003 the applicant was released on parole.

B. Relevant domestic law

Article 19 of the Constitution provides that no one shall be subjected to torture, cruel or degrading treatment and punishment.

Article 11.7 of the Code of Criminal Procedure (ՀՀ *քրեական դատավարության օրենսգիրք*) provides that in the course of criminal proceedings no one shall be subjected to torture, unlawful physical or mental coercion, and other cruel treatment. It is prohibited to coerce testimony from a suspect, accused, defendant, witness and other parties to the proceedings by way of violence, threat, trickery, violation of their rights, as well as through other unlawful actions.

Article 20 of the Code provides that no one shall be obliged to testify against himself.

According to Article 105.1 of the Code, materials which have been obtained under coercion, threat, trickery, humiliation of a person, as well as through other unlawful actions, shall not constitute the basis for charges and be used as evidence in criminal proceedings.

COMPLAINTS

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

(a) the use in court of evidence obtained under torture was in violation of this Article; and

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(b) he was subjected to degrading treatment by having been kept in an iron cage during the proceedings before the Syunik Regional Court and the Criminal Court of Appeal.

2. The applicant complains under Article 6 § 1 of the Convention, in connection with the criminal proceedings against him, 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 in an unspecified prosecutor's office;

(b) his right not to testify against himself was violated and his testimony obtained under torture was used in court as evidence;

(c) the principle of equality of arms was violated since the Criminal Court of Appeal refused to admit as evidence the specialist opinion while admitting the expert opinion which had been ordered by the investigating authority;

(d) the trial was not fair since the testimonies of witnesses T. and A. made at a later stage of the trial, which were in his favour, were distorted by the Court of Appeal and used against him;

(e) the trial was not fair since the court judgments were unreasoned and did not touch upon many of the arguments raised and evidence adduced by him and his defence counsel;

(f) the trial was not fair since the evidence obtained under torture, i.e. statements of witnesses T. and A., were relied upon by the courts and used against him; and

(g) the principle of equality of arms was violated since he was kept in an iron cage which made him feel and look like a party not having equal rights with his opponent.

3. The applicant complains under Article 6 § 2 that the presumption of innocence was violated since he was kept in a cage which made him look like a criminal.

4. The applicant complains under Article 6 § 3 (d) that the Criminal Court of Appeal arbitrarily refused to call a hearsay witness on the applicant's behalf while calling two such witnesses on the prosecution's behalf.

THE LAW

1. The applicant complains about the use in court of evidence obtained under torture and being kept in an iron cage during the proceedings. He invokes Article 3 of the Convention which, insofar as relevant, provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment..."

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a) As to the complaint about the use in court of evidence obtained under torture, the Court considers that this complaint would be more appropriately dealt with under Article 6 § 1 of the Convention.

b) As to the complaint about being kept in an iron cage, the Court recalls that it may only deal with a case within a period of six months from the date of the final decision. Where an applicant complains of a continuing situation, the six month period set by Article 35 § 1 begins when the situation ends (see, e.g., *Papon v. France (no. 1)* (dec.), no. 64666/01, ECHR 2001-VI). In the present case the applicant complains of the conditions in which he was kept in the proceedings before the Syunik Regional Court and the Criminal Court of Appeal. The proceedings before the Court of Appeal terminated on 1 April 2003, which is more than six months before the introduction of this application to the Court on 29 October 2003.

It follows that this complaint was lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

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 ... by an ... impartial tribunal ..."

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 law-enforcement authorities, 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.

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 complaint about the coercion and the subsequent use in court of the applicant's confession statement, 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.

c) As to the Criminal Court of Appeal's refusal to admit as evidence the specialist opinion, the Court recalls that the admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them (see, e.g., *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III, § 48). In the present case the Court of Appeal examined the applicant's request to admit as evidence the specialist opinion presented by him. The Court of Appeal found that this opinion had been presented in

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breach of the relevant domestic provisions and, thus, could not be admitted as evidence. The Court notes that there is nothing in the materials in its possession that would allow it to depart from the findings of the Court of Appeal.

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 distortion of witness testimonies, as indicated above, as a general rule, it is for the national courts to assess the evidence before them. The Court notes that the applicant has failed to submit any evidence to demonstrate that the Criminal Court of Appeal overstepped the margin of appreciation left to the domestic courts in assessing the witness testimonies in question.

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.

e) As to the complaint about the alleged lack of reasoning in the court judgments, the Court recalls that Article 6 § 1 obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument (see *Hiro Balani v. Spain*, judgment of 9 December 1994, Series A no. 303-B, pp. 29-30, § 27). In the present case courts at all three instances issued relatively detailed judgments relying upon numerous items of evidence in reaching their conclusions. Having regard to all the materials in its possession and the margin of appreciation left to the domestic courts in such matters, the Court finds no indication that the courts failed to give reasons for their judgments.

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.

f) As to the complaint about the use in court of witness statements obtained under torture, 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.

g) As to the complaint about a violation of the principle of equality of arms, the Court recalls that it may only examine complaints in respect of which domestic remedies have been exhausted (see, e.g., *Valašinas v. Lithuania* (dec.), no. 44558/98, 14 March 2000). In the present case the applicant failed to raise this complaint in his appeal lodged with the Court of Cassation on 14 April 2003.

It follows that the applicant has failed to exhaust domestic remedies, and that this part of the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

3. The applicant complains about a violation of the presumption of innocence. He 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"

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The Court notes that the applicant similarly failed to raise this complaint in his appeal to the Court of Cassation.

It follows that the applicant has failed to exhaust domestic remedies, and that this part of the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

4. The applicant complains about the Criminal Court of Appeal's refusal to call a witness 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 right] ... to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

The Court recalls that Article 6 § 3 (d), as a general rule, leaves it to the national courts to assess whether it is appropriate to call witnesses and it does not require the attendance and examination of every witness on the accused's behalf (see, e.g., *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, § 33). The Court notes that the applicant failed to submit any evidence in support of his complaint that the Court of Appeal arbitrarily refused his request to call a witness on his behalf, such as a copy of this request and of the relevant refusal. There is nothing in the case file to otherwise substantiate this complaint.

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 the alleged violation of his right to silence and the admission in court of evidence obtained under torture;

Declares the remainder of the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President

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