THE GOVERNMENT OF THE REPUBLIC OF ARMENIA

ACTION PLAN

CASE OF NALBANDYAN v. ARMENIA

(Virabyan group of cases)

(nos. 9935/06 and 23339/06, final on 30 June 2015)
(Supervised by the Committee of Ministers under the enhanced procedure)

Department for Relations with the European Court of Human Rights
Ministry of Justice of the Republic of Armenia
30 March 2018

EXECUTION OF VIRABYAN GROUP OF CASES

I. INTRODUCTION

The updated information regarding individual and general measures undertaken for the purposes of execution of *Virabyan* case was submitted on 22 February 2018 (reference document: DH-DD(2018)224). The part of general measures regarding Article 3 is equally applicable to *Nalbandyan* case. Thus, to avoid any repetitions, this document is aimed at informing the Committee of Ministers on developments in the process of executing *Nalbandyan* case, as well as presenting new data on general measures concerning Article 3.[1]

II. INTRODUCTORY CASE SUMMARY

Substantive violation of Article 3 of the Convention

1. In the *Nalbandyan* case two (mother and daughter) of three applicants' (husband, wife and daughter) on suspicion of murdering the third applicant's classmate were subject to ill-treatment in police custody in June and July 2004 characterised as torture by the European Court.

2. On 23 August 2004 the criminal proceedings concerning the third applicant were terminated for lack of evidence of her involvement in the crime. On 4 February 2005 the Regional Court found the first and second applicants guilty of murder and sentenced them to nine and fourteen years' imprisonment respectively. This decision was later upheld by the Court of Appeal and the Court of Cassation. As regards the first applicant, the European Court found no medical evidence in the case file that would enable to conclude that he had been subjected to ill-treatment.

Procedural violations of Article 3

3. No effective investigations were carried out into the applicants' allegations of ill-treatment. The European Court criticised the investigation as neither independent, nor impartial and objective due to the fact that the authorities were called upon to investigate the actions of employees of the same prosecutor's office and their subordinates. The authorities also failed to secure a proper and objective collection and assessment of medical and other evidence vital for the effective outcome of the investigation.

[1] As regards the information on the execution of *Ayvazyan* case (no. 56717/08, final on 13 November 2017), it will be submitted in the prescribed time limits.

Violation of Article 6 §§ 1 and 3 (c)

4. The hearings in July and August 2005 in the criminal case of the applicants before both the Regional Court and the Court of Appeal were held in an atmosphere of constant threats and verbal and physical abuse, addressed at the applicants, their family members and lawyers. The Court of Cassation acted with excessive formalism and lack of due diligence in refusing to admit the appeal filed by the lawyer, which resulted in a disproportionate limitation on the first applicant's access to that court.

III. INDIVIDUAL MEASURES

A. Payment of just satisfaction[2]

5. The just satisfaction was paid within the deadline.

B. Re-opening proceedings

With reference to the Committee of Ministers Decision to keep the Committee updated on the progress of the re-opened proceedings and investigation[3]

Re-opening of the criminal case on alleged murder

6. It has to be recalled that following the European Court's judgment the criminal case at issue was reopened at national level by the decision of the Court of Cassation of 24 June 2016. In particular, all the judgments of the Gegharkunik Regional Court, Court of Appeal and Court of Cassation regarding the alleged murder committed by the second applicant and assisted by the first applicant were reviewed and subsequently quashed.

7. Taking into account the findings of the European Court and given the nature of the violations found by the latter, by its decision of 24 June 2016 the Court of Cassation specifically highlighted that the most appropriate measure to put an end to the violations and remedy, as far as possible, their negative consequences for the applicants, is the re-opening of the proceedings and fresh examination of the case in line with all the requirements of fair trial. The Court of Cassation stated that in order to come to a corresponding conclusion, during conducting the fresh examination of the case, the court shall put an end to the violations found by the European Court, assess each end every single evidence from the standpoint of relevance and permissibility and all the evidence in their entirety from the standpoint of being sufficient to resolve the case.

[2] The just satisfaction form in respect of *Nalbandyans'* payment was submitted to the Just Satisfaction Unit of the Department for the Execution of Judgments of the European Court of Human Rights in September 2015.
[3] Reference document: http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2016)1273/H46-2

8. At the same time, the Court of Cassation left the detention as a preventive measure applied to the second applicant unaltered. The case was sent to Gegharkunik Regional Court for re-examination. On 11 November 2016 Gegharkunik Regional Court admitted the case for examination. On 8 August 2017 it, upon its own initiative, changed the detention as a preventive measure applied to the second applicant by an undertaking not to leave. Consequently, the second applicant was released from detention from the courtroom. At present the judicial proceedings are ongoing.

Re-opening of the criminal proceedings concerning the applicants' allegations of ill-treatment

9. All the judgments of Kentron and Nork-Marash District Court of Yerevan (hereinafter, the District Court) and the Criminal and Military Court of Appeal concerning the dismissal of the applicants' allegations of ill-treatment were quashed by the Court of Cassation. By its decision of 24 June 2016 the Court of Cassation specifically highlighted that the re-opening of the proceedings and fresh examination of the case is the most appropriate measure to put an end to the violations and remedy, as far as possible, their negative consequences for the applicants. Consequently, the case was sent to the District Court for re-examination. On 14 November 2016 the District Court decided to send the case to Gegharkunik Regional Court for examination.

10. On 9 January 2017 the Gegharkunik Regional Court granted the claim submitted by the applicants and their representative and quashed the decision of 31 August 2004 on refusing to institute criminal proceedings on the basis of second and third applicants' allegations of ill-treatment. Taking into consideration the violations found by the European Court in the *Nalbandyan* judgment, the Gegharkunik Regional Court, *inter alia*, concluded that the investigation conducted into the allegations of ill-treatment was neither effective nor independent.

Investigation into the re-opened case: Measures undertaken to ensure adequate and effective investigation

11. *Initiation of investigation:* In contrast to the situation existing at the material time where no criminal case was instituted at all regarding the allegations of ill-treatment and the decision refusing its institution made generalized conclusions lacking any reasoning, on 26 January 2017 criminal proceedings no. 61200417 have been instituted under Article 309 § 2 of the Criminal Code for exceeding official authority accompanied by violence[4] making it possible to carry out necessary investigative measures towards addressing the allegations of ill-treatment.

[4] It was both legally and practically impossible to qualify the actions of the officials as torture due to the fact that at the material time Armenian legislation lacked definition of torture, otherwise it would have resulted in violation of the principle – "*No punishment without law*".

12. *Independence and impartiality:* In line with the international standards on the investigation of alleged ill-treatment cases, on 7 February 2017 the criminal case was sent to the Special Investigation Service, a separate and independent agency specialized in carrying out of investigation of cases possibly involving abuses by public officials[5]. Officials involved in conducting new investigation and all decision-makers are in practical and hierarchical terms independent from those implicated in the facts being investigated.

13. *Victim status and involvement in the proceedings:* From the very outset of the investigation, all three applicants were granted *victim status* (victim status was granted to the son of the first and second applicants as well), in contrast to the situation existing at the material time where no criminal case was instituted into their allegations of ill-treatment at all making it impossible to give any procedural status to them and thus depriving them of the opportunity to be fully involved in the investigation process and enjoy the right of actively participating in the proceedings.

14. *Thoroughness of new investigation*: The new investigation, which is wholly aimed at addressing the deficiencies identified by the European Court, is as comprehensive as possible and consists of all reasonably possible investigative activities and steps that could have been and still can be taken considering the time elapsed and objective obstacles encountered. In this context, the investigative authorities did their utmost to take all reasonable steps to discover and secure evidence concerning the relevant incident. In order to establish the circumstances in which the applicants may have suffered ill-treatment, since present the following actions have been undertaken:

- *Questioning of the alleged victims:* All three applicants have been interrogated in relation to their allegations of ill-treatment and given the possibility to provide detailed and exhaustive account of the events, whereas at the material time neither the first nor the third applicant were ever questioned in connection to the allegations of ill-treatment.

- *Interrogations of alleged perpetrators:* All the officials of Vardenis Police Division and Gegharkunik Regional Prosecutor's Office who carried out special state service and who according to the statements of the applicants had relation to the alleged ill-treatment have been interrogated. Due to the objective obstacles encountered during the renewed investigation, it was impossible to question certain alleged perpetrators, in particular, the Deputy Head of Gegharkunik Regional Prosecutor's Office and the Deputy Head of Division IV of the Department for Criminal Intelligence of the Police. It was also impossible to interview the second applicant's mother who addressed letters regarding the ill-treatment to High-ranking officials. It has been established that the mentioned persons passed away.

[5] For more details, see Action Report of 22 February 2018 regarding *Virabyan* case, §§ 37-40: Reference document: DH-DD(2018)224.

- *Confrontations with the alleged perpetrators:* It has to be recalled that according to the judgment, no confrontations had been held between the applicants and the alleged perpetrators at the material time and the investigating authority, without any justification, gave preference to the evidence provided by the police officers. To address these deficiencies, as well as to properly and objectively establish the relevant facts and reveal the inconsistencies between the testimonies given by the applicants and the alleged perpetrators, more specifically the officials of Vardenis Police Division and Gegharkunik Regional Prosecutor's Office who appeared in the testimonies of the applicants, confrontations have been held between the applicants and those persons.

- *Identification and questioning of any other possible witnesses:* Genuine efforts have been made by the investigating authority to identify and collect evidence from persons who may have witnessed the incident in question or be able to shed light on the circumstances surrounding it, which at the material time the investigating authority had also failed to do. In this context, members of the operational-investigative team of the murder case, the attesting witnesses of the investigative measure conducted on 10 July 2004 with the second applicant's participation, the member of the medical staff of Abovyan penitentiary institution, who conducted the medical examination of the second applicant upon her admission, the expert who carried out the forensic-psychiatric expert examination of the second applicant in 2004, as well as the second applicant's brothers, the third applicant's uncle's wife and the applicants' neighbours have been questioned in the framework of the investigation.

- *Collecting of other evidence (including medical):* To further secure a proper and objective collection of other evidence (including medical) vital for the overall effectiveness of the investigation, documentation related to the relevant incident was thoroughly examined by the investigating authority. In particular, all the materials of the case-file regarding murder, including the video recording of the investigative measure conducted on 10 July 2004 with the second applicant's participation have been scrutinised. The investigating authority assembled the numerous letters of the second and third applicants, as well as the second applicant's mother regarding the alleged ill-treatment addressed to the President, Prime-minister, Prosecutor General and the Human Rights Defender of the Republic of Armenia in 2004-2005. After being scrutinised, all the relevant letters have been recognised as evidence.

  Given the time elapsed, for the purpose of addressing as far as possible the shortcomings as regards the *medical evidence* identified by the European Court in the judgment and establishing the causes of injuries and their consistency with the allegations made, the available medical evidence, such as records from the detention facility and health care services have been examined. More specifically, the investigative authority collected and scrutinised medical documents regarding the second and third applicants from Abovyan penitentiary institution and Armenia Medical Centre, as well as the criminal incident

registry of Armenia Medical Centre. Further on, forensic medical expert examinations were assigned in respect of the second and third applicants.

As mentioned hereinabove, the member of the medical staff of Abovyan penitentiary institution, who conducted the medical examination of the second applicant upon her admission, as well as the expert who carried out her forensic-psychiatric expert examination in 2004 were questioned as well. However, it was impossible to interview the doctor who examined the third applicant at the Armenia Medical Centre in 2004, as this person had passed away.

15. *Results already achieved:* Based on the entirety of the evidence collected in the course of the investigation, **criminal charges have been brought under Article 309 § 2 of the Criminal Code for exceeding official authority accompanied by violence[6] against G.H., member of the investigative team of the murder case, investigator at Gegharkunik Regional Prosecutor's Office in 2004.**

16. At present the investigation is ongoing and all the necessary investigative measures are being undertaken by the domestic authorities to continue comprehensive, thorough and objective investigation.

With reference to the Committee of Ministers Decision to provide the Committee with information regarding the security of the participants in the court proceedings and the access to the court[7]

17. *Access to the court: Inter alia,* to restore, as far as possible, the first applicant's violated right of the access to the court, the proceedings regarding the alleged murder have been re-opened at national level, all the judicial acts have been reviewed and quashed and the Court of Cassation specifically underlined the importance of conducting the fresh examination of the case in line with all the requirements of fair trial.

18. *Security of the participants in the court proceedings:* The safety and security of the participants in the court proceedings has been and is ensured by resorting to mechanisms envisaged by the legislation of RA for court proceedings (in particular, by the Service of Judicial Bailiffs which has started its activities since 1 January 2008[8] and through the powers of the presiding judge), as the hearings regarding both the alleged murder and the applicants' allegations of ill-treatment, have been held in an atmosphere of safety and security. Furthermore, no need of applying security measures arose in the courtrooms during the mentioned proceedings. Therefore, the courts conducting the proceedings under consideration found no

[6] It was both legally and practically impossible to qualify the actions of the investigator as torture due to the fact that at the material time Armenian legislation lacked definition of torture, otherwise it would have resulted in violation of the principle – "*No punishment without law*".
[7] Reference document: http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2016)1273/H46-2
[8] For more details, see General Measures of the present document.

necessity to apply the protective measures specified in Article 98[1] of the Criminal Procedure Code, nor has such a motion been ever brought before the courts either by the applicants themselves or their defence lawyer.[9]

19. The same applies to the investigation. Neither the applicants nor their defence lawyer have ever applied to the investigative authority for taking protective measures envisaged by domestic legislation. Whereas throughout the investigation, the investigating authority in its turn did not discover any circumstances to apply the security measures *ex officio.*

IV. GENERAL MEASURES

A. Violation of Article 6 §§ 1 and 3 (c)

With reference to the Committee of Ministers Decision to provide the Committee with information regarding the security of the participants in the court proceedings and the access to the court[10]

Security of the participants in the court proceedings

20. To ensure the safety and security in the courtrooms during judicial proceedings, and in this context to guarantee that the safeguards provided by Article 6 §§ 1 and 3 (c) are well preserved in practice, the following *legislative and organisational* measures shall be noted.

21. Following the adoption of the *Judicial Code* back in 2007, in general aimed at regulating relations pertaining to the organization and functioning of the judiciary, the institute of the *Judicial Bailiffs* was introduced[11], which started its activity since 1 January 2008 in the structure of RA Judicial Department. The Service of Judicial Bailiffs is a type of special public service tasked with ensuring, in accordance with the Judicial Code and other laws, *protection of the life, health, dignity, rights, and freedoms of the judge, parties to proceedings and other persons in court from criminal and other unlawful encroachment; maintenance of public order and security*

[9] There was one exception. In particular, in the course of the hearings regarding the alleged murder, the second applicant, merely asked the court to ensure her security in Vardenis, without bringing any reasons and written motion. The court found that, at the moment there were no apparent grounds for applying security measures (as the hearings were held in the atmosphere of safety and security), and at the same time read out and explained to her the right and possibility of bringing a corresponding motion before the court. However, no such a motion was brought either by the second applicant or her defence lawyer.

[10] Reference document: http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2016)1273/H46-2

[11] Specific chapters (Chapters 25-29) of the Judicial Code clearly regulate the relations pertaining to the tasks and functions, principles of operation, rights and obligations, binding nature of the demands of a Judicial Bailiff, cases and procedure for using physical force and special means, as well as structure and management of, main conditions for appointment and dismissal from the Judicial Bailiffs Service and the requirement for Bailiffs' testing and trainings.

in the territory of the court; execution of court orders subject to immediate execution on the spot; and protection of court assets, buildings and support premises.[12]

22. Demands made by a Judicial Bailiff within the limits of his/her authority shall be binding. Failure to comply with these demands or hindering the performance of Judicial Bailiff's duties shall give rise to liability prescribed by law.[13]

23. For the purposes of raising the effectiveness of the activities and the professionalism of Judicial Bailiffs, they shall take part in trainings in the Academy of Justice.[14]

24. To accomplish its tasks successfully, the Service of Judicial Bailiffs cooperates with the Republic of Armenia Police and other public bodies with a view of sharing information, organizing and implementing joint action, and providing the necessary mutual assistance. Turning more specifically to the cooperation with the Republic of Armenia Police, with a view of both ensuring safety and security of the accused, in particular, and other persons in court, in general, Government Decree N 351-N of 2 April 2009 provides for a specific and detailed order of activities. The Decree, *inter alia*, stipulates a clear set of guidelines on supervision and escort of the detainees to the court by *a designated escort police division.*[15]

25. *The escort police division*, in cooperation with the court where the detainee shall be transferred, draws up an act on inspection of building conditions at the same time specifying how Judicial Bailiffs and the escorting officers shall cooperate for the safety and security reasons. Furthermore, whether necessary, or based on the motion of the court, specific plan on organising an increased service, assigning check points, assessing forces and means, as well as on the presence of police officers in civilian clothes in the courtroom is drawn up in advance and implemented with an ultimate objective to maintain public order and ensure safety of the parties to the proceedings during the hearings.

26. Another organizational measure aimed at ensuring public order and safety during hearings is the *instalment of a glass partition*, which separates the criminal bar area from the public gallery in the courtroom. At present, this kind of partition is installed only in two courts in Yerevan and in case of sufficient funding can be applied in other courts of Armenia as well. Nonetheless, it has to be mentioned that, where necessary, other courts can hold circuit cessions in these courtrooms.

Access to court

27. At the outset, it should be recalled that the European Court found that the Court of Cassation had acted with excessive formalism and lack of due diligence in refusing to admit the

[12] Articles 198 and 213 of the Judicial Code of the Republic of Armenia
[13] Article 215 §§ 1, 3 of the Judicial Code of the Republic of Armenia
[14] Article 209 of the Judicial Code of the Republic of Armenia
[15] Government Decree N 351-N of 2 April 2009 on approving order of activities for escorting and protecting the arrested and detained persons by the Republic of Armenia Police.

appeal filed by the lawyer, which resulted in a disproportionate limitation on the first applicant's access to that court.

28. In this context, the Court of Cassation, exercising its constitutional power on ensuring uniform application of law, set down important guidelines for the domestic authorities regarding the lawfulness of dispensing with lawyer's services. In doing so it took into account the developing case-law of the European Court, the very essence of the fundamental right to a fair trial and in particular the right of access to court and the right of everyone charged with a criminal offence to be effectively defended by a lawyer.

29. In particular, in case no. HQRD/0436/01/08 the Court of Cassation was called, *inter alia*, to determine whether the Court of Appeal had acted lawfully in accepting the waiver of defence lawyers by the accused (more specifically, whether the Court of Appeal had been authorized to accept the waiver in the absence of the defence lawyers). It has to be mentioned that the appeals on points of law had been brought by the defence lawyers of the accused, despite the fact that the accused dispensed with their services during the hearings before the Court of Appeal and the Court of Cassation in its turn accepted the appeals for examination (here, it has to be recalled that similar situation was in *Nalbandyan* case, where in contrast to the existing one, the Court of Cassation left the appeal brought by the defence lawyer unexamined).

30. Elaborating on the legitimate grounds provided for by domestic legislation regarding the waiver of a defence lawyer, the Court of Cassation specifically highlighted that the body in charge of conducting proceedings can accept the waiver, only when, after having examined all the circumstances and motives standing behind it, it is persuaded that:

- the accused has made the statement voluntarily, at his/her own initiative and it has not been preconditioned by the circumstances of the case,
- he/she fully understands and realises all the possible consequences of such a behaviour,
- the person is capable of defending himself/herself in person.

31. It is important to note, that based on the circumstances of the case, the Court of Cassation found that the Court of Appeal had not been authorised to accept the waiver of the defence lawyers and had breached the domestic legislation which resulted in violation of the rights of the accused to defence. Consequently, the case was remitted to the First Instance Court for a fresh examination.[16]

32. Against this background, the Government would like to emphasise that both legislative and organisational measures have been undertaken capable of creating mechanisms and procedures through which safeguards provided by Article 6 §§ 1 and 3 (c) will be preserved in practice, and of contributing to prevention of similar violations in the future.

[16] Decision of the Court of Cassation of 29 June 2009 on the case HQRD/0436/01/08

B. Violation of Article 3

33. As mentioned in the Introduction of the present document, for general measures regarding Article 3 reference shall be made to the Action Report on *Virabyan* case submitted on 22 February 2018.[17] However, in addition, the following major developments are worth mentioning as well.

34. *Law on Pardon:* On 7 March 2018 a brand new Law on Pardon was adopted. According to Article 7 § 4 **no pardon shall be applied for the crime of torture**. This is the first step resulting from the policy aimed at raising effectiveness of the fight against impunity for torture.

35. *Fundamental legal safeguards against ill-treatment:* It should be reiterated that for the increase of the procedural safeguards, the draft Criminal Procedure Code, in particular Article 110, contributes to securing basis for comprehensive and effective investigation into acts of torture. The Government consider that Article 110 which, *inter alia*, stipulates the minimum rights[18] of the arrested person, can be considered as a fundamental safeguard against any form of ill-treatment. It is worth to mention that the minimum rights prescribed in this article are totally in conformity with the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The aim of this article, among the others, is to create a clear system of mechanisms and procedures through which allegations, indications and evidence of ill-treatment can be communicated. In particular, the rights to have the fact of one's detention notified to a third party, to have an access to a lawyer and a doctor, as well as to be informed about his/her rights and obligations and the reasons of the arrest orally from the moment of becoming *de facto* deprived of liberty and in writing at the time of entry into the administrative building of the Inquiry Body are crucial for the collecting of evidence and communication of information relating to torture.

36. Therefore, given the important nature of these rights, pending the adoption of the draft Criminal Procedure Code, and despite the fact that the Court of Cassation case-law has already established grounds for ensuring those rights from the moment of *de facto* deprivation of liberty, **corresponding amendments[19] have been made to the existing Criminal Procedure Code in 2018[20] to put in place legislative provisions for application of these rights from the very moment of deprivation of liberty.**

[17] For more details, see Action Report of 22 February 2018: Reference document: DH-DD(2018)224.
[18] To be informed about minimum rights and obligations stipulated by this Article orally from the moment of becoming *de facto* deprived of liberty and in writing at the time of entry into the administrative building of the Inquiry Body or of a body that has the power to conduct the proceedings; to know the reason for depriving him of liberty; to remain silent; to inform a person of his choosing about his whereabouts; to invite an attorney; and to undergo a medical examination if he so demands.
[19] Law on making amendments and supplements to the Criminal Procedure Code of the Republic of Armenia (HO-69-N) of 16 January 2018
[20] Article 129 of the Criminal Procedure Code

37. *Workshop on the execution of torture related judgments:* As mentioned in the Action Report of *Virabyan* case, in March 2018, in close cooperation with CoE, it was envisaged to organise a meeting with the participation of relevant domestic authorities and the representatives from the CoE. On 20-21 March 2018 the meeting took place and served as a great platform for discussing the issue of furthering the effectiveness of torture prevention and its investigation, in the light of the European Court's judgments against Armenia supervised by the Committee of Ministers.[21]

V. CONCLUSION

38. In the light of the information submitted in the present document and the recent Action Report on *Virabyan* case, the Government kindly invites the Committee of Ministers to close the supervision of the individual measures in the *Virabyan case*, and continue the supervision of general measures regarding ill-treatment and effective investigation within the framework of *Nalbandyan and Ayvazyan* cases. The Government will periodically update the Committee of Ministers as to the progress of the execution of these judgments.

[21] https://www.coe.int/en/web/human-rights-rule-of-law/-/armenian-stakeholders-discuss-the-implementation-of-judgments-of-the-european-court-of-human-rights